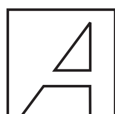
Steiner ● Ademović

Constitution of Bosnia and Herzegovina

Commentary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A functional constitutional order is the basis for political and societal development in all countries. This is no less the case in Bosnia and Herzegovina. As in all other countries, constitutional jurisprudence and expertise is vital for the continuing process of refinement and adaptation that all Constitutions undergo over time. Despite the considerable political focus on Constitutional issues in Bosnia and Herzegovina over many years, there has been rather less involvement by experts in Constitutional and International Public Law. This is unfortunate. Constitutional reform is not solely a political issue. It is also an eminently juridical matter. This is the case in all countries, including Bosnia and Herzegovina. Juridical contributions depend on legal analyses and commentaries on case law and court interpretations. Such tools have – until now – been unavailable in Bosnia and Herzegovina.

For these reasons, I am especially pleased to welcome the publication of this comprehensive Commentary of the Constitution of Bosnia and Herzegovina. This Commentary will fill a void in providing a comprehensive reference for experts in Constitutional law, whether they be citizens of Bosnia and Herzegovina or foreign countries. This will serve as a basis for sound legal advice to political leaders on Constitutional reform issues. This can only help to strengthen the rule of law by bringing greater clarity on fundamental legal concepts and principles. This publication will, I believe, promote the development of a common understanding of the Constitution as the very foundation of the State itself.

I would like to express my commendation to the Konrad Adenauer Foundation and its Rule of Law Program for South East Europe for initiating this important work. Not the least, I would like to thank the whole team that made this publication a reality.

NORWEGIAN MINISTRY
OF FOREIGN AFFAIRS

Jan Braathu
Ambassador
Royal Norwegian Embassy, Sarajevo

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Introduction

A constitution is the highest norm in the national legal system of every country. It is a basis for political organization and democracy. Development of the State legal and democratic structures in the **South Eastern European countries** in transition thus requires contemporary State constitutions providing for the basic institutional and substantive elements of a democratic legal State. In this connection, significant developments took place in the countries which are successors of the former Yugoslavia. Let me mention two examples: in autumn 2006, the Republic of Serbia adopted a new Constitution and in October 2007, the Parliament of the Republic of Montenegro accepted – for the first time after achieving independence – a Constitution which was disputable for a long period time.

The *Konrad Adenauer* Foundation follows reforms of the constitutional systems of the countries of the former Yugoslavia and other **South Eastern European countries** in transition and has projects related to the constitutional system and law. The Foundation effectuates its work through its offices abroad, but also through a special Rule of Law Program South East Europe [*Rechtsstaatsprogramm/Teil Südosteuropa (RSP SOE)*], which is present in all countries of South Eastern Europe. In this connection, the focus of the activities of the *RSP SOE* is not only on constitutional consulting but also on taking measures to improve a functional constitutional judiciary, since the Constitution needs not only the people who are its bearer and who are ready to protect it, but also the norms providing for special bodies such as the Constitutional Court, which must be willing and capable of safeguarding the Constitution and, if necessary, to implement it despite political pressure.

The *Konrad Adenauer* Foundation has put an emphasis on both fields of development in Bosnia and Herzegovina. The reason for this is the special role which the State plays in South Eastern Europe with regards to its special constitutional situation. The applicable Constitution of Bosnia and Herzegovina is still designated as Annex 4 of the Dayton Agreement. The international community prepared it so as to create a stable basis for the co-existence of

the peoples. The efforts which have been made so far in order to develop a new Constitution, *i.e.*, in order to adapt the applicable Constitution to new challenges, and which the *Konrad Adenauer* Foundation and many other national and international personalities have supported, have remained without success. Even recent efforts made by the European Union and the USA to unblock the process known as "constitutional reform" have not been fruitful. Obvious differences in the opinions of politicians, often based on ethnic grounds, have been obstacles to their harmonization. Furthermore, proposals for reform coming from the Venice Commission of the Council of Europe have not been not supported enough by the Parliament of Bosnia and Herzegovina. The "Dayton Constitution" thus still remains a basis for the legal system in Bosnia and Herzegovina.

For the aforementioned reasons, it is a particular pleasure for us after several years of work to present an overall Commentary on the Constitution of BiH, including the case-law of the Constitutional Court of BiH, the former Human Rights Chamber for BiH and the former Human Rights Commission within the Constitutional Court of BiH. Despite difficult work conditions in the field of constitutional law, these judicial bodies succeeded in interpreting the State Constitution in the light of aims to stabilize Bosnia and Herzegovina by respecting international standards for the protection of human rights and freedoms. The case-law of the Constitutional Court of BiH, the former Human Rights Chamber for BiH and the former Human Rights Commission within the Constitutional Court of BiH have given a particular importance to the international personality of the State, its organization and the establishment of a democratic legal State based on a market economy. This case-law is comparable with the case-law of other European constitutional courts and the case-law of the European Court of Human Rights. The Constitutional Court of BiH, the former Human Rights Chamber for BiH and the former Human Rights Commission within the Constitutional Court of BiH made many precedent-setting decisions in this field.

With the exception of a Commentary on the Case-Law of the Human Rights Chamber for BiH with regards to Annex 6 of the Dayton Peace Agreement from 2001 and two Collections of Summaries of Decisions of the Chamber/ Commission from 2006 (the so-called "Digests"), an overall manual on constitutional law intended for legal practitioners has not been published so far. The judicial field relating to the Constitutional Court of BiH, the former Human Rights Chamber for BiH and the former Human Rights Commission within the Constitutional Court of BiH has not been elaborated on in official textbooks on constitutional law.

This Commentary on the Constitution should fill in certain gaps. On the one hand, it should offer basic knowledge of the constitutional system of Bosnia and Herzegovina, which is a prerequisite for the successful functioning of public administration, lawful fulfilment of public obligations and guaranteeing fundamental human rights.

Furthermore, the Commentary on the Constitution of BiH has a significance going beyond Bosnia and Herzegovina. The reason for this is the fact that this Commentary covers an extensive list of human rights provided for by the Constitution of BiH (European Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements for the protection of human rights). Therefore, it is also of interest for other constitutional courts and institutions for the protection of human rights in this region. Moreover, the Commentary on the Constitution of BiH has an importance exceeding the frontiers of Bosnia and Herzegovina because the Constitution of BiH as Annex 4 of the Dayton Peace Agreement is the key element to establishing peace in Bosnia and Herzegovina. The contributions to the Commentary have been written by the experts who directly participated in the process of consolidation of peace in the country by working for the State institutions and international organizations. Therefore, the Commentary as a referential work and collection of ideas may be significant for *peace-building-missions* in other regions of the world, the reason being that the mechanisms for the protection of human rights provided for in Annexes 4, 6 and 7 of the Dayton Agreement have been analyzed in this Commentary, and the interactions of the national authorities and High Representative for Bosnia and Herzegovina under Annex 10 have been researched in detail in this Commentary. Taking this into account, the publishers decided to publish the Commentary in the German and English languages as well. The aim of this is to reach a large circle of readers.

This Commentary should be used as a literature of reference and adviser in the whole of Bosnia and Herzegovina. For this reason, the publishers attached a particular importance to a neutral composition of authors, although they are aware of the fact that every commentary on the constitution must keep pace with the constitutional development in the country. Taking this into account, national experts and legal practitioners must inevitably face the Constitution and the case-law of the constitutional courts and have an influence on its further shaping. Thus, the national authorities should be more entrusted with future elaborations of the Commentary. In doing this, a decisive criterion for selection of such authors must not be their ethno-political orientation but rather their expert and analytical capacities.

The Commentary on the Constitution of BiH could not have been effectuated without significant efforts and support coming from a number of persons and institutions. First of all, I would like to express my gratitude to Dr. iur. *Nedim Ademović* and Dr. iur. *Christian Steiner* as co-initiators, main authors and coordinators of this Commentary. This project could not be possible without their tireless efforts and personal involvement. I am particularly grateful to all of the other authors who made their knowledge and experience accessible to the general public by writing contributions to this Commentary. I would also like to express my gratitude to the translators and proofreaders. We are also indebted to the Ministry of Foreign Affairs of the Kingdom of Norway, which significantly contributed to this publication. Mister *Doru Toma* largely supported this project and I am very grateful to him. I should like to record a debt of gratitude to all those persons who are not mentioned by their names but who have contributed to the success of this publication.

Finally, I would sincerely like that this Commentary on the Constitution of BiH reaches the largest possible scope of readers and that it gives a significant impetus for future work in the fields of constitutional law and the judiciary in Bosnia and Herzegovina and other countries.

Dr. iur. Stefanie Ricarda Roos, M.A.L.D.
Director, Rule of Law Program South East Europe,
Konrad Adenauer Stiftung
Bucharest, February 2010

Preface

It is a particular honour and pleasure for me to provide a preface for this important publication. While I am convinced that a commentary on the constitution is useful and important in any country, I hope that, taking into account the specific constitutional situation in Bosnia and Herzegovina, this publication will make a real contribution to bring the country forward. This is my wish as President of the Venice Commission, since our Commission has devoted more energy and attention to Bosnia and Herzegovina than to any other country.

Commentaries on the texts of laws belong to a tradition developed mainly in the German-speaking countries. They have proved their usefulness as an instrument providing practitioners with the information they need to fulfil their respective roles, be it as judges, practising lawyers, civil servants, prosecutors or in-house attorneys working for private companies or NGOs. Commentaries on constitutions appear to me particularly useful. There is always a risk that the constitution is perceived as a text remote from the daily preoccupations of the legal community, a text which has its importance mainly for the highest bodies of the state. If this attitude prevails, the constitution will remain a programmatic text with little relevance for the daily life of people.

This is, however, a completely outdated concept of the constitution. Modern constitutions, especially – but not exclusively – in the field of human rights, express the values of a society and these values permeate through all legal fields. All lawyers therefore have to be conscious of the implications of the constitution for their respective field of work. A commentary on the constitution is the ideal tool to make them "constitution conscious" and to provide all lawyers, and also other citizens, with all the necessary information in a coherent and accessible form. In a new democracy it is particularly important to continuously question whether traditional practices are in line with constitutional values, and therefore legal practitioners need, more than anyone else, succinct and accessible information on the interpretation of the Constitution and its implications for other fields of law.

In Bosnia and Herzegovina, the need to bring the Constitution closer to the legal community and to the people is particularly acute. Uniquely, it was not prepared and adopted in a democratic process by the institutions and the people of the country, but it originated as an Appendix to an international treaty. Moreover, as regards human rights, the Constitution does not provide much detail, but mainly refers to international treaties, in particular the European Convention of Human Rights. It is, therefore, far less an expression of the national legal culture than other constitutional texts, although some of its aspects, and flaws, reflect a specific tradition of the former Socialist Federative Republic of Yugoslavia.

Moreover, foreigners have been involved to a great extent in interpreting and developing the Constitution. Three of the nine judges of the Constitutional Court of Bosnia and Herzegovina are internationals. The Office of the High Representative, as the "final authority in theater" for interpreting the General Framework Agreement for Peace in Bosnia and Herzegovina, played a crucial role in interpreting and developing the Constitution, as did the Venice Commission through its Opinions.

The Constitution of Bosnia and Herzegovina is, however, a special case not only due to the degree of international involvement, but also due to the fact that it is the most dysfunctional constitution of Europe, if not the world. Power is decentralised to such an extent that effective governance becomes impossible and decision-making in the State institutions is paralysed by requirements for inter-ethnic consensus. The institutional structure is not conceived for a State of equal citizens, but divides power between ethnic groups, thus cementing earlier divisions and making it more difficult to overcome them. This reflects the fact that the objective of the adoption of the Constitution in 1995 was to stop the fighting and not to build a modern State. Since then, the country has made much progress in other respects and this progress should now also be reflected in the Constitution.

The task of any commentary to the Constitution of Bosnia and Herzegovina therefore is also to point to the need for constitutional reform and to provide a solid basis for reform efforts by clearly analysing and describing the situation as it stands. In any case, the recent decision by the European Court of Human Rights in the case of *Sejdic and Finci v. Bosnia and Herzegovina* has made constitutional reform inevitable.

The Venice Commission has been insisting, for some time already, on the need for constitutional reform. This is the fruit of our long-term experience in dealing with constitutional issues in Bosnia and Herzegovina since the mid-

1990s. This long-term involvement nevertheless also shows the progress already achieved. The first major task the Commission had following the adoption of the Constitution was to assess, in 1996, the compatibility of the constitutions of the two Entities with the State Constitution. At that time the issue was not constitutional reform, but ensuring that the Constitution would be implemented by the Entities. This was not an easy task, since at the time Republika Srpska was reluctant to accept any kind of integration into Bosnia and Herzegovina. But the intervention of the Venice Commission, at the request of the Office of the High Representative, was successful and Republika Srpska made important amendments to its Constitution on the basis of the Opinion of the Commission.

It should therefore be noted that, in the constitutional field, the first success was to ensure that the Constitution was really implemented by the Entities.

Moreover, the Constitution raised difficult questions of interpretation, which were only partly due to its succinct character. In the absence of a common project for the State, there were no common principles for interpreting the Constitution. Each and every point of interpretation of its provisions was contentious due to the lack of such a common basis. Only the efforts of the International Community could ensure some degree of coherence.

It was clear from the outset that the powers of the State level, as provided for in the Constitution, were too weak. This fact is recognised by the Constitution itself, which provides mechanisms for the extension of the powers of the State level. On this basis, some additional powers were transferred by the Entities to the State and a more dynamic interpretation of the Constitution permitted the State to assume competencies which, by necessity, have to be the prerogative of the State level. Opinions of the Venice Commission contributed to this process.

This process has also had its limits. It could not lead to significant reforms of the State-level institutions, to the extent that their structure and methods of decision-making were regulated by the Constitution. These institutions do not reflect a democratic consensus or an orientation towards the common weal, but the interests of the parties to the pre-1995 conflict. The main emphasis is on ethnic representation and safeguarding narrowly understood ethnic interests according to a zero-sum logic. Legally, the main flaw of these arrangements is that some provisions are based on ethnic discrimination, as pointed out by the Venice Commission and more recently the European Court of Human Rights.

As regards the competencies of the State level, a more systematic approach providing the State level with minimum powers required in any democratic

modern state is indispensable. With the present arrangements, the country is not able to participate fully in the process of European integration. As a member state of the Council of Europe, Bosnia and Herzegovina is often not able to implement its commitments since the State is unable to ensure implementation by the lower levels. Membership of the European Union is far more demanding. It requires the State to have administrative capacities to carry out extremely complex negotiations, legislative powers to adopt rules required for membership and coercive powers to ensure implementation of commitments.

For these reasons the Venice Commission, in its Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (CDL-AD(2005)003), urged the country to undertake a comprehensive constitutional reform based on consensus and to be carried out step-by-step.

This call for reform was soon taken up and in April 2006 a first reform package based on the Venice Commission proposals was submitted to Parliament. Despite general support from the Republika Srpska-based parties, this package unfortunately narrowly failed in Parliament.

A slightly different version of the package, again based on the Opinion of the Venice Commission, was presented as a proposal from the International Community in Butmir in October 2009. The reaction by most of the politicians was disappointing and showed that they continue to be wedded to an ethnic zero-sum game logic. It remains to be hoped that the decision by the European Court of Human Rights of 22 December 2009, which makes constitutional reform a legal necessity, will lead to a change in attitude.

In any case, the constitutional reform process will have to go on for several years and constitutional reform will remain a focus of political discussions. The present commentary should help to make these discussions more focused and more accurate, by providing a true picture of the present legal situation. This is all we can do as lawyers. The final decisions will have to be made by the elected representatives of the people.

For all these reasons, I sincerely hope that the present commentary will be studied and used by all decision-makers.

Gianni Buquicchio

President of the Venice Commission

Introduction

On December 14th, 1995, the Republic of Croatia, Republic of Bosnia and Herzegovina and Federal Republic of Yugoslavia signed the *General Framework Agreement for Peace in Bosnia and Herzegovina*, known as the Dayton Peace Agreement. In addition, the Signatory Countries and the BiH Contracting Parties signed 12 Special Agreements designated as Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina. The Special Agreements were signed by the Signatory Parties made up of different members and related to the civil and military components of the peace agreement. By signing this peace agreement, the adversaries put an end to the worst armed conflict in Europe since World War II.

Since then, in Bosnia and Herzegovina, efforts have been made with the large support and participation of the international community in order to overcome multiple consequences of the war which divided the country and society. That division is still a problem in Bosnia and Herzegovina. Moreover, the country is passing through a transition process, changing from a moderate totalitarian/ socialist system into a democratic society and market economy, a process which is years late due to the war. The legacy of the sudden and non-democratic dissolution of the Socialist Federal Republic of Yugoslavia, which caused a difficult economic and political crisis in the whole region (with the exception of Slovenia and parts of Croatia), rendered overcoming the complex problems of the transition process more difficult. Finally, internal social tensions, caused by the intentional destruction of the multi-ethnic and multi-cultural identity of Bosnia and Herzegovina as a special characteristic of the country, rendered solving multilayered problems of the country more difficult.[1]

The State of Bosnia and Herzegovina as a legal successor of the Republic of Bosnia and Herzegovina gained a new *Constitution of Bosnia and Herzegovina* from Annex 4 of the Dayton Peace Agreement. The population accepted and accepts the newly organized State in different manners depending on their ethnic affiliation. Nationals and internationals have developed a view fluctuating between love and hate towards the new constitutional organization,

1 *Sekulić*, 1999, p. 275 *et seq*.

which was rashly shaped into the Constitution of Bosnia and Herzegovina in Dayton. Some contemptuously consider such a Constitution as inappropriate for establishing an operative State. Others ignore it and confine themselves to studying the Constitutions of the Entities. Despite multiple efforts to reform the Constitution, the text agreed to in 1995 is still in force, although, without formal amendments,[2] some matters have been amended by agreements between the Entities and State, particularly the matter of distribution of responsibilities, and by acts of the High Representative for Bosnia and Herzegovina. The applicability of those constitutional modifications, which are not written into the text of the Constitution itself and call for new reforms, give rise to a number of practical issues, particularly in the field of distribution of competencies between the Entities and the State.

The Constitutional Court of Bosnia and Herzegovina as a *permanent State* judicial body has far-reaching competences. In addition to six national judges, three international judges have been appointed as a part of this body safeguarding peace. Based on the Agreement on Human Rights (Annex 6 to the General Framework Agreement for Bosnia and Herzegovina) the Human Rights Chamber was established as a part of the Commission on Human Rights. The competences of the Human Rights Chamber show similarities to the competences of the European Court of Human Rights, so that its competences overlap with the competences of the Constitutional Court of Bosnia and Herzegovina in the field of protection of constitutional human rights and freedoms. Unlike the Constitutional Court of Bosnia and Herzegovina, the Human Rights Chamber for Bosnia and Herzegovina, which operated under that name as an independent institution and the activities of which ended on 31 December 2003, was composed of a majority of international judges - eight foreign judges and six national judges.

All the decisions of the Human Rights Chamber for Bosnia and Herzegovina relating to the admissibility and merits, merits, admissibility of review and review itself have been analysed in this Commentary, including relevant decisions on admissibility, so-called decisions to *strike out* and other decisions (such as those relating to compensation). The same applies to the decisions of the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina (which operated from 1 January 2004 to 31 December 2006). As to the case-law of the Constitutional Court of Bosnia and Herzegovina, all decisions published until 2008 have been taken into account, including a few subsequent decisions relevant to this analysis. Although the secondary

2 This applies to the original text, not to the supplement to the BiH Constitution in the form of Amendment No. 1 to the BiH Constitution.

literature relating to the conflict in Bosnia and Herzegovina and issues relating to safeguarding peace is comprehensive, works relating to the constitutional issues and commentaries on certain decisions are rare. The authors and publishers of this Commentary consider this text as a first step towards more intensive research and study of contemporary BiH constitutional law.

The aim of this Commentary is to make legal practitioners in Bosnia and Herzegovina more familiar with the modern constitutional case-law of the Constitutional Court of Bosnia and Herzegovina, the former Human Rights Chamber for Bosnia and Herzegovina and the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina. The users and readers should be free of the uncomfortable feeling which this legal field causes, since it is often politicised. Their awareness and knowledge of modern constitutional law in Bosnia and Herzegovina should be raised in order to strengthen the legal state, democracy and the protection of human rights and freedoms. A comprehensive table of **contents** of the Commentary is made first of all in order to make it possible for the readers to use it more easily. In particular, the Commentary is made according to the BiH Constitution itself starting from its Preamble and finishing with the last part of the Constitution of Bosnia and Herzegovina - Annex II to the Constitution of Bosnia and Herzegovina. Every important segment of each individual Article of the Constitution has been elaborated in chronological order, including certain supplements which may be useful. Therefore, the contents fully follow the constitutional structure. This also applies to the constitutional rights and freedoms as a relevant part of the Commentary. Two indexes – an **index of key words** and an **index of decisions** – are attached at the end of the Commentary in order to make it possible for users to find the text in the fastest and easiest manner, *i.e.*, by the issues they are interested in, if the contents themselves are not helpful, or if their requests are more detailed.

Before we express our gratitude, we would like to say that this Commentary would have never been created if the judges and legal advisors of the Constitutional Court of Bosnia and Herzegovina and Human Rights Chamber for Bosnia and Herzegovina had not achieved remarkable results during the period of the last 15 years, which we recognized as valuable for academic and expert elaboration. Moreover, both institutions played a large role in our expert and professional training for a certain period of time. Taking this into account, this Commentary, although expressing our personal opinion, represents a kind of personal acknowledgement and gratitude to these institutions.

Finally, we would like to express our sincere gratitude to the whole team of the Rule of Law Program South East Europe of the German political foundation

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Dr. iur. Christian Steiner　　　　　　Dr. iur. Nedim Ademović

The list of abbreviations used

A	Admissibility (decision)
A&M	Admissibility and merits (decision)
BiH	Bosnia and Herzegovina
BVerfGE	Judgment of the Federal Constitutional Court (FR Germany)
CBBiH	Central Bank of Bosnia and Herzegovina
CRPC	Commission for Real Property Claims of Displaced Persons and Refugees
DR	Decisions and Reports
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ESI	European Stability Initiative
EU	European Union
EUPM	European Union Police Mission
FAZ	*Frankfurter Allgemeine Zeitung*
FBiH	Federation of Bosnia and Herzegovina
Federation	Federation of Bosnia and Herzegovina
GFAP	General Framework Agreement for Peace for Bosnia and Herzegovina
HDZ	Croatian Democratic Community
HRC for BiH	Human Rights Chamber of Bosnia and Herzegovina
HZHB	Croatian Community of Herzeg-Bosnia
ICC	International Criminal Court
ICFY	International Conference on Former Yugoslavia
ICG	International Crisis Group
ICRC	International Committee of Red Cross
ICTY	The International Criminal Tribunal for the former Yugoslavia
IMF	International Monetary Fund
IPTF	International Police Task Force
JNA	Yugoslav People’s Army
M	Merits (decision)
MIP	Mission Implementation Plan of the ICTY
OG of BiH	Official Gazette of Bosnia and Herzegovina

OG of DB	Official Gazette of the Brčko District
OG of RS	Official Gazette of the Republika Srpska
OG of RBiH	Official Gazette of the Republic of Bosnia and Herzegovina
OG of SFRY	Official Gazette of the Socialist Federative Republic of Yugoslavia
OG of FBiH	Official Gazette of the Federation of Bosnia and Herzegovina
OG of HZHB	Official Gazette of the Croatian Community of Herzeg-Bosnia
OHR	Office of the High Representative
OSCE	Organisation for Security and Cooperation in Europe
OTP	Office of the Prosecutor (ICTY)
p.	Page
pp.	Pages
PDP	Party of Democratic Progress
PIC	*Peace Implementation Council*
PLIP	*Property Law Implementation Plan*
R	Decision on Review
RR	Decision on Request for Review
RBiH	Republic of Bosnia and Herzegovina
Reports	Reports of Judgments and Decisions (European Court of Human Rights)
RoPE	Rules of Procedure and Evidence
RS	Republika Srpska
SDA	Party of Democratic Action
SDS	Serb Democratic Party
SNSD	Union of Independent Social Democrats
SFRY	Socialist Federal Republic of Yugoslavia
SRBiH	Socialist Republic of Bosnia and Herzegovina
SRS	Serb Radical Party
TEC	Treaty establishing the European Community
UN	United Nations
UNDP	UN Development Programme
UNHCR	UN High Commissioner for Refugees
UNMIBH	UN Mission in Bosnia and Herzegovina
UNSC	UN Security Council
USA	United States of America
YB	Yearbook

CONSTITUTION OF BOSNIA AND HERZEGOVINA

(Authentic text in English)

Preamble

Based on respect for human dignity, liberty, and equality,

Dedicated to peace, justice, tolerance, and reconciliation,

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,

Guided by the Purposes and Principles of the Charter of the United Nations,

Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,

Determined to ensure full respect for international humanitarian law,

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,

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

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.

3. Composition

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

4. Movement of Goods, Services, Capital, and Persons

There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

5. Capital

The capital of Bosnia and Herzegovina shall be Sarajevo.

6. Symbols

Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency.

7. Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

a. All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.

b. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

c. All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.

d. Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

e. A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity. There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

Article II: Human Rights and Fundamental Freedoms

1. Human Rights

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

2. International Standards

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

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a. The right to life.

b. The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

c. The right not to be held in slavery or servitude or to perform forced or compulsory labor.

d. The rights to liberty and security of person.

e. The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

f. The right to private and family life, home, and correspondence.

g. Freedom of thought, conscience, and religion.

h. Freedom of expression.

i. Freedom of peaceful assembly and freedom of association with others.

j. The right to marry and to found a family.

k. The right to property.

l. The right to education.

m. The right to liberty of movement and residence.

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.

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.

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.

7. International Agreements

Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

8. Cooperation

All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

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

1. Responsibilities of the Institutions of Bosnia and Herzegovina

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

a. Foreign policy.

b. Foreign trade policy.

c. Customs policy.

d. Monetary policy as provided in Article VII.

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

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

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

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

i. Regulation of inter-Entity transportation.

j. Air traffic control.

2. Responsibilities of the Entities

a. The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.

b. Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one

Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization.

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.

d. Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

3. Law and Responsibilities of the Entities and the Institutions

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

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

4. Coordination

The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.

5. Additional Responsibilities

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

b. Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

Article IV: Parliamentary Assembly

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

1. House of Peoples

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.

2. House of Representatives

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

a. Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

b. A majority of all members elected to the House of Representatives shall comprise a quorum.

3. Procedures

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

b. Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.

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

d. All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the

Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.

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

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

g. The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.

h. Decisions of the Parliamentary Assembly shall not take effect before publication.

i. Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

j. Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. Powers

a. The Parliamentary Assembly shall have responsibility for:

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

c. Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

d. Approving a budget for the institutions of Bosnia and Herzegovina.

e. Deciding whether to consent to the ratification of treaties.

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

Article V: 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.

1. Election and Term

a. Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

b. 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.

2. Procedures

a. The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

b. The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3).

c. The Presidency shall endeavor to adopt all Presidency Decisions (i.e., those concerning matters arising under Article V(3) (a)-(e) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.

d. A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

3. Powers

The Presidency shall have responsibility for:

a. Conducting the foreign policy of Bosnia and Herzegovina.

b. Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

c. Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member.

d. Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

e. Executing decisions of the Parliamentary Assembly.

f. Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

g. Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

h. Coordinating as necessary with international and nongovernmental organizations in Bosnia and Herzegovina.

i. Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

4. Council of Ministers

The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

a. Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

b. No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.

c. The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.

5. Standing Committee

a. Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

b. The members of the Presidency shall select a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Members of the Presidency shall be members of the Standing Committee.

Article VI: Constitutional Court

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

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

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

c. The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

d. For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

a. A majority of all members of the Court shall constitute a quorum.

b. The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

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

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

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

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

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

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

4. Decisions

Decisions of the Constitutional Court shall be final and binding.

Article VII: Central Bank

There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

1. The Central Bank's responsibilities will be determined by the Parliamentary Assembly. For the first six years after the entry into force of this Constitution, however, it may not extend credit by creating money, operating in this respect as a currency board; thereafter, the Parliamentary Assembly may give it that authority.

2. 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, all of whom shall serve a six-year term. The Governor, who shall not be a citizen of Bosnia and Herzegovina or any neighboring state, may cast tie-breaking votes on the Governing Board.

3. Thereafter, the Governing Board of the Central Bank of Bosnia and Herzegovina shall consist of five persons appointed by the Presidency for a term of six years. The Board shall appoint, from among its members, a Governor for a term of six years.

Article VIII: Finances

1. The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina.

2. If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis.

3. The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly.

Article IX: General Provisions

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

2. Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

3. Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

Article X: Amendment

1. Amendment Procedure

This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

2. Human Rights and Fundamental Freedoms

No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

Article XI: Transitional Arrangements

Transitional arrangements concerning public offices, law, and other matters are set forth in Annex II to this Constitution.

Article XII: Entry into Force

1. This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.

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

Annex I: Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide

2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto

3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto

4. 1957 Convention on the Nationality of Married Women

5. 1961 Convention on the Reduction of Statelessness

6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination

7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto

8. 1966 Covenant on Economic, Social and Cultural Rights

9. 1979 Convention on the Elimination of All Forms of Discrimination against Women

10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

12. 1989 Convention on the Rights of the Child

13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

14. 1992 European Charter for Regional or Minority Languages

15. 1994 Framework Convention for the Protection of National Minorities

Annex II: Transitional Arrangements

1. Joint Interim Commission

a. The Parties hereby establish a Joint Interim Commission with a mandate to discuss practical questions related to the implementation of the Constitution of Bosnia and Herzegovina and of the General Framework Agreement and its Annexes, and to make recommendations and proposals.

b. The Joint Interim Commission shall be composed of four persons from the Federation, three persons from the Republika Srpska, and one representative of Bosnia and Herzegovina.

c. Meetings of the Commission shall be chaired by the High Representative or his or designee.

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain

in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

3. Judicial and Administrative Proceedings

All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.

4. Offices

Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.

5. Treaties

Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.

Declaration On Behalf Of The Republic Of Bosnia And Herzegovina

The Republic of Bosnia and Herzegovina approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Muhamed Sacirbegovic
For the Republic of Bosnia and Herzegovina

Declaration On Behalf Of The Federation Of Bosnia And Herzegovina

The Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens, approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Kresimir Zubak
For the Federation of Bosnia and Herzegovina

Declaration On Behalf Of The Republika Srpska

The Republika Srpska approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement.

Nikola Koljevic
For the Republika Srpska

COMMENTARY ON THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Introduction: Genesis and Legitimacy of the Constitution of Bosnia and Herzegovina

A. Enactment of the Constitution within the international legal agreement

1. BiH Constitution as an element of consolidation of peace

The Constitution of Bosnia and Herzegovina may be understood only in the context of a group of international legal agreements that were agreed upon in Dayton/ Paris, in particular when viewed together with the Elections Agreement (Annex 3), the Human Rights Agreement (Annex 6), the Agreement on Refugees and Displaced Persons (Annex 7), and the Agreement on the Civil Implementation of the Peace Agreement (Annex 10). Besides the BiH Constitution, the mentioned Annexes also contain the substantive and procedural laws, which may usually be found in a state constitution (Annexes 3, 6 and 7), or regulations that affect the BiH Constitution in practice (Annex 10). Since regulations relating to elections, human rights and the return of refugees and displaced persons were not separated from the text of the Constitution in earlier drafts of the Constitution, this new regulation of the case law (both of the Constitutional Court and the Human Rights Chamber[3]) has reopened the issues related to the relation among the mentioned annexes.[4]

The Civil Annexes to the GFAP contain a great number of objectives and principles set for the reconstruction of Bosnia and Herzegovina. Nevertheless, first and foremost, one should mention that the military task was to end the armed conflict by establishing military security. At the same time, this task was an important condition for successful implementation of the civil components

3 In the further text, the Human Rights Chamber will be characterized as a "court" and its members as "judges", despite the fact that this is not the exact terminology used in Annex VI (in the original English version, this institution was referred to as a "Chamber" composed of "members"). Nevertheless, the Human Rights Chamber has the character of a "court" in every sense of that word. For more about this, see: "b. Human Rights Chamber", p. 118.

4 Neither has *Szasz* found the answer, 1996a, p. 80.

of the peace process, which is, then again, the guarantee for lasting peace in the country. In the opinion of the signatories from Dayton, fair democratic elections should have been the starting position for the new beginning, whereas the technical conduct of such elections was a lesser challenge than the creation of the necessary political and social conditions for holding the elections. Despite the democratic legitimacy of institutions at all governmental levels, which kept growing with each new election, there was and there still is a significant problem in the reconstruction process. This concerned the inability of institutions to responsibly control the fate of the country on their own, so that the international community had to come to their assistance by taking concentrated and wide-ranging substitute measures. Indeed, such a large-scale engagement of the International Community was also necessary due to the usual "childhood diseases" of countries in transition, which were additionally intensified by the huge economic damage and social breakdown caused by the armed conflict. This was the case not only because of the very consequences, which were rather evident, but also because of the fact that the armed conflict obscured the consciousness of the general population when it came to the fact that it was necessary to reform the economic system, which was unable to sustain itself. While other states were able to handle the challenges of transition on their own, the inabilities of the institutions of Bosnia and Herzegovina were programmed back in the Dayton Constitution. The successful compromise reached in order to end the armed conflict had forced the three antagonistic ethnic groups (despite the Washington Agreement, the same goes also for the two sides in the Federation) to continue living together in a sovereign state, and to cooperate on reconstruction. The dependency of the reconstruction process on the cooperation of the three opposing, formerly warring, sides inevitably led to the intervention by a neutral fourth side, which in this case was the International Community personified in the Office of the High Representative.

The process of creating structures of a legal state and democracy-oriented institutions at the State level, as provided for in the BiH Constitution, considering their development under a protectorate, face a double challenge today, 14 years after the establishment of peace. After many years of guardianship, at times pleasant, the institutions of Bosnia and Herzegovina must learn to make difficult and unpopular decisions by themselves, which are necessary for Bosnia and Herzegovina to secure its future survival, and to stand by such decisions before its citizens. In addition, these institutions must learn to make such difficult decisions by compromise, as stoppages in legislative and executive authority at the state-institution level are unacceptable, considering all the problems the country has.

B. Practical problems of implementation in the post-war period

In order to contribute towards a better understanding of topical constitutional and legal issues, the most significant practical problems encountered in implementation at present or in the past by the national and international actors shall be presented. There are numerous analyses, assessments and reports, such as the text of the *UNHCR*[5] or those of various non-governmental organisations such as the *International Crisis Group*,[6] *United States Institute of Peace*[7] and *European Stability Initiative*.[8] A situation report from 2008 was given in the Report of the European Commission of the European Union on the progress of Bosnia and Herzegovina on "the path to Europe".[9]

1. Double transition

Bosnia and Herzegovina has experienced a double process of transition: on the one hand, from armed conflict towards lasting peace as a post-conflict society and, on the other hand, development from moderate authoritarian socialism towards a free democratic state and market economy.

Since the entire territory of Bosnia and Herzegovina was caught up in war and the neighbouring states were involved, practically speaking, the entire population of Bosnia and Herzegovina was a victim. Other than the dead and the wounded, the armed conflict saw mass expulsions and large parts of the country were ethnically "homogenised", meaning that an otherwise well-functioning multi-ethnic society was split. The "brain drain", which had started during the conflict, continued in the subsequent years due to a lack of economic prospects, despite improvement in the security situation. Practically, the economy did not function. An army of the unemployed, victims of the conflict and retired persons have put a strain on the State treasury ever since. Considering the goal of achieving sustainable stabilisation of the country, what poses a particularly serious problem is the fact that, despite the rightfully sealed survival of Bosnia and Herzegovina as a multi-ethnic State in Dayton,

5 See, <www.unhcr.ba>, authors' archives.
6 In particular, *ICG*, 1999b, 1999f, 1999g, 1999h, 2000, 2000d, 2001a, 2001b, 2001c, 2002, 2002a, 2002c, 2003.
7 See, <www.usip.org>, authors' archives.
8 In particular, *ESI*, 1999, 2000, 2001.
9 European Commission of the European Union, Report on the progress of BiH in 2008, SEC COM/2693 final 5 November 2008, accessible at: <http://www.delbih.ec.europa.eu/?akcija=clanak&CID=39&jezik=1&LID=57>.

possibilities still exist for conflict to break out. Nationalistic groups had already used such potential in the past, and such potential for conflict was refreshed by memories of a traumatic ethnic conflict in the recent past. The State of Bosnia and Herzegovina, which had been weakened during the conflict, was completely stripped of its legitimacy and institutions. The reason behind such a position was the concentration of State power, which came into being during the armed conflict, on ethnically determined territorial units. In a state which is not wanted by at least two of its constituent peoples, joint institutions could barely operate.

Transition towards democracy, protection of human rights and a market economy, owing to the destructive armed conflict, is hard to implement and is conditioned by three aspects. Firstly, the reform of a destroyed economy is a challenge *per se*. Secondly, necessary measures are hard to implement in a political climate full of obstructions and inconsideration. Finally, the armed conflict made a large proportion of the population, including the ruling circles, fail to realise that the country is in this sad situation not only because of the armed conflict, but also because it is conditioned by the very system in the country. After decades of non-alignment and non-affiliation with any of the blocks, throughout which Yugoslav socialism had generously supported both the East and the West, and an average citizen enjoyed a certain living standard and privileges that had been almost non-existent in the countries of the East Block, a great many people are nostalgic about the pre-war times, and are unable to comprehend the real meaning of reform leading towards a market economy. Authoritarian "master minds" and the system of Communist Party nomenclature[10] further consolidated themselves during the years-long conflict, and were adapted by the nationalistic parties to their goals and turned into instruments as such. The effect of this is that the ethnic collective interests had suppressed the interest of the individual – who, anyway, has always come after the public interest – to third place. In that sense, *Alefsen*[11] justifiably observes the lack of division of power, as police and judiciary are distinguished by ethnic loyalty, so that, for instance, war criminals remain unpunished and returnees from other ethnic groups unprotected. A lack of human rights based culture and civil society, as well as weak pluralist media and lengthy political tensions in neighbouring countries, additionally hinder changes.[12]

10 See, *ESI*, 1999, p. 4 *et seq*.
11 1999, p. 57 *et seq*.
12 *Simor*, 1997, p. 652 *et seq*., describes the most important problems in the field of human rights in the years immediately after the war.

2. Unity without consensus

The contradiction of political unity without consensus, which was very clearly observed by *Alefsen*, is apparent in Bosnia and Herzegovina's post-conflict politics. It is a result of compromise forced in Dayton; the price for survival of a multi-ethnic state, which was necessary in order to not legitimise ethnic cleansing, and to not send the wrong signal to areas in the region with a similar ethno-political situation and to the Soviet Union, which was falling apart.[13] A great obstacle for stabilisation of the country is the lack of preparedness for consensus. Groups not favouring a joint state, through constant delays and inhibition of the decision-making process, are trying to prove that such a state is dysfunctional. Reckless statements coming from diplomatic circles on "establishing new borders in the Balkans" encourage them in doing so. The Serbian side has again recently put on the agenda the issue of a new system of the state, thereby linking the decision on the final status of Kosovo and the continuation of the Republika Srpska in Bosnia and Herzegovina.[14] In that context, the proposed referendum in the Republika Srpska has caused significant political tensions. Where the areas of responsibility are not separated in the very Constitution – as is the case between the two Entities – attempts were made, beyond the constitutional framework, to establish independent representation of certain ethnic groups by setting up parallel institutions. This brought into question all "supra-ethnic structures" at the State, Entity and Cantonal levels. Unlike the warring sides after World War II, when each country had a chance to tackle reconstruction on its own, only to agree, seven years later, being driven by reason, on strategic cooperation within the European Coal and Steel Community, Bosnia and Herzegovina's warring sides immediately went together aboard the same "ship", the sinking of which would be acceptable for at least two out of the three of them.[15] Overcoming the past through criticism, which is necessary for the common future of peoples, proved a tough

13 Regarding the aforesaid, compare the allegations at the beginning of p. 30. *et seq*.

14 On 21 February 2008 the RS National Assembly passed a Resolution on the Non Recognition of the Unilateral Declaration of Independence of Kosovo and Metohija and on the Position of the Republika Srpska, claiming, among other things, that the Republika Srpska has the right to a referendum on its state and legal status if several states, particularly those from the EU, recognise Kosovo. For, in that case, one should presume that a new principle in international law has been established, thereby recognising the priority right to self-determination pending disassociation. The issue of the constitutionality of this resolution was subject to review before the BiH Constitutional Court (Case No. U 6/08). On 30 January 2009 the BiH Constitutional Court rejected the request for review due to lack of competence of the BiH Constitutional Court to make a decision in this case, as the resolution is "an act constituting a type of political proclamation which is not legally binding" (paragraph 10).

15 Similarly, *Hayden*, 1998, [Discrediting the Peace].

endeavour, since the peace agreement failed to name losers and culprits.[16] Also, no side is willing to show that it recognises injustice. From a practical point of view, the only form of overcoming the past in the first years after the end of the conflict was the activity of the International Criminal Tribunal for the former Yugoslavia (ICTY).[17] This leading role for prosecuting war crimes in the country was taken over a few years ago by the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina[18] since the Entities' lower instance national courts had tackled that problem area indecisively and insufficiently.[19]

3. Weaknesses of the international engagement

The International Community, personified in institutional actors,[20] in mixed authorities (such as the Constitutional Court and the Human Rights Chamber), and in a large number of non-governmental organisations, has invested a great deal in the civil implementation process, which cannot be measured solely by money.[21] However, the implementation process was in no way facilitated by the international actors, as their fields of activity often overlapped to a great extent and, unfortunately, they were completely uncoordinated and unharmonised; additionally their mutual struggle to justify their very presence in the country has in no way facilitated the implementation process.[22]

Ever since the era of High Representative *Petritsch*, the International Community has tried to withdraw and to remove the decision-making of a foreign factor, the effects of which (dependency on foreign donors, shifting responsibility for "unpleasant decisions" to international organisations, lack of democracy etc.) have been earlier cautioned against.[23] First and foremost, Bosnia and Herzegovina's officials should have shifted responsibility to their own cause, under the motto of "*ownership*" regarding the peace implementation process.[24]

16 Equally, *Pajić*, 1998, p. 136.
17 ICTY, <www.un.org/icty>.
18 Overview by *Lauth*, 2005.
19 Compare, *Garms/Peschke*, 2006.
20 Overview by *Winkelmann*, 2002, pp. 6-13; *O'Flaherty*, 1998, p. 75 *et seq*.
21 *Inglis*, 1998, p. 92 *et seq*.
22 *O'Flaherty*, 1998.
23 See, *e.g.*, reports of *ESI* from 1999, 2000, 2001 and 2002; *Chandler*, 2000, p. 1 *et seq*.
24 As to this change in strategy, and an overview of all of the activities of the High Representative: *La Ferrara*, 2000, pp. 184 -196 (191 *et seq*). Compare the speech of the High Representative before the Steering Board Ministerial Meeting of 22 September 1999, <www.ohr.int/ohr-dept/presso/presssp/archive.asp> (OHR online media archive).

Consequently, the "*Partnership forum*" was set up in order to promote cooperation between the Council of Ministers, the civil sector and the High Representative.[25] By means of "*streamlining*" it should have acted against the "*institutional overkill*" of the international assistance organisations,[26] and, in general, shaped the international assistance more efficiently while remaining budget-conscious.[27] After a temporary relapse in terms of returning to this practice with elements of a foreign protectorate under *Ashdown*, who had to initiate great reforms with three nationalistic political parties (HDZ, SDA and SDS), his successor, *Christian Schwarz-Schilling*, by imposing a moratorium on the Bonn powers,[28] was unsuccessful at attempting to make the national officials (re)assume responsibility and show political maturity. His successor *Miroslav Lajčák* faced a delicate task of reaffirming the authority of his powers in the interest of stabilisation, thereby not falling into the trap of protectionist care again. The present High Representative *Valentin Inzko* inherited *Lajčák's* problems. In addition, *Inzko* was charged with a task whereby the State was required to fulfil as soon as possible two conditions and five objectives of the Peace Implementation Council in Bosnia and Herzegovina from February 2008 in order for the Office of the High Representative to be closed, and in order to define at the same time new relations between Bosnia and Herzegovina and the European Union.[29]

C. Revolutionary genesis of the Constitution?

As stated in the last paragraph of the Preamble, "Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine . . . the Constitution of Bosnia and Herzegovina". The participation of the constituent peoples as constitution makers as stated in this sentence is more of a "fiction", with the aim of legitimising the Constitution, than reality: Bosnia and Herzegovina, as a "symbolic structure" of the international community,[30] lacks (for the time being at least) the emotional support of the population.[31] For, the BiH Constitution, as per Annex 4 of the General Framework

25 Press release of the High Representative, dated 19 July 2001, OHR online archive.

26 *Marko*, 2001, pp. 55-87 (77).

27 See also *Nowak*, 1999.a, p. 44 and *Nowak*, 2000, p. 61 *et seq*.

28 More about the Bonn powers see: "(a) Legal acts of the High Representative (Annex 10 of GFAP)", p. 783.

29 To learn more about this, see the *Report to the European Parliament by the OHR and EU Special Representative for BiH, May – November 2008* of 26 October 2009, available in English at: <http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=44152>.

30 *Maziau*, 2002, p. 568; *Hayden*, 1998, -Introduction-.

31 *Hayden*, 1998, -Symbols of feigned unity-.

Agreement, is a constitutional act which "through amendments substitutes and renders ineffective" the Republic of BiH Constitution[32] and which entered into force when the General Framework Agreement was signed. The text of the BiH Constitution largely came into being during various peace negotiations in Bosnia and Herzegovina,[33] and its final version is the result of the closed-door negotiations held at the American Dayton, Ohio Airbase.

> The first peace plan, entitled *Treaty Provisions for the Convention*, which came into being at the *EC Peace Conference on Yugoslavia* (often referred to as the *Carrington* or the *Brussels* or the *Hague Conference*), took as a starting point the preservation of the Federal Republic of Yugoslavia, and it failed because *Milošević* refused to accept it.[34] The Arbitration Commission, which came into being at the mentioned conference, and which is also referred to as the *Badinter Commission* after the name of its first president, offered a number of positions that might serve as guidelines for the policy of the EC and its member states. Among other things, the Commission had recognised significant minority rights, human rights and fundamental freedoms of the Bosnian Serbs, which the republics have to provide for members of minorities and ethnic groups, "including, if appropriate, the right to choose nationality", which, however, does not imply the right to secession from the future state, in particular because violent changes of borders were declared legally null and void. Moreover, the Commission took the position that the borders of the former Yugoslav republics following the break-up of the federation should be treated as international borders. In case Bosnia and Herzegovina declared independence – which at the time was still uncertain – the State would be recognised.[35] When it seemed that the break-up of Yugoslavia could no longer be halted, the *Carrington Conference* focused on having the process flow as orderly as possible, and on preventing the break-up of Bosnia and Herzegovina. For this purpose, in March 1992, constitutional principles were proposed for Bosnia and Herzegovina (the so-called *Cutileiro Plan*). Partition of the country under that plan to regions that would be in essence autonomous and to a great extent ethnically defined, yet territorially undetermined, was quickly rejected. As a new attempt to bring it under control, in August 1992 the *London International Conference on the Former Yugoslavia* was convened, whereby resolve to preserve the integrity of Bosnia and Herzegovina within the then borders was expressed. At the *International Conference on the Former*

32 Article XII.1.

33 Overview by *Szasz*, 1995a.

34 As to the stages of the peace process, see, first and foremost, analytical reports *Szasz*, 1995a, p. 364 *et seq*.; similarly, with appendices 1995a.

35 See opinions no. 1-3 of the Commission, published in EJIL, volume 3 (1993), book 1, p. 182 *et seq*.; on the Commission and on analysis of its relevant opinions in the context of successor states see *Pellet*, 1992, *Rich*, 1993, *Türk*, 1993 and *Watts*, 1998, p. 414 *et seq*.

Yugoslavia (*ICFY* or the *Vance-Owen Negotiations* or *Geneva Conference*), set up at the *London Conference*, there were discussions about various constitutional models, from establishing a centralised State to partitioning the country. Thereafter the UN Security Council, and the *ICFY Steering Committee*, as well as the warring sides, proposed a federal system model (precursor of the *Vance-Owen* Plan*)*; however, again, this one lacked information on the accurate number of federal units or on their partition to the three sides, which was the reason why the sides stated they were unable to discuss the proposal. From January 1993 the sides negotiated the so-called *Vance-Owen Plan*: it involved a package of proposals which consisted of constitutional principles, partition of the country to ten provinces/regions (three for each people plus a multi-ethnic Sarajevo), agreement on cessation of war operations and withdrawal of military forces, and a plan for transition from a state of war to a new constitutional framework. While Croats went on to approve this plan right away, in which they saw territorial privileges, and Bosniaks approved it reluctantly, the Bosnian Serbs conditioned the approval of the plan with its ratification in Parliament. The Parliament refused to do so, which was confirmed once more at the referendum held consequently. The *Invincible-Plan* (named after the British aircraft carrier where negotiations had taken place) from August/September 1993, which, as a matter of fact, revived the *Cutileiro* principles and another ICFY option which had been rejected earlier, *i.e.*, division of three republics making up a loose-knit union, was rejected by Bosniaks, as that plan allocated them only 30% of the territory. Equally unsuccessful was the attempt of the young EU to apply the *Invincible-Plan* in November 1993. Only after the strategy was changed in 1994, which was introduced mainly by the United States, and thanks to which Bosniaks and Croats were made to sign the *Washington Agreement* on 1 March 1994, which brought them to reunification within the Federation of Bosnia and Herzegovina, did the negotiating settlement became more certain. The mentioned agreement brought about an immediate ceasefire between the two sides, and united their forces against the Bosnian Serbs. The implementation of this agreement in practice, *i.e.*, of the very Federation, dragged on until after the signing of the Dayton Agreement.[36] The Bosnian Serb army found itself in a situation where it lost significant parts of its territory in battles against the forces of the Federation.[37] Moreover, owing to their refusal of the Contact Group Plan, Bosnian Serbs were completely isolated by not only the international factors but also by Belgrade power-holders, who had provided them with substantial financial and logistical assistance before that.[38] Because of world-wide disapprovals following the shelling of a Sarajevo market in February and August 1994, and the seizure of the UN safe havens and massacres, committed by the Bosnian

36 *Čalić*, 1996b, p. 201 *et seq*.; *Malcolm*, 1996, p. 255 *et seq*.
37 *Čalić*, 1996b, p. 242 *et seq*.
38 *Goette*, 1997, p. 242.

> Serbs in July 1995, NATO took tougher and more consistent measures against the troops of the Bosnian Serbs.[39] Unlike Bosniaks and Croats, who entertained hope that the problem might be solved by military means because the situation at the frontline had changed, Bosnian Serbs were willing to negotiate now.[40] After another failed attempt, this time under the guidance of the Contact Group and in cooperation with the ICFY, followed by mere interim agreements from Geneva and New York from September 1995,[41] finally negotiations in Dayton, which the *US State Department* was actually in charge of, brought peace.

Thus, under substantial pressure of the international community, the State,[42] the warring sides, with Bosnian Serbs being *de facto* represented by *Milošević*,[43] following three-week marathon negotiations,[44] finally reached an agreement and initialled the Agreement on 21 November in Dayton. The General Framework Agreement for Peace in Bosnia and Herzegovina was finally signed in Paris on 14 December 1995.[45] This agreement, often referred to as the Paris or Dayton Agreement, actually constitutes a series of agreements and is comprised of a framework agreement and 12 annexes,[46] which were partly signed by different, and partly by the same signatories. It is a complex structure which was developed within different peace plans as far back as 1991, and it was converted into a final text in Dayton, mainly, at the working groups of the Contact Group (USA, Russia, Great Britain, France and Germany).[47] Because of their involvement in the conflict, Croatia and the rest of Yugoslavia had to commit to guaranteeing peace.[48] The GFAP and its annexes were accompanied by accessory agreements and cover letters of the very signatories and the states witnessing the initialling and signing of the agreement. Such documents support the entire structure, they make it complete, and some of them make the text more comprehensible.[49]

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39 *Čalić*, 1996b, p. 245 *et seq*.
40 *Nowak*, 2000, p. 31 *et seq*.
41 Critical review by *Hayden*, 1995.
42 *Šarčević*, 2001a, p. 327 *et seq*.
43 *Gaeta*, 1996, p. 150 *et seq*.
44 Summary of negotiations *Auswärtiges Amt*, 1998; *Holbrooke*, 1998, p. 231 *et seq*.
45 GFAP, as well as other documents relevant in this context were collected in: *OHR* (2000); these texts may be found on the OHR internet site, <www.ohr.int>. 1st edition [*OHR*, 1996] contains copies of original documents with signatures of the parties to the agreement. GFAP with Annexes was printed in ILM, volume 35 (1996), book 1, p. 89 *et seq*., GFAP, and Annexes 4, 6 and 10, and in HRLJ, volume 18, nos. 5-8, p. 309 *et seq*. GFAP overview by *Dörr*, 1997, pp. 129-180. From the international law aspect: *Gaeta*, 1996, pp. 147-163.
46 As to the legal nature of the Annex, see *Gaeta*, 1996, p. 147.
47 *Ischinger*, 1998, p. 32 *et seq*.; *Szasz*, 1995a.
48 *Gaeta*, 1996, 154 *et seq*.
49 *Szasz*, 1996, p. 304.

As Annex 4 to the GFAP, the BiH Constitution forms an integral part of the international legal agreement.[50] Unlike other annexes, the BiH Constitution was not made in the form of an agreement. Instead, representatives of the Republic of BiH, the Federation and the Republika Srpska *approved* the text of the Constitution in the attached statement. When viewed formally, one could even ascertain that the Republic of BiH, as an internationally recognised state, established the text of the Constitution together with the dissident groups that had *de facto* control over a part of its territory.[51] However, a more realistic viewpoint is that, in enacting the Constitution, the International Community had substituted the people of Bosnia and Herzegovina, *i.e.*, peoples, as a sovereign constitutional authority.[52]

This type of genesis is certainly uncommon, not only as a formal act of creation but also because of the real circumstances in which intensive closed-door negotiations were held, which were graphically described in the published texts of the immediate participants.[53] Numerous norms, which, in order to be acceptable for all ethnic groups, critically approached the limits of functionality of a state, are easy to recognise right away as being the result of a compromise.[54] What was sought was the lowest common denominator for opposing interests of the three peoples. While Bosniaks sought preservation of Bosnia and Herzegovina within its pre-war borders as a strong multi-ethnic and centralised state, Croats and Serbs wanted to ensure if not immediate or consequent secession, then at least as broad an autonomy as possible, and thereby as weak as possible State institutions.[55] Also, they wanted to ensure their own influence on State institutions by way of rights of collective participation to the right to veto.[56] Some view the (certainly high) price of peace ("ethnocracy", lack of democracy in enacting the constitution, recognition of ethnic cleansing) as too high and consider that basically it is only justified by the real political interests of Europe, the United States and Russia.[57] The compromise of contradiction at the core of the BiH Constitution – one state, but two ethnically identified Entities; democracy and ethnocracy; individual rights and collective rights – made the BiH Constitution more of a project for implementation and interpretation with uncertain outcome, than clear guidance.

50 U 5/98-III, paragraphs 19 and 73; agreed to by *Šarčević*, 2001a, p. 319.
51 *Gaeta*, 1996, p. 161.
52 *Maziau*, 2002, p. 567.
53 *Auswärtiges Amt*, 1998; *Holbrooke*, 1998, p. 231 *et seq*.; *Bildt*, 1998, p. 120 *et seq*.
54 *Marko*, 2001, p. 62.
55 *Auswärtiges Amt*, 1998, pp. 55, 57.
56 *Auswärtiges Amt*, 1998, pp. 60, 80 *et seq*., 86 *et seq*.
57 As *Šarčević*, 1996, p. 46 *et seq*.

D. Doubts about legitimacy

Individuals deny the legitimacy of the BiH Constitution for its unusual genesis, and also by providing arguments that the 1974 RBiH Constitution is still in force in its revised version from February 1993.[58] If we look at it strictly, indeed no amendments to the old RBiH Constitution had occurred within the framework prescribed.[59] It is more accurate to state that the BiH Constitution "amends and renders ineffective" (Article XII.1) the RBiH Constitution, without action on the part of the competent authorities provided for in the RBiH Constitution and without the proceedings provided for in the RBiH Constitution. The rest of the RBiH Assembly, which stayed behind after the Bosnian Serbs representatives departed, at a session of 30 November 1995, accepted the Dayton Agreement, and in the RBiH Constitutional Law of 12 December 1995[60] it declared the BiH Constitution valid, provided that the Dayton Agreement be "satisfactorily" implemented. Otherwise, the BiH Constitution ought to be declared null and void and the RBiH survival secured under the internationally recognised name. This act lacked a majority, which, according to the RBiH Constitution, was necessary for amendments to the constitution.[61] In any case, both Entities' parliaments approved the BiH Constitution subsequently.[62] In addition to formal shortcomings, an objection was raised that the country was given a new constitution without preliminary debate which would have legitimised it politically, without having been approved or accepted afterwards by "the competent constitution-making bodies".[63] It is claimed that the BiH Constitution did not "grow out of the internal legal structures", and therefore it has "few organic grounds in Bosnia and Herzegovina itself".[64]

Besides, it was objected that the BiH Constitution, under the constitutional and legal standards, does not possess the "quality of a constitution", for, as claimed, it destroys the political unity of the Bosnian State people (*Staatsvolk*), it deprives it of its constitution-making features and encourages disintegration of a State community. Unlike the RBiH Constitution, it is further stated that (abstract) *citizens of the State* are no longer holders of the constitution-making

58 Compare *Šarčević*, 1996, p. 10 *et seq*., 47 *et seq*.; *Šarčević*, 2001a, pp. 297-339 and *Yee*, 1996, pp. 177-181.

59 *Šarčević*, 2001a, p. 326 *et seq*.; *Šarčević*, 2001, footnote 30; *Yee*, 1996, p. 177 *et seq*.

60 *OG of RBiH*, No. 49/95.

61 *Šarčević*, 2001, footnotes 30, 57; *Yee*, 1996, p. 178.

62 *Šarčević*, 1996, p. 45; *Yee*, 1996, p. 178, footnote 13; different in: *Hayden*, 1998, -Dayton's constitutional paradox-.

63 *Šarčević*, 2001a, p. 320; *Yee*, 1996, p. 180 *et seq*.; similarly, *Hayden*, 1995; *Miljko*, 1999, p. 94 *et seq*.

64 *Inglis*, 1998, p. 86, translation of the author.

power, but *ethnic groups*. Ethnic groups, as constitution-makers, and their respective representatives in Dayton, lacked the democratic legitimacy that the entire State people should have. Territorial division legitimates the war's "ethnic cleansing". Also, the BiH Constitution proved entirely inappropriate for its main task – stabilisation of the country. The BiH Constitution, therefore, is not "a solid foundation for legal shaping of a self sustainable, reproductive state community"; it encourages "political and ethnic conflicts" and it lives "off arbitrary chaos of nationalistic ideas of the leading political forces".[65] The division into two militarily independent Entities, as stated further, "recognised" and "legalised" the results of the war,[66] which places priority on collective rights over individual rights. The entire organisation of the State and public authority, as claimed, has nationalistic features, and the constitutional act is nothing but a pact between states, whereby the BiH Constitution lacks features of a constitution as a legal act of the state.[67] A leitmotif that runs through the Constitution is the coupling of ethnicity with political identity. In this way the State is being divided into three peoples, thereby supporting the State structure still based on nationalism, which is not in accordance with the idea of human rights as individual rights.[68]

Besides, it is claimed that the BiH Constitution meets conditions for its quashing, as it came into being under the threat of force[69] and by violating *ius cogens*;[70] the reason being for the latter, first and foremost, that the territorial division of the country consequently legitimised ethnic cleansing. It is acknowledged nevertheless that the BiH Constitution, owing to its recognition in practice, is valid in international law. Violation of constitutional law, which was in force at the time of entering into the agreement, and violation of *ius cogens*, may be justified by the difficult international and legal situation that the RBiH was in at the time of the signing of the agreement.[71] Regardless of its shortcomings at the time of its creation, it is nevertheless claimed that the BiH Constitution is an ineffective and only temporarily valid legal act, as the BiH Constitution proved in practice completely inefficient in consolidating BiH as an entity of international law; therefore, as claimed, the BiH Constitution is "an absolute failure of experimental enactment of a constitution".[72]

65 *Šarčević*, 2001a, p. 306 *et seq*.
66 *Yee*, 1996, p. 182; *Pajić*, 1998, p. 135 *et seq*.
67 *Miličević*, 1998, p. 14.
68 *Alefsen*, 1999, p. 56.
69 Article 52 of the Vienna Convention on the Law of Treaties.
70 Article 53 of the Vienna Convention on the Law of Treaties.
71 *Šarčević*, 2001a, p. 327 *et seq*., *Šarčević*, 2001, p. 301 *et seq*.
72 *Šarčević*, 2001, p. 338; *Šarčević*, 2001, pp. 496 *et seq*. 531.

E. Summary and Opinion

The applicability or effectiveness of the BiH Constitution has been denied for mainly three reasons: firstly, there are claims that the Constitution was made in a manner that is undemocratic and by way of violating the RBiH Constitution; secondly, the Constitution contains norms that are contrary to international law; thirdly, it has proven to be completely unsuitable in practice. These objections are definitely justified. However, the objectors failed to consider the constitution-making procedure, its contents and applicability within the context of extremely difficult and complex circumstances taking place during the peace negotiations. In an effort to bring peace to the region, it was necessary to take several factors into consideration: the geographic distribution, including fluctuating front-lines; military balance of forces; political conflicts among the prospective mediating forces; availability of sources for pressure and reward - all of which was aimed at urging the direct parties in conflict to accept the proposal for settlement; as well as humanitarian activities in the war-stricken area and treatment of war crimes.73 Due to the circumstances described above, the demands for a one hundred percent fair, legal and text-book example constitution were unrealistic. In the stage of armed conflict and in the early days of the post-war period this constitution required the warring parties to be considerate, reasonable, self-critical and humane, and it even required the capability for reconciliation. However, these are the behaviours and characteristics that the war opponents, by the very nature of things, do not posses when in the passion of battle. The subsequent scenarios according to the 'what would happen if' principle have only a limited effect on the quality of the solution that was really found, particularly in a situation where no realistic alternative is offered.

In a situation as described above, the mentioned weaknesses should not affect the applicability of the BiH Constitution. As far as the *genesis of the constitution* is concerned, it is true that the procedures and competencies for amending the constitution, which were stipulated under the RBiH Constitution, were not complied with. Therefore, a major objection refers exactly to an insufficient democratic legitimacy which, as a rule, is acquired through the participation of competent constitutional bodies representing a people as a sovereign. Nevertheless, the BiH Constitution - from a substantive point of view - was approved by the representatives of the largest part of the population, although the Constituent Assembly was not convened. We should take account that both Entity parliaments and the Republic Parliament, with the latter elected in

73 *Szasz*, 1995a, p. 364.

accordance with the RBiH Constitution - and in somewhat reduced numbers - voted separately for the BiH Constitution.[74] An excuse for not complying with the formal and legal requirements from the RBiH Constitution may be associated with the difficult international legal crisis the competent bodies were facing, and that situation called for an end to the armed conflict, as admitted by famous critics.[75] Therefore, we could, by supporting the opinion of *Mark*,[76] talk about "a revolutionary replacement" of the RBiH Constitution, or, as per the opinion of *Maziau*[77] "…*la signature du Traité de Dayton vaut revolution juridique*." *Yee*[78] also refers to similar circumstances that occurred at the time of the making of the U.S. Constitution and he also makes the point that in periods of crisis, the "convenience" of a normal procedure needs to be temporarily sacrificed.

The issue of the legitimacy of the BiH Constitution may be assessed only to some extent based on the constitutional and international legality or illegality of the RBiH secession from the Socialist Federal Republic of Yugoslavia.[79] To be more precise, this process was not conducted in the form provided for under the SFRY Constitution – neither was it conducted accordingly in other former republics that seceded from the federation – because such a procedure was not envisaged at all. However, the SFRY Assembly,[80] in the first sentence of the normative part of the Constitution,[81] provided for a principle of self-determination of "people" (not Republics) of Yugoslavia, including "the right to secession". Unlike the preceding constitutions, which were still referring to the "territories",[82] the 1974 SFRY Constitution recognised the statehood (*Staatlichkeit*) of the republics (Article 3). However, this constitution made a legal distinction between *people* and *republic*;[83] which, as late as in the conflict, became clear even to unengaged observers – not only that the national borders failed to match the borders of the republics in legal terms, but they also failed to match each other in factual terms.

Pursuant to Article 1 of the SFRY Constitution, the SFRY was "a federal state, as a state union of voluntarily united peoples, their socialist republics and

74 *Yee*, 1996, pp.178, 180, *et seq*., footnote 13.
75 *Šarčević*, 2001a, p. 327 *et seq*.; *Šarčević*, 2001, p. 301 *et seq*.; *Yee*, 1996, p. 178 *et seq*.
76 2002, p. 389.
77 2002, p. 568.
78 1996, p. 179.
79 *OG of SFRY*, No. 9/74.
80 Translation in German by *Flanz*, 1974.
81 *Flanz*, 1974, p. 5.
82 *Flanz*, 1974, p. 8.
83 *Rich*, 1993**,** p. 38. *et seq*.

socialist autonomous provinces" and it consisted of the mentioned republics and provinces (Article 2). Its territory was "unified and composed of the territories of its socialist republics" including its outer borders that could be changed only upon the consent of all the republics and provinces (Article 5, paragraph 3). Given such regulations, in order to consider "the secession" from a federation, a constitutional act, Article 2 of the SFRY Law would have to be amended.[84] On the other hand, the right of people to secede from the SFRY would be completely meaningless if there was a willingness to connect the exercise of that right with the approval to amend the constitution, which had to be given by the Federal Council of the SFRY Assembly with the consent of all the assemblies of the republics and provinces.[85]

Except for Bosniaks who did not aspire to create their own state but only to preserve the survival of the former Republic of BiH as an independent state, all other peoples claimed their right to self-determination. This fact should urge us to think about it. Additionally, it should be mentioned that the notion of people having the right to secession is very imprecisely defined; the same applies to the international-legal admissibility of using such a right (for example in the form of secession), including individual and collective rights arising from that right, such as statutes of autonomy or federalisation.[86] However, there is unified opinion that secession, even a forceful one if needed, is justified only in exceptional circumstances, such as protecting an ethnic group from grave discrimination.[87] And vice-versa, in the interest of stability of the community of states and for the reason of an international legal ban on violence, it may occur that secession is necessary even at the price of the territorial integrity of the relevant state.[88] In the background of the aforementioned, in the interest of all the peoples of the region, being in a conflict that the former Yugoslavia was not able to avoid, and given an unavoidable dispute between the postulate of the territorial integrity of the Yugoslav federation and the republics on the one hand and the said right to secession of people on the other hand, the first priority should have been a *peaceful* solution.

84 It is different according to *Šarčević* (1996, p. 12. *et seq*.), who, given the statehood of the former republics, when it comes to international recognition of BiH, refers to BiH as to "an already existing state" within the Yugoslav federation, which separates from the federation "on the basis of free expression of will (referendum) of its citizens". This kind of expression of people's will gives a democratic legitimization to secession from the federation, which was the condition of the international community prior to recognition; but referendum as a form for deciding was not provided for in the Federal Constitution, neither was any other form.

85 Article 398 of the SFRY Constitution; according to *Flanz*, 1974, p. 251.

86 *Heintze*, 1999, paragraphs 28-30.

87 *Heintze*, 1999, paragraph 29, subparagraph 10, *et seq*.

88 *Heintze*, 1999, paragraph 29, subparagraph 12.

Within the events preceding the adoption of declarations of independency, Slovenia and Croatia, being more and more dissatisfied with either real or experienced Serb domination in the Yugoslav federation, were trying to contribute to further decentralisation of the federal State and their aim was confederation, but the Serbian representatives in the federal institutions opposed to that plan.[89] The secession of Slovenia, Croatia and, at some later point, of Bosnia and Herzegovina, at the first moment was not welcomed, neither by the community of nations nor by interested international organisations. They feared the consequences of the disintegration of an ethnically mixed territory, and the territory of Bosnia and Herzegovina was of that kind. The states of the European Community had differing opinions concerning the issue of whether to recognise the republics that seceded from the Yugoslav federation as sovereign states or not.[90] Due to the use of force by the JNA and futile negotiations attempts, this process was not named the secession but *dismembratio* (disintegration) which took place along the borders of the former republics that used to be internal borders.[91] The intention was to punish the military aggression against the seceding republics. However, the consequences of such thinking were that the remainder of Yugoslavia was not considered a legal successor of the – already non-existing – international legal personality of the SFRY.[92] Only after Slovenia and Croatia had undertaken to comply with the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*[93] did the EC and its members finally decided to recognise BiH.[94] The reason why the EC and its

89 *Šarčević*, 1996, p. 14.

90 *Rich*, 1993.

91 As regards the Commission and its opinion, additionally see footnote 35. See the statement about the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* of 16 December 1991, which was published in the EJIL, volume 4 (1993), book 1, p. 72: "The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States."

92 Compare *Rich*, 1993, p. 60; *Heintze*, 1999, paragraph 29, subparagraphs 5, 7 *et seq*., paragraph 31, subparagraph 25 with further references; *Epping*, 1999, paragraph 5, subparagraph 14, with doubts about the compatibility of this view with international legal study on the continuation; *Rich*, 1993, p. 53 *et seq*.; *Weller*, AJIL, 1992, 572; The UN Security Council Resolution, UN S/RES/777 of 16 September 1992; about the issues of legal successor of SFRY in general: *Watts*, p. 405 *et seq*., also see, *Kamming*, 1996, about the issues of legal successors of states that signed human rights treaties. *Murswiek*, the issues of the right to secession, AVR, volume 31 (1993), p. 307 *et seq*., p. 330 *et seq*.

93 With reference to Guidelines, compare *Szasz*, 1995, p. 239 *et seq*.; *Rich*, 1993, pp. 42-44; *Heintze*, 1999, paragraph 29, subparagraph 15, with the statements about political issues of international-legal recognition, and, see *Gloria*, 1999, paragraph 22, subparagraph 44 *et seq*. (not objective criteria for recognition but "conditions for establishment of diplomatic relations"); contrary to *Hillgruber*, 1998, p. 499 *et seq*., who, apart from the "the study of three elements", considers that the recognition by other states is another condition for acquiring international-legal personality.

94 *Hillburger*, 1998, p. 507 *et seq.*

members decided to recognise Bosnia and Herzegovina was also the positive outcome of the referendum of BiH citizens for an "independent (...) Bosnia and Herzegovina,[95] (although the referendum showed threat attributes due to the boycott of Bosnian Serbs)."

95 *Rich*, 1993, p. 49 *et seq.*

Preamble

Based on respect for human dignity, liberty, and equality,

Dedicated to peace, justice, tolerance, and reconciliation,

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,

Guided by the Purposes and Principles of the Charter of the United Nations,

Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,

Determined to ensure full respect for international humanitarian law,

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995,

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:

A. Significance of the Preamble

The Preamble is an integral part of the BiH Constitution. This follows from its international and legal character, which is in conjunction with Article 31, paragraph 1 of the Vienna Convention on the Law of International Treaties, according to which the interpretive context of a treaty is composed of the preamble and annexes.[96] Additionally, the preamble of the Constitution may

96 U 5/98-III, paragraph 19.

have a normative character;[97] it is not only an auxiliary tool for interpretation.[98] Therefore, the Preamble of the BiH Constitution also serves as a norm for the Entity Constitutions.[99]

> For explanation purposes, the Constitutional Court invokes, inter alia, the decision of the Canadian Supreme Court in the case *Reference re Secession of Quebec*,[100] wherein the Court establishes that "these constitutional principles support and maintain the constitution related text: they are vital unuttered postulates on which the text is based [...]. Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood [...]. The principles assist in interpreting the text and in describing the sphere of competencies, the scope of rights and obligations and the role of our political institutions". Thus, "the principles are not purely descriptive for the government either." By responding to the rhetorical issues in which the Supreme Court may use these fundamental principles that are incorporated in the Constitution through its preamble, the Court reconfirmed its position in the case *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997) 3, S.C.R.3, in paragraph 95. "As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law."

A perception that the preamble has a normative character that marks the constitutional text is of special importance for the BiH Constitution. This preamble and its 10 lines give "10 commandments" to the BiH State and its citizens for a peaceful life together in a heterogeneous society, one that had suffered through the trauma of armed conflict, in order to ensure that something similar never happens again. The preamble is actually a catalogue of fundamental values and goals of international and constitutional law, as well as social values and goals that go without saying somewhere else, but in this case, they should leave a permanent mark upon the constitution and the future of the country.

97 U 5/98-II, paragraph 13, U 1/98.
98 U 5/98-III, paragraphs 23-24.
99 U 5/98-III, paragraph 26.
100 1998, 2. S.C.R. paragraphs 49-54.

B. About the Lines Respectively

1. Human dignity, freedom and equality;

"Based on respect for human dignity, liberty, and equality"

AP 143/04 Mulavdić *et al*.	20050923
AP 177/05 Karanović *et al*.	20060412
AP 696/04 Subotić	20050923
U 19/01-A&M Genjac "Article 52 of the RS Law on Labour"	20011102
U 4/04-M (partial decision) Tihić "Flag, Coat of Arms and Anthem of FBiH and RS"	20061118
U 7/06-M Pamuk	20060331

The first line of the Constitution's Preamble determines three cornerstones for Bosnia and Herzegovina after Dayton: the Framer of the Constitution relies on human dignity, freedom and equality as generally accepted fundamental and central constitutional values. Thus, the State does not serve its own purpose but it rather justifies its own existence by protecting those greatest values. The said provisions, in Article II of the Constitution, have been largely incorporated within specific fundamental rights, and in Article X.2, a protective clause has been incorporated whereby it is forbidden to abolish or reduce the said rights by any prospective amendments to the Constitution.

The BiH Constitution declares that **respect for human rights** is a fundamental prerequisite for a free and democratic society.[101] An accurate definition of the term "human dignity" raises new issues since that term, particularly in the era of globalization, bears an impression of a specific view of the world possessed by the person using that specific term. "Naïvely referring" to philosophers, philosophic traditions, natural law, etc., will not bring us a step further.[102] In defining the said term, one should primarily rely on the applicable constitution. Only if such an approach achieves success should one think about "examining whether philosophic definitions of 'human dignity' term have a minimum in common, which may become a basis for interpretation of the term".[103]

Despite the relativity of the term "human dignity" depending upon the point of view, it may be helpful, when defining the said term, to take into consideration current attempts of other states with the same or similar culture.

101 Compare with U 7/06, paragrapah 38.
102 *Starck* in: *Mangoldt/Klein/Starck*, 1999, p. 34.
103 *Starck*, *Ibid*.

If one gives a comparative view of the Western states whose constitutions are dedicated to the effective protection of fundamental rights, the legal state and democracy, a comparison with the definitions of human dignity in the democracies of Western Europe must be made. This is particularly true if one takes into account the circumstances under which the BiH Constitution was adopted, which testifies to the will for radical change aimed at achieving the mentioned values along with departing from communism and authoritative forms of government. Any limitation in favour of supremacy of state interest over the protection of the individual, which someone might try to justify by the tradition of Yugoslav communism, has no more room in a constitution whose provisions on the protection of human rights and fundamental freedoms use the highest international standards as a point of reference. The European Convention for the Protection of Human Rights and Fundamental Freedoms was proclaimed applicable under the constitution, which practically elevated the complete international humanitarian law to the level of the constitution.

From the aspect of comparative law, several attempts of international constitutional courts and human rights courts will be mentioned in defining this term. For example, the German Federal Court (*Bundesverfassungsgericht*), in its judgment "Eavesdropping" (*Abhörurteil*), stated as follows:[104]

> "[...] In giving an answer to the question what exactly the human dignity mean, we must be cautious not to interpret this pathetic word only within its highest meaning assuming that the human dignity is violated only if the treatment by authorities, while enforcing laws, constitutes the lack of respect a human being is entitled to as a person, in other words if a 'disrespectful treatment' is in place. If, nevertheless, we do that we will downgrade the meaning of Article 79, paragraphs 3 of the Basic Law [guaranties of the eternal validity of German Basic Law, which is similar to Article X.2, the second sentence of the BiH Constitution]105 relating to prohibition of re-introduction of, for example, torture, pillar of shame or methods of Third Reich. Such a limitation is not in accordance with the concept and spirit of the Basic Law. Article 79, paragraph 3, in conjunction with Article 1 of the Basic Law has a substantially more specific content. Accordingly, the Basic Law acknowledges that a free personality of a human being, his/her values and qualities are on the highest scale of fundamental value system. All state authorities are obliged to respect and protect a human being along with all his/her values and individuality. A human being must not be 'inhumanly' treated as an object, even if it is done with good intentions and not because of the lack of respect for his/her values as a person. The First Senate of this Court formulated the aforesaid by stating that it is contrary to human dignity to consider a human being as a

104 The Constitution of the Federal Republic of Germany is named the Basic Law (*Grundgesetz*) and it protects human dignity under Article 1, paragraph 1, wherein it is stipulated: "Human dignity is inviolable. All state authorities are obliged to respect and protect human dignity".

105 Authors' remark.

> mere object being subjected to the actions of state authorities or to dispose of him/her in the name of state authority without much thinking, (the notes on current and major jurisdictions are to follow- *authors' remark*). The aim of the aforesaid is in no way to point to the direction in which the violations of human rights may be found. This is a principle whose roots are in Article 1 of the Basic Law and this principle sets directly the criteria".[106]

The Charter of Fundamental Rights of the European Union,[107] in its first chapter ("Human Dignity"), has also placed human dignity at the top of the catalogue of fundamental rights. Article 1 of the Charter states: "Human dignity is inviolable. It must be respected and protected." In the explanations to the Charter, which had been originally worked out under the auspices of the European Convent (*Europäischer Konvent*), and then published in the "Official Journal of the European Communities", No. 2007/C 303/02 of 14 December 2007, as to the obligation to respect human dignity, the following can be inferred: the dignity of the human person is not only a fundamental right in itself but constitutes a real basis of fundamental rights. None of the rights laid down in the Charter may be used to harm the dignity of another person, and the dignity of a human person is a part of the substance of the right laid down in the Charter. It must therefore be respected, even where a right is restricted.

The right to self-determination is also an element of human dignity since, according to the constitution, a person serves one's own purpose and one has one's own values, which, again, presumes the freedom of a person to make decisions about one's own life. Nevertheless, for the purpose of complying with the principle of fairness (Article II.3 of the BiH Constitution) and the obligation to limit human rights, the freedom of an individual must be harmonized with the fundamental rights of other persons.

Human dignity, from the perspective of the classic protective function of fundamental rights, must be **respected** by State authority at all levels. That is to say, human dignity must be respected by the State of "Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities" (Article II.6 of the BiH Constitution). It has already been stated, on page 37 *et seq.*, that this obligation of respect for human rights may have a normative character exceeding the requirements under Article II of the BiH Constitution. For example, human dignity plays a significant role when dealing with the issue of whether the media may be excluded from criminal

106 Federal Constitutional Court (BverfG), judgment of the 2nd Senate dated 15 December 1970, 2 BvF 1/69, 2 BvR 629/68 and 308/69, in: BverfGE 30, 1 [140].

107 "Official Journal of the European Communities" (*Amtsblatt der Europäischen Gemeinschaften*) No. 2000/C 364/01 of 18 December 2000.

trials.[108] Also, in resolving an issue of lawfulness of deprivation of liberty against someone's will, human dignity serves as a landmark.[109] Furthermore, both the use of force and measures undertaken as a reaction to the behaviour of a person deprived of liberty, when unnecessary, may jeopardise the principle of human dignity and violate Article 3 of the ECHR.[110]

Unlike Article 1, paragraph 1 of the German Basic Law,[111] the obligation to respect human dignity, according to line No. 1 of the BiH Constitution, does not contain an independent subjective human and constitutional right only. The Preamble may indeed have a normative character (see, page 37 *et seq.*), and therefore, may be applied as a criterion for interpretation, as already stated in the decisions of the BiH Constitutional Court. In the Decision of the Constitutional Court U 19/01, the Constitutional Court, *inter alia*, finds that the provisions of line 1 of the Preamble have been concretised as human rights and fundamental freedoms according to Article II.3, 4, 5, as well as according to Article II.2 in conjunction with the ECHR. Provided that in examining certain human rights those principles have already been taken into consideration, then, there will be no need for special control of the violations of the principles laid down in the Preamble (paragraph 35). The fact that 'the obligation to respect human rights' may be a criterion for interpretation follows from the ECHR as well, which is proved by the appropriate case-law of the European Court of Human Rights, for example, in relation to Articles 3 and 8. Accordingly, respect for human rights is *the very essence* of the ECHR.[112]

> While referring to the obligation of respect for human rights, the European Court of Human Rights, considers that, for example, corporal punishment[113] constitutes a disrespect for human dignity; the same applies to long lasting doubts cast on the state of mind of a person's mental health which are subsequently proved to be ill-founded;[114] lengthy proceedings, which, as such, are unacceptable for medical reasons;[115] lack of punishment for rape within marriage;[116] non-issuance of personal documents in individual

108 Compare with AP 177/05, paragraph 14.

109 AP 143/04, paragraph 67.

110 AP 696/04, paragraph 83, making reference to the ECtHR judgment, *Ribitsch v. Austria*, 4 December 1995, Series A no. 336, paragraph 38.

111 As to a leading opinion regarding this Article, compare with *Höfling*, in: *Sachs*, 1999, pp. 3-5a.

112 ECtHR, *Tyrer v. the United Kingdom*, 25 April 1978, paragraph 33.

113 ECtHR, *Bock v. FR Germany*, 29 March 1989, paragraph 48.

114 ECtHR, *X. v. France*, Application no. 18020/91, Report of 17 October 1991, paragraph 51

115 ECtHR, *S. W. v. the United Kingdom and* C. *v. the United Kingdom*, 22 November1995, paragraph 44.

116 ECtHR, *Kalderas Tziganes v. FR Germany*, Application no. 7823/77, and *Kalderas Tziganes v. Holland*, Application no. 7824/77, 6 July 1977, paragraph 57.

cases;[117] use of force against a person deprived of liberty, which is not absolutely necessary due to the person's behaviour;[118] in exceptional cases, deportation of seriously ill foreign citizens after being released from prison;[119] and conditions of detention which are incompatible with human dignity.[120]

2. "Dedicated to peace, justice, tolerance and reconciliation..."

Given the painful experience of conflict which divided a population that had been living in peace for centuries beforehand, the Framer of the Constitution held that the obligation was to particularly express in the Constitution a dedication to peace, justice, tolerance and reconciliation. According to line 5 of the Preamble, Bosnia and Herzegovina, as an equal member of the international community, is obliged to respect the objectives and principles of the United Nations, such as the promotion of world peace and international security – which means *external* peace, while line 2 of the Preamble primarily stipulates the obligation to develop *internal* peace, a value and "leitmotiv" for a peaceful co-existence within Bosnia and Herzegovina. Such an obligation, *i.e.*, dedication can barely be found in other constitutions. Its obvious aim is to encourage those to which it refers to overcome the consequences of a horrible armed conflict. The basis of this line is an elementary and universally valid principle implying that there is no State without internal peace. It is precisely in pluralist societies that the (internal) peace, justice and tolerance as basic values of coexistence are expressed in the constitutional norms on state monopoly of force and the protection of human rights and the rule of law. So the Framer of the Constitution stipulated the obligation of cooperating with the International Criminal Tribunal for the Former Yugoslavia (Article II.8) in order to support the reconciliation process. Likewise, Article IX.1 stipulates that no person who is serving a sentence imposed by the ICTY, and no person who is under indictment by the ICTY and who has failed to comply with an order to appear before the it may stand as a candidate or hold any appointive, elective, or other public office.

Another measure aiming at reconciliation and overcoming the past through criminal proceedings is the establishment of a Special Department for War

117 ECtHR, *Ribitsch v. Austria*, 4 December 1995, paragraph 38; see also *Tekin v. Turkey*, 9 June 1998; *Assenov v. Bulgaria*, 28 October 1998.
118 ECtHR, *D. v. The United Kingdom*, 2 May 1997, paragraph 52 *et seq*.
119 ECtHR, *Kudla v. Poland*, 26 October 2000, paragraph 94.
120 ECtHR, *Kudla v. Poland*, 26 October 2000, paragraph 94.

Crimes within the Court of BiH on 9 March 2005.[121] A significant contribution to the search for truth and thus reconciliation was given by various commissions for missing persons, particularly the *Republika Srpska Commission for Investigation of the Events in and around Srebrenica between 10 and 19 July 1995*, which was established in accordance with a Decision taken by the Human Rights Chamber in March 2003. Following initial obstacles which the institutions of the Republika Srpska put in the way of the Commission's activities, in June 2004 the Commission, finally, following significant interventions by the High Representative, published a serious report on the aforementioned events.[122] However, all efforts invested in the establishment of the Truth and Reconciliation Commission failed due to the lack of political will but also due to a concern of the victims that such a commission could have an unfavourable impact on the activities of the prosecution bodies or prevent such activities.[123]

3. Peace in pluralism through democracy and fair procedures

"Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society"

AP 35/03 SDPBiH	20060929
U 44/01 Names of "Serbian" cities/towns	20040227
U 5/98-II "Izetbegović II"	20000701 *OG of BiH*, No. 17/00
U 5/98-III "Izetbegović III – constituent peoples"	20000914 *OG of BiH*, No. 23/00
U 2/04 Mustafa Pamuk	20040428
U 4/04-M (partial decision) Tihić "Flag, coat of arms and anthem of FBiH and RS"	20061118
U 5/04 S. Tihić "Constitutionality of the Constitution"	20060127
U 8/04 M. Pamuk "Higher education"	20040626
U 4/05 N. Špirić "City Council of the City of Sarajevo"	20050422
U 7/05 S. Tihić "City Council of the City of Istočno Sarajevo"	20050212
U 10/05 Ž. Jukić "Public Broadcasting System"	20050722
U 13/05 Tihić	20060526
U 7/06 M. Pamuk "BiH & Croatia: agreement on social rights"	20060331

121 Compare, *Lauth*, 2005.
122 *UNDP BiH*, 2005, p. 10. *et seq*.; *ICTY*, 2004, p. 8. *et seq*.
123 Compare, *Gisvold*, 1998, *UNDP BiH*, 2005, p. 9. *et seq*.; *ICTY*, 2004, p. 7. *et seq*.

a. Introduction

Line 3 of the Preamble of the Constitution of BiH is not used solely as a tool for interpretation. Together with the entire Preamble, it has a normative character which enables it to be directly applicable. On one hand, this conclusion follows from the case law of the Constitutional Court of BiH, and, on the other hand, from the standpoint of a majority of the constitutional courts of European countries, and, finally – if taking into account the international roots of the BiH Constitution – from the Vienna Convention on the Law of Treaties.[124]

As in previous lines, line 3 of the Preamble of the Constitution of BiH contributes towards the determination of constitutional values. They are formulated as a certain conviction related to goals and means. The presumed goal is to establish peaceful social relations in a pluralist society. Democratic governmental institutions and fair procedures should contribute towards it. Therefore, this line should be understood primarily as the creation of a peaceful and pluralist society, which encompasses State institutions (governance and conduct) as the most adequate instrument for the achievement of the mentioned goal.

Within the context of the Dayton Agreement, and in the context of the new constitutional systems of the states of Central and Eastern Europe during the 1990's, such formulation may be somewhat surprising. Nevertheless, one might think that in Bosnia and Herzegovina "a democratic state" may be viewed as a goal, and a pluralist society as a means for the fulfilment of that goal. Since the 1990's a democratic state, or rather, a democratic and constitutional state based on the rule of law, has been a particularly celebrated model.[125] Yet, it would be too optimistic to believe that a pluralist society may come into being to start with, and then to bring about such a model for the state. Namely, one should consider that a state must be both democratic and pluralist in order to retain a pluralist society. Such a conclusion should have been helpful to all the states of Central and Eastern Europe where, during the development of their constitutional systems, a problem of national, ethnic or cultural minorities occurred, which was resolved by introducing pluralist structures into the state apparatus.[126] Thus, for instance, in the Constitution of Slovenia peoples are constituent state elements; in Bosnia and Herzegovina, three peoples, Bosniaks, Croats and Serbs, are viewed as constituent peoples who are equal and who exercise the state authority jointly. Although this relationship, *i.e.*, relation, is

124 U 5/98-II, paragraph 13, U 1/98; U 5/98-III, paragraphs 23-24; details on normativity of the Preamble, see "A. SIGNIFICANCE OF THE PREAMBLE", p. 35.

125 See, *Häberle*, 2008.

126 *Constantinesco*, *S. Pierré-Caps*, 2006, p. 322 *et seq.*; *Kymlicka*, 1995.

overemphasised in Bosnia and Herzegovina, it[127] does not solely affect the core of line 3 of the Preamble of the Constitution of BiH, as it concerns the sphere of civil society.[128]

b. The role of line 3 of the Preamble of the Constitution of BiH in the case law of the Constitutional Court of BiH

The role of line 3 of the Preamble of the Constitution of BiH in the case law of the Constitutional Court of BiH is important and is applied indirectly in a majority of cases. On one hand, the Constitutional Court of BiH refers to the enumerated articles of the Constitution of BiH rather than to the individual lines of the Preamble. On the other hand, the Constitutional Court of BiH readily connects line 3 of the Preamble of the Constitution of BiH with other constitutional provisions. Line 3 of the Preamble of the Constitution of BiH has, in principle, the scope of a guideline, whose role is to specify and shape the multiethnic character of the State authority in Bosnia and Herzegovina in accordance with the relevant international rights enumerated in Annex 1 to the Constitution of BiH.[129] However, this provision is applied also in social areas where particularly sensitive issues arise, such as language, religion or the return of refugees and internally displaced persons.

(a) Structures of multiethnic democratic State authority in Bosnia and Herzegovina

Collective equality of all three constituent peoples, as well as their respective right of veto, used in the event when their vital national interest is threatened, constitutes one of the fundamental elements of the structure of a multiethnic democratic State authority.

In a very important decision of the Constitutional Court of BiH, No. U 5/98-III, collective equality of the three constituent peoples was derived from the combination of lines 10 and 3 of the Preamble of the Constitution of BiH, as well as from Articles I.2 and II.4 of the Constitution of BiH. Thus, line 3 of the Preamble of the Constitution of BiH is linked to the entire Constitution of BiH, particularly with its ethnic structure, whereby the term "democratic, multiethnic state" is being used. The Constitutional Court of BiH shapes the constitutional equality of the three peoples as a concrete and functional concept.[130]

127 More about this in part 2 of this text.
128 More about this in part 3 of this text.
129 See, U 5/98-III, paragraph 54.
130 U 10/05, paragraphs 22 and 23.

Constitutional equality of the three peoples contains collective rights, which are not restricted territorially; they are applicable in both Entities in an equal manner,[131] irrespective of whether the mentioned peoples constitute a *de facto* minority or majority in one Entity. Further, collective rights relate to joint participation and influence on the State institutions, which are manifested through quotas prescribed by the Constitution. Quotas affect the electoral right, as well as the process of decision-making in the State institutions. The constituent peoples' right of veto is narrowly linked with the constitutional mechanism of vital interest that the peoples refer to. However, it shall be recognised only if the equality of constituent peoples is violated.

According to the position of the Constitutional Court of BiH, the right to representation in institutions and participation in the State authorities is applicable, in principle, only to such institutions and procedures as explicitly provided for by the very Constitution of BiH.[132] Even more so, such provisions must be narrowly, *i.e.*, restrictively interpreted, for, otherwise, they shall be contrary to the principle of prohibition of discrimination. Taking into account that this principle has been strictly stressed in the decisions of the Constitutional Court of BiH Nos. U 5/98-III (equality of constituent peoples), U 7/05 (participation of the constituent peoples in the city councils of Istočno Sarajevo and Banja Luka) and U 10/05 (Public Broadcasting System), such a principle creates a certain tension as far as the reasoning stated in decisions Nos. U 4/05 (participation of the Serbs in the City Council of the City of Sarajevo), also,[133] broadly speaking, U 44/01 (names of the cities/towns), U 4/04 (symbols) and U 8/04 (languages in higher education). In Decision No. U 4/05 the Constitutional Court of BiH confirmed that the Statute of the City of Sarajevo is unconstitutional, as Serbs have not been given equal treatment and position as the other two peoples. In the Decision No. U 7/05 the Constitutional Court of BiH decided that, from the constitutional viewpoint, it is not necessary that the city statutes of Istočno Sarajevo and Banja Luka provide for existence of special privileged positions of the members of the constituent peoples. In particular, it is not possible to conclude that the Constitution of BiH provides for a general institutional model, which may be carried over to the level of the Entities.[134] This contradiction can be resolved by taking into account that the Statute of the City of Sarajevo explicitly gave a privileged position to Bosniaks and Croats, whereby Serbs were discriminated against, which cannot be claimed for Istočno Sarajevo and Banja Luka.

131 U 5/98-III, paragraphs 56 and 57.
132 U 5/98-III, paragraph 68.
133 More about this in the text following hereafter.
134 U 7/05, paragraph 40.

Therefore, structures of a multiethnic democratic State show that there is a certain compromise which should prevent both the total assimilation of peoples, *i.e.*, ethnic communities, and their strict separation.[135] Territorial division must not serve as an instrument for ethnic separation; it must contribute towards mutual ethnic coexistence, peace and integration in the State and society. Thus, representatives of the three constituent peoples elected by certain polling precincts shall not be treated as "ethnic" representatives, as they represent all citizens who live in the territory of the respective precinct.[136] Accordingly, ethnic participation must not turn into ethnic domination. This means that an absolute or unrestricted right of veto must not be recognised.[137]

(b) Structures of a multiethnic pluralist society

If the rights of representation and participation in the government are, in principle, restricted to the State level, then the constitutional principles of prohibition of discrimination against groups and the return of refugees and displaced persons, which imply numerous languages and religions, as well as cultural pluralism in social life, particularly in the area of upbringing and tradition, deserves special attention and guarantees.

Therefore, this is related to the area of social life. Accordingly, linguistic and religious pluralism are not necessary only in the State institutions but also in the Entities and in public life, such as, for instance, universities.[138] The Framework Law on the Public Broadcasting System provides for equal rights of all constituent peoples, and therefore it does not violate "the vital interest" of the Croat people.[139] However, unconstitutional discrimination shall exist if the names of the cities/towns relate to only one constituent people, as that violates the integration of the constituent peoples and a possibility for return of members of other constituent peoples.[140] Similarly, unconstitutional discrimination shall exist if the coat of arms, anthem and symbols of one administrative-territorial unit do not include all three constituent peoples.[141] The vital interest of the Bosniak people shall be threatened if the legal solution for the exercise of the property right of refugees and displaced persons is made difficult in a disproportional manner;[142] conversely, the vital interest of the Bosniaks shall

135 U 5/98-III, paragraph 56 *et seq*.
136 U 5/98-III, paragraph 65.
137 U 5/98-III, paragraph 55.
138 U 8/04, paragraph 34.
139 U 10/05.
140 U 44/01.
141 U 4/04.
142 U 2/04.

not be threatened by the agreement of Bosnia and Herzegovina and Croatia on special rights of the former members of the Croatian Defence Council.[143]

The third line of the Preamble of the Constitution of BiH, therefore, served, on one hand, to constitute and protect the institutions and procedures of a multicultural and multiethnic state, and, on the other hand, to consolidate the respective structures by preserving the cultural pluralism of the society that was applicable up until that point. However, one could ask oneself the question as to how much it corresponds to European standards.

c. European standards of pluralism

To this end, the case law of the European Court of Human Rights occupies the most significant place, as it is directly applicable in the constitutional system of Bosnia and Herzegovina and has priority over all other law (Article II/2. of the Constitution of BiH). Admittedly, although the Constitutional Court of BiH had refused to assign to the ECHR "a supraconstitutional" rank from this provision,[144] the rights laid down in the ECHR have the same status as the constitutional rights and freedoms, and the Constitutional Court of BiH is being mindful of the State avoiding the adoption of judgments to its detriment in Strasbourg.

To the extent to which it is possible for the European case law on pluralism to be systematised, one might say that there are two directions: one is traditional and is found in the majority of national constitutional systems and, by relying on the principle of classical separation of state and society, it builds a society on the basis of the independent and free competition of social forces; the other one is new, and it depends on the internal state cultural pluralism, and its goal is to protect cultural, religious and social minorities.

(a) Traditional theory of pluralism

Traditional shaping of social pluralism affects, primarily, institutions which are relevant for the enforcement of the state will, that is to say, political parties and other public and legal bodies such as associations, the press and electronic media, etc. The basis for this is the right to freedom of thought and expression, which must be independent from the state and which must be in the free market of opinion, for, in such a manner, it builds the democratic opinion of a society. An example of this is the case law of the constitutional courts of the

143 U 7/06.
144 U 5/04.

Federal Republic of Germany,[145] Spain[146] and France,[147] and particularly issues related to the public funding of political parties and their obligations to the intra-party democracy.

In the case law of the European Court, also emphasised is the narrow link between freedom of expression and democracy. The link between these two categories particularly comes to the fore in a public debate, which has a special general interest and which, at the same time, determines the very core of this freedom.[148] This primarily relates to Articles 10 and 11 of the ECHR, as well as to Article 3 of Additional Protocol No. 1 to the ECHR, which guarantees the right to regular free elections, which, then again, should make it possible for the will of the people to be manifested. Thereby, it is important that the right to elections be viewed not only as objective obligations of the member states of the Council of Europe, but also as – under certain conditions – the rights to authentic parliamentary representation pursuable through subjective action.

A question arises as to how much does the construction of the multiethnic State of Bosnia and Herzegovina correspond to that concept? A possible contradiction between ethnic quotas and the right to individual political expression of opinion during the elections the Constitutional Court of BiH has already recognised in its Decision No. U 5/98, whereby it asked itself a question in such a context:

> "However, to what extent may institutional devices for the representation and participation of groups with the aim of power sharing infringe upon individual rights and in particular, voting rights?"[149]

First and foremost, the resolution lies in differentiating between the areas where quotas are needed and the areas where they are not needed. Otherwise, quotas might be viewed as discrimination.

Nevertheless, one could object that differentiation between these two categories has not always been clearly made,[150] it has not always been clearly reasoned,[151] that the quotas have so far suppressed the building of political opinions of political parties, or that Bosnia and Herzegovina's combination of ethnic quotas and territorial division does not represent an ideal solution, as it, undoubtedly,

145 See, for instance, judgments of the Federal Constitutional Court, BVerfGE 8, 51; 44, 125; 85, 264.

146 Judgments of the Spanish Constitutional Court (*Tribunal Constitucional*): STC 6/1981 and 36/2003.

147 Decision of the French Constitutional Council (*Conseil Constitutionnel*) on the right of the media: CC 86-210, DC of 29 July 1986.

148 ECtHR, *Handyside v. United Kingdom* of 7 December 1976, series A no. 24.

149 U 5/98-III, paragraph 113.

150 U 4/05.

151 U 7/05.

results in discrimination against members of the constituent peoples as per their respective place of residence and representatives of "others", that is to say "genuine" minorities.[152] In a number of its reports, the Venice Commission pointed out this problem and emphasised that it was necessary to think about the electoral system of Bosnia and Herzegovina, and to this end made special emphasis on the following:[153]

> "The ethnic representation and privilege of constituent peoples, *i.e.*, Bosniacs, Croats and Serbs, in the composition of the parliamentary and executive institutions and decision-making processes leads to a double exclusion: first, all Serbs who reside on the territory of FBiH as well as all Croats and Bosniacs who reside on the territory of RS are excluded from the right to stand as candidates for the Presidency elections. Second, all "Others" who do not identify themselves as members of these constituent peoples are also excluded from the right to stand as candidates in the elections for both bodies referred to. Thus, a member of one of the 23 legally recognized national minorities or a person with the background of a "mixed marriage" who does not want to identify himself as exclusively Bosniac, Croat or Serb or a person who refuses to identify himself for whatever reason is prohibited by the Constitution and the Election Law to run in the elections for these bodies."

Indeed it would be possible for the constitutional and legal right to be shaped so as to retain provisions on quotas of constituent peoples in order to preserve their equality, and yet to take into account the "others" and to forego association of candidates with polling precincts on territorial grounds.

(b) New theories about pluralism

Starting with a structural meaning of freedom of opinion for a "democratic society", the European Court has recently added a new, special, rather significant dimension to the notion of pluralism, which can be primarily described by the motto and term of cultural pluralism. To this end, a good example is the judgment *Gorzelik et al. v. Poland*. In this case the European Court describes the role of pluralism in a democratic society in the following manner:

> "For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. **The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion** [emphasis by author]. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively."[154]

152 U 13/05.
153 CDL AD (2008)027-f, paragraph 9.
154 ECtHR, *Gorzelik et al. v. Poland* of 17 February 2004, paragraph 92.

This does not only mean that the State should, first and foremost, protect minorities – which is undoubtedly necessary in Bosnia and Herzegovina – but, also, that a pluralist society is not composed solely of rigid groups, but that it is built through presumed interaction of individuals and groups of a society, which should be distinctive by diverse identities and, certainly, that that possibility is guaranteed. In other words: minorities must not become rigid and obsessive by themselves; there must be a possibility to discuss affiliation to minorities in a free and open debate. By adopting such case law, the ECHR creates a completely new study of anthropology, philosophy and political sciences which is narrowly related to the theory of deliberative democracy and which, as a precondition for the existence of a pluralist society, sees the necessary presence of a freedom-loving debate, differing opinions and the necessary flexibility of individual and collective identities.[155]

This new emphasis on pluralism is significant for Bosnia and Herzegovina, because it better corresponds to the linguistic meaning of line 3 of the Preamble of the Constitution of BiH than to the meaning that the very Constitutional Court of BiH has assigned to it. Admittedly, the European Court has still not received the cases pending against Bosnia and Herzegovina concerning the mentioned problem. However, it would be better and safer to recommend that the social dynamics be followed in order for the development of pluralism not to be halted by rigid constitutional structures.

4. Provisions relating to the economic system

"Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy"

AP 164/04-A&M Hadžiabdić *et al*.	20060331
CH/98/375 *et al.* Đ. Besarović *et al*.	20050406
CH/02/12468 *et al.* Š. Kadrić *et al*."Ratna šteta"	20050907
U 1/98 H. Silajdžić	19980605
U 5/98-II "Izetbegović II"	20000701 *OG BiH,* No. 17/2000
U 5/98-III "Izetbegović III – Constituent Peoples"	20000914 *OG BiH,* No. 23/2000
U 83/03 N. Špirić "JNA apartments"	20040922
U 14/05 N. Špirić "Old Foreign Currency Savings"	20051202

In line 4 of the Preamble, the Framer of the Constitution constitute the legal and constitutional principle of general welfare, *i.e.*, a social state (*general welfare*) and proclaim that the objective is economic growth and that the protection of

155 See among others *Ringelheim*, 2006.

private property and the development of a market economy are the framework for an adequate economic system, thus making a clear difference from their communist predecessors. Despite the fact that the constitutional text deals in a precise manner with certain elements, such as the legal right to property as a legal personality, this line has a decisive significance; it gives framework coordinates for social and economic policies in a new Bosnia and Herzegovina. The Constitutional Court and Commission for Human Rights within the Constitutional Court dealt with this framework several times. Accordingly, the conclusion that the Commission has drawn from line 4 is that the principle of a social state is applicable in Bosnia and Herzegovina.[156] The Constitutional Court has concluded in several decisions that these principles are binding upon the State.[157] Therefore, the State is not only obliged to protect against violations of the rights deriving from the aforesaid but it also has a positive obligation to promote and encourage the general welfare and economic growth when protecting private property and encouraging a market economy. Simultaneously, the State's prerogative is to evaluate the best manner in which the general welfare and economic growth can be achieved, particularly if, owing to the circumstances, there are certain limitations, such as those of a financial nature.[158] Moreover, while making efforts to achieve the objectives described here, the State is not limited to the instruments laid down in the Preamble.[159] However, the prerogative of evaluation also has limits if the means used to achieve the constitutional aims are obviously counter-effective.

When dealing with difficult legal issues which could affect the property of large groups of the population, the Constitutional Court and the Commission for Human Rights within the Constitutional Court willingly refer to line 4 of the Preamble; such issues are, for example, occupancy rights of former members of Yugoslav People's Army (JNA),[160] "lost" old foreign currency savings either in foreign banks[161] or national banks[162] or war reparations.[163] The constitutional principle of general welfare in those cases is used as an additional standard to the existing lines of the Preamble having a subjective character.[164] The general welfare thus leaves its mark on the interpretation of certain provisions relating to those fundamental rights which have an economic dimension.

156 CH/98/375 *et al*. Besarović *et al*., paragraph 1236.
157 Compare, AP 164/04, paragraphs 89 and 96; U 14/05, paragraph 46.
158 Compare, U 14/05.
159 Compare, U 83/03, paragraph 18: the use of housing policy to the benefit of soldiers and war veterans.
160 U 83/03, paragraph 53 *et seq*.
161 AP 164/04, paragraph 84 *et seq*.
162 U 14/05, paragraph 48.
163 CH/02/12468 *et al.*, paragraph 126 *et seq*.
164 Compare, U 83/03, paragraph 54.

5. Orientation to the purposes and principles of the UN Charter

"Guided by the purposes and principles of the Charter of the United Nations"

The architect-Framer of the Dayton Constitution held that his actions were guided by the purposes and principles of the United Nations Charter. Both in lines 1, 2, 6, 7 and 8 of the Preamble and Article I.1, primarily in respect of the protection of human rights (Article II and Annex I to the BiH Constitution),[165] Bosnia and Herzegovina, following Dayton, is considered the successor of the international subject, namely the former *Republic of Bosnia and Herzegovina*,[166] and as part of the community of peoples whose purposes and principles are binding upon Bosnia and Herzegovina.

The purposes and principles established in Chapter I of the United Nations Charter read as follows:

Article 1 of the UN Charter

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2 of the UN Charter

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

165 For the foregoing details, see "2. International protection of human rights", p. 123.

166 See explanation relating to Article I.1, "A. Continuation according to international law (Article I.1)", p. 88.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

6. Sovereignty, territorial integrity and political independence

"Committed to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law"

CH/98/375 *et al.* Đ. Besarović *et al*.	20050406
U 4/04 S. Tihić "Flag, Coat of Arms and Anthem of FBiH and RS"	20061118
U 5/98-IV "Izetbegović IV"	20001231 *OG of BiH*, No. 36/00
U 7/06 M. Pamuk "BiH & Croatia: Social Rights Agreement"	20060331
U 9/00 "State Border Service"	20020130 *OG of BiH*, No. 1/02

The obligation to respect the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international

law includes also the rejection of possible separatist tendencies (or their continuation) even at the price of a long political and economic deadlock at the level of the State of Bosnia and Herzegovina.

According to the first sentence of Article I.1 of the BiH Constitution, *Bosnia and Herzegovina*, from the point of view of international law, is not a newly established legal personality but a State successor of the international personality of the *Republic of Bosnia and Herzegovina* with its borders internationally recognized at the moment of adoption of the Constitution.[167] The State thus *remained* a Member State of the United Nations and maintained or could apply for membership in organisations within the United Nations system and other international organisations (Article I.1, second sentence thereof). Bosnia and Herzegovina is the very same state that it was initially as the Republic of Bosnia and Herzegovina, and one of the five states – namely Slovenia, Croatia, the former Federal Republic of Yugoslavia[168] and the former Yugoslav Republic of Macedonia – which were created by the disintegration of Yugoslavia. The United Nations recognised it as an independent State on 1 March 1992. Prior to this, the majority of citizens of Bosnia and Herzegovina, in a referendum, voted for independence, autonomy and the sovereignty of the State. Bosnia and Herzegovina, however, lost the mark "Republic" and got a new internal structure consisting of so-called Entities, namely the Federation of Bosnia and Herzegovina and the Republika Srpska (Article I.1, first sentence thereof, in conjunction with Article I.3 of the BiH Constitution).

According to Article I of the General Framework Agreement concluded in Dayton, the Republic of Croatia and the then Federal Republic of Yugoslavia explicitly undertook to respect – in addition to other international obligations, such as the conduct of relations with Bosnia and Herzegovina in accordance with the principles set forth in the United Nations Charter, as well as the 1975 Helsinki Final Act[169] – the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina. In international law, this is something that goes

167 For the foregoing details, see explanation relating to Article I.1, "A. Continuation according to international law (Article I.1)", p. 88.

168 Following the dissolution of the Socialist Federative Republic of Yugoslavia (1991/92), on 12 February 1992 Serbia and Montenegro agreed in Podgorica to associate in a new Yugoslavia, which, however, was not an international legal successor of the former Yugoslav statue. That State was proclaimed on 27 April 1997, which was the date of entry into force of a new Constitution. On 9 April 2002 the Parliaments of the remaining Yugoslav Republics of Serbia and Montenegro decided to disassociate and that both Republics, as agreed, should be, in the future, fully autonomous, but would remain part of the State called Serbia and Montenegro during the next three years. Following a referendum which took place on 3 June 2006, Montenegro became fully independent.

169 *Günter*, 1995, p. 92 *et seq*.

without saying. It is only the prehistory of centrifugal conflict that can give an explanation as to why the obligation to respect sovereignty, territorial integrity or political independence of a State, which is an implicit international obligation, is also formulated as a *legal-constitutional* obligation. Calling into question these inter-state obligations would not only create an external threat but also an internal threat, which was confirmed and manifested again in the years following the armed conflict. So, in addition to line 6 of the Preamble, Article III.2(a) of the BiH Constitution entitles the Entities to "establish special parallel relationships" with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, which, according to Article VI.3(a), line 3, may be examined objectively by the Constitutional Court. Moreover, according to Article III.5 of the BiH Constitution, the State of BiH may assume responsibilities other than those provided for by Article III.1 if they are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina. The legislature used this, for example, when adopting the Law on the State Border Service.[170] Therefore, the Entities are subject to the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina and they themselves do not have the legal capacity of a State.[171] Finally, in Article V.5(a) of the BiH Constitution, the architect-Framer of the Constitution, once again, precisely stipulated the obligation for the armed forces in Bosnia and Herzegovina, *i.e.*, those of the Federation and the Republika Srpska, to respect the sovereignty and territorial integrity of Bosnia and Herzegovina; therefore, they should also act in accordance with the aforementioned principles.[172] The fact that common armed forces have central significance encouraged the Framer of the Constitution to adopt, following difficult and long negotiations, the Law on Defence of BiH in 2003.[173]

7. Respect for international humanitarian law

"Determined to ensure full respect for international humanitarian law"

International humanitarian law proved to be ineffective in the most horrible armed conflicts in Europe after World War II; it could not prevent what had lasted for years: genocide, ethnic cleansing, concentration camps, urbicide, and horrible economic damage. For this reason the Framer of the Constitution

170 Compare, U 9/00, paragraph 13.

171 U 4/04, paragraph 140; see, for more details, comments relating to Article I.3, p. 108.

172 Compare, U 5/98-IV, paragraph 56.

173 *OG BiH*, No. 43/03.

considered it important to once again stipulate in the Preamble the obligation for all responsible parties to respect international humanitarian law.

The core of international humanitarian law is the four Geneva Conventions from 1949 and their Additional Protocols from 1977 and 2005:

> First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
>
> Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
>
> Third Geneva Convention relative to the Treatment of Prisoners of War;
>
> Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War;
>
> Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I);
>
> Protocol Additional to the Geneva Convention relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II);
>
> Protocol Additional to the Geneva Conventions of 12 December 2005.

In order to avoid all possible misunderstandings relating to the applicability of these instruments on the territory of the State of Bosnia and Herzegovina at the moment of the adoption of the Constitution, the Framer of the Constitution included them in the list of 15 international instruments for the protection of human rights provided for in Annex I to the BiH Constitution, thus giving them the rank of substantive constitutional rights.[174] The State and its lower level units are obliged to respect international humanitarian law, thus, to prevent violations of that law but also to take positive actions in the field of protection of people against violations of that law. This also includes the obligation to incorporate new developments relating to humanitarian law into the national law of the State (such as Additional Protocol of 12 December 2005).

Given the unlimited nature of obligations which may be imposed by humanitarian law, as deriving from line 7 of the Preamble, the question arises as to whether new developments in the case-law of the Constitutional Court, relating to the isolated applicability of the instruments laid down in Annex I to the Constitution, are sustainable. If the Court, in Case No. AP 95/06,[175] allows the rights under Annex I to be exercised only if discriminatory treatment is proven, then it can be considered a violation of an *absolute* obligation to respect humanitarian

174 For the foregoing details, see: “b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution”, p. 155.

175 Paragraph 11.

law, and thus, an obligation which is not exclusively related to discrimination. Therefore, the quoted case-law of the Constitutional Court, could, at least in this sense, if not as a matter of principle, be called into question.[176]

8. Inspired by human rights

> **"Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments"**

AP 149/03 S. S.-B. *et al.*	20010504
AP 95/06 Ajanović	20070306
U 1/98 H. Silajdžić	19980605
U 5/98-III "Izetbegović III – Constituent Peoples"	20000914 *OG of BiH*, No. 23/00

Through line 8 of the Preamble, the Framer of the Constitution announces the field of human rights at the international level and indicates as examples the most important instruments in the field of human rights, which are then also in the text of the Constitution, *i.e.*, Annex I to the Constitution proclaimed these as binding.[177] Bosnia and Herzegovina is thus obliged to protect human rights.

Admittedly, the Universal Declaration of Human Rights is only mentioned in the Preamble, not in the remaining part of the text of the Constitution. Despite the normative character of the Preamble,[178] the Universal Declaration of Human Rights should not be proclaimed by using a bypass, *i.e.*, the Preamble, in the sense of the general validity of the substantive constitutional law.[179] Unlike other lines, the Constitutional Court, generally, does not recognise in line 8 a constitutional basis for reviewing lower legal norms, since this line, according to the views taken by the Constitutional Court, does not contain the legal principles from which responsibilities, the scope of rights and duties or the role of the political parties could derive.[180]

There is no need to return to the Universal Declaration of Human Rights nor refer to it because of the presence of large-scale guarantees for the protection of human rights in the BiH Constitution, and above all because of the obligation

176 For the foregoing details, see: "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.
177 See below p. 123 *et seq*.
178 See above p. 37 *et seq*.
179 U 17/00, paragraph 22; U 149/03, paragraph 34.
180 Compare, U 5/98-III, paragraph 26.

to apply the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in the context of new developments in the Constitutional Court's case-law, according to which the instruments enumerated in Annex I to the Constitution cannot be examined in an isolated manner but only in connection with the prohibition of discrimination,[181] the question arises as to whether the application of line 8 of the Preamble can – at least in respect of the instruments enumerated in it, if not in respect of all other instruments indicated elsewhere in the Constitution – lead to their *unlimited* application regardless of the principle of equality. Such a move and interpretation would be finally too courageous taking into particular account the open wording of the aforementioned line of the Preamble ("inspired", "as well as other human rights instruments,"). Finally, such a move is not necessary in order to apply the instruments from Annex I to the Constitution in an absolute manner, which we will explain additionally below.[182]

9. Geneva and New York Basic Principles

The Framer of the Constitution relies on the basic principles agreed to in Geneva on 8 September 1995 and New York on 26 September 1995.[183] According to these agreements, the parties agreed to a framework for the peace agreement which was concretised subsequently in Dayton. These principles document "decisions taken by the international personalities in order to put an end to the Bosnian and Herzegovinian tragedy through negotiations as peaceful means, not military means".[184] These basic principles were fully transformed into provisions of the Dayton Agreement, particularly the BiH Constitution. However, they do not have binding character, as follows from the Preamble. At any rate, the Preamble is not subject to codification, since it is considered to be a pre-constitutional activity.[185] Only in the event that there is a dilemma about the interpretation of the Constitution can the aforementioned principles be given certain significance for historical interpretation. In Case No. U 5/98, the Constitutional Court made clear that in the case of possible inconsistencies between the basic principles and subsequent text of the Constitution, the text of the Constitution would prevail. The Republika Srpska tried to challenge such supremacy of the Constitution by claiming that it was stated in the Geneva Basic Principles of 8 September 1995 that "each Entity will continue to exist under its

181 AP 95/06, paragraph 11.

182 See "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.

183 The integral text of the principles: *Popović/Lukić*, 1997, p. 11 *et seq*.

184 *Begić*, 1997, p. 277.

185 Compare, *Starck* in *Mangoldt/Klein/Starck*, 1999, p. 17.

present Constitution". In response, the Constitutional Court rightfully indicated the remaining part of the text which reads: "as amended to accommodate these basic principles". This is further elaborated, as noted by the Constitutional Court, in Article III.3(b) and Article XII.2 of the BiH Constitution in terms of an absolute supremacy of the BiH Constitution.[186]

10. Constituent power

a. Commentary of *Steiner/Ademović*

> **"Bosniaks, 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"**

U 5/98-III "Izetbegović III – Constituent Peoples"	20000914 *OG of BiH*, No.23/00
U 8/04 M. Pamuk "Visoko obrazovanje"	20040626
U 4/05 N. Špirić "Gradsko vijeće Grada Sarajeva "	20050422
U 10/05 Ž. Jukić "Javni RTV sistem"	20050722

Line 10 of the Constitution deals with the relation between ethnocracy and civil society, and thus perhaps the most important key for peace in Bosnia and Herzegovina. We have already mentioned controversies relating to the legitimacy of the BiH Constitution.[187] In Case No. U 5/98 – III Partial Decision, the Constitutional Court of BiH adopted the conclusion, based on the following sentence of the Preamble "Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina", that the Constitution of Bosnia and Herzegovina determines that Bosniaks, Croats and Serbs are the architects-framers of the Constitution.

> In February 1998, Mr. *Alija Izetbegović*, then the Chair of the Presidency of BiH, instituted proceedings in Case No. U 5/98 which probably had the most far-reaching impact on the State organisation and joint social and political activity of its most powerful peoples. In these proceedings, the Constitutional Court adopted four partial decisions which become known to the general public as the *Decision on the Constituent Peoples.*[188] In the proceedings relating to Case No. U 5/98, the applicant claimed that a number of provisions of the Entities' Constitutions were in violation of the BiH Constitution.

186 See U 5/98-III, paragraph 62.
187 See p. 30 *et seq*.
188 As to the background, course of the proceedings and analysis of the Decision, see *Winkelmann*, 2003, *Maziau*, 1999a and *Stahn*, 2000.

Observations to the provisions of the Constitution of the Republika Srpska. In the proceedings for review of constitutionality, the applicant first challenged the provisions of the Preamble of the Constitution of the Republika Srpska, which stated that the Serb people, *inter alia*, had the right to self-determination, "respecting for their struggle for freedom and State independence", and that the Serb people manifest "the will and determination to link their State with other States of the Serb people". The applicant claimed that the wordings, according to which "the Republika Srpska is a State of the Serb people and of all its citizens" (Article 1), and the term "border" between the Republika Srpska and the Federation (Article 2.II), were contrary to the provisions of the BiH Constitution. Furthermore, the applicant challenged the right of the Republika Srpska to "establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics", and the competence of the Republika Srpska to regulate and ensure "co-operation with the Serb people outside the Republic" (Article 68, paragraph 1, item 16); furthermore, the applicant challenged: the wording relating to the prohibition of "extradition" of citizens of the Republic (Article 6, paragraph 2); the provision proclaiming the Serbian language and Cyrillic alphabet as official (Article 7); and material State support to the Orthodox Church and co-operation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values (Article 28 paragraph 4). The applicant also challenged the provision which provided that foreign citizens and stateless persons may be granted "asylum" in the Republika Srpska (Article 44, paragraph 2), and the clause stating that in the case of differences between the provisions on rights and freedoms in the Republika Srpska Constitution and those in the BiH Constitution, the provisions which are more favourable to the individual shall be applied (Amendment LVII, item 1, which supplements the Chapter on Human Rights and Freedoms). The applicant also challenged different forms of property, the holders of property rights, and the legal system relating to the use of property (Article 58, paragraph 2, Article 68, item 6 and provisions of Articles 59 and 60). The applicant further claimed review of the authority of the President of the Republika Srpska to perform duties related to defence, security, and relations with other States and international organisations (Article 80 as modified by Amendment XL, item 1); to appoint, promote, and recall officers of the Army, judges of military courts, and Army prosecutors (Article 106, paragraph 2) and to appoint and recall heads of missions of the Republika Srpska in foreign countries and propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska (Article 80 as modified by Amendments XL and L, item 2); the authority of the Government of the Republika Srpska to establish the Republic's missions abroad (Article 90 as supplemented by Amendments XLI and LXII); establishment of a National Bank of the

Republika Srpska (Article 98); and the National Bank's competence to propose statutes relating to monetary policy (Article 76, paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2). Finally, the applicant challenged the constitutionality of the authority of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH (Article 138 as modified by Amendments LI and LXV).

Observations to the provisions of the Constitution of the Federation of Bosnia and Herzegovina. As to the Constitution of the Federation, the applicant objected to the fact that (only) Bosniaks and Croats are constituent peoples (Article I.1(1)), that (only) Bosnian and Croatian are official languages in the Federation (Article I.6(1)), regulation relating to dual citizenship (Article II.A.5 (c) as modified by Amendment VII), the Federation's responsibility to organise and conduct the defence of the Federation (Article III.1(a)) and the task of the President of the Federation to appoint heads of diplomatic missions and military officers (Article IV.B.7 (a) and Article IV.B.8).

(a) The constituent status of Bosniaks, Croats, Serbs and Others

Article 1 of the RS Constitution (the version related to Amendment XLIV, according to which "the Republika Srpska [...] shall be the State of Serb people and of all its citizens", was one of the central issues challenged in the procedure for review of constitutionality. A counterpart of Article 1 of the RS Constitution was Article I.1(1) of the FBiH Constitution, the version related to Amendment III. It read: "Bosniacs and Croats as constituent peoples, along with Others, and citizens of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina defined in Annex II to the General Framework Agreement for Peace in Bosnia and Herzegovina, so that the Federation of Bosnia and Herzegovina shall be composed of federal units with equal rights and responsibilities."

The applicant held that the principle of constituent status of all three peoples (the last paragraph of the Preamble of the BiH Constitution) throughout the BiH territory was thereby violated; in the applicant's view, the Republika Srpska could not be established as a national State of the Serb people.[189] The statehood of Bosnia and Herzegovina had always been founded on the equality of the peoples, religions, cultures and citizens that

189 U 5/98-III, paragraph 34.

> have been traditionally living on its territory.[190] In addition, throughout the entire history of BiH, ethnic criteria had never been applied to organise the State structure, nor had territories been an element of the constitutional order.[191] According to the 1991 census, a multi-ethnic society existed across the entire territory of BiH.[192] The applicant asserted that the problem in the BiH Federation was partly "amortised" through a guarantee of equality for the category of "Others" and, in particular, through their proportional representation in all institutions of the Federation.[193] On the other hand, the one nation exclusive rights under Article 1 of the RS Constitution would prevent the realisation of fundamental rights of all refugees and displaced persons to return to their homes of origin, as stipulated under Article II.4 of the BiH Constitution, and thereby it would prevent a restoration of the ethnic structure that had been disturbed by the armed conflict and ethnic cleansing.[194] The applicant asserted that the same applied to Article I.1(1) of the FBiH Constitution.[195]

The first task of the BiH Constitutional Court in this case was to clarify the range of meaning of the notion "Bosniaks, Croats and Serbs, as constituent peoples (along with Others)", as stated in the Preamble of the BiH Constitution. Neither the Federation of BiH nor the Republika Srpska shared the applicant's view according to which Serbs are also a constituent people in the Federation of BiH and that Bosniaks and Croats are also constituent peoples in the Republika Srpska.[196]

> The Republika Srpska argued that, given the adjective *Srpska* in its name, there could be no intention that the constituent people status be extended to the other two peoples.[197] In addition, there was nothing to support that *the constituent status* of peoples could be treated as the notion of "collective rights" since it was not established anywhere in the normative part of the BiH Constitution as a legal principle or a norm related to the constituent status.[198] The paragraph, of itself, in the Preamble does not necessarily mean that there is constituent status of all the peoples "on the entire territory" and in both Entities, as claimed by the applicant; namely, one people are constituent also if they are constituent people in *one* of the Entities, and thereby they are also constituent in one part of the State territory.[199] It is further claimed that the time sequence and the

190 Paragraph 36.
191 *Ibid*.
192 *Ibid*.
193 Paragraph 101.
194 Paragraph 34.
195 Paragraph 99; in this context, compare with the text under "E. Discrimination", p. 467 *et seq*.
196 Paragraph 37 *et seq*.
197 *Ibid*.
198 Paragraph 38.
199 Paragraph 39.

> modalities of the signing of the text of the Constitution left no room for doubt that only the Serb people constitute the Republika Srpska.[200] The position of the people as a constituent people is limited exclusively to the territory and to the competence of the joint State institutions but not to the original responsibilities of the Entities.[201]

The BiH Constitutional Court's view does not coincide with this legal view. As to the relevant paragraph of the Preamble in connection with the institutional provisions of the BiH Constitution, as well as based on the genesis of the BiH Constitution and the objectives of the Peace Agreement in general, it follows that Article 1 of the RS Constitution is in violation of the constituent status of Bosniaks and Croats. In addition, Article 1 of the RS Constitution is in breach of the positive obligations of the Republika Srpska to safeguard the return of refugees pursuant to Article II.3(m) *i.e.*, Article II.5 of the BiH Constitution.[202] Moreover, the designation of Bosniaks and Croats as constituent peoples under the FBiH Constitution gives unjustified privileges only to these two peoples within the Federation's institutional structures.[203]

In its subsequent decisions, the BiH Constitutional Court upheld its interpretation of paragraph 10 of the Preamble. In Case No. U 4/05, it is stated that the principle of **a multi-ethnic state** is one of the vital constitutional principles and, in particular, taking into consideration the national demographic structure evident in the statistics related to the 1991 census.[204] As a result of the characterisation of Bosniaks, Croats and Serbs as *constituent peoples*, none of the mentioned groups has been declared a majority by the Constitution; it is more precise that the constituent peoples are named as **equal groups** so that any special privilege for one or two of these peoples or any domination thereof in governmental structures is prohibited.[205]

(b) Pluralism instead of territorial segregation

In the Constitutional Court's view, the BiH Constitution clearly distinguishes *constituent peoples* (the last paragraph of the Preamble) from *national minorities* (Article II.4 of the BiH Constitution). Taking into account also Article I of the BiH Constitution, it follows that the BiH Constitution underlines the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state. It is essential to clarify what a form ought to be given to this multi-ethnic state,

200 Paragraph 40.
201 *Ibid*.
202 Paragraph 74.
203 Paragraph 124.
204 U 4/05, paragraphs 22-24.
205 U 4/05, paragraph 25 in conjunction with 5/98-III, paragraph 60.

in the context of the Peace Agreement as a whole. Next, the Constitutional Court concluded that it was essential to clarify whether the territorial division of the Entities implied also the territorial division of the constituent peoples.[206] To answer this question, the Court took as a starting point the notion of "**a democratic multi-ethnic state**". This notion must be construed in light of other constitutional norms and principles and, in particular, in view of the principle of democracy (Article I.2 of the BiH Constitution), as well as within the principle expressed in the Preamble according to which democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.[207] In this respect, a democratic system of authority requires, besides efficient and equal *participation* in government, the ability to compromise, too. Furthermore, a numerical minority must not be given an opportunity to enforce its will on a majority, for instance, by being granted the veto-power.[208] Therefore, the designation of Bosniaks, Croats and Serbs as constituent peoples may be construed only in such a way that none of them can be recognised, by the force of the Constitution, as being a majority but that all of them, **as groups**, **are equal**; consequently, any special privilege for one or two of these peoples or any domination thereof in governmental structures is prohibited.[209] In addition, ethnic homogenisation either through assimilation or territorial segregation is prohibited.[210] Territorial division among the peoples was not declared in the Peace Agreement as a condition to maintain peace. Actually, it follows from Article VII of the General Framework Agreement and Preamble of the BiH Constitution that peaceful relations shall be best established within a pluralist society based on respect for human rights and freedoms and, particularly, based on the right of all refugees and displaced persons to return to their homes of origin (Article II.5 of the BiH Constitution in conjunction with Annex 7 of GFAP). In view of the aforementioned one may say that the overall objective of the Peace Agreement was to facilitate the return of all refugees and displaced persons in order to re-establish the multi-ethnic society which had existed before the armed conflict, without any division on ethnic grounds.[211]

(c) Territorial instead of ethnic federalism

The Constitutional Court also denies an assertion according to which the institutional structure of the joint institutions of BiH (Parliament, the Presidency,

206 Paragraph 52 *et seq*.
207 Paragraph 54.
208 Paragraph 55 *et seq*.
209 Paragraph 60.
210 Paragraph 57.
211 Paragraph 73 about the RS Constitution, paragraph 103 about the FBiH Constitution.

the Council of Ministers and the Constitutional Court) and the respective electoral mechanisms reflect the territorial separation of the constituent peoples in the Entities.[212] The electoral mechanisms do not reflect ethnic but federal division. Thus, the Serb Member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of the Republika Srpska.[213] All Delegates to the House of Representatives in both Entities elect Members of the House of Peoples. They are not elected by delegates of their ethnic group.[214] Besides, Delegates to the BiH House of Representatives, from both Entities, are not elected only by members of their ethnic group but by all citizens. The same applies to the Council of Ministers and the Constitutional Court.[215] Hence, in no way can affiliation to one ethnic group be essential, but the territory or specific institutions of the Entities serve as the legal point of reference for the election of members of the BiH institutions.[216]

(d) Ethnic parity within institutions is an exception

If there are special rights for representation and participation of the constituent peoples, applicable to the procedures of election and appointment to the positions in some State institutions, then these special rights in no way may be applied also for other institutions or procedures. On the contrary, these special collective rights have to be narrowly construed because of a possible collision with non-discrimination. In particular, the Constitutional Court has further established that it cannot be concluded that the Constitution of BiH provides for a general institutional model, which could be transferred to the Entity level, or that similar, ethnically-defined institutional structures on an Entity level need not meet the overall binding standard of non-discrimination in accordance with Article II.4 of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples.[217]

The constituent peoples, indeed, enjoy the collective rights to be represented and to take part in State institutions. However, the relevant provisions cannot be deemed to be a general model of ethnic representation, which could then lead to a territorial division of the constituent peoples on the level of an Entity by the force of the BiH Constitution.[218]

212 Paragraph 64.
213 Paragraph 65.
214 Paragraph 66.
215 Paragraph 67.
216 *Ibid*.
217 Paragraph 68.
218 Paragraph 69.

(e) Balance between ethnic and civil concepts (*citoyenneté*)

The Court did not accept an objection by the Republika Srpska that Article 1 of the RS Constitution defines neither the Serb people as constituent people nor the Republika Srpska as a Serb nation-state exclusively. Article 1 of the RS Constitution, *i.e.*, its challenged provisions, in view of the Constitutional Court, is a compromise between the ethnic and non-ethnic principles of legitimacy. In addition, the RS Constitution, on the face of it, contains no ethnic differentiation as to the composition of the State authorities. Therefore, this compromise formula together with this institutional structure might indeed allow an equal representation of all citizens.[219] However, non-discrimination of an individual cannot be the same as collective equality of ethnic groups, nor can it be a substitute for the latter. Taking into account other constitutional provisions as well, the RS Constitution places the Serb people in a favourable position, which cannot be legitimatised since the Serb people, at the level of the Republika Srpska or at the level of Bosnia and Herzegovina, are not in the factual position of an endangered minority that must preserve its existence. Consequently, collective privileges of the Serb people are in violation of the principle of collective equality mentioned in the Preamble, and in favour of this constituent group.[220]

As to the compromise formula between the principle of ethnicity and the principle of non-ethnic citizens, the same applies to the FBiH Constitution. Recognition of "Others" in the FBiH Constitution is indeed a considerable difference but it is only a half-hearted substitute for the status of a constituent people.[221] While "Others" are proportionally represented in several governmental bodies of the Federation, Bosniaks and Croats enjoy various privileges in other cases, including the veto-power.[222] Such special treatment would not stand a test related to the principle of collective equality, (firstly) as to the individual right to vote under Article 3 of the First Additional Protocol to the ECHR in conjunction with non-discrimination (secondly), and (thirdly) as to the equal representation under Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination (Annex I to the BiH Constitution). The favourable treatment of Bosniaks or Croats is not necessary for their protection and, consequently, cannot be justified within the meaning of the mentioned Conventions.[223] The institutional safeguard clauses (guarantees), with the purpose of power sharing

219 Paragraph 70.
220 Paragraph 71.
221 Paragraph 104.
222 Paragraphs 105, 107-111.
223 Paragraphs 112, 116, 127.

in consensus democracy, are indeed legitimate, but must not entirely exclude the individual right to participate,[224] as it is, to a certain extent, in the FBiH Constitution.[225] Thus, the very essence and effectiveness of the free expression of the opinion of the people in the choice of legislature as well as the principle of collective equality are breached as the FBiH Constitution provides for veto-powers on behalf of ethnically defined "majorities", which are in fact minorities, and are thus able to enforce their will on the parliament.[226]

> In his concurring opinion on the Decision taken in Case No. U 5/98-III, Judge *Danelius* agrees with the final decision in its entirety though he holds that the paragraph of the Preamble reading "Bosniaks, Croats, and Serbs as constituent peoples" has no normative force and, therefore, cannot be deemed to be assessment criteria. However, he also considers that the challenged provisions are unconstitutional for being in violation of the prohibition of discrimination under Article II.4 of the BiH Constitution in conjunction with the right to return under Article II.5 of the BiH Constitution. Namely, the notion "constituent people", referred to in Article I.1(1) of the FBiH Constitution, is not sufficiently clear and specific and, besides, it has a symbolic significance and is emotionally coloured. The designation of Bosniaks and Croats as constituent peoples might also imply a special role of these two peoples in creating the Federation as well as it could reasonably make the Federation appear primarily as a territory populated by Bosniaks and Croats, which may well have a dissuasive effect particularly on Serb refugees and displaced persons wishing to return to the Federation.

(f) The constituent status imposes intraparty pluralism

According to the jurisprudence of the BiH Constitutional Court, the principle of constituent peoples, in the end, imposes intraparty pluralism. Namely, the political parties at all levels of authority are obliged to observe a multiethnic structure on their lists in order to ensure ethnic parity in elected bodies. Otherwise, they might be in a position where election results would not correspond to the number of mandates to which a certain political party is entitled to in a legislative body.[227]

In this way, the Constitutional Court attempts to achieve a balance between **the reciprocal voting right and ethnic parity**, which, in the Constitutional Court's opinion, stated in its Decision No. U 4/05, arises from the principle of

224 Compare with paragraph 113.
225 Paragraph 116.
226 Paragraph 124.
227 Compare, U 4/05, paragraph 30.

constituent peoples, as read in Decision No. U 5/98-III. The reciprocal voting right is thus conditioned through the constitutional obligation stipulating a minimum representation of all constituent people in elected bodies: the minimum representation is mandatory also where the election results do not correspond to the number of mandates to which a certain political party is entitled to in elected bodies, *i.e.*, the number of mandates which should be granted to a certain political party, because its list of candidates does not include candidates from other ethnic groups. In this way, the Constitutional Court sets up a constitutionally-legally established **mechanism of consensus democracy in the pluralistic state.**

> The proceedings in Case No. U 4/05 were the reason for the practical application of the principle of constituent people. In this case, the Constitutional Court had to decide whether Article 21(3) of the Statute of the City of Sarajevo was consistent with the BiH Constitution. The challenged provision stipulated, inter alia, that Bosniaks, Croats and Others should individually have a minimum of 20% of places guaranteed in the City Council regardless of the election results. Pursuant to paragraph 4 of this Article, it was stipulated that if the minimum of the guaranteed places referred to in paragraph 3 of this Article had not been reached upon the selection of City Councillors, the City Councillors should be selected from among candidates enumerated on the lists of the political parties represented in municipal councils according to the election results. The applicant maintained that representatives of the Serb people were not selected at all to the City Council of the City of Sarajevo, whereby the principle of constituent peoples and the prohibition of discrimination were violated. The BiH Constitutional Court upheld the applicant's position and found a violation of the principle of constituent peoples and of the prohibition of discrimination (Article II.4 of the BiH Constitution) in conjunction with Article 5.1(c) of the Convention on the Elimination of All Forms of Racial Discrimination.[228] Serbs also should be guaranteed a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results.[229] To treat the group of Serbs as a part of the "Others" does not satisfy to a sufficient extent the principle of constituent peoples.[230]

The jurisprudence explicitly referred to ethnic parity, the subject matter of the Decision No. U 5/98-III, which departs from the assertions of the said Decision as it wants to see the application of participation rights in general, at all levels. Whereas the Constitutional Court in its Decision No. U 5/98-III recognised collective rights as represented in governmental structures only for the cases

228 U 4/05, paragraph 38.
229 U 4/05, paragraph 25.
230 U 4/05, paragraph 28 with reference to U 5/98, paragraph 104.

particularly regulated by the Constitution, which implies that the Constitutional Court *did not actually want* to derive the general rule of ethnic parity for all public bodies, including Entity, Cantonal and municipal levels, *i.e.*, communal levels, the Constitutional Court, sitting in its new composition, refers now to such a general rule.

Nevertheless, the arguments offered in Decision No. U 4/05 cannot be entirely denied. The very reference to Decision U 5/98-III, asserting that the Court derived the general rule of ethnic parity from the principle of constituent peoples in that decision, is contradictory. In its Decision on constituent peoples, in fact, the Constitutional Court recognised ethnic parity in the joint authorities only as a special form of the constituent status, which should not be generalised.[231] It is another issue whether the Entities, cantons and municipalities, individually, aspire to introduce ethnic parity especially for certain institutions and bodies and, if they do so, to what extent one should be consistent in applying this principle. Setting the quota for the City Council may be *justified* also by the principle of constituent peoples as well as by the principle prohibiting discrimination in terms of *affirmative action*. According to the interpretation of the principle of constituent peoples in the Decision U 5/98-III, however, this is not *mandatory*. In case an authority or body introduces a quota-based system, this quota must not be set in a discriminatory manner.

By applying its case law established in Decision U 5/98-III, the Constitutional Court, therefore, should have left room to manoeuvre in order for the authority, which enacts the statute to that effect, to decide by itself and there would have been no need to declare the challenged regulation unconstitutional. In order for the previous case law to be altered, it would be necessary to suggest it explicitly and that the Constitutional Court get to grips with the arguments given in its Decision No. U 5/98-III. In this case, therefore, the fact that the City of Sarajevo introduced a parity system should not have been criticized at all. However, the fact that the City of Sarajevo introduced a minimum of 20% of seats in its City Council for Bosniaks, Croats and Others but not for Serbs had to be disapproved. Although Serbs may be regarded as a part of "Others", a failure to explicitly mention the said ethnic group and to justify the privileges granted to Bosniaks, Croats and (undesignated) "Others" amounts to prohibited discrimination against Serbs. However, the quota should be mandatory only in the case where there are sufficient Serb councillors to the city council. If it is not possible to give Serbs the mandates anticipated for them, due to a lack of Serb councillors to the city council, it should then be allowed that these seats be granted to members of other political parties even if this implies members of

231 See above, "10. Constituent power", p. 61 *et seq.*

other peoples. Such a conclusion, however, would be contrary to the principle of intraparty pluralism, which is proclaimed in Decision No. U 4/05.

(g) The constituent status and "the vital national interest"

Under the BiH Constitution, in the political decision-making processes and procedures related to the enactment of laws, the constituent peoples are entitled to invoke the vital national interest and, thereby, to initiate separate proceedings for the resolution of such disputes. Thus, pursuant to Article IV.3 (e) of the BiH Constitution, a majority of any ethnic group within the House of Peoples may block the enactment of a law by Parliament if the relevant ethnic group declares that the given law is destructive to its vital national interest. Such a deadlock, if possible, should be resolved through the participation of the House of Peoples and, possibly, by convening a Joint Commission and, in the end, by submitting an application to the Constitutional Court. In addition, pursuant to Article V.2(d), a dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected.[232] Next, the decision shall be put forward to the National Assembly of the Republika Srpska or to the Bosniak or Croat Delegates to the FBiH House of Peoples for further examination. The challenged decision may be declared ineffective by a two-thirds majority vote in each of these bodies.

The BiH Constitution does not contain a catalogue of the vital national interests or a definition of the notion "vital national interest". Nevertheless, the BiH Constitutional Court does not hold that the vital national interest of the constituent peoples is a notion with no substance but that it is protective of certain principles without which a society "with differences protected under its respective constitution" could not "function efficiently". Accordingly, the idea of "constituent status" has a direct effect on the answer to the question of what a vital national interest of one people may imply.[233]

(h) The status of constituent people suppresses the status of minority

Given the unequal numerical strength of the three majority peoples, an issue arises as to whether the constituent status of one of the peoples excludes its minority status under the existing international-legal agreements, the result

232 This formulation will be addressed additionally, p. 647 *et seq*.

233 Compare, U 8/04, paragraphs 29, 30; U 10/05, paragraph 25; U 7/06, paragraph 34.

of which would be that members of that group could not invoke the minority status to which they would actually be entitled if they were not granted the privilege of constituent people status.

The BiH Constitutional Court addressed this issue in Case No. U 10/05. In his request for review of constitutionality, Mr. *Velimir Jukić*, the then Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, challenged Article 26(4) of **the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina**, claiming that the mentioned Law was destructive to the vital interest of the Croat people in Bosnia and Herzegovina.

> In the applicant's opinion, the right to freedom of expression (Article 10 of ECHR) was violated as the mentioned Law stipulated that that the Public Broadcasting System of Bosnia and Herzegovina was to be composed of three public broadcasters (one at the State level and two at the level of the Entities), whereby there was no possibility for the three constituent peoples, at the level of the Entities, to have one channel each in their respective languages. In this respect, the applicant referred to the 2002 Report of a group of experts of the Advisory Panel to the Media Division of the Director General of Human Rights of the Council of Europe, underlining that Article 10 of the European Convention not only enshrined an individual right to media freedom, but also entailed a duty to guarantee pluralism of opinion and cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all. In addition, reference was made to Article 11 of the European Charter for Regional or Minority Languages with regard to a violation of the collective right to have public service broadcasting in the relevant language; Article 11 provides that national minorities may have at least one radio station and one television channel in their language. Finally, the applicant complained that the existing broadcasters of the Entities had been *de facto* using only the Bosnian (in the FBiH) and Serb (in the RS) languages and the BiH Law on the Public Broadcasting System did not provide the mechanisms for the implementation of the programming principles. Thus, according to the applicant, it is at the discretion of authorised personnel of the RTV Services to make decisions about each language, and whether and to what extent cultural, traditional and religious characteristics of the constituent peoples would be observed.

The Constitutional Court did not share such a view.[234] A violation of the vital interests of the Croat people in Bosnia and Herzegovina cannot be derived from a violation of their right to freedom of expression. Indeed, according to the ECHR's case law, public monopolies in audiovisual media breach this fundamental right primarily because they cannot ensure several different sources of information

234 U 10/05, paragraph 50.

and a plurality of points of view. However, the present issue, as established by the Court, is not concerned with plurality of viewpoints but with the use of language. The challenged Draft Law neither excludes nor favours any language of a constituent people in BiH in relation to other languages; on the contrary, Article 26, paragraphs 4 and 5 thereof guarantee equality of the three official languages of the constituent peoples. The said Law, therefore, differs from the Framework Law on Higher Education that the Constitutional Court held to be destructive to the vital interests of the constituent peoples in Bosnia and Herzegovina, including the Croat people, too.[235]

In addition, the Croat people in BiH cannot invoke the rights guaranteed to minorities to create at least one radio station and one television channel in the own languages, which is the right provided for under the European Charter for Regional or Minority Languages. In order to apply the Charter, a certain group of people must be defined as a minority in the positive legislation of a state. The Croat people are not a national minority in Bosnia and Herzegovina but a constituent people. Furthermore, the purpose and the idea of the Charter is not to guarantee to the minorities, such as Croats in BiH, the rights under the Charter but its objective is to protect groups which, by reason of their minority status, lack effective protection for their language rights against domination by the languages of majority groups. In BiH, the language rights of the constituent peoples enjoy extensive protection under the Constitution and laws of Bosnia and Herzegovina. The constitutional principle of collective equality of the constituent peoples requires equal treatment of all constituent peoples by public authorities and public services in BiH and the Entities. This applies to their rights to use their own languages and to enjoy their cultural traditions.[236]

The argument offered by the Constitutional Court in its Decision No. U 10/05, on the face of it, seems formalistic or even contradictory: a constituent people, *per definitionem*, is not a minority even if it is a numerical minority. Consequently, the status of constituent people guaranteed by the Constitution excludes the minority status and the rights inherent to that status. This may, as in the present case, result in a situation where one ethnic group, because of its status as a constituent people, is deprived of special rights which they would have been entitled to from the point of view of international law as well as under the BiH Constitution (by means of the international instruments

235 U 10/05, paragraph 40, with reference to U 8/04, paragraphs 36-40, with reference to the case-law of the ECtHR in the cases *Handyside v. the United Kingdom*, judgment of 24 November 1976, Series A no. 24; *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A no. 276.

236 U 10/05, paragraph 4.1

listed in Annex I thereto), if that group were a national minority. If this case is viewed in isolation, such an outcome might seem absurd. Actually, one *de facto* minority (a numerical minority), because of the privileged status of that group as a constituent people under the Constitution, is deprived of the right which that group would be entitled to if it had no privileged status. The logic behind the constituent status of a people, however, does not require that the minority rights be guaranteed since the Constitution, elsewhere, guarantees to the constituent peoples rights broader in scope than the rights guaranteed to minorities, starting from the right to participate in authorities up to the veto-power. In this context, the Constitutional Court holds that the rights of people, who belong to numerically smaller groups, are sufficiently protected. In this respect, the position taken by the Constitutional Court can be upheld.

b. Comments by Prof. Dr. *Joseph Marko*, the judge rapporteur in the Case No. U 5/98 (line 10)

"Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina."

AP 2678/06 Party for Bosnia and Herzegovina	20060929
U 44/01 The names of "Serb" towns	20040511 *OG of BiH*, No. 18/04
U 5/98-III "Izetbegović III – the constituent peoples"	20000914 *OG of BiH*, No. 23/00
U 4/04-M (Partial Decision) Tihić "Family Patron-Saints' Days and Church Holidays of the RS"	20061811
U 4/04-M (Partial Decision) Tihić "Flag, Coat of Arms and Anthem of the FBiH and RS"	20063103
U 8/04 Law on Higher Education	20040626
U 4/05 N. Špirić "City Council of the City of Sarajevo"	20050422
U 13/05 Tihić	20060526
U 5/06 Ivo Miro Jović	20090529

The importance of line 10 of the Preamble to the BiH Constitution was shown for the first time in Case No. U 5/98 of the BiH Constitutional Court. It was the legal basis for one of the most significant decisions of the BiH Constitutional Court concerning the fundamental institutional structures of the state's system of government based on the interpretation of the notion "status of constituent people". The mentioned Decision, formally and technically, is divided into 4 partial decisions and it is published in the Official Gazettes of the State. In addition, it should be underlined that the third partial decision of 1 July 2000,

generally known as "decision on the constituent status of peoples", is generally recognised in academic literature.

The basis of this decision is the provision of Article XII(2) of the BiH Constitution, which provides that the Entities are obliged to conduct an amendment procedure and alter their Constitutions in order to ensure conformity with the Constitution of BiH, no later than three months from the date on which the Dayton Agreement enters into force. The applicant in Case No. U 5/98 held that a number of provisions of the Constitutions of the Entities were inconsistent with the BiH Constitution.

> **Objections as to the Constitution of the Republika Srpska** In the proceedings for review of constitutionality, the provisions of the Preamble to the RS Constitution were challenged in part where it is stated, inter alia, that the Serb people have the right to self-determination, "respecting the centuries-long struggle of the Serb people for freedom and State independence", and "taking into account the natural and democratic right, will and determination of the Serb people from the Republika Srpska to link its State completely and tightly with other States of the Serb people". In addition, the applicant held that the wording according to which the Republika Srpska is "a State of the Serb people and of all its citizens" (Article 1), as well as the term "the border" between the Republika Srpska and the Federation (Article 2.II) were in contravention of the provisions of the BiH Constitution. Furthermore, the applicant disputed the right of the Republika Srpska to establish "special parallel relationship with the Federal Republic of Yugoslavia and its Member Republics" (Article 68, paragraph 1, item 16), the wording that a citizen of the Republika Srpska cannot be extradited (Article 6, paragraph 2), the declaration that the Serbian language and Cyrillic alphabet are the official language and alphabet (Article 7), as well as the material support by the State for the Orthodox Church and cooperation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values (Article 28, paragraph 4). In addition, the applicant requested a review of the provision stipulating that foreign citizens and stateless persons may be granted "asylum" in the Republika Srpska (Article 44, paragraph 2), the clause according to which, in the case of differences between the provisions on rights and freedoms in the RS Constitution and those of the BiH Constitution, the provisions which are more favourable to the individual shall be applied (the BiH Constitution amended by Amendment LVII, item 1 which supplements the Chapter on Human Rights and Freedoms). Moreover, the applicant challenged different forms of property, the holders of property rights, and the legal system relating to the use of property (Article 58 paragraph 1, Article 68 item 6 and the provisions of Articles 59 and 60). Also, it was requested that the authority of the RS President be reviewed as regards

> his powers to perform duties related to defence, security, and relations with other States and international organisations (Article 80, as modified by Amendment XL, item 1); to appoint, promote, and recall officers of the Army, judges of military courts, and Army prosecutors (Article 106 paragraph 2); to appoint and recall heads of missions of the Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska (Article 80, as modified by Amendments XL and L, item 2); and the authority of the Government of the Republika Srpska to establish the Republic's missions abroad (Article 90, supplemented by Amendments XLI and LXII). Next, according to the applicant, the establishment of the National Bank of the Republika Srpska (Article 98) and its competence to propose statutes relating to monetary policy (Article 76, paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2) were not consistent with the BiH Constitution. Finally, the applicant challenged the constitutionality of the power of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH (Article 138, as modified by Amendments LI and LXV).
>
> **Objections as to the Constitution of the Federation of Bosnia and Herzegovina** As to the Constitution of the Federation of BiH, the applicant objected to the fact that (only) Bosniaks and Croats are constituent peoples (Article I.1(1)), that (only) Bosnian and Croatian are official languages in the Federation (Article I.6(1)), the regulation relating to dual citizenship (Article II.A.5 (c) as modified by Amendment VII), the Federation's responsibility to organise and conduct the defence of the Federation of BiH (Article III.1(a)) and the task of the President of the Federation to appoint heads of diplomatic missions and military officers (Article IV.B.7 (a) and Article IV.B.8).

As a precondition necessary for linguistic clarification of the normative content of the notion "constituent peoples", the Constitutional Court had to answer affirmatively the issue raised as to whether the preamble to the constitution, as such, can generally have a normative character. Namely, this issue was raised as the representatives of the People's Assembly of the Republika Srpska, pointing to the related viewpoint of *Hans Kelsen*, negated the normative character of the Preamble and, accordingly, they requested that the applicant's request be rejected on formal grounds, i.e., due to lack of legal relevance of the provisions referred to in the request concerned.

However, the BiH Constitutional Court did not share *Kelsen's* opinion but it concluded in the two-step reasoning that some lines of the Preamble have a normative content, which is of legal relevance. Pointing to the formal character of the Dayton Constitution as an international agreement, the BiH Constitutional

Court dismissed the allegations of the representatives of the People's Assembly of the Republika Srpska that the Preamble was not made a part of the BiH Constitution, as the BiH Constitution comprises only the provisions which have a normative character. Namely, the allegations of the representatives of the People's Assembly of the Republika Srpska were in contravention of the explicit provision of Article 31 paragraph 2 of the Vienna Convention of the Law on Treaties, which stipulates the following:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text and including its preamble and annexes: […]."[237]

Thus, in a formal sense, it was clarified that the Preamble and its provisions are an integral part of the BiH Constitution and, consequently, they constitute the standard of judicial review for the BiH Constitutional Court. The next analysis related to the clarification of the content of the notion "status of constituent people" in order to review the constitutionality of the challenged provisions of the Entities' constitutions. Given that the "historical" intention of the contracting parties in Dayton, despite the judge rapporteur's enormous efforts in the present case, could not be determined, the majority of the members of the BiH Constitutional Court decided to try to determine the meaning of this notion through a systemic interpretation, particularly taking into account the part of the BiH Constitution related to the organisation of the State. Based on such methods of interpretation, the BiH Constitutional Court derived from the Dayton Constitution three general normative principles, as well as a number of other normative principles, which further elaborated those general ones. In addition, the BiH Constitutional Court, with a double meaning of the word, "reasoned" the basic normative content of the constitutional principles by referring to the case-law of the Supreme Court of Canada and the Supreme Court of Switzerland. Thus, the Supreme Court of Canada, in the case "Reference re Secession of Quebec", established as follows: "[…] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by an oblique reference in the preamble to the Constitution Act, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Thus, the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[238]

237 Translation taken from the Decision No. U 5/98-III, paragraph 19.
238 1998, 2.S.C.R, paragraph 50; translation taken from the Decision No. U 5/98-III, paragraph 23.

Finally, the BiH Constitutional Court dismissed the objection of the representatives of the People's Assembly of the Republika Srpska that the provisions of the Preamble to the BiH Constitution had no normative character and that the BiH Constitutional Court therefore could not take those provisions as a standard of judicial review, and that it should declare the request inadmissible.

The three general constitutional principles, which in the Decision were derived from the provisions of the Preamble to the BiH Constitution in conjunction with the provisions of the BiH Constitution relating to the organisation of the state, are presented below. These three general constitutional principles have considerably developed the BiH Constitution.

1. **The principle of multi-ethnicity**: given the correlation between the provisions of Article I.2 of the Dayton Constitution, which stipulate that Bosnia and Herzegovina shall be a "democratic state", and line 3 of the Preamble to the BiH Constitution, which defines "a pluralist society" as a precondition for a democratic system of government, the BiH Constitutional Court derived the principle that Bosnia and Herzegovina – by territorial delimitation through the establishment of two Entities, where the Federation of Bosnia and Herzegovina is further divided into 10 cantons – corresponds to a model of a multi-ethnic state, where the territorial delimitation must not result in upholding the effects of ethnic cleansing during the armed conflict or, moreover, afterwards, in institutional segregation and national homogenisation within the State institutions.[239] Particularly, based on the correlation between the provisions of Article II.5 of the Dayton Constitution and Annex VII and its provisions relating to the return of refugees and displaced persons, the BiH Constitutional Court concluded that an overall objective of the Dayton Peace Agreement was the re-establishment of the multi-ethnic society which had existed before the armed conflict.[240]

2. **Principle of collective equality of constituent peoples**: as it follows from the constitutional organisational principles related to the composition of the Presidency and a second chamber of the BiH Parliament, *i.e.*, the House of Peoples, it was essential for the authors of the Dayton Agreement to ensure that the aforementioned State authorities effectively participate in political decision-making processes not only through individual equality in respect of the electoral right but also through the collective ethnic representation of the three constituent peoples. Taking into account the aforementioned, the BiH Constitutional Court came to the conclusion that the notion "constituent peoples" comprises also the principle of collective equality of these three ethnic

239 U 5/98, paragraphs 53-61.
240 *Ibid*., paragraph 73.

groups.[241] However, this notion encompasses specific rights and obligations. Thus, the BiH Constitutional Court first provides the reasoning that the principle of collective equality poses an obligation on the Entities to comply with the principle prohibiting discrimination against any member of the three constituent peoples, in particular against these constituent peoples which are, *de facto*, in the position of ethnic minority in the respective Entity.[242] Second, the principle of collective equality prohibits any special privilege for any of the three constituent peoples by which one or two of these peoples recognise any special or additional rights.[243] Furthermore, the BiH Constitutional Court, based on the aforementioned principle, concludes that the application of the special rights of the three constituent peoples, which are recognised by the Dayton Constitution, are justified only at the State level by the force of the Dayton Agreement itself, and that such rights cannot be transferred without special justification to the Entity level or local level of government.[244] Besides, it follows from the principle of collective equality of the constituent peoples that the category of "Others" cannot be a substitute for guaranteeing the special collective rights of one of the three constituent peoples.[245] On the other hand, the BiH Constitutional Court tried to face the issue related to the tension between the individual and collective rights and it concluded that a total exclusion of persons from the representation system gave rise to a violation of the individual political right, so that, in any case, the category of "Others" had to be included into the representation systems in order to prevent this total exclusion of individual rights.[246]

3. Based on the correlation between the provisions of Annex 7 to the Dayton Peace Agreement on refugees and displaced persons and obligation to secure the equality of all citizens, as individuals, before the law in accordance with Article II(4) of the Dayton Constitution, the Constitutional Court, finally, deduced **the rule on prohibition of discrimination** as follows:[247]

a. The prohibition of *de iure* discrimination;

b. The prohibition of *de facto* discrimination, *i.e.*, the prohibition of indirect discrimination;

241 *Ibid*., paragraph 60.
242 *Ibid*., paragraph 59.
243 *Ibid*., paragraph 60.
244 *Ibid*., paragraph 68.
245 *Ibid*., paragraph 104.
246 *Ibid*., paragraph 116.
247 *Ibid*., paragraph 79.

c. The prohibition of upholding the effects of past *de iure* discrimination, where the Entities, based on the correlation between the principle prohibiting discrimination and the provisions of Annex 7 to the Dayton Peace Agreement, are also under a positive obligation "to create in their territories political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group."[248]

Having established these three basic constitutional principles, and taking into account the specific context of BiH, the BiH Constitutional Court concretised the aforementioned principles in relation to the notion of "constituent peoples" as follows:

1. The right of the Serb people to self-determination mentioned in the Preamble to the RS Constitution was declared unconstitutional;[249]

2. One cannot identify territory with ethnicity and, therefore, a general model of ethnic representation of the constituent peoples cannot be derived from the Dayton Constitution;[250]

3. Although the Dayton Constitution almost ideally matches a model of concordant democracy (*Konkordanzdemokratie*), the principle of collective equality prohibits one or two of the constituent peoples from being granted absolute veto-power;[251]

4. In the fourth decision in Case No. U 5/98 of 19 August 2000, the Constitutional Court finally decided that the languages of the constituent peoples, as official languages, must be used on an equal footing at all administrative-territorial levels.

The BiH Constitutional Court applied these principles in a number of its subsequent decisions to various constellations of ethnic discrimination.

An issue of ethnic symbols was raised in two cases. In Case No. U 44/01, the BiH Constitutional Court concluded that the adjective "Serb", which was added to the names of a certain number of towns in the RS, had a discriminatory character, as the change of names of certain towns during the armed conflict when the ethnic cleansing had occurred demonstrated a clear intention to emphasise that they were "purely" Serb towns. Moreover, this ethnic and

248 *Ibid*., paragraph 80.
249 *Ibid*., paragraphs 29-33.
250 *Ibid*., paragraphs 64-67.
251 *Ibid*., paragraphs 55 and 116.

national labelling clearly signals that it is necessary to maintain the ethnic territorial homogenisation, which also proves the competent authorities' intention to prevent the return of refugees and displaced persons, contrary to the obligations under Annex 7 to the Dayton Peace Agreement. In this way, the BiH Constitutional Court applied the principle, which had already been established in Case No. U 5/98, that the effects of past *de iure* discrimination may not be maintained. In Decision No. U 4/04, the laws of the Republika Srpska and the Federation of Bosnia and Herzegovina relating to the coat of arms and flag and the laws of the Republika Srpska relating to the anthem and the Family Patron-Saint's Days and Church Holidays were challenged before the BiH Constitutional Court on the ground of alleged ethnic discrimination. The BiH Constitutional Court granted the applicant's request and declared the respective symbols unconstitutional and rendered the challenged laws ineffective as they provided privileges only to certain constituent peoples.

The second set of decisions of the BiH Constitutional Court related to the regulations, which provided an institutional guarantee of a minimum representation of the constituent peoples at the local level and at the level of the Entities. In its Decision No. U 4/05, the BiH Constitutional Court declared unconstitutional the Statute of the City of Sarajevo given that it provided the minimum representation of Bosniaks, Croats and "Others" in the City Council of the City of Sarajevo, while Serbs were excluded. Referring to the principle of collective equality of the three constituent peoples, the BiH Constitutional Court refused the argument that Serbs, in any case, could be represented through the category of "Others", as the mentioned principle prohibited that Serbs were subsumed under this category. In another similar case, which related to the constitutionality of the statutes of the cities of Banja Luka and Istočno Sarajevo, the BiH Constitutional Court dismissed the request for minimum representation of Bosniaks and Croats. However, this decision, which, on the face of it, appears to be in contradiction to the former constitutional and judicial case-law, may be explained. The BiH Constitutional Court, in its Decision No. U 5/98, derived from various electoral mechanisms for the Presidency of BiH and the Houses of the Parliamentary Assembly of BiH the principle that there was no identification of territorial and ethnical representation. Thus, the BiH Constitutional Court established that the Dayton Constitution did not require a uniform model of political representation at all administrative-territorial levels. If, in any of the cases, the statute of the city does not contain mechanisms to secure privileged representation of the constituent peoples, then there is no obligation under the BiH Constitution to provide such a mechanism. However, in case such a mechanism is provided, as it was in the case related to the Statute of the City of Sarajevo, then again the principle of collective equality of

the constituent peoples applies so that a failure to show regard for one of the constituent peoples gives rise to discrimination. However, the Constitutional Court failed to consider the statutes of the cities of Banja Luka and Istočno Sarajevo in relation to indirect discrimination.

Two further decisions taken by the BiH Constitutional Court related to a concretisation of the notion of "vital national interest" of constituent peoples. In Decision No. U 8/04, the Croat Caucus in the House of Peoples of the Parliamentary Assembly of BiH claimed that the Draft Framework Law on Higher Education in Bosnia and Herzegovina was destructive to a vital national interest of the Croat people, as the Draft Law provided no possibility for establishing a State university, wherein teaching would be exclusively in the Croatian language. The BiH Constitutional Court established a violation of a "vital national interest" of the Croat people in the case concerned. However, afterwards, by stating that the vital national interest does not permit that any language be ruled out but rather requires the equal use of the three official languages in higher education institutions, the BiH Constitutional Court turned "upside down" the allegations and, thereby, the definition of vital national interest given by the Croat Caucus. In Case No. U 5/06, the Delegates of the Croat Caucus once again challenged the constitutionality of the Law on the Public Radio-Television System of Bosnia and Herzegovina as the mentioned law did not permit the establishment of a radio and television system exclusively in the Croatian language. The BiH Constitutional Court dismissed the request and reasoned that the challenged law neither discriminated nor favoured any of the three official languages.

As a result of the aforementioned proceedings, it may be stated that the BiH Constitutional Court specified the principle of collective equality as an obligation on the equal use of the three official languages in public life, as it does not permit discrimination or privileges of one of the three languages through institutional segregation. Therefore, collective equality must not be organisationally applied in terms of the well-known formula of the US Supreme Court, which was established in the case *Plessy v. Ferguson*: "Separate but equal". On the contrary, instead of institutional segregation, collective equality requires a certain combination of autonomy and integration in order to advance the languages and improve social cohesion. In addition, in Case No. U 42/05, taking the principle of equality of the official languages as a starting point, the BiH Constitutional Court obliged the RS competent authorities to publish once again the Agreement on its special parallel relationship with the Federal Republic of Yugoslavia in the "Official Gazette of the RS", but this time in all three official languages in the RS.

Furthermore, a number of decisions related to the issue of a strict ethnic system of a distribution of power in respect of members of the Presidency and the

second chamber of the Parliamentary Assembly of BiH. Namely, such a system *ex constitutione* excludes citizens of BiH who do not identify themselves as one of the three constituent peoples from their passive electoral right. By the Dayton Constitution itself, collective equality of the constituent peoples is connected with a violation of the basic political right in a democratic system and, thereby, it gives rise to a paradoxical question as to whether the constitutional right is unconstitutional. In Decision No. U 5/04, *Sulejman Tihić*, the then-Chair of the Presidency of Bosnia and Herzegovina, lodged a request for review in which he requested that the BiH Constitutional Court examine whether the provisions of Articles IV and V of the Dayton Constitution were in conformity with the standards set forth in Article 3 of Additional Protocol No. 12 to the ECHR, given that the ECHR, pursuant to Article II of the Dayton Constitution, has "*priority over all other laws*". The BiH Constitutional Court rejected the request as inadmissible. The majority of the members of the court reasoned that the ECHR in the BiH legal system is not superior to the Dayton Constitution as its authority and direct application stem from the Dayton Constitution itself. Thus, it is out of the question that the ECHR could be used as a standard for review of the provisions of the Dayton Constitution. In Decision No. U 13/05, *Sulejman Tihić*, a Member of the Presidency of BiH, lodged another request whereby he sought a review of certain provisions of the Election Law of Bosnia and Herzegovina, which *de iure* prevented certain citizens from exercising their passive electoral right (for example, all "Others"). Once again, the majority of the members of the court rejected the request as inadmissible, as the discriminatory provisions of the Election Law, in an identical manner, arose from the constitutional provisions. In her interesting dissenting opinion, Judge *Constance Grewe* argued against the reasons given by the majority of the members of the court, pointing to fact that "the problem" in the case concerned was not just ethnic proportionality but the identification of territory and ethnicity, which gave rise to the discriminatory effect related to the deprivation of the right to vote and to stand for election. This deprivation was perhaps justified in 1995 when the Dayton Agreement was made. However, subsequently, when Bosnia and Herzegovina ratified Additional Protocol No. 12 to the European Convention, it could not be justified any longer. In Decision No. AP 2678/06, a candidate for election to the Presidency of BiH sought review of a decision taken by the Central Election Commission, by which he was deprived of the right to stand as a candidate for election. Surprisingly, this time the BiH Constitutional Court declared that it had competence to take a decision in the relevant case. However, the majority of the members of the Constitutional Court dismissed the appeal and reasoned that the deprivation of the right was justified by the situation related to the ethnic conflict in Bosnia and Herzegovina. Once again, Judge *Constance Grewe*, in her dissenting opinion, offered the arguments contrary to the decision of the majority of the BiH Constitutional Court and underlined that the principle of a

multi-ethnic State required that the territorial criterion in elections of members of the Presidency of BiH should be abolished, and that the Constitutional Court has competence to seek that the Parliamentary Assembly of BiH modify the challenged provisions of the BiH Constitution so that Bosnia and Herzegovina would be able to meet its international obligations. Two citizens of Bosnia and Herzegovina of Roma and Jewish ethnicity, respectively, namely *Dervo Sejdić* and *Jakob Finci*, filed applications in 2006 with the ECtHR,[252] seeking that a judgment be adopted against Bosnia and Herzegovina for depriving them of their right to be elected. In its *amicus curiae* opinion, the Venice Commission of the Council of Europe adopted a position in favour of the applicants, stating that the deprivation of members of the constitutional and legal category of "Others" of the right to be elected does not necessarily follow the principle of collective equality of the constituent peoples and, thereby, it is in violation of the obligation to comply with the principle of proportionality, developed by the ECtHR as a measure to be used in examining whether or not an interference with the rights and freedoms safeguarded by the ECHR is justified. The Venice Commission of the Council of Europe put forward an argument that the FBiH Constitution may serve as an example proving that the deprivation of the right to be elected and, thereby, a violation of Article 1 of Additional Protocol No. 12 to the ECHR, may be avoided by incorporating the constitutional category of "Others", in addition to the constituent peoples, into the provisions on a proportionate composition of the Presidency of BiH. The case was taken over by the Grand Chamber of the ECtHR, which held a hearing on its admissibility and merits on 3 June 2009,[253] and adopted a final decision on this issue on 22 December 2009. It was established that the provisions of the BiH Constitution relating to the House of Peoples of the BiH Parliamentary Assembly discriminate against the so-called Others within the meaning of Article 14 in conjunction with Article 3 of Additional Protocol No. 1 to the ECHR (paragraph 50). The Grand Chamber of the ECtHR concluded that, given the progress that the State has made since signing the Dayton Peace Agreement (paragraph 47), it is no longer justified to entirely deprive the members of the so-called Others of the right to be elected to this legislative house. There are no reasonable and justified reasons to support something like that. The ECtHR also concluded that the ECHR does not require complete abolition of the principle of parity power sharing and the introduction of the principle which would simply reflect the principle of "majority", nor has the time come for something like that in Bosnia and Herzegovina. However, the ECtHR referred to the opinion of the Venice

252 See, ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06.

253 See Internet page: <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20090603-1/lang/>; accessed for the last time on 21 October 2009.

Commission, which offered a modality of retaining the principle of parity power sharing without excluding certain groups at the same time (paragraph 48). The ECtHR resorted to the same reasoning when it came to the deprivation of the so-called Others of the right to be elected to the BiH Presidency, whereby the Court referred to the provision of Article 1 of Additional Protocol No. 12 to the ECHR (paragraph 56 in conjunction with paragraphs 47-49).

The goal of this constitutional jurisprudence is to put an end to the situation in which the entire State organisation is strictly based on the concept of ethnic proportionality. In addition, when it comes to the issue of the organisation of the State and other public institutions, it seeks to create a balance within "the compromise formula", which is already incorporated into line 10 of the Preamble to the BiH Constitution. Namely, this formula incorporates the ethnic principle, which is reflected through the categories of the constituent peoples and the category of "Others", on the one hand, and the principle of individual equality of all citizens, on the other hand.

Article I – Bosnia and Herzegovina

1. Continuation

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

2. Democratic Principles

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

3. Composition

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

4. Movement of Goods

Services. Capital. and Persons. There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

5. Capital

The capital of Bosnia and Herzegovina shall be Sarajevo.

6. Symbols

Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency.

7. Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

a) All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.

b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

c) All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.

d) Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4) (d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

e) A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity. There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

A. Continuation according to international law (Article I.1)

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

CH/98/375 *et al*. Đ. Besarović *et al*.	20050406
CH/02/12468 *et al.* Š. Kadrić *et al*. "War damage"	20050907
U 5/98-III "Izetbegović III –Constituent peoples"	20000914 *OG BiH*, 23/2000
U 4/04 "Flag, Coat of Arms and Anthem of FBiH and RS"	20060331

Pursuant to Article I.1 of the BiH Constitution, first sentence, *Bosnia and Herzegovina* is not a new creation from the standpoint of international law, since, as a state, it continues the international legal personality of the *Republic*

of Bosnia and Herzegovina within the outer borders which have been recognised at the moment of the Constitution's adoption in accordance with international law. Therefore, the State remains to be a member of the United Nations, and it may keep its membership in the organisations belonging to the UN system, as well as in other organisations or it may apply for such membership.[254] The same applies to the international agreements listed in Annex I to this Constitution, wherein it is stated that Bosnia and Herzegovina shall remain a party to the international agreements or, – if the Republic of Bosnia and Herzegovina, as a state, has not yet acquired membership – it shall become a party.[255] The BiH Constitution's Article I.1 ensures **continuation** according to international law. So, the issue **is not about the legal successor**. Bosnia and Herzegovina is the same State which, as the Republic of Bosnia and Herzegovina, resulted from the *dismembratio* (disintegration) of Yugoslavia and was recognised in 1992 as an independent state.

However, Bosnia and Herzegovina had lost the label "republic" attached to its name, and subsequently its internal structure changed. In other words Bosnia and Herzegovina was divided into two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.[256] Some consider that the loss of the label *republic* is in contradiction to the principle of continuation.[257] However, the loss of the label "republic", which was attached to its name, does not mean that Bosnia and Herzegovina has given up this form of state organisation. The name is not a decisive factor for state organisation, but what matters is the factual form of the respective state's organisation provided for in the constitution.

Article I.1 of the BiH Constitution is an excellent example of the Dayton Agreement's constitutional **compromise**: the major interest of Bosniaks was Bosnia and Herzegovina existing as a sovereign state within the existing borders at the moment of the conclusion of the peace settlement.[258] By consenting to the BiH Constitution, the signatory parties gave up their respective international personalities – the Republika Srpska gave up its factual international personality due to the fact that it was not internationally recognised and the Federation gave up its feigned international personality[259] and thus both the parties have undertaken to comply with the sovereignty, territorial integrity and political independence of the State.[260] However, the Bosnian Serbs, who

254 Article I.1, second sentence.
255 Article II.7 of the BiH Constitution.
256 Article I.1, first sentence, in conjunction with Article I.3 of the BiH Constitution.
257 For instance, *Trnka*, 2000, p. 314.
258 *Szasz*, 1995a, p. 377 *et seq.*
259 Compare, *Gaeta*, 1996, p. 158 *et seq*; *Szasz*, 1995a, p. 403, footnote 67.
260 Sixth line of the Preamble of the BiH Constitution.

had secessionist intentions, were given special consideration by being granted the status of an *entity* and by the fact that the union or unity of the State was very weak – whatever the case may be, that was the initial position. Moreover, Article III.2(a) of the BiH Constitution entitles the Entities to form special parallel relations with the neighbouring countries as long as it is consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, and Article III.2(d) of the BiH Constitution entitles the Entities, with the previous consent of the Parliamentary Assembly, to conclude agreements with other states and international organisations. The BiH Constitution distanced itself from addressing the issue of leaving the "union" (for instance: conducting a referendum after the expiry of a certain period of time), which was considered as a possibility in some earlier proposals of the constitution.[261] Despite wide autonomous rights, the Entities have been definitely subordinated to the sovereignty and territorial integrity of Bosnia and Herzegovina; that is to say that the Entities, by their nature, do not possess the quality of a state.[262]

Furthermore, the continuation of Bosnia and Herzegovina is regulated under the interim provisions of Articles 2-5 of Annex II to the BiH Constitution. The said provisions provide for the continuation and validity of the former law, *i.e.*, the legal regulations (Article 2) and the continuation or transfer of judicial and administrative procedures (Article 3); the destiny of international agreements is also regulated (Article 5), as well as the continuation of the existence of the BiH institutions until they are changed (Article 4).[263] In this context, Article II.7 of the BiH Constitution is also included, which provides that the Bosnia and Herzegovina of the Dayton Peace Agreement shall remain a member of the international-legal mechanisms for the protection of human rights.

The issue of international continuation also has practical consequences for the continuation of the **existence of individual rights** and the distribution of competencies for guaranteeing the mentioned human rights. Thus, after 14 December 1995, Bosnia and Herzegovina, as an entity of international law, is under the obligation not to deprive its citizens from legal positions they had been granted prior to the Dayton Constitution taking effect.[264] The level at which such acquired positions may be guaranteed (state/entity, canton/municipality), in particular when it comes to the rights of citizens to require something from the state (*Leistungsrechte*), depends on the (new) constitutional-legal distribution of competencies. Accordingly, the State of BiH, as an administrative-territorial

261 *Szasz*, 1995a, p. 379 *et seq*.

262 U 5/98-III, paragraph 28; U 4/04, paragraph 140; see details in further text: "C. State composition (Article I.3)", p. 108.

263 For more details, see the comments attached to those provisions on page 991.

264 CH/02/12468 *et al.*, paragraph 90.

unit, is responsible for making compensation for war damage "if it is possible to establish that there is a continued responsibility of the State within the new Constitution of Bosnia and Herzegovina".[265] In general terms, it is not the responsibility of the State of BiH, but it is the responsibility of the Entities to make compensations for war damage;[266] however, this kind of compensation does not include settlement of old foreign currency savings.[267]

B. Democratic principles (Article I.2)

Democratic principles. Bosnia and Herzegovina is a democratic state which shall operate under the rule of law and with free and democratic elections.

1. Democracy

Bosnia and Herzegovina is a *democracy* which should be ensured through free democratic elections.[268] However, the term "democracy", which is referred to in the BiH Constitution, has specific characteristics due to the fact that it contains the elements of **consensual democracy**, *i.e.*, **the collective rights**. Thus, the closing line of the Preamble underlines the special status of Bosniaks, Croats and Serbs as "constituent peoples (along with Others)".[269] The elements of proportional representation of peoples are contained in the procedure of the appointment of delegates in the House of Peoples (Article IV.1), elections for the House of Representatives (Article IV.2), elections for the three members in the Presidency (Article V.1), composition of the Council of Ministers (Article V.4(b)), appointment of members of the first Management Board of the Central Bank (Article VII.2), and even in the procedure of appointment of Judges to the Constitutional Court (Article VI.1).

Indeed, in some cases (for instance, in the case of the Constitutional Court), from a formal point of view, it is about a required federal representation. However, in reality, due to the demographic structure caused by the war, **the postulates of federal representation** result in the fact that the power of three state pillars is proportionally distributed among three constituent peoples. As far as the Constitutional Court is concerned, this observation is also confirmed, although in a questionable manner when it comes to constitutional-legal terms,

265 *Ibid*., paragraph 143.
266 *Ibid*., paragraph 146.
267 CH/98/375 *et al*., paragraph 1152 *et seq*.
268 Article I.2 of the BiH Constitution, p. 91.
269 See details in further text, on page 61 *et seq*.

by the applicable Rules of the Constitutional Court which constitute a positive-legal regulation of lower normative-hierarchical significance[270] (despite its standardisation as a "constitutional category").[271] In the course of legislative procedure, the Delegates of the House of Peoples from amongst one people may block the passing of laws by the Parliamentary Assembly with the argument that the said laws constitute a threat to the vital interest of their people (Article VI.3(e)). Finally, Article IX.3 of the BiH Constitution requires that the structure of employed civil servants in the institutions of Bosnia and Herzegovina should generally reflect the ethnic structure of Bosnia and Herzegovina.

If we try to assess such constitutional regulations by comparing them with standards of international law, then they become questionable. As to passing the BiH Election Law, the Venice Commission pointed to neuralgic points in the said law, which concern the election of the Presidency members and delegates of the House of Peoples. However, the applicable regulations of the BiH Election Law are just the repeated provisions of Articles IV and V of the Constitution of BiH. Therefore, as claimed, the mentioned provisions of the Constitution are in violation of international law, or, more precisely, in violation of Article 25 of the International Covenant on Civil and Political Rights[272] and Article 4 of the Framework Convention for the Protection of National Minorities.[273]

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270 *OG of BiH*, Nos. 60/05 and 64/08; details in "B. Article VI.1 (composition)", p. 674.

271 See, U 6/06, paragraph 24.

272 Article 25 of the International Covenant on Civil and Political Rights stipulates:
"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."
Translation of this Article taken from the page: <http://www.bh-hchr.org/Dokumenti/Pakt%20o%20gradjanskim%20i%20politickim%20pravima.doc>, (interpreter's remark)

273 Article 4 of the Framework Convention for the Protection of National Minorities stipulates as follows:
"1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."
The above text is taken from: *The Office of the High Commissioner of the United Nations for Refugees, Independent Bureau for Humanitarian Issues*, Official texts, Sarajevo, 1998, pp. 169, 171.

The Venice Commission gives arguments that combining territorial with ethnical representation, as to persons whose ethnic affiliation does not match (factually) the ethnicity of the Entity they reside in, prevents them from standing as candidates in elections for the BiH Presidency. Therefore, a (declared) Croat or Bosniak, who has his/her residence in the Republika Srpska, cannot stand as a candidate for the position of a Member in the BiH Presidency on behalf of the Republika Srpska, and the same principle applies to a Serb who resides in the Federation. Moreover, as to the so-called Others, i.e., persons who did not identify themselves as members of any of the three majority ethnicities, they are completely deprived of the right to run for elections.[274] The same applies to the appointment of the Delegates in the House of Peoples. Moreover, it should be mentioned that delegates in the House of Peoples of the Federation, who are not Bosniak or Croat, are deprived (indirectly) of their active electoral right to be appointed as Croat or Bosniak delegates in the House of Peoples of BiH, unlike the situation in Republika Srpska where the entire National Assembly appoints the delegates in the House of BiH Peoples (admittedly, Serbs only). The Venice Commission claims that this lack of congruence is hardly understandable. Further, only the Croat, Serb and Bosniak delegates in the House of Peoples of BiH have the right to veto; however, the national minorities have no such a right although, due to their position, they are in need of that right more than others. Such a situation comes under question in light of Article 5 of the Convention for the Elimination of All Forms of Racial Discrimination[275] (which is a part of Annex 1 to the BiH Constitution).[276] This violation of international provisions might have been necessary in 1995 for the purpose of reaching peace in BiH. However, taking into account the generally positive democratic development and stabilisation of the country, those violations, in the context of the

274 *Venice Commission*, *Opinion on the Electoral Law of Bosnia and Herzegovina* of 24 October 2001, CDL-INF (2001) 21, <www.venice.coe.int/docs/2001/CDL-INF(2001)021-e.html>, pp. 15-18, pointing to the Decision of the Constitutional Court No. U 5/98-III, paragraph 65. See also, *Simor*, 1997, p. 646.

275 Article 5 of the Convention on the Prevention of Racial Discrimination:
"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
[...]
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; [...]"
The above text has been taken from: *The Office of the High Commissioner of the United Nations for Refugees*, *Independent Bureau for Humanitarian Issues*, Official texts, Sarajevo, 1998, pp. 169, 171.

276 *The Venice Commission*, footnote No. 3, pp. 19-21 referring to the Decision of the Constitutional Court No. U 5/98-III, paragraph 115 *et seq*.; *Marko*, 1999, p. 102 *et seq.*

> present exhaustive jurisprudence of the ECHR[277] and special relations in BiH, can no longer be justified, particularly because of the fact that clear participation interests have been guaranteed in a manner consistent with international law. Therefore, apart from making relevant amendments to the Law, it is necessary to amend the Constitution as well. This long-lasting and difficult process of reform of the Constitution, in the opinion of the Venice Commission, should not be in collision with the timetable of the 2002 general elections.[278]

The procedure of normative control of constitutionality in case U 5/04 had the same goal. This procedure was initiated by Mr. *Sulejman Tihić*, who was the Chairman of the BiH Presidency at that time. That case required an assessment of the procedure related to the appointment of delegates in the House of Peoples (Article IV.1), then, to the procedure of election of the Chairmen and his deputies in the chambers of the Parliamentary Assembly (IV.3(b)), and to the procedure of election of the Presidency members (Article V.1). The applicant claimed that there was a violation of the individual electoral rights referred to in Article 3 of Protocol No. 3 to the ECHR relating to the prohibition of discrimination because Serbs, Croats and Bosniaks were not treated equally in the mentioned regulations. Special treatment for the members of constituent peoples amounts to discrimination against "Others" when it comes to the enjoyment of their right to participate in political processes according to Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, which is an integral part of Annex 1 to the BiH Constitution.[279]

The BiH Constitutional Court dismissed that request for mainly two reasons:[280] on the one hand, the Court reasoned that **the ECHR is a part of the Constitution** and not above it, so the control of constitutional regulations according to the criteria of ECHR, which is incorporated in the BiH Constitution, was not to be considered. On the other hand, the Constitutional Court, pursuant to Article VI.3, is obliged to "uphold the Constitution". Accordingly, the Constitutional Court cannot declare some provisions void. The Court further argues that in formal terms the point at issue is not related to a dispute within the meaning of Article VI.3(a) of the BiH Constitution. Actually, the list of competencies under Article VI.3 does not stipulate that the Constitutional Court should examine the compatibility of the provisions of the Constitution with, for instance, the ECHR or international law. Such authorisation would be identical to the right of the Constitutional Court to interpret its own competence ("*Kompetenz-Kompetenz*"),

277 *Mathieu-Mohin and Clerfayt v. Belgium*, of 2 March 1987, Series A no. 113.
278 *The Venice Commission*, footnote No. 3, pp. 22-27, 30.
279 Paragraph 2 *et seq*.
280 U 5/04, paragraph 13 *et seq*.

which would be hard to harmonise with the principle of power division. Only the constitution maker can revise or amend the Constitution. In the best case scenario, the Constitutional Court could identify the inherent contradictions which seem to be impossible to resolve, *e.g.*, in the interpretation procedure which is consistent with international law, and leave it to the discretion of the constitution maker to eliminate those contradictions by amending the text of the constitution – under the prescribed procedure and by the required majority.

2. Legal state

Pursuant to Article I.2 of the BiH Constitution, Bosnia and Herzegovina is a legal state. When using the term "*rule of law*" one should be cautious. The Anglo-Saxon term "*rule of law*" does not mean the same as the term "legal state" (Germ. *Rechtsstaat*), so the above term is clumsily interpreted as "*rule of law*" (Germ. *Herrschaft des Rechts*). The continental European understanding of legal state includes both the formal and substantive aspects. The legal aspect (formal legal state) is related to the forms of state activities, *i.e.*, to the "state of law" in which the power is divided and where the principle applies that human rights and freedoms may be limited only by law (*Gesetzesvorbehalt*) and, consequently, the compliance with procedural laws is valued. The content and substantive components of a legal state comprise the substantive principles which include, above all, the principle of obligation to respect human rights and freedoms – "the state of justice".[281] Although, by force of circumstances, the Constitution uses the Anglo-Saxon term "*rule of law*" in its original English text, that principle should be conceived in much wider terms, *i.e.*, in its BiH context and, consequently, in its Continental-European context. The Constitutional Court, the Human Rights Chamber and the Human Rights Commission within the Constitutional Court have been interpreting and invoking the principle of a legal state in different ways with respect to both its formal and substantive meaning.

a. Legal certainty

AP 101/04 S.M.	20050118
AP 358/04 E. Š.	20050128
AP 531/04 Una banka d.d. Bihać	20050527
AP 551/03 S.A.	20040929
AP 58/03 S. G. *et al*.	20040104
AP 653/03 A. H.-Đ. *et a*l.	20040304
CH/01/8050 Savić	20050907
CH/02/8770 "Dobojputevi" d.d.	20031205
CH/02/10476 Lugonjić	20040910

281 *Zippelius*, 1994, p. 287 *et seq.*

CH/02/12546 Čustović	20060705
CH/03/13106 *et al*. AD Boksit "Milići" *et a*l.	20070627
CH/03/13593 Tripić	20050404
CH/03/14015 *et al*. Ravnjak *et al*.	20060508
CH/03/14418 Tomić	20060913
CH/03/14880 Osmankić	20060913
CH/98/375 *et al*. Đ Besarović *et al*.	20050406
U 49/02 H.B. *et al.*	20031128
U 49/03-1 D. T.	20050722
U 49/03-2 D. T.	20040826
U 49/03-3 D. T.	20060526
U 5/04 S. Tihić "Constitutionality of the Constitution"	20060127
U 68/02 S. Tokić "Law on Excise and Sales Tax"	20040625

As far as the principle of legal state is concerned, the point of issue is not related to the terms only, such as, for instance, the term "justice", which is a pretty shapeless term from the point of view of judicial practice, but the issue is about concrete principles required for the functioning of public authority. For instance, the term legal state also implies that the state will guarantee **legal certainty**[282] to its citizens and this is an essential principle of the BiH legal system.[283]

Legal certainty means that each individual may rely on the meaning and **predictability** of positive legal regulations, as well as on the rights and obligations arising from those regulations. This primarily means that the rights and obligations of citizens cannot be regulated based on (political) statements which are not legally compulsory (*e.g.*, memoranda of understanding), but rather by law and similar legal acts which may be reviewed.[284] Furthermore, upon amending a law, an individual shall not be disproportionately burdened by way of revoking his previously granted legal position in a manner that is unacceptable and inappropriate. The principle of legal certainty serves the purpose of legally guaranteed consequences being assigned to a factual substrate. A disproportional burden occurs when, for instance, the rights and obligations of an individual which have existed for a long period of time are retroactively revoked or limited.[285] Therefore, it is contrary to the Constitution, for instance, to retroactively review the agreements on sale of socially owned apartments which had been signed 12 years earlier and which the competent public prosecutor certified.[286] Accordingly, the legal certainty of an individual is sometimes in conflict with the public interest. A regulation which retroactively

282 CH/03/13106 *et al.*, paragraph 44.
283 Compare, CH/98/375 *et al.*, paragraph 1236.
284 U 68/02, paragraph 45.
285 CH/03/13106 *et al*., paragraph 44.
286 *Ibid*., paragraph 44 *et seq*.

restricts the acquired legal position must comply with **the principle of proportionality**.[287]

In view of the aforesaid, the requirement for protecting the principle of confidence in the continued existence of legal regulations, based on which the rights and authorities have been created for the future, does not only apply to general legal acts (legislation). A judicial institution and jurisprudence (judicial practice) are to be consistent despite the fact that the courts are not formally bounded by former decisions. Therefore, the courts shall always follow the consistent practice of the ECHR.[288] Accordingly, a citizen must also be given a possibility to expect the courts to take identical decisions in regards to identical problems in situations where the law does not provide for a certain margin of appreciation. And vice versa: if the courts enjoy a certain margin of appreciation (Germ. *Ermessenspielraum*), for instance, in pronouncing criminal sanctions,[289] the independence of the judiciary must be observed. That is to say, decisions that have been made possible by law and adopted based on a judicial valuable judgment (*Wertungsentscheidungen*) are not to be subjected to assessment by the Constitutional Court.

Differential legal treatment requires reasonable justification. The same rule applies even to a challenged decision which is lawful and consistent with the constitution but is different in relation to other persons being in the same situation, because no one has the right to seek **equality in unjustified treatment**. Hence, there is no right to equal treatment if a measure/standard which is to be assessed, either as equal or unequal, is unlawful. Otherwise, legal certainty and the obligation of equal treatment would require the states to repeat unlawful actions. The said principles face the limits of another essential postulate of a legal state, which means that a lawful action of the state (rule of law) is required even when such an action would lead to unequal treatment of identical cases and to legal *un*certainty.[290] The principle of legal certainty does not protect confidence in a continued unlawful activity.

An allegation that the Constitutional Court applies unequal treatment in identical cases may be a reason for renewal of procedure in order to review the decisions of the Constitutional Court; the same rule applies even when the Constitutional Court changes its judicial practice upon publication of the challenged decision.[291] The consequence of this act is that a party that lost

287 CH/98/375 *et al*., paragraph 1241.

288 CH/02/10476, paragraph 92.

289 Compare, U 49/02, paragraph 54, referring to the EComHR, *K. v. FR Germany*, Application No. 15252, judgment of 21 November 1990, and ECtHR, *Iatridis v. Greece*, judgment of 25 March 1999, *Reports and Decisions* 1999-II, paragraph 58.

290 AP 653/03, paragraph 44; CH/03/14015, paragraph 17.

291 U 49/03, Ruling, paragraph 10.

the case in the proceedings before the Constitutional Court is entitled to a **renewal of the proceedings** if the Constitutional Court subsequently revises its interpretation of regulations that used to be relevant to the decision in question or if it adopts some other decision which is a precedent.

> In case U 49/03 (Decision on Merits of 26 August 2004) before the Constitutional Court, the appellant sought a transfer of an occupancy right from her grandfather who had died on 7 June 1999. In the last instance of ordinary judiciary, the RS Supreme Court dismissed her request with the argument that she, as a granddaughter, does not belong to the circle of persons entitled to seek the transfer of occupancy rights. Namely, based on the amended legal regulations that were in force from 1993 to 28 October 1999, the grandchildren of occupancy right holders were not entitled to the transfer of the said right.[292] The Constitutional Court first upheld the decision of the RS Supreme Court and then reasoned that the appellant, according to the then applicable laws, did not have the protected status of an owner,[293] neither could the mentioned apartment be considered a home within the meaning of Article 8 of ECHR.[294] At some later point the Constitutional Court granted the renewal of proceedings requested by the appellant since the Court, in the meantime, changed its jurisprudence in similar cases. The changed jurisprudence of the Constitutional Court, for the purpose of protecting legal certainty, required the renewal of proceedings – as argued by the Constitutional Court.[295] In its Decision on the Merits of 26 May 2006, which followed afterwards, the Court established that there was a violation of the appellant's right to protection of the apartment within the meaning of Article 8 of the ECHR. Unlike the ECHR, the RS Supreme Court took only positive-legal provisions into consideration, which concern the transfer of occupancy rights and, in doing so, the Court overlooked the standards of Article 8 of ECHR.[296] Contrary to the aforementioned, the Human Rights Commission within the Constitutional Court of BiH considers that grandchildren are entitled to an occupancy right to which their grandmothers and grandfathers were originally entitled *if at the moment of adoption of the final administrative decision (in the second judicial instance)* the right to the transfer of the occupancy right had legally existed and provided that the relevant legal solution is not of discriminatory nature.[297]

Legal certainty requires consistency and prohibits retroactive limitation of rights. At the same time, legal certainty means that certain requirements must be met

292 Compare, U 49/03, paragraph 13.
293 Paragraph 29.
294 Paragraph 36.
295 Ruling of 22 July 2005, paragraph 10.
296 Paragraph 40.
297 CH/03/14418, paragraph 44 *et seq*.

with respect to the quality of law, which must be **accessible, predictable and assessable**. In this regard, while pointing to the recent jurisprudence of the ECtHR,[298] the Human Rights Commission within the Constitutional Court of BiH, in Case No. CH/03/14880[299] draws a conclusion that the law must be, first of all, sufficiently understandable. A citizen must be in a position to conclude, based on the law, how he should behave, so that his conduct is in accordance with the regulations applicable to the case in dispute. Secondly, a norm is not considered a law within the meaning of the ECHR if it is not sufficiently and precisely defined so that a citizen may adjust his conduct accordingly: a citizen must be able – to the extent corresponding to the relevant circumstances and, if necessary, with appropriate professional advice – to predict the consequences of his actions. Of course, an absolute and precise predictability is not what is required when it comes to the consequences of the application of law. Namely, while a possibility to predict the legal consequences is desirable, an exaggerated rigidity of law would close the road to interpretations that are adjusted to the changed circumstances. Accordingly, most of the laws should be formulated by means of terms that are more or less indefinite, and whose application and interpretation is a matter of judicial practice.

Legal certainty is a prerequisite for effective legal protection. The courts should have an active role since their lack of action would cause uncertainty among the citizens when it comes to the scope and limits of their rights.[300] An effective legal protection means that it is not allowed to conduct **several parallel proceedings** with respect to the same case. For instance, given the fact that Annex 7 to the GFAP envisages mechanisms for return of abandoned property, then, as far as the same case is concerned, the parallel proceedings before the Entity authorities should not be conducted[301] (violation of principle *litis pendentio*).

However, the rights of an individual may be subject to limitations for the purpose of protecting legal certainty. These limitations primarily include **statutory time-limits**.[302]

In the opinion of the Constitutional Court, the postulate of legal certainty requires that proceedings be postponed until, in the process of abstract control (review) of norms conducted before the Constitutional Court in accordance with Article

298 *Sunday Times v. the United Kingdom*, 26 April 1979, Series A no. 30, paragraphs 47 and 49.
299 Paragraph 39.
300 Compare, CH/02/8770, paragraph 61.
301 CH/01/8050, paragraph 121.
302 AP 551/03, paragraph 23; CH/03/13593, paragraph 10; AP 101/04, paragraph 35.

VI.3(a) of the BiH Constitution, a decision is taken on the constitutionality of a law granting immunity to the defendant.[303]

Furthermore, legal certainty requires that the proceedings of finding a legal solution be prescribed and it also requires a **consistent** (*Bestandskraft*) completion of the proceedings. An exception to this rule is renewal of proceedings, which is to be treated in restrictive terms and, for instance, when it comes to evidence, the proceedings should be renewed only when new evidence arises, the so-called *nova reperta*. If the proceeding is unlawfully reinitiated and if an injured party is revoked of his previously granted rights, the violation of legal certainty occurs.[304] A similar case is when an individual is granted a certain right and all available legal remedies challenging that right have been exhausted, and then, by application of an inadmissible legal remedy (this concerns the revision procedure), that right becomes the subject of a challenge again. In this case, an injured party should have confidence in the consistency of the law. If the party is revoked of that right **in proceedings using inadmissible legal remedies**, that would amount to a violation of the injured party's right to have confidence in legal certainty that should be actually protected.[305] The right acquired by a legally binding decision is protected to the same extent **from retroactive revocation through a law**. The principle of legal certainty obliges competent bodies to enforce a legally binding judgment.[306]

b. Division of power

AP 3208/06 Škutora *et al.*	20070116
AP 683/04 DOO Konzum promet	20050913
AP 774/04 Runić *et al*.	20051220
CH/01/8507 Softić	20051215
CH/01/8110-A&M	20030307
CH/02/9138 *et al.* Ašanin *et al*.	20051109
CH/03/14954 Radmilović	20070315
CH/98/375 *et al.* Đ Besarović *et al*.	20050406
U 19/00 Kemokop *et al.*	20010504

Another element of the formal principle of a legal state is the division of power. Although it is not explicitly mentioned in the BiH Constitution, the Constitutional Court and the Human Rights Commission within the Constitutional Court of BiH have emphasised several times that the division of power is an inherent

303 Compare, AP 58/03, paragraph 8 *et seq*.
304 CH/02/12546, paragraph 48 *et seq*.
305 AP 358/04, paragraph 25 *et seq*.
306 AP 531/04, paragraph 30.

element of the principle of a legal state.[307] The principle of division of power stipulates that "the state regulatory power is divided into functional fields, which are, in legal terms, assigned to special and mutually divided branches of state government."[308] In this regard, the Constitutional Court differentiates among four branches of state power: "legislative, executive, administrative and judicial power",[309] in which case the executive power is represented by the Presidency and Government (Council of Ministers) – according to Article V of the BiH Constitution. "It is a legitimate right of each state to organise its system in a way it deems to be the most functional and which serves to the best of its interest."[310] The BIH Constitution, in this regard, provides for horizontal division of power among the legislature, Presidency, Council of Ministers, administration and judiciary. The aforementioned is to be differentiated from the division of competencies between the State of BiH and Entities, which is carried out according to the federal, *i.e.*, con-federal principles and not according to the functional fields of state power.[311]

The line of division between different fields of state power is not always so strict. Therefore, together with the Human Rights Commission within the Constitutional Court of BiH,[312] we may conclude, as follows: the laws and other legal norms are passed by the legislature. Those norms do not regulate only the primary legal relations (substantive law) but also the secondary legal relations (procedural law). The said norms are applied by the institutions of executive power, *i.e.*, the administration. The exercise of executive power and the administration of those norms is under the control (review) of the judiciary. There is a difference between the executive power and administration on the one hand, and the judiciary on the other hand. This difference is reflected in the fact that the executive power looks to the future and, based on its legal authorities, gives shapes and fundaments to legal and factual relations in the public interest; and the judiciary is in charge of subsequent control (review) of the lawfulness of the administration's acts. Such a division of tasks does not eliminate the possibility for granting some "manoeuvring space" to the administration in which it may take proper decisions in some cases. Those decisions may be checked by the judiciary only to some extent, *i.e.*, inasmuch as it is necessary to establish whether the administration has used "the permitted manoeuvring space" in a wrong manner; however, in such situations the judiciary shall not make decisions in the stead of the administration.

307 See, for instance, AP 3208/06, paragraph 10; CH/02/9138 *et al*., paragraph 106.
308 *Maunz/Zippelius*, 1994, p. 89.
309 AP 863/04, paragraph 11.
310 *Ibid*.
311 See under: "Article III – Responsibilities of and Relations between the Institutions of Bosnia and Herzegovina and the Entities", p. 573.
312 Compare, CH/02/9138 *et al.*, paragraph 106.

State authorities, each in their field, do not act independently of each other, but rather "in relation to the previously defined co-action, and thus they act in a relationship of mutual dependence and control (*check and balance*)".[313] Accordingly, the task of the judiciary is to interpret and apply the laws. If a need be, the laws shall identify and fill in the existing legal gaps.[314] The Constitutional Court, by virtue of the BiH Constitution, has a special role in regards to the legislature: the Constitutional Court is obliged to declare unconstitutional laws invalid.[315] With the purpose of resolving an issue of inconsistency with the Constitution and provided that the legal situation requires that, the Constitutional Court may oblige the legislature to act.[316] And vice versa, pursuant to Article VI.3(a) of the BiH Constitution, the Entity parliaments are tasked with electing Judges to the Constitutional Court. Within the authorities given by law, the executive power issues legal regulations in the form of generally binding decrees. As to the essence of some legal field (which is related to human rights and freedoms) the decision shall be adopted by the legislature; that issue shall not be left to the executive power's margin of appreciation (for instance, the issue of basic modalities relating to the settlement of "old foreign currency savings"). The reason for this is the fact that the administration lacks the "democratic substrate" possessed by the legislature based on its legitimacy gained in democratic elections, which gives the right to the legislature to take over responsibility for such decisions.[317] The fact that legal norms dealing with human rights and freedoms could be passed by the legislature exclusively is one of the expressions of the division of power and, at the same time, one of the principles of democracy. Finally, the courts also have wide authority in controlling the work of the administration, with the aim to ensure effective legal protection under Article 6 of the ECHR.[318]

Both the legislative and executive powers must fully comply with the independence of the judiciary. Accordingly, it should not occur that legally binding decisions of courts are relativised by subsequently issued regulations. That may happen if, for instance, a judgment on awarding a certain amount of money and legally prescribed interest is subsequently *ex lege* "corrected" by an Entity legislature's decision to annul the interest rate. As far as the Constitutional Court is concerned, that would mean an unacceptable interference

313 *Öhlinger*, 1997, p. 56; CH/02/9138 *et al.*, paragraph 106.
314 CH/03/14954, paragraph 47.
315 Article VI.3(a); compare, for instance, U 5/98-III.
316 For instance, U 14/05, see also the decisions of the Human Rights Commission within the Constitutional Court of BiH: CH/01/8507, paragraph 54; CH/98/375, paragraphs 1268, 10 *et seq.*
317 CH/98/375, paragraph 1244.
318 U 19/00, paragraph 26 *et seq.*

by the legislature with the work of the judiciary.[319] Also, the Entity government cannot, by issuance of a decree, suspend the enforcement of legally binding decisions of the CRPC, as referred to in Annex 7 to the GFAP (CRPC), until the CRPC makes a decision on the party's request for renewal of the proceedings. Such prevention of enforcement imposed by the executive power would mean that the government has usurped the legislative authority, which is inconsistent with the principle of separation of powers.[320] A postponement of enforcement would not be considered illegal only if imposed by law and if the public interest is justly and lawfully determined, including the ownership rights of the individual.[321]

c. Scope of obligation to comply with the Constitution

AP 1603/05 Lončar	20061221
U 106/03 I. D.	20041027
U 19/00 Kemokop *et al.*	20010504

According to its position, the Constitution is the highest legal act in the State.[322] It is not only legally binding on the executive power and administration, but on the legislature and judiciary, including the Constitutional Court. Pursuant to Article VI.1 of the Constitution, the Constitutional Court is even obliged to protect the Constitution. That linking to the Constitution, *i.e.*, the constitutional connection, is another element of a legal state.

The concrete consequences of this connection with the constitution have become a matter of dispute, and the judicial practice of the Constitutional Court experienced a certain change in this regard. The Court originally supported the opinion that, due to the supremacy of the Constitution, the state authorities should simply disregard unconstitutional laws and directly invoke the BiH Constitution.[323] In that manner the courts would preserve lawfulness, which is one of their main tasks arising from the principle of a legal state.[324] Moreover, the Constitutional Court established that if ordinary courts have doubts concerning the constitutionality of laws that should be amended, they are under an obligation to initiate the proceedings for the purpose of concrete (incidental) control of constitutionality according to Article VI.3(c) of the BiH

319 AP 774/04, paragraph 432.
320 CH/02/9138 *et al*., paragraph 109.
321 CH/01/8110-A&M, paragraph 54 *et seq.*, paragraph 62.
322 U 106, paragraph 33.
323 U 106, paragraph 33.
324 *Ibid*.

Constitution.[325] That is to say that the courts enjoy certain discretion when it comes to the assessment of a possible lack of constitutionality, but not when it comes to their obligation to initiate proceedings if they are confident that there is an unconstitutional legal ground for taking a decision.

The Court subsequently corrected the above stand-point.[326] Namely, the Constitutional Court is still of the opinion that an ordinary court, due to the supremacy of the Constitution, shall not apply an unconstitutional law. However, the court is now obliged to bring the unconstitutional norm under its control (review). If the result of the control (review) shows that a certain law is consistent with the Constitution, the court shall apply the result. If the court becomes convinced that the law is unconstitutional, the relevant court will no longer be allowed, by invoking this Constitution, to simply disregard the law and adjudicate the relevant case. Now, the court is under the obligation to "forward" the constitutional issue to the Constitutional Court of BiH in accordance with Article VI.3(c) of the BiH Constitution.[327] In the meantime – even though the Constitutional Court has not given an explicit opinion about that matter – the proceedings before the lower instance court must be suspended until the Constitutional Court adopts a decision.

So, it remains unclear whether a norm, which is considered to be unconstitutional, should be bypassed by lower instance courts, *i.e.*, whether the ordinary courts should simply decide not to apply that norm without initiating proceedings before the Constitutional Court and without waiting for its decision. The BiH Constitution does not contain clear regulations such as, for instance, the norm in Article 100 of the German Basic Law.[328] Article 100 of the German Federal

325 *Ibid*.
326 Compare, AP 1603/05.
327 Compare, AP 1603/05, paragraph 33, the second sentence, paragraph 37.
328 Article 100 of the Basic Law stipulates:
"(1) If a court concludes that a law on whose validity its decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the Land court with jurisdiction over constitutional disputes where the constitution of a Land is held to be violated, or from the Federal Constitutional Court where this Basic Law is held to be violated. This provision shall also apply where the Basic Law is held to be violated by Land law and where a Land law is held to be incompatible with a federal law.
(2) If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.
(3) If the constitutional court of a Land, in interpreting this Basic Law, proposes to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it shall obtain a decision from the Federal Constitutional Court."
(The text has been taken from the German Basic Law, which was translated by Prof. Dr. Edin Sarcevic, who calls it the Basic Law. Source: <http://www.uni-leipzig.de/~eurlaw/cms/cms/upload/Sarcevic_Grundgesetz.pdf> (interpreter's remark.).

Constitutional Court stipulates that there shall be a constitutional monopoly in favour of the German Constitutional Court (*Bundesverfassungsgericht*). The purpose of this norm is to give the Federal Constitutional Court the final word in interpreting the Basic Law. Contradictory interpretations of the Basic Law should be avoided for the sake of simplicity of law and legal certainty; and the lower courts must not place themselves above the will of the legislature.[329]

Due to the shortage of similar regulations in the Constitution of BiH, it is necessary to find a solution within the valid regulatory framework of the BiH Constitution. The supremacy of the Constitution, (Article III.3(b), the first sentence of the BiH Constitution) and principle of legal certainty (as a part of the principle of a legal state according to Article I.2 of the BiH Constitution) are the most important interpretation tools. As to the constitutional human rights and freedoms guaranteed by the ECHR, which could be considered a special case (an exception), we might support the opinion that the "direct application of rights" (Article II.2 of the BiH Constitution) from the Convention could be comprehended in a way that ordinary courts are under the obligation to directly apply those rights and freedoms. Therefore, ordinary courts should apply them without taking into account the laws which are contrary to them and without forwarding the issue of the constitutionality of those laws to the Constitutional Court (or the issue of their compatibility with the Convention) and without waiting for the decision of the Constitutional Court in that regard.[330] Otherwise, the constitutional-legal obligation of "direct application" of the ECHR would be irrelevant.

However, making this type of conclusion based on the constitutional-legal norm requiring "direct application" of the ECHR is not imperative. The direct applicability of rights under the ECHR, according to Article II.2 of the BiH Constitution, should primarily mean as follows: in order for these rights and freedoms to be applicable in BiH, no special act by the legislature is required in order for those norms to be incorporated in the legal system, *i.e.*, unlike other agreements according to international law. Accordingly, the courts should take into account the rights from the ECHR when adopting decisions and they should also conduct a control (review) as to whether a certain norm – which is decisive for a dispute – is consistent with the ECHR (and definitely, whether it is consistent with the Constitution).

It is quite another issue whether the courts have the right to disregard the application of a specific law if they come to the conclusion that the related law is in contravention of the ECHR and if they fail to forward the case to

329 Compare, *Schlaich/Korioth*, 2001, paragraph 128 *et seq.*, with further references.
330 Similar to conclusions in Decision No. U 106/03.

the Constitutional Court, which should take a decision (Article VI.3(c) of the BiH Constitution). If that solution is made possible for the rights under the ECHR, the same should apply to the entire constitutional law. The above is true inasmuch as the BiH Constitution does not contain normative-hierarchical differences,[331] as it is directly and equally applied in the whole territory of the state, and consequently in the Entities, and as it excludes application of any lower-ranking unconstitutional law (Article III.3(b), the first sentence of the BiH Constitution). The effectiveness of the Constitution and the human rights and freedoms safeguarded under the Constitution, ECHR and Annex I to the Constitution does not primarily depend on whether the lower instance courts must wait for the decision of the Constitutional Court. The effectiveness depends on whether the ordinary courts take into account the BiH Constitution at all or whether they keep it in mind when taking decisions, as well as on the fact that a possible unconstitutional law is not applied while proceedings before the ordinary courts are suspended and the proceedings before the Constitutional Court of BiH are still in progress, as referred to in Article VI.3(c) of the BiH Constitution. Admittedly, as to urgent cases, an injured party may seek interim legal protection even from the Constitutional Court itself.

It is true that the protection of human rights and freedoms *in the instant case* would be more effective, or at least faster, if the lower instance courts could simply evade the law which is inconsistent with the ECHR without waiting for the adoption of the decision by the Constitutional Court. However, such an interpretation becomes questionable for several reasons. On the one hand, because of the fact that hardly correctable presumptions would be created with respect to the cases in which the Constitutional Court, after conducting the control (review) of constitutionality, would establish that a certain norm is consistent with the BiH Constitution. In the meantime, the legally valid decisions adopted under such circumstances could be corrected only in a renewed proceeding. On the other hand, lower instance courts may be tempted not to forward a disputable issue to the Constitutional Court – since it would be possible for them to end the proceedings, which is independent of the decision of the Constitutional Court but in compliance with the ECHR (according to their own assessment). However, such an approach might have undesirable effects: a norm that is contrary to the ECHR would remain in force and be applied to other cases. Finally, only by the existence of the Constitutional Court's monopoly is it possible to prevent contradictory interpretations of the same norm and ensure legal unity and legal certainty. The aspect of legal unity is very important for Bosnia and Herzegovina since in many legal fields, except for the Constitutional Court, there is no instance of supreme judicial review at

331 U 5/04, paragraph 14.

the state level which would take care of a unified and harmonized application of law in the Entities.

In view of the aforementioned, a solution presented in the Constitutional Court's Decision No. U 106/03 is not a convincing one since that decision gives implications of different treatment depending on whether the disputed norm is in violation of the BiH Constitution and ECHR or not. The BiH Constitution is directly applicable in Bosnia and Herzegovina, as are the rights under the ECHR – neither more nor less. The suggested solution relies on the wrongly understood term of "direct" application of the ECHR. The term "direct application" should be perceived only in connection with mutual effect of international law (ECHR) and constitutional law. In order to apply the ECHR, no additional order for its application is required, neither is any other act required for its incorporation in the domestic legal system.

Therefore, the courts shall be obliged to examine not only whether a norm intended to resolve a dispute is consistent with the fundamental rights under the ECHR, but also whether it is consistent with the remainder of the Constitution and constitutional provisions. If a conclusion would be made that it is inconsistent, then the courts would have to suspend the proceedings in progress so that the issue of compatibility with the BiH Constitution and ECHR could be forwarded to the Constitutional Court. After the decision is adopted the lower court may resume the proceedings while complying with the decision of the Constitutional Court.

d. Effective legal protection and judicial control

AP 1785/06 Maktouf	20070330
AP 5/06 Ministry of RS	20060314
U 19/00 Kemokop *et al.*	20010504
U 3/99 H. D.	20000317
U 62/01 Pjanić	20020405

The principle of a legal state also includes an obligation of the state to provide **effective legal protection** against the acts of public authority and in providing this protection a state may need the assistance of an independent judiciary. Therefore, the courts should have a possibility of reviewing an alleged violation of rights both in legal and factual meaning.[332] The principle of a legal state obliges the courts to provide thorough reasons for their decisions, as that

332 U 19/00, paragraph 30 *et seq.*

enables rationality and a possibility to control state decisions.[333] The obligation to provide reasons for courts' decisions gives an opportunity to any injured party to effectively exercise his rights of appeal.[334] An obligation of providing reasons serves the purpose of democratic legitimacy, particularly in regards to admissibility and transparency of state decisions.[335]

e. Human rights and freedoms – liberal constitutional order

Apart from the abovementioned, to some extent formal, *i.e.*, technical-procedural aspects of the principle of a legal state, there is also a substantive component in the form of **human rights and fundamental freedoms** for which there is a special regulation in the constitution.[336] Protection of human rights and freedoms is aimed at providing each citizen with an inviolable sphere that is out of the reach of public authority. By recognising fundamental rights, the state purposely restricts its area of activity in favour of a liberal constitutional order.

C. State composition (Article I.3)

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

The concept of Bosnia and Herzegovina is one of the most disputed issues, since it determines the degree of centralisation and the degree of autonomy of the Entities. The BiH Constitution does not contain any common definitions such as federation, union of states or confederation, but is rather limited to several basic coordinates and to the shaping of relations between the State and Entities *in concreto*. Therefore, it is in the interest of both the integrative and disintegrative forces to add the missing categorisation to the Constitution and thus, in advance, give a foundation framework to all possible and subsequently raised disputes and discussions.

The structure of Bosnia and Herzegovina is that of **negotiations resulting in inconvenience**: after the contracting parties, by signing the Washington Agreement in March 1994, had given birth to the (Bosniak-Croat) Federation

333 *Meinz/Zippelius*, 1994, p. 98.
334 U 62/01, paragraph 19.
335 *Meinz/Zippelius*, 1994, *Ibid*.
336 Article II of the BiH Constitution (p. 121), and also Annex I to the BiH Constitution (p. 989).

consisting of ten Cantons, they considered that such an agreement had to be amended and finalised. The parts of the country not under the control of the RBiH institutions, such as the Republika Srpska (which had not been recognised yet), were to be attached to the Federation within a final peace settlement for the whole territory of the RBiH. It meant that the Federation of Bosnia and Herzegovina was designed as the continuation of the Republic of BiH – even if, from a formal point of view, it was to be on a provisional basis. Finalisation of the FBiH Constitution, which had been originally designed in Washington, failed in Dayton for two reasons: on the one hand, because the Republika Srpska opposed to the inclusion according to the cantonal model, and, on the other hand, because revision of the Washington Agreement, which was aimed at dividing the Federation into two parts, was not desirable at all. Thus, in the end, the existing Federation was declared one part of the country and the Republika Srpska joined it as another part of the country. In order to leave enough room for different interpretations concerning the legal nature of the abovementioned parts of the country, the term "entity" was used (*entity* – Article I.3 of the BiH Constitution[337]), which does not purposely indicate that there is any categorisation in regards to the organisation of the state but is rather a value neutral description of the situation as found. The result is asymmetry: one State, two Entities, three constitutional peoples, which, unlike the symmetry model of 3 peoples – 3 entities, has at least one advantage, which is creating stronger ties among the peoples. Being without their own entity and, additionally, given the cantonal division that was not carried out 100% according to the "pure" ethnic principle, the separation aspirations of the Bosnian Croat power holders do not seem to be realistic any more. For these reasons, it could be expected that the Bosnian Croats oppose similar aspirations coming from the Republika Srpska. On the other hand, within the Dayton arrangement, it was necessary to offer an additional level of power to a continuing personality of international law – Bosnia and Herzegovina. The institutions of this "federal level" had to be constituted starting from zero since the original plan under the Washington model was to transfer the tasks of those institutions, *i.e.*, of that level of authority, to the Federation. In fact, according to the said model, the plan was to attach the Republika Srpska to the Federation "only" as an additional canton (or to be divided into several cantons). Instead of a homogenous state structure at three levels (federation/ cantons/municipality), the country got asymmetric structure with four levels of authority in the Federation (state/federation/cantons/municipality) and three in the centralised Republika Srpska (state/entity/municipality).

337 Article I.3 of the BiH Constitution reads as follows::
"Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities")."

The Brčko District has a special role in this kind of state formation.[338] Brčko is a land corridor between the eastern and western part of the Republika Srpska and that is the reason why the status of that piece of land was the subject of intense discussions in Dayton. In order to avoid the failing of the peace settlement, according to Article V of Annex 2 to the GFAP, the final decision on Brčko was left to be adopted through arbitration. In the meantime, the administration that was divided between the Entities remained in place. In March 1999, in its final award, the OHR Arbitration Commission established that Brčko was to be a neutral district under its own sovereign administration, *i.e.*, under the direct supervision of Bosnia and Herzegovina. This decision additionally worsened an already tense situation in the Republika Srpska caused by the High Representative's decision on removal of Nikola Poplašen from his office as the President of the Republika Srpska, as well as because of the NATO airstrikes on Kosovo.[339] The decision resulted in the transfer of entity authorities for Brčko to the Supervisor for the Brčko District. As to the state authorities, from that moment the District was to be under the supervision of the State. On 8 March 2000, by the entry into force of the decision on district status, Brčko District started its legal existence.

In order to prevent the inter-entity boundary lines to continue existing as factual state borders, **the fundamental freedoms** necessary for the functioning of the common market (movement of goods, services, persons and capital) were established in Article I.4 of the BiH Constitution,[340] and the refugees and displaced persons were granted a special right to return under Article II.5 of the BiH Constitution.[341]

The Constitutional Court neither determined nor did it limit itself when it came to terminology. Nevertheless, according to its *dicta*, *i.e.*, its jurisprudence, we may conclude that the Constitutional Court sees Bosnia and Herzegovina as a federation. In its first partial decision concerning the above case, the Constitutional Court adopted several fundamental conclusions. Thus, the Court explicitly established that the use of the term "state border" *(border)* in Article II.2 of the RS Constitution is inconsistent with Articles I.1 and 4 of the BiH Constitution (the authentic English version), and with Articles III and X of the

338 See, CH/00/4116 *et al*.-A&M, paragraph 16 *et seq*., paragraph 51 *et seq.*
339 *ICG*, 1999.i.
340 Article I.4 of the Constitution reads:
"Movement of goods, services, capital, and persons. There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities."
341 From a historical point of view, see, *Szasz*, 1995a, p. 381 *et seq*.

Framework Agreement, and with Annex 2 to the GFAP. In the said provisions a clear distinction was made between the term "boundary", which is a mark for the Entity border and the term "border", which is a mark for the external border of Bosnia and Herzegovina and this distinction is relevant from the aspect of international law (U 5/98-I, paragraphs 14-17).

> The Republika Srpska presented arguments before the Constitutional Court that the term "border" can be definitely used as a mark for organised political-territorial units bearing the name "republic". Using the said term in Article 1 of the RS Constitution does not allude to the independence of the Republika Srpska. Even Article III.3(a) of the BiH Constitution, it is further claimed, refers to the state functions of the Entities ("governmental functions"), and Article I.7 of the BiH Constitution makes reference to the citizenship ("citizenship") of Entities. Regardless of the aforesaid, the Republika Srpska claimed that it has to be seen as a state not in terms of international but rather constitutional law.[342] It is further claimed that that the sovereignty of the Entities is an essential characteristic of their statehood and that the Dayton Peace Agreement acknowledged their territorial separation. Moreover, their peoples have the collective right of "self-organisation" of their own state so that the Entities could act "according to the decisions taken at the level of joint institutions only if they conform to their own interests".[343] "It is evident that the Republika Srpska can be called a state as its statehood is the expression of its original, united, historical People's movement, of its people which has a united ethnic basis and forms an independent system of power in order to live really independently, although an independent entity within the framework of a complex state community."[344]

The Constitutional Court, as a judicial body, did not take part in this terminology related discussion, unlike some of its judges. Instead, the Constitutional Court limited itself to the clarification that defining the Republika Srpska as a sovereign and independent state is inconsistent with the BiH Constitution.[345] In this regard, the Constitutional Court first presented the arguments that the provisions of the Preamble of the RS Constitution are not merely descriptive, but in conjunction with Article 1 of the RS Constitution, they are also vested with a powerful normative force. The Court finds that the existence of a constitution, the name "Republic" or citizenship is not *per se* proof of the existence of statehood. Although it is also quite often the case in federal states that their component entities do have a constitution, and that they might even be called a republic or grant citizenship, all these institutional elements are granted or guaranteed by a

342 U 5/98-III, paragraph 12.
343 *Ibid*.
344 *Ibid*., paragraph 13.
345 U 5/98-III, paragraph 27 *et seq*.

federal constitution. The same holds true for Bosnia and Herzegovina.[346] Pointing to Article I.1 of the Constitution of BiH, the Court undoubtedly establishes the fact that only Bosnia and Herzegovina continues "its legal existence under international law as a state, with its internal structures modified as provided herein". In consequence, Article I.3 establishes two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska as component parts of the state of Bosnia and Herzegovina. In addition, as seen from Article III.2(a) of the Constitution of BiH, for instance, the Entities are subject to the sovereignty of Bosnia and Herzegovina. Despite examples of component units of federal states, which are also called states themselves, in the case of Bosnia and Herzegovina it is thus clear that the Constitution of BiH did not recognise the Republika Srpska and the Federation of Bosnia and Herzegovina as "states" but instead refers to them as "Entities".[347] Accordingly, the Constitution of BiH does not leave room for any "sovereignty" of the Entities or a right to "self-organisation" based on the idea of "territorial separation". Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their "sovereign" statehood. In the same manner, "*governmental functions*", according to Article III.3(a) of the Constitution of BiH, are thereby allocated either to the joint institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH.[348] Accordingly, the Constitution of BiH does not leave room for any "sovereignty" of the Entities or a right to "self-organisation" based on the idea of "territorial separation". Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not a proof of their "sovereign" statehood.

As far as the relevant literature is concerned, different opinions have been presented with respect to the concept of Bosnia and Herzegovina. The major topics are "federation" or "federal state".[349] *Ademović*[350] makes the point that it is "*a complex federation consisting of two entities and a district*". *Waters*,[351] however, considers that the relevant state is "*highly confederal*",[352] and even *Szasz*,[353] considers that this Dayton state construction is a "*more or less loose union of [...] ethnic entities*". While putting tremendous efforts in offering valid

346 Paragraph 28.
347 Paragraph 29.
348 Paragraph 30.
349 Compare, *Yee*, 1996, p. 181 *et seq*.; *Marko*, 1999, p. 101 *et seq*.; *Winkelmann*, 2003, p. 60 *et seq.*, 85; *Begić*, 2003, p. 45; *Miljko*, 2003, p. 41; *Markert*, 2003, p. 88 *et seq*.
350 2006, p. 55 *et seq.*
351 1999, p. 531.
352 "*Highly confederal*", *Waters*, *Ibid*.
353 Compare, 1995a, p. 377.

reasons, *Snežana Savić*,[354] the former President of the Constitutional Court, tried to prove that this state, in its new form, is a confederation and not a federation, although the author admits that the BiH Constitution contains "*certain elements of federative organisation*".[355]

D. Freedom of movement in the economy – four freedoms (Article I.4)

Movement of goods, services, capital and persons

There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

AP 792/06 "Gallor" d.o.o. Pale	20060116
CH/02/12468 *et al*. Š Kadrić *et a*l.	20050907
U 14/04 A. Terzić "Tax Laws of FBiH"	20041029
U 27/03 TUP "Centar" p.o.	20040528
U 35/00 E. and D.S.	20030627
U 5/98-II "Izetbegović II"	20000701 *OG BiH*, No. 17/00
U 68/02 S. Tokić "Law on Excise and Sales Tax"	20040625

Article I.4 of the BiH Constitution guarantees free movement of goods, services, capital and persons in the whole territory of the state. It is quite clear that, in this regard, the Framer of the Constitution has relied on Article **14 of the Treaty Establishing the European Community (TEC)**[356] and, at the same time, that fact tells a lot about the position and prognosis of the Framer of the Constitution (or of its international protectors) when it comes to the freedom of movement in the post-Dayton Bosnia and Herzegovina. The political and social division of the state caused by the armed conflict was also reflected in the economic field. In addition to several goods' smuggling routes, the state was also economically divided, and thus it found itself in an initial situation similar

354 2003.
355 *Ibid*., p. 28.
356 Article 14 stipulates as follows:
"(1) The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992."
(2) The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.
(3) The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors. [...]"

to that which the countries establishing the European Community had been faced with. In a small country such as Bosnia and Herzegovina, securing free economic flow and creating a single market was even more important than it was for those much bigger and much more populated states of the European community.

Given the fact that there is no definition of terms in the BiH Constitution, neither is there any distinction with respect to fundamental freedoms, the Constitutional Court, when interpreting Article I.4, pointed to the **Treaty on Establishing the European Community** and to the relevant **jurisprudence of the European Court of Justice**.[357] So far, the Constitutional Court and Human Rights Chamber have rarely dealt with the issue of fundamental freedoms of a single market. As to *freedom of movement*, the issue was dealt with in the following cases: U 27/03;[358] U 68/02,[359] U 14/04,[360] AP 792/06[361] and U 14/04.[362] As to *the freedom of movement of services*, the issue was dealt with by the Human Rights Commission within the Constitutional Court of BiH in cases: CH/02/12468 *et al*.[363] and CH/98/375 *et al*.[364]

The aforementioned four (economic) fundamental freedoms make a complete constitutional frame for the **freedom of market economy** in the country, which is stipulated by the Constitution, for instance, in the fourth line of the Preamble[365] and in Article II.3(k) (property protection). In view of the above, the Constitutional Court points to the obligation of the State to establish **an operational economic system** and to **ensure full economic balance**.[366]

The **guarantee of the freedom of movement** in Bosnia and Herzegovina has been positively and generally defined in the first sentence of the regulation. What comes in the second sentence is a precise definition of the guarantee from the first sentence, which is defined as a restriction: Bosnia and Herzegovina and the Entities shall not impede the full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Finally, the third sentence refers to the prohibition of activities that would flagrantly violate these

357 U 68/02, paragraph 41.
358 Ministerial permit for transport of goods, see paragraphs 6 and 28.
359 Excises, internal customs duties, see paragraphs 5 and 40.
360 Tax on Sale of Goods, see paragraphs 5 and 21.
361 Law regulations on pharmaceutical activities; see paragraphs 4 and 14.
362 Tax on Services, see paragraphs 5 and 21.
363 Possibility of providing lawyer's services, see paragraph 224.
364 Payment of "old foreign currency savings", see paragraph 1204.
365 "Desiring to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy."
366 U 68/02, paragraph 40.

freedoms: namely, controls on the Entity boundary lines have been prohibited. Such a systematic scheme clearly indicates that the prohibition of control on Entity boundary lines is not, at the same time, a permit to perform some other activities not restricting the freedom of movement on the mere boundary line between the Entities but perhaps restricting it in some other way.[367] Moreover, in the first sentence, reference has been made to the obligation of the State to act in a positive direction for the purpose of ensuring freedom of movement in the whole country, so the State shall not be limited to mere compliance with the restrictions referred to in the second and third sentence.[368] An effective means for providing freedom of movement is harmonization of the Entities' legal systems, which differ in many fields,[369] including removal of regulations preventing economic exchange, such as indirect taxes existing next to uniformly regulated indirect taxes.[370]

Also, **the Entities**, within their competencies, may and must act for the purpose of ensuring freedom of movement.[371] However, it may be required that some competencies for passing laws, which are mainly assigned to the Entities and the Brčko District, should cease to be decentralised if it would lead to a restriction of the freedom of capital flow.[372]

The Constitutional Court and the Human Rights Commission within the Constitutional Court of BiH have grasped the guarantee of freedom of movement in its connection with the prohibition of discrimination under Article II.4 of the Constitution of BiH, which is not only against any measure preventing freedom of movement, but it also encourages the state to create institutional guarantees for the freedom of movement in order to prevent discriminatory practice.[373] According to the opinion of the Human Rights Commission within the Constitutional Court of BiH, for establishing that there is a violation of freedom of movement it is not necessarily required that a measure should have a discriminatory character. It is sufficient that the limiting measure burdens one group more than another even if such differential treatment would not result in a discriminatory factual state.[374]

367 Also CH/02/12468 *et al*., paragraph 224.
368 Compare, U 68/02, paragraphs 40 and 44.
369 Compare, for instance, the Law on the System of Indirect Taxation, *OG of BiH*, No. 44/03.
370 Compare, U 14/04, paragraph 30; U 5/98-II, paragraph 29.
371 AP 792/06, paragraph 14; U 68/02, paragraph 44.
372 Compare, once again, CH/98/375 *et al*., paragraph 1204 *et seq.*, with regards to payment of "old foreign currency savings".
373 U 68/02, paragraph 43.
374 For instance, see CH/98/375 *et al*., paragraph 1204.

Abolition of customs duties in the trade business between the Entities is a prerequisite for the creation of a single market. Therefore, it is not only that customs duties have been forbidden, but it also includes all other restrictions in the turnover of goods within the state, which might be imposed by the State or by any other lower level of authority. The same rule applies to the restrictions concerning quantity or any other measure that would have such an effect, including all discriminatory levies or practices.[375] In this respect, it is irrelevant whether the legislative authority,[376] the administration[377] or the judiciary[378] are responsible for restriction of free movement. When it comes to excises on sale, if it happens that both the seller from one Entity and ultimate purchaser from the other Entity are obliged to pay excise on the same goods, it will mean that a prohibited administrative measure relating to restriction of goods' movement is in place. This rule applies even when the seller, by submitting proof that the excise was paid by the purchaser, is entitled to make a request for return of the paid excise. The excise should be paid by the ultimate consumer. Therefore, it is forbidden to request payment of excises from the seller who sells his goods in the other Entity.[379] Every person, through the ordinary judiciary, may reach the decision granting him the exercise of the right to freedom of movement for that is a **directly applicable right**.[380]

E. Capital (Article I.5)

Capital. The capital of Bosnia and Herzegovina shall be Sarajevo.

Even after the signing of the Dayton Agreement, Sarajevo continued to remain the capital of Bosnia and Herzegovina. Sarajevo has always been the capital and also the political, administrative and cultural centre of the former Republic of Bosnia and Herzegovina. At the same time, Sarajevo is the capital of the Federation of BiH, which is one of the Entities (Article 4 of the FBiH Constitution), and the capital of the Canton Sarajevo, which comprises 9 municipalities (of which four are the municipalities of Sarajevo City). This administrative-territorial division was agreed upon in the Washington Agreement of 1 March 1994. Sarajevo is the largest city in BiH with its 304,000 inhabitants (according to data from 2006).

375 U 68/02, paragraph 41.
376 U 14/04.
377 U 27/03.
378 AP 792/06.
379 68/02, paragraph 46.
380 U 27/03.

As a capital, Sarajevo is the main seat of the executive power. Moreover, all the constitutional authorities are seated in Sarajevo: the Parliamentary Assembly, the Presidency, the Standing Committee on Military Matters, the Constitutional Court and the Central Bank. Most of the State institutions are situated in Sarajevo, so the Court of BiH and the High Judicial and Prosecutorial Council have their seats in the capital. In meeting the aspirations that common institutions be more widely distributed in other parts of the country, the Indirect Taxation Administration[381] has been seated in Banja Luka, the capital of the Republika Srpska.

F. State symbols (Article I.6)

Symbols. Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by its Presidency.

Bearing in mind the manner in which the Constitution was made, it is not a surprising fact that efforts to define the state symbols had failed in Dayton. The signatory parties agreed that the authorities for making decisions on symbols shall be vested in the Parliamentary Assembly provided that the decision is confirmed by the Presidency.

For years the members of the Parliamentary Assembly were not able to reach an agreement about the common state symbols, so on 3 February 1998 the High Representative simply imposed the symbols.[382] The same happened with the state hymn. The High Representative imposed it by issuing his Decision on Imposing the State Hymn of BiH.[383] In addition to the design of flag, the design of the coat of arms and the melody of the hymn, the mentioned laws have also regulated the use of those symbols.

No agreement has been reached on the lyrics of the hymn so far. That is indicative of the lack of integrative force in the State and speaks volumes

381 *OG of BiH*, No. 89/95.

382 Decision on Imposing the Law on the Flag of BiH, *OG of BiH*, Nos. 1/98, 19/01 and 23/04. Pursuant to the above decision, the flag shall have the following design: there is a yellow triangle on the blue background (blue colour is the colour of the Council of Europe), along whose hypotenuse there are nine little white stars of which two are half stars. The blue colour symbolizes the membership in the Council of Europe, the yellow triangle symbolises the state territory whose corners represent three constituent peoples (Bosniaks, Croats and Serbs). The white stars symbolise Europe.
The Law on the Coat of Arms of BiH, *OG of BiH*, Nos. 8/98, 19/01 and 23/04. The coat of arms of Bosnia and Herzegovina is similar to the flag, but it has the shape of a coat of arms.

383 *OG of BiH*, Nos. 19/01 and 17/04.

about that issue. The state symbols, such as the flag, the coat of arms and the hymn, including state holidays,[384] are usually a part of the state's identification, *i.e.*, of its state related identity. As to the former state symbols which were accepted after the Republic of Bosnia and Herzegovina had promulgated its independence (the white flag and coat of arms with lilies), the Serb and Croat representatives in the Parliamentary Assembly refused to accept them, although, from the historical point of view, those symbols have no features that would be considered exclusively Bosniak features.[385] The flag and coat of arms, whose noticeably neutral and perhaps sterile content was purposely chosen, were not particularly accepted. In a situation where at least three different peoples exist, or the peoples having the feelings of such affiliation, and where a common unifying identity is still missing such as, for instance, the identity of the European Union, it is almost impossible to reach an agreement about symbols of such a lacking identity. If we take into account that the identity is largely defined as distinctiveness in relation to other identities, then it is not surprising that the groups feeling closer to the neighbouring countries across the state border do not expect much benefit from the union, which they definitely did not join voluntarily. Moreover, during the decades under Tito's regime, no strong BiH identity was developed, which would be different from the identity of other socialist Yugoslav republics and the reason was the lack of any identification feature – either unifying ethnicity, economic, social or political unity. If such an identity had ever existed in the history of the republic, it was neutralised in the ethnic conflicts of the world wars.

This fear of any possible integrative feature of the new Bosnia and Herzegovina, except for the formal symbols such as the flag, coat of arms and hymn, is also related to other less important state symbols, such as registration plates, bank notes[386] and passports.[387]

384 Bosnia and Herzegovina still has no Law on State Holidays. This is also related to the lack of will to reach an agreement. Therefore, from the constitutional aspect (Article 2, Annex II to the Constitution), the regulations that were in force at the time of the former Yugoslavia and RBiH are still applicable, more precisely: the Law on State Holidays (*OG of SFRY*, No. 6/73; *OG of RBiH*, Nos. 2/92 and 13/94), Law on declaring 6 April as a day of international recognition of the Republic of Bosnia and Herzegovina (*OG of RBiH*, Nos. 8/94 and 13/94), Law on declaring 1 March as a day of independence of the Republic of Bosnia and Herzegovina (*OG of RBiH*, No. 9/95), and Law on declaring 25 November as a day of statehood of the Republic of Bosnia and Herzegovina (*OG of RBiH*, No. 9/95). It is not surprising that the above holidays are not observed in the Republika Srpska.

385 As claimed by *S. Tihic*, the former Bosniac Member of Presidency; compare with U 4/04, paragraph 20.

386 See Decisions of Bonn Conference on Implementation of Peace in BiH of 10 December 1997, p. 4, (available at: <www.ohr.int/pic/default.asp?content_id=29660>).

387 See Article 3 of the Law on Amendments to the Law on Travelling Documents of BiH, *OG of BiH*, No. 27/00.

G. Citizenship (Article I.7)

7. Citizenship

There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that:

a) All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.

b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

c) All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly.

d) Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence.

AP 190/02 J. R.	20040723
AP 3114/06 Zvjezdan Begić	20070116
AP 746/07 Imad al-Husin	20070405
CH/02/8679 *et al*.-A&M	20021011
CH/02/8961 Ait Idir	20030404
U 5/98-III "Izetbegović III – constituent peoples"	20000914 *OG of BiH*, No. 23/00

The basic constitutional-legal determiners of the citizenship provisions reflect an ambivalent position of the citizens of Bosnia and Herzegovina when it comes to their loyalty to the state. Except for **citizenship** – "being a citizen" of Bosnia and Herzegovina (*citizenship of Bosnia and Herzegovina*) – the entity citizenship (*citizenship of each Entity*) has been recognised by the BiH Constitution. All citizens of either Entity are thereby citizens of Bosnia and Herzegovina.[388]

388 Article I.7(a) of the BiH Constitution.

Unlike Article 15 of the United Nations Universal Declaration of Human Rights, none of the other conventions that are referred to in Annex 1 to the BiH Constitution or in Annex 6 to the GFAP guarantee any "right to citizenship" as such. The prohibition of revocation of citizenship for deportation purposes was intentionally left out of Additional Protocol No. 4 to the ECHR.[389] According to the opinion of the Human Rights Chamber, such a ban does arise from the context of the prohibition of abuse of rights under Article 17 of the ECHR. The Human Rights Chamber established that if the contracting parties would be allowed to revoke citizenship only for the purpose of subsequently deporting the concerned person, the prohibition of deportation would be just a fine word on a piece of paper. A measure whose clear and only aim is to evade the prohibition has the same meaning as a direct violation of prohibition.[390] However, if a person submits an application for citizenship, it does not mean that the competent state bodies are not authorised to conduct the deportation procedure.[391] The citizenship related disputes, as constitutional issues, fall within the exclusive competence of the Constitutional Court.[392]

Article I.7 of the BiH Constitution should be interpreted in the context of special rights guaranteed under the Additional Protocols to the ECHR.[393]

389 Compare, CH/02/8679 *et al*.,-A&M, paragraphs 149, 191.

390 Compare, CH/02/8679 *et al*.,-A&M, paragraphs 192-198, wherein the Human Rights Chamber came to the conclusion that when the public authorities were revoking citizenship their only aim was deportation of the applicants.

391 AP 3114/06, paragraph 16.

392 AP 190/02, paragraph 21.

393 About the prohibition of deportation of nationals and aliens under Article 3 of the Additional Protocol No. 4 of ECHR and Article 1 of the Additional Protocol No. 7 to the ECHR, see "19. Expulsion of nationals and aliens (Articles 3 and 4 of Additional Protocol No. 4 to the ECHR and Article 1 of Additional Protocol No. 7 to the ECHR)", p. 442.

Article II – Human rights and fundamental freedoms

1. Human Rights:

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

2. International Standards

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

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a) The right to life.

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

c) The right not to be held in slavery or servitude or to perform forced or compulsory labor.

d) The rights to liberty and security of person.

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

f) The right to private and family life, home, and correspondence.

g) Freedom of thought, conscience, and religion.

h) Freedom of expression.

i) Freedom of peaceful assembly and freedom of association with others.

j) The right to marry and to found a family.

k) The right to property.

l) The right to education.

m) The right to liberty of movement and residence.

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.

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.

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.

7. International Agreements

Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

8. Cooperation

All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

A. Clarification attached to Article II of the BiH Constitution

1. Introduction

A wide-ranging scope of protection of human rights and fundamental freedoms, due to the war experience, was commonly accepted as a basic prerequisite for a new, promising beginning.[394] If we take into account some flagrant violations of fundamental human rights during the armed conflict, someone might be surprised by the fact that the conflicting parties had accepted this concept immediately. This illusive change of consciousness was not without a hidden agenda: on the one hand, the participants thought that if they show an alleged interest for the protection of human rights, they would have a tactical advantage in the negotiations. On the other hand, all of them potentially had a large interest to protect *their* ethnic group in the territory ruled by some other group.[395] This negotiation strategy clearly indicates that the war power-holders were making calculations aimed at protecting human rights only when it was not in collision with their more important interest – the preservation of power. It was most probably clear to all the participants that formal recognition of human rights on the Paris document is nothing but an empty promise – concerning "the old personnel" at least, and that the real difficulties were to be faced in the process of fulfilling the undertaken obligations. Given the committed injustices, the provisions on the applicability of ECHR and mechanisms for the protection of human rights agreed upon in Dayton – which are sometimes declared as inappropriate for building peace in Bosnia and Herzegovina – will indeed become inappropriate unless, as a first task, the consequences of the most cruel violations of fundamental rights are eliminated for the purpose of creating a foundation for normal functioning of the human rights instruments declared applicable in Bosnia and Herzegovina.[396]

2. International protection of human rights and freedoms

Taking into account the aforementioned, some efforts have been made for the mechanisms of the protection of human rights in the reconstruction phase to be shaped in a way to be more efficient and more independent from the

394 *Szasz*, 1995, p. 252; *Bekker*, 1996; *Nowak*, 2001.
395 *Szasz*, 1995a, p. 397.
396 *Sadiković*, 1999, p. 20 *et seq*.

national/nationalistic influence.[397] In order to make a clear distinction between traditional communist positions on the protection of human rights, the contracting parties were suggested to follow the proved models of western countries. Taking the Preamble as a starting point, we can see that the BiH Constitution contains numerous provisions on the protection of human rights and fundamental freedoms referring to international law. In the first line of the Preamble an explanation is given that in making the Constitution, the Framer of the Constitution relied on the principles of the protection of human rights, liberty and equality. Moreover, the Framer of the Constitution was guided by the Purposes and Principles of the Charter of the United Nations,[398] and was determined to ensure full respect for international humanitarian law.[399] The Framer of the Constitution was inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as by other human rights instruments.[400] Disregarding the fact that the Preamble points to different documents, the mere text of the BiH Constitution contains a series of constitutional principles and elements of state organisation similar to those that could be found in the constitutions of western democracies. By the provision on applicability of ECHR and the other 15 international conventions, the BiH Constitution, in its Annex 1, "**constitutionalises**" the whole package of human rights and fundamental freedoms of different kinds and different scope. Admittedly, the Constitution of BiH thus follows the trend of the Middle and Eastern European countries, which, in making their constitutions, relied on the proved western models in order to legitimise state power after the fall of socialism and meet the standards for accession to, for instance, the Council of Europe or the European Union.[401] However, the BiH Constitution shows a remarkable degree of internationalisation, which can be found in both its substantive-legal and institutional meanings.

A **basic regulation** of the post-Dayton protection of human rights is incorporated in **Article II of the BiH Constitution**. Pursuant to paragraph 1 of the said provision, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental

397 About the more specific reasons and goals of the Dayton Agreement's provisions on the protection of human rights, compare, *Szasz*, 1996; *Sloan*, 1996, wherein mutual effects and connection of mechanisms provided for under different annexes have been explained; compare also with realistic prognosis of *Pajić*, 1998.

398 Fifth line of the Preamble.

399 Seventh line of the Preamble.

400 Eighth line of the Preamble.

401 Compare, *Hartwig*, 1993.

freedoms. That was the purpose of establishing the Human Rights Commission under Annex 6 of the GFAP. Pursuant to Article II.2 of the BiH Constitution, the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina and shall have priority over all other law.[402]

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, and, direct their actions accordingly.[403] Article II.4 of the BiH Constitution, in conjunction with **Annex I to the BiH Constitution**, refers to numerous international agreements *to be applied in Bosnia and Herzegovina*. It is evident that relying on international standards in the field of protection of human rights is not any *per se* guarantee for the successful building of a democratic legal state. The constitutional principles of a legal state, democracy and protection of human rights have defined a necessary frame and made the required **instrumentalities** available, so that these values that are common in the western democracies are permanently established in the minds of the people and institutions of Bosnia and Herzegovina. The experiences of the transition countries of Middle and Eastern Europe, described by *Hartwig*,[404] have proved the aforementioned once again.

Internationalisation of the substantive law in the BiH Constitution and in other constitution-related annexes has been supplemented by the institutional and **procedural-technical internationalisation** of the Agreement on Elections (Annex 3 to the GFAP), Agreement on Human Rights (Annex 6 to the GFAP) in the form of the Commission for Real Property Claims under Annex 7 to the GFAP, as well as by the authorities of the High Representative under Annex 10 to the GFAP. Outside the frame of Annex 4, international participation was also provided for in the form of the Commission to Preserve National Monuments, which was established under Annex 8 to the GFAP. When it comes to the BiH Constitution, we may finally conclude as follows: the international agreements which are incorporated in the Annex to the BiH Constitution are not only a kind of substantive-legal measure for the functioning of the state. Moreover, regardless of whether Bosnia and Herzegovina has ratified the instrumentalities under Annex I, the public authorities, pursuant to Article II.8 of the BiH Constitution, are obliged to cooperate with the bodies supervising the implementation of the mechanisms under Annex I, as well as with other organisations authorised by

402 About the disputable relationship between the BiH Constitution and the ECHR, see on p. 153.
403 Article II.6 of the BiH Constitution.
404 1993, p. 936 *et seq.*

the UN Security Council to protect human rights or international humanitarian law, and are also obliged to provide unrestricted access to those organisations. What might be characteristic for the constitutional practice of democratic countries is the appointment of international judges to the constitutional court of the respective state, *i.e.*, to the constitutional authority of a sovereign state and a member of UN.[405] Similar regulations are contained in Article II of the BiH Constitution, according to which the first Governor of the Central Bank shall be appointed by the International Monetary Fund.

a. Commission on Human Rights

Even after taking a quick look at the Constitution of BiH, it becomes clear that special importance has been given to the protection of human rights in the Peace Agreement. Annex 6 to the GFAP – Agreement on Human Rights – is therefore of crucial importance. In that agreement the contracting parties have undertaken to ensure the highest level of internationally recognised human rights and fundamental freedoms.[406] As a support to the fulfilment of those obligations and as a supplement to the mechanisms provided for in the BiH Constitution and Annexes to the GFAP, the Commission on Human Rights was established, consisting of international representatives as well.[407] This Commission should not be mistaken for the *Human Rights Commission within the Constitutional Court of BiH*, which originated from the Human Rights Chamber. The commission established pursuant to Annex 6 consisted of two parts: the Office of the Ombudsman and the Human Rights Chamber and it relied on the model applied in Strasbourg (Commission-Court) and was designed to be a unique institution, but in practice it transformed into two divided organisational institutions.[408]

In some earlier proposals for the constitutional arrangements (pre- Dayton), except for the Ombudsman, there were talks about establishing a human rights court as a last judicial instance to which all other state courts would be subordinated (including the Constitutional Court) when it comes to the field of human rights. There was a plan for this court – until such time as Bosnia and Herzegovina is admitted to the Council of Europe – to be consisted of mainly international judges and to function only up until the time of BiH admission

405 About these details, see: “B. Article VI.1 (composition)”, p. 674.

406 Article I of Annex 6.

407 Compare, Article II.1 of the BiH Constitution.

408 About the Human Rights Commission, and particularly, about the Human Rights Chamber, except for the informative annual reports (*Annual Reports*, *HRC*, 1998-2003) see also, *Küttler*, 2003, *Woischnik*, 2004; *Blumenstock*, 2001; *Decaux*, 2001; *Nowak*, 2001a; *Berg*, 1999; *Gemalmaz*, 1999; *Neussl*, 1999; *Nowak*, 1998a; *Rauschning*, 1998; *Nowak*, 1998, *Nowak*, 1997; *Aybay*, 1997.

to the Council of Europe. However, in Dayton, both institutions were excluded from the direct constitutional framework and were transferred to Annex 6. As to Annex 4, the consequences of this exclusion were not precisely explained, and the same occurred with Annexes 3 and 7, which are also very important to the Constitution,[409] and this caused conflicts over the competencies between the authorities referred to in different annexes. In the end, the plan relating to the character of the court as a last judicial instance for human right issues was given up as well. Instead, a widely placed norm on competencies was introduced.[410]

b. Human Rights Chamber

(a) Composition (Article VII of Annex 6)

Unlike the Constitutional Court, international judges of the Human Rights Chamber made up the majority and the ratio was 8:6. Out of the six domestic judges, four were appointed by the Federation of BiH and two by the Republika Srpska. However, Article VII of the BiH Constitution did not precisely define the internal state authority in charge of appointing the judges. The international judges were appointed by the Committee of Ministers of the Council of Europe in agreement with the contracting parties under Annex 6. The Committee of Ministers was also appointing the President of Human Rights Chamber. All members of the Human Rights Chamber had to be distinguished lawyers possessing qualifications required for appointment to high judicial office. They were appointed for a term of five years and could be reappointed.[411] The Members of the Chamber appointed after the transfer of responsibilities to BiH, pursuant to Article XIV of Annex 6, were to be appointed by the Presidency of Bosnia and Herzegovina.[412]

> Article VII.2 explicitly refers to Resolution (93)6 of the Committee of Ministers of the Council of Europe dated 9 March 1993. Therein, the Council of Europe envisages the procedure which is to be followed by the European non-member states seeking assistance for setting up a court or similar judicial body for the control of respect for human rights within its internal legal system. The mandate of the said judicial body will be limited until the respective state's accession to the Council of Europe.[413] At the request of a European non-member state, the Committee of Ministers may, after consultation with the *Strasbourg* authorities, appoint specially

409 *Szasz*, 1996, pp. 305, 310; *Szasz*, 1995, p. 251 *et seq*.
410 *Szasz*, 1995a, p. 401 *et seq*.
411 Article VII.3.
412 Article VII.4.
413 Article 5 of the Resolution.

qualified persons to such a judicial body.[414] The number of foreign experts must be higher than the number of domestic experts.[415] The said judicial body shall, *inter alia*, apply the substantive law from the ECHR.[416]

(b) Competencies

The main regulation on the competencies of the Human Rights Chamber is Article VIII.1 of Annex 6,[417] in conjunction with Article II.2 of Annex 6.[418] The Human Rights Chamber was assigned a special task to establish whether there were violations of human rights and freedoms according to the ECHR, which are evident or which are alleged to have been committed, as well as whether there was discrimination in the application of the rights safeguarded under the international conventions attached to Annex 6, if the contracting parties are to be held responsible for those violations. Any person could address the Human Rights Chamber directly or through an application submitted to the Ombudsmen. Except for individuals, the contracting parties, non-governmental organisations or group of persons could also claim a violation of the rights under Article II.2 of Annex 6. First, the Human Rights Chamber was deciding on the admissibility of an application and was giving particular priority to allegations of especially severe or systematic violations.[419] The proceedings used to be completed either by an amicable resolution of the matter, a report – which happened only in one case (CH/97/35) – or by a decision with the

414 Article 1.
415 Article 2.
416 Article 3.
417 Article 8 of Annex 6 reads:
"Jurisdiction of the Chamber: The Chamber shall receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II."
(The text of the above provision was taken over from the official web page of the Human rights Chamber: <www.hrc.ba>).
418 Article II.2 of Annex 6 reads:
"2. The Office of the Ombudsman and the Human Rights Chamber shall consider, as subsequently described:
(a) alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or
(b)alleged or apparent 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 arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ."
419 Article VIII.2 of Annex 6.

statement of reasons on the existence or non-existence of the violation of obligations under Annex 6. The Human Rights Chamber was authorised to issue a measure with the purpose of correcting the violation (remedies) or a measure on compensation for damage.[420] The decisions of the Human Rights Chamber – with an exception to the internal revision procedure (Article X.2) – were *final and binding*, and the contracting parties were obliged to enforce them in accordance with Articles XI.3 and 6.[421]

Applications submitted to the Human Rights Chamber were an accurate reflection of the situation faced by the entire nation after the war: there were numerous claims regarding pre-war properties, which the applicants – very often against the will of the local population of other ethnic groups – wanted to repossess. Another essential complexity was related to the cases of applicants' unsuccessful attempts to be reinstated to their previous employment positions. The reconstruction of devastated religious facilities was also the subject of the Human Rights Chamber's decisions, as were the unsuccessful attempts of owners of foreign currency savings who were trying to get their savings back, which they had deposited with domestic banks before the war. Frequently, there were the cases – and what else could be expected – where the conflict between different ethnic or religious groups was also of certain significance. That was manifested in the manner in which the members of other ethnic groups were treated and such treatment was either discriminatory or in violation of their human rights. Thus, the Human Rights Chamber dealt with cases of unlawful deprivation of liberty, threats of execution, torture and inhuman treatment, and there were also cases related to missing persons, forced labour, unfair trials, irregularities in the process of privatisation of socially owned property and nationalisation, including cases where the applicants wanted to exercise their right to freedom of opinion and freedom of association. In several cases, the Human Rights Chamber had to deal with the activity of the international community in Bosnia and Herzegovina.

(c) Legal nature

The Human Rights Chamber found itself in a tight spot between international law and domestic law. The Human Rights Chamber was established by the force of an international agreement. Its legal basis has been mostly defined under Article VI of the General Framework Agreement for Peace in Bosnia and Herzegovina and agreements on human rights under Annex 6 to the GFAP, which is its integral part. Nevertheless, the (contracting) Parties to Annex 6 are only

420 Articles IX and XI.1.
421 Details, *Nowak*, 2001, paragraph 11 with further references to *Dörr*, 1997, pp. 169-171.

the internal subjects: the State of BiH, the Federation of BiH and the Republika Srpska. The budget of the Human Rights Chamber was to be defined by the contracting parties under Annex 6 and financed by Bosnia and Herzegovina;[422] however, in practice the international community had to finance almost 100% of the budget of the Human Rights Chamber.

> It took a whole year and the President of the Human Rights Chamber had to step aside before the international donors showed readiness to finance the Chamber.[423] Even in the years to come the donations were not sufficient to cover the planned budget of the Human Rights Chamber, and, to some extent, donations were late.[424] That was a reason for a feeling of insecurity in the course of planning activities.[425] The Human Rights Chamber was mostly financed by the European Commission and the United States.[426] Despite the intense efforts of the OHR to urge Bosnia and Herzegovina to finance the Human Rights Chamber at least partially, the contribution of the State was insignificant. As late as 2002, Bosnia and Herzegovina gave a significant contribution with respect to financing the Human Rights Chamber: 400,000 KM.[427]

The mixed composition of the Human Rights Chamber has already been discussed. Article XIV of Annex 6 ("Transfer") refers to the legal nature of the Human Rights Chamber, stipulating that five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above. This text can, indeed, be interpreted in a way to understand that the Commission – and consequently the Chamber – has been designed as a permanent institution, and that, after the transitional phase, only its appearance and holders of authorities will change, which means that the Chamber and Commission would not fully disappear. The arguments supporting this statement are contained in the already mentioned Article VII.4 to Annex 6. Pursuant to the above Article, the Members appointed after the transfer of responsibilities to the domestic institutions, described in Article XIV of Annex 6, shall be appointed by the Presidency of Bosnia and Herzegovina. This regulation implies that the Chamber will continue to exist without its international judges.[428]

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422 Article III.2 of Annex 6.

423 *HRC*, 1998, p. 17 *et seq*.

424 *HRC*, 1999, p. 11 *et seq*; *HRC*, 2000, p. 13; *HRC*, 2002, p. 5.

425 *HRC*, 2002, p. 20.

426 Compare, the list of donors and donations in the Annual Reports of the *HRC*, 1998-2003.

427 *HRC*, 2000, pp. 4, 13; *HRC*, 2002, p. 5; *HRC*, 2003, p. 23; about the whole topic, see also, *Nowak*, 2001a, p. 785 *et seq*.

428 Also, *Nowak*, 2004, p. 17.

Therefore, the Human Rights Chamber was partly perceived as an internal-state judicial authority of *sui generis character*; and, as claimed by *Nowak*, by force of its mixed legal foundation, it is neither a constitutional nor an international court.[429] The "mixed judiciary" was also mentioned, the so-called *juridiction mixte*.[430] The fact that the Human Rights Chamber is a type of *court* has never been challenged.[431] The issue of the legal nature of the Human Rights Chamber was finally addressed by the European Court in 2006. In *Jeličić v. Bosnia and Herzegovina* (Decision on Admissibility of 15 November 2005), the European Court argued that the Human Rights Chamber had certain international elements, such as, for instance, the fact that the enforcement of decisions of the Human Rights Chamber have been supervised by international organisations on the ground of the international nature of Annex 6. Nevertheless, the European Court further claims that the "national" elements (meaning the internal-state elements) were prevailing, so, in conclusion, it is a domestic court which is a part of the legal system of Bosnia and Herzegovina. The formal obligation of the State of Bosnia and Herzegovina to finance the Human Rights Chamber[432] could be viewed as the aforementioned "national" element. Moreover, only Bosnia and Herzegovina, and not Croatia or Serbia, was authorised to extend the mandate of the Human Rights Chamber until 31 December 2003. Also, the European Court further claims that there was no host agreement between the Human Rights Chamber and Bosnia and Herzegovina, and the mandate of the Human Rights Chamber was not any kind of international obligation, but it was exclusively the matter of Bosnia and Herzegovina and its Entities. Despite its mixed composition and international presence in the Human Rights Chamber, the European Court concluded that the Human Rights Chamber was not a mixed international court.[433]

Classifying the Human Rights Chamber into the category of domestic courts is also an important issue because of the possibility for its decisions to be challenged before the European Court. As to the point that different standpoints might be advocated for in regards to this matter, there is the fact that the Venice Commission "underwent change" concerning its opinion about the character of the Human Rights Chamber. Thus, in 1998, in one of its reports, the Venice Commission did not describe the Chamber as a "court" of Bosnia and Herzegovina. However, the Commission, in its capacity as *amicus curie* in the mentioned proceedings before the European Court, described the Human

429 *Nowak*, 2004, p. 3 *et seq*.

430 *Decaux*, 2000, p. 709.

431 Compare, first, with *Küttler*, 2003, p. 235; also *Nowak*, 2004, p. 4, *Berg*, 1999, p. 1 *et seq.*

432 Article III.2 of Annex 6.

433 Compare, ECtHR, *X and X v. Germany*, Decision of Admissibility of 10 June 1958, Yearbook 2, p. 256.

Rights Chamber as a "domestic" or "national" court. In 1998, a question was raised as to whether the Constitutional Court is entitled to review the decisions of the Human Rights Chamber, as "a court in Bosnia and Herzegovina".[434] There were justified reasons for avoiding the said reviews and the Venice Commission opted for the opinion stating that both courts should operate simultaneously and at the same level (The Human Rights Chamber never formally accepted this opinion). However, the motivation and the policy of the European Court (including the Venice Commission now) in the field of human rights, whose aim was that the European Court keeps the right to review the wrong decisions of the Human Rights Chamber, should not be fully disregarded.

(d) Caseload

The Human Rights Chamber commenced functioning at the end of March 1996.[435] In its initial phase the Chamber had to operate with extremely limited resources and only after the caseload had started to increase was an administrative- and expertise-base established to facilitate the work. Just prior to the end of its mandate, the Human Rights Chamber was operating with 55 domestic and international judicial experts (lawyers). Although the contracting parties, pursuant to Annex 6, were fully responsible for the financing of the Human Rights Chamber, the representatives of the international community realised very soon that the Parties referred to in Annex 6 lacked the political will to give support to the Chamber. The influx of cases was increasing and reached such a scale that the Chamber was no longer able to deal with it by means of the resources at its disposal.

> In the period between March 1996 and December 2003, the Human Rights Chamber registered a total of 15,169 applications, out of which 6,243 applications were finalised, amounting to 2,619 decisions of a different nature; there were 1,238 decisions on admissibility, 239 decisions on admissibility and merits or only on merits, 12 decisions on compensation for damages, 152 decisions on admissibility of requests for review and 9 revision decisions; there were also 959 strike-out decisions (erasing of applications) and 10 decisions of other kinds. On 31 December 2003, there were 8,926 cases pending.[436]

(e) "Implementation of Annex" 6 to the GFAP

Eight years after Dayton we may ascertain the fact that the components of the Commission on Human Rights experienced different destinies and that intense

434 Compare this *syntagme* with Article VI.3(b) of the BiH Constitution.
435 With reference to the aforesaid, see the Annual Reports of the Human Rights Chamber, 1998-2003.
436 *HRC*, 2004, p. 26.

discussions have been held for several years in this regard. The institution of the Ombudsmen, as early as 2001, was transferred to the jurisdiction of Bosnia and Herzegovina as required by the Law on the Human Rights Ombudsman for Bosnia and Herzegovina,[437] and became a unique institution. This institution comprises three persons performing duties of ombudsmen and, during a transitional period, the international ombudsman was appointed to a term of office of only three years.[438]

Contrary to the above, pursuant to Article XIV of Annex 6, after the term of office of the international judges had been re-extended to an additional three years by the agreement of the contracting parties under Annex 6,[439] the Human Rights Chamber was transformed into the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina. Despite the name, the Commission was independent and it was not a part of the Constitutional Court, neither in institutional nor organisational terms. It was comprised of 5 former judges of the Human Rights Chamber and there were two international judges among them until the end of 2004. The Commission primarily dealt with the pending applications the Human Rights Chamber did not manage to resolve. The applications arriving after 1 January 2003 were dealt with solely by the Constitutional Court.

The agreement on the gradual closing of the Human Rights Chamber is associated with numerous issues, which are impossible to be elaborated in detail in this book.[440] It is almost beyond any doubt that the Human Rights Chamber was conceived as a permanent institution.[441] However, it seems quite possible that the contracting parties subsequently changed their conception of Annex 6. As counter-arguments, there are the allegations that the amendments to the Agreement on Human Rights required the consent of the Parties to the General Framework Agreement for Peace - GFAP (Croatia and former Serbia and Montenegro). However, such a conclusion cannot be drawn from the GFAP, neither does it make any sense to associate the amendment to this agreement, which only has effect on the interior structure of state, with the consent of third parties. On the other hand, there are arguments that amending Annex 6 would be possible only if simultaneous amendments to the Constitution take place, since in Article II.1 of the Constitution reference has been made to

437 *OG of BiH*, No. 32/00.

438 Critical view of the abovementioned, see, *Nowak*, 2004, p. 18.

439 *Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina*; available at the Internet page of the Human Rights Chamber: <http://www.hrc.ba/bosnian/home.htm>).

440 Compare, in that regard, the justified critical stand-points of: *Nowak*, 2004, p. 19.

441 Compare, above, p. 118.

Annex 6. In technical terms, such a position is unsustainable: to be precise, Annex 6, in formal terms, is an independent international agreement, whose amendment, under strict terms, is subject to Article 56 of the Vienna Convention on the Law of Treaties.[442] However, even from the systematic point of view, such a demand seems to be exaggerated. In that case all the annexes to which the BiH Constitution refers should be viewed as constitutional law, not only in substantive terms (which might be considered justified) but also in formal terms. This view is supported by the fact that the said Annexes (for instance Annexes 3, 6 and 7), unlike the previous pre-Dayton proposals of the Constitution (which included the direct annexes to the Constitution), were separated from the BiH Constitution and placed next to it. In other words, they were placed in parallel with the Constitution and other Annexes to the GFAP. Still, regardless of whether the chosen arrangement for closing the Human Rights Chamber was consistent with the Constitution and international law or not, a critical view of such an arrangement is understandable and justified.[443] And even more so, there were some more convenient and more transparent arrangements, but due to the zealous struggle and because of alleged financial difficulties those arrangements have never been addressed in a serious and competent manner.

The mandate of the Human Rights Commission within the Constitutional Court of BiH was originally supposed to last until 31 December 2004 and the goal was to finalise all cases registered by the Human Rights Chamber which could not be finalised by 31 December 2003. Despite cooperation with the Constitutional Court and despite the technical and personnel support of the Constitutional Court, that goal was set too ambitiously. By the end of 2004, the Human Rights Commission within the Constitutional Court of BiH adopted 3,230 decisions out of 8,926 existing applications.[444] Afterwards, in 2005, by the new *Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina*,[445] its mandate was extended for an indefinite period of time for the purpose of finalising the 5,696 pending proceedings. The "New" Commission comprised of three domestic members, the former judges of the Human Rights Commission and two national judges of the Constitutional Court. The First Panel, which comprised of the former judges of the Human Rights Commission, was to decide on the admissibility of cases. The Panel Commission, in which two national judges of the Constitutional Court were being rotated every second month, was deciding on the merits of the cases.

442 Szasz, 1995a, p. 403.
443 Compare, Nowak, 2004, p. 19.
444 *HRC*, 2006, p. 22.
445 Unpublished, authors' archive.

Between 1 January 2005 and 31 December 2006 an additional 5,101 cases were finalised.[446] The remaining 595 cases were transferred to the jurisdiction of the Constitutional Court by an additional *Agreement pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina*. The applications submitted to the Human Rights Commission within the Constitutional Court of BiH continued to be dealt with pursuant to Annex 6, but it should be noted that the division into panels was carried out as it was the case with the second Human Rights Commission within the Constitutional Court of BiH, but this time it was operating according to new procedural rules.[447] By the end of the first half of 2007, the Constitutional Court managed to resolve all pending cases of the Human Rights Commission. Thus, in mid 2007, Annex 6 was finally implemented and the Human Rights Chamber ceased to exist; in other words, it was incorporated into the Constitutional Court of BiH.

3. Overcoming the past through the application of the ECHR?

After every armed conflict which has given rise to a great number of victims and extensive material damage, a central element is the overcoming of events in order to establish permanently peaceful relations. Overcoming the past brings each post-conflict society a difficult task. This applies in particular to Bosnia and Herzegovina for two reasons: on the one hand, the conflict divided the society which, at the end of the conflict, under international pressure and against the will of the majority of its population, following the conclusion of a peace agreement characterised by far-reaching compromises, was forced into coexistence as single state. On the other hand, these peace agreements contain a great many instruments for the restoration of permanent peace, but they do not contain anything suggesting who carried substantial responsibility for the breakout of the conflict and its consequences. Historical truths are necessary in order to overcome events in a well-founded manner, and the painstaking victory over historical imprecision and lies is yet to come.

Experiences in other post-conflict societies show that a recipe for the *one and only* ideal mechanisms for overcoming the past cannot be patented. Between the general amnesty without any institutional analysis and unconditional criminal prosecution, as two extremes – more or less successfully – mixed solutions have been applied, such as setting up various commissions for the establishment of

446 *HRC*, 2006, p. 22.
447 *OG of BiH*, No. 38/07, available at the website of the Human Rights Commission within the Constitutional Court of BiH: <http://www.hrc.ba/commission/bos/default.htm>.

the truth, partial amnesties and criminal tribunals for the criminal prosecution of persons bearing responsibility. Upon the establishment of the ICTY in The Hague, the path for the overcoming of the wartime consequences in Bosnia and Herzegovina has been paved to a large extent. The role of the ICTY was once again emphasised in Dayton and its position in relation to the signatories of the agreement from Bosnia and Herzegovina was reinforced.[448] Continuous discussions on the founding of a commission for the establishment of the truth have not yielded any results as yet.[449] Instead, the international community still had confidence that criminal prosecution would have an appropriate impact: by setting up the War Crimes Section of the Court of Bosnia and Herzegovina, in the spring of 2005, "nationalisation" of this process began. This special chamber, the judicial composition of which is in part international,[450] upon the closure of the ICTY in 2010, will continue prosecuting war crimes committed during the war for some time to come.[451]

Viewed in the context of overcoming the past, the role of the BiH Constitutional Court and the Human Rights Chamber for BiH appears, at first sight, limited, especially if overcoming the past is considered in the classical sense – the *ideal* overcoming of the injustice done. If one expands this term to the elimination of the actual consequences of the armed conflict, that is to say, restoration and/or compensation, then, according to the linguistic meaning and interpretation of the General Framework Agreement for Peace in BiH, only, possibly, the Commission for Real Property Claims, established under Annex 7, will have the function and task to reinstate the original condition. Contrary to this, due to the time constraints of competences (*ratione temporis*) to the violations committed after the entry into force of the Dayton Agreement, the BiH Constitutional Court and the Human Rights Chamber for BiH do not address *prima facie* the overcoming of the past in the narrow or broad sense.

448 See Article II.8 of the BiH Constitution.

449 *Gisvold*, 1998, discusses the arguments in favour of and against the founding of a commission for the establishment of the truth in Bosnia and Herzegovina.

450 In connection with the status of international judges and prosecutors, see three decisions of the High Representative which provoked strong controversial political reactions in the state (Decision on the extension of the mandate of the international member of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina and the appointment of Sven Marius Urke to execute that mandate; Decision enacting the Law amending the Law on the Prosecutor's Office of Bosnia and Herzegovina and ordering the authorities of Bosnia and Herzegovina to secure the fulfilment of conditions for the termination of the international presence by transferring the positions to the citizens of Bosnia and Herzegovina; Decision enacting the Law amending the Law on the Court of Bosnia and Herzegovina, all dated 14 December 2009, accessible at the Internet address: <http://www.ohr.int/decisions/archive.asp>). See, also, *Statements by HR/EUSR Valentin Inzko and members of the PIC Steering Board Ambassadors at the Press Conference in Sarajevo* of 14 December 2009, accessible at the Internet address: <http://www.ohr.int/ohr-dept/presso/pressb/default.asp?content_id=44275>.

451 See, *Lauth*, 2005.

However, despite the limitations of competences, the practice showed a completely different picture. In the area related to return problems, both courts adopted decisions that may serve as guidance, thereby significantly contributing to the *elimination of the consequences of the war*. Even more so, the BiH Constitutional Court and the Human Rights Chamber for BiH placed emphasis upon the ideal overcoming of the past in the narrow sense. The basis for this bridge leading up to the pre-Dayton period has two main aspects: first, both courts consider themselves competent to establish violations of human rights which, indeed, started before the date since which the *ratione temporis* competence has become effective, but they continued even after the mentioned date (*establishment of the so-called continued violations of human rights*). Second, in relation to such continued violations, the courts – not only in that context though – for the sake of a legal assessment of the facts of the case from the period after the takeover of the competences, used events taking place before the relevant date, and established facts in that sense (*the establishment of the truth*). Both constitute contributions towards the overcoming of the past. A significant element of this process is the establishment of the truth. If serious violators of human rights and freedoms deny, falsify or mitigate the events that took place, or present them as something harmless, the process of establishing the truth for victims will mean a continuation of suffering. The main task of the commissions for the establishment of the truth, as independent bodies, is precisely to bring to light the truth about disputed events, to establish them for future generations and to make them available to the public at large. Only when that happens, victims will perhaps be able to forget, or even to forgive; perpetrators will have to face the truth; and the entire society will be able to face the challenge and to commence the process of reconciliation based on the facts.

By continuing to establish violations of human rights and freedoms in the post-Dayton period, the BiH Constitutional Court and the Human Rights Chamber for BiH will indirectly offer to victims satisfaction for injustices done to them during the armed conflict. That, indeed, is not a primary objective of the decisions, since the legal assessment of actions and activities undertaken before the date of the takeover of the *ratione temporis* competences, as a rule, is not made. Nevertheless, this "side effect" of the establishment of continued violations in the pre-Dayton period must not be disregarded. To this end, in addition to the decisions on the so-called "laid-off" employees and the restoration of pre-war property ownership, it is necessary to mention the cases concerning missing persons.[452]

452 See below under "23. Employment related rights: Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights", p. 453.

In the context of overcoming the past, what could be even more significant is the establishment of facts related to the wartime events that would be relevant for the establishment of violations of human rights and freedoms from the period after Dayton. To that end, both the BiH Constitutional Court and the Human Rights Chamber adopted comprehensive conclusions that might serve as contributions to the general establishment of the truth about wartime events. The authority of mixed national and international independent judicial bodies – if you will – gives additional weight to the judicial establishment of the truth in the process of analysing and overcoming the past, due to the non-existence of other domestic instances with similar rights. In relation to this it is necessary, for example, to mention the decisions of the BiH Constitutional Court in Cases Nos. U 5/98 and U 19/01. In the decision adopted in Case No. U 5/98 the BiH Constitutional Court established statistical data related to the distribution of population in Bosnia and Herzegovina before the war and described consequences of the ethnic cleansing policy.[453] In the decision in Case No. U 19/01 the Court depicted one of the elements of this policy in the domain of employment.[454] To that end, in the jurisdiction of the Human Rights Chamber, first and foremost, it is necessary to state the decisions adopted in relation to the destruction of religious facilities[455] and the fate of the missing persons.[456] If the truth is to be told, the Human Rights Chamber, for the sake of establishing the facts of the case, also used the relevant judgments of the ICTY. However, by doing so, the Human Rights Chamber gave additional legitimacy and range of impact to the ICTY decisions.[457] Besides, by its orders the Human Rights Chamber obliged the Republika Srpska to establish the truth, thereby ordering the RS to carry out a "complete, clear, thorough and detailed investigation of events" which led to violations of Articles 3 and 8 of the ECHR (violations of positive obligations resulting from failure to give information as to the fate of the missing persons)[458] which the Human Rights Chamber established,[459] and to communicate the results of the investigation to the state and international organisations and institutions. In the decision adopted in the case of Srebrenica,

453 U 5/98-III, paragraph 86 *et seq*.

454 U 19/01, paragraph 4 *et seq*.

455 Compare with commentary on Article 9 of the ECHR, under "8. Freedom of thought, conscience and religion (Article 9 of the ECHR)", p. 364.

456 CH/01/8365 *et al*.-A&M [Srebrenica]; CH/01/8569 *et al*.-A&M [Foča]; CH/02/8879 *et al*.-A&M [Višegrad]; CH/02/9358 *et al*.-A&M [Vlasenica]; CH/02/10235 *et al*. [Bratunac]; CH/02/9851 *et al*.-A&M [Rogatica]; CH/02/10074-A&M [Travnik]; in relation to the mentioned problem area see also *Nowak*, 1998.b and *Nowak*, 2000, p. 15 *et seq*.

457 See, for instance, order no. 9 in the Srebrenica case for the decision of the Human Rights Chamber to be published in the *OG of RS*.

458 See the commentary on Article 3 of the ECHR, under "2. Prohibition of torture (Article 3 of the ECHR)", p. 192.

459 See, for instance, order No. 8 in the Srebrenica case.

the Human Rights Chamber took into account that in the first report that the Republika Srpska had drafted on Srebrenica, events in and around Srebrenica were portrayed one-sidedly, in a distorted and unimportant way.[460]

4. Dogmatic principles of the fundamental human rights and freedoms

a. General provisions

Coherent dogmatic principles regarding fundamental human rights and freedoms has not been developed so far in the jurisprudence of the BiH Constitutional Court and the Human Rights Chamber for BiH. That is understandable considering different judicial traditions that influenced the jurisprudence of these courts. While national lawyers, naturally, have had no common ground either with the case law of the ECHR from Strasbourg or with the jurisprudence of the European constitutional courts, international judges have come from completely different judicial cultures and systems. Since the ECHR is a legal basis which is relevant for the domain of human rights and fundamental freedoms, the application of the Strasbourg dogmatic approach was almost inevitable. Besides, through the presence of international judges and expert associates, the dogmatic of the western constitutional and supreme courts was practiced in the jurisprudence of the BiH Constitutional Court and the Human Rights Chamber for BiH. As we move on, we will try to present, systematise and, possibly, supplement the elements of the dogmatic of fundamental human rights and freedoms in Bosnia and Herzegovina that were only hinted at and concealed between the lines of the jurisprudence.

b. Human rights and freedoms: protection, restriction and justification of interference

CH/96/30-M	19970905
CH/98/375 *et al*. Đ. Besarović *et a*l.	20050406
U 14/00-1 Manojlović	20011230 *OG of BiH,* No. 33/01
U 24/00 Avdić	20020130 *OG of BiH,* No. 01/02
U 3/99 H.D.	20000810 *OG of BiH,* No. 21/00
U 39/01 M. H.	20020910 *OG of BiH,* No. 25/02

Violations of human rights and freedoms are examined in three steps.[461] The first step to be investigated is whether a certain life situation falls under the

460 See more about it in CH/01/8365 et al.-A&M, paragraph 179.

461 See, for instance, U 3/99; U 24/00, paragraphs 29-31; U 14/00, paragraph 18 and paragraph 30 *et seq*.

protection of some of the fundamental human rights and freedoms, such as, for instance, whether an apartment to which one has the rights to constitutes "home" within the meaning of Article 8 of the ECHR,[462] whether an occupancy right constitutes "ownership" as referred to in the ECHR,[463] or whether a certain statement falls within the scope of protection of the freedom of expression.[464] The next step is whether these protected rights have been, possibly, interfered with, for instance, if the courts prevented repossession of an apartment. Last of all is to investigate whether an interference was justified, and it will be justified only if provided for by law, if a legal measure in a democratic society is necessary for the sake of a certain – and, under the ECHR, justified – goal and if it fulfils the requirement of proportionality.

The principle of an obligation of interfering with human rights and freedoms on the basis of the law (*Gesetzesvorbehalt*) first requires the existence of a legal basis for the restriction of some protected fundamental human right and freedom. It is within the competence of the legislature to exhaustively regulate conditions for restrictions, so that an individual can anticipate the consequences of his/her own actions in the circumstances which correspond, to a sufficient degree, to an individual case.[465] In addition, the law must be generally accessible in an appropriate manner.[466] On the basis of the principle of hierarchy of norms[467] it arises that the very law which serves as a legal basis for the restriction of some fundamental human rights and freedoms must be brought in line with the law of higher status. Therefore, it is necessary to check whether the disputable legal basis has been brought in line with the BiH Constitution and the ECHR in substantive terms.[468] It goes without saying that the application of the legal basis must be lawful. If mistakes occur during the application and interpretation of the legal basis, then the restriction of the fundamental human rights and freedoms is not based on the relevant law and is thereby contrary to the ECHR and the BiH Constitution. Naturally, from the doctrine of the third instance of the Human Rights Chamber, *i.e.*, from the doctrine of self-restriction of the BiH Constitutional Court (as they are not courts of cassation), certain restrictions arise in relation to the points of reference

462 U 14/00, paragraph 18 *et seq*.

463 U 14/00, paragraph 30 *et seq*.

464 U 39/01, paragraph 22 *et seq*.

465 The principle of legal certainty suggests stipulation of clear and precise legal norms; see, CH/96/30-M, paragraph 31, referring to the ECtHR, *Sunday Times v. Great Britain* of 26 April 1979, Series A No. 30, paragraph 49.

466 *Ibid*.

467 In relation to this, see the text that follows.

468 See, CH/96/30-M, paragraph 31 with further references to the ECtHR, *Winterwerp v. Holland* of 24 October 1979, Series A No. 33, paragraph 45 *et seq*., and *Malone v. Great Britain* of 2 August 1984, Series A No. 82, paragraph 67.

applied while reviewing decisions of the lower instance courts.[469] Areas relating to the essence of some fundamental human rights and freedoms must be regulated by the very legislature. The legislature has no right to delegate those areas to the executive branch, *i.e.*, to the administrative bodies, for them to regulate it within the scope of the right to enact ordinance.[470]

c. Guarantees of the institutions

AP 228/04 Association of the Families of the Missing Persons and the Organisation of the Camp Inmates of the City of Istočno Sarajevo	20050713
CH/01/8618 Halilović	20051107
CH/03/14807 Vučković	20050510
CH/98/240 *et al*. D. I. *et al*.	20050208
CH/99/2317 Grbić	20050512
U 5/98-II "Izetbegović II"	20000630 *OG of BiH,* No. 17/00

In Case No. U 5/98-II, in relation to the right to property, the BiH Constitutional Court elaborates for the first time on the legal mechanism of institutional guarantees.[471] According to the Preamble, by protecting private ownership, one aspires to the common good and economic development, and to the advancement of the market economy.[472] In addition, the right to property is protected by Article II of the BiH Constitution, and, therefore, it does not constitute only the subjective right of defence of an individual but it also constitutes the institutional guarantee as a condition for the functional market economy.[473] This positive obligation of Bosnia and Herzegovina and the Entities should be specified by adequate legal framework.[474] According to the jurisprudence of the German Federal Constitutional Court (*BVerfG*), the institutional guarantee for property prohibits exemption of legal areas from the domain of private law which constitute an elementary part of each person's activity in the property-related area protected by the Constitution, whereby effect of the right to property would be annulled or narrowed substantively.[475]

469 See below under "6. Standards of control", p. 143.

470 See, CH/98/375, paragraph 1244; it is similar also to "*Wesentlichkeitstheorie*" of the Federal Constitutional Court of FR of Germany; see, in relation to this, *Sommermann, Karl-Peter* in: *Mangoldt/Klein/Starck*, 1999-I, p. 129 *et seq*.

471 Paragraph 14.

472 Line 4 of the Preamble.

473 *Ibid*.

474 *Ibid*.

475 *Wendt*, 1999, paragraph 10 with further references to the decisions of the Federal Constitutional Court: BVerfGE 24, 367 (389); 58, 300 (339).

d. "Objective" value of fundamental human rights and freedoms

(a) Obligation as to the positive protection

AP 164/04-A&M Hadžiabdić *et a*l.	20060331
CH/03/13051-A&M	20031107
CH/03/14688 *et al*. Kahvić *et al*.	20040908
CH/96/15 B. Grgić	19970805
CH/96/1 M. Matanović	19970711
U 14/05 N. Špirić "Old foreign currency savings"	20051202
U 18/00 Hajdarević	20021019 *OG of BiH,* No. 30/02

Pursuant to Article 1 of the ECHR, the BiH Constitutional Court and the Human Rights Chamber took from the Strasbourg jurisprudence the idea about the positive obligation of activity of the state for the sake of efficient protection of fundamental human rights and freedoms.[476] Under Article 1 of the ECHR (obligation of respect for human rights), the high contracting parties guarantee to all persons under their respective jurisdiction the rights and freedoms laid down in Part I of the ECHR.

According to them, the State not only is obliged to respect fundamental human rights and freedoms, so as not to unjustifiably restrict them (defence function or the so-called dimension of human rights and freedoms), but the so-called positive obligation lies within the competence of the State and its authorities, that is the obligation to act in order to protect fundamental human rights if necessary for efficient protection of human rights; the same applies to Article I of Annex 6 to the GFAP.[477] Not only that the State has to create appropriate structures in order to ensure implementation of fundamental human rights and freedoms, but it has to ensure appropriate instruments to prevent their violation. Moreover, the state must provide for the instruments for inquiry into and possible punishment of the already existing violations.[478] The legislature must create the necessary framework conditions in order for an individual to be able to actually exercise his/her rights.[479]

476 U 18/00, paragraph 53 with further references to the EComHR, Application No. 20357/92 of 7 March 1994, D.R. 76A, p. 80.

477 CH/96/1-M, paragraph 56 with further references to the ECtHR, *X and Y v. Holland* of 26 March 1985, Series A no. 91, paragraph 23; *Platform "Ärzte für das Leben" v. Austria* of 21 June 1988, Series A no. 139, paragraph 32, and *McCann et al. v. Great Britain*, Series A no. 324, paragraph 161. Also (in conjunction with Article 8 of the ECHR), CH/96/17-A&M, paragraph 26 *et seq*. with further references.

478 CH/96/15-M, paragraph 17.

479 See, U 5/98-II, paragraph 13 *et seq*.; CH/98/1373-A&M, paragraph 84; CH/01/6979-A&M, paragraph 67; CH/98/1335-A&M *et al*., paragraph 213 with further references

Thus, for instance, the investigative judge also must examine the allegations and establish the facts of the case if a prisoner informed him/her that police had abused him/her.[480] Prior to extradition, expulsion or only informal "surrender" of a certain person to the authorities of another state, the state surrendering the person must request information as to the legal grounds for detention, and then examine them.[481] Otherwise, the state infringes upon its obligation of offering protection under Article 1 of the ECHR in connection with a violation of a human right in the present case. The term "jurisdiction" should thereby be interpreted in broad terms.[482] Therefore, FBiH and BiH, prior to surrendering the Algerians to the U.S. military forces, must have requested information from the United States as to the legal grounds for detention, although neither the Federation of BiH nor BiH, under the Dayton Agreement, have jurisdiction over the military forces of the United States stationed in BiH.[483]

In Case No. AP 164/04, the appellants claimed that their right of ownership was violated, because they were unable to collect their savings deposits from the accounts in the branch offices of the *Ljubljanska Bank* and the *Investbanka* in Bosnia and Herzegovina which they had deposited prior to the break-up of the SFRY. Indeed, the BiH Constitutional Court dismissed the claim of the appellants that Bosnia and Herzegovina was responsible for the payment of their so-called old foreign currency savings, reasoning that the state did not take over the branch offices of the mentioned banks, but only the rights and obligations, thus the standing to be sued does not exist. Considering that the *Ljubljanska Bank* and *the Investbanka* have seats outside Bosnia and Herzegovina, the Court held that no BiH bank is obliged to make the payment, but rather some Slovenian or Serbian bank.[484] Notwithstanding this, the BiH Constitutional Court confirmed that the state is obliged to undertake positive (affirmative) foreign policy measures,[485] in accordance with its constitutional competences,[486] in order to protect the ownership of its citizens abroad. In addition, on 29 June 2001 the state had signed the Succession Agreement with

to the ECtHR, *X and Y v. Holland* of 26 March 1985, Series A no. 91, paragraph 23; *Platform "Ärzte für das Leben" v. Austria* of 21 June 1988, Series A no. 139, paragraph 32; *Aydın v. Turkey* of 25 September 1997, Reports of Judgments and Decisions 1997-VI, paragraph 103; *Osman v. Great Britain* of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, paragraphs 115-116.

480 See, CH/97/34-A&M, paragraph 74.

481 CH/02/8679 *et al*.-A&M, paragraph 232.

482 CH/02/8679 *et al*.-A&M, paragraph 232 with further references to the ECtHR, *Loizidou v. Turkey* of 23 March 1995, Series A no. 310, paragraph 62.

483 CH/02/8679 *et al*.-A&M, paragraph 233.

484 Paragraph 51 *et seq*.

485 Paragraph 96.

486 Paragraphs 90-94.

the former Yugoslav Republics giving rise to an obligation to commence, under the auspices of the Bank for International Settlements, negotiations aimed at settling the problem of savings.[487]

Case No. CH/03/14688 *et al*. was related to the inability of biological parents to get in touch with their children whom they had placed in a children's home and who, as a result of the armed conflict, had been sent to Italy through the state institutions. The Human Rights Commission within the BiH Constitutional Court obliged the state in the present case to unfailingly provide the parents with all available information as to the whereabouts of their children and their respective status.[488] Besides, the state was ordered to do everything possible in order for the parents to get in touch with their children.[489]

(b) Indirect "third effect" (*Drittwirkung*) of human rights and freedoms

AP 559/04 Pejdaha	20051202
AP 912/04 APRO „Sunce" d.d. Neum	20060401
AP U 19/06 Ibrahimović *et al*.	20070330
CH/01/7928 *et al*. Dumanovski *et al*.	20060913
CH/01/7979 Hidanović	20060405
U 15/99 Zec	20010612 *OG of BiH,* No. 13/01
U 24/00 Avdić	20020130 *OG of BiH,* No. 01/02
U 29/02 R. T.	20030627
U 39/01 M. H.	20020910 *OG of BiH,* No. 25/02
U 8/99 Modričkić	19991105

The BiH Constitutional Court, in Case No. U 39/01, for the first time explicitly referred to the effect of human rights and freedoms on the rights of third persons (the principle of "third effect" of human rights and freedoms, which was developed in the German Constitutional School entitled "*Drittwirkung*"). The reasoning of the mentioned decision states that the human rights and freedoms in principle are related to the protection of an individual from unjustified restrictions of the respective rights and freedoms imposed by the state, although they could occasionally affect the relation among private, physical and legal persons.[490] It is therefore insignificant in the present case whether the employment, concerning the appellant and the employer, is of private or public and legal nature (*i.e.*, whether the state or a private legal entity

487 Paragraph 96.
488 Conclusion No. 4.
489 Conclusions nos. 5 and 6.
490 Paragraph 24.

carries passive responsibility for disciplinary sanction against the employee). In any case, if the applicability of the right to freedom of expression in a disciplinary procedure is confirmed, the courts should consider that right in interpretation and application of corresponding disciplinary regulations.[491] In the present case, it would require striking a balance between the appellant's free expression of opinion, on the one hand, and the personal integrity of co-workers and clients, on the other, in order to show significance of a human right or freedom in a democratic society.[492] Naturally the Court eventually came to a conclusion that the area of protection of the human right has not even been interfered with in the present case, so that the Court did not have to take into account the freedom of expression of opinion.

In legal disputes between the private law entities who have standing to sue in relation to human rights and freedoms, all state bodies have the obligation, while applying and interpreting the ordinary positive regulations, to take into account, to a sufficient degree, the fields of application of certain human rights and freedoms and to weigh out among themselves different positions of human rights and freedoms, as the human rights of all persons should be protected in the same manner. The BiH Constitutional Court concretely examines whether the courts, while applying and interpreting relevant legal regulations, in accordance with Article II.6 of the BiH Constitution, had considered to a sufficient degree the scope and range of human rights and freedoms.[493] Human rights and freedoms are objective values applicable to all areas of the law, so that not a single civil-law regulation should oppose the system of values of the fundamental human rights and freedoms, and it has to be interpreted in compliance with the spirit of the respective system.[494]

Conversely, human rights and freedoms do not *directly* affect other rights, although the BiH Constitutional Court, in its Decision No. U 8/99, perhaps gives such an impression. Namely, in that case the Constitutional Court had the task to adopt a decision on the appeal of a woman who had been expelled from her apartment during the armed conflict and who now wanted to return to her apartment. Indeed, the courts found that the present occupant did not have the right of ownership over the said apartment, but they did not consider themselves competent to order eviction, as that was the competence of the housing/administrative institutions. The BiH Constitutional Court granted the appellant's appeal providing the following arguments:

491 *Ibid*.
492 *Ibid*.
493 U 29/02, paragraph 23.
494 *Hesse*, 1995, p. 158.

> "On the basis of the judgment of the Supreme Court of the Republika Srpska and the ruling of the County Court, as well as the judgment of the Basic Court, it undoubtedly follows that a one-room apartment in Banja Luka, […] had been used by Mrs. H. M., the occupancy right holder since 7 February 1980 on the basis of the contract on the use of apartment, up until 28 August 1995, when the defendant S. V., by using force, had forced her out of the apartment, thereby making it impossible for her to continue living there. This type of conduct constitutes a violation of the right […] of peaceful use of ownership within the meaning of Article 1 of Protocol No. 1 to the Convention, because the appellant's right to possession of apartment had been forcibly denied."

One could get the impression here that the defendant (a private person) was directly responsible for the violations of the appellant's human rights, by having forcibly gained possession of the apartment. Nevertheless, a question arises whether the BiH Constitutional Court, in the mentioned decision, wanted to expand the effect of the fundamental human rights to a relation between private persons. This formulation could be justified rather as a lapse. One could presume so also on the basis of the reasoning that follows below:

> "Since such conduct has continued to this day, the courts were obliged (given that the BiH Constitution had entered into force on 14 December 1995), in deliberating on the present case, to take into account the provisions of Article II.2, 3(e), (f) and (k) of the BiH Constitution and to bear in mind the protection of the fundamental human rights and freedoms, and to apply, thereby giving them priority over all other law, the provisions of Articles 6, paragraph 1 and Article 8, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to the Convention. Failure to apply them brought about failure to offer court protection of fundamental human rights and freedoms provided for in the Constitution and thereby prevented the appellant's return to the respective apartment. [...]."

Yet, if one takes a better look at the Decision No. U 8/99, it will be seen that it does not concern the establishment of *direct* effect of human rights, because the obligation of illegal possessor to vacate the apartment is not derived directly from human rights here; his obligation certainly stems from ordinary positive regulations. What is more, in the present case the appellant's human rights do not affect even indirectly the legal position of the illegal possessor, for instance, through interpretation of regulations in accordance with the BiH Constitution. Nevertheless, constitutional rights of access to a court and adoption of a court decision impact the interpretation of the ordinary positive regulations. Namely, the courts referred – just as they did in parallel appeals that the BiH Constitutional Court deliberated on (see, for instance, U 24/00) –

to the alleged primary competence of the housing bodies, and not the courts. Still, the BiH Constitutional Court rejected this interpretation of the relevant regulations, suggesting that the appellant's human rights and freedoms were violated by the refusal to issue an order for eviction of the illegal occupant.[495] The right of access to a court and decision-making body, therefore, instruct that Article 30 in conjunction with Article 10 of the Law on Housing Relations be interpreted so that the courts must immediately order eviction from the illegally usurped apartment. In addition to the effect on ordinary positive regulations (*Ausstrahlungswirkung*), the positive obligation of the state to offer protection of human rights and freedoms (*staatliche Schutzpflicht*) may have perhaps played a role here.[496] The courts were obliged to protect the appellant from an illegal limitation of her living environment, protected by human rights and freedoms, which was enforced by the illegal possessor, and, for that purpose, to ensure *on their own* that substantive regulations be complied with, without referring to the competence of administrative bodies while doing so.

Contrary to this, the decision in Case No. U 15/99 was probably adopted on the basis of the indirect effect of the human rights and freedoms of the returnees under Article II.5 of the BiH Constitution in conjunction with Article XII.3 of Annex 7 to the GFAP. The Court, naturally, forewent making a precise dogmatic-based decision. In Case No. U 15/99[497] it was established that the authorities had allocated the appellant's house in Prijedor to a refugee family in the summer of 1995, and had requested from the appellant to leave her house, which she did. This situation lasted for several months after the end of the armed conflict, and the appellant continued living in the same town. After her house had been allocated to the refugees, probably expecting that she would have to leave her place permanently, the appellant exchanged her house for a house half the size of her house on the Croatian island of Brač. The contract of exchange was made in the presence of a lawyer, and in September 1995 the contract was confirmed by the Basic Court in Prijedor. It was undisputed that the contracting party had not used any threats. However, it was not possible to establish undoubtedly whether and to what extent the appellant had been exposed to threats in the form of anonymous calls during the war and up until the conclusion of the contract. Thanks to, among other things, the honesty of the refugee family to whom the house had been allocated, the appellant returned to her house after the armed conflict. In March 1996 the appellant tried to have the contract of exchange of the real property cancelled in court, as she asserted that she had

495 See, U 6/98, U 2/99, U 3/99, U 7/99, U 24/00, paragraph 27; in Case No. U 8/99 the BiH Constitutional Court, however, does not refer to this dogmatic connection.

496 See also under "(a) Obligation as to the positive protection", p. 142.

497 See, in connection with the facts of the case, the Decision No. U 15/99, paragraph I, and the minutes from the verbal discussion (authors' archive).

not entered into the contract voluntarily, but under threat. At the time of the conclusion of the contract the armed conflict was still raging. And being a Croat in Prijedor, where Serbs were dominant, as she stated, she felt as if she were under threat and forced to enter into a contract. The lower courts considered the contract valid and ordered the appellant to leave the house. The appellant filed an appeal with the BiH Constitutional Court for the violation of the right to property, home and a fair trial. She held that the ordinary courts failed to consider the wartime circumstances to a sufficient degree.

The BiH Constitutional Court first established that after selling a house, the former owner, in principle, cannot refer to the right of ownership or to the right to a home in relation to the sold house.[498] Indeed, such protection is gone only if the transfer of ownership was legally valid. The voluntary nature of the transfer may, among other things, be questionable if the ownership was transferred in a situation in which the seller was in a difficult position or under strong pressure, or was in serious danger. These aspects must be taken into account when assessing the issue as to whether the seller had lawfully transferred his/her rights to another person. The BiH Constitutional Court did not find that it was proven that the appellant was in actual danger, or that the buyer of the house or a third person had forced her to enter into a contract of exchange for the real property.[499] Admittedly, in assessing the transfer of ownership[500] one must take into account other circumstances, *e.g.*, that the appellant had already lived for 60 years in the house which she had inherited from her father,[501] and for that reason, she must have had a particular attachment to the house. There are no indications that under normal circumstances she would want to leave her house in order to live somewhere far away, in a place to which she has no attachments. Besides, the facility which she received in exchange was an unfinished summer house which she had not seen prior to the exchange. Also, the house in Brač was of a lower value than her house in Prijedor, so that the exchange, from an economic point of view, was probably unfavourable for the appellant. Therefore it appears that the transfer was unusual (*abnormal transaction*) and that it would not have occurred in normal circumstances. The transfer had occurred during the armed conflict, at a time when the appellant, as a Croat (in an area mainly populated by Serbs), had been exposed to substantial difficulties and when, according to her own allegations, she had feared for her life.[502] The buyer was, without question, aware of the fact that

498 Heading IV, paragraph 4.
499 Heading IV, paragraph 5.
500 Heading IV, paragraph 6.
501 Heading IV, paragraph 7.
502 Heading IV, paragraph 8.

the appellant was in a difficult situation, and that that was the reason for which she was prepared to do the exchange.

Therefore the Constitutional Court was convinced that the appellant had entered into the contract of exchange of real property owing to her vulnerability. Namely, as a member of an ethnic minority, she had lived during a time when an ethnic cleansing policy had been conducted throughout Bosnia and Herzegovina.[503] The contract did not reflect the will of the appellant under the normal circumstances. One may assume that the buyer, at least in general, was aware of the reasons which made the appellant decide to have the exchange. Making such an assessment, the BiH Constitutional Court took into account the objectives of the GFAP and of the BiH Constitution; it was necessary to remove the consequences of the cases of ethnic cleansing which had taken place during the war.[504] The important objective which, among other things, was to be achieved, in view of Article II.5 of the BiH Constitution, was the return of refugees and displaced persons to their homeland and their previous homes. In accordance with Article XII.3 of Annex 7 to the GFAP, the Commission for Refugees and Displaced Persons does not recognise as valid the unlawful transfers of ownership of property. This includes all transfers of ownership conducted under coercion, or as a favour in return for obtaining permission to leave the area, or for the issuance of other documents, or transfers of ownership which were otherwise related to ethnic cleansing.[505] In the opinion of the BiH Constitutional Court, redressing the consequences of ethnic cleansing, within the context of the GFAP objectives, had such a priority that in certain cases it affected legal businesses that had been legally valid and which, in other circumstances, would have been in accordance with the standards of private law. Therefore the enforcement of the contract of exchange of real property is contrary to the appellant's right to residence and the right to property.[506] The BiH Constitutional Court quashed the decisions of the lower courts and established that the contract of exchange of real property was null and void.

During deliberations the BiH Constitutional Court was certainly aware of the fact that the appeal was on the borderline between private and constitutional law. That is the reason why it offered a reasoning by which it was not called upon to examine the appeal pursuant to the Law on Obligations; on the contrary, the Court held that it was called upon to establish whether the decisions of the lower courts had violated the BiH Constitution, in particular Article 8 of the

503 Heading IV, paragraph 13.
504 Heading IV, paragraph 10.
505 Heading IV, paragraph 11.
506 Heading IV, paragraph 14.

ECHR and Article 1 of Additional Protocol No. 1 to the ECHR.[507] Naturally, the dogmatic link between human rights and freedoms and the ordinary positive regulations is not clearly visible. This explains the behaviour of the three judges who were against the adopted decision, as they did not hold that the Court was competent to examine the application and interpretation of the relevant regulations of the civil law.[508] What is more, Judge *Popović* considered that the decision adopted by the majority of judges was contradictory if, on the one hand, it did not take into account as a standard the positive regulations, although it did review the final challenged judgment adopted by lower courts precisely on the basis of such ordinary positive regulations. He further held that the BiH Constitutional Court assigned to itself a position of an ordinary court, which has not been provided for by the BiH Constitution.[509] This manner of operation, in his opinion, does not hold ground in the jurisprudence of the European Court in Strasbourg either.

A separate opinion is based on an erroneous presumption of sharp distinction between the ordinary and constitutional law. This separate opinion does not recognise **the effect of fundamental human rights and freedoms** on the interpretation and application of the ordinary law, which affects relations among private persons in the form in which it is, for example, known in the German jurisprudence or in the jurisprudence of Strasbourg.[510]

In the judgment in Case No. AP 559/04 the Constitutional Court has a clearer reasoning – the principle of the effect of human rights and freedoms on the rights of third persons obligates the state to protect human rights and freedoms not only against state measures and activities but also to protect them against violations committed by private law legal or physical persons. With that goal in mind, the state must, apart from the obligation under Article 1 of the ECHR, act preventively in order to ensure the protection of human rights and the freedoms of an individual.[511] This also includes the practice of efficient court protection, by means of which a citizen may exercise rights and freedoms.[512] Thereby the state, of course, has a wide margin of appreciation in setting objectives and means.[513]

507 Heading VI, paragraph 2.
508 Particularly Article 60 of the Law on Obligations; see separate opinion of Judge *Popović*.
509 *Ibid*.
510 See, *Frowein/Peukert*, 1996, Article 1, paragraph 12.
511 Paragraph 36.
512 AP 912/04, paragraph 41.
513 AP U 19/06, paragraph 25.

The obligation of private law physical and legal persons, with the help of which state tasks are being carried out, must not interfere with the principle of *Drittwirkung*, *i.e.*, the principle of the effect of fundamental human rights and freedoms on the rights of third persons. In carrying out its tasks through private law physical persons and legal persons the state cannot avoid the obligation of respecting fundamental rights and freedoms.[514]

e. Protection of human rights and freedoms and the fight against terrorism

The possible international obligations of Bosnia and Herzegovina in the fight against international terrorism do not render ineffective the applicability of fundamental human rights and freedoms. As to the procedure of expulsion, that is, extradition of alleged terrorists, the Human Rights Chamber dealt with the conflict between the protection of human rights and freedoms, on the one hand, and requirements for an efficient fight against international terrorism, on the other hand, as a consequence of the 11 September 2001attack on the United States. In the case which served as the basis for the Application No. CH/02/8679 *et al*., Bosnia and Herzegovina attempted to justify the measures which are contrary to the Convention by stating that the state, in accordance with Resolution No. 1373 of the Security Council of the United Nations of 28 September 2001, is obliged to meet possible requests of the United States for the hand-over of persons suspected of terrorist activities; this obligation has priority under international law.[515]

The significance of fundamental human rights and freedoms as part of the fight against terrorism, in the opinion of the Human Rights Chamber, arises from the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism* of 15 July 2002. In its *Guidelines*, the Committee of Ministers of the Council of Europe, amongst other things, lays down directives for the procedures of extradition which are relevant in the fight against terrorism. According to them, extradition of a person into a country where he/she is threatened with the death penalty, torture, or inhuman or degrading treatment, is inadmissible. Extradition is possible only if a country which is to carry out the extradition has obtained beforehand the guarantee that the mentioned person will not be sentenced to death, or in the event that such a sentence has been passed, that the sentence will not be carried out.[516]

514 CH/01/7979, paragraph 49 *et seq*.
515 Paragraph 263.
516 CH/02/8679 *et al*.-A&M, paragraphs 265-267; see also CH/02/8961-A&M, paragraph 163.

5. Hierarchy of norms

CH/01/8507-Softić	20051215
CH/98/1366-A&M V. Č.	20000309
U 106/03 I. D.	20041027
U 19/00-Kemokop *et al*.	20010504
U 25/00 BiH Law on Travel Documents (OHR)	20010323
U 28/01-2 Jugović	20020312 *OG of BiH,* No. 05/02
U 40/01 Topić	20020910 *OG of BiH,* No. 25/02
U 8/99 Modričkić	19991105

"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."[517] The Entities were given a three-month time limit to bring in line their respective constitutions with the BiH Constitution.[518] This is how the normative and hierarchic priority of the BiH Constitution over the ordinary law of Bosnia and Herzegovina, and over the constitutional and ordinary laws of the Entities, has been unequivocally laid down as a constitutional principle.

When compared to the ordinary law, it follows from the aforementioned higher status of the BiH Constitution that the BiH Constitutional Court, on the one hand, does not examine the conformity of a law of Bosnia and Herzegovina with another such law even if the disputed law was imposed by the Hugh Representative instead of by the legislature,. Otherwise the BiH Constitution would be interpreted on the basis of the ordinary law, which is contrary to the clause of normative and hierarchic priority of the BiH Constitution referred to in Article III.3(b) of the BiH Constitution.[519] However, what is decisive is the procedural consequence, which even the national lawyers who practice constitutional law do not consider understandable, even though it clearly follows from the clause of the right of priority of the BiH Constitution referred to in Article VI.3(c) of the BiH Constitution: if a court, during regular proceedings, finds that there are serious doubts about the constitutionality of a certain regulation to be applied in the case at hand, it must not apply said regulation, but it must forward the issue of the conformity of a disputed norm with the BiH Constitution to the BiH Constitutional Court, in accordance with Article VI.3(c) of the BiH Constitution.[520]

517 Article III.3(b) of the BiH Constitution.
518 Article XII.2 of the BiH Constitution.
519 U 25/00, paragraph 33.
520 U 106/03, paragraph 33, and below at "3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution", p. 866.

A judgment based on a law which is in contravention with the BiH Constitution is itself in contravention of the Constitution.[521] The BiH Constitutional Court, thus, does not examine solely whether a certain right of an individual has been restricted on the basis of some law, but also whether some existing law has been correctly applied in a particular case.[522] Even a law which is the basis for some control (review) is subject to examination on the basis of the standards of the BiH Constitution, including the ECHR.[523] In the meantime, *i.e.*, during the proceedings following appeal, the BiH Constitutional Court carries out the proceedings of control (review) of norms under Article VI.3(c) of the BiH Constitution and adopts a decision (in the reasoning of a decision on appeal) that the norm which is of crucial importance for the dispute at hand is possibly contrary to the BiH Constitution.[524] The same goes for the ECHR, which has "priority" over ordinary positive regulations: even if the conduct of the criminal investigative bodies has been formally covered by law, *i.e.*, it has been in accordance with the law, but the very law has violated the rights guaranteed by the ECHR, a judgment based on such an investigation (which is contrary to the Convention) cannot hold out.[525]

6. Standards of control

a. The BiH Constitution and the ECHR

AP 2678/06 Party for Bosnia and Herzegovina	20060929
CH/03/14958 Grabovac	20060913
CH/03/15198 Džuzdanović *et al*.	20060605
CH/96/30 B. Damjanović	19970905
U 5/04 S. Tihić "Decision on Admissibility"	20060127
U 27/01 DOO HA-EMM	20020423 *OG of BiH,* No. 08/02

While the BiH Constitutional Court, on the basis of its foundation and position in the BiH Constitution, may refer to and take as a standard of control (standard of review) the BiH Constitution; the ECHR, which is referred to by the BiH

521 See, U 8/99; U 19/00, paragraph 23 *et seq*., paragraph 33 *et seq*.; U 28/01, paragraph 25; U 40/01, paragraph 26 *et seq*.

522 As to the control (review) of judgments adopted on the basis of arbitrariness of the ordinary courts within the appellate jurisdiction of the Constitutional Court, see below at "7. The scope of control", p. 167.

523 See, for instance, U 36/01, paragraph 24, as to the conformity of formal presumptions for the institution, conduct and exhaustion of procedural options within the appellate proceeding with Article 6, paragraph 1 of the ECHR; U 40/01, paragraph 26 *et seq*., as to the conformity of preclusive time limit with the right to attendance of the defendant in the appellate proceeding.

524 U 106, paragraph 33; see also CH/01/8507, paragraph 46 and conclusion No. 3.

525 See, CH/98/1366-A&M, paragraph 87.

Constitution (Article II.2 of the BiH Constitution); the international mechanisms for the protection of human rights and freedoms enumerated in Annex I to the BiH Constitution, referred to by Article II.4 of the BiH Constitution; and the Human Rights Chamber, by the nature of things, initially referred to Annex 6 to the GFAP. Naturally, since the review of constitutionality, meanwhile, became part of the review of lawfulness of the interference of the state with the human rights and freedoms ("*provided for by law*"), the Human Rights Chamber could have theoretically taken the BiH Constitution as a relevant standard for control (review). The Chamber had used this possibility at least once in a case where it was necessary to refer to the constitutionality, and not to the rights and freedoms guaranteed by Annex 6.[526] When reviewing the justification of applications, the Human Rights Commission within the BiH Constitutional Court had a custom to refer to the legal opinion of the BiH Constitutional Court in relation to the constitutionality of relevant regulations that were to be applied in a particular case.[527] Also, in the event of an assertion that the right referred to in Annex 6 was violated due to the application of an unconstitutional state act, the Human Rights Commission within the BiH Constitutional Court used to examine the constitutionality of "the lawfulness of [the] restriction of human rights and freedoms by the state"; namely, whether "the interference" with human rights and freedoms would fulfil the criterion of lawfulness if the very law was constitutional.[528]

The principal standard of control (review) in the procedures of protection of human rights and freedoms for both courts is the ECHR with additional protocols thereto. It makes up the core of the catalogue of human rights and freedoms in the BiH Constitution and Annex 6. The disputed issue is whether the ECHR, given the phrasing of Article II of the BiH Constitution, also has priority over the BiH Constitution. The phrasing of this constitutional provision could be interpreted in this respect, as the provision relates that the rights and freedoms referred to in the ECHR and additional protocols thereto shall be directly applied and shall have "*priority over all other law*". The English term "*law*" (unlike "*laws*") can indeed be understood as the entire legal system (in Bosnia and Herzegovina "*pravo*"). Yet if the ECHR has priority over all other "law", that would also include the very BiH Constitution. This interpretation was partly espoused in the relevant expert opinions.[529] It has grounds in the constitutional theory and practice of other states which have incorporated the principle of normative constitutional

526 See, CH/96/30-M, paragraph 34 and the remainder of the text.

527 For instance, the decision on constitutionality of the Law on Immunity of BiH; CH/03/14958, paragraph 23 *et seq*.

528 See, CH/03/15198, paragraph 11.

529 *Nowak*, 1996, p. 97; *Nowak*, 1999.a, p. 31; dilemmas by *Yee*, 1996, p. 184; *Ademović*, 2005, p. 3 *et seq*.

hierarchy. In Austria, for instance, the constitutional principles have greater significance than "simple constitutional provisions".[530] This interpretation, however, could be challenged by stating that the Constitution maker in Article III.3(b), first sentence, of the BiH Constitution makes a distinction between constitutional law ("*constitutions*") and the ordinary law ("*law*") of BiH and that of the Entities. Namely, it reads as follows: "*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* [...]."[531] When comparing these constitutional provisions it follows that the Constitution maker, by using two notions "*constitution/law*", makes a distinction between the constitutional law and the ordinary law.

In Case No. U 5/04, the BiH Constitutional Court took a position in relation to the mentioned disputed issue, and refused to give priority to the rights and freedoms referred to in the ECHR over the BiH Constitution. The BiH Constitutional Court held, on the one hand, that it was not competent to examine the conformity of certain provisions of the BiH Constitution with the standards provided for by the ECHR.[532] On the other hand, the legal opinion of the BiH Constitutional Court became clear on the basis of the translation of the English version of the relevant constitutional provisions: the rights referred to in the ECHR have priority "over all other laws", and not over all other "law". This manner of interpreting (or translating) corresponds to the unofficial version of the text of the BiH Constitution in the local language, which can be found on the website of the BiH Constitutional Court ("These acts have priority over all other *laws*").[533] Here the notion "law" has the same meaning as the German word "*Gesetz*", which ought not to be confused with the notion "*Recht*" ("right"). This translation can be found also in other decisions of the BiH Constitutional Court.[534]

b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution

AP 379/07 MPA "Posavina promet" d.o.o	20070320
AP 813/06 Selimović	20070509
CH/01/6796-A Halilagić	20010307
CH/01/8365 *et a*l.-A&M	20030303
CH/02/10720 Skopljak	20060116
CH/96/30-M Damjanović	19970905

530 *Öhlinger*, 1997, p. 25 *et seq*.
531 Parts of the text were emphasised by the authors.
532 Paragraph 14.
533 Parts of the text were emphasised by the authors.
534 See, for instance, AP 2678/06, paragraph 18.

CH/97/59-A&M Rizvanović	19980612
CH/97/69-A&M Herak	19980612
CH/98/1786-A&M	19991105
U 22/01 Kušec	20011230 *OG of BiH,* No. 33/01
U 5/98-III "Izetbegović III – Constituent peoples"	20000914 *OG of BiH,* No. 23/00
U 5/98-IV "Izetbegović IV"	20001231 *OG of BiH,* No. 36/00

The position of international mechanisms enumerated in Annex I to the BiH Constitution is not clear on the basis of the actual constitutional phrasing. Article II.7 of the BiH Constitution obliges Bosnia and Herzegovina to remain a signatory to the mentioned international agreements, or to become one. In addition to this, in accordance with Article II.8 of the BiH Constitution, all competent institutions in Bosnia and Herzegovina cooperate with the supervisory bodies of the mentioned mechanisms and secure unrestricted access to them. In accordance with Article II.4 of the BiH Constitution, all persons in Bosnia and Herzegovina, without difference, are enabled to enjoy the rights and freedoms enumerated in Article II of the BiH Constitution and in Annex I to the BiH Constitution. Annex I to the BiH Constitution contains no further explanations, but it only enumerates instruments under the title "Additional Protocols on Human Rights to be applied in Bosnia and Herzegovina".[535] Therefore, this conclusion is not applicable solely to the ECHR, for which the very BiH Constitution stipulates "direct application" (Article II.2 of the BiH Constitution), but also for other international instruments referred to in Annex I to the BiH Constitution. There is no doubt about this whatsoever, for the BiH Constitutional Court presented the same stance in several cases and applied some of the instruments which were not ratified at the time of adoption of decisions, or they were ratified but were not in effect.[536] In addition, there is no doubt that Bosnia and Herzegovina is obliged, under its constitutional law (Article II.7 in conjunction with Annex I to the BiH Constitution), albeit not being a member, to subject itself to the mentioned agreements insofar as it concerns possible cooperation with supervisory bodies, or accession to the mentioned international agreements.[537]

Nevertheless, there are two more difficult issues left that warrant special attention. The first one relates to the scope of the agreements. That is to say, although there is no doubt that the international instruments referred to in Annex I to the BiH Constitution are applied irrespective of whether the state ratified

535 O'Flaherty, 1998.a, p. 220, states the instruments applicable in Bosnia and Herzegovina already at the time of the entry into force of the BiH Constitution.

536 See, for instance, U 5/98-III, paragraph 57, or U 5/06, paragraphs 53 and 61 in connection with the European Charter for Regional or Minority Languages.

537 See more about this in the commentary related to Article II.7 of the BiH Constitution, p. 548.

them or not, an issue arises as to their respective scope and as to whether their international status in Bosnia and Herzegovina may, nevertheless, affect their constitutional status. The second issue relates to whether these instruments may be applied solely in connection with the prohibition of discrimination or not, that is in their full capacity.

(a) Instruments for the protection of human rights referred to in Annex I to the BiH Constitution: international status versus constitutional status

Bosnia and Herzegovina has not become a member to all 15 of the instruments for the protection of human rights referred to in Annex I to the BiH Constitution.[538] Therefore, some instruments have not been ratified as yet or have not been ratified to the full capacity possible. In addition, many of these instruments have been amended since 14 December 1995, when they became a substantive part of the BiH Constitution. Accordingly, for instance, on 14 December 1995, Bosnia and Herzegovina adopted the International Covenant on Civil and Political Rights, including the First and Second Optional Protocols from 1966 and 1989 respectively, as part of the BiH Constitution, whereas its Second Optional Protocol[539] was ratified by the State only in 2000.[540] The situation with the ECHR is similar - it was taken over on 14 December 1995 as part of the BiH Constitution, although Bosnia and Herzegovina, along with Additional Protocol No. 12 to the ECHR, did not ratify it until 2002. However, the Additional Protocol No. 12 to the ECHR only entered into force on 1 April 2005, while Additional Protocol No. 14 to the ECHR was ratified only on 19 May 2006 (and has not entered into force as of yet). Therefore, a question arises as to the scope to which these 15 instruments for the protection of human rights referred to in Annex I to the BiH Constitution have become part of the constitutional law of BiH. Besides, one may wonder whether the constitutional scope of protection of these instruments changes automatically as these instruments change or, most often, get amended at the international level. Thus, for instance, one may wonder whether the BiH Constitution, when it comes to the ECHR, has been automatically expanded, or not, on 1 November 1998 – on the day Additional Protocol No. 11 to the ECHR went into force.[541] Very clearly, these issues are the result of the dual legal nature – constitutional and international – of these 15 instruments for the protection of human rights referred to in Annex I to the

538 *Ibid*.

539 This protocol was accepted and declared the Resolution of the UN General Assembly No. 44/128 of 15 December 1989.

540 *OG of BiH,* No. 27/00.

541 This issue may be of crucial importance, for because of its contents, this Additional Protocol does not have *de facto* effect on the substantive scope of the BiH Constitution.

BiH Constitution and the mutual effects on and interaction with the functioning of the legal system.[542]

What is clear and undeniable is that these 15 instruments for the protection of human rights referred to in Annex I to the BiH Constitution shall be applied irrespective of the formal membership of Bosnia and Herzegovina, to the extent stipulated by the very BiH Constitution. Accordingly, if the BiH Constitution stipulates that the Second Optional Protocol to the International Covenant on Civil and Political Rights from 1989 shall be applied, the fact that Bosnia and Herzegovina ratified this protocol only in 2000 in no way affects the constitutional scope of protection. Likewise, the European Convention on the Prevention of Torture, Inhuman or Degrading Treatment or Punishment (1987) became part of the BiH Constitution on 14 December 1995. Given the fact that Additional Protocols Nos. 1 and 2 to this convention have not been mentioned (which is logical, as they went into force only on 1 March 2002), they should not subsequently become part of the constitutional protection regardless of the fact that the state ratified them on 12 July 2002 (they entered into force on 1 November 2002). In this manner, one may reach a different scope of protection for certain instruments or their parts at the constitutional or lower level of the legal system of BiH, namely to different obligations of BiH at the constitutional and international level.

Still, certain problems may occur in taking a legal position if the constitutional phrasing of a certain constitutional provision is unclear in some way. That shall be the case with the ECHR, although it does not fall among these 15 instruments for the protection of human rights referred to in Annex I to the BiH Constitution. That is to say, Article II.2 of the BiH Constitution reads that "[r]ights and freedoms provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms *and in the protocols thereto* […] shall be directly applied in Bosnia and Herzegovina".[543] The constitution maker failed to state clearly which protocols were implied. What is clear is that all protocols which were in force on the day of entry into force of the BiH Constitution were implied (with Additional Protocol No. 8 to the ECHR being the last one). The example involving the European Convention on the Prevention of Torture, Inhumane or Degrading Treatment or Punishment (1987) is what leads one to make such a conclusion, as the constitution maker deliberately

542 This may not be asserted for the rest of the international acts, as they, according to the case-law of the BiH Constitutional Court, do not carry constitutional importance, nor do they have greater effect in terms of hierarchy and norms (compare with, AP 953/05, paragraph 33 *et seq*.).

543 Emphasised by authors.

omitted the two protocols to the ECHR in the BiH Constitution, obviously due to the fact that they were not in force. However, a question arises whether the substantive scope of constitutional protection automatically expands if a specific protocol enters into force on 14 December 1995, as was the case with Additional Protocols Nos. 11 and 12 to the ECHR. The answer to this question should be positive, at least when it comes to the ECHR. The reason for such an interpretation is precisely based on the fact that the constitution maker has used the notion "protocols", without enumeration, as was the case with, for instance, the International Covenant on Civil and Political Rights. Obviously, the constitution maker had the intention of incorporating the ECHR into the BiH Constitution as "a living mechanism", thereby separating it from the rest of the 15 mechanisms referred to in Annex I to the BiH Constitution. Therefore, if a certain protocol goes into force, the BiH Constitution should "expand" automatically. Nevertheless, the case-law of the BiH Constitutional Court in Case No. U 13/05 leads one to a relatively different conclusion, that is to say that it does not suffice that a protocol goes into force solely, but that Bosnia and Herzegovina formally commits to obligations through ratification (as was the case with Additional Protocols Nos. 11 and 12 to the ECHR). Actually, the main decision and separate opinions of judges *Grewe*, *Feldman* and *Palavrić* in Case No. U 13/05 do not question the possibility of the application of Additional Protocol No. 12 to the ECHR as part of the BiH Constitution for two reasons: on the one hand, BiH ratified this Additional Protocol, and, on the other hand, it went into force (on 1 April 2005) at the time of adoption of a specific decision in the proceedings before the BiH Constitutional Court.

Another specific problem is the issue of the constitutional protection of the rights and freedoms stated in the 15 instruments for the protection of human rights referred to in Annex I to the BiH Constitution, which, at the international level, depend, on the one hand, on ratification of a specific instrument and, on the other hand, on special procedures that must be carried out at the international level in order for those rights to be guaranteed at the national level. Precisely one such issue was the case of review of some of the most recent constitutional case-law (U 5/06).

> In the Case No. U 5/06 the applicant *Ivo Miro Jović*, the Chairman of the Presidency of Bosnia and Herzegovina at the time the request was filed, claimed, among other things, that certain provisions of the Law on Public Broadcasting System of Bosnia and Herzegovina[544] are in contravention of Article 3 paragraph 1 in conjunction with Article 11 paragraph 1 lines

544 *OG of BiH*, No. 78/05.

> (a) – (i) of the European Charter for Regional or Minority Languages.[545] He held that, although the Croats in BiH are not a national minority and the Croatian language is neither a regional nor a minority language but an official language, this does not release BiH from its obligation to set up a separate television channel in "a regional or minority language", *i.e.*, in an official language which is less used within a certain territory of BiH. The BiH Constitutional Court dismissed the request for procedural reasons since the applicant failed to ensure the 5 votes of judges necessary for the request to be granted.[546] According to the opinion of the judges who dismissed the request, the right referred to in Article 3 paragraph 1 in conjunction with Article 11 paragraph 1 lines (a) – (i) of **the European Charter for Regional or Minority Languages** may be applied only if the mentioned international agreement was ratified, and the procedure for the protection of "a minority language", in terms of guaranteeing benefits for the language as if it were a minority language, was officially completed (paragraph 53). According to the opinion of the judges who voted to grant the request, these rights may be guaranteed regardless of ratification or previously mentioned procedures (paragraph 61).

Due to the impossibility on the part of the BiH Constitutional Court procedure-wise to take a legally binding position, the case-law failed to offer a specific answer to the question asked. An argument supporting the position that these rights, still ought to be included in the substantive scope of protection of the BiH Constitution is the fact that ratification is irrelevant for the application of a specific instrument referred to in Annex I to the BiH Constitution. Thus, one could state that additional procedures at the international level are irrelevant for the guaranteeing of rights and freedoms if they are theoretically possible under the mentioned instrument. Besides, this interpretation would be in full compliance with the constitutional obligation of BiH to guarantee "the highest level of internationally recognised human rights and fundamental freedoms" (Article II.1 of the BiH Constitution). On the other hand, the position that these rights are not absolutely applicable is also acceptable, or that they are applicable up until such time that the State makes a reservation regarding their application, for, they depend not only on ratification, but on additional

545 This article allows for certain official languages to be treated as "minority languages", which automatically means that they enjoy special rights provided for in the Charter. However, for such treatment to be effective it does not suffice that the Charter be ratified, but that certain activities be taken at the international level.

546 Paragraphs 3 and 4 of Article 40 of the Rules of the Constitutional Court, adopted at the session of 29 and 30 May 2009, which amended the hitherto rules of procedure of the BiH Constitutional Court. Pursuant to these provisions, if a request does not have the support of a majority of judges (5), or a majority of judges considers that a request should be dismissed or rejected, the request shall be considered as dismissed whereby the positions of all judges shall be stated in the decision (those granting the request and those dismissing/rejecting it). The only situation in which this cannot take place, theoretically, is when the BiH Constitutional Court is making a decision in full composition, with all 9 judges that is.

procedures at the international level which Bosnia and Herzegovina failed to initiate in the present case (U 5/06).

(b) Instruments for the protection of human rights referred to in Annex I to the BiH Constitution: full protection or solely in connection with the prohibition of discrimination

At the outset it was uncertain whether the instruments referred to in Annex I to the BiH Constitution would be applied, given the ambiguous phrasing solely in relation to the prohibition of discrimination under Article II.4 of the BiH Constitution. Not even from the previous decisions of the BiH Constitutional Court, where it referred to the agreements listed in Annex I, was it possible to see clearly whether the mentioned rights applied in general, without restrictions, or only in cases where such rights should be enjoyed by all persons, without discrimination (*i.e.*, only in relation to the prohibition of discrimination). Namely, cases in which the BiH Constitutional Court examined a violation of some right referred to in the agreement listed in Annex I had always contained elements of discrimination.[547]

It was precisely the Human Rights Chamber that was the first to take a clear stance regarding the mentioned issue. In its opinion, Article II.4 of the BiH Constitution contains, on the one hand, the obligation that all persons (in general) be provided with the rights and freedoms referred to in Annex I, and, on the other hand, that such rights be guaranteed without discrimination.[548] In this interpretation of Article II.4 of the BiH Constitution the Human Rights Chamber relied on Article I of Annex 6, which is to ensure the mentioned rights irrespective of possible discrimination. To this, one should add that the very Article II.1 of the BiH Constitution, which guarantees the highest level of protection of the internationally recognised human rights and freedoms, also refers to Annex 6 to the GFAP.

If instruments of Annex I clearly, unambiguously and absolutely forbid a certain action, the Human Rights Chamber for BiH considers that the guaranteed right of an individual, in contrast to the prohibition, may only be protected if such prohibition has direct effect; laws violating such a prohibition are, therefore, unconstitutional.[549] Besides, if the mentioned rights of an individual clearly

547 See, U 22/01 (unequal treatment in relation to housing space), paragraph 27; U 5/98-III (enjoyment of political rights without discrimination); see also U 5/98-IV, paragraphs 17, 63.

548 CH/96/30-M, paragraph 37; CH/97/69-A&M, paragraph 56; CH/97/59-A&M, paragraph 67; differently by *Nowak*, 2001.a, p. 784.

549 See, CH/96/30-B, paragraph 37; CH/97/69-A&M, paragraph 56; CH/97/59-A&M, paragraph 67.

arise from the instruments of Annex I, they are the rights which are at the same level as those in the BiH Constitution. The Chamber examines even the instruments from the Appendix to Annex 6 solely in connection with the prohibition of discrimination – not because of the fact that these instruments, under Annex 6, are valid for a limited period of time only, in connection with the prohibition of discrimination; in this respect Annex 6 is even more clear than Article II.1 and 4 of the BiH Constitution. Instruments from the Appendix to Annex 6 are also included in the standards of human rights and freedoms to be protected by Article I.1 of Annex 6, in general, *i.e.*, without relating solely to the prohibition of discrimination. Therefore, it does not concern the substantive and legal restriction of *the scope of protection*, but restriction of the *jurisdiction of control* of the Human Rights Chamber in accordance with Article II.2(2) of Annex 6.

Therefore, the Human Rights Chamber rejected on the regular basis of appeals as *ratione materiae* incompatible with Annex 6 if an appellant requested that a review be carried out concerning a violation of some of the rights listed in the Appendix to Annex 6 (such as the right to labour, to fair compensation, to appropriate housing space etc.), thereby not claiming, nor was it obvious, that there was discrimination in enjoyment of the mentioned rights.[550]

In order to be able to make use of the standards of the instruments from the Appendix to Annex 6, however, in one case the Human Rights Chamber detoured via Article II.4 of the BiH Constitution in connection with identical instruments enumerated in Annex I to the BiH Constitution. The starting point is to review the lawfulness of an interference with rights and freedoms, which happens often and should be reviewed in cases; namely, the restriction of human rights and freedoms must have a legal basis, which itself must be constitutional. The standards of the BiH Constitution, however, also include agreements from Annex I to the BiH Constitution.[551]

Considering this “bridge” toward Annex 4, which was built by the Human Rights Chamber in relation to its respective jurisdiction, a question arises as to whether the Human Rights Chamber could have or even has had to apply the mentioned rights via Article II.4 of the BiH Constitution in all cases

550 CH/97/67-A&M, paragraph 115 *et seq*.; CH/97/113-A, paragraph 10 with further references to the ECtHR, *Van der Mussele v. Belgium* of 23 November 1983, paragraph 48; CH/98/681-A, paragraph 12; CH/98/1214-A, paragraph 16; CH/98/1366-A&M, paragraph 57; CH/98/1387-A, paragraph 12 *et seq*.; see also CH/01/6796-A, paragraph 16 *et seq*.

551 Compare a case where application took place, under “d. Optional Protocol No. 2 to the International Covenant on Civil and Political Rights, whose aim is the abolishment of the death penalty”, p. 190.

where the applicant claimed his/her rights referred to in the agreement in the Appendix to Annex 6 to have been violated without claiming, at the same time, to have been discriminated against. In doing so, the following distinction should be made. When it comes to the clearly defined rights, which ought to protect an individual from the state and state measures (as is the case of prohibiting the death penalty), appropriate rights should be directly taken as a standard for examining the lawfulness of interference with the mentioned rights. When it comes to the provisions on human rights and freedoms, which are *per se* absolute in nature, any linking or conditioning with the prohibition of discrimination makes very little sense. Otherwise, one would reach an absurd conclusion. Take, for instance, Article 2 of the Optional Protocol No. 2 to the International Covenant on Civil and Political Rights,[552] which, in principle, prohibits the imposition of the death penalty in a time of peace. If one accepts the interpretation that the International Covenant on Civil and Political Rights protects only with respect to the prohibition of discrimination, it would not be possible to find a violation of this absolute right if the state imposed the death penalty against all persons sentenced to death, without discrimination. A violation of this right might be established, however, if the death penalty were imposed on individuals in a selective and discriminatory manner. Such a conclusion is quite absurd.

However, when it comes to the right of citizens to participate in something, such as the right to be allocated an apartment, employment, social benefits etc., the situation is different. In such cases, the absolute right to request from the state a certain action exists only in a limited manner.[553] Therefore, a violation of these rights shall be presumed only if the state acts in a *discriminatory* manner. However, discrimination shall not exist if social rights are guaranteed at a minimum level required by the relevant agreements, and no one is allowed separate or special rights. Perhaps the authors of Annex 6 had in mind this problem area when specifying the jurisdictions of the Human Rights Chamber in relation to the agreements referred to in the Appendix. The fact that the earlier drafts had included in these agreements a great many *soft-law-instruments* (legally non-binding agreements) supports the aforesaid. Bosnia and Herzegovina was not expected to *apply* them obligatorily in the State bodies, thus it was decided to use them only as *targets/objectives which are obligatory under international law*, as is, nevertheless, usual.[554] If certain provisions of the instruments in the Appendix provide protection from

552 Compare again "d. Optional Protocol No. 2 to the International Covenant on Civil and Political Rights, whose aim is the abolishment of the death penalty", p. 190.

553 *Osterloh*, 1999, paragraph 53 *et seq*.

554 In this sense, similarly in *Simora*, 1997, p. 649.

discrimination, it is superfluous to establish discrimination in exercising some right to non-discrimination.[555]

In a decision adopted subsequently, the Human Rights Chamber once again referred to the instruments listed in Annex I to the BiH Constitution, thereby not wanting to take them as the basis for its decision. The Chamber held that the positive obligation to search for missing persons and to submit possible information to their relatives after the end of the armed conflict does not arise solely from the right to respect for family life[556] but also from Article 32 in conjunction with Article 33, paragraph 1 of Additional Protocol No. 1 to the Geneva Convention. Namely, they are amongst the instruments enumerated in Annex I to the BiH Constitution and they can be applied in Bosnia and Herzegovina.[557] Contrary to this, in its more recent jurisprudence the BiH Constitutional Court and the Human Rights Commission within the BiH Constitutional Court took a position that the instruments referred to in Annex I to the BiH Constitution should not apply independently, but only in connection with discriminatory treatment.[558]

In literature, when it comes to this issue, if any views are presented at all, the view mainly espoused is that the instruments referred to in Annex I to the BiH Constitution are not directly applicable. However, pursuant to Article II.6 of the BiH Constitution, Bosnia and Herzegovina and the Entities are obliged to guarantee the mentioned rights to legislative, judicial and administrative measures.[559] Accordingly, Bosnia and Herzegovina and all courts, institutions, authorities, and bodies indirectly governed by the Entities or which operate within the Entities, must apply the human rights and freedoms referred to in Article II.2 of the BiH Constitution, and they must direct their activity in an appropriate manner so that the instruments referred to in Annex I to the BiH Constitution obtain a status different from the status of the ECHR. This *argumentum a contrario* is not so strange after all. Yet, this regulation appears inaccurate particularly if viewed in connection with other constitutional provisions which prescribe the obligation of any body of the State authority to respect the rights provided for in Article II of the BiH Constitution. Under Article II.1 of the BiH Constitution, the parties commit themselves to ensuring the highest level

555 Nevertheless, that is how the Human Rights Chamber proceeded in certain cases, for instance, in CH/98/1786-A&M, paragraph 133 *et seq*., in conjunction with Article 5 of the International Convention on Elimination of all Types of Race Discrimination; see, also, footnote No. 2237, p. 491).

556 See commentary on Article 8 of the ECHR, p. 326.

557 CH/01/8365 *et al*.-A&M, paragraph 175.

558 See, for instance, AP 379/07, paragraph 17; AP 813/06, paragraph 17; CH/02/10720, paragraph 53.

559 *Nowak*, 1996, p. 97; *Simor*, 1997, p. 648 *et seq*.

of the internationally recognised human rights and freedoms. In accordance with Article III.2(c) of the BiH Constitution, the Entities must provide for all the persons in their respective territory a safe and secure environment, by ensuring, in accordance with the internationally recognised standards and by observing the internationally recognised human rights and freedoms, under Article II of the BiH Constitution, that civilian authorities implement laws and also enact other appropriate measures. Namely, under Article III.3(b), first sentence, of the BiH Constitution, "The Entities and any subdivisions thereof shall comply fully with this Constitution", which implies the entirety of Article II, and not only paragraph 2. Besides, it would be incomprehensible if the State authority, due to Article II.6, had to comply to a lesser extent with the prohibition of discrimination, which is regulated in principle in Article II.4 of the BiH Constitution, and in particular in connection with the specific right to return referred to in Article II.5 of the BiH Constitution regarding Annex 7 to the GFAP, than with the prohibition of discrimination referred to in the ECHR. Considering this, *argumentum a contrario* referred to in Article II.6 of the BiH Constitution, that instruments from Annex I to the BiH Constitution have a lower status (*i.e.*, that they are not directly applicable), is not convincing.

Another argument supports the fact that the agreements referred to in Annex I to the BiH Constitution may be directly applied and that such application does not depend on the prohibition of discrimination. Article II.4 of the BiH Constitution is not solely related to the agreements referred to in Annex I but also to the entire Article II of the BiH Constitution, including the ECHR. It is not possible to argue about the fact that the rights referred to in the ECHR, under Article II.2 of the BiH Constitution, and the rights specifically referred to in Article II.3 of the BiH Constitution and, particularly, the right to return referred to in Article II.5 of the BiH Constitution, apply without assertion to the existence of discrimination. Therefore, in *argumentum a contrario* it is not possible to understand why only the instruments in Annex I to the BiH Constitution ought to apply exclusively in relation to discriminating treatment.

c. Comparing standards of review

U 18/00 Hajdarević	20021019 *OG of BiH,* No. 30/02
U 24/01 Krstić	20020312 *OG of BiH,* No. 05/02
U 26/00 "Labour Law of FBiH"	20020423 *OG of BiH,* No. 08/02
U 26/01 The Court of Bosnia and Herzegovina	20020403 *OG of BiH,* No. 04/02

As part of the discussion on the merger of the Human Rights Chamber and the BiH Constitutional Court, followed by the *transfer* of competences of the Human Rights Chamber to the BiH Constitutional Court and, finally, about the

implementation of Annex 6, it was reasserted continuously that the standards of control (review) of the BiH Constitutional Court lagged behind the standards of control (review) of the Human Rights Chamber; therefore, one of the consequences of the dissolution of the Human Rights Chamber would be the reduction in the level of protection of human rights and freedoms. In a legal opinion on the merger,[560] the Human Rights Chamber expressed the position that the very Human Rights Commission of Bosnia and Herzegovina under Annex 6 ensures the highest level of internationally recognised protection of human rights and freedoms in accordance with Article II.1 of the BiH Constitution. It was emphasised thereby that the Human Rights Chamber – unlike the BiH Constitutional Court – might give its opinions about manifest cases of discrimination within the scope of the implementation of the rights referred to in the Appendix to Annex 6, as well as about the cases where discrimination is claimed to exist.

Yet, based on this comparison of standards of control (review), one may observe that these remarks are not completely justified. Both courts apply the ECHR and the additional protocols thereto to the same extent. With regards to the prohibition of discrimination, both courts can review the mentioned instruments referred to in this annex, that is the Appendix. Neither the BiH Constitutional Court (according to the opinion espoused by the authors of this text), nor the Human Rights Chamber protect the human rights and freedoms in a restrictive manner, *i.e.*, only in the case of allegations of discrimination. Otherwise, the BiH Constitutional Court, as an institution of Bosnia and Herzegovina, is equally obliged to protect human rights and freedoms (Article II.1 of the BiH Constitution) at the highest internationally recognised level, to which the BiH Constitutional Court drew attention in its regular jurisprudence.[561] The fact that the Human Rights Commission was founded "for that purpose" does not release the BiH Constitutional Court from this obligation. This applies even more so from the moment when the state assumed responsibility for the application of Annex 6, whereby the objectives and tasks of Annex 6 were transferred to the state institutions. Yet the substantive constitutional law, of which the BiH Constitutional Court must be mindful, as "the guardian" thereof, does not comprise solely the ECHR and additional protocols thereto, or the instruments of Annex I to the BiH Constitution. In addition, the Court must be mindful of the constitutional rights and principles: Article II.5 of the BiH Constitution in connection with Annex 7 provides for the right to return (which has been dealt with separately), which the BiH Constitutional Court has used several times in

560 Authors' archive.

561 U 26/00, paragraph 19; U 16/00, paragraph V.a; U 18/00, paragraph 20; U 24/01, paragraph 20; U 26/01, paragraph 18.

its jurisprudence. The BiH Constitution finally instituted constitutional principles such as pluralism, democracy, the legal state, a market economy, the freedom of movement of persons, goods, services and capital; these are the principles which bestow upon the BiH Constitutional Court additional standards of control and which – in such a direct and comprehensive manner – were not at the disposal of the Human Rights Chamber.

7. The scope of control

The notion of the scope of control (review), on the one hand, rests on the issue of the distinction between the jurisdiction of the ordinary judiciary and, on the other hand, the jurisdiction of the BiH Constitutional Court. That issue concerns the division of duties and tasks, and also the understanding of a constitutional court: to what extent, how profoundly and how extensively must it review the decisions of the lower ordinary courts, without thereby putting itself in danger of assuming the role of supervisor and, as a result thereof, "getting suffocated" in a greater number of proceedings. As a way of distinction, the basic rule that the ordinary law is a matter of the lower ordinary courts, and the constitutional law is a matter of the BiH Constitutional Court shall apply. However, it is not always simple to draw this line in the practice.

a. The Constitutional Court of BiH

AP 75/05 Krnjić	20060412
AP 286/05 Džinić	20060412
AP 963/07 Kobilj & Zulović	20070509
U 11/00 B. Š.	20000818
U 11/01 Kovačević	20020803 *OG of BiH,* No. 20/02
U 12/00 Jašarević	20020130 *OG of BiH,* No. 01/02
U 15/99 Zec	20010612 *OG of BiH,* No. 13/01
U 17/00 Zunđa	20010710 *OG of BiH,* No. 17/01
U 22/00 Guskić	20011012 *OG of BiH,* No. 25/01
U 29/02 R. T.	20030627
U 30/01 Marković	20020829 *OG of BiH,* No. 24/02
U 31/01 R. Š.	20011221
U 39/01 M. H.	20020910 *OG of BiH,* No. 25/02
U 4/99 Association of Blind Citizens Lukavac	19990928 *OG of BiH,* No. 16/99
U 51/01 Cantonal Prosecutor's Office Sarajevo	20020910 *OG of BiH,* No. 25/02
U 53/02 O. S.	20030725
U 62/01 Pjanić	20020829 *OG of BiH,* No. 24/02
U 7/00 Hadžisakić	20010224 *OG of BiH,* No. 06/01
U 8/99 Modričkić	19991227 *OG of BiH,* No. 24/99

Since the BiH Constitutional Court, given the linguistic phrasing referred to in Article VI.3(b) of the BiH Constitution, originally considered itself to be competent only to review court judgments. Therefore, the differential treatment of constitutional appeals lodged against court judgments (as a special form of an act of public authority), as opposed to appeals lodged against other forms of acts of public authority, in the beginning did not play the important role that a German jurist would be familiar with, based on the case law of the Federal Constitutional Court of the FR Germany, which applies a different standard of control (review) to these two types of appeals. With respect to the scope of control (review), the jurisprudence was, therefore, certainly related only to the control (review) of court judgments. Consequently the BiH Constitutional Court, in the appeals where the parties complained about a violation of procedural or substantive law under regular positive regulations (without complaining, at the same time, about a violation of some of the constitutional human rights and freedoms), only briefly stated that it does not review the correctness of the application of ordinary positive regulations or facts of the case that had been established by the ordinary lower instance courts.[562] The BiH Constitutional Court reviewed the facts of the case established by the lower courts only if the proceedings conducted by the lower court were unfair; the burden of proving procedural errors, therefore, was on the appellant.[563] The decision in Case No. U 15/99, indeed, reads that the Constitutional Court is not called upon to review an appeal on the basis of the obligation law or other norms of private law, but to establish whether the challenged judgments violate the appellant's human rights and freedoms. As part of the review, the BiH Constitutional Court ordered that an oral hearing be held, and it established the facts on its own and assessed them in a manner different from that of the lower instance ordinary courts.[564] In other proceedings on the appeals lodged, the BiH Constitutional Court only quoted the appropriate norms of the ordinary law and then briefly established that the application of such norms by the lower instance courts did not constitute a violation of the mentioned constitutional human rights and freedoms;[565] at times it would explicitly uphold the decision adopted by the lower instance courts.[566]

Subsequently the scope of control has been further specified. This happened first, naturally, regarding the merits of appeals, which is similar to the jurisprudence of the European Court,[567] and particularly to the jurisprudence of the German

562 U 4/99; U 17/00, paragraph 19; U 22/00; U 11/01, paragraph 16.
563 U 17/00, paragraph 30 *et seq*.
564 See details under p. 147.
565 U 11/00; U 12/00.
566 U 12/00; U 31/01, paragraph 24 *et seq*.
567 In *Barthold v. FR Germany* of 25 March 1985, paragraph 48, with further references, the ECtHR argues as follows: "[…] the logic of the system of safeguard established by the Convention sets limits upon the scope of the power of review exercisable by

Federal Constitutional Court.[568] The decision in Case No. U 27/01, indeed, reads that the BiH Constitutional Court is not called upon to review whether appropriate legal regulations were correctly interpreted and applied; this is within the jurisdiction of the ordinary courts and authorities of the Entities. With respect to Article 1 of Additional Protocol No. 1 to the ECHR, it sufficed that a tax obligation had a legal basis and that the application thereof did not burden an individual excessively or inappropriately, for which no grounds existed in the present case.[569] In another decision the BiH Constitutional Court noted that it was not called upon to establish whether the lower instance courts had correctly applied the Law on Housing Relations, but only whether the appellant's constitutional rights were violated.[570] While interpreting Article VI.3(b) of the BiH Constitution, the Court subsequently alleged that the notion of a "constitutional issue" implies a restriction of the jurisdiction of the BiH Constitutional Court to only those proceedings on appeal which raise relevant issues under the BiH Constitution. The BiH Constitutional Court is not called upon to review the procedure of the establishment of facts of a case, or the interpretation and application of the ordinary law by the lower instance courts unless the decisions of the lower instance courts violate constitutional rights. Constitutional rights are violated in the event when a decision of an ordinary court has disregarded or erroneously applied the constitutional rights of an individual, when they have applied the law manifestly arbitrarily, when the applied law is in itself unconstitutional, or when a violation of the fundamental principles of a fair proceeding has occurred (fair trial, access to court, effective legal remedies, etc).[571]

In the decision in Case No. U 7/00, the Constitutional Court, for instance, considered that the lower instance court exceeded its margin of appreciation. Namely, the Supreme Court of the RS should not have considered itself to have been bound by the established facts of the case in the administrative proceeding. Taking into account the appropriate regulations of the Law on Administrative

the Court in this respect. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection"; the ECtHR carries on in this direction in: *Chappell v. United Kingdom* of 30 March 1989, paragraph 54; *Tre Traktörer Aktiebolag v. Sweden* of 21 June 1989, paragraph 58; *Allan Jacobsson v. Sweden* of 25 September 1989, paragraph 57. Finally, the ECtHR shall review whether non-compliance with the national law arises on the basis of what has been presented by the applicant.

568 See, *Schlaich/Korioth*, 2001, paragraph 274 *et seq*.

569 Paragraph 28 *et seq*.

570 U 31/01, paragraph 24.

571 U 30/01, paragraph 17; also, U 39/01, paragraph 19; U 62/01, paragraph 17; U 29/02, paragraph 23. In the appeal over a violation of the right to a fair trial, the entire proceeding is subject to review, including the presentation of evidence (U 53/02, paragraph 31).

Procedure and Dispute, the court should have established the facts on its own. Therefore, the appellant was denied the right of access to court. Next, the BiH Constitutional Court itself conducted the procedure of assessment of evidence and established that the facts of the case were different from that which had served as a basis for the adoption of the challenged decision.[572] Also in Case No. U 8/99, the BiH Constitutional Court established that the lower instance courts applied the ordinary law in contravention of the Constitution. The courts should have directly applied the constitutional human rights to property, possession of apartment and access to court, and thus, should have secured ownership to the appellant over her old apartment. With respect to this, one may consider that the decision adopted in Case No. U 15/99 goes in the same direction. In the said decision the BiH Constitutional Court eventually concluded that the lower instance courts, in applying the relevant provisions of the obligation law, did not recognise the significance of the right to return (Article II.5 of the BiH Constitution in conjunction with Article XII.3 of Annex 7 to the GFAP), the right to property and the right to free use of apartment. Therefore the Court adopted a decision that the contract on exchange of real property, contrary to the position of the lower instance courts, was null and void.[573]

However, in more recent decisions[574] the BiH Constitutional Court has entirely left the assessment of whether the appellant is entitled to some human rights and freedoms (in the present case, to property, in the form of entitlement to payment of the earned salary) to the lower instance courts. While doing so, it does not examine at all whether the courts have arbitrarily established facts and applied appropriate regulations, although the appellant complained precisely about the arbitrary application of the substantive law and erroneously established facts. Thus, for instance, in Case No. AP 75/05 the appellant claimed that he had an occupancy right over an apartment in the RS. However, the BiH Constitutional Court laconically argued that the appellant "failed to prove in the conducted court proceeding before the ordinary courts that he had acquired the occupancy right over the apartment at issue in accordance with the existing legal regulations, *i.e.*, that he had legally acquired the property, and therefore he may not refer to a violation of the right to property he had not acquired […]".[575] Through such practice the BiH Constitutional Court gives up its competences to carry out the control (review) and responsibility thereof.

572 *Ibid*.

573 See details under "(b) Indirect "third effect" (Drittwirkung) of human rights and freedoms", p. 144 *et seq*.

574 See, for instance, AP 286/05, paragraph 9 *et seq*.

575 Paragraph 14.

The risky self-restriction of the BiH Constitutional Court in relation to the issues arising from constitutional law as opposed to the issues arising from the ordinary law may be observed clearly in the Decision No. U 51/01. In that case, the State Prosecutor's Office, in addition to a violation of international criminal law, also complained that the Supreme Court of the FBiH abused human rights, and that it did not comply with the ordinary procedural law.[576] The BiH Constitutional Court established that the State Prosecutor's Office may not have referred to Article 6 of the ECHR, which was, as a matter of fact, correct, yet it failed to point out a real problem. The BiH Constitutional Court added that the issue of whether the provisions of the law on territorial jurisdiction of the courts was correctly applied or not was not a constitutional issue falling under the jurisdiction of the BiH Constitutional Court.[577] One may object to this argument. It is correct that the lower instance courts, mainly, have a certain freedom of interpretation in applying the ordinary regular law. The BiH Constitutional Court reviews judgments of the lower instance courts only within the stipulated scope (in particular the control of arbitrariness). A violation of the regulations under the ordinary regular law on territorial jurisdiction, certainly, may constitute a constitutional issue, as within the scope of the jurisdiction of courts the constitutional procedural rights (primarily, the right to a fair proceeding) are exercised precisely through the ordinary regular law. Accordingly, the right to a judge is also determined by law. If a court violates the mentioned law, it automatically constitutes a violation of the right to "a lawful judge".[578] Of course, if a law can be interpreted both ways, it is difficult to prove the arbitrariness of a decision.

b. Human Rights Chamber

CH/00/3513 Hodžić	20030506
CH/00/3880-A&M Marjanović	20021108
CH/00/3921 Bogdan	20060607
CH/00/5454 Maksimović	20060405
CH/00/5480-A&M Dautbegović	20010706
CH/00/5796-D Lukenda & Bevanda	20010705
CH/01/6840 Ćosić	20070605
CH/01/6881 D. K.	20050608
CH/01/7488-A&M Buzuk	20020705
CH/01/7686 Makić	20011109
CH/01/8507 Softić	20051215

576 See what has already been mentioned about this case on p. 761.

577 U 51/01, paragraph 30.

578 "Lawful judge" is a translation of a German legal term *„Recht auf einen gesetzlichen Richter*", which implies the right of an individual to be tried by a judge assigned under the law.

CH/02/8640 *D P Trgopromet v. RS*	20050208
CH/02/8724 Murgić	20050118
CH/02/8820 Tomanić	20020905
CH/03/13424 Islamic community - Vakuf Directorate	20070605
CH/03/13429 Dutina-Glavaš	20070315
CH/03/14442 Pavlović	20060208
CH/03/14954 Radmilović	20070315
CH/98/1324-A&M Hrvačević	20020308
CH/98/1366-A&M V. Č.	20000309
CH/98/548-M Ivanović	20000706
CH/98/638-A&M Damjanović	20000211
CH/98/724-A&M Matović	20000520
CH/99/2117-D	20011206
CH/99/2565-D	19991208
CH/99/2629-D	19991208
CH/99/3476 M. M.	20030508

Relying on the case law of the Court in Strasbourg, the Human Rights Chamber restricted the intensity with which the national courts established and assessed the facts of a case. According to the position of the Human Rights Chamber for BiH, it is within the jurisdiction of national courts to assess presented evidence. The Chamber is not competent to give its assessment as a replacement for the assessment of facts by the national courts. Despite this, if a violation of Article 6, paragraph 1 of the ECHR is established, it is necessary that the Human Rights Chamber establishes whether the entire proceeding, including the manner in which the prosecution and defence collected evidence, has been fair and in accordance with the standards referred to in Article 6, paragraph 1 of the ECHR.[579] Therefore the Human Rights Chamber, in contradictory and arbitrary decisions, will exceptionally establish a violation of the right to a fair trial.[580] The Human Rights Chamber may review the facts of a case which had already been established by the ordinary courts only if it is claimed or manifest that the courts had assessed evidence erroneously and that such assessment lacked minimum fairness.[581] For instance, establishment of the facts of a case is deficient when the competent court dismissed a request of a party to the proceeding to hear a witness, although a concrete testimony of the witness has fundamental significance for the establishment of the facts of the case; whereby the concerned party to the proceeding bears the burden of proving the

579 CH/98/638-A&M, paragraph 80; CH/99/2565-A, paragraph 10; CH/99/2629-A, paragraph 9; CH/99/2117-A, paragraph 44 with further references to the ECtHR, *Lüdi v. Switzerland* of 15 June 1992, Series A No. 238, paragraph 43; *Dombo Beheer B.V. v. Holland* of 27 October 1993, Series A No. 274, paragraph 31; *Barberà, Messegué and Jabardo v. Spain* of 6 December 1988, Series A No. 146, paragraph 68.

580 See, CH/98/1366-A&M, paragraphs 71-83.

581 CH/98/638-A&M, paragraphs 80-82; CH/98/724-A&M, paragraph 41; CH/98/1324-A&M, paragraph 68; disputed borderline case: CH/98/548-M.

significance of the testimony of a witness.[582] Yet if the facts which the witness was to testify about had already been established by way of other evidence, the court might dismiss a request for a judicial hearing of a witness.[583] Contrary to this, if lacking any grounds indicating the existence of a violation of the right to a fair trial, the application shall be dismissed as manifestly ill-founded, that is *ratione materiae* incompatible with Annex 6.[584]

This applies also to the interpretation of domestic law by the ordinary courts. Domestic courts enjoy a certain margin of appreciation regarding the interpretation of the ECHR, through the wording as follows "*in accordance with a procedure prescribed by law*" refers to national law.[585] Precisely in the applications filed with the Human Rights Chamber, at the core of which lied a private legal dispute on whether a certain right existed or not, the Human Rights Chamber in principle took as a starting point the things established by the domestic court.[586] If there is a possibility to interpret a certain provision in several ways in accordance with the ECHR, the competent body may, according to its own assessment, opt for one of the interpretations possible.[587] Contrary to this, this does not rule out the possibility for the Human Rights Chamber to establish a violation in the event that the interpretation and application by the domestic courts were incompatible with the rights referred to in the ECHR.[588] Thereby, while assessing whether a certain law was applied arbitrarily, the Human Rights Commission within the BiH Constitutional Court may apply the typical mechanisms of the ordinary judiciary, such as, for instance, the rules on the *ratione temporis* application of regulations.[589] If and when it is established that the selected interpretation is in contravention of the EHCR, there is room to adopt an additional conclusion, *i.e.*, that of several possible interpretations the one which is in contravention of the Convention was selected for being over-restrictive or extensive.[590] The interpretation shall always be arbitrary if not covered by linguistic phrasing of the law,[591] or if covered by linguistic meaning but with the very phrasing being in contravention with the BiH

582 CH/02/8640, paragraph 7 with further references to the ECtHR, *Ankel v. Switzerland* of 23 October 1996, Reports 1996-V, paragraph 36.
583 CH/01/6840, paragraph 10.
584 See, for instance, CH/00/3513-A, paragraph 5; CH/01/7686-A, paragraphs 4-7.
585 CH/00/3880-A&M, paragraph 126 with further references to the ECtHR, *Winterwerp v. Holland* of 24 October 1979, Series A No. 33, paragraphs 45-47, and *Benham v. United Kingdom* of 10 July 1996, Reports 1996-III, paragraph 41.
586 CH/02/8820-A, paragraph 23; CH/99/3476-RR, paragraph 14 *et seq*.
587 CH/03/13429, paragraph 50.
588 In relation to the right to liberty of person, see CH/00/3880-A&M, paragraph 126; in relation to the right of access to court see CH/00/5454, paragraph 45.
589 CH/03/14442, paragraph 77.
590 CH/00/3921, paragraph 36.
591 CH/03/14954, paragraph 47.

Constitution.[592] As part of the review of the lawfulness of restrictions on human rights and fundamental freedoms, for instance, the right to property or the right to private and family life, the Human Rights Chamber for BiH reviewed on a regular basis their conformity with the domestic law, such as, for instance, in cases where the lawfulness of the deprivation of freedom of a person was brought into question,[593] or where the disputed issue was the issuing of a permit for the construction of a hydro-electric power plant in a protected area.[594] When reviewing arbitrariness, the Human Rights Commission within the BiH Constitutional Court at times dealt profoundly with the interpretation and application of ordinary legal regulations.[595]

B. Maximum protection of fundamental human rights and freedoms (Article II.1 of the BiH Constitution)

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.

Bosnia and Herzegovina and both Entities guarantee the highest level of the internationally recognised human rights and fundamental freedoms. The general clause of Article II.1, first sentence, of the BiH Constitution becomes concrete in the subsequent paragraphs of Article II of the BiH Constitution, but also in other places, in relation to the obligation to protect the implicated rights (paragraphs 2, 3, 4, 5 and 7, Articles I.4, I.7(b), III.2(c) of the BiH Constitution, Annex I to the BiH Constitution), in relation to such entities that have the responsibility to provide protection (paragraph 6, Articles I.4, III.2(c) of the BiH Constitution) and in relation to the holders of rights (paragraphs 3, 4 and 5 of Article II of the BiH Constitution). However, the general clause is not insignificant. Even if the obligation to provide legal protection at the highest level is too unspecified, the constitutional norm, nevertheless, contains **a guideline** in the sense that, if there is a dilemma, priority is given to the protection of an individual right or freedom. This applies especially in cases when, comparing the international or European system of protection, it is proven that there is an appropriate level of protection. Indeed, concerning the ECHR and the European Court case law, this

592 CH/03/13424, paragraph 51.

593 CH/01/7488-A&M, paragraph 88, as to the period spent in pre-trial detention.

594 CH/00/5480-A&M, paragraph 114 *et seq*.; see also the application filed by the opponent party: CH/00/5796-A.

595 See, CH/01/6881, paragraph 60 *et seq*.; CH/01/8507, paragraph 44 *et seq*.

arises directly from Article II.2 of the BiH Constitution. However, comparison with other legal systems and the case law of the then constitutional courts and courts of human rights may, in certain cases, be a role model and, according to the general clause of Article II.1, first sentence, of the BiH Constitution, it may be a binding action. Accordingly, the scope of protection of an individual right provided by the European Court, in certain cases, may be smaller than the scope of protection provided by the established national constitutional courts. In that case, the standard for the legal protection in Bosnia and Herzegovina would be the one that was recognised in the consolidated case law of other constitutional courts.

Accordingly, the BiH Constitutional Court referred to the general clause in Article II.1, first sentence, of the BiH Constitution in order to ensure the respect for constitutional human rights and freedoms against the acts of international factors, which, in accordance with international law, discharge certain tasks in Bosnia and Herzegovina.[596] The State is obliged to protect all persons in its territory from SFOR actions that are in contravention of the ECHR (in the present case it concerned the deprivation of freedom) although SFOR enjoys immunity.[597]

It appears that precisely Article II.1 of the BiH Constitution, through its contextual linking of the obligation to protect human rights and freedoms and by founding the Human Rights Commission under Annex 6, gives **instructions for action** that the Human Rights Chamber oftentimes referred to in its practice, particularly in relation to the discussion about the so-called merger with the BiH Constitutional Court. One could easily deduce from this regulation the integration of the Human Rights Commission (the Human Rights Chamber and the Ombudsmen) into the constitutional framework, which could, then, be presumed also for the Commission for Real Property Claims of Displaced Persons and Refugees under Annex 7 in conjunction with Article II.5 of the BiH Constitution. The constitutional case law of the Constitutional Court regarding its relation with the Human Rights Chamber would then, certainly, have to look differently. The previous division of work – whereby the Human Rights Commission would tackle issues related to human rights and fundamental freedoms and the Constitutional Court the remainder of the constitutional issues, or the Human Rights Commission would tackle individual cases and the BiH Constitutional Court would tackle the rest of the proceedings – would result in the continued existence of the Human Rights Chamber.

596 See, U 9/00, paragraph 5; especially p. 783, “q. Particularity: Competence to review international interventions”.

597 See also AP 2582/05, paragraph 38 et seq. in connection with violations of Article 5 of the ECHR.

Nevertheless, despite the assigning of duties and tasks under Article II.1 of the BiH Constitution and despite the non-existence of a separate and explicit competence of the BiH Constitutional Court over individual cases under Article VI.3 of the BiH Constitution, the case law has developed in the completely opposite direction. In support of such case law, Article VI.3(b) of the BiH Constitution in conjunction with Article II of the BiH Constitution provides a rather solid basis, especially if taking into account trends in the constitutional case law of Western Europe and the countries in transition of Central and Eastern Europe. If, under Article II.1 of the BiH Constitution, Bosnia and Herzegovina is obliged to protect internationally recognised human rights and freedoms at the highest level, if such rights, under Article II and Annex I to the BiH Constitution, have been incorporated into the BiH Constitution and if the BiH Constitutional Court, under Article VI.3 of the BiH Constitution, has been appointed as a guardian of the Constitution, it is completely clear that the BiH Constitutional Court is called upon to protect the mentioned rights within the scope of its jurisdiction under Article VI.3 of the BiH Constitution, which, in accordance with item (b), includes the adoption of decisions on constitutional issues arising from the opinion of any court in Bosnia and Herzegovina.

C. Obligation to directly apply the ECHR (Article II.2 of the BiH Constitution)

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.

The rights referred to in the ECHR are directly applicable in Bosnia and Herzegovina. The rights referred to in the ECHR do not require any "act for transformation", in order to develop their effect in the legal system of BiH. They are directly applicable law. These types of **constitutional obligations regarding direct application** are unusual. When it comes to the BiH Constitution, on the one hand, this is corroborated by referring to the speed with which the authors of the text of the Constitution were forced to draft provisions on the protection of human rights and fundamental freedoms as part of the peace agreements. However, this legal technique, which was selected for the first time in the *Carrington* plan,[598] was subsequently considered purposeful as it was possible to reach a consensus on it, in general, and therefore, it was no longer rejected. In this manner it was possible to have a breakthrough with

598 See, above, p. 26.

respect to the practice of the protection of human rights and fundamental freedoms in the former Yugoslavia, which was, for the most part, unknown and questionable to the international negotiators. If the standard catalogue of fundamental human rights and freedoms had been set up without references to the Agreement on the Protection of Human Rights, probably these rights would have been interpreted and applied in accordance with the legal tradition of the region.[599] Thanks to the selected technique, it was possible in one stroke to "spill" the entire catalogue of rights of the ECHR and instruments of Annex I to the BiH Constitution across Bosnia and Herzegovina, thereby not having to request from the State to fulfil the demanding criteria set by the Council of Europe, which Bosnia and Herzegovina joined only on 12 July 2002. The view espoused in the end is that "the constitution maker" wished to automatically, in an "ultra-monistic" manner, introduce into the national legal system the necessary international law related to fundamental human rights and freedoms, in order to avoid, amid divergent national interests, the complicated procedure of enacting laws.[600]

The obligation to directly apply the ECHR and the instruments of Annex I to the BiH Constitution in Bosnia and Herzegovina is considered purposeful in general, although their application in practice has caused difficulties at times. The application of international legal instruments was hindered by the lack of translation and poor publicity, in support of which *Marko*[601] provided figurative examples. Indeed, the ECHR, and the instruments referred to in Annex I to the BiH Constitution, were translated by the Council of Europe into the local languages. However, the ECHR was published in the *Official Gazette of Bosnia and Herzegovina* only in 1999[602] and it took several more years for ECHR-related materials to appear, such as Reports on judgments and decisions, and manuals, or instructions on the application in local languages. Internationalisation of law, undoubtedly, brings linguistic difficulties. A question arises whether the local legal practitioners are able to successfully do their work of protecting human rights and freedoms because, primarily, they are not familiar with the basic notions of protecting human rights and fundamental freedoms and of a democratic legal state, in a manner constituting the basis of the ECHR and the BiH Constitution, and that the technical problem of translation comes in second. There were individual objections that, due to the obligation of direct

599 See *Szasz*, 1995, p. 245 *et seq*.; *Szasz*, 1996, p. 306. As to the understanding of the fundamental human rights and freedoms in the states of the Warsaw Treaty, which – albeit – are not possible to apply in full to the former Yugoslavia, see *Mangoldt*, 1988, and *Brunner*, 1988.a.

600 *Vehabović*, 2006, p. 47.

601 2002, p. 391 *et seq*.

602 *OG of BiH,* No. 6/99.

application, there is a threat that the interpretation of the ECHR by domestic bodies could depart from the interpretation by the bodies in Strasbourg, or that the ECHR, otherwise, would not be suitable for application in a post-conflict environment.[603] In practice it turned out that the courts tackling issues related to human rights and fundamental freedoms took different paths in individual cases. Accordingly, the citizens of Bosnia and Herzegovina partly received protection of human rights and fundamental freedoms which went beyond the protection offered by the European Court – for which there is good reason considering the requirement specified in Article II.1 of the BiH Constitution – whereas in other cases such protection lagged behind the European Court standard. However, this situation in Bosnia and Herzegovina is probably not different from that in other countries in transition, and even in the states of Western Europe that have a consolidated democracy.

In accordance with the obligation of direct application of Article II.2 of the BiH Constitution, in the subsequent part one should look only at the regulations of the ECHR and additional protocols thereto which contain subjective legal positions.

1. The right to life and the abolition of the death penalty (Article 2 of the ECHR, Protocol No. 6 to the ECHR and Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty)

Article 2 of the ECHR [right to life]

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

603 As asserted by *Gret Haller*, the first person to have exercised the office of the Ombudsman in BiH; quoted as in *Decaux*, 2000, p. 713 *et seq*.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (1983)

Article 1. Abolition of the death penalty

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

Article 2. Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

Article 1

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

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

Article 2

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

[...]

AP 1045/04 Mršić	20051117
AP 1104/04 I. T.	20050628
AP 1180/06 Ljubović	20060613
AP 1417/05 Simić	20060912
AP 173/05 Kopić	20060209
AP 2405/05 Hodžić	20070419
AP 899/05 Trnjaković	20060314
CH/01/6979-D&M E. M. & S. T.	20020308
CH/02/8679 *et al*.-D&M Boudellaa *et al*.	20021011
CH/02/8961-D&M Ait Idir	20030404
CH/96/30-M Damjanović	19970905
CH/97/59-D&M Rizvanović	19980612

CH/97/69-D&M Herak	19980612
CH/98/668 Čebić	20030704
CH/99/3196-D&M Palić	20010111

a. Survey

The true scope of the right to life, under Article 2 of the ECHR, in Bosnia and Herzegovina, arises only in connection with Additional Protocol No. 6 to the ECHR and Articles 1 and 2 of the Optional Protocol No. 2 to the International Covenant on Civil and Political Rights. In member states, these protocols strengthen the protection of life and significantly reduce the admissibility of the imposition of the death penalty. Article 2 of the ECHR restricts the imposition of the death penalty solely to the extent that the death penalty must be *provided for by law* for certain criminal acts and the death penalty must be pronounced by a *court*. Additional Protocol No. 6 to the ECHR in principle abolishes the death penalty (Article 1), although, even under Additional Protocol No. 6 to the ECHR, imposing the death penalty and the execution thereof is also possible in the peacetime. Naturally the death penalty must be *provided for by law* and it may be applied – which arises from the principle of obligation to comply with the law – only in the instances laid down in the law and in accordance with the provisions thereof. The death penalty shall be limited to *acts committed in the time of war or during the imminent threat of war* (Article 2). Thus, the starting point is the time of the commission of a criminal act. Nevertheless, this abolishes the death penalty for all acts committed in times of peace. Articles 1 and 2 of Optional Protocol No. 2 to the International Covenant on Civil and Political Rights go one step further, and according to them, in principle, *imposition of the death penalty during peacetime are completely* prohibited. Even during armed conflict, the death penalty is allowed only if carried out on the basis of a sentence for some particularly grave act of a military nature, committed during the time of the armed conflict, and only if such an exception was made by voicing reservation at the time of the ratification of or joining the Covenant. Taking into account these two agreements (the Covenant and the ECHR), which regulate the same issue, one should be mindful of the fact that Optional Protocol No. 2 to the International Covenant on Civil and Political Rights shall be applied instead of Article 2 of the ECHR only if it contains stricter requirements as to the admissibility of the death penalty. Otherwise, one should be mindful *at all times* of all the requirements to be met and arising from Article 2 of the ECHR and protocols thereto. Thus, for instance, a requirement that the goal of the imposition of the death penalty be the enforcement of a *court* judgment arises exclusively from Article 2 of the ECHR.[604]

604 See, for instance, also CH/96/30-M, paragraph 38 *et seq*.

b. Article 2 of the ECHR

(a) The scope of protection

Article 2 of the ECHR protects an individual, first and foremost, against intentional and unlawful deprivation of life by the State. Yet not every threat to the life of an individual falls within the scope of protection of Article 2 of the ECHR, but only the deliberate deprivation of life and a ruthless threat to the life of an individual.[605] Therefore, measures such as the ban on preventing the penetration of dampness into an apartment,[606] tax collection,[607] dismissal from work,[608] decisions on the right of the damaged person to compensation of damage in a contentious proceeding[609] or eviction order[610] do not fall within the scope of protection of Article 2 of the ECHR irrespective of subjective burden on an individual as a result of the mentioned measure.

On the other hand, Article 2 of the ECHR obligates the State to undertake appropriate measures in order to protect the life of persons within the scope of its competences.[611] The State is obliged to enact effective criminal regulations in order to act preventively in the event of assault on persons under its respective jurisdiction. In addition, the State must assign effective enforcement mechanisms to such regulations for the sake of prevention, suppression and the sanctioning of violations of the law.[612] Therefore, the competent bodies ought to carry out, among other things, an efficient and official investigation in the event of the violent death of a person, as the purpose is to ensure efficient compliance with domestic laws in order to protect people’s lives. Effective investigation is to be such that it enables the identification and punishment of the persons responsible. Thereby the obligation relates to a lesser degree to some concrete result, and to a greater degree to providing appropriate means for investigation.[613] The obligation to carry out an effective investigation does not extend solely to cases where involvement of State actors was established.[614] Thus, by the force of its authority monopoly and

605 AP 1104/04, paragraph 14.
606 AP 1180/06, paragraph 9.
607 AP 287/06, paragraph 8 *et seq*.
608 AP 2405/05, paragraph 22.
609 AP 1417/05, paragraph 30 *et seq*.
610 AP 899/05, paragraph 23 *et seq*.
611 CH/01/6979-A&M, paragraph 50 with further references to the ECtHR, *L.C.B. v. United Kingdom* of 9 June 1998, Reports 1998-III, p. 1403, paragraph 36.
612 CH/01/6979-A&M, paragraph 50 with further references to the ECtHR, *Osman v. United Kingdom* of 28 October 1998, Reports 1998-VIII, p. 3159, paragraph 115.
613 See, CH/01/6979-A&M, paragraph 50 with further references to the ECtHR, *McKerr v. United Kingdom* of 4 May 2001, paragraphs 111-113.
614 CH/01/6979-A&M, paragraph 51 with further references to the ECtHR, *Yasa v. Turkey* of 2 September 1998, paragraph 100.

as a manifestation of its positive obligation, the State must protect human rights and fundamental freedoms, and make sure that investigations are carried out regarding the deprivation of life committed by private physical persons.[615] All State bodies that have the competence for prosecution and criminal investigations have this obligation. If, for instance, the State Prosecutor's Office fails to carefully collect evidence and to investigate a committed criminal act, it will violate the positive obligation of protecting human rights and fundamental freedoms. If necessary, State bodies must cooperate during the investigation.[616] If upon the completion of the independent investigation a criminal proceeding is initiated, a criminal judgment adopted and, possibly – in the eyes of a victim, mild – criminal sanctions imposed, that will not constitute a violation of the positive obligation on the part of the State to protect human rights and fundamental freedoms referred to in Article 2 of the ECHR.[617]

(b) Restriction of human rights and fundamental freedoms

Any action on the part of State bodies or private persons, which conduct may be attributed to the State, resulting in the death of a person who has been subjected to such action, shall be considered as restriction of the right to life. An important case of restriction of the mentioned right is the imposition of the death penalty as referred to in paragraph 1 of this article. Other circumstances, to be treated separately, in which the State may deprive a person of life are regulated by paragraph 2.

A violation of the right to life may be presumed also in the cases of the **disappearance** of a person, which may be attributed to the State even if not unambiguously established that the mentioned person was deprived of life at the hands of the government.[618] On that occasion a conclusion on the existence of a violation of the right to life is based on the presumption which, on the basis of different circumstances and information, has become so concrete as to be sufficient to establish the existence of a violation of the right under Article 2 of the ECHR. This includes a permanent failure on the part of the government to invest efforts in order to clarify the circumstances of disappearance and the fate of the person gone missing.[619]

615 CH/01/6979-A&M, paragraph 51 with further references to EComHR, *Dujardin v. France* of 2 September 1991, DR 72, p. 236; CH/98/668-A&M, paragraph 77.

616 AP 1045/04**,** paragraph 36 *et seq*.

617 AP 173/05**,** paragraph 6 *et seq*.

618 CH/99/3196-A&M, paragraph 66 *et seq*.

619 CH/99/2150-R, paragraph 112 with further references to the ECtHR, *Cyprus v. Turkey* of 10 May 2001, Reports 2001-IV, paragraphs 134-136.

The ECHR and additional protocols thereto do not provide for protection against one's disappearance. Therefore, with the definition of the notion "disappearance" the Human Rights Chamber links a – legally non-binding – declaration of the General Assembly of the UN of 18 December 1992 (A/RES/47/133) on the protection of all persons against disappearance. According to the mentioned declaration, any act bringing about one's disappearance shall constitute a violation of the right to life, or a serious threat to the mentioned right (Article 1). According to the preamble of the mentioned declaration, the following are considered to be causes of one's disappearance: deprivation of freedom, arrest or taking away a person against his/her will, or some other form of deprivation of freedom by officials of the governmental authority/power (both vertically and horizontally), or by organised groups or private persons acting on behalf of the State, with its direct or indirect support, with its consent or tolerance, with refusals to disclose the fate or whereabouts of the person concerned, or to confess that the person was deprived of freedom, thereby depriving the person concerned of all protection guaranteed by the right to life.[620] Assessing the question whether there is a violation of Article 2 of the ECHR as a result of causing the disappearance, shall depend on the circumstances of each individual case, and particularly – owing to the lack of direct evidence – on the existence of sufficient indications relying on circumstantial evidence, which on the basis of necessary standards for presentation of evidence allow for a conclusion to be made that the death of a person concerned occurred at the time of his/her detention.[621] Therefore, indications are particularly significant, for this type of "procedural and investigative repression" is characterised by the very attempt to prevent divulging any information on kidnapping or the whereabouts of the victim or the fate thereof.[622] The significant criterion for the presumption of death is the period which elapsed from the moment of the deprivation of freedom. The longer one goes without obtaining any new information about the arrested person, the greater the probability of the person being deceased.[623]

> In Case No. CH/99/3196, on the basis of the statements of witnesses who confirmed that Colonel *Palić* had been arrested by the RS Army, that the arrest took place after 14 December 1995, and owing to the lack of any credible and essential explanation and failure to show the minimum

620 See also CH/99/3196-A&M, paragraph 66.

621 CH/99/3196-A&M, paragraph 67 with further references to the ECtHR, *Tas v. Turkey* of 14 November 2000, paragraph 63.

622 CH/96/1-M, paragraph 35, and CH/99/3196-A&M, paragraph 67, both with further references to the Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* of 29 July 1988, paragraph 131.

623 CH/99/3196-A&M, paragraph 69 with further references to the ECtHR, *Tas v. Turkey* of 14 November 2000, paragraph 64.

> eagerness for clarification, the Human Rights Chamber came to presume that Colonel *Palić* had passed away.[624]

Restriction of human rights and fundamental freedoms, by way of failing to act in order to protect them, is questioned also in cases where the State fails to conduct a procedure against a perpetrator of a criminal act of a **premeditated murder** and to, possibly, ensure that a just penalty be effected. This does not concern solely the victim of a criminal act, but also his/her family.[625]

> In the mentioned case one of the municipal courts in Canton 10 evaluated the perpetrator of a criminal act of premeditated murder as mentally incompetent without sufficiently establishing the facts of the case or the reasoning, and ordered him to undergo compulsory psychiatric treatment, following which, he was rather quickly discharged as a healthy person. The Supreme Court of FBiH, indeed, established significant violations of the procedure, but was unable to quash the judgment to the detriment of the defendant. In this case the Human Rights Chamber considered that the Federation of BiH was responsible, on the one hand, because the perpetrator, given the political situation and the distribution of the population in that part of the country, could have assumed that he would not be prosecuted for his act. Therefore, the Federation of BiH failed to act preventively with regards to the commission of the act.[626] On the other hand, the municipal court with its suspicious decision of ordering the treatment (thereby ruling out the existence of the defendant's responsibility), and the State Prosecutor's Office by failing to appeal against the mentioned decision, denied the victim's right to life.[627]

(c) Justification of interference with the right to life

i. Cases under Article 2, paragraph 2 of the ECHR

Deprivation of life shall not be regarded as inflicted in contravention of Article 2 of the ECHR when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

624 CH/99/3196-A&M, paragraphs 68, 70.

625 CH/01/6979-A&M, paragraphs 59, 61 *et seq*., with further references to the ECtHR, *Akdeniz et al. v. Turkey* of 31 May 2001.

626 See, CH/01/6979-A&M, paragraphs 53-58.

627 Paragraph 59.

ii. Possibility of the legal restriction of human rights and fundamental freedoms

Deprivation of life is certainly admissible only in the event of a criminal act for which the death penalty is provided for by *law*.

iii. Court sentence

Deprivation of life shall be allowed only if effected in order to execute a *court* sentence, imposing a legally binding death penalty. In accordance with the jurisprudence of the European Court in Strasbourg, the Human Rights Chamber linked to the notion of "court" substantive and procedural requirements for admissibility of the adoption of a decision on deprivation of life. According to the said jurisprudence, only such a body possessing a series of fundamental features shall be considered "a court", as a governmental body, within the meaning of the ECHR, that is, primarily, a body that does not depend on the executive branch or the parties to the proceeding, yet which offers certain procedural guarantees adapted to the circumstances of each individual case.[628] In the event of adoption of a sentence of the death penalty, the procedure must meet the highest procedural requirements; in accordance with Article 15 of the ECHR, no exceptions are permitted even in time of war, so that – in the event that it is not possible to ensure the appropriate procedural guarantees – imposing and executing a death sentence are not admissible.[629]

The **independence** of a body is assessed on the basis of the manner of appointment of its members, the length of their mandate, the mechanisms of protection against external influence, and on the basis of the impression of independence the respective body leaves. The inability of the executive branch to dismiss judges during their mandate, generally speaking, is a natural consequence of their independence. The fact that formal legal regulations on the respective issue are lacking, does not imply *per se* a shortage of independence as long as the independence of judges is factually recognised and as long as other necessary guarantees are in place.[630] When it comes to the jury and lay judges, as well as professional judges, the requirement of independence and impartiality is applied.[631]

628 CH/96/30-M, paragraph 38, with quotation from the ECtHR, *De Wilde et al. v. Belgium* of 18 June 1971, Series A no. 12, paragraph 78.
629 CH/96/30-M, paragraph 38.
630 CH/96/30-M, paragraph 39 with further references to the ECtHR, *Campbell and Fell v. United Kingdom* of 28 June 1984, Series A no. 80, paragraphs 78, 80.
631 CH/96/30-M, paragraph 39 with further references to the ECtHR, *Holm v. Sweden* of 25 November 1993, Series A no. 279, paragraph 30.

> Taking this standard as the basis, the Human Rights Chamber considered that a military court, whose members, at the proposal of the minister of defence, were usually appointed and dismissed by the President of the Republic of BiH, was not sufficiently independent in order to be considered a court within the meaning of Article 2 of the ECHR; the Human Rights Chamber thought so especially because the law did not provide a minimum length of the mandate in practice, or substantive and procedural requirements on the basis of which the procedure of dismissal of judges was stipulated, nor could anything like that be anticipated soon. In the given conflicting situation, inadmissible influence from outside might have been expected. All in all, the military court did not appear sufficiently independent.[632]

A judgment adopted by a body which does not meet the requirements set before the court within the meaning of Article 2 of the ECHR cannot be redressed so as to examine and review at the appellate instance whether the judgment was in accordance with the ECHR; an error once made may only be corrected by quashing the first instance judgment.[633]

c. Additional Protocol No. 6 to the ECHR

The prohibition of imposing the death penalty and of the execution of the already imposed death penalty is restricted by the application of Article 2 of Additional Protocol No. 6 to the ECHR.[634] As an extraordinary regulation, Article 2 of Additional Protocol No. 6 to the ECHR must be narrowly interpreted, especially in relation to the right to life under Article 2 of the ECHR, which is a fundamental right referred to in the ECHR and which, along with Article 3 of the ECHR, lays down a fundamental value of the democratic societies making up the Council of Europe. Therefore, deprivation of life must be subjected to strict control, taking into account all of the circumstances of each individual case.[635]

Upon the entry into force of Additional Protocol No. 6 to the ECHR, imposing or executing the death penalty is possible solely concerning acts committed in time of war, or during the imminent threat of war, primarily by applying the law. In the time of **peace** the State may neither impose nor execute the

632 CH/96/30-M, paragraph 40.

633 CH/96/30-M, paragraph 41 with further references to the ECtHR, *De Cubber v. Belgium* of 26 October 1984, Series A no. 86, paragraphs 31-33; see in addition to the notion of "court" other cases set concurrently: CH/97/69-A&M, paragraph 59 *et seq*., and CH/97/59-A&M, paragraph 69 *et seq*.

634 CH/96/30-M, paragraph 28; AP 656/04, paragraph 29.

635 CH/96/30-M, paragraph 29 with further references to the ECtHR, *Klass et al. v. Germany* of 6 September 1978, Series A no. 28, paragraph 42, and *McCann et al. v. United Kingdom* of 27 September 1995, Series A no. 324, paragraph 147.

death penalty. Therefore, upon the entry into force of Additional Protocol No. 6 to the ECHR all criminal codes in Bosnia and Herzegovina which provided for the death penalty (the State or Entities' codes) were no longer applicable.[636] Pending amendments to relevant regulations in Bosnia and Herzegovina, this has brought about a void in the laws addressing criminal acts for which a punishment of imprisonment exceeding 15 years was prescribed, as a maximum punishment of imprisonment.[637] The legal situation was temporarily unclear.[638] In Case No. AP 656/04, the BiH Constitutional Court did not share the appellant's opinion that the competent court should not have imposed a punishment of imprisonment for a term of 20 years.[639] Namely, after the entry into force of the prohibition of imposing or executing the death penalty (direct application of Additional Protocol No. 6 to the ECHR) it is admissible for the death penalty prescribed by law to be replaced by a punishment of imprisonment for a term of 20 years.[640]

Since Bosnia and Herzegovina was not a member state of the ECHR at the international level, the Human Rights Chamber for BiH argued it by saying that the additional procedural requirement related in the last sentence of Article 2 of Additional Protocol No. 6 to the ECHR, which stipulates that the Secretary General of the Council of Europe must be informed of the relevant law regarding the death penalty in time of war, naturally, was not applicable.[641]

> In Case No. CH/96/30–M, the Human Rights Chamber established that a violation of Article 1 of Additional Protocol No. 6 to the ECHR existed, as a deprivation of life which the appellant was threatened with might have been subsumed under Article 141 of the Criminal Code of SFRY (genocide), which was applicable in the Federation of BiH at the time and which, in general, provided for the death penalty to be imposed not only in the time of war or during the imminent threat of war.[642]

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636 AP 656/04, paragraph 29.

637 *Ibid*., paragraph 31. Accordingly, for instance, Article 38, paragraph 2 of the Criminal Code of RS alternatively (*OG of SFRY,* Nos. 44/76, 34/84, 37/84, 74/87, 57/89, 3/90 and 38/90 and *OG of RS,* Nos. 12/93, 19/93, 26/93, 14/94 and 3/96) provided for a punishment of imprisonment for a term of 20 years for the criminal acts for which the death penalty was prescribed; this constituted an exception from a maximum punishment of imprisonment for a term of 15 years (Article 38, paragraph 1 of the Criminal Code of RS).

638 *Ibid*., paragraph 33.

639 *Ibid*., paragraph 34.

640 The Human Rights Commission within the BiH Constitutional Court came up with the same result in Case No. CH/98/724, paragraph 31 *et seq*.; as to the doubts about commuting the death penalty into a punishment of imprisonment in conjunction with Article 7 of the ECHR, see p. 299.

641 CH/96/30-M, paragraph 30; CH/97/59-A&M, paragraph 61.

642 Paragraph 33; see also equivalent cases CH/97/69-A&M, paragraph 50, and CH/97/59-A&M, paragraph 63.

Retaining the primacy of law requires that the imposing and execution of the death penalty be prescribed to a sufficient degree by clear and precise legal norms. If an individual is unable to anticipate with sufficient certainty that certain conduct implies a certain criminal sanction, then the penalty prescribed by law does not meet the mentioned requirements. In the mentioned Decision No. CH/96/30-M, the Human Rights Chamber held that Article 142 of the Criminal Code of SFRY (a crime against the civilian population), in conjunction with Article 37 of the same law, was not sufficiently specified. Namely, it is not possible to foresee what circumstances and what forms of criminal acts referred to in Article 142 result in the death penalty being imposed, especially with further references to Article 37, which prescribes such penalty only in "the gravest cases of serious criminal offences perpetrated".[643]

The adequate regulations must be **applied correctly**. The death penalty can only apply in cases provided for by the law and in accordance with the appropriate regulations.[644] Finally, Article 2 of Additional Protocol No. 6 to the ECHR provides nothing more than the principle of lawfulness, which derives from the principle of supremacy of the law: if the legal basis is required to restrict a human right or freedom, *e.g.*, the right to life in this case, then the State, in applying that legal basis, must also comply with the requirements provided for by the law. Otherwise, the principle of supremacy of the law would be a dead letter. A correct interpretation and application of the legal basis from the aspect of an appropriate human right or freedom must be subject to meticulous control so that the usual self-restraint of the BiH Constitutional Court and Human Rights Chamber must not apply in this case.

The law itself must substantially and formally be in compliance with the ECHR and BiH Constitution.[645] These standards include the instruments provided for by Annex I to the BiH Constitution, particularly the Optional Protocol to the International Covenant on Civil and Political Rights, the aim of which is the abolishment of the death penalty.[646]

For the purposes of international co-operation in criminal matters, the abolishment of the death penalty in accordance with Article 1 of Additional Protocol No. 6 to the ECHR means that the extradition of a person to a country

643 Paragraph 33, see also CH/97/69-A&M, paragraph 51.

644 CH/97/69-A&M, paragraph 48; CH/97/59-A&M, paragraph 61.

645 CH/96/30-M, paragraph 31 with further reference to the ECtHR, *Winterwerp v. the Netherlands*, 27 November 1987, Series A no. 33, paragraph 45; *Malone v. the United Kingdom*, 2 August 1984, Series A no. 82, paragraph 67.

646 See CH/96/30-M, paragraph 37; CH/97/69-A&M, paragraph 56; CH/97/59-A&M, paragraph 67; as to the constitutional status of the instruments provided for by Annex I to the BiH Constitution, see "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.

where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that the person whose extradition has been requested will not be sentenced to death or in the event of such a sentence being imposed, it will not be carried out.[647] If the State which carries out the extradition of a person does not receive such guarantees, and the individual risks being sentenced to death by the receiving State, there will be a violation of Article 1 of Additional Protocol No. 6 to the ECHR.[648] With regards to the doubt as to whether the death sentence will be pronounced or executed, the State which carries out the extradition will be responsible if it fails to obtain the appropriate information in a timely fashion during the procedure of extradition.[649]

> In Decision No. CH/02/8679 et al.-A&M, the Human Rights Chamber, taking into account the U.S. law, exposed the arguments in support of the conclusion that the Algerians in Guantánamo were at risk of the death penalty.[650]

If there are not sufficient safeguards to ensure a fair trial, as stipulated by, for example, Article 14 of the International Covenant on Civil and Political Rights or Article 6, paragraph 1 of the ECHR, then it is more probable that the death penalty will be imposed. With regards to the death penalty, international humanitarian law therefore requires minimum guarantees ensuring a fair trial.[651]

> In deciding the Case of Boudellaa et al. in "Camp X-Ray", Cuba, the Human Rights Chamber was of the opinion that such minimum standards were lacking.[652] The Human Rights Chamber therefore concluded that the death penalty was possible. Given the uncertainty as to what punishment the applicants could face, the BiH and Federation of BiH authorities should have sought guarantees from the US that the death penalty would not be

647 CH/02/8679 *et al*.-A&M, paragraph 273 with further reference to Guideline XIII(2) from *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism* of 15 July 2002, and EComHR, *Aylor-Davis v. France*, Application No. 22742/93 of 20 January 1994, DR 76-A, p. 164 (170-172), and *Raidl v. Austria*, Application No. 25342/94 of 4 September 1995, DR 82-B, p. 134.

648 CH/02/8679 *et al.*-A&M, paragraph 274.

649 See CH/02/8679 *et al.*-A&M, paragraph 276 *et seq.*; similarly, CH/02/9499-A&M, paragraph 199.

650 Paragraphs 278-283; in this respect, see also a criticism which judge *Rauschninga* expressed in his dissenting opinion which may not be disregarded, paragraphs 2-18.

651 See CH/02/8679 *et al.--A&M*, paragraphs 284-286 with further reference to the practice of the UN Human Rights Committee in, for example, *Earl Pratt and Ivan Morgan v. Jamaica*, Communication No. 210/198, U.N. Doc. Supp. No. 40 (A/44/40) 222 (1989), Decision of 6 April 1989, paragraph 15; ECOSOC-Resolution 1984/50 relating to *Safeguards guaranteeing protection of the rights of those facing the death penalty*, of 25 May 1984.

652 CH/02/8679 *et al.*-A&M, paragraph 299.

imposed on the Algerians. Their failure to do so constitutes the violation of Article 1 of Additional Protocol No. 6 to the ECHR.[653] The objection raised by judges *Tadić* and *Pajić* in this case was not so unusual. They stated that the State of BiH, being an infant State, should not be expected to meet such highly demanding standards which would hardly even be complied with by some countries with highly established legal systems and the rule of law.[654] This opinion is certainly contrary to the law which the State and its Entities represent, the law that Bosnia and Herzegovina and its Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms (Article II.1 of the BiH Constitution and Article I of Annex 6 of the GFAP).

d. Optional Protocol No. 2 to the International Covenant on Civil and Political Rights, whose aim is the abolishment of the death penalty

According to Article 1, in conjunction with Article 2(2) of the Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, deprivation of life is absolutely prohibited in each State Party.[655] This prohibition has constitutional rank.[656] Carrying out the death penalty in times of peace does not have a valid legal basis if the penalty was imposed in accordance with the law in times of armed conflict.[657] Therefore, given the absolute prohibition against State deprivation of life according to Article 2(2) of the Optional Protocol, the death penalty cannot be used validly by Bosnia and Herzegovina under the supremacy of the law as laid down in Article 2 of Additional Protocol No. 6 to the ECHR although this provision exceptionally allows deprivation of life in times of armed conflict. Such case-law of the Human Rights Chamber and probably the persuasion of the OSCE on the spot was applied only in the case of applicant *Dragan Matović*, in which the Supreme Court commuted the death sentence to a prison sentence in 1999 with the instructions that Bosnia and Herzegovina has obligations under Article II of the BiH.[658]

The bypass to which the Human Rights Chamber has resorted through Article II.4 of the BiH Constitution in conjunction with Articles 1 and 2(2) of the

653 CH/02/8679 et al.-A&M, paragraph 300.
654 Separate opinions by the aforementioned judges, item b.
655 CH/96/30-M, paragraph 37.
656 As to the quotations relating to the instruments provided for by Annex I, see "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.
657 CH/96/30-M, paragraph 37; CH/97/69-A&M, paragraph 54; CH/97/59-A&M, paragraph 66.
658 See CH/98/724-A&M, paragraph 15.

Optional Protocol to the International Covenant on Civil and Political Rights in order give reasons for a violation of Article 2 of Additional Protocol 6 to the ECHR is certainly not convenient. It results from a systemic gap in the Human Rights Chamber's competencies under Article II.2 of Annex 6 of the GFAP. In particular, unlike Article I of Annex 6 which provides that the Parties have the obligation to guarantee the rights provided for by internationally recognized human rights agreements listed in the Appendix to Annex 6 of the GFAP, the Human Rights Chamber, as stipulated by Article II.2 of Annex 6, only has to establish whether the individual is discriminated against in the enjoyment of the rights guaranteed by it. Judges *Möller* and *Nowak* stressed this ambivalence in their concurrent opinion.

However, there is a dilemma about whether the Parties to Annex 6 of the GFAP should be subject to the instruments listed in the Appendix without conferring the competence to the Human Rights Commission provided for in Annex 6 of the GFAP to find possible failures to meet these obligations. A comparison with a parallel regulation under Article II.4 of the BiH Constitution can be mentioned in support of this conclusion: the Human Rights Chamber interprets this provision as making it possible for the instruments listed in Annex I to the BiH Constitution, which correspond to the instruments listed in Appendix to Annex 6, to be used, *not only without discrimination but also generally (as isolated)*.

The BiH Constitutional Court does not have to have resort to the bypass through Article 2 of Additional Protocol No. 6 to the ECHR. The prohibition of deprivation of life in times of peace follows directly from Article 2.2 of the Optional Protocol to the International Covenant on Civil and Political Rights, which, in Bosnia and Herzegovina, has the rank of substantive constitutional law based on the appropriate jurisdiction of the Human Rights Chamber. In this respect, the regulation providing for wide jurisdiction under Article VI.3 of the BiH Constitution is proving to be an advantage. The BiH Constitutional Court upholds the Constitution and it is competent to decide appeals lodged against lower-instance courts. However, all substantive rights provided for by the BiH Constitution, including the agreements listed in Annex I to the BiH Constitution are included in the standards of the BiH Constitution.

As to the extradition procedure or informal handover of individuals to a foreign State, the obligation of the State which carries out the extradition is not conditional upon informing the person of the risk of him/her being sentenced to death in the receiving country but that the State which carries out the extradition is competent to exclude such possibility before extradition or handover.[659]

659 CH/02/8679 *et al.*-A&M, paragraph 268 *et seq.*

2. Prohibition of torture (Article 3 of the ECHR)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The judgments in which the Court expressed its standpoint of principle:

AP 1051/04 A. R.	20050615
AP 1150/05 Pranjić	20060613
AP 129/04 Hadža *et al*.	20050527
AP 143/04 Mulavdić *et al*.	20050923
AP 21/02 F. S.	20040517
AP 228/04 Udruženje porodica nestalih lica Istočno Sarajevo i Gradska organizacija logoraša Istočno Sarajevo *et al*.	20050713
AP 2553/05 Đoković	20060509
AP 2582/05 Tešić *et al*.	20070116
AP 696/04 Subotić	20050923
AP 81/04 S. Š.	20050128
CH/00/3078 *et al*.-Radenica *et al*.	20000706
CH/00/3610 Đurić	20070605
CH/00/3642-D&M Aleksić	20021108
CH/01/8152 R. K.	20060403
CH/01/8365 *et al*.-D&M Selimović *et al*. (Srebrenica)	20030303
CH/01/8442 Pejanović	20060607
CH/01/8569 *et al*.-D&M Pašović *et al*. (Foča)	20031107
CH/02/10652 Savić	20050208
CH/02/10721 B. S.	20060111
CH/02/10757 J. R. *et al*.	20070207
CH/02/7243 Šukurma	20050802
CH/02/8679 *et al*.-D&M Boudellaa *et al*.	20021011
CH/02/8879 *et al*.-D&M Smajić *et al*. (Višegrad)	20031205
CH/02/9842-D&M Durmo	20030110
CH/03/13051 S. S.	20031008
CH/03/13051-D&M S. S.	20031107
CH/03/13436 Rizvić	20070626
CH/03/13821 Sušić	20060801
CH/03/14632 Stojkić	20070626
CH/03/15015 Č. R.	20070208
CH/97/34-D&M Šljivo	19980910
CH/97/45-D&M Hermas	19980218
CH/98/1027 *et al*.-D&M R.G. *et al*.	20000609
CH/98/1335 *et al*.-D&M Rizvić	20020308
CH/98/1373-D&M Bajrić	20020510
CH/98/1374-D&M Pržulj	20000113
CH/98/1786-D&M Odobašić	19991105
CH/98/896-D&M Čvokić	20000609

CH/98/946-D&M H. R. & Momani	19991105
CH/99/2150-D&M Unković	20011109
CH/99/2688-D&M Savić	20031222
CH/99/3196-D&M Palić	20010111
U 22/03 N. P. *et al*.	20040326

Article 3 of the ECHR enshrines one of the fundamental rights of a democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the ECHR **prohibits in absolute terms torture or inhuman or degrading treatment**. Unlike most of the substantive clauses of the ECHR and its Protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.[660]

As to the deprivation of liberty, any recourse to physical force by the State which has not been made strictly necessary by the individual's own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention.[661] The requirements of an investigation and the undeniable difficulties inherent in the fight against crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals.[662]

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.[663] In this sense "ill-treatment" involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an

660 CH/97/45-A&M, paragraph 28 with further reference to the ECtHR, *Aksoy v. Turkey*, 18 December 1996, Reports 1996-VI, paragraph 62; CH/98/1373-A&M, paragraph 78; CH/98/946-A&M, paragraph 52.

661 CH/97/34-A&M, paragraph 73; CH/97/45-A&M, paragraph 29; CH/98/946-A&M, paragraph 53; CH/98/1335-A&M *et al*., paragraph 211; CH/98/1374-A&M, paragraph 151; CH/00/3642-A&M, paragraph 71.

662 CH/97/45-A&M, paragraph 29 with further reference to the ECtHR, *Ribitsch v. Austria*, 4 December 1995, Series A no. 336, paragraph 38; CH/98/946-A&M, paragraph 53; AP 696/04, paragraph 83.

663 CH/99/3196-A&M, paragraph 76, and CH/99/2150-R, paragraph 106 with further reference to the ECtHR, *Cruz Varas et al. v. Sweden*, 20 March 1991, Series A no. 201, paragraph 83, and *Kurt v. Turkey*, 25 May 1998, Reports 1998-III, paragraph 133; CH/98/1335-A&M *et al*., paragraph 210, and CH/98/1374-A&M, paragraph 150, with further reference to the ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, paragraph 162; AP 173/03, item 27.

individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.[664]

The distinction between inhuman and degrading treatment and torture derives principally from a difference in the intensity of the suffering inflicted and that a special stigma is attached to deliberate inhuman treatment causing very serious and cruel suffering. Although it is not necessary to distinguish inhuman and degrading interrogation techniques, a distinction had to be drawn between treatment that is inhuman and degrading and treatment that may amount to torture. For example, ill-treatment is considered torture within the meaning of Article 3 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment if the victim has received a number of blows, and whatever a person's state of health, such intensity of blows will cause significant pain. Furthermore, the ill-treatment is considered torture if the victim is repeatedly humiliated and threatened with further ill-treatment and it is reasonable for the victim to suspect that such threats would be carried out. The length of ill-treatment is also important, as is the impossibility of predicting the duration and period of repetition of torture.[665] Therefore, **torture** is a deliberate, inhuman treatment causing very serious cruel suffering.[666] The aim of inflicting pain or suffering is obtaining from the individual or a third person information or a confession, punishing him for an act he/she or a third person has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[667]

Article 3 of the ECHR also contains a **positive obligation** that requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment. Children and other vulnerable individuals, in particular, are entitled to State protection,

664 CH/03/13051-A&M, paragraph 191 with further reference to the ECtHR, *Pretty v. the United Kingdom*, 29 April 2002, paragraph 52.

665 See CH/00/3642-A&M, paragraph 75 with further reference to the ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25; *Selmouni v. France*, 28 July 1999, Reports 1999-V, paragraph 92.

666 CH/98/1027 *et al.*-A&M, paragraph 129 with further reference to the ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, paragraph 167.

667 CH/00/3642-A&M, paragraph 73 et seq., with a quotation of Article 1 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

in the form of effective deterrence, against such serious breaches of personal integrity.[668] If the victim is ill-treated by a third person and if the ill-treatment can be considered as inhuman and degrading treatment within the meaning of Article 3 of the ECHR, and the perpetrator is not convicted, if such treatment is justified according to the national law, then the national law **did not provide adequate protection** against treatment within the meaning of Article 3 of the ECHR, which amounted to violation of that provision.[669]

The obligation of authorities and institutions to provide protection also includes the attitude towards the bodies and representatives of **international organisations** which are entrusted in Bosnia and Herzegovina, in accordance with international law, with tasks and duties in the realm of power referring to the state sovereignty. The immunity which these international protagonists enjoy does not exempt the state institutions from the obligation to protect its citizens against violations of human rights and freedoms.[670]

The conditions of detention *per se*, without any allegation of deliberate ill-treatment by the police, prison guards or other persons, can already amount to a violation of Article 3 of the ECHR. This can be due to prolonged isolation, deprivation of light or uninterrupted exposure to artificial light, overcrowding, absence of heating, poor sanitary conditions, lack of exercise or, more likely, an accumulation of such conditions.[671] To be subjected to constant threats and humiliations, to be kept in a period of prolonged uncertainty concerning one's fate and to be deprived of proper food and access to clean clothes constitute inhuman and degrading treatment.[672] In the case of severe prison conditions including isolation, which are dictated by the extreme security requirements surrounding persons deprived of liberty which are considered to be extremely dangerous (such as terrorists are), the authorities have a wider margin of

668 CH/03/13051-A&M, paragraph 190, with further reference to the ECtHR, *Pretty v. the United Kingdom*, 29 April 2002, paragraph 49 *et seq*.; *A. v. the United Kingdom*, 23 September 1998, Reports 1998-IV, paragraph 22.

669 CH/03/13051-A&M, paragraph 192 with further reference to the ECtHR, *A. v. the United Kingdom*, 23 September 1998, Reports 1998-IV, paragraph 21 *et seq*.; in addition, possible violation of Article 8 of the ECHR, p. 306.

670 See AP 2582/05, item 38 *et seq.*, item 83 *et seq.*, as to the deprivation of liberty by the SFOR.

671 CH/02/8679 *et al*.-A&M, paragraph 306 with further reference to the ECtHR, *Guzzardi v. Italy*, 6 November 1980, 6 November 1980, Series A no. 39, p. 40, paragraph 107; *Dougoz v. Greece*, 6 March 2001, paragraphs 45-49; EComHR, *Ensslin, Baader, Raspe v. Germany*, Application No. 7572/76 *et al.*, 8 July 1978, DR 14, p. 64 (109-111); *McFreely et al. v. the United Kingdom*, 15 May 1980, DR 20, p. 44 (81-89); see also CH/97/45-A&M, paragraphs 26, 30; CH/98/1335-A&M *et al.*, paragraph 212, and CH/98/946-A&M, paragraph 54, in which the Human Rights Chamber held that all requirements were met to establish the violation.

672 CH/98/896-A&M, paragraph 55.

appreciation to assess whether such prison conditions are necessary.[673] Inhuman treatment can also occur in the case where a prisoner is deprived of medical treatment.[674] The investigative judge who fails to take any steps to investigate a person's allegations on maltreatment by the police while in custody[675] violated the positive obligation to protect the person's right not to be subjected to inhuman and degrading treatment. In such circumstances, the judge is competent to assess the evidence.[676]

The appellant/applicant is obliged to submit evidence proving that he/she has been a victim of inhuman and degrading treatment or torture. On the other hand, the authorities have the obligation to provide effective protection to a person allegedly a victim of such treatment (the possibility of filing charges, interrogation of his/her allegations, court proceedings, etc.). It is necessary to examine whether the State has fulfilled that obligation in each particular case. Article 3 of the ECHR does not require that the perpetrator must always be convicted.[677] In the case of a denial of the allegations on inhuman treatment, the evidence proving that a person has been the victim of such treatment must be produced, as well as evidence showing certain recognizable injuries. A mere, arbitrary allegation without precise evidence is not enough. On the other hand, if certain injuries can be recognized, the State bears the burden to produce evidence capable of proving that the relevant authorities cannot be held responsible for them, where a person is taken into custody in good health and is, after release from custody, found injured.[678] The establishment of the existence of inhuman treatment during **police custody** is based on three factors: first, no one claims that the marks on the person's body are the result of events pre-dating his arrest, carried out by the applicant himself, or caused by an escape attempt; second, that person drew attention to his marks at his first appearance before the investigative judge; and, finally, different doctors, including an official of the prison authorities, must issue certificates containing precise and concurring medical observations and indicating dates

673 See, CH/02/8679 *et al.--A&M*, paragraph 307 with further reference to the EComHR, *Kröcher i Möller* Sweden, Application No. 8463/78, 16 December 1982, DR 34, p. 24 (51-55).

674 CH/03/14632, paragraph 19 *et seq.*; CH/97/34-A&M, paragraph 81 with further reference to ECtHR, *Hurtado v. Sweden*, 28 January 1994, Series A no. 280-A.

675 CH/98/1335-A&M *et al.*, paragraphs 213-218; CH/98/1373-A&M, paragraph 86 *et seq.*

676 CH/00/3610, paragraph 16 *et seq.*

677 AP 1051/04, item 13.

678 CH/98/1335-A&M *et al.*, paragraph 178, CH/98/1374-A&M, paragraph 146 with further reference to ECtHR, *Tomasi v. France*, 27 August 1992, Series A no. 241, paragraphs 108-111; CH/98/1373-A&M, paragraph 79; CH/00/3642-A&M, paragraph 63; CH/01/8152, paragraph 21.

for the occurrence of the injuries which corresponded to the period spent in police custody.[679]

There is a violation of the prohibition of torture or inhuman or degrading treatment in the case of **enforced disappearance** of a person and, as a rule, that violation relates to the victim himself/herself,[680] and potentially to members of the family of the victim.[681] As to the victim himself/herself, this view of the Human Rights Chamber is based on Article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly (A/RES/47/133), providing that any act of enforced disappearance constitutes a violation of the right not to be subjected to torture and other cruel, inhuman and degrading treatment or punishment. It makes reference to the practice of the UN Human Rights Committee which has held that the abduction and disappearance of the victim and prevention of contact with his family and with the outer world constitutes cruel and inhuman treatment.[682]

An enforced disappearance can also – although not in every case[683] – constitute a violation of the rights of **family members** of the victim under Article 3 of the ECHR.[684] In this sense, Article 3 is considered as the "**right to know the truth**".[685] Whether a family member's right under Article 3 of the ECHR has been violated by the enforced disappearance of the victim depends, on the one hand, on the special factors (*considered as to the victim*) which additionally determine the suffering of the family members when their close relative becomes a victim of violations of human rights and freedoms. These factors are: proximity of the family tie (with weight attached to parent-child relationships), particular circumstances of the relationship between the missing person and the family member, extent to which the family member witnessed the events resulting in the disappearance (however, the absence of this factor may not deprive the family member of victim status) involvement of the family

679 CH/97/34-A&M, paragraph 74 with further reference to the ECtHR, *Tomasi v. France*, 27 August 1992, Series A no. 241, paragraph 110.

680 CH/99/3196-A&M, paragraph 72 *et seq*.

681 *Ibid*., paragraph 76 *et seq*.

682 *Ibid*., paragraph 73 with further reference to the UN Human Rights Committee, *Celis Laureano v. Peru*, Communication No. 540/1993, 25 March 1996, Reports of the UN Human Rights Committee (1997), Volume II, paragraph 8.5.

683 See CH/99/2150-R, paragraph 106.

684 CH/99/3196-A&M, paragraph 77 *et seq*., and CH/99/2150-R, paragraph 108 with further reference to the UN Human Rights Committee, *Elena Quinteros v. Uruguay*, Communication No. 107/1981, 17 September 1981, Reports of the UN Human Rights Committee (1983), paragraph 14, and Ombudsman of Bosnia and Herzegovina, Reports 7/96, 30 September 1998; also ECtHR, *Tas v. Turkey*, 14 November 2000, paragraph 79.

685 CH/01/8365 *et al.*-A&M, paragraph 182 *et seq.*; CH/01/8569 *et al.*-A&M, paragraph 75 *et seq.*; CH/02/8879 *et al.*-A&M; AP 129/04, paragraph 54 *et seq*.; AP 143/04, paragraph 68 *et seq*.

member in attempts to obtain information about the missing person (however, the absence of complaints may not necessarily deprive the family member of victim status) and response, reactions, and attitude of the authorities to the complaints and inquiries for information about the fate of the missing person. In addition, the overall context of the disappearance, *i.e.*, a state of war, the breadth of armed conflict, the extent of the loss of life, is also relevant, as well as the amount of anguish and stress caused to the family member as a result of the disappearance.

The essential reason for finding the violation is not the enforced disappearance itself but the reaction and attitude of the authorities in such a situation (*considered as to the authorities*). First of all, this latter, in certain cases, can amount to the violation of the relatives' right under Article 3 of the ECHR. Complacency, intimidation, and harassment by authorities may be considered aggravating circumstances. The extent to which the authorities conducted a meaningful and full investigation into the disappearance is also relevant as well as the extent to which the authorities provided a credible, substantiated explanation for a missing person last seen in the custody of the authorities. The amount of credible information provided to the authorities to assist in their investigation is also relevant and finally, whether the authorities were involved in the disappearance.[686]

Article 3 obliges the State to establish an **institutional framework** necessary for the effective protection of human rights and freedoms. If the Law on Missing Persons[687] provides for the establishment of an institute and fund to establish the fate of missing persons, then this law must be implemented; otherwise, this could constitute a violation of the obligations to provide protection under Article 3 of the ECHR.[688]

The victim of a criminal offence and his/her relatives are entitled under Article 3 of the ECHR **to an investigation into the criminal offence** and possible punishment of the perpetrator of the **criminal offence**. This relates not only

686 See CH/99/2150-R, paragraphs 106, 114 *et seq*., with reference to the ECtHR, *Çakici v. Turkey*, 8 July 1999, paragraph 98, Reports 1999-IV; with further reference to the ECtHR, *Cyprus v. Turkey*, 10 May 2001, Reports 2001-IV, paragraphs 104, 154-158. In Case No. CH/99/2150-R, decision for or against violation of the relatives' rights under Article 3 of the ECHR was put on the scales; finally, the majority voted against (paragraph 119). See also Decision CH/99/2150-A&M where the second panel of the Human Rights Chamber, having pointed to the fact that the proceedings were considerably protracted, found that there was a violation of rights (paragraph 98). See also CH/99/2688-A&M, paragraph 72 *et seq*. (no violation).

687 *OG of BiH*, No. 50/04.

688 AP 228/04, paragraph 42.

to the offences against physical persons but all criminal offences.[689] The victim or other persons have the obligation to report the criminal offence.[690] The investigation and other measures must be effective, but their result does not have to be positive.[691] However, in order to make a decision on the termination of an investigation, amnesty or pardon, there must be a legal basis and reasoning; otherwise, the rights of the victim and his/her relatives under Article 3 of the ECHR can be violated.[692] Based on Article 3 of the ECHR, there is no right to reach a precise result of the criminal prosecution, for example, a punishment.[693]

The extradition of foreigners can entail obligations under Article 3 of the ECHR if there are substantial grounds for believing that there is a risk that a person, if extradited, will be subjected to treatment in violation of Article 3 of the ECHR in the receiving country. In such circumstances, Article 3 requires the State not to extradite such a person to that country.[694] The obligation which falls upon the State which carries out the extradition of a person under Article 3 is not conditional upon informing the person to be extradited of the risk of him/her being subjected to torture or inhuman or degrading treatment in the receiving country. Quite to the contrary, the obligation of the State which carries out the extradition is to exclude such a possibility.[695] Although there are a number of decisions wherein the States were found responsible under Article 3 of the ECHR, since they carried out the extradition despite the high-security conditions of detention or danger of torture in the receiving countries,[696] the Human Rights Chamber has not taken any decision establishing the violation of Article 3 of the ECHR for extradition or expulsion to a State whose high-security conditions were so invasive as to amount to a violation of Article 3 of the ECHR. Detention of highly dangerous individuals requires the authorities to strike a very delicate balance between the requirements of security and basic individual rights. An extraditing State is not in a position and cannot be required to carry out this balancing exercise by referring to Article 3 of the

689 As to the ownership, see CH/01/7243, paragraph 14; CH/03/15015, paragraph 40 *et seq*.; as to the offences against physical persons, see CH/02/10721, paragraph 16; CH/01/8442, paragraph 47 *et seq*.

690 CH/03/13821, paragraph 20 *et seq.*

691 CH/03/13436, paragraph 24 *et seq.*; CH/03/13051, paragraph 197.

692 CH/02/10757, paragraph 38; CH/02/10652, paragraph 12.

693 AP 2553/05, paragraph 13.

694 CH/02/8679 *et al*.-A&M, paragraph 305 with further reference to the ECtHR, *Ahmed v. Austria*, 17 December 1996, 17 December 1996, Reports 1996-VI, paragraph 39; *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, pages 35-36, paragraphs 90-91; *Cruz Varas et al. v. Sweden*, 20 March 1991, Series A no. 201, paragraphs 69-70; *Vilvarajah et al. v. the United Kingdom*, 30 October 1991, Series A no. 215, paragraph 103; *Chahal v. the United Kingdom*, 15 November 1996, Reports 1996-V, paragraph 74.

695 CH/02/8679 *et al.*-A&M, paragraph 268 *et seq*.

696 See CH/02/8679 *et al*.-A&M, paragraph 310 with a number of pieces of evidence.

ECHR.[697] Moreover, the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in specific circumstances.[698]

In applying these principles, the Human Rights Chamber, in the case of *Boudellaa et al.*, came to the conclusion that BiH and the Federation of BiH, taking account of all circumstances, might not have started from the assumption that the applicant would be subjected to inhuman or degrading treatment in Guantánamo Bay. Therefore, the handover of the applicant to the U.S. military forces was not in violation of Article 3 of the ECHR.[699] The circumstances in the *Durmo* Case were different. In that case the Human Rights Chamber, based on a report of the UN Committee against Torture and Amnesty International came to the conclusion that the applicant, due to the alleged terrorist activities, could be subjected to torture in Egypt and that the FBiH should have been aware of it.[700]

Overview of the case-law with regards to Article 3 of the ECHR

Inhuman and degrading treatment or torture has not been found in the following cases:

- notice of electricity and water supply cut-off for unpaid bills;[701]
- handcuffing the convicted person in order to take him to a medical examination;[702]
- telephone disconnection;[703]
- expulsion of a foreigner to Camp X-Ray in Guantanamo, Cuba, USA;[704]

697 CH/02/8679 *et al.*-A&M, paragraph 312.

698 See CH/02/8679 *et al.*-A&M, paragraphs 313-315, with reference to the case-law of the UN Committee against Torture based on Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Mutombo v. Switzerland*, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994), paragraph 9.3; *Tahir Hussain Khan v. Canada*, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995), paragraph 12.2. with further reference to the ECtHR, *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, paragraph 88, and *Vilvarajah et al. v. the United Kingdom*, 30 October 1991, Series A no. 215, paragraph 103.

699 CH/02/8679 *et al.*-A&M, paragraph 316 *et seq*.

700 CH/02/9842-A&M, paragraph 111 *et seq*.

701 AP 1150/05, paragraph 9.

702 AP 81/04, paragraph 27.

703 AP 21/02, paragraph 24.

704 CH/02/8679 *et al.*-A&M, paragraph 323.

- hospitalisation of a prisoner in the psychiatric hospital for epilepsy ;[705]
- criminal proceedings were not conducted[706] or the criminal proceedings were terminated due to the lack of evidence;[707]
- difference in classification of a criminal offence.[708]

Inhuman and degrading treatment has been found in the following cases:

- expulsion of a foreigner to Egypt despite the fact that he faced a risk of being subjected to torture, inhuman or degrading treatment in the receiving country;[709]
- captivity during which the person was kept in a state of prolonged uncertainty as to his fate, including threats of death;[710]
- passive conduct of the State authorities to investigate the enforced disappearance of the person;[711]
- passive conduct of the State authorities with regards to the criminal offence against the property of the injured party[712] or body of the injured party;[713]
- producing fear in order to extort information or a confession from the person by handcuffing him, blindfolding him, exposing him to a loud music and flashing lights and by placing him in a cold container and putting him before a make-believe firing squad;[714]
- preventing the competent criminal authorities from prosecuting the perpetrators of criminal offences committed while on official duty;[715]
- physical and verbal ill-treatment particularly on the grounds of ethnic affiliation, notably if it causes deep mental traumatism;[716]

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705 CH/97/83, paragraph 83.
706 AP 1051/04, paragraph 13; CH/02/10757, paragraph 38.
707 CH/02/10652, paragraph 12.
708 AP 2553/05, paragraph 3 in conjunction with paragraph 14.
709 CH/02/9842, paragraph 122.
710 CH/97/45, paragraphs 26, 30.
711 AP 129/04, paragraph 57; AP 143/04, paragraph 66; AP 228/04, paragraph 40; CH/01/8365 *et al*., paragraph 191; CH/01/8569, paragraph 80; CH/99/3196, paragraph 80.
712 CH/01/8442, paragraph 62; CH/03/15015, paragraph 52.
713 CH/98/1373, paragraph 87.
714 AP 2582/05, paragraph 83 *et seq*.; AP 696/04, paragraph 81 *et seq.*
715 CH/99/2150, paragraph 98 *et seq*.
716 CH/98 /1786, paragraph 102.

- conditions of deprivation beneath human dignity, punching, malnutrition, prison overcrowding, cold in the room, minimum sanitary facilities;[717]
- kicking and punching;[718]
- inflicting serious bodily injury by unnecessary use of arms;[719]
- Incommunicado detention and uncertainty as to one's own fate in the prison.[720]

Torture was found in the following cases:

- Failure to undertake the effective prosecution of the perpetrator of a criminal offence;[721]
- Ill-treatment to extort information or confession by handcuffing, tying to the radiator, beating with a small baseball bat and rubber hose, kicking;[722]
- Failure to provide necessary medical treatment, which caused severe pain.[723]

3. Prohibition of slavery and forced labour (Article 4 of the ECHR)

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labour.

(3) For the purpose of this article the term "forced or compulsory labour" shall not include:

a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;

717 CH/97/45, paragraphs 26, 30; CH/98/946, paragraphs 50, 54; CH/98/896-A&M, paragraphs 51, 56.
718 CH/98/1374, paragraph 152.
719 CH/98/1027, paragraph 133.
720 CH/99/3196, paragraph 74.
721 CH/03/13051, paragraph 197.
722 CH/00/3642, paragraphs 61, 77.
723 CH/98/1027, paragraph 133.

c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

d) any work or service which forms part of normal civic obligations

CH/00/3880-A&M Marjanović	20021108
CH/02/9601-A&M G. K.	20031010
CH/97/45-A&M Hermas	19980218
CH/98/896-A&M Čvokić	20000609
CH/98/946-A&M H. R. & Momani	19991105

Forced or compulsory labour is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[724] If the circumstances of detention of a person are such that he would fear serious consequences if he refused to perform such work, the work exacted from the prisoner would constitute forced or compulsory labour within the meaning of Article 4 of the ECHR.[725]

Paragraph 3 indicates certain types of work as exemptions to those considered as forced labour or compulsory labour. This means that certain types of work are in effect compulsory labour but they are not considered as such within the meaning of Article 4, paragraph 2 of the ECHR. According to paragraph 2(a), the term forced or compulsory labour does not include any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention. Such labour is permissible in the ordinary course of detention not only in relation to convicted offenders, but also to those held on remand.[726]

Military service as logistic support to the army during armed conflict was also applied to the persons who were not medically fit for military service or to the persons who were not acceptable in terms of ethnic affiliation, *i.e.*, the members of minorities in certain areas. If a person was included in such compulsory military service, which was comparable with the military service and which served as logistic support to the army, the period spent in such service must be included when assessing whether the person was fit regardless of the army to which that person belonged during the armed conflict or the army he served after the armed conflict. If such person is mobilized, despite the fact that he had already been in such service, the mobilization constitutes discrimination

724 CH/97/45-A&M, paragraph 35 with further reference to the ECtHR, *Van der Mussele v. Belgium*, 23 November 1983, Series A no. 70, and Article 2, paragraph 2 of the International Labour Organisation concerning Forced or Compulsory Labour.

725 CH/98/896-A&M, paragraph 61.

726 CH/00/3880-A&M, paragraph 106 with further reference to EComHR, *X v. Switzerland*, 14 December 1979, p. 238 (248-249).

with regards to his right that he must not be forced to be in a service longer than it is applicable to the persons who, *proprio motu*, served in the army.[727]

However, with regards to the enjoyment of rights under Article 4 of the ECHR relating to forced labour in the army, the Human Rights Chamber found that such persons were obliged to directly file an application with the Human Rights Chamber within a time limit of 6 months from the date when the treatment complained of ended, *i.e.*, after 14 December 1995 (the date of entry into force of Annex 6), on the assumption that there was no effective legal remedy available in Bosnia and Herzegovina before.[728] The Human Rights Chamber certainly did not take a view on this issue, *i.e.*, as to whether there was an effective legal remedy in Bosnia and Herzegovina so that this decision allowed a lawsuit in the future, such as a claims for damages.

4. Rights to liberty and security (Article 5 of the ECHR)

(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;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

727 CH/02/9601-A&M, paragraph 52 *et seq*.
728 CH/02/9601-A&M, paragraph 45.

(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 authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(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.

AP 1125/05 Đaković	20070116
AP 1426/05 Menzilović *et al.*	20061109
AP 1594/05 Hadžić	20060920
AP 1812/07 Radonja	20070716
AP 1824/05 Husanović	20060613
AP 1943/07 Vrančić	20070716
AP 204/03 N. P.	20041015
AP 216/03 S. M.	20040929
AP 223/02 "Šeha es" d.o.o. and E. Š.	20040723
AP 2271/05 Marinić *et a*l.	20061221
AP 2319/06 Kazaferović	20061020
AP 247/05 B. V.	20050518
AP 2499/06 Mejakić *et al.*	20061020
AP 252/05 Maktouf	20060412
AP 2561/05 Šarović	20061109
AP 2582/05 Tešić *et al*.	20070116
AP 3114/06 Begić	20070116
AP 3117/06 Ljubičić	20070716
AP 312/04 Stjepanović	20050923
AP 330/04 C. C.	20041217
AP 542/05 Vještica	20060314
AP 543/04 M. N.	20050626
AP 641/03 V. Đ.	20041130
AP 662/04 Halilagić	20051220
AP 696/04 Subotić	20050923
AP 805/04 A. K.	20041130
AP 805/04 A. K.	20041130
AP 94/04 N. J.	20040317

AP 953/04 D. R.	20041130
AP 976/05 Knežević	20060209
AP 1066/07 Popović	20070605
AP 911/07 Hadžiselimović	20070419
AP 997/07 Radonja	20070509
CH/03/14486 Tahirović	20070627
CH/00/3880-A&M Marjanović	20021108
CH/00/4371-A Gračanin	20011107
CH/01/7488-A&M Buzuk	20020705
CH/02/10446 Mandžić	20070627
CH/02/11108 *et al.* Basić *et al.*	20030509
CH/02/12427 Ilijašević	20031010
CH/02/12528 Krasnići	20061105
CH/02/8679 *et al*.-A&M Boudellaa *et al*.	20021011
CH/02/9834-A&M Erbez	20031010
CH/02/9842-A&M Durmo	20030110
CH/03/13854 Podroščanin	20070627
CH/03/14212-A&M Syla	20031222
CH/03/14903 Beganović	20061220
CH/96/15-M Grgić	19970805
CH/96/1-M Matanović	19970711
CH/96/21-M Čegar	19980406
CH/97/34-A&M Šljivo	19980910
CH/97/41-A&M Marčeta	19980406
CH/97/45-A&M Hermas	19980218
CH/98/1027 *et al.*-A&M R.G. *et al.*	20000609
CH/98/1324-A&M Hrvačević	20020308
CH/98/1335 *et al.*-A&M Rizvić	20020308
CH/98/1366-A&M V Č.	20000309
CH/98/1370-A Huskić	20010703
CH/98/1373-A&M Bajrić	20020510
CH/98/1374-A&M Pržulj	20000113
CH/98/1786-A&M Odobašić	19991105
CH/98/896-A&M Čvokić	20000609
CH/98/946-A&M H. R. & Momani	19991105
CH/99/1505-A Šabančević	20010703
CH/99/1838 *et al.*-A&M Karan *et al.*	20030704
CH/99/1900&1901-A&M D. Š. & N. Š.	20020412
CH/99/2317-A&M Grbić	20050512
CH/99/3196-A&M Palić	20010111
U 19/00 Kemokop *et al.*	20010504
U 51/01 Cantonal Prosecutor's Office	20020226

a. Prohibition of arbitrary deprivation of liberty (Article 5.1 of the ECHR)

The guarantees contained in Article 5 of the ECHR have fundamental importance for securing the right of individuals to be free from arbitrary detention at the hands of the authorities. Any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of the national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from **arbitrariness**.[729] This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5, paragraph 1 of the ECHR gives an exhaustive listing of the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation with regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom.[730]

If there is reliable information that State authorities deprived a person of liberty and, on the other hand, there is no official record on the whereabouts of that person, while the authorities refuse to take any investigative steps in order to find out his fate, there is an assumption in support of the conclusion that there has been a serious violation of the right to liberty and security of that person.[731] Therefore, it not only deprives the applicants of elementary human rights guarantees but also enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee.[732]

With regards to **the positive obligations of protection** deriving from Article 1 of the ECHR in conjunction with Article 5 of the ECHR, the authorities are obliged to take effective measures to safeguard against the risk of disappearance and to conduct a prompt, effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.[733] The State authorities have the obligation to investigate thoroughly into allegations of arbitrary deprivation even in cases where it cannot be established, although it

729 CH/97/41-A&M, paragraph 57 with further reference to the ECtHR, *Giulia Manzoni v. Italy*, 1 July 1997, Reports 1997, paragraph 21; CH/99/3196-A&M, paragraph 60 with further reference to the ECtHR, *Kurt v. Turkey*, 25 May 1998, Reports 1998-III, paragraphs 122 and 124.

730 CH/99/3196-A&M, paragraph 60 with further reference to the ECtHR, *Kurt v. Turkey*, 25 May 1998, Reports 1998-III, paragraphs 122 and 124.

731 CH/99/3196-A&M, paragraph 61 *et seq*.

732 CH/99/3196-A&M, paragraph 61 *et seq*.

733 CH/99/3196-A&M, paragraph 60 with further reference to the ECtHR, *Kurt v. Turkey*, 25 May 1998, Reports 1998-III, paragraphs 122 and 124.

is alleged, that the deprivation of liberty is attributable to the authorities.[734] If the authorities do not provide a credible and substantiated explanation of what has happened and thereby show that they have not taken effective steps to investigate the occurrence and ascertain the fate of the individual concerned, this constitutes a violation of the obligation to provide protection of human rights and fundamental freedoms under Article 1 of the ECHR in conjunction with Article 5 of the ECHR – the right of every person not to be deprived of liberty in an arbitrary manner.[735] At any rate, there is a difference in whether the respect for human rights and fundamental freedoms was binding or not upon the relevant authorities at the moment when a person went missing. If this is not the case – such as the case of persons who went missing during the armed conflict in Bosnia and Herzegovina – then the burden of proof placed on the State can be *prima facie* restricted. In particular, additional indications are necessary, if only a piece of evidence based on indications that this person was still in prison after the entry into force of the rights and freedoms under the ECHR in Bosnia and Herzegovina (14 December 1995), *i.e.*, under control of the State authorities.[736]

Before **extraditing, expelling** or the formal handing over of a person to the custody of the authorities of another State, the State which hands over the person is obliged to obtain and examine information as to the legal basis of that custody, as it follows from the quoted provisions relating to extradition procedure.[737]

b. Justification for restriction of the right to liberty and security

(a) Lawful arrest

Liberty may be deprived only in a manner in accordance with a procedure prescribed by the law. For this reason, deprivation of liberty presupposes conformity with domestic law,[738] also conformity with the purpose of the

734 AP 696/04, paragraph 53; AP 2582/05, paragraph 58.

735 CH/96/1-M, paragraph 57 *et seq*., with reference to ECommHR, *Kurt v. Turkey*, 5 December 1996, paragraph 201 *et seq*.; in this respect, see the commentary on Article 2 of the ECHR under: "(a) The scope of protection", p. 181, relating to the importance of the established facts based on indications.

736 CH/96/15-M, paragraphs 14-19; the aforementioned should be distinguished from the EComHR, Application No. 8007/77, *Cyprus v. Turkey*, DR 72, p. 5 (37-39), paragraphs 116-123, and *Kurt v. Turkey*, Reports of 5 December 1996, paragraphs 198-215.

737 CH/02/8679 *et al*.-A&M, paragraphs 232, 237.

738 As to the maximum duration of custody, see, for example, CH/01/7488-A&M, paragraph 88.

restrictions permitted by Article 5, paragraph 1, namely the protection of individuals from arbitrariness; it is required in respect of both the ordering and the execution of the measures entailing deprivation of liberty.[739]

From the aspect of Article 15 of the ECHR and Article XI of Annex 1-A of the GFAP, in the transitional period after the entry into force of the Dayton Agreement, deprivation of liberty of **prisoners of war** cannot be considered unlawful. Admittedly, Article 5 of the ECHR does not provide any justification for the deprivation of liberty of prisoners of war. However, if the arrest took place in accordance with domestic and international law, the initial **deprivation of liberty was not unlawful**, since Article XI of Annex 1-A of the GFAP provides the extension of detention during the short transitional period after the entry into force of the GFAP, and Article 15 of the ECHR provides for an exception to Article 5 of the ECHR. However, if the detention is longer than is provided for by transitional time-limits and if, in addition, the detention of a person is kept secret, which is in violation of the obligations under Annex 1-A of the GFAP, then it is also in violation of Article 5 of the ECHR.[740]

With regards to the arrest of persons suspected of war crimes, additional requirements are laid down in the so-called Rules of the Road which were agreed to in Rome by Presidents Izetbegović, Tuđman and Milošević on 18 February 1996. According to item 5, paragraph 2 of the *Rules of the Road* (*Cooperation on War Crimes and Respect for Human Rights*), "persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal".[741] The *Rules of the Road* do not have lower-ranking legal force than the obligations of the signatory Parties to Annex 6 to punish violations of international humanitarian law. They provide for "a division of competencies" which serves no other purpose than the prevention of arbitrary arrest or detention by national authorities and which need therefore to be respected.[742] The *Rules of the Road* entered into force on date of signing the

739 CH/97/41-A&M, paragraph 57 with further reference to the ECtHR, *Manzoni v. Italy*, 1 July 1997, Reports 1997, paragraph 21; CH/97/34-A&M, paragraph 107; CH/03/14212-A&M, paragraph 61.

740 CH/99/1900 *et al*.-A&M, paragraph 67 *et seq*.; see also, CH/991838 *et al*.-A&M, paragraph 100 *et seq*.

741 See <http://www.nato.int/ifor/general/d960218b.htm>; see *Rules of the Road* and CH/98/1335-A&M *et al*., paragraph 143 *et seq.* and CH98-1373-A&M, paragraph 50 *et seq*., with evidence relating to the status of the Federation of BiH with regards to the *Rules of the Road* and relevant case-law of the Supreme Court of the Federation of BiH.

742 CH/98/1366-A&M, paragraph 75 *et seq.*; CH/98/1366-R, paragraph 13 with further reference to CH/98/1366-RR, paragraph 9.

Agreement.[743] The Parties were obliged to inform the competent institutions and authorities of the *Rules of the Road*, so that the authorities could not refer to – allegedly[744] – the lack of awareness of the content of these *Rules*.[745] The deprivation of liberty before issuing a relevant order, arrest warrant or indictment reviewed beforehand by the ICTY and declared consistent with international legal standards constitutes unlawfulness due to the lack of the ICTY's approval regardless of whether a person was already deprived of liberty for other matters with which he/she was charged.[746] For the question whether the *Rules of the Road* are applicable or not, one should firstly take into consideration the legal classification of criminal charges by the domestic authorities. If the domestic authorities have determined the alleged act to have constituted a serious violation of international humanitarian law, the authorities have to obtain prior approval by the Hague. However, if the domestic authorities have determined that the alleged crime does not constitute a war crime, since the factual allegations are classified differently, the *Rules of Road* will apply if the factual allegations, being the basis for the charges, point to the fact that the act committed obviously constitutes a war crime. The domestic authorities must not be allowed to circumvent the request for approval by The Hague by circumventing the correct classification and thus a particular factual allegation pointing to the commission of a war crime.[747] If a person was arrested on suspicion of a war crime prior to the entering into force of the *Rules of the Road*, the Parties could not be expected to release that person before obtaining approval by the ICTY. However, the domestic authorities had to obtain the approval "without delay", *i.e.*, within a time limit of one month from the date of the entry into force of the *Rules of Road*.[748] As the approval by the ICTY is not based on any allegation from the indictment, but on the assessment as to whether the produced evidence suffice to launch an investigation and to issue a detention order, the approval would practically fail if the indictment was modified. A different case would be if the charges are modified both in facts and law to such an extent that it may be concluded that the approval does not legitimate the indictment any more.[749] The violation of the *Rules of the Road* cannot be justified by referring to the principle *male captus bene detentus*; it

743 CH/98/1374-A&M, paragraph 135; CH/99/1366-A&M, paragraph 65; CH/98/1324-A&M, paragraph 61; see also the Decision of the Human Rights Chamber sitting in plenary, in CH/98/1366-R, paragraph 10 *et seq*.

744 CH/98/1324-A&M, paragraph 62 *et seq*.

745 CH/98/1324-A&M, paragraph 61.

746 CH/97/34-A&M, paragraph 108; CH/97/41-A&M, paragraph 59; CH/97/45-A&M, paragraph 46; CH/98/1324-A&M, paragraph 63 et seq.; CH/98/1373-A&M, paragraph 98.

747 See CH/98/1335-A&M *et al*., paragraph 227.

748 CH/98/1335-A&M *et al*., paragraphs 226, 229.

749 See CH/01/7488-A&M, paragraph 92; CH/01/7912 *et al.*-A&M, paragraph 136 *et seq*.

is a principle which applies to the right relating to extradition and plays no role in the application of the *Rules of the Road*.[750]

If the domestic law stipulates an obligation to examine the measures of deprivation of liberty, and it is not fulfilled within the prescribed time limits, the deprivation of liberty will be unlawful.[751]

(b) Particular grounds for excluding the unlawfulness

The list of grounds for excluding unlawfulness with regards to the deprivation of liberty is specified in Article 5, paragraph 1 of the ECHR. If the deprivation of liberty relies exclusively or factually on other reasons, for example, if a person has been deprived of liberty in order to exchange him/her for another detained person, then it is unlawful as being unjustified.[752]

i. Article 5, paragraph 1(a)

The deprivation of liberty is justified if a person is "lawfully held in the prison in accordance with a legally binding judgment rendered by a competent court". This would be a legally formal reason for the deprivation of liberty, since in principle it relates to the matter that there must be a judgment, not to the matter of whether the judgment is lawful, *i.e.*, whether the judgment has been rendered in accordance with the standards provided for by Article 6 of the ECHR.[753] Regardless of this, the facts alleged in the judgment must constitute a criminal offence punishable according to the law in the moment of commission of the offence.[754] The judgment as a condition of deprivation of liberty also means that there must be an order to enforce the criminal judgment. Therefore, whether an adequate order was served on the convicted person while depriving him/her of liberty is not insignificant, all the more so if the competent authorities attempted several times and with no success to deliver the order to enforce the criminal judgment.[755] However, after a legally binding judgment has been pronounced, the detained person must be released immediately,[756] or the order

750 See CH/98/1366-R, paragraph 16 *et seq*.

751 CH/00/3880-A&M, paragraph 126 *et seq.*; CH/01/7912 *et al.*-A&M, paragraph 142.

752 CH/96/21-B, paragraph 35; CH/97/45-A&M, paragraph 45 *et seq.* with further reference to ECtHR, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, paragraph 194; CH/98/1027 *et al.*-A&M, paragraph 139.

753 *Ademović*, 2005, p. 29.

754 AP 1594/05, paragraph 40.

755 AP 1594/05, paragraph 41.

756 Article 192 of the Criminal Procedure Code of the FBiH (*OG of FBiH*, No. 35/03) does not provide for the possibility of keeping the person detained after the judgment becomes legally binding.

to enforce the criminal judgment must be served on him/her immediately. Otherwise, the extension of detention will be unlawful.[757]

In this respect, the term "judgment" has an autonomous meaning so that it does not have to necessarily relate to the conviction in criminal legal terms. It is important for the deprivation of liberty to be provided by a decision, such as for placement in a psychiatric hospital.[758] According to the case-law of the European Court, the judgment must be legally binding.[759] According to regulations in Bosnia and Herzegovina, a person can – if the judgment has not yet become legally binding – be committed to serve his/her sentence only at his/her own request.[760] Otherwise, deprivation of liberty would be unlawful for enforcement of a criminal judgment. However, if the legally binding judgment is quashed in extraordinary court proceedings, and the convicted person has already started serving his/her sentence, then he/she must file a motion for release from prison. Otherwise, there is no violation of Article 5, paragraph 1(a) of the ECHR.[761] Article 5, paragraph 1(a) of the ECHR does not "cover" deprivation of liberty before the moment when the judgment is pronounced or before the moment when precautionary measures are taken.[762]

The competent court must adopt a decision establishing a violation of Article 5, paragraph 1(a) of the ECHR, in which case the mere existence of a violation of **territorial** jurisdiction is not sufficient. It is true that in that case the judgment is unlawful, but it is not unconstitutional.[763] Some other principle applies if a decision is adopted by an authority having no *ratione personae* jurisdiction.[764] There is another case in which the BiH Constitutional Court ruled in the opposite manner. To be more precise, in Case No. AP 662/04,[765] the BiH Constitutional Court concluded that there is no violation of the BiH Constitution when a competent body adopts a decision without the required quorum (13 members) because the present members (10) and the members who voted *for* the decision (7) made the quorum anyway. Given the fact that a lack of quorum may fall within the scope of the term "*ratione personae jurisdiction*", the BiH Constitutional Court was not explicit enough in that decision as to stating whether it deviated from the previous position presented in Case No.

757 AP 1426/05, paragraph 42 *et seq*.
758 *Ademović*, 2005, p. 30.
759 ECtHR, *Wemhoff v. Germany*, 27 June 1968, Series A no. 7, paragraph 9.
760 See, for example, Article 152, paragraph 4 of the Law on Criminal Procedures of the FBiH (*OG of BiH*, No. 35/03).
761 AP 204/03, paragraph 29 *et seq*.
762 AP 1594/05, paragraph 40.
763 U 51/01, paragraph 30.
764 AP 216/03, paragraph 20.
765 Paragraph 43.

AP 216/03. If the recent practice would constitute an official standpoint, then the violations of regulations on territorial and *ratione personae* jurisdiction would be admissible from a constitutional point of view. However, given the idea of the right to "a lawful judge", which constitutes one of the basic elements of the right to a fair trial in the constitutional system of the Federal Republic of Germany, this approach creates doubts.[766]

With reference to the procedural requirement for the protection of rights under Article 5, paragraph 1(a) of the ECHR, the BiH Constitutional Court established that there is no effective legal remedy in the RS (similar regulations are applied in the Federation of BiH as well), which means that the appellant would have to file an appeal with the BiH Constitutional Court immediately, *i.e.*, within 60 days as from the day following the expiry of the first day of serving the prison sentence for the execution of a criminal sanction.[767]

ii. Article 5, paragraph 1(b)

Deprivation of liberty is also justified in the event of "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".

Accordingly, there are two additional possibilities envisaged for the lawful deprivation of liberty. The first one is the existence of the **concrete judicial act**, whereby an order is given on undertaking a concrete action or to restrict some action, in which case non-compliance with the order amounts to deprivation of liberty as a repressive measure. The second possibility is concrete and specific and is called **the obligation prescribed by law**, in which case non-compliance with the said obligation amounts to deprivation of liberty as a coercive measure.[768] A typical case relating to an obligation prescribed by law is identification of persons based on their personal identification documents. So, the deprivation of liberty is obviously unlawful if it seems that it relies on the legal basis but, in real life, it constitutes a misuse of law.[769] In the mentioned case, a police official arrested the appellant with the explanation that he had to establish his identity in the police station although, as it was subsequently clarified, he already knew the appellant but refused to check the personal identification documents which were presented to him for the purpose of establishing the appellant's identity.

766 See the judgement of the German Federal Constitutional Court, BVerfGE 14, 152 (164).
767 AP 94/04, paragraph 20.
768 *Ademović*, 2005, p. 32 *et seq*.
769 CH/98/1786-A&M, paragraph 104 *et seq*.

iii. Article 5, paragraph 1(c)

Further, the deprivation of liberty is justified in the event of "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". This provision regulates so-called preventive detention and pre-trial confinement. Pursuant to Article 5, paragraph 1(c) of the ECHR, the deprivation of liberty should give an opportunity to the competent authorities to confirm or deny a suspicion relating to the commission of a criminal offence which is the basis for a deprivation of liberty and thus speed up the investigation.[770] As long as the defendant is not convicted by a non-legally binding judgment, his detention shall be considered as being in compliance with Article 5, paragraph 1(c) of the ECHR and not with Article 5, paragraph 1(a) of the ECHR.[771]

The first requirement of this provision is the **lawfulness** of the deprivation of liberty. The condition for this lawfulness is the issuance of an arrest order by a competent court based on which a person may be deprived of liberty. Any other deprivation of liberty, such as, for instance, when a suspect is caught on the spot,[772] is lawful provided that the requirements under Article 5, paragraph 3 of the ECHR have been met. Thus, for instance, in cases of arrests for the purpose of punishing war criminals, a previously issued court order, warrant, or ICTY indictment are required.[773] If the deprivation of liberty is not aimed at conducting criminal proceedings, such a deprivation of liberty is unlawful. Also, if a person is deprived of liberty for the purpose of "his/her own protection" because that person moves in "insecure territory" and if there is no previous announcement to the police or to the relevant international organisation, then such a deprivation is unlawful since that deprivation of liberty is not aimed at conducting a criminal proceeding.[774]

"Punitive action", within the meaning of Article 5, paragraph 1(c) of the ECHR is also a special term. It is identical to the definition of the term "criminal charge" under Article 6 of the ECHR. Therefore, it is not of crucial importance whether the domestic law defines a certain action as punitive but whether, according to the substantive criteria of the ECHR, it should be considered as a punitive action.

770 CH/00/3800-A&M, paragraph 117 with further reference to the ECtHR, *Murray v. the United Kingdom* of 28 October 1994, Series A no. 300-A, paragraph 55.
771 See CH/00/3880-A&M, paragraph 123 *et seq*.
772 See, for instance, Article 147 of the FBiH Criminal Procedure Code (*OG of FBiH*, No. 35/03).
773 For more about this topic, see: "(a) Lawful arrest", p. 208.
774 CH/98/896-A&M, paragraph 65 *et seq*.

Accordingly, both customs felonies[775] and economic felonies[776] may be viewed as "criminal acts" within the meaning of Article 5, paragraph 1(c) of the ECHR.[777]

The question on the existence of a basis for reasonable **suspicion** is a significant characteristic of the principle on protection from arbitrary arrest. Reasonable suspicion presumes that there are facts or information which may convince an objective observer that a certain person might have committed a criminal offence. However, identifying the situations that contain the basis for reasonable suspicion depends on the circumstances of each individual case.[778] Thus, for the beginning, the deprivation of liberty is sufficiently justified in a situation where the suspect was in the possession of a landmine and wire[779] or a weapon with ammunition.[780] A suspicion must exist at the moment of the deprivation of liberty about which a decision is to be adopted on *prima facie* grounds. If the evidence substantiating the suspicion are presented only after the person concerned is arrested, in a way that he is charged only during the interrogation in the form of a written statement, such kind of deprivation of liberty is considered to be arbitrary.[781]

The **extension of detention** for a suspect who was originally deprived of liberty due to the reasonable suspicion of having committed a criminal offence is to be determined according to Article 5, paragraph 3 of the ECHR, which is considered together with Article 5, paragraph 1(c) of the ECHR.[782] If the original detention is extended or if it lasts for a long period of time, the lawfulness of such a detention is not determined according to Article 5, paragraph 1(c) of the ECHR but according to Article 5, paragraph 3 of the ECHR.[783]

Deprivation of liberty constitutes a very sensitive restriction of individual human rights and fundamental freedoms. Therefore, a deprivation of liberty is admissible only in cases where a huge probability exists that guilt will be established or that a sanction will be pronounced, in other words if there is a reasonable suspicion that the person concerned committed an offence he was

775 U 19/00, paragraph 23.
776 AP 223/02, paragraph 19 *et seq*.
777 See more about this topic in: iv. "A criminal charge", p. 264.
778 CH/00/3880-A&M, paragraph 117 in conjunction with the ECtHR, *Fox et al. v. the United Kingdom* of 30 August 1990, Series A no. 182, paragraph 32.
779 CH/97/34-A&M, paragraph 90.
780 CH/98/1373, paragraph 96.
781 CH/98/1027 *et al*. -A&M, paragraph 138 *et seq*.
782 AP 805/04, paragraph 33 with further references to the ECtHR, *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, paragraph 29.
783 CH/02/12427-A&M, paragraph 103 with further references to the ECtHR, *De Jong et al. v. Holland* of 22 May 1984, Series A no. 77, paragraph 44, and *Letellier v. France* of 26 June1991, Series A no. 207, paragraph 35.

charged with. Of course, a strong requirement is that a deprivation of liberty is admissible only if criminal proceedings could be initiated and conducted.[784] Other reasons for deprivations of liberty may be regulated by ordinary laws. The successful conduct of criminal proceedings is always possible if there is no fear that a suspect, *i.e.*, the defendant will jeopardise the criminal proceedings.

Article 5, paragraph 1(c) of the ECHR stipulates that deprivations of liberty should prevent the commission of a criminal offence or the flight of a suspect after having committed an offence. However, these two requirements from Article 5, paragraph 1(c) of the ECHR are not final. Other reasons for a deprivation of liberty may be regulated by the ordinary law.[785] Thus, Article 146 of the Criminal Code of the Federation of BiH[786] provides that a deprivation of liberty is admissible if there is a risk that flight, concealment, collaboration, collusion or commencement of commission of a criminal offence or the completion of a commenced criminal offence will occur or if there is a threat to public security if the person concerned remains at liberty. Unless these reasons for deprivation of liberty exist, a suspect or defendant must remain at liberty.[787] The gravity of the offence the person concerned is charged with is not a sufficient reason for ordering a deprivation of liberty.[788] The competent authority must present that, in addition to reasonable suspicion, there is also a justified reason for a deprivation of liberty, which means not only giving unsustainable statements or referring to the law in general terms.[789] It is true that in some countries similar provisions exist. For instance, in the Republic of Austria, according to Article 180, paragraph 7 of the Criminal Procedure Code,[790] detention must be imposed in the event of a criminal offence for which the law provides a minimum of ten years in prison unless it could be presumed, based on the facts of the specific case, that there are no reasons for the deprivation of liberty referred to in paragraph 2 of this provision, such as threat of escape, threat of hiding, etc. It is acceptable for the European Court that the national law provides for

784 AP 247/05, paragraph 23.

785 CH/03/13854, paragraph 20.

786 *OG of FBiH*, No. 35/03.

787 AP 805/04, paragraph 33.

788 CH/00/3880-A&M, paragraphs 146, 151, 153 with further references to *Wemhoff v. Germany* of 27 June 1968, Series A no. 7, paragraphs 10, 12; *Tomasi v. France* of 27 August 1992, Series A no. 241, paragraph 84; see, also, CH/01/7912 *et al*.-A&M, paragraph 156 *et seq.*; CH/01/7488-A&M, paragraph 104 with further references to the ECtHR, *Letellier v. France* of 26 June 1991, Series A no. 207.

789 CH/03/14486, paragraph 96 *et seq.*; CH/02/11108 *et al*.-A&M, paragraph 152 with further references to the ECtHR, *Letellier v. France* of 26 June 1991, Series A no. 207, Series A no. 207; these requirements were not met in: AP 1824/05, see paragraph 10 *et seq.* in the mentioned decision; AP 2398/06 also raises doubts, in which case a non-legally binding judgment on imposing 5 years in prison, which was adopted by the court of first instance, is obviously considered as a sufficient reason for deprivation of liberty.

790 BGBl, 1975/631 titled as 1998/153.

obligatory deprivation of liberty with respect to certain cases or if, for special reasons, there is a lawful presumption that the person concerned may flee due to the gravity of punishment he may expect. It is true that the Committee of Ministers of the Council of Europe, in its Resolution which was adopted on 9 April 1965, recommended that the governments of the member states limit pre-trial detention, to apply it only when necessary and to consider it as an exception. This resolution is not a legally binding regulation.[791] Thus, it could be concluded that in such cases the domestic authorities must have mechanisms that make it possible for giving up deprivations of liberty, *i.e.*, a mechanism for the prevention of misuse and arbitrariness by competent authorities.

The cases in which the BiH Constitutional Court, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court confirmed that, except for a reasonable suspicion, there is one or several legal **reasons for arrest:**

- The appellant is a citizen of Serbia, his family is also in that country and his place of residence is in that country;[792]
- two suspects are also on the run and it is presumed that other suspects, given the imposed sanction, would make an attempt to flee;[793]
- there is a risk that the defendants may flee because they have no personal documents issued for a stay in BiH (although they are citizens of BiH) and they are also citizens of the Republic of Serbia, which has not yet signed the readmission agreement with BiH, and they have no considerable property in BiH and are charged with a grave criminal offence;[794]
- there is a risk that the suspect may flee since it is obvious from his dossier that the state prosecutor's office is conducting second proceedings against him for the forgery of documents; the suspect may, owing to his business engagement in prominent international companies, obtain huge amounts of money; it is not known where the suspect hides his Canadian visa;[795]
- there is a risk that the suspect may flee since he has dual citizenship and he had already been on the run and was arrested owing to an international warrant and an order was issued for him to be deprived of liberty;[796]

791 Res. [65] 11, published in the FR of Germany as an attachment to BAnz issue 102 of 3 June 1965, p. 152; quotation and note in *Frowein/Peukert*, 1996, p. 107, footnote 151.
792 AP 247/05, paragraphs 8, 28.
793 AP 997/07, paragraphs 2, 13.
794 AP 2499/06, paragraph 18 *et seq*.
795 AP 252/05, paragraphs 7, 41.
796 AP 542/05, paragraphs 8, 35 *et seq*.

- there is a risk that the suspect may flee since, in addition to his BiH citizenship, the suspect also has Croatian citizenship and Croatia has not yet signed an agreement with Bosnia and Herzegovina on readmission of its citizens; the defendant has already been on the run for a long time using a false identity after the international warrant was issued for him to be deprived of liberty;[797]

- there is a risk that the suspect may flee since he stated that he had no BiH personal documents and that he was only in transit.[798]

The cases in which the BiH Constitutional Court, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court confirmed that there is a threat to the **public order and security** established by the competent courts:

- a risk that the close relatives of the victim and other citizens may take revenge against the person deprived of liberty due to the type of criminal offence and the manner in which that criminal offence was committed;[799]

- the type of criminal offence and the manner in which the criminal offence was committed: throwing an explosive device among a group of gathered people;[800] detonation of an explosive device during daylight in a public place;[801]

- the type of criminal offence and the manner in which the criminal offence was committed: selling drugs at places visited by a large number of young people and children. In addition, the suspect has already been convicted on several occasions due to the commission of the same offence;[802]

- the type of criminal offence and the manner in which the criminal offence was committed: genocide;[803]

- a threat to public order and security since the suspect was charged with the criminal act of genocide and if he would be released, the population of a small village where he used to reside would become very disturbed and frightened.[804]

The cases in which the BiH Constitutional Court, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court confirmed

797 AP 3117/06, paragraph 6 *et seq.*, paragraph 22 *et seq*.
798 AP 2319/06, paragraph 14.
799 AP 1066/07, paragraphs 7, 14.
800 AP 805/04, paragraphs 8, 35.
801 CH/02/11108-A&M, paragraph 169 *et seq*.
802 AP 911/07, paragraphs 3, 9.
803 AP 542/05, paragraphs 7, 33 *et seq*.
804 AP 3117/06, paragraph 6 *et seq.*, paragraph 22 *et seq*.

that there is a threat that the evidence may be concealed or that there might be **collaboration and collusion among offenders**:

- all suspects acted in an organised manner and with previous collaboration, so if they are not deprived of liberty there is a risk that they may interrupt the continuation of the investigation proceedings;[805]
- prospective witnesses live in the immediate vicinity of the defendant, who is charged with a grave criminal offence and therefore there is a risk of evidence concealment, collaboration or collusion;[806]
- the defendant has very strong private and professional connections with the witnesses that should be interrogated, and given the fact that other investigative actions should be taken by the state prosecutor's office against the persons known to the defendant, there is a risk of evidence concealment, collaboration or collusion;[807]

For the purpose of protecting the legal properties being threatened by **acts of terrorism**, the police must urgently investigate all available information, including secret sources of information, and sometimes detain an alleged terrorist on the basis of reliable information which cannot be disclosed without putting the source of the information in jeopardy. Therefore, when it comes to the criminal offences of terrorism, the issue whether there is a "basis" for a reasonable suspicion should be assessed less strictly and only to the extent that the safeguard secured by Article 5, paragraph 1(c) of the ECHR is not impaired.[808] As to this issue, it should be examined whether the obligations of UN members referred to in paragraph 2(e) of UN Resolution No. 1373 on the fight against terror (2001),[809] play any role in this regard. Vice versa, that is to say that none of the institutions in charge of criminal prosecution will be absolved from considering whether a reasonable suspicion existed at the time of making the arrest merely due to the fact that the committed offence was one of terrorism. Additionally, the domestic authorities will not be absolved from assessing the reasonableness merely because the offence under domestic law stipulates obligatory pre-trial detention.[810]

If an order is issued by the court **to release** a certain person from detention, a postponement of several hours of the suspect's release cannot be covered any

805 AP 997/07, paragraphs 2, 13.
806 CH/02/11108-A&M, paragraph 169 *et seq*.
807 AP 1943/07, paragraphs 2, 10.
808 CH/02/8679 *et al*.-A&M, paragraph 212 with a quotation from the ECtHR, *Fox et al. v. the United Kingdom* of 30 August.1990, Series A no. 182, paragraph 32.
809 CH/02/8679 *et al.*-A&M, paragraph 213.
810 CH/02/11108 *et al.*-A&M, paragraph 137.

more by Article 5, paragraph 1(c) in some cases, in particular if the continued detention is aimed at bridging the time until extradition, deportation, etc.[811]

iv. Article 5, paragraph 1(d)

Deprivation of liberty is also justified in the event of "the **detention of a minor by lawful order** for the purpose of **educational supervision** or his lawful detention for the purpose of bringing him before the competent legal authority". There are two kinds of measures. In this regard "educational supervision" does not include only educational measures and educational recommendations[812] but also juvenile detention. On the other hand, detention of a minor shall be any deprivation of liberty aimed at bringing a minor before the competent legal authority, which does not necessarily have to be a court, in order to enforce all necessary measures (for instance, separation of a child from violent parents) and not only because a minor committed some criminal offence.[813]

v. Article 5, paragraph 1(e)

Deprivation of liberty is also justified in the event of "the lawful detention of persons for the prevention of the **spreading of infectious diseases**, of persons of unsound mind, alcoholics or drug addicts or vagrants". This provision serves as a basis for the protection of state public order and security, including the protection of other persons and their property, being in great need of professional and, above all, medical assistance in order for their psycho-physical integrity to be protected.[814] Article 5, paragraph 1(e) of the ECHR differentiates among four groups of persons: persons of unsound mind, alcoholics, drug addicts or vagrants. The European Court,[815] the BiH Constitutional Court and the Human Rights Commission within the BiH Constitutional have only developed the case-law on mentally ill persons.

In order for the detention of a mentally ill person to be "lawful" within the meaning of Article 5, paragraph 1, the mental illness, except for in urgent cases, must be confirmed by the objective findings of a medical expert. On the other hand, a mental illness must be of such kind to justify the deprivation

811 See, CH/02/8679 *et al.*-A&M, paragraph 219 *et seq.* with further references to the ECtHR, Quinn *v. France* of 22 March 1995, Series A no. 311, paragraph 42; in this regard, see also p. 221, the part about Article 5 paragraph 1(f) of the ECHR.

812 See, for instance, Article 86 of FBiH Criminal Code (*OG of FBiH*, No. 36/03).

813 *Ademović*, 2005, paragraph 62 *et seq*.

814 AP 2271/05, paragraph 69 related to the ECtHR, *Luberti v. Italy* of 23 February 1984, Series A no. 85.

815 *Ademović*, 2005, p. 63.

of liberty.[816] The person may be kept in detention only for the period of the duration of illness.[817] Additionally, the competent court, which – as needed – may issue an order on release from detention, must be checking the mental health of the respective patient on a regular basis.[818] The ECHR standards, in particular those relating to the pronouncement of an order on deprivation of liberty or on remaining under medical treatment, should be covered by explicit law regulations. Should the legal regulations for the determination of the detention measure be changed in some specific case after the detention measure has been pronounced, the competent institutions must examine whether the requirements for continued deprivation of liberty have been met in that specific case.[819]

For the purpose of medical treatment the court may refer a person only to a special clinic; special wards for mentally ill persons within a prison do not meet these requirements either.[820] According to Article 5, paragraph 1(e) of the ECHR, the state is under an obligation to form a special clinic for mentally ill persons. Despite the fact that Bosnia and Herzegovina has undertaken the obligation to build such an institution by the end of 2005, based on which one matter before the European Court ended with a friendly settlement,[821] in the opinion of the BiH Constitutional Court – given the state of facts at the end of 2006 – such an institution has not been established yet in BiH.[822]

vi. Article 5, paragraph 1(f)

Finally, the deprivation of liberty is justified if a person has been "lawfully arrested" or deprived of liberty for the purpose of preventing his **illegal entry** into a country or if a procedure of **deportation or extradition** is under way against that person.

Accordingly, the authorities must prove that the arrest has been originally justified. Except for compliance with domestic procedural regulations,[823] this

816 AP 2271/05, paragraph 60.

817 *Ibid*., with further references to the ECtHR, *Winterwerp v. Holland* of 24 October 1979, Series A no. 33, paragraph 39.

818 AP 2271/05, paragraph 60.

819 AP 2271/05, paragraph 61 *et seq.*; AP 1125/05, paragraph 31.

820 AP 2271/05, paragraph 60, 66 *et seq.*, with further references to the ECtHR, *X v. the United Kingdom* of 5 November 1981, Series A no. 46, paragraph 43, and *Ashingdane v. the United Kingdom* of 28 May 1985, Series A no. 93, paragraph 44.

821 See, in connection with that issue, the ECtHR, *Hadžić v. Bosnia and Herzegovina* of 11 October 2005, Application No. 11123/04.

822 AP 2271/05, paragraph 62 *et seq*.

823 As to the competencies and extradition procedure, see CH/03/14212-A&M, paragraph 63 *et seq*., wherein different violations of law have been established.

requires that the deprivation is in accordance with the aims of Article 5 under the ECHR protecting an individual from arbitrariness.[824] A legal basis is required for deprivation of liberty. An injured party must be informed of the reason for his deprivation of liberty and that person must have a possibility to file a complaint against the decision ordering detention.[825] The injured party must fall within one of the categories listed in Article 5, paragraph 1(f) of the ECHR. However, the "necessity" for issuing an order on deprivation of liberty is wider according to item (f) than according to the provisions under item (c), since under this item the order is only required in the event of undertaking the measures of deportation or extradition. Therefore, it is of no relevance whether the decision on deportation or extradition, which makes the basis for the issuance of an order on the deprivation of liberty, could be justified by the national law or ECHR, except for cases involving arbitrariness. As long as a competent proceeding on deportation or extradition is under way it is of no relevance whether that person will be really extradited, because a distinction must be made between the lawfulness of the arrest and the lawfulness of the extradition.[826] The fact that the arrested person initiated the procedure of getting citizenship is irrelevant within the meaning of Article 5, paragraph 1(f) of the ECHR.[827]

According to Article 5, paragraph 1(f) of the ECHR, the repeated deprivation of liberty which has been carried out by the different State institutions (in this case the Federation of BiH and the Republika Srpska) due to the same criminal offence which was allegedly committed in the area of Slovenia will be in accordance with Article 5, paragraph 1(f) of the ECHR if each of the competent institutions complies with the ECHR standards. After Interpol issues an international warrant to the competent BIH institutions along with an arrest order, the suspect is not entitled to confront the arrest in the RS with an explanation that, based on the same arrest order, he has already been already arrested and then released in the territory of the Federation of BiH because Slovenia failed to submit a request for his extradition.[828]

Furthermore, according to Article 5, paragraph 1(f) of the ECHR, the deprivation of liberty is justified only if, from a legal point of view, a certain person has

824 CH/02/8679 et al.-A&M, paragraph 223.

825 CH/02/8679 *et al.*-A&M, paragraph 224 *et seq*.

826 CH/03/14212-A&M, paragraph 61 in relation to the ECtHR, *Chahal v. the United Kingdom* of 15 November 1996, Reports 1996-V, paragraph 112, and EComHR, *Caprino v. the United Kingdom*, Application No. 6871/75, Yearbook XXI (1978), P. 284 (294); CH/02/12528; paragraph 29 in relation to the EComHR, *Lynas v. Switzerland*, Application No. 7917/75, DR 6, p. 1411; AP 3114/06, paragraph 14 in relation to EComHR, *Zamir v. the United Kingdom*, Application No. 9174/80, DR 40, p. 42.

827 AP 3114/06, paragraph 16.

828 CH/02/12528, paragraph 31.

been eventually deported or extradited. **An informal act of "handing over"** a suspect to the authorities of a foreign country is not in compliance with this regulation. Such an act constitutes arbitrariness, in particular if a legal requirement or an explicit court ban is avoided in that way and an individual is denied a special measure of protection from deportation or extradition.[829]

> In Case CH/02/8679 *et al*, the United States only "offered" to the Government of Bosnia and Herzegovina to put the arrested Algerians in "detention". According to the opinion of the Human Rights Chamber, this informal offer failed to satisfy the requirement of the Criminal Procedure Code of BiH when it comes to submitting a request for extradition.[830] The authorities acted in a similar manner in CH/02/9842: upon the expiry of pre-trial detention – which was probably lawful – the appellant was legally but not physically released, he stayed in the detention of the Federation authorities because they did not inform him that he was released from detention or about the changed reasons for his remaining in detention (deportation or extradition). This unlawful measure was aimed at handing over that person to the Egyptian authorities at some later point and the Federation of BiH had failed, even formally, to comply with regulations on extradition procedure. In addition to handing the person to the Egyptian authorities and violations of the relevant procedural law, the appellant was also stripped off his citizenship.[831]

(c) Obligation to inform the person concerned of the reasons for his arrest and of any charge against him/her (Article 5, paragraph 2 of the ECHR)

Article 5, paragraph 2 of the ECHR should ensure that a certain person is obligatorily informed of the reasons for his deprivation of liberty. The person must be informed about the essential legal and factual basis for his deprivation of liberty in simple, non-technical and understandable language so that the individual can challenge the lawfulness of his/her arrest before the court if deemed to be necessary. It is a must to deliver this information to the person concerned. However, Article 9, paragraph 2 of the International Covenant on Civil and Political Rights does not require that a person deprived of liberty must be accordingly informed at the moment of the deprivation of liberty. It is sufficient to carry out this task within a short period of time following the arrest. There is a question whether the delivery of the said information corresponds to the standards of Article 5 and this issue should be examined

829 See, CH/02/8679 *et al.*-A&M, paragraphs 226, 228 *et seq.* in relation to the ECtHR, *Bozano v. France* of 18 December 1986, Series A no. 111, paragraph 60; CH/02/9842-A&M, paragraph 98 *et seq*.

830 Paragraph 227.

831 For more about this topic, see "G. Citizenship (Article I.7)", p. 119.

based on the circumstance of each individual case.[832] If a person is deaf he is entitled to a special court interpreter for deaf persons.[833]

At an early stage it is not required to present a case-file to the injured party to have any insight or to get all of the details of the indictment. What the individual needs is to be given information concerning the lawfulness of his arrest. However, as a rule, a mere categorisation of the offence the individual is charged with is not sufficient, neither is it sufficient according to the legal definition in the domestic criminal code. If a person is arrested due to a certain offence, he/she must be informed about the details of that offence, including the state of facts based on which the suspicion has been formed, and that suspect should be asked whether he/she would admit that he/she committed that offence or not.[834] It is obvious that delays exceeding four months concerning the notification of the injured party about the legal basis for the arrest, after which the individual is a given the possibility to determine whether the arrest was lawful, do not satisfy the requirements under Article 5, paragraph 2 of the ECHR.[835] Neither does the delay of two days satisfy the requirement from Article 5, paragraph 2 of the ECHR, in particular if no information was delivered to that person as to the legal basis for the deprivation of liberty.[836] There is no violation of Article 5, paragraph 2 of the ECHR in the following cases: if a person spends 27 hours in detention and if he, immediately after being deprived of liberty, is informally informed about the offence he is charged with or if he gets this information after the decision on termination of investigation has been delivered to him prior to his being released, and if, during that time, he was not interrogated with regards to the lawfulness of his detention.[837]

(d) It is obligatory to bring the accused before a judge "promptly" or to release him from detention (Article 5, paragraph 3 of the ECHR)

Article 5, paragraph 3 of the ECHR stipulates special rights for the persons deprived of liberty or detained in accordance with paragraph 1(c). Article 5, paragraph 3 of the ECHR is not significant when it comes to deprivations of liberty according to other provisions of paragraph 1(c). That is a key difference

832 CH/96/21-M, paragraph 39; CH/97/45-A&M, paragraph 53, and CH/02/11108 *et al.*-A&M, paragraphs 143, 145 in relation to the ECtHR, *Fox et al. v. the United Kingdom* of 30 August 1990, Series A no. 182, paragraph 40, and *De Wilde et al. v. The Netherlands*, 18 June 1971, Series A no. 12, paragraph 71; see also CH/97/34-A&M, paragraph 94; AP 696/04, paragraph 61; AP 2582/05, paragraph 65.

833 AP 805/04, paragraph 37.

834 CH/01/7488-A&M, paragraph 125; CH/02/11108 *et al*.-A&M, paragraph 147.

835 CH/97/45-A&M, paragraph 54.

836 CH/96/21-M, paragraph 40.

837 CH/98/1374-A&M, paragraph 141.

when compared with Article 5, paragraph 4 of the ECHR. The person deprived of liberty according to paragraph 1(c) must be brought before a judge or other official person authorised under law to exercise judicial authority. Moreover, those persons are entitled to a decision within a reasonable time or to be released from detention, in which case the release from detention may be conditioned by guaranteeing that the person concerned will appear before the court. The guarantees from Article 5, paragraph 3 of the ECHR concern the persons detained in respect of the criminal proceedings to follow.[838] Accordingly, paragraph 3 shall not be applied to extradition related detention under Article 5, paragraph 1(f) of the ECHR.[839]

i. Bringing a suspect before a judge "promptly"

An official person who is considered a **judge** or some other official person who, pursuant to Article 5, paragraph 3 of the ECHR, is authorised under law to execute judicial power, is obliged to **examine** the circumstances supporting the deprivation of liberty and those against the deprivation of liberty and, taking into account the legal criteria, to decide whether there are reasons **justifying the deprivation of liberty** or, if those reasons do not exist, to **issue an order to release the person concerned from detention**.[840]

Bringing a suspect before a judge or some other officer executing judicial power is **compulsory**. It is not a discretionary right of the authorities in charge of criminal proceedings. From the very beginning, the Court of BiH limited the practice of bringing a suspect before a judge to only those cases where the reasons for the deprivation of liberty created doubts; such a practice is unacceptable because in that way the right to protection from arbitrary deprivation of liberty is undermined since this right is guaranteed under Article 5, paragraph 3 of the ECHR.[841] The Court of BiH offered the reasons for this practice stating that the applicable procedural law contains no provision requiring that a person must be brought before a judge promptly. That is the reason why some of the detainees spent more than six months in the pre-trial detention only on the basis of the

838 CH/02/8679 *et al*.-A&M, paragraph 160. This regulation should have a preventive effect with regards to the arbitrary deprivation of liberty and the period spent in detention should be as short as possible (CH/01/7488-A&M, paragraph 97 in relation to the ECtHR, *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, paragraph 30).

839 CH/03/14212-A&M, paragraph 56 in relation to the ECtHR, *Quinn v. France* of 22 March 1995, Series A no. 311, paragraph 53, and *De Wilde et al. V. Holland* of 18 June 1971, Series A no. 12, paragraph 71.

840 CH/97/34-A&M, paragraph 98 with further references to the ECtHR, *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, paragraph 31.

841 AP 953/04, paragraph 15 in relation to the ECtHR, *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34.

"status of acts" and they had never been brought before a judge.[842] In order to confront this judicial practice, which is obviously contrary to the ECHR, the BiH Constitutional Court issued an interim measure ordering that the person concerned must be brought before a judge within 24 hours. If a suspect is in pre-trial detention which is confirmed to be consistent with the Constitution based on a decision of the BiH Constitutional Court[843] and if, in the meantime, the State Prosecutor's Office **extends or modifies** the investigation, which may have effect on the extension of pre-trial detention, the suspect must be brought before a judge because of both the new accusations and the extension of detention measure.[844] The judge is not obliged to schedule a hearing at a special date or for that purpose only. The hearing may be held during the main trial. In that case the person shall not suffer damage if a ruling on detention is adopted outside the hearing.[845]

The provision which, by the force of law, **withdraws the discretionary right from the judge to decide on the justification of detention** is in contravention of the ECHR. So, the deprivation on liberty which is based on that provision is unlawful. To be more precise, if a judge or a body authorised to examine the reasons for the deprivation of liberty, while taking a decision on an extension of pre-trial-detention, lacks room for making the assessment which means that he can under no circumstances terminate the pre-trial detention in a lawful manner and issue an order on releasing the person concerned from detention because, for instance, the extension of detention in the event of warranted suspicion is compulsory under law;[846] this judge or the body in charge of examining the lawfulness of detention cannot be considered a judge or other officer authorised to execute judicial power within the meaning of Article 5, paragraph 3 of the ECHR. Therefore, such deprivations of liberty shall be considered unlawful.[847]

The requirements of Article 5, paragraph 3 of the ECHR shall not be met if a competent judge, due to an unquestionable legal presumption, cannot examine whether there is a reasonable suspicion on which the Prosecutor's Office has

842 AP 976/05, paragraph 26; in relation to judicial practice of the RS, see Interim Measure in AP 1812/07, paragraph 18 *et seq*.

843 AP 997/07.

844 AP 1812/07, paragraph 18 *et seq*.

845 AP 247/05, paragraph 26, *et seq*.

846 As in the case of Article 183, paragraph 1 of the FBiH Criminal Code.

847 CH/01/7488-A&M, paragraph 98 *et seq.*, CH/01/7912 *et al*.-A&M, paragraph 151 *et seq.*, in relation to the ECtHR, *Schiesser v. Switzerland* of 4 December 1979, Series A no. 34, paragraph 30 *et seq*., *De Jong et al. v. Holland* of 4 May 1984, Series A no. 77, paragraph 47 *et seq.*, *Fox et al. v. the United Kingdom* of 30 August 1990 and 27 March 1991, Series A no. 182; CH/02/11108 *et al*., paragraph 108; CH/02/12427-A&M, paragraph 113.

based its order on the determination of a pre-trial detention measure.[848] Based on the principle of "equality of arms", the state prosecutor is a *party* to the proceedings and therefore he cannot be considered a judge or other officer authorised by law to execute judicial power as referred to under Article 5, paragraph 3 of the ECHR.[849]

As to the issue of whether a person was brought before a judge "promptly" within the meaning of Article 5, paragraph 3 of the ECHR, the assessment is not to be made based on the circumstances of each individual case but on the basis of, *inter alia*, domestic procedural regulations. Therefore, the criminal prosecution authorities have a certain margin of appreciation.[850] However, the maximum time-limit for bringing a person before a judge shall not exceed four days.[851] Accordingly, bringing a person before a judge on the day when he is deprived of liberty could be considered as usual practice.[852] Even if domestic law permits a detention of three days until the day of bringing a person before a judge, which, as a rule, is still in compliance with the maximum deadline of four days, there must be special reasons justifying the fact that a person was not brought before a judge.[853] Insignificant exceeding of the time limit prescribed by law (for instance, 24 hours time-limit in which the State prosecutor, after taking over a person who was arrested by police, must submit a request to the judge who should issue a detention measure – Article 139, paragraph 4 of the Criminal Procedure Code of F BiH (*OG of FBiH*, Nos. 36/03, 26/04 and 63/04)) does not automatically mean that Article 5, paragraph 3 of the ECHR has been violated.[854] The domestic procedural regulations must not be given such significance so as to violate the essence of the rights under Article 5, paragraph 3 of the ECHR. That is the case when, for instance, the obligation of the State has been denied in respect of securing the release of a detainee or bringing him before a competent judge "promptly". Therefore, if there is doubt that terrorist acts have been committed, the period of four days and six hours cannot be any more viewed as being in accordance with these standards.[855] That is even less applicable to the period of seven days of not bringing a person before a judge.[856]

848 CH/03/14903, paragraph 55 *et seq*.
849 AP 976/05, paragraph 28.
850 CH/03/14903, paragraph 50.
851 CH/03/14903, paragraph 50 in relation to the ECtHR, *Brogan v. the United Kingdom* of 29 November 1988, Series A no. 145-B, paragraph 67.
852 CH/01/7488-A&M, paragraph 98
853 CH/02/9834-A&M, paragraph 87 *et seq*.
854 AP 2561/05, paragraph 29 *et seq*.
855 CH/97/34-A&M, paragraphs 101, 103 in relation to the ECtHR, *Brogan v. the United Kingdom* of 29 November 1988, Series A no. 145-B, paragraph 59.
856 CH/03/14903, paragraph 55 *et seq.*

ii. Trial within a reasonable time or release from detention

It is required that criminal proceedings involving **detained persons** be conducted **with particular expedition and acceptable reasons should be given for continued detention.** The word "or" should not be understood so as to imply that the trial within a reasonable time is an alternative to a release from detention. In any case the extension of a detention measure must be justified.[857] The suspect/accused is presumed innocent until a judgment is rendered, so the aim of that principle is, in fact, the submission of a request for temporary release of the suspect/accused if the extension of detention is no longer appropriate.

The reasonableness of the length of detention is related to the whole *period of duration of detention*, which means not only to the period until the commencement of main trial.[858]

> The reasonableness of the length of detention according to Article 5, paragraph 3 of the ECHR must be distinguished from the **reasonableness of the length of proceedings** according to Article 6, paragraph 1 of the ECHR. The commencement and the end of detention on the one hand and the length of proceedings on the other need to be distinguished. In both cases reasonableness is assessed according to different criteria. Thus, the length of trial in some cases may be reasonable due to the complexity of the case and that rule does not automatically apply to the extension of detention.[859]

Time-limits for assessing the reasonableness of the length of detention until adjudication of the matter are related to the time of the deprivation of liberty or the commencement of a detention measure on the one hand and to the time when the decision is taken on the confirmation of indictment on the other. For instance, the commencement of criminal proceedings is not relevant. Accordingly, the detention pending a decision of the appeal panel concerning a legal remedy is not relevant either.[860] In the event of a longer detention which had occurred prior to the entry into force of the ECHR (competence *ratione temporis*, crucial date 14 December 1995),[861] that period of detention may,

857 CH/00/3880-A&M, paragraph 146; CH/01/7488-A&M, paragraph 102.

858 CH/00/3880-A&M, paragraphs 146, 148, with quotation from the ECtHR, *Neumeister v. Austria* of 7 May 1974, Series A no. 8, paragraph 4; CH/02/12427-A&M, paragraph 115.

859 CH/01/7488-A&M, paragraph 103.

860 CH/01/7912 *et al*.-A&M, paragraph 154 in relation to the ECtHR, *Wemhoff v. Germany* of 27 June 1969, Series A no. 7, paragraph 12; CH/00/3880-A&M, paragraph 150.

861 The reasonableness of the length of detention prior to the entry into force of the Dayton Peace Agreement (14 November1995), due to impossibility to apply the ECHR, is not legally relevant *ratione temporis* within the meaning of the possibility

nevertheless, be taken into consideration when assessing the reasonableness of the length of detention after 14 December 1995.[862] The continued reasonable suspicion, *i.e.*, the one that existed at the time of the deprivation of liberty, is *condicio sine qua non* concerning the extension of a detention measure, but after the expiry of a certain period of time it is no longer *per se* justified because the assessment of this issue may change over time and that is why the authorities must speed up the proceedings.[863]

The substantive criterion for assessing the reasonableness of the length of detention is, first of all**,** the complexity of the proceedings.[864] Firstly, depending on the complexity of the case, the competent authorities must prove that the speed at which they dealt with the case was appropriate.[865] *Secondly*, in assessing whether the length of detention was appropriate, the courts should examine whether the reasons given by the national authorities are relevant and sufficient to prove that the detention was not extended for an inappropriately long period of time and that this continued detention is not in contravention of Article 5, paragraph 3 of the ECHR.[866] *Thirdly*, the competent authorities must prove that they displayed special diligence in the conduct of the proceedings*.*[867] *Fourthly*, it should be examined whether the accused contributed to the delays in the proceedings. *Fifthly*, the state legal system must be functioning so as to provide a quick completion to the proceedings

for its legal assessment. At the moment of expiry of this time-limit a lot of civilians and military were kept in detention although the requirement was not met as to the existence of some justified reason under Article 5, paragraph 1 of the ECHR. After 14 December 1995 those persons, pursuant to Article IX of Annex 1-A to the Dayton Peace Agreement, may be kept in detention for a maximum of 60 days "after the transfer of the authority". Article IX of Annex1-A to the Dayton Peace Agreement, pursuant to Article 15 of the ECHR, derogated from the obligation under Article 5 of the ECHR in some way (CH/02/10446, paragraph 19 *et seq.*).

862 See, CH/00/3880-A&M, paragraph 149 *et seq*., the quotation from the ECtHR, *Kalashnikov v. Russia* of 15 July 2002, paragraphs. 110-111.

863 CH/02/11108 *et al*.-A&M, paragraph 171, and CH/02/12427-A&M, paragraphs 119 and 124, in relation to the ECtHR, *Kemmache v. France* of 27 November 1991, Series A no. 218, paragraphs 45 and 52.

864 CH/02/12427-A&M, paragraph 124; CH/02/11108 *et al*.-A&M, paragraphs 171, 174; AP 641/03, paragraph 32.

865 CH/00/3880-A&M, paragraph 151.

866 In connection with this issue see also "iii. Article 5, paragraph 1(c)", p. 214, discussing the risk of flight from detention, the risk of hiding and repeating the same offence and the threat to public order and security. See examples in CH/02/11108 *et al*.-A&M, paragraph 169 *et seq.*; CH/00/3880-A&M, paragraph 154. See also CH/00/3880-A&M, paragraphs 146, 151, 153 in connection with *Wemhoff v. Germany* of 27 June 1968, Series A no. 7, paragraphs 10, 12, and *Tomasi v. France* of 27.8.1992, Series A no. 241-A, paragraph 84; see also CH/01/7912 *et al.*-A&M, paragraph 156 *et seq.*; CH/01/7488-A&M, paragraph 104 in relation to the ECtHR, *Letellier v. France* of 26 June 1991, Series A no. 207.

867 See the proceedings in the Case CH/00/3880-A&M, which is a sad example of the lack of diligence, in particular paragraph 155, where it is pointed to the fact that the criminal proceedings which were conducted against a detained appellant were being forgotten from time to time.

and compliance with the requirements set forth in Article 5, paragraph 3 of the ECHR.[868] The state must ensure that the judiciary is structured and equipped properly so that the competent criminal prosecution bodies can fulfil their obligations under Article 6, paragraph 1 and Article 5, paragraph 3 of the ECHR. Possible shortcomings in this regard (such as weaknesses in procedural organisation, poor court staffing capacity, insufficiently precise regulations for replacement of judges being unable to do their job) cannot justify an extremely long detention.[869]

When it comes to **extension of detention,** the bodies in charge of criminal proceedings must, while complying with the principle of the presumption of innocence, consider all circumstances for or against the public interest when it comes to a deviation from the rule on the protection of personal freedom and extension of detention. These considerations must be found in a decision (ruling) upon the request for review of detention.[870] Extension of detention may be justified in some cases only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[871] The severity of expected sanction cannot justify an extension of detention measure.[872] An obligation to carefully examine a detention measure is violated when, for instance, the charge is prevailingly based on the requirement that a perpetrator should to be identified by the witnesses or when the accused is denied his right to confront the witnesses for a long period of time and, at some later point, it turns out that not a single witness was able to identify the perpetrator.[873]

(e) *Habeas corpus* (Article 5, paragraph 4 of the ECHR)

Article 5, paragraph 4 of the ECHR guarantees the right of *habeas corpus*. Accordingly, everyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of detention shall be decided speedily by a court and have release ordered if the detention is not lawful. This right includes all forms of measures relating to a deprivation of liberty under Article 5.[874] This right does not apply only to unlawful detention

868 CH/02/12427, paragraph 134.
869 See CH/02/11108 *et al.*-A&M, paragraph 178 *et seq.*
870 CH/01/7912 *et al*.-A&M, paragraph 155 in relation to the ECtHR, *Toth v. Austria* of 25 November 1991, Series A no. 224, paragraph 67.
871 CH/00/3880-A&M, paragraph 147, with quotation from the ECtHR, *W. v. Switzerland* of 26 January 1993, Series A no. 254, paragraph 30; AP 641/03, paragraph 27.
872 Although the practice appears to be different: see commentary under "iii. Article 5, paragraph 1(c)", p. 214.
873 See, CH/01/7488-A&M, paragraph 105.
874 AP 2271/05, paragraph 72.

and is not dependent on possible application for release on bail. If there is no right of *habeas corpus* or if it is restricted, it means that Article 5, paragraph 4 of the ECHR has been violated.[875]

The term "**lawfulness"** from paragraph 4 corresponds to the same term under Article 5, paragraph 1 of the ECHR and it does not concern the domestic law only but also the ECHR, its principles and goals relating to the limitation of deprivation of liberty under paragraph 1.[876] Lawfulness means fulfilling the requirements of law quality: the law should, in a sufficiently precise manner, regulate the issues relating to the institutional frame, including the proceedings and other important aspects of the right of *habeas corpus*.[877]

A person who is deprived of liberty is entitled to a judicial authority that will promptly examine whether the procedural requirements have been met for his deprivation of liberty, whether there are justified reasons for the suspicion and whether the deprivation of liberty and subsequent issuance of a detention measure have pursued a legitimate aim.[878] In order to meet the time related requirement, it is sufficient if the law stipulates that the detention measure shall be reviewed *ex officio* at bi-monthly intervals.[879] Article 5, paragraph 4 of the ECHR becomes more significant if a measure of detention was originally lawful and, at some later point, circumstances have occurred creating doubt about the lawfulness of continued detention.[880] The court must check whether the continued detention meets the requirement of lawfulness and this is particularly important when considering an extension of detention measure.[881] It does not mean only that the decision on that issue must exist, but it also means that the decision must be submitted to both the lawyer and detainee.[882] When it comes to judicial practice, a judicial decision adopted within a period of eight days was considered a decision adopted "within a short period of time".[883]

875 CH/00/3880-A&M, paragraph 162 in relation to the ECtHR, *De Wilde et al. v. Belgium* of 18 November 1970, Series A no. 12, paragraph 73, and *Kolompar v. Belgium* of 24 September 1992, Series A no. 235-C, paragraph 45.

876 CH/96/21-B, paragraph 49; CH/97/45-A&M, paragraph 63 in relation to the ECtHR, *Brogan et al. v. the United Kingdom* of 29.11.1988, Series A no. 145-B, paragraph 65; CH/00/3880-A&M, paragraph 163 in relation to the ECtHR, *Van Droogenbroeck v. Belgium* of 24 June 1982, Series A no. 50, paragraph 48.

877 AP 2271/05, paragraph 77 *et seq.*

878 CH/97/45-A&M, paragraph 64.

879 CH/00/3880-A&M, paragraph 163.

880 CH/00/3880-A&M, paragraph 164 in relation to the ECtHR, *Bezicheri v. Italy* of 25 October 1999, Series A no. 164, paragraphs 21-22.

881 CH/02/9834-A&M, paragraph 105; AP 2271/05, paragraph 71.

882 *Ibid*.

883 AP 641/03, paragraph 38.

The necessity for having a judicial decision issued on the lawfulness of detention (concerning the deprivation of liberty and continued detention) gives rise to the definition of "court" which has been developed in Articles 5 and 6 of the ECHR. The traditional court decision is not required.[884] However, the authority in charge of issuing a decision must have the characteristics of a court and be independent from executive authority and must have the authorisation to issue legally binding decisions.[885] In several cases the Constitutional Court had to deal with the issue whether the provisions of Article 5, paragraph 4 of the ECHR had been violated due to the lack of the judge's impartiality because the judge who was deciding the matter in the previous proceedings was also deciding on the extension of detention and was participating at the main trial.[886] According to the opinion of the BiH Constitutional Court, this circumstance gives no *per se* basis for considering that the judge lacks impartiality since judges decide on *different issues* (constancy of the deprivation of liberty and constancy of the indictment); special reasons which would, anyway, substantiate allegations on the lack of impartiality must be proved by the appellant.[887]

"Judicial" decisions on the lawfulness of deprivation of liberty also require compliance with **procedural guarantees** such as "equality of arms", the right of access to a court and the right to a fair and adversarial proceedings.[888] Therefore, if the person concerned, who is accompanied by his attorney, is not permitted to attend court trials or sessions, in particular when the state prosecutor is the only one who is attending, the guarantees for the protection from arbitrariness are violated and such a situation is not in accordance with the provisions of Article 5, paragraph 4 of the ECHR. Furthermore, neither is it in accordance with the provisions of Article 5, paragraph 4 of the ECHR if the arrested person is not provided access to documents that may be deemed relevant or if the proceedings provide no possibility for directly informing the arrested person or his attorney about the reasons for ordering detention, or if the arrested person is not given an opportunity to challenge the allegations of the State Prosecutor's Office, or if he is not given an opportunity to prepare the request for release from detention.[889]

884 AP 2271/05, paragraph 73 in relation to the ECtHR, *Weeks v. the United Kingdom* of 2.3.1987, Series A no. 114, paragraph 61.

885 AP 2271/05, paragraph 73 in relation to the ECtHR, *De Wilde*, *Ooms and Versyp v. Belgium* of 18 November 1971, Series A no. 12, paragraphs 76, 77.

886 See AP 543/04.

887 *Ibid*., paragraph 28 *et seq*., in relation to the ECtHR, *Nortier v. Holland* of 24 August 1993, Series A no. 267, paragraph 33; see also AP 312/04, paragraph 50.

888 AP 2271/05, paragraph 73.

889 CH/02/12427-A&M, paragraph 143 *et seq.*, CH/03/14212-A&M, paragraph 91 in relation to the ECtHR, *Toth v. Austria* of 12 December 1991, Series A no. 224, paragraph 84; *Lamy v. Belgium* of 30 March 1989, Series A no. 151, paragraph 29;

As to the application of Article 5, paragraph 4 of the ECHR concerning compliance with the mentioned principles, less severe criteria are applied in cases of **extradition proceedings.** By the very nature of things, the international obligations of the State that is conducting the extradition are also relevant during such proceedings. At the same time, the essence of the right of *habeas corpus* must be complied with. That will not be the case if the person who is deprived of liberty is denied the right of access to court where he can challenge the lawfulness of his detention and if he is denied the access to the documents he needs in order to be able to submit a request for release from detention.[890]

(f) Compensation, Article 5, paragraph 5 of the ECHR

Pursuant to Article 5, paragraph 5 of the ECHR, any person who is deprived of liberty contrary to the above provision shall be entitled to compensation. In order for the appellant to be authorised to file a compensation claim in accordance with Article 5, paragraph 5 of the ECHR, he must first reach a legally binding decision establishing the violation of some rights guaranteed under Article 5, paragraphs 1-4 of the ECHR.[891] An approval for special compensation provided for under domestic procedural law is not a requirement for filing a compensation claim under Article 5, paragraph 5 of the ECHR.[892] This is because the right to compensation must be enforceable in practice. In such a case the general principles on the effectiveness of legal remedies are applied. Moreover, the compensation claim must include both pecuniary and non-pecuniary damage.[893] In the opinion of the Human Rights Chamber, BiH and the Entities were under an obligation to secure the effective mechanisms for legal protection concerning compensation for prisoners of war who were kept in detention after March 1996.[894] The Federation of BiH was not able to produce evidence that mechanisms *de lege lata* are effective with respect to different compensation claims.[895] On the other hand, the civil courts were not

Keus v. Holland of 25 October 1990, Series A no. 185-C, paragraph 27; *Niedbala v. Poland* of 4 July 2000, paragraph 66 *et seq.*; EComHR, *Farmakopoulos v. Belgium*, Application No. 11683/85 of 4 December 1990; for details see also CH/02/12427-A&M, paragraph 143 *et seq.*

890 CH/03/14212-A&M, paragraph 92 in relation to the ECtHR, *Sanchez-Reisse v. Switzerland* of 21 October 1986, Series A no. 107, paragraph 50.

891 AP 94/04, paragraph 24.

892 *Ademović*, 2005, paragraph 97 *et seq*.

893 See, CH/97/45-A&M, paragraph 71 *et seq.* in relation to the ECtHR, *Akdivar et al. v. Turkey* of 16 September 1996, Reports 1996, paragraphs 66-69.

894 CH/99/1838 *et al*. --A&M, paragraph 107; see also Article IX of Annex 1-A of Dayton Peace Agreement.

895 See, in relation to the quality of provisions, CH/98/1027 *et al.*-A&M, paragraphs 116-118; CH/98/1373-A&M, paragraph 68 *et seq.*; with regards to the effectiveness of theoretical rights to redress CH/98/1374-A&M, paragraph 116.

considered competent, so the injured persons enjoyed no legal protection.[896] However, in some cases the BiH Constitutional Court established that there was a violation of the right under Article 5 and ordered just compensation because of both an insufficiently effective compensation mechanism (Article 5, paragraph 5 of the ECHR) and violations of the rights under Article 5, paragraphs 1-4 of the ECHR.[897] Based on its positive obligations to protect human rights and fundamental freedoms, Bosnia and Herzegovina cannot be released from its obligation to pay the just compensation for human rights violations referred to in Article 5 of the ECHR with an explanation that the international community (in this specific case SFOR) is also responsible for the violation.[898]

(g) Competing provisions

Article 5 of the ECHR is a *lex specialis* in relation to **Article 2 of Additional Protocol No. 4 to the ECHR** (freedom of movement).[899] There is a difference between these two rights in respect of the degree and intensity of restrictions on personal freedom. If it is possible to apply the principle of protection of human rights from Article 5 of the ECHR then it is not necessary to separately examine Article 2 of the Additional Protocol No. 4 to the ECHR.[900] Given the fact that there are different targets of protection, a violation of Article 5, paragraph 1 to the ECHR is not a justified reason for waiving the right to have a violation of Article 5, paragraph 4 to the ECHR (*habeas corpus*) examined.[901] Article 5, paragraph 4 is *lex specialis* in relation to **Article 13 of the ECHR**.[902] If it is already established that there was a violation of Article 5, paragraph 1 of the ECHR, the right of examining whether there was a violation of Article 5, paragraphs 2 and 5 of the ECHR may be waived.[903] As to the issue of whether the originally lawful detention measure has became unlawful over time, the case shall no longer be considered under **Article 5, paragraph 1(c)** but under **Article 5, paragraph 3 of the ECHR**.[904] The right to a trial within a reasonable

896 CH/99/2317, paragraph 33 et seq.

897 AP 2582/05, paragraph 46 *et seq*.

898 AP 2582/05, paragraph 46 *et seq.*; see also "(f) Compensation, Article 5, paragraph 5 of the ECHR", p. 233.

899 See CH/97/34-A&M, paragraph 67.

900 CH/98/1374-A&M, paragraph 155 *et seq*.

901 CH/96/21-M, paragraph 47, and CH/97/45-A&M, paragraph 61 in relation to the ECtHR, *Bouamar v. Belgium* of 29 February1988, Series A no. 129, paragraph 55; CH/98/1027 *et al.*-A&M, paragraph 143.

902 CH/96/21-B, paragraph 48, and CH/97/45-A&M, paragraph 62 in relation to the ECtHR, *Chahal v. the United Kingdom* of 15 November 1996, Reports 1996.

903 CH/98/1786-A&M, paragraph 114 *et seq*.

904 CH/00/3880-A&M, paragraph 125, in relation the ECtHR, *De Jong et al. v. Holland* of 22 May 1984, Series A No. 77, paragraph 44, and *Letellier v. France* of 26 June 1991, Series A No. 207, paragraph 35.

time, according to **Article 6, paragraph 1 of the ECHR**, is more of a general right than the right to a decision within a reasonable time without delay or to release from detention according to Article 5, paragraph 3 of the ECHR. The right to a fair trial under Article 6, paragraph 1 to the ECHR is applied from the moment charges have been filed within the meaning of the ECHR.[905] As soon as the charges are filed in that regard, Article 6, paragraph 3(a) suppresses the regulations under Article 5, paragraph 2 of the ECHR since at that moment the accused must prepare his defence, which is more demanding than the right to prepare the defence against the pronounced measure of detention.[906]

5. The right to a fair trial (Article 6 of the ECHR)

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. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

905 Compare "5. The right to a fair trial (Article 6 of the ECHR)", p. 231.

906 CH/01/7488-A&M, paragraphs 109, 127, in relation to the ECtHR, *Eckle v. Germany* of 21 June 1983, Series A no. 65, paragraph 73, and EComHR, *G. et al. v. Austria*, Application No. 9614/81 of 12 October 1983, DR 34, p. 119 (121).

a. Introduction: Judiciary and War

An inefficient judiciary and the unreasonable length of court proceedings are not problems peculiar to Bosnia and Herzegovina. In addition, certain violations occurring in the war years may be excused considering the stressful individual and real circumstances under which the judiciary was functioning. During the war, the administration and judiciary, nevertheless, "slipped in" to the war without significant resistance or opposition so that they, "as other means of war", were instrumentalised or available to serve the same purpose. For the mentioned reason, it would have been surprising had the court preserved its independence during the armed conflict. Furthermore, numerous decisions and judgments passed by independent institutions had no real effect in practice since they could not be enforced due to a rise of national intolerance among citizens or a lack of support by the independent enforcement authorities. Numerous examples revealing the lack of judicial protection[907] confirm that the rule of law in Bosnia and Herzegovina did not have the individual and institutional forms, as necessary, even after the end of the war activities. *Salvisberg*[908] concludes that, primarily, the police and the administration as well as the judiciary were chiefly under the nationalist parties' control or power so that the exercise of individual rights, in principle, was conditioned on adequate ethnic affiliation. Numerous rights, nominally speaking, enumerated in the extensive catalogue of human rights and freedoms safeguarded under the Constitution, remained *de facto* without effective protection because of the lack of independent courts, administrative bodies and police. Thus, for example, because of the weakness of the written law or the laws applied by the highest courts of this country, *i.e.*, adjusted to real life situations, a legally binding decision on eviction, enacted in favour of a member of a minority people and against a member of a majority people in a certain place, obviously was not enforced despite many attempts and the additional support of the international community.[909] Human rights were respected and complied with when they corresponded to ethnic constellations. Human rights implied an ethnic connotation,[910] so that their essence was "stolen". The 2002 Human Rights Report by the *International Crisis Group* was appalling. Moreover, in a number of its reports, the International Crisis Group confirmed that the situation in the BiH judiciary at all levels and in all parts of the country was poor and pessimistic. It may be said that the establishment of the Brčko District of BiH was the only successful reform process.[911]

907 For instance, collected in *ICG*, 2000.
908 1999, p. 76 *et seq*.
909 *Marko*, 1999, p. 107 *et seq.*; see also the commentary below, regarding Article II.5 of the BiH Constitution: "a. Delays or denial of the right to repossession of property", p. 515.
910 *Sekulić*, 1999, p. 281.
911 *ICG*, 2002c.

b. The general right to a fair trial (Article 6 paragraph 1 of the ECHR)

(a) Conditions of Application

i. Overlapping as to the scope of work

Article 6, paragraph 3 of the ECHR governs the special features of a fair trial within the meaning of the notion stated in paragraph 1 of this provision, so that any alleged violations under paragraphs 1 and 3 can be examined together.[912] Prior to bringing the person deprived of liberty before the competent court, an appeal lodged due to a failure to inform the appellant of the nature and cause of the charges against him should not be considered under Article 6 paragraph 3(a) of the ECHR but in connection with the lawfulness of detention under Article 5 paragraph 2 of the ECHR.[913]

ii. Proceedings related to the "determination" of civil rights and obligations

AP 1029/04 M. P.	20050615
AP 1078/05 „Skrškopromet"	20050615
AP 1086/04 Geca	20051202
AP 1129/04 Plotan	20051117
AP 1151/05 D. Ć.	20050713
AP 1199/05 Inkometal AG	20060509
AP 1228/05 Hadžiibrahimbegović	20060613
AP 1285/05 Zlatić	20060509
AP 1293/05 „Krivaja" d.d.	20060912
AP 1390/05 Krasnići	20051013
AP 1393/05 V. D.	20050713
AP 1489/05 Bošnjak	20060509
AP 1509/05 Šakan *et al*.	20060920
AP 1570/05 Hasić	20061109
AP 1641/05 Kovač	20060912
AP 1658/06 „Veletekstil" d.o.o. Sarajevo	20060920
AP 1675/05 Kešelj	20060613
AP 1918/05 Tehnograd-Company	20051013
AP 1943/07 Vrančić	20070716
AP 201/05 B. K.	20050713
AP 240/03 Đ. M.	20040318
AP 240/06 Imširović	20070419

912 CH/98/1335-A&M *et al.* paragraph 245, including additional reference to the ECtHR, *Delta v. France*, 19 December 1990, Series A no. 191, paragraph 34.
913 CH/98/1374-A&M, paragraph 109.

AP 2458/05 „Croatia osiguranje“ d.d.	20060929
AP 291/03 A. S.	20040723
AP 310/04 E. S.	20041209
AP 368/04 F. B.	20040929
AP 439/04 Milićević	20060920
AP 441/06 H. A.	20060313
AP 479/05 Tomšić	20060509
AP 533/05 Šabić	20060314
AP 535/06 Kremić	20060412
AP 551/04 S. H.	20050518
AP 637/04 A. K.	20050722
AP 726/05 N. O.	20050615
AP 73/02 Sanas	20030725
AP 743/04 Bašagić	20051117
AP 776/06 Krasnići	20060412
AP 79/06 Remetić	20060314
AP 84/04 Ž. B.	20050323
AP 854/04 „Vilkom“	20041209
AP 895/05 Marković	20060209
AP 90/05 „Etaeng Trading ltd“	20050615
AP 969/04 Z. V.	20050323
CH/00/5247 „Sarajevska pivara“	20061106
CH/00/5548 Pehlić	20050706
CH/01/7309 Kasumović AP 240/06	20061219
CH/01/8032 Ivanić	20060206
CH/01/8112 *et al*. D&M Jotić *et al*.	20051109
CH/01/8304 Dervišević	20060913
CH/01/8393 Hifziefendić	20051005
CH/02/10738 Mrda	20061220
CH/02/10757 *et al*. J. R. *et al*.	20070207
CH/02/12401 Kuduzović	20070508
CH/02/8780 Sarač	20070509
CH/03/14064 *et al*. Nikolić	20070227
CH/03/14284-H. B.	20051106
CH/03/14363 Vuković	20070626
CH/03/14958 Grabovac	20060913
CH/97/61-D Majstorović	19980722
CH/98/548-D Ivanović	20000309
CH/98/638-D&M Damjanović	20000211
CH/99/1859-D&M Jeličić	20000211
U 13/00 Croatian telecommunications	20000929
U 16/03 R. S.	20040317
U 20/01 Džananović	20011012 *OG of BiH,* No. 25/01
U 21/02 S. T.	20040326
U 24/01 Krstić	20020312 *OG of BiH,* No. 05/02
U 28/01-2 Jugović	20020312 *OG of BiH,* No. 05/02
U 31/02 S. A.	20040326
U 40/01 B. T.	20010831

U 5/02 FMO – FBiH Army	20040121
U 51/01 Cantonal Prosecutor's Office in Sarajevo	20020910 *OG of BiH,* No. 25/02
U 59/01 Bičakčić	20020829 *OG of BiH,* No. 24/02
U 60/01 Garib	20020829 *OG of BiH,* No. 24/02
U 61/01 Čović	20020829 *OG of BiH,* No. 24/02
U 63/01 Z. I.	20060627
U 65/02 Dž. A.	20031229 *OG of BiH,* No. 43/03

Article 6, paragraph 1 of the ECHR is applicable only to proceedings determining a person's "civil" rights or obligations, or any criminal charge against a certain person.[914] This is one of the essential requirements for the application of Article 6, paragraph 1 of the ECHR. In this respect, it is irrelevant whether proceedings are classified as civil or criminal by the domestic legal order. Actually, it is essential that the proceedings, under the substantive criteria, "determine" the "civil" rights or obligations or any criminal charge. This may also be the case in proceedings, which, under domestic law, are not defined as civil but, for example, as administrative proceedings. However, the effect of such proceedings must have a sufficiently strong connection with the civil rights and obligations or ought not to have irrelevant effects on such rights and obligations but have to determine them directly. Therefore, the "civil" rights or obligations must be the only or one of the relevant matters of the proceedings.[915] In addition, the extent and manner to which Article 6 is applicable depends on the special features of the proceedings concerned and account must be taken of the entirety of the proceedings conducted under the domestic legal order.[916] When perceived in such a fashion, any criminal charge filed against a person may be determined also in disciplinary proceedings, also by applying Article 6.[917]

Furthermore, the constitutional and legal review of the regularity of the proceedings may be conducted, as a rule, only once the court judgment **completing certain proceedings** has become legally binding.[918] If an appellant, in general, complains of a violation of the right to a fair trial, the appeal shall be premature if the highest court passes the challenged decision and refers the case back to the lower court for renewed proceedings. In such a case, it

914 AP 291/03, paragraph 24 with reference to ECtHR, *Tre Traktorer Aktiebolag v. Sweden*, 17 July 1989, Series A no. 159, paragraph 41; *H. v. France*, 24 October 1989, Series A no. 162-A, paragraph 47.

915 Compare with U 65/02, paragraph 33 with reference to ECtHR, *Ringeisen v. Austria*, 16 July 1971, Series A no. 13, paragraph 94; *König v. Germany*, 28 June 1978, Series A no. 27, paragraphs 30 and 32, pp. 90 and 94; *La Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A no. 43, p. 21, paragraph 47; CH/98/835, paragraph 43.

916 CH/98/638-A&M, paragraph 71 with reference to ECtHR, *Brualla Gómez De La Torre v. Spain*, 19 December 1997, paragraph 37.

917 Compare with CH/01/8304, paragraph 41.

918 Compare with CH/97/46-M, paragraph 65.

is necessary that the proceedings as a whole are concluded.[919] Consequently, an issue as to the fairness of the proceedings must be assessed based only on the proceedings as a whole.[920] If the competent court decides only on the justification of the decision ordering detention for a certain person, the court does not decide on "any criminal charge against him", within the meaning of the ECHR and, therefore, any reference to a violation of Article 6 of the ECHR is premature.[921] If the appellant is actually never brought before the court *i.e.*, put on trial, such proceedings are not relevant as to Article 6, paragraph 1 of the ECHR.[922] The same applies in the case of a subsidiary prosecutor where the State Prosecutor's Office discontinues the criminal proceedings against a certain person.[923]

In addition, a legally binding procedural or substantive partial decision in criminal proceedings does not fall within the ambit of Article 6, paragraph 1 of the ECHR. Thus, for instance, if the court first takes a final decision on the territorial jurisdiction of the court,[924] or it decides on the real jurisdiction of an administrative body,[925] the court does not decide, taking into account the proceedings as a whole, on the "civil" rights or obligations, *i.e.*, on any criminal charge, as the court decides only about the procedural requirements for further proceedings. Such proceedings do not come within the scope of Article 6 of the ECHR (incompatible *ratione materiae*).

Likewise, **the provisional decisions** are excluded from the safeguards of Article 6 of the ECHR, given that those decisions, only temporarily and not finally, mostly pending a completion of the main issue, determine a "civil" right or obligation *i.e.*, any criminal charge. In general, these include proceedings on the *interim measures*,[926] or proceedings on the *interim safety measures*.[927] However, there are *exceptions* to this rule, which should encompass those cases wherein a provisional decision should produce permanent effects: in the case that a request for interim measures is not identical to the main request (and both have to be characterised as civil) and if damage, which may occur if the request for interim measures is dismissed, could not be redressed

919 CH/03/13051-A&M, paragraph 147.
920 U 28/01, paragraph 23 with reference to ECtHR, *Monnell and Morris v. the United Kingdom*, 2 March 1987, Series A no. 115, pp. 54 and 56.
921 AP 1943/07, paragraph 12 *et seq*.
922 CH/97/41-A&M, paragraph 46; CH/98/1374-A&M, paragraph 109.
923 AP 310/04, paragraph 6.
924 U 51/01, paragraph 27 *et seq*.
925 U 5/02, paragraph 24; AP 240/06, paragraph 6.
926 U 63/01, paragraph 22; AP 79/06, paragraph 9; CH/01/8032, paragraph 10 *et seq*.
927 AP 90/05, paragraph 7; AP 776/06, paragraph 8; however, see AP 1918/05, paragraph 10.

by a legally binding decision, then Article 6 of the ECHR safeguards the proceedings initiated upon a request for interim measures.[928] Exceptionally, the Constitutional Court also applied Article 6 of the ECHR in Case No. AP 743/04. This case concerns the reasonableness of the length of civil proceedings related to the decision on interim measures suspending the enforcement of the legally binding administrative decision granting repossession of the apartment.[929] Likewise, the decision in criminal proceedings conducted upon a request for safety measures (which is of a civil nature) also falls within the scope of Article 6 of the ECHR.[930]

In cases where a certain decision affects a person's "civil" rights or obligations only **indirectly**, such a decision does not fall within the scope of Article 6 of the ECHR. Thus, for instance, the proceedings related to *the registration of certain legal data*: U 20/01: removal from the court register of the person authorised to represent the company; similarly, in case AP 1078/05: the registration of the person authorised to represent the company; U 13/00: the registration of transfer of ownership; AP 1489/05: the registration of a dispute in the land books; AP 854/04 and AP 441/06: the registration of the ownership right in the land books;[931] however, it is different in proceedings challenging the validity of one's registration in the land books where the relevant issue comes within the scope of Article 6 of the ECHR: AP 869/04, paragraph 30); AP 1509/05: the establishment of criteria for registration of the ownership right in the land books.

Besides, Article 6 of the ECHR does not apply to proceedings related to *the obtaining of evidence*.[932] Furthermore, if the criminal proceedings against a certain person are suspended as a consequence of *amnesty* declared for the criminal offence the accused person is charged with, such proceedings do not determine the justification of a criminal charge.[933] As to the proceedings related to *the recognition of a foreign judgment* determining a person's civil rights, the Constitutional Court first denied that it related to proceedings determining one's civil rights or obligations within the meaning of Article 6 of the ECHR.[934] Subsequently, the Court nevertheless corrected its legal position and concluded that Article 6 of the ECHR was applicable to the proceedings

928 CH/02/12401, paragraph 19 *et seq.*; see, also, CH/00/5548, paragraph 56.
929 *Ibid*., paragraph 39 *et seq*.
930 CH/01/8393, paragraph 52 *et seq*.
931 This case-law was altered in 2008. Namely, in Case No. AP 2706/06 (dated 14 October 2008, paragraph 41), the Constitutional Court of BiH concluded that the appeal, related to the proceedings for registration of the ownership right, was *ratione materiae* compatible with the Constitution of Bosnia and Herzegovina.
932 AP 1029/04, paragraph 7.
933 U 24/01, paragraph 18.
934 U 16/03, paragraph 16; AP 1199/05, paragraph 8.

to recognise foreign judgments in case one's civil rights or obligations were determined by such judgments, although, strictly speaking, such proceedings do not concern the establishment but recognition of the already determined civil rights or obligations.[935] This correction of the case-law is commendable as the *exequatur* proceedings are necessary for recognition and enforcement of foreign judgments in Bosnia and Herzegovina, although these proceedings, *per se*, indeed, cannot be identified as the determination of a person's right but the determination of applicability of a foreign judgment in the country. Therefore, *de facto* it relates to the proceedings determining a person's civil rights or obligations, which have to comply with the standards of Article 6 of the ECHR. Next, although *bankruptcy proceedings*, *per se*, are not a civil "dispute", such proceedings provisionally regulate the issue of the existence of these rights and, therefore, Article 6 of the ECHR should be applied.[936]

Any civil rights or obligations, or any criminal charges against a person are not decided in proceedings deciding **the admissibility of a certain legal remedy.** Consequently, a violation of Article 6 of the ECHR cannot be established in proceedings deciding the admissibility of a request for *extraordinary review in a civil case*[937] *or in a criminal case*,[938] which is concluded by a legally binding decision, as well as in the case of deciding the admissibility of *a request to restore the original condition*,[939] or *a request for renewed proceedings in a civil case*[940] or *in a criminal case*,[941] or *a petition to reopen/to renew the proceedings in a criminal case*.[942] Nevertheless, where significant deficiencies have been identified, even a procedural decision on renewed criminal proceedings may be construed as the determination of the criminal charge in terms of Article 6, paragraph 1 of the ECHR, if the court conducted certain evidentiary proceedings and re-established the facts on the basis of new evidence and, actually, upheld once again the previous conviction and sentence.[943] In this case, HRC for BiH departed from its case-law previously established in Case No. CH/97/61-D,[944]

935 AP 1570/05, paragraph 27 *et seq*.
936 CH/03/14064 *et al*., paragraph 26 *et seq*.
937 AP 240/03, paragraph 9.
938 U 40/01, paragraph 15.
939 AP 73/02, paragraph 12.
940 AP 73/02, paragraph 12 with reference to EComHR, *G. v. SR Germany*, Application No. 10431/83, 16 December 1983, DR 35, p. 243.
941 CH/97/61-A, paragraph 17; CH/98/548-A, paragraph 41 *et seq.*; AP 1151/05, paragraph 6; AP 1641/05, paragraph 7; U 31/02, paragraph 16 *et seq*.
942 CH/98/638-A&M, paragraph 68 *et seq*., with reference to EComHR, *X. v. Austria*, Application No. 7761/77, 8 May 1978, DR 14, p. 171 (173); *Callaghan et al. v. the United Kingdom*, No. 14739/89, 9 May 1989, DR 60, p. 296 (300).
943 CH/98/638-A&M, paragraph 71 *et seq.*, 87 with reference to ECtHR, *J.J. v. the Netherlands*, 27 March 1998, DR 1998-II, pp. 34-40; see, also, Separate Opinions by President *Picard* and Judges *Grotian* and *Tadić*.
944 Paragraph 17.

which strictly relied on the jurisprudence of the European Court. The Chamber upheld such an approach, which is apparently more contemporary than the jurisprudence of the European Court, and, in another case, it publicly deviated from the Strasbourg case-law.[945] Furthermore, Article 6 of the ECHR does not apply to proceedings deciding *a petition for the protection of legality*, and not only because such proceedings relate to the decision on admissibility of a legal remedy but because an injured party, *i.e.*, a right holder or a holder of the obligation, is entitled only to an initiative and is not entitled to pursue the legal remedy. A decision to pursue a legal remedy is left to the discretion of the competent public Prosecutor's Office.[946] The same applies to *the inspection proceedings* where an individual, also, is entitled only to an initiative and cannot demand that the proceedings be instituted. Besides, in inspection proceedings, the rights of the person who requested the inspection proceedings are not decided but rather those of the third party obligations (for example, an obligation to pull down an unlawfully erected brick fence). However, the inspection proceedings may help a party damaged by the third party's acts or failure to act. Yet, the rights of an injured party are not decided in such proceedings.[947] In addition, the court decision asserting that the court is not competent to decide the relevant matter does not determine a civil right or obligation, or any criminal charge.[948] Nevertheless, in case the legal remedies are declared admissible by the relevant decision and that the competent authority re-determines the civil right or obligation, or the criminal charge, such a decision falls within the ambit of Article 6 of the ECHR.[949]

Article 6 of the ECHR is not applicable if **the proceedings are discontinued** and not completed by a decision on the merits, as, for instance, in cases where the criminal proceedings are discontinued as a result of a statute of limitations for criminal prosecution[950] or in case **the proceedings are terminated**.[951] Only under *exceptional circumstances* and if there are strong indications that a fault in the proceedings at an earlier stage cannot be remedied at a later

945 See, CH/98/548-D, paragraph 45; see also, the relevant analysis by *Garms*, 2003; see, also, AP 637/04 in which the Constitutional Court asserts that the appellant's request for renewed proceedings is manifestly ill founded (paragraph 22); this conclusion departs from the previous case-law of the Constitutional Court.

946 AP 368/04, paragraph 4.

947 CH/03/12026, paragraph 17 *et seq*.

948 CH/03/14284, paragraph 11; CH/00/5247, paragraph 17 *et seq*.; CH/02/10738, paragraph 44 *et seq*.

949 See, for instance, AP 240/03, paragraph 9; AP 73/02, paragraph 12; CH/98/638-A&M, paragraph 68 *et seq*., with reference to EComHR, *X. v. Austria*, Application No. 7761/77, 8 May 1978, DR 14, p. 171(173); *Callaghan et al. v. the United Kingdom*, Application No. 14739/89, 9 May 1989, DR 60, p. 296 (300).

950 CH/02/10757, paragraph 24; AP 533/05, paragraph 13.

951 AP 1390/05, paragraph 11: the accused was unavailable; as to the civil proceedings, see: AP 291/03, paragraph 22; AP 1285/05, paragraph 5.

stage, may the proceedings be examined before their conclusion in respect of a possible violation of Article 6 of the ECHR.[952] The Constitutional Court has found such an exception in cases Nos. U 59/01, U 60/01 and U 61/01, which all carried political weight. In the mentioned cases, the appellants addressed the Constitutional Court at an earlier stage, complaining of a violation of Article 6 of the ECHR and claiming immunity against criminal prosecution.[953]

A decision on a civil right or obligation, or a criminal charge, in terms of Article 6, paragraph 1 ECHR, in certain cases, may also be taken in the course of the **enforcement proceedings** related to the legally binding court judgment (by which a civil right or obligation, or a criminal charge has already been determined).[954] Otherwise, in the case that the protection of Article 6 of the ECHR was completely excluded from the enforcement proceedings, the guarantees given in the course of the decision-making process would often have no effect.[955] In fact, the enforcement proceedings are an integral part of the proceedings on the merits. However, under the European Court's case-law and the case-law of the former European Commission for Human Rights, this conclusion is applicable only if it is claimed that the enforcement proceedings *have exceeded a reasonable time*,[956] as well as in the case that a civil right or obligation, or any criminal charge in terms of Article 6, paragraph 1 of the ECHR is *re-determined* in the course of enforcement proceedings.[957] The meaning of redetermination is to be assessed on the basis of specific features of each individual case. At any rate, Article 6 of the ECHR is not applicable to the enforcement proceedings going through their normal course of development, including, also, any possible difficulties, such as, for instance, in the case of a blocked account of the debtor,[958] in the case of a debtor's insolvency,[959] or where the enforcement court ordered the payment of a debt instead of the sale of a debtor's property.[960] Also, in the opposite case, *i.e.*, where the economic situation is changed in favour of

952 CH/97/46-M, paragraph 65 with reference to ECtHR, *De Cubber v. Belgium*, 26 October 1984, Series A no. 86, paragraph 33; *De Haan v. the Netherlands*, Reports 1997, paragraph 52 *et seq*.; ECtHR, *Ruiz-Mateos v. Spain*, 6 November 1990, DR 67, p. 197; *X. v. Norway*, 4 July 1978, DR 14, p. 229.

953 However, compare the Separate Opinions by Judges *Danelius* and *Favoreu.* See, also, Decision of HRC for BiH, CH/03/14958.

954 AP 895/05, paragraph 12 *et seq*.

955 CH/96/17-A&M, paragraph 34 and CH/96/27-A&M with reference to *Scollo v. Italy*, 28 September 1995, Series A no. 315-C, and quotation from *Hornsby v. Greece*, 19 March 1997, Reports 1997-II, paragraph 40.

956 U 21/02, paragraph 40 with reference to ECtHR, *Di Pede v. Italy and Zappia v. Italy*, 26 September 1996, DR 1996-IV, pp. 16-24; see, also CH/02/8780, paragraph 54 *et seq*.

957 U 21/02, paragraph 40 with reference to EComHR, *K. v. Sweden*, 1 July 1991, Application No. 13800/88, DR 94.

958 AP 551/04, paragraph 7.

959 CH/03/14363, paragraph 24 *et seq*.

960 AP 1658/06, paragraph 12 *et seq*.

a creditor, a debtor does not enjoy the protection of Article 6, paragraph 1 of the ECHR.[961] Contrary to these cases, the civil rights, which have already been determined by a final decision, are re-determined in enforcement proceedings within the meaning of Article 6, paragraph 1 of the ECHR, if the executive or legislative authorities, by enacting the law, prevent or postpone indefinitely the enforcement of legally binding court judgments against the budget.[962] In such cases, the legislative authorities must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[963] The legislature must be particularly watchful of situations where, in this manner, third-party rights and interests are involved, such as, for instance, in the case of the sale of marital property of a debtor[964] or in the case of the sale of a third-party property which includes the debtor's share.[965] The third situation where Article 6 of the ECHR applies to enforcement proceedings – apart from a breach of the reasonable time requirement in enforcement proceedings and redetermination – the Constitutional Court views as the arbitrary application of laws.[966]

The proceedings instituted upon request for renewed criminal proceedings for the purpose of pronouncing a **flat sentence** of imprisonment in accordance with legally binding judgments, constitute an entirety together with the proceedings in which criminal liability was determined and a single sentence was pronounced, *i.e.*, such proceedings constitute part of the "determination" and, therefore, the principles of the right to a fair trial are guaranteed in such proceedings.[967]

If the appellant, before the Constitutional Court, challenges a procedural decision taken in **inheritance proceedings**, the appellant, for the purpose of applying Article 6, paragraph 1 of the ECHR, must prove that the relevant proceedings concerned a dispute over the civil right and the determination thereof. As to this issue, the case-law of the highest courts varies. Firstly, the objective of inheritance proceedings does not have to be the determination of an issue in terms of Article 6, paragraph 1 of the ECHR. The challenged factual or legal issues may be the subject matter of parallel civil proceedings, the outcome of which may be significant for the very inheritance proceedings.

961 Compare AP 1393/05, paragraph 10 *et seq.*; compare, also, AP 535/06, paragraph 10, in which the Enforcement Court ordered that the debtor's share be sold instead of the real property; and AP 479/05, paragraph 19 *et seq*., the removal of buildings constructed unlawfully.

962 CH/01/8112 *et al*.-A&M, paragraph 239 *et seq*.

963 CH/01/8112 *et al*.-A&M, paragraph 241 *et seq.*; AP 969/04, paragraph 24 *et seq*.

964 AP 1086/04, paragraph 25 *et seq*.

965 AP 2458/05, paragraph 24 *et seq*.

966 AP 1293/05, paragraph 25 *et seq*.

967 AP 726/04, paragraph 29.

In such a case, both proceedings must be regarded in their entirety, which may be subject to review in appellate proceedings before the Constitutional Court.[968] If the appellant *failed to avail himself* of the civil proceedings to resolve an issue disputable in respect of the inheritance proceedings, a procedural decision taken in inheritance proceedings is insufficient in order for Article 6 of the ECHR to be applicable since the relevant proceedings did not dispute *i.e.*, determine a civil right.[969] The same may be concluded in respect of the proceedings instituted for the purpose of obtaining a supplementary decision on inheritance.[970] Contrary to the said case-law, the Constitutional Court, in Case No. AP 1129/04, declared the appeal admissible and decided on the merits of the case, which also related to the inheritance proceedings challenged for an alleged violation of the rights protected under Article 6 of the ECHR.[971] In Case No. 1675/05, the Constitutional Court declared the appeal, lodged against the procedural decision on inheritance, manifestly ill-founded for the appellant's failure to refer to Article 1 of Protocol No. 1 to ECHR, but the Constitutional Court did not declare it inadmissible *ratione materiae*. The Human Rights Commission within the Constitutional Court of BiH regarded inheritance proceedings as the proceedings that may give rise to an issue related to civil rights within the meaning of Article 6 of the ECHR, namely, whether or not a person has a right to inherit.[972]

Starting from its linguistic meaning, Article 6, paragraph 1 of the ECHR guarantees the fair trial rights of **the accused**. Therefore, protection afforded by Article 6, paragraph 1 of the ECHR does not extend to proceedings initiated by a person against a third party or to a request filed to a public Prosecutor's Office to initiate such proceedings.[973] Consequently, Article 6, paragraph 1 of the ECHR does not guarantee the right to a fair trial of third parties – or of an injured party, his/her relatives (in the capacity of subsidiary prosecutors) or of the public – in the context of the requirement that the accused must be justly punished or that the accused, because of the faults of the proceedings or an arbitrary decision, must not be exempted from criminal liability. It follows that Article 6, paragraph 1 of the ECHR does not afford protection against a court decision by which a person is absolved from criminal liability in an arbitrary manner. According to this case-law, an appellant, who is a relative of an injured party, claiming in the appeal that he/she was unlawfully denied the

968 U 65/02, paragraphs 25-28.
969 AP 201/05, paragraph 8; AP 439/04, paragraph 12; AP 84/04, paragraph 7 *et seq*.
970 AP 1228/05, paragraph 9 *et seq*.
971 Paragraph 18 *et seq*.
972 CH/01/7309, paragraph 14 *et seq*.
973 CH/98/981-A, paragraph 10; CH/98/1214-A, paragraph 14.

right to participate effectively in the criminal proceedings in the capacity of a subsidiary prosecutor, cannot claim a violation of Article 6, paragraph 1 of the ECHR.[974] Namely, these types of cases do not concern the determination of a "criminal charge" of an injured party or of his/her relative (within the meaning of Article 6, paragraph 1 of the ECHR), but they concern only the accused and, therefore, the guarantees of Article 6 of the ECHR are applicable only to the accused.[975] Consequently, a victim tortured by police officers has no possibility, under Article 6 of the ECHR or other protected rights enumerated in Annex 6 of GFAP, to complain against apparent irregularities made in favour of the accused.[976] Moreover, Article 6 of the ECHR does not apply to an injured party even where domestic law provides a victim with the right to participate in criminal proceedings as an injured party, since this is not a right guaranteed by the ECHR, but by domestic law.[977] However, it is different where a decision on justification of a charge against a person is, in terms of Article 6, paragraph 1 of the ECHR, at the same time, decisive for a civil claim of a third party, for instance, of an injured party's claim or his/her relative's compensation claim against a perpetrator of a crime.[978] Judges of Human Rights Chamber for BiH *Masenko-Mavi*, *Grasso* and *Aybay* disagreed with the majority opinion according to which **an injured party,** i.e.**, a victim does not enjoy any protection** under Article 6 of the ECHR. In their view, the injured party must enjoy the guarantees of Article 6, paragraph 1 of the ECHR because an injured party (a victim), according to the domestic law, in fact, joins the criminal prosecution as a party entitled to compensation for the injury caused by the crime at issue. In other words, in these types of proceedings, the "civil rights" are being determined within the meaning of Article 6, paragraph 1 of the ECHR.[979] Yet, the impossibility to protect a victim against arbitrary decisions of criminal courts, in terms of the guarantees of Article 6, paragraph 1 of the ECHR, is alleviated by the fact that the protection is afforded by other provisions of the ECHR. Namely, such a case would relate to a breach of the right to respect for family life of a victim's close family member[980] and a breach of the right prohibiting inhuman treatment.[981]

974 CH/99/2150, Decision on review, paragraph 93 *et seq*.
975 CH/99/1568-A&M, paragraph 42.
976 See CH/00/3642-A&M, paragraph 56.
977 CH/99/1568-A&M, paragraph 42; CH/03/13051-A&M, paragraph 143.
978 CH/99/1568-A&M, paragraph 42; CH/98/981-D, paragraph 10; CH/03/13051-A&M, paragraph 151.
979 Compare CH/99/2150-R, Annex I: Separate Opinion of Judge *Victor Masenko-Mavi*, joined by judges *Giovanni Grasso and Rona Aybay*, paragraph 3 with reference to ECtHR, *Moreira de Azevedo v. Portugal*, 23 October 1990, Series A no. 189; *Tomasi v. France*, 27 August 1992, Series A no. 241-A.
980 Article 8 of the ECHR; see p. 306 *et seq*.
981 Article 3 of the ECHR; see p. 180 *et seq*.

iii. "Civil" Claim

AP 1/03 S. B.	20040615
AP 100/04 Trade Union "Doboj-putevi" *et al*.	20050422
AP 102/03 M. K.	20041014
AP 1028/04 Čejević	20050212
AP 1029/04 M. P.	20050615
AP 1044/04 M. M.	20050426
AP 1071/04 Dupčanin	20051013
AP 1071/04 Dupčanin	20051013
AP 1080/04 Divčić	20051117
AP 1111/05 Opština Grude	20060509
AP 1115/04 Arsenić	20051117
AP 1118/04 Đ. Đ.	20050615
AP 1150/05 Prnjić-M. Lukić	20060613
AP 116/02 R. R.	20040929
AP 1175/06 Pejić	20060920
AP 1180/05 Begić	20060209
AP 1189/05 Karaica	20060412
AP 1193/05 Suljagić	20060627
AP 120/04 R. Z.	20041209
AP 1205/05 Bašić	20060412
AP 121/04 E. P.	20050412
AP 1232/05 Karić	20060509
AP 127/02 „Krajina-auto" a.d. Banja Luka	20040517
AP 128/06 „Hermetički kompresori" d.o.o.	20080110
AP 1294/05 Brulić	20060613
AP 1338/05 Zijadić	20060627
AP 1427/05 SUR. „Student"	20060627
AP 1509/05 Šakan *et al*.	20060920
AP 156/05 T. K.	20050518
AP 1605/05 M. i Z. Cirić	20061020
AP 1788/05 Atmani	20060920
AP 189/02 R. D.	20040630
AP 1929/05 District Brčko of BiH	20060912
AP 21/02 F. S.	20040517
AP 211/05 Tvico	20060412
AP 2144/05 „Hercegovac"	20061020
AP 220/05 Vrdoljak	20060314
AP 227/04 J. Č.	20041014
AP 233/03 B. D.	20041130
AP 2348/05 Anita *et al*. Blatešić	20060929
AP 2363/05 „FEAL" d.o.o. Široki Brijeg	20060708
AP 2367/06 Omerović	20060920
AP 2367/06 Omerović	20060929
AP 244/05 „Dale Jemes Baumgardner"	20060209
AP 2467/05 Novaković	20061020

AP 2618/05 Agency for Privatisation, Banja Luka	20061109
AP 2679/06 „DEPOS‟	20060920
AP 285/03 „Kalen‟ d.o.o. Zenica	20040723
AP 289/03 Pilić *et al*.	20041119
AP 289/04 Đ. O.	20041130
AP 311/03 N. E.	20041014
AP 311/04 A. G.	20040422
AP 322/04 M. K.	20041119
AP 334/06 N. B. *et al*.	20060920
AP 35/03 „SDP BiH‟	20060929
AP 365/04 B. B.	20050217
AP 39/03 Herzegovina-Neretva Canton	20040227
AP 393/04 M. B.	20050412
AP 397/04 M. T.	20050615
AP 422/04 B. G.	20050518
AP 452/04 M. G.	20050412
AP 483/03 I. H.	20040929
AP 490/05 Prpić	20060509
AP 510/04 I. G.	20050420
AP 518/04 S. L.	20050412
AP 545/03 I. H.	20041217
AP 558/04 M. K.	20050217
AP 585/05 Kordić	20060509
AP 623/04 „Destilacija‟ a.d.	20050518
AP 640/04 Krištić	20050913
AP 642/04 Talam	20051202
AP 643/03 „Bomi Frist” d.o.o.	20040929
AP 644/04 L. K.	20050412
AP 645/04 Jovičić	20051202
AP 669/03 „Razvitak” d.d. Gradačac	20040317
AP 682/04 R. A.	20050615
AP 691/04 H., A. i A. V. *et al*.	20050628
AP 700/05 Stanić	20060412
AP 71/02 J. Z.	20040428
AP 72/06 Piljić	20060912
AP 731/04 A. M.	20050615
AP 75/03 „Jodex” d.o.o.	20040317
AP 807/04 Ilijašević	20050913
AP 825/04 „Mepros‟ d.d.	20050913
AP 83/03 S. M.	20040929
AP 830/04 M. G.	20050128
AP 836/04 Popović	20071117
AP 862/04 Pavlović	20060314
AP 869/04 M. Ž.	20050225
AP 870/04 „NCO‟ d.o.o	20050207
AP 886/06 Kovačević	20080110
AP 912/04 APRO „Sunce‟ d.d. Neum	20060401

AP 914/04 M. P. *et al*.	20050412
AP 93/05 Mihajlović	20060223
AP 947/05 Ninković	20060209
AP 950/05 J. S.	20050913
AP 963/04 Sadiković	20051117
AP 963/05 S. P.	20050722
AP 965/04 Lj. R.	20050615
AP 972/04 Bojanić *et al*.	20050913
CH/00/3615 Jotić	20051109
CH/00/4636 Kuduzović	20060801
CH/00/4784 Hodžić	20070605
CH/00/5134 Škrgić *et al*.	20020208
CH/00/5764 Džebo	20070626
CH/00/5901 Klub penzionera	20060703
CH/00/7018 Momić	20050208
CH/01/6796 Z. Halilagić	20010307
CH/01/7248 D&M Ordo	20020705
CH/01/7309 Kasumović	20061219
CH/01/7382 Hrapović	20050905
CH/01/7464 Đulabić	20061219
CH/01/7635 Delić	20051005
CH/01/7701-A&M The BiH Islamic Community Council (the Mrkonjic Grad Mosques case)	20031222
CH/01/7979 Hidanović	20060405
CH/01/8507 Softić	20051215
CH/01/8529 Marijanović	20030205
CH/018518 Gazdić	20070207
CH/02/10476 Z. Lugonjić	20030401
CH/02/10569 Kalaba	20070207
CH/02/11114 Jakovljević	20070605
CH/02/11179 Sadžak	20050510
CH/02/12380 Lagumdžija	20060111
CH/02/12389 A. J.	20061219
CH/02/12468 *et al*.-Kadrić *et al*.	20050207
CH/02/12546 Čustović	20060705
CH/02/13640 Delić	20060508
CH/02/8724 Murgić	20050118
CH/02/8750 Dizdarević	20061219
CH/02/8754 Beganović	20060801
CH/02/8961 D&M Ait Idir	20030404
CH/02/9412 Mihajlović	20061219
CH/03/13051 D&M S. S.	20031107
CH/03/13640 Čuković	20050118
CH/03/14114 Martinović	20070508
CH/03/14212 D&M Syla	20031222
CH/03/14599 Drašković	20060206
CH/03/14958 Grabovac	20060913

CH/03/14986 Koštić	20060911
CH/03/14991 Školjić	20050510
CH/03/15183 Malić	20061106
CH/97/76 D&M Softić	20011012
CH/98/1309 *et al*.-D&M Kajtaž *et al*.	20010907
CH/98/166 D&M Bjelonja	20030207
CH/99/1427 Safić	20050606
CH/99/1838 *et al*.-D&M Karan *et al*.	20030704
CH/99/2503 Kubur	20060111
CH/99/2743 D&M Sarač	20030704
CH/99/2763 Halilović	20051107
CH/99/3375 D&M E. Ž.	20031205
U 104/03 K. M.	20040419
U 109/03 S. B.	20040517
U 128/03 „Kućni savjet"	20040922
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 2/99 Kadenić & Mesinović	19991122 *OG of BiH*, No. 20/99
U 27/01 HA-EMM	20020423 *OG of BiH*, No. 08/02
U 3/01 „Čajavec holding" *et al*.	20020312 *OG of BiH*, No. 05/02
U 3/99 H.D.	20000810 *OG of BiH*, No. 21/00
U 35/03 Z. G.	20040721
U 39/00 Assembly of Herzegovina-Neretva Canton	20010926 *OG of BiH*, No. 24/01
U 39/03 S. A.	20040130
U 47/02 BAZ AGRO d.o.o. Mostar	20040121
U 5/00 Elezović	20010119 *OG of BiH*, No. 01/01
U 55/01 Fifić	20020829 *OG of BiH*, No. 24/02
U 58/01 R. R.	20031229 *OG of BiH*, No. 43/03
U 6/00 Dolinić *et al*.	20020524 *OG of BiH*, No. 10/02
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 63/02 BAZ MP d.o.o. Mostar	20040121
U 65/02 Dž. A.	20031229 *OG of BiH*, No. 43/03
U 66/03 A. B.	20040721
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 03/00
U 70/03 K. M.	20040130
U 8/00 Hreljić	20000818 *OG of BiH*, No. 22/00

Article 6, paragraph 1 of the ECHR applies to disputes either between two private individuals or between a private individual and the State, the result of which is decisive for **civil rights and obligations**.[982] Considering that the notion "civil", within the meaning of Article 6, paragraph 1 of the ECHR, is independent of a definition in the domestic legislation, the domestic legal system of the State, however, may be taken as a starting point for deciding the legal nature of the dispute. Substantive criteria as well as the effects of

982 CH/01/701-A&M, paragraph 116 with reference to ECtHR, *Ringeisen v. Austria*, 16 July 1971, Series A no. 13, paragraph 94.

the right, of itself, are of great significance for an individual.[983] In addition, it is necessary to compare the legal systems of other states in order to investigate whether or not there is a specific notion of "civil rights and obligations", which encompasses the substratum of a particular case.[984] In a "grey zone" between public and private rights, *i.e.*, in administrative proceedings which also result in civil rights violations, for Article 6, paragraph 1 of the ECHR to be applied it does not suffice that such proceedings have little relevance to or only insignificant effects on civil rights and obligations; it is essential that a civil right or obligation, of itself, is the only or one of the only subject-matters of the dispute, *i.e.*, the proceedings, so that the result of these proceedings directly determines the relevant civil right or obligation.[985] This is the case where, for instance, de-expropriation, *i.e.*, the return of expropriated property is to be decided in administrative proceedings.[986]

The effect of the Constitutional Court's request, according to which the State must secure **minimum procedural guarantees**, including judicial review and the right of any party to participate in proceedings, irrespective of the legal nature of the claim in question, *i.e.*, no matter whether it concerns civil rights or obligations, or a **public claim,** is unclear.[987] It is "unclear" given that the Constitutional Court, after its Decision of 28 March 2003, rejected, on formal grounds, numerous appeals related to a breach of Article 6 of the ECHR in public disputes.[988] In the following text, a systematic review of and guide to the case-law of the BiH Constitutional Court, the Human Rights Chamber for BIH and the Human Rights Commission within the BiH Constitutional Court relating to the rights and obligations defined as "civil" is presented.

The civil nature of the claims is UPHELD:

- **Legal counsel**, the right to be registered into a counsel register;[989]
- **Copyright**;[990]

983 U 65/02, paragraphs 31 and 33 with reference to ECtHR, *König v. Germany*, 28 June 1978, Series A no. 27, pp. 88-90 and 94, as well as *Ringeisen v. Austria*, 16 July 1971, Series A no. 13, paragraph 94.

984 U 65/02, paragraph 32.

985 Compare U 65/02, paragraph 33 with reference to the ECtHR case-law, *La Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, Series A no. 43, p. 21, paragraph 47.

986 CH/98/835-A&M, paragraph 43 with reference to ECtHR, *Ringeisen v. Austria*, 16 July 1971, Series A no. 13, paragraph 94; CH/01/7248-A&M, paragraph 203 *et seq*. The Strasbourg case-law examples are included.

987 U 148/03, paragraph 49 *et seq*.

988 For instance, AP 669/03: tax liabilities; AP 75/03: custom duties.

989 CH/01/7979, paragraph 51 *et seq*.

990 The right to patent (AP 518/04, paragraph 23 *et seq*.); copyright protection (AP 1232/05, paragraph 32).

- **Bank guarantee**;[991]
- **Shareholders' rights**;[992]
- **Insurance contributions**, a dispute on;[993]
- **Work permit**;[994]
- **Life support,** a contract on;[995]
- **Citizenship,** the right to;[996]
- **Expropriation** proceedings;[997]
- **Building permit**;[998]
- **The use of land for construction purposes**;[999]
- **Property claims**;[1000]
- **Immunity**, the right to;[1001]
- **Infrastructure services**;[1002]

991 The right to sue (AP 912/04, paragraph 23 *et seq*.).

992 CH/00/5134, paragraph 297; AP 100/04, paragraph 31; AP 623/04, paragraph 24; AP 93/05, paragraph 10 *et seq.*; the sale of shareholder rights: AP 1111/05, paragraph 55 *et seq.*; the right to contest a conclusion of the shareholders' meeting: AP 640/04, paragraph 14.

993 CH/01/8507, paragraph 38; AP 311/04, paragraph 31 *et seq.*; AP 1338/05, paragraph 9.

994 A Restaurant's operating licence: CH/03/14986, paragraph 12; Operating licence for Dentists in private practice: AP 220/05, paragraph 8 *et seq*.

995 CH/03/14114, paragraph 19 *et seq.*; AP 120/04, paragraph 23 *et seq*.

996 In case that the relevant decision affects the enjoyment of civil rights or fulfilment of civil obligations (CH/02/8679 *et al*.-A&M, paragraph 161 with reference to EComHR, *S. v. Switzerland*, Application No. 13325/87, 15 December 1988, DR 59, p. 257).

997 CH/01/7701-A&M, paragraph 116; implicitly in Case No. CH/00/6134-A&M, paragraph 99 *et seq.*; see, also, U 3/01, paragraph 25; AP 836/04, paragraph 27.

998 The rights in proceedings initiated upon a request to obtain a construction permit related to either private or state property (CH/01/7701-A&M, paragraph 116; implicitly in Case No. CH/00/6134-A&M, paragraph 99 *et seq*. See, also, U 3/01, paragraph 25).

999 CH/00/4784, paragraph 27 *et seq.*; AP 127/02, paragraph 15; U 128/03, paragraph 27.

1000 The right to property (AP 642/04, paragraph 20); of a subsidiary prosecutor in the proceedings related to the repossession of confiscated *i.e.*, seized property (implicitly in Case No. U 3/99), within a framework of enforcement proceedings (AP 914/04, paragraph 11).

1001 U 59/01, U 60/01, U 61/01, AP 963/05, paragraph 25 *et seq*.; AP 322/04, paragraph 12.

1002 The right to be connected to a water supply system (AP 1071/04, paragraph 11 *et seq*.); the right to get a telephone connection (AP 21/02, paragraph 25).

- **Disability,** the right to the determination of;[1003]
- **Alimony,** obligations arising from marriage;[1004]
- **Benefits under a social-security scheme**;[1005]
- **Interest**;[1006]
- **Loan**, the creditor's right to request the repayment of;[1007]
- **Boundary,** a dispute about;[1008]
- **Lease**;[1009]
- **Reimbursement of compulsory and useful costs**;[1010]
- **Contractual obligations**;[1011]
- **Education**;[1012]
- **Parenting and Childcare**;[1013]
- **Awarding of a broadcasting licence to the RTV station**;[1014]
- **Compensation claim**[1015] (see, however, below, about disputes related to the amount of the claim, which, according to the Constitutional Court's case law, are exempted from the application of Article 6 of the ECHR);

1003 AP 644/04, paragraph 20; U 8/00.
1004 U 11/00; AP 483/03, paragraph 15.
1005 U 39/03, paragraph 19.
1006 AP 825/04, paragraph 23.
1007 AP 2363/05, paragraph 30.
1008 AP 72/06, paragraph 12 *et seq*.
1009 CH/97/51-A&M, paragraph 46; CH/02/11114, paragraph 20 *et seq.*; AP 71/02, paragraph 25 *et seq*.
1010 U 55/01, paragraph 24.
1011 The right to challenge the contract (U 109/03, paragraph 21); claim against unlawful gain (AP 334/06, paragraph 7 *et se*q.); the right to have a contract declared void (AP 1605/05, paragraph 30); endowment (AP 545/03, paragraph 19 *et seq*.; AP 965/04, paragraph 18 *et seq*.); the cancellation of a contract for a failure to fulfil contractual obligations (AP 227/04, paragraph 16 *et seq*.); liabilities under the electricity supply contract (U 17/00, paragraph 26).
1012 The right to repeat the Academic Year (AP 585/05, paragraph 36 *et seq.*, paragraph 48).
1013 AP 83/03, paragraph 20 *et seq*.; AP 346/04, paragraph 23.
1014 CH/01/7248-A&M, pp. 206-208; CH/01/8590 *et al*.-A&M, paragraph 59.
1015 Irrespective of how this claim is regulated by domestic legislation or independent of the institution deciding on the claim (CH/99/1838 *et al*.-A&M, paragraph 117 with reference to ECtHR, *Georgiadis v. Greece*, of 29 May 1997, Reports 1997-III, paragraph 35 *et seq*.).

- **Compensation claim in criminal proceedings by an injured party**;[1016]
- **Inheritance**, the right to;[1017]
- **Severance pay,** the right arising from employment;[1018]
- **Pension, disability,** claims arising from the right to;[1019]
- **Retirement, early**;[1020]
- **Retirement, old-age**;[1021]
- **Pension**, **foreign**;[1022]
- **Possession**;[1023]
- **Procedure of regulatory planning**;[1024]
- **Procedural decisions**;[1025]
- **Hours of work**;[1026]

1016 An injured party's right to compensation in criminal proceedings where such proceedings are decisive of a compensation claim made by the party whose civil right is to be determined in civil proceedings (CH/02/8667-A&M, paragraph 67 with reference to ECtHR, *Acquaviva v. France*, 21 November 1995, Series A no. 333-A; *Moreira de Azevedo v. Portugal*, 23 October 1990, Series A no. 189).

1017 CH/01/7309, paragraph 14 *et seq*.

1018 CH/02/12546, paragraph 33 *et seq*., CH/02/12389, paragraph 13.

1019 U 5/00; U 7/00; U 7/01, paragraph 19; also, despite the public-legal nature: U 53/02, paragraph 20 *et seq*., with reference to ECtHR, *Kerojärvi v. Finland*, 15 July 1995, paragraph 36; U 66/03, paragraph 24.

1020 The right to the amount of pension in case of early retirement (U 35/03, paragraph 31 *et seq*.); the right to receive a part of early pension in accordance with the bilateral agreement (AP 830/04, paragraph 20 *et seq*.).

1021 Claims arising from the right to old-age retirement (U 5/00; U 7/00; U 7/01, paragraph 19; also, despite the public-legal nature: U 53/02, paragraph 20 *et seq*., with reference to ECtHR, *Kerojärvi v. Finland*, 15 July 1995, paragraph 36; CH/01/7635, paragraph 33 *et seq*.); the right to the amount of pension (AP 1080/04, paragraph 20); the right to old-age retirement in accordance with the legal regulations applicable at the time of acquiring the right to retirement (AP 1028/04, paragraph 22 *et seq*.).

1022 Pension payable in the home country (CH/01/8518, pp. 2 and 9); the determination of the amount of pension, a part of old-age pension insurance is effectuated in the home country (CH/00/5764, paragraph 19 *et seq*.).

1023 The right to possession (AP 2348/05, paragraph 27 *et seq*.).

1024 Rights in legal proceedings (CH/01/7701-A&M, paragraph 116; implicitly in Case No. CH/00/6134-A&M, paragraph 99 *et seq.*; see, also, U 3/01, paragraph 25; AP 558/04, paragraph 18 *et seq.*; AP 1294/05, paragraph 10).

1025 The right to civil proceedings upon a claim lodged by an injured party for damage compensation even in case the criminal proceedings, which are completed by a final judgment, are re-opened as a result of extraordinary remedy (AP 691/04, paragraph 22 *et seq*.).

1026 The right to have the hours of work determined (CH/99/1427, paragraph 12; in Army: AP 963/04, paragraph 39 *et seq*.).

- **Employment relations**;[1027]
- **Divorce,** the right to;[1028]
- **Paupers' rights**;[1029]
- **Servitude**;[1030]
- **Social welfare card**, the right to have a;[1031]
- **Merger proceedings**, the right to;[1032]
- **Housing list**;[1033]
- **Apartment**;[1034]
- **Dwelling costs**;[1035]
- **Status-related disputes**;[1036]
- **Damage compensation**;[1037]

1027 The lawfulness of the termination of employment (AP 2144/05, paragraph 26); a partial disability (U 8/00); the contestation of general acts governing employment issues (CH/99/2763); payment of remuneration (AP 2367/06, paragraph 13); payment of transportation bonus (AP 731/04, paragraph 18 *et seq*.); payment of sickness benefits (AP 397/04, paragraph 20) or payment for the period when a person is "laid-off" (AP 452/04, paragraph 24);

1028 AP 346/04, paragraph 23.

1029 AP 1205/05, paragraph 8 *et seq*.

1030 AP 1180/05, paragraph 19.

1031 AP 1150/05, paragraph 7 *et seq*.

1032 AP 289/04, paragraph 26.

1033 A dispute on the right to an apartment based on a housing list (CH/01/7464, paragraph 14 *et seq*.); the right to be placed on a company's housing list (U 70/03, paragraph 23).

1034 The right to respect for home (*explicit* in U 6/98, U 2/99, U 3/99, U 6/00, U 7/00, U 15/00, U 22/01, paragraph 35, AP 645/04, paragraph 22; CH/97/46-M, paragraph 63 with reference to ECtHR, *Gillow v. the United Kingdom*, 24 November 1986, Series A no. 109, paragraph 68); the right to re-conclude the agreement on the apartment, if the agreement is *ex lege* declared void (AP 510/04, paragraph 20 *et seq*.).

1035 A payment of a garbage collection fee (AP 1/03, paragraph 26; AP 116/02, paragraph 24); liabilities arising out of the electricity supply contract (U 17/00, paragraph 26).

1036 Such as a question whether a person is employed or "laid-off", or whether a person is entitled to severance pay (CH/99/2743-A&M, paragraph 51 *et seq*.).

1037 Damage suffered as a result of the death of a relative (AP 289/03, paragraph 25 *et seq*.); compensation for the lost personal property of the family (CH/99/2150-R, paragraph 95 with reference to ECtHR, *Acquaviva v. France*, 21 November 1995, Series A no. 333, pp. 45-48; AP 102/03, paragraph 22); against the State (U 18/00, paragraph 24 *et seq*.); against the Insurance Company (U 23/00; AP 1115/04, paragraph 29); the use of someone else's real property (AP 490/05, paragraph 33); the property seized and used for military purposes during the war

- **Costs of the proceedings**;[1038]
- **Costs of the proceedings**;[1039]
- **Registration of ownership rights in the land registry**;[1040]
- **Registration of ownership in the land registry**, challenging the registration of ownership.[1041]

The civil nature of the claims is DISPUTED:

As to the question of whether labour disputes and disputes arising from employment of **civil servants, officials and other public servants** may be deemed to be civil disputes and, thereby, fall within the ambit of the right to a fair trial, the HRC for BiH expanded not only the Strasbourg case-law but its own, too: a staring point to resolve this issue was the principle according to which disputes relating to the recruitment, careers and termination of service of civil servants could not be deemed to affect a civil right.[1042] Furthermore, the Chamber, in accordance with the case-law of the Strasbourg organs, made an exception stating that, under particular circumstances, disputes may be deemed to be civil disputes where the claims at issue relate to a purely "economic right" (such as payment of a salary or a pension), or at least an "essentially economic" right.[1043] The Constitutional Court, as well as the Human Rights Chamber for BiH, referred concurrently to the *functional* criterion, established in the case-law of the European Court, according to which certain positions in the public-service sector, which involve responsibilities in the general interest or participation in the exercise of powers conferred by public

(CH/98/166-A&M, paragraph 68; CH/01/8529, paragraph 53; CH/02/12468 *et a*l, paragraph 138); real property investments (AP 1193/05, paragraph 17); the unlawful deprivation of liberty (CH/99/1838 *et al*.-A&M, paragraph 117); in criminal proceedings (AP 972/04, paragraph 21; AP 691/04, paragraph 22 *et seq*.).

1038 CH/02/12468 *et al*, paragraph 115 *et seq*.; CH/00/3615, pp. 196, 210 and 217.

1039 In civil proceedings: (U 65/01, paragraph 33; AP 950/05, paragraph 22; AP 311/03, paragraph 20; AP 189/02, paragraph 25); in criminal proceedings (AP 807/04, paragraph 19 *et seq.*; AP 886/06, paragraph 6 *et seq*.); in enforcement proceedings (AP 128/06, paragraph 22).

1040 AP 2706/06, paragraph 41; see, however, the previous case-law: AP 1509/05, paragraph 8.

1041 AP 869/04, paragraph 30.

1042 CH/98/681-A, paragraph 14 with reference to ECtHR, *Neigel v. France*, Reports 1997-II, 17 March 1997, paragraph 43; *Huber v. France*, 19 February 1998, Series A no. 188, paragraph 36.

1043 CH/98/681-A, paragraph 14 with reference to ECtHR, *De Santa v. Italy*, 2 September 1997, Reports 1997-V, paragraph 18; *Francesco Lombardo v. Italy*, 26 November 1992, Series A no. 249-B, paragraph 17; *Massa v. Italy*, 24 August 1993, paragraph 26; *Nicodemo v. Italy*, 2 September 1997, Reports 1997-V, paragraph 18; as well as CH/98/1599-A, paragraph 7.

law, are not afforded the protection of the right to a fair trial.[1044] Therefore, the only disputes excluded from the scope of Article 6, paragraph 1 of the ECHR are those which are instituted by civil servants whose duties typify the specific activities of public service insofar as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. According to this position, Article 6, paragraph 1 of the ECHR does not apply to disputes between civil servants and public institutions, *i.e.*, administrative institutions, participating in the exercise of powers conferred by public law.[1045] To determine the applicability of Article 6, paragraph 1 of the ECHR to public servants, irrespective of whether they are hired under contracts for temporary staff services, it is necessary to adopt a functional criterion based on the nature of the duties and obligations of a civil servant. In this regard, it is necessary, in light of the object and purpose of the ECHR, to employ a restrictive interpretation on exceptions from Article 6, paragraph 1 of the ECHR.[1046] Certain public positions, in particular those within the police force and armed forces, serve to enforce the State's sovereign power, as stipulated by public law; some do not have such a function. Only in the first case can it be recognised that the State has a legitimate interest in requiring of these servants a special bond of trust and loyalty. On the other hand, in respect of other positions, which do not have this "public administration" aspect, as described above, there is no such interest.[1047] In each particular case, it is necessary to ascertain whether the applicant's position entails – in respect of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In Case No. U 58/01,[1048] the Constitutional Court decided that the appellant, as an employee of the Ministry of Interior, who is conferred with sovereign power, did not enjoy the protection of Article 6, paragraph 1 of the ECHR. Conversely, the Constitutional Court decided that the school teacher was entitled to protection.[1049] On 24 October 2003, practically at the same time when the Constitutional Court took the Decision in Case No. U 58/01, on 5 November 2003, the Human Rights Chamber for BiH passed its Decision in Case

1044 U 58/01, paragraph 24.

1045 U 39/00, paragraph 20 *et seq.*; U 58/01, paragraph 25; and CH/97/76-A&M, paragraph 96, CH/01/6796-A, paragraph 19 with reference to ECtHR, *Pellegrin v. France*, Application No. 28541/95, December 1999, ECtHR Collection of Decisions 1999-VIII, pp. 64-67; and CH/98/1309 *et al*.-A&M, paragraph 138.

1046 U 58/01, paragraph 26.

1047 U 58/01 paragraph 27 *et seq*.

1048 Paragraph 28.

1049 U 64/01, paragraph 46.

No. CH/99/3375 (the Chamber's decision was delivered on 5 December 2003, and only on 29 December 2003 was the decision of the Constitutional Court published in the *Official Gazette*). In the aforementioned decision, the Chamber departed from its previous case-law,[1050] as well as from the Constitutional Court's case-law established in Case No. U 58/01, where the court upheld the functional criterion of separation and extended the application of Article 6 of the ECHR also to the disputes raised by civil servants who participate in the exercise of the State's sovereign powers conferred by public law; however, there are exceptions as to certain positions in the public service, in particular the positions of the highest ranks, which cannot be afforded the guarantees of Article 6 paragraph 1 of the ECHR, because appointment to them and termination from them necessarily involves the exercise of wide discretion.[1051] The Human Rights Chamber, in principle, offered three arguments in support of such an extension of the Strasbourg case-law: first, in a democratic society within the meaning of the ECHR, the right to fair administration of justice holds such a prominent place that a restrictive interpretation would be contrary to *ratio legis.*[1052] Second, in the Chamber's view, the main reasons to exempt disputes relating to civil servants from the ambit of Article 6 of the ECHR, such as the special bond of trust and loyalty in the exercise of powers conferred by public law, cannot be applied where the relevant law treats those public servants equally as any other employees, as it is the case in the public-service sector of Bosnia and Herzegovina. Furthermore, being supportive of the opinion of the four judges dissenting in the *Pellegrin* case, the Human Rights Chamber cannot understand that, in a State governed by the rule of law, civil servants are entitled to the right to court proceedings as any other citizen and, at the same time, the elements of a fair trial are not guaranteed to them also in the extreme cases relating to protection against possible arbitrariness in the proceedings. Thirdly, the Chamber highlighted that the scope of Article 6 of the ECHR should be interpreted in light of other obligations undertaken by the Annex 6 Signatory Parties and, in particular, those related to the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights – even where the Chamber, pursuant to Article II.2(b) of Annex 6, is competent to safeguard the rights mentioned in the Appendix to Annex 6 only as to the claims related to alleged discrimination. The UN Human Rights Committee, however, in its

1050 Compare, for instance, CH/02/10476-A with reference to the issue of decertification of police officers by the IPTF.

1051 CH/99/3375-A&M, paragraph 64; see also, CH/02/12470-A&M, paragraph 96: Article 6, paragraph 1 is not applicable to a high-ranking military official.

1052 For the same reason, the European Court, in the Case *Delcourt v. Belgium* (17 January 1970, Series A no. 11), extended the applicability of the right to a fair trial to appellate proceedings. Based on the relevant reasoning, the Chamber, in the case of *Ivanović*, extended the guarantees of Article 6 of the ECHR to the proceedings instituted upon a request for renewal of the criminal proceedings.

consistent case-law[1053] interpreted Article 14 of the International Covenant on Civil and Political Rights so that the concept of "suit at law" was based on the nature of the right in question rather than on the status of one of the parties. According to the said case-law, the procedure concerning a dismissal from employment constituted the determination of rights and obligations in a suit at law even if related to a fireman or a policeman.[1054]

At the time, the Chamber's case-law and the Constitutional Court's case-law relating to the mentioned issues were manifestly incompatible. Given the fact that the decisions were passed at the same time and without observing each other's decisions, and taking into account that it related to the two completely different judicial bodies, any reference to the "subsequent" case-law would be irrelevant. In any event, it would be difficult for the Constitutional Court to disagree, at least, with the third argument (the International Covenant on Civil and Political Rights), and, particularly, given that the Constitutional Court's hands are not "tied", unlike the Chamber's, considering the restrictions set forth in Article II.2(b) of Annex 6.[1055]

Subsequently, the Human Rights Commission within the BiH Constitutional Court returned to the case-law established in the *Pellegrin* case, and applied the principle of separation under the functional criterion. In so doing, it observed the duties and responsibilities of an injured party, and in practice, exempted not only high-ranking officials and civil servants, *e.g.*, judges[1056] or former officials in public security[1057] but also officers of the Armed Forces[1058] or low-ranking policemen,[1059] from the protection of Article 6 of the ECHR.

Thereafter, the Constitutional Court's case-law was inconsistent. In the Decision taken in Case No. AP 39/03, the Constitutional Court upheld the position according to which almost each public or private, physical or legal entity, including even the State as a legal subject,[1060] enjoy the protection. Thus, the appeals lodged for a violation of the right to a fair trial were declared admissible in cases related to the dismissal of the Head of the Police,[1061] or of

1053 *Muñoz Hermoza v. Peru*, Application No. 203/1986, 4 November 1998, and *Casanovas v. France*, Application No. 441/1990, 10 August 1994, CCPR/C/51/D/441/1990.

1054 CH/99/3375-A&M, pp. 52-64.

1055 Compare, "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155 *et seq*.

1056 CH/03/14599, paragraph 22; CH/02/8750, paragraph 11 *et seq*.; CH/02/10569, paragraph 15.

1057 CH/02/9412, paragraph 22 *et seq*.

1058 CH/99/2503, paragraph 11 *et seq*.

1059 CH/00/4636, paragraph 8 *et seq*.

1060 Paragraph 12 *et seq*.

1061 AP 233/03, paragraph 18 *et seq*.

the soldier,[1062] as well as of the Public Prosecutor.[1063] The Constitutional Court, however, decided differently in the proceedings regarding the appointment and dismissal of judges,[1064] or in a dispute concerning a councillor's mandate,[1065] as well as in a dispute relating to the promotion of a civil servant in the Ministry.[1066] These appeals were declared inadmissible. Therefore, there has been no clear criterion for differentiation.

The case-law established recently by the European Court has been of great assistance. In the *Vilho Eskelinen v. Finland* case,[1067] the European Court further developed the functional criterion established in the *Pellegrin* case. According to this case-law, the safeguards of Article 6 of the ECHR, in any case, should be afforded to all civil servants who have access to judicial review under domestic law.[1068] The Constitutional Court has also accepted this position.[1069]

The Constitutional Court's case-law with regard to the proceedings related to the **privatisation of social/state property** is inconsistent, too. In Case No. AP 365/04, the Constitutional Court declined to recognise the proceedings, *i.e.*, the dispute related to the offer for privatisation of the public company, as civil.[1070] Contrary to the aforementioned, in Case No. AP 1044/04, the Constitutional Court decided that the appeal related to the determination of validity of the offer given in the course of the privatisation of the public real property was admissible and took the decision on the merits, establishing a breach of Article 6 of the ECHR.[1071]

In addition, the case-law remains unclear also as to the **electoral right**. In Case No. AP 2679/06, there was a dispute between one political party and the Central Election Commission of BiH as to the election of a candidate to the State legislative authority. In the view of the Constitutional Court of BiH, a political party takes part in elections based on a list of its registered candidates, so that the dispute could be characterised as civil.[1072] On the other hand, in Case No. AP 35/03, the Constitutional Court concluded that both active and

1062 AP 2467/05, paragraph 12 *et seq*.
1063 AP 2347/06, paragraph 14.
1064 U 104/03, paragraph 21 *et seq*.; AP 121/04, paragraph 10; AP 700/05, paragraph 8; AP 422/04, paragraph 10.
1065 AP 947/05, paragraph 5 *et seq*.
1066 AP 156/05, paragraph 8.
1067 Application No. 63235/00, 19 April 2007.
1068 Paragraph 42 *et seq*.
1069 See, for instance, the recent case-law established in Case No. AP 2231/06 of 23 and 24 November 2007, paragraphs 10-13.
1070 Paragraph 23.
1071 Paragraphs 14, 16 *et seq*.
1072 Paragraph 21.

passive electoral rights are not civil rights but subjective political rights and, consequently, Article 6 of the ECHR is not applicable, but rather Article 3 of Additional Protocol 1 to ECHR applies.

Also, in the Constitutional Court's view, appeals related to **public expenditure** may raise an issue, too. Positively, tax debt collection through administrative proceedings cannot be characterised as a civil, but rather a public obligation. Therefore, in such cases, Article 6 of the ECHR does not apply.[1073] It is obvious that Article 6 of the ECHR does not apply to certain proceedings related to customs duties;[1074] however, it is applicable to other proceedings.[1075]

The civil nature of the claims is DENIED

- **Amnesty**, a request for;[1076]
- **Asylum**;[1077]
- **Permission to stay lodged by aliens**, a decision on a request for;[1078]
- **Donation**, the right to;[1079]
- **Citizenship**, the right to;[1080]
- **Immunity**, a request to;[1081]
- **Loan**, collateral;[1082]
- **Compensation**, the right to the amount of compensation;[1083]

1073 AP 669/03, paragraph 8; AP 285/03, paragraph 8; U 27/01, paragraph 31 with reference to ECtHR, *Ferrazzini v. Italy*, 12 July 2001, ECtHR Collection of Decisions 2001-VII.

1074 AP 75/03, paragraph 21; U 47/02, paragraphs 29, 38; U 63/02, paragraph 38.

1075 AP 870/04, paragraph 26: a reimbursement of overpaid customs duties; U 46/03, paragraph 25 *et seq*.; U 148/03, paragraph 41 *et seq*., a reimbursement of the customs charges.

1076 CH/02/8724, paragraph 7; CH/02/13640, paragraph 7; CH/03/15183, paragraph 9 *et seq*.

1077 AP 1788/05, paragraph 36.

1078 CH/03/14212-A&M, paragraph 57 with reference to ECtHR, *Maaouia v. France*, 5 October 2000, ECtHR Collection of Decisions 2000-X, pp. 38-41, and *Mamatkulov et al. v. Turkey*, 6 February 2003, paragraph 80 *et seq*., AP 244/05, paragraph 6 *et seq*., AP 1189/05, paragraph 6 *et seq*.

1079 AP 1118/04, paragraph 4.

1080 CH/02/8961, paragraph 87 *et seq*.; CH/02/11179, paragraph 7; CH/01/7382, paragraph 11.

1081 CH/03/14958, paragraph 18 *et seq*.

1082 Loan guarantee: CH/02/8754, paragraph 13; the loan allocated to the third party is challenged: AP 862/04, paragraph 11 *et seq*.

1083 AP 211/05, paragraph 16. This case-law is disputable as the Constitutional Court holds that the compensation claim, *per se*, is of a civil nature in terms of Article 6, paragraph 1 of the ECHR (see, also, above).

- **Obtain evidence**, a request to;[1084]
- **Pension**, a request for the amount of;[1085]
- **Job application**, a dispute over the lawfulness of a job vacancy announcement;[1086]
- **Connection to the Water Supply System**, obligation to remove an illegal connection to the water supply system;[1087]
- **Privatisation process**, methodology and privatisation program;[1088]
- **Expulsion of aliens**;[1089]
- **Work**, the right to;[1090]
- **Work permit for aliens**;[1091]
- **RTV fee**, obligation to pay;[1092]
- **Apartment**, a request to be placed on a housing list;[1093] a request for allocation of an apartment;[1094]
- **The moving of an alien into the country**;[1095]
- **Ownership**, a request to have the seized property restored;[1096]
- **Minutes**, the right to have the validity of the minutes determined.[1097]

1084 AP 1029/04, paragraph 7.
1085 CH/00/5901, paragraph 12 *et seq*.
1086 AP 1929/05, paragraph 6.
1087 AP 1071/04, paragraph 11 *et seq*.
1088 AP 2618/05, paragraph 9.
1089 CH/03/14212-A&M, paragraph 57 with reference to ECtHR, *Maaouia v. France*, 5 October 2000, ECtHR Collection of Decisions 2000-X, pp. 38-41, and *Mamatkulov et al. v. Turkey*, 6 February 2003, paragraph 80 *et seq*.
1090 AP 682/04, paragraph 6.
1091 AP 1427/05, paragraph 9.
1092 AP 1175/06, paragraph 5.
1093 CH/00/7018, paragraph 10.
1094 CH/03/13640, paragraph 10; CH/03/14991, paragraph 15.
1095 CH/03/14212-A&M, paragraph 57 with reference to ECtHR, *Maaouia v. France*, 5 October 2000, ECtHR Collection of Decisions 2000-X, pp. 38-41, and *Mamatkulov et al. v. Turkey*, 6 February 2003, paragraph 80 *et seq*.
1096 AP 393/04, paragraph 17.
1097 CH/02/12380, paragraph 13.

iv. "A criminal charge"

AP 1138/05 Župljanka *et al*.	20060627
AP 1892/05 Renovica	20060627
AP 2078/05 Macanović	20060412
AP 223/02 „Šeha Es"	20040723
AP 2581/05 Adamović	20070330
AP 437/06 H. M.	20050323
AP 508/04 Almy	20050323
AP 620/04 Salih *et al*. Hadžić	20050913
AP 633/04 D. V.	20050527
AP 662/04 Halilovíć	20051220
CH/01/8304 Dervišević	20060913
CH/02/10476 Z. Lugonjić	20030401
CH/02/11112 Žepić	20061106
CH/02/12470 D&M Obradović	20031107
CH/03/14212 D&M Syla	20031222
U 19/00 „Kemokop" *et al*.	20020308
U 59/03 A. D.	20040517

The notion of a *criminal charge* has an autonomous meaning within the scope of Article 6 of the ECHR. The domestic positive and legal determination of a sanction or an objection cannot exclude the application of Article 6 of the ECHR if, in accordance with the meaning of this notion defined in the Convention, it relates to a criminal charge. The **substantive contents** of the relevant law are decisive so that, besides criminal charges, in a narrower sense of the word, the disciplinary and minor offence proceedings may be included within the scope of Article 6 of the ECHR.[1098] This is determined, primarily, based on the manner in which a certain objection, *i.e.*, a criminal charge, is shaped by the domestic law. If the domestic law characterises the offence as criminal, then it is criminal in nature within the meaning of Article 6 of the ECHR. If the domestic law characterises the offence as disciplinary or administrative, then it represents only certain indications for the applicability of Article 6, paragraph 1 of the ECHR.[1099] Account must be taken of **the scope of applicability and the goal of a criminal prosecution, as well as the character, severity and purpose of a sanction**.[1100] The positive answer to all the mentioned elements, under the criteria of the ECHR, is not conditioned by the criminal legal classification of a charge. Nevertheless, two elements must be cumulatively fulfilled: *the scope*

1098 AP 2078/05, paragraph 25.

1099 CH/01/8304, paragraph 36 *et seq*.

1100 CH/02/10476-A, paragraph 21 *et seq*., with reference to ECtHR, *Campbell and Fell v. the United Kingdom*, 28 June 1984, Series A no. 80; *Engel et al. v. the Netherlands*, 8 June 1976, Series A no. 22, pp. 80-85; CH/02/12470-A&M, paragraph 97 *et seq*., AP 2468/05, paragraph 21.

of applicability of the violated rule of conduct and its *purpose* must relate to a criminal charge in terms of the ECHR.[1101] As to the scope of applicability of the rule of conduct, the following dividing line must be created: while the criminal provisions may be characterised as general, which means they are applicable to all persons and operate in the general interest of a society, the provisions characterised as disciplinary are usually applicable only to a certain group of people, which is to act in compliance with the stipulated rules of conduct.[1102] In this regard, it is necessary to observe whether the mode of conduct stipulated by the disciplinary provisions for a certain group is typical or atypical. For example, if incorrect or false information or forged documents in the Army are defined as a disciplinary offence, it supports the view that this offence, in accordance with the ECHR, is characterised as criminal since it does not relate to a specific failure of the Army but relates to conduct which is subject to sanction anywhere in the world.[1103] *The purpose* of a criminal sanction, in general, is the prevention or punishment of certain conduct and, therefore, the regulations allowing a removal of danger cannot be classified as criminal. As to the *character and severity* of a sanction, it may be said that it relates to a criminal sanction if an injured party is deprived of liberty,[1104] or if the fine imposed under the Civil Procedure Code is considerable,[1105] or if there is a threat of being registered in the criminal record even if the fine, unless paid, is replaced by imprisonment.[1106]

Pursuant to the consistent case-law established by the Strasbourg organs, a removal from a position and dismissal from employment or similar **employment sanctions** cannot be said to be of a criminal nature.[1107] Contrary to this view and without tackling the case-law of the ECHR, the Constitutional Court perceived a removal of one judge from the Supreme Court of the Republika Srpska after disciplinary proceedings were instituted for false information as "criminal".[1108] Afterwards, the Constitutional Court, without drawing any reference to the mentioned decision, exempted the judges, as civil servants, from the protection of Article 6 paragraph 1 of the ECHR[1109] in terms of the decision in the *Pellegrin*

1101 AP 2468/05, paragraph 21.
1102 CH/01/8304, paragraph 38.
1103 CH/01/8304, paragraph 40.
1104 CH/01/8304, paragraph 39.
1105 AP 437/06, paragraph 18 *et seq*.
1106 CH/02/12470-A&M, paragraph 102 *et seq*., with further references.
1107 ECtHR, *Verešova v. Slovakia* (reduction of salary), Application No. 70497/01, 1 February 2005, p. 4; *Lee v. the United Kingdom*, Application No. 53429/99, 16 May 2000 (suspension), *Ozdas v. Turkey*, Application No. 45555/99, 5 December 2000 (expulsion from the Army).
1108 AP 633/04, paragraphs 20-29; see, also, AP 662/04, paragraph 27, and AP 2581/05, paragraph 27 *et seq*.
1109 AP 1892/05, paragraph 7 *et seq*.

case.[1110] However, irrespective of this exemption in accordance with the case-law established in *Pellegrin*, there remains the position that a dismissal of a judge through disciplinary proceedings cannot be regarded as a criminal sanction but as a typical disciplinary sanction. The fact that, in disciplinary proceedings, the judge has guaranteed almost all the procedural standards typical for criminal proceedings makes no difference.

Regulatory offences may also be of a "criminal" nature within the meaning of Article 6 of the ECHR. This is the case where there are offences determined on the basis of the Customs Law,[1111] the Road Traffic Safety Law,[1112] the Law on Minor Offences[1113] or the Law on Excise Duty and Sales Tax,[1114] and if the amount of the fine imposed is considerable and has a preventive character. In addition, it is not essential that the stipulated sanction is characterised as criminal. Moreover, economic offences, determined on the basis of the Economic Code, may be characterised as criminal within the meaning of Article 6 of the ECHR.[1115]

It cannot be said that it concerns a criminal charge in terms of Article 6 of the ECHR where a high-ranking military official is sent into early retirement because of a breach of *SFOR-Instructions to the Parties*, due to his political engagement and a failure related to his support of the Dayton Peace Agreement.[1116] Also, there is no criminal charge in the procedure of decertification of policemen and their subsequent dismissal from their positions,[1117] or in decisions regarding the entry, stay, deportation or expulsion of aliens.[1118]

(b) An independent and impartial tribunal established by law

AP 10/03 „Ganić" d.o.o. Sanski Most	20040723
AP 1070/06 Mirković-Kalinić	20070330
AP 108/04 G. R. *et al*.	20050323
AP 1080/05 Čulajević	20060412

1110 ECtHR, *Pellegrin v. France*, Application No. 28541/95, 8 December 1999, ECtHR Collection of Decisions 1999-VIII, pp. 64-67.
1111 AP 508/04, paragraph 17 *et seq*.
1112 AP 508/04, paragraph 17 *et seq*.
1113 AP 620/04, paragraph 21 *et seq*.
1114 AP 1138/05, paragraph 9.
1115 CH/02/11112, paragraph 7 *et seq*.; AP 223/02, paragraph 19 *et seq*.
1116 CH/02/12470-A&M, paragraph 107.
1117 CH/02/10476-A, paragraph 24.
1118 CH/03/14212-A&M, paragraph 57 with reference to ECtHR, *Maaouia v. France*, 5 October 2000, EtCHR Collection of Decisions 2000-X, pp. 38-41; *Mamatkulov and Abdurasulović v. Turkey*, 6 February 2003, paragraph 80 *et seq*.

AP 1112/04 Mraković-Malkoč	20051013
AP 215/05 Jonuzi	20060412
AP 23/06 Stajić	20070215
AP 2367/05 Redžić	20060314
AP 255/03 M. B.	20041014
AP 450/04 D. E.	20050323
AP 48/06 Đukarić *et al*.	20050314
AP 525/04 B. Č.	20050118
AP 543/04 M. N.	20050628
AP 587/05 Mašić	20060412
AP 600/04 G. C.	20050217
AP 689/04 Đerić	20051013
AP 703/04 PP „IDS“ Novi Travnik	20050323
AP 71/02 J. Z.	20040428
AP 74/04 I. S.	20050323
AP 767/04 Samardžić	20051117
AP 962/04 Mukić	20051013
AP 971/04 A. R.	20050628
AP 98/04 J. Z.	20040428
AP 982/05 Drakula *et al*.	20060314
CH/00/6558 D&M Garaplija	20020412
CH/01/7248 D&M Ordo	20020705
CH/01/8050 Savić	20050907
CH/01/8304 Dervišević	20060913
CH/01/8590 *et al*. D&M Televizija "MIB" Brčko *et al*.	20021206
CH/02/9892 D&M Lazić	20030905
CH/97/110 D&M Memić	20000211
CH/97/51 D&M Stanivuk	19990611
CH/97/67 D&M Zahirović	19990708
CH/97/77 D&M Šehić	19991105
CH/98/1786 D&M Odobašić	19991105
CH/98/548 B. Ivanović	20000706
CH/98/756 D&M Đ. M.	19990514
U 162/03 S. S.	20040721
U 47/03 N. C.	20040615

Pursuant to Article 6, paragraph 1 of the ECHR, the civil right or obligation, or a criminal charge, must be determined by *an independent and impartial tribunal established by law*.

i. "Tribunal"

The institutions, *i.e.*, the bodies that issue certain decisions, and which are not *courts* in the classic sense of the word, may be perceived as tribunals within the meaning of Article 6, paragraph 1 of the ECHR, provided they fulfil the requisite

characteristics of a tribunal. Several of these appear in the text of Article 6 paragraph 1 of the ECHR itself. Thus, such a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of the rules of law and after proceedings conducted in a prescribed manner. In addition, such a body must also meet the requirements of independence, in particular from the executive, and of impartiality.[1119] The notion "independent" refers to the relations between a court and judges. The notion "impartial" refers to the relations between judges and parties to the proceedings. A body *i.e.*, a tribunal that takes a decision must not be biased as regards the subject matter of the decision; it must not be under outside pressure either from the public or some other factors. The court has to build its position on the basis of evidence presented in the proceedings and facts established in this manner. The fact that the judge is guided by his personal motives and his perception of a certain matter must not affect his personal opinion.[1120] Besides independence and impartiality, it is necessary to satisfy a series of further requirements, including the duration of its members' terms of office and guarantees afforded by its procedure.[1121] When the proceedings before an adjudicatory body fail, with regards to its quality as "a tribunal", to comply fully with the requirements, such defects may be cured if those proceedings are subject to subsequent control (review) by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 paragraph 1 of the ECHR.[1122] Where an institution adopts the governing codes, rules, regulations, and guidelines in the relevant field and, at the same time, interprets and applies them to individual cases without the possibility of any appeal to an independent external tribunal with full jurisdiction, this structure lacks the appearance of independence and impartiality required for a tribunal, within the meaning of paragraph 1 of Article 6 of the ECHR.[1123]

1119 CH/01/7248-A&M, paragraph 212 with reference to ECtHR, *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, paragraph 64.

1120 U 47/03, paragraph 23 with reference to ECtHR, *Boeckmans v. Belgium*, 8 Yearbook of the ECtHR, 410 at 412 (1963).

1121 CH/01/7248-A&M, paragraph 212 with reference to ECtHR, *Belilos v. Switzerland*, 29 April 1988, Series A no. 132, paragraph 64.

1122 CH/01/7248-A&M, paragraph 215 with reference to ECtHR, *Bryan v. the United Kingdom*, 22 November 1995, Series A no. 335, paragraph 40, and *Zumtobel v. Austria*, 21 September 1993, Series A no. 268, pp. 29-30.

1123 CH/01/7248-A&M, paragraph 218 with reference to the proceedings before the Communications Regulatory Agency of Bosnia and Herzegovina, upheld also in CH/01/8590 *et al*.-A&M, paragraph 66; compare, also, Concurring Opinion of Judges *Picard* and *Grotrian* with reference to the Decision in Case No. CH/01/7248-A&M, underling the structural defects, as well as the Dissenting Opinion of Judges *Nowak* and *Rauschning* with reference to ECtHR, *H. v. Belgium*, 30 November 1987, Series A no. 127-M, paragraph 50, according to which an institution cannot have the quality of a tribunal if it concurrently holds several state powers.

ii. "Tribunal established by law"

It is held that an institution is established by law if it is also established by the High Representative's decision, which has the force of law.[1124] It is necessary to make a distinction between a tribunal established by law and an independent and impartial tribunal.[1125]

iii. Independent tribunal

Article 6, paragraph 1 of the ECHR requires that a tribunal must meet the requirements of independence and impartiality. An assessment of the independence of a tribunal, on the one hand, depends on **the type and manner of the appointment of its members and the duration of their term of office**, as well as **the existence of guarantees against outside pressures**. On the other hand, a tribunal must present an **appearance of independence**. Namely, a judicial body not only has to "govern justice" but it must ensure that justice is seen to be done. Otherwise, the confidence that the courts in a democratic society must inspire in the public may be undermined.[1126] The independence of judges may be challenged in a case where the manner of their appointment, generally speaking, is not satisfactory, or that the composition of the particular court deciding the case was influenced by improper motives. However, the independence of judges, *per se*, is not endangered if they are not appointed for life, provided that they cannot be discharged in an arbitrary manner or on grounds that are not related to the specific reason for dismissal.[1127] In a certain case, a term of three years of office may satisfy the requirement of independent tribunal.[1128] In addition, the fact that the executive appoints members of a tribunal is not *per se* contrary to the principle of independence.[1129] What is important, however, is that the tribunal must have the power to give binding decisions that cannot be altered by a non-judicial authority.[1130]

1124 Compare CH/01/7248-A&M, paragraph 209 *et seq*., with reference to the Independent Media Commission and the Communications Regulatory Agency of Bosnia and Herzegovina*.*

1125 Compare CH/01/8590 *et al*.-A&M, paragraph 62 *et seq*.

1126 CH/96/30-M, pp. 39-40; CH/98/756-A&M, paragraph 85 with reference to ECtHR, *Sramek v. Austria*, 22 October 1984, Series A no. 84, paragraph 42; CH/97/67-A&M, paragraph 136 with reference to *Campbell et al. v. the United Kingdom*, 28 June 1984, Series A no. 80, paragraph 77 *et seq*.; CH/97/77-A&M, paragraph 67.

1127 CH/02/9892-A&M, paragraph 88 *et seq*., with reference to EComHR, *Zand v. Austria*, Application No. 7360/76, 12 October 1978, DR 15, p. 81-82.

1128 CH/02/9892-A&M, paragraph 89 with reference to ECtHR, *Sramek v. Austria*, 22 October 1984, Series A no. 84, paragraph 37, in the case of lay judge (laypersons).

1129 CH/02/9892-A&M, paragraph 89 with reference to ECtHR, *Sramek v. Austria*, 22 October 1984, Series A no. 84, paragraph 38.

1130 CH/02/9892-A&M, paragraph 89 with reference to ECtHR, *Findlay v. the United Kingdom*, 25 February 1997, ECtHR Collection of Decisions 1997-I, paragraph 77.

The executive may also issue guidelines to the members about the general performance of their functions, as long as any such guidelines are not in reality instructions as to how cases are to be decided.[1131] If the executive observes the work of tribunals, to which the executive is actually liable, such tribunals do not possess independence.[1132] Though the requirement of independence is thoroughly guaranteed where judges are appointed for life and work full-time and hold office *ad vitam aut culpam*, the practice of an initial appointment (*e.g.*, on a one year probation) with the expectation of appointment for life time after this period, is not incompatible with Article 6 paragraph 1 of the ECHR. In this case, it is important that the entire process for the appointment of judges for a probationary period and for a full appointment afterwards is safeguarded against outside pressure. This also concerns the appointment of additional judges.[1133] In respect of the principle of independence, account must be taken of specific circumstances, including personal, which are present in the course of the overall judicial reform process.[1134] The appointment of judges by a political assembly is not in itself incompatible with Article 6 paragraph 1 of the ECHR, if the practice of appointment as a whole is satisfactory and where guarantees against outside pressures exist.[1135] These requirements shall not be satisfied if members or sympathisers of the ruling party (HDZ in the relevant case) are appointed to judicial office but their work is manifestly influenced by fear that their "politically incorrect" decision might lead to their dismissal.[1136] As to those cases, which all relate to Canton 10, the respondent party, the Federation of Bosnia and Herzegovina, in fact conceded that there was a "problem" in the judicial system in Canton 10 in respect of both "efficiency and independence".[1137] There is a similar problem if a judge of the military tribunal is subject to the apparent control by higher-ranking officers and his tenure as a judge is far too short to achieve a satisfactory level of independence.[1138] On the other hand, the presence of the international monitors at court proceedings, even where the public is excluded from a hearing, in principle, does not endanger the concept of judicial independence.[1139] The exception is the BiH Constitutional Court. When

1131 CH/02/9892-A&M, paragraph 89 with reference to ECtHR, *Campbell et al. v. the United Kingdom*, 28 June 1984, Series A no. 80, paragraph 79.

1132 CH/01/8050, paragraph 88 *et seq*.

1133 AP 1080/05, paragraph 23.

1134 Compare CH/02/9892-A&M, paragraph 90 *et seq*. The example of the reform process in the Brčko District of BiH.

1135 CH/98/756-A&M, paragraph 86 with reference to EComHR, *Crociani et al. v. Italy*, 18 December 1980, DR No. 22, p. 147, 220 *et seq*.

1136 CH/98/756-A&M, paragraph 86 *et seq*., CH/97/67-A&M, paragraph 137 *et seq*., and CH/97/77-A&M, paragraph 68, with reference to enforcement orders issued in Canton 10 with regard to the claims of Serbs and Bosniaks, which are just made-up as being resolved.

1137 *Ibid*.

1138 CH/01/8304, paragraph 36 *et seq*.

1139 CH/02/9892-A&M, paragraph 100 *et seq*.

it comes to sessions closed to the public, which is more-or-less a rule, the presence of international or national monitors would endanger the independence of judges, or that of the BiH Constitutional Court. The BiH Constitutional Court provided a reasoning for such a position as follows:

> "The monitoring of judicial proceedings does not require the Constitutional Court of Bosnia and Herzegovina to permit attendance of the closed-door sessions of the Constitutional Court. The Constitutional Court is not a judicial body in a classical sense of the term, although it does carry out certain judicial functions in a procedure which is specific and significantly different from the procedure carried out by the ordinary courts.
>
> The very presence of persons coming from outside the BiH Constitutional Court, and particularly the monitoring at the sessions on deliberations and voting of the Constitutional Court, would constitute a violation of Article II.3(e) of the Constitution of Bosnia and Herzegovina, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In other words, each and every decision that has not been adopted behind closed doors, but under someone else's supervision, shall not be considered as being adopted in compliance with the principles of a fair trial."[1140]

Not only individual judges or a court as an organ but the **judiciary as a whole**, the one of the three traditional "branches of government" under the principle of separation of powers, must be respected and independent. Laws on the judiciary guarantee the independence of the judiciary, exercising judicial power in accordance with the law and the Constitution. The fact that the judiciary is funded from the budget of one territorial-administrative unit (*e.g.*, Canton) does not mean that it is dependent on the executive branch.[1141] The administrative and legislative branches, however, must not interfere with the work of the judicial branch, such as to vote for or to enact norms depriving the courts of their judicial authority secured by the Constitution. This is the case, for instance, where the legislative branch prohibits or suspends the enforcement of court decisions through law,[1142] or modifies enforcement decisions.[1143]

iv. Impartial tribunal

The existence of partiality must be determined according to **subjective and objective criteria**. On the one hand, it is necessary to ascertain whether a tribunal, that is a particular judge, is *subjectively* impartial, given his personal conviction in a given case. If there are no elements to raise doubts as to the

1140 The BiH Constitutional Court has, on several occasions, rejected the requests of the OHR, OSCE or the representatives of non-governmental organisations to attend the sessions on deliberations and voting of the BiH Constitutional Court (authors' archive).

1141 AP 971/04, paragraph 21.

1142 AP 703/04, paragraphs 42, 47.

1143 AP 982/05, paragraph 22.

impartiality, the personal impartiality of a judge is to be presumed. The parties to the proceedings may experience various circumstances so as to lead to a conclusion that a particular judge in a given case is subjectively partial. Nevertheless, much more than an arbitrary claim based on a subjective feeling of a party to the proceedings is needed to cast doubts on the impartiality of a judge.[1144] On the other hand, it is necessary to consider *objectively* how the public and not necessarily the accused perceive the im/partiality of the judge in criminal proceedings.[1145] Furthermore, besides the judge's conduct, other circumstances are essential, including whether the appearances of the judge offer sufficient guarantees to assure impartiality. Actually, the goal of this conclusion is the confidence which the courts in a democratic society must inspire in the public. Therefore, this implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, or the impartiality of the judge is capable of appearing open to doubt as a consequence of his participation at an earlier stage in the proceedings or because he already took part in the decision-making process, the judge in respect of whom there is a legitimate reason to fear a lack of impartiality should not adjudicate the relevant case.[1146] The finding of objective partiality is often alleviated based on the fact that the law itself specifies and sanctions such circumstances.[1147] This means that there is a legitimate reason to fear that a particular judge lacks impartiality if an injured party in criminal proceedings is his/her spouse.[1148]

The case-law has set huge obstacles in order for a petition questioning the impartiality of a judge to be accepted. The reasoning and burden of proof rest on the party claiming partiality.[1149] Arbitrary allegations, *e.g.*, that the court, while deciding, pandered to media pressure or the pressure of protesters of a certain interest group,[1150] or pressure based on ethnic loyalty[1151] do not satisfy the requirement necessary to prove a judge's lack of impartiality. Even where

1144 AP 48/06, paragraph 28.
1145 AP 71/02, paragraph 31.
1146 CH/97/51-A&M, paragraph 47, and CH/97/110-A&M, paragraph 72 with reference to ECtHR, *Fey v. Austria*, 24 February 1993, Series A no. 255, paragraph 28, and *Ferrantelli et al. v. Italy*, 7 August 1996, ECtHR Collection of Decisions 1996-III, paragraph 58; CH/98/548-M, paragraph 45; CH/98/548-M, paragraph 46 *et seq*., with reference to ECtHR, *Hauschildt v. Denmark*, 24 May 1989, Series A no. 154, paragraph 48; CH/00/6558-A&M, paragraph 59 with reference to ECtHR, *De Cubber v. Belgium*, 26 October 1984, Series A no. 86, paragraph 24; CH/00/6558-A&M, paragraph 61; CH/01/7248-A&M, paragraph 216 *et seq*.
1147 AP 1070/06, paragraph 40.
1148 AP 98/04, paragraph 22.
1149 AP 10/03, paragraph 27; AP 600/04, paragraph 26.
1150 AP 10/03, paragraph 27; AP 600/04, paragraph 26.
1151 AP 10/03, paragraph 27; AP 600/04, paragraph 26.

the judge adjudicates in appellate proceedings, and was involved in the case as a judge at first instance but did not take part in the first instance proceedings, this mere fact is insufficient to call the judge's impartiality into question.[1152] There is no legitimate reason to fear that a particular judge lacks impartiality even if he takes part in two different criminal cases against the same person, first as a judge in the proceedings to determine the detention and, second, as a judge of first instance.[1153] In addition, the lack of impartiality of a judge cannot be claimed or it cannot be claimed that a judge makes a decision under pressure only on account of the fact that an injured party participated effectively in criminal proceedings.[1154] Furthermore, if the court fails to decide the cases in accordance with the order in which the cases are registered, this cannot lead to a conclusion that the court lacks impartiality.[1155] Moreover, the court's lack of impartiality and giving in to pressure from the "powerful parties" cannot be claimed solely on the basis of the fact that a "big company" is a party to the proceedings.[1156] The Prosecutor's Office is just a party to the proceedings and the court must remain impartial and independent in this regard. However, the fact that the court and the Prosecutor's Office work in the same building *per se* does not lead to the conclusion that the court lacks impartiality.[1157] There is a legitimate reason to suspect the lack of impartiality of a judge if, immediately after the conclusion of the main trial, the judge reads out a previously prepared judgment in writing, by which the accused is sentenced to imprisonment.[1158]

In many appeals the issue of impartiality of a judge is raised based on the fact that a judge **participates** in the decision-making process of the same criminal case **at different stages of the proceedings**. Such repeated participation at different stages of the proceedings, in principle, does not mean that a particular judge in a given case lacks impartiality within the meaning of Article 6, paragraph 1 of the ECHR.[1159] To this end, the Constitutional Court, Human Rights Chamber for BiH and the Human Rights Commission within the BiH Constitutional Court found no problem when: a particular judge adjudicates at the second instance as well as in the appellate panel;[1160] a particular judge takes part in the pre-trial investigation and then decides on a complaint against the indictment;[1161]

1152 AP 543/03, paragraph 23; similar to AP 2367/05, paragraph 30.
1153 AP 450/04, paragraph 25; similar to AP 1112/04, paragraph 33.
1154 U 162/03, paragraph 29.
1155 U 47/03, paragraph 25 *et seq*.
1156 AP 962/04, paragraph 36.
1157 AP 767/04, paragraph 33.
1158 AP 74/04, paragraph 26.
1159 CH/98/548-M, paragraph 52.
1160 AP 689/04, paragraph 28 *et seq*.
1161 AP 255/03, paragraph 22.

a particular judge decides on a procedural decision extending detention as well as at first instance,[1162] or at second instance;[1163] a particular judge decides on separate issues raised in preliminary proceedings as well as upon an appeal at the second instance;[1164] a particular judge decides on the division of criminal proceedings and takes part in the first instance proceedings;[1165] a particular judge decides in the renewed first instance proceedings after the first instance judgment was quashed and the case was referred back for retrial and decided by the second instance court; a particular judge takes for the second time the decision in the appellate proceedings, after the referral of the case back to the first instance court for renewed proceedings.[1166] An indication for the lack of impartiality of a judge could be that he must base his pre-trial decision on a very high degree of clarity as to the question of guilt of the suspect, *i.e.*, the accused.[1167]

(c) "The right of access to court"

AP 1/03 S. B.	20040615
AP 101/04 S. M.	20050118
AP 102/03 M. K.	20041014
AP 1040/04 M. Lj.	20050527
AP 107/03 F. A.	20040929
AP 112/04 V. B.	20041230
AP 1123/04 Zelenjaković	20060401
AP 1202/05 Višnjevac	20060412
AP 1257/05 Došen *et al*.	20060912
AP 1290/05 Lukić	20060613
AP 130/02 Z. i I. D.	20040723
AP 1391/05 Čurić	20051220
AP 1548/05 Vranješ	20060920
AP 219/03 Č. D.	20040723
AP 225/04 O. S.	20050323
AP 2389/05 Delić	20060509
AP 277/05 Pajić	20060412
AP 311/04 A. G.	20040422

1162 AP 543/04, paragraph 29; CH/99/2625-D, paragraph 13 *et seq*.

1163 AP 767/04, paragraph 28 *et seq*.

1164 CH/99/2625-A, paragraph 12 with reference to ECtHR, *Saraiva de Carvalho v. Portugal*, 22 April 1994, Series A no. 286, p. 38, paragraph 35; AP 525/04, paragraph 19 *et seq*.

1165 AP 23/06, paragraph 31.

1166 CH/00/6558-A&M, paragraph 62 *et seq*., with additional reference to Strasbourg's case-law; see, also, Separate Opinion by Judge *Grasso*; AP 587/05, paragraph 23.

1167 CH/99/2625-A, paragraph 12 with reference to ECtHR, *Hauschildt v. Denmark*, 24 May 1989, Series A no. 154, pp. 22-23, paragraph 52.

AP 321/05 Herzegovina-Neretva Canton	20060509
AP 325/05 Motika	20060314
AP 358/04 E. Š.	20050128
AP 405/04 Z. H.	20050412
AP 464/04 Lj. S. *et al*.	20050217
AP 487/04 D. S.	20050518
AP 551/03 S. A.	20040929
AP 602/04 Kožulj *et al*.	20061013
AP 619/04 P. K.	20050527
AP 638/04 Z. Š.	20050518
AP 691/04 H. A. i A. V. *et al*.	20050628
AP 70/05 A. O. *et al*.	20050422
AP 701/05 Pejak	20060412
AP 763/05 „Mastel Berox“ d.o.o. Sarajevo	20060223
AP 854/04 „Vilkom“	20041217
AP 994/04 Kurtović	20050913
CH/00/10999 Dervović	20070509
CH/00/1669 *et al*.-S. G. *et al*.	20060913
CH/00/1669 S. G. *et al*.	20060913
CH/00/2317 Grbić	20050512
CH/00/4116 *et al*.-D&M Spahalić *et al*.	20010907
CH/00/5454 Maksimović	20060405
CH/00/5503 Bašanović	20070509
CH/00/5522 Đonlić	20070509
CH/00/5751 „Vakufska direkcija“	20060607
CH/01/7248 „ORDO-RTV Sveti Georgije“	200200603
CH/01/7701-A&M CH/01/7701-A&M The BiH Islamic Community Council (the Mrkonjic Grad Mosques case)	20031222
CH/01/8030 Dizdarević	20070627
CH/01/8050 Savić	20050907
CH/01/8112 *et al*.-D&M N. V.	20031107
CH/01/8507 Softić	20051215
CH/01/8590 „MIB“ Brčko *et al*.	20021105
CH/02/10472 Kućni savjet	20070627
CH/02/10542 N. N.	20050510
CH/02/12322 Omerović	20061220
CH/02/12538 Golijanin	20061108
CH/02/12546 Čustović	20060705
CH/02/8655 D&M Sačak *et al*.	20030704
CH/02/9138 *et al*.-Ašanin *et al*.	20051109
CH/03/13029 Bajrić	20070605
CH/03/13453 Kovačević	20060208
CH/03/13625 Novaković	20051005
CH/03/13678 Pašagić	20061220
CH/03/13736 Mihajlović	20060913

CH/03/13844 Ćirić	20070627
CH/03/14149 Marjanović	20061220
CH/03/14465 Čorić	20061220
CH/03/14742 Džafić	20060913
CH/03/14870 Dobnik	20060913
CH/03/14913 Bešlić	20050309
CH/03/15147 Papaz	20070207
CH/97/65 D&M Panić	19990514
CH/98/1124 *et al*.-D&M Dizdarević *et al*. (21 "Gradiška cases")	20000609
CH/98/1195 D&M Lisac	20000512
CH/98/1297 D&M D. B. *et al*.	20031010
CH/98/1309 *et al*.-D&M Kajtaz *et al*.	20010907
CH/98/697-M. Džonlić	20000211
CH/98/752 *et al*.-A&M Bašić *et al*. (15 "Gradiška cases")	19991210
CH/98/866 D&M Caljan	20000309
CH/99/1714 Vanovac	20021104
CH/99/1714 D&M Vanovac	20021108
CH/99/1838 *et al*.-D&M Karan *et al*.	20030704
CH/99/1838 Karan *et al*.	20030704
CH/99/2743 Sarač	20030630
CH/99/3227 D&M Milisavljević	20030606
CH/99/3574 D&M Tasovac	20031107
U 10/03 PP "Gana" Teslić and G. G.	20040323
U 106/03 I. D.	20041027
U 107/03 A. G.	20041119
U 17/06 OGH	20060929
U 2/99 Kadenić & Mesinović	19991122 *OG of BiH*, No. 20/99
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 25/03 V. S.	20040121
U 28/00 F. Dž.	20031128
U 3/99 H. D.	20000810 *OG of BiH*, No. 21/00
U 36/02 S. S.	20040130
U 40/02 DOO "10th October"	20040304
U 5/00 Elezović	20010119 *OG of BiH*, No. 01/01
U 5/00 S. i Z. E.	20000929
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 6/98 P. J.	19990926
U 64/02 I. H.	20031023
U 7/00 Hadžisakić	20010224 *OG of BiH*, No. 6/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 3/00
U 71/03 M. K.	20040615
U 75/03 E. T.	20040615
U 8/00 Hreljić	20000818 *OG of BiH*, No. 22/00

The right to a fair trial, within the meaning of Article 6, paragraph 1 of the ECHR, includes *a right of access to courts*.[1168] This right is inseparable from the other rights guaranteed by Article 6 of the ECHR.[1169] The right of access to courts protects also the right not to be put through court proceedings against one's own will if the legal presumptions necessary to conduct the proceedings are not complied with (the *negative* right of access to courts). A breach of this negative component of the right of access to courts arises if, for instance, the court grants a revision by an arbitrary and incorrect interpretation of the relevant legal prerequisites essential for a revision,[1170] or if the court accepts a civil action although the legal prerequisites to conduct the proceedings are not met,[1171] or if the proceedings completed by a final judgment are renewed by the court in an arbitrary manner.[1172]

The legal situation related to the right of access to courts in the legal field must be sufficiently clear and coherent; otherwise, the right of access to courts would be excluded as a consequence of legal uncertainty.[1173] This requirement is not satisfied if the law anticipates a certain legal remedy, referring to another legal act, which actually does not contain that remedy at all.[1174]

Shortcomings in the organisation of the judiciary of the Entities must not be a burden on the individual. Even when it is recognised that the State enjoys discretion in relation to the organisation of a judicial system,[1175] it has to organise it in such a way so that the courts are able to fulfil their respective obligations referred to in Article 6 paragraph 1 of the ECHR, which includes making sure that legal remedies are available and comprehensible to individuals.[1176] Bosnia and Herzegovina, thus, cannot prohibit the Entities' courts from exercising their authority to decide on decisions of the State institutions regulating status-related issues of individuals, while, at the same time, prohibiting the damaged persons from accessing courts at the State level.[1177]

1168 U 6/98; U 2/99; U 3/99; U 7/99; U 5/00; U 7/00; U 18/00, paragraph 23; U 24/00, paragraph 24 with reference to ECtHR, *Golder v. the United Kingdom*, 21 February 1975, paragraph 36.

1169 U 7/00; U 3/99; U 24/00.

1170 AP 358/04, paragraph 23 *et seq.*; AP 405/04, paragraph 22 *et seq*.

1171 AP 1040/04, paragraph 22.

1172 CH/02/12546, paragraph 38 *et seq.*; CH/01/8030, paragraph 36 *et seq*.

1173 CH/98/1309 *et al*.-A&M, paragraph 145 *et seq*. See, also, CH/98/1714-A&M, paragraph 58 *et seq.*, and with reference to the issue of a "laid off employee" in FBiH; CH/00/4116 *et al*.-A&M, paragraph 148 *et seq*., with reference to the legal situation in the Brčko District prior to the Arbitration Award.

1174 U 17/06, paragraph 17 *et seq*.

1175 U 25/03, paragraph 22.

1176 U 18/00, paragraph 40 in conjunction with the ECtHR, *Zanghi v. Italy*, of 19 February 1991, Series A no. 194, paragraph 21; U 14/99, paragraph 5.

1177 CH/98/1309 *et al*.-RR, paragraph 10 *et seq.* in relation to the period between the setting up and establishment of the Court of Bosnia and Herzegovina.

The necessity for a legal remedy to be accessible and comprehensible requires a decision-making body, *i.e.*, a court, not to interpret and apply formally the procedural provisions on admissibility of a legal remedy, but by observing the peculiarities of each individual case, thereby not rendering the respective legal remedy illusory.[1178] On the other hand, each person has to prove that a body being addressed with a request is competent to decide on the respective case. Arbitrary and erroneous interpretation of regulations as to its own competence shall violate the right of access to court.[1179] Thus, a violation of the right of access to court shall exist if a court, unlawfully, deprives an individual of a decision on the merits as to the existence of the right of ownership or occupancy right or the right to use a property, by declaring itself incompetent or by referring the individual to initiate an administrative proceeding. This is applicable especially in such events when the regulations[1180] or the case-law[1181] have assigned the respective subject matter to courts.[1182]

> In Case No. U 7/99, the appellant had been forcibly evicted from his apartment during the war. After the armed conflict, a third person moved into the apartment without the appellant's consent. The first instance court deliberated on the appellant's lawsuit for repossession only after several months had elapsed following the filing of the lawsuit and after the appellant's apartment had been allocated to the unlawful possessor for use as a temporary accommodation, by a decision of the municipal commission for refugees and displaced persons. The appellant did not appeal against this decision. The first instance court referred to the legal validity of the respective decision and the appellant's failure to file an appeal. As a result thereof, the court dismissed the appellant's civil action, which decision was upheld by the second instance court.

1178 U 36/02, paragraph 25 *et seq*.

1179 AP 102/03, paragraph 36 *et seq*.; CH/99/1838, paragraph 119; CH/03/13678, paragraph 30 *et seq*.; CH/00/5454, paragraph 31 *et seq*.

1180 In the present case, Articles 10 and 30 of the Law on Housing Relations of the Republika Srpska (*OG of SRBiH,* Nos. 14/84, 12/87 and *OG of RS,* No. 19/93). Under Article 10 of the Law on Housing Relations of the Republika Srpska, the courts have competence over housing disputes, as well as municipal bodies if provided so by the respective law. If anyone should come into possession of a socially-owned apartment unlawfully, the damaged persons may initiate a proceeding before administrative authorities for eviction (compare with Article 30 paragraph 1 of the Law on Housing Relations). The Housing Administration is responsible for eviction, both at the request of a party and *ex officio*, unless more than three years have elapsed from the day of the unlawful moving into the respective apartment to the day of filing a request (paragraph 2). Irrespective of this, the owner of the apartment still has the right to initiate a proceeding before the competent court concerning the eviction, within the next five years (paragraph 7).

1181 Judgment of the SRBiH Supreme Court, No. U 549/88, of 19 May 1988.

1182 U 6/98; U 2/99; U 3/99; U 7/99; U 5/00; U 24/00; CH/98/752 *et al*.-A&M, paragraph 166 *et seq.*; CH/98/866-A&M, paragraph 63 *et seq*.

The establishment of a violation of the right of access to court presumes that a damaged person has addressed a competent court. Therefore, in proceedings before the Constitutional Court it is necessary oftentimes to first clarify **the issue of the competence** of the authority, which was addressed with a request, in order to reach a decision as to whether the appellant has failed to exhaust legal remedies provided for by law.[1183] Thereby this does not concern the applicability of Article 6 of the ECHR,[1184] or the existence of a legal remedy[1185] for a certain legal issue in Bosnia and Herzegovina which falls in the domain of protection of Article 6 of the ECHR. Rather this is about the issue as to which body has the competence to make a decision. However, even with a body declaring itself competent to make a decision on the merits, whereby a reasonable doubt exists that such decision will not be complied with, there is **legal uncertainty** leading to a violation of the right of access to court.[1186]

Should a competent court adopt a ruling on **discontinuation of the proceedings**, in order to clarify a specific previous question, such discontinuation, if lawful, does not constitute a violation of the right of access to court.[1187] Contrary to this, should the court proceedings be discontinued for a specific period of time on the basis of **the instruction issued by the executive authority**, and, as a result, the courts deprive an individual of the right to a decision on merits, it amounts to a violation of the right of access to court.[1188] The same applies in the cases where courts discontinue civil proceedings despite being aware of the fact that the present possessor has unlawfully used the apartment, thereby referring to the administrative decision allocating the apartment to an unlawful possessor.[1189]

1183 See, for example, as to competence over paying unpaid pensions: U 5/00; as to competence over a lawsuit for the hand over of posession of an apartment, the occupancy right holder of which had passed away, and a third person had moved in: AP 130/02, paragraph 29 *et seq.*; as to competence over a civil action for establishing the occupancy right and possession over an apartment: U 6/98; as to competence over the compensation of damage resulting from unlawful arrest: CH/00/2317, paragraph 33 *et seq*.

1184 See details under: "(a) Conditions of Application", p. 237.

1185 As to the payment of social security contributions arising from employment, see, AP 311/04, paragraph 31 *et seq.*, or CH/01/8507, paragraph 31; in relation to admissibility to build an apartment on top of the attic apartment, see CH/00/5522, paragraph 50 *et seq.*; CH/02/10472, paragraph 33 *et seq*.

1186 CH/98/1309 *et al*.-A&M, paragraph 146 in relation to the question whether owing to non-existence of a well-functioning ordinary court at the State level, the Entities' courts may decide on the un/lawfulness of the acts of the State administration.

1187 AP 107/03, paragraph 28; as to the unlawful discontinuation of the proceeding, see AP 70/05, paragraph 27. *et seq.*; AP 691/04, paragraph 25 *et seq.*; CH/03/13625, paragraph 70 *et seq.*; CH/03/14870, paragraph 77 *et seq.*; CH/02/12538, paragraph 37 *et seq.*

1188 U 23/00, where the Constitutional Court observed that such proceedings seriously question and cast doubt on the independence of the courts and fairness of the proceedings; see, also, CH/96/3 *et al*.-M, paragraph 40; CH/96/22-M, paragraph 41; CH/98/659 *et al*.-A&M, paragraph 194 *et seq.*

1189 U 24/00, paragraph 27 *et seq.*

> In the present case, the competent first instance court did not act for a total of 18 months upon the appellant's civil action for repossession. In the meantime, the competent ministry had allocated the apartment to an unlawful possessor, in order to try to legalise his status thereof. Following this, the court, referring to the mentioned administrative decision, discontinued the proceeding, arguing that the administrative authorities had competence over such disputes.[1190]

The right of access to court exists not only in the event of the adoption of a first instance decision, but it also extends to the right to institute **appellate proceedings**.[1191]

With regards to Article 6 of the ECHR, in principle, no objections can be raised if the courts relied on the facts of the case established in the administrative proceedings, especially if the appellant had the possibility to request a review of the facts of the case in the administrative proceedings, and to submit new evidence by requesting the reopening of the administrative proceedings.[1192] Nevertheless, the courts are not necessarily bound by the facts of the case established by the administrative authority.[1193] Thus, the Constitutional Court, pursuant to Article 38, paragraph 1 of the Law on Administrative Procedure of the Republika Srpska, considers that binding the courts by the facts of the case arising from the administrative proceedings is justified only if such facts are clear and indisputable. In other cases the court, pursuant to Article 38, paragraph 3 of the same law, may and must establish by itself the facts of the case.[1194] In particular when pronouncing fines, which are treated as criminal and legal sanctions within the meaning of Article 6, paragraph 1 of the ECHR, courts must have the right to review the facts of the case established by the administrative authorities and, if necessary, to establish them by themselves (for instance, by hearing witnesses); courts cannot limit themselves to having review of the administrative authorities' decisions on pronouncing fines reduced to the review of the correct application of legal norms.[1195] Accordingly, it is inconsistent with Article 6, paragraph 1 of the ECHR for the courts to dismiss a civil action for repossession of an apartment with the reasoning that the competent administrative authority had declared the apartment abandoned, and that the appellant had failed to challenge the

1190 Compare with U 24/00, paragraph 25.

1191 In relation to the issue of admissibility of a revision appeal and the problem of the value of a dispute, see CH/03/14742, paragraph 51 *et seq.*

1192 U 8/00.

1193 U 7/00 in connection with the ECtHR, *Le Compte et al. v. Belgium*, 23 June 1981, Series A no. 43, paragraph 5 (item b).

1194 *Ibid*., in connection with the ECtHR, *Terra Woningen v. Holland*, 17 December 1996, Reports 1996-VI, paragraph 54.

1195 U 19/00, paragraph 33; U 10/03, paragraph 28; similarly, U 106/03, paragraph 38.

respective decision. Therefore the courts are bound by the facts of the case established by the administrative authorities.[1196]

> The appellant, named in the Case No. U 7/00, had been forcibly expelled by a refugee from his apartment in Banja Luka in September 1995. Several months thereafter the municipality declared the apartment abandoned, and allocated it to the refugee concerned as a temporary accommodation. In June 1996 the appellant filed a civil action with the Basic Court in Banja Luka for repossession of the apartment. The proceedings were suspended half a year thereafter for unknown reasons. The complaint and the civil action filed against the apartment being declared abandoned and its allocation to a third person were unsuccessful. The Supreme Court of the RS upheld the administrative acts with the reasoning that the administrative acts became legally binding, for which reason the RS Supreme Court was bound by the established facts of the case.

The right of access to court safeguards **comprehensive procedural guarantees** and it requires the public and unhindered conduct of proceedings, as well as guaranteeing the lawfulness of the proceedings and compliance with the standards of a legal state.[1197] The right of access to court must be **effectively** guaranteed and not only formally safeguarded.[1198] An individual has the right to request from the court to decide on his/her request **in full**.[1199] For this reason, it is inadmissible for the court to suspend the proceedings and to refer the disputed case for deliberations to a certain commission which has neither the character of a "court" within the meaning of Article 6 of the ECHR, nor does it have the competence to decide on the disputed issue.[1200] Therefore, Article 6 of the ECHR would also be violated should the legal system, as far as a certain legal and disputed issue covered by this Article is concerned, fail to provide for the creation of an authority which may be treated as a "court".[1201] Contrary to this, it is not unconstitutional to transfer competence for the resolution of issues related to the well-foundedness of a request for the reimbursement of "war damage" to the State public attorney's office, although this judicial authority does not have the character of a court within the meaning of Article 6 of the ECHR.[1202] A violation of the right of access to court may exist under

1196 U 7/00.

1197 U 18/00, paragraph 23 in connection with the ECtHR, *Hornsby* v. *Greece*, 19 March 1997, Reports 1997-II, paragraph 40; CH/98/1309 *et al*.-A&M, paragraph 140; U 107/03, paragraphs 7 and 21; in relation to the length of the proceedings see AP 994/04, paragraph 28; CH/99/2743, paragraph 60 *et seq.*

1198 CH/00/5751, paragraph 48 *et seq.*

1199 AP 225/04, paragraph 23 *et seq.*

1200 CH/99/1714, paragraph 49; contrary to the case law of the BiH Constitutional Court in Case No. AP 2389/05, paragraph 7.

1201 CH/01/7248, paragraph 224 *et seq.*; CH/01/8590, paragraph 66 *et seq.*

1202 AP 1257/05, paragraph 31 *et seq.*

certain circumstances when an administrative court, instead of deciding on the merits of the case, quashed the deficient administrative acts and referred the case back for a new administrative proceeding and a decision.[1203]

The right of access to court also extends to the enforcement proceedings of an adjudicated matter ending in a legally binding decision. Otherwise, the main trial could go without results, *i.e.*, effect.[1204] Therefore, Article 6, paragraph 1 of the ECHR shall be violated if the enforcement of the right established by a final decision against (the pecuniary claim of) the State is postponed for an indefinite period of time. That is a move by way of which the legislature, in contravention of the principle of a legal state, interferes with a judicial authority.[1205] Also, it is inadmissible for the executive authority to take away executive force from court judgments on the basis of general administrative acts.[1206] Enforcement may be terminated only on the basis of legal acts, whereby the law must comply with the principles of a legal state.[1207] An obvious example of a violation of the right of access to court occurs when a legally valid decision, establishing the right of a certain person to a compensation apartment due to the expropriation of his/her own property, has not been enforced for over 20 years,[1208] or if a decision ordering the remediation of the effects of an unlawful action has not been enforced.[1209]

The right of access to court shall be violated if an individual is denied the adoption of an administrative decision stipulated by law, which needs to contain all its appertaining elements, and is, instead, provided with an unofficial letter containing a legal position of the administrative authority contrary to his/her request, and the courts declare themselves incompetent regarding the

1203 U 15/00; U 23/00; U 19/00, paragraph 33. In Case No. U 15/00 the appellant addressed the RS Supreme Court three times, which did not deem it necessary to adopt a decision on the merits and to complete the case (compare the details about the proceedings on p. 376). The Constitutional Court, therefore, quashed the decision of the RS Supreme Court and ordered the court to decide the case on its own.

1204 CH/96/28-A&M, paragraph 35 *et seq.*, in connection with the ECtHR, *Scollo v. Italy*, 28 September 1995, Series A no. 315-C, paragraph 44 *et seq.*; *Hornsby v. Greece*, 19 March 1997, Reports 1997-II, paragraphs 40, 45; in relation to the registration in the land registers see, AP 854/04, paragraph 24; in relation to the enforcement of decisions of the Commission for Implementation of Article 143 of the Labour Law see, CH/03/13453, paragraph 31 *et seq.*

1205 CH/01/8112 *et al*.-A&M, paragraph 147 *et seq.*, in connection with the ECtHR, *Stran Greek Refineries et al. v. Greece*, 9 December 1994, Series A no. 301-M, paragraph 49 *et seq.*

1206 CH/02/9138 *et al*., paragraph 105 *et seq.*

1207 CH/00/1669 *et al*., paragraph 143 *et seq.*; CH/03/14913, paragraph 36 *et seq.*; CH/00/10999, paragraph 35 *et seq.*

1208 CH/99/3227-A&M, paragraph 84 *et seq.*

1209 AP 602/04, paragraph 27 *et seq.*

respective request,[1210] or if failing to institute a court proceeding within a time limit stipulated by law.[1211] **Failure** on the part of a competent authority **to adopt a formal administrative decision** prevents an individual from instituting a court proceeding for the protection of his/her rights.[1212]

In certain cases it may be justified to conduct proceedings **in the absence** of a party to the proceedings. However, the moment such a person has learned of the proceedings or a decision adopted in his/her absence, he/she has to be given an opportunity to secure a new decision on merits.[1213]

The right of access to court shall be violated if courts declare themselves incompetent concerning the issue of the reimbursement of damages due to unlawful arrest and the prosecutor's instructions to pursue the claim for damages before the **authorities established by Annex 6**. The courts provide for a division of competences between ordinary courts and authorities established by Annex 6. By the force of Annex 6 and the Constitution of Bosnia and Herzegovina, ordinary courts are competent and obliged to award damages directly under the ECHR irrespective of the concrete regulation of that issue under the domestic positive legal regulations.[1214]

The right of access to court, however, **cannot be guaranteed infinitely**. The legislature has the competence to shape the respective right in accordance with its nature, depending on the time and place, needs and possibilities available in a society, *i.e.*, in a community, on one hand, and an individual, on the other. Certain **restrictions on the right of access to court** must not narrow that right in such a way as to deny the very nature of the respective right. Besides, restriction on the right of access to court must follow a legitimate aim, and be implemented by employing appropriate means.[1215] Typical restrictions on the right of access to court are the so-called **inherent restrictions**, such as the financial ones, for instance court fees paid when filing a civil action. These are admissible if the financial capacity of the individual is observed.[1216] Fees amounting to 3% fall within the scope of the principle of proportionality. Yet,

1210 U 5/00 in relation to the retrospective reimbursement of unpaid pensions.

1211 CH/01/7701-A&M, paragraph 118 in connection with the ECtHR, *De Geouffre de la Pradelle v. France*, 16 December 1992, Series A no. 253-M, paragraph 34 *et seq.*

1212 *Ibid*., with references to the ECtHR, *Albert et Le Compte v. Belgium*, 10 February 1983, Series A no. 58, paragraph 20.

1213 CH/00/3574-A&M, paragraph 106; CH/02/8655-A&M, paragraph 107.

1214 CH/991838 *et al*.-A&M, paragraph 119 *et seq.*

1215 U 18/00, paragraph 23, in connection with the ECtHR, *Tolstoy-Miloslavsky v. United Kingdom*, 13 July 1995, Series A no. 323, paragraph 59; CH/00/6134-A&M, paragraph 101, in connection with the ECtHR, *Ashingdane v. United Kingdom*, Series A no. 93, paragraph 57; AP 464/04, paragraph 32.

1216 AP 638/04, paragraph 18; CH/02/10542, paragraph 7.

the right of access to court may be violated if a court unlawfully decides on the admissibility of a civil action.[1217]

Also lodging **legal remedies** may be connected with certain conditions, such as, for instance, the **form** of a legal remedy,[1218] or the **time limit** provided for lodging a legal remedy. Time limits are, in principle, justified because of compliance with the principle of legal certainty. Namely, setting time limits for the exercise of a certain right is good for legal certainty and the proper functioning of the legal system.[1219] These types of restrictions of the right of access to court may violate the right of access to court only in exceptional circumstances, that is when they are set so restrictively as to objectively prevent the effective use of a stipulated legal remedy.[1220]

> This is the case, for instance, when appellate proceedings – such as the one referred to in Article 123 of the Law on Civil Procedure of the RS – do not begin with the delivery of a judgment to the legal representative of a party to the proceedings, but with the delivery of a judgment to the defendant instead (*ibid*.). This is applicable in particular when a lawyer representing a party to the proceedings is expected to be familiar with domestic positive legal regulations and to represent the interests of his/her client.[1221] From the perspective of the Constitution, no complaint may be lodged if a revision appeal pursuant to Article 428 of the Criminal Procedure Code of the RS is available only to the convicted person, that is to his/her legal representative, and not to the prosecution or to some third party.[1222]

Also **substantive regulations on a certain right being subject to the statute of limitations** may contain, as a justified consequence, a restriction on the right of access to court. For, similar to the procedural legal provisions on preclusive time limits, it is in the state's public interest to protect confidence in a certain state of affairs, which has lasted for an extended period of time and, if the party concerned has not instituted a proceeding, to change that state of affairs.[1223]

> During the course of the proceedings an objection of applicability of the statute of limitations may be raised also at the second instance proceedings,[1224] or by filing a special civil action one may request that it be

1217 CH/98/1297-A&M, paragraph 39 *et seq.*
1218 U 75/03, paragraph 17.
1219 AP 551/03, paragraph 23.
1220 U 36/01, paragraph 23.
1221 U 36/01, paragraph 24.
1222 U 34/00, see the following part "the Constitutional Court reached a conclusion."
1223 Compare AP 1/03, paragraph 26; U 71/03.
1224 AP 487/04, paragraphs 7, 26 *et seq.*; AP 763/05, paragraphs 11, 34 *et seq.*

established that a third person has no right to seek through court or forcibly to exercise one's right due to the expiry of the statute of limitations.[1225]

The issue that is still not clear, unique and fully resolved is the issue whether the statute of limitations is subject to termination during **the state of war**.[1226] According to the Human Rights Chamber for BiH, the state of war affects the right being barred by the statute of limitations. The statute of limitations shall be suspended (i) during wartime by filing a civil action with any court. This very reason makes it irrelevant whether during wartime postal services were in operation between the entities up to 1998.[1227] In relation to the repossession of property under Annex 7 and the challenging of obligations-related relations – contract on exchange – entered into during the war, courts must apply the so-called property laws as *lex specialis* against the regulations on the statute of limitations referred to in the Law on Obligations.[1228] Also, in the area of employment relations, it is necessary to take into account the state of war. Refugees and displaced persons have to report to their employers as soon as possible, in order to be reinstated to work. Only upon establishing the respective moment, one may say that the statute of limitations has started running for one to exercise rights and for the conduct of a proceeding in the event that the employer is not willing to reinstate the employee to work of its free will.[1229] Should an employer refuse to reinstate an employee to work for real reasons, although it could have dismissed the request on the grounds of the expiry of the statute of limitations, the court might not raise an objection to the applicability of the statute of limitations; instead, it had to adopt a decision on merits in relation to the right to be reinstated to work.[1230]

Issuing a certificate attesting to unpaid wages that remain outstanding does not mean that that the employer has admitted the debt. Consequently, no suspension of the statute of limitations has occurred.[1231] Claims for unpaid pensions that are subject to the statute of limitations of 6 months shall be in consistence with the Constitution.[1232] However, the statute of limitations of 6 months applicable to the right to pension pursuant to Article 17 of the Agreement on Mutual Rights and Obligations in Implementing Retirement and Disability Insurance (*OG of RS* No. 15/00) is not in accordance with the BiH Constitution.[1233] Also, from the perspective of constitutional law,

1225 AP 219/03, paragraph 19.
1226 Position denied: AP 1290/05, paragraph 12; AP 1548/05, paragraph 12; position upheld: AP 325/05, paragraph 31 *et seq.*
1227 CH/03/15147, paragraph 17.
1228 CH/00/5503, paragraph 52 *et seq.*
1229 CH/03/14149, paragraph 33 *et seq.*
1230 CH/03/14465, paragraph 31 *et seq.*
1231 AP 701/05, paragraph 25.
1232 AP 112/04, paragraph 27 *et seq.*
1233 AP 2213/06, paragraph 26.

> one may not object to the positive legal regulation of the issue related to the right to reimbursement of unpaid, outstanding wages,[1234] or the right to fulfilment of contractual obligations[1235] being subject to the statute of limitations within three years effective from the day of becoming due; likewise, one may not raise an objection if the statute of limitations in the case of "missing persons" starts running only from the day when the legal requirements for pronouncing a certain person deceased have been met, and not from the day a person has been reported missing.[1236] Also, it is proportionate if the right to reimbursement of damages becomes subject to the statute of limitations within three years, effective from the day one learnt of the damage and the entity inflicting damage.[1237]

Another example of inherent restrictions on the right of access to court is the mechanism of res iudicata.[1238] Thus, if a legal successor, *i.e.*, an heir, tries to reopen the proceedings completed by a legally valid decision, which proceedings his predecessor was a party to, the restriction on the right of access to court will be justified.[1239] However, *res iudicata* shall not occur if a creditor tries to exercise his/her right established by a legally valid decision the second time around, after the exercise failed the first time around,[1240] or if one party to the proceedings tries to reach an out-of-court settlement in an ordinary court procedure.[1241] *Res iudicata* applies to the enforcement court as well, which is not allowed, during the enforcement proceedings, to reopen and reconsider the issue of competence concerning the issue ending in a legally valid decision.[1242]

Another admissible restriction on the right of access to court are the mechanisms of litis pendentis,[1243] **standing to sue and be sued**[1244] and the **immunity** of the adverse party.[1245]

1234 AP 101/04, paragraph 28 *et seq.*

1235 AP 277/05, paragraph 19; in relation to economic agreements see, AP 619/04, paragraph 22 *et seq.*

1236 AP 1123/04, paragraph 21 *et seq.*

1237 AP 1391/05, paragraph 23.

1238 CH/03/13029, paragraph 27 *et seq.*

1239 AP 321/05, paragraph 22.

1240 AP 1202/05, paragraph 25 *et seq.*

1241 U 64/02, paragraph 48.

1242 CH/02/12322, paragraph 47 *et seq.*

1243 CH/03/13736, paragraph 45 *et seq.*; in relation to the repossession of property before the administrative authorities and the CRPC see, CH/00/1669, paragraph 129 *et seq.*; CH/01/8050, paragraph 118 *et seq.*

1244 CH/03/13844, paragraph 30 *et seq.*

1245 U 28/00, paragraph 26 *et seq.*

(d) Decision-making within a reasonable time

AP 1070/05 Ljubas	20060902
AP 1101/04 "H.I.G.A.T." GmbH, Graz	20051013
AP 1232/05 Karić	20060509
AP 1291/05 "Anuschka" d.o.o. Vićenca	20060929
AP 1410/05 Katalinić	20051109
AP 167/03 M. P. & M. Č.	20041130
AP 2240/05 Kalinić	20051109
AP 2554/05 Đogić	20070116
AP 45/02 A. P.	20040530
AP 505/04 E. Č.	20050515
AP 633/04 D. V.	20050527
AP 769/04 M. B.	20041130
AP 770/04 Babičić	20050913
AP 922/06 Čađo	20060412
AP 962/04 Mukić	20051013
CH/00/4259 Vujić	20061004
CH/00/5548 Pehlić	20050706
CH/00/6399 Veledar	20060406
CH/00/6423 Vujasinović	20050404
CH/004295-A&M Osmanagić	20021204
CH/01/6930-A&M "Kompas" Međugorje	20030110
CH/01/7080 Miljković	20060607
CH/01/7912 *et al*.-A&M Landžo *et al*.	20031107
CH/01/8054-A&M Pilipović	20021105
CH/01/8066 Marčeta	20060405
CH/01/8110 D. R.	20030307
CH/01/8121-A&M Janković	20031010
CH/01/8529 Marijanović	20030205
CH/01/8529-A&M Marjanović	20030207
CH/01/8582-A&M M. J.	20031010
CH/02/8667-A&M Harbaš	20030905
CH/02/8770-A&M "Dobojputevi" d.d.	20031205
CH/02/9270 Ganibegović	20060705
CH/02/9794-A&M Demiri	20030407
CH/03/13051 S. S.	20031008
CH/03/13051-A&M S. S.	20031107
CH/03/13601 Đedović	20060913
CH/03/14008 Jakšić	20050510
CH/03/14803 Bašić	20060913
CH/03/14807 Vučković	20050510
CH/03/14934 Papić	20060705
CH/03/14992 Numić	20061108
CH/96/2 *et al*.-A&M Podvorac *et al*.	19980612
CH/97/54 D. Mitrović	19980610
CH/97/62-A&M Malčević	20000908

CH/97/77-A&M Šehić	19991105
CH/98/1018-A&M Pogarčić	20010406
CH/98/1019-A&M Sp. L. *et al*.	20010406
CH/98/1169-A&M R. M.	20030606
CH/98/1171-A&M Čuturić	19991008
CH/98/1221-A&M Okulić	20000908
CH/98/1251-A&M Softić	20030306
CH/98/126 *et al*.-A&M Marić *et al*.	19990310
CH/98/271-A&M Filipović	19991210
CH/98/367-A&M Janković	20000512
CH/98/457-A&M Anušić	20001013
CH/98/565-A&M M. K.	20031222
CH/98/603-A&M R. T.	20021108
CH/98/617-A&M Lončar	20010309
CH/98/640-A&M S. J.	20030509
CH/98/660-A&M Babić	20010208
CH/98/688-A&M Muftić	20021108
CH/98/698-A&M Jusufović	20000609
CH/98/724-A&M Matović	20000520
CH/98/774-A&M Karamehmedović	20000706
CH/98/835-A&M Suljović	20031107
CH/98/916-A&M Tomić	20020111
CH/99/1713 Vanovac	20041105
CH/99/1714-A&M Vanovac	20021108
CH/99/1757-A&M Sekulić	20031010
CH/99/1905-A&M Tanasić	20030905
CH/99/1951-A&M Spremo	20021206
CH/99/1972-A&M M. T.	20030905
CH/99/2007-A&M Rakita	20030309
CH/99/2233-A&M Čivić	20000512
CH/99/2239 partial decision-A&M Cipot-Stojanović	20000609
CH/99/2289-A&M M. G.	20031010
CH/99/2386-A&M Dragičević	20030905
CH/99/2627-A&M Jusufović	20031010
CH/99/2696-A&M Brkić	20010112
CH/99/2743 Sarač	20030704
CH/99/3050-A&M Mujagić	20010309
CH/99/3227-A&M Milisavljević	20030606
CH/99/3375-A&M E. Ž.	20031205
CH/99/3546-A&M Tuzlić	20010208
U 14/99 “Hoteli Bosna”	20001231 *OG of BiH*, No. 36/00
U 22/01 Kušec	20011230 *OG of BiH*, No. 33/01
U 23/00 Vrhovac	20010416 *OG of BiH*, No. 10/01
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 25/03 V. S.	20040121
U 6/00 Dolinić *et al*.	20020524 *OG of BiH*, No. 10/02

Article 6, paragraph 1 of the ECHR grants everyone the right for his/her dispute concerning a certain right to be completed within a reasonable time. This right is particularly significant for the proper functioning of the judiciary.[1246] It exists and is applicable irrespective of the guarantees for the right to a fair trial.[1247] Reasons to guarantee this right are multiple: first and foremost, in criminal proceedings, it is necessary to make sure that the defendant is not exposed to the indictment for too long before a decision is reached as to his/her guilt; also, it is necessary to avoid overly long exposure of the defendant to uncertainty regarding his/her fate; and finally, this right protects one from unjustified delays of the proceedings, which may threaten the effectiveness and credibility of a strong judiciary.[1248] From the perspective of the Convention, the only relevant matter is the length of the proceedings which apparently and without special cause gives reasons for concern, for the Convention, in principle, does not provide protection from deviations from the ideal state of affairs, but only from the fundamental violations of human rights.[1249] On the other hand, the right to proceedings within a reasonable time protects one from unreasonably lengthy proceedings, yet it does not protect an individual from the proceedings being completed "too quickly", even in a situation when it is in the interest of an individual to have the proceedings last for a certain period of time.[1250]

i. Computing the length of the proceedings

In computing the length of the proceedings, in principle, one takes into account only the period after the entry into force of the Constitution of BiH, *i.e.*, of Annex 6 to the GFAP, although the length of the proceedings prior to that date (14 December 1995) is not completely irrelevant; that period of time has a bearing on answering the question as to which stage the proceeding had reached as of 14 December 1995 and how long it had already taken up until that date.[1251] Irrespective of this, in **civil proceedings** the length of the proceedings is computed starting from the date of filing the civil action, and ending as of the day of the completion of the proceedings.[1252] In case a party

1246 CH/97/54-A, paragraph 10, in connection with the ECtHR, *Guincho v. Portugal*, 10 July 1984, Series A no. 81, paragraph 38; CH/01/7912 *et al*.-A&M, paragraph 164.

1247 CH/02/11108 *et al*.-A&M, paragraph 189, in connection with the ECtHR, *Eckle v. Germany*, 21 June 1983, Series A no. 65; CH/02/11108 *et al*.-A&M, paragraph 189.

1248 CH/02/11108 *et al*.-A&M, paragraph 189, in connection with the ECtHR, *Wemhoff v. Germany*, of 2 June 1969, Series A no. 7, paragraph 64; *Stogmüller v. Austria*, 10 November 1969, Series A no. 9, paragraph 62; and *Guincho v. Portugal*, 10 July 1984, Series A no. 81, paragraph 80; CH/99/1713, paragraph 57.

1249 CH/01/7912 *et al*.-A&M, paragraph 166, in connection with the ECtHR, *Eckle v. Germany*, 21 June 1983, Series A no. 65, paragraph 80.

1250 Compare with AP 922/06, paragraphs 4, 9.

1251 U 14/99, paragraph 5; U 23/00; CH/98/724-A&M, paragraph 43.

1252 Compare, U 22/01, paragraph 36; U 17/00, paragraph 27 in connection with the ECtHR, *Guincho v. Portugal*, 10 July 1984, Series A no. 81, paragraph 29.

to the proceedings changed, for instance if the plaintiff had passed away, the length of the proceedings would not be computed starting from the beginning of the proceedings.[1253]

The crucial moment for computing the reasonability of the length of the **administrative proceedings** has not been regulated uniformly in the case law of the BiH Constitutional Court, Human Rights Chamber for BiH and the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina. According to the BiH Constitutional Court, filing a civil action in an administrative dispute is of crucial significance, as the right to proceedings within a reasonable time relates only to judicial administrative proceedings, and not to a procedure before administrative authorities. Nevertheless, the length of the proceedings before administrative authorities *may* be relevant when deciding on the reasonable length of the proceedings.[1254] The Human Rights Chamber for BiH and the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina follow, however, the case law of the European Court, according to which the computing of the reasonable length of the proceedings includes the length of the proceedings before administrative authorities.[1255] For, the State is obliged to organise its legal system in such a manner so that the rights falling within the scope of Article 6 of the ECHR are protected effectively. Therefore, the very Convention makes no distinction, which the domestic legal system makes, between the proceedings before the courts and the procedures before administrative authorities.[1256] Subsequently, the BiH Constitutional Court changed its legal position, and started computing the reasonableness of the duration of the proceedings from the moment of the institution of administrative proceedings.[1257]

In **criminal proceedings** the crucial moment for computing the reasonability of the length of the proceedings is the moment when the damaged person has become aware of the fact of being formally suspected of a certain criminal act ("charge" within the meaning of Article 6, paragraph 1 of the ECHR), for as of that moment it is in his/her interest for the proceedings to be completed without delay by a decision of his/her innocence, or guilt. Thereby it is irrelevant whether the charge has been made in formal and legal terms or not, or if the

1253 CH/03/13601, paragraph 67.

1254 AP 45/02, paragraph 42.

1255 See, for instance, CH/01/7080, paragraph 16.

1256 Compare, U 25/03, paragraph 22; ECtHR, *Lutz v. Germany*, 25 August 1987, Series A no. 123, paragraph 50 *et seq*. This position is also upheld by the Constitutional Court (see, for instance, AP 633/04, paragraph 26).

1257 See, for instance, AP 2561/07, paragraph 36.

suspect has been arrested.[1258] In the event that the suspect is on the run, even when the fugitive is aware of the fact that he has been charged with certain things, the time limit for computing the reasonability of the length of the proceedings shall start running from the moment of his availability to the authorities, *i.e.*, when arrested or brought before the investigating judge.[1259] The length of the proceedings is separately computed for a private prosecutor if it concerns his right to compensation for damage in the criminal proceedings; in which case the crucial moment is the filing of such a request with the criminal court regardless of the fact whether it is already ongoing or not.[1260] The time limit shall stop running once the proceedings are completed, during the course of which a decision has been made on the well-foundedness of the indictment against a certain person.[1261] Usually that is the day of delivery of the first instance judgment, that is to say not the judgment by which the appellate proceeding has been completed.[1262] In case the proceedings have not been completed in such a manner, the length of the appellate proceeding may affect a decision on the reasonable length of proceedings.[1263] If the law provides for a certain date by which the proceedings must be completed, failing to comply with the respective deadline shall automatically constitute a violation of the right to proceedings within a reasonable time.[1264]

ii. Criteria as to the reasonable length of proceedings

The reasonable length of proceedings shall be judged on **a case-by-case basis**. It depends, first and foremost, on the complexity of each individual case, the conduct of the parties to the proceedings, courts and State institutions,[1265] on the importance of a decision for an individual, as well as on

1258 CH/01/7488-A&M, paragraph 109 (see in the mentioned decision the part relating to the overlapping of protection referred to in Article 6 of the ECHR with protection referred to in Article 5, paragraph 3 of the ECHR); CH/00/3880-A&M (paragraph 177 in connection with the ECtHR, *Eckle v. Germany*, 21 June 1983, Series A no. 65, paragraph 73) considering as important the moment when the competent body has officially informed an individual of being suspected of having committed a certain criminal act; CH/02/11108 *et al*.-A&M, paragraph 191.

1259 CH/01/7488-A&M, paragraph 110, and CH/02/11108 *et al*.-A&M, paragraph 192 in connection with the ECtHR, *Girolami v. Italy*, 19 February 1991, Series A no. 196-E, paragraph 13.

1260 CH/03/13051, paragraph 157.

1261 CH/01/7488-A&M, paragraph 111, CH/00/3880-A&M, paragraph 179, and CH/02/11108 *et al*.-A&M, paragraph 193 in connection with the ECtHR, *Scopelliti v. Italy*, 23 Novemebr 1993, Series A no. 278, paragraph 18.

1262 CH/02/11108 *et al*.-A&M, paragraph 193.

1263 CH/97/77-A&M, paragraph 66 in connection with the ECtHR, *Hornsby v. Greece*, 19 March 1997, Reports 1997-II, paragraph 40; CH/98/603-A&M, paragraph 56 *et seq.*

1264 CH/00/4259, paragraph 110 *et seq.*

1265 Available in greater detail in: CH/02/11108 *et al*.-A&M, paragraph 198.

other circumstances.[1266] The formal identification of proceedings as "urgent" through explicit legal provisions has a special role.[1267]

The **complexity** of a case shall be established based on the seriousness of the substratum of facts to be assessed, the number of parties to the proceedings, the quantity of evidence to be exhibited, and in particular based on the number of witnesses; thus, other facts-related or legal aspects of the case may play a specific role.[1268] Delays in contacting and hearing witnesses, in principle, cannot justify an unreasonable length of the proceedings; however, it is necessary to appraise, on one hand, delays in conducting evidentiary proceedings, primarily, the hearing of parties to the proceedings and, on the other hand, the aim and expectations sought to be achieved thereby.[1269] Courts must observe the time limits laid down by law when it comes to undertaking certain procedural actions at different stages of the proceedings.[1270] Should the defendant constantly refuse to participate in the proceedings (for instance, by failing to attend hearings) and the court fails to respond to it by using appropriate legal measures of coercion, the plaintiff can not be blamed for the delays in the proceedings resulting from such failures.[1271] In its role of *dominus litis*, the court cannot accept obstructions of the proceedings by the parties to the proceedings, as it is obliged to use its legal powers, the aim of which is to expedite the proceedings.[1272] A summons addressed to a defendant residing in a neighbouring country cannot serve as justification for significant delays in the proceedings.[1273] The accused, in principle, has no obligation to support the work of the Prosecutor's Office for the sake of completing the proceedings as

1266 U 14/99, paragraph 5; U 22/01 (an example of the absurdity of a court procedure due to never-ending delays) paragraph 37; U 17/00, paragraph 28 in connection with the ECtHR, *Vernillo v. Italy*, 20 February 1991, Series A no. 198, paragraph 30; CH/97/51-A&M, paragraph 51; CH/97/54-D, paragraph 10 in connection with the ECtHR, *Vallée v. France*, 26 April 1994, Series A no. 289-A, paragraph 34; CH/97/62-A&M, paragraph 76; CH/01/7488-A&M, paragraph 112; CH/00/5548, paragraph 67.

1267 For instance, proceedings over the disturbance of possession: AP 1101/04, paragraph 52; or the enforcement proceedings: CH/01/8110, paragraph 69; CH/03/14807, paragraph 34 *et seq.*

1268 CH/00/3880-A&M, paragraph 181; CH/01/7488-A&M, paragraph 113.

1269 CH/01/7488-A&M, paragraph 113 in connection with the ECtHR, *Idrocalce SRL v. Italy*, 27 February 1992, Series A no. 229-F; *Tumminelli v. Italy*, 27 February 1992, Series A no. 231-H.

1270 CH/03/14992, paragraphs 95, 98.

1271 Compare, CH/98/1171-A&M, paragraph 35; CH/98/617-A&M, paragraph 45; AP 769/04, paragraph 36 *et seq.*

1272 In relation to the problem of attendance of the parties to the proceedings, see AP 2554/05, paragraph 87; CH/03/13051, paragraphs 165 and 167. In relation to the necessity to use police forces in order to enforce a court decision, see CH/01/8393, paragraph 75 *et seq.*

1273 Cases CH/98/640-A&M, paragraph 71, and CH/99/1568-A&M, paragraph 51 *et seq.*, offer an example of significant ommissions on the part of the court.

soon as possible. However, if the accused uses procedural instruments in order to slow down the proceedings, such conduct may be relevant in assessing the reasonable length of the proceedings.[1274] Yet, the plaintiff might not claim that the length of the proceedings was unreasonable if he/she alone took the blame for the proceedings, for having failed to provide his/her new address,[1275] or if the civil action had such deficiencies indicating that the court must discontinue the proceedings until such time as the deficiencies have been removed.[1276] Also, objective difficulties, that neither the court nor any of the parties to the proceedings are responsible for, such as, for instance, the non-existence of a bilateral agreement between Bosnia and Herzegovina and Slovenia by way of which the presence of a damaged party in the capacity of a witness may be secured during a trial,[1277] are not of such relevance as to reach a conclusion as to the unreasonable length of the proceedings.

Lack of **resources** cannot be a justification for the unreasonable length of proceedings, as the State is obliged to organise its judicial system in such a way (including the necessary number of employees) so that courts are able to meet the requirements referred to in Article 6 of the ECHR in relation to the reasonable length of the proceedings.[1278] Also no justification is possible if proceedings conducted by a court have come to a standstill awaiting amendments to a certain law.[1279] Thereby the court not only bears responsibility for the causes originating from within, but also for the delays resulting from the poor functioning of other State institutions, such as, for instance, generating the findings of medical court expertise.[1280] Therefore, if proceedings have been conducted for the unreasonable period of time of 4 years (3.5 years of which is in the post-Dayton period), due to limited resources of the court and awaiting amendments to the law, not even the complexity of the case might justify the respective period.[1281] Similarly, the court may not justify an unreasonable length of proceedings on the repossession of property, resulting from the suspension of the proceedings pending the completion of proceedings on a disputed issue

1274 CH/00/3880-A&M, paragraph 183; CH/01/7912 *et al*.-A&M, paragraph 177, and CH/02/11108 *et al*.-A&M, paragraph 197 in connection with the ECtHR, *Ledonne (*No. *1) v. Italy*, 12 May 1999, paragraph 25.

1275 AP 167/03, paragraph 35.

1276 AP 2240/05, paragraph 39.

1277 AP 770/04, paragraph 51.

1278 U 14/99, paragraph 5; CH/00/3880-A&M, paragraph 185 in connection with the ECtHR, *Majaric v. Slovenia*, 8 February 2000, paragraph 39; *Ledonne (*No. *2) v. Italy*, 12 May 1999, paragraph 23; *Zimmermann et al. v. Switzerland*, 13 July 1983, Series A no. 66, paragraphs 27-32; AP 1410/05, paragraph 42.

1279 CH/98/724-A&M, paragraph 46.

1280 CH/03/13051-A&M, paragraph 163 *et seq*.

1281 CH/98/724-A&M, paragraphs 44-46.

before the administrative authorities, with its completion date being uncertain, although the court could adopt a decision on the merits on its own.[1282]

> In Case No. U 6/00, the Municipal Court had suspended the proceedings in June 1997. By February 2001 the appellant still had not entered into possession of his apartment, whereby there were no indications as to when the administrative proceedings might be completed. The Constitutional Court referred the case back to the Municipal Court with the instruction to adopt a decision on the merits.

A clear violation of the right to a trial within a reasonable time would exist in a case where the proceedings had taken 12 years in total, five years of which were during the period after the entry into force of the Constitution of BiH, whereby the courts failed to state any reasons whatsoever for which they had failed to conduct the proceedings.[1283]

Given that the protection under Article 6 of the ECHR also extends to the **enforcement** of a judgment, it is not possible to justify the failure to enforce a decision of eviction for over two years, for the reason that the police constantly failed to protect the court executors from a group of persons aiming at preventing the enforcement.[1284]

Even when the courts of first and second instance happen to make a decision in a case relatively quickly, the right to trial within a reasonable time may be violated if the first instance court fails to correct errors identified by the second instance court,[1285] or if the courts prove incapable in adopting a final decision, and **instead they constantly quash the lower instance decisions** and refer the appellant back to a lower instance court for new proceedings and adoption of a new decision.[1286] The fact that the courts of appeal have the legal possibility to quash a lower instance judgment and to refer the case back for new proceedings, does not amount to a justification for non-compliance with the obligations referred to in Article 6 of the ECHR – to conduct a fair trial within a reasonable time – especially if the possibility exists for the first

1282 U 6/00; U 24/00, paragraph 28.

1283 U 23/00; another apparent example: CH/99/1972-A&M.

1284 CH/96/17-A&M, paragraph 35, in connection with the ECtHR, *Scollo v. Italy*, 28 September 1995, Series A, No. 315C, paragraphs 44-45, and *Hornsby v. Greece*, 19 March 1997, Reports 1997-II, paragraph 45; see, similarly, CH/03/13051, paragraphs 165 and 167.

1285 CH/01/8529, paragraph 57; CH/00/6423, paragraph 31 *et seq.*

1286 Compare CH/99/3050-A&M, paragraph 57, in connection with the ECtHR, *Bock v. Germany*, 29 March 1989, Series A, No. 150, paragraph 47: "[...] not [...] a lack of activity, but rather an excess of it, which does not sit well with the principle *lites finire oportet*"; CH/01/8066, paragraph 63 *et seq.*; CH/00/6399, paragraph 52.

instance judgment to be modified, for a hearing to be held, or for ordering the main hearing to be held before another panel.[1287] Should the court not be authorised by law to modify by itself the first instance judgment, whereas referring back the case to the first instance court for adoption of a new decision would constitute a violation of the right to a fair trial within a reasonable time, the court of appeal would have the obligation, by referring to direct application of Article 6 of the ECHR, to decide by itself on the case and to complete it. For, the provisions of Article 6 of the ECHR have priority over ordinary legal positive provisions.[1288] The same applies to the administrative courts.[1289]

If limited resources cannot serve as a justification for the unreasonable length of the proceedings, still, certain **difficulties** which the courts in Bosnia and Herzegovina have encountered **after the war** have to be taken into account.[1290] Should reasonable, quick and appropriate steps be taken in order to remove "bottlenecks" for the proper functioning of the judiciary, such difficulties could be justified by taking into account the social and political situation within the country.[1291] To this end, proceedings taking 3.5 years in the period after December 1995 (5.5 years in total) do not have to constitute a violation of Article 6, paragraph 1 of the ECHR.[1292] Also, a **temporary burden on the courts** in terms of cases might moderate requirements referred to in Article 6, paragraph 1 of the ECHR, should such courts take concrete steps in order to resolve the respective problems.[1293] Similarly, the **reform of the judiciary and amendments to laws**, which necessarily entail certain delays in the proceedings, because of amendments to regulations on jurisdiction, procedures and requirements of form, may serve as a justified excuse for the length of the proceedings, for the reason that the courts have to adapt themselves thereto.[1294]

1287 CH/99/3050-A&M, paragraph 60, in connection with the ECtHR, *Baraona v. Portugal*, 8 July 1987, Series A no. 122, paragraph 48; see, also, CH/02/8667-A&M, paragraph 80 *et seq.*

1288 CH/03/14008, paragraph 46 *et seq.* In connection with the issue of priority of the ECHR and its direct application by competent authorities see also: "a. The BiH Constitution and the ECHR", p. 153.

1289 CH/03/14934, paragraph 54. In connection with the issue of priority of the ECHR and its direct application by competent authorities see also: "a. The BiH Constitution and the ECHR", p. 153.

1290 CH/00/4295-A&M, paragraph 56; AP 1232/05, paragraph 52.

1291 CH/01/7912 *et al.*-A&M, paragraph 194, in connection with the ECtHR, *Zimmermann et al. v. Switzerland*, 13 July 1983, Series A no. 66, pp. 11-13; *Milasi v. Italy*, 25 June 1987, Series A no. 199, p. 47.

1292 U 14/99, paragraph 5.

1293 AP 1070/05, paragraphs 21, 56.

1294 AP 505/04, paragraph 30 *et seq.*; AP 1291/05, paragraph 42; CH/99/2654, paragraph 56 *et seq.*

Finally, the nature of **appellate proceedings** involves the fact that a damaged person must wait for a certain period of time for the final decision to be taken. This makes the proceedings of 3.5 years justified.[1295]

iii. Digression: Damages for an unreasonable length of proceedings

In the event of a violation of the right to a trial within a reasonable time, the Constitutional Court shall guarantee pecuniary compensation. The value of damages in "ordinary" cases, *i.e.*, proceedings, shall amount to BAM 150 for each year of unjustified delays in the proceedings, *i.e.*, double the amount in the proceedings identified by law as "urgent".[1296] In establishing the value of damages, the BiH Constitutional Court was guided by the case law of the ECHR in the Case *Apicella v. Italy*,[1297] which, then again, was guided by the gross domestic product of the country concerned. Nevertheless, a priority legal remedy in cases of unreasonable length of proceedings is the urgent completion of the proceedings. For this very reason, the damages before the Constitutional Court for the violation of the right to a trial within a reasonable time are symbolic in nature.[1298] However, it is a justified question whether symbolic damages may justify and fulfil the obligation on the part of the State to award "fair damages" or the so-called redress to "a victim" of a violation of human rights, in order for the victim not to have that status any longer. The BiH Constitutional Court stopped using the term "symbolic damages" in 2009, although no changes whatsoever took place when it comes to the computation of the amount of damages.[1299]

On the other hand, the Human Rights Chamber for BiH and the Human Rights Commission within the BiH Constitutional Court would usually award higher damages, as both institutions, in addition to the criteria that the Constitutional Court considered in the Case No. AP 938/04, also, considered additional criteria in order to award a fair amount in damages. Accordingly, the respective courts used to award between BAM 343 and 515 in "ordinary" cases, and BAM 687 in "urgent" cases.[1300]

1295 Compare, CH/99/1951-A&M, paragraph 39, whereby the Chamber acted rather mildly over the fact that the RS judiciary had apparently proven that it was capable to correct on its own an unlawful judgment.

1296 AP 938/04, paragraph 50.

1297 Application No. 64890/01, judgment of 10 November 2004.

1298 AP 938/04, paragraph 48.

1299 See, for instance, AP 3971/08, paragraph 44 *et seq*.

1300 CH/02/9270, paragraph 65 *et seq.*

(e) "Equality of arms" and the right to a hearing

AP 114/02 I. Š.	20041027
AP 161/05 Ivanović	20060412
AP 214/03 "Privredna banka" d.d. Sarajevo	20041130
AP 312/04 Stjepanović	20050923
AP 447/04 J. Š.	20050412
AP 473/04 State of BiH	20050318
AP 592/03 S. Š.	20041014
AP 620/04 Salih *et al*. Hadžić	20050913
AP 656/04 Vujanović	20050913
AP 668/04 M. K.	20050615
AP 711/05 Božić	20060314
AP 86/05 Kićanović	20051013
CH/98/1324-A&M Hrvačević	20020308
CH/98/934-A&M Garaplija	20000706
U 101/03 A. H.	20040517
U 28/01-2 Jugović	20020312 *OG of BiH*, No. 05/02
U 40/01 Topić	20020910 *OG of BiH*, No. 25/02
U 6/02 Đorđić	20020829 *OG of BiH*, No. 24/02
U 95/03 M. H.	20040929

The right to a fair trial also extends to the principle of "equality of arms", according to which each party to the proceedings must have a reasonable opportunity to present his/her case in such a manner and under such conditions so as not to be essentially neglected in comparison with the other party to the proceedings.[1301] This type of protection shall be guaranteed also in the previous criminal proceedings,[1302] and shall also extend to the appellate instances.

Equality of arms in the evidentiary proceedings is one of the most important elements of this principle. First and foremost, it presumes that the parties take part in the evidentiary proceedings, in order to be heard; the court must make sure to eliminate procedural obstacles preventing a party from presenting its case.[1303] In doing so, the court has the right of discretion when it comes to allowing[1304] certain evidence and its assessment.[1305] Certainly, the court must make sure that no party to the proceedings is privileged; there is not, however, an obligation on the part of the court to establish a certain rapport and proportion between evidence which the parties have requested to be presented

1301 AP 214/03, paragraph 28; CH/02/9892-A&M, paragraph 113 in connection with the ECtHR, *De Haes et al. v. Belgium*, 24 February 1997, Reports of Judgments and Decisions of the ECtHR 1997-I, paragraph 53; CH/01/7488-A&M, paragraph 118.

1302 CH/01/7488-A&M, paragraph 115.

1303 AP 473/04, paragraph 34.

1304 AP 620/04, paragraph 25.

1305 AP 711/05, paragraph 28; AP 161/05, paragraph 31; U 95/03, paragraph 25.

and evidence which the court has allowed to be presented.[1306] Any error on the part of the court in the evidentiary proceedings need not necessarily constitute a violation of the right to "equality of arms". What is necessary is for that error to actually bring one of the parties to the proceedings into an unfair position, *i.e.*, to disturb the equality of arms. Thus, certain irregularities in refusing certain evidence,[1307] or in presenting certain evidence[1308] do not automatically constitute a violation of the principle of "equality of arms". Similarly, if the court fails to forward an appeal to the other party to the proceedings, and the appeal is dismissed, such an error shall be irrelevant.[1309] Moreover, the principle of "equality of arms" shall not be disturbed if the reply to the appeal is not forwarded to the appellant, as there is no legal obligation to do so.[1310]

If the indictment is based on the statement of a witness, and the accused fails to request the hearing of the respective witness, no violation of the principle of "equality of arms" shall exist even if it is proven that the prosecution has concealed facts related to the availability to the prosecution authorities of such witnesses who may have been key witnesses for his/her defence.[1311] Nevertheless, it would not be acceptable if the court heard seven witnesses for the prosecution, and no witness whatsoever for the defence, albeit it turned out that some of the witnesses who had been refused were important for establishing the correct facts of the case.[1312]

In relation to the right to a hearing, the principle of "equality of arms" shall apply in the same way in both the first instance proceedings and the **appellate proceedings**. However, it is necessary to view the proceedings as a whole, as well as the role of the very appellate proceedings in an individual case. Should a public hearing be held in the first instance proceedings, ruling out the possibility to hold a public hearing in the second instance proceedings might be justified if it concerned a problem related to the application of legal regulations, and not the establishment of the facts of the case.[1313] Therefore, it is not necessary for the accused or his/her defence counsel to be present at all times in the appellate proceedings.[1314] However, if the appellate proceedings concern the establishment of facts, then Article 6, paragraph 1 in conjunction

1306 AP 447/04, paragraph 25.
1307 AP 312/04, paragraph 42; AP 114/02, paragraphs 23, 24 and 26.
1308 U 101/03, paragraph 27.
1309 AP 86/05, paragraph 45.
1310 AP 668/04, paragraph 28.
1311 AP 85/05, paragraph 24.
1312 CH/98/1335 et al.-A&M, paragraph 252.
1313 CH/98/934-A&M, paragraph 54, and CH/98/1324-A&M, paragraph 73 in connection with the ECtHR, *Monnell and Morris v. United Kingdom*, 2 March 1987, Series A no. 115, paragraphs 54, 56, 58.
1314 Compare, U 28/01, paragraph 24; U 40/01, paragraph 25.

with Article 6, paragraph 3(c) of the ECHR shall be violated if the accused, despite the request filed, fails to attend the session of the second instance criminal panel.[1315] Therefore, the final decision on the obligation of participation in the second instance proceedings shall be assessed on the basis of the very regulation of the respective proceedings under the domestic regulations and circumstances of each individual case. The failure on the part of the accused to take part in the proceedings requires, first and foremost, a legal basis;[1316] the right to "equality of arms" shall be violated if the session of the second instance criminal panel is attended by the representative of the prosecution, and not by the representative of the defendant, *i.e.*, his/her defence counsel.[1317] Pursuant to Article 371 of the Law on Civil Procedure of the RS, there is a provision entitling the president of the panel or the very panel of the RS Supreme Court to summon the accused and the accused's defence counsel to attend the session of the panel. Thereby, the Constitutional Court interprets the notion "session" as "a public hearing" within the meaning of Article 6, paragraph 1 of the ECHR.[1318] The Human Rights Chamber for BiH, unlike the Constitutional Court, deems that making a distinction between the notions "session" and "hearing, *i.e.*, public hearing" before the court is justified in light of Article 6, paragraph 1 of the ECHR, as these two legal terms have different aims to follow under the law: at a "session", one discusses legal issues, while at a public hearing one establishes a substratum of the facts.[1319] However, within the time limit provided for filing an appeal, the accused must request to attend the session of the second instance court. In order to do so, he/she must be informed of the session to be held. If the accused fails to request this, and the first instance court has presented sufficient evidence for the correct establishment of the facts of the case, his/her absence at the session shall be in compliance with Article 6 of the ECHR.[1320] According to the aforementioned, legal restrictions on the participation of the accused in the appellate proceedings (such as, for instance, pursuant to Article 371 of the RS Criminal Procedure Code) can only be partially justified from the perspective of Article 6, paragraph 1 of the ECHR. If the accused requests the review not only of the application of relevant positive regulations, but also of the established facts of the case, that is of the sentence determined in the first instance proceedings, the accused or his/her defence counsel must be guaranteed the right to a public hearing in the second instance proceedings *regardless of whether he/she has filed a request previously* requesting so. The exception shall exist in the case when

1315 Compare with CH/98/934-A&M, paragraph 62 *et seq.*
1316 Compare, U 28/01, paragraph 25; U 40/01, paragraph 25 *et seq.*
1317 U 28/01, paragraph 27; U 40/01, paragraph 29.
1318 U 28/01, paragraph 25 *et seq.*
1319 Compare, CH/98/1324-A&M, paragraph 77.
1320 CH/98/1324-A&M, paragraph 80; see the similar case: AP 592/03, paragraph 28.

the accused or his/her defence counsel have forgone *explicite* such right.[1321] An additional criterion for judging whether the accused should be guaranteed the right to participate in the second instance proceedings would be the degree of the punishment pronounced in the first instance proceedings: the graver the punishment, the greater the interest of the accused to be present during the second instance, *i.e.*, the appellate proceedings, in order to have the possibility to defend his/her rights.[1322]

A violation of the right to "equality of arms" committed at an earlier stage of **the proceedings may be redressed** at a later stage of the proceedings. Should a violation of the right of the accused occur at a preparatory stage of the criminal proceedings in relation to proving his/her innocence, and the person is fully acquitted in the first instance proceedings, it would be possible to say that the first instance proceedings were a legal remedy for all the omissions made by the investigating judge during the pre-trial investigation.[1323] Also, a violation of this right in the appellate proceedings (due to a denial of the right to a public hearing) may be redressed in the procedure on a revision appeal.[1324]

The defendant may **waive** his/her rights referred to in Article 6, paragraph 1 of the ECHR. However, the waiver might not be accepted solely on the grounds of the fact that the accused had failed to make a timely request from the criminal panel of the second instance court to be notified on the session of the panel. Such a conclusion might not be admissible in particular if the defendant submitted a request to attend the session, only after the time limit laid down by law had expired.[1325]

(f) Public hearing

AP 1087/04 Todorović	20051202
AP 1124/04 ODP „Interplet" *et al.*	20051013
AP 1401/05 Pranjić -M- Lukić	20060912
AP 217/03 B. M.	20040929
AP 407/04 D. Z.	20040723
AP 481/05 Burović	20060314

1321 Compare, U 28/01, paragraph 27; U 40/01, paragraph 28.
1322 Compare, U 28/01, paragraph 28 in connection with the ECtHR, *Ekbatani v. Sweden*, 26 May 1988, Series A no. 134, and *Kremzow v. Austria*, 21 September 1993, Series A no. 268-M, wherein the Constitutional Court attributed great significance, as far as the accused is concerned, to the sentence of imprisonment of three years pronounced in the first instance proceeding.
1323 CH/01/7488-A&M, paragraph 118.
1324 AP 656/04, paragraph 26.
1325 U 40/01, paragraph 30.

AP 74/04 I. S.	20050323
CH/01/7248-A&M "ORDO" RTV Sveti Georgije	20020705
U 103/03 Ž. K.	20040528
U 148/03 „Lijanovići" d.o.o.	20031128
U 19/00 „Kemokop" *et al*.	20020308
U 28/01-2 Jugović	20020312 *OG of BiH*, No. 05/02
U 40/01 Topić	20020910 *OG of BiH*, No. 25/02
U 59/03 A. D.	20040517
U 6/02 Đorđić	20020829 *OG of BiH*, No. 24/02

Article 6, paragraph 1 of the ECHR guarantees the right to a public hearing, as one of the fundamental principles of the right to a fair trial referred to in Article 6, paragraph 1 of the ECHR.[1326] In addition to the exceptions to this principle, which are stated in the 2nd sentence, the parties to the proceedings may waive this right either tacitly or explicitly.[1327] The principle of a public hearing protects from "a closed-door trial", carried out in the absence of public scrutiny, and it aims at promoting the confidence of the public in the judiciary.[1328] For that matter, publicity of the proceedings in criminal law is a prerequisite for the criminal law to achieve its integrative and preventive purpose[1329] and to act with the aim to fight crime and to develop the social discipline of citizens.[1330]

In principle, in each individual case there must be **at least one** chance for an accused person to take part in a public hearing pertaining to the substance of the case, and not only to the admissibility of the case, unless exceptions stated in sentence 2 are applied. This applies, nevertheless, only to the proceedings during which the well-foundedness of a criminal charge against some person is being deliberated on. Criminal proceedings carried out in the absence of the accused, in essence, are not necessarily in contravention of the Convention. However, once the convicted person has learnt of a judgment, he/she must have a chance to renew criminal proceedings during which he/she may request that a public hearing be held.[1331] Therefore, legal provisions providing for a public hearing only when and if a party to the proceedings has requested it satisfy the imperatives laid down in Article 6, paragraph 1 of the ECHR,

1326 CH/01/7248-A&M, paragraph 220 in connection with the ECtHR, *Diennet v. France*, 26 September 1995, Series A no. 325-A, paragraph 33.

1327 CH/01/7248-A&M, paragraph 220 in connection with the ECtHR, *Le Compte et al. v. Belgium*, 23 June 1981, Series A no. 43, paragraph 59.

1328 CH/97/34-A&M, paragraph 134 in connection with the ECtHR, *Axen v. Germany*, 8 December 1983, Series A no. 72, paragraph 25; CH/01/7248-A&M, paragraph 220 in connection with the ECtHR, *Diennet v. France*, 26 September 1995, Series A no. 325-A, paragraph 33.

1329 In connection with the issue of the purpose of the criminal law compare, *Ambos/ Steiner*, *2001* (in German language), that is *Ambos*, *2002*, in English language.

1330 AP 74/04, paragraph 25.

1331 U 103/03, paragraphs 25, 28; AP 407/04, paragraph 18 *et seq.*

although in practice the majority of the proceedings are completed without holding a public hearing, particularly concerning disputes of a purely technical nature.[1332] Yet, the very *possibility* to hold a public hearing does not satisfy the requirement of publicity of the respective hearing even when the very law does not prohibit *explicite* that the public be barred from the proceedings; for, the non-existence of the very prohibition to bar the public may not lead one to conclude that the publicity of the proceeding was made possible.[1333] Absence of family members and representatives of the international community at a hearing does not constitute in itself evidence that the hearing has not been held in public, particularly in such cases when the minutes from the hearing apparently point to the public nature of the hearing.[1334]

Article 6 of the ECHR does not necessarily also require a public hearing to be held in **the appellate proceedings**.[1335] The important thing here is the nature of the dispute in the respective case. Unless there is a discussion pertaining to the substratum of the facts in the appellate proceedings, there is no need to hold a public hearing.[1336] Otherwise, if a public hearing had not been held in the first instance proceedings, which is in contravention of the Convention, such omission might be corrected by holding a public hearing in the second instance proceedings.[1337]

Given that, according to domestic law, within the meaning of Article 6 of the ECHR,[1338] a "criminal charge" may be deliberated upon also by authorities which apparently have no **judicial character** (tribunal), such as the competent authorities for the conduct of offence and disciplinary procedures, Article 6 of the ECHR requires that a public hearing be held before at least one institution, *i.e.*, an authority with the character of a "court" as provided for in the Convention.[1339] The obligation to hold a public hearing in **civil and administrative procedures** shall depend on the special nature of a particular case.[1340]

1332 CH/01/7248-A&M, paragraph 221 in connection with the ECtHR, *Håkansson et al. v. Sweden*, 21 February 1990, Series A no. 171-A, paragraphs 136-137, and *Schuler-Dgraggen v. Switzerland*, 24 June 1993, Series A no. 263, paragraph 58.

1333 CH/01/7248-A&M, paragraph 222 *et seq.*, in connection with the procedure before the Communications Regulatory Agency of Bosnia and Herzegovina (CRA).

1334 CH/97/34-A&M, paragraph 135.

1335 CH/03/13372, paragraph 11 in connection with the European Commission of Human Rights, *K. v. Switzerland*, 4 December 1984, DR 242.

1336 AP 1401/05, paragraph 59 *et seq.*

1337 AP 1124/04, paragraph 31 in connection with the ECtHR, *Diennet v. France*, 26 September 1995, Series A no. 325-A.

1338 More on this see: "iv. "A criminal charge", p. 264.

1339 AP 481/05, paragraph 27 *et seq.*; AP 1087/04, paragraph 27 *et seq.*; U 59/03, paragraph 25 *et seq.*

1340 See, for instance, Case No. U 148/03 (paragraph 55 *et seq.*), concerning which it was necessary to hold a public hearing in the administrative proceedings; and

(g) Other general requirements of fair proceedings

AP 1028/04 Čejević	20050212
AP 111/02 "Duplex Keenvele" d.o.o.	20040615
AP 114/02 I. Š.	20041027
AP 1401/05 Pranjić -M- Lukić	20060912
AP 1603/05 Lončar	20061221
AP 210/05 Duraković	20051220
AP 2348/05 Blatešić	20060929
AP 263/05 Štrbac	20060314
AP 447/04 J. Š.	20050412
AP 5/05 Hasić	20060314
AP 506/04 Kopić	20050923
AP 525/04 B. Č.	20050118
AP 544/03 S. L.	20040924
AP 557/04 G. K.	20041130
AP 620/04 Salih *et al*. Hodžić	20050913
AP 658/04 S. D.	20050118
AP 661/04 M. Š.	20050422
AP 668/04 M. K.	20050615
AP 734/04 Lonco	20050913
AP 911/04 N. G. and R. S.	20050615
AP 977/04 Stevanović	20051117
CH/00/5616 Sukno	20010605
CH/03/14397 J. M.	20060403
CH/98/1366-A&M V. Č.	20000309
U 146/03 Ž. C.	20040326
U 39/01 M. H.	20020910 *OG of BiH*, No. 25/02
U 56/01 V. G. *et al*.	20030725
U 62/01 Pjanić	20020829 *OG of BiH*, No. 24/02
U 95/03 M. H.	20040929

i. Appropriate and coherent reasoning of a decision

The right to a fair trial includes the right of a party to the proceedings to be informed of the decisive reasons for a court decision, as that enables the party to appropriately use legal remedies.[1341] However, Article 6, paragraph 1 of the ECHR does not require the court to reason all arguments presented by the parties to the proceedings before the court, but only those that the court finds relevant for the decision. Therefore, although there is an obligation of the

AP 217/03, paragraph 22, concerning which it was not necessary to hold a public hearing.

1341 U 62/01, paragraph 19, and U 56/01, paragraph 28, both in connection with the ECtHR, *Hadjianastassiou v. Greece*, Application No.12945/87, 16 December 1992, paragraph 33.

court to consider all arguments presented by the parties to the proceedings, Article 6, paragraph 1 of the ECHR may not be interpreted in such a way as to impose an obligation on the court to include in its judgment all the arguments presented.[1342] Furthermore, in relation to the substratum of the facts, relevant are such facts on which the application of the very legal norm depends. Should the court fail to present a relevant factual description, the judgment might be considered arbitrary or uninformed.[1343] Finally, the court must present and assess crucial evidence and present it clearly in the judgment.[1344]

Final decisions of courts of appeal, in principle, do not have to contain thorough reasoning for decision-making.[1345] However, if the first instance court has made certain omissions in relation to providing reasoning for the claims, from the constitutional and legal standpoint, no objections to such omissions may be raised if the second instance court corrects them.[1346]

A violation of the right to a fair trial may exist in a case when the court of appeal has provided contradictory argumentation for its judgment and has failed to correct the apparent omissions in the challenged judgment of the first instance court. Thus, if the domestic criminal courts sentenced a person for certain criminal acts, concerning which the Prosecutor of the International Criminal Tribunal for the former Yugoslavia – due to the lack of a reasonable suspicion – had not allowed the furtherance of criminal proceedings, that would not be in compliance with Article 6, paragraph 1 of the ECHR. A clearance issued by the international prosecutor under the so-called *Rules of the Road*,[1347] is compulsory and it constitutes an obstacle for the conduct of a criminal proceedings unless, during the course of the proceeding, and following the refusal to issue a clearance for the conduct of a proceeding, new evidence has been presented convincing the court of the guilt of the accused.[1348]

1342 U 62/01, paragraph 19, and U 56/01, paragraph 28, both in connection with EComHR, Application No. 10938/84, 9 December 1986, DR 50, 98, and Application No. 10153/82, 13 October 1986, DR 49, 67; AP 1401/05, paragraph 61.

1343 AP 5/05, paragraph 32; AP 2348/05, paragraph 36.

1344 AP 1603/05, paragraph 35.

1345 U 62/01, paragraph 19, and U 56/01, paragraph 28, both in connection with EComHR, Application No. 8769/79, 16 July 1981, DR 25, 240.

1346 The Constitutional Court was "generous" in Case No. U 62/01 (paragraph 20), in connection with the obligation of the ordinary courts to argue the reasons of their respective judgments.

1347 About details see p. 209.

1348 For more details regarding this topic compare CH/98/1366-A&M, paragraphs 71-83.

ii. Evidentiary proceedings

Evidentiary proceedings, in principle, fall within the jurisdiction of the ordinary courts, which, as *dominus litis*, enjoy **a wide margin of appreciation** in relation to the issue of admissibility of evidence proposed and its respective assessment.[1349] Rejecting certain evidence shall violate Article 6, paragraph 1 of the ECHR if the appellant is able to prove that the rejected evidence is of crucial importance for the correct establishment of the facts of the case.[1350] For that matter, precisely in evidentiary proceedings the principle of "equality of arms" is of decisive relevance.[1351] No party to the proceedings may be privileged.[1352] Each party to the proceedings is authorised to face evidence being presented in the contradictory procedure,[1353] whereby the court is not obliged to allow for each and every piece of evidence to be presented.[1354] Taking into account the principle of directness in the evidentiary proceedings, the restriction of one's right to face a piece of evidence presented during the contradictory procedure must be corroborated with an important and justified reason.[1355]

Whether the principle of fair proceedings has been complied with must be observed from the standpoint of **the proceedings as a whole**, so that individual irregularities or issues of unlawfulness need not necessarily bring into question the entire evidentiary proceedings; as, the court decision can be based on other evidence as well, which the presentation has not been brought into question, or upon which omissions can be corrected at a later stage of the proceedings.[1356]

In cases where the provided reasoning for a decision is based on **indirect evidence or indications,** they must "appear as a firm, closed circle allowing for just one conclusion in relation to the relevant fact, and, in objective terms, to completely rule out a possibility of a different conclusion in relation to the

1349 AP 1028/04, paragraph 30; CH/00/5616, paragraph 3; CH/03/14397, paragraph 14; AP 620/04, paragraphs 10, 24; AP 557/04, paragraph 25; AP 210/05, paragraph 26.

1350 AP 114/02, paragraph 24; AP 668/04, paragraph 22 *et seq.*

1351 AP 447/04, paragraph 27.

1352 AP 544/03, paragraph 21; U 95/03, paragraph 24.

1353 U 146/03, paragraph 23.

1354 AP 447/04, paragraph 27; for instance, concerning the universally known facts: AP 111/02, paragraph 22.

1355 For instance, if a certain witness is no longer available or if summoning a witness for confrontation would be directly related to his/her extra costs: AP 525/04, paragraph 26 *et seq.*; AP 734/04, paragraph 23; AP 977/04, paragraph 23 *et seq.*; AP 506/04, paragraph 24.

1356 AP 658/04, paragraph 23; AP 911/04, paragraph 23; AP 506/04, paragraph 28; AP 263/05, paragraph 28 *et seq.*

respective fact".[1357] Hearing **anonymous or protected witnesses** is not, in principle, prohibited if the rights of the accused are sufficiently protected by any other way.[1358] However, a judgment must not be based exclusively on the statement of an anonymous or protected witness; in such cases it is necessary to provide reasoning based on additional evidence, which will apply in particular if the presentation of certain evidence by the defence has not been permitted.[1359] The same shall apply to witnesses to whom the Office of the Prosecutor guarantees immunity in relation to certain criminal acts that the accused has been charged with.[1360]

(h) Interpretation and application of rights in good faith

AP 1001/04 A. Z.	20050513
AP 1028/04 Čejević	20050212
CH/98/1245-A&M Slavnić	19991105
U 29/02 R. T.	20030627
U 36/03 N. S.	20040615

The right to a fair trial includes the obligation of the courts to interpret and apply applicable legal norms in good faith. That means, firstly, that the competent authority must apply the appropriate law correctly to the case concerned.[1361] Secondly, as far as the application of the provisions of the (appropriate) law, in principle, their interpretation falls within the scope of the ordinary courts.[1362] Nevertheless, ordinary courts must, in interpreting and applying positive legal provisions, to a sufficient extent, take into account constitutional and human rights, which, as a matter of fact, are subject to subsequent control by the Constitutional Court, that is by authorities established by Annex 6.[1363] The principle of a legal state, and in particular the principle of legal certainty, as its inherent element, obliges the ordinary courts to follow the case-law of the higher instance courts, albeit such an obligation is non-existent in formal and legal terms. Therefore, Article 6 of the ECHR may be violated if the ordinary courts disregard the established or permanent case-law of the higher instance courts without providing a reasonable basis for doing so.[1364]

1357 AP 5/05, paragraph 31; AP 661/04, paragraph 36.
1358 AP 506/04, paragraph 23.
1359 Compare with U 146/03, paragraph 22 *et seq.*
1360 AP 661/04, paragraph 33.
1361 U 36/03, paragraph 27.
1362 AP 1028/04, paragraph 30; AP 1001/04, paragraph 23.
1363 U 29/02, paragraph 23; see, also, commentary to Article II.6 of the Constitution of BiH, p. 544.
1364 CH/98/1245-A&M, paragraph 63.

c. Presumption of innocence – *in dubio pro reo* (Article 6, paragraph 2 of the ECHR)

AP 1603/05 Lončar	20061221
AP 3189/06 Vikalo	20070523
AP 5/05 Hasić	20060314
AP 579/05 Nuspahić	20060509
AP 767/04 Samardžić	20051117
AP 86/05 Kićanović	20051030
CH/01/7912 *et al*.-A&M Landžo *et al*.	20031107
CH/02/11108 & CH/02/11326-D&M Bašić & Čošić	20030505
CH/02/9892-A&M Lazić	20030905
CH/03/14486 Tahirović	20070627
CH/98/1245-A&M Slavnić	19991105
U 22/03 N. P. *et al*.	20040326
U 50/03 D. P.	20040721

Pursuant to Article 6, paragraph 2 of the ECHR, a person charged with a criminal offence shall be presumed innocent until proven otherwise. The presumption of innocence is a special reflection of the principle of a fair trial. It aims at protecting a suspect from differing assessments by judicial authorities or statements by officials, which all come down to the assessment of innocence of a suspect, without his/her guilt being lawfully established. The court must not commence a proceeding with a prejudice as to the guilt of a person concerned, *i.e.*, with a position taken beforehand as to the guilt of a person.[1365] Therefore, there is a violation of the right to a presumption of innocence if the court has pronounced the accused guilty, although the accused was unable to defend himself/herself, and the prosecution has apparently failed to submit evidence as to his/her guilt.[1366]

The presumption of innocence and the principle of a fair trial also guarantee the right to – and provide protection for everyone from – **self-incrimination/ self-accusation** (putting the blame on oneself, *i.e.*, admitting one's own guilt). A criminal court using evidence obtained by way of coercion violates Article 6, paragraph 1 of the ECHR.[1367] The suspect, *i.e.*, the accused, has the right, though not the obligation, to defend himself/herself in the proceedings. If the accused does not present his/her defence, the court must not come

1365 CH/02/8679 *et al*.-A&M, paragraph 247 in connection with the ECtHR, *Rushiti v. Austria*, Application No. 28389/95, of 21 March 2000, paragraph 31; CH/02/9892-A&M, paragraph 105; AP 767/04, paragraph 25.

1366 AP 2572/05, paragraph 33 in connection with the ECtHR, *Minelli v. Switzerland*, 25 March 1983, Series A no. 62, paragraph 37.

1367 U 22/03, paragraph 30; U 50/03, paragraph 21 in connection with the ECtHR, *Saunders v. United Kingdom*, 17 December 1996, Reports 1006-VI.

to the conclusion that the respective person is guilty for the act he/she has been charged with. The burden of proof always lies on the institutions responsible for the prosecution. If the court is not convinced of the guilt of the accused, or has doubts about his/her guilt, the accused must be cleared of charges.[1368] Moreover, the presumption of innocence conditions the criminal court, if believing that the accused is guilty, to establish with certainty the facts incriminating the accused. On the other hand, the facts in favour of the accused must be considered as established even when they are only probable, *i.e.*, when there is doubt that they exist.[1369] The very fact that the accused, *i.e.*, the defence, has challenged evidence of the prosecution does not prevent the court from assessing the respective evidence as credible and establishing the facts on the basis thereof.[1370] Taking into account previous convictions, in the manner stipulated by law, does not in itself constitute a violation of the right to a fair trial and a violation of the presumption of innocence.[1371]

Statements by the competent authorities **in the previous proceedings** or as part of **"out-of-court" activities**, indicating that there is a suspicion that a certain person had committed a criminal act, that the person was arrested, that the person admitted to the commission of a criminal or similar act, do not violate the principle of presumption of innocence until such time as the competent authority has submitted a formal statement reading that the respective person is guilty of committing a criminal act.[1372] Contrary to this, Article 6, paragraph 2 of the ECHR shall be violated if the court has already, in its arrest warrant, considered that the suspect is guilty of committing a criminal act.[1373] Besides, a violation of the presumption of innocence shall also be found in cases where the competent authorities have brought about the **negative consequences** (for instance, by adopting an administrative act) for a certain person beyond the very criminal proceedings, which are based solely upon the presumption that the mentioned person will be pronounced guilty of having committed a criminal act.[1374] However, the principle of presumption of innocence may neither be applied in the case that a decision on revoking a citizenship is made,[1375] nor in the case that a decision is made on depriving one from the right to enter

1368 AP 5/05, paragraph 29 in connection with the ECtHR, *Barbera, Messeque and Jabardo v. Spain*, 6 December 1988, Series A no. 146, paragraph 29.

1369 AP 1603/05, paragraph 41.

1370 AP 767/04, paragraph 26.

1371 AP 579/05, paragraph 29.

1372 CH/02/9892-A&M, paragraph 106 (there is no violation), in connection with the EComHR, *Krause v. Switzerland*, Application No. 7986/77, 13 DR (1978) 73.

1373 CH/03/14486, paragraph 91 *et seq.*

1374 CH/02/9892-A&M, paragraph 109, concerning a temporary revocation of an operating permit for a coffee shop from the person under the investigation.

1375 CH/02/8679 *et al*.-A&M, paragraph 244 in connection with the EComHR, *S. v. Switzerland*, Application No. 13325/87, of 15 December 1988, DR 59, p. 257.

a country, and the right to stay in a country, or that a decision is made on deportation of a person,[1376] as such a decision does not imply deliberation on either a "civil right or obligation", or "on the well-foundedness of any criminal charges" against the respective person. Therefore, negative consequences must relate to a specific "civil right or obligation", namely to a criminal charge within the meaning of Article 6, paragraph 1 of the ECHR. Moreover, the principle of presuming innocence may be applied on a case-by-case basis and beyond a criminal proceeding, if there is a sufficiently firm link with the criminal proceeding.[1377] For, under certain circumstances, not only a judge and a court, but also other State institutions, may be held to act contrary to the principle of presuming innocence.[1378] In this manner, Article 6, paragraph 2 of the ECHR may be applied even after the completion of criminal proceedings, for instance, in a procedure concerning the costs of the proceedings or in a procedure concerning compensation for damage for unlawful pre-trial detention.[1379] In the procedure of revocation of one's citizenship, according to the Human Rights Chamber for BiH, the presumption of innocence may be applied if during the criminal pre-trial investigation one's citizenship is revoked on the basis of a suspicion about a committed criminal act, whereby the competent institution itself has not assessed the evidentiary material, and consequently by applying fundamental principles of the evidentiary proceedings, reached conclusions relating to crucial facts. Namely, by proceeding in this manner, the competent administrative authority, with the aim to revoke citizenships, has abused the status of the suspects, while at the same time violating the principle of presumption of innocence.[1380]

> In Case No. CH/02/8679, the appellants' citizenships were revoked on the grounds that they were suspected, *inter alia*, of an attempt to carry out international terrorist activities; this is to say that at the time of obtaining their citizenships they did not reveal their intention of offending the Constitution and laws of Bosnia and Herzegovina. The Human Rights Chamber understood the reasoning provided by the administrative authorities as follows: the administrative authorities concluded, exclusively based on the fact that criminal proceedings have been instituted against

1376 CH/02/8679 *et al*.-A&M, paragraph 244 in connection with the ECtHR, *Maaouia v. France*, Application No. 39652/98, of 5 October 2000, Reports of Judgments and Decisions of the ECtHR 2000-X, paragraphs 40-41.

1377 CH/02/8679 *et al*.-A&M, paragraph 248.

1378 CH/02/8679 *et al*.-A&M, paragraph 245 *et seq.*, in connection with the ECtHR, *Allenet de Ribemont v. France*, 10 February 1995, Series A no. 308, paragraph 37, in which, as the pre-trial investigation was underway, two police officers, with the support of the Ministry of the Interior, testified about the suspect's guilt.

1379 CH/02/8679 *et al*.-A&M, paragraph 247 in connection with the ECtHR, *Rushiti v. Austria*, Application No. 28389/95, of 21 March 2000, paragraph 31.

1380 Compare with CH/02/8679 *et al*.-A&M, paragraph 249; next compare with the separate opinion of Judge *Rauschning.*

> the applicants (which, actually, have not been proven at all), that the applicants obtained their respective citizenships by fraud or in other ways stated in the relevant provisions, as the applicants did not reveal to the court their intention of getting involved in such terrorist activities at the time when their applications for citizenship were approved, and that, by doing so, they offended the Constitution and laws of Bosnia and Herzegovina.[1381]

Otherwise, the principle of presuming innocence does not prevent one from establishing in the **civil procedure** the responsibility of the accused for actions that may constitute a criminal act even when he/she has not been convicted in a criminal procedure[1382] Also, a decision on the discontinuation of criminal proceedings because of the application of **the Law on Amnesty** and, to this end, the procedure on the costs of the proceedings, do not speak of the guilt or innocence of the accused within the meaning of Article 6, paragraph 2 of the ECHR, so that the principle of presuming innocence may not be applied.[1383]

Reports by the press on criminal proceedings in certain cases may have detrimental effects on the fairness of a proceeding, particularly in connection with the principle of the presumption of innocence. Such reports cannot be avoided to a certain extent; however, a judge is expected to distance himself from such reports, and to make a judgment in the respective case based exclusively on the evidence presented in the proceeding and on the established facts. In addition, regarding this problem, the freedom of media and the freedom of expression, as well as the right of the State institutions to inform the public about the criminal proceedings, play a certain role. The courts cannot operate in a vacuum. Submitting reports and comments on the proceedings contribute in their way to the publicity of the work, which is in full compliance with the principle of public proceedings referred to in Article 6, paragraph 1 of the ECHR.[1384] It is apparent that any possibility of a violation of the principle of presumption of innocence shall be ruled out if the media report on a legally valid adjudication of the accused (that is of the convicted person at present), as the presumption of innocence applies only up until the moment a sentence has been pronounced.[1385]

1381 Paragraph 241 *et seq*., with quotations referred to in the decision on the revocation of citizenship.

1382 CH/02/8679 *et al*.-A&M, paragraph 248 in connection with the EComHR, *C. v. United Kingdom*, Application No. 11882/85, of 7 October 1987, DR 54, p. 166 *et seq.*

1383 U 24/01, paragraph 21.

1384 Compare, CH/02/11108 *et al*.-A&M, paragraph 122 (there is no violation) in connection with the EComHR, *Berns & Ewert v. Luxembourg*, 6 March 1991, DR 68, p. 161, and the ECtHR, *Worms v. Austria*, 29 August 1997, Reports of Judgments and Decisions of the ECtHR 1997-V, paragraph 50; CH/02/9892, paragraph 107.

1385 AP 2189/06, paragraph 45.

d. Special rights to protection as part of a fair proceeding (Article 6, paragraph 3 of the ECHR)

Guarantees provided for by Article 6, paragraph 3 of the ECHR make up specific aspects of the right to a fair trial, so that they have to be interpreted within the scope of paragraph 1, Article 6 of the ECHR.[1386]

(a) The overlapping of the scope of activities

If a certain person was suspected of having committed a certain criminal offence and if, to that end, there was no official position from a competent authority or an indictment for that matter, and if it is not expected that such person would soon have to appear in court to confront the suspicion of having committed a criminal act, any references to a violation of the right referred to in Article 6, paragraph 3 of the ECHR would be premature. Restrictions on the rights and freedoms of a damaged person, for instance, on the grounds of the arrest based on a suspicion that the person had committed certain criminal acts, might have certain effect in relation to Article 5 of the ECHR.[1387] On the contrary, if the indictment was issued, requirements and standards referred to in Article 5, paragraph 2 of the ECHR should be substituted by those referred to in Article 6, paragraph 3(a) of the ECHR.[1388]

(b) Obligation to inform a person of the nature and cause of the accusation, and the free-of-charge assistance of an interpreter (Article 6, paragraph 3(a) and (e) of the ECHR)

AP 1030/04 Shunlong	20051013
AP 105/03 A. P.	20041130
AP 1089/04 Trivić	20051013
AP 86/05 Kićanović	20051013

Under Article 6, paragraph 3(a) of the ECHR, an accused person has the right to be informed promptly and in detail, in a language he/she understands, of the nature and the reasons for the charges filed against him/her. The purpose of this provision is for the accused to be provided with all information necessary

1386 Compare CH/97/34-A&M, paragraph 124 in connection with the ECtHR, *Granger v. United Kingdom*, 28 March 1990, Series A no. 174, paragraph 43; CH/98/638-A&M, paragraph 79 in connection with the ECtHR, *Barberà, Messegué and Jabardo v. Spain*, 23 September 1987, Series A no. 146, p. 31, paragraph 67.

1387 Compare with CH/02/9499-A&M, paragraph 108.

1388 CH/01/7488-A&M, paragraph 127.

to **prepare his/her defence**, and not to be taken by surprise by the conduct of the prosecution; therefore, this obligation is more comprehensive than the one stated in Article 5, paragraph 2 of the ECHR.[1389] The differing scope of the obligations to give information, under Article 5, paragraph 2 and Article 6, paragraph 3(a) and (b) of the ECHR, may be relevant if the accused, who is already in pre-trial detention, prior to the issuance of an indictment against him/her, has requested to inspect documentation. This does not apply at a later stage though, after the indictment is issued.[1390]

It is considered that an individual has been **accused** for a certain criminal act as soon as significant steps and actions have been taken against him/her.[1391] In so doing, it is necessary to provide him/her with information as to the type of indictment, that is to say about the criminal act he/she has been charged with, as well as about the reasons for issuing the indictment, that is about the facts on which a reasonable suspicion is based.[1392] Also, it is necessary to provide reasoning as to the legal nature of complaints incriminating the individual.[1393]

When it comes to the assessment and interpretation of the term "**promptness**", the moment of arrest is not considered relevant, as is the case with Article 5, paragraph 2 of the ECHR, but the moment of bringing the first indictment against the respective person.[1394] For that reason, the arrested person does not have to be promptly informed, *i.e.*, in the very arrest warrant, of the charges against him/her, but within the shortest time possible.[1395] The ECHR protects the accused person also from unannounced and unexpected substantial amendments to the indictment, as in such cases where the accused is not in a position to defend himself/herself in an appropriate manner against such objections; this shall also apply when the court, based on the domestic

1389 CH/97/34-A&M, paragraph 113 in connection with the EComHR, *Bricmont v. Belgium*, Application No. 10857/84, of 15 July 1986, 48 DR 106, p. 149; CH/01/7488-A&M, paragraph 127 *et seq.*, in connection with the EComHR, *G., S. and M. v. Austria*, Application No. 9614/81, of 12 October 1983, DR 34, p. 121, paragraph 130.

1390 Compare with CH/01/7488-A&M, paragraph 129.

1391 CH/97/34-A&M, paragraph 113 in connection with the ECtHR, *Deweer v. Belgium*, 27 February 1980, Series A no. 35, paragraph 46.

1392 CH/97/34-A&M, paragraph 113 in connection with the ECtHR, *Albert et al. v. Belgium*, 10 February 1983, Series A no. 58, paragraph 41.

1393 CH/01/7488-A&M, paragraph 129 in connection with the ECtHR, *Pélissier v. France*, 25 March 1999, Reports of Judgments and Decisions of the ECtHR 1999-II, paragraphs 51-52.

1394 CH/01/7488-A&M, paragraph 128: Article 6, paragraph 3(a) in conjunction with paragraph 3(b).

1395 AP 86/05, paragraph 29.

positive procedural regulations, is not bound by the indictment, *i.e.*, by its legal definition.[1396]

When it comes to language, the BiH Constitutional Court takes as a starting point the equality of all three official languages (Bosnian, Croatian and Serbian). If the case concerns a citizen of Bosnia and Herzegovina, whereby one or more of the official languages in BiH are being used, the suspect, *i.e.*, the accused, in principle, shall not be entitled to a court interpreter. Namely, the BiH Constitutional Court assumes that all three domestic languages are easily understood.[1397] If other languages are concerned, the court, as a rule, uses its interpreters, as this protects the already proven quality of translations, the independence and impartiality of the court.[1398] However, if the court uses an interpreter "from outside", for instance, an *International Police Task Force UN* (IPTF) translator, for the translation of a witness statement in a previous proceeding,[1399] or a an interpreter engaged by the accused for the interpretation during the main trial,[1400] the rights of the suspect, *i.e.*, of the accused may be violated only if proven that the interpreter, *i.e.*, translator has translated wrongly, or if there are grounds for his/her impartiality to be brought into question. As already said, the burden of proving lies on the suspect, *i.e.*, on the accused.[1401]

(c) The right to defence (Article 6, paragraph 3(b) and (c) of the ECHR)

AP 2050/05 Hrnjičić	20070116
AP 502/04 S. K.	20041130
AP 549/04 Stojkić *et al*.	20051117
AP 55/06 Trokić	20070605
AP 599/04 „Pasuscuro" d.o.o.	20051013
AP 767/04 Samardžić	20051117
AP 978/05 Mijatović	20050913
AP 990/04 A. M.	20050412
CH/02/11995 Hodžić *et al*.	20021011

1396 CH/98/1335 *et al*.-A&M, paragraph 260 *et seq.*, ECtHR, *Pélissier et al. v. France*, 25 March 1999, DR 1999-II, paragraph 54. In a criminal proceeding deliberated on in Case No. CH/98/1335 *et al*., the indictment was made out for an ordinary murder, and although no reasons and arguments for a different conviction were given, the accused was convicted of a war crime – "unlawful killing of [an] enemy".
1397 AP 1089/04, paragraph 27.
1398 AP 1030/04, paragraph 24.
1399 AP 105/03, paragraph 32.
1400 AP 1030/04, paragraph 24.
1401 *Ibid.*

CH/02/9892-A&M Lazić	20030905
CH/03/14459 Arsenić	20070626
CH/98/934-A&M Garaplija	20000706
U 2/02 F. Ć.	20030627
U 50/03 D. P.	20040721

Under Article 6, paragraph 3(b) of the ECHR, the accused must be given enough time and must be provided with facilities in order to be able to properly prepare his/her defence, he/she must not be denied the possibility to present arguments of defence before the court, as that would, otherwise, affect the outcome of the proceedings.[1402] As to whether the accused has been given enough time to prepare his/her defence will depend on the circumstances of each individual case, the main role being attributed to the complexity of the case and to the defence counsel's workload.[1403] This shall also apply in the event of subsequent amendments to the indictment. Should that occur during the main trial, the accused would have the right to request for the proceedings to be suspended in order to prepare his/her defence.[1404]

Restrictions on the defence may be accepted in certain cases, for instance, where the accused has no chance or possibility to challenge the decision on admissibility of a certain piece of evidence, where the accused has no opportunity to give his/her opinion following the reading of the minutes on the hearing of a witness, or where he/she has no opportunity to cross-examine a witness in a contradictory procedure. In these cases, a violation of the right to prepare the defence shall be found, and that is particularly pronounced in cases when the challenged judgment is based precisely on such evidence.[1405]

While Article 6, paragraph 3(b) of the ECHR exclusively pertains to the preparation of the defence, Article 6, paragraph 3(c) of the ECHR guarantees the general right to use legal assistance and the support of a lawyer-defence counsel throughout the entire proceedings.[1406] It is important that the suspect has defence counsel present during police questioning, *i.e.*, during the pre-trial investigation.[1407] The defence counsel must have a power of attorney or

1402 CH/97/34-A&M, paragraph 123 in connection with the EComHR, *Can v. Austria*, 30 September 1985, Series A no. 96, p. 5.

1403 CH/02/9892-A&M, paragraph 114 in connection with the ECtHR, *Albert et al. v. Belgium*, 10 February 1983, Series A no. 58, paragraph 41; EComHR, Application No. 7909/77, of 12 October 1978, DR 15, p. 160.

1404 AP 990/04, paragraph 21; AP 978/05, paragraph 25.

1405 AP 549/04, paragraph 32 *et seq.*; AP 55/06, paragraph 32.

1406 CH/98/1366-A&M, paragraph 86, with quotations from the EComHR, *Can v. Austria*, 12 July 1984, Series A no. 96, paragraph 54.

1407 CH/01/7912 *et al*.-A&M, paragraph 204 in connection with the ECtHR, *Imbrioscia v. Swtizerland*, 24 November 1993, Series A no. 275, paragraph 36, and *John*

be authorised by law. If these prerequisites are not in place, the court must not take into account the statements given by the person concerned.[1408] Still, the right to defence counsel is not an absolute right and it may be subject to restrictions in exceptional circumstances. Nevertheless, it is permitted when necessary and when it does not negatively affect the defence of the accused. That should be the case if the accused was forced to self-incrimination, or should he be subsequently charged with his previous silence.[1409] If the accused has more than one defence counsel, Article 6, paragraph 3(c) of the ECHR shall not be violated if all of them are not present during the proceeding.[1410]

Also, under the ECHR, the request for assistance of required defence counsel is not unrestricted. The legislature ought to determine under which conditions and the time when it is necessary for the required defence counsel to make himself/herself available.[1411] In considering the question when the required defence counsel must be placed at the disposal of the accused, it is necessary to take into account the financial situation of the accused, the complexity of the case, capacity of the accused to defend himself/herself, and the gravity of the punishment anticipated in the respective case.[1412] The right to an *ex officio* defence counsel, among other things, presumes that the *ex officio* defence counsel is qualified enough so as to be able to conduct the defence at a certain stage of the proceeding.[1413] Formal assignment of an *ex officio* defence counsel does not meet this standard, as Article 6, paragraph 3(c) of the ECHR does not mention "assignment", but the "assistance" of a defence counsel. Although, the State is responsible for regulating this issue, the State, however, cannot be responsible for each and every omission on the part of the *ex officio* defence counsel. Taking into account the independence of a lawyer, in principle, the defence is a matter that the defence counsel and his/her client (the defendant) must reach an agreement on. This shall apply in particular if it concerns the free choice of a defence counsel. When it comes to an *ex officio* defence counsel, the state authorities assume certain monitoring obligations, as the accused may not affect the selection of an *ex officio* defence counsel. If the *ex officio*

Murray v. United Kingdom, 8 February 1996, Reports of Judgments and Decisions of the ECtHR 1996-I, paragraphs 63-66.

1408 AP 599/04, paragraph 30 *et seq.*

1409 CH/01/7912 *et al*.-A&M, paragraph 204.

1410 U 2/02, paragraph 21.

1411 CH/00/3880-A&M, paragraph 191.

1412 CH/00/3880-A&M, paragraph 191 in connection with the ECtHR, *Quaranta v. Switzerland*, 24 May 1991, Series A no. 205. Article 6, paragraph 3(c) of the ECHR requires, thereby, *effective* court defence (CH/98/934-A&M, paragraph 47 in connection with the ECHR), *Artico v. Italy*, 13 May 1980, Series A no. 37, paragraph 34; U 50/03, paragraph 27.

1413 CH/98/934-A&M, paragraph 49.

defence counsel withdraws from the case or does not fulfil his assignments in terms of “effective defence”, the responsibility of the State is only to warn him/her to duly perform his/her duties, or to replace him/her if such omissions have become evident, unless the State authorities have indicated otherwise.[1414] If the law shall provide for an *ex officio* defence, Article 6, paragraph 3(c) of the ECHR does not guarantee the right of the suspect, *i.e.*, of the accused, to engage a defence counsel of his/her choosing or to select a defence counsel from the court list of the *ex officio* defence counsels.[1415]

Article 6 of the ECHR *explicite* does not guarantee the right of the suspect, or of the accused to **freely communicate with his/her defence counsel**. Such a right, however, arises from within the scope Article 6, paragraph 3 of the ECHR. Yet, the aforementioned does not mean that the right to communication with one’s defence counsel must be guaranteed in absolute terms without any restrictions whatsoever.[1416] Given the great significance of the right to defence,[1417] in principle, the suspect must be given a possibility, as early as the initial stage of the pre-trial investigation actions, to consult with his/her defence counsel without hindrance and without the presence of other persons. Why? The defence counsel does not have to prepare himself/herself only for the main hearing,[1418] but he/she also has to be ready to oversee the initial stages of the proceedings, such as the review of lawfulness of taking certain measures in the pre-trial investigation, preparation of requests for the evidentiary procedure, and especially for the preparation of the defence in relation to the reasons for, length of and conditions in pre-trial detention. Some of these functions pertaining to the assistance of the defence counsel shall be endangered or frustrated if the defence counsel is allowed to communicate with his/her defendant only in the presence of a court officer. Whether a court officer must be physically separated from the defence counsel and his/her defendant shall depend on the circumstances of each individual case. If during the communication between the defence counsel and the defendant, a court officer is in another room, which is separated by a glass partition from the room where the defence counsel and his defendant are, one may not say that the right to free communication has been violated.[1419] Exceptions to the principle of

1414 CH/01/7912 *et al*.-A&M, paragraph 123 *et seq.*, in connection with the ECtHR, *Artico v. Italy*, 13 May 1980, Series A no. 37, *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, paragraph 65, and the ECtHR, *X v. Germany* (Application No. 6946/75), of 6 July 1976, DR 6, p. 114.

1415 CH/02/11995, paragraph 15; CH/03/14459, paragraph 23 *et seq.*

1416 CH/98/1366-A&M, paragraph 85 *et seq.*, in connection with the EComHR, *Can v. Austria*, 12 July 1984, Series A no. 96, paragraph 52.

1417 AP 767/04, paragraph 35 in connection with the ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 1984, Series A no. 80.

1418 AP 767/04, paragraph 36.

1419 U 2/02, paragraph 29.

confidentiality of defence require a special legal reason and justification.[1420] If the defence counsel and the defendant are separated by a thick glass wall for security reasons, with the communication being physically feasible, this may be in compliance with Article 6, paragraph 3(c) of the ECHR.[1421] A clear violation of Article 6, paragraph 1 and paragraph 3(b) and 3(c) of the ECHR shall exist if (under the old law) the investigating judge has not allowed the suspect to contact his/her defence counsel prior to the first hearing, and the convicting judgment has relied on a statement given by the accused on that occasion.[1422] The requirements of defence, in terms of the right to a fair trial referred to in Article 6, paragraph 3(b) in conjunction with paragraph 1 of the ECHR, shall not be met in a situation when the accused meets his/her defence counsel for the very first time at the main hearing.[1423] However, there is no such right enabling the defendant to arrange the possible answers to the questions asked by the court and the prosecution.[1424]

The suspect, *i.e.*, the accused has the right to **forgo** the assistance of a defence counsel. However, the court must be cautious in such a case, especially if there are reasons indicating that the suspect, *i.e.*, the accused, is unaware of the consequences of waiving the right to defence counsel. The court should not decide on behalf of the suspect, *i.e.*, the accused, on waiving the right to the assistance of defence counsel. He/she alone should make a decision as to the respective right.[1425] If the accused was informed of the right to use the assistance of defence counsel, and he/she waived that right, he/she may not complain afterwards that he/she did not have the right to a defence counsel.[1426]

(d) Presenting evidence and witnesses (Article 6, paragraph 3(d) of the ECHR)

AP 105/03 A. P.	20041130
AP 223/06 R. J.	20070215
AP 2238/05 Tomić	20061117
AP 476/04 R. V.	20040630
AP 506/04 Kopić	20050923
AP 662/04 Halilagić	20051220

1420 CH/98/1366-A&M, paragraph 86, with quotations from the EComHR, *Can v. Austria*, 12 July 1984, Series A no. 96, paragraphs 55-57.
1421 AP 767/04, paragraph 35.
1422 CH/98/1366-A&M, paragraph 87 *et seq.*
1423 CH/97/34-A&M, paragraph 125.
1424 AP 767/04, paragraph 36.
1425 CH/01/7912 *et al*.-A&M, paragraph 204.
1426 Compare, CH/97/34-A&M, paragraph 118 et seq.; AP 502/04, paragraph 21; AP 2050/05, paragraph 38.

AP 679/04 Veljko *et al*. Lazić	20050913
AP 91/04 A. D.	20050223
CH/02/9892-A&M Lazić	20030905

Article 6, paragraph 3(d) of the ECHR contains, in principle, two rights: the right of the accused to examine prosecution witnesses and the right for the attendance and the hearing of defence witnesses to be granted under the conditions applicable to the prosecution witnesses. These two rights are independent of each other. Article 6, paragraph 3(d) of the ECHR; however, does not contain the right to present other evidence, for instance, to present evidence by way of "reconstructing an event". The lawfulness of rejecting or refusing certain evidence can only be discussed within the scope of Article 6, paragraph 1 of the ECHR.[1427]

In principle, the task of the ordinary courts is to assess the available evidentiary material and the relevance of the evidence which the accused has requested to be presented.[1428] Therefore, pursuant to Article 6, paragraph 3(d) of the ECHR, it is up to the domestic courts to assess whether it is necessary to hear certain witnesses or to present expert analysis; the BiH Constitutional Court, the Human Rights Chamber for BiH or the Human Rights Commission within the BiH Constitutional Court are tasked only with establishing whether the proceedings as a whole, including the evidentiary proceedings, have been fair and just.[1429] Within the scope of the principle of "equality of arms" the defence has the right to summon witnesses and to cross-examine them; it is important as a rule that the defence has the right to attend the hearing of witnesses in the proceedings conducted against the accused.[1430] Nevertheless, the court is not obliged to summon and hear all witnesses who have been proposed, and there is no obligation for all the witnesses to be cross-examined. There is an exception concerning the so-called protected witnesses.[1431] Also, it is lawful and allowed for the minutes of the statements of witnesses, who cannot be heard *in persona* before the court for objective reasons, to be read at the main hearing provided that the defence may, thereafter, give its opinion in relation

1427 AP 476/04, paragraph 21.

1428 CH/98/1324-A&M, paragraph 69, and CH/98/1335 *et al*.-A&M, paragraph 251, both in connection with the ECtHR, *Barbèra, Messegué and Jabardo v. Spain*, 6 December 1988, Series A no. 146, paragraph 68.

1429 CH/98/1324-A&M, paragraph 69, and CH/98/1335 *et al*.-A&M, paragraph 251, and CH/97/34-A&M, paragraph 129, both in connection with the ECtHR, *Asch v. Austria*, 26 April 1991, Series A no. 203, paragraphs 25-26; *Vidal v. Belgium*, 22 April 1992, Series A no. 232-A, paragraph 33, U 53/02, paragraph 31; CH/98/1366-A&M, paragraph 90; CH/98/1335-A&M *et al*., paragraphs 251 and 253.

1430 CH/02/9892-A&M, paragraph 122 in connection with the EComHR, *Krupp v. Denmark*, 42 DR (1985), p. 287; AP 55/06, paragraph 32.

1431 AP 105/03, paragraph 25.

to the statements.[1432] However, in such case a judgment cannot be exclusively based on such statements.[1433]

As the very wording of Article 6, paragraph 3(d) of the ECHR "under the conditions applicable to the prosecution witness" requires, it is crucial for the prosecution and defence to comply with the principle of "equality of arms".[1434] An apparent imbalance between the number of witnesses for the prosecution and for the defence may violate the right to a fair proceeding, as may the refusal of the court to hear certain witnesses if it is expected that hearing such witnesses can generate relevant statements in favour of the accused.[1435] The accused must, however, provide reasons and convince the court that such witnesses may offer particularly important statements in favour of the defence.[1436] If the court rejected or refused to hear a certain witness, although the accused had requested for the witness to be heard, the court must provide the reasoning for such a decision.[1437] One cannot object if the court does not summon a certain witness whose name the defence had refused to disclose.[1438] Similarly, Article 6 of the ECHR would not be violated if the court, with the consent of the defence, read the minutes on the hearing of witnesses, as the defence waived the right to cross-examine witnesses.[1439] False statements of witnesses *per se* do not bring into question the fairness of the proceedings; however, should a competent authority influence a witness, which would result in giving a false statement, the fairness of the proceedings could be brought into question.[1440] Presenting evidence by way of reconstructing events, should the accused be forced to do so – whereby witnesses were being shown photos during the hearing which appeared to have shown the applicant reconstructing the crime – although the trial minutes did not mention that any such photos had been shown, might not be in compliance with the right to a fair trial.[1441]

Usability, relevance and authenticity of unlawfully obtained evidence shall be assessed on a case-by-case basis, which is the responsibility, first and

1432 AP 506/04, paragraph 25; AP 679/04, paragraphs 26, 30.

1433 AP 2238/05, paragraph 22; AP 91/04, paragraph 32; AP 223/06, paragraph 26 *et seq.*

1434 Compare, CH/98/1335 *et al*.-A&M, paragraph 251 in connection with the ECtHR, *Engel et al. v. Holland*, 8 June 1976, Series A no. 22, paragraph 91.

1435 Compare, CH/98/1335 *et al*.-A&M, st. 252, 267 *et seq.*, in connection with the ECtHR, *Vidal v. Belgium*, 22 April 1992, Series A no. 232-A, paragraph 34.

1436 AP 662/04, paragraph 37.

1437 CH/00/6558-A&M, paragraph 68 in connection with the ECtHR, *Vidal v. Belgium*, 22 April 1992, Series A no. 235, paragraph 34.

1438 CH/98/1335 et al.-A&M, paragraph 275.

1439 Compare, CH/98/1335 et al.-A&M, paragraph 276.

1440 CH/98/1335 *et al*.-A&M, paragraph 249; CH/98/1335-A&M *et al*., paragraph 249.

1441 CH/98/1335 *et al*.-A&M, paragraph 271 *et seq.*

foremost, of the ordinary courts. Use of unlawfully obtained evidence is not *per se* prohibited within the meaning of Article 6 of the ECHR. The purpose of the fairness of proceedings is of crucial importance, and it relates to whether the rights of the defence have been sufficiently protected throughout the entire proceedings, and whether sufficient counter-measures have been taken in order to redress any unlawfulness occurring during the proceedings. To this end, it is necessary to take into account the answers to questions regarding how the evidence has been obtained, what is the extent of the violations of the Convention, what is the effect of disputable evidence on the final outcome of the proceedings and whether a decision on guilt relies on other evidence as well. In certain cases, a piece of evidence obtained in a way contrary to the standards laid down in the Convention may be used if a conviction for a criminal act is based exclusively on it, if obtained in accordance with the standards of domestic positive legal norms and if constituting firm evidence. Evidence of entering a guilty plea must be interpreted on the basis of more severe criteria, particularly if it is found that it was obtained under duress. Finally, it is relevant whether the defence has had a chance to challenge the usability of certain evidence and whether the issue of relevance and authenticity of a certain piece of evidence has been discussed in the presence of the defence.[1442]

Errors in relation to evidence at an earlier stage of the criminal proceedings can be **corrected** at a later stage of the criminal proceedings. Thus, the right to a fair trial shall not be violated if the court fails to inform the accused of the hearing of a protected witness at the stage of preparing the main hearing. However, the respective error must be corrected during the main hearing.[1443]

6. No punishment without law (Article 7 of the ECHR)

> **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.**

1442 CH/01/7912 *et al*.-A&M, paragraph 205 *et seq.*, in connection with the ECtHR, *Khan v. United Kingdom*, 12 May 2000, Reports of Judgments and Decisions of the ECtHR 2000-V, paragraph 34, and *Schenk v. Switzerland*, 12 July 1988, Series A no. 140.

1443 AP 506/04, paragraph 30.

AP 1129/06 "Bringing the arrested persons before the Court BiH"	20060613
AP 114/02 I. Š.	20041027
AP 1785/06 Maktouf	20070330
AP 2398/06 Bilić	20061109
AP 622/04 Čubela	20050913
AP 632/04 Imširović	20051013
AP 68/03 E.S.	20050722
CH/01/7912 *et al*.-A&M Landžo *et al*.	20030110
CH/03/14958 Grabovac	20060913
CH/97/34-A&M Šljivo	19980910
CH/98/1324-A&M Hrvačević	20020308
CH/98/1366-A&M V.Č.	20000309
U 24/03 Adnan Terzić	20040922

a. *Nullum crimen sine lege, nulla poena sine lege* (paragraph 1)

Article 7, paragraph 1 of the ECHR establishes a specific prohibition of retrospective criminal laws – the principle *nullum crimen sine lege, nulla poena sine lege*. No one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. In addition, a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed. Therefore, the prohibition against retrospectivity relates to the factual substrates and heavier *penalties.*

Article 7 of the ECHR is one of the basic elements of the principle of the rule of law contained in Article I(2) of the Constitution of BiH. Thus, this principle has a prominent place in the system of protection of the rights safeguarded by the ECHR.[1444] The notion **criminal offence** is defined by adequate qualification standards stated in Article 6 of the ECHR (a criminal charge) and, therefore, Article 7 of the ECHR is also applicable to disciplinary and administrative proceedings, which fall under the scope of Article 6 of the ECHR.[1445] Whether or not the principle *nullum crimen sine lege, nulla poena sine lege* is violated may be assessed only after **the exhaustion of all effective legal remedies available under the law**.[1446]

The punishment for a certain action must be **stipulated by law** at the time when the action is taken and it must be defined clearly and comprehensively

1444 AP 1785/06, paragraph 62.

1445 AP 1785/06, paragraph 61; CH/01/7912 *et al*.-A&M, paragraph 112; about the preconditions for application of Article 6 of the ECHR, see: "iv. "A criminal charge"," p. 264.

1446 AP 1129/06, paragraph 7.

to allow an individual to adjust his/her conduct accordingly. Therefore, it must be possible to observe the punishability from the linguistic interpretation of criminal-law provisions. Consequently, **the prohibition of analogy** in interpreting criminal-law provisions is applicable. Finally, the legal basis has to meet the principles of the rule of law.[1447]

> For that reason, the BiH Constitutional Court's decision taken in Case No. AP 622/04 is unsatisfactory. By that decision, the Constitutional Court of BiH, without any further reasoning, rejected the appeal as *prima facie* inadmissible. Namely, the appellant complained that he had been convicted of the criminal offence of illicit production of and trafficking in narcotics. Pursuant to Article 2 of the Law on Production of and Trafficking in Narcotics,[1448] in the appellant's view, marijuana, *i.e.*, tetrahydrocannabinol, was not defined as a prohibited narcotic substance at the time he had committed the acts for which he was charged.[1449] The Law on Production of and Trafficking in Narcotics prohibited the production of and trafficking in narcotics (Article 1). Article 2 of the said Law provided the definition of synthetic and natural narcotics in general. However, pursuant to the provisions of that Article, the competent public health authorities were obliged to establish a list of prohibited narcotics, which had to be published in the *OG of SFRY*. The list of prohibited narcotics had existed since 1978.[1450] However, the new list, created on the basis of the Law on Production of and Trafficking in Narcotics, was neither established nor published. The Constitutional Court of BiH failed to deal with these allegations of the appellant. Pursuant to Article 7 of the ECHR, it was necessary to give an answer as to whether the 1978 Law was applicable. Furthermore, it was necessary to take into consideration the issue of "determinability" of the elements of the criminal offence of illicit production of and trafficking in narcotics in the relevant case given that the competent administrative authorities (the competent public health institution), which were legally obliged to define the elements of the criminal offence, failed to meet their legal obligation to create and to publish the list of prohibited substances.

Article 7 of the ECHR stipulates **the prohibition on retrospective criminalisation, which applies only to the substantive laws**, in conjunction with **the punishability** and **the severity of punishment**. Therefore, it is necessary to make a distinction between punishability and

1447 Compare AP 1785/06, paragraph 64; AP 795/04, paragraph 20 in conjunction with ECtHR, *Kokkinakis v. Greece* of 25 May 1993, Series A, No. 260-A, paragraph 52.

1448 *OG of SFRY*, No. 13/91.

1449 AP 622/04, paragraphs 5, 10; similar to AP 632/04, paragraph 9 *et seq*.

1450 *OG of SFRY*, No. 55/78, a legal act by the Federal Executive Council.

criminal prosecution. Circumstances preventing criminal prosecution such as, for example, a retrospective revocation of immunity, do not fall within the ambit of the protection afforded by Article 7 of the ECHR.[1451] In addition, Article 7 of the ECHR does not apply to criminal procedural law. Finally, the prohibition of retrospective criminal laws also cannot be applied where the state retroactively specifies certain means of securing the conduct of criminal proceedings (such as, for example, an investigative detention because of circumstances that occurred before the relevant provision has become effective).[1452]

Article 7 of the ECHR prohibits the imposition of a penalty which is heavier than the one that was applicable at the time the offence was committed. The imposition of lesser penalties does not fall within the scope of the protection offered by this Article. In cases where an injured party holds that a heavier penalty has been imposed, the injured party has the burden of proving the arguments before the court.[1453]

b. Punishment according to the general principles of law recognised by civilised nations

The objective of the provisions of paragraph 2 is to fill the gaps within the domestic criminal legislation, which could be subject to the prohibition of retrospective laws. As a result, the sentencing and punishment of a certain person cannot be ruled out in cases where the person is charged with an offence on account of any act or omission, which, at the time it was committed, was criminal according to general principles of law, recognised by civilised nations.

During the war in Bosnia and Herzegovina, *war crimes* were legally punishable as crimes under international law. The Former SFRY signed and ratified, *inter alia*, the four Geneva Conventions and the 1977 Additional Protocols. At the time of the declaration of independence, *i.e.*, on 6 March 1992, the Republic of Bosnia and Herzegovina obliged itself to comply with international law, which had been ratified by SFRY. Accordingly, the prohibition of retrospective laws under Article 7 paragraph 1 of the ECHR does not prevent the punishment of war crimes committed between 1991 and 1995.[1454]

As to the prohibition to impose a heavier penalty, a very interesting issue arose before the Constitutional Court of BiH and the Human Rights Chamber for BiH. Actually, pursuant to the Criminal Code of SFRY applicable during the

1451 CH/03/14958, paragraph 18 *et seq.*; see, also, AP 68/03, paragraph 9 *et seq*., and U 24/03, paragraph 67 *et seq*.

1452 AP 2398/06, paragraph 14 *et seq*.

1453 AP 114/02, paragraph 33.

1454 CH/97/34-A&M, paragraph 65; CH/98/1366-A&M, paragraph 55.

war, a maximum penalty that could be imposed was 20 years imprisonment or the death penalty. In the Criminal Code of FBiH, which was applicable after the war, the legislature increased the penalty to a maximum term of imprisonment of 40 years. Upon the entry into force of the Constitution of BiH and, accordingly, of the Second Optional Protocol to the International Covenant on Civil and Political Rights,[1455] the possibility of imposing the death sentence as an alternative to imprisonment in Bosnia and Herzegovina was abolished. Given such legal developments, *inter alia*, the arguments were presented before the Constitutional Court of BiH and the Human Rights Chamber for BiH according to which the severity of penalties had to be determined consistent with a maximum penalty stipulated by the Criminal Code of SFRY (20 years imprisonment), and not in accordance with the new Criminal Code of FBiH (40 years imprisonment). In proceedings conducted before the Human Rights Chamber for BiH, it was possible to circumvent a direct answer to this question by presenting the fact that the penalties imposed in the relevant case had been 9 years imprisonment and 12 years imprisonment, respectively, so that the consideration of the issue related to the maximum penalty within the meaning of Article 7 paragraph 1 of the ECHR was unnecessary.[1456]

In its Case No. AP 1785/06, the Constitutional Court of BiH presented its view in respect of the said relationship between the prison sentence and the death penalty, although the prison sentence imposed in that case was substantially below the legal maximum – the appellant was sentenced to 5 years imprisonment. According to the view of the Constitutional Court of BiH, the retrospective imposition of a heavier penalty does not constitute a violation of Article 7 paragraph 1 of the ECHR, if it is justified under paragraph 2 of the same Article. Article 7 paragraph 1 of the ECHR prohibits neither the retrospective application of the law nor does it exclude reconviction for the same offence (the principle of *ne bis in idem*). Article 7 paragraph 1 of the ECHR is limited to cases in which an accused person is found guilty and convicted of a criminal offence.[1457] Article 7 paragraph 2 of the ECHR refers to "the general principles of law recognised by civilised nations", and Article III.3(b) of the Constitution of BiH incorporates "the general principles of international law" into the domestic legal system. Thus, the Statute of the ICTY is also part of the legal system of Bosnia and Herzegovina.[1458] There is no violation of Article 7 paragraph 1 of the ECHR if the domestic law does not stipulate criminal

1455 See: "d. Optional Protocol No. 2 to the International Covenant on Civil and Political Rights, whose aim is the abolishment of the death penalty", p. 178; "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.

1456 Compare CH/01/7912 *et al*.-A&M, paragraph 113.

1457 AP 1785/06, paragraph 72.

1458 *Ibid*., paragraph 71.

sanctions for certain offences at the time of their commission. However, these offences are war crimes under international law.

By using these arguments in Case No. AP 1785/06, the Constitutional Court of BiH does not rely on the punishability and penalty prescribed by the domestic legal system, but the one prescribed in accordance with international law, *i.e.*, the four Geneva Conventions and the 1977 Additional Protocols, the Convention on the Prevention and Punishment of the Crime of Genocide, and the general principles of law recognised by civilised nations.[1459] The wording of Article 7 paragraph 2 of the ECHR is not restrictive and it has to be construed dynamically. Furthermore, this Article encompasses also other acts which imply immoral behaviour generally recognised as criminal according to national laws.[1460]

In its Case No. AP 1785/06, the Constitutional Court could also rely on the judgment of the ECtHR in the case of *Naletilić*.[1461] In the said judgment, the European Court presented its arguments according to which the issue of the application of a "more lenient law" ought to be assessed under paragraph 2 rather than paragraph 1 of Article 7 of the Convention. The Constitutional Court of BiH provides the reasoning for such a position also based on the case-law related to the Nuremberg and Tokyo Military Trials conducted in 1945 and 1946. At that time, the accused were sentenced for crimes that were only subsequently, *i.e.*, by the Geneva Conventions, legally defined.[1462] At any rate, the concept of individual criminal responsibility for acts committed contrary to the Geneva Conventions or appropriate national laws is very closely related to the concept of human rights protection. Namely, human rights and related conventions concern, *inter alia*, the right to life, the right to physical and emotional integrity and the prohibition of slavery and torture. As a rule, violations of these rights lead to criminal responsibility under law. Therefore, inadequate sanctions for perpetrators of crime or a lack of protection of victims would contravene the principle of fairness and the rule of law.[1463]

Similar issues arose in Case No. AP 656/04. The appellant was charged with the offence of the murder of two or more persons. At the time the offence had been committed, a sentence of 10 years imprisonment *or* the death penalty was prescribed in the Criminal Code of the Republika Srpska – *Special Part*.[1464] At that time, the maximum term of imprisonment under the Criminal Code

1459 *Ibid*., paragraph 73.
1460 *Ibid*., paragraph 75.
1461 ECtHR, *Naletilić v. Croatia*, Application No. 51891/99 of 4 May 2000.
1462 AP 1785/06, paragraph 77.
1463 *Ibid*., paragraph 78.
1464 *OG of RS*, Nos. 15/92, 4/93, 17/93, 26/93, 14/94 and 3/96.

of the Republika Srpska – *General Part*,[1465] was 15 years. Exceptionally, the maximum term of imprisonment under the Criminal Code of the Republika Srpska – *Special Part*, for the offences for which the death penalty could be imposed, was 20 years. As the possibility to impose the death penalty had been ruled out after the entry into force of Protocol No. 6 to the ECHR, the appellant before the Constitutional Court of BiH presented his arguments asserting that the prison sentence had to be assessed under the general provisions governing the maximum term of imprisonment (that is, 15 years), and not under the exceptions prescribed for offences for which the death penalty might be imposed (20 years imprisonment). The Constitutional Court of BiH disagreed with the appellant's view and underlined that the maximum term of 20 years imprisonment had not been prescribed as a replacement for the death sentence but as an alternative punishment. We are inclined to support this view given that the decisive issue is related to the severity of the penalty for an offence, which a perpetrator can "count on" at the time of the offence. In cases where the law foresees alternative punishments and, subsequently, one of those is ruled out (in the relevant case, the death penalty), the perpetrator cannot claim that another alternative is ruled out, too, and that the general rules on the imposition of a prison sentence must be applied. The perpetrator was aware that he could be subject to the death penalty or the sentence of 20 years imprisonment at the time the offence was committed.

7. Right to respect for private and family life (Article 8 of the ECHR)

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.

a. Introduction

Article 8 paragraph 1 of the ECHR guarantees to everyone the right to respect for his private and family life, his home and his correspondence. The essential object of Article 8 is to protect the individual against **arbitrary interference**

1465 *OG of SFRY*, Nos. 44/76, 34/84, 37/84, 74/87, 57/89, 3/90 and 38/90, and *OG of RS*, Nos. 12/93, 19/93, 26/93, 14/94 and 3/96.

by public authorities.[1466] Article 8 therefore encompasses primarily **a sphere of private life**, the right to live, as far as one wishes, protected from publicity and to develop relationships with other human beings.[1467] On the other hand, Article 8 of the ECHR does not protect the right to work as well, as it does not afford protection against unemployment and other related rights and material claims.[1468]

However, the protection of the private sphere is not unrestricted. Nevertheless, in order for an interference to be justified, it must be in accordance with the law and it must be the measure 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.

An interference is **in accordance with the law** if it meets the following conditions: (a) the interference must be based on national 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 citizen to regulate his conduct.[1469] If it turns out that the interference is in accordance with the law, even then it can constitute a violation of Article 8 of the ECHR provided that it is considered that it is not necessary to achieve one of the "legitimate aims" under Article 8 paragraph 2 of the ECHR. "**Necessary**" in this context means that the interference corresponds to social needs and that there is reasonable proportionality between the interference and the legitimate aim pursued.[1470]

b. Right to respect for private and family life

AP 1031/04 S. B.	20050426
AP 1040/05 Baraković	20060209
AP 1788/05 Atmani	20060920
AP 346/04 M. K.	20050118
AP 60/03 I. H.	20040723
AP 83/03 S. M.	20040929

1466 U 14/00, paragraph 17 in conjunction with ECtHR, *Kroon v. the Netherlands*, judgment of 27 October 1994, paragraph 31; CH/02/8767-A&M, paragraph 100.

1467 CH/99/2696-A&M, paragraph 59.

1468 *Ibid*.

1469 AP 1031/04, paragraph 18, with reference to *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, paragraph 49).

1470 *Ibid*., paragraph 19.

CH/00/3880-A&M Marjanović	20021108
CH/00/4033-A Hodžić	20030506
CH/00/4820-A Čajević	20001012
CH/00/5480-A&M Dautbegović	20010706
CH/00/5514 H. S.	20051214
CH/01/8365 *et al.*-A&M Selimović *et al*. (Srebrenica)	20030303
CH/01/8569 *et al.*-A&M Pašović *et al*. (Foča)	20031107
CH/02/8879 *et al.*-A&M Smajić *et al.* (Višegrad)	20031205
CH/03/13051-A&M S.S.	20031107
CH/03/13460 Karajić	20060206
CH/03/14055-A&M Gajić	20031205
CH/98/892-A&M Mahmutović	19991008
CH/99/2150-R Unković	20020510
CH/99/2688-A&M Savić	20031222
CH/99/3196-A&M Palić	20010111

Article 8 of the ECHR protects an individual against **arbitrary interference with** his/her **private and family life by public authorities**. Besides, a State has a positive obligation, inherent in an effective respect for private or family life, to provide **positive protection** to an individual. The positive obligation on the State to provide protection may involve the adoption of measures to secure respect for private and family life where endangered by third persons. The boundaries between the positive and negative obligations under Article 8 of the ECHR are not always precisely defined.[1471] Vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.[1472] Thus, a victim of crime may claim a violation of the right to private and family life in a case where the State has failed to effectively prosecute the perpetrators of a crime and where the victim in the renewed criminal proceedings is placed in a position to risk repeated encounters with the defendants, who could threaten, insult, and assault both his/her person and moral integrity.[1473]

In answering the question as to what is the best protection of certain aspects of the right to private and family life to be afforded, the State enjoys **a certain margin of appreciation**.[1474] However, the use of available procedures and

1471 CH/03/13051-A&M, paragraph 175 in conjunction with ECtHR, *Van Kück v. Germany*, judgment of 12 June 2003, paragraph 70 *et seq.*, and *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A No. 91, paragraph 23.

1472 CH/03/13051-A&M, paragraph 176 in conjunction with ECtHR, *Stubbings et al. v. United Kingdom*, judgment of 22 October 1996, Reports 1996-IV, paragraph 64 (the case regarding the protection of children from sexual abuse).

1473 CH/03/13051-A&M, paragraph 177.

1474 CH/02/8767-A&M, paragraph 100 in conjunction with ECtHR, *Keegan v. Ireland*, judgment of 26 May 1994, Series A No. 290, paragraph 49, and *Kroon et al. v. the Netherlands* of 27 October 1994, Series A No. 297-C, paragraph 31.

legal remedies must ensure the effective and efficient protection of the rights safeguarded by Article 8 of the ECHR. Thus, in certain cases, the protection afforded by the standard civil law is insufficient. In such cases, the criminal law provisions are necessary as an effective prevention mechanism; indeed, it is by such provisions that the matter is normally regulated. Other criminal law measures are necessary so that sanctions have a preventive effect on individuals. In cases where the State fails to secure to an individual or to the courts efficient mechanisms under domestic law for protection of the rights safeguarded by Article 8 of the ECHR, then there is a lack of fair balance which has to be struck between the interests of the individual and the State, and restrictions on an individual's rights are not proportionate within the meaning of this Article.[1475]

> In one particular case, the courts confirmed their inefficiency given that, for six years, the judicial authorities were unable to conclude the criminal proceedings against a doctor, who, at the same time, was a delegate to the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, and his accomplices for the crime of kidnapping and forcible abortion. The courts let the accused use delaying tactics in the criminal proceedings. In addition, the application of the provisions of criminal procedure, which were already unclear, was to the advantage of the accused, while the legitimate interests of the victim to have the criminal proceedings completed within a reasonable time were disregarded. Despite the fact that the accused performed a forcible abortion upon a woman with whom he had shared an intimate relationship, the accused continued carrying out his duties as a physician and a delegate to Parliament, and was not deprived of liberty (detention) for a single day. The Human Rights Chamber found that those legislative and judicial failures of the Republika Srpska constituted a violation of Articles 3 and 8 of the ECHR.[1476]

The right to respect for family life encompasses **the right of access to information** about the fate of close family members. In cases where an injured party may present sufficient evidence to show that state institutions and bodies held control over his/her close relatives, or were in possession of the body (for example, based on evidence that a person was deprived of liberty but apparently never released, or testimonies given by witnesses or information given by relevant institutions such as the International Committee of the Red Cross), the State is in breach of its positive obligation to protect the constitutional rights of the family members of "missing persons" under

1475 CH/03/13051-A&M, paragraph 179 *et seq.*, in conjunction with ECtHR, *Stubbings et al. v. the United Kingdom*, 22 October 1996, Reports 1996-IV, paragraph 63, *X and Y v. the Netherlands*, 26 March 1985, Series A No. 91, paragraph 27, and *Mikulić v. Croatia*, judgment of 7 February 2002, Reports 2002-I, paragraph 62 *et seq.*

1476 CH/03/13051-A&M, paragraph 183 *et seq*., paragraph 193 *et seq*.

Article 8 of the ECHR if the State "with no justified reason" or "arbitrarily" refuses to release information on the fate and whereabouts of close relatives or information on the location of the mortal remains.[1477] This positive obligation to search for **missing persons** and to share with the families all relevant information concerning their relatives after the end of the armed conflict also arises from Article 32 in conjunction with Article 33(1) of Additional Protocol No. 1 to the Geneva Conventions, which, on the basis of Annex I to the Constitution of Bosnia and Herzegovina, constitutes substantive constitutional law.[1478] The objection that information and evidence pertaining to the fate of a missing person was lost or destroyed does not relieve the competent authorities of their positive obligation to release information or to give clarification.[1479] On the other hand, there is no violation of the right to respect for family life under Article 8 of the ECHR[1480] in cases where there are unjustified delays in investigation proceedings conducted against the persons responsible for the disappearance or murder of the applicant's close relatives but the information is eventually disclosed to the applicant.

In the event that the exhumation of a body is ordered and the close relatives have very strong emotional and traditional bonds with the grave of the deceased, there is an interference with the right to respect for private and family life of the close relatives of the deceased.[1481] Besides, the interpretation of the notion "family and close relative" depends on the society in question and social relationships as well as cultural traditions prevailing in the society to which the injured party belongs. Accordingly, in particular cases evidence of direct kinship connection is not essential to grant the protection of Article 8 of the ECHR.[1482]

A sentence of imprisonment by its very nature imposes certain restrictions on the rights protected under Article 8 of the ECHR. Such restrictions are justified under the reasons provided by paragraph 2 of Article 8 of the ECHR only in cases where prisoners are not completely isolated as it is an essential part of both private and family life and the rehabilitation of prisoners that

1477 CH/00/4033-D, paragraph 7; CH/00/4820-D, paragraph 9; CH/99/3196-A&M, paragraph 83 *et seq.*; CH/99/2150-Decision on review, paragraph 122 *et seq.* (126) in conjunction with ECtHR, *Cyprus v. Turkey*, 10 May 2001, paragraph 159; *Gaskin v. the United Kingdom*, 7 July 1989, Series A No. 160, pp. 33, 36 *et seq.*, 49; CH/01/8569 *et al.*-A&M, paragraph 70 *et seq.*; CH/02/8879 *et al.*-A&M, paragraph 84 *et seq.*; CH/01/8365 *et al.*-A&M, paragraph 174.

1478 CH/01/8365 *et al.*-A&M, paragraph 175.

1479 CH/99/2688-A&M, paragraph 67; CH/01/8569 *et al.*-A&M, paragraph 73.

1480 CH/99/2150-Decision on review, paragraph 127.

1481 Compare CH/98/892-A&M, paragraph 84 in conjunction with *X. v. Germany*, DR 24, pp. 137-139.

1482 Compare CH/02/12016-A&M, paragraph 102 in conjunction with the Decision of the UN Human Rights Committee, *Hopu et al. v. France*, Communication 549/1993 of 29 July 1997, paragraph 10.3.

their contact with the outside world be maintained as far as is practicable, with a view to facilitating their rehabilitation. Given that going to jail implies that a prisoner is unable to make contact with close family members, such a punishment amounts to an interference with the rights safeguarded by Article 8 of the ECHR. Therefore, it is necessary to examine whether it is justified within the meaning of paragraph 2 of this Article, *i.e.*, whether it is "covered" by one of the exceptions foreseen in the said paragraph. Article 8 of the ECHR, only in exceptional cases, provides that a prisoner may be transferred to an alternative detention facility closer to his family.[1483]

Construction of a power plant that may interfere with the protected natural heritage assets and, thereby, with the well-being and the right to home of inhabitants living in that area, may constitute an interference with the right to respect for private and family life and home.[1484]

In addition, **proceedings to establish paternity** also fall within the protection afforded by Article 8 of the ECHR. In this regard, the term *family life* in Article 8 of the ECHR is not confined solely to marriage-based relationships and may encompass other *de facto* "family ties" where parties are living together outside marriage and where there is sufficient constancy in their relationship.[1485]

However, if there is not a personal relationship between (a presumed) father and a child, it is not the right to family life which applies, but the right to *private life*. The concept of private life covers the physical and psychological integrity of a person and it may sometimes imply the physical and psychological identity of a person. Respect for *private life* must also comprise to a certain degree the right to establish and develop relationships with other human beings.[1486] Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and it implies that the right of an individual to such information is essential with regard to the formation of one's personality.[1487] Consequently, it is in accordance with the Constitution of BiH

1483 *Compare* CH/00/3880-A&M, pp. 196 and 201 in conjunction with EComHR, *Ouinas v. France* (Application No. 13756/88), 12 March 1990, DR 65, p. 265; *Wakefield v. the United Kingdom*, 1 October 1990, Decisions and Reports No. 66, p. 255.

1484 CH/00/5480-A&M, paragraph 112 *et seq.* in conjunction with ECtHR, *Coster v. the United Kingdom* (Application No. 24876/94), 18 January 2001; *Noack et al. v. Germany* (Application No. 46346/99), 25 May 2000; *Guerra et al. v. Italy*, 19 February 1998, Series A No. 875; Lopez Ostra v. Spain, 9 December 1994, Series A No. 303

1485 AP 1040/05, paragraph 28 in conjunction with ECtHR, *Kroon et al. v. the Netherlands*, 27 October 1994, Series A No. 297-C, paragraph 30.

1486 *Compare* AP 1040/05, paragraph 29 in conjunction with ECtHR, *Niemietz v. Germany*, 16 December 1992, Series A No. 251-B, paragraph 29.

1487 *Ibid*., in conjunction with ECtHR, *Gaskin v. the United Kingdom*, 7 July 1989, Series A No. 159, paragraph 39.

that the court orders that a certain person be subject to relevant medical tests, which do not, necessarily, include DNA testing, in order to obtain information on one's identity.[1488]

Article 8 of the ECHR does not contain any specific rule concerning the question of which parent should be awarded **the custody of children** if the family unit is disrupted by divorce. In principle, this is left to the competent authorities, which have a discretionary power to decide on the basis of the relevant national law and in accordance with the established facts. Nevertheless, disputes over child custody fall within the scope of protection of Article 8 of the ECHR so that the authorities, while taking the decision, must observe the standards of the right to family life within the meaning of Article 8 of the ECHR. Based on the established facts and assessment of all available evidence, the court must take account of a child's well being while taking its decision.[1489] In proceedings concerning custody and access to children in divorce cases, the right to a decision within a reasonable time and efficient proceedings is essential.[1490] Accordingly, when it concerns the right to family life, it is wholly unacceptable that institutions and courts fail to comply with the reasonable time requirement in deciding which parent should be awarded the custody of the children. The reasons for this are that there is uncertainty as to which administrative authorities are competent to conduct proceedings and which law should be applied in the relevant case.[1491] However, if one parent gets the custody of a child, the other parent indisputably has the right to have contacts with the child.[1492]

Reunion, i.e.**, the stay of aliens who are close relatives**. The scope of the State's positive obligation to admit to its territory relatives of its own native citizens and to grant them a stay in Bosnia and Herzegovina will vary according to the particular circumstances of the persons involved. In essence, it must involve true family relationships or partner relationships in a legal sense. If this element is missing and, in particular, if this is a manner to circumvent the regulations on the entry and stay of aliens in Bosnia and Herzegovina, Article 8 is not applicable.[1493]

A State has the right to control and to regulate by law the entry of non-nationals into its territory. In principle, pursuant to Article 8 of the ECHR, the

1488 *Ibid*., paragraphs 19, 32 *et seq*.

1489 CH/03/13460, paragraph 14 *et seq.*; AP 83/03, paragraph 24; AP 60/03, paragraph 30.

1490 CH/03/14055-A&M, paragraph 59 *et seq*., in conjunction with ECtHR, *Hoffmann v. Austria*, 23 June 1993, Series A No. 255-C, paragraph 29, and *W. v. the United Kingdom*, 8 July 1987, Series A No. 121.

1491 CH/03/14055-A&M, paragraph 60. *et seq*.

1492 CH/00/5514, paragraph 17. *et seq.*; AP 346/04, paragraph 31.

1493 AP 1788/05, paragraph 49.

State has no obligation to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in Bosnia and Herzegovina.[1494] In cases where the State denies an alien his/her stay with the respective partner in Bosnia and Herzegovina, such a measure amounts to an interference with the right to respect for family life.[1495] Consequently, such a measure must be in accordance with law;[1496] it must pursue a legitimate aim, such as the protection of public order and national security;[1497] and it must be necessary in a democratic society. In addition, such a measure must be justified by a pressing social need and interest and it must be proportionate to the individual's interest; the State enjoys a certain margin of appreciation in this field as to whether the aforementioned requirements are met in the relevant case.[1498] In this regard, it is necessary to observe the ties which an injured party has established in Bosnia and Herzegovina as well as the ties retained with the country of origin (citizenship, age of the members of his/her family and whether they are sufficiently grown up to care for themselves, the current relationships and ties with other countries, the funds for self-sustenance, the existence of other citizenship, etc.).[1499] As to the protection of public security, the registration of an injured party in the **Interpol register** is substantial even if that person has never been criminally convicted.[1500] **The existence or maintenance of ties with another country**, the citizenship of which an injured party possesses, is sufficient under Article 8 of the ECHR to assume that that person may establish or maintain his/her family life in that country. This applies also in cases where it may be assumed that the other spouse must leave his/her country of origin.[1501] Even in cases where Bosnian citizenship, obtained by a person, is unlawfully revoked, it does not constitute an obstacle to expel the person from the country if that person has retained his/her ties with the native country or if the period of his/her stay in Bosnia and Herzegovina is relatively short and the person has the possibility to live with his/her family in the native country.[1502]

1494 CH/02/8767-A&M, paragraph 101 in conjunction with ECtHR, *Abdulaziz et al. v. the United Kingdom* of 28 May 1985, Series A No. 94, paragraph 67; AP 1788/05, paragraph 57.

1495 CH/02/8767-A&M, paragraph 102.

1496 CH/02/8767-A&M, paragraph 103 *et seq*.

1497 *Ibid*., paragraph 106.

1498 *Ibid*., paragraph 107 *et seq*., in conjunction with ECtHR, *Beldjoudi v. France* of 26 March 1992, Series A No. 234-A, paragraph 74, and *Boughanemi v. France* of 24 April 1996, Reports 1996 II, paragraph 41.

1499 *Ibid*., paragraphs 107, 111.

1500 CH/02/8767-A&M, paragraph 110.

1501 When it concerns the conclusion of the decision, see, CH/02/8767-A&M, paragraph 111 *et seq.*; see, also, Separate Opinion by Judge *Nowak*.

1502 AP 1788/05, paragraph 61.

The right to protection of **a private sphere of life** under Article 8 of the ECHR is restricted by the right to **freedom of the media**. State authorities and private media must observe the standards of Article 8 of the ECHR if publishing certain kinds of information about a person, which fall within the scope of private sphere.[1503]

c. The right to respect for home

AP 102/03 R. R.	20040428
AP 1100/05 Ćelić	20051117
AP 1200/05 Džaka	20060627
AP 1498/05 Mišanović	20060912
AP 238/04 D. D.	20040929
AP 2601/05 Brekalo	20060509
AP 301/04 Mulahalilović	20050923
AP 418/04 M. S.	20050412
AP 642/03 S. F.	20041217
AP 663/04 Bezbradica	20051013
AP 696/04 Subotić	20050923
CH/00/3509 Stević	20061106
CH/00/3574-A&M Tasovac	20031107
CH/00/3708-A&M Lazarević	20010309
CH/00/3733 *et al.*-A&M Marjanović *et al.*	20011109
CH/00/4116 *et al.*-A&M Spahalić *et al.*	20010907
CH/00/4566 *et al.*-A&M Jusić *et al.*	20020607
CH/00/4566 Jusić	20020510
CH/00/5152 *et al.*- Rašković *et al.*	20050706
CH/00/5371 *et al.*-Jovićević *et al.*	20050706
CH/00/5408-A&M Salihagić	20010511
CH/00/6258-A&M Babić	20010706
CH/00/6304-A&M Kovačević	20031205
CH/00/6436 Krvavac *et al.*	20020703
CH/01/7257-A&M Borota	20030207
CH/01/7967-A&M Sejdinović	20031222
CH/02/10606 Nedinić	20070208
CH/02/12226 Haziraj	20030401
CH/02/12226-A&M Haziraj *et al.*	20030509
CH/02/12421-A&M Kulovac	20030307
CH/02/12435-A&M Bojić	20031222
CH/02/8202 *et al.* M. P. *et a*l.	20030316
CH/02/8265 Pejaković	20060913
CH/02/8939-A&M M. H.	20030307
CH/02/9040-A&M Latinović	20030110

1503 AP 1031/04, paragraph 17.

CH/03/12844 Šišić	20070605
CH/03/14418 Tomić	20060913
CH/96/28-A&M M.J.	19971203
CH/97/114-A&M Ramić	20010907
CH/97/40-M Galić	19980612
CH/97/62-A&M Malčević	20000908
CH/97/65-A&M Panić	19990514
CH/98/1124 *et al.*-A&M Dizdarević *et al.* (21 Gradiška Cases)	20000609
CH/98/1195-A&M Lisac	20000512
CH/98/1198-A&M Gligić	19991008
CH/98/1237-A&M F.G.	19991008
CH/98/124 *et al.* Laus *et al*. (7 JNA Cases)	19990611
CH/98/1251-A&M Softić	20030306
CH/98/1493-A&M Pilipović	20030606
CH/98/1495-A&M Rosić	19990910
CH/98/1785-A&M Radulović	19991210
CH/98/394-A&M Jurić	19991210
CH/98/457-A&M Anušić	20001013
CH/98/575-A&M Odobašić	20010511
CH/98/636-A&M Miljković	19990611
CH/98/645-A&M Blagojević	19990611
CH/98/659 *et al.*-A&M Pletilić *et al.*	19990910
CH/98/697-M Džonlić	20000211
CH/98/698-A&M Jusufović	20000609
CH/98/710-A&M D.K.	19991210
CH/98/752 *et al.*-A&M Bašić *et al.* (15 Gradiška Cases)	19991210
CH/98/764-A&M Kalik	19990910
CH/98/800-A&M Gogić	19990611
CH/98/814-A&M Prodanović	19990611
CH/98/834-A&M O.K.K.	20010309
CH/98/874 *et al.* Pemac *et al*.	20050208
CH/98/894-A&M Topić	19991105
CH/98/916-A&M Tomić	20020111
CH/98/935-A&M Gligić	19990910
CH/98/958-A&M Berić	19991210
CH/99/2030 *et al.*-A&M Rudić *et al.*	20020307
CH/99/2030 Rudić	20011207
CH/99/2233-A&M Čivić	20000512
CH/99/2289-A&M M.G.	20031010
CH/99/2396 Vržina	20051109
CH/99/2425-A&M Ubović *et al*. (Glamoč Case)	20010907
CH/99/2432-A&M Ivić	20031205
CH/99/2624 I. A.	20050309
CH/99/3071 *et al.*-A&M Jokić *et al.*	20020208

CH/99/3227-A&M Milisavljević	20030606
CH/99/3546-A&M Tuzlić	20010208
U 1/02 V.Z.	20041217
U 12/00 Jašarević	20020130 *OG of BiH*, No. 1/02
U 131/03 S.Č.	20040922
U 14/00-1 Manojlović	20011230 *OG of BiH*, No. 33/01
U 140/03 F.K.	20040121
U 15/99 Zec	20010612 *OG of BiH*, No. 13/01
U 17/03 S.K.	20040517
U 2/99 Kadenić i Mesinović	19991122 *OG of BiH*, No. 20/99
U 22/01 Kušec	20011230 *OG of BiH*, No. 33/01
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 26/03 R.H.	20040423
U 3/99 H.D.	20000810 *OG of BiH*, No. 21/00
U 55/02 Basic Court of Doboj	20040219 *OG of BiH*, No. 03/04
U 6/01 Babajić	20011230 *OG of BiH*, No. 33/01
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 7/00 Hadžisakić	20010224 *OG of BiH*, No. 06/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 03/00
U 8/99 Modričkić	19991227 *OG of BiH*, No.24/99

(a) The scope of protection

Article 8, paragraph 1 of the ECHR provides that everyone has the right to respect for his/her home. **The notion of home** comprises both *rented property*, a home owned as *private property*,[1504] and the so-called *property for a specific purpose*.[1505] Both the Constitutional Court and Human Rights Chamber broadly interpreted the term "home" so that the protection provided for by Article 8 of the ECHR covers not only the existing *formal occupancy right* but also the *de facto* occupancy right.[1506] In the case where the apartment is divided into two parts, each co-tenant has the right to respect for his home in his part of the apartment.[1507] The scope of protection of Article 8 of the ECHR covers **business premises** too if they are used to earn the family living.[1508] Therefore, a lawyer's office may be covered by the protection of Article 8, paragraph 1 of the ECHR.[1509]

1504 U 55/02, paragraph 28, with reference to the ECtHR, *Gillow v. the United Kingdom*, 24 November 1986, Series A no. 124-C; AP 418/04, paragraph 21.
1505 CH/00/3509, paragraph 1 *et seq*.
1506 See U 14/00, paragraph 21 and statements relating to Article 1 of Protocol No. 1 to the ECHR on p. 404.
1507 AP 1498/05, paragraph 35.
1508 CH/98/800-A&M, paragraph 50 with reference to ECtHR, *Niemietz v. Germany*, 16 December 192, Series A No. 251-B, paragraphs 30 and 31.
1509 AP 301/04, paragraph 23.

Despite the broad definition of this right ("the right to home", not the "right to protect his/her home"), **Article II.3(f) of the BiH Constitution** does not provide wider protection than Article 8 of the ECHR, since Article II.3 of the BiH Constitution solely provides for the list of rights protected by that Article.[1510]

What is decisive for the character of "home" within the meaning of Article 8 of the ECHR is that the person *ab initio* **intends** to use certain premises so as to establish his/her "home". The use does not necessarily have to last for a certain period of time but it must be **on a regular basis**.[1511] This applies not only to the occupancy right holder but also to the members of his/her household if they want to refer to the protection of the right to home.[1512] The existence of a legal norm in order to use and be in possession of a "home" is not necessary but this fact must be relevant when examining whether the interference with the right to home is justified.[1513]

Such a view corresponds to the practice of the bodies of the ECHR. In fact, they adopted the view that first of all Article 8 of the ECHR imposes an obligation on the State to secure to every person **the protection of the right to life in his/her home**, and that the protection of property and possession of the premises in which someone's home is placed is of secondary importance.[1514] Therefore, this constitutional right primarily protects the **factual relationship** between a person and premises, and that relationship is to be established in each individual case.[1515]

At the beginning, the BiH Constitutional Court took a different view. In particular, in its previous decisions the BiH Constitutional Court was of the opinion that protection under Article 8 of the ECHR could not be guaranteed if the case related to an unlawful use of "home".[1516] This view was rectified in Case No. U 26/03, wherein the Court concluded that the unlawful use of certain premises which took place subsequently did not make obstacles to the application of

1510 See above, the statements regarding the standards of control, p. 143 *et seq*.

1511 AP 2601/05, paragraph 26.

1512 AP 1/02, paragraph 36; U 140/03, paragraph 22 *et seq.*; AP 238/03, paragraph 20.

1513 CH/02/12421, paragraph 39; CH/03/12844, paragraph 37 *et seq*.; see also, *de facto* protection of the occupancy right holder who, failing a contract on apartment use, *i.e.*, a decision on the apartment allocation, does not have an acquired occupancy rights in formal terms: CH/99/2396, paragraph 45 *et seq*.; CH/02/8265, paragraph 53 *et seq*.

1514 Compare, EComHR, *Howard v. the United Kingdom*, Application No. 10825/84, DR 52, 198, 1987.

1515 AP 1200/05, paragraph 9 *et seq*.; the fact that a person is registered at an address does not automatically apply that he/she resides in that apartment, U 1/02, paragraph 36.

1516 U 6/01; U 31/01, paragraph 22 *et seq*.; U 17/03, paragraph 27.

Article 8.[1517] After that case, the BiH Constitutional Court fully joined the case-law of the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court which held that the unlawful use of home is not a requirement for protection under Article 8 of the ECHR.[1518] Moreover, an unlawful occupant of a socially owned apartment, who abandoned it due to the war conditions, has the right to repossess that property according to the case-law of the BiH Constitutional Court.[1519] Divorce, voluntary or involuntary abandonment of an apartment do not lead to the loss of the "home" character within the meaning of Article 8.[1520] This interpretation – in the context of expulsions during the armed conflict in Bosnia and Herzegovina – corresponds to the intent which the Framer of the Constitution wanted to achieve by applying Article II.5 of the BiH Constitution and the whole Annex 7 of the Dayton Peace Agreement, which guarantees the right to return of refugees and displaced persons.[1521] This is the reason why returnees retained sufficient ties with the property which they wanted to repossess in order for that property to be considered their "home".[1522] However, if the injured party abandoned the property voluntarily, the only thing which that party has to do in order to be covered by the protection of the right to home is not to allege that it is the place of his/her origin, or to allege that his/her ancestors lived there, or that they were interred there, or that he/she has a close relationship with the property. Moreover, even the mere intention of a person to live in the future in a certain place does not make a property "home" within the meaning of Article 8 of the ECHR.[1523] If an occupancy right holder gives the apartment on lease but he/she keeps the premises for temporary use, he/she will not necessarily lose his/her relationship with that apartment as his/her "home" under Article 8 of the ECHR.[1524]

Article 8 of the ECHR imposes **positive obligations** on the State to protect the individual against the unlawful interference of third persons with the safeguarded sphere of his/her right to "home".[1525] Moreover, it is necessary to strike a fair

1517 U 26/03, paragraph 20 *et seq*.
1518 U 131/03, paragraph 28; AP 1100/05, paragraph 26; AP 663/04, paragraph 23.
1519 U 14/00; AP 102/03, paragraph 28 *et seq*.
1520 U 6/98; U 2/99; U 3/99; U 7/99; U 8/99; U 15/99; U 7/00; U 14/00; U 24/00, paragraph 29; U 55/02, paragraph 28; CH/97/46-M, paragraph 42.
1521 U 14/00, paragraph 20.
1522 CH/97/58-A&M, paragraph 48 with reference to ECtHR, *Gillow v. the Unites Kingdom*, 24.11.1986, Series A no. 109, paragraph 46; *Buckley v. the United Kingdom*, 25 September 1996, paragraph 54; CH/97/46-M, paragraph 42; CH/98/659 *et al.*-A&M, paragraph 165; CH/98/777-A&M, paragraph 74; CH/97/62-A&M, paragraph 53.
1523 CH/99/2425 *et al*. -A&M, paragraph 149 with reference to ECtHR, *Loizidou v. Turkey*, 18 December 1996, Reports 1996-VI, Volume 26, paragraph 66.
1524 CH/00/3574-A&M in conjunction with paragraph 98.
1525 As to "Third party effect" (the so-called *Drittwirkung*), in general, see on p. 144.

balance between the general interest, on the one hand, and the interests of the individual, on the other hand. In weighing up the mentioned interests, the aims mentioned in Article 8, paragraph 2 also have certain relevance.[1526] This element of the constitutional right to home requires effective mechanisms for implementation of the laws which entitle the individual to repossess his/her apartment within a time limit;[1527] moreover, adequate instruments must be available in order to make it possible for the individual to defend himself/herself against unlawful interference with his/her right to home by third persons. This primarily includes the possibility of obtaining an enforceable decision against the person that interferes with the right to "home"[1528] and enforcing such a decision in compliance with the legal procedure.[1529] The public authorities' failure to protect the individual and his/her right to home against the interference by third persons violates Article 8 of the ECHR in the same manner in which the State takes measures whereby it unlawfully or unjustifiably interferes with this right.[1530]

It is important to take into account the aim of protection of public order and security. In certain circumstances, that aim may lead to a situation in which the protection of the exercise of the right to home is postponed for a certain period of time due to, for example, the impossibility of removing resistance by the unlawful occupant of the property without jeopardizing public order and security. However, the State has the obligation to resolve such situations and, just like in the case of the positive obligation relating to the protection of lawful demonstrations from violence by counter demonstrators, to take adequate, reasonable and effective steps to remove obstacles to the exercise of the right to home.[1531]

Neither Article 8 of the ECHR nor Article II.3(f) of the BiH Constitution, nor Article 17 of the International Covenant on Civil and Political Rights entitle the individual to request that a "home" be allocated to him/her or to obtain a home with certain features (*e.g.*, the size of the apartment). On the other hand, the

1526 CH/96/17-A&M, paragraph 26 and CH/96/28-A&M, paragraph 25 with reference to ECtHR, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, paragraph 31; *Airey v. Ireland*, 9 October 1979, Series A no. 32, paragraph 32; *X & Y v. the Netherlands*, 26 March 1985, Series A no. 91, paragraph 23 *et seq*.; *Velosa Barreto v. Portugal*, 21 November 1995, Series A no. 334, paragraph 23; U 74/03, paragraph 47, and *Lopez Ostra v. Spain*, 9 December 1994, Series A no. 303 C, paragraph 51.

1527 CH/00/4566, paragraph 65; CH/99/2030, paragraph 122.

1528 CH/96/28-A&M, paragraph 28.

1529 Compare also, CH/00/6143 *et al*.-A&M, paragraph 48; CH/00/6142-A&M, paragraph 48, and CH/99/3071 *et al.-A&M*, paragraph 100 *et seq*., regarding the enforcement of enforceable decisions of the CRPC; CH/02/12226, paragraph 74.

1530 Compare CH/00/6436, paragraphs 76, 79; CH/02/12435, paragraph 87.

1531 CH/96/28-A&M, paragraph 26 *et seq.* with reference to ECtHR, *Plattform Ärzte für das Leben v. Austria*, 21 June 1988, Series A no. 139, paragraphs 30-34, in conjunction with Article 11 of the ECHR.

individual is entitled to request the State to protect him/her against unjustified or unlawful interference with the existing right to home.[1532] However, the right to request the allocation of an adequate apartment could be derived from Article 11 of the International Covenant on Economic, Social and Cultural Rights, constituting a part of substantive constitutional law (Annex 1 to the BiH Constitution). In the case in question, the BiH Constitutional Court could not establish the violation of this right, since the positive obligations arising from this Covenant are generally ill-defined, particularly those referred to in Article 11, which are unspecified.[1533]

(b) Interference with the protected scope of the right to home

Any relevant infringement upon and threat to the right to occupy the home constitutes "interference" with the right to home. The term "interference" includes deprivation of home, *i.e.*, deprivation of the right to home or adoption of the conclusion whereby the possessor, *i.e.*, the occupant of the home is ordered to move out.[1534] Furthermore, the allocation of the right to home to a third person constitutes "interference" with the right to home of the former occupant, if the courts, although not competent to act so, make a decision[1535] whereby the decision on allocation of the apartment[1536] remains in force despite its manifest unlawfulness. The interference with the right to home also occurs where the individual is prevented from repossessing his/her home[1537] or the repossession of the property is obviously delayed.[1538] In the context of fulfilment of positive obligations, there is an interference with the right to home where the courts decline their competence to decide the plaintiff's claim and, instead of dealing with it by themselves, they instruct the plaintiff to institute administrative proceedings and establish that the defendant has the occupancy right, *i.e.*, the right to use the apartment and thus fail to provide the judicial protection to the plaintiff in terms of issuing a legal act whereby the unlawful occupant could be evicted from the apartment.[1539] The decisions of the

1532 U 22/01, paragraphs 24, 28; AP 690/04, paragraph 14 with reference to ECtHR, *Velosa Barreto v. Portugal*, 21 November 1995, Series A no. 334; CH/99/3227, paragraph 50.

1533 U 22/01, paragraph 27.

1534 CH/97/40-M, paragraph 49; CH/97/46-M, paragraph 46.

1535 See differences in Case No. U 24/00, paragraph 30.

1536 If an apartment was declared abandoned, it could be allocated temporarily to a third person in accordance with Article 7 of the Law on the Use of Abandoned Apartments; with regard to this issue, see also "c. JNA apartments", p. 511; "b. Disputes on occupancy right and other rights to possession", p. 522.

1537 U 14/00, paragraph 22.

1538 CH/97/42-A&M, paragraph 52.

1539 U 6/98; U 2/99; U 3/99; U 7/99; CH/98/659 et al.-A&M, paragraph 151.

administrative authorities and courts are subject to the protection of Article 8 of the ECHR if they prevent the former occupant of the apartment from challenging the municipal authorities' allegations taken in the minutes according to which the home was definitely abandoned,[1540] or if the administrative or judicial authorities are proving to be incapable or not willing to make it possible for the injured party to repossess his/her property, for example his/her apartment, despite the existence of an enforceable decision.[1541] A typical example of such incapability or lack of will is the case when the competent police authorities refrained from giving assistance to the court officers to enforce a binding and enforceable decision.[1542] Another typical example of such interference with this right is the search of property and persons, which otherwise may be allowed within the meaning of Article 8, paragraph 2 of the ECHR. Such search can be in accordance with the national law and the permission of the injured party has a significant role.[1543]

(c) Justified interference with the right to home

In accordance with Article 8, paragraph 2 of the European Convention, and according to the interpretation of the European Court of Human Rights, interference with the right to home may be justified if it is "in accordance with the law", if it has a specific aim which is legitimate within the meaning of that paragraph and if it is "necessary in a democratic society".[1544] If the Court finds that the interference is unlawful, it will not examine further criteria relating to the justification of interference.[1545]

(d) The lawfulness of interference

Any interference with the right to home must be based on the law in order to be justified. The requirement "in accordance with the law" primarily refers to the national legal system[1546] but it also includes the examination of the standards under ECHR.[1547] Therefore, the necessity to regulate the interference with the right to home imposes by law certain qualitative requirements on the legal basis, *i.e.*, it must be harmonised with the principle of the rule of law,

1540 U 7/00.
1541 CH/97/62-A&M, paragraph 55 *et seq*.
1542 CH/96/17-A&M, paragraph 27.
1543 AP 642/03, paragraph 31; AP 696/04, paragraph 91.
1544 U 6/98; U 2/99; U 3/99; U 7/99; U 7/00 with reference to ECtHR, *Gillow v. the United Kingdom*, 24 November 1986, Series A no. 124-C, paragraph 48; U 24/00, paragraph 31.
1545 CH/97/40-M, paragraph 50; CH/00/6143 *et al.*-A&M, paragraph 51.
1546 CH/02/9130-A&M, paragraph 46; CH/01/7728-A&M, paragraph 131.
1547 CH/02/9040-A&M, paragraphs 57, 69.

which is *explicitly* mentioned in the Preamble of the ECHR. The national law must secure to the individual the protection against the arbitrary interference of the public authority with his/her rights under Article 8 of the ECHR.[1548]

Lawful interference with the right to home is in accordance with the meaning of the terms of the ECHR if the following requirements are met: (a) the interference has to be in accordance with the domestic or international law; (b) the relevant law must be accessible so that the individual can be easily informed about its contents; and (c) the law must be formulated with reasonable precision and clarity so as to allow the individual to adapt his actions according to the law.[1549]

The accessibility of the legal act is assessed, *inter alia*, according to the residence of the persons who might be affected by the legal act.

> Therefore, publication of the 1995 Decision on the Cessation of War of the Presidency of the RBiH only on the bulletin board of the building of the Presidency in Sarajevo could not suffice to render the act in question accessible. The time-limits in question (a seven-day time-limit applying to persons living within the borders of the country and a fifteen-day time-limit applying to persons living abroad), which run from the date when the decision on the cessation of the state of war was published and within which the occupancy right holders could request repossession of their apartments, were not "accessible".[1550] It is not acceptable that a law should deprive persons permanently of their rights if they do not fulfil a wholly unreasonable condition, such as the time-limit referred to, which could not possibly be fulfilled by the vast majority of those affected. Therefore, this Law does not meet the requirements of the rule of law in a democratic society.[1551]

If the law provides for abstract conditions for enforcement of a legal act, and if it does not secure to the individual clear and precise instruments to act upon, the individual cannot comply with the law so that such a legal act does not meet the qualitative requirements.[1552] The eviction of a person without giving him/her at least one opportunity to see the conclusion on the eviction in order to be informed on the legal basis for adopting the conclusion is also unlawful.[1553]

1548 CH/97/40-M, paragraph 49; CH/97/46-M, paragraph 52 *et seq.* with reference to ECtHR, *Malone v. the United Kingdom*, 2. August 1984, Series A no. 82, paragraph 67.

1549 U 14/00, paragraph 19 with reference to ECtHR, *Sunday Times v. the United Kingdom*, 26 April 1979, paragraph 49; CH/97/46-M, paragraph 53.

1550 CH/97/46-M, paragraph 56: "*wholly unrealistic.*"

1551 CH/97/46-M, paragraph 57.

1552 CH/98/659 *et al.*-A&M, paragraph 173 e*t seq.* with reference to the provisions relating to the repossession of property in the RS Law on the Use of Abandoned Property.

1553 CH/97/40-M, paragraph 50.

The cases where the competent authorities take measures by referring to the law which in legally formal terms does not exist or fail to decide the claims or legal remedies, or fail to take a decision within the time limits stipulated by the law amount to unlawfulness.[1554] Moreover, failing to act upon the decision on interim measures, whereby the Human Rights Chamber has forbidden the eviction even if the case relates to the unlawful occupant, is also unlawful; otherwise, the eviction, without decision on interim measure, would be lawful.[1555] Therefore, compliance with the decision of the Human Rights Chamber on interim measures has priority over the challenged act on eviction.

If there is a legal basis in accordance with the BiH Constitution, then it must be observed. Therefore, failure to comply with the relevant provisions while searching an apartment and confiscating private belongings against the affected party's will are not in accordance with this constitutional right, since the requirements of "lawfulness" relating to the interference with this constitutional right have not been met.[1556]

The problem that often arises in practice is the temporal applicability of the legal basis for taking a decision because the laws were previously amended, often at various administrative and territorial levels during the period of armed conflict and thereafter. Taking into account the length of certain administrative and judicial proceedings, the cases where the legal basis for making decisions had changed several times during the proceedings were not rare. The same applies to the appellate proceedings. In such cases, the competent authority – either administrative or judicial – must apply the legal basis which was applicable at the moment of taking the first-instance decision or appellate decision, not the one which was applicable at the moment of instituting the proceedings or the occurring fact. There is no need to follow this conclusion if the legislature regulates explicitly and through transitional provisions the application of former law provisions to the pending proceedings. Another exception is the case where the competent authority has the task to decide which regulation was legally applicable at a moment in the past,[1557]and not to take a decision in accordance with the existing legal solutions.

The explained principles do not apply to the administrative judicial proceedings and disputes. In particular, the administrative courts have the obligation to

1554 CH/97/62-A&M, paragraph 61 *et seq.*; in relation to the enforceable decision of CRPC: CH/97/114-A&M, paragraph 82 *et seq.*, CH/99/1961-A&M, paragraph 104, CH/00/6143 *et al*.-A&M, paragraph 50, and CH/00/6142-A&M, paragraph 51; denial of competence: U 6/98, U 2/99, U 3/99, U 7/99.

1555 CH/98/710-A&M, paragraph 36.

1556 AP 696/04, paragraph 91 *et seq.*, this case related to the activities of SFOR.

1557 CH/03/14418, paragraph 48.

examine whether the administrative authorities correctly applied the law at the moment of taking a decision. The same applies to the constitutional judiciary.[1558]

(e) The legitimate aim and necessity in a democratic society

Either in cases relating to interference with the right under Article 8 of the ECHR or in cases relating to the failure to meet the positive obligations of protection, the public authority has the obligation to strike a fair balance between the interests of the individual and the general interest of the society, *i.e.*, the State.[1559]

Therefore, in a case relating to the allocation of the right to use the abandoned property, the Constitutional Court emphasised that the interference initially served a legitimate aim in accordance with the meaning of Article 8, paragraph 2 of the Convention. The relevant aim was the protection of the rights of others, *i.e.*, the rights of persons who were forced to leave their homes because of the war. Indeed, the armed conflict in Bosnia and Herzegovina caused mass movements of the population and created a great number of housing problems. Many apartments and houses were abandoned or destroyed, or the inhabitants were forcefully evicted. Empty homes were immediately taken over by others. The authorities, at the time, of the Republic of Bosnia and Herzegovina enacted a law which temporarily solved the housing problems caused by the great number of refugees. However, if a person has not been able to realise his rights to repossess his property five years after the end of armed conflict, the "interference", which initially could have been justified and in compliance with the principle of "necessity", can no longer, five years after the end of the armed conflict, represent a necessary "interference in a democratic society" with the person's right to return to his home.[1560] The competent authorities violated its discretionary right in weighing out the current occupant's interest in staying in the apartment and that of the person claiming the repossession of the apartment, since the legally prescribed requirement of necessity to protect the vulnerable categories of population has not been met and the claim for repossession of the apartment was filed by a possible "returnee", where the return of internally displaced persons and refuges is one of the primary constitutional objectives.[1561] Moreover, it is irrelevant whether the court decision is relied upon on the applicable legal basis. Also, the legitimate aim does not exist either where the administrative authority attempts, with the

1558 CH/02/10606, paragraph 47 *et seq*.

1559 CH/99/2315-A&M, paragraph 81 with reference to ECtHR, *Powell and Rayner v. the United Kingdom*, 21 February 1990, Series A no. 172, paragraph 41.

1560 U 14/00, paragraph 24 *et seq*.

1561 CH/98/1493-A&M, paragraph 110 *et seq*.

aim to allocate the apartment to a person, to enforce the eviction of the person who occupied the apartment and to declare it abandoned although there is no legal basis for establishing that the apartment is abandoned.[1562]

Given the shortage of **alternative accommodation**, which renders the process of property return more difficult, the eviction from an apartment is in accordance with Article 8 of the ECHR even if the occupant of the apartment is not evicted in order to make it possible for the former occupant of the apartment to repossess it but in order to declare the apartment alternative accommodation for a third person provided that there is the possibility of allocating an alternative accommodation to the current occupant and that he/she can pursue a legal remedy in order to explain the reasons why he/she needs to have alternative accommodation or to continue with the occupation of the current apartment. Given the shortage of housing units, it is permitted only in exceptional cases, within the meaning of Article 8 of the ECHR, that the person to be evicted cannot be heard in the procedure before the competent authority, and that his/her appeal against the first-instance act did not have suspensive effect.[1563]

As to the cases relating to the **contracts on exchange of apartments**, which were concluded during the armed conflict, the Human Rights Chamber admitted that it would be legitimate and necessary to provide a prompt and simple procedure for property return in order to achieve one of the central objectives of the Dayton Peace Agreement: providing the return of refugees and displaced.[1564] However, the Human Rights Chamber established that there was a violation of Article 8 of the ECHR if the competent authorities failed to take into consideration the civil procedure for establishing the lawful occupant/owner of property or if they failed to decide requests for interim measures but, instead, they enforced the conclusion on eviction. Such a manner of conduct lacks the fair balance between the interests of the current and pre-war occupant of property (the returnees), which was struck in the law itself, and *de facto* deprives the current user of property of any possibility of legal protection in the enforcement procedure.[1565] Even where the law itself did provide for the possibility of suspending the procedure for property return, including the conclusion on eviction from the apartment/property (which was the case in

1562 CH/96/3-M; CH/96/22-M; CH/96/31-M, paragraph 24.

1563 As to a meticulous consideration of a fair balance, see CH/02/8939-A&M, paragraph 54 *et seq*.; CH/02/12421-A&M, paragraph 53; see, however, doubts expressed in the separate opinion of the President of the Human Rights Chamber, Ms. *Piccard*, regarding both cases.

1564 CH/02/9130-A&M, paragraph 49; CH/01/7728-A&M, paragraphs 135-140.

1565 CH/01/7257-A&M, paragraph 70; CH/02/9130-A&M, paragraph 57.

the Federation of BiH for a long period of time), the administrative authorities were obliged, by directly applying the ECHR, to wait for a court decision on the validity of the contract on exchange of apartments.[1566] In order to protect the rights of other persons in a democratic society, the former occupant, *i.e.*, the former possessor who received a final and binding decision of the CRPC, is not necessarily in a better position in the enforcement procedure than one (within the procedural possibilities provided for by the Law on the Cessation of the Application of the Law on Abandoned Property) who initiated the alternative national administrative procedure. In particular, in the first case, the suspension of the procedure for repossession of exchanged property is at the discretion of the first-instance court (which usually fails to take such decision) which deals with the preliminary issue relating to the procedure for repossession – the validity of the contract on exchange. In the second case, the suspension of the procedure for repossession of property is automatic.[1567] Therefore, the eviction of the current occupant of property before the final decision on the validity of contract on exchange may be "necessary in a democratic society for protection of other persons" even if the issue relates to the users registered as owners in land books. From the point of view of classic civil law, that this result is a little peculiar follows from the constellation which gives priority to the repossession of property of internally displaced persons and refugees over the procedural rights of the current possessors and owners. The consistency of giving priority to the interests of a certain group of citizens with rights under Article 6 of the ECHR partially relies on the fact that the majority of proceedings relating to the property repossession, together with their legal substantive basis, is provided for by Annex 7 of the Dayton Peace Agreement, in which case the BiH Constitutional Court and Human Rights Chamber are excluded from the control of procedure and decisions and legal substantive solutions as long as the CRPC exists.[1568]

Relying on the case-law of the European Court of Human Rights relating to the protection of lawful demonstrations from violence by counter demonstrators, the Human Rights Chamber did not find any justified reason for the fact that the police forces did not give assistance to the judicial officers for more than two years to **enforce** the conclusion on eviction of certain persons, since a group of people **prevented and did not allow** the eviction. Although a delay in taking action for reasons of public order protection is justified in some

1566 CH/02/9040-A&M, paragraph 60 *et seq*.
1567 CH/02/9130-A&M, paragraphs 36, 58 *et seq*.
1568 For details see CH/01/7728-A&M, paragraph 141 *et seq*. and paragraph 85 with reference to the Venice Commission, Preliminary Proposal for Restructuring of Human Rights Protection Mechanisms in Bosnia & Herzegovina, 18/19.6.1999, CDL (1999) 19 final, p. 10.

circumstances, the authorities have the obligation and responsibility to carry out the enforcement regardless of the attempts of people to unlawfully obstruct the enforcement. The fact that the competent authorities were passive in prosecuting the persons who unlawfully prevented the enforcement of a final and enforceable legal act can be mentioned in support of the conclusion on violation of the State's positive obligations.[1569]

According to the BiH Constitutional Court, the allocation of occupancy rights to either of divorced spouses in accordance with Article 20 of the Law on Housing Relations – Revised Text (*Official Gazette of the SRBiH*, Nos. 14/84, 12/87 and 36/89 and *OG of RS*, Nos. 19/93 and 22/93) and their physical separation are pursuant to the public and legitimate interest, which is necessary for the protection of health and morals, and for the protection of the rights and freedoms of others.[1570] A joint living after divorce and under such circumstances could provoke further harm and damages. The State is not interested in such living arrangements and, therefore, it does not support it. Moreover, such an unbearable situation in a house or apartment would have undesirable consequences on the children. Finally, every person has a right to live in a peaceful, safe and pleasant atmosphere respecting, as far as the circumstance of every particular case can allow, his/her dignity.[1571] The Constitutional Court accepts that in the situation where an apartment is not able to be divided into two smaller habitable units whereby the owner of the apartment is also unable to offer two smaller apartments instead of the former spouses' single apartment, then the eviction from the apartment combined with providing this person with a temporary accommodation represents the most adequate measure.[1572]

Just like in the case of the allocation of the right to occupy civilian apartments, the temporary allocation of the apartments owned by the former **Yugoslav People's Army (JNA)** to the soldiers and families of war veterans was necessary in the post-war period in order to resolve the problem of the acute shortage of housing resources. After the armed conflict ended and after the cessation of the state of war had been declared, such activities were not "necessary" any more in a democratic society. Therefore, the measures preventing the former members of the JNA from repossessing their apartments were not "adequate" relating to the aim sought to be achieved. The officers of the JNA can also be

1569 CH/96/17-A&M, paragraph 28 with reference to ECtHR, *Plattform Ärzte für das Leben v. Austria*, 21 June 1988, Series A no. 139, paragraphs 30-34.
1570 U 55/02, paragraph 32.
1571 U 55/02, paragraph 31.
1572 U 55/02, paragraph 33.

considered as refugees and displaced persons. Therefore, one of the main objectives of the Constitution – **the return of refugees and displaced persons**[1573] – applies to this group of people. However, if the affected party (an officer of the JNA) resolved his housing problem meanwhile and outside Bosnia and Herzegovina by acquiring the occupancy right over another socially owned apartment, the repossession of the apartment is no longer justified, since the State has a public interest in resolving the shortage of housing resources.[1574] Furthermore, all officers cannot be considered refugees and displaced persons; for example, those who have remained in the service of the JNA after 19 May 1995 (in case of apartments with occupancy right) and after 14 December 1995 (in case of privately owned property). In particular, these persons have remained active in the service of the armed forces of foreign states after the date prescribed by the law. "Deprivation of their possessions" in terms of the impossibility to repossess the property (without compensation in the case of a socially owned apartment with occupancy right, *i.e.*, with certain compensation in case of private property, is proportional to the aim sought to be achieved, which is the protection of **the principle of loyalty** expressed by the members of military forces to their own country.[1575] However, if an affected party did not remain active in the service of military forces of foreign countries after the date prescribed by the law (14 December 1995), such a person cannot be considered a disloyal citizen, the result of which is the fact that the public interest in the return of that person is given preference over the shortage of housing resources problem of its own soldiers.[1576] It is also allowed, within the meaning of the principle of proportionality, to connect the repossession of property – the JNA apartments – to BiH citizenship or to make it conditional upon BIH citizenship.[1577]

From the point of view of constitutional conformity, the public authority must in such circumstances carefully weigh out the confronted particular interests of certain groups, which also relates to the public interest of the State, taking particular account of the standards with regards to the constitutional rights and freedoms and constitutional principles. If the State, either the legislature or administrative authorities, observes its discretionary right, *i.e.*, its margin of appreciation, from the constitutional point of view, then there should not be objections to the law or decision taken by the administrative authority.

1573 CH/98/1493, paragraphs 104, 111.
1574 CH/00/5371 *et al*., paragraph 88 *et seq*.
1575 CH/02/8202 *et al*., paragraph 162; CH/00/5152 *et al*., paragraph 118 *et seq*.; CH/98/874, paragraph 157 *et seq*.
1576 CH/99/2624, paragraph 60 *et seq*.
1577 CH/02/8202 *et al*., paragraph 158.

(f) *Excursus*: The occupancy right in Bosnia and Herzegovina

The case-law of the BiH Constitutional Court, Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court relating to the "occupancy right" deals with three large legal fields. The first field concerns the application of the Law on Housing Relations.[1578] Despite the fact that this Law has been in force for a long time, its interpretation and application in practice cause a lot of difficulties. They are mostly the consequence of the fact that a lot of occupants of socially-owned property and the members of their households are refugees or displaced persons, *i.e.*, they abandoned their property. Taking this into account, it is important to draw a distinction between this Law and the so-called property laws adopted in accordance with Annex 7 to the Dayton Peace Agreement. The remaining two fields concern the application of the aforementioned property laws and repossession of property of internally displaced persons and refugees.

The problems arising in the application of these rights relate to the **particularities of the property laws** according to Annex 7 of the Dayton Peace Agreement comparing to the Law on Housing Relations. The property laws apply exclusively in case of return of internally displaced persons and refugees, *i.e.*, the claims for repossession of property within the meaning of Article 8 of the ECHR. Furthermore, the laws provide for particular institutional frameworks and procedures.[1579] Thus, it may happen that a claim is not justified according to the Law on Housing Relations but it is justified according to the property laws adopted in accordance with Annex 7 of the Dayton Peace Agreement, since the substantive legal solutions are different.

The following review and analysis of the Law on Housing Relations concerns solely Article 8 of the ECHR. A further analysis of this Law, particularly the impact of the war on the occupancy right and property relations, development of the mechanism of the occupancy right and other significant issues are presented in the part of this Commentary relating to the property right.[1580]

1578 *Official Gazette of SRBiH*, Nos. 14/84, 12/87 and 36/89, which the FBiH and the RS apply in accordance with the Takeover Law (*OG of FBiH*, No.11/98; *OG of RS*, Nos. 19/93 and 22/93).

1579 See, for example, AP 152/05, paragraph 10.

1580 See also "(a) War and ownership," p. 396.

i. Application of the Law on Housing Relations

AP 1036/04 Đorđević	20050913
AP 1049/05 Milanović	20060314
AP 142/02 Z. Ć.	20040615
AP 1498/05 Mišanović	20060912
AP 1505/06 Selimović	20061020
AP 21/03 K. J.	20040922
AP 221/04 FMO	20050412
AP 280/04 D. H.	20040929
AP 281/05 M. O.	20050628
AP 323/04 E. F.	20041217
AP 342/04 R. V.	20050527
AP 380/04 E. I.	20050412
AP 663/04 Bezbradica	20051013
AP 689/04 Đerić	20051013
AP 703/05 Behramović	20060412
AP 762/04 A. P.	20050412
AP 819/04 Zekanović	20050913
AP 910/04 B. V.	20050615
CH/00/3531 Lukić	20070508
CH/00/3574 Tasovac	20031009
CH/01/8088 Panić	20051214
CH/01/8493 Vasić	20070627
CH/02/11139 Miljanović	20070315
CH/02/11214 Mrgud	20060306
CH/03/14418 Tomić	20060913
CH/03/14630 Tešić	20070627
CH/99/1959 Dedić	20051003
U 1/02 V. Z.	20041217
U 121/03 Z. M.	20040922
U 131/03 S. Č.	20040922
U 140/03 F. K.	20040121
U 49/03 Tica	20060625
U 86/03 UG OTTOFARM Sanski Most	20040723

According to Article 11 of the Law on Housing Relations, the acquisition of the occupancy right implies, on the one hand, that the apartment is **allocated to a person in accordance with a decision,** that the person has signed a **contract on apartment use** with the authority allocating the apartment and, on the other hand, that the occupant did **move into** the apartment. If he/she did not move into the apartment, despite the valid decision and contract, there is no occupancy right and thus the apartment cannot be considered the claimant's "home" within the meaning of Article 8 of the ECHR.[1581] As a rule,

1581 AP 281/05, paragraph 24.

the legal and factual grounds for allocating the apartment and concluding a contract on apartment use is the apartment allocation list. If such a list is not validly established, there is no possibility of filing a request for allocation of the apartment.[1582] A decision on the allocation of the apartment can be taken only by the holder of the disposal right over the apartment.[1583]

According to Articles 19 and 20 of the Law on Housing Relations, **spouses** are co-holders of the occupancy right. In case of a dissolution of the marriage, it is not unconstitutional if one spouse is declared the occupancy right holder.[1584] If one spouse is not a member of the household of the other spouse but lives instead in the apartment of his father, he is entitled to file a request to transfer the occupancy right to himself after the death of his father regardless of the fact that formally he is still married.[1585]

Following the entry into force of the Law on Housing Relations in 1974, the establishment of the co-tenant relationship according to Article 71 *et seq.* of the Law on Housing Relations was no longer permitted. However, a co-tenant relationship established in an unlawful manner in 1989 can be justified *per se* where, taking into account housing needs, the eviction of the unlawful co-tenant would be a disproportionate measure in order for the lawful co-tenant to occupy the rest of the apartment.[1586] However, in both cases, the BiH Constitutional Court, having acted in accordance with Article 6 of the Dayton Peace Agreement, reached the conclusion that occupation of the remaining part of the apartment by the co-tenant was in accordance with the ECHR.[1587] Therefore, it is necessary to strike a balance between the opposing interests.

If the subtenant is evicted from the apartment in accordance with a decision of the competent authority (Article 54 of the Law on Housing Relations), such decision *per se* does not justify the eviction of the occupancy right holder and the members of his/her household.[1588]

1582 AP 910/04, paragraph 31 *et seq.*
1583 CH/02/11214, paragraph 17 *et seq*.
1584 U 121/03, paragraph 27.
1585 CH/01/8493, paragraph 35 *et seq*.
1586 AP 1498/05, paragraph 40 *et seq*. This Decision could be understood as declaring the provision in question of the Law on Housing Relations, given the circumstances of each individual case, unconstitutional, since it is disproportionate in cases such as the present case. However, the Constitutional Court did not declare this provision unconstitutional under Article VI.3(c) of the BiH Constitution – as it did, for example, in Case No. U 106/03 – nor did it point in any way to this inconsistency with the BiH Constitution.
1587 CH/02/11139, paragraph 108 *et seq*.
1588 CH/00/3574, paragraph 99.

An unlawful occupant of the apartment can acquire protected legal status if that occupant has used the apartment for a period of at least 8 years.[1589] However, this does not apply to apartments which have already been allocated in a lawful manner to a third person,[1590] regardless of whether that person lived in that apartment or not.[1591] The time limit of 8 years for "acquisition of occupancy right by adverse possession" expired on 6 December 2000, since the occupancy right could not be acquired as of that date any more.[1592] The co-tenant of an unlawful occupant of the apartment does not enjoy an independent right to continue occupying the apartment if the unlawful occupant was evicted from the apartment in accordance with a legally binding decision.[1593]

Whether a person is **a member of the household of the occupancy right holder** (Articles 6 and 22 of the Law on Housing Relations) or not is to be determined according to the state of facts at the moment the court takes its decision, and not at the moment of death of the occupancy right holder.[1594] If a person is not included in the list of members of the household of the occupancy right holder (children, spouse etc.), he/she has the possibility to submit evidence proving that he/she acquired the right to transfer the occupancy right to himself/herself based on other criteria.[1595] If another apartment is allocated to the occupancy right holder, the members of the household of the occupancy right holder are not entitled to transfer the occupancy right. They share the same destiny as the occupancy right holder.[1596] The members of the occupancy right holder's household are entitled to use the apartment if the occupancy right holder has the apartment privatised. On the other hand, the owner of the apartment is entitled to use the apartment at any time even if he/she moved out of it due to bad relations with one of the members of his/her household.[1597]

1589 Compare with Article 30 of the Law on Housing Relations; AP 1049/04, paragraph 44 *et seq.*; AP 663/04, paragraph 22. It is not fully acceptable if the court establishes in item 28 that the court decision is in accordance with the BiH Constitution and it fails to take into consideration the legal solutions provided for by Article 30 of the Law on Housing Relations. The appellant has lived in the apartment in question for more than 8 years with no contract on apartment use, so that she was an unlawful occupant of the apartment within the meaning of Articles 2 and 11 of the Law on Housing Relations. However, she acquired *ex lege* the occupancy right.

1590 AP 703/05, paragraphs 12, 41 *et seq*.

1591 AP 819/04, paragraph 11 *et seq*.

1592 AP 221/04, paragraph 30 *et seq*.

1593 AP 689/04, paragraph 27.

1594 As to the grandson's rights, see: U 86/03, paragraph 31; U 1/02, paragraph 39; AP 323/04, paragraph 18 *et seq*.; U 49/03, paragraph 29 *et seq*.; see also CH/03/14630, paragraph 29 *et seq.*; CH/03/14418, paragraph 46.

1595 U 86/03, paragraph 31.

1596 CH/01/8088, paragraph 16.

1597 U 131/03, paragraph 32. Therefore, it is necessary to take into account the fact that meanwhile the former occupancy right holder became the owner of the apartment, since the Law on Housing Relations cannot apply to him anymore. On the other hand, other members of his household are still under protection of this Law.

If a member of the family household moves out of the apartment, he can, upon the approval given by the occupancy right holder, return to the apartment and thus acquire again that legal status, including the right to file a request for transfer of the occupancy right from the occupancy right holder in case of his/her death.[1598] However, if he/she moves into the apartment only after the death of the occupancy right holder, there is no possibility of transferring the occupancy right, since there was no common household before the death of the occupancy right holder. Occasional visits are not sufficient to establish a common household.[1599] However, this does not apply if a former member of the household of the deceased occupancy right holder, who abandoned the apartment during the armed conflict, cannot return to the apartment due to objective insurmountable obstacles.[1600]

ii. Annex 7 – Repossession of abandoned property

AP 1038/04 Kašmo-Hastor	20050923
AP 1100/05 Ćelić	20051117
AP 2463/05 Pržulj	20060509
AP 258/03 D. M.	20040929
AP 264/05 Trožić	20060223
AP 293/05 Planinčić	20060223
AP 4/05 H. B.	20050527
AP 85/03 M. P.	20040826
CH/00/3531 Lukić	20070508
CH/00/5092 Ćišić	20060405
CH/00/6101 Maglajac	20041105
CH/01/7417 Bilić	20060607
CH/01/8457 Gotovac	20060705

1598 AP 1505/06, paragraph 42; AP 21/03, paragraph 35 *et seq*.

1599 U 140/03, paragraph 20 *et seq.*; AP 142/02, paragraph 20; AP 280/04, paragraph 25 *et seq.*; AP 762/04, paragraph 29 *et seq*.

1600 AP 380/04, paragraph 23 *et seq*.; AP 1036/04, paragraph 20 *et seq*.; AP 342/04, paragraph 28 *et seq*. In all aforementioned cases, the appellants abandoned the apartments and the household of the occupancy right holder during the war. In terms of fulfilment of legal formal requirements, they acquired the right to file a request for repossession of the property based on the Law on the Cessation of the Application of Abandoned Apartments, dated 4 April 1998 (*OG of FBiH*, No. 11/98). In the event that such persons file a timely request for repossession of the apartment, the competent administrative authorities cannot dismiss the request on the grounds that such a person was not a member of the household of the occupancy right holder at the moment of his/her death (see, for example, CH/99/1959, paragraph 16 *et seq*.; CH/00/3531, paragraph 19 *et seq.).* However, all appellants failed to comply with the time limit to file a request for repossession, and they filed only a request for transfer of the occupancy right from the deceased occupancy right holder. Therefore, the administrative authorities rightfully requested the appellant to submit evidence proving that they were the members of the household of the occupancy right holder at the moment of his/her death.

CH/01/8486 Jagodić	20050706
CH/02/10804 Knežević	20061220
CH/02/10854 Bilčar	20060306
CH/02/12323 *et al.* Dobrilović *et al.*	20051215
CH/02/12532 Šlemer	20050706
CH/02/9040 Latinović	20030110
CH/03/10919 Vuković *et al.*	20061219
CH/03/13122 Gotovina	20061219
CH/03/13501 Kajtez-Alijagić	20061220
CH/03/13736 Mihajlović	20060913
CH/03/14521 Arnautović	20070627
CH/03/14630 Tešić	20070627
CH/03/14954 Radmilović	20070315
CH/03/15083 Fazlić	20060911
CH/99/1959 Dedić	20051003

After the entry into force of Annex 7 of the General Framework Agreement, the Entities adopted the necessary laws in order to make it possible for citizens to repossess private and socially-owned apartments and other property abandoned during the armed conflict.[1601] The time limits for repossessing abandoned socially-owned property were legally prescribed proportionately so that accordingly they had to be complied with.[1602] On the other hand, the law did not provide for any time limits for repossessing private property.[1603] Furthermore, according to the incontestable legal prerequisite, all persons who abandoned their property in the period from 30 April 1991 to 19 December 1998 were legally regarded as refugees and internally displaced persons. Therefore, in the procedure for repossessing the property, the competent authorities were not entitled, according to the so-called property laws, to determine or consider the reasons for abandonment of the property. The purpose of this legal prerequisite provided for by Annex 7 of the General Framework Agreement was to re-establish the facts, *i.e.*, to make the population return to where they lived on 30 April 1991.[1604] The only fact which the competent authorities could establish was whether the injured party had possessed a property on that date,[1605] which means that this fact could prevent the authorities from allowing

1601 As to the details regarding these laws, see "(a) War and ownership", p. 396.
1602 AP 4/05, paragraph 45.
1603 CH/01/8486, paragraph 57 *et seq*.; see also, CH/02/12532, paragraph 15 *et seq*.
1604 CH/03/14521, paragraph 48.
1605 The authors of Annex 7 obviously intended to prevent the relevant national authorities conducting the procedure for repossessing the abandoned property from having a margin of appreciation in establishing whether a person abandoned the property due to the war conditions for some other reasons. However, the Constitutional Court reserved the right in more than one case to oppose this legal condition and decide that the claimant abandoned the apartment voluntarily (AP 645/04, paragraph 35 *et seq.*).

the persons who were not in possession of the property on the relevant date to return the property.[1606] When it comes to socially-owned apartments, the persons having the right to repossess the property are both the occupancy right holder and members of his/her household.[1607] If the occupancy right holder died before the adoption of a decision on repossession of property, the members of his household could continue with the proceedings and submit evidence proving that the occupancy right holder had met all of the legal requirements to repossess the apartment. Only after the decision on repossession of the apartment had been taken did the members of the occupancy right holder's household have the obligation to file a request for transfer of the occupancy right according to the Law on Housing Relations.[1608] Neither the administrative authorities nor any party to the procedure for repossessing the apartment had the right to submit evidence proving that the applicant of a claim for repossession of apartment, who had proved that he/she had been in possession of the apartment on 30 April 1991, did not meet the legal requirements to be the occupancy right holder according to the Law on Housing Relations.[1609] Only after the procedure for repossessing the apartment was concluded, a third person who had a legal interest, *i.e.*, the authorities legitimated in accordance with the law, had the right to institute relevant proceedings for reasons provided for by the Law on Housing Relations. Therefore, a person who repossessed the apartment in accordance with the decision on apartment repossession had to face the possibility of again losing possession of the apartment if he/she did not meet the requirements laid down in the Law on Housing Relations. For example, if there is a legally binding judgment rendered in 1992, whereby the possessor of the apartment was ordered to move out of the apartment, that judgment could be a legal basis for evicting the re-possessor from the apartment. Furthermore, possession of an apartment which was returned upon the procedure for repossessing the apartment could be challenged again if it was established that the aforementioned person had been in possession of the apartment on 3 April 1991 but had not occupied the apartment for more than 6 months before that date.[1610]

As to the procedure for repossessing the apartment, the exception to this rule applies to the situation where there is a contract on exchange of apartments.

1606 AP 258/03, paragraphs 7, 28 *et seq.*; AP 1038/04, paragraph 27 *et seq*.
1607 CH/00/3531, paragraph 19 *et seq.*; AP 2463/05, paragraph 10 *et seq.*
1608 CH/99/1959, paragraph 16 *et seq.*; CH/02/10854, paragraph 14; CH/00/3531, paragraph 19 *et seq*.; CH/03/14630, paragraph 29 *et seq*.
1609 AP 1100/05, paragraph 33.
1610 CH/03/10919, paragraph 13; CH/03/14521, paragraph 91 *et seq.*; CH/03; AP 293/05, paragraph 34 *et seq*., See, however, a separate opinion in Case No. AP 264/05, paragraph 9 *et seq*. and AP 85/03, paragraph 23 *et seq*.

In such a case, the procedure for repossessing the "pre-war" apartment, which was exchanged subsequently in accordance with the contract, is suspended and the competent court is given an opportunity to establish the legal validity of the contract on exchange of apartments.[1611] The competent authority must not adopt either a favourable or unfavourable solution relating to the return of the apartment before the court makes a decision on the validity of the contract on exchange of apartments.[1612] The contract on exchange of apartments must be legally valid in order to have effect on the request for repossession of the apartment.[1613]

If the apartment or other property was destroyed during the war so that it could not objectively be returned to the person who filed a request for repossession, the Entities do not have an obligation to reconstruct the apartment or other property nor do they have an obligation to pay compensation. However, insofar as the Federation of BiH is concerned, this fact should not be an obstacle for the competent authority to take an appropriate decision on return of destroyed property if the applicant submits evidence proving that he/she has the right of repossession. Moreover, the person whose socially-owned property was destroyed is entitled to purchase that property after the decision on return of destroyed property has been taken. Therefore, the administrative authorities are obliged to make a decision on return and, if the decision is favourable to the applicant, he/she has the right to initiate the procedure for purchase of the property. However, for precautionary reasons, the administrative authorities have the right to forbid the use of destroyed property.[1614] On the other hand, the Republika Srpska undertook to pay compensation for irreparably destroyed socially owned property.[1615] Finally, if it is established during the proceedings that the State is to be held responsible for destruction of property, or it can be held responsible for allocating the property for use by a third person (for example, land was allocated for construction of private apartments or business premises) so that the pre-war possessor cannot repossess his/her property, another adequate property must be allocated to the person who has filed a claim for repossession or he/she must receive compensation for it.[1616]

1611 CH/03/13501, paragraph 37 *et seq*.; see also CH/03/14954, paragraph 38 *et seq*.
1612 CH/02/9040, paragraph 60 *et seq*.
1613 CH/03/13122, paragraph 13 *et seq*.
1614 CH/03/15083, paragraph 24 *et seq*.
1615 CH/02/10804, paragraph 38 *et seq*.
1616 CH/00/6101, paragraph 82; CH/02/12323 *et al*., paragraph 56 *et seq*.; CH/00/5092, paragraph 36 *et seq*.; CH/01/7417, paragraph 49 *et seq.*; CH/01/8457, paragraph 35 *et seq.*; CH/03/13736, paragraph 50 *et seq*.

iii. Annex 7 – Repossession of JNA apartments

CH/00/5152 *et al*. Rašković *et al.*	20050706
CH/02/8202 *et al*. M. P. *et al*.	20030316
CH/03/14442 Pavlović	20060208
CH/98/1311 *et al*. Kurtišaj *et al.*	20020902
CH/98/874 *et al*. Pemac *et al*.	20050208
CH/98/922 Pilipović	20050512
U 83/03 N. Špirić "JNA Apartments"	20040922

Special rules apply to the former officers of the JNA. In principle, the issue relates to Article 3(a) of the Law on the Cessation of Application of the Law on Abandoned Apartments (insofar as the socially owned apartments are concerned) and Article 39(e) of the Law on Sale of Apartments with Occupancy Rights (insofar as the purchased apartments are concerned, which means privately owned apartments). The owner of a JNA apartment can only be a person who concluded an appropriate contract on the purchase of an apartment and who paid the purchase price.[1617] The Law on the Cessation of Application of the Law on Abandoned Apartments in its original form prescribed two requirements for repossession of JNA apartments: BiH citizenship and the condition that he/she was not in active service in the JNA on 30 April 1991. Both the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court established that neither of these two requirements were in accordance with the right to home.[1618] The result of these decisions was the fact that the Federation of BiH amended the legal regulations so as to forbid the repossession of socially owned apartment if the officer of the JNA was in active service on 19 May 1992 and, in case of purchased apartments, on 14 December 1995. The BiH Constitutional Court and the Human Rights Commission within the BiH Constitutional Court established that these requirements met the standards relating to the constitutional human rights and freedoms.[1619] However, the State is obliged to pay a just compensation to the owners of the apartments, who do not fulfil the requirements for repossession.[1620] In principle, the justification for such a legal solution is the fact that such persons could not be considered displaced persons and refugees.

This was the first exception to the rule according to which persons who left their apartments between 30 April 1991 and 19 December 1998 shall be considered

1617 CH/98/1311 *et al*., paragraph 81; CH/03/14442, paragraph 40.

1618 CH/02/8202 *et al*., paragraph 158 *et seq*.

1619 CH/02/8202 *et al*., paragraph 162 *et seq.*; CH/00/5152 *et al*., paragraph 118 *et seq*.; CH/98/874, paragraph 157 *et seq.*; U 83/03, paragraph 41 *et seq*.

1620 CH/98/874, paragraph 190.

refugees and displaced persons. The next exception provided for by the law, although declared consistent with the ECHR, is deprivation or non-return of JNA socially-owned apartments if meanwhile another socially owned apartment was allocated to the claimant outside Bosnia and Herzegovina.[1621] In case the occupancy right holder does not fulfil the requirements for repossessing the apartment, his spouse shares the same destiny.[1622]

d. Respect for various forms of communication

AP 21/02 F. S.	20040517

If a telecommunication company disconnects the user's phone line for reasons prescribed by law, such action constitutes interference with the right to communicate within the meaning of Article 8 of the ECHR. However, the interference is justified if the user does not pay his telephone bills.[1623]

8. Freedom of thought, conscience and religion (Article 9 of the ECHR)

(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.

AP 913/04 „Max music company" d.o.o.	20051220
CH/00/4889-A&M The BiH Islamic Community Council (the Jakeš Mosques cases)	20011010
CH/01/7488-A&M Buzuk	20020705
CH/01/7701-A&M The BiH Islamic Community Council (Mrkonjić-Grad)	20031222
CH/02/12016 Čengić	20030905
CH/02/9448-D Local community Mladikovine	20020905
CH/03/14004 Dačiragić	20070508
CH/96/29-A&M The BiH Islamic Community Council (the Banja Luka Mosques cases)	19990611

1621 CH/00/5371 *et al*., paragraph 88 *et seq*.
1622 CH/98/922, paragraph 117.
1623 AP 21/02, paragraph 38.

CH/98/1062-A&M The BiH Islamic Community Council (the Zvornik Mosques cases)	20001109
CH/98/892-A&M Mahmutović	19991008
CH/99/2177-A&M The BiH Islamic Community Council (the Prnjavor graveyard case)	20000211
CH/99/2656-A&M The BiH Islamic Community Council (the Bijeljina Mosques cases)	20001206
U 39/01 M. H.	20020405
U 5/98-IV Izetbegović IV	20001231 *OG of BiH*, No. 36/00

a. Introduction

Article 9 of the ECHR protects the so-called *forum internum*, people's inner spiritual world, which includes the thought, conscience and religion of an individual.[1624] This right includes the freedom of an individual to convert, *i.e.*, to change his religious conviction or world view and the freedom – either alone or in community with others and in public or private – to manifest that religion or belief in teaching, practice, worship and observance.

Although the said right contains several elements, the freedom to manifest one's religion is a central part of the case-law not only in BiH but also in the entire region. The reason for this is the fact that the constitutional order of the former SFRY was not inclined to the freedom of religious expression either of individuals or religious communities. Actually, there is a reason why the freedom to manifest one's religion is experienced as one of "the most sensitive and controversial freedoms in a democratic society."[1625] In addition to the aforementioned, we may conclude that religious diversity, resulting in diversities in culture and tradition in the territory of the former Yugoslavia and, in particular, in BiH, was partially the reason for the war. If nothing else, religion was instrumentalised by the warring parties in their propaganda. Moreover, some people have defined the armed conflict in BiH as a religious war.[1626] Although it is true that, on the one hand, multi-confessionality may make life together in a community difficult, such conclusions divert our attention from the real reasons for the conflict in BiH.

Article 9 of the ECHR and Article 2(1) of the Additional Protocol to the ECHR, which came into effect in BiH with the entry into force of the Peace Agreement, are very clear. Namely, as far as these freedoms are concerned, a threat to a peaceful life together in a multi-confessional and multi-cultural community is

1624 AP 913/04, paragraph 22.

1625 Compare *Harland/Roche/Strauss*, 2003, p. 231 („*empfindlichsten und kontroversesten Freiheiten in einer demokratischen Gesellschaft*"; the author's translation).

1626 Compare, *Esad Ćimić*, Interview of 10 March 2000 to *BH Dani* – weekly magazine, available at <www.bhdani.com/arhiva>.

not related to the enjoyment of the right to freedom to manifest one's religion and belief itself but, on the contrary, it relates to the prevention thereof.

Given that the case-law of the BiH Constitutional Court and Human Rights Chamber for BiH concerning the right to freedom of religion is not very extensive, one might think that "religious tolerance and life together" prevails in BiH, or one could think that citizens simply lack sufficient awareness, so that the real problems are not discussed openly and clearly. Nevertheless, the relevant case-law is not too narrow given that the freedom to manifest one's religion, in a substantive sense, includes the cases in which the religious communities requested either reinstatement, construction or reconstruction of their property, as well as the protection of their cultural heritage, such as cemeteries. Such a conclusion is justified, irrespective of the fact that those cases, in principle, have been considered within the scope of the right to property and the right not to be discriminated against, and not within the scope or from the aspect of the right to freedom of religion.

b. Freedom of thought

Freedom of thought could be viewed as a safeguard applicable to the stage prior to the physical *i.e.*, substantive expression of thoughts, meaning the expression of thoughts "towards the outside world". Therefore, freedom of thought is included in the "so-called" absolute freedoms given that thoughts cannot be limited. Only after the expression of one's thoughts may thoughts be limited, not on the basis of Article 9(2) of the ECHR but on the basis of Article 10(2) of the ECHR (the right to freedom of expression).[1627] However, in cases where certain "expression" cannot be defined as a thought (because it relates to a pure defamation case), such an expression of thoughts cannot fall under the protection of freedom of thought.[1628]

c. Freedom of religion

(a) The scope of protection

The necessity of securing true religious pluralism is an inherent feature of the notion of democracy. In the context of religious opinions and beliefs, active protection measures are often necessary to prevent unjustified **interference** with or attacks on religious objects. In extreme cases, protection measures

1627 AP 913/04, paragraph 23.
1628 U 39/01, paragraph 27.

must also include the punishment of persons.[1629] The freedom protected by Article 9 of the ECHR is one of the foundations of "a democratic society" within the meaning of the ECHR. The freedom to manifest one's religion is one of the most vital elements that goes 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, which is inseparable from the notion of democracy and which has been dearly won over the centuries, depends to a large extent on the freedom to manifest one's religion. Neither the BiH Constitution nor the ECHR nor international law require the separation between state and church or the establishment of collective equality of religious communities. Therefore, "a State Church" system cannot in itself be considered to be in violation of Article 9 of the ECHR on condition that it includes specific safeguards for the individual's freedom of religion.[1630] The right to freedom of religion as guaranteed under the ECHR excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.[1631] Freedom to manifest one's religion, on the one hand, relates to the issue of individual *conscience* and, on the other hand, it functions as the freedom of *expression* of one's own beliefs. A State must undertake the obligation to regulate the relations towards religious beliefs and doctrines and, particularly, to guarantee the free exercise of the rights safeguarded under Article 9 of the ECHR. Therefore, a State must refrain not only from an unjustified interference with the right to freedom to manifest one's religion but it must take measures aimed at securing it. Otherwise, if a State creates or allows an atmosphere in public which prevents freedom of expression, that State violates the rights safeguarded under Article 9 of the ECHR.[1632] In extreme cases, the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. In democratic societies, in which several religions coexist within one and the same population, it may therefore be necessary to place restrictions on the freedom of manifestation

1629 CH/96/29-A&M, paragraph 171 in conjunction with ECtHR, *Otto Preminger-Institut v. Austria*, 20 September 1994, Series A No. 295-A, paragraphs 44 and 49; CH/98/1062-A&M, paragraph 86; CH/99/2656-A&M, paragraph 88.

1630 U 5/98-IV, paragraph 39 *et seq.* in conjunction with EComHR, *Darby v. Sweden*, 9 May 1989, Series A No. 187, paragraph 45.

1631 CH/96/29-A&M, paragraph 176 in conjunction with ECtHR, *Kokkinakis v. Greece*, 25 May 1993, Series A No. 260-A, paragraph 31; EComHR, *Darby v. Sweden*, 9 May 1989, Series A No. 187, paragraph 45; ECtHR, *Manoussakis v. Greece*, 26 September 1996, Reports 1996-IV, Book 17, paragraph 47; CH/98/1062-A&M, paragraph 80.

1632 U 5/98-IV, paragraph 41 in conjunction with ECtHR, *Otto Preminger-Institut v. Austria*, 20 September 1994, Series A No. 295-A, paragraph 47.

in order to reconcile the interests of the various groups and to ensure that everyone's beliefs are respected.[1633]

Therefore, the right to freedom of religion includes the freedom of members of a religion or belief to worship or assemble in connection with a religion or belief, and to establish and maintain places of warship or similar objects and to communicate and express their feelings.[1634] The expression of religious feelings protected under Article 9 of the ECHR encompasses also religious funerals as well as funerals in cemeteries that are usually reserved for members of another religion.[1635] The taking of Confession and Holy Communion during the Easter Holidays must be considered as acts of worship essential to the practice of Catholicism and that Catholicism is a religion widely practised in the Federation of Bosnia and Herzegovina. As such, they are protected under Article 9 of the ECHR.[1636]

The protection under Article 9 of the ECHR implies the peaceful enjoyment of religious rights also to those detainees who hold such religious beliefs so that any limitation placed in this context on such rights must be justified for the purposes of paragraph 2 of Article 9 of the ECHR.[1637]

The status and rights of the religious communities are regulated within the domestic legal system by the ordinary law, *i.e.*, by the SRBiH Law on the Legal Status of Religious Communities, which was enacted in 1976.[1638]

(b) Interference with the right to freedom to manifest one's religion and justification

Any restriction on the right to freedom of religion, which is not insignificant, must be shown to have been justified for the purposes of paragraph 2 of Article 9 of the ECHR.[1639]

Pursuant to paragraph 2 of Article 9 of the ECHR, the freedom to manifest one's religion or beliefs can only be restricted by such limitations as are prescribed by

1633 CH/96/29-A&M, paragraph 177 in conjunction with ECtHR, *Kokkinakis v. Greece*, 25 May 1993, Series A No. 260-A, pp. 31 and 33, as well as *Otto Preminger-Institut v. Austria*, 20 September 1994, Series A No. 295-A, paragraph 47; CH/02/12016, paragraph 119.

1634 CH/96/29-A&M, paragraph 178 with reference to Article 6 of the UN General Assembly Declaration No. 36/55 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; CH/98/1062-A&M, paragraph 187.

1635 CH/98/892-A&M, paragraph 85; CH/00/4889-A&M, paragraph 45.

1636 CH/01/7488-A&M, paragraph 135.

1637 CH/01/7488-A&M, paragraph 135; CH/03/14004, paragraph 15 *et seq.*

1638 Compare, CH/99/2177-A&M, paragraph 40 *et seq*.

1639 CH/96/29-A&M, paragraph 179.

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. The questions therefore are firstly whether there is a legal basis for the interference under domestic law; secondly whether a legitimate aim is pursued; and thirdly whether the interference is strictly proportionate to the aim pursued.[1640]

A limitation on the freedom to manifest one's religion may also exist in cases of denial of permission for construction, reconstruction, or use of places of worship,[1641] or in cases of a religious funeral denial, or if there is an order for exhumation of the deceased who was buried in accordance with the religious regulations and practice,[1642] or if the funeral of a person in a cemetery which belongs to another confession is denied,[1643] or if there is a seizure and allocation of land and the construction of other objects on a graveyard.[1644] In addition, a failure to protect believers during worship or other religious ceremonies constitutes an interference with the freedom to manifest one's religion as the State, in this context, has an obligation to secure positively the right to freedom of religion.[1645]

(c) The supremacy of law

Any limitation on or interference with the right to freedom to manifest one's religion requires a legal basis. In this regard, it is to be stated that the HRC established that the *Rules of the Road*,[1646] which stipulate the rules applying to persons detained in the detention facility of the ICTY, did not apply to persons detained in the Federation of Bosnia and Herzegovina.[1647]

(d) The principle of proportionality

A restriction on or interference with the right to freedom of religion must be in accordance with the principle of proportionality. In assessing whether there is any necessity for a limitation on or interference with the right to freedom of religion, the State enjoys a certain margin of appreciation. Nevertheless, in delimiting the extent of the margin of appreciation afforded to a State,

1640 CH/01/7488-A&M, paragraph 136; CH/99/2656-A&M, paragraph 93.
1641 CH/00/29-A&M, paragraph 182; CH/98/1062-A&M, paragraph 87; CH/99/2656-A&M, paragraph 90.
1642 CH/98/892-A&M, paragraph 85.
1643 CH/00/4889-A&M, paragraph 46.
1644 CH/01/7701-A&M, paragraph 128 *et seq.*
1645 CH/00/29-A&M, paragraph 183 *et seq.*
1646 Compare, p. 209.
1647 CH/01/7488-A&M, paragraph 137.

the importance of freedom of religion for religious pluralism, an essential and integral part of a democratic society, must be taken into account.[1648] As to the aforementioned restrictions on or interferences with the right to freedom of religion, the HRC, in principle, could not establish a reasonable justification for the State authorities' conduct. On the other hand, restrictions placed on detainees' religious freedom pursue a legitimate aim if necessary in a democratic society in the interests of public safety, for the protection of public order or for the protection of the rights and freedoms of other prisoners. In addition, the notion "order" has a particular meaning that has to be construed in the context of "a prison as an institution" (the order that must prevail within the confines of a prison). The question is, therefore, whether the interference is necessary to maintain "order" within the confines of a prison. In answering this question, it is essential to examine whether restrictions on detainees' religious freedom are necessary or whether the public interest is more important.[1649]

> In Case No. CH/01/7488-A&M, the Human Rights Chamber found no difficulty in the fact that a Catholic priest had been made available by the prison authorities to the applicant, who had chosen not to avail himself of the services of this priest, because the priest had not been the one the applicant had wished to see. However, Article 9 of the ECHR does not provide the right to be given access to a priest of one's own choosing. In this context, there is a wide margin of appreciation afforded to States to assess whether or not a certain priest is indispensable for maintaining order and discipline in prison.[1650]

9. Freedom of expression (Article 10 of the ECHR)

(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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1648 CH/00/29-A&M, paragraph 179.
1649 Compare CH/01/7488-A&M, paragraph 138.
1650 CH/01/7488-A&M, paragraph 139 *et seq*.

AP 1005/04 Federation of BiH-Radio-television *et al.*	20050212
AP 1064/05 “Pres-sing” LLC *et al.*	20060314
AP 1145/04 “Pres-sing” LLC *et al.*	20050212
AP 1203/05 “MM Company” LLC	20060314
AP 1289/05 “Pres-sing” LLC *et al.*	20061109
AP 1423/05 “Pres-sing” LLC *et al.*	20060708
AP 1881/06 Gutić	20060120
AP 198/03 Dedić	20061020
AP 2963/06 Memić	20070509
AP 712/05 Federation of BiH-Radio-televizija *et al.*	20060412
AP 787/04 Avdić *et al*.	20052012
AP 96/05 “Pres-sing” LLC	20060209
CH/01/7248-A&M Ordo	20020705
U 10/05 Jukić	20050722
U 39/01 Hasic	20020405
U 42/03 Špirić	20041217

In Case No. CH/01/7248-A&M, the first time after the entry into force of the Dayton Agreement, a constitutional dispute arose as to the scope of the protection of freedom of expression under Article 10 of the ECHR. In 1999, the Independent Media Commission, which was later succeeded by the Communications Regulatory Agency, took a decision suspending a provisional broadcasting license to a private radio and television station in Banja Luka named “ORDO” RTV Sveti Georgije. This provisional license was thereafter renewed. However, in 2001, RTV Sveti Georgije again violated the applicable provisions of the Broadcasting Code of Practice and the Terms and Conditions of its license. Immediate cause for those new violations and a temporary revocation of a provisional broadcasting license was a live call-in television programme entitled “These are the fruits of our battle”, broadcast on 8 May 2001 from Banja Luka, concerning protests against the groundbreaking ceremony for the laying of the cornerstone to reconstruct the former Ferhadija mosque. The moderator of RTV Sveti Georgije allowed not only his studio guest but also his many viewers, who called in, to express their tendentious and inciting opinions and comments live on the air. As a result, call-in viewers, amongst other things, invited citizens to take part in protests against the groundbreaking ceremony for the laying of the cornerstone of the Ferhadija mosque. In addition, some callers expressed criticism and insults against Muslim believers, their representatives and representatives of the Islamic Community. In principle, the position taken by call-in viewers, also agreed to by the studio guest, was that the protests were provoked because the groundbreaking ceremony for the laying of the cornerstone to reconstruct the Ferhadija mosque was planned on St. George’s Day, a major Orthodox religious holiday.[1651]

1651 Compare CH/01/7248-A&M, paragraph 1 *et seq*.

a. The scope of protection

As one of the essential foundations of a democratic society, freedom of expression enjoys special protection under the ECHR.[1652] The rights protected by Article 10 of the ECHR overlap with some other rights protected by the ECHR, including the rights protected by Article 9 of the ECHR. However, in the context of the right to hold and express opinions, Article 10 is virtually indistinguishable from Article 9 of the ECHR.[1653] In addition, although some anti-democratic expression may be subject to a direct attack under Article 17 of the ECHR, the European Court has never relied on Article 17 to justify interference with freedom of expression. Rather, the European Court has required that the legitimacy of the interference with such expression must be justified under paragraph 2 of Article 10 of the ECHR.[1654] Article 10 of the ECHR protects every form of expression, even reviled expression. Given its fundamental importance for a democratic society, Article 10 of the ECHR is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[1655]

What is protected is **an opinion,** and not a mere insult, which is not intended to make certain spiritual decline toward something or which is not aimed at influencing a third person's point of view or providing certain information to another person. Where it is possible to replace the challenged phrase by any other insulting term, then it does not involve a protected opinion but a plain insult.[1656]

A careful distinction needs to be made between **facts** and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments

1652 CH/01/7248-A&M, paragraph 170 in conjunction with the ECtHR, *Jersild v. Denmark*, 23 September 1994, Series A No. 298, paragraph 31.

1653 CH/01/7248-A&M, paragraph 170 in conjunction with *Keir Starmer*, European Human Rights Law, paragraph 24.3 (2002).

1654 CH/01/7248-A&M, paragraph 170 in conjunction with *D.J. Harris/M. O'Boyle/C. Warbrick*, Law of the European Convention on Human Rights, pp. 373-374 (1995).

1655 CH/01/7248-A&M, paragraph 170 *et seq.* in conjunction with the ECtHR, *Handyside v. the United Kingdom*, 7 October 1976, Series A No. 24, paragraph 49; U 39/01, paragraph 22. Freedom of expression encompasses also radio and cable programme services (CH/01/7248-A&M, paragraph 172 in conjunction with the ECtHR, *Groppera Radio AG et al. v Switzerland*, 28 March 1990, Series A No. 173, paragraph 55).

1656 Compare U 39/01, paragraph 25.

is not susceptible of proof.[1657] In each individual case the court should carefully assess whether it implies value-judgments or facts.[1658]

However, the opposite applies as well. **A statement of untrue facts** does not automatically imply that such expressions do not fall under the protection of Article 10 of the ECHR. For example, in a case where a journalist has a legitimate aim, when it involves a matter of great public concern and when reasonable efforts have been invested in confirmation of the facts, media enjoys the protection of Article 10 of the ECHR even in cases where it is later established that the facts were untrue.[1659] However, in cases where the media states untrue facts, those cannot be considered justified if the statements can be proved to be false. In such a case, a journalist's reason being that he relied on a "trusted" source of information whose identity, pursuant to Article 9 of the Federation of BiH Law on Protection against Defamation (*OG of FBiH*, No. 59/02), he does not want to disclose, does not suffice.[1660] In cases where there is a wilful or negligent dissemination of untrue facts, an injured person shall be entitled to demand corrections or a denial to be issued in public.[1661] Moreover, an injured person is obliged to employ this "procedural" possibility. In cases where the relevant media agree to issue a denial, no censure is allowed. In a denial, contradictory statements must not be removed. If the relevant media do not want or decline to make public the truth, *i.e.*, a denial, an injured person shall be entitled to judicial protection and may raise an issue under Article 10 of the ECHR.[1662] However, the judicial protection in this context can be afforded only if false facts have been made public, but the judicial protection does not relate to offensive language in public, since "a denial" cannot be issued for offensive language.[1663]

Freedom of expression implies also **an order** to the media to impart information and ideas to the public, as the public is entitled to be informed.[1664] On the other

1657 AP 1145/04, paragraph 35 in conjunction with the ECtHR, *Lingens v. Austria*, 8 July 1986, Series A No. 103; in conjunction with the disclosure of a statement of untrue facts see, for example, AP 1145/04, paragraph 35; AP 1005/04, paragraph 38 *et seq.*; AP 96/05, paragraph 35 *et seq*.; AP 712/05, paragraph 46 *et seq.* in conjunction with the expression of value-judgments see, for example, AP 787/04, paragraph 45 *et seq.*; AP 1064/05, paragraph 37 *et seq*.

1658 AP 1203/05, paragraph 51.

1659 Compare, AP 1145/04, paragraph 35 in conjunction with the ECtHR, *Dalban v. Romania*, 28 September 1999, Reports 1999-VI.

1660 AP 1203/05, paragraph 51.

1661 AP 1423/05, paragraph 32.

1662 AP 1423/05, paragraph 32.

1663 AP 1064/05, paragraph 38.

1664 U 10/05, paragraph 38 in conjunction with the ECtHR, *Jersild v. Denmark*, 23 September 1994, Series A No. 298.

hand, the media cannot be required to play the role of the “so called” *public watchdog*.[1665]

Article 10 of the ECHR does not provide protection as to the creation of public broadcasting radio-television systems. Therefore, a complaint about disproportionate treatment of the State’s RTV system compared to the Entities’ systems because the programme of one is not transmitted via the networks of other systems does not fall within the protection afforded by Article 10 of the ECHR. Radio-television systems, which have the status of public institutions, do not enjoy the protection of this Article irrespective of the fact that they are independent legal persons. However, the position referred to in the preceding paragraph does not pertain to the right of employees of the public broadcasters who may, as any other citizens, seek protection under this right. Nevertheless, in cases where higher goals are to be achieved, such as, for example, the protection of the identity of one’s sources, certain restrictions on the exercise of freedom of expression by those persons may be justified.[1666]

b. Interference with (restriction of) the freedom of expression and a justification for it

Freedom of expression is essential to the functioning of a democratic society. Therefore, it is a fundamental guarantee of all human rights and freedoms. Any restrictions on the freedom of expression can infringe upon not only the rights of an individual or the media but, at the same time, they can infringe the prerequisites for a democratic system within society, which are, on the other hand, the foundation of protection of other human rights and freedoms. In case of possible conflicts of the right to freedom of expression with other guaranteed rights and freedoms, the courts face a difficult task as they need to balance the conflicting rights and freedoms in each individual case. Only in exceptional cases should the freedom of expression be in retreat before another human right or freedom. For example, this will be the case where it is shown that the protection of democratic values and order is more important than the freedom of expression itself.[1667]

1665 U 10/05, paragraph 38 in conjunction with the ECtHR, *The Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216, paragraph 59.

1666 U 42/03, paragraph 22 *et seq*. The reasoning in the said judgment is in collision with the decision taken in Case No. AP 39/03 of 27 April 2004, where the BiH Constitutional Court extended the scope of protection of this constitutional freedom to the “State”, whereby it consciously distances itself from the case-law of the ECtHR. Actually, the Decision AP 39/03 is not mentioned anywhere in the mentioned Decision U 42/03. Consequently, the case-law of the BiH Constitutional Court requires a certain consolidation (as to this issue see, also, “iii. “Civil” Claim”, p. 248).

1667 AP 1005/04, paragraph 26 *et seq*.

States are permitted to require licensing of broadcasting enterprises based on the third sentence of Article 10, paragraph 1. Namely, States are allowed to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole. Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at the national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. The compatibility of such interferences with the ECHR must nevertheless be assessed in light of the other requirements of paragraph 2.[1668] In particular, a State must not use a system of broadcast licensing to create a public broadcasting service monopoly, as it is contrary to the purposes of this freedom, media pluralism and diversity.[1669]

Pursuant to paragraph 2 of Article 10 of the ECHR, restrictions on the exercise of freedom of expression must be prescribed by law, 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

(a) The supremacy of law

Restrictions on the exercise of freedom of expression under Article 10 of the ECHR shall be "prescribed by law" if the governing instruments have a basis in the national law and satisfy the conditions of accessibility and foreseeability.[1670]

i. A basis in the national law

A criterion related to a legal basis in the national law shall not be complied with in cases where there is only a law enacted by the legislature. Also, the regulations, which have no force of law (within the institutional context) and

1668 CH/01/7248-A&M, paragraph 172, in conjunction with the ECtHR, *Groppera Radio AG et al. v. Switzerland*, 28 March 1990, Series A No. 173, paragraph 61, and *Informationsverein Lentia et al. v. Austria*, 24 November 1993, Series A No. 276, paragraph 32.

1669 Compare, U 10/05, paragraph 39 *et seq.*, in conjunction with the ECtHR, *Informationsverein Lentia v. Austria*, 24 November 1993, Series A No. 276.

1670 CH/01/7248-A&M, paragraph 174.

which are enacted by the competent authorities, may be considered as a "law" within the meaning of the provision of Article 10, paragraph 2 of the ECHR.[1671]

Therefore, the relevant provisions adopted under the regular procedure by the Independent Media Commission, *i.e.*, the Communications Regulatory Agency, may constitute a legal basis for the restriction of the right of freedom of expression.[1672]

ii. Accessibility

The accessibility of a legal basis is determined according to the circumstances of each individual case. In addition, it is not decisive that the governing instruments have been published in official gazettes of the country. In some cases, unpublished instruments may, depending on the circumstances of the case, satisfy the requirements of accessibility. The requirements of accessibility may be satisfied where the governing instruments, as in the case of regulations issued by the Communications Regulatory Agency, have been served directly to the person concerned.[1673]

iii. Foreseeability

To be foreseeable, a legal basis must be formulated with sufficient precision to enable an individual to regulate his conduct. The individual must be able, if needs be with professional and expert advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring with it excessive rigidity, whereas the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In assessing whether the criterion of foreseeability is satisfied, account may also be taken of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents.[1674]

1671 CH/01/7248-A&M, paragraph 175, in conjunction with the ECtHR, *Barthold v. Germany*, 25 March 1985, Series A No. 90, paragraph 46.

1672 CH/01/7248-A&M, paragraph 176 *et seq.*

1673 Compare, CH/01/7248-A&M, paragraph 178 *et seq.*, in conjunction with the ECtHR, *Sunday Times v. the United Kingdom*, 26 April 1979, Series A No. 30, paragraph 49, and *Groppera Radio AG et al. v. Switzerland*, 28 March 1990, Series A No. 173, paragraph 68.

1674 CH/01/7248-A&M, pp. 174, 180 *et seq.*, in conjunction with the ECtHR, *Barthold v. Germany*, 25 March 1985, Series A No. 90, paragraph 45, *Sunday Times v. the*

> As to the governing instruments of the Communications Regulatory Agency, the Human Rights Chamber held that the criterion of foreseeability was satisfied since the Independent Media Commission, i.e., the Communications Regulatory Agency, formulated the regulations with sufficient precision and, based on its experience, made them available to the broadcasters, including the applicant.[1675]

(b) Legitimate aim

Besides the criterion of lawfulness, it is necessary to identify one or more legitimate aims enumerated in paragraph 2 of Article 10 of the ECHR in order for an interference with the freedom of expression to be justified, *i.e.*, whether the restrictions are 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

As to the case-law of the BiH Constitutional Court in respect of the freedom of expression, the relevant cases usually imply the protection of third persons from defamation and insult. **Public persons** have to accept a much wider range of restrictions on their private lives than persons in whom there is a narrow range of public interest or there is no public interest at all. Namely, as to the first group of persons, there is a justified interest of the public to be informed about them. However, freedom of expression does not encompass the protection against disclosing information or opinions as to the intimate or private spheres of the lives of public persons, but it regards information related to their businesses or duties or the most prominent elements of their personality, which justify the existence of public interest.[1676] Criticisms of public persons fall within the scope of freedom of expression. However, it does not encompass the disclosure of a statement of facts, which is manifestly untrue.[1677]

In the case of "ORDO" RTV Sveti Georgije, after the broadcast of a "live" programme concerned protests against the groundbreaking ceremony for the laying of the cornerstone to reconstruct the former Ferhadija mosque in Banja Luka, the Human Rights Chamber held that the conditions were met to justify the interference with freedom of expression by way of prohibiting the broadcast

United Kingdom, 26 April 1979, Series A No. 30, paragraph 49, and *Leander v. Sweden*, 26 March 1987, Series A No. 116, paragraph 51.

1675 CH/01/7248-A&M, paragraph 181 *et seq.*

1676 AP 712/05, paragraph 47.

1677 AP 712/05, paragraph 47.

and suspending the broadcasting licence as it had been legitimately aimed at protecting **public safety.**[1678]

In principle, the necessity for **maintaining the authority and impartiality of the judiciary** does not prevent the parties in proceedings from using irony or expressing criticism directed at the court or a judge.[1679] However, the right to freedom of expression shall be restricted in cases where expressions contain what would seem to be the elements of an offence (for example, an obstruction to the performance of official duties). In such a case, the imposition of sanctions against a perpetrator of such an offence constitutes a legitimate restriction on freedom of expression.[1680]

(c) Necessary in a democratic society

An interference with freedom of expression is necessary in a democratic society if the reasons stated by the national authorities justify it and if the reasons are relevant and sufficient, and the means employed are proportionate to the legitimate aim pursued. The national authorities must apply standards in conformity with the principles of Article 10 and appropriately assess the relevant facts. Besides, it is primarily for the national authorities, notably the courts, to interpret and apply national law. The adjective "necessary" in paragraph 2 of Article 10 of the ECHR implies the existence of a "pressing social need". Moreover, in assessing the existence and extent of the necessity for an interference with the freedom of expression, States enjoy a certain margin of appreciation. This margin of appreciation, however, is not unlimited. It goes hand in hand with ECHR supervision, the scope of which will vary according to the circumstances.[1681] The safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep various bounds set, *inter alia*, in the interest of the protection of the reputation and rights of others, it is nevertheless incumbent on it to impart information and ideas on political questions of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Moreover, freedom of the press gives politicians the opportunity to reflect and

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1678 CH/01/7248-A&M, paragraph 184 *et seq.*

1679 AP 198/03, paragraph 43 *et seq.*

1680 AP 2963/06, paragraph 47 *et seq.*

1681 Compare, CH/01/7248-A&M, paragraph 187 in conjunction with the ECtHR, *Jersild v. Denmark*, 23 September 1994, Series A No. 298, paragraph 31; the ECtHR, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A No. 295-A, paragraph 45; *Lingens v. Austria*, 8 July 1986, Series A No. 103, pp. 39, 50, and *Incal v. Turkey*, 9 June 1998, Reports 1998, paragraph 58.

comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[1682]

In view of the above, in examining whether the sanctions imposed on the broadcasters or, precisely, on the moderator of the disputed programme, are irrelevant within the meaning of paragraph 2 of Article 10 of the ECHR, a number of factors must be taken into account, which, on the one side, observe the importance of freedom of expression in a democratic society and, on the other hand, observe the necessity of restricting the media's freedom of expression. In cases where a television programme disseminates racist remarks, it is necessary first to establish who utters the offensive statements, either the broadcaster's employees or third persons, guests in the programme. Even where such statements are uttered by third persons, *i.e.*, guests in a programme, the broadcaster or the moderator of the programme are obliged to observe the views. Otherwise, the programme may seem to be speculative given that the media has an obligation to create public opinion objectively. In this regard, it is also necessary to establish whether certain views or programmes of the media, from an objective point of view, have as their purpose the propagation of racist views and ideas.[1683]

> Having established those criteria in case of "ORDO" RTV Sveti Georgije, the Human Rights Chamber came to the conclusion that a live, unedited, uncensored, call-in television programme, which presented racist remarks by third persons and which was broadcast only one day after extensive violent protests in Banja Luka preventing the groundbreaking ceremony for laying the cornerstone to reconstruct the former Ferhadija mosque, was unjustifiable. The suspension and later revocation of the broadcaster's provisional broadcasting license were proportionate to the legitimate aims of protecting the rights of others, protecting public safety, and preventing disorder or crime.[1684]

The same applies to a decision ordering a journalist to pay compensation for making an untrue statement of fact. Given the principle of proportionality, the court has to award fair and balanced compensation for damages in each individual case. These requirements shall not be satisfied in cases where the court incorrectly establishes that an untrue statement of fact has not been

1682 CH/01/7248-A&M, paragraph 188 *et seq.*, with the quotation from *Jersild v. Denmark*, 23 September 1994, Series A No. 298, paragraph 31; and *Castells v. Spain*, 23 April 1992, Series A No. 236, paragraph 43.

1683 CH/01/7248-A&M, paragraph 189 *et seq.*, in conjunction with *Jersild v. Denmark*, 23 September 1994, Series A No. 298, paragraph 30 *et seq.*

1684 CH/01/7248-A&M, paragraph 191 *et seq.*; See also the Separate Opinions by Judges *Pajić* and *Popović.*

published. The amount of compensation ought to be made commensurate with the scope of damage.[1685]

10. Freedom of peaceful assembly and association with others (Article 11 of the ECHR)

(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.

AP 279/04 S.L. *et al.*	20050412
CH/02/11033-A&M Associated Worker's Union of the FBiH	20031205
CH/96/17-A&M Blentić	19980722

a. Introduction

Article 11 of the ECHR guarantees the right to freedom of assembly and association. In principle, this human right secures two types of freedom. On the one hand, it relates to political and democratic freedoms, which are closely associated with the freedom of expression protected under Article 10 of the ECHR. Actually, it concerns the right to protest and the right to become a member of a political party. On the other hand, it involves the fundamental rights arising from labour relations; it primarily implies the right to join a trade union or the right to refuse to be a member of such an association.[1686] These freedoms have a special place within the system of the ECHR, as they are a very important element in building a democratic society.[1687] Although this freedom is guaranteed in many constitutions, there are considerable differences in the practical application thereof. A level of democracy may, to a large extent, dictate the exercise of this right in practice.[1688] Freedom of assembly and association is subject to certain restrictions (paragraph 2), as are any other freedoms enumerated in Articles 8 through 11 of the ECHR.

1685 AP 1289/05, paragraph 41 et seq.
1686 *Ovey/White*, 2002, p. 298.
1687 AP 279/04, paragraph 21.
1688 *Trnka*, 2000, p. 171.

b. The scope of protection

Article 11 of the ECHR does not secure any particular treatment of trade unions and their members. Nevertheless, this provision of the Convention imposes an obligation on States to protect rights that are indispensable for the effective enjoyment of trade union freedom. These essential rights also include the right of trade unions to be registered in order to be able to carry out the activities protected by Article 11 of the ECHR.[1689] This freedom also protects collective measures, such as the strike, which are necessary in the realisation of the interests of workers' associations. The right to a strike is derived from the workers' freedom of association and assembly. In the legal system of BiH, a worker or a group of workers are not entitled to the said right but workers' associations (primarily trade unions), entitled to represent workers, enjoy the protection. Such associations promote workers' economic and social interests as well as workers' individual interests.[1690]

Under Article 11 of the ECHR, a State has a positive obligation to take reasonable and appropriate measures aimed at the effective exercise of the rights secured by Article 11 of the ECHR. Thus, a State has to take measures to protect lawful demonstrations from violence by counter demonstrators, although the authorities cannot guarantee a successful outcome and have wide discretion as to the means to be used. In so doing, a State enjoys a wide margin of appreciation, which means that a State, in selecting and in implementing such measures, must have certain discretionary powers.[1691]

c. Interference with the right to freedom of assembly and association, and a justification for it

Interference with this freedom, *i.e.*, any restriction on it, must be prescribed by law and 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 does not provide for the prohibition of lawful restrictions on the rights of members of armed forces, police or State administration.

1689 CH/02/11033-A&M, paragraph 34.
1690 AP 279/04, paragraph 21.
1691 CH/96/17-A&M, paragraph 28 in conjunction with the ECtHR, *Plattform Ärzte für das Leben v. Austria*, 21 June 1988, Series A No. 139, pp. 30-34.

(a) The supremacy of law

The principle of supremacy of law under paragraph 2 of Article 11 of the ECHR corresponds, by its contents, to the same principle related to other rights and freedoms enumerated in the ECHR, *i.e.*, Articles 8, 9 and 10 of the ECHR.[1692]

(b) Necessary in a democratic society and in pursuance of a legitimate aim, within the meaning of paragraph 2

i. Legitimate aims

In any area of life where there is a pressing social interest, freedom of assembly and association may be subject to restrictions. This would be the case if a State pursues one or more enumerated legitimate aims, such as the protection of the priority rights of third persons. Thus, it may be justified to enact rules protecting areas where a minimum amount of work activities and conditions of life and work, which must not be affected by a strike, ought to be secured.[1693]

Provisions governing the issue of **time limits for registration** of trade unions have a legitimate aim – ensuring the principle of legal certainty, one of the fundamental aspects of the rule of law. Finally, limitation periods can thus be considered to be in the interest of the protection of rights and freedoms of others.[1694]

ii. Necessary in a democratic society

The "necessity" which may justify restrictions on freedoms guaranteed in paragraph 1 of Article 11 of the ECHR is that which may be derived from the notion of "a democratic society".

In determining whether a "necessity" within the meaning of Article 11, paragraph 2 of the ECHR exists, States have only a limited margin of appreciation as to the possible exceptions set out in that paragraph, and only convincing and compelling reasons can justify such restrictions.[1695]

1692 See, details about Articles 8-10 of the ECHR, p. 341, 369, 376 and AP 279/04, paragraph 23 in conjunction with the ECtHR, *Schmidt and Dahlström v. the United Kingdom*, 6 February 1976, Series A No. 21, p. 16.

1693 AP 279/04, paragraph 24 *et seq*.

1694 CH/02/11033-A&M, paragraph 41 in conjunction with the ECtHR, *Stubbings et al. v. the United Kingdom*, 22 October 1996, Reports 1996-IV, paragraph 51.

1695 CH/02/11033-A&M, paragraph 44 *et seq.* in conjunction with the ECtHR, *United Communist Party of Turkey et al. v. Turkey*, 30 January 1998, Reports 1998-I, paragraph 45 *et seq.*

Therefore, the Human Rights Chamber did not hold, in the relevant case as well as in general, that the short time-limit of 15 days for registration of the workers' association, a trade union, after the holding of the founding assembly session was "a necessity" within the mentioned context.[1696] Therefore, such a time limit does not provide for the possibility of the effective enjoyment of freedom of association.

Legal prohibitions against strikes spreading to other spheres, which are essential to maintaining the life and work of citizens (for example, public education) may be justified in a democratic society in certain cases.[1697]

11. Right to marry (Article 12 of the ECHR)

> **Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.**

Article 12 of the ECHR guarantees the right to marry and to found a family for persons who meet the requirements for entering into a marriage and founding a family. This human right does not relate to the right to divorce.[1698] Furthermore, Article 12 of the ECHR does not require that States take actions aimed at encouraging people to found a family, such as, for example, medical assistance or treatment of infertile couples free of charge. This right does not provide that married prisoners are permitted conjugal visits. Finally, this right does not impose an obligation on a State to ensure, upon a request, a reunion of spouses in BiH in cases where one spouse is living abroad and does not have BiH citizenship.[1699]

However, a prohibition of remarriage for three years after a divorce is in contravention of Article 12 of the ECHR, as the mentioned prohibition is disproportionate to the legitimate aim that is sought to be achieved – the protection of the institution of marriage.[1700] In addition, a legal provision prohibiting a person to enter into a marriage while serving a prison sentence is in contravention of the right to marry under Article 12 of the ECHR.[1701]

1696 AP 279/04, paragraph 24 *et seq*.

1697 AP 279/04, paragraph 24 *et seq*.

1698 AP 2647/05, paragraph 11, in conjunction with the ECtHR, *Johnston et al. v. Ireland*, 18 December 1986, Series A No. 112, paragraph 51 *et seq.*

1699 AP 2647/05, paragraph 11, in conjunction with the ECtHR, *Hammer v. the United Kingdom*, Application No. 7114/75 of 13 December 1979, DR 24, and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A No. 94.

1700 AP 2647/05, paragraph 11, in conjunction with the ECtHR, *F. v. Switzerland*, 18 December 1987, Series A No. 112.

1701 AP 2647/05, paragraph 11, in conjunction with the ECtHR, *Draper v. the United Kingdom*, Application No. 8186/78, DR 72 and 81 (1980).

12. Right to an effective remedy (Article 13 of the ECHR)

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

AP 1100/05 Ćelić	20051117
AP 215/05 Jonuzi	20060412
AP 255/06 Mutapčić *et al.*	20070605
AP 422/04 B.G.	20050518
AP 953/05 Bilbija *et al*.	20060708
CH/00/4371-A Gračanin	20011107
CH/01/7257-A&M Borota	20030207
CH/02/12421-A&M Kulovac	20030307
CH/02/8939-A&M M. H.	20030307
CH/02/9842-A&M Durmo	20030110
CH/96/3 *et al*.-M Medan *et al.*	19971103
CH/97/40-M Galić	19980612
CH/97/45-A&M Hermas	19980218
CH/98/1027 *et al*.-A&M R.G. *et al.*	20000609
CH/98/636-A&M Miljković	19990611
CH/98/814-A&M Prodanović	19990611
CH/98/946-A&M H. R. & Momani	19991105
CH/99/1505-A Šabančević	20010703
CH/99/2150-A&M Unković	20011109
U 14/99 Hotel "Bosna"	20001231 *OG of BiH*, No. 36/00
U 17/00 Zunđa	20010710 *OG of BiH*, No. 17/01
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 61/02 M. O.	20040121
U 62/01 Pjanić	20020829 *OG of BiH*, No. 24/02
U 70/03 K. M.	20040130

a. The scope of protection

Article 13 of the ECHR provides certain procedural guarantees. This constitutional right implies the obligation on the legislature to avail an individual of an effective mechanism to enforce the rights and freedoms set forth in the ECHR. The competent national authority must be able to deal with alleged violations of human rights and freedoms in cases where an individual has an arguable claim to be the victim of a violation and, if appropriate, to order redress as necessary. In this regard, States enjoy a certain margin of appreciation as to the form or manner in which they conform to their obligations.[1702]

1702 U 18/00, paragraph 46 in conjunction with the ECtHR, *Lithgow et al. v. the United Kingdom*, 8 July 1986, Series A No. 102, p. 74, paragraph 205, and *Pine*

However, Article 13 of the ECHR has a limited scope as it provides for the right to an effective remedy **only for the rights and freedoms set forth in the Convention**. Therefore, where an individual claims a violation on account of the absence of an effective remedy in respect of certain rights that are not protected by the ECHR (for example, the right to work), such a claim is inadmissible, according to the terminology used by the BiH Constitutional Court, *i.e.*, it is *ratione materiae* incompatible with the ECHR.[1703] Thus, the BiH Constitutional Court, unlike its previous case-law, follows the case-law of the ECHR.[1704]

The remedy must be effective in practice as well as in law. It must not be available only in theory, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State.[1705]

There are four elements for determining the effectiveness of an appeal mechanism. First, its *institutional* effectiveness, which requires that a decision-maker be independent of the authority at fault for the alleged or actual violation of the ECHR. The effectiveness as to *the substance of a case* requires that a complainant be able to raise the substance of the right at issue before the national authority from which he is seeking the remedy. The effectiveness as to *the legal assistance* entails that a competent national authority must be afforded an opportunity to establish the alleged violations of one or more of the rights referred to by a complainant.[1706] Finally, Article 13 of the ECHR requires the *material* effectiveness of an appeal mechanism, which requires that any remedy a person may have been awarded in his favour be such that the person may take effective advantage of it.[1707] This case-law discloses that Article 13 of the ECHR guarantees only the effective *mechanism* to enforce the ECHR rights. However, this does not necessarily guarantee success, *i.e.*, a positive result at the end of the proceedings to decide on the remedy sought. Therefore, in case

Valley Developments Ltd. et al. v. Ireland, 29 November 1991, Series A No. 222; CH/97/45-A&M, paragraph 108, and CH/98/946-A&M, paragraph 121, with a quotation from the ECtHR, *Aydin v. Turkey*, 25 September 1997, Reports 1997, paragraph 103.

1703 AP 422/04, paragraph 12.

1704 Compare, for example, *Klass et al. v. Germany*, 6 September 1978, Series A No. 28, p. 28 *et seq.*

1705 U 18/00, paragraph 46,and CH/97/45-A&M, paragraph 108, both in conjunction with the ECtHR, *Aksoy v. Turkey*, 18 December 1996, Reports 1996-VI, paragraph 95; AP 953/05, paragraph 55.

1706 AP 953/05, paragraph 37 in conjunction with the ECtHR, *Silver et al. v. the United Kingdom and Northern Ireland*, 25 March 1983, Series A No. 61, p. 42.

1707 CH/97/40-M, paragraph 56; CH/97/756-A&M, paragraph 93; CH/00/6444 *et al*.-A&M, paragraph 85.

the outcome of the proceedings does not satisfy the applicant's expectations, this does not mean that it would constitute a *per se* violation of Article 13 of the ECHR.[1708]

In Case No. U 18/00, the BiH Constitutional Court established the absence of an effective mechanism as BiH had failed, in the course of its constitutional re-organisation after Dayton, to establish all bodies necessary to perform its constitutional obligations towards its citizens or, in other words, it had failed to establish an operative body which would be competent for inter-Entity transport or a judicial body that would deal with cases brought by appellants against the decisions of those State bodies.[1709] The available mechanisms were useless for the appellant since he could not obtain any copy of an administrative act, which limited his rights. On the one side, this act would disclose which legal remedies were available to him and, on the other hand, the appellant would be able to see the reasoning (legal grounds) for limiting his rights in order to properly frame any appeal against such an act.[1710] In the same manner, theoretical remedies cannot be defined as being effective in a case where an individual avails himself of this remedy and the competent authority persists in ignoring and not offering any adequate answer to it.[1711]

Article 13 of the ECHR shall apply as from the moment when an individual has **an arguable claim** to be the victim of a breach of the rights set forth in the Convention. Evidence that a person's rights and freedoms guaranteed by the ECHR are violated is not indispensable.[1712] However, where it appears that a violation of the Convention rights and freedoms is *prima facie* ill-founded, Article 13 of the ECHR shall not apply. An arguable claim of a violation may be taken into account in cases where several courts have presented their views on the matter at issue.[1713]

Given the fundamental importance of **the prohibition of torture** and the especially vulnerable position of victims of torture, Article 13 of the ECHR imposes, without prejudice to any other remedy available under the domestic

1708 AP 1100/05, paragraph 37; U 70/03, paragraph 26; AP 255/06, paragraph 13.
1709 Paragraph 47.
1710 CH/97/40-M, paragraph 58.
1711 CH/97/756-A&M, paragraph 94; CH/00/6444 *et al*.-A&M, paragraph 86.
1712 U 17/00, paragraph 34, and U 18/00, paragraph 44 in conjunction with the ECtHR, *Silver et al. v. the United Kingdom*, 25 March 1983, Series A No. 61, paragraph 113; CH/97/40-M, paragraph 55 in conjunction with the ECtHR, *Powelland Rayner v. the United Kingdom*, 21 February 1990, Series A No. 172, paragraph 31; CH/00/6444 *et al*.-A&M, paragraph 84; AP 953/05, paragraph 37 in conjunction with the ECtHR, *Klass et al. v. Germany*, Series A No. 28, p. 28 *et seq*.
1713 Compare, U 18/00, paragraph 45.

system, an obligation on States to carry out a thorough and effective investigation of incidents of torture. In cases where there are sufficient indications that a person has been tortured by agents of the State, an "effective remedy" requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there are reasonable grounds to believe that an act of torture has been committed. However, such a requirement is implicit in the notion of an "effective remedy".[1714] Likewise, this applies equally to forms of inhuman or degrading treatment, which, in a substantive sense, do not exceed the limit necessary to disclose an appearance of the elements of the criminal offence of "torture".[1715]

> In Case No. CH/97/45-A&M, the Human Rights Chamber, while deciding on the remedy, could not establish that the national law stipulated an effective remedy, which would enable the victim to institute appropriate legal proceedings under the previously described standards. The State Public Prosecutor's Office failed to make use of his powers to carry out any investigations directed against those responsible.[1716]

b. As to Article 6 of the ECHR and other *lex specialis*

As to the rights and freedoms which are claimed to have been violated by court judgments, the applicability of Article 13 of the ECHR is determined by way of viewing this right through the prism of the right to a fair trial under Article **6 of the ECHR**.[1717] Article 6 of the ECHR guarantees, *inter alia*, the right of access to an independent and impartial tribunal. However, this right does not provide the possibility to challenge a first instance judgment before an appellate court (a right of appeal is offered in criminal matters under Article 2 of Additional Protocol No. 7 to the ECHR). In addition, Article 13 of the ECHR does not exceed this scope and, thereby, does not require that first instance judgments should be challenged before courts of higher instance to establish compliance with the

1714 CH/97/45-A&M, paragraph 108, with a quotation from the ECtHR, *Aydin v. Turkey*, 25 September 1997, Reports 1997, paragraph 103.

1715 CH/97/45-A&M, paragraph 109.

1716 Compare, paragraph 110; as well as the Decision No. CH/98/946-A&M, paragraph 122.

1717 U 62/01, paragraph 13.

principles of human rights and freedoms.[1718] In cases where a violation of the right of access to court as safeguarded by Article 6, paragraph 1 of the ECHR has been established, it may be decided that it is unnecessary also to examine the complaint under Article 13 of the ECHR as the requirements of Article 13 of the ECHR are less strict than those of Article 6 of the ECHR.[1719] There is no violation of the right to an effective remedy where the law does not guarantee an appeal instance or a public hearing before an appellate court.[1720] The same applies to a procedural situation where the RS Supreme Court referred the case back to the court of first instance for renewed proceedings, without the possibility of holding a public hearing. In such a case, it is possible to refer to a violation of the right to a fair trial under Article 6, paragraph 1 of the ECHR.[1721]

Article 5 paragraph 4 provides a *lex specialis* in relation to the more general requirements of Article 13.[1722] Article 1, Additional Protocol No. 7 to the ECHR, as regards extradition and deportation of aliens, may in some cases provide a *lex specialis* in relation to Article 13 of the ECHR.[1723]

c. Legal protection from individual decisions of the High Representative

At the beginning of its work, the Constitutional Court of BiH, similarly to the Human Rights Chamber, acted in a defensive manner in respect of individual appeals lodged against individual acts of the High Representative. At the end of 2004, the Constitutional Court of BiH took a number of decisions by which it reached a turning point in its case-law where it related to the mentioned issue.[1724] The appeals lodged against individual acts of the High Representatives were no more rejected for the reason that those were not "court judgments", as it was previously done, but were rejected solely on formal grounds – *for being premature*, given that the appellants had failed to challenge before

1718 U 62/01, paragraph 13 in conjunction with EComHR, Application No. 10153/82 of 13 October 1986, DR 49, 67.

1719 CH/96/3 *et al*.-M, paragraph 43 in conjunction with the ECtHR, *Hentrich v. France*, 22 September 1994, Series A No. 296-A, paragraph 65; CH/01/7248-A&M, paragraph 228.

1720 AP 215/05, paragraph 100.

1721 U 14/99, paragraph 5.

1722 CH/96/21-B, paragraph 48, in conjunction with the ECtHR, *Chahal v. the United Kingdom*, 15 November 1996.

1723 CH/02/8767-A&M, paragraph 98.

1724 Compare, AP 759/04, AP 777/04, AP 784/04, AP 766/04, all dated 29 September 2004, as well as AP 905/04 and AP 347/04 of 30 November 2004; unpublished in *OG of BiH*, <www.ustavnisud.ba>. See, details in "q. Particularity: Competence to review international interventions", p. 782 *et seq*.

the competent courts the cases related to removal from a position and the prohibition on carrying on certain activities.[1725] The challenged individual acts as well as other similar acts of the High Representative, especially when it concerns the consequences of those acts for the injured parties, raised very serious issues in relation to the BiH Constitution and the ECHR. As to the individual acts of the High Representative, *inter alia*, there was no possibility to challenge those acts by way of any effective remedy and this, by implication, raised an issue with regard to the guarantees under Article 13 of the ECHR.[1726] Besides, the challenged acts contained no instruction on remedy. On the other hand, given the direct application of the ECHR, all State authorities in BiH were obliged to examine all acts in contravention of the Convention and to guarantee the protection against possible violations of the rights and freedoms safeguarded by the ECHR.[1727]

It was only a matter of time before an injured party would exhaust or attempt to exhaust all available legal remedies in order to address the BiH Constitutional Court with an appeal against a decree of the High Representative and by complaining of the (expected) lack of legal protection in the country. Indeed, that moment occurred when the appeal No. AP 953/05 was lodged with the BiH Constitutional Court. That was the moment when the Constitutional Court, consequentially, could and had to decide on the merits of the case. The appellants were two high-ranking officials from the RS (*Bilbija* and *Kalinić*) who were removed from their offices by a decision of the High Representative in 2004, and they were also barred from holding any public position and any office within political parties. The appellants first addressed the Court of BiH, which denied its competence to examine the acts of the High Representative. Both the appellants complained to the BiH Constitutional Court against BiH, and not against the OHR. The appellants claimed, *inter alia*, a violation of their right to an effective remedy stipulated under Article 13 of the ECHR. Namely, the appellants claimed that there was no single independent judicial instance available to them in BiH, which could provide them judicial protection against the individual decisions of the OHR.[1728]

In its decision of 8 July 2006 (AP 953/05), the BiH Constitutional Court established a violation of Article 13 of the ECHR by BiH. The BiH Constitutional Court confirmed that there was no effective legal remedy against the decisions of the High Representative available within the legal system of Bosnia and

1725 Compare the enacting clause and paragraph 10 *et seq*. of the Decision.
1726 *Ibid*., paragraph 8.
1727 *Ibid*., paragraph 9.
1728 AP 953/05, paragraph 13 *et seq*.

Herzegovina.[1729] The State should not disregard its positive obligations under Article 1 of the ECHR, irrespective of the fact that the State transferred some of its competencies to the "international community".[1730] The appellants' constitutional rights and freedoms cannot be restricted or left entirely unprotected due to the fact that the High Representative has a special status in BiH. The State, contrary to its obligations, failed to take actions towards the relevant international bodies and institutions in order to establish a protection mechanism against breaches of human rights and freedoms by the High Representative. At the same time, in accordance with its case-law, the BiH Constitutional Court itself did not review the relevant individual decisions of the High Representative.[1731]

It was the first time that the BiH Constitutional Court had to deal with the question of whether the High Representative, in the exercise of his international mandate, could breach constitutional rights and freedoms in BiH. Successive Security Council Resolutions adopted under Chapter VII of the UN Charter recognise the High Representative as having authority under Annex 10 to the General Framework Agreement for Peace to make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council. Member States of the UN have an obligation under Article 25 of the UN Charter to carry out the decisions of the Security Council in accordance with the UN Charter. It is not entirely clear whether the relevant provisions of the Security Council Resolutions are the decisions of the Security Council. In addition, they do not say that they are decisions. However, they clearly go beyond mere recommendations, and Article 39 recognises only two formal acts which the Security Council can promulgate under Chapter VII, namely recommendations and decisions. The Constitutional Court therefore accepts that the relevant provisions of the Resolutions are decisions for the purposes of Article 25 of the Charter. In international law, the High Representative thus has power to make binding decisions, and authorities of Bosnia and Herzegovina have an obligation to co-operate with the High Representative, by virtue of both the General Framework Agreement for Peace and the Security Council Resolutions.[1732]

Pursuant to Article 103 of the UN Charter, BiH obligations to act in accordance with decisions of the Security Council override the obligations under any other treaty. This means that, in case of a conflict, even the obligations related to

1729 Paragraph 51.

1730 AP 953/05, paragraph 52 *et seq*. in conjunction with the ECtHR, *Matthews v. the United Kingdom*, 18 February 1999, pp. 29 and 32.

1731 *Ibid*., paragraph 40 *et seq*.

1732 *Ibid*., paragraph 62.

human rights may be cancelled by the Security Council Resolutions adopted under Chapter VII of the UN Charter. The only possible exception so far recognised in the literature is an obligation which amounts to *ius cogens*, a peremptory norm of international law.[1733]

However, the obligations of Bosnia and Herzegovina in public international law to co-operate with the High Representative and to act in conformity with decisions of the UN Security Council cannot determine the constitutional rights and freedoms applicable in BiH. Namely, the positive obligation of BiH to secure to its citizens the protection of rights and freedoms has no effect on the decisions of the High Representative. Second, Article 103 of the UN Charter deals only with a sub-set of possible conflicts of laws in public international law, namely conflicts between the obligations of Member States of the United Nations arising under various treaties. It does not attempt (and indeed would be powerless to attempt) to determine the effect of any such conflict on the obligations of the authorities of Member States under their national, constitutional or legal order. Finally, the commitments of the BiH authorities and the human rights applicable within the jurisdiction of Bosnia and Herzegovina are clearly enumerated in the BiH Constitution. Although the BiH Constitution has its origin in an international treaty, Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, it has been functioning for more than eleven years as a national Constitution, the highest legal act of the State of BiH. In addition, it has a dual nature. It has an international aspect as one of the foundations for the existence and international recognition of BiH in the international community. Also, it has a purely national aspect when perceived from within the State as the highest source of validity for the laws and institutions of BiH. It is as a national, not an international, instrument that the Constitutional Court, as the highest judicial authority within BiH, interprets and gives legal effect.[1734]

There is nothing in the international legal context that would lead to a conclusion that is different from the one reached on the basis of the interpretation of the rights in the national constitutional context.[1735] It follows from the

1733 See, Article 30, paragraph 1 of the Vienna Convention on the Law of Treaties; Decision by the First Instance Court of the European Court of Justice, *Kadi v. Council of the European Union*, 21 September 2005, case T-315/01; Separate Opinion by *ad hoc* Judge *Lauterpachta* in the case related to the application of the Convention on the Prevention and Punishment of the Crime of Genocide (International Court of Justice, 13 September 1993, General List No. 91, paragraph 100); a Commentary on Article 103 of the UN Charter by *Bernhardt* in *Bruce Simma and others*, The UN Charter – A Commentary (2nd edition), paragraph 295. Also, see the Decision of the ECtHR, *Bosphorus Airways v. Ireland*, 30 June 2005, Application No. 45036/98.

1734 *Ibid*., paragraphs 64-68.

1735 *Ibid*., paragraph 71.

aforementioned that the State has a positive obligation to ensure respect for the fundamental human rights enshrined in the Constitution of Bosnia and Herzegovina or stemming from international treaties and which have the source of their legal force in the BiH Constitution. Therefore, the question is raised as to whether BiH has undertaken activities aimed at securing an effective legal remedy against individual decisions of the High Representative. The answer would be negative.[1736] BiH *was obliged to make an effort, through the Steering Board of the Peace Implementation Council and Security Council of the United Nations, a body in charge of nominating and confirming the appointment of the High Representative, to point to the alleged violations of constitutional rights of individuals on the grounds of lack of an effective legal remedy and thus to ensure the protection of constitutional rights of its citizens*.[1737] There is no effective legal remedy available within the existing legal system of BiH against individual decisions of the High Representative concerning the rights of individuals, nor has Bosnia and Herzegovina undertaken activities, required by its positive obligation, to ensure an effective legal remedy against the said decisions of the High Representative through the bodies responsible for the nomination and appointment of the High Representative.

In view of the aforementioned, the Constitutional Court recalled the European Commission for Democracy through Law (the Venice Commission) opinion on decertified police officers, which had been adopted at its 64th plenary session (Venice, 21-22 March 2005). The Venice Commission considered that neither the courts in BiH nor any other authority in BiH were competent to review or reverse the decertification decisions. Therefore, the Venice Commission held that it was appropriate that the United Nations carry out a review process of the decertification decisions that had been challenged before the Bosnian authorities. While it was up to the UN Security Council to decide as to which body would be the most appropriate to review the decertification proceedings, the Venice Commission suggested that a special body be set up by the Security Council and be mandated to review the decisions on decertification of police officers, which had been challenged before the authorities in BiH.[1738]

Consequently, the Constitutional Court established a violation in the relevant case, which was lodged against the individual decisions of the High Representative, of the appellants' right to an effective remedy under Article 13 of the ECHR since such an effective remedy did not exist and BiH made no attempt to secure it.

1736 *Ibid*., paragraph 72.
1737 *Ibid*., paragraph 73.
1738 *Ibid*., paragraph 76.

First: Legal protection against the OHR. Under the national constitutional system, which provides that certain agreements on human rights and freedoms shall be applied directly, legal protection against the acts of the High Representative, whose authority stems from Annex 10 to the General Framework Agreement for Peace *and* from the relevant decisions of the Security Council, which were adopted under Chapter VII of the UN Charter, must be secured. Neither national law nor international laws provide any regulation that would rule out the exercise of human rights and freedoms.

Second: There is no decision on the merits. The BiH Constitutional Court failed to decide on the standards of human rights protection that should be imposed on the High Representative in securing human rights and freedoms, and as to whether there are any restrictions in individual cases relating to the ordinary scope of the human rights protection that would be justified in the public interest, *i.e.*, as to the implementation of the Peace Agreement. Namely, the BiH Constitutional Court did not decide on the constitutionality of the individual decisions of the High Representative.

Third: The necessity of existence of an internationally recognised judicial body. At the time when the BiH Constitutional Court was taking its decision, there was no competent body that could provide protection to the appellants (including the BiH Constitutional Court itself). The BiH Constitutional Court, with the recommendations of the Venice Commission, suggested that neither the BiH Constitutional Court itself nor any other national body could order the establishment of such a supervising body *without the participation of the Security Council and, possibly, of the Peace Implementation Council*.

Fourth: The contents of positive protection. The State's responsibility related to a violation of the appellant's rights under Article 13 of the ECHR does not lie in its failure to foresee adequate legal protection. In this context, the BiH Constitutional Court points to the fact that the State lacks the authority to do so. However, the State should have intervened with the legally (the UN Security Council) and politically (the Peace Implementation Council) responsible bodies in order to establish an internationally recognised judicial body and thus to secure legal protection for its citizens.

Fifth: The BiH Constitutional Court maintains a formula of functional duality and does not exceed the boundaries of responsibility established in relation to international law. The national legislature has the power to alter, if necessary, the laws imposed by the OHR and the BiH Constitutional Court is competent to review the constitutionality of those laws and, if necessary, to render them ineffective. On the contrary, individual acts of the High Representative are not

based on international-legal authorities so that the national bodies are not competent to review whether or not those acts are compliant with the BiH Constitution.[1739]

13. Prohibition of Abuse of Rights (Article 17 of the ECHR)

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 17 of the ECHR does not guarantee a separate individual right or freedom. It relates more to the rule of interpretation of the ECHR, which is aimed at safeguarding the ideas and objectives of the ECHR.[1740] Therefore, Article 17 of the ECHR is applicable only in conjunction with one of the other rights or freedoms protected under the ECHR. A complainant needs to show an act of the State aimed at the destruction of any of the rights and freedoms protected by the ECHR, or aimed at its limitation to a greater extent than is provided in the ECHR.[1741]

14. Protection of property (Article 1 of Additional Protocol No. 1 to the ECHR)

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.

AP 1/03 S. B.	20040615
AP 1/05 B. N.	20050518
AP 100/04 Labour Union "Doboj-putevi" *et al.*	20050422
AP 1019/04 Zećir and Adil Musić	20061013

1739 For details as to the relationship between the BiH Constitutional Court and the High Representative, see "(a) Legal acts of the High Representative (Annex 10 of GFAP)," p. 784 *et seq*.

1740 U 62/01, paragraph 17.

1741 Compare, CH/01/7488-A&M, paragraph 75.

AP 1028/04 Čejević	20050212
AP 1035/05 Boljanić	20060412
AP 1038/04 Kašmo-Hastor	20050923
AP 1048/04 Brčaninović	20051013
AP 1050/04 M. Ž.	20050412
AP 1082/05 Melća and Sead Džiho *et al.*	20060209
AP 1086/04 Geca	20051202
AP 1094/04 Marketing Agency "Stella"	20051220
AP 1105/05 Stupac	20060412
AP 1109/05 Milošević	20060708
AP 1110/05 Cviko	20060613
AP 1129/04 Plotan	20051117
AP 113/04 S. M.	20050318
AP 1131/04 Eljazović	20050913
AP 115/04 B. U.	20050323
AP 120/03 M. Ć.	20040417
AP 1223/06 Mikić	20070913
AP 1231/05 Husić	20060412
AP 1236/06 "Tržnica" a.d. Banja Luka	20070913
AP 127/02 "Krajina-auto" a.d. Banja Luka	20040517
AP 1292/05 Džebrić	20060627
AP 1294/05 Brulić	20060613
AP 130/04 Alibašić *et al.*	20051202
AP 1305/05 Đurić	20060912
AP 1419/05 Alihodžić	20060627
AP 147/02 Ministry of Defence of FBiH	20040826
AP 147/05 Ubović	20060412
AP 148/05 Kotlo	20060929
AP 1488/05 Golubčić	20060920
AP 160/03 N. S.	20040428
AP 162/05 Lazić	20060412
AP 179/02 N. Š.	20041014
AP 1874/05 Begić	20060613
AP 189/02 R. D.	20040630
AP 2078/05 Macanović	20060412
AP 21/03 K. J.	20040922
AP 211/05 Tvico	20060412
AP 218/05 Dizdarević	20060223
AP 221/04 FMO	20050412
AP 2213/06 Macanović	20080110
AP 222/04 J. K.	20041219
AP 2363/05 FEAL d.o.o. Široki Brijeg	20060708
AP 239/03 M. D.	20041130
AP 258/03 D. M.	20040929
AP 267/03 V. S.	20041130
AP 28/03 M. N.	20040419
AP 281/05 M. O.	20050628

AP 286/05 Đinić	20060412
AP 300/04 Z. P.	20041130
AP 335/04 P. M.	20050318
AP 36/03 N. S.	20040419
AP 365/04 B. B.	20050217
AP 380/04 E. I.	20050412
AP 393/04 M. B.	20050412
AP 45/02 A. P.	20040530
AP 450/06 Klipić	20070405
AP 487/04 D. S.	20050518
AP 497/04 R. and S. F.	20050628
AP 498/04 "Čivčija Turs" d.o.o. and A. Č.	20050323
AP 528/04 Maksimović	20051013
AP 531/04 Una banka d.d. Bihać	20050527
AP 561/04 R. R.	20050713
AP 570/05 DOO "Drvopromet" Velika Kladuša	20060509
AP 623/04 "Destilacija" a.d.	20050518
AP 624/04 T-P prom d.o.o. Distrikt Brčko BiH *et al.*	20050628
AP 625/04 Innungskrankenkasse Ortenau	20050923
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AP 643/03 "Bomi Frist" d.o.o.	20040929
AP 647/04 S. S. and S. K.	20040929
AP 65/03 A. R.	20040929
AP 653/03 A. H. Đ*. et a*l.	20040304
AP 669/03 DD "Razvitak" Gradačac	20040317
AP 678/04 N. and Š. K.	20050615
AP 68/05 Korić	20051220
AP 7/05 V. B.	20050615
AP 706/05 Perić	20060412
AP 740/04 Marić	20050913
AP 741/04 M. Ž.	20050412
AP 742/04 Hromalić	20050913
AP 75/03 "Jodex" d.o.o.	20040317
AP 774/04 Runić *et al*.	20051220
AP 803/05 Hasandić	20060209
AP 83/02 Faculty of Forestry of University of Sarajevo	20040723
AP 83/06 Čović	20060209
AP 834/04 "Hypo Alpe Adria Bank"a.d. Banja Luka	20051117
AP 851/04 Mustedanagić	20051117
AP 856/04 Jezdimirović	20051202
AP 91/02 S. Z.	20040723
AP 914/04 M. P*. et al.*	20050412
AP 926/06 Saller-Osenk	20050509
AP 95/04 A. P.	20041130
AP 950/05 J. S.	20050913
AP 959/04 Kočović	20050913

AP 979/04 Belobrk	20050923
AP 981/04 "Plamingo" d.o.o Gračanica	20051220
AP 983/04 Insurance Company Sarajevo - Osiguranje d.d. Sarajevo	20050527
AP 993/04 Suljević	20051220
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CH/00/10999 Dervović	20070509
CH/00/3557 Dizdar	20050309
CH/00/3615 *et al*. Jotić *et al.*	20051109
CH/00/3708-A&M Lazarević	20010309
CH/00/3733 *et al.*-A&M Marjanović *et al.*	20011109
CH/00/3868 *et al*. S. D. *et al.*	20051003
CH/00/4023 Martinović *et al.*	20061219
CH/00/4080 Markanović	20060801
CH/00/4116 *et al.*-A&M Spahalić *et al.*	20010907
CH/00/4566 *et al*.-A&M Jusić *et al.*	20020607
CH/00/4863-A Islamic Community in BiH	20010605
CH/00/4889-A&M Islamic community of BiH (the Jakeš mosque case)	20011010
CH/00/5134-R "Agrokomerc"	20030508
CH/00/5134 Škrgić *et al.*	20020208
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CH/00/5408-A&M Salihagić	20010511
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CH/00/6134-A&M Štrbac *et al.*	20020906
CH/00/6142-A&M Petrović	20010309
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CH/00/6144-A&M Leko	20010309
CH/00/6258-A&M Babić	20010706
CH/00/6304-A&M Kovačević	20031205
CH/00/6436 *et al.*-A&M Krvavac *et al*.	20020705
CH/00/6444 *et al.*-A&M Trkija *et al.*	20020510
CH/00/7018 Momić	20050208
CH/004295-A&M Osmanagić	20021204
CH/01/6930-A&M "Kompas" Međugorje	20030110
CH/01/7090 Bosić	20070627
CH/01/7224-A&M Vučkovac	20030207
CH/01/7248-A&M Ordo	20020705
CH/01/7252 Beneš	20061220
CH/01/7257-A&M Borota	20030207
CH/01/7264 Toman	20051003
CH/01/7358 Mujčić	20070627
CH/01/7635 Delić	20051005
CH/01/7967-A&M Sejdinović	20031222
CH/01/8068 Stanić *et al.*	20021011
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CH/00/3615 *et al*. Jotić *et al.*	20031107
CH/01/8361 Graho	20050905
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CH/02/10828 R. M.	20060306
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CH/02/11321 Gavrić	20070626
CH/02/12226-A&M Haziraj *et al.*	20030509
CH/02/12361 Jovanović	20051214
CH/02/12426 Mišić	20070626
CH/02/12435-A&M Bojić	20031222
CH/02/12468 *et al.*-Š. Kadrić *et al*. "War-related damage"	20050907
CH/02/12488 *et al*.-V. B.	20070509
CH/02/12501 Šehović	20061220
CH/02/12994 Mičić	20031104
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CH/02/8655-A&M Sačak *et al.*	20030704
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CH/02/8847 Mahmutović	20070626
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CH/02/9345 *et al.* Agović *et al.*	20070627
CH/02/9348 Skočir	20070207
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CH/03/12994-A&M Mičić	20031205
CH/03/13106 *et al.* AD Boksit "Milići" *et al*.	20070627
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CH/03/13438 Salihović	20060911
CH/03/13520 Milovanović	20060913
CH/03/13810 Lukač	20061106
CH/03/13937 Petrović	20060801
CH/03/14312 Sarić	20070508
CH/03/14880 Osmankić	20060913
CH/03/14880 Osmankić	20060913
CH/03/2183 Terzić	20070627
CH/03/9628-A&M Roman Catholic Archdiocese of Vrhbosna	20030606
CH/96/17-A&M Blentić	19971105
CH/96/2 *et al.*-A&M Podvorac	19980612
CH/96/21-M Čegar	19980406
CH/96/22-M Bulatović	19971107
CH/96/23-M Kalinčević	19980217
CH/96/27-A&M Bejdić	19980114
CH/96/28-A&M M.J.	19971203

CH/96/29-A&M Islamic Community of BiH, Banja Luka mosques	19990611
CH/96/3 *et al*.-M. Medan *et al.*	19971103
CH/97/104 *et al*.-A&M Todorović *et al.*	20021011
CH/97/104 *et al.*-A&M Todorović *et al.*	20021011
CH/97/110-A&M Memić	20000211
CH/97/114-A&M Ramić	20010907
CH/97/40-M Galić	19980612
CH/97/42-A&M Eraković	19990115
CH/97/46-M Kevešević	19980910
CH/97/48 *et al*.-A&M Poropat *et al.*	20000609
CH/97/49-A&M Đurić	20000113
CH/97/51-A&M Stanivuk	19990611
CH/97/58-A&M Onić	19990212
CH/97/60 *et al.*-A&M Miholić *et al*.	20011207
CH/97/62-A&M Malčević	20000908
CH/97/63 *et al*.-A&M Šećerbegović *et al.*	19990611
CH/97/65-A&M Panić	19990514
CH/97/70-A&M Lačević	19991007
CH/97/73-A&M Bojkovski	20010406
CH/97/76-A&M Softić	20011012
CH/97/77-A&M Šehić	19991105
CH/97/81 *et al*.-A&M Grbavac	19990115
CH/97/82 *et al.*-A&M Ostojić	19990115
CH/97/93-A&M Matić	19990611
CH/98/1019-A&M Sp. L. *et al.*	20010406
CH/98/1040-A Živojnović	19991009
CH/98/1062-Islamic Community in BiH	20011012
CH/98/1062-A&M Islamic Community in BiH, the Zvornik mosques cases	20001109
CH/98/1066-A&M Kovačević	20010511
CH/98/1124 *et al.*-A&M Dizdarević *et al*. (21 Gradiška cases)	20000609
CH/98/1169-A&M R. M.	20030606
CH/98/1195-A&M Lisac	20000512
CH/98/124 *et al.* Laus *et al.* (7 JNA cases)	19990611
CH/98/1245-A&M Slavnić	19991105
CH/98/1251-A&M Softić	20030306
CH/98/126 *et al*.-A&M Marić *et al.*	19990310
CH/98/129 *et al.*-A&M Ivković *et al.*	19990310
CH/98/1311 *et al.*-A&M Kurtišaj *et al.*	20020906
CH/98/1493-A&M Pilipović	20030606
CH/98/1495-A&M Rosić	19990910
CH/98/159 *et al.*-A&M Huseljić *et al.*	19990611
CH/98/166-A&M Bjelonja	20030207
CH/98/174 *et al.*-A&M Vidović *et al.*	19990514
CH/98/232 *et al.*-A&M Banjac *et al.*	20010706

CH/98/375 *et al*. Besarović *et al*.	20050406
CH/98/377 *et al.*-A&M Đurković *et al.*	20031107
CH/98/377 *et al.*-A&M Đurković *et al.*	20031107
CH/98/394-A&M Jurić	19991210
CH/98/420 *et al.*-A&M Kugić *et al.*	20031010
CH/98/457-A&M Anušić	20001013
CH/98/575-A&M Odobašić	20010511
CH/98/636-A&M Miljković	19990611
CH/98/640-A&M S. J.	20030509
CH/98/659 *et al*.-A&M Pletilić *et al.*	19990910
CH/98/697-M Džonlić	20000211
CH/98/698-A&M Jusufović	20000609
CH/98/704-A&M Kovačević	20020111
CH/98/706 *et al*.-A&M Šećerbegović *et al.*	20000407
CH/98/710-A&M D. K.	19991210
CH/98/752 *et al.*-A&M Bašić *et al.* (15 Gradiška cases)	19991210
CH/98/756-A&M Đ.M.	19990514
CH/98/777-A&M Pletilić	19991008
CH/98/799-A&M Brčić	20020510
CH/98/800-A&M Gogić	19990611
CH/98/814-A&M Prodanović	19990611
CH/98/834-A&M O. K. K.	20010309
CH/98/866-A&M Caljan	20000309
CH/98/874 *et al.* Pemac *et al*.	20050208
CH/98/875 *et al.*-A&M Živković	20000512
CH/98/894-A&M Topić	19991105
CH/98/896-A&M Čvokić	20000609
CH/98/916-A&M Tomić	20020111
CH/98/935-A&M Gligić	19990910
CH/98/958-A&M Berić	19991210
CH/99/1554-A Pezer	20000607
CH/99/1859-A&M Jeličić	20000211
CH/99/1961-A&M Zornić	20010208
CH/99/2028-A&M Crnogorčević	20021011
CH/99/2030 *et al.*-A&M Rudić *et al.*	20020307
CH/99/2177-A&M Islamic community of BiH, Prenjavor mosque case	20000211
CH/99/2233-A&M Čivić	20000512
CH/99/2289-A&M M. G.	20031010
CH/99/2315-A&M Hadžisaković	20031010
CH/99/2396 Vržina	20051109
CH/99/2425-A&M Ubović *et al*. (Glamoč cases)	20010907
CH/99/2432-A&M Ivić	20031205
CH/99/2627-A&M Jusufović	20031010
CH/99/2628-A Šišić	20000308
CH/99/2640 Džambić	20050307

CH/99/2656-A&M Islamic community of BiH, the Bijeljina mosques cases	20001206
CH/99/3071 *et al*.-A&M Jokić *et al.*	20020208
CH/99/3227-A&M Milisavljević	20030606
CH/99/3546-A&M Tuzlić	20010208
U 102/03 R. R.	20040428
U 106/03 I. D.	20041027
U 108/03 H. A.	20040227
U 11/01 Kovačević	20020803 *OG of BiH*, No. 20/02
U 11/02 M. D.	20030626
U 12/01 Nikolić	20020803 *OG of BiH*, No. 20/02
U 131/03 S. Č.	20040922
U 14/00-1 Manojlović	20011230 *OG of BiH*, No. 33/01
U 14/03 "Tržnica" a.d. Banja Luka	20040922
U 14/05 N. Špirić "Foreign Currency Deposits"	20051202
U 159/03 "Privredna banka" d.d. Sarajevo	20041130
U 16/00 "2-year rule"	20010612 *OG of BiH*, No. 13/01
U 17/03 S. K.	20040517
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 19/01 "RS Labour Law"	20020615 *OG of BiH*, No. 13/02
U 19/03 Croatia osiguranje d.d. Ljubuški	20040317
U 2/01 V. R.	20031024
U 2/99 Kadenić & Mesinović	19991122 *OG of BiH*, No. 20/99
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 26/03 R. H.	20040423
U 27/01 HA-EMM	20020423 *OG of BiH*, No. 08/02
U 3/01 Čajavec holding *et al.*	20020312 *OG of BiH*, No. 05/02
U 3/99 H.D.	20000810 *OG of BiH*, No. 21/00
U 30/02 Čatak	20040227
U 32/03 M. Š.	20050615
U 33/00 Jelić	20020213 *OG of BiH*, No. 02/02
U 36/03 N. S.	20040615
U 4/01 S. S.	20040219 *OG of BiH*, No. 03/04
U 4/99 Blind Persons' Association Lukavac-Gračanica	19990928 *OG of BiH*, No. 16/99
U 43/03 L. B.	20040517
U 44/02 N. H.	20030725
U 46/02 J. J. i M. J.	20040326
U 5/00 Elezović	20010119 *OG of BiH*, No. 01/01
U 5/00 Elezović	20010119 *OG of BiH*, No. 01/01
U 5/01 D. T.	20040219 *OG of BiH*, No. 3/04
U 5/98-II "Izetbegović II"	20000630 *OG of BiH*, No. 17/00
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 61/02 M. O.	20040121
U 65/02 Dž. A.	20031229 *OG of BiH*, No. 43/03
U 65/03 "Fructa trade" d.o.o. and D. J.	20040922
U 7/00 Hadžisakić	20010224 *OG of BiH*, No. 6/01

U 7/01 Kušec	20010803 *OG of BiH*, No.19/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 03/00
U 72/03 H. Š.	20040721
U 8/99 Modričkić	19991227 *OG of BiH*, No. 24/99
U 88/03 "Medimpex" d.o.o.	20040721
U 95/03 M. H.	20040920

a. Introduction

(a) War and ownership

When it comes to property rights,[1742] legislative, administrative and judicial authorities face a difficult task.[1743] During the war, hundreds of thousands of people left their property or possessions for more secure regions. Taking into account such a situation, it was necessary to provide accommodation for refugees and displaced persons ("within their own" ethnic group). As the accommodation capacities were far from sufficient to meet demands, people encroached on the apartments and houses which had been left by their real owners and possessors. In order to legalize the possession of the new occupants, socially owned apartments and private real properties were declared "abandoned" if the occupancy right holder and/or his/her relatives abandoned the real property or if they did not occupy it temporarily. New possessors were given the right to use such real properties. In such cases, people lived in the apartments of third persons in a manner which was "allegedly" lawful. The apartments which were not abandoned "willingly" by their occupants (for example, due to ethnic cleansing), including destroyed apartments and the apartments to which the lawful occupants returned within the time limit after the armed conflict could not be declared abandoned. However, the real situation seemed to be different even in such cases. If the original (pre-war) occupants did not leave their apartments and if they were not "welcome" based on their ethnic origin – additional pressure was exerted on them by accommodating refugees in their apartments according to the summary procedure so that they were evicted in a summary manner as well.

After the Dayton Peace Agreement had been signed, the international community requested that the Entities make it possible for refugees and displaced persons to repossess their pre-war real properties. The legal and political basis was Annex 7 of the Dayton Peace Agreement and Article II.5 of

1742 Compare, *Simor*, 1997, p. 653 *et seq*.; for more details of the legislation concerning the ownership rights in BiH, see in *Waters*, 1999, p. 536 *et seq*.

1743 Concerning this issue, see quotations available at: <www.ohr.int/ohr-dept/rrtf/>; <www.ohr.int/ohr-dept/hr-rol/property/>; <www.ohr.int/plip/>; last visited : 24 September 2008.

the Constitution of BiH. In order to achieve these aims, the representatives of the international community, particularly the OHR, OSCE, UNHCR, UNMBiH[1744] and the Commission provided for by Annex 7 within the so-called *Property Law Implementation Plan* (PLIP) cooperated in a coordinated manner. In addition to this, the return of refugees was supported by a number of non-governmental organizations which provided logistics and financial and moral support to the refugees in the field. Within the national boundaries, cantonal ministries for physical planning were responsible for the process of the return of refugees and displaced persons in the Federation of Bosnia and Herzegovina, while the Ministry of Refugees and Displaced Persons was responsible for the same process in the Republika Srpska. It was necessary to organize the return for hundreds of thousands of refugees and displaced persons and to regulate their property relations, particularly in the cases where people decided not to return *de facto* but only to regain possession or ownership, *i.e.*, the economic value of their pre-war possession or ownership. The right to repossess the pre-war real properties was a key element of the return process all the more so since the reinstatement to previous employment positions was rarely possible in the difficult economic situation even when the employer was willing to do it.

During the first years after the war, legal regulations dealing with the rights and obligations of refugees and displaced persons were tendentiously unfavourable. For example, the time limit for filing a claim for repossession of an abandoned apartment was short. Moreover, the time limit for filing the claim was published in an absurdly unsatisfactory manner so that a number of former occupants and owners failed to comply with the time limit. The members of the so-called ethnic minority groups who had left their possessions during the war were particularly affected. For this reason, such regulations were doubly discriminating. On the one hand, they prevented the members of minority ethnic groups from repossessing their real properties, and, on the other hand, they operated in favour of new possessors – the members of the majority ethnic group – so as to make it possible for them to keep possessing the aforementioned real properties.[1745] Partially in cooperation with the national relevant authorities and partially as an act of international community, a "*highly confusing*"[1746] system

1744 For more details of the UNHCR mission, see *Winkelmann*, BiH: Protectorate...? (BiH: Protectorate…?), p. 9.

1745 For more details, see Law on Abandoned Apartments of the RBiH (*OG of RBiH*, Nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95); Law on Temporary Abandoned Real Property Owned by Citizens (*OG of RBiH*, Nos. 11/93 and 13/94); Decree on the Use of Abandoned Apartments of Croatian Community Herceg-Bosna (*OG of HZHB*, No. 13/93) and, concerning this issue, see the case-law of the BiH Constitutional Court and Human Rights Commission within the BiH Constitutional Court indicated below, particularly CH/98/777-A&M, paragraph 109.

1746 CH/02/9868-A&M, paragraph 111.

was created – as it was described by the Human Rights Chamber – which was supposed to make it possible for the former occupants to regain their possessions, *i.e.*, their ownership.[1747] In order to improve the situation relating to the return, both Entities reformed their regulations relating to abandoned property in a similar manner in 1998. All laws dealing with abandoned property, together with the by-laws, were declared invalid. Former occupants of the apartments were entitled to return to their apartments and to transform the occupancy right into ownership rights one year after the repossession of the apartment. In order to support a sustainable return, former occupancy right holders, now the new owners of privatised apartments, were not entitled to sell their apartments within a time limit of two years after the repossession of apartments.[1748] This restriction on the right to sell the apartment was annulled at a later stage. Taking into account the objectives of the return process, the High Representative used to supplement, rectify and harmonise the Entities regulations dealing with the property rights. This included, *inter alia*, the extension of time limits for filing a claim for repossession of an apartment, where contracts on use of apartments, which had been concluded during the war and immediately after the war, were declared null *ex lege*. In addition to this, the High Representative retroactively annulled all decisions and declared invalid all measures taken by the relevant authorities with regards to the socially owned property, subsequently State owned property, which had been allocated to private persons during the war or after the war, since this massively affected the refugees' and displaced persons' right to repossession, and thus hindered the return process.[1749]

1747 For legal developments, see Case No. CH/97/42-A&M, paragraph 12 *et seq*., or Case No. CH/97/60 *et al*.-A&M, paragraph 65 *et seq*. (with regards to the Federation) and CH/99/1961-A&M, paragraph 27 *et seq.* (with regards to the RS). For more details, see (with regards to the Federation) Law on Sale of Apartments with Occupancy Rights, dated 6 December 1997, (with regards to the Federation) Law on the Cessation of the Application of the Law on Abandoned Apartment, dated 4 April 1998 (*OG of FBiH*, No. 11/98), the RS Law on the Cessation of Application of the Law on the Use of Abandoned Property, dated 2 December 1998 (*OG of RS*, No. 38/98), and the High Representative's Decision amending the aforementioned Laws (27 October 1999) with the guidelines to interpret these laws. Concerning the issue of competing norms relating to the CRPS's enforceable decisions relating to the contracts on the exchange of apartments, see Cases Nos. CH/02/9130-A&M and CH/01/7728-A&M.

1748 See U 16/00, p. 410.

1749 Compare, the High Representative's *Decision on suspending the power of local authorities in the Federation and the Republika Srpska to dispose of socially-owned land in cases where the land was used on 6 April 1992 for residential, religious, cultural, private agricultural or private business activities*, dated 26 May 1999, (*OG of FBiH*, No. 20/99), and decisions taken subsequently on 30 December 1999 (*OG of FBiH*, No. 54/99), dated 27 April 2000 (*OG of BiH*, No. 13/00, *OG of FBiH*, No. 17/00, *OG of RS*, No. 12/00), dated 20 December 2000 (*OG of BiH*, No. 34/00, *OG of FBiH*, No. 56/00, *OG of RS*, No. 44/00), dated 30 March 2001. (*OG of BiH*, No. 11/01, *OG of FBiH*, No. 15/01, *OG of RS*, No. 17/01), dated 31 July

The formulation and implementation of the objectives of the return process constituted, in themselves, a difficulty. For certain observers the objective of the international community was not only *to make it possible* for refugees and displaced persons to return. The involvement of the international community did go beyond the limits of making it possible for them to return; it aimed at encouraging the return process and even at putting a certain pressure on it.[1750] Yet others criticised that not only the national authorities but also the international community neglected the return process. Given the huge scale of migration of refugees, an obstacle almost insurmountable was the fact that the return process could not progress in a *synchronised*, *i.e.*, *parallel* manner due to its massive nature. Owing to the circumstances, the refugees and displaced persons from one ethnic group lived in houses and apartments of the other ethnic group. If the situation had been ideal, all refugees and displaced persons would have left their homes and returned to their homes in a parallel manner, at the same moment, thus leaving the real properties to the initial possessors. However, in the field, a number of refugees and displaced persons did not want to return to their places of origin. In other cases, the apartments were destroyed or temporary occupants still lived in their apartments, since they did not have alternative accommodation, or the authorities refused to enforce decisions on eviction. It often happened that people had to move into garages or similar facilities, since they were not entitled to temporary accommodation according to the laws, or there was no accommodation, where their pre-war apartment was destroyed. Certain Entity laws dealing with this issue aimed at partially resolving the problem of mutually occupied apartments by imposing the reciprocity clauses, which practically made it impossible for individuals to repossess their property. For these reasons, the Human Rights Chamber declared such regulations contrary to the ECHR.[1751]

2002 (*OG of BiH*, No. 24/02, *OG of RS*, No. 49/02, *OG of FBiH*, No. 43/02) and dated 31 March 2003 (*OG of BiH*, No.13/03, *OG of FBiH*, No. 23/03), whereby the validity of the High Representative's decisions on prohibition of disposal of socially/state owned property was extended from 27 April 2000 to 15 May 2003. As the State and the Entities did not reach an agreement on the State owned property, including the former "socially-owned property", at the end of 2004 (24 September 2004) the Council of Ministers, based on a declaration of the Peace Implementation Council established the Commission for State property, for the Identification and Distribution of State Property, the Specification of Rights and Obligations of Bosnia and Herzegovina, the Entities and the Brčko District of Bosnia-Herzegovina in the Management of State Property (*OG of BiH*, Nos. 10/05, 18/05, 69/05 and 70/05); the Commission was entrusted with the task to pass the Law on State Property. As the Commission did not pass the aforementioned Law by the end of 2007, the High Representative once again passed a decision forbidding the national authorities to dispose of State property at all levels (see all decisions at: <www.ohr.int/decisions/archive.asp>; last visited on: 21 April 2009).

1750 Compare, commentary on Case No. U 16/00, p. 410.

1751 CH/98/659 *et al.*-A&M, paragraph 173 and, concerning the legislation dealing with the repossession of land in RS, see the Law on the Use of Abandoned Property.

Therefore, the factual substrate in Case No. U 15/00 dealt with by the BiH Constitutional Court is not a unique case but it illustrates obstacles to the return process: the appellant left a one-room apartment in Zvornik at the beginning of the war (1992) and, based on a decision of the – incompetent – Public Security Station (in Zvornik) of the Ministry of Interior, moved into the apartment of a family who left Zvornik. After the war, *the Commission for the Accommodation of Refugees and Administration of Abandoned Property* issued a ruling ordering the appellant's eviction from the apartment within a time limit of three days. The Ministry of Refugees and Displaced Persons of the Republika Srpska dismissed a complaint filed by the appellant, since he did not have the status of refugee according to the law. The appellant brought an action before the Supreme Court of the Republika Srpska, which quashed the administrative act for procedural failures and incompletely established facts, whereupon the Commission quashed the 1992 administrative act of the Public Security Station. The appellant filed a complaint with the Ministry against the act quashing the ruling but without success, whereupon he initiated an administrative dispute by bringing an action before the Supreme Court of the Republika Srpska, which quashed the ruling of the Ministry and remitted the case for new proceedings and decision. In the Supreme Court's view, the crucial issue, *i.e.*, whether the apartment could be considered abandoned according to the law, was not completely clarified. Furthermore, it was not clear why the Commission and the Ministry considered the appellant as unlawful occupant, since he had moved into the apartment based on the ruling of the Public Security Station. As the Ministry of Refugees and Displaced Persons of Republika Srpska did not take a decision which could be enforced within the time limit prescribed by Article 62 of the Law on Administrative Disputes, the appellant requested the Supreme Court to take a decision accordingly. However, the Supreme Court established that the Ministry had not complied with its order and the ruling of the Commission had been issued based on the incompletely established facts. The Supreme Court therefore concluded that the Commission had to take a new decision. The appellant addressed the BiH Constitutional Court requesting it to quash the ruling of the Supreme Court, to order for it to deal with the case by itself and to take a final and enforceable decision. The BiH Constitutional Court found that meanwhile the Ministry of Refugees and Displaced Persons of the Republika Srpska had placed the apartment at the disposal of a third person. That person stated that he would leave the apartment in order to make it possible for the original occupant to repossess it but only after regaining possession of his apartment in Sarajevo.

(b) The so-called *occupancy right* as a socially restricted real right

There were only two types of ownership of real property in the former Yugoslavia and the Republic of Bosnia and Herzegovina: *private* and *social ownership*. Most occupants had occupancy rights over socially owned apartments located mostly in town areas. This occupancy right was individualised in accordance with the Law on Housing Relations.[1752] Therefore, first the employees and workers of socially owned companies or State authorities were the ones who could acquire the occupancy right by paying monthly contributions to the housing fund. Depending on a number of factors – family situation, housing needs (whether the individual has a private apartment or house), etc. – an apartment was allocated to the individual but he/she acquired the occupancy right only by lawfully moving into the apartment (based on the decision on allocation of the apartment) and by concluding a contract on use of the apartment. The legal status of the occupant who had the occupancy right was inferior to the legal status of the owner of the apartment but largely superior to the legal status of a lessee. As a social ownership, the occupancy right was a right socially limited to tenancy. In addition to this, the right to an apartment depended to a large extent on the need of the occupant but also on whether the apartment was really used – which in a way also proved the needs of the occupant. After the death of the occupancy right holder, the occupancy right used to be transferred to the first relative. If the relatives could not reach an agreement on the legal successor, the court would decide it taking into account the real needs of the interested parties. The occupancy right was an inalienable right and was not subject to disposal. However, two occupancy right holders could, for example, exchange their apartments. If an occupant left the apartment for a long period of time, the occupancy right would cease to be in effect. In the privatisation process which had started before the war, the occupancy right holders had privileged status while purchasing the apartments (privatisation) over which they had the occupancy right and in which they lived. In that case, certain items would be deducted from the purchase price as contributions to the housing fund – so that in certain cases the entire purchase price would be subtracted. Given such form, the occupancy right could be called a *socially restricted real right*.

1752 *OG of BiH*, No. 14/84, 12/87 and 36/89; applicable in FBiH: *OG of FBiH*, No. 11/98, and in RS: *OG of RS*, No. 19/93 and No. 22/93.

(c) Relation between Article 1 of Additional Protocol No. 1 to the ECHR and Article II.3(k) of the BiH Constitution

Article II.3(k) of the BiH Constitution is limited – as is usually the case with constitutions – to the quotation on the right to property[1753] as one of the rights under the ECHR, which is to be secured to all persons on the territory of Bosnia and Herzegovina. The protection of the right to property, according to this constitutional provision and according to the standpoint of the BiH Constitutional Court, does not go beyond the scope of protection under Article 1 of the Additional Protocol to the ECHR.[1754]

(d) Dogmatic particularities of the right to property

The term "property" is a normative term. This means that the legislator needs to define what is to be considered as property. Unlike the notion of marriage which, let us say, can be regarded as a social creation regardless of the legislation regulating it, the subject, scope and limits of the term "property" can be determined by legal regulations only. The German Federal Constitutional Court describes this as follows:

> "The precise authorities of an owner at a moment derive from […] a total number of applicable legal regulations dealing with the issue of ownership at that moment. If that total number shows that the owner has not an authority, then this does not form part of his ownership right. How and in which form the legislator is to exclude that authority from the ownership right is nothing else but the question of legislative technique. If the legislator defines the original […] position of ownership right broadly and it excludes certain authorities by imposing another regulation, then the holder of the right has a restricted legal position from the very beginning."[1755]

Article 14, paragraph 1 of the German Basic Law (the Constitution) shows this dogmatic particularity more clearly than Article 1 of Additional Protocol No. 1 to the ECHR. It reads as follows: "The ownership right and inheritance right are guaranteed. The content and restrictions thereof shall be determined by the law".[1756] Article 14 of the Basic Law protects therefore the ownership right

1753 The BiH Constitution and the ECHR contain the term "property" which has a wider meaning than the meaning of the term "ownership". For more details, see the text under the heading "7. The scope of control", p. 167.

1754 U 16/00, U 11/01, paragraph 18, U 12/01, paragraph 34, U 27/01, paragraph 30.

1755 Decision of the Federal Constitutional Court of Germany, BVerfG, 58, 300 (336); translation provided by D. P.

1756 "*Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt*" (translation provided by Edin Šarčević, available at: <http://www.uni-leipzig.de/~eurlaw/cms/cms/upload/Sarcevic_Grigesetz.pdf>, translation provided by. D. P.).

(against the legislature's interventions as well) although, at the same time, it leaves for the legislator to define the content of and restrictions on the right. Similarly, the Strasbourg case-law leads to the conclusion that this court holds that every individual legal system has the competence to define what the property right is: the individual has the task to secure his/her legal position in compliance with the relevant laws (*sic*).[1757] According to Article 1 of Additional Protocol No. 1 to the ECHR, the term "property" is considered an autonomous term, so that a legal position can be considered as proprietary according to the ECHR even if the national legislation does not consider that position as such.[1758] This ambivalent position of the legislature, which is, on the one hand, bound by the right to property,[1759] and, on the other hand, has to define the content and scope of that right by itself, shows to what extent it is necessary to set absolute constitutional boundaries within the ordinary national legislation. According to the German dogma,[1760]and case-law of the BiH Constitutional Court as well, this restriction imposed by the legislature in shaping the laws is covered by the term of institutional guarantee ("*InstitutsgarantieI*"). It can be included in a systemic manner in the restriction on justification for not interfering with property rights (it is called the restriction of restriction in the German dogma – *Schranken-Schranke*).

b. The scope of protection

(a) A summary of basic principles

Article 1 of Additional Protocol No. 1 to the ECHR and Article II.3(k) of the BiH Constitution protect only the existing ownership and similar legal status although in principle they do not protect the right to acquire a property.[1761] However, Article 1 of Additional Protocol No. 1 to the ECHR includes "legitimate expectations" to acquire a property if they are based on an applicable administrative act or administrative legal regulations.[1762] Therefore, the "legitimate expectations" mean that a person can prove that he/she is entitled to the proprietary legal status he/she claims based on a legal act. The term

1757 EComHR, *Simpson v. The United Kingdom*, (Application No. 11716/85), 14 May 1986, paragraph 5.

1758 ECtHR, *Van Marle et al. v. the Netherlands*, 3 June 1986, paragraph 41.

1759 Article II.1 and 6 of the Constitution of BiH or Article 1, paragraph 3 of the Basic Law (Constitution) of the Federal Republic of Germany.

1760 *Sachs*, 1999.b, paragraph 30; *Wendt*, 1999, paragraph 10 *et seq*.

1761 U 16/00, paragraph V.b and U 7/01, paragraph 23, with a reference to the ECtHR, *Marckx v. Belgium*, 27 April 1979, paragraph 50; U 37/00, paragraph 29.

1762 CH/98/1040-A, paragraph 20, with a reference to the ECtHR, *Pine Valley Developments Ltd. et al. v. Ireland*, 29 November 1991, Series A no. 222, paragraph 51, and *Pressos Compania Naviera S.A. et al. v. Belgium*, 20 November 1995, Series A no. 332, paragraph 31.

"property" includes a *wide range of proprietary interests* representing an economic value.[1763] This term should not be interpreted in a restrictive manner. Moreover, the notion of ownership includes all property rights which represent an economic value[1764] even if they are not classified as civil rights[1765] according to the national legislation or ownership rights.[1766] A temporary right which has an economic value can constitute property within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR.[1767] However, socially owned property allocated for use does not constitute property.[1768] Both the legal position *in rem* and legal position *in personam* can be considered as property within the meaning of Article 1 of Additional Protocol No.1 to the ECHR even if there is a lack of clarity relating to its existence.[1769] As to the *in rem* legal position, in order for a right to fall under the scope of protection, it may be necessary to prove the existence of just title (*iustus titiulus*), or the ownership should be based on the permanent indisputable possession and use.[1770]

(b) *In rem* and *in personam* legal positions

First of all, *in rem* and *in personam* legal positions representing an economic value are included in the scope of protection of property rights. These are, for example, the following rights:

- *bank guarantee*;[1771]
- *marital property*;[1772]
- *certificates*;[1773]
- *goodwill* of a company as well as the acquired clients;[1774]

1763 U 14/00, paragraph 30; AP 159/03, paragraph 39.

1764 CH/96/3 *et al.*-M, paragraph 32, CH/96/22-M, paragraph 34, and CH/96/28-A&M, paragraph 32, with a reference to ECtHR, *Van Marle v. the Netherlands*, 1986, Series A no. 101, paragraph 41, *Pressos Compania Naviera S.A. v. Belgium*, 1995, Series A no. 332, paragraph 31.

1765 CH/03/14880, paragraph 29 *et seq*.

1766 U 16/00, paragraph V.b; similarly, U 12/01, paragraph 28; CH/96/29-A&M, paragraph 191; CH/97/51-A&M, paragraph 58.

1767 CH/98/1495-A&M, paragraph 61; CH/98/894-A&M, paragraph 49.

1768 CH/03/9628-A&M, paragraph 92.

1769 CH/98/1245-A&M, paragraph 72.

1770 CH/96/29-A&M, paragraph 191, with reference to ECtHR, *Holy Monasteries v. Greece*, 9 December 1994, Series A no. 301-A, paragraphs 58-60.

1771 AP 834/04, paragraph 23 *et seq.*

1772 AP 222/04, paragraph 19 *et seq*.; AP 803/05, paragraph 20.

1773 AP 179/02, paragraph 7.

1774 CH/00/6183 *et al.*-A&M, paragraph 156 *et seq.*, with reference to the ECtHR, *Van Marle et al. v. the Netherlands*, 26 June 1986, Series A no. 101, paragraphs 10-11.

- *interests*;[1775]
- *credit funds*;[1776]
- *reimbursement of civil litigation costs*;[1777]
- *compensation for the costs of an attorney assigned ex officio* in criminal matters if the claim for reimbursement is based on services rendered in accordance with the applicable lawyer fee;[1778] this, however, does not include the compensation for the costs of the lawyer of a private prosecutor, since these costs are not considered as "necessary" costs in criminal matters;[1779]
- *compensation for performed work*;[1780]
- *intangible rights*;[1781]
- *money deposited in a bank account*[1782] in local or foreign currency,[1783] which belongs to a foreigner or national;[1784]
- *fines*;[1785]
- *in personam rights* being the subject of civil litigation (for example: the right to transfer ownership based on a contract on purchase of a JNA apartment;[1786] the right of the purchaser who buys an apartment from the initial purchaser of a JNA apartment;[1787] the protection is applicable even when the transfer of ownership was not effectuated during the time the purchaser was alive; the purchaser's legal successors are also protected –

1775 U 44/02, paragraphs. 30, 34; U 4/99; U 88/03, paragraph 20; CH/00/3615 *et al*., paragraph 187 *et seq*.; CH/01/7090, paragraph 36; AP 147/02, paragraph 20; AP 774/04, paragraph 371.

1776 AP 2363/05, paragraph 30.

1777 AP 189/02, paragraph 34; AP 950/05, paragraph 22; CH/00/3615 *et al*., paragraph 196.

1778 AP 926/06, paragraph 18.

1779 AP 1110/05, paragraph 9 *et seq.*

1780 AP 1/05, paragraph 27; AP 1105/05, paragraph 23; AP 653/03, paragraph 63, with reference to ECtHR, *Smokovitis v. Grece*, 11 April 2002 (No. 46356/99), paragraph 32; CH/97/77-A&M, paragraph 83.

1781 AP 1223/06, paragraph 24.

1782 CH/97/48 *et al.*-A&M, paragraph 161; CH/98/1019-A&M, paragraph 37; AP 1109/05, paragraph 35; CH/97/104, paragraph 121; CH/98/377, paragraph 229.

1783 AP 531/04, paragraph 27.

1784 AP 856/04, paragraph 28.

1785 U 65/03, paragraph 18, with reference to the ECtHR, *Gasus Dosier – and Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-M, paragraph 60; AP 498/04, paragraph 22.

1786 CH/98/640-A&M, paragraph 77 *et seq*.

1787 CH/98/640-A&M, paragraph 77 *et seq*.

if the inheritance was confirmed by a judicial authority;[1788] even those who acquire that right through exchange;[1789]

- *compensation for expropriation/nationalisation/*confiscation *of property* either in cash[1790] or in kind;[1791]
- *termination pay* if it is provided for by the law;[1792] but not if the person is not retired immediately after the employment termination;[1793]
- *pension (the right to)*;[1794]
- *sales taxes*;[1795]
- *possession*;[1796]
- *full expropriation (the claim for)*;[1797]
- *disposal and use* of socially/State owned building land either for intended purposes or not (the right to);[1798] the right to rebuild a facility on land if the original facility is destroyed;[1799] priority right to build on land over which the State has the right of disposal;[1800] this applies regardless of whether the building land is designated for intended purposes or not;[1801] a temporary right to use town building land not intended for special purposes can be considered as property until the moment of its confiscation;[1802]

1788 CH/99/2028-A&M, paragraph 51 *et seq*.
1789 CH/97/70-A&M, paragraph 62.
1790 U 46/02, paragraph 26 *et seq*.; AP 624/04, paragraph 17; AP 1019/04, paragraph 24; AP 993/04, paragraph 63 *et seq.*; AP 487/04, paragraph 20; CH/02/12426, paragraph 21 *et seq*.
1791 CH/99/3227, paragraph 58 *et seq.*; border cases in CH/98/1169-A&M, paragraph 58; CH/00/4295-A&M, paragraph 39: the outcome of the private dispute is "open" so that there are no legitimate expectations.
1792 AP 335/04, paragraph 18; AP 741/04, paragraph 31 *et seq.*; AP 218/05, paragraph 17.
1793 CH/03/13937, paragraph 13 *et seq*.
1794 AP 740/04, paragraph 24.
1795 AP 1131/04, paragraph 24 *et seq*. Such case-law is contrary to the legal views expressed in Cases No. AP 663/03, paragraph 8; AP 643/03, paragraph 23, whereby the Constitutional Court rejected to confirm the character of property.
1796 AP 127/02, paragraph 34.
1797 AP 528/04, paragraph 21.
1798 AP 851/04, paragraph 25 *et seq.*; AP 113/04, paragraph 22; CH/02/8953-A&M, paragraph 59.
1799 CH/99/2656-A&M, paragraphs 106-113; CH/98/704-A&M, paragraph 55.
1800 CH/00/6134-A&M, paragraph 86 et seq.: transformation into socially owned property does not amount to the deprivation of owenrship but to certain restrictions on disposal and use thereof, while the legal status remains the same, and it even can be inherited.
1801 CH/02/8953-A&M, paragraph 59.
1802 CH/02/8655-A&M, paragraph 116.

- *war-related damage*;[1803]
- *servitude right*;[1804]
- *the occupancy right*,[1805] since it is a *sui generis* real right and as such it represents an economic value. The occupancy right (and the ownership right subsequently) can be acquired through (a) a decision on the allocation of an apartment (b) a contract on the use of an apartment. In addition to this, (c) the person must move into apartment. In the event that these three requirements have not been fulfilled, the occupancy right cannot be acquired, and the competent authorities can initiate proceedings to evict the person. Therefore, the mere decision on the allocation of an apartment is not sufficient to consider the occupancy right as a property right falling within the scope of protection.[1806] A decision on the allocation of an apartment and conclusion of a contract on the use of an apartment are not sufficient if the person to whom the apartment is allocated has never moved into the apartment.[1807] The same applies if the decision on the allocation of an apartment and contract on the use of an apartment are declared null.[1808]

An exception to the rule on the lawful acquisition of occupancy rights is provided for by Article 30, paragraphs 2 and 6 of the Law on Housing Relations. According to these provisions, in cases of unlawful use of the apartment, the state authorities are entitled to evict the person within a time limit of three years from the date of the unlawful moving into the apartment, where the owner of the apartment can do the same within a time limit of eight years.[1809] Therefore, if an apartment was used unlawfully for more that 8 years, the occupant acquired the occupancy right through the "servitude right".[1810] The

1803 AP 774/04, paragraph 373.

1804 AP 1292/05, paragraph 20.

1805 Concerning the occupancy right within the meaning of Article 8 of the ECHR, see also: "(f) *Excursus:* The occupancy right in Bosnia and Herzegovina", p. 349 *et seq*.

1806 U 43/03, paragraph 31; similarly, AP 1035/05, paragraph 8.

1807 CH/01/8361, paragraph 15 *et seq*.

1808 AP 281/05, paragraph 33. Decisions on the allocation of an apartment (and thus the contracts on the use of the apartment) adopted in the period from 1 April 1992 to 19 December 1998 were declard null (AP 995/04, paragraph 32). There is an exception to this rule if the apartment is not "burdened" by an occupancy right, for example, if the occupancy right holder died during the war (AP 979/04, paragraph 30 *et seq*.).

1809 The Law on Housing Relations does not provide for a tacit conclusion of contract or acquisition through the servitude right. However, over the years the situation was becoming more and more difficult for both the State authorities and the owners to evict a person who had been using the apartment for years according to the aforementioned conditions. (*Ibid*.).

1810 U 26/03, paragraph 20 *et seq.*

eight-year time limit expired on 6 December 2000, since the occupancy right could be acquired until that date.[1811]

Another exception to this rule is the procedure for repossession of abandoned apartments (according to Annex 7 of the Dayton Peace Agreement) by the persons who did not acquire the occupancy right formally but lived in the apartment on 30 April 1991 and were paying the utility bills on a regular basis, where the State authorities did not institute appropriate proceedings to evict them despite the fact that such persons could not produce relevant documents proving a lawful use of the apartment, such as a decision on the allocation of the apartment and/or the contract on the use of the apartment.[1812] However, we would like to point out that such cases do not relate to the acquisition of occupancy rights but to the repossession of an apartment. The situations in which a real pre-war occupant claims repossession of his/her apartment but does not have any act relating to the apartment are also included in this group;[1813] or he/she has nothing but a decision on the allocation of an apartment,[1814] where other requirements (the contract on the use of the apartment) have not been fulfilled for justified reasons such as, for example, the fact that a building has never been officially declared suitable for moving in. Article 1 of Additional Protocol No. 1 to the ECHR provides that the right to repossess the apartment cannot be acquired in such a situation. If there is no contract on the use of the apartment, where it was not possible to move into apartment, since third persons used the apartment unlawfully, the person who claims his/her right must request eviction. Otherwise, Article 1 of Additional Protocol No.1 cannot apply.[1815]

1811 AP 221/04, paragraph 30 *et seq*.

1812 U 14/00, paragraph 30. According to the BiH Constitutional Court, this *de facto* servitude right does not cease to exist by the fact that the occupant abandoned the apartment due to war conditions. The Cessation Law declares all judicial, administrative and other decisions terminating occupancy rights null and void and thereby re-establishes continuity temporarily interrupted by the Law on Abandoned Apartments. In view of this, not even the owner could evict the appellant from the apartment, after the pre-war occupant regained possession of the apartment, provided that 8 years elapsed from the moment he had moved into the apartment. This exclusion of eviction creates a strong legal status of possession equally strong as that of an occupancy right holder. Taking this into account, all legal regulations providing for the existence of an occupancy right (for example, Article 4, paragraph 1 of the Law on the Cessation of the Application of the Law on Abandoned Apartments) should be interpreted as including the actual occupant of the apartment. Otherwise, it is contrary to the BiH Constitution and the ECHR. Furthermore, see Annex 7 of the GFAP and Article II.5 of the BiH Constitution as a possibility of extending the scope of protection of the Court to the aforementioned cases relating to *de facto* occupants of apartments.

1813 CH/99/2396, paragraph 45 *et seq*.

1814 CH/02/8265, paragraph 53 *et seq.*; U 102/03, paragraph 40 *et seq*.

1815 AP 258/03, paragraph 38 *et seq*.

The occupancy right, once acquired, can be lost if the occupant moves out of the apartment or does not live in the apartment permanently.[1816] The possessor acquires the right to occupy the apartment permanently and peacefully if he/she uses the apartment uninterruptedly. According to the Law on Housing Relations, a (co-)occupancy right holder, thus the occupancy right holder under Article 1 of Protocol No. 1 to the ECHR, is the spouse of the original holder of the right who lives in the same apartment. Other occupants (members of the household of the occupancy right holder) do not have the occupancy right in a formal sense; the occupancy right holder is the only one who has such a right. However, they have a *de facto* right to occupy the apartment, which again is not a property right within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR.[1817] However, the members of the occupancy right holder's household can acquire the occupancy right after the death of the occupancy right holder if they fulfil other requirements. A wife who lives with the occupancy right holder acquires that right automatically.[1818] Certain requirements provided for by the law must be fulfilled; first of all there must be a *common* household[1819] and an individual must have the status as a *member* of the common household[1820] in order to transfer the occupancy right from the occupancy right holder to that other person. The occupancy right cannot be transferred if the occupancy right holder left the apartment, since another apartment is allocated to him/her in accordance with a decision on the allocation of apartment. In that case, the members of the household of the "new" occupancy right holder share his/her destiny.[1821] After the entry into force of the Law on Sale of Apartments with

1816 AP 1038/04, paragraph 27 *et seq*.

1817 U 17/03, paragraph 31 (however, this conclusion should be accepted in light of the special factual and legal status of this case, particularly the fact that the relations between a member of the household of the occupancy right holder and the occupancy right holder were permanently unresolved, where the Law on Housing Relations made it possible for the occupancy right holder to request eviction of the member of his household; see U 131/03, paragraph 34 *et seq.).*

1818 U 6/98; U 2/99; U 7/99; U 24/00; U 12/01; U 55/02, paragraph 38 *et seq*.; CH/96/28-A&M, paragraph 32; CH/97/46-M, paragraph 72 *et seq.*; CH/97/62-A&M, paragraph 66.

1819 CH/02/9603, paragraph 8; AP 7/05, paragraph 23; AP 380/04, paragraph 31; with regards to the disposal father the death, see AP 120/03, paragraph 28 *et seq.*; AP 21/03, paragraph 47; AP 959/04, paragraph 29, CH/98/710-A&M, paragraph 39 *et seq*.

1820 As to the right of a grandchild of the occupancy right holder to transfer the occupancy right after the death of the occupancy right holder, see U 12/01, paragraph 27 *et seq*. In Case No. U 12/01, the appellant's grandmother died in the period when the grandchildren were not any longer considered members of the household of the occupancy right holder according to the Amendments to the Law on Housing Relations from 1993. In 1999, the High Representative declared null the aforementioned Amendments, where the BiH Constitutional Court has held that the aforementioned nullity had *ex nunc* effects. Concerning this problem area, see the following headings: "a. Legal certainty", p. 95 and "i. Application of the Law on Housing Relations", p. 350.

1821 AP 95/04, paragraph 17 *et seq*.; CH/01/8088, paragraph 16.

Occupancy Right, the occupancy right holders acquired the right and possibility of purchasing their apartments.

> However, the right to purchase an apartment could be acquired provided that the apartment was occupied for at least six months, where the apartment could not be sold the first two years after the apartment had been purchased. The constitutionality of this regulation imposed by the High Representative (Article 8.a of the Law on Sale of Apartments with Occupancy Right) was reviewed by the BiH Constitutional Court in Case No. U 16/00. This regulation was to encourage refugees and displaced persons to return to their home instead of purchasing the apartments and selling them immediately after the purchase. In that manner, the international community wanted to render more difficult a process whereby the occupancy right would become an unlimited real right, where the aim was to support the return process. On the one hand, the Court has held that the occupancy rights of refugees and displaced persons did not cease to exist when they had left their apartments due to war conditions (U 16/00), since the former occupants had the right to return to their pre-war apartments (Article 3 of the Law on the Cessation of the Application of the Law on Abandoned Apartments in conjunction with Annex 7 of the Dayton Peace Agreement). Furthermore, the Court has held that this right to return is a property right within the meaning of Article 1 of Additional Protocol No.1 to the ECHR. However, "the right of an occupancy right holder is not a full property right but a right to live in the apartment and the right to, subject to certain conditions, purchase the apartment"(U 16/00). This is the reason why the scope of its protection is reduced if compared to full ownership. If viewed in isolation and independently from possible discrimination, the occupancy right does not provide the right to purchase the apartment and to acquire ownership over it. The Constitutional Court therefore concluded that the two-year rule was not in violation of Article 1 of Additional Protocol No. 1 to the ECHR.

A person who wanted to purchase an apartment with occupancy rights had to file a request for purchase of the apartment and, in addition to this, conclude a contract on the purchase of the apartment.[1822] In that case, the contract was to be signed by both parties, where it did not have to be certified by the competent public attorney.[1823] However, the payment of the purchase price without a valid contract was not enough.[1824] The existence of a valid contract on purchase, if the occupancy right holder died meanwhile, had to be established in the inheritance proceedings.[1825] "Temporary" occupancy rights are also property within the meaning of Article 1 of Additional Protocol No.1 to the ECHR.[1826]

1822 AP 1129/04, paragraph 28; CH/02/12361, paragraph 20.
1823 AP 83/02, paragraph 22.
1824 AP 1488/05, paragraphs 6, 29.
1825 CH/03/12868, paragraph 19.
1826 CH/98/1495-A&M, paragraph 61; CH/98/894-A&M, paragraph 49.

- *Compensation for damages* (the right to compensation for damages) in the case of car accident;[1827] in the case of inflation, denomination or devaluation;[1828] in the case of unlawful dismissal. The right to compensation for damages must not be determined in an arbitrary manner[1829] although the individual is not entitled to quantify damage, since such rights (the right to a certain amount of compensation for damages) are not included in the rights safeguarded by Article 1 of Additional Protocol No. 1 to the ECHR.[1830] The aforementioned two decisions of the BiH Constitutional Court contradict one another, since the Constitutional Court cannot examine whether compensation for damages has been established in an arbitrary manner without dealing with the relation between the awarded compensation for damage and the compensation which the appellant claimed and justified by producing evidence. Furthermore, the damaged party must be entitled to claim *adequate* compensation for damages, where what is adequate is to be determined in each individual case.

- *Shares in a company*.[1831] If a person invests his/her own property as a share in a joint stock company, he/she will lose the proprietary position within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR so that his/her property will no longer be safeguarded but the shares he/she acquired in such manner will be safeguarded within the meaning of the same Article.[1832] However, small shareholders do not have a right of action to challenge the management's decisions relating to the company itself; the small shareholders therefore lack a protected interest within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR. This applies, for example, to the situation in which a decision on the sale of the company is taken (although a small shareholder is not forced to sell his share in the company[1833]) or an administrative act whereby the work permit of the company is declared invalid;[1834]

1827 U 44/02, paragraphs 30, 34; U 95/03, paragraph 20.

1828 U 30/01, paragraph 21; U 11/01, paragraph 22 *et seq*., with reference to the ECtHR, *Akkus v. Turkey*, 24 Jun 1997, paragraph 30; and U 30/01, paragraph 20 *et seq*., with reference to ECtHR, *Aka v. Turkey*, 23 September 1998, paragraph 49 *et seq*. Concerning the problem of inflation, see the Decision of the Constitutional Court in Case No. AP 162/05, paragraph 14 *et seq*.; AP 218/05, paragraph 18 *et seq*.

1829 U 19/03, paragraph 24.

1830 AP 211/05, paragraph 16.

1831 AP 100/04, paragraph 31; AP 623/04, paragraph 24; internal shares acquired on the basis of the contributions of the employees: CH/00/5134, paragraph 258.

1832 U 159/03, paragraph 39 *et seq*.

1833 CH/00/3868 *et al*., paragraph 23.

1834 CH/01/7358, paragraph 11.

- *Ownership* which is registered in land books;[1835] ownership acquired through the adverse possession of private real property[1836] or State owned property;[1837]
- *Lease*.[1838]

(c) Property rights with public character

Property rights with public character such as the right to *old-age pension*,[1839] *disability pension*[1840] or *maternity pay*,[1841] represent "possessions" within the meaning of Article 1 of Additional Protocol No.1 to the ECHR. However, it is necessary to determine the existence of a legal basis, *i.e.*, the fulfilment of the requirements to acquire such a right in each individual case.[1842] The payment of contributions to the pension fund can be considered as property, *i.e.*, ownership of a share in the fund. However, Article 1 of Additional Protocol No. 1 to the ECHR does not provide the right to social benefits or reimbursement of certain amounts (aside from those provided for by the law).[1843] *Contributions to the housing fund* are nothing but taxes or solidarity contributions, which is not enough to acquire the ownership right to a portion of the fund.[1844] The ownership also includes the crafts and trade permission to run a restaurant.[1845] The payments of *taxes*[1846] or *customs duties* are included in the protected scope but only in case of arbitrariness by public authorities.[1847]

1835 CH/01/7224, paragraph 70; CH/02/9868-A&M, paragraph 77 *et seq*.
1836 AP 65/03, paragraph 20.
1837 AP 1874/05, paragraph 10 *et seq*.; CH/03/13810, paragraph 17.
1838 CH/97/51-A&M, paragraph 58.
1839 U 5/00; AP 639/04, paragraph 20 *et seq.*; AP 1028/04, paragraph 15 *et seq.*; CH/01/7635, paragraph 33 *et seq*.
1840 CH/03/13520, paragraph 37 *et seq*.
1841 AP 36/03, paragraph 25.
1842 CH/02/11321, paragraph 30, with regards to the determination of disability pension by the medical commission, CH/02/9348, paragraph 17, with regards to the recognition of the right to pension so as to include the years of service effectuated abroad.
1843 Compare, CH/98/706 *et al*.-A&M, paragraph 82, with reference to the EComHR, *Müller v. Austria*, 1 October 1975, D.R. 3, p. 31; *Tricković v. Slovenia*, 27 May 1998; ECtHR, *Gaygusuz v. Austria*, 31 August 1996, Reports 1996-IV, paragraph 41; CH/98/875 *et al.*-A&M, paragraph 64; CH/99/1554-A, paragraph 5; CH/02/8923 *et al*.-A&M, paragraph 81 *et seq*.; CH/03/12994-A&M, paragraph 88; CH/02/10046-A&M, paragraph 76.
1844 CH/01/8068, paragraph 4; CH/02/10828, paragraph 9.
1845 CH/02/9868-A&M, paragraph 80 *et seq*.
1846 U 27/01, paragraph 27.
1847 Compare, AP 28/03, paragraph 33.

(d) Positive obligations to protect the right to property

Article 1 of Additional Protocol No.1 to the ECHR stipulates not only the obligation of the State not to interfere arbitrarily with the individual's right to property but also, in conjunction with Article 1 of the ECHR, the positive obligation of the State to protect the individual's right effectively.[1848] In the decision *Whiteside v. The United Kingdom*, the EComHR imposed on the State a *positive obligation* of protection in another context. This is the State's obligation to take adequate measures to protect the individual against the *interference with property rights by third persons*, *i.e.*, private persons whose activities cannot be imputed to the State.[1849] Here, the EComHR refers to a special obligation of the State known as "*Ausstrahlungswirkung*" in the German dogma at a previous time and as the obligation to protect today.[1850] So far the European Court of Human Rights has not found that a violation of property rights occurred because the national laws did not secure an effective protection of the property right. In three parallel applications against Italy, which were filed for an excessive length of the proceedings, the European Court of Human Rights did not exclude the violation although it did not deal with it since it found a violation of the right to a hearing within a reasonable time.[1851] It does seem that such cases of insufficient legal protection should be classified under the right of access to a court (Article 6 of the ECHR) and the right to an effective legal remedy (Article 13 of the ECHR).

> For example, in Case No. U 18/00 the BiH Constitutional Court found a violation of both rights and went beyond the European Court of Human Rights by holding that the right to property was affected too (and violated – see details on p. 576). In particular, the Court has held that the courts did not make it possible for the individual to exercise his rights. This is reminiscent of the procedural effects of protection of property rights, known as "*Verfahrensgarantie*"[1852] in German constitutional law. In the aforementioned Case No. AP 160/03, the BiH Constitutional Court found a violation, since the appellant could not prove ownership before the Court due to an error in the land books.

1848 Compare, U 18/00, paragraph 53, with reference to the ECtHR, *Whiteside v. The United Kingdom*, 7 March 1994, Application No. 20357/92, D.R. 76 A, p. 80; AP 160/03, paragraph 28.

1849 CH/96/28-A&M, paragraph 32.

1850 *Sachs*, 1999.b, paragraph 32.

1851 ESLJP, *Santilli v. Italy*, 19 February 1991, Series A no. 194-B, paragraph 21 *et seq*., *Brigandi v. Italy*, 19 February 1991, Series A no. 194-B, paragraph 31 *et seq*.; *Zanghi v. Italy*, 19 February 1991, Series A no. 194-B, paragraph 22 *et seq*.; in conjunction with Article 1 of Additional Protocol No. 1 to the ECHR, a commentary in *Frowein/Peukert*, 1996, paragraph 44, seems confusing, where the author considers that the ECtHR refused to apply Article 1 of the Additional Protocol No. 1 to the ECtHR.

1852 *Wendt*, 1999, paragraph 43.

By referring to the case-law of the European Court of Human Rights with regards to the protection of lawful protests against the attacks of opponents, the Human Rights Chamber has held that Article 1 of Additional Protocol No. 1 to the ECHR stipulates for the State the obligation to effectively protect the individual who was repossessing his apartment against the resistance of an unlawful possessor during the procedure of enforcement of a decision on eviction.[1853]

(e) There is no protected "property" within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR

The BiH Constitutional Court did not establish that there was a property within the meaning of Article 1 of Additional Protocol No. 1 to the ECHR in the following cases:

- *customs duties*;[1854]
- *donation* for reconstruction of a house, if there is no right to it but a decision is at the discretion of the administrative authority;[1855]
- *expropriated property*;[1856]
- *confiscated property*;[1857]
- *nationalised property*;[1858]
- *compensation for damages* in the case of dissolution of marriage concluded according to Shariat (the so-called mahr);[1859]
- *compensation for damage caused to property during the war if the alleged responsible person is not sued*;[1860]
- *offer in the privatisation process*[1861] or *auction*;[1862]
- *taxes on revenue, sales tax*;[1863]

1853 CH/96/27-A&M, paragraph 31 *et seq*. with reference to the ECtHR, *Plattform Ärzte für das Leben v. Austria*, 21 June 1988, Series A no. 139, paragraphs 30-34.
1854 AP 75/03, paragraph 21.
1855 AP 83/06, paragraph 5l.
1856 CH/02/8785, paragraph 19 *et seq*.
1857 U 61/02, paragraph 21; CH/03/13438, paragraph 15 *et seq*.
1858 AP 68/05, paragraph 37 *et seq*.; CH/03/13424, paragraph 49 *et seq*.; CH/01/8525, paragraph 11.
1859 Compare, U 62/01, paragraph 23 *et seq*.
1860 AP 742/04, paragraph 33 *et seq*.
1861 AP 365/04, paragraph 23; CH/03/14312, paragraph 31 *et seq*.
1862 AP 914/04, paragraph 14.
1863 AP 669/03, paragraph 8; AP 643/03, paragraph 23.

- right to restitution in accordance with *a law supposed to be adopted*;[1864]
- *priority right to purchase* in the case of division of property according to the ownership portions;[1865]
- *precarious contract*[1866]
- *list on the allocation of apartments:* being put on the apartment allocation list (based on which socially owned apartments used to be allocated); the procedure for assessment of the candidate's eligibility for putting him/her on the list;[1867] request to declare the apartment allocation list null;[1868]
- *costs of utilities: garbage collection fee*;[1869]
- *meal allowance* off duty;[1870]
- ownership and other property rights whose acquisition is *at the discretion of administrative authorities* (expectations of acquiring a land;[1871] the employees' expectations of acquiring shares in a company in the privatisation process;[1872] the expectations of a JNA member who had an occupancy right that he would conclude a contract on the apartment purchase[1873]);
- ownership and other property rights *which the appellant could not prove during the proceedings* (ownership;[1874] compensation for expropriation;[1875] a priority right to purchase a land, which ceased to exist;[1876] the rights under the purchase pre-contract;[1877] occupancy right;[1878] heritage;[1879] claim for damages;[1880] claim for compensation for damages caused by inflation

1864 CH/98/1040-A, paragraph 21; CH/03/9628-A&M, paragraph 92; CH/00/4863-A, paragraph 3 *et seq*.
1865 U 33/00, paragraphs 27, 31.
1866 U 11/02, paragraph 25.
1867 CH/00/7018, paragraph 10.
1868 CH/02/8791, paragraph 27 et seq.; AP 1419/05, paragraph 16.
1869 AP 1/03, paragraph 26.
1870 CH/00/4080, paragraph 17 *et seq*.
1871 CH/99/2627, paragraph 32 *et seq*.
1872 CH/01/7674-A, paragraph 19.
1873 CH/98/1169-A&M, paragraph 56 *et seq*.
1874 AP 91/02, paragraph 28; AP 983/04, paragraph 31.
1875 AP 1050/04, paragraph 26.
1876 U 3/01, paragraph 29.
1877 U 30/02, paragraph 31.
1878 AP 45/02, paragraph 84; AP 120/03, paragraph 32; U 43/03, paragraph 32; AP 959/04, paragraph 29.
1879 AP 1488/05, paragraph 29; U 65/02, paragraph 45; CH/02/8847, paragraph 8 *et seq*.; AP 1082/05, paragraph 7 *et seq*.
1880 U 72/03, paragraph 29.

or denomination[1881]; compensation for military service;[1882] pension;[1883] compensation for performed work[1884]);

- ownership and other property rights exercised *without legal basis*;[1885] however, unlawfully acquired ownership[1886] or lease,[1887] fall under the scope of application[1888] if the unlawfulness is based on an act of the competent authority, its failure to act or declaration;
- ownership and other property rights which *are allocated for temporary use*;[1889]
- ownership and other property rights which *have been declared null in fair proceedings* (declaration on nullity of a purchase contract;[1890] declaration on nullity of a decision on restitution;[1891] declaration on nullity of a lease contract[1892]);
- *confiscated property*.[1893]

c. Interference with the right to property

The Constitutional Court and the Human Rights Chamber have interpreted the content of protection and the circumstances under which the right to property can be restricted by referring to the case-law of the European Court of Human Rights[1894] according to which Article 1 of Additional Protocol No. 1 to the ECHR contains three rules:

(1) The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property;

1881 AP 162/05, paragraph 14 *et seq*.; AP 218/05, paragraph 18 *et seq*. See also U 30/01, paragraph 21; U 11/01, paragraph 22 *et seq*.
1882 AP 147/05, paragraph 30.
1883 CH/02/12994, paragraph 89; CH/99/2640, paragraph 8 *et seq*.
1884 AP 286/05, paragraph 11.
1885 CH/99/2628-A, paragraph 16.
1886 U 108/03, paragraph 34.
1887 U 14/03, paragraph 34.
1888 U 14/03, paragraph 33, with reference to the ECtHR, *Pine Valley Developments Ltd. et al. v. Ireland*, 29 November 1991, Series A no. 222, paragraph 51, see also AP 561/04, paragraph 28.
1889 CH/03/9628-A&M, paragraph 92.
1890 AP 497/04, paragraph 37.
1891 CH/02/11111, paragraph 21.
1892 AP 1236/06, paragraph 26.
1893 AP 393/04, paragraph 17; see also AP 2078/05, paragraph 42.
1894 For example, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no.52, paragraph 61; *Scollo v. Italy*, 28.9.1995, Series A no. 315-C, paragraph 26.

(2) The second rule contained in the second sentence of the same paragraph, covers deprivation of possession and makes it subject to certain conditions (lawfulness, general interest, proportionality);

(3) The third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in the general interest in accordance with the law.

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 the peaceful enjoyment of property and should therefore be construed in light of the general principle enunciated in the first rule.[1895] A distinction between deprivation and (extensive) control of the use of property needs to be made, since Article 1 of Additional Protocol No.1 to the ECHR contains in principle different requirements to be fulfilled in both types of interventions.[1896]

(a) Deprivation: *de facto* and *de iure*

Deprivation of property occurs in principle only when an owner is deprived of all his rights in accordance with the law or by application of a legal authorization with the same effects.[1897] If the owner has his ownership right *de iure* but he is practically prevented from using his land, since the State uses it for some other purposes (for example, as a military training polygon) then it is *de facto* deprivation.[1898] Therefore, *de facto* deprivation does not require any formal act on deprivation but covers all State authorities' measures which entail the same legal consequences as those of formal deprivation of property because of their strong effects.[1899] *De facto* deprivation is an act whereby the State interferes with one's property in the general interest – or authorises third persons to do so. If, for example, a court decides to allocate an apartment with a common occupancy right to one of the divorced spouses, then it is not (*de facto*) deprivation, since the court does not work in the public interest but the court gives, in the (private) interest of one spouse, the priority right to the spouse

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1895 U 6/98; U 2/99; U 3/99; U 5/00; U 24/00; U 14/00, paragraph 29; U 7/01, paragraph 22; U 11/01, paragraph 20; U 12/01, paragraph 27; (U 18/00, paragraph 50, with reference to the ECtHR, *Allan Jacobson v. Sweden* 25 October 1989, Series A no. 163, paragraph 53); CH/96/17-A&M, paragraph 31; CH/96/28-A&M, paragraph 31; CH/96/29-A&M, paragraph 190.

1896 U 74/03, paragraph 31.

1897 U 74/03, paragraph 30, with reference to the ECtHR, *Lithgow v. The United Kingdom* 8 July 1986, Series A no. 102.

1898 CH/99/2425 *et al*.-A&M, paragraph 126; see also U 74/03, paragraph 30: physical occupancy of a real property as *de facto* nationalisation.

1899 CH/98/375 *et al*., paragraph 1214.

whom it considers more important.[1900] Interference with the property right is possible only if the applicable legislation deprives a spouse of his/her property in an arbitrary and unfair manner (in this case: the apartment and occupancy right). If there is still a certain factual use of the property and justified faith in the future use of that property despite the State intervention, then it is not *de facto* deprivation but the control of use.[1901]

Examples of *de facto* deprivation:

- *The court's unlawful standpoint* that it does not have jurisdiction over the matter, the consequence of which is the fact that the owner cannot take possession of his property through the procedure of repossession of the property he abandoned;[1902]
- *Declaration* of the apartment as "abandoned" and *forcible eviction* of occupants although a legal remedy against deprivation of property, which has no suspensive effect, has been filed;[1903]
- *Lawful prohibition of the enforcement of legally binding decisions for long years* and failure to re-regulate the legal status of the injured party;[1904]
- *Adjournment of enforcement of repossession* of the apartment with an occupancy right, which has been ordered by a court, despite the time limits provided for by law;[1905]

Examples of *de iure* deprivation:

- *Lawful taking of possession of a land/real property*;[1906]
- Retroactive annulment of a *labour relationship*, entailing the cessation of all related rights;[1907]

1900 U 55/02, paragraph 41 *et seq*., with reference to the ECtHR, Application No. 8588/79 & 8589/79, Decisions on Admissibility, 12 October 1982, DR 29, p. *81 et seq*.

1901 CH/98/375 *et al*., paragraph 1214, with reference to the ECtHR, *Sporrong & Lonnroth v. Sweden*, 23 September 1982, Series A no. 52, paragraphs 70-73; *Allan Jacobson v. Sweden*, 25 October 1989, Series A no. 163, paragraph 54; *Fredin v. Sweden*, 18 February 1991, Series A no. 192, paragraphs 4, 52 *et seq*.

1902 U 3/99.

1903 CH/97/46-M, paragraph 77, with reference to the ECtHR, *Papamichalopoulos v. Greece*, 24 June 1993, Series A no. 260-B, paragraph 42.

1904 AP 774/04, paragraph 382.

1905 CH/97/42-A&M, paragraph 61; CH/97/58-A&M, paragraph 58; CH/97/62-A&M, paragraph 68.

1906 U 74/03, paragraph 30, with reference to the ECtHR, *Hentrich v. France*, 22 September 1994, Series A no. 296-A, paragraph 34 *et seq*.

1907 CH/97/77-A&M, paragraph 84 *et seq*.

- Allocation of a priority *right to build*;[1908]
- *Declaration of retroactive invalidity of purchase contracts*;[1909]
- *Loss due to inflation* while waiting for collection of an amount from the public institution, if the loss is not compensated by the appropriate interest;[1910]
- Imposition of *fines*;[1911]
- *Lawful deprivation of the right to interest* for a certain period of time;[1912]
- *Lawful prevention of* enforcement *of a judgment relating to the compensation for damage*;[1913]
- *Unlawful dismissal* of a claim for damages;[1914]
- *Confiscation of a car* which was imported in an unlawful manner;[1915] confiscation of means of transportation and goods for alleged evasion of payment of customs duty;[1916]
- *Deprivation of the right to dispose and use* socially owned building land intended for a certain purpose according to the urban development plan;[1917]
- *Confiscation of land appropriated in an unlawful manner*;[1918]

1908 CH/98/704-A&M, paragraph 61.

1909 CH/96/3 *et al.*-M, paragraph 37. If the State authorities, based on a decision on annulment, denies the existence of private property, and warns the possessor that he could run a risk of eviction, then there is an additional violation of the legal status protected by Article 1 of Additional Protocol No. 1 to the ECtHR (CH/96/22-M, paragraph 47), and if the eviction is effectuated, there is certainly a violation (CH/97/40-M, paragraph 43).

1910 Compare, U 11/01, paragraph 22 *et seq*., with reference to the ECtHR, *Akkus v. Turkey*, 24 June 1997, Reports 1997-IV, paragraph 30; and U 30/01, paragraph 20 *et seq*., with reference to the ECtHR, *Aka v. Turkey*, 23 September 1998, Reports 1998-VI, paragraph 49 *et seq*. In Case No. U 30/01 the appellant did not succeed in his case, since he wanted to receive compensation for the loss caused by inflation by claiming modification of the decision in the enforcement proceedings instead of, as it was ordered by the court, claiming adoption of a new enforcement decision (paragraph 21). Given the failure to comply with the procedural regulations, the BiH Constitutional Court could not find a violation of the right to property (see paragraph 22).

1911 AP 498/04, paragraph 22; U 65/03, paragraph 18.

1912 AP 774/04, paragraph 385; similarly, U 44/02, paragraph 38; CH/00/3615 *et al*., paragraph 244 *et seq.*

1913 CH/00/10999, paragraph 35 *et seq*.

1914 U 36/03, paragraph 35.

1915 AP 2078/05, paragraph 42. However, see also AP 393/04, paragraph 17.

1916 CH/00/4023, paragraph 39.

1917 AP 851/04, paragraph 25 et seq.; CH/00/3557, paragraph 57 et seq.; CH/02/12488 et al., paragraph 52 et seq.; CH/03/2183, paragraph 58 et seq.

1918 AP 706/05, paragraph 32.

- Refusal to *return an apartment* over which the appellant does not have formal occupancy right but which he possesses lawfully, in which he had lived before the war, in respect of which he had paid utility bills on a regular basis, where the state authorities allowed him, despite the lack of contract on the use of apartment, to live in the apartment for years;[1919]

- Consideration of *a claim for payment of pension in erroneous proceedings (within the meaning of the subject-matter competence)*;[1920]

- *Disturbance of possession*, which was established in judicial proceedings, and the failure to comply with an order imposing the restoration to a previous state provided for by the law;[1921]

- *Enforcement of a judicial decision on enforcement* relating to marital property although the wife's debt established in accordance with the law was not joint and several;[1922]

- Imposition of the payment of *legal interest;*[1923]

- *Failure to enforce a decision of the CRPC* despite the fact that there were not legal obstacles to it,[1924] *i.e.*, *incomplete enforcement of* a decision on the return of an abandoned apartment;[1925]

- Prevention of the exercise of *minority rights of the shareholders*;[1926]

- *De facto* suspension of payment of *disability pension*;[1927]

- Dismissal of a claim for damages caused by the violation of the rights over *non-monetary assets*;[1928]

- Unconstitutional *failure to regulate property status* (foreign currency deposits).[1929]

1919 U 14/00, paragraph 30.
1920 AP 740/04, paragraph 26 *et seq*.
1921 AP 148/05, paragraph 44.
1922 AP 1086/04, paragraph 25 *et seq*.
1923 U 4/99.
1924 CH/01/7252, paragraph 24 *et seq.*; CH/02/9345 *et al*., paragraph 43 *et seq.*
1925 CH/02/12501, paragraph 29 *et seq*.
1926 CH/00/5134, paragraph 289.
1927 CH/03/13520, paragraph 37 *et seq*.
1928 AP 1223/06, paragraph 26.
1929 U 14/05, paragraph 56.

(b) Control of use

If there is no formal procedure for deprivation, it is necessary to scrutinise the matter regardless of the first impressions of the situation, since the ECHR guarantees an effective and practical respect of the rights. If interference with the right to property is of lower priority than a *de facto* deprivation of the property – since in principle the holders can still dispose of their property and can use, it but the State's act is intended for the deprivation of property, which creates a legal uncertainty questioning any investment in the property – then the matter relates to an interference with the peaceful enjoyment of property. Therefore, the restriction on the use of property is restricted not only through the imposition of a law or other formal State act but also through actions taken by the State authorities.[1930]

If the legislature adopts a regulation dealing with the use of property without depriving the owner of the possibility of using the property, then the matter does not relate to the deprivation but to a regulation dealing with the use.[1931]

Examples of restrictions on the use of property:

- State program for payment of old foreign currency savings;[1932]
- State program for payment of compensation for war-related damage;[1933]
- Legal regulations to establish a faculty;[1934]
- Transformation into certificates of unpaid claims based on the right to pension;[1935]
- Servitude rights over land/real property;[1936]
- Public decision on the program for privatisation of a State owned company;[1937]

1930 CH/99/2425 *et al*.-A&M, paragraph 139 *et seq*., with reference to the ECtHR, *Van Droogenbroeck v. Belgium*, 24 June 1982, Series A no. 50, paragraph 38, and *Airey v. Ireland*, 9 October 1979, Series A no. 32, paragraph 24.
1931 CH/98/375 *et al.*, paragraph 1215 *et seq.*; CH/02/12468 *et al*., paragraph 172 *et seq.*
1932 CH/98/375 *et al*., paragraph 1215 *et seq*.
1933 CH/02/12468 *et al*., paragraph 172 *et seq*.
1934 CH/00/6183 *et al.*-A&M, paragraph 191.
1935 CH/03/14880, paragraph 35 *et seq*.
1936 AP 1292/05, paragraph 22; AP 1048/04, paragraph 28.
1937 AP 100/04, paragraph 33.

- Protection of the status as member of the household of the former occupancy right holder who acquired the ownership right to the apartment in the privatisation procedure;[1938]
- Occupancy right over a private property;[1939]
- Partial expropriation;[1940]
- Issuance of necessary permissions allowing the removal of measures imposing restrictions on the right to property (for example, relocation of a planned road going over the appellant's land);[1941]
- Urban-planning permit for the legalisation of an illegally constructed building.

(c) Positive obligations of protection

When it comes to the protection of the right to property, the State has positive obligations. The State must provide effective instruments making it possible for an individual to exercise his/her property rights.[1942] If the State violates its positive obligations to protect an individual so as to make third persons respect his or her property rights, then the State interferes with his or her right to property. This is the case, for example, if the legislature fails to create legal conditions for exercising the right to property – for example, if the insurance company reimburses the invalidity pension,[1943] or the court establishes that the possession has been taken unlawfully, failing at the same time to order repossession.[1944] The same applies if a court declares itself incompetent,[1945] or if it unlawfully refuses to resolve a dispute *res iudicata*,[1946] or if the administration and the courts fail to take appropriate measures in order to help the occupant while repossessing his/her apartment which he had to leave forcibly.[1947] According to the view of the BiH Constitutional Court, this constitutes *de facto*

1938 U 131/03, paragraph 34 *et seq*.
1939 AP 647/04, paragraph 23.
1940 AP 528/04, paragraph 24 *et seq*.
1941 AP 678/04, paragraph 21; AP 1305/05, paragraph 11 *et seq*.
1942 AP 130/04, paragraph 77; CH/01/8486, paragraph 70; U 14/05, paragraph 56, CH/01/7224-A&M, paragraphs 78, 82, AP 160/03, paragraph 28.
1943 U 18/00, paragraphs 51-53; for more details, see p. 582.
1944 AP 148/05, paragraph 26.
1945 U 6/98; U 2/99; U 3/99; U 7/99; U 24/00, paragraph 36; however, this is not the cases if such a decision was lawful: AP 570/05, paragraph 26.
1946 U 2/01, paragraph 31 *et seq*.
1947 U 7/00; CH/00/6436, paragraphs 76, 79.

deprivation of property rights.[1948] In the cases where the police did not respect positive obligations under Article 1 of Additional Protocol No. 1 to the ECHR by failing to assist the authorities enforcing the eviction, the Chamber did not find *de facto* deprivation of property but rather a failure to respect the ownership right falling within the scope of the first rule (the first sentence of the first paragraph).[1949] The failure of the administration and courts to comply with the time limits prescribed by the law, their general refusal to enforce legally binding decisions on return or compensation for damages, and the legislature's prevention of enforcement of such decisions constitute interference with the right to property.[1950] If the State authorities do not prevent the population from unlawfully using private land (in the instant case: the place where a mosque was constructed and destroyed during the war) as a parking place or waste-area, they violate the positive obligations of protection of property rights.[1951]

d. Justification

The right to property is not guaranteed without limitations. However, a number of requirements must be fulfilled in order to interfere with the right to property, regardless of whether it is related to the deprivation or control of property so that the interference, regardless of its nature, is allowed in compliance with the requirements provided for by law. Moreover, every interference with the right to property must ensure a balance between the interests of the individual and the public interest, and thus must be proportional. Moreover, deprivation must be in compliance with the conditions provided for by the general principles of international law and must be in the general interest. In regulating the use of property, the State must take into account the procedural guarantees laid down in paragraph 2 of Article 1. The ownership right must have such a precise shape in the laws that the mechanism of ownership of private persons could be maintained.

1948 Implicitly in U 6/98; U 2/99; U 3/99; explicitly in U 7/00.

1949 CH/96/17-A&M, paragraph 32; CH/96/28-A&M, paragraph 33, with reference to the EComHR, *Whiteside v. The United Kingdom*, (Application No. 20357/92), DR S. 80, and *Scollo v. Italy*, 28 September 1995, Series A no. 315-C, paragraph 26; concerning the violation of Article 8 of the ECHR, compare, CH/96/28-A&M, paragraph 22; concerning Article 6, paragraph 1 of the ECHR, see CH/96/28-A&M, paragraph 34.

1950 CH/01/8110-A&M, paragraph 46; CH/97/62-A&M, paragraph 70; CH/99/1961-A&M, paragraph 104; CH/00/6143 *et al*.-A&M, paragraph 50; CH/00/6142-A&M, paragraph 59; compare also, CH/00/3574-A&M.

1951 CH/01/7701-A&M, paragraph 138.

(a) Lawfulness of interference with the right to property

Interference with the right to property is subject to "the conditions provided for by law [...]". The obligation of lawfulness has a central meaning within the principle of the legal state in order to justify any interventions whatsoever into the right to ownership.[1952] Therefore, this principle is equally related to the deprivation *de facto* and deprivation *de iure*.[1953]

At any rate, every interference without legal basis is unlawful where, for example, the administration takes a lawful possession without complying with the procedure for deprivation of the right to possession provided for by the law.[1954] In addition, the notion of "legal basis" covers not only the laws but also other general legal acts such as decrees and acts of public companies (statutes etc.) based on which the employer pays compensation for performed work, if such acts fulfil the standards of the ECHR (publicity, *i.e.*, access and transparency).[1955]

However, an interference is unlawful even if there is a legal basis but that legal basis is not brought into line with the BiH Constitution, *i.e.*, compatible with the ECHR. According to the ECHR, the legal basis must be accessible to the individual and formulated in a sufficiently clear manner.[1956] If the aforementioned is not the case, the affected person is not able – or is able solely with appropriate advice – to behave in accordance with the law and to foresee what consequences a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring with it excessive rigidity, whereas the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions to be resolved by courts and competent authorities.[1957] The use of vague terms is therefore necessary and allowed but in the event a disputable case arises there must be the possibility of review by courts.[1958]

As any interference with the right to property must be in accordance with the BiH Constitution and thus ECHR, the Constitutional Court and other courts and administrations are obliged to review the conformity of applicable laws with

1952 CH/98/166-A&M, paragraph 82.
1953 CH/99/2425 *et al.*-A&M, paragraph 127 *et seq.*
1954 AP 1048/04, paragraph 28.
1955 AP 559/04, paragraph 35.
1956 U 74/03, paragraph 34.
1957 CH/03/14880, paragraph 39, with reference to the ECtHR, *Sunday Times v. The United Kingdom*, 26 April 1979, Series A no. 38, paragraph 47 *et seq*.
1958 CH/98/375 *et al*., paragraph 1246 *et seq*.

the BiH Constitution and European Court of Human Rights while examining the lawfulness of interference.[1959] In this respect, not only are human rights and freedoms included in the constitutional standards but also the constitutional principle such as the legal state or separation of powers.[1960] For example, the situation in which the executive power adjourns the enforcement of a legally binding judgment, either by issuing a decree or tacitly, constitutes a violation of the principle of separation of powers, since it does not have the right to interfere with the judicial power.[1961] In order for the interference to be lawful, it is necessary to apply the appropriate law and to apply it correctly, not arbitrarily; this is not the case if the legal basis is not in force any longer,[1962] if the law is applied wrongly or arbitrarily,[1963] or if the interference is based on an incorrect law.[1964]

If the interference lacks legal grounds or if the legal grounds are unconstitutional, the examination of the proportionality of the interference is of no significance anyway.[1965]

The interference which does not take account of the decisions of the High Representative or temporary measures imposed by the Human Rights Chamber is unlawful.[1966] The measures which had a legal basis at the beginning must not be in force any more if the related legal basis was abrogated subsequently. In this respect, temporary allocation of abandoned apartments to refugees based on the Law on Abandoned Apartments was probably covered by the law at the beginning. However, if the legal basis was later abolished, and all administrative, judicial and other decisions which were taken in compliance with that law were rendered ineffective, then the continuation of the allocation of apartments to third persons is without legal basis.[1967] It amounts to the same situation, whether there is no legal basis or if it is abolished in a judicial decision.[1968]

1959 U 106/03, for more details, see "b. Obligation to submit a request", p. 867, relating to the obligation to respect the BiH Constitution.
1960 Compare, CH/03/13106 *et al.*, paragraph 32 *et seq.*; CH/03/14880, paragraph 43.
1961 CH/01/8110-A&M, paragraph 51 *et seq.*, with reference to the judgment of the RS Constitutional Court in Cases U 36/96 and 49/96 of 30 March 1999. However, the adjournment of enforcement can be lawful if it is provided for by law. However, the law must strike a fair balance between the general interest and the injured party's right to property (CH/01/8110-A&M, paragraph 54 *et seq.*, paragraph 62).
1962 AP 36/03, paragraph 28 *et seq*.
1963 AP 740/04, paragraph 30; U 32/03, paragraph 25 *et seq*.
1964 AP 625/04, paragraph 38 *et seq*.
1965 CH/98/166-A&M, paragraph 82, with reference to the ECtHR, *Iatridis v. Greece*, 25 March 1999, Reports 1999-II, p. 97, paragraph 58.
1966 CH/00/6134-A&M, paragraph 92 *et seq.*; CH/01/7701-A&M, paragraph 144.
1967 U 14/00, paragraph 35.
1968 CH/97/104 *et al.*-A&M, paragraph 138 *et seq.*: in that case, it was quashed by the judgment of the Constitutional Court of FBiH.

(b) Compatibility with the conditions provided for by the general principles of international law

Deprivation of ownership must also be in accordance with the general principles of international law. These requirements do not apply while confiscating the property of nationals of a country.[1969]

(c) Interference with the right to property in the general/public interest

If the interference is lawful within the meaning of the BiH Constitution, *i.e.*, the ECHR, then another requirement must also be fulfilled: interference which is provided for by law must be in the legitimate public/general interest. In the Case *James v. The United Kingdom*, the European Court of Human Rights rejected the applicant's request that the term "public interest" be reduced to the term "the interest of the community" and held that the subject and aim of Article 1 of Additional Protocol No.1 to the ECHR are the protection against the **arbitrary, compulsory taking of property**.[1970] Moreover, the public interest provided for by law cannot be applied arbitrarily.[1971] The legitimate aim of deprivation in the general interest can relate to the public and private interest. In other words: a deprivation whose interests are the *priority rights of third persons* can be considered in some cases as a deprivation in the general interest. The priority rights of individuals are not more significant than the priority rights of third persons or the public, *i.e.*, the general interest of a community.[1972] If there is a legitimate interest at the moment of making a decision but it ceases to exist at a later point, this usually entails the fact that there is no justification of intervention in basic rights any more.[1973] This means that it becomes legitimate to prove that an interference with the right to property is unconstitutional if a law, which was formally in force, has become obsolete based on the fact that its existence is no longer justified due to a change in the factual and legal circumstances.

The notion of a *legitimate aim in the general interest* should be defined in each individual case. When it comes to this term, the Human Rights Chamber has referred to the case-law of the European Court of Human Rights, stating that

1969 CH/96/3 *et al*.-M, paragraph 34, with reference to the ECtHR, *James et al. v. The United Kingdom*, 21 February 1986, Series A no. 98, paragraph 66.
1970 U 74/03, paragraph 31, with reference to the ECtHR, *James et al. v. The United Kingdom*, 21 February 1986, Series A no. 98, paragraph 41.
1971 CH/01/7248, paragraph 185 *et seq*., paragraph 200.
1972 CH/98/874, paragraph160.
1973 CH/00/3557, paragraph 57 *et seq.*

the national authorities, because of their direct knowledge of their society and its needs, are in principle better suited than an international judge to appreciate what is "in the public interest". The decision to interfere with the right to property involves consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. Therefore, the European Court of Human Rights generally respects the decisions of the national authorities unless such decisions are manifestly without reasonable foundation.[1974] For example, an Entity's regulation imposing a six-month time limit for the retroactive payment of a pension from the date of filing a claim passed this type of test.[1975] However, the argument relating to the directness or autonomy of national decision-making procedures (European Court of Human Rights *v*. competent authorities of BiH) can apply in a restricted manner and in the national legal context (the BiH Constitutional Court *v*. other national authorities), since the BiH Constitutional Court is geographically, politically and socially more similar to the decision-making procedures in Bosnia and Herzegovina than those of the European Court of Human Rights. However, the courts at the highest level, including the BiH Constitutional Court itself, are recommended to refrain from interfering with the competence of authorities at the lower levels, since the administration and ordinary courts within a national legal system are more familiar with any particular case.[1976]

The Constitutional Court and Human Rights Chamber, in their case-law, have indicated as a priority public interest the justification of interventions aiming at mitigating the consequences of the war. However, the usual aspects of the public interest indicated in the case-law of other democratic societies and countries (such as a functional legal system, establishment of legal certainty by prescription of statute of limitations[1977] or creation of social justice through distribution of socially owned property),[1978] got meanwhile a particular role.

In the cases relating to the repossession of the JNA apartments, the Chamber confirmed that there could be a legitimate interest in equally guaranteeing the right to the purchase of apartments with an occupancy right. However, the Chamber could not recognise such a deep social imbalance between the conditions of purchase of apartments of JNA members on the one hand, and

1974 CH/99/2624, paragraph 87, with reference to the ECtHR, *James et al.* v. *The United Kingdom*, 21 February 1986, Series A no. 98, paragraph 46.

1975 AP 2213/06, paragraph 26.

1976 For more detail, see a commentary relating to the scope of review within constitutional control (review), p. 167.

1977 AP 239/03, paragraph 21; AP 1105/05, paragraph 28; AP 221/04, paragraph 30.

1978 CH/02/9868-A&M, paragraph 95, with reference to the ECtHR, *James et al.* v. *The United Kingdom*, 21 February 1986, Series A no. 98, paragraph 41.

other occupancy right holders on the other hand in order to justify a declaration of retroactive invalidity of the contracts of purchase of JNA apartments.[1979] However, deprivation of an occupancy right (including the impossibility of repossessing the apartment) and the private property (through the privatisation of apartments) of the persons who were members of military forces outside the territory of Bosnia and Herzegovina after 19 May 1992 (when it comes to the occupancy right) and after 14 December 1995 (when it comes to the privatised JNA apartments) is in the general interest since it serves (a) to meet the housing needs of the members its own army, demobilised soldiers and thus the public welfare,[1980] but also (b) to protect the principle of loyalty towards its own country.[1981]

The State has a wide margin of appreciation to regulate the use of private property for military purposes at the time of an imminent threat of war and at wartime, since the national security and defence of a country are strong general interests.[1982] At any rate, temporary deprivation of property for military purposes is in the public interest during wartime.[1983] After the war, the State's obligations to compensate for war-related damage and to pay old foreign currency savings could not be fulfilled at once, since it would have jeopardised the **macroeconomic stability** of the country, its sovereignty, financial independence and banking system.[1984] In the context of the **return process**, the public interest is not only a prompt return of houses and apartments used for accommodation but also the business premises, since their capacity was also an important factor influencing the decision of refugees and displaced persons to return[1985] – the reason being the fact that they served often as a means of earning a living.

(d) Proportionality (*fair balance*)

Any interference with property rights, including interference which does not constitute a deprivation of property or a restriction thereon,[1986] must be fair after weighing the interests of the holders of rights on the one hand and the

1979 CH/96/3 *et al.*-M, paragraph 37; CH/96/2 *et al.*-A&M, paragraphs 59-61; CH/97/82 *et al.*-A&M, paragraph 91; CH/97/60 *et al.*-A&M, paragraph 148.
1980 U 83/03, paragraph 54.
1981 CH/98/874 et al., paragraph 157 *et seq*.
1982 CH/98/166, paragraph 87.
1983 CH/01/6930-A&M, paragraph 77.
1984 CH/02/12468 et al., paragraph 181 *et seq*.; CH/98/375 et al., paragraph 1221.
1985 CH/02/9868-A&M, paragraph 96 *et seq*.
1986 U 18/00, paragraph 52 *et seq.*; CH/96/17-A&M, paragraph 31, with reference to the ECtHR, *Sporrong & Lonnroth v. Sweden*, 23 September 1982, Series A no. 52, paragraph 69.

interests of society on the other hand. In this context, taken measures must have a **legitimate aim** in the general interest and, taking into account the aim, must seem appropriate. The same applies to interferences in the form of failure to respect the **positive obligations of protection** of the right to property.[1987] At any rate, while interfering with the right to property, the national authorities have a wide **margin of appreciation**, notably in complex and difficult cases, since they are the subject of controversial discussions and assessment in democratic societies, where the national authorities are in principle better suited to consider the needs and resources than international judges.[1988] Despite the wide margin of appreciation (legislative, *i.e.*, administrative), such appreciation must not be without reasonable foundation.[1989]

There is no fair balance if **an excessive burden** in the general interest is placed on the individual.[1990] In order to consider the question whether something constitutes an excessive burden placed on the appellant, it is usually important to consider whether the appellant is able to effectively challenge a measure before the court,[1991] whether he had the possibility of receiving compensation and whether he could avail himself of procedural guarantees. A reasonable length of the proceedings also plays a significant role.[1992]

A legal situation that is too **uncertain** is unacceptable, and thus is disproportional. In Case CH/97/104, such an uncertain legal situation occurred because the Federation continued restricting the appellants' disposal of their foreign currency deposits, although meanwhile the legal basis for doing so was abolished by the Constitutional Court of the FBiH.[1993]

1987 CH/99/2315-A&M, paragraph 81, with reference to ECtHR, *Powell and Rayner v. The United Kingdom*, 21 February 1990, Series A no. 172, paragraph 41; CH/96/29-A&M, paragraph 190.

1988 CH/97/48 *et al*.-A&M, paragraph 163 (with reference to the ECtHR, *Lithgow et al. v. The United Kingdom*, 8 July 1986, Series A no. 102, paragraph 122) pointing to a complex problem relating to the issue of proportionality and adequacy in the case of old foreign currency savings.

1989 CH/96/3 *et al.*-M, paragraph 35, and CH/97/51-A&M, paragraph 60, in each decision referring to the ECtHR, *James v. The United Kingdom*, 21 February 1986, Series A no. 98, paragraph 46; CH/96/29-A&M, paragraph 190.

1990 U 14/00, paragraph 32; U 74/03, paragraph 36 *et seq.*; CH/96/3 *et al*.-M, paragraph 35, with reference to the ECtHR, *James et al. v. The United Kingdom*, 21 February 1986, Series A no. 98, paragraphs 46, 50.

1991 CH/96/29-A&M, paragraph 190, CH/97/51-A&M, paragraph 60, and CH/97/77-A&M, paragraph 77, with reference to the ECtHR, *Hentrich v. France*, 22 September 1994, Series A no. 296-A, paragraph 49; with regard to the prescribed time limit for institution of proceedings, see AP 450/06, paragraph 34.

1992 CH/97/48 *et al.*-A&M, paragraph 163, with reference to the ECtHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52, paragraphs 70-73.

1993 CH/97/104 *et al*.-A&M, paragraph 145 *et seq*.

The legislature can impose a law to adjourn the enforcement of claims for damages against *fiscus* for **budgetary reasons**, although in doing so it must strike a fair balance between the general interest in preventing bankruptcy of the State, *i.e.*, the maintenance of macroeconomic stability, on the one hand and the property interests of the affected person, on the other hand. At any rate, this will not be the case if the law stipulates the adjournments for an indefinite period of time[1994] or for too long period.[1995]

In order to preserve the legal certainty deriving from the principle of a legal state, **retroactive deprivation** of ownership status is possible only if it is justified by cogent reasons.[1996] In addition, the important question is whether a just compensation for confiscated property is offered to the injured party, *i.e.*, compensation for costs, and whether the legal situation is sufficiently clarified.[1997] Therefore, it is disproportionate to declare the purchase contracts retroactively null by reasoning that the buyers of the aforementioned apartments comparing to the buyers of similar socially owned apartments had a particularly favourable position.[1998] Even if the aim pursued by the legislator is fully legitimate in this case, the use of means which have been discriminating from the very beginning is not allowed.[1999] Even the possibility of compensating for damage caused by the loss of ownership rights cannot justify the inadequate and discriminating deprivation of such property.[2000]

The **retroactive deprivation of the right** to interest on war-related damages in order to protect insurance companies against claims which could financially ruin them is also disproportional.[2001]

If the interests of the former (*quasi*) occupancy rights holders are contrary to the interests of the current occupants or owners of disputed apartments, then in weighing the interests, the priority right is **the right to return** according to Article II.5 of the BiH Constitution and the aims under Article 7 of the General Framework Agreement.[2002]

1994 CH/01/8110-A&M, paragraph 62, and CH/00/3615 *et al. Jotić et al*., paragraph 141 *et seq*.; AP 981/04, paragraph 22.
1995 AP 1094/04, paragraph 40.
1996 CH/96/3 et al.-M, paragraph 37; CH/96/22-M, paragraph 38; CH/02/9868-A&M, paragraph 102.
1997 CH/02/9868-A&M, paragraph 103 *et seq*.
1998 *Ibid*.
1999 CH/97/60 *et al.*-A&M, paragraph 159.
2000 CH/97/60 *et al.*-A&M, paragraph 165.
2001 Compare, U 44/02, paragraph 24 *et seq*.
2002 U 14/00, paragraph 33; see also subsequent cases: CH/98/1493-A&M, paragraph 125; also, CH/01/7728-A&M, paragraph 154 *et seq*.

> Case No. U 55/02 can be classified among such cases. An important decision was taken in that case, although it did not have significant legal consequences.[2003] The case related to the compatibility of Article 20 of the **Law on Housing Relations** with Article 1 of Additional Protocol No. 1 to the ECHR. This regulation orders the court to grant the occupancy right to one of the divorced spouses (who are the joint occupancy right holders) if they cannot reach an agreement by themselves. The Constitutional Court has held that the allocation of the housing right over the apartment to one of the spouses is not in violation of the right to property even if the other one completely looses the occupancy right. Why? The party who has lost that right must receive compensation for that part of the marital property in accordance with the Family Law.[2004] If the obligation related to the compensation does not derive *explicate* from the applicable Family Law, which would not be surprising taking into account that the case relates to the occupancy right as a socialistic heritage, such an obligation is established in the decision of the BiH Constitutional Court. Therefore, Article 20 of the Law on Housing Relations should be interpreted in a way that the allocation of occupancy rights to one spouse entails the obligation to award compensation to the other one.

In determining the interest rates, the principle of **equivalent value** in bilateral obligation relations must be complied with.[2005] In the disputes relating to taxation law, it is sufficient that the imposition of a tax had a basis in law and that its application did not impose an excessive or disproportionate burden on the individual or legal person concerned, in which case the constitutional standards have been met.[2006]

(e) Institutional guarantee and theory of the "essence" of the right to property ("*Wesensgehalt*")

In Case No. U 5/98-II, the Constitutional Court considered the aforementioned institutional guarantee of the right to property. A number of provisions of the RS Constitution were challenged in these proceedings. The Constitutional Court defined criteria for the Entities' legislation relating to property rights, first of all ownership right deriving from the BiH Constitution.[2007] The Preamble of the BiH Constitution provides that the parties are desiring "to promote

2003 This, in principle, is not surprising, since the legal public and other relevant subjects did not respond often to such "first impression" decisions, *i.e.*, precedential cases of the highest ranking authorities. The reason being the fact that the decisions of the BiH Constitutional Court are not followed sufficiently so that they are understood as a signal for taking certain measures to prevent dealing with the same or similar cases.

2004 U 55/02, paragraphs. 44-46.

2005 U 4/99.

2006 U 27/01, paragraph 28 *et seq.*

2007 U 5/98-II, paragraph 14.

the general welfare and economic growth through the protection of private property and the promotion of a market economy”. Moreover, the ownership right is guaranteed by Article II of the BiH Constitution. The ownership right is not only an individual right requiring judicial protection against unjustified interference but also a kind of *institutional safeguard* for the functioning of market economy. Insofar as the ownership right is concerned, the constitutional obligation of Bosnia and Herzegovina and the Entities to create the necessary legal framework derives from this. The restrictions imposed by the legislature, such as they are explicitly defined in Article 1 of Additional Protocol No. 1 to the ECHR (paragraph 15), implicitly derive from the ownership rights – in the manner mentioned in the Preamble and Article I.4 of the BiH Constitution (the four fundamental freedoms of the so-called common market). If the European Court of Human Rights, in case the State considers it necessary to interfere with property rights, weighs the general interests of the community, on the one hand, and the obligation to protect the rights of the individual one the other hand, this means that it weighs in general and assumes that there is a privately owned property. If the actions of the legislature led to a full reduction of private property – for example, by the nationalisation of industrial branches – then the ownership right would be significantly restricted, particularly if the private property – as it is provided for by the BiH Constitutional Court – is explicitly indicated as a condition for the functioning of a market economy. The supremacy if the BiH Constitution over the Constitutions of the Entities would be a dead letter if private property were abolished. This idea, as it is stated by the Court, can be found in the jurisprudence of the constitutional courts of Central Europe. According to that case-law, the **main content** of human rights and freedoms, their nucleus and essence, must not be affected regardless of the circumstances. The *absolute* margin to restrict the rights guaranteed by the Constitution is underlined by the legislature.

Taking into account this standard, the request in Case No. U 5/98, whereby the applicant requested the Court to declare certain provisions of the Entities’ Constitutions unconstitutional, was successful. The challenged provisions were contrary to the fundamental provisions of the BiH Constitution relating to the significance of private property and the principle of a market economy. However, the BiH Constitutional Court declared Article 58, paragraph 1 of the RS Constitution constitutional, since this provision could be interpreted in a manner not to be incompatible with the BiH Constitution. This provision reads as follows:

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

Article 58, paragraph 1 of the RS Constitution can hold grounds if the standard and obligation deriving from the BiH Constitution apply. The challenged provision of Article 58, paragraph 1 of the Constitution of RS can be interpreted as being a legal authorization or constitutional obligation of Republika Srpska to transform all socially owned property into other forms of property, particularly private property.[2008] In contrast to this, interpreting this regulation as maintaining the category of socially owned property would be unconstitutional. This is a heritage of the old communist self-management system and can no longer be considered to be in conformity with the promotion of a market economy required by the BiH Constitution because it creates, in theory and practice, serious obstacles to any privatisation process necessary in Bosnia and Herzegovina to establish a properly functional market economy.[2009]

In contrast to this, the Court partially quashed Article 59 of the RS Constitution. This Article read as follows:

> "Natural resources, urban construction sites, real estate and property of particular economic, cultural and historical significance determined by law to be of general interest, shall be State-owned. Certain goods of general interest may also be privately owned under the conditions determined by law.
>
> Under the conditions determined by law, the right of use may be instituted on property of general interest as well as on urban construction sites.
>
> The use and exploitation of property of special cultural, scientific, artistic or historical significance, or significant for the protection of nature or the environment, may be restricted against a full compensation to the owner
>
> The protection, use, improvement and management of the property of general interest, as well as the payment of compensation for the use of property of general interest and urban construction site shall be regulated by law".

With respect to the challenged provision of Article 59 of the Constitution of RS, the Constitutional Court has found the following: Paragraph 1 of the Article provides that natural resources, urban construction sites, real estate, and certain goods of general interest shall be state-owned as a rule. Since paragraph 2 of the same Article, as an exception, allows for privately owned property of certain goods of the general interest (demonstrated by the wording "may also be privately owned"), the entire understanding of privately owned property as a rule and an exception to this rule is reversed through this legislative

2008 U 5/98-II, paragraph 17 *et seq*.
2009 *Ibid*.

restriction. The same rule applies to paragraph 3 of the same Article on the use of goods of general interest and urban construction sites. The organisation of the first three paragraphs of the challenged Article therefore clearly establishes a constitutional obligation that natural resources, urban construction sites, real estate and certain goods of general interest must be state-owned. However, such a rule goes far beyond the boundaries imposed by the standards of the Constitution of BiH outlined above. To declare natural resources, urban construction sites, and real estate to be state-owned property *ex constitutione* infringes on the very "essence" of privately owned property as an individual right and an institutional safeguard.[2010]

On the other hand, Article 59, paragraph 4 of the RS Constitution is compatible with the BiH Constitution.[2011] This Article indicates legitimate aims relating to goods of general interest, where the authorization to put limitations on ownership does not fully exclude privately owned property. Furthermore, this Article provides the owner with full compensation. The provisions of paragraph 5 do not violate the BiH Constitution either, since they do not violate the essence of that right.[2012] Therefore, the matter does not relate to deprivation but to the restriction of private property all the more so since compensation is prescribed.

15. Right to education (Article 2 of Additional Protocol No. 1 to the ECHR)

> **No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical conviction.**

CH/00/6183 *et al*.-A&M Bilbija *et al.*	20040606
CH/03/14950 Mujabašić	20061219

Article 2 of Additional Protocol No. 1 to the ECHR provides for a right, thus not only for an aim of the State. The first sentence of this provision guarantees the possibility of having access to educational institutions. The right to use educational capacities available at a precise moment must be secured to all persons.[2013] However, the State does not have the obligation to choose an

2010 *Ibid*., paragraphs 20 and 21.
2011 *Ibid*., paragraph 23.
2012 *Ibid*., paragraph 24.
2013 CH/03/14950, paragraph 14, with reference to the EComHR, *X v. the United Kingdom*, (Application No. 8844/80), 9 December1980.

educational system or organizational form, nor does it have the obligation to provide a certain degree of education. There is no precise right to subsidise certain educational institutions. The State has certain manoeuvring room in shaping its educational system.[2014] The fact that State institutions have established educational institutions does not create an absolute and unlimited right of access to these institutions. The State is entitled to **set limitations on access** (*i.e.*, admission) to educational institutions by defining the number of students and duration of the program. The refusal of access (admission) does not constitute a violation as long as the individual **is not discriminated** against compared with other interested persons.[2015] Therefore, if a student is not allowed to study any longer, since he/she overstepped the maximum duration of study, Article 2 of Additional Protocol No. 1 to the ECHR has not been violated.[2016]

As for the **State support** of educational institutions, the prohibition of discrimination also applies. For the right to education to be effective, it is further necessary, *inter alia*, that the individual, who is provided with that right, 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, **official recognition** of studies which have been completed.[2017]

The first sentence concerns the right of the child and the second sentence the right of the parent. The right to education contained in the first sentence is an autonomous right and does not derive, for example, from the right of the parent contained in the second sentence, which is an additional right. The structure of the Article shows that these provisions constitute a whole which is determined by the content and scope of the first sentence.[2018]

Unlike the European Commission of Human Rights which has ruled, in effect, that the right to education is concerned primarily with elementary or secondary school education and not necessarily with advanced degree or higher specialised education, the European Court of Human Rights recently declared admissible complaints concerning the denial of the right to education by an applicant

2014 CH/03/14950, paragraph 14, with reference to the EComHR, *Simpson v. the United Kingdom*, (Application No. 14688/89), 4 December 1989.

2015 CH/03/14950, paragraph 14, with reference to the EComHR, *X. v. Austria*, (Application No. 5492/72), 16 July 1973.

2016 CH/03/14950, paragraph 15.

2017 CH/00/6183 *et al.*-A&M, paragraphs 164 and 169, with reference to the ECtHR, *Belgian Linguistic Case*, 23 July 1968, Series A no. 6, paragraph 3 *et seq.*; EComHR, 2 May 1978, DR 14, p. 182.

2018 CH/00/6183 *et al.*-A&M, paragraph 165, with reference to the ECtHR, *Campbell and Cosans v. The United Kingdom*, 25 February 1982, Series A no. 48, paragraph 40, and *Kjeldsen et al. v. Denmark*, 7 December 1976, Series A no. 23, paragraph 52.

who was refused entrance to university. The Chamber has outlined that there is nothing in the wording of that provision specifically restricting the right to elementary or secondary education so that the regulation could also cover advanced degree education at an institution prescribed by law.[2019] Such case-law was confirmed and developed in a subsequent decision taken in 2006 so that the master studies were included in the scope protected by Article 2 of Additional Protocol No. 1 to the ECHR.[2020]

The right to education calls for regulation by the legislature, regulation which may vary in time and place according to the needs and resources of the community and individuals. It goes without saying that such regulation must never injure the substance of the right to education or conflict with other rights enshrined in the Convention. The Convention therefore implies a just balance between the protection of the general interests of the community and the respect of fundamental human rights.[2021] It is justified to forbid an institution from educating a target group if the education offered did not meet the minimum conditions as to the quality provided for by law.[2022] Such minimum conditions can relate to the premises of the educational institution, which are necessary to ensure health and professional conditions for the educational process. Limitations in this sense must be based on facts, must be understandable and must be adequate. Formalistic and unrealistic justifications are not sufficient.[2023] For example, the closure of a private higher school was justified by lack of adequate capacity of the premises, although the inspectors did not find it nor did the students complained of it. Moreover, the public university did not comply with the offer and agreement according to which the students of the higher school were to continue their studies by explaining that there were not enough students (20) to justify organizing classes for them. Furthermore, the State authorities tried to disqualify the higher school publicly and before the public institutions, including its students, by considering the school illegal and by announcing that the diplomas acquired at that school would not be recognised.[2024]

2019 CH/00/6183 *et al.*-A&M, paragraphs 166 and 170, with reference to the ECtHR, *Eren v. Turkey*, 6. June 2002, Reports of Judgements and Decisions 2006-II.

2020 CH/03/14950, paragraph 15.

2021 CH/00/6183 *et al.*-A&M, paragraphs 167 and 171, with reference to the ECtHR, *Belgian Linguistic Case*, 23 July 1968, Series A no. 6, paragraph 5, and *Soering v. The United Kingdom*, 7 July 1989, Series A no. 161, paragraph 89.

2022 CH/00/6183 *et al.*-A&M, paragraph 168, with reference to the EComHR, *Jordebo v. Sweden*, 6 March 1987, DR 51, pages 125-135.

2023 Compare, CH/00/6183 *et al.*-A&M, paragraph 172 *et seq.*

2024 *Ibid*.

16. Right to free elections (Article 3 of Additional Protocol No. 1 to the ECHR)

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.

AP 35/03 SDPBiH	20050128
AP 952/05 BiH Democratic National Union	20060708
CH/02/12470-A&M Obradović	20031107
CH/98/230 *et al*.-A Suljanović *et al.*	19980514

According to the Preamble of the ECHR, fundamental human rights and freedoms "are best maintained by an effective political democracy." The mentioned provision absolutely guarantees the basis of a parliamentary democracy. The said basis is accordingly of prime importance in the ECHR system.[2025] This provision, through the case-law of the ECHR organs, gradually evolved from an objective institutional guarantee to a subjective right, *i.e.*, it developed into classical human rights or freedoms. At the beginning, after the entry into force of the provisions of Article 3 of Additional Protocol No. 1 to the ECHR, the European Commission of Human Rights regarded the said provision as *an institutional right* to free elections.[2026] Afterwards, the idea of *universal suffrage* was incorporated. As a consequence, Article 3 of Additional Protocol No. 1 to the ECHR developed into the concept of *subjective political human rights* – the "right to vote" and the "right to stand for election to the legislature."[2027]

This provision actually guarantees the right of participation in the election to the "legislature" or at least of one of its chambers if it has two or more. In addition, the provision of Article 3 of Additional Protocol No. 1 to the ECHR is not limited only to the national parliament; however, it has to be interpreted in light of the constitutional structure of the State in question.[2028] Consequently, the right to free elections encompasses all the bodies with legislative jurisdiction.

This means that a body that can only propose laws and not adopt them cannot be deemed to be a legislative body within the scope of the relevant right under

2025 AP 952/05, paragraph 29 in conjunction with the ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, paragraph 47.

2026 AP 952/05 in conjunction with the EComHR, *X. v. Belgium*, Application No. 1028/61, 18 September 1961.

2027 Compare, AP 952/05, paragraph 29 in conjunction with the ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, paragraph 51.

2028 AP 35/03, paragraph 43 in conjunction with the ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, paragraph 53.

the ECHR.[2029] An obligation to hold elections does not relate to bodies with legislative powers transferred by the legislature and bodies whose legislative powers relate to a restricted circle of persons.[2030] Hence, a legislative body is a body whose powers derive directly from a constitution.[2031]

As to the quality of standards, Article 3 of Additional Protocol No. 1 to the ECHR foresees 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. Article 3 of Additional Protocol No. 1 to the ECHR does not create any obligation on a State to introduce a specific system, such as, for example, proportional representation or majority voting with one or two ballots, *etc*. For this reason, there is no violation of Article 3 of Additional Protocol No. 1 to the ECHR in cases where the Constitution of the FBiH foresees different types of elections for different administrative-territorial units within the Entity or where the election results at the level of the Entity do not reflect the election results achieved at cantonal level.[2032]

In addition, the phrase "conditions which will ensure the free expression of the opinion of the people in the election of the legislature" implies essentially – apart from the freedom of expression (already protected under Article 10 of the European Convention) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.[2033]

Article 3 of Additional Protocol No. 1 to the ECHR applies not only to direct elections, but also to the indirect elections of the legislature. The Constitutional Court bases its argument on the linguistic interpretation of Article 3 of Additional Protocol No. 1 to the ECHR, as there is no mention of the word "direct" in the Article concerned. The Constitutional Court therefore reaches the conclusion that Article 3 of Additional Protocol No. 1 to the ECHR does not exclude indirect elections and that people may freely express their opinion on the final composition of the legislature even in indirect elections.[2034]

The rights contained in Article 3 of Additional Protocol No. 1 to the ECHR are not absolute. States have a wide margin of appreciation in making the right to vote and the right to stand for elections subject to conditions, as long as the

2029 AP 35/03, paragraph 44 in conjunction with the EcomHR, *W, X, Y and Z v. Belgium*, Applications Nos. 6745/74 and 6746/74, Yearbook XVIII (1975), p. 236.

2030 AP 35/03, paragraph 44 in conjunction with the EComHR, *X vs. the United Kingdom*, DR 32 (1983), p. 274.

2031 *Ibid*.

2032 AP 35/03, paragraph 45.

2033 AP 35/03, paragraph 45 in conjunction with the ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, paragraph 54.

2034 AP 35/03, paragraph 46.

conditions do not curtail the right in question to such an extent as to impair their very essence and deprive them of their effectiveness. Furthermore, any electoral system must be organised and assessed in light of the political evolution of the country concerned, and, as such, it will be accepted as long as the free expression of the opinion of the people in the choice of the legislature is ensured. In addition, conditions that are imposed must be in pursuit of a legitimate aim and must not be disproportionate. In examining whether certain restrictions on the right to free elections, *i.e.*, on the right to vote and the right to stand for elections, are proportional, the emphasis is placed on considering the nature and severity of interference. Next, the importance is on considering whether the eligibility conditions are imposed by a body that has to provide, for example, sufficient procedural guarantees of fairness and objectivity. The lack of procedural safeguards and arbitrariness by the competent body involved in the removal of the candidate's name from the list of candidates constitute a violation of Article 3 of Additional Protocol No. 1 to the ECHR.[2035] In cases where a certain measure cannot be characterised as a limitation on the right to vote and the right to stand for elections, such as, for example, the imposition of a pecuniary penalty on a political party as a result of a violation of the Election Law, such a case does not fall within the scope of the provisions of Article 3 of Additional Protocol No. 1 to the ECHR.[2036] On the basis of such a legal view, a conclusion may be reached that it is no longer of importance to distinguish the "so called" direct and indirect restrictions on the electoral rights as only direct restrictions constitute an "interference" with electoral rights. Nevertheless, it would be more appropriate to apply, even in cases of indirect restrictions on the electoral right, the general principles for determining the justification for an interference with a certain right or freedom. The reason for the aforementioned is that even indirect restrictions on electoral rights may, to a large extent, affect the free exercise thereof.[2037]

In the Case of *Obradović*, the applicant was a high-ranking military officer and former Assistant Minister of Defence of the FBiH. Since he was involved in the creation of "parallel" (Croatian) institutions,[2038] he took early retirement. In such a situation, it remained unclear as to whether these measures were ordered directly by the SFOR Commander or the Minister of Defence of the

2035 Compare, CH/02/12470-A&M, pp. 124 and 128 *et seq*. in conjunction with the ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A No. 113, paragraph 23 *et seq*., 52, *Gitonas et al. v. Greece*, 1 July 1997, Reports 1997-IV, *Ahmed et al. v. the United Kingdom*, Reports 2000-IV, *Podkolzina v. Latvia*, 9 April 2002, *Selim Sadak et al. v. Turkey*, 11 June 2002; AP 35/03, paragraph 42.

2036 AP 952/05, paragraph 30.

2037 Compare the commentary under "4. Dogmatic principles of the fundamental human rights and freedoms", p. 139.

2038 See, details on p. 808.

FBiH, *with the consent of* the SFOR Commander. On the basis of the mentioned disciplinary sanction, the Election Commission banned the applicant from standing at the general elections. The Court of BiH upheld that decision. In the decision preventing certain persons who obstructed the implementation of the Dayton Peace Agreement from standing for election, the Human Rights Chamber recognised the public aim given the fledgling nature of the post-war political system in BiH at that time, which needed protection. The ban on standing for elections related to certain candidates, who acted, to a large extent, contrary to the political rules in post-war BiH, was not a disproportionate penalty. In the relevant case, the Human Rights Chamber established that the proceedings were lacking in all procedural fairness and legal certainty and that the applicant was therefore prevented from instituting the relevant proceedings wherein his claim could be seriously considered. Consequently, the Human Rights Chamber established that the ban on the applicant from participating in the elections could not be considered proportional to the aim sought.[2039]

17. Prohibition of imprisonment for debt (Article 1 of Additional Protocol No. 4 to the ECHR)

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

AP 954/06 Enver and Hajrudin Delimustafić	20070405
CH/03/13817 Racković	20060306

Article 1 of Additional Protocol No. 4 to the ECHR concerns the cases where a failure to meet contractual or public obligations is established. Therefore, Article 1 of Additional Protocol No. 4 to the ECHR is not applicable in cases where an action or a failure to take action is not of a contractual nature but of a criminal nature (for example, a fraud) and where a criminal sanction, namely imprisonment, may be imposed.[2040] Likewise, Article 1 of Additional Protocol No. 4 to the ECHR does not protect an individual from being imposed a sentence of imprisonment, as an alternative to pecuniary sanction that may be imposed by a criminal court in cases where a person fails to pay a fine. Besides, the legal possibility to impose a sentence of imprisonment as an alternative punishment is consistent with Article 5(1)(a) of the ECHR and Article 1 of Additional Protocol No. 4 to the ECHR in cases where the judge conducts a fair trial in accordance with the law.[2041]

2039 CH/02/12470-A&M, pp. 128, 131, 139.
2040 AP 954/06, paragraph 42.
2041 CH/03/13817, paragraph 12 in conjunction with the EComHR, *Desborough v. Frankreich*, Application No. 20509/92, 9 April 1996.

18. Right to liberty of movement (Article 2 of Additional Protocol No. 4 to the ECHR)

(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

(2) Everyone shall be free to leave any country, including his own.

(3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.

(4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

AP 1148/06 Hadžić	20070913
AP 690/04 Mirvić	20051013
CH/98/1786-A&M Odobašić	19991105
CH/98/1786-A&M Odobašić	19991105

Article 2 of Additional Protocol No. 4 to the ECHR guarantees to the individual the right to liberty of movement and freedom to choose his/her residence provided that he/she lawfully stays within the territory of a State. Consequently, this right guarantees also the right to everyone to leave a country, if he/she wishes to do so. Therefore, the notion "free choice of place of residence" does not encompass the right of a person to be allocated an apartment or accommodation. Consequently, as to the cases involving disputes over apartments, there is no interference with the right to liberty of movement under Article 2 of Additional Protocol No. 4 to the ECHR.[2042]

The right to renounce citizenship may be derived from this internal and external right to liberty of movement under Article 2, paragraphs 1 and 2, of Additional Protocol No. 4 to the ECHR. A number of refugees from Bosnia and Herzegovina have lodged such a request in order to acquire citizenship of other countries, including the Federal Republic of Germany, and to settle permanently in those countries. In addition, a right to renounce certain citizenship can be found neither in the other parts of the ECHR nor in any other international agreement applied in connection with the protection of human rights and freedoms.[2043]

2042 AP 690/04, paragraph 15; see, also, AP 1148/06, paragraph 14.
2043 CH/98/677-A, paragraph 2 *et seq.*, paragraph 8 *et seq.*

In cases where a violation of Article 5 of the ECHR is established, there is no need to establish a violation of Article 2 of Additional Protocol No. 4 to the ECHR since the former encompasses the latter.[2044]

19. Expulsion of nationals and aliens (Articles 3 and 4 of Additional Protocol No. 4 to the ECHR and Article 1 of Additional Protocol No. 7 to the ECHR)

Article 3 of Additional Protocol No. 4 to the ECHR. Prohibition of expulsion of nationals

(1) 1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

(2) No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4 of Additional Protocol No. 4 to the ECHR. Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited

Article 1 of Additional Protocol No. 7 to ECHR. Procedural safeguards relating to expulsion of aliens

(1) An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

(2) An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

CH/02/12027-D Schilling	20030110
CH/02/8679 *et al*.-A&M Boudellaa *et al*.	20021011
CH/02/8961-A&M Ait Idir	20030404
CH/02/9499-A&M Bensayah	20030404
CH/02/9842-A&M Durmo	20030110

2044 Compare CH/97/34-A&M, paragraph 67.

a. Introduction

Articles 3 and 4 of Additional Protocol No. 4 to the ECHR and Article 1 of Additional Protocol No. 7 to the ECHR provide certain guarantees to nationals and aliens concerning their stay in the territory of a State. Article 3 of Additional Protocol No. 4 to the ECHR protects nationals from expulsion and guarantees them the right to enter their own country and stay in it as long as they want. Article 4 of Protocol No. 4 to the ECHR and Article 1 of Additional Protocol No. 7 to the ECHR offer certain procedural safeguards to aliens in respect of an expulsion procedure which is underway or is about to commence. In its case-law, the Constitutional Court of BiH and the Human Right Chamber, *i.e.*, the Human Rights Commission within the BiH Constitutional Court, dealt only with Article 1 of Additional Protocol No. 7 to the ECHR.

b. Scope of protection

(a) Common elements

Article 3 of Additional Protocol No. 4 to the ECHR prohibits any expulsion of nationals and Article 4 of Additional Protocol No. 4 to the ECHR and Article 1 of Additional Protocol No. 7 to the ECHR have linked individual and collective expulsion of aliens with certain procedural safeguards. In this regard, selection of the terms "expel" and "expulsion", which are used in these provisions, should not be interpreted as a formal limitation of their application only to "expulsion cases" within the meaning of domestic legal provisions and domestic legal terminology. The protection afforded by the two provisions applies also to cases in which a person is deported, removed from the territory in pursuance of a refusal of entry order or handed over to the officials of a foreign power.[2045] As far as the application of these provisions is concerned, the decisive issue is whether the person concerned has **citizenship** or not.

The new State and Entity laws on citizenship of BiH indicate that there are certain differences, although the regulation of citizenship falls within the competence of the State of BiH, and therefore Entity regulations must be harmonised with State law. The substantial contradictions between the Law on Citizenship of BiH[2046] and the Law on Citizenship of FBiH,[2047] which are still unresolved, have also appeared in the Chamber's case *Boudellaa et al.* To be more precise, the Human Rights Chamber noticed that in this case the

2045 CH/02/8679 *et al*.-A&M, paragraph 167 *et seq*.; CH/02/9842-A&M, paragraph 79 *et seq*.
2046 *OG of BiH*, Nos. 13/99, 41/02, 6/03, 14/03.
2047 *OG of FBiH*, No. 43/01.

issue of the legal significance of a decision on revocation of citizenship was regulated differently.[2048] The Chamber did not uphold the supremacy of either law but took the position that the mentioned contradiction has caused legal uncertainty which the injured party must not be burdened with. The Chamber considered that a more favourable provision should be applied, *i.e.*, the one which postpones the effects of the decision on revocation of citizenship for a longer period of time.[2049]

If domestic law provides that a decision on revocation of citizenship shall enter into force on the day when the procedural decision on revocation of citizenship is delivered, then the State must prove that the procedural decision has been indeed delivered. Accordingly, if the revocation of citizenship is a decisive moment for expulsion in wider terms, then the competent institutions must prove when and through whom the procedural decision was delivered. If such proof cannot be offered, the injured party must be treated as a person who has not lost his/her citizenship.[2050] Taking into account close links between the citizenships which are granted by the competent bodies at the State level and at the Entity level (Article I.7(a) of the BiH Constitution), the legislature envisaged in Article 31, paragraph 3 of the Law on Citizenship of BiH that if citizenship is revoked by a competent Entity body the decision enters into force only upon the explicit consent of the Minister for Civil Affairs and Communications' of BiH or, if a minister presents no opinion in that regard, the decision enters into force after the expiry of two months.[2051] The citizenship of an injured party will not be considered revoked unless the Minister confirms the decision or unless the time limit of two months expires.[2052]

The pressure of other states interested in the expulsion of certain persons cannot justify violation of domestic law and obligations arising from Annex 6 to the Dayton Peace Agreement. In the *Durmo* case it is stated as follows: "Since pressure by the authorities of the United States of America and the Arabic Republic of Egypt to speed up the proceedings and to act according to their command cannot exempt the Federation from its obligations under domestic law and the Agreement […]", wherein the Human Rights Chamber has made a critical observation of the manner in which the authorities of Bosnia and

2048 Compare, CH/02/8679 *et al*.-A&M, paragraph 171 *et seq*.
2049 *Ibid*., paragraph 175.
2050 CH/02/9842-A&M, paragraph 84 *et seq*.
2051 The decision of the competent authority of the Entity becomes effective two months following its
submission to the Ministry of Civil Affairs of Bosnia and Herzegovina, unless this Ministry concludes that the conditions of Articles 9, 10, 11, 12, 21, 22 and 23 have not been fulfilled."
2052 CH/02/9842-A&M, paragraphs 87-89.

Herzegovina acted in respect of the "fight against terror" which, at that time, was carried out "in some other place".[2053]

(b) Article 3 of Additional Protocol No. 4 to the ECHR

Article 3 of Additional Protocol No. 4 to the ECHR protects nationals from expulsion by means of an individual or of a collective measure (paragraph 1) and guarantees the right of a national to enter and stay in the territory of the State of which he is a national (paragraph 2). Article 3 of Additional Protocol No. 4 to ECHR is not applied to the cases of deportation.[2054]

(c) Article 4 of Additional Protocol No. 4 to the ECHR

This provision prohibits collective expulsion of aliens. As to the meaning of this human right, the term "collective" means expulsion of a large number of persons which are not expelled on the basis of individual criteria but on the basis of certain common and general criteria such as citizenship, race, skin colour, etc.[2055]

(d) Article 1 of Additional Protocol No. 7 to the ECHR

Article 1 of Additional Protocol No. 7 to the ECHR offers protection in the case of an alien residing in a foreign territory lawfully, but who has to leave it against his will. In that case the person concerned has a range of procedural rights at their disposal which should provide an opportunity to submit *substantive-legal reasons* against expulsion before a competent institution conducting a lawfully prescribed procedure. In that way the competent institution, if nothing else, has the possibility to order an expulsion being fully aware of the consequence of that act.[2056] To be more precise, an individual is entitled to (a) submit reasons against expulsion, (b) to have one's case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

According to Article 1 of Additional Protocol No.7 to the ECHR, protection may be requested not only in cases in which an expulsion by force has already taken place but the protection must be provided as soon as there is a decision ordering expulsion or any other serious threat of expulsion. A more restrictive

2053 CH/02/9842-A&M, paragraph 90.
2054 EComHR, *Brückmann v. Germany*, Application No. 6242/73, 17th Yearbook 458 (1974).
2055 *Frowein/Peukert*, 1996, paragraphs 151, p. 850.
2056 Compare, CH/02/8767-A&M, paragraph 89.

interpretation of Article 1 of Protocol No. 7 to the ECHR would result in an unsatisfactory protection of the alien's right. The procedural requirements can only be satisfied if an applicant may challenge his expulsion while still being in the country of which he was a lawful resident. Upon the completion of the proceedings the procedural rights become illusory.[2057]

c. Interference with the safeguarded rights and justification for interference

(a) Article 3 of Additional Protocol No.4 to the ECHR

Interference with the right, *i.e.*, a restriction on the enjoyment of the right, under Article 3 of Additional Protocol No. 4 to the ECHR exists if a State takes a certain action based on which the national must permanently leave the country without having a possibility to return to his country.[2058]

(b) Article 1 of Additional Protocol No.7 to the ECHR

Interference with the procedural rights safeguarded under Article 1 of Additional Protocol No. 7 to the ECHR occurs in the case in which an injured party is prohibited from or denied the exercise of the aforementioned rights during an appropriate procedure or when he faces complications in this regard. Article 1, paragraph 2 of Additional Protocol No. 7 to the ECHR provides for an exception concerning the obligation to protect procedural rights under paragraph 1, lines (a)-(c) when such an expulsion is necessary in the interests of public order or is grounded on reasons of national security. However, the expulsion shall always follow a lawfully issued decision.[2059] According to the theory and *principle of supremacy of law*, in the case of restricting human rights and freedoms,[2060] a legal basis is always required in order to justify an act of expulsion and the related decision on expulsion must be in accordance with law.

However, it will be considered that Article 1 of Additional Protocol No. 7 to the ECHR is violated if there is no practical way or some other possibility to challenge or review the decision on expulsion.[2061] That possibility was lacking

2057 CH/02/8767-A&M, paragraph 85.

2058 EComHR, *X. v. Germany and Austria*, Application No. 6189/73, 46 Reports of Judgements and Decisions of EComHR No. 214 (1974).

2059 Compare CH/02/8679 *et al*.-A&M, paragraph 188.

2060 See "b. Human rights and freedoms: protection, restriction and justification of interference", p. 139.

2061 CH/02/8767-A&M, paragraph 91 *et seq*.; neither the Court of Bosnia and Herzegovina indicated in the decision itself functioned at the relevant time, nor was the appeals panel which was envisaged by law mindful to carry out the assigned tasks.

in Case No. CH/02/8679 because the State and Entity Ministries failed to reach an agreement on expulsion of the applicant. Although the Federal Ministry of Interior submitted an initiative to the Ministry of Civil Affairs and Communications to issue such a decision the Ministry of Civil Affairs and Communications never issued it. The Human Rights Chamber refused to accept an argument that the decision on refusal of entry, which also orders the applicants to leave the territory of Bosnia and Herzegovina immediately, could be a substitute or a legal basis for expulsion within the meaning of Article 1 of Additional Protocol No. 7 to the ECHR. Article 34 of the Law on Immigration and Asylum[2062] prohibits expulsion of aliens to countries in which their life is threatened or where they are in danger of being subjected to torture, inhuman or degrading treatment. No such limitations are provided for with respect to the issuance of decisions on refusal of entry. As a result, if a decision on refusal of entry could substitute for a decision on expulsion, these limitations could be easily circumvented.[2063] Even if a decision on refusal of entry into the territory of BiH would be presumably considered as a substitute or a legal basis for expulsion, the acts of the competent FBiH authorities were unlawful for several reasons. Firstly, the decisions on refusal of entry into the territory of BiH were not delivered to the parties participating in the proceedings or they were delivered to them in an unlawful manner (delivery slips submitted to the Human Rights Chamber were allegedly signed by each of the applicants and SFOR as an organ delivering the decisions). In fact, the competent authorities deprived the applicants of their right to appeal since the procedural decisions on expulsion were delivered to them just before they were actually brought out of the country by U.S. forces. Furthermore, the applicants were given the wrong advice that pursuant to the relevant provisions of the Law on Administrative Proceedings the appeal against a procedural decision has no staying effect, although Article 38 of the Law on Immigration and Asylum provides that the submission of an appeal against the procedural decision on refusal of entry to a person residing in the territory of BiH shall stay the execution of that decision. That legal basis was simply passed over in silence. Finally, the expulsion was unlawful because it resulted in a violation of the legally effective interim measure issued by the Human Rights Chamber, whereby the responsible parties were ordered to undertake all necessary steps in preventing the expulsion of applicants from the country.[2064] Accordingly, the expulsion shall be considered unlawful in the event of disregarding the provisions stipulating a staying effect of a legal remedy.[2065]

2062 *OG of BiH*, No. 23/99.
2063 Compare, CH/02/8679 *et al*.-A&M, paragraphs 179-181.
2064 Compare CH/02/8679 *et al*.-A&M, paragraphs 183-185.
2065 CH/02/8679 *et al*.-A&M, paragraph 205.

20. Right of appeal in criminal matters (Article 2 of Additional Protocol No. 7 to the ECHR)

(1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

(2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

AP 1081/04 D. G.	20050518
API 2281/05 *Gligorić et al.*	20070706
CH/97/68-D Simić	10080910
U 62/01 Pjanić	20020829 O*G of BiH*, No. 24/02

Article 2, paragraph 1 of Additional Protocol No. 7 to the ECHR guarantees the right to a legal remedy in criminal matters and thus, together with Article 6 to the ECHR, this Article operates as an additional procedural safeguard in criminal matters. Article 6 of the ECHR guarantees, *inter alia*, the right of access to a minimum of at least one instance that satisfies the requirement of an independent judicial body. However, there is no safeguarded right as to requesting the higher-ranking courts to review the decisions of the courts of first instance. On the other hand, Article 13 to the ECHR does not provide for a wide range of rights since the right to an effective legal remedy does not imply that there is a possibility for an injured party to initiate the procedure of review of the judgement before the court of appeals in order to establish whether the judgment is consistent with the standards of human rights and freedoms.[2066]

The right to appeal in criminal matters is not of an absolute nature. This right is subject to limitations such as those concerning the prescription of time-limits for filing an appeal which is important in order for the legal system to be functional. Accordingly, the reasonable time limits, in principle, do not violate Article 2, paragraph 1 of Additional Protocol No.7 to the ECHR.[2067]

The scope of protection provides that everyone shall have the right to ordinary remedies but not the right to extraordinary remedies.[2068] Moreover, in paragraph 2 there are three exceptions prescribed. Namely, an appeal in criminal matters

2066 U 62/01, paragraph 13, in relation to the EComHR, Application No. 10153/82 of 13 October 1986, DR 49, 67.
2067 AP 1081/04, paragraph 11.
2068 CH/97/68-A, paragraph 22.

must be granted in regard to (a) offences of a minor character, as prescribed by law, or (b) in cases in which the person concerned was tried in the first instance by the highest tribunal or (c) was convicted following an appeal against acquittal. Accordingly, if an injured party is acquitted during the first instance proceedings but, based on the appeal of the State Prosecutor's Office to the Supreme Court that person is convicted, he/she cannot refer again to the right of appeal on the basis of Article 2 of Additional Protocol No. 7 to the ECHR since it is about an exception according to paragraph 2 of this Article.[2069]

21. Article 4 of Additional Protocol No. 7 to the ECHR – Right not to be tried or punished twice – *ne bis in idem*

(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

(3) No derogation from this Article shall be made under Article 15 of the Convention.

AP 278/06 Pekić	20070605
AP 910/06 Granulić	20070605
AP 954/06 Enver and Hajrudin Delimustafić	20070405
AP 2248/05 Farmers Cooperative "Ratar" Brka	20070116
CH/98/1335 *et al*. Rizvić *et al.*	20020308
CH/99/2142 Varivoda Stipo	20000406
CH/00/4371-A Gračanin	20011107
CH/01/6979-A&M E. M. & S. T.	20020308
U 8/02 Kovačević	20031024

A person's right *ne bis in idem* prohibits a person from being tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has previously been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned. Therefore, it relates to an independent right although, at the same time, it forms part of the right to a fair trial under Article 6 of the ECHR.[2070] It is also felt that the

2069 AP 2281/05, paragraph 42.
2070 Compare AP 954/06, paragraph 34.

principle of *ne bis in idem* should be applied outside the criminal procedure law, *i.e.*, to other types of proceedings.[2071]

In order for a factual substrate of the case to be encompassed by the protection of Article 4, Additional Protocol No. 7 to the ECHR, **the equivalent criminal offence** must exist. Therefore, a formal definition of a criminal offence is not essential but rather a factual substrate of a criminal offence is required.[2072] Moreover, the type of property protected from a criminal offence is also important.

The constitutional principle of *ne bis in idem* is not breached in cases where several elements of various criminal offences are present in one offence committed by a person and where that person is punished adequately on various grounds. For example, this will be the case if a driver is punished for the criminal offence of driving under the influence of alcohol *and* for the criminal offence of obstructing a police officer in the exercise of his/her duty (in the relevant case, the criminal offence of attempt).[2073] In addition, this constitutional right does not protect a person from the possibility that charges may be filed again for the same offence in cases where criminal proceedings related to that offence are pending or are not concluded by a legally binding decision.[2074] Such a conclusion follows from the linguistic interpretation of the provisions of Article 4, Additional Protocol No. 7 to the ECHR, which requires, as a precondition for applying this right, that the proceedings have already been concluded by a legally binding decision. Culpability is validly established in cases where the substantive validity of the judgment has occurred.[2075]

Paragraph 2 of Article 4, Additional Protocol No. 7 to the ECHR provides an **exception** to the *ne bis in idem* rule in cases where it concerns the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings which could affect the outcome of the case. The notion "shall not prevent" indicates and clarifies that the reopening of the case is necessary if the legal requirements have been met. Therefore, it is always necessary to balance, on the one side, the principle of legal certainty arising from Article 4, Additional Protocol No. 7 to the ECHR, which is stipulated exclusively with regard to a convicted person and, on the

2071 See AP 2248/05, paragraph 38, as to the civil procedure law.
2072 AP 954/06, paragraph 36.
2073 U 8/02, paragraph 40; similarly in Case No. AP 910/06, in which the appellant was convicted of a public order offence as well as of causing grievous bodily harm (paragraph 12); see also AP 278/06, paragraph 12.
2074 CH/98/1335 *et al*., paragraph 294.
2075 AP 954/06, paragraph 36.

other side, the interests of substantive justice (in this case, the interests of the public and the victim of the offence). In finding a balance between the mentioned interests, the particularities of each individual case must be taken into account. First of all, the severity of a defect in the proceedings and in the judgment of conviction, the legal effect of which is challenged, must be considered. Besides, as to the principle of legal certainty, the element of time plays an important role in striking a fair balance of interests. This entails the time that elapsed after the conclusion of the proceedings and the issue of possible responsibility with regard to the elapsed time and delays in the procedure to reopen the case in criminal proceedings.[2076]

> In Case No. CH/01/6979,[2077] the Human Rights Chamber ruled out the possibility of reopening the case in criminal proceedings as more than three years had passed since the final decision in the criminal proceedings had been rendered, in which the court ordered *B.B.* to undergo mandatory psychiatric treatment in custody, and the delays related to a retrial could be attributed solely to the victim's legal representative, *i.e.*, the victim of the criminal offence.

22. Article 1 of Additional Protocol No. 12 to the ECHR – 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.**

U 13/05 Tihić	20060526
U 5/04 S. Tihić "Constitutionality of the BiH Constitution"	20060127

Additional Protocol 12 was signed by Bosnia and Herzegovina on 24 April 2002, was ratified on 29 July 2003 and entered into force on 1 April 2005.

Additional Protocol No. 12 to the ECHR provides for the *general* prohibition of discrimination and, thereby, its purpose is to supplement Article 14 of the ECHR, which prohibits discrimination against an individual or a group only in the enjoyment of any right and/or freedom guaranteed by the ECHR itself (with the exception of Article 5, Additional Protocol No. 7 to the ECHR, which concerns

2076 Compare, CH/01/6979-A&M, paragraph 82 *et seq*.
2077 Paragraph 84.

equality between spouses). When it comes to discrimination, the scope of the protection afforded by the ECHR has been extensively widened in this way.

The guarantees afforded by Additional Protocol No. 12 to the ECHR in the case-law of the Constitutional Court concern the abstract review proceedings instituted by Mr. *Sulejman Tihić*, Chair of Presidency of Bosnia and Herzegovina, in which he challenged the constitutionality of Article 8.1, paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina.[2078] According to Mr. *Sulejman Tihić*, there is a violation of the general prohibition of discrimination given that Serbs in the Federation of Bosnia and Herzegovina and Bosniaks and Croats in the Republika Srpska and the so-called Others in Bosnia and Herzegovina cannot run for the Presidency of Bosnia and Herzegovina.[2079] However, the Constitutional Court of Bosnia and Herzegovina established that the challenged provisions are a legal replica of the provisions of Article V of the Constitution of Bosnia and Herzegovina. Therefore, the request was directed towards the provisions of Article V of the Constitution of Bosnia and Herzegovina. However, the Constitutional Court of Bosnia and Herzegovina is bound to "uphold the Constitution of Bosnia and Herzegovina" and the provisions of the ECHR are not placed on a higher level in the normative hierarchy than the other provisions of the Constitution of Bosnia and Herzegovina. Consequently, the Constitutional Court of Bosnia and Herzegovina could not examine the challenged provision on the basis of the Constitution of Bosnia and Herzegovina itself.[2080]

In her Separate Opinion opposed to the opinion of the majority, Judge *Grewe* holds that the request is admissible and that Article 1 of Additional Protocol No. 12 to the ECHR is applicable. When it comes to the merits of the case, the provisions of Article 8.1, paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina fall within the protection afforded by Article 1 of Additional Protocol No. 12 to the ECHR and they come into collision with the general prohibition of discrimination, which is one of the fundamental principles and objectives of the Dayton Peace Agreement. However, viewed from the basic objectives of the Dayton Peace Agreement – the establishment of peace and stability and the avoidance of further casualties – unequal treatment is legitimate and, *per se*, justified.[2081] Nevertheless, 12 years after the Dayton Peace Agreement, this argument raises doubts, particularly taking into account that Bosnia and Herzegovina, in the meantime, has become a member of the Council of Europe.

2078 *OG of BiH*, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 and 52/05.
2079 U 13/05, paragraph 2 *et seq.*
2080 *Ibid*., paragraph 9, including additional reference to Case No. U 5/04; see also Separate Opinion by Judge *Feldman*, paragraph 3 of the Decision on the Admissibility and Merits in Case No. U 13/05.
2081 See, Separate Opinion by Judge *Grewe* related to the Case No. U 13/05.

Thus, Bosnia and Herzegovina has undertaken an obligation to comply with the principles applicable within the Council of Europe, irrespective of its obligation to comply with the principles arising from the constitutional order under Article II.2 of the BiH Constitution. Anyway, it may be noticed based on its population, composition and history that, without difficulties, Bosnia and Herzegovina cannot be constituted as a civil state. Accordingly, at the initial stage, it was fully justified to guarantee not only the civil rights of an individual but also the collective rights. Nevertheless, there is no proportionality in cases where the collective rights in a consensual democracy make it impossible for a group of citizens to take part in the political process, by denying their passive right to stand as candidates in elections.

23. Employment related rights: Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights[2082]

Article 6 of the International Covenant on Economic, Social and Cultural Rights

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 of the International Covenant on Economic, Social and Cultural Rights

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

2082 Translation taken from the Decision of the Human Rights Chamber No. CH/97/67-A&M, paragraph 116.

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

a. Introductory notes: reinstatement to former position

CH/01/7351-A&M Kraljević	20020412
CH/97/50-A&M Rajić	20000407
CH/97/67-A&M Zahirović	19990708
CH/97/76-A&M Softić	20011012
CH/98/1018-A&M Pogarčić	20010406
CH/98/1171-A&M Čuturić	19991008
CH/98/1309 *et al*.-A&M Kajtaz *et al*.	20010907
CH/98/565-A&M M. K.	20031222
CH/98/948-M Mitrović	20020906
CH/99/1714-A&M Vanovac	20021108
CH/99/2239-A&M Cipot-Stojanović	20030404
CH/99/2696-A&M Brkić	20011012
CH/99/2743 Sarač	20030704
U 19/01 Labour Law of RS	20020615 *OG of BiH*, No. 13/2002
U 26/00 Labour Law of the Federation of Bosnia and Herzegovina	20020423 *OG of BiH*, No. 08/2002

As to sustainable return, to have the possibility of providing the means to earn a living is equally as important as the reinstatement into possession of a property. It was assumed that a returnee would be reinstated without trouble to his/her former position and, in any case, if the employer were still in business. However, many years after the Dayton Peace Agreement, the mere fact that a number of companies have ceased production or operate at their minimum capacity and, as a result, require fewer employees shows that reinstatement to former positions has had little prospect. Moreover, returnees had no access to the available positions and, in particular, if it involved the so-called "minority" returnees. Actually, they had to face a simple problem: during the armed conflict, members of the ethnic group that remained or moved to a certain area at that time had mainly taken over or occupied their positions. Such an employment practice, or the practice when filling these posts during

the armed conflict, had been justified on security and economic grounds. In order to resolve the issue of surplus employees in companies operating with financial difficulties or the issue of employees who were refugees, certain legal regulations were adopted on the basis of which many employees were placed on so called "waiting lists". In few cases, employees placed on such lists were paid a certain kind of compensation for a certain period of time. In other cases, such employees were terminated from their employment.[2083] Public companies' unreadiness to remove employees from waiting lists amounted to a violation of the relevant labour regulations. Moreover, such actions were discriminatory in cases where those positions were available to members of a "majority" ethnic group within a certain territory. After the entry into force of Annex 6 to the Dayton Peace Agreement, in cases where the employees were placed on the waiting lists or fired from their jobs, the Human Rights Chamber was in a position, on the basis of Article 6, paragraph 1 and Article 7, paragraphs (a) (i) and (ii) of the International Covenant on Economic, Social and Cultural Rights, to establish a violation of the right not to be treated differently in the enjoyment of their employment rights, as well as a violation of the right to a fair trial or the right to a decision within a reasonable time under Article 6 of the ECHR.[2084] This often occurred because the administrative authorities or the courts acted in a partial and discriminatory manner and continually and unreasonably delayed the proceedings related to reinstatement of employees to their former employment.[2085] In addition, persons who were members of minority communities but stayed in certain areas and, subsequently, took refuge or moved to the areas where they were members of a majority ethnic group, and who sought employment there, also suffered damage as a result of such discriminatory or unlawful deprivation of the right to work. Likewise, returnees to certain areas, which were populated in the meantime by members of another ethnic community, were often denied the right to be reinstated to their former positions under the pretext of being "on the side of the aggressor".[2086]

The irony of the whole situation was that employers, who were unscrupulous in terminating employees during the armed conflict and who ensured that decisions terminating employment were delivered at any rate to employees, circumvented their responsibility after the entry into force of the Dayton Peace Agreement as the Human Rights Chamber was not competent *ratione temporis*

2083 CH/97/67-A&M, paragraph 124.

2084 For example, CH/98/948-B, paragraph 48 *et seq.*; CH/98/565-A&M, paragraph 50 *et seq*.; CH/99/2696-A&M, paragraph 65 *et seq*.; CH/00/3476-A&M, paragraph 76.

2085 CH/97/67-A&M; CH/98/948-M; see also quotes related to the principle prohibiting discrimination: "2. Article II.4 of the BiH Constitution – Non-discrimination", p. 485.

2086 CH/97/50-A&M, paragraph 60 *et seq*.

for the events occurring before 14 December 1995. In this way, unlike cases related to waiting lists (a continuing violation), or cases related to termination of employment after 14 December 1995 (either with or without retrospective effect), the Constitutional Court and the Human Rights Chamber declared that they had no competence *ratione temporis* in cases related to the termination of employment prior to 14 December 1995. The Entities attempted to legalise the cases of unlawful termination of employment though special legal provisions incorporated into new labour laws. In the *Republika Srpska*, employees who were placed on waiting lists were sent to a Commission, which had been established for the payment of severance pay, the amount of which depended on various factors including, *inter alia*, the length of service. In this regard, it was unclear as to whether the new regulations ruled out the possibility to file a request for reinstatement to the former position. Since it was a classic case in practice, the constitutionality of a severance payment became questionable when viewed in the context of the return of refugees and displaced persons. In its controversial decision, the Constitutional Court of Bosnia and Herzegovina took the position that the disputed regulations did not raise any constitutional issue, taking into account the priority economic objectives. However, the said decision remained incomplete as to the issue of whether an injured party may file a lawsuit with the competent court instead of receiving severance pay and claim reinstatement.[2087]

> In a Separate Opinion, Judge *Marko* openly criticised the majority decision. In his opinion, although the approach taken by the legislature may be practical and reasonable in a purely economic point of view, its effects are highly problematic: undeniably discriminatory dismissals in the past, which formed a part of an organised campaign of ethnic cleansing, are upheld and in some way legalised, thereby creating new discrimination. He further stated that it may not be the legislative objective, but it is certainly the effect of such a regulation. The payment of severance pay, on the other hand, puts an end to the possibility to address a court and, therefore, it is disproportionate and does not sufficiently take into account the main objective of the return of refugees and displaced persons.

In the Federation of Bosnia and Herzegovina, the legislature also made efforts to create a complete and sustainable resolution of the heavy burden of "semi-employed" workers placed on waiting lists who, in the privatisation process, were an unbearable burden of uncertainty for companies. According to the laws of the Federation of Bosnia and Herzegovina, all employees placed on waiting lists, or all those who were factually in such a situation, would formally become unemployed after the expiry of a 6-month period and would be entitled to claim

2087 U 19/01, paragraph 21 *et seq*.

severance pay. The Entity's special commissions and cantonal commissions were created with regard to the determination and payment of severance pays. In order to protect a number of companies from bankruptcy, the legislature quickly reduced the amount of severance pay. The Constitutional Court of Bosnia and Herzegovina held that such a correction was consistent with the Constitution of Bosnia and Herzegovina since significant general economic interests justified it.[2088] Nevertheless, likewise in the Republika Srpska, there was huge confusion between the commissions created in accordance with the new provisions of the Labour Law and the ordinary courts. The main victims of the situation as such were those who were fired and those who were placed on waiting lists. The commissions were repeatedly remitting cases of the mentioned persons to the courts and *vice versa* and, as a result, they received decisions which did not have any legal value [2089] According to the case-law of the Human Rights Commission within the Constitutional Court, legal uncertainty related to the possibility of challenging the lawfulness of the termination of employment before the ordinary courts, and not only the commissions' decisions on the amount and grounds of severance pay, was in contravention of the right of access to court under Article 6 of the ECHR.[2090] However, it should be taken into account that the Human Right Chamber for Bosnia and Herzegovina, before the decision of the Human Rights Commission within the Constitutional Court has been taken, clearly opposed the entire system of "waiting lists" in the Federation of Bosnia and Herzegovina, holding that it was in contravention of the ECHR (although in Case No. CH/98/1714-A&M it adopted remedies solely in respect of the appellant's situation). Such a conclusion is not directed against the idea itself, *i.e.*, the mechanism of severance pay, but against the practical impossibility of having a court decision by which it would be determined whether placement on the waiting lists is *per se* unlawful and which, if so, could result in *reinstatement to a former work position*.

Nevertheless, the cases concerning the employment of former employees and civil servants in the former institutions of the Republic of Bosnia and Herzegovina, who continued their employment during the period between the entry into force of the Dayton Peace Agreement and the establishment of new institutions of Bosnia and Herzegovina, are not directly linked with the return of refugees and displaced persons. Since the jurisdiction of the institutions of Bosnia and Herzegovina was reduced, it was necessary to reduce the number of civil servants, too. However, this process in the new institutions was mostly non-transparent and arbitrary and the Human Rights Chamber found violations

2088 U 26/00.
2089 Compare, for example, CH/98/565-A&M; CH/99/2743-A&M, paragraph 55 *et seq*.
2090 CH/98/1714-A&M, pp. 58-60.

of the human rights in respect of the applicants' claims. In the *Kajtaz et al.* case for example, the applicants continued working within the institutions of Bosnia and Herzegovina originating from the institutions of the Republic of Bosnia and Herzegovina and received their salaries on a regular basis. In 1998, the selection process was going on behind their backs, and the applicants learnt by chance about the results thereof. The applicants never received any procedural decision changing their status or position.[2091] As a consequence and because of the insufficiently clear and coherent overall legal system for adjudicating these claims and the competence of the courts to decide on the lawfulness of the acts passed by State institutions and due to the non-existence of well-functioning courts at the State level, the applicants found themselves in a "grey legal zone" where they were "betrayed" by both their employers and the courts. The Human Rights Chamber established first a violation of the right of access to court.[2092] With regard to ethnic origin, which was a selection criterion, the Human Rights Chamber accepted or recognised that, for a certain time period, Bosnia and Herzegovina, as a respondent party, would be entitled to achieve an ethnic balance of the employees within its bodies since the objective to achieve a national balance was legitimate in the context of the overall political situation in the country.[2093] Yet, the Human Rights Chamber for Bosnia and Herzegovina established that the practical application of the said criterion was arbitrary for a number of reasons. With respect to the applicants of mixed origin or mixed marriages, who did not want or could not declare themselves as being affiliated with an ethnic group, the Human Rights Chamber established that the applicants were discriminated against on the ground of national and ethnic origin in their enjoyment of the right of access to public service under Article 25(c) of the International Covenant on Civil and Political Rights.[2094]

b. Overview of Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights through the case-law

AP 311/04 A.G.	20040422
CH/00/3476-A&M M.M.	20030307
CH/02/9541 Krajnović	20061107
CH/98/565-A&M M.K.	20031222
CH/99/1425 Mujić	20061107
CH/99/2239-A&M Cipot-Stojanović	20030404
CH/99/2753 Terzić	20050706

2091 CH/98/1309 *et al*.-A&M, paragraph 14 *et seq*.
2092 CH/98/1309 *et al*.-A&M, paragraph 146.
2093 CH/98/1309 *et al*.-A&M, paragraph 161.
2094 CH/98/1309 *et al*.-A&M, pp. 164-169.

Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights guarantee the right to work and the protection of the rights originating from labour relations. In addition to the right to work, these provisions include, *inter alia*, the right to the free choice and acceptance of work and appropriate measures safeguarding the right to work (Article 6, paragraph 1), as well as the possibility to seek implementation of measures towards the improvement of working conditions, such as training programmes, reinforcement of personal capacities, *etc*. (Article 6, paragraph 2). Article 7 stipulates the right of everyone to the enjoyment of just and favourable conditions of work as to remuneration, safe and healthy working conditions, equal opportunities for everyone to be promoted as well as social security and leisure and rest.

The case-law of the Human Right Chamber and the Human Rights Commission within the BiH Constitutional Court, as to Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, relates primarily to the possibility of applying these Articles as the ECHR and its Protocols do not stipulate the right to work and the other related rights. However, labour relation disputes may be defined as civil disputes within the meaning of Article 6 of the ECHR.[2095] Nevertheless, this Article of the ECHR only affords procedural safeguards in such disputes, whereas no material safeguards are afforded, as foreseen in Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights.

During the armed conflict in Bosnia and Herzegovina, but also during the post-war period, employees were mainly discriminated against on the basis of their national status. Such discrimination was manifested primarily in terminating employees and, subsequently, in rejecting requests for reinstatement of the employees to their former employment. Labour relations of employees who were of a “wrong” national origin were most often terminated in a straightforward manner. Employees were regularly banned from work although neither a general legal act, nor an individual legal act, regulating such a ban was passed. In addition, in many cases employees were placed on the “so-called” waiting lists and, once more, without any individual legal basis and with no employment opportunity to get a job again.[2096] The Human Rights Chamber confirmed in some cases the public interest of the State to dismiss a number of employees during the armed conflict.[2097] Indeed, this implied that it had been prohibited to terminate their employment on the ground of their ethnic origin.[2098] Likewise, ethnic origin or discrimination on any other grounds could

2095 See, details on: “23. Employment related rights: Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights”, p. 453.

2096 Compare CH/02/9541, paragraph 24. *et seq*.; AP 311/04, paragraph 27.

2097 CH/99/2239, paragraph 54 *et seq*.

2098 *Ibid*.

not affect reinstatement to employment after the armed conflict.[2099] Therefore, the State had a positive obligation to reinstate the employees who had been dismissed during the armed conflict or immediately afterwards. In principle, the competent public authorities were not allowed to keep the employees who had been hired in the meantime, as the employees who had lost their employment would be thus prevented from reinstatement to their former employment.[2100]

Unfortunately, the employment policy and practices during the armed conflict and after its conclusion did not satisfy the standards of Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights, notwithstanding the consequential case-law of the BiH Constitutional Court, the Human Right Chamber for BiH, and the Human Rights Commission within the BiH Constitutional Court. Deliberately using various factual and legal means, employers, primarily the Entities, were persistent in supporting or pursuing discriminatory and nationalist employment policies. This actually precluded the sustainable return of refugees and displaced persons and, consequently, undermined the main objective of the Dayton Peace Agreement under Article II.5 of the BiH Constitution and Annex 7 to the Dayton Peace Agreement.[2101]

24. Right of everyone to social security and social insurance (Article 9 of the of the International Covenant on Economic, Social and Cultural Rights)

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

CH/02/8923 *et al*. Kličković *et al*.	20030106

There was only one case before the highest courts in the country wherein the application of Article 9 of the International Covenant on Economic, Social and Cultural Rights was considered, relating to social security (the right to pension),[2102] which certainly falls within the protection afforded by Article 6 of the ECHR and Article 1 of Additional Protocol No. 1 to the ECHR.

2099 CH/99/2753, paragraph 62 *et seq*.
2100 CH/98/565, paragraph 48; CH/02/9541, paragraph 24 et seq.; CH/99/1425, paragraph 33 et seq.; CH/99/2239, paragraph 54 et seq.; CH/98/565, paragraph 48; CH/00/3476, paragraph 67 *et seq*.
2101 As to the relevant background, compare, also, "a. Introductory notes: reinstatement to former position", p. 454.
2102 CH/02/8923 *et al*., paragraph 84.

25. Access to public service (Article 25(c) of the International Covenant on Civil and Political Rights)

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

[…]

c. To have access, on general terms of equality, to public service in his country.

CH/01/6796-A Halilagić	20010307
CH/01/7952-A&M Selimović *et al*.	20020111

Whereas the ECHR does not comprise the right to equal access to public service,[2103] such a right is afforded by Article 25(c) of the International Covenant on Civil and Political Rights. In addition, the notion of "public service" implies executive authorities as well as judicial authorities, so that judges[2104] and state prosecutors[2105] may claim a violation of their right of equal access to public service.

26. European Charter for Regional or Minority Languages (1992)

U 5/98-III "Izetbegović III – Constitutional Peoples"	20000914 *OG of BiH*, No. 23/00
U 5/98-IV Izetbegović IV	20001231 *OG of BiH*, No. 36/00
U 8/04 M. Pamuk "Higher Education"	20040626
U 10/05 V. Jukić "Public Broadcasting System"	20050722

The European Charter for Regional or Minority Languages (1992) is a substantive constitutional law in Bosnia and Herzegovina.[2106] Together with the Framework Convention for the Protection of National Minorities (1994) and the International Convention on the Elimination of All Forms Racial Discrimination (1965), the European Charter imposes an obligation on the State to ensure linguistic pluralism in order to integrate various linguistic ethnic groups and society.[2107] Therefore, ethnic separation through territorial delimitation must

2103 CH/01/6796-A, paragraph 15, with reference to the ECtHR, *Glasenapp v. Germany*, 28 September 1984, Series A No. 104, paragraph 48.

2104 CH/01/7952-A&M.

2105 CH/01/6796-A.

2106 U 5/98-III, paragraph 58.

2107 U 5/98-III, paragraph 57.

not serve as an instrument of assimilation or segregation of linguistic groups in a multi-ethnic Bosnia and Herzegovina. It does not meet the standards of a democratic state and pluralistic society within the meaning of Article I.2 in conjunction with line 3 of the Preamble of the BiH Constitution.[2108] The European Charter for Regional or Minority Languages (1992) makes a clear distinction between (legal) collective equality and the (factual) status of national minority. Therefore, Article 1 of the European Charter for Regional or Minority Languages (1992) clearly distinguishes official languages from minority languages.[2109] The constitutional principle of collective equality of the constituent peoples requires that the constituent people, irrespective of its *de facto* minority status in certain territory, enjoy equal treatment.[2110]

In the context of language, this means that the Entities, in regulating the issue of official languages, must abide by the rules that have been previously described, and which secure the protection of a pluralistic society. The rule granting official status to *one* language only and offering no protection mechanisms for other languages is not compatible with the aforementioned. In order to avoid breaches of the principles of the European Charter for Regional or Minority Languages, any State is offered the possibility to set forth minimum standards and regulations for language rights by a framework law. Thus, in the context of Bosnia and Herzegovina, the European Charter offers the possibility that the State, on the basis of one framework law, sets forth standards applicable to all three languages of the constituent peoples so that the three languages may equally and effectively be used and are allowed to be used at all administrative-territorial levels and before all State authorities.

The principles of Articles 8 through 13 of the European Charter for Regional or Minority Languages offer a yardstick for such a framework law. Lower standards may be set and may only be applied to languages of other groups (those that do not have the status of constituent peoples).[2111] As a result, the BiH Constitutional Court declared Article 7 of the RS Constitution unconstitutional for granting only the Serbian language official status and for restricting the use of other languages by territorially defined rules.[2112] For the same reason, the BiH Constitutional Court concluded that it was unconstitutional to prevent one constituent people from declaring its own language an official language of higher education institutions.[2113]

2108 *Ibid*., paragraph 57.
2109 *Ibid*., paragraph 57 *et seq*.
2110 *Ibid*., paragraph 59.
2111 U 5/98-IV, paragraph 34.
2112 U 5/98-IV.
2113 U 8/04, paragraph 44 *et seq*.

Collective equality of constituent peoples in respect of the right to language does not comprise the requirement of linguistic exclusivity.[2114] In Case No. U 10/05, the task of the BiH Constitutional Court was to establish whether the vital interest of one constituent people is essentially comparable with the vital interest of a national minority, and if so, to what extent. Namely, the issue raised in the case was whether one of the constituent peoples may invoke the specific rights of national minorities.

> *Želimir Jukić*, Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina at the time, referred to Articles 10 and 14 of the ECHR, and Article 11 of the European Charter for Regional or Minority Languages, as he held that the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina was destructive to the vital interest of the Croat people in Bosnia and Herzegovina. He claimed a violation of the right to freedom of expression as the Public Broadcasting System of Bosnia and Herzegovina was based on three organisational units, one at the state level and two at the level of the Entities, so that there was no possibility that all *three* constituent peoples could have public broadcasters in their languages at the level of the Entities. The applicant also referred to a Report on Media Diversity in Europe in 2002 prepared by a group of experts of the Advisory Panel to the Media Division of the Director General of Human Rights of the Council of Europe, wherein it was underlined that Article 10 of the ECHR not only enshrined an individual right to media freedom, but also entailed a duty to guarantee pluralism of opinion and the cultural diversity of the media in the interests of a functioning democracy and of freedom of information for all and that governments of the member states should act against increasing concentration in media. *Jukić* also referred to Article 11 of the European Charter for Regional or Minority Languages in respect of the collective right to public broadcasting in one's own language. In his view, this provision guarantees national minorities the right to have at least one public broadcaster in their own languages. To that end, it was alleged that the Entities' Broadcasting Systems were *de facto* using exclusively the Serbian language (in the Republika Srpska) and the Bosnian language (in the Federation of BiH). Furthermore, the applicant asserted that the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina did not define the instruments implementing the programming principles set forth in the mentioned Draft Law. Thus, in his opinion, the law had no relevance as it left room for authorised personnel of the Public Broadcasting System of Bosnia and Herzegovina to make decisions at their discretion as to the use of languages, and to what extent ethnic, regional, traditional, religious, cultural, linguistic and other characteristics of the constituent peoples would be observed.[2115]

2114 Compare, U 10/05.
2115 Compare U 10/05, paragraph 6.

The applicant's request was not supported by the BiH Constitutional Court.[2116] First, the BiH Constitutional Court stated that the argument, according to which the European Court considers public monopolies in audiovisual media to violate Article 10 of the ECHR primarily because they cannot ensure several different sources of information and a plurality of points of view,[2117] was not relevant to the present case. More precisely, the present issue was not related to the principles of plurality of viewpoints but to the right of the constituent people to have a public broadcast in its own language.

The remainder of the argument is essential for making the principal distinction between collective rights and the rights of national minorities.[2118] The Draft Law guarantees equality of all three languages. In addition, the Draft Law does not contain provisions that would place the Serbian language or the Bosnian language into a more favourable position than the Croatian language. The Croats are a constituent people throughout Bosnia and Herzegovina and this is a fundamental difference in respect of national minorities. The constituent status also relates to the Croatian language and the other two languages. The European Charter for Regional or Minority Languages pursues the aim of protecting certain groups which, because of their status of national minority in a country, do not enjoy the effective protection of their own language compared to the dominant, majority language in the country. The challenged Draft Law stipulates *ex lege* linguistic and cultural equality before the law, which is derived from the constitutional principle of the collective equality of the constituent peoples. Consequently, the Croats cannot demand special rights which, in effect, belong to national minorities.

The BiH Constitutional Court regards the constituent status as a constitutional status, which *per se* offers to privileged groups sufficient rights to protection and to participation and there is no need to enter into the sphere of national minorities. Consequently, the constituent status rules out the right to demand minority rights even in case where the constituent group in a country constitutes a minority, in the context of numbers and statistics, compared to other groups. This argument may be justified by the fact that the collective rights, based on the principle of constituent status, are special rights in relation to the rights of national minorities. These rights are often much wider than the rights of national minorities although this is not always the case in certain fields. The collective rights derived from the principle of constituent status are guaranteed

2116 U 10/05, paragraph 50.

2117 U 10/05, paragraph 41, in conjunction with the ECtHR, *Handyside v. the United Kingdom*, 7 December 1976, Series A No. 24; *Informationsverein Lentia v. Austria*, 24 November 1993, Series A No. 276.

2118 U 10/05, paragraph 41 *et seq*.

by the BiH Constitution. Therefore, they rule out *ex leges* additional special rights that are anticipated for other ("ordinary") groups, and which are derived from their status of national minority. Being aware of the pluralistic composition of the society and the tensions stemming from the need for a single functional state organisation, on the one hand, and the legitimate demand for protection of national minorities, on the other hand, the Framer of the BiH Constitution shaped special group rights (of the constituent peoples) in a particular way. The constitutional provisions related to the special rights of the constituent peoples cannot rest on the general rules protecting national minorities and at the expense of functionality of the state.

D. Article II.3 of the BiH Constitution – an example of enumeration of human rights

3. Enumeration of Rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a) The right to life.

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

c) The right not to be held in slavery or servitude or to perform forced or compulsory labour.

d) The rights to liberty and security of person.

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.

f) The right to private and family life, home, and correspondence.

g) Freedom of thought, conscience, and religion.

h) Freedom of expression.

i) Freedom of peaceful assembly and freedom of association with others.

j) The right to marry and to found a family.

k) The right to property.

l) The right to education.

m) The right to liberty of movement and residence.

Article II.3 of the BiH Constitution guarantees everyone in the territory of Bosnia and Herzegovina the rights afforded by the ECHR and offers, as an example, a set of constitutional rights and freedoms. The primary objective of these rights and freedoms is that they are "at first sight" observable and, in this way, available to their holders so that there is no need to seek these rights through international mechanisms affording the protection of human rights and freedoms enumerated in the BiH Constitution and which are even now, for various reasons, unavailable to their beneficiaries.[2119] However, these rights are not superior to other constitutional rights and freedoms nor are they specified. Such a conclusion follows already from the linguistic meaning of Article II.3 of the BiH Constitution. Because of the same interpretation of these rights and freedoms, the BiH Constitutional Court has rejected the possibility of separately examining violations of the rights and freedoms enumerated in Article II.3 of the BiH Constitution in cases where it had already examined alleged violations of the same or similar rights and freedoms protected under the ECHR. The reason for this is the fact that the rights and freedoms enumerated in Article II.3 of the BiH Constitution do not offer a broader scope of protection than the rights and freedoms afforded by the ECHR.[2120]

For the reasons already described above as to the need to comply with the normative principle of the constitutional rights and freedoms (the legal regulation), the enumeration of this second generation of very important human rights and freedoms (such as the right to health) in Article II.3 of the BiH Constitution was desisted, which is different from, for example, Article II.A.2(1)(m)-(q) of the Federation of BiH Constitution. Nevertheless, it may be noted that the International Covenant on Economic, Social and Cultural Rights has not been deleted from the list of international mechanisms for the protection of human rights and freedoms referred to in Annex I to the BiH Constitution.[2121] It is also interesting to note that in former proposals on amendments to the BiH Constitution, economic, social and cultural rights, in the same way as group rights and freedoms, including the protection of minorities, are not formulated as constitutional objectives but as rights and freedoms with no difference in their scope of applicability compared to other constitutional rights and freedoms (primarily political and civil rights). A lack of these rights in Article II.3 of the BiH Constitution, *per se*, has no impact as

2119 *Szasz*, 1995, p. 249.

2120 In this respect, generally, see for example U 17/00, paragraph 21; as regards the right to a fair trial, see: U 41/01, paragraph 24; see also U 16/00, U 12/01, paragraph 34, U 27/01, paragraph 30; in connection with the criteria of the applicability of Article 6 of the ECHR, *i.e.*, Article II.3(e) of the BiH Constitution, see: U 58/01, paragraph 22.

2121 As to the relevant events, see, *Szasz*, 1996, p. 307 *et seq*.

to the effect or the range of effect within the constitutional order. Given the effect of such a wide spectrum of agreements for the protection of human rights and freedoms, the idea for a while was to make a clarification by way of a normative collision clause stipulating that in the case of any dilemma as to the effect of certain rights and freedoms, those rights and freedoms that are more favourable for their beneficiaries prevail. Finally, this idea was abandoned as such an approach was implied.

E. Discrimination

1. Comparative introduction

a. Introduction

International concern about discrimination is now longstanding. Thus, guarantees of equality were a feature of the Minority Treaties concluded between the League of Nations and states established after the First World War. Such a guarantee was also imposed as a condition on the admission of some other states to the League of Nations. A conception of equality also underpinned the adoption of the Slavery Convention in 1926, even though this was not expressly articulated in it. Despite this, however, the elaboration of international and European norms and mechanisms to tackle discrimination and promote equality has primarily been a post-Second World War phenomenon.

The starting point for action against discrimination in the present international legal order is the stipulation in the Charter of the United Nations in 1945 of the promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as one of the purposes of the organisation and of the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as a specific duty for the organization.[2122] This has provided the legal basis in succeeding years for both elaborating and adopting a wide range of treaties - some affording a general guarantee against discrimination and others dealing with its manifestation in particular forms - and the numerous efforts made by the bodies established by the Charter or under its authority to address the problem of discrimination, whether generally or in specific countries.

The objective of tackling equality is also a key feature of the mandates that have been prescribed for the specialised agencies of the United Nations. Thus

2122 Articles 1(3) and 55 respectively.

"recognition of the principle of equal remuneration for work of equal value" is an objective of the International Labour Organization,[2123] it is a function of the United Nations Educational, Scientific and Cultural Organization to collaborate "among the nations to advance the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social"[2124] and it is a principle guiding the work of the World Health Organization that "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."[2125]

Furthermore the achievement of equality and the proscription of discrimination have been a central part of the commitments made by those belonging to the intergovernmental and supranational organisations established at the European level. Thus every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by *all* persons within its jurisdiction of human rights and fundamental freedoms,[2126] to achieve which many more specific standards and mechanisms have been adopted and introduced. Similarly there are numerous undertakings related to equality, tolerance and non-discrimination in the human dimension of the Organization for Security and Co-operation in Europe, together with various implementing measures in respect of them. Within the European Union the promotion of equality between men and women is identified as a task of the European Community and there are also particular treaty commitments and powers relating to such equality.[2127] Moreover various Directives have been adopted to ensure equality between those who are nationals of the European Union and to proscribe a number of other forms of discrimination.

It is thus not surprising that at least some of the forms of discrimination prohibited in the treaty commitments and other measures already referred to are now also contrary to customary international law. This is most certainly the case with discrimination based on race – which has undoubtedly achieved the status of *jus cogens* and there is growing support for the view that the prohibition of discrimination based on religion and gender may also be required by customary international law but it is unlikely that the latter prohibits all forms of discrimination. At the same time it should be noted that it has been accepted that discriminatory treatment can attain a level of severity that

2123 Preamble to the Constitution.
2124 Article 1.2 of the Constitution.
2125 Preamble to the Constitution.
2126 Article 3 of the Statute of the Council of Europe, emphasis added.
2127 Article 2 and Articles 13, 39, 137 and 141 respectively of the Treaty of the European Union.

renders it degrading[2128] and thus contrary to a norm that is non-derogable at both the global and the European level.[2129]

The prohibition of discrimination is moreover closely linked to the need to maintain pluralism as a part of the equally strong commitment at the global and regional level to democracy.[2130]

Maintaining pluralism and thus democracy certainly necessitates tolerance of the expression of views that offend, shock and disturb but not of those that promote hatred between sections of society.[2131] It may also be necessary to place restrictions on other freedoms in order to reconcile the interests of different groups in a society and thereby ensure that everyone's identity and beliefs are respected. In particular, freedoms cannot be used to weaken or destroy the ideals and values of a democratic society such as through promoting the introduction into all legal relationships of a distinction between individuals grounded on personal attributes such as an individual's gender, race, religion or belief, categorising everyone according to these attributes and allowing them rights and freedoms only on this basis. This would be unacceptable since it would infringe on the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. As the European Court of Human Rights has observed in relation to this approach being espoused with respect to religion, "Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs".[2132]

b. European and International Norms

This section reviews first the different sources within Europe and at the global level establishing prohibitions on discrimination. It then identifies the prohibited grounds of discrimination and looks at certain restrictions as to their

2128 ECtHR, (GC), No. 25781/94, *Cyprus v. Turkey*, 10 May 2001, Reports 2001/IV, paragraphs 302-310.

2129 Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the ECHR.

2130 See, *e.g.*, Article 25 of the International Covenant on Civil and Political Rights, Preamble to the Statute of the Council of Europe and Article 3 of Protocol No. 1 to the ECHR.

2131 See ECtHR (GC), Application No. 15890/89, *Jersild v. Denmark*, 23 September 1994, ECtHR, Application No. 33269/06, *Vajnai v. Hungary*, 8 July 2008 and CERD, No. 4/1991, *L K v. Netherlands*, 16 March 1993.

2132 ECtHR (GC), Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi (the Welfare Party) and Others v. Turkey*, 13 February 2003, paragraph 119.

applicability. It concludes by examining the different mechanisms created to give effect to the various prohibitions on discrimination.

(a) Sources of the Prohibition

Global instruments concerning the prohibition of discrimination comprise both general provisions in treaties guaranteeing a wide range of human rights and freedoms and treaties or provisions in them concerned specifically with discrimination either in relation to a specific group or in a specific context.

The former are primarily in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. Thus both include undertakings to guarantee no discrimination generally in respect of all the enumerated rights and to ensure the equal rights of men and women to the enjoyment of all the rights set forth in these Covenants,[2133] and the International Covenant on Civil and Political Rights also specifically guarantees equality before the law and requires the prohibition of discrimination and effective protection against it.[2134] However, the latter instrument also makes special provision for the protection of children against discrimination with regard to measures of protection required by a child's status as a minor.[2135]

The more specific global instruments, *i.e.*, either solely concerned with the prohibition of discrimination or containing provisions with that object, comprise the Convention against Discrimination in Education, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Political Rights of Women, the Convention on the Rights of Persons with Disabilities,[2136] the Convention on the Rights of the Child,[2137] the Convention on the Suppression and Punishment of the Crime of *Apartheid*, the Convention relating to the Status of Refugees,[2138] the Convention relating to the Status of Stateless Persons,[2139] the ILO's Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, the ILO's Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, the ILO's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries,[2140] the International Convention against *Apartheid* in Sports, the International Convention on the Elimination of All

2133 Articles 2 and 3 in both cases.
2134 Article 26.
2135 Article 24.
2136 Article 5.
2137 Article 2.
2138 Article 3.
2139 Article 3.
2140 Article 3.

Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[2141] and the Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (ILO Convention No. 159).[2142]

In addition it should be noted that the ILO's Convention (No. 105) concerning the Abolition of Forced Labour requires the suppression of forced labour as a means of racial, social, national or religious discrimination[2143] and certain treaties specifically provide that non-citizens should have in respect of certain matters the same entitlement as a national, notably in the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

At the European level there is a similar distinction to that at the global as regards the character of the treaties prohibiting discrimination whereas in the European Union the adoption of laws is more significant than treaty provisions for the prohibition of discrimination. No treaty or other legal obligations have been adopted under the auspices of the Organization for Security and Co-operation in Europe.

The ECHR prohibits discrimination in relation to the enumerated rights and freedoms[2144] but has been supplemented by a provision guaranteeing equality of rights and responsibilities for spouses[2145] and a general guarantee against discrimination[2146]. While the only reference to discrimination in the European Social Charter is in its Preamble, the European Social Charter (Revised) has both a right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex and a general guarantee against discrimination.[2147] There is also specific protection against discrimination in the Framework Convention for the Protection of National Minorities,[2148] the Council of Europe Convention on Action against Trafficking in Human Beings[2149] and the Council of Europe Convention on Access to Official Documents, [2150]as well as protection against the promotion of discrimination

2141 Article 7.
2142 Articles 3 and 4.
2143 Article 1(e).
2144 Article 14.
2145 Article 5 of Protocol No. 7.
2146 Protocol No. 12.
2147 Article 20 and Article E in Part V respectively.
2148 Articles 4, 6(2) and 9.
2149 Articles 3 and 6(d).
2150 Article 2(1).

in the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

The European Union has prohibitions on discrimination both in its constitutive treaties and in Directives that are also binding on its member states. They relate to forms of discrimination based on nationality between workers of member states as regards employment, remuneration and other conditions of work and employment, securing equality between men and women with regard to labour market opportunities and treatment at work and the requirement of equal pay for male and female workers for equal work or work of equal value.[2151] The power to issue Directives is to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[2152] and one Directive has been adopted pursuant to it.[2153] In addition there are several Directives aiming to achieve equality between men and women.[2154]

(b) Grounds

The broadest list of prohibited grounds of discrimination in any European or global treaty is to be found in the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This Convention prohibits discrimination based on grounds "such as sex, race, colour, sex, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status".[2155] Many other instruments have most of these grounds and some refer to grounds which are not included amongst them,

2151 Articles 39, 137 and 141 of the Treaty of the European Union.

2152 Article 13 of the Treaty of the European Union.

2153 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the "Race Directive"); and Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (the "Framework Directive"). The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment.

2154 Notably Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

2155 Article 7.

notably disability,[2156] health[2157] and association with a national minority.[2158] One Convention even specifies that the applicable grounds or attributes can be those of the parent as much as the child affected by a measure.[2159]

However, more important perhaps is the question of whether the listing is illustrative or exhaustive. There are, of course, some treaties clearly limited to specific grounds of discrimination because that is their very focus, notably those concerned with gender, indigenous and tribal peoples and race, while those concerned with refugees and stateless persons only proscribe discrimination on account of race, religion or country of origin. Even those limited grounds might be wider than first thought. Thus the understanding of the term 'race' in one instrument[2160] is defined to include not only colour and national or ethnic origin as mentioned above but also descent, and the Committee on the Elimination of Racial Discrimination has taken the view that identification of individuals as being members of a particular racial or ethnic group or groups shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.[2161] It is probable that both approaches to defining race would be taken by the bodies responsible for interpreting this concept in other instruments. Indeed interpretation of itemised terms can widen their scope – 'sex', *e.g.*, has been interpreted to cover 'sexual orientation'[2162] but more importantly most lists of grounds ensure that they are not exhaustive by prefacing them with the phrase 'such as' and ending with the reference to 'other status'. Certainly the latter has been found to extend to age,[2163] height,[2164] past employment,[2165] sexual orientation,[2166] and could possibly extend to persons who are internally displaced[2167] or even to those whose immigration status is irregular. In principle such lists are capable of extending to any group of

2156 Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

2157 The European Social Charter (Revised).

2158 The ECHR and the European Social Charter (Revised).

2159 Convention on the Rights of the Child.

2160 The International Convention on the Elimination of All Forms of Racial Discrimination.

2161 General Recommendation No. 08: Identification with a particular racial or ethnic group (Article 1, paragraphs 1 and 4): 22/08/90.

2162 UN H.R.Cttee., No. 488/1992, *Toonen v. Australia*, 31 March 1994.

2163 UN H.R.Cttee., No. 983/2001, *Love et al v. Australia*, 25 March 2003.

2164 UN H.R.Cttee., No. 854/1999, *Wackenheim v. France*, 15 July 2002; the case concerned dwarves.

2165 ECtHR, Applications Nos. 55480/00 and 59330/00, *Sidabras and Dziautas v. Lithuania*, 27 July 2004.

2166 ECtHR, Application No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999.

2167 See *Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons*, paragraph 2.

persons with a shared attribute, inherent or chosen, and they should not, therefore, be construed too strictly.

Under European Union law the prohibited grounds of discrimination are generally limited to age, disability, gender, nationality, racial or ethnic origin, religion or belief and sexual orientation. However, the European Union's Charter of Fundamental Rights seeks to prohibit discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.[2168] When the Charter enters into force it will operate as a constraint on measures adopted by European Union institutions and may be used in assessing the acceptability of various national implementing measures.

(c) Areas of Activity and Restricted Applicability

The reach of some prohibitions on discrimination is necessarily limited by their application only to persons belonging to specified categories, namely, children, the disabled, European Union nationals, indigenous and tribal persons, members of a national minority or of a racial group, migrant workers, refugees, the stateless, victims of trafficking and women. Moreover the focus of certain treaties will only be on treatment in a particular context such as access to information, education, employment, politics and sport.

Other prohibitions are limited to discrimination affecting a particular group of rights and generally speaking if the impugned treatment does not affect one of those rights then, no matter how objectionable the difference in treatment, protection will not be afforded by the concerned guarantee.[2169] However, as the European Court of Human Rights has shown, there is a scope for mitigating the effect of such a limitation by finding impermissible discriminatory treatment that affects matters falling within the penumbra of a right. While such matters would not be protected by the substantive right itself, the presence of discrimination enables a complaint about the treatment to be upheld through reliance on the two provisions – the substantive guarantee and the prohibition on discrimination – taken together.[2170] There is *no* reason why this approach is not emulated in the case of similar prohibitions.

2168 Article 21.

2169 See, *e.g.* ECtHR, Application No. 9228/80, *Glasenapp v. Federal Republic of Germany*, 20 August 1986, Series A No. 104.

2170 *E.g.*, ECtHR, Application No. 1474/62, *Belgian Linguistic Case*, 23 July 1968, Series A No. 8, as regards the provision of education.

The reach of the general prohibitions on discrimination[2171] will, however, be to all aspects of life that have a public dimension in the sense of the impugned treatment, being dependent on the law and legal institutions in order for it to be applied or enforced.

Only three treaties restrict the benefit of the prohibition of discrimination to those who are the nationals of the country concerned. One authorises developing countries to determine the extent to which they would guarantee certain economic rights to non-nationals.[2172] A second does so to the extent of allowing restrictions to be imposed on the exercise by aliens of the rights to freedom of assembly, association and expression[2173] but this has in practice been given a narrow construction.[2174] The third excludes from the definition of racial discrimination distinctions, exclusions, restrictions or preferences between citizens and non-citizens.[2175] However, the last provision cannot be used as an excuse for not performing obligations under other human rights treaties, which are generally applicable to non-nationals.[2176]

In addition to these restrictions it should be noted that the prohibitions on discrimination in the Revised Social Charter are only applicable to nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned.[2177]

(d) Implementation Mechanisms

Generally the norms prohibiting discrimination in global treaties are implemented through committees comprised of independent experts scrutinising periodic reports submitted by states-parties and making observations on them, as well as issuing general comments and recommendations applicable to all states parties. These observations, comments and recommendations constitute an authoritative guide to the requirements of the relevant provisions.

2171 Article 26 of the International Covenant on Civil and Political Rights and Protocol No. 12 to the ECHR.

2172 Article 2(3) of the International Covenant on Economic, Social and Cultural Rights.

2173 Article 16 of the ECHR.

2174 ECtHR, Application Nos. 15773/89 and 15774/89, *Piermont v. France*, 27 April 1995, Series A No. 314.

2175 Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination.

2176 See General Recommendation No. 30: Discrimination Against Non Citizens; CERD/C/64/Misc.11/rev.3, 1 October 2004.

2177 Article 1 of the Appendix to both instruments.

However, in the case of certain global treaties,[2178] there is also the option of the examination of communications by individuals and or states-parties alleging non-compliance with the prohibitions concerned and issuing views or recommendations in respect of them, as well as in one instance[2179] establishing a Commission of Inquiry where it is alleged that persistent and serious violations had been committed which the State concerned had repeatedly refused to address, which can ultimately lead to the matter being brought before the ILO Conference or the International Court of Justice. The latter stage has yet to occur in relation to any prohibition on discrimination.

In several instances provision is only made for disputes about interpretation and application of the prohibition concerned to be brought before the International Court of Justice,[2180] but this has not always been accepted by states-parties and has not actually been used with respect to any prohibition on discrimination.

In one instance there is the theoretical option of using a conciliation and good offices commission to resolve disputes as to the interpretation and application of the prohibition,[2181] but so far this body has never been called upon to exercise its functions.

The monitoring of Council of Europe treaty obligations relating to discrimination is also primarily effected by a committee of experts whose recommendations may be endorsed by a political body, the Committee of Ministers.[2182]

In the case of one of treaty,[2183] the alleged victim of a breach of the prohibition or a state-party can complain to the European Court of Human Rights, whose judgment is legally binding and the implementation of which is monitored by

2178 The Conventions of the International Labour Organization, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention against Apartheid in Sports, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.

2179 The Conventions of the International Labour Organization.

2180 The Convention on the Political Rights of Women, the Convention on the Suppression and Punishment of the Crime of *Apartheid*, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons and the International Convention against *Apartheid* in Sports.

2181 The Convention against Discrimination in Education through the Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education.

2182 The European Social Charter, the European Social Charter (Revised), the Framework Convention for the Protection of National Minorities, the Council of Europe Convention on Action against Trafficking in Human Beings, the Council of Europe Convention on Access to Official Documents.

2183 The ECHR.

the Committee of Ministers. In the case of two other instruments[2184] there is the option of allowing collective complaints regarding non-compliance with the prohibition,[2185] which can result in a recommendation by the expert committee being adopted by the Committee of Ministers.

For one treaty there is provision for the settlement of disputes as to the interpretation or application of the treaty through negotiation or any other peaceful means of the choice of the states-parties concerned, including submission of the dispute to an expert committee, to an arbitral tribunal whose decisions shall be binding upon the parties, or to the International Court of Justice.[2186]

Implementation of the prohibition on racial discrimination in Council of Europe member states is also furthered by the work of the European Commission against Racism and Intolerance ("ECRI"), an independent human rights monitoring body established by the Committee of Ministers. Its remit includes reporting on the situation in the member states on racism and intolerance and on the action taken to implement its reports. It also adopts General Policy Recommendations which give substance to more general obligations to tackle racism and intolerance.

European Union law is meant to be implemented through national implementing measures but various provisions in it can be relied upon directly in national courts which can also seek rulings from the European Court of Justice as to the scope of a particular obligation regarding discrimination in the context of a specific case. Non-compliance with European Union law can lead to proceedings being brought by the European Commission against the member state concerned in the European Court of Justice.

c. Discrimination

This section examines first the key elements comprising discrimination and then looks at the forms discrimination can take, concluding with consideration of the problems of proof and the provision of remedies.

2184 The European Social Charter and the European Social Charter (Revised).

2185 Through acceptance of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

2186 The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

(a) The Key Elements

In order for discrimination to be established as occurring in contravention of the norms discussed above there must be (a) a difference in treatment between (b) persons who are in analogous or relatively situations by (c) reference to one of the prohibited grounds where (d) there is no objective and reasonable justification for this difference in treatment.

A difference in treatment may arise from action taken by the state in the form of, *e.g.*, prohibiting or requiring certain conduct, imposing or removing certain disqualifications, giving or denying various opportunities or affecting particular interests or possessions.

Persons claiming to be subject to discrimination will need to demonstrate that their position is analogous or relatively similar to that of others benefiting from more favourable treatment and thus identify an appropriate comparator.[2187]

Tribunals applying global and European norms against discrimination have recognised that discrimination may be either direct or indirect in character. Discrimination will be direct where it is established that the reason for the difference in treatment was a prohibited ground whereas it will be indirect where a condition, practice, requirement or rule has a disproportionate impact upon a particular class or group of persons despite being neutral on its face with respect to the treatment of different classes or groups. Indirect discrimination may also arise from a *de facto* situation.[2188] In assessing this impact, statistical evidence can be sufficient to put the burden on the State concerned to justify the difference in treatment.[2189]

(b) Forms of Discrimination

Direct discrimination may be established where different reasons from those given are established as the motive for a decision.[2190]

2187 ECtHR (GC), Application No. 13378/05, *Burden v. United Kingdom*, 29 April 2008 (cohabiting sisters not analogous to married persons or civil persons who did not have to pay inheritance tax on their home).

2188 See, *e.g.*, ECtHR (GC), Application No. 57325/00, *D H v. Czech Republic*, 13 November 2007 (in which it was established that Roma children were disproportionately found in special educational needs schools and thus received an inferior education) and UN H.R.Cttee., No. 760/1997, *Diergaardt v. Namibia*, 20 July 2000 (in which Afrikaans speakers were found to be disproportionately affected by the practice of using English in communications with public officials).

2189 See, *e.g.*, ECtHR (GC), Application No. 57325/00, *D H v. Czech Republic*, 13 November 2007.

2190 See, *e.g.*, ECtHR, Application No. 12875/87, *Hoffman v. Austria*, 23 June 1993, Series A No. 255-C, where religion rather than the best interests of the child was found to be the basis of a custody decision.

In fulfilling the prohibition on indirect discrimination there will also be a need to take account of relevant differences between groups or classes of persons.[2191]

Furthermore a failure to make reasonable accommodation, *i.e.*, a modification of, or adjustment to a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or customarily performed, in order to make it possible for a qualified individual to apply for, perform the essential functions of, and enjoy the equal benefits and privileges of employment could – especially in the context of disability – amount to discrimination.[2192]

It should be noted that harassment – *i.e.*, unwanted conduct related to a prohibited ground/origin, which takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment – has been explicitly deemed to be discrimination in some instruments[2193] and may be construed as required under other less specific instruments and may be construed as contrary to more general prohibitions of discrimination.[2194]

A State will be responsible for discrimination that occurs when its functions are delegated or sub-contracted to a private entity or individual.[2195]

Furthermore there is a positive obligation on a State to protect persons against discrimination by private entities.[2196]

However, the provision of separate education by reference to the gender of pupils or for religion or linguistic reasons, as well as the maintenance of private educational arrangements, has been specifically excluded from the definition of discrimination in respect of education.[2197]

2191 See, *e.g.*, ECtHR (GC), Application No. 34369/97, *Thlimmenos v. Greece*, 6 April 2000, Reports 2000-IV, in which there was a failure to treat convictions arising from a religious conviction differently from others when determining admission to a profession.

2192 See Article 5(3) of the Convention on the Rights of Persons with Disabilities and Article 5 of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.

2193 *E.g.*, Article 5 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2194 *E.g.*, CERD, No. 26/2002, *Hagan v. Australia*, 20 March 2003.

2195 UN H.R.Cttee, No. 273/1988, *B d B v. Netherlands*, 30 March 1989.

2196 CERD, No. 11/1998, *Lacko v. Slovak Republic*, 9 August 2001; failure to prosecute a restaurant for denial of access.

2197 Article 2 of the Convention against Discrimination in Education.

Apartheid – *i.e.*, denial of the right to life and liberty of a person, murder, the infliction of serious bodily or mental harm, torture, cruel, inhuman or degrading treatment or punishment, arbitrary arrest and illegal imprisonment, imposition of living conditions calculated to cause physical destruction in whole or in part, measures calculated to prevent participation in the political, social, economic and cultural life of the community, measures to effect segregation and exploitation by submission to forced labour by reference to membership of a racial group, as well as persecution for opposition to *apartheid* – is an aggravated form of discrimination which, as a crime against humanity, attracts international criminal responsibility for those who commit, participate in or directly incite or conspire in its commission.[2198]

(c) Proof and Remedies

Some instruments allow for the burden of proof to be reversed in cases of alleged discrimination so that, where facts from which it may be presumed that there has been direct or indirect discrimination have been established, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.[2199] This approach has been used by the UN Human Rights Committee[2200] but has not generally been accepted by the European Court other than in cases of indirect discrimination.[2201]

There may also be a burden on a State to prove that violence giving rise to a breach of the right to life and/or the prohibition on inhuman and degrading treatment was not racially motivated and thus also in breach of the prohibition on discrimination.[2202] Moreover a failure to carry out an effective investigation into racially motivated violence will constitute a breach of the prohibition on discrimination taken with the breach of the right to life or the prohibition on inhuman and degrading treatment[2203] as will the toleration by the authorities of such violence.[2204]

2198 The Convention on the Suppression and Punishment of the Crime of *Apartheid*.

2199 *E.g.*, Article 8 of Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Article 10 of Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.

2200 No. 208/1986, *Bhinder Singh v. Canada*, 9 November 1989.

2201 See (GC), Application No. 57325/00,*D H v. Czech Republic*, 13 November 2007.

2202 See ECtHR(GC), Application Nos. 43577/98 and 43579/98, *Nachova v. Bulgaria*, 6 July 2005, Reports 2005-VII and ECtHR, Application No. 42722/02, *Stoica v. Romania*, 4 March 2008.

2203 ECtHR (GC), Application Nos. 43577/98 and 43579/98, *Nachova v. Bulgaria*, 6 July 2005, Reports 2005-VII.

2204 ECtHR, Application No. 71156/01, *97 Members of the Gldani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, 3 May 2007.

Similarly, violence against women resulting in loss of life and inhuman and degrading treatment will amount to a breach of the prohibition on discrimination taken with the provisions guaranteeing the substantive rights concerned where there has been insufficient commitment to take appropriate action to address domestic violence.[2205]

A victim of discrimination should be afforded an effective remedy by the national legal system. In many instances this may be sufficiently achieved through the provision of civil and public law proceedings but in some instances a criminal remedy may be appropriate and indeed is specifically required in one instance.[2206] However, it has also been recognised that it may be harder to establish discrimination in criminal proceedings because of the need to demonstrate intent.[2207]

d. Justifications

This section looks at the general considerations determining whether differential treatment can be justified, then the acceptability of measures to assist specific groups and finally the position in emergency situations.

(a) General Considerations

A difference in treatment will not amount to discrimination which is inadmissible where it has an objective and reasonable justification. This will exist where the differential treatment concerned pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Legitimate aims have been found to include support for the traditional family,[2208] the development of linguistic unity of two large language regions,[2209] the protection of the labour market and of public order,[2210] safeguarding national security[2211] and securing the safety of employees.[2212]

2205 ECtHR, Application No. 33401/02, *Opuz v. Turkey*, 9 June 2009.
2206 The Convention on the Suppression and Punishment of the Crime of *Apartheid*.
2207 See ECtHR, Application No. 67336/01, *Danilenkov and Others v. Russia*, 30 July 2009.
2208 ECtHR, Application No. 40016/98, *Karner v. Austria*, 24 July 2003, Reports 2003-IX.
2209 ECtHR, Application No. 1474/62, *Belgian Linguistic Case*, 23 July 1968, Series A No. 6, as regards the provision of education.
2210 ECtHR, Application Nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, Series A No. 94, as regards immigration control.
2211 ECtHR, Application Nos. 55480/00 and 59330/00, *Sidabras and Dziautas v. Lithuania*, 27 July 2004, Reports 2004-VIII, as regards employment restrictions.
2212 UN H.R.Cttee., No. 208/1986, *Bhinder Singh v. Canada*, 9 November 1989, as regards wearing hard hats.

There will, however, be a need to show a link between a legitimate aim and the differential treatment concerned[2213] and it may be found to lack a factual basis.[2214]

Furthermore there must exist a reasonable relationship of proportionality between the means employed and the aim which is being sought to be realised.[2215] In this regard it will be material that the difference in treatment is limited in scope.[2216] It will not be decisive that the problem could be addressed by some other means[2217] nor that the hardship suffered by some in the group or class is significant, but not generally.[2218]

States are likely to be given the benefit of the doubt in assessing whether and to what extent differences in otherwise similar situations justify different treatment where general measures of economic or social strategy are involved.[2219] However, despite the wide range of prohibited grounds of discrimination, particularly close scrutiny is given to treatment that affects persons by reason of their birth, gender, marital status, nationality, race, religion or sexual orientation[2220] and particularly weighty evidence will be required before such treatment will be regarded as justified.

2213 ECtHR (GC), Application No. 29515/95, *Larkos v. Cyprus*, 18 February 1999, Reports 1999-I, a measure supposedly for the social protection of tenants.

2214 ECtHR, Application Nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, Series A No. 94, an alleged difference between the effect of men and women on the labour market.

2215 See, *e.g.*, ECtHR, Application Nos. 55480/00 and 59330/00, *Sidabras and Dziautas v. Lithuania*., 27 July 2004, Reports 2004-VIII, (a bar on employment on former secret service employees extending to the private sector was excessive) and UN H.R.Cttee., Nos. 359/1989 and 385/1989, *Ballantyne et al v. Canada*, 31 March 1993 (a bar on using English in signs was not needed to protect the French language).

2216 ECtHR, Application No. 27417/95, *Cha'are Shalom Ve Tsedek v. France*, 27 June 2000, Reports 2000-VII; restrictions on ritual slaughter were mitigated by an ability to purchase the meat needed from a neighbouring country.

2217 ECtHR, No. 8777/79, *Rasmussen v. Denmark*, 28 November 1984, Series A No. 87, a choice of approach to the handling of paternity disputes existed.

2218 ECtHR, No. 8793/79, *James and Others v. United Kingdom*, 21 February 1986, Series A No. 98.

2219 ECtHR (GC), Application Nos. 65731/01 and 65900/01, *Stec and Others v. the United Kingdom*, 12 April 2006, which concerned a difference between the pensionable age of men and women.

2220 ECtHR, Application No. 6833/74, *Marckx v. Belgium*, 13 June 1979, Series A No. 31; ECtHR, Application Nos. 9214/80, 9473/81 and 9474/81, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 28 May 1985, Series A No. 94; ECtHR (GC), Application No. 30943/96, *Sahin v. Germany*, 8 July 2003; ECtHR, No. 17371/90, *Gaygusuz v. Austria*, 16 September 1996, Reports 1996-IV; ECtHR (GC), Application No. 57325/00, *D H v. Czech Republic*, 13 November 2007; ECtHR, Application No. 12875/87, *Hoffman v. Austria*, 23 June 1993, Series A No. 255-C; and ECtHR (GC), Application No. 43546/02, *E B v. France*, 22 January 2008.

A person's marital status can have no bearing on the acceptability of any difference of treatment by reference to gender.[2221]

(b) Measures to Help Certain Groups

Many treaties also except measures on behalf of certain groups from being treated as discrimination even though the differential treatment would otherwise fall within its scope. Sometimes this exception is temporary but in others it is done on a permanent basis. The former include those aimed at accelerating *de facto* equality[2222] and those for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection.[2223] Possibly permanent measures are authorised to meet the requirements of persons who for reasons such as sex, age, disablement, family responsibilities or social or cultural status are generally recognised to require special protection or assistance,[2224] to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority,[2225] to protect maternity,[2226] to safeguard indigenous and tribal people[2227] and to secure the rehabilitation of the disabled,[2228] as well as those in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions.[2229]

They are also found in European Union Directives[2230] and are specifically authorised in the European Union's Charter of Fundamental Rights in favour of the under-represented sex.[2231]

2221 Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

2222 Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women and Article 5 of the Convention on the Rights of Persons with Disabilities.

2223 Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination.

2224 Article 5(2) of the ILO's Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

2225 Article 4 of the Framework Convention for the Protection of National Minorities.

2226 Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.

2227 Article 4 of the ILO's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries.

2228 The Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (ILO Convention No. 159).

2229 Article 7(2) of the European Charter for Regional or Minority Languages, which treaty does not itself prohibit discrimination.

2230 *E.g.*, Article 5 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2231 Article 23.

Moreover these measures will be regarded as having an objective and reasonable justification even in the case of norms without such explicit provisions.[2232]

Such measures can include preferential treatment, targeted recruitment, the adoption of training and support programmes, the setting of targets and the use of mainstreaming, policy impact assessments and quotas.

(c) Emergencies

Derogation from obligations under the International Covenant on Civil and Political Rights in an emergency must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin[2233] and differential treatment that has no objective and reasonable justification is unlikely to be regarded as lawful for the purpose of derogations under the ECHR, the European Social Charter and the European Social Charter (Revised)[2234] where it is for a prohibited ground.

e. Conclusion

There is now an extensive body of global and European law governing discrimination and, although particular elements of it have their own specific focus, it is clearly moving in the same general direction. This is true not only of the grounds of prohibited discrimination but also of the understanding of what is entailed by discrimination, how it can be proved and the limited circumstances in which it can be justified. The commonality evident in global and European standards, as well as the interpretation of them afforded by international and regional tribunals, provides a clear indication as to what is required of the national law, both as to the scope of formal guarantees and the arrangements needed to give effect to them.

2232 *E.g.*, ECtHR, No. 1474/62, *Belgian Linguistic Case*, 23 July 1968, Series A No. 8. See also the UN Human Rights Committee's *General Comment No. 04: Equality between the sexes (Article 3)*, 30 July 1981, paragraph 2.

2233 Article 4(1).

2234 Pursuant to Articles 15, 30 and F respectively.

2. Article II.4 of the BiH Constitution – Non-discrimination

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

Article 14 of the ECHR

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.

Article I(14) of Annex 6 to the Dayton Peace Agreement

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

Article 2, paragraph 1 of the International Covenant on Civil and Political Rights[2235]

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the International Covenant on Civil and Political Rights

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.

2235 The text is available on the Ministry of Human Rights and Refugees' website: <www.mhrr.gov.ba>.

AP 105/03 A.P.	20041130
AP 1119/05 Milošević *et al*.	20060627
AP 119/04 H.Ć.	20041209
AP 215/05 Jonuzi	20060412
AP 612/04 L.B.	20041130
AP 653/03 A.H.-Đ.	20040304
AP 807/04 Ilijašević	20050913
AP 825/04 "Mepros" d.d. Sarajevo	20050913
AP 98/03 I.Š.	20041027
CH/00/3476-A&M M.M.	20030307
CH/00/3834 Mobić	20070627
CH/00/4094 Dahirović	20060510
CH/00/6444 *et al*.-A&M Trkija *et al*.	20020510
CH/01/6796-A Halilagić	20010307
CH/01/6979-A&M E.M. & S.T.	20020308
CH/01/7351-A&M Kraljević	20020412
CH/01/7952 Selimović *et al*.	20020111
CH/02/12226-A&M Haziraj *et al*.	20030509
CH/02/12435-A&M Bojić	20031222
CH/02/8202 *et al*. M. P. *et a*l.	20030316
CH/02/8923 *et al*.-A&M Kličković *et a*l.	20030110
CH/02/9435 *et al*. Okanović *et al*.	20061220
CH/03/12928 Ivanović	20060913
CH/03/13424 The Islamic Community Council - Vakuf Directorate	20070605
CH/03/14015 *et al*. Ravnjak *et al*.	20060508
CH/03/9628-A&M, the Catholic Archdiocese of Vrhbosna	20030606
CH/96/29-A&M The BiH Islamic Community Council (the Banja Luka Mosques case)	19990611
CH/97/35 friendly settlement Malić	19980525
CH/97/41-A&M Marčeta	19980406
CH/97/45-A&M Hermas	19980218
CH/97/46-M Kevešević	19980910
CH/97/50-A&M Rajić	20000407
CH/97/67-A&M Zahirović	19990708
CH/97/76-A&M Softić	20011012
CH/97/77-A&M Šehić	19991105
CH/98/1018-A&M Pogarčić	20010406
CH/98/1027 *et al*.-A&M R.G. *et al*.	20000609
CH/98/1309 *et al*.-A&M Kajtaz *et a*l.	20010907
CH/98/1373-A&M Bajrić	20020510
CH/98/1374-A&M Pržulj	20000113
CH/98/1493-A&M Pilipović	20030606
CH/98/1786-A&M Odobašić	19991105
CH/98/232 *et al*.-A&M Banjac *et al*.	20010706
CH/98/420 *et al*.-A&M Kugić *et al*.	20031010

CH/98/565-A&M M.K.	20031222
CH/98/659 *et al*.-A&M Pletilić *et al*.	19990910
CH/98/698-A&M Jusufović	20000609
CH/98/706 *et al*.-A&M Šećerbegović *et al*.	20000407
CH/98/752 *et al*.-A&M Bašić *et al*.	19991210
CH/98/756-A&M Đ.M.	19990514
CH/98/777-A&M Pletilić	19991008
CH/98/875 *et al*.-A&M Živković	20000512
CH/98/892-A&M Mahmutović	19991008
CH/98/896-A&M Čvokić	20000609
CH/98/946-A&M H.R. & Momani	19991105
CH/98/948-M. Mitrović	20020906
CH/99/2177-A&M The BiH Islamic Community Council, the Prnjavor cemetery case	20000211
CH/99/2239-A&M Cipot-Stojanović	20030404
CH/99/2696-A&M Brkić	20010112
U 10/05 V.Jukić "Public Broadcasting System"	20050722
U 11/00 B.Š.	20000811
U 19/01 "RS Labour Law"	20020615 *OG of BiH*, No. No. 13/02
U 22/01 Kušec	20011230 *OG of BiH*, No. No. 33/01
U 26/00 "FBiH Labour Law"	20020423 *OG of BiH*, No. No. 08/02
U 28/01-2 Jugović	20020312 *OG of BiH*, No. No. 05/02
U 36/01 Trivić	20020410 *OG of BiH*, No. No. 07/02
U 49/02 H.B. *et al.*	20030928
U 5/98-III "Izetbegović III – Constituent Peoples"	20000914 *OG of BiH*, No. No. 23/00
U 64/01 D.B.	20031224 *OG of BiH*, No. No. 41/03

a. Introductory note as to the prohibition of discrimination

(a) Cases of group discrimination as a result of armed conflict

The situation in Bosnia and Herzegovina after the armed conflict was characterised by the fact that human rights, in essence, were *generally* complied with; however, compliance or non-compliance with human rights and freedoms was *determined by ethnopolitical factors*. People were not generally deprived of their rights but, as a rule, this occurred only in cases where nationalist holders of power were of another ethnic-origin than the persons concerned.

Discrimination was far-reaching. Immediately after the entry into force of the Dayton Peace Agreement, there were cases that involved even **unlawful deprivation of liberty** for the purpose of exchanging prisoners or persons deprived of liberty and, those persons, in principle, for discriminatory motives,

were subjected to forced labour, to inhuman or degrading treatment and their property was often subject to confiscation or looting.[2236] In one case, the Human Rights Chamber established that the applicant had suffered discrimination in the enjoyment of his rights afforded by Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination.[2237] After some initial difficulties in respect of insufficient evidence,[2238] the Human Rights Chamber succeeded at a later stage, with support of international organisations working in the field, in establishing the discriminatory conduct in many cases by the parties responsible under Annex 6 to the Dayton Peace Agreement.

Systematic discrimination on the grounds of national origin was particularly severe in cases involving the "so-called" **minority returnees**, refugees and displaced persons involved in proceedings pending before municipal administrative authorities or before insufficiently independent courts.[2239] In addition, in the post-conflict period, the legal situation concerning either socially or privately owned abandoned property was such to reinforce the results of ethnic cleansing; administration and courts, too, contributed in their way to the general atmosphere in which minority returns were denied.[2240]

At a higher level, the issue of discrimination against returnees has been mentioned in the comments of the cases dealt with by the BiH Constitutional Court, such as **"ethnicised" names of towns**,[2241] as well as the **ethnic issue conditioned territorial symbols**,[2242] wherein the BiH Constitutional Court always concluded that discrimination on grounds of ethnic origin or the instrumentalisation of social or religious or national symbols had a significant potential in preventing refugees or displaced persons from returning to areas in which another ethnic group constituted a majority.

Great attention was paid to the cases related to the "so-called" **JNA-apartments** of military officials who had served in the JNA armed forces during the armed conflict and who, afterwards, sought to be reinstated into their pre-war apartments located in the territory of the present Federation of BiH. By adopting special provisions within the framework Law on Cessation of the

2236 CH/97/45-A&M; CH/98/896-A&M; CH/97/41-A&M; CH/98/1373-A&M, paragraph 112; CH/98/946-A&M.

2237 CH/98/1786-A&M, paragraph 135.

2238 CH/97/46-M.

2239 Compare CH/98/756-A&M, paragraph 80; see also CH/97/77-A&M, paragraph 58 *et seq*., CH/00/6444 *et al*.-A&M, paragraph 75.

2240 CH/98/659 *et al*.-A&M, paragraph 204 *et seq*.; CH/98/777-A&M, paragraph 105 *et seq*.; CH/98/752 *et al*.-A&M, paragraph 173 *et seq*.

2241 U 44/01.

2242 U 4/04.

Application of the Law on Abandoned Apartments (Article 3a), the authorities of the Federation of Bosnia and Herzegovina wanted to prevent the return of such persons, considering them to be enemies or traitors *par excellence*. The Human Rights Chamber established that these provisions were implicitly discriminatory.[2243] Although these provisions targeted real or presumed aggressors, which could, in some way be emotionally understandable, the concern arose from the intention to maintain in the post-conflict period "the achievements" of ethnic cleansing or factual movement of ethnic groups made during the armed conflict. The last category includes, for example, the cases[2244] described above, involving disputes on the re-establishment of cultural and religious facilities destroyed during the armed conflict or relating to the closure of a Muslim cemetery in Banja Luka and the related disputes arising from the prohibition of religious funerals.

In the case of the Catholic Archdiocese of Vrhbosna, the Human Rights Chamber established that the Archdiocese of Vrhbosna and members of the Catholic Community, compared to the Islamic Community, had been subjected to an ongoing pattern of discrimination in the Travnik Municipality in respect of **the right to freedom of religion**. In the opinion of the Human Rights Chamber, the municipal authorities, with no objective justification, subjected to differential treatment the Catholic Community compared to the Islamic Community to the detriment of the former. Differential treatment was reflected in the municipal authorities' dubious decision on temporary restitution (since there were no legal grounds to do so) of a considerable portion of nationalised property located in that area, which had been formerly owned by the Islamic religious community (a building of importance), while only a part of the property of the Catholic Archdiocese of Vrhbosna, which had been nationalised 40 years earlier, was returned in a manner that would not meet the real needs for religious education.[2245]

Another complex case related to employees who during the armed conflict were placed, either for economic or "security" reasons, on the "so-called" **waiting lists** or whose employment was terminated instantly. The affected persons could almost never be reinstated to their former employment and it often occurred that their employment was occupied by persons who were of another ethnic group, which was the majority in the relevant area. In this way, in the opinion of the Human Rights Chamber, the affected persons were discriminated against in the enjoyment of their right to work and to just and

2243 CH/98/1493-A&M, paragraph 137 *et seq*.
2244 See "(a) Cases of group discrimination as a result of armed conflict", p. 487.
2245 Compare CH/03/9628-A&M, paragraph 101 *et seq*.

favourable conditions of work and, in some case, in the enjoyment of their right to equal pay for equal work (Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights).[2246]

The continuation of such a pattern of discrimination after the armed conflict, honestly, could be expected. For that reason, the prohibition of discrimination had a vital role in the **post-Dayton legal order** of Bosnia and Herzegovina. The prohibition on discrimination based on sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status is applicable in Bosnia and Herzegovina not only under Article 14 of the ECHR and the relevant provisions stipulated in other international mechanisms protecting human rights and fundamental freedoms. Actually, discrimination is explicitly prohibited by Article II.4 of the BiH Constitution and Article I.1(4) of Annex 6 to the Dayton Peace Agreement and it affords everyone protection against unjustified treatment in the enjoyment of all rights and freedoms under the BiH Constitution and Annex 6, including the rights and freedoms enumerated in annexes to these two legal acts. Pursuant to Article II.2(b) of Annex 6 to the Dayton Peace Agreement, the Human Rights Chamber, together with the Office of the Ombudsman for Bosnia and Herzegovina, shall particularly examine whether the Parties and signatories to Annex 6 to the Dayton Peace Agreement or their administrative-territorial units have acted in a discriminatory manner. The same task for the BiH Constitutional Court clearly follows from its constitutional obligation to uphold ("to protect") the BiH Constitution (Article VI.3 of the BiH Constitution), which, *per se*, includes also the constitutional rights and freedoms under Article II of the BiH Constitution.

(b) The scope of protection against discrimination

The European Court holds that, where a substantive Article of the ECHR has been invoked and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine additional allegations on discrimination in the enjoyment of the rights or freedoms under the ECHR,

2246 CH/97/67-A&M, paragraph 131 *et seq*.; similarly in Case No. CH/98/948-M, CH/00/3476-A&M, paragraph 76, and CH/98/1018-A&M, paragraph 67 *et seq*., a violation of Article 5(e)(i) of the International Convention on the Elimination of All Forms Racial Discrimination of 7 March 1966; compare, also, CH/99/1714-A&M, paragraph 45 *et seq*., and CH/01/7351-A&M, paragraph 67 *et seq*., relating to the cases involving the retrospective termination of employment after the armed conflict; compare, finally, CH/99/2696-A&M, which clarifies what absurd costs certain municipalities or other public authorities committed to after the armed conflict, for a prolonged period of time, in order to employ people from another ethnic group (the relevant case related to a person who had been employed as a dentist and a specialist of oral surgery).

though the position is otherwise if clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case. Taking into account the importance of the prohibition of discrimination enshrined in the Dayton Agreement (Article II.2(b) of Annex 6 to the Dayton Peace Agreement), the Human Rights Chamber found itself called upon to act in a different way.[2247]

According to the case-law of the European Court, followed by the BiH Constitutional Court, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court, Article 14 of the ECHR complements the other substantive provisions of the ECHR and it has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions. Thus, the prohibition of discrimination is of an accessory nature. Nevertheless, the establishment of a violation of the prohibition of discrimination does not depend on the establishment of a violation of the right or freedom to which discrimination relates. Namely, even in cases where there is a justified interference with the rights or freedoms safeguarded by the ECHR, the possibility that the affected person has been discriminated against in the enjoyment of that right or freedom is not ruled out.[2248] Therefore, a violation of the prohibition of discrimination may exist not only in cases where a violation of the rights or freedoms safeguarded by the ECHR has been established but also in cases where such a violation does not exist. However, in order for one to enjoy the right not to be discriminated against, the precondition is that the relevant case must fall within the scope of protection of a certain right or freedom protected by the ECHR (compatibility *ratione materiae*).[2249]

Article 14 of the ECHR, *i.e.*, Article I.14 in conjunction with Article II.2(b) of Annex 6 to the Dayton Peace Agreement, affords protection against discrimination in the enjoyment of the other substantive provisions safeguarded by the ECHR, *i.e.*, in the enjoyment of the other rights or freedoms safeguarded by Annex 6 to the Dayton Peace Agreement.[2250] The BiH Constitutional Court holds that Article II.4 of the BiH Constitution provides for a wider scope of protection than Article 14 of the ECHR, as Article II.4 of the BiH Constitution stipulates that an individual shall be entitled to protection against discrimination not only in

2247 CH/97/45-A&M, paragraph 82, in conjunction with the ECtHR, *Dudgeon v. the United Kingdom*, 22 October 1981, Series A No. 45, paragraph 67.

2248 U 19/01, paragraph 15, in conjunction with the ECtHR, *Belgian Linguistic Case*, 23 July 1968, Series A No. 6; *Prince Hans-Adam II of Lichtenstein v. Germany*, 12 July 2001, Reports 2001-VIII, paragraph 91; CH/03/9628-A&M, paragraph 101.

2249 AP 1119/05, paragraph 21, in conjunction with the ECtHR, *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A No. 291-B, paragraph 22; AP 119/04, paragraph 16.

2250 CH/97/45-A&M, paragraph 86; U 19/01, paragraph 15.

respect of the rights or freedoms protected by the ECHR, but also in respect of the other rights or freedoms safeguarded by the BiH Constitution, including the instruments comprised in Annex I to the BiH Constitution.[2251] The protection extends through Article II.5 of the BiH Constitution to the rights or freedoms safeguarded by Annex 7 to the Dayton Peace Agreement. In particular, pursuant to Articles II.4 and II.5 of the BiH Constitution in conjunction with Article I.3(a) of Annex 7 to the Dayton Peace Agreement, the Entities are obliged to prevent and abolish "domestic legislation and administrative practices with discriminatory intent or effect".[2252] Subsequently, the BiH Constitutional Court accepted such a wide scope of protection also for Article 14 of the ECHR.[2253]

In the opinion of the Human Rights Commission within the BiH Constitutional Court, Article 26 of the International Covenant on Civil and Political Rights, compared to Article 14 of the ECHR and Article 2 of the International Covenant on Civil and Political Rights, goes even further as to protection. The reason for this is that the said Covenant guarantees an independent right to equality before the law and equal protection through the law.[2254]

(c) Identifying and determining comparable groups

Not every difference in treatment will amount to a violation of the prohibition of discrimination. Therefore, it must be established whether certain persons in an analogous or relevantly similar situation enjoy preferential treatment, and then it is necessary to examine whether there is a reasonable or objective justification for this distinction.[2255] This means that it is necessary to determine whether or not **comparable groups** exist. Consequently, one cannot claim discrimination against oneself in different situations.[2256]

> It is not necessary to have identical situations. For example, the BiH Constitutional Court accepted that the case involved a comparable situation where the employer, despite the fact that it had four job vacancies for professors, announced only three job vacancies.[2257] In addition,

2251 U 44/01-1, paragraph 45; U 4/04, paragraph 110 *et seq*.
2252 U 5/98-III, paragraphs 77-79; U 22/01, paragraph 32.
2253 See, for example, U 64/01, paragraph 44.
2254 CH/96/29-A&M, paragraph 156; similarly in Case No. U 22/01, paragraph 31.
2255 CH/97/45-A&M, paragraph 86, in conjunction with the ECtHR, *National and Provincial Building Society et al. v. the United Kingdom*, 23 October 1997, Reports 1997, paragraph 88; U 36/01, paragraph 26, and U 22/01, paragraph 33, in conjunction with the ECtHR, Belgian Linguistic Case, 23 July 1968, Series A No. 6; U 64/01, paragraph 36, in conjunction with the ECtHR, *Marckx v. Belgium*, 13 June 1979, Series A No. 31, paragraph 33.
2256 AP 825/04, paragraph 33.
2257 U 64/01, paragraph 38 *et seq*.

judicial actions may be equally comparable.[2258] In principle, there are no comparable situations where in one case a certain legal norm was in effect, which was decisive for the case in question, and it was not in effect in another case[2259] or the legal norm was, in the meantime, modified.[2260] Thus, there is no discrimination in a case where the JNA-pensioners, who had paid contributions to the JNA-Pension Fund in *Belgrade* while serving in the JNA but residing in *Sarajevo*, receive lower pensions than their colleagues who had paid contributions to the Pension Fund in *Sarajevo*. The reason for this is the mere fact that the first category did not acquire the right related to the Pension Fund in Sarajevo. Moreover, in case the BiH Fund decides, for humanitarian reasons, to pay a certain pension amount to this category of pensioners, it does not mean that they are entitled to equality.[2261]

Further, there is discrimination in respect of the right to social security safeguarded by Article 9 of the International Covenant on Economic, Social and Cultural Rights in cases where a returnee to the Federation of BiH (where he lived prior to the armed conflict and where he acquired the right to social security, including the right to a pension) is not guaranteed the same rights to social security as persons who did not leave the territory of the Federation of BiH during the armed conflict. In addition, the Human Rights Chamber construed the status of displaced persons, within the meaning of Annex 7 to the Dayton Peace Agreement, in close connection with their ethnic origin, so that differential treatment is connected with one of the "so-called" statuses (nationality) relevant for the purposes of Article II.2(b) of Annex 6 to the Dayton Peace Agreement. The return of refugees and displaced persons as the key element of the Peace Agreement is hindered if the pensioners' return to the Federation of BiH may fail as the affected persons, who receive much lower pensions in the Republika Srpska, are not able to return to live in the Federation of BiH where the cost of living is much higher and where they have to live on their Republika Srpska pensions.[2262] The decisive fact is whether or not an affected person wants to return to the Federation of BiH. If an affected person has already returned (similar, for example, in the case of *Kličković et al.*) or if he/she may prove the intention to return, his/her decision to return must not be brought in question by the fact that a returnee who receives a lower pension in the Republika Srpska cannot afford the cost

2258 CH/03/14015 *et al*., paragraph 17.

2259 Compare CH/03/13424, paragraph 58 *et seq*., as an example of the two comparable requests for repossession of the nationalised and expropriated property.

2260 See, U 26/00, paragraph 36, in connection with the decrease of the legally guaranteed amount of severance pay after the conclusion of labour relations in the context of "layoff status"; as an example of very complex comparable groups see also CH/98/706 *et al*.-A&M, paragraph 90 *et seq*.

2261 Compare CH/98/706 *et al*.-A&M.

2262 CH/02/8923 *et al*.-A&M, paragraph 84 *et seq*.

> of living in the Federation of BiH, which is far higher than in the Republika Srpska. So, in an opposite situation, this means that it is not justified to recognise the right to a pension payable from the Federation of BiH Pension Fund to pensioners who left the present territory of the Federation of BiH during the war and moved to the present territory of the Republika Srpska and who do not want to return to their pre-war homes.[2263]

(d) Grounds of discrimination

In the further procedure on the examination of discrimination it should be established whether the unequal treatment is based on certain grounds, in other words whether it is based on a personal feature of the injured person (prospective victim of discrimination) such as: ethnicity, religion or language. The features listed in Article 14 of the ECHR are not itemised but rather they represent the most significant examples. This is clearly confirmed in the last part of the first sentence of Article 14 of the ECHR ("or other status").[2264] However, a person is unequally treated, which is legally relevant, only if a certain feature may be identified. Accordingly, in order to establish that there is discrimination it is not sufficient that a person claims, in general terms, that he/she is unequally treated without pointing to the grounds of inequality.[2265] In its decisions, the BiH Constitutional Court has failed to clarify the grounds of discrimination, *i.e.*, what feature of an injured person constitutes a basis for unequal treatment.[2266] If unequal treatment is directly linked with one of the explicitly defined features in Article 14 of the ECHR, then a special burden of proof rests with the State that such treatment is justified.[2267]

> Unequal treatment applied on the basis of essential features of individuals is found in the following cases: an administrative body does not allow a certain person to return to his/her pre-war apartment based on his/her *ethnic ground or origin*, but the members of another ethnicity are allowed to do so;[2268] a judicial body prevents a private prosecutor from conducting fair criminal proceedings because of his/her ethnicity;[2269] during the armed conflict an employer puts only the employees of Bosniak or Croat ethnicity on the waiting list;[2270] in a small area of the RS an administrative body gives an order to destroy only Bosniak and

2263 Compare CH/03/12994-A&M, paragraph 98 *et seq*.
2264 Compare, also, CH/01/7952, paragraph 60.
2265 CH/97/76-A&M, paragraph 78.
2266 See, for instance, AP 98/03.
2267 CH/96/29-A&M, paragraph 156.
2268 CH/02/12226, paragraph 70.
2269 CH/98/756-A&M, paragraphs 70-88; CH/01/6979-A&M, paragraphs 71-74.
2270 CH/00/3834, paragraph 34 *et seq*.

Croat houses;[2271] a special regulation on repossession of the so-called JNA apartments, when compared to repossession of other apartments, constitutes differential treatment based on ethnic grounds;[2272] deprivation of liberty for the purpose of the exchange of prisoners or forced labour or inhumane treatment on solely ethnic grounds;[2273] deprivation of the right to equal protection before the court (Article 26 of the International Covenant on Civil and Political Rights), in a way that the police authority failed to offer protection to an individual from the attack and insult of a third party;[2274] the court guarantees a certain degree of social protection only to persons whose spouse died but denies that protection to persons who lived in *factual informal marriage* with their cohabiting partner who died;[2275] creating quantitative difference with respect to the right to receive support from the spouse in proportion to his/her earnings.[2276]

(e) Justification

Not every form of unequal treatment constitutes discrimination. Such kind of treatment may be justified under certain circumstances. Unequal treatment of similar or identical (the so-called comparable) categories constitutes a prohibited form of unequal treatment – discrimination – only if it is not **in accordance with law,** if it does not pursue a **legitimate aim** and is **not proportional**. That is to say that such treatment is not necessary or that less severe and available means were not used for the purpose of achieving the same goal or that the means used were not proportional to the aim sought to be achieved.[2277]

Thus, unequal treatment on the ground of sex may be justified if there are justified reasons for such treatment. Also, an employment policy may be linked with an ethnicity criterion if a balance is to be struck with respect to the representation of different ethnic groups, for instance, in administrative bodies. In order to achieve that legitimate aim, which is permissible **per se**, the process of selection of candidates must be, if nothing else, transparent,

2271 CH/03/12928, paragraph 51 *et seq*.

2272 CH/02/8202 *et al*., paragraph 188 *et seq*.

2273 CH/97/45-A&M, paragraph 92; CH/98/946-A&M, paragraph 130; CH/97/45-A&M, paragraphs 96, 100; CH/98/946-A&M, paragraph 130.

2274 CH/97/41-A&M, paragraph 65. In connection with the proceedings in Canton 10, compare also CH/01/6979-A&M, paragraph 72 *et seq*.; in these proceedings the Chamber could additionally rely on the opinion of the Federation of BiH according to which there was a problem in Canton 10 with regards to the efficiency and independence of judicial system (CH/98/756-A&M, paragraphs 70-88, and recommendation to see CH/01/6979-A&M, paragraph 71).

2275 CH/00/4094, paragraph 46 *et seq*.

2276 U 11/00.

2277 U 5/98-III, paragraph 79; CH/97/46-M, paragraph 92, in relation to ECtHR, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, paragraphs 32, 33.

fair and objective and the special personal circumstances of each candidate must be taken into consideration.[2278] Also, it is justified on the merits if the State offers its support to members of legitimate military forces only and not to members of paramilitary groups.[2279] The State is entitled to reconstruct judicial authority personnel, which means that there is a legitimate aim defined by law. But, if the State sets a maximum age limit as a criterion for employment (of course, if the set age limit is lower than the one required for retirement), it will be considered that the State has violated the principle of proportionality.[2280] It will be considered that the State pursues a legitimate aim in the cases of allocation of JNA apartments to soldiers and veterans of its own military force being in need of housing. However, as to the criteria to be met by the pre-war members of the JNA in order to be able to repossess their apartments, such as having BiH citizenship, the Human Rights Chamber for BiH found them not to be proportional.[2281]

(f) Indirect discrimination and the obligation of positive protection

A discriminatory intention and acting may be established not only in cases where a certain law or some other general or individual legal act directly creates distinctions based on certain criteria, such as religion or language, without a reasonable justification or argument. A law or some other legal act may be *prima facie* neutral but its effects may be of a discriminatory nature. Also, a certain act that is neutral **per se** may be applied in a discriminatory manner. Similarly, a certain law may be applied in a neutral manner but it might be that the said law was enacted with a **discriminatory intent**. Furthermore, a violation of the principle of prohibition of discrimination occurs in cases where the previous **de iure** discrimination is still in place due to the state authorities' acts or omissions (which are non-discriminatory if separately viewed) in the forthcoming period.[2282]

Exactly the lastly mentioned form of prohibition of discrimination indicates that it is not only that the State has (a negative) obligation to refrain from discrimination by undertaking or by omitting to undertake certain actions but

2278 CH/98/1309 *et al*-A&M, paragraph 163, in relation to the European Court of Justice in Luxemburg, *Badeck et al. v. Germany*, Reports 2000, p. I-1875.

2279 CH/02/9435, paragraph 62 *et seq*.

2280 CH/01/7952, paragraph 75 *et seq*.

2281 CH/02/8202 *et al*., paragraph 191 *et seq*.; another solution exists if a key date is 14 December 1994.

2282 U 10/05, paragraph 44; U 5/98-III, paragraph 79 (for more details see "(a) Republika Srpska as a "State of Serb people", p. 499); example: U 19/01, paragraph 21 *et seq*; similar case in CH/99/1714-A&M, paragraph 49.

it also has a positive obligation to protect an individual from discriminatory behaviour of third persons. This specific obligation of the State arises from Article III.2(c) of the BiH Constitution. Pursuant to this provision, the Entities shall assure legal certainty and protection of persons under their jurisdiction in a way that they will support the institutions for enforcement of civil law in their compliance with internationally recognised standards, human rights and fundamental freedoms under Article II of the BiH Constitution and shall undertake other appropriate measures. As to the return of refugees and displaced persons which is a constitutional goal, these positive obligations have been amended by Article II.1 of Annex 7 to the Dayton Peace Agreement. Pursuant to the mentioned article, political, economic and social conditions should be created in the Entities which will contribute to the voluntary return and the harmonious reintegration of refugees and displaced persons without giving preferences over any specific group. Pursuant to Article I.3(a) of Annex 7 to the Dayton Peace Agreement, all ethnic groups and minorities should be protected from administrative bodies and their practice, as well as from private persons.[2283] *Indications* that the courts act in a discriminatory manner occur if an injured party is a member of a "minority" in relation to the complete composition of the court and prosecutor's office and when the courts make enormous procedural mistakes in the procedure and in the application of substantive-legal provisions (which could be considered as arbitrariness) and for which there is no reasonable justification).[2284]

> Establishing that there is a violation of the prohibition of discrimination in conjunction with the right to equal treatment before the courts and other judicial authorities[2285] is, definitely**,** *redundans*, *i.e.*, it is a legal tautology. Namely, it means as follows: an individual whose right to equal treatment has been violated is actually unequally treated. It is enough to establish that an individual is unequally treated since the prohibition so implies in itself. There is a systematic failure hiding behind the double treatment found by the Chamber and it concerns the competences of the Chamber (which is authorised to apply the instruments from the Addendum to Annex 6 of the Dayton Peace Agreement) only when it comes to the prohibition of discrimination. As to cases where those instruments prohibit discrimination or unequal treatment, that instruction of restricted competence of the Chamber should be reduced for teleological reasons at least, which means it should not be applicable.[2286]

2283 U 5/98-III, paragraph 80 *et seq*.

2284 Compare CH/01/6979-A&M, paragraph 71.

2285 *Ibid*., paragraph 72 *et seq.*

2286 About this, see, above: "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.

(g) There is no right to equality in "unlawfulness"

A special problem is related to the question of whether the right to equal treatment exists in the event of the State acting unlawfully under the same or similar circumstances. Those are the situations where the authorities or courts take decisions in favour of individuals although an obvious unlawfulness is in place and, then, third parties seek the same treatment, the same regime, *i.e.*, the same decision because they are in the same or similar situations. The BiH Constitutional Court has been convincing so far while reasoning that no person is entitled to seek equality in "unlawfulness" because it will lead to a situation where the State will act in an unlawful manner again. In other words: there is no discriminatory treatment if an injured party facing a comparable situation is treated less favourably but lawfully because such a comparable situation, which the party refers to, was obviously resolved in an unlawful manner. In the instant case it is about the Court's decision dealing with the complaint of the expiry of the limitation period concerning the appellant's right and according to this decision the complaint was rightly granted although the courts, in similar situations, dismissed such complaints unlawfully.[2287]

The decision of the BiH Constitutional Court No. AP 98/03 should be interpreted in light of the aforementioned obligation of the state authorities to act in a lawful manner since such reasoning was missing in the mentioned decision. In this way an impression is created that, nevertheless, there is a possibility to submit a request for equal treatment even when it would mean that the competent authorities must decide again in an unlawful manner. Unlike in Case Nos. U 49/02 and AP 653/03, in Case No. AP 98/03 the BiH Constitutional Court failed to examine the *lawfulness* of the decision challenged by the appellant before the BiH Constitutional Court and the decision which was submitted for the purpose of proving that he was unequally treated. By failing to give any further reasoning or to analyse the case the Court directly established that in the comparable situation it decided, without a justified reason, in a different manner which resulted in the appellant being discriminated against. By referring to the judicial practice of the European Court, the Constitutional Court presented arguments that the domestic courts, in addition to fair and objective proceedings, must also apply the same standards in cases with a similar factual and legal substrate.[2288] This conclusion should be supported in cases in which it is possible to interpret a relevant norm in different ways so that each interpretation may be considered theoretically lawful. The principles

2287 Compare, for instance, U 49/02, paragraph 55; AP 653/03, paragraph 44.

2288 AP 98/03, paragraph 34 in relation to the ECtHR, *Rasmussen v. Denmark*, 28 November 984, Series A no. 87, paragraphs 35, 38.

of legal certainty and equal treatment oblige all the authorities to envisage a possible decision in a comparable situation.[2289] In that manner, the legal opinion from the previous decision could be changed only based on the relevant justified reasons in order to avoid arbitrariness. This applies to administrative cases where the administrative authorities, by force of law, enjoy a certain margin of appreciation or to adjudicate cases if the law allows for desecration of the court to act within the lawful borders like, for instance, in cases of determining a criminal sanction or awarding compensation for damage.[2290]

However, if it comes out that the courts and administration have acted in an unlawful manner in similar situations there is a justified reason for deviation from such a precedent case or practice. Despite the principle on obligation of equal treatment and principle of legal certainty the State cannot be forced to repeat an unlawful decision. On the one hand, public authorities – administration and courts – pursuant to the BiH Constitution are obliged to comply with the law and the BiH Constitution. On the other hand, the confidence that the court will act in an unlawful manner is not worthy of protection even if, in certain situations, such acting would have a positive effect on the individual situation.

Accordingly, *there is no right to equal treatment in unlawfulness.*

b. Group cases of ethnically motivated discrimination

(a) Republika Srpska as a "State of Serb people"

In its Third Partial Decision in Case No. U 5/98, the BiH Constitutional Court established that Article 1 of the RS Constitution,[2291] except for the *collective* rights, has also violated the principle of the prohibition of discrimination of *individual* rights under Article II.4 of the BiH Constitution in conjunction with the right to freedom of movement and residence (Article II.3(m) of the BiH Constitution), the right to freedom of religion (Article II.3(f) of the BiH Constitution), the right to property (Article II.3(k) of the BiH Constitution) and the right to return (Article II.5 of the BiH Constitution and Annex 7 to the Dayton Peace Agreement), as well as some in conjunction with certain

2289 Compare, AP 807/04, paragraph 35 in relation to the ECtHR, *Iatridis v. Greece*, 25 March 1999, DR 1999-II, paragraph 58.

2290 AP 105/03, paragraph 39; AP 807/04, paragraph 35. Compare, also, AP 612/04, paragraph 37, about the application of the principle of legality with respect to the prosecution of perpetrators who committed criminal offences, and AP 215/05, paragraph 33, in respect of differences made while deciding on the severity of penalty.

2291 About this, see also: "10. Constituent power", p. 61 *et seq.*

agreements under Annex I to the BiH Constitution.[2292] The BiH Constitutional Court reached the same conclusion by analysing Article I.1(1) of the Federation of BiH Constitution, in which case freedom of religion was overlooked in error. Additionally, the mentioned provision of the Federation of BiH Constitution is also in violation of Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination from 1965.[2293]

Taking into account the instructions from Article II.4 of the BiH Constitution, the principle of prohibition of discrimination also applies to other rights under Article II, in particular under Article II.5 of the BiH Constitution in conjunction with Annex 7 to the Dayton Peace Agreement, as well as to the agreements under Annex I to the BiH Constitution. It is applicable even on a larger scale than Article 14 of the ECHR. In particular, the Entities are obliged to abolish any law or administrative practice containing discrimination or whose application may result in a certain form of discrimination. In the opinion of the Court, the discriminatory intent or effect may be established in different forms: a law is obviously discriminatory if it explicitly creates distinctions among or treats differently certain groups on the basis of some criteria such as language, religion, ethnicity, etc., and there are no justified reasons for such treatment. The application of a discriminatory law, which is *per se* neutral, will be considered discriminatory and the same applies to the neutral application of a neutral *per se* law which is *passed with discriminatory motive*. It will be considered as a discriminatory behaviour if the past historical *de iure* discrimination is *maintained* or perpetuated based on the State authorities' intentional acting or omitting to act. Thus, the Entities have a positive obligation on the basis of Article III.2(c) of the BiH Constitution to meet the requirements of the creation of legal certainty and protection of persons under their jurisdiction and they also have an obligation, based on Article II.1 of Annex 7 to the Dayton Peace Agreement, to create economical, political and social perspectives which will contribute to the voluntary return and harmonious reintegration of refugees and displaced persons without giving preferences over any specific group. The last positive obligation from Article I.3(a) of Annex 7 to the Dayton Peace Agreement was made effective in the way that it protects national groups and ethnic communities, *i.e.*, the minorities from administrative acts of administrative authorities and private persons.[2294]

In the opinion of the Constitutional Court, despite the fact that it contains the principle of prohibition of discrimination, the illusory neutrality of the RS

2292 U 5/98-III, paragraph 97.
2293 *Ibid*., paragraph 139.
2294 *Ibid*., paragraphs 77-80.

Constitution has failed to satisfy those standards. It is true that Article 1 of the RS Constitution is not *prima facie* discriminatory.[2295] However, this provision demonstrates its discriminatory nature indirectly since, as a constitutional ground, it is used by the public authorities as a ground for perpetuating the discrimination that had occurred during the armed conflict (in particular ethnic cleansing) as well as to neglect the obligation of creating a favourable climate for the return of refugees and displaced persons. According to the statistical data relating to the pre-war ethnic composition of the population in Republika Srpska territory, as well as the ethnic composition of returnees,[2296] the BiH Constitutional Court pointed to the fact that Article 1 of the RS Constitution has a discriminatory effect within the meaning of Article 13(a) of Annex 7 to the Dayton Peace Agreement because the results of the previous *de iure* discrimination in the form of ethnic cleansing in the Republika Srpska are still in place. Moreover, such an example of discriminatory behaviour may be found in the composition of the RS Government, judiciary and police.[2297] The relevant statistics, which allow for the same conclusion to be made about the FBiH, are referred to by the BiH Constitutional Court in respect of Article I.1(1) of the Federation of BiH Constitution.[2298]

Referring to the relevant reports of various international organisations operating in the field, the Constitutional Court concluded that:

> "... following the entering into force of the Dayton Agreement, there was and still is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Republika Srpska in order to prevent the so-called "minority" returns, either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation, or violent attacks on grounds of ethnic origin only, let alone the failure "to establish necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group", which follows from the right of all refugees and displaced persons to freely return to their homes of origin […]."[2299]

In addition,

> "[...], an almost ethnically homogeneous executive and judicial power of the Republika Srpska is a clear indicator that this part of the provision of Article 1 with the wording "The Republika Srpska is the state of the Serb people"

2295 *Ibid*., paragraphs 82-83.
2296 *Ibid*., paragraphs 86-89, or paragraphs 131-136.
2297 *Ibid*., paragraphs 90-93.
2298 *Ibid*., paragraphs 131-136.
2299 *Ibid*., paragraph 95 for the RS, paragraph 139 for the Federation of BiH.

> must be taken verbatim and provides the necessary link with a purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing [...]."[2300]

Taking into consideration the explicit wording of the text of the Constitution that "democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society", ethnic segregation can never be a legitimate aim with respect to the principles of democratic societies, nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation, serve as a means to uphold peace on these territories.[2301]

> In his separate (concurring) opinion, Judge *Danelius* focused on questioning an evident discriminatory effect of Article I of the BiH Constitution since it is incompatible with the constitutional obligation on creating a climate for the refugees and displaced persons in order to be able to return to their pre-war homes, which is a basic goal of the BiH Constitution. Neither can the protective designation of Serbs in the Republika Srpska as a State-building people be justified by the fact that the Serbs in the Republika Srpska are currently the majority population.[2302]

(b) Serbian, Bosnian and Croatian languages as official languages

Neither provisions of the Entity constitutions regulating the issue of official languages could get a pass mark after taking into consideration the right to freedom of movement and residence (Article II.3(m) of the BiH Constitution) and the right to return (Article II.5 of the BiH Constitution) in conjunction with the principle on prohibition of discrimination (Article II.4 of the BiH Constitution). With reference to Article I.6(1) of the Federation of BiH Constitution, the BiH Constitutional Court additionally relied on the European Charter for Regional or Minority Languages from 1992.[2303]

Article 7 of the RS Constitution[2304] used to read:

> "The Serbian language of ijekavian and ekavien dialect and the Cyrillic alphabet shall be in official use in the republic, while the Latin alphabet shall be used as specified by the law."

2300 *Ibid*., paragraph 95.
2301 *Ibid*., paragraph 96.
2302 Separate Opinion of Judge *Danelius* in regards to the decision in Case No. U 5/98-III.
2303 Compare, U 5/98-IV, paragraph 63 *et seq.*
2304 Changed and amended on the basis of Amendment No. LXXI.

> In regions inhabited by groups speaking other languages, their languages and alphabet shall also be in official use, as specified by law."

Article I.6 of the Federation of BiH Constitution[2305] reads (paragraph 1 was the only one challenged):

> "(1) The official languages of the Federation shall be the Bosnian and the Croatian languages. The official script will be the Latin alphabet.
>
> 2. Other languages may be used as means of communication and instruction.
>
> 3. Additional languages may be designated as official by a majority vote of each House of the Legislature, including in the House of Peoples a majority of the Bosniak Delegates and a majority of the Croat delegates."

Taking the analysis of the provisions of Entity Constitutions as a starting point, as well as the judicial practice, the BiH Constitutional Court came to a conclusion that the area of application of the term "official language" in the Republika Srpska is very wide. Namely, it significantly extends beyond the public area, in other words it also includes the areas which generally do not fall within the sphere of public authority, such as the media and economy.[2306] For the purposes of the interpretation of this provision, the legal provisions on the existence of other languages are less important than the territorial limitation to the areas inhabited by groups speaking other (non-Serbian) languages. Taking into account the pre-war ethnic composition of the population on the one hand and the obligation of safeguarding the right of return within the meaning of Article II.5 of the BiH Constitution on the other, no reference is to be made to the regions inhabited by groups speaking other (non-Serbian languages) unless the languages that have just emerged after the territorial segregation during the return process are taken into consideration. Accordingly, Article 7, paragraph 2 of the RS Constitution is inherently discriminatory and is in contravention of the positive obligations of the Republika Srpska to protect the right to return in conjunction with the right to freedom of movement and residence. Moreover, this provision is in contravention of Article I.4 of the BiH Constitution since it prevents the guaranteeing of economic freedom of movement of goods, services, people and capital.[2307] In principle, the BiH Constitutional Court has acknowledged that regulating the issue of official languages may be the Entities' legitimate aim. However, given the implications of such arrangements on the subjective right of individuals and given the introduction of a market economy (the Preamble of the Constitution) there is an implicit, but also necessary

2305 Changed and amended on the basis of Amendment No. XXIX.
2306 U 5/98-IV, paragraphs 25-28, 30.
2307 *Ibid*., paragraph 29-31.

responsibility of Bosnia and Herzegovina in this regard. Pursuant to Articles 8 through 13 of the European Charter for Regional or Minority Languages from 1992, that responsibility implies that, in the form of a framework law, the minimum standards have been established for the regulation of language issue. All the more so, the legislative authority of Bosnia and Herzegovina must consider the effective possibility of equal use of Bosnian, Croatian and Serbian languages not only in the institutions of Bosnia and Herzegovina but also at the level of Entities and at the level of their administrative units operating within the bodies of legislative, executive and judicial authorities, as well in the public life. The highest standards of Articles 8 through 3 of the European Charter for Regional or Minority Languages from 1992 should serve as a guideline for the mentioned three languages and, accordingly, the establishment of private schools would not be sufficient to meet the said standards. The lower standards referred to in the European Charter could – taking into account the appropriate conditions – be sufficient only for other languages.[2308]

The Constitutional Court used these standards, *i.e.*, this reasoning, in a proper manner in respect of the challenged provision of the FBiH Constitution. Additionally, the decision relies on the lack of participation of other ethnic groups in the legislative processes and that aspect has been already mentioned in a different context. Article I.6(3) of the FBiH Constitution gives the right of veto to Bosniaks and Croats when deciding on the introduction of other languages as official languages, which constitutes a violation of the right of other groups, which is referred to in Article 15 of the Framework Convention for the Protection of National Minorities and Article 1, paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, paragraph 3 of Article I.6 gives no legislative authority to the official use of other scripts since paragraph 1 determines that the Latin script is in official use together with the Croatian and Bosnian languages and thus it has made a distinction between language and script.[2309]

(c) Role of the Orthodox Church

The BiH Constitutional Court was to examine the constitutionality of Article 28, paragraph 4 of the RS Constitution,[2310] which reads as follows:

> "The State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values".

2308 *Ibid*., paragraph 34.
2309 *Ibid*., paragraphs 62-64.
2310 Changed and amended on the basis of Amendment No. LXXII.

In the opinion of the BiH Constitutional Court, giving privileges to the Orthodox Church in general terms does not create Constitution-related dilemmas, neither does the Constitution of BiH or other international law mechanisms, including the ECHR, guarantee the right of religious communities to equal treatment or an exclusive obligation that the State and church should be separated. Accordingly, establishing a state church is not in contravention of Article 9 of the ECHR, provided that specific guarantees are ensured with respect to the individual freedom of religion.[2311] Despite the aforesaid, the challenged provision from the RS Constitution does not reflect the standard of a democratic and pluralistic society. Article 28, paragraph 4 of the RS Constitution serves – as practice shows[2312] – as a constitutional basis for the creation of a public atmosphere in which the right to freedom of expression and religion is prevented.[2313] The safeguards from paragraphs 1 and 2 of Article 28 of the RS Constitution, when it comes to individual freedoms and the equality of religious communities, can neither remove this deficiency nor can they guarantee the effectiveness of the right to freedom of religion within the meaning of the ECHR.[2314] Also, giving clear privileges to the Orthodox Church through the provision of material assistance by the Republika Srpska, as it is stipulated under Article 28, paragraph 4 of the RS Constitution, cannot be justified within the constitutional meaning and therefore, it is inherently discriminatory.[2315]

(d) "De-Ethnisation" of town names

CH/00/4424 *et al*.-A	20001012
CH/01/8569 *et al*.-A&M Pašović *et a*l.	20031107
U 44/01 Names of "Serbian towns"	20040227

A similar problem arose in the judicial case dealing with the names of "Serbian" towns.[2316] In the procedure of review of abstract constitutionality there have been two legal acts of the RS[2317] under review, which were enacted during the armed conflict in Bosnia and Herzegovina. Those acts changed the names or the parts of the names of towns and settlements[2318] under Serb control in a

2311 U 5/98-IV, paragraph 39.

2312 U 5/98-IV, paragraphs 44-46. The Court mainly relies on the reports of the Ombudsman for Bosnia and Herzegovina in Case (B) 842/00, as well as in of the Human Rights Chamber's Case No. CH/96/29.

2313 Compare, U 5/98-IV, paragraphs 40, 42, 47.

2314 *Ibid*., paragraph 41.

2315 *Ibid*., paragraph 48.

2316 U 44/01.

2317 Law on Territorial Organisation and Local Self-Government (*OG of RS*, Nos. 11/94, 6/95, 26/95, 15/96, 17/96, 19/96 and 6/97), Law on the Town of Sarajevo, Law on the Town of Srpsko Sarajevo (*OG of RS*, Nos. 25/93, 8/96, 27/96 and 33/97).

2318 See the list in paragraph 17 of the decision.

way that to those towns' names was added the prefix "Serbian" or a change was made in some other way in order to manifest an exclusive demand of the Serb people relating to the ethnic affiliation of those towns or settlements.[2319]

> A similar application was submitted to the Human Rights Chamber and it only dealt with the issue of renaming the town of Foča into Srbinje. As to this application, the Human Rights Chamber could not find reasons indicating that there was a violation of the ECHR. The applicants were specifically claiming that by the act of renaming the town they were prevented from returning to their pre-war homes. The Human Rights Chamber noted that the primary aim of the applicants was to have the town's pre-war name of Foča restored. Taking into account the aforesaid, the Human Rights Chamber established that a right to have the pre-war name restored is not guaranteed under the ECHR and therefore declared the application incompatible *ratione materiae* with Annex 6 of the Dayton Peace Agreement.[2320]

However, the BiH Constitutional Court came to another conclusion. Before that conclusion was reached, the proceedings had been considerably obstructed.[2321] Almost three years after the submission of the request, which means after 27 February 2004, the Constitutional Court was still unable to take a decision. Since the challenged legal acts remained in force even after the enactment of the BiH Constitution there was no obstacle for the BiH Constitutional Court to take a decision in the relevant case.[2322]

The Court established that the challenged provision on changing the names of towns is discriminatory against the refugees and displaced persons of other ethnic backgrounds and against their right to return to their pre-war places of residence (Article II.4 in conjunction with Article II.5 of the BiH Constitution). Moreover, the Court considered that the challenged provisions were in contravention of the positive constitutional obligation to treat equally all constituent peoples.[2323] Renaming the towns by adding the prefix "Serbian" before the names of towns or municipalities, *i.e.*, replacing the previous name with the new one, which is associated with affiliation to the Serbs as a group, or by abolishing the previous prefix "Bosnian" in some cases implies that there is an intention to consider the related towns and municipalities exclusively as

2319 For instance, renaming *Goražde* into *Srpsko Goražde* or *Foča* into *Srbinje*; in conjunction with the historical context and psychology which make a basis for something like that to happen, compare also CH/01/8569 *et al*.-A&M, paragraph 9 *et seq.*

2320 CH/00/4424 *et al*.-D.

2321 Compare the allegations in the part of the decision "Procedure before the Constitutional Court."

2322 Compare, U 44/01-1, paragraph 54.

2323 *Ibid*., paragraph 55.

Serbian.[2324] The BiH Constitutional Court could not find or recognise a reasonable justification for the unequal treatment resulting from these provisions. If the names of the towns are changed in order to clearly indicate that certain places are situated in the Republika Srpska and that they are now inhabited by the Serb population as a majority, then such an approach would be against the constitutional principle of equality of the three constituent peoples in BiH.[2325] By putting the prefix "Serbian" before the names of towns or municipalities the fact is ignored that in many cases the current structure of the population is a result of the armed conflict and migrations caused by the armed conflict and it does not match the population structure from the beginning of the conflict. That is not in accordance with one of the basic goals of the peace agreement, in other words it is against the principle of the return of refugees and displaced persons to their pre-war homes. Even though this change in the names of towns and municipalities could be viewed as a desire to have those names be different from similar names of towns and municipalities in the territory of the FBiH, this goal could be easily achieved by choosing a prefix or name which is ethnically neutral. In any case, the constitutional arguments used in this regard were explicitly against choosing names that would indicate affiliation with any ethnic group, in the instant case with the Serb ethnic group. Therefore, in the instant case there is no reasonable relationship of proportionality between the means used and the goals sought to be achieved.[2326]

First, the BiH Constitutional Court ordered the RS National Assembly to harmonise Article 11 of the Law on the Territorial Organisation and Local Self-Government and Articles 1 and 2 of the Law on the Town of Srpsko Sarajevo with the Constitution of Bosnia and Herzegovina within three months of the date of publication of the decision. Since the order was not compiled with, the BiH Constitutional Court, by its decision of 22 September 2004, made the mentioned provisions ineffective, whereby the previous provisions, as an interim solution, became valid again. The fact that the unconstitutional provisions were not amended because the mechanism for the protection of "vital national interest" was used in the Council of Peoples of the Republika Srpska was of no relevance.[2327] At some later point the legislative authority of the Republika Srpska enacted the Law on Amendments to the Law on the Territorial Organisation of the Republika Srpska,[2328] whereby it adjusted the basic law to the decision of the BiH Constitutional Court and, for instance, the

2324 *Ibid*., paragraph 49.
2325 *Ibid*., paragraph 50 *et seq*.
2326 *Ibid*., paragraph 5 *et seq*.
2327 U 44/01-2, paragraph 9 *et seq*.
2328 *OG of RS*, No. 103/05.

town of *Foča*, which had been renamed into *Srbinje* during the armed conflict, was given back its previous name.

(e) Entity symbols – the enemy of the return process

Following the adoption of the decision of the Constitutional Court on the restoration of names of towns, a path was created to further challenge the ethnocratically instrumentalised State symbols at the Entity level.

> Two months after the adoption of the decision in Case U 44/01, in April 2004, *Sulejman Tihić*, the Chairman of the Presidency of Bosnia and Herzegovina at the time of filing the request, submitted a request for review of the constitutionality of the flag and coat of arms of the two Entities, as well as of the anthem of the Republika Srpska[2329] with an explanation that these Entity symbols constitute racial discrimination against the members of ethnic groups not represented by the challenged symbols.[2330]
>
> The applicant found the grounds for his request in the fact that, according to Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of BiH, the flag and coat of arms of the Federation of BiH, as well as the golden lily and the red-and-white chessboard represent the traditional symbols of Bosniaks and Croats, respectively, in which case there is absolutely nothing in those symbols that the Serb people could identify themselves with.
>
> On the other side of the Entity line, based on Articles 1 and 2 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, the coat of arms and flag contained only the symbols and colours of Serb people. Pursuant to Article 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska it is stipulated that the national anthem of the Republika Srpska shall be "Bože pravde**"**, which originated in 1872 and in the text of this song the Serb people are glorified and prayers are sent to God to "unify the Serb brothers, to save the Serb king and the Serb lineage".[2331] Even the National Assembly stated that "if the text of the anthem itself is examined, it must be admitted that it seems that it has racist and discriminatory character". However

2329 Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina (*OG of Federation of BiH*, No. 21/96 and 26/96), Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Hymn of the Republika Srpska (*OG of RS*, No. 19/92), Articles 2 and 3 on the Use of Flag, Coat of Arms and Hymn (*OG of RS*, No. 4/93) and Articles 1 and 2 of Law on Family-Patron's Days and Church Holidays of the Republika Srpska (*OG of RS*, No. 19/92).

2330 Article II.4 of the Constitution of BiH in conjunction with Articles 1.1. and 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination.

2331 U 4/04, paragraph 22.

> that text, in their opinion, can be seen correctly only as an historical and obsolete document, as an inheritance of the past. Today there is neither a "Serb crown" nor "Serb lineage". This text should not be understood as a political proclamation for the glorification of only the people of Serb origin, excluding all other constituent peoples but rather as "a transcendental imagination distant from the real contents".[2332] The applicant considered that Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem was discriminatory on racial grounds, according to which "the flag, the coat of arms and the anthem of the Republika Srpska shall be used […] in accordance with the provisions of this law, public order and moral norms of the Serb people […]". That article, including the very Article 2 of the mentioned law, is in contravention of Article I.1 of the BiH Constitution (continuity of the international personality of BiH) and Article I.3 of the BiH Constitution (composition of the State). Accordingly, these provisions "constitute the state-hood of the Republika Srpska".

The BiH Constitutional Court has met the applicant's request. Taking into account the special political and temporal context in which the challenged provisions were voted for in the two Entities, it must be noted that the disputed Entity symbols are in violation of the principle on constituent status of peoples not represented by these symbols, that these peoples are discriminated against by the use of those symbols and that the said symbols are not in line with the obligation of the State "to engage in no act of racial discrimination", in other words "to undertake 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", which is stipulated by Article 1.1 and Article 2(a) of the International Convention on the Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.[2333] It is a legitimate right of the Bosniak and Croat people in the Federation of BiH and the Serb people in the Republika Srpska to preserve their tradition, culture and identity through legislative mechanisms, but an equal right must be given to the Serb people in the Federation of BiH and the Bosniak and Croat peoples in the Republika Srpska and other citizens of Bosnia and Herzegovina. It cannot be considered reasonable or justified if any constituent people have a privileged position in preservation of tradition, culture and identity as all three constituent peoples and other citizens of Bosnia and Herzegovina enjoy the rights and fulfil obligations in the same manner as provided for in the Constitution of Bosnia and Herzegovina and the Constitutions of the Entities. Moreover, it is of a particular importance that under the Constitution of the Federation of BiH and the Constitution of the Republika Srpska the identity of the constituent

2332 U 4/04, paragraph 54.
2333 *Ibid*., paragraph 149.

peoples, education, religion, language, fostering culture, tradition and cultural heritage are defined as vital national interests of the constituent peoples.[2334]

i. Coat of arms and flag of the Federation of BiH

According to the opinion of the Constitutional Court, the coat of arms and the flag of the Federation of BiH are in violation of the principle of prohibition of discrimination based on national or ethnic grounds,[2335] as well as the constitutional principle of constituent people status because only the Bosniaks and Croats are represented by those symbols, not the Serbs in the Federation of BiH.[2336] It is true that Croats and Bosniaks in the Federation of Bosnia and Herzegovina have the legitimate right to preserve their tradition, culture and identity through legislative mechanisms, but an equal right must be given to Serbs as a constituent people and to other citizens of Bosnia and Herzegovina, all the more so as the Constitution of the Federation of Bosnia and Herzegovina defines the identity of the constituent peoples such as education, religion, language, fostering culture, tradition and cultural heritage as vital interests of the constituent peoples. Such right, in dealing with the symbols of the Federation of BiH, was not given to the Serb people as the status of constituent people was not acknowledged by the Constitution of the Federation of BiH at the time of passing the challenged laws.[2337] Further, the coat of arms and the flag of the Federation of BiH are in violation of the Entities' obligation under Article 2(a) of the International Convention on the Elimination of All Forms of Racial Discrimination. According to the Convention, the Entity shall refrain from engaging in any act or practice of racial discrimination; in other words, the Entity must "undertake 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".[2338]

ii. Coat of arms, flag and anthem of the Republika Srpska

The Constitutional Court took a similar decision concerning the symbols used by the Republika Srpska.[2339] These symbols, as official symbols of a territorial unit which has the status of an Entity, constitute a constitutional category and

2334 U 4/04, paragraph 150.
2335 Article II.4 of the Constitution of BiH in conjunction with Articles 1.1. and 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination.
2336 U 4/04, paragraph 125 *et seq*.
2337 *Ibid*., paragraph 123.
2338 *Ibid*., paragraph 125.
2339 *Ibid*., paragraph 136.

as such must represent all the 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, the 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 multiethnic Entity. As such they must reflect the character of the Entity. Taking into account the aforesaid, the arguments of the National Assembly that other constituent peoples in the Republika Srpska are not denied the right to use their own symbols, *i.e.*, other people may freely display their symbols on religious institutions, cannot be accepted.[2340] The Constitutional Court reiterated that it does not deny the right of the Serb people in the Republika Srpska to preserve its tradition, culture and identity through the symbols of the Republika Srpska, but an equal right must be given to the Croats and Bosniaks as constituent peoples and to all other citizens of the Republika Srpska bearing in mind that in the Constitution of the Republika Srpska the vital national interests of the constituent peoples are *inter alia* defined as the identity of the constituent peoples, education, religion, language, promotion of culture, tradition and cultural heritage.[2341] That the anthem of the Republika Srpska symbolises solely the Serb people in the Republika Srpska, as confirmed by the National Assembly, is undisputed.[2342]

The challenged symbols mean "distinction, exclusion, restriction or preference based on 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", which is prohibited under Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.[2343] This opinion of the Constitutional Court, taken together with the principles in its Decision in Case *U-5/98* on the constituent status of peoples and given the political and temporal context in which the legislator adopted the challenged law, leads to a conclusion that Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska have a discriminatory character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others. This opinion also leads to the conclusion that in the instant case the obligation of the State "to engage in no act or practice of racial discrimination", in other

2340 *Ibid*., paragraph 131.
2341 *Ibid*., paragraph 132.
2342 *Ibid*., paragraph 133.
2343 *Ibid*., paragraph 134.

words the obligation of the State "to undertake 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" was not complied with".[2344]

With reference to Article 2 of the Law on the Use of Flag, Coat of Arms and Anthem of the Republika Srpska, which stipulates that these symbols shall represent "the statehood" of the Republika Srpska, the Constitutional Court referred, once again, to its judicial practice in Case No. 5/98-IV. As the term "statehood of RS" had to be erased from Article 1 of the RS Constitution, the BiH Constitutional Court considered that neither in this case is it possible to find an interpretation of the term "the statehood" which would be in accordance with the BiH Constitution. Unlike federal states consisting of units that call themselves states, as far as Bosnia and Herzegovina is concerned, it is clear that the Republika Srpska and the Federation of BiH, according to the BiH Constitution, are not states but Entities. The BiH Constitutional Court relied on the provisions of Article I.1 and Article I.3 of the BiH Constitution which guarantee the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina. Finally, special parallel relations of the Entities with neighbouring countries are not possible without the consent of the Parliamentary Assembly of Bosnia and Herzegovina.[2345]

iii. Use of symbols in accordance with the moral norms of Serb people

The BiH Constitutional Court concluded that Article 3 of the Law on the Use of Flag, Coat of Arms and Anthem, in the part that provides that the symbols of the Republika Srpska are used "**in accordance with the moral norms of the Serb people**" is not in conformity with Article II.4 of the Constitution of Bosnia and Herzegovina, in conjunction with Article 1.1 and Article 2(a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.[2346] The Constitutional Court did accept the National Assembly's argument that the words "Serb people" must be understood as "Serb citizens". By relying on its decision in Case No. U 5/98, the Constitutional Court confirmed that putting the Serb people into a privileged position has no legitimacy since neither at the level of the Republika Srpska nor at the level of Bosnia and Herzegovina do the Serb people have a factual position of an endangered minority which must

2344 *Ibid*., paragraph 135.
2345 *Ibid*., paragraphs 137-141.
2346 *Ibid*., paragraph 147.

preserve its existence. Therefore, pursuant to Article 1, the privileged position of the Serb people violates the explicit designation of constituent peoples under the Constitution of Bosnia and Herzegovina.[2347]

F. 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.

1. Introduction

A significant part of the case law of the BiH Constitutional Court and the Human Rights Chamber deals with appeals, *i.e.*, applications, related to the process of returnees. Here, we primarily refer to the procedures where appellants, *i.e.*, applicants, submitted a request for repossession of their pre-war home, or a request for reinstatement to their pre-war employment, whereas courts or administrative authorities denied them that right fully or partially, or delayed the completion of the procedure. In this respect, the BiH Constitutional Court noted the following:

> "In the period between 1991 and 1995 the war in the territory of Bosnia and Herzegovina caused mass displacements and expulsions of population on the grounds of ethnic origin. Members of a certain ethnic group who refused to leave voluntarily were forced by military and paramilitary forces of a majority ethnic group to leave their homes [evidence].
>
> "In addition to the expulsion of population by force, which oftentimes caused serious violations of the international humanitarian law (see, in addition to the UN ECOSOC Report, also the case law of the International Criminal Tribunal for the former Yugoslavia), a lot more subtle ways were being employed to make the lives of members of a certain group more difficult, in order to force them to leave their homes and places where they lived. Such measures also included the termination of employment to employees who had a certain ethnic background: employees were dismissed, or were put on lay-off lists (and they were never reinstated to work). In certain cases it was clearly noted that the reason was their ethnic or political affiliation, yet in a majority

2347 *Ibid*., paragraph 143 *et seq*.

> of cases no reasons whatsoever were mentioned. In some cases, during the war, members of certain ethnic groups had been dismissed for failing to show up for work, although the employees may have been deported, may have fled, or may have not come to work for fear of persecution. However, even after the war there were cases of dismissals, demotions, cases where persons were not allowed to advance in service, or where they were prevented from getting employed on the grounds of ethnic origin or affiliation with some political group, trade union or labour organisation promoting the rights of workers [evidence]."[2348]

At the end of February 2003, the competent international organisations (OHR, OSCE, UNHCR and CRPC), who were in charge of the Property Laws Implementation Plan (PLIP), recalled that the re-instatement of property rights of refugees and internally displaced persons is but *one* of the elements of Annex 7 to the Dayton Peace Agreement.[2349] Annex 7 to the Dayton Peace Agreement had not been implemented by the time the PLIP was introduced. Admittedly, it is an important step in the process of implementation, yet it is but one of many elements for a sustainable return of refugees and displaced persons. Annex 7 to the Dayton Peace Agreement shall be enforced in full once all the people are able to return to their homes, once they have the same chance for employment, education and integration into the social protection systems. Responsibility for this lies on the local communities.

2. Groups of cases

The case law of the BiH Constitutional Court and the Human Rights Chamber, including the Human Rights Commission within the BiH Constitutional Court, which deals with the issue of the process of return of refugees and displaced persons, incorporates, in principle, property-related disputes in relation to restitution (restoration) or compensation for property damage (ownership or other forms of property rights) which had been destroyed during the war. Thereby, the process of privatisation of the so-called social (*i.e.*, state-owned) property into private property had a certain role. A significant part of the case law relates to disputes on the re-reinstatement of cultural and spiritual legacy, as well as to the impossibility to use them. Further, this group includes cases concerning the reinstatement of employment and the payment of pensions.

Discrimination on the ground of ethnic affiliation was very often present, as an inevitable thread accompanying all these groups of cases. For that

2348 U 19/01, paragraph 4.

2349 Press release of the High Representative on behalf of the mentioned organisations dated 27 February 2003, available at: <www.ohr.int/ohr-dept/presso/pressr/archive.asp>.

matter, refugees and displaced persons constantly met with the resistance of incompetent or hostile administrative authorities and courts, so that a large number of cases involved problems related also to the right to a fair trial.

In its case law, both courts, the BiH Constitutional Court and the Human Rights Chamber, relied, mainly, on the property right, the right to inviolability of home, freedom of religion, various procedural guarantees or prohibition of discrimination. The BiH Constitutional Court may, additionally, rely on the right to return (Article II.5 of the Constitution of BiH), as a specific constitutional right of protection. Finally, also Annex 7 to the Dayton Peace Agreement had a certain role in providing arguments for decisions of the BiH Constitutional Court. In essence, one may distinguish between the following groups of cases:

a. Delays or denial of the right to repossession of property

AP 1070/05 Ljubas	20060902
CH/00/3708-A&M Lazarević	20010309
CH/00/3733 *et al*.-A&M Marjanović *et al*.	20011109
CH/00/4566 *et al*.-A&M Jusić *et al*.	20020607
CH/00/6134-A&M Štrbac *et al*.	20020906
CH/00/6423 Vujasinović	20050406
CH/00/6436 *et al*.-A&M Krvavac *et al*.	20020705
CH/00/6444 *et al*.-A&M Trkija *et al*.	20020510
CH/01/7080 Miljković	20060607
CH/01/7252 Meneš	20061220
CH/01/8457 Gotovac	20060705
CH/97/46-M Kevešević	19980910
CH/97/62-A&M Malčević	20000908
CH/98/1124 *et al*.-A&M Dizdarević *et al*. (21 cases from Gradiška)	20000609
CH/98/659 *et al*.-A&M Pletilić *et al*.	19990910
CH/98/698-A&M Jusufović	20000609
CH/98/752 *et al*.-A&M Bašić *et al*. (15 cases from Gradiška)	19991210
CH/98/756-A&M Đ. M.	19990514
CH/98/777-A&M Pletilić	19991008
CH/98/866-A&M Caljan	20000309
CH/99/2030 *et al*.-A&M Rudić *et al*.	20020307
CH/99/2289-A&M M. G.	20031010
CH/99/2315-A&M Hadžisaković	20031010
U 15/00 Delić	20010416 *OG of BiH*, No. 10/01

In a series of cases, the BiH Constitutional Court and the Human Rights Chamber, including the Human Rights Commission within the BiH Constitutional Court, dealt with the failed attempts of owners and occupancy right holders to repossess their pre-war property. On the basis of the old, "wartime" legal basis, which was in contravention of the ECHR, the competent institutions and authorities had declared the pre-war property abandoned or had instantly and directly allocated it to third persons, and had seized it, oftentimes unlawfully, and at times forcibly.[2350] In some cases, the appellants, *i.e.*, applicants, met with the silence of the administration or inactivity of the competent authorities, notwithstanding the fact that the legal situation was changed so as to guarantee to the pre-war owners and occupancy rights holders the rights to repossession of their respective property. It was practically impossible for them to exercise their rights in such a manner. Finally, the courts rejected their claims, oftentimes thereby unlawfully denying their own jurisdiction.[2351] Less seldom were the competent administrative authorities or courts *pro forma* active. However, the damaged persons were unable to effectuate their claims due to the impossibility of obtaining an enforceable judgment, as the case was continuously being referred back from the higher to the lower instances and *vice versa*.[2352]

Even when the courts were able to preserve their independence, and adopted a decision on the eviction of an unlawful occupant in favour of the so-called minority returnees, repossession would fail as a result of the impossibility to implement such a decision in the enforcement proceedings. In some cases the enforcement proceedings would stall, even after unjustifiably lengthy administrative or judicial proceedings,[2353] or police forces would refuse to render the necessary support, that is they would hold that "they were not in a position" to assist the competent executive judicial authorities, which were opposed by groups of citizens organised in order to "protect" unlawful or temporary occupants.[2354] Occupancy rights holders experienced similar things. Despite final decisions of the CRPC upholding their occupancy right and the right to the restitution of their apartment, they were unable to repossess their respective apartment, in spite of numerous attempts. Namely, in many such cases the domestic competent administrative authorities refused to issue a ruling on the

2350 As to the cases of seizing property after the war in the absence of refugees or displaced owners, which purpose was to allocate the mentioned property to third persons, compare, also, with CH/00/6134-A&M.

2351 CH/98/756-A&M; CH/97/62-A&M; CH/98/659 *et al*.-A&M; CH/98/752 *et al*.-A&M; CH/98/866-A&M, paragraph 63 *et seq.*; CH/98/698-A&M, paragraph 81; CH/98/1124 *et al*.-A&M.

2352 U 15/00; CH/01/7080; CH/00/6423.

2353 Compare, for instance, with AP 1070/05.

2354 CH/96/17-A&M; CH/96/27-A&M; CH/96/28-A&M; CH/97/51-A&M; CH/00/6143 et al.-A&M; CH/00/6142-A&M; CH/00/6144-A&M.

enforcement of a decision of the CRPC in a timely fashion, that is to say within the legal time limit.[2355] At times returnees who had enforceable judgments were denied repossession of property with the reasoning that such facilities were not habitable, for the reason that their purpose had been changed in the meantime, that is they were transformed into business premises.[2356] In such situations the only possibility that the damaged persons were left with was compensation for damage.

If, after all those problems, returnees still managed to repossess their property, it would happen oftentimes that it had been destroyed or looted. Unfortunately, in many cases returnees were unable to prove who had stolen or destroyed their property, and that the competent authorities were responsible. Nevertheless, in one case the Human Rights Chamber obtained relevant information and consequently adopted a decision establishing that authorities competent for the return were responsible, because their failure to act resulted in the theft of the applicant's property.[2357] The Human Rights Chamber was not in a position to establish in all cases discriminatory motives on the part of the competent authorities to carry out obstruction, although in many cases there was room for such a view.[2358]

By the time the application of the legislation on abandoned apartments or property was completed, the legal situation, despite its neutrality, was discriminating against the so-called minority returnees, so that ethnic cleansing, which had taken place during the armed conflict, "continued". Namely, it was completely logical for the members of "the minority groups" in a certain territory to leave their homes because of the armed conflict. It was those persons precisely who, by instituting proceedings for the repossession of property, had to face the legal situation where their apartments were occupied by third (more often than not, also displaced) persons.[2359]

> The incomprehensible effect of the normativity of principles of the legal state and the rule of arbitrariness, in the same area and at the same time, on the one hand, and weakened confidence in the functionality of the judiciary, on the other, was very well clarified before the Human Rights Chamber in Case No. CH/96/28. In September 1995, that is, right before the adoption of the Dayton Agreement, troops of the Army of the Republic

2355 CH/99/2030 *et al*.-A&M; CH/99/2289-A&M, paragraph 52; CH/00/3708-A&M; CH/00/3733 *et al*.-A&M; CH/00/4566 *et al*.-A&M.

2356 CH/01/8457, CH/01/7252.

2357 CH/99/2315-A&M, paragraph 79 *et seq*.

2358 Compare CH/97/46-M with CH/00/6444-A&M and CH/00/6436 *et al*.-A&M; CH/98/698-A&M.

2359 CH/98/659 *et al*.-A&M, paragraph 207; CH/98/777-A&M, paragraph 109; CH/98/752 *et al*.-A&M, paragraph 176; CH/98/1124 *et al*.-A&M, paragraph 186.

of BiH were advancing in the field, the consequence of which was that the Serbian civil population started moving from the affected areas. The applicant, who was of Bosniak origin, had to leave, along with his family, his apartment in Banja Luka, where he had lived as an occupancy right holder for almost 30 years. Namely, when three members of the reserve police arrived in front of his apartment and tried to force their entry, the applicant called the regular police in Banja Luka in order to protect him. Police arrived some time later, and, after interrogating the appellant, they left the apartment, and left the applicant's family at the mercy of the reserve police members. The reserve police members gave the applicant's family 5 minutes to leave the apartment. The same night an expelled person of Serbian origin moved into the apartment. For more than two years, which, mainly, related to the post-Dayton period, the applicant was unable to repossess the abandoned apartment. The applicant fought against the unlawful conduct of the police and the occupation of the apartment by employing the conventional instruments of a legal state. In 1996 the applicant managed to obtain a legally binding court ruling on the eviction of the unlawful occupant. During that year the applicant tried 7 times to enforce the ruling in the presence of a court executor and police, and failed in so doing. Each attempt at eviction of the apartment was accompanied by a group of enraged people who were "protecting" the unlawful occupant. Despite failed attempts, the applicant still believed the competent authorities that they would enable him to exercise his right. However, each time the eviction was attempted the police would stage the situation such that it was "impossible" to execute the eviction. Even when the unlawful occupant gave possession of the apartment to another unlawful possessor with the aim that the eviction ruling would thereby cease to be legally effective, the applicant persisted in his trust in the legal state. Subsequently, in December 1996 he brought a legal action with the competent court against the new unlawful possessor of the apartment. The court did not take a decision on the legal action until November 1997 when the Human Rights Chamber issued its decision in the same case. Only following the decision by the Human Rights Chamber did the applicant manage to repossess the apartment at issue.

b. Disputes on occupancy right and other rights to possession

CH/00/1669 *et al*.-S. G. *et al*.	20060913
CH/01/7224-A&M Vučkovac	20030207
CH/01/7257-A&M Borota	20030207
CH/02/8939-A&M M. H.	20030307
CH/03/12959 Šišić	20060913
CH/03/14597 Krajter	20061220
CH/96/23-M Kalinčević	19980217

CH/97/42-A&M Eraković	19990115
CH/97/46-M Kevešević	19980910
CH/97/58-A&M Onić	19990212
CH/98/1198-A&M Gligić	19991008
CH/98/1232-A&M Starčević	19991210
CH/98/1237-A&M F. G.	19991008
CH/98/1495-A&M Rosić	19990910
CH/98/1785-A&M Radulović	19991210
CH/98/636-A&M Miljković	19990611
CH/98/710-A&M D. K.	19991210
CH/98/894-A&M Topić	19991105
CH/98/935-A&M Gligić	19990910
CH/99/1961-A&M Zornić	20010208
U 15/99-2 Zec	20010612 *OG of BiH*, No. 13/01

Pursuant to legal regulations, which were adopted immediately after the war, oftentimes in a manner which was not completely transparent and accessible to all, the pre-war occupancy rights holders were given a rather short time limit (7-14 days) to file claims for repossession of their apartments, which had been abandoned during the war. As a result of a failure to file an appropriate claim, many apartments were declared "permanently abandoned", so that the previous occupancy rights holders lost all rights to their respective apartments, which were, most often, allocated to third persons (oftentimes displaced persons or senior military personnel).[2360] In 1998, under the auspices of the international community, the legal situation was completely changed and all legal acts which had been enacted on the basis of regulations on abandoned apartments were declared null and void retroactively. Unfortunately, the Chamber still continued to tackle the mentioned problem area, as there were situations where two claims were filed for one and the same apartment, *i.e.*, the pre-war occupancy right holders filed a claim on the one hand, and the "post-war" occupancy right holders or temporary occupants did so as well, on the other. The consequence was such that the pre-war occupancy right holders encountered great difficulties and long delays in recovering possession over their pre-war apartments. Very often the reason for it– which became irrelevant following the adoption of new legislation – was that the temporary occupants, allegedly or in reality, had no alternative accommodation whatsoever at their disposal,[2361] or that their pre-war apartments were still being occupied by third persons.[2362] Therefore, a lack of alternative accommodation constituted one of the largest problems in the implementation of the process of return.

2360 CH/97/46-M; CH/96/23-M; CH/98/1237-A&M.
2361 CH/97/42-A&M, CH/97/58-A&M.
2362 CH/99/1961-A&M.

For that reason precisely, in accordance with the standards of human rights and freedoms,[2363] the legislature adopted new legislation allowing the eviction of temporary occupants from apartments even in such cases where the goal was not for apartments to be returned to the pre-war occupancy right holders, but to list them among apartments intended for alternative accommodation, *i.e.*, to put them at the disposal of third persons, if a temporary occupant was able to get alternative accommodations for themselves.[2364] In order for the process of return not to be prevented or endangered, all temporary occupants were denied temporary legal protection against rulings on eviction.[2365] In other words, an appeal against the first instance ruling did not have a suspending effect. In some cases the competent authorities proved to be so "consistent" as to evict people occupying apartments lawfully, for instance, on the basis of a contract on the lease of an apartment or a ruling on the allocation of an apartment.[2366] There were times when apartment occupants (filing applications with the Human Rights Chamber) were threatened with eviction,[2367] or eviction was actually enforced,[2368] whereby the fact that the Human Rights Chamber had issued a temporary measure prohibiting eviction was not complied with (which happened indeed on at least one occasion).[2369] Proving as an especially difficult problem area to deal with in practice were the cases where courts had to balance the interests, on the one hand, of the pre-war owners or occupancy rights holders, and, on the other hand, of temporary owners or occupancy rights holders when it comes to property which had been exchanged or sold during the war. Relevant legislation had to be improved on several occasions. Courts were in "deep trouble", for, in certain cases, legislation stipulated conduct contrary to the principle of the legal validity of legal acts, or stipulated very detailed mechanisms of protection against the enforcement of eviction rulings. Since Annex 7 to the Dayton Peace Agreement did not stipulate *ex lege* the nullity of a contract on the sale or exchange of real property during the war,[2370] but allowed instead for a possibility to challenge before a court the legal presumption of entering into a contract with a defective intention (threat and coercion), it was necessary to clarify whether both parties to the proceedings had entered into

2363 CH/02/8939-A&M, paragraph 66.

2364 On this see a separate opinion of the President of the Human Rights Chamber in Case No. CH/02/8939-A&M.

2365 Compare with, CH/02/8939-A&M.

2366 For instance CH/98/1198-A&M; CH/98/1232-A&M; CH/98/1495-A&M; CH/98/894-A&M; CH/98/710-A&M; CH/98/1785-A&M; CH/98/935-A&M; CH/98/636-A&M.

2367 For instance CH/96/23-M; CH/98/1198-A&M; CH/98/1232-A&M; CH/98/1495-A&M; CH/98/1785-A&M; CH/98/894-A&M.

2368 For instance CH/96/23-M; CH/98/1198-A&M; CH/98/1232-A&M; CH/98/1495-A&M; CH/98/1785-A&M; CH/98/894-A&M.

2369 CH/98/710-A&M.

2370 Likewise in U 15/99.

a contract of their own free will. The CRPC limited itself – as stated in the text above – to determining conscientious possession, that is ownership as of 1 April 1992. This means that a date, which the parties should not consider disputable, was selected. The CRPC would leave domestic courts with the decision-making on the crucial issue relating to the validity of a subsequently concluded contract on the purchase and sale or exchange of real property.[2371] Thereby, the enforcement of the CRPC decision was the rule. In exceptional circumstances, a damaged person could file a claim with the CRPC in order for the enforcement of the decision to be delayed pending the completion of court proceedings related to the validity of a contract on the purchase and sale or exchange, solely if allowed by the CRPC.[2372] For this to happen, the new owner had to file a claim and attach thereto a contract on exchange or purchase and sale, and prove that he would suffer irreparable damage if the enforcement of a CRPC decision was not postponed. Therefore, the domestic courts were not authorised to allow, without exclusive order by the CRPC, the postponement of the enforcement of a CRPC decision.[2373] Thereby, the necessary cooperation between domestic administrative authorities and courts, on one hand, and the CRPC, on the other, was not well-functioning, mainly because the domestic authorities were not familiar with the relevant regulations or practice. Despite the fact that the applicant managed to obtain a legally binding judgment in his favour and that he was registered in a land book as an owner,[2374] or that an appropriate judicial dispute was under way,[2375] there were instances where domestic courts "blindly" enforced an eviction ruling, issued on the basis of a CRPC decision, without issuing beforehand the decision on temporary court protection that was being sought. The Human Rights Chamber considered such deficiency or denial of legal protection to be a violation of the right to property, as well as a violation of the right to an effective legal remedy.[2376] Also, unequal treatment of legal holders of a CRPC decision and those who had not obtained such a decision (as yet) was, in the opinion of the Human Rights Chamber, unjustified, precisely for the – above mentioned – reasons whereby the situation concerning ownership was undisputable as at the relevant date (1 April 1992).[2377]

2371 The burden of proof lies with a party claiming that a contract on exchange or purchase and sale had been entered into on a voluntary basis.

2372 Article 11 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Refugees and Displaced Persons (*OG of FBiH,* Nos. 43/99, 51/00, 56/01, 27/02 and 24/03).

2373 CH/00/1669 et al.; CH/03/12959; CH/03/14597.

2374 For instance, CH/01/7224-A&M, paragraph 70 *et seq*.

2375 CH/01/7257-A&M, paragraph 50 *et seq*.

2376 *Ibid*. Still, this practice could be characterised as contrary to that applied in Case No. CH/00/1669 *et al*., which should be given priority, as it is absolutely in accordance with Article 11 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Refugees and Displaced Persons (*OG of FBiH,* Nos. 43/99, 51/00, 56/01, 27/02 and 24/03), which was neglected in Case No. CH/01/7257-A&M.

2377 CH/01/7257-A&M, paragraph 67 *et seq*.

c. JNA apartments

CH/00/3574-A&M Tasovac	20031107
CH/00/5152 *et al*. Rašković *et al*.	20050706
CH/02/8202 *et al*. M. P. *et a*l.	20030316
CH/03/14442 Pavlović	20060208
CH/96/2 *et al*.-A&M Podvorac *et al*.	19980612
CH/96/22-M Bulatović	19971107
CH/96/31-M Turčinović	20080311
CH/97/40-M Galić	19980612
CH/97/60 *et al*.-A&M Miholić *et a*l.	20011207
CH/98/1311 *et al*. Kurtišaj *et al*.	20020902
CH/98/1493-A&M Pilipović	20030606
CH/98/240 *et al*. D. I. *et al*.	20050208
CH/98/874 *et al*.-Pemac *et a*l.	20050208
CH/99/2624 I. D.	20050309
U 83/03 N. Špirić "JNA apartments"	20040922

A significant part of the case law of the Human Rights Chamber – and, after the dissolution of this institution, of the Human Rights Commission within the BiH Constitutional Court and of the BiH Constitutional Court – relates to the applications lodged by (former) JNA military personnel. In 1991, pursuant to the federal Law on Securing Housing for the JNA,[2378] the JNA started transforming military apartments, houses and land, which it had at its disposal (approximately 16,000 in BiH), and which were socially-owned, into apartments in private ownership (privatisation) in favour of its members. The majority of buyers of such apartments had already lived for years in such apartments on the basis of an occupancy right. Accordingly, prior to the beginning of the war a large number of contracts on the purchase of apartments were entered into with the JNA, and in some cases the purchase price had been paid already. In the subsequent period the Government of the Socialist Republic of BiH prohibited the further sale of socially-owned property,[2379] as the JNA lost the legitimacy to sell such apartments after BiH had gained independence.[2380] Administrative authorities and courts delayed the procedures of concluding contracts on purchase which had begun. Besides, all the property of the SFRY, including that belonging to the JNA in the territory of BiH, became property of the Republic of BiH, and all socially-owned property was transformed into state-owned property. In February 1995, all administrative authorities and courts, pursuant

2378 *OG of SFRY,* No. 84/90. That was the law of SFRY which was adopted in 1990 and which entered into force on 6 January 1991.

2379 *OG of SRBiH,* No. 4/92.

2380 What is more, the Government of SRBiH, already before it gained independence, banned the sale of socially-owned property by law (CH/96/2, paragraph 9).

to the decree of the Presidency of the Republic of BiH with legal force,[2381] terminated all procedures of purchase of apartments that had commenced. In December 1995, all contracts on the purchase of apartments, also pursuant to the presidential decree with legal force,[2382] were retroactively declared null and void (this decree was voted for in the form of law in 1996).[2383] Some applicants were threatened with eviction,[2384] or eviction had already been enforced.[2385] The Human Rights Chamber confirmed that all former JNA military persons acquired ownership rights if they had concluded a valid and legal contract on the purchase of apartments prior to the entry into force of the presidential decree. Retroactive cancellation of such contracts was in contravention of the ECHR.[2386] Damaged persons should not have been obliged, pursuant to the legal regulations on abandoned apartments, to leave apartments, nor could they have been prevented from repossessing the mentioned apartments if they had been abandoned.[2387]

The legal situation changed at the beginning of 1998.[2388] In order for one to repossess an apartment, pursuant to Article 3.a of the Law on the Cessation of the Application of the Law on Abandoned Apartments, it was stipulated that an applicant for repossession of an apartment must be in possession of BiH citizenship as of 30 April 1991, and that he/she must not have been a member of the JNA after the given date. On the contrary, such person would lose his/her status as a refugee or displaced person, unless the applicant gained such a status outside the SFRY before 14 December 1995, whereby after acquiring such a status one could not be a JNA member and could not have other occupancy or similar rights outside BiH. The Human Rights Chamber held that the requirements described above, citizenship and non-affiliation with the JNA, were in contravention of the ECHR.[2389]

The legal situation changed again thereafter, under the pressure of the OHR in agreement with the Federation of BiH Government. On the one hand, conditions for the recognition of contracts on the purchase of JNA apartments were changed.[2390] Only a person who had a valid contract on the purchase of

2381 *OG of RBiH,* No. 4/95.

2382 *OG of RBiH,* No. 50/95.

2383 Compare with CH/96/3 *et al*.-M, paragraph 8 *et seq*., CH/96/22-M, paragraph 7 *et seq*., paragraph 21 *et seq*.

2384 CH/96/22-M.

2385 CH/97/40-M; CH/00/3574-A&M.

2386 See, for instance, CH/96/2, paragraph 58 *et seq*.

2387 CH/96/22, paragraphs 19, 46.

2388 Law on the Cessation of the Application of the Law on Abandoned Apartments (*OG of FBiH,* No. 11/98).

2389 CH/97/60 *et al*.-A&M, paragraph 158 *et seq*.

2390 Article 39.a-e of the Law on the Purchase of Apartments with Occupancy Right from 1999; in connection with this, see, CH/98/240 *et al*., paragraph 73 *et seq*.

an apartment and who had paid in full the price for the apartment could be recognised as an owner of the apartment.[2391] Nevertheless, recovery of JNA apartments was still connected to the conditions prescribed in Article 3.a of the Law on the Cessation of the Application of the Law on Abandoned Apartments. Only during 2004 were such conditions discarded.[2392] Under the regulations from 2004, conditions ruling out the possibility for repossession of a military apartment were as follows: possession of an occupancy or similar right in the territory of the former SFRY (paragraph 1); service in a foreign army after 14 December 1995 (paragraph 2);[2393] or existence of a contract on the purchase of respective apartment from the "post-war" occupant (paragraph 3). The condition referred to in paragraph 3 has never been the subject of consideration in terms of its conformity with the standards referred to in Annex 4 or 6 to the Dayton Peace Agreement. Therefore, there is no case law related to this paragraph. On the other hand, the Human Rights Commission within the BiH Constitutional Court held that the condition referred to in paragraph 2 was brought in line with the ECHR.[2394] Namely, the state has a legitimate right to defend and impose on citizens the obligation to be loyal to their state (this principle arises from the principle of the sovereignty of a state), which will be violated or threatened if a person serves in the army of a foreign state. In such a case, the state has the right not to restore the possession of an apartment to the applicant, and to pay adequate damages to the applicant. When it comes to paragraph 3, the Human Rights Commission within the BiH Constitutional Court considered that these conditions were contrary to the ECHR, as they were in contravention of the principle of proportionality of an interference with property rights.[2395]

Article 3.a of the Law on the Cessation of the Application of the Law on Abandoned Apartments was amended again in the summer of 2003. A former JNA member could repossess the apartment if he was not in a foreign army after 14 December 1995 (paragraph 1), or if he acquired refugee status outside the former SFRY before 14 December 1995. However, a condition whereby a person must not acquire another occupancy or similar right in the territory outside BiH was still applicable. The BiH Constitutional Court declared as constitutional the entire Article 3.a, in its form from 2003.[2396]

2391 CH/98/1311 *et al*., paragraph 81; CH/03/14442, paragraph 40.
2392 Article 39.e of the amended Law on the Purchase of Apartments with Occupancy Right.
2393 In this case, applicants were restricted in terms of their right to compensation.
2394 CH/02/8202 *et al*., paragraph 162 *et seq*.; CH/00/5152 *et al*., paragraph 118 *et seq*.; CH/98/874, paragraph 157 *et seq*.
2395 CH/99/2624, paragraph 60 *et seq*.; CH/03/14442, paragraph 53 *et seq*. However, this provision still remained in force.
2396 U 83/03, paragraph 41 *et seq*.

What can one conclude? A balanced solution – even if not always completely in conformity with the standards laid down in the ECHR[2397] – must be sought, unfortunately, within the tense relations which are the result of the right to return, on the one hand, and the social sensitivity towards the members of the opponent military forces, on the other. That is a painstaking matter which requires, in addition to the intervention of the highest courts, a creative role and influence of the international community embodied, primarily, in the persona of the High Representative. By then, the courts would have to establish that in many cases of preventing one from acquiring the right of ownership over the so-called JNA apartments, or from repossessing them, the property rights and/or the right to home were violated, solely or in connection with the prohibition of discrimination in enjoying the mentioned rights.

d. Stalling or suspending the enforcement of the compensation for damage

AP 774/04 Runić *et al*.	20051220
CH/00/3615 *et al*.-Jotić *et al*.	20051109
CH/01/3615 *et al*.-Jotić	20051109
CH/01/8110-A&M	20030307
CH/01/8529 Marijanović	20030205
CH/02/12468 *et al*. Š. Kadrić *et al*. “War damage”	20050907
CH/97/104 *et al*.-A&M Todorović *et al*.	20021011
CH/97/48 *et al*. further legal remedies	20030704
CH/97/48 *et al*.-A&M Poropat *et al*.	20000609
CH/98/166-A&M Bjelonja	20030207
CH/98/375 *et al*.-Đ. Besarović *et al*.	20050406
CH/98/377 *et al*.-A&M Đurković *et al*.	20031107
CH/98/420 *et al*.-A&M Kugić *et al*.	20031010
CH/99/1613 *et al*. Š. B. *et al*.	20051214
U 14/05 N. Špirić “Old foreign currency savings”	20051202
U 57/01 35 members of the House of Peoples of the Parliament of Federation of BiH, *et al*.	20031220

The consequences of the armed conflict in BiH, taking into account the length of duration, scope and intensity of the war activities, are enormous. Many people are trying to obtain compensation for the damage they suffered, or to get with their existing and recognised damage compensation claims as far as *fiscus*. Oftentimes, the courts granted claims filed by plaintiffs. Nevertheless, the Entities opposed the enforcement and payment of damages determined by legally binding enforceable judgments, mainly in order to prevent the national treasury from going bankrupt.

2397 Compare with, CH/03/14442.

e. War damage

In the Republika Srpska, *fiscus* was burdened with claims filed by military persons, by close relatives of killed military personal, by owners whose real property or movable property had been seized for war purposes, or whose property had been destroyed or damaged during military operations, as well as by holders of so-called old foreign currency savings. One case concerned a failure on the part of the competent courts to enforce an enforceable judgment in respect of the compensation for damage, which was, obviously, happening on the basis of tacit instructions by the executive authorities. Such instructions were subsequently "reinforced" by enacting a law which was supposed to relieve the Republica Srpska *fiscus* of burden, so as to postpone indefinitely the enforcement of all enforceable judgments in respect of the compensation for damage. Before the entry into force of the Law on Postponement of Enforcement of Court Decisions on Payment of Compensation for Pecuniary and Non-Pecuniary Damages resulting from War Activities and on Payment of Old Foreign Currency Savings Deposits, Payable from the Republika Srpska Budget,[2398] the Human Rights Chamber considered that the right of access to court and the right to property of all persons who were awarded the so-called war damage by a legally binding judgment were violated. Namely, courts failed to enforce the respective judgments by violating the constitutional principle of division of power. After the entry into force of the mentioned law, the Chamber, nevertheless, recognised as to the Republika Srpska the legitimate right to postpone the enforcement of "war damage" for the sake of the protection of its own economic sustainability. However, the Chamber raised an objection that the established blanket laws, which led to indefinite postponement of the enforcement of "war damage", violate the principle of a fair balance between the individual property rights of damaged persons, on the one hand, and the public interest of an Entity, on the other hand, as well as the right of access to court and the principle of the rule of law. The Human Rights Chamber obliged the Republika Srpska to discontinue the uncertainty for creditors by committing itself to amending legal solutions related to creditors and the Republika Srpska *fiscus*.[2399] Indeed, in the subsequent period, the Republika Srpska undertook legislative activities in a manner which was obviously contrary to the binding decision of the Chamber, so that, in the end, the disputed law again damaged a great number of persons. In Decision No. CH/01/8110, the Human Rights Chamber confirmed its previous case law and again ordered the Republika Srpska to commit itself to new amendments to the legal solutions, in order to

2398 *OG of RS,* No. 25/02.
2399 CH/01/8110-A&M, paragraph 44 *et seq*.

redress violations of the right to property and the right to a fair trial referred to in the ECHR.[2400] Unlike Decision No. CH/01/8110, in Case No. CH/01/8112 the Human Rights Chamber issued an additional order to the Republika Srpska to enforce legally binding judgments issued to the applicants, reasoning that postponement of enforcement was no longer justified since the RS failed to enforce the decision of the Human Rights Chamber in a proper manner in Case No. CH/01/8110.[2401] Decision No. CH/01/8112 was consequently rendered ineffective following the proceedings on the request for review of the mentioned decision.[2402]

In 2003, all unsettled claims for compensation for damage of war veterans, of close relatives of killed military personnel, of owners whose real and movable property had been seized for war purposes, or whose property was destroyed and damaged during military operations, as well as of the holders of so-called old foreign currency savings, were declared by the Republika Srpska to be part of the so-called public debt. The payment of public debt was postponed on the basis of the Law on the Temporary Postponement of the Enforcement of Claims payable from the Budget of the Republika Srpska[2403] pending the adoption of a law to regulate the manner of settlement of claims payable from the budget of the Republika Srpska in respect of the internal debt, at the latest by 31 December 2004. This was the first time that war damage was defined as the internal debt of the Republika Srpska. In 2004, pursuant to the Law on Determination and the Manner of Settlement of the Internal Debt of the Republika Srpska,[2404] the term of public debt, which, *inter alia*, included the so-called war damage, was expanded in a procedural sense to the verification procedure. Under Article 21 of the Law on Determination and the Manner of Settlement of the Internal Debt of the Republika Srpska, the public debt was to be paid over a period of 40 years, in the form of state vouchers. The legal solution was such that the interest was not stipulated either for the past or future period. On the other hand, the interest determined by the courts in legally binding judgments in relation to "war damage" would be written off. In 2005, the Republika Srpska imposed a special Law on Exercising Rights to Compensation for Pecuniary and Non-Pecuniary Damage sustained during the war activities from 20 May 1992 to 19 June 1996,[2405] which, as *lex specialis*, replaced the Law on Determination and the Manner of Settlement of the Internal Debt of the Republika Srpska.

2400 CH/01/8112 *et al*.-A&M, Conclusion No. 5.
2401 CH/01/8112-A&M, paragraph 164.
2402 These proceedings were completed only in 2005, as part of a decision dealing also with a group of similar cases.
2403 *OG of RS,* No. 110/03.
2404 *OG of RS,* No. 63/04.
2405 *OG of RS,* No. 103/05.

In November 2005, the Human Rights Commission within the BiH Constitutional Court declared that the provisions on compensation for "war damage" were in contravention of the ECHR, that is regarding Article 6 of the ECHR and Article 1 of Additional Protocol No. 1 to the ECHR, for being contrary to the principle of proportionality.[2406] The Human Rights Commission ordered the Republika Srpska to adjust the relevant provisions in accordance with the reasoning of the decision of the Commission, and – unlike in the Case No. CH/01/8112 – not to enforce finally binding judgments of the courts if this order is fully implemented.[2407] This decision was subsequently (indirectly) upheld by the case law of the BiH Constitutional Court.[2408] Given the bombastic financial and economic echo of this and similar cases, the full implementation of this decision of the Commission, indeed, came as a (positive) surprise.[2409]

Similar problems existed also in the Federation of BiH. The initial decision, however, did not relate to the merits of the case itself on the so-called war damage, but to the problem of the un/reasonable length of the proceedings. The *Bjelonja* case concerned an attempt to enforce a claim of compensation for damages filed by the applicant, which was related to the seizure of her house for military purposes during the armed conflict. It took courts over five years to decide on the civil action of the applicant for the damages. Besides, the Federation of BiH delayed the repossession of the house, although such an act was no longer justified by the public interest. The Human Rights Chamber established that the right to a decision to be made within a reasonable time was violated, as well as the right to property of the applicant.[2410] Although the Federation of BiH had started already in 1998 to regulate the suspension of payment of claims for war damage compensation established by legally binding judgments,[2411] only in 2005 did the highest court in BiH adopt the first decision related to such legal conduct. Since legal regulations of the Federation of BiH are rather similar to the legal regulations of the RS, court decisions,

2406 CH/01/3615 *et al*., paragraph 180 *et seq*.

2407 CH/01/3615 *et al*., Conclusion No. 11, paragraph 262.

2408 AP 774/04.

2409 Compare the ruling on enforcement of the decision of 20 December 2006 in relation to the Decision No. CH/01/3615 *et al*.

2410 CH/98/166-A&M, paragraphs 75, 88. Compare, also, with CH/01/8529 in connection with compensation for the seized lorry.

2411 See, the Law on Temporary Suspension of the Enforcement of Claims arising during the State of War and Imminent Threat of War, published on 15 October 1998 (*OG of FBiH,* No. 39/98); Law on Determination and Enforcement of Claims arising during the State of War and Imminent Threat of War (*OG of FBiH,* No. 43/01); Law on Temporary Postponement of the Enforcement of Claims arising from Enforcement Decisions payable from the Budget of the Federation of Bosnia and Herzegovina (*OG of FBiH,* No. 9/04); Law on Determination and the Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina (*OG of FBiH,* No. 64/04).

in principle, did not differ.[2412] However, the Federation of BiH failed to enforce a decision within the time limit prescribed by the Human Rights Commission within the BiH Constitutional Court, so that the Federation of BiH had to enforce the legally binding judgments issued to the applicants. Even the Federation of BiH failed to enforce this obligation, so the Human Rights Commission within the BiH Constitutional Court established, in its ruling on the failure to enforce a decision, that failures were made on the part of the Federation of BiH.[2413]

f. "Old foreign currency savings"

In cases of so-called *old foreign currency savings*, the Human Rights Chamber dealt with a further problem consisting of failed socialist economic solutions and war consequences. The applicants had been holders of foreign currency savings accounts in (then) domestic banks long before the war. Already in the 1980s access to foreign currency was limited in a way, as there was the intention to strike a balance between the scarce foreign currency needs of *fiscus*, on one hand, and economic "bottlenecks", on the other. Prior to the beginning of the armed conflict the majority of holders of foreign currency savings accounts were completely prevented from accessing their foreign currency savings. A great number of civil actions brought by holders were not solved or were solved unsuccessfully. In cases where courts granted claims, the financial administration would, in principle, refuse to enforce such judgments. In 1997 and 1998, the Federation of BiH tried to solve the problem of "the old foreign currency savings", in the process of privatisation, in order to accommodate the holders of foreign currency savings accounts, on the one hand, and, on the other, to avoid the ruin of the budget and banking system of the Entities. Instead of cash payments, holders of foreign currency savings accounts (similarly to the rest of creditors who had claims against the state in respect of unpaid wages, pensions etc.) were restricted in using their foreign currency savings, whereby they received the so-called certificates instead, which, then again, they could invest in privatisation of real property or socially-owned, *i.e.*, state-owned enterprises. However, the applicants preferred cash payments, especially when it turned out that certificates had in the market just a minor portion of their nominal value. The two-year time limit which was provided for certificates to be used, considering constant delays in the process of privatisation in practice, was too short, so that the pressure on certificates holders was all the greater. In addition, numerous holders of foreign currency savings accounts with minor foreign currency amounts, when it came to the imposed solution of the problem, were let down and the fate of their claims was

2412 CH/02/12468 *et al*.
2413 CH/02/12468 *et al*., ruling of 13 September 2006.

uncertain. In its first in a series of adopted decisions, which were extremely controversial within the Human Rights Chamber, the Human Rights Chamber gave, in principle, "the green light" for the solution established by the Federation of BiH. However, the Chamber held that the solution was disproportional and that it was not in conformity with the right to property under the ECHR. The Human Rights Chamber held that Bosnia and Herzegovina was responsible for the situation related to "the old foreign currency savings". Naturally, the Chamber only requested from the Federation of BiH to improve the legal solutions, as it considered that, under the BiH Constitution and a framework law at the State level, it was competent to do so.[2414]

The Federation of BiH undertook amendments to the relevant legislation in the period from November 2000 to February 2002. The situation got additionally complicated over the judgment of the Constitutional Court of the Federation of BiH of 8 January 2001, which held that the main solutions related to the issuance and use of certificates were in contravention of the Constitution of the Federation of BiH, and accordingly it rendered ineffective the relevant provisions. In practice, the judgment of the Constitutional Court of the Federation of BiH, nevertheless, was not in effect – provisions rendered ineffective were still applied. This fact was a consequence of the Federation of BiH not knowing how to proceed following the judgment, given that the judgment was, for the major part, *without adequate reasoning*.[2415] Besides, the Federation of BiH found it much easier to start enforcing a decision of the Human Rights Chamber on "the old foreign currency savings", which was adopted shortly before, where the Chamber established that certain provisions related to "the old foreign currency savings" violated standards of the ECHR. Therefore, the Federation of BiH was ordered to improve the respective provisions. However, the mentioned provisions were not the subject of the judgment of the Constitutional Court of the Federation of BiH. Precisely for this reason, the Federation of BiH, obviously, of two obligations selected the one which suited it better. Finally, it was important that the Federation of BiH lodged an appeal against the judgment of the Constitutional Court of the Federation of BiH with the BiH Constitutional Court. Unfortunately, the BiH Constitutional Court, at the time, and much after that, *de facto* was not in a position to deliberate on the appeal.

2414 Compare with, CH/97/48 *et al*.-A&M, including a great number of separate opinions.

2415 The total disorientation and helplessness of the Federation of BiH were confirmed in the contents of the appeal lodged by the Federation of BiH with the BiH Constitutional Court of 11 May 2001 (authors' archive). In it, namely, the Federation of BiH openly committed itself and voiced "the will" to enforce the decision of the Human Rights Chamber, because it genuinely did not know "what to do with the judgment of the Constitutional Court of the Federation of BiH". However, one must admit that such a conclusion lacks any sort of argumentation or reasoning.

Namely, that was when the five-year mandate of judges from the first line-up was due to expire and when new judges for the BiH Constitutional Court were being selected. Consequently, the BiH Constitutional Court decided on the appeal only in the end of 2003, so as to reject it as untimely.[2416]

In the end of 2002, the Human Rights Chamber, in a series of cases, again assessed very confusing legislation relating to "frozen" accounts of "the old foreign currency savings". Although it held that amendments to the existing regulations were *per se* acceptable, the Chamber adopted a decision stating that the Federation of BiH lacked legal grounds to act in relation to "the old foreign currency savings", as the Constitutional Court of the Federation of BiH rendered ineffective certain provisions. This brought about legal uncertainty which kept the applicants in suspense, so that the Federation of BiH still continued interfering with the rights to property of the applicants in a disproportionate manner.[2417]

After some months elapsed again, and the Federation of BiH or BiH failed to undertake steps to enforce the decision of the Chamber, in July 2003, in the case *Poropat et al. and Todorović et al.*,[2418] the Chamber imposed a decision on further legal remedies, *i.e.*, financial compensation to all applicants. Shortly before the expiry of its mandate (31 December 2003), the Chamber upheld its previous case law in relation to the unresolved situation with the holders of "the old foreign currency savings" accounts in the case *Đurković et al.* The Chamber again ordered the Federation of BiH to settle the continuous legal uncertainty by May 2004, so as to adopt the necessary laws and decrees creating a clear legal framework, which would offer concrete and reliable information to the holders of "the old foreign currency savings" accounts, thereby observing the public interest, and the principle of proportionality.[2419]

The issue of regulating the payment of "old foreign currency savings" was resolved only upon the enactment of a new law in 2004.[2420] During 2005, the Human Rights Commission within the BiH Constitutional Court put "under scrutiny" the conformity of the respective law with the standards referred to in Annex 6 to the Dayton Peace Agreement. Namely, in the case *Besarović et al*.,[2421] the Human Rights Commission within the BiH Constitutional Court

2416 U 57/01.
2417 CH/97/104 *et al*.-A&M.
2418 CH/97/48 *et al*.-further legal remedies.
2419 CH/98/377 *et al*.-A&M.
2420 Law on Determination and the Manner of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina (*OG of FBiH,* No. 64/04).
2421 CH/98/375 *et al*.

concluded that the payment of old foreign currency savings was the exclusive responsibility of the State. Admittedly, the State has discretion to delegate its competence to the Entities due to technical, economic or other justified reasons, thereby being mindful of the right to property of the damaged persons and of the equality of legal solutions for all citizens throughout the territory of BiH.[2422] However, the State failed to give a guarantee for such a solution. On the other hand, regulations in the Federation of BiH, which were in force at the time, were in contravention of Article 6 of the ECHR and Article 1 of Additional Protocol No. 1 to the ECHR.[2423] In order to help the State legislature, which was not willing to find solutions up until that time, the Human Rights Commission within the BiH Constitutional Court gave very detailed instructions on how to solve the problem. There was a similar situation with the regulations in the RS.[2424]

In December 2005, the BiH Constitutional Court declared unconstitutional the entire set of regulations of the Federation of BiH, the Republika Srpska and the Brčko District concerning "old foreign currency savings", because these administrative and territorial units did not have the legitimacy to regulate the respective issue. The BiH Constitutional Court obliged the State to adopt within 3 months a framework law on "old foreign currency savings".[2425] By this decision, the BiH Constitutional Court to a great extent prevented the State and the Entities from implementing the decision of the Human Rights Commission within the BiH Constitutional Court in terms of implementing the ordered reforms.[2426]

Under the Law on the Settlement of the Obligations arising from the Old Foreign Currency Savings Accounts[2427] the decision of the BiH Constitutional Court No. U 14/05 was implemented, as well as the decision – though only partly – of the Human Rights Commission within the BiH Constitutional Court in the case *Besarović et al.* at the State level. Still, the Law on Conditions and Manner of Settlement of Debts arising from the Old Foreign Currency Savings Accounts by Issuance of Bonds in the Republika Srpska[2428] derogates from the total system of payment of "old foreign currency savings" which was stipulated.[2429]

2422 CH/98/375 *et al*., paragraph 1196 *et seq*.
2423 CH/98/375 *et al*., paragraph 1222 *et seq*.
2424 Compare with, CH/99/1613 *et al*., paragraph 1 *et seq*.
2425 U 14/05.
2426 Compare with, for instance, CH/99/1613 *et al*. of 8 March 2006.
2427 *OG of BiH,* No. 28/06.
2428 *OG of RS,* No. 1/08
2429 For more on this, see the controversial decision of the BiH Constitutional Court No. U 3/08. See, also, the very convincing separate dissenting opinions of the then President of the Court Madam *Palavrić* and Vice-President of the Court Madam *Galić*.

g. Pensions and social protection

(a) JNA pensions

Applications of former JNA military personnel filed with the Human Rights Chamber, who, following the breakout of the war in BiH, had not joined the professional service in the RBiH Army or the Federation of BiH Army, concern to a minor extent problems in the process of return, and to a greater extent the consequences of the break-up of the former Yugoslavia and disputes on the succession of obligations of the then federal institutions of public nature. Applicants complained to the Human Rights Chamber regarding their level of military pension, particularly when considering the pensions received in BiH by their colleagues who had been in the RBiH Army or Federation of BiH Army during the war.[2430] In the respective cases, the Human Rights Chamber reached as far as the final boundaries of its territorial jurisdiction. Namely, the problem that these persons had was related to the non-existence of a regional agreement. That agreement should have regulated the issue of the division of obligations of this portion of social protection (pensions in particular), which arose in the then federal State and at the central governmental level, which vanished upon the break-up of the former Yugoslavia, the resolution of which was awaited for a long time in terms of signing an international agreement.[2431]

In its respective cases, the Human Rights Chamber failed to find violations of the property rights of the applicants, or violations of the principle of prohibition of discrimination in connection to this right. Admittedly, the applicants had exercised their right to pension until April 1992 with the Institute for Social Insurance of Army Insurees in Belgrade. However, they were unable to exercise that right with the Pension and Disability Fund of BiH. In September 1992, the Republic of BiH enacted a decree with legal force, according to which the JNA pensioners would receive 50% of the amount of their former pension. This decree was confirmed as the Law of the Republic of Bosnia and Herzegovina in June 1994, and by Article 139 of the Law on Pension and Disability Insurance of the Federation of BiH which entered into force on 31 July 1998. The Chamber established that the fact that these pensioners, on humanitarian grounds, still do receive a certain portion of their respective pension, notwithstanding the fact that it amounts to solely 50% of the amount of their former pension, does not constitute a justified request, and, accordingly, it does not constitute

2430 CH/98/706 *et al*.-A&M.

2431 All information on the pension system, that might assist in understanding this respective problem-area, may be found in CH/98/706 *et al*.-A&M, paragraph 37 *et seq*. with further references.

interference with their right to property. Also, there are justified reasons as to why such treatment is not discriminatory, notwithstanding the fact that the applicants receive significantly lower pensions than their colleagues who had served in the Republic of BiH Army or the Federation of BiH Army who, by doing so, directly acquired the right to a pension from the Pension and Disability Fund of BiH.[2432]

In June 2001, the successor states of the former Yugoslavia entered into an Agreement on Succession Issues among the successor states of the former SFRY. In the Agreement, amongst other things, it regulated the issue of payment of social allowances in the so-called trans-border cases. Bosnia and Herzegovina ratified the Agreement at the end of 2001. The applicant in the case *Bavčić et al.* claimed that the legal situation had thus changed, and that, as a result, he was entitled to a full pension, notwithstanding the fact that he had not served in the Republic of BiH Army or the Federation of BiH Army, irrespective of his place of residence. The Human Rights Chamber accepted the applicant's position that the State had committed itself to obligations arising from the Agreement. Thereby the pension claims of applicants against the JNA Pension Fund were replaced by claims against Bosnia and Herzegovina. However, at the time of deliberating on the application the Agreement has not still entered into force, resulting from the fact that the Republic of Croatia has not yet ratified it. Besides, where possible, international obligations arising from the Agreement had to be "transformed" into the obligations under the domestic law.[2433]

(b) Social protection and the issue of pensions "exceeding the Entities' demarcation lines"

In Bosnia and Herzegovina itself, owing to the break-up of a single, republic-based pension and disability healthcare fund, and the setting up of three new funds in Banja Luka, Sarajevo and Mostar (the latter two were merged during 2000 into one federation fund), new problems arose in relation to social protection. Taking into account the enormous migration of the population, it was necessary to ensure that all persons, despite their change of place of residence or address, received social protection. In March 2000, the funds agreed that, following the signing of the agreement, social protection would be provided by such a fund which provided protection up until that time, regardless of

2432 Compare with, CH/98/706 *et al*.-A&M, paragraph 81 *et seq*.; also, CH/98/232 *et al*.-A&M, paragraph 44 *et seq*.; CH/98/875 *et al*.-A&M, paragraph 63 *et seq*.; CH/98/702 *et al*.-A; CH/98/744 *et al*.-A.

2433 CH/02/10046-A&M, paragraphs 75, 81, 83 *et seq*.

whether the beneficiary would subsequently change his/her place of residence or address, in terms of exceeding the territorial jurisdiction of a fund. One must admit that such a provision, first and foremost, has a certain legal clarity and certainty. Since pensions in the RS were significantly lower than in the Federation of BiH (which is, to some extent, still the case), this agreement was criticised by the beneficiaries who had acquired their right to pension, before the war in BiH, in the territory of the present day Federation of BiH, with the Pension and Disability Fund of BiH, with a seat in Sarajevo. During the war, due to their relocation to the territory of the present day Republika Srpska, they continued receiving pensions from the Pension and Disability Fund of the Republika Srpska. If such persons were to return to their pre-war places of living, after the signing of the respective agreement, in accordance with the said agreement, they would still have to receive pensions from the Pension and Disability Fund of the Republika Srpska. However, the amount of such pensions is significantly lower than in Federation of BiH, although they had been receiving throughout their years of service the same contributions as their colleagues who had remained in the territory of the present day Federation of BiH and who still received pensions from the Pension and Disability Fund of BiH. Besides, they would be forced to live on lower pensions, although living expenses in the Federation of BiH are higher than in the RS. In practice, this problem-area proved to be an obstacle to the return of pensioners from the RS to the Federation of BiH.[2434] By the middle of 2002 this delicate and uncertain situation was aggravated additionally by the fact that healthcare protection was geographically tied to the place where one was exercising the right to pension, so that internally displaced persons could not receive compensation for medical treatment costs unless they received it in the Entity where they exercised their right to pension.[2435]

2434 See details in CH/02/8923 *et al*.-A&M, paragraph 8 *et seq*.; CH/03/12994-A&M, paragraph 14 *et seq*. The interesting thing is that Decision No. CH/02/8923 *et al*.-A&M was the reason for the Pension and Disability Fund of the Republika Srpska to bring a civil action against the Pension and Disability Fund of BiH, whereby the former fund requested that the latter commit itself to moving over into its fund all pensioners who, as of 30 April 1992 and onwards, have been in the same situation as the applicant *Karanović*. Moreover, the Pension and Disability Fund of the Republika Srpska requested from the Pension and Disability Fund of BiH to pay compensation for damages in the amount of a sum of all pensions that the Pension and Disability Fund of the Republika Srpska had paid to this category of people since 1 April 2005. In the hitherto regular court proceedings the claim of the plaintiff was dismissed. Presently there are ongoing proceedings on the appeal lodged with the BiH Constitutional Court (AP 2549/09; status as at: 12 August 2009).

2435 This problem was solved by the signing of the agreement among the two Entities and the Brčko District in December 2001, although it was implemented in a satisfactory manner only in the middle of 2002 (CH/02/8923 *et al*.-A&M, paragraph 17 *et seq*.).

In order to resolve the mentioned problem with pensioner-returnees, the State and both Entities had to implement appropriately the decision of the Human Rights Chamber No. CH/02/8923 *et al*. That implied implementation of the reform of this portion of social protection in both Entities, which had thus far[2436] ignored and obstinately refused to commit themselves to the obligation arising from this decision. The fact that this obligation, following the judgment by the European Court[2437] in connection with the enforcement of the decision of the Chamber in Case No. CH/02/8923 *et al*., has become an international obligation of Bosnia and Herzegovina, *i.e.*, of the Entities within the internal legal system, has not assisted a great deal. The reason was certainly the social and political sensitivity of the problem. Reform of this part of social protection is opposed, primarily, by those who would lose certain rights by its implementation.

3. Agreement on Refugees and Displaced Persons (Annex 7 to Dayton Peace Agreement)

CH/00/5092 Ćišić	20060405
CH/00/6101 Maglajac	20041105
CH/01/7243 Šukurma	20050805
CH/01/7417 Milić	20060607
CH/02/10804 Knežević	20061220
CH/02/12065 Stokanović	20060605
CH/02/12323 *et al*. Dobrilović *et al*.	20051215
CH/03/15015 Č. R.	20070208
CH/03/15083 Fazlić	20060911
CH/99/1961-A&M Zornić	20010208

The result of the four-year armed conflict in Bosnia and Herzegovina was the largest expulsion of a population in Europe after World War II. According to the UNHCR and OSCE reports, more than 2.2 million persons had to leave their homes in Bosnia and Herzegovina. Out of that number 1.3 million people

2436 Status of affairs as at: 30 August 2009.

2437 Compare with the ECtHR, *Karanović v. Bosnia and Herzegovina*, judgment of 2 November 2007, whereby a violation of the applicants' rights was established, given the fact that the decision of the Human Rights Chamber No. CH/02/9364 was not implemented. The implementation of this decision was not even aided by the conclusion of the BiH Constitutional Court on the failure to enforce the decision of the Human Rights Chamber No. CH/02/9364. Within the context of the enforcement of this decision see, also, the decision of the BiH Constitutional Court No. U 12/08, which concerns the request filed by 68 representatives of the National Assembly of the Republika Srpska for the settlement of a dispute with the Federation of BiH in relation to the enforcement of the judgment of the ECtHR, *Karanović v. Bosnia and Herzegovina* of 2 November 2007. The BiH Constitutional Court rejected the request as inadmissible due to the lack of jurisdiction of the BiH Constitutional Court over this issue.

found shelter outside Bosnia and Herzegovina, in other countries,[2438] and the rest found refuge in Bosnia and Herzegovina,[2439] or in other places where they felt safe.[2440] The temporal (interim) mechanisms for the acceptance of refugees abroad were in the favour of refugees, giving them the possibility to avoid any strict procedures for acquiring asylum status.[2441]

The expulsion led to the displacement of the whole population and to the sad conclusion that the leaders of nationalist parties succeeded in achieving a temporary victory by carrying out the policy of ethnic cleansing. When it comes to the ethnic structure of Bosnia and Herzegovina before the armed conflict, the population was so interspersed as to resemble “a leopard’s skin”. After the conflict, large ethnically homogenous areas were created in the majority of state territory. At the end of December 2008, out of 2.2 million refugees and displaced persons there were 1,026,692 who succeeded in returning.[2442]

Annex 7 to the Dayton Peace Agreement in conjunction with Article II.5 of the BiH Constitution incorporated one of the major elements of the peace agreement, in other words it imposed an agreement which has annulled the ethnic cleansing and reinstated an ideal *status quo ante* of a multi-ethnic victory of the population in Bosnia and Herzegovina. With the aforementioned aim, Annex 7 to the Dayton Peace Agreement guarantees the right of all refugees and displaced persons to return to their pre-war homes, the restitution of property rights which were not exercised by free will, as well as compensation in cases where restitution is not possible.[2443]

> The preconditions for obtaining compensation for damage have not been thus far defined. According to the judicial practice of the Human

2438 These persons have the official status of *refugees*.

2439 These persons have the official status of *internally displaced persons.*

2440 Andersen, 1996, p. 194 and Bagshaw, 1997, p. 1 *et seq*., with further references.

2441 *Andersen*, 1996, p. 194 *et seq*., *Bagshaw*, 1997, p. 2 *et seq.*; for more details see *Fitzpatrick*, 2000.

2442 UNHCR, Return Statistics of 31 December 2008, available at: <www.unhcr.ba/return/2008.htm>; last visited: 12 August 2009. Although the statistical data sound and look quite depressing it must be noted that in the meantime some of the expelled persons (refugees or internally displaced persons) lost that status. In other words, many persons resolved the issue of their status as refugees or internally displaced persons in some other way instead of returning to their pre-war places of residence. Thus, according to the UNHCR Report on Annex 7 to the Dayton Peace Agreement, there are still 135,000 internally displaced persons who are in need of accommodation (“*Briefing Note on UNHCR and Annex 7 in Bosnia and Herzegovina*”, UNHCR, The UN Refugee Agency, UNHCR Representation in Bosnia and Herzegovina, available at: <www.unhcr.ba/updatedec07/DPsOct07.pdf>, last visited: 12 August 2009).

2443 Articles I.1, XI and XII.2 of Annex 7 to the Dayton Peace Agreement; see, also, *Van Houtte*, 1998, p. 559.

> Rights Commission within the BiH Constitutional Court, a person who is considered to be entitled to compensation for damage bears the burden of proof that the army or some other institution had caused damage to or destroyed his/her property.[2444] Accordingly, a claim relating to compensation for damage cannot exist independent of the liability of state authorities.[2445] According to the interpretation of the Human Rights Chamber, a claim in which compensation for damage is sought, pursuant to Annex 7 of Dayton Peace Agreement, is not of an objective nature, which means it is not independent of liability. Instead, State authorities are obliged to secure funds for that purpose in general terms and not in each individual case. Individual cases of compensation for damage are, accordingly, granted based on civil law. Such claims are regulated, for instance, by the Law on the Privatisation of State-Owned Apartments in the Republika Srpska,[2446] where Article 54 obliges the municipalities to provide alternative accommodation for each returnee whose property was devastated during the armed conflict.[2447]

At the same time, Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska have undertaken to guarantee the right of return to refugees and displaced persons and the restitution of their property rights by ensuring legal and factual conditions for their safe return (Article I.2-4 and Article II of Annex 7 to the Dayton Peace Agreement have defined all of these obligations in a very specific manner). Thus, Annex 7 of the Dayton Peace Agreement contains very precise regulations, as was the case with the previous peace agreements.[2448] The provisions on return from Annex 7 to the Dayton Peace Agreement have been supported by a clause in Annex 3 to the Dayton Peace Agreement which stipulates that a citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote, in person or by absentee ballot, in that municipality.[2449]

The UN High Commissioner for Refugees (UNHCR)[2450] the International Committee of the Red Cross and the UN Development Program (UNDP)[2451] used to play a major role in the organisation of return. Returnees charged with a criminal offence, other than a serious violation of international humanitarian law

2444 Compare, for instance, CH/01/7243 or CH/03/15015.

2445 See, for instance, CH/02/12065 or CH/03/15083.

2446 *OG of RS*, Nos. 11/00, 20/00, 18/01, 35/01, 16/02, 47/02, 65/03, 3/04, 70/04, 67/05 and 118/05.

2447 For more details, see CH/02/10804.

2448 *Szasz*, 1996, p. 312 *et seq.*; *Szasz*, 1995.a, p. 404.

2449 Article IV.1, the second sentence of Annex 3 to the Dayton Peace Agreement; Compare, *Andersen*, 1996, p. 199 *et seq.*

2450 UNHCR, compare, *Winkelmann*, 2002, p. 9 *et seq.*

2451 Article I5, III – about the role of UNHCR and International Committee of the Red Cross during the armed conflict, compare, *Young*, 2001.

as defined in the Statute of the International Tribunal for the Former Yugoslavia since 1 January 1991 or a common crime unrelated to the conflict, shall upon return enjoy **amnesty**.[2452] Article V of Annex 7 to the Dayton Peace Agreement obligates the signatory parties to provide information through the tracing mechanisms of the ICRC on all persons unaccounted for and to cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of those who are unaccounted for.

The return of refugees and displaced persons is a two-fold, challenging responsibility. On the one hand, it must be guaranteed that a returnee will not become a victim again if he/she returns to his/her pre-war place of residence, where the population structure has completely changed after the armed conflict – which is an often case – and this population is often hostile to the returnees of a different ethnicity. On the other hand, the return of people, as a basic pillar of support to lasting peace in the region, must not go in the opposite direction, thus undermining the peace process by making it possible for hostile groups, which continued to exist after the armed conflict and were ready to mobilise, to re-enter into conflict with the victims or with the attackers upon any re-encounters.[2453] That is the reason why some observers considered that both the purpose and the process of return have been jeopardised.[2454]

In order for individuals to be able to return to their pre-war homes, they first had to overcome their traumatic experiences from the armed conflict. Their return depended considerably on whether they would be able to repossess their pre-war property, their houses or their apartments as owners or as occupancy right holders or as occupancy right holders' household members. In the first post-war years it was hard to satisfy this requirement due to a number of relevant reasons. Moreover, in addition to the fact that the then applicable regulations were not so favourable when it came to property repossession, many other practical problems were also an obstacle to quick return.

There were expulsions of people or there were small to large-scale "voluntary" exoduses on all sides due to which thousands of people moved onto the real property or into the houses or apartments of other expelled persons. Accordingly, there are countless cases where the expelled persons wanted to return to their pre-war homes that were occupied (mostly) by displaced persons of another ethnic group who could not or did not want to move out.[2455] Since

2452 Article VI of Annex 7 to the Dayton Peace Agreement.
2453 Compare, *Andersen*, 1996, p. 193.
2454 *Hayden*, 1998, chapter "*Discrediting the Peace*".
2455 Compare, for instance, CH/99/1961-A&M.

the "exchange" of homes in the whole territory of Bosnia and Herzegovina was not simultaneously organised by the competent authorities, those who voluntarily left their homes or those who were evicted by "diligent" authorities, by irony of fate, were the first to find themselves on the streets or in refugee reception centres.

The restitution of property rights entailed difficult problems in the executive-legal practice which was primarily entrusted to the Entities. An additional problem was created by a number of considerably complicated domestic and international regulations. During the armed-conflict in BiH more than half of the housing space in the Federation of BiH and almost a third in the RS was devastated.[2456] Out of the 1,207,693 housing units in BiH, around 452,000 housing units sustained damage during the armed conflict, out of which 805 were completely or considerably damaged.[2457] The devastation of privately or socially owned properties continued after the armed conflict, too. With the aim of achieving private or "public" interests (mainly for the purpose of constructing new premises) municipalities were confiscating property owned by refugees or displaced persons by disregarding positive-legal regulations and then allocating those properties to third parties. This was done under the excuse that, due to the degree of damage, the premises were uninhabitable and there was a real threat to the community unless they were completely removed. After that, the "cleansed" areas were allocated to third parties. As for the returnees who were willing to return and reconstruct their homes, the competent authorities expropriated their property and thus, indirectly, prevented them from exercising their right to return.[2458]

Apart from the shortage of housing, the policy of expelling the "new population" or the competent institutions from the places of the so-called minority returns has undermined the return process. It is an interesting point that the political elites were against the return of other political ethnic groups into the areas in which they held power and control. Nevertheless, they were also against the policy of having their own respective ethnic groups remain in or return to the areas where they were, *de facto*, in the minority. The policy of ethnic cleansing thus continued and was consolidated. Sometimes the opposition against the return was manifested by the use of force, for instance: by setting on fire newly reconstructed houses in order to prevent minority returns; by organising

2456 *Simor*, 1996, p. 653 with further references.

2457 See the statistics of the Ministry for Human Rights and Refugees of Bosnia and Herzegovina, Housing and Urban Profile of Bosnia and Herzegovina – Images of destruction, reconstruction and development prospective, Sarajevo, May 2001, p. 6; available at: <www.mhrr.gov.ba> (last visited: 13 March 2008).

2458 Compare, for instance, CH/00/6101; CH/02/12323 *et al*.; CH/00/5092; CH/01/7417.

public protests and marches; by "spontaneous" gatherings or demonstrations against returnees; by discrimination in employment policy; by restrictions on the freedom of movement; by a shortage of infrastructure for the post office, telecommunications or similar traffic between the Entities; by threats of criminal prosecution; by nationalistic media reports; and by refusal of police to offer necessary assistance in the evictions of members of the other majority group, etc.[2459] Also, the resistance to enforce a decision of the Human Rights Chamber on the repossession of an apartment was a usual practice until 2000, mostly in the RS. Regretfully, prior to leaving property and handing it over, evicted persons frequently conducted the policy of scorched earth – often with the approval of the competent authorities – by way of completely destroying or robbing that property.[2460]

In order to ensure the restitution of property rights, regardless of the will of the signatories to Annex 7 to the Dayton Peace Agreement, the methods and instruments already incorporated in some other Annex to the Dayton Peace Agreement were used. As was the case with establishing the Interim Commission under Annex 3 to the Dayton Peace Agreement, the Constitutional Court of BiH under Annex 4 to the Dayton Peace Agreement, and the Human Rights Chamber and Ombudsman under Annex 6 to the Dayton Peace Agreement, a body was established consisting of international experts: the Commission for Displaced Persons and Refugees,[2461] comprised of three international and six domestic members. Upon its establishment, this commission was named the Commission for Real Property Claims of Displaced Persons and Refugees – CRPC, which means it was given the name which describes its task fairly accurately.[2462] Pursuant to Article XVI of Annex 7 to the Dayton Peace Agreement, after one extension of its mandate, responsibility for the financing and functioning of this commission was subsequently transferred from the competence of the Signatory Parties to fall within the competence of the BiH institutions.

After huge initial difficulties, the return process commenced functioning as late as in 1999, owing to the special authorities of the High Representative and the considerably enforced engagement of the relevant international agencies in the Property Legislation Implementation Plan (PLIP). From that moment the process progressed in a positive direction. As regards the aforesaid, a fairly important fact was that a legal framework was created for the repossession of

2459 *Simor*, 1996, pp. 653, 659 *et seq*.; *Stavropoulou*, 1998, p. 135 *et seq*.
2460 *HRC*, 2001, p. 1.
2461 Article VII *et seq*. under Annex 7 to the Dayton Peace Agreement.
2462 For more details about the CRPC, see *Van Houtte*, 1998, and *Van Houtte*, 1999. See also comparable analysis of mechanisms of compensation for damage, including CRPC, by *Ferstman*, 2002.

abandoned properties, houses and apartments, providing also the possibility to obtain compensation for damage in an amount that was close to the properties' market value, which made it possible for people to fight for their existence in some other place. While only 15% of 135,875 repossession claims were resolved by the end of July 2000, that number increased by June 2004 to 92.6% of resolved repossession claims. Of course, at that time the return related statistics indicated that in this respect there were huge differences between the two Entities.[2463] Further, the returnees were receiving, at least formally, the support of religious leaders of other ethnic groups.[2464] In 2007, the percentage of repossessed properties was very high. Namely, out of 211,784 repossession claims there have been 197,678 granted.

Nevertheless, the quota of property restitution is only one among the many aspects of the return process. It is not a guarantee of the sustainable return of all refugees and displaced persons. Thus, at the end of September 2007, despite the optimistic statistics, many refugees or displaced persons who managed to repossess their properties did not return to their pre-war homes. Out of 2.2 million persons who suffered damage, there were 446,215 refugees and 577,750 displace persons who actually returned. Despite the fact that they had managed to regain possession of their property, many of them left their homes again and some of them, in fact, never returned. Given the difficult economic, political or social situation, they are not to be blamed for not returning. Mainly the elderly and inhabitants of agricultural areas were willing to remain in their pre-war places of residence. Moreover, there was a tendency that people were choosing to live in places where they would not be an ethnic minority, which is a reflection of the hidden negative experiences from the previous conflict. Consequently, a large number of victims of eviction and ethnic cleansing, upon repossession of their property, sold that property and inhabited areas where they were members of the ethnic majority.[2465]

2463 Compare the detailed and, as a rule, the monthly statistics on the implementation of property laws in Bosnia and Herzegovina issued by the UNHCR, OHR, OSCE, UNMIBIH and CRPC, which are available at: <www.ohr.int> (last visited: 20 August 2009). The statistics show the implementation of property laws in Bosnia and Herzegovina since the time of the amendments to the legislation from October 1999. These are the monthly statistics which are regularly updated based on information obtained from organisations operating in the field (OSCE, UNHCR and OHR). Attention should be given to the criteria and the basis for statistics that have been subject to change for years.

2464 Compare, for instance, an article in *Nezavisne novine* dated 30 January 2003, p. 6, wherein the representatives of the Serb Orthodox Church and Islamic Religious Community jointly condemned the attacks against religious premises which took place in Prijedor at that time.

2465 As to the development of these tendencies, compare the extensive report of UNHCR, *Briefing Note on UNHCR and Annex 7 in Bosnia and Herzegovina*, available at: <www.unhcr.ba> (last visited: 14 March 2008).

4. Right to return as a special individual right

U 5/98-III "Izetbegović III – Constituent peoples"	20000914 *OG of BiH*, No. 23/00
U 15/99-2 Zec	20010612 *OG of BiH*, No. 13/01
U 14/00-1 Manojlović	20011230 *OG of BiH*, No. 33/01
U 44/01 Names of "Serb" towns	20040227
U 19/01-A&M Genjac "Article 152 of the RS Labour Law"	20011102

By safeguarding the special right to return, which was supplemented by obligations to protect the Signatory Parties to Annex 7 of Dayton Peace Agreement, Article II.5 of the BiH Constitution – in conjunction with Annex 7 to the Dayton Peace Agreement – exceeds the usual international-legal standards which, in principle, guarantee or regulate only the internal freedom of movement of citizens, as well as the right of every person to return to his/her home country after abandoning it, meaning that these standards guarantee the right of return to war prisoners or protected persons.[2466] The Constitutional Court has in several instances placed an emphasis on the special significance of return as a basic goal within the Dayton context and within the fight against ethnic cleansing and the neutralisation of its effects. Article II.5 of the BiH Constitution, in conjunction with Article XII.3 of Annex 7 to the Dayton Peace Agreement,[2467] has clarified that "in the context of the General Framework Agreement, the goal of elimination of [the] effects and traces of ethnic cleansing is considered to be so important that in some cases it [effects] the validity of legal transactions which would otherwise satisfy the requirements of civil law".[2468] Article II.5 of the BiH Constitution reflects a special situation in Bosnia and Herzegovina which occurred due to the events of the war and reflects the decisiveness of the Framer of the Constitution to re-establish "a multiethnic and multicultural society" in Bosnia and Herzegovina.[2469] In the beginning, the Constitutional Court of BiH did not recognise any additional elements in the right of return under Article II.5 of the BiH Constitution that were not already contained within the regular standards of human rights and freedoms (such as

2466 Compare, for instance, Article 13 of the Universal Declaration of Human Rights, Article 12, paragraph 4 of the International Covenant on Civil and Political Rights and Article 3 of Additional Protocol No. 4 to the ECHR; for more details see *Stavropoulou*, 1998.

2467 Article XII.3 of Annex 7 to the Dayton Peace Agreement stipulates: "*In determining the lawful owner of any property, the Commission shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing. Any person who is awarded return of property may accept a satisfactory lease arrangement rather than retake possession [...]*."

2468 U 15/99.

2469 U 19/01, paragraph 30.

the right to property, freedom of movement, prohibition of torture and inhuman treatment, the right to a home, etc).[2470] However, in its subsequent decisions the Constitutional Court placed an emphasis on the constitutional status of the right to return and acknowledged the constitutional obligation of the State to "re-establish [the] *status quo ante*".[2471] In addition to the special right to the repossession of property or ownership over real properties, Article II.5 of the BiH Constitution stipulates for refugees and displaced persons "a general right of return to [their] homes of origin".[2472] The principle of compliance with the right to return will be jeopardized if a returnee is not given the possibility to re-establish his/her pre-war employment status in the place of return.[2473]

G. Article II.6 – Implementation

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

AP 1315/06 Džemić *et al*.	20071108
AP 1603/05 Lončar	20061221
AP 2253/05 Municipal Court of Tuzla and Tuzla Canton	20070331
AP 3182/06 Damjanović	20070116
AP 946/04 P. D.	20050108
AP 96/01 Penzioni fond	20020510
AP 976/05 Knežević	20060209
U 4/04-M (partial decision) Tihić "Flag, Coat of Arms and Anthem of FBiH and RS"	20061118
U 68/02 S. Tokić "Law on Excises and Sales Tax"	20040625

Article II.6 of the BiH Constitutional Court regulates the matter which, from the point of view of the legal state, implies in itself that the public authorities are bound by human rights and freedoms. The obligation to protect the rights under Article II.1 of the BiH Constitution must be complied with in the procedure of the implementation of this provision. In connection with this matter, the constitutional principle of the hierarchical-normative supremacy of the BiH Constitution over "an ordinary" law of central power, including the law of lower administrative territorial units (entities, canton, municipalities), should be taken

2470 U 5/98-III, paragraph 78.
2471 U 14/00, paragraphs 20 and 32.
2472 U 19/01, paragraph 30.
2473 U 19/01, paragraph 31. See, also, further reasoning in Decision No. U 19/01 (including the Separate Opinion of Judge *Joseph Marko*) related to the consequences and effects on the right to "sustainable return" (see, also, commentary under "(a) War and ownership", p. 396.

into consideration, as well as the obligation of all levels of power to comply with the BiH Constitution (Article III.3(b) of the BiH Constitution in conjunction with Article XII.2 of the BiH Constitution).[2474] Given the fact that the Framer of the Constitution explicitly referred to the matter which is ordinarily understood – the obligatory application of and respect for human rights and freedoms – a conclusion could be made that the Framer's intention was to avoid, at any price, the misunderstandings which usually arise in the authoritative regimes: the only thing that matters is having the State open to the principle of respect for human rights and freedoms *pro forme*, but not in reality. In other words, as long as everything is fine on paper, no question is raised as to the significance of that paper for an individual. As to the authors of the constitutional text written in Dayton who experienced difficulties regarding the lack of implementation in many transitional countries, they obviously wanted to avoid the gap which usually arises between the constitutional demands or needs on the one hand, and the constitutional reality on the other. Given that the sentence from the first part of Article II.6 of the BiH Constitution ("Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities") does not have an excessively dogmatic character, it resolves the concerns of the Framer of the Constitution as to the possibility that some administrative-territorial level of government may neglect the obligation to effectively comply with human rights and freedoms.

Pursuant to the judicial practice of the BiH Constitutional Court under Article II.6 in conjunction with Article II.1 and Article II.2 of the BiH Constitution, a conclusion could be made that the ECHR has a *direct* effect on all administrative-territorial levels, in other words on all kinds of power: legislative, administrative and judicial.[2475] In the course of the decision making procedure, all State authorities, in particular the courts, must take into consideration not only laws and other general acts but also the standards of human rights and freedoms, including the remainder of constitutional law.[2476] Therefore, in an individual case a decision may be made directly on the basis of the BiH Constitution if a lower-ranking law gives no appropriate legal basis for the decision.[2477] Moreover, a Constitution-related order may be derived from Article II.6 in conjunction with Article II.1 of the BiH Constitution to quash or amend all legal acts which are in contravention of the ECHR, and this applies to all State authorities. This order was extended by the Constitutional Court of BiH to include all other constitutional law, as well

2474 For more details see the statements on normative hierarchy, p. 152 *et seq*.

2475 In Decision No. AP 1315/06, paragraph 33, the Constitutional Court derives "direct application" of the ECHR, and even more so, it derives it directly from Article II.6 of the BiH Constitution without depending on Article II.1 of the BiH Constitution.

2476 AP 3182/06, paragraphs 11 and 42.

2477 AP 976/05, paragraph 29.

as the constitutional and general principles of international law which are an integral part of the BiH Constitution.[2478] Article II.6, in conjunction with Article II.1 and Article II.2 of the BiH Constitution, provides for an obligation to respect the constitutional-legal standards under the ECHR with no exceptions.[2479] Yet, what do these exceptionally important conclusions on which constitutional law is largely based mean to the public authority?

This interpretation of Article II.6 of the BiH Constitution should not amount to a situation where the administrative bodies and courts will not apply legal regulations which they consider to have been in contravention of the BiH Constitution or the ECHR. A specific advantage of the direct application of human rights and freedoms in an individual case must not overcome the legal uncertainty which may be produced by such conduct. Direct application of human rights and freedoms and the supremacy of the BiH Constitution and human rights and freedoms should not, accordingly, amount to a situation where the administrative bodies and courts would be entitled to make a common law ineffective on an incidental basis (in individual cases), but it rather imposes an obligation to always take into consideration the BiH Constitution and human rights and freedoms. Should there be a possibility for multiple interpretations of common law, then a law which is in line with the BiH Constitution should be chosen. If a legal act can in no way be interpreted in a constitutional manner, the distinction should be made as to whether the administrative or judicial body came to such a conclusion.

As for **administrative bodies**, when it comes to parliamentary (legislative) legal acts (in particular, the laws), the principle of lawfulness applies (*i.e.*, the obligation to comply with the law), even in a situation where the administrative bodies have doubts about their constitutionality. The compatibility of a legislative legal act with the BiH Constitution or international agreements may be established only in individual cases if the relevant case reaches the competent court,[2480] and this is done in two possible ways:

- referring the case to the Constitutional Court by the assigned court on the basis of Article VI.3(c) of the BiH Constitution, or
- by filing a constitutional appeal by the injured party within the appellate procedure under Article VI.3(b) of the BiH Constitution.[2481]

2478 U 4/04, paragraphs 54, 62.

2479 AP 946/04, tačka 6.

2480 The principle of lawfulness must be complied with as long as the case is being deliberated on before the administrative bodies.

2481 For more details, see the recent case-law of the BiH Constitutional Court in Case No. AP 1311/06, paragraph, 31 et seq.

This conclusion arises from the justified monopolistic position of the Constitutional Court of BiH to decide the Constitution-related cases. If the issue is about the lower legal acts (such as the statutes, rules or decrees), the administrative bodies can not avoid applying them because the obligation of compliance with the principle of legal certainty is in place and this principle is inherent to the principle of a legal state (the rule of law) under Article I.2 of the BiH Constitution. However, as to the complaint of the party against the unlawfulness or unconstitutionality of that administrative act, the administrative body that enacted it or a higher instance administrative body or, eventually, the administrative court may quash or amend that administrative act upon the civil action and thus bring it in line with the law or the BiH Constitution.[2482] Finally, during the judicial proceedings or upon their completion the case may again reach the Constitutional Court of BiH in two possible ways mentioned above, in which case the competence of the Constitutional Court of BiH, when it comes to proceedings under Article VI.3(c) of the BiH Constitution, may, to some extent, be limited *ratione materiae*.[2483]

The courts are not entitled to make an applicative norm ineffective on an incidental basis because they consider it to be in contravention to the BiH Constitution. Neither are they entitled to apply that norm in an individual case. If a constitutionally conforming interpretation is not possible and they are convinced that the provision is unconstitutional they are obliged to terminate the proceedings and refer the disputed and Constitution-related issue to the BiH Constitutional Court.[2484]

The Constitutional Court of BiH also applied the provision of Article II.6 of the BiH Constitution to the discussion on the capability of enjoying the protection of human rights and freedoms.[2485]

2482 *Mangoldt/Klein/Stark*, 2000-I, p. 128.

2483 Compare the statements and comments about Article VI.3(c) of the BiH Constitution: "3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution", p. 866.

2484 Compare, once again, the statements and comments about Article VI.3(c) of the BiH Constitution: "3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution", p. 866.

2485 For more details, see the statements and comments under "l. Competence ratione personae (Article 16, paragraph 4, items 5 and 10)", p. 749, which are related to the persons authorised to file an appeal, i.e., the competencies of the courts ratione personae; see, also, the Separate Opinion of Judge Palavric in Case No. AP 2253/05, according to which none of the mentioned persons or bodies under Article II.6 of the BiH Constitution are entitled to be an "appellant" within the meaning of Article VI.3(b) of the BiH Constitution.

H. ARTICLE II.7 – INTERNATIONAL AGREEMENTS

Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

In **choosing the international-legal instruments** for the protection of human rights and freedoms it is obvious that, on the one hand, the aim of Framer was to cover as wide spectre of activity as possible and, on the other hand, being oriented to and led by the specific circumstance prevailing in Bosnia and Herzegovina. The Framer of the Constitution intended to place the rights and freedoms from international instruments at the disposal of individuals or groups irrespective of the domestic procedure required for the incorporation of those instruments into the legal system or their applicability within the domestic legal system.[2486] Therefore, it was of great importance to extract the so-called *soft law* from a number of international instruments of the UN, the International Committee of the Red Cross, the Council of Europe and the OSCE, since the applicability of the rights and freedoms contained in the mentioned instruments makes sense only if it concerns legally binding provisions of international contracting law. Those provisions provide for the subjective-legal position of an individual. In other words, they provide for a law which, in the case of need, may be required in lawful proceedings before the competent State authorities (the so-called standardisation of human rights).

It is a fact that Bosnia and Herzegovina has undertaken to comply with the international legal instruments for the protection of human rights and freedoms listed in Annex I to the BiH Constitution. However, in addition to this obligation, Bosnia and Herzegovina has also undertaken to remain or become a contracting party to the international agreements as provided by Article II.7 of the BiH Constitution. This obligation may be explained by the efforts of the Framer of the Constitution to have Bosnia and Herzegovina undertake international obligations towards other contracting parties as provided under Article 26 and Article 27 of the Vienna Convention on the Law of International Treaties in addition to its domestic engagement within the constitutional obligation to respect the standards of these instruments. The relevant part applies to the obligation of the public authorities, based on Article I.8 of the BiH Constitution, to be committed to cooperation and to secure unrestricted access to all of the international human rights monitoring mechanisms to be established in Bosnia and Herzegovina; to the supervisory bodies to be established by any international agreement listed in Annex I to the BiH Constitution; the International Criminal Tribunal for the Former Yugoslavia; and any other agency authorised by the UN

2486 For more details see, *Szasz,* 1995, pp. 246-249, *Szasz,* 1995, p. 306 *et seq.*

Security Council whose mandate is related to human rights and humanitarian law. In principle, the human rights and freedoms enshrined in the ECHR and international instruments under Annex I to the BiH Constitution may be divided into four categories:

- general human rights and freedoms, in particular civil and political rights;
- group rights, in particular the rights of national minorities;
- economic, social and cultural rights, and
- citizenship and nationality related rights.

Annex I to the BiH Constitution contains in total 15 international instruments. Based on the Notice of Succession from 1993, Bosnia and Herzegovina became a member state upon signing almost all of these agreements. On 15 December 1993 the Republic of Bosnia and Herzegovina published a list in the *Official Gazette of RBiH*,[2487] which contains all the multilateral international agreements which became legally binding on Bosnia and Herzegovina after the notification according to Article 1, the first part, paragraph 4, item 4 of the Decree with legal force on taking over and applying the federal laws applicable in Bosnia and Herzegovina as republic laws.[2488] As per this list, as of 15 December 1993, Bosnia and Herzegovina became bound by the following instruments under Annex I to the BiH Constitution:[2489]

1. Convention on the Prevention and Punishment of the Crime of Genocide (1948);
2. Geneva Conventions I-IV for the Protection of War Victims (1949) and Additional Protocols I-II (1977);
3. Convention relating to the Status of Refugees (1951) and Protocol (1966);
4. Convention on the Nationality of Married Women (1957);
5. Convention on the Reduction of Statelessness (1961);
6. International Convention on the Elimination of All Forms of Racial Discrimination (1965);

2487 *OG of RBiH*, No 25/93.
2488 *OG of RBiH*, No. 2/92.
2489 Accordingly, taking into account a clear linguistic meaning of the provisions of Article II.7 of the BiH Constitution, Bosnia and Herzegovina was legally bound by these agreements even on the day on which the BiH Constitution entered into force (14 December 1995).

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

8. International Covenant on Economic, Social and Cultural Rights (1966);

9. Convention on the Elimination of All Forms of Discrimination against Women (1979);

10. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), and

11. Convention on the Rights of the Child (1989).

When it comes to the rest of the mechanisms, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) was ratified on 13 December 1996. The Framework Convention for the Protection of National Minorities (1994) was ratified on 24 February 2000. The European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) was ratified on 12 July 2002. The European Charter for Regional or Minority Languages (1992) was signed in 2006 but has yet to be ratified to this today.[2490] The ECHR, which is on the list of the 15 international instruments under Annex I to the BiH Constitution and although it has a special constitutional position (Article II.2 of the BiH Constitution), was ratified only on 12 July 2002[2491]

Consequently, with the exception of the European Charter for Regional or Minority Languages (1992), a conclusion could be made that Bosnia and Herzegovina has met its constitutional obligation from Article II.7 of the BiH Constitution: "Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution."

2490 Status as of 22 August 2009.

2491 Accurate data on the signing, ratification and publication of some international-legal instruments under Annex I to the BiH Constitution, as well as of it its Protocols, including the ECHR, may be found at*: The Council of Ministers of BiH*, 2003, p. 17 *et seq*; also available at: <www.coe.int>.

I. Article II.8 Cooperation

All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

1. Introduction

Article II.8 represents a novelty in constitutional dealings with human rights, aiming at the full implementation of human rights at the domestic level by compelling "all competent authorities" to cooperate with international human rights bodies. "All competent authorities" refers to all authorities, including those that were not established at the time of the entering into force of the Dayton Agreement, particularly the State level institutions only established in the aftermath of the Dayton Agreement. The provision equally addresses the judiciary, the executive and the legislative branches at all governmental levels, including the Brčko District. Article II.8 has offered enormous potential to the international community in the aftermath of the Dayton Agreement, without which the human rights section of the Constitution could be criticised as a mere catalogue of internationally recognised human rights and fundamental freedoms. This "human rights access clause" provided an opportunity for all authorities involved to take human rights seriously and to (further) strengthen the impressive achievement of the incorporation of the human rights standards in the Constitution.[2492]

2. Cooperation with the ICTY

Cooperation with the ICTY has in practice been the most problematic aspect of Article II.8. However, jurisprudence of the Constitutional Court and of other courts on that specific aspect of Article II.8 hardly exists. "Cooperation" means any form of cooperation in all matters of relevance to the tribunal and with all principal organs of the ICTY under Article 11 of the ICTY Statute (the Statute), that is, with the Chambers, the Office of the Prosecutor (OTP), and the Registry of the ICTY.

2492 *Pajic*, 1998, p. 7.

a. Cooperation on the basis of Article 29 of the ICTY Statute

The wording of Article II.8 places particular emphasis on compliance with orders on the basis of Article 29 of the Statute, usually being the basis for requests for transfer not only of suspects and persons accused by the ICTY and for arrest warrants, but also for requests to hand over evidentiary material and for the appearance of witnesses.

Article 29 of the Statute constitutes a "novel and unique obligation" under international law[2493] by creating an *erga omnes* obligation for all UN member states to cooperate with the Tribunal[2494] and trumping other international legal obligations by virtue of Article 103 of the UN Charter.[2495]

Despite the fact that only three persons accused by the ICTY remain to be brought before it, the issues relating to the transfer of the accused and suspects should be considered in retrospect and – to the extent applicable – taken as lessons learned by BiH authorities for future cases. This particularly relates to cooperation with the International Criminal Tribunal for the former Yugoslavia, thereby considering the significant differences between the concept of complementarity as enshrined in Article 1 of the Rome Statute and the concept of primacy of the ICTY in accordance with Article 9 paragraph 2 of the ICTY Statute.[2496]

(a) ICTY Arrest Warrants and Domestic Extradition Law

Upon confirmation of an indictment by a Judge in accordance with Rule 47 of the ICTY Rules of Procedure and Evidence (RoPE), the Rules create a basic regime applicable to the arrest and apprehension of those indicted to take place in the country concerned. After confirming the indictment the Judge issues warrants for the arrest of the accused and an order for his surrender to the Tribunal, which are transmitted to the national authorities of the State where it is believed that the accused can be found[2497] and/or to the international forces

2493 *Prosecutor ./. Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 October 1997, paragraph 26.

2494 *Prosecutor ./. Blaškić*, Decision of the President on the Defence Motion Filed Pursuant to Rule 64, IT-95-14-T, 2 April 1996, paragraph 26; *Cryer*, 2005, p. 133.

2495 Regarding the difference between "order" and "request" under Article 29 of the Statute see *Sluiter*, 2002, p. 148.

2496 See *Zhou*, 2006, p. 204; *Gilbert*, 1998, p. 53.

2497 Rule 59 *bis* RoPE.

supervising the implementation of the Dayton Peace Accords.[2498] In addition, Rules 39 and 40 of the ICTY RoPE give the ICTY Prosecutor the right to ask States for certain measures to be taken.

i. "Transfer" and "Surrender" *versus* "Extradition"

To distinguish between inter-State procedures and those involving States and international criminal tribunals, the terms "transfer" and "surrender" are used instead of "extradition" in the relevant international documents.[2499] This change in terminology reflects important conceptual and operational differences between transfer or surrender under the Statute and under traditional extradition[2500] in that the principles of domestic extradition law should not be invoked against requests for transfer by the ICTY. Rule 58 of the RoPE further clarifies the relationship between Article 29 of the Statute and national extradition provisions, stipulating that "the obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."

Therefore, neither the common concepts of extradition law, such as equality and reciprocity or the acceptance of exceptions based on national policy and human rights protection against arbitrary arrest and detention as often contained in national constitutions, extradition treaties or the national legislation of the state in which the defendant is found,[2501] nor the (developing) rule of *aut dedere aut judicare*, requiring states to either extradite or to prosecute those persons accused by another state of a crime defined under international law apply here as these would violate the primacy of the tribunal stipulated in Article 9 paragraph 2 of the ICTY Statute.[2502]

According to resolution 827 (1993) (paragraph 4) "States shall take any measure necessary under their domestic law to implement the provisions of both the resolution and the Statute, including the obligation of States to comply

2498 *Brown*, 1999, p. 514; regarding the execution of ICTY orders by international organizations see above: "2. Cooperation with the ICTY", p. 551.

2499 *Bassiouni*, 2002, p. 49; *Gallant*, 1996, p. 344.

2500 *Gallant*, 1996, p. 346.

2501 *Gallant*, 1996, p. 353.

2502 On the development of the principle of *aut dedere aut judicare* see: International Law Commission, Preliminary report on the obligation to extradite or prosecute of the Special Rapporteur, GA, A/CN.4/571, 7 June 2006 paragraph 50-51; according to *Bassiouni*, referring to a significant number of multilateral conventions creating or recognizing crimes under international law, usually containing requirements that signatories extradite alleged offenders, amongst others, a *jus cogens* norm of *aut dedere aut judicare* has already arisen, see *Bassiouni*, 2002, International Extradition, pp. 10, 13-14.

with requests for assistance and orders issued by a Trial Chamber under Article 29 of the Statute". It follows that, since 1993, all States have been under an obligation to enact any implementing legislation necessary to permit them to execute arrest warrants and requests of the Tribunal.[2503]

The Framer of the BiH Constitution, however, only made general reference to "cooperation with the ICTY". It would have been preferable had the Framer of the Constitution of BiH not only included a provision on the obligation to cooperate and comply with orders under Article 29 of the Statute, but if a provision specifically allowing for the extradition of citizens in clearly defined cases, most importantly for cases of transfer of suspects and accused to the ICTY, had been included.[2504]

ii. Transfer of Entities' Citizens – Decision of the Constitutional Court of BiH No. 5/98-I

In the absence of such a provision in the Constitution of BiH, the citizenship argument was raised by the Government of the Republika Srpska in proceedings brought before the BiH Constitutional Court regarding the constitutionality of a number of provisions of the entity constitutions, including Article 6 paragraph 2 of the Constitution of the RS, prohibiting, according to the RS authorities, the extradition of RS citizens and therefore also preventing their transfer to the ICTY. The Constitutional Court, in Partial Decision U 5/98-I of 29 and 30 January 2000, without examining whether the obligation to surrender and transfer persons to the ICTY is covered by the term "extradition" or how otherwise these terms relate to each other, limited itself to stating that "[w] hatever the case may be, the wording of Article II.8 of the Constitution of BiH is quite clear and there can be no doubt that all competent authorities in Bosnia and Herzegovina, *i.e.*, also the authorities of the Entities, have to comply with orders issued pursuant to Article 29 of the Statute of the Tribunal"[2505] and that the responsibility for international and inter-Entity criminal law enforcement, of which the cooperation with the ICTY forms a part, falls, pursuant to Article II.1(g) of the Constitution of BiH, within the responsibilities of the institutions of BiH.[2506] Accordingly, the Court declared Article 6 paragraph 2 of the Constitution

2503 Unless no amendment to internal law is needed for them to do so, see *Prosecutor ./. Blaškic*, Decision of the President on the Defence Motion Filed Pursuant to Rule 64, IT-95-14-T, 2 April 1996, paragraph 8.

2504 An example of such provision is Article 16 Paragraph 2, second sentence of the constitution of the Federal Republic of Germany (Basic Law), which allows the extradition of citizens in select cases, such as in the case of a transfer to an international tribunal.

2505 *Constitutional Court of BiH*, U 5/98, Partial Decision I, paragraph 23.

2506 Constitutional Court of BiH, U 5/98, Partial Decision I, paragraph 22.

of the RS unconstitutional. While the conclusion should be endorsed, it would however have been useful if the Court had defined the term of “compliance” with ICTY orders more clearly in so far as they relate to the transfer of persons in order to assist the legislature in developing appropriate legislation at the domestic level, particularly at the State level or, alternatively, if it had stated that such legislation may not be necessary given the relevant regulation of the Constitution.

iii. Domestic Legislation and Cooperation Obligations

Despite the adoption of several laws in BiH at various levels (Republic, Entities and State level) at different times since the establishment of the ICTY in 1993 with a view to implementing both the Statute as well as the relevant Security Council Resolutions 827 and 955, the “unquestionable obligation” to enact implementing legislation necessary to permit States to execute warrants and requests of the Tribunal[2507] has arguably been met only partially by the Bosnian authorities.

Interestingly, the ICTY has not taken a strong position on domestic legislation except in those cases where they appear to have violated or put into question the primacy of the Tribunal, for example, in the case of the RS law on cooperation with the ICTY of 2002 and in the case of the (draft) law on the establishment of a Truth and Reconciliation Commission for BiH in 2001, providing for the possibility to grant amnesty to war crimes suspects.[2508]

The “Decree with force of law on extradition at the request of the international tribunal” promulgated by the President of the Republic of Bosnia and Herzegovina in 1995[2509] expressly allowed extradition to the ICTY on the basis of an indictment or an arrest warrant, irrespective of citizenship considerations (Article 3 and 4 of the Decree) and provided for a judicial review procedure by the (then) Supreme Court of Bosnia and Herzegovina limited to establishing whether the accused is the one in respect of whom the extradition request had been submitted and whether the extradition request pertained to criminal acts specified by the statute of the ICTY (Articles 8 and 18 of the Decree). The Federation of BiH adopted a law in 1996,[2510] and the RS adopted the “Law on

2507 *Prosecutor ./. Blaškic*, Decision of the President on the Defence Motion Filed Pursuant to Rule 64, IT-95-14-T, 2 April 1996, paragraph 8, see also *Petrovic*, 1998, p. 203.

2508 See <www.un.org/icty/pressreal/p591-e.htm>. See, also, ”• Enforcement of Sentences in Cases Transferred under Rule 11bis”, p. 568 *et seq*.

2509 *OG of RBiH*, No. 12/95.

2510 *Law on extradition of indicted persons at the request by the International Tribunal*, *OG of FBiH*, No. 9/96.

cooperation of the Republika Srpska with the International Criminal Court in the Hague"[2511] in 2001, after some involvement of the High Representative. Both laws removed the main obstacles against transfer of persons, *i.e.*, the citizenship of the concerned person.[2512]

The BiH State level authorities, after the entry into force of the Dayton Agreement, have neither taken a position regarding the (continuous) application of the Decree nor adopted new legislation and have thus far failed to adopt appropriate legislation regulating that aspect of cooperation,[2513] even though the BiH Criminal Procedure Code (CPC), as enacted in January 2003, had expressly called for special legislation at the State level for the procedure to hand over suspects or accused persons against whom criminal proceedings are ongoing before international criminal courts.[2514] Article 414, paragraph 2 is thus an argument against the otherwise acceptable suggestion that, in analogy to the Decree of the Republic, which had referred to the then applicable provisions of the CPC of the Republic, the provisions of the BiH CPC should apply *mutatis mutandis* to cases involving the transfer of persons to the ICTY, especially since also the Criminal Procedure Code of BiH generally prevents the extradition of BiH citizens.[2515] A general law on international legal cooperation should be adopted to address these and other shortcomings in the area of judicial cooperation.

iv. Criminal Code and Election Law of BiH

Non-cooperation with the ICTY by official persons in the institutions of BiH, the entities and the Brčko District by way of failure to enforce ICTY orders is declared a criminal offence in Article 203 of the BiH Criminal Code, punishable with imprisonment of between one and ten years. The failure to report the whereabouts of a person indicted by the ICTY is declared a criminal offence (Article 231 Criminal Code), however, first-line blood relatives and certain professional groups are expressly exempted. Providing assistance to persons indicted by the ICTY is punishable with imprisonment of up to three years (Article 233 of the Criminal Code) with the same exemption made for first-line blood relatives as Article 231.

2511 *OG of RS*, No. 52/01.

2512 Article 2 of the Law of the Federation of BiH and Article 14 (3) of the Law of the RS respectively.

2513 For other relevant state level legislation regarding cooperation with the ICTY see above: "iii. Domestic Legislation and Cooperation Obligations", p. 555.

2514 Article 414 paragraph 2 of the Criminal Procedure Code of Bosnia and Herzegovina, OG 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.

2515 Article 415 paragraph 1 a).

Article 1.6 of the BiH Election law[2516] repeats the wording of Article IX (General Provisions) of the Constitution prohibiting persons who are serving sentences imposed by the ICTY or who, being indicted, fail to comply with an order to appear before the Tribunal, from standing as a candidate or holding public office in the territory of BiH, also extending this prohibition to political parties maintaining such a person in a political party position or function. Fining a political party for violation of the relevant provisions does not amount to a violation of the rights of the party under Article II.3(e) of the Constitution, Article 6(1) or (2) of the ECHR, Article 3 of Protocol No. 1, or of Article 1 of Protocol No. 12 to the ECHR.[2517]

v. Implementation of Arrest Warrants and Requests for Transfer

▪ International Actors Performing Cooperation Obligations "on behalf" of the BiH Authorities

A considerable number of persons accused by the ICTY have been arrested and transferred at the request of the ICTY by the competent authorities in BiH since the beginning of the operations of the ICTY, while a couple of persons surrendered voluntarily. The circumstances of a couple of arrests involving international actors, such as SFOR, have resulted in challenges by the defence in hearings before the ICTY, arguing that the arrests took place in violation of generally accepted principles of international law and fundamental rights.[2518]

Given the unique constitutional set up of Bosnia and Herzegovina under the Dayton Constitution, the obligation to cooperate must be seen in the context of the strong involvement of the international community. Realistically, with the respective Entities being unfriendly towards the idea of handing over suspects or accused persons from their respective ethnic group since the very beginning of the operation of the ICTY, SFOR – against its initial reluctance – and later EUFOR had to accept the responsibility to implement some of those obligations

2516 *OG of BiH*, Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 77/05, 11/06, and 32/07.

2517 Constitutional Court of BiH, AP 952/05, *Demokratska Narodna Zajednica BiH*, Decision of 8 July 2006; Court of BiH, Iž-09/05, decision of 9 February 2005; *Election Complaints and Appeals Council*, decisions no.: 02-50-4434/04 of 11 October 2004.

2518 For example, the case of *Todorović*, where the Defence argued that *Todorović* in fact had been kidnapped and the Trial Chamber initially refused an evidentiary hearing on his arrest, see *Prosecutor ./. Simić, Tadić, Zarić and Todorović*, Decision stating Reasons for Trial Chamber's Order of 4 March 1999 on Defence Motion or Evidentiary Hearing on the Arrest of the accused *Todorović*, IT-95-9, 4 March 1999. The matter was only solved when *Todorović* eventually pleaded guilty, see *Cryer*, 2005, p. 138.

"on behalf" of the Bosnian authorities.[2519] Therefore, the obligation to cooperate has, to some extent – and not only in the beginning of the operation of the Tribunal – been executed by the actors of the international community, *i.e.*, SFOR/EUFOR.[2520]

▪ Extension of Cooperation Obligations to the Territory of Other States

It is unclear whether the obligation to cooperate also extends to the territory of other States.[2521] Obviously, this extension cannot take place without violating or at least infringing upon that State's right not to have police functions exercised on its territory without consent.[2522] In any event, the obligation to cooperate can also include other forms of cooperation with authorities of other countries, especially neighbouring countries, for example in cases of expulsion of persons from the country of their citizenship. Once the respective person is found on the territory of BiH, the obligation of the BiH authorities is clearly triggered both on the basis of Article 29 of the Statute and Article II.8 of the Constitution.[2523]

▪ Judicial Review

Since ICTY arrest warrants are only issued after a decision of an ICTY judge assessing the evidence presented by the Prosecution, there seems to be consensus that additional judicial review at the domestic level of the evidence submitted to the judge in the ICTY in the proceedings for transferring the accused is not required.[2524] However, considering the fact that the judicial review at the domestic level is basically limited to the question of whether the person to be transferred is in fact the person named in the indictment or arrest warrant respectively and the crimes charged fall under the jurisdiction of the ICTY, a more careful review at the domestic level might be preferable.

The Court of BiH, as the competent domestic Court to deal with the judicial review of transfers of persons accused by the ICTY,[2525] has only been involved in

2519 See *Brown* in: Bassiouni, International Criminal Law, p. 515, *Schabas*, p. 469.

2520 See, for example, the arrest of *Zdravko Tolimir* in June 2007, who appears to have been deported from Serbia to Bosnian territory, where EUFOR arrested him and delivered him to the authorities in The Hague; see also *Prosecutor ./. Nikolić*, decision on interlocutory appeal concerning legality of arrest, IT-94-2-AR73, 5 June 2003, paragraph 26.

2521 *Brown*, 1999, p. 515.

2522 *Cryer*, 2005, p. 138, on the obligation to arrest war criminals also outside the State's own territory derived from the Geneva Conventions see *Sharp*, p. 421.

2523 On the debate regarding the luring of suspects or "trickery" see *Cryer*, 2005, p. 138; *Bassiouni/Scharf*, 2000, p. 447, 448-449; *Ackermann/O'Sullivan*, 2000, p. 292.

2524 Gallant, 1996, p. 372.

2525 Given the exclusive jurisdiction of the Court of BiH for war crimes, see Article 13(1) of the Law on the Court of Bosnia and Herzegovina, Articles 170 – 203 of

one case of transferring an accused to the ICTY thus far, and, in the absence of relevant State level legislation regulating the procedure, applied Article II.8 of the Constitution directly,[2526] in addition to quoting Security Council Resolution 827 (1993) as a basis for its order to immediately transfer the accused to the ICTY authorities.

(b) Other Requests for Cooperation under Article 29 of the ICTY Statute

Other requests on the basis of an order in accordance with Article 29 of the Statute relate to requests for assistance in locating and transferring witnesses to the ICTY and/or to the transfer of evidence to the ICTY.

i. Orders for Subpoena of Witnesses

Orders for the subpoena of witnesses are issued on the basis of Article 29 in conjunction with Rule 54 of the RoPE and are usually addressed to the authorities of the country of which the witness is a resident or citizen.[2527]

▪ Orders Issued to Individuals

The ICTY also has the power to "pierce the State veil"[2528] and to issue orders for the presence of witnesses directly to individuals. Although requests would normally go through the State, the international tribunal may enter into direct contact with an individual subject to the sovereign authority of a State in cases where authorities prevented the Tribunal from fulfilling its mandate.[2529] The individual, being within the "ancillary" criminal jurisdiction of the international tribunal, is obliged to comply with its orders, requests and summonses.[2530] It thus seems that going through the State is a concession made by the Tribunals, but not one that is legally necessary.[2531]

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the Criminal Code of BiH and in relation to cases transferred by the ICTY, Article 2 (1) of the Law on Transfer.

2526 Order of the Court of BiH of 9 June 2006 against *Dragan Zelenović*, X-EKS-06/218, who had been arrested in Russia and transferred to the territory of Bosnia and Herzegovina on 8th June 2006.

2527 See, for example, *Prosecutor ./. Vidoje Blagojević, Dragan Jokić*, Decision on *Vidoje Blagojević*'s request for the issuance of subpoenas ad testificandum and supporting documentation, and subsequent request to the government of the Netherlands, 27 May 2004.

2528 *Cryer*, 2005, p. 135.

2529 *Prosecutor ./. Blaškić,* Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 October 1997, paragraph 55.

2530 *Blaškić*, AR108bis, paragraph 55; on original doubts whether the orders of the tribunals actually bind individuals see *Klip*, 1996, p. 268-9, 275.

2531 *Cryer*, 2005, p. 135-6.

In any event, the BiH authorities remain directly responsible under Article II.8 of the Constitution when orders to assist in the transferring of witnesses are either exclusively addressed to the authorities or are addressed to the authorities in addition to the individuals concerned. The argument that witnesses may be arrested in the course of their testimony cannot be invoked by the authorities or individuals, given the possibility of safe conduct for witnesses under investigation, *i.e.*, immunity for the testimony and during the time of travel to and from the ICTY on the basis of Rule 54 of the RoPE.[2532] Alternatively, witnesses may also use the possibility to testify via video-link.

▪ Persons Exempted from the Obligation to Testify

Limited groups of people, such as representatives of the International Committee of the Red Cross (ICRC), are immune from appearing as witnesses before courts, including the ICTY.[2533] The Tribunal also cannot issue binding orders on State officials in relation to their official duties.[2534] Accordingly, the refusal on the side of the authorities to facilitate the transfer of such witnesses would not amount to a violation of Article II.8.

ii.Transfer of Evidence

The ICTY can in principle request any evidence to be transferred to it that is considered necessary in the context of the proceedings before it. In practice the Chamber orders the search and seizure of relevant places and/or items. The same as the above would apply, that is the direct applicability of the orders in BiH on the basis of Article 29 of the Statute. The only exception would again be evidence that was provided to the ICRC on the basis of confidentiality. National authorities have the possibility to declare evidence provided to the ICTY as ‘national security evidence’, binding the ICTY Prosecutor’s Office to only use the evidence confidentially, without disclosing its original source.[2535]

2532 See, for example, *Prosecutor ./. Dokmanović*, Decision Regarding Defence Motion to Protect Witness, 27 August 1997, Order Granting Safe Conduct to Defence Witnesses, Case No. IT-96-21-T, 25 June 1998 (RP (D6729-D6732); May, p. 170; *Sluiter*, 2002, NILR, 87-113.

2533 *Prosecutor ./. Simić, Tadić and Zarić*, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the testimony of a witness, IT-9-9-PT, 27 July 1999, *Prosecutor ./. Brdjanin and Tadić*, Decision on interlocutory appeal, IT-99-36-AR73.9, 11 December 2002; *Cryer*, 2005, p. 135.

2534 See *Blaškić*, AR108, paragraphs 38-44; *Cryer*, 2005, p. 135.

2535 For a discussion of the procedural problems resulting from the use of such sensitive evidence during proceedings before the ICTY, especially in relation to the rights of the accused, see *Cryer*, 2005, pp. 139-140.

(c) Cooperation in light of the completion strategy of the ICTY

i. The completion strategy of the ICTY and outstanding arrests

Resolution 1503 (U.N. Doc. S/RES/1503 (2003)) reiterates the ICTY's completion strategy by calling on the ICTY to "take all possible measures to complete investigations by the end of 2004, to complete all trial activities at the first instance by the end of 2008, and to complete all of its work in 2010, by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction […]". With the ICTY working towards the completion of its mandate, cooperation with the ICTY and assistance in the dismantling of the ICTY indictees' support network has to be intensified in order to bring all those who are indicted and at large before the trial prior to its closure.[2536] In that regard, resolution 1503 did not only recall and reaffirm the ICTY's completion strategy, but also urged "Member States to consider imposing measures against individuals and groups of organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups, or organizations."[2537]

▪ Implementation at the National Level

With a view to facilitate the implementation of international restrictive measures, such as, for example, UNSC Resolution 1503 and EC Council Regulation 1763/2004 of 11 October 2004, imposing certain restrictive measures in support of effective implementation of the mandate of the ICTY,[2538] the BiH State level "Law on application of certain temporary measures in support of effective implementation of the mandate of the ICTY, and other international restrictive measures from 2006"[2539] as prepared by the ICTY Cooperation Monitoring Working Group, established by the Chair of the Council of Ministers in 2005 and adopted in 2006, provides for the application of appropriate measures, such as the freezing of funds and the freezing of economic resources.[2540] The law clarifies in Article 1 paragraph 3 as its purpose "to regulate in BiH the manner of implementation of the UNSC resolutions or EU decisions that foresee international restrictive measures, particularly UNSC Resolution 1503 (2003) through the application of

2536 See *Raab*, 2005, p. 92.
2537 U.N. Doc. S/RES/1503 (2003), Preamble, paragraph 6.
2538 EC OJ L 315, 14.10.2004, p. 14, last amended by Commission Regulation (EC) No. 1053/2006 of 11 July 2006, EC OJ L 189, 12.07.2006, p. 5.
2539 *OG BiH*, No. 25/06.
2540 Article 4 paragraph 1(a) and (b) of the Law.

certain measures in support of effective implementation of the ICTY mandate" and to a large extent mirrors the EC Regulation. The law aims at dismantling the network of support for ICTY indictees by also targeting the "support network" of ICTY indictees. While the adoption of the law as such is an important step forward in the cooperation of BiH authorities with the ICTY and its legislative codification, from a domestic perspective, however, it appears problematic in that it lacks legal clarity both in relation to the procedure for the application of measures as well as in relation to the notion of "assistance" to an ICTY indictee.[2541] In contrast to the above mentioned law, neither the EC Regulation (which only refers to indictees, the names of whom are included in the Annex of the Regulation) nor the Security Council (which, in relation to support networks, limited itself to urging member States to consider measures against support network and did not establish such a list of persons or "imposed" measures on member States) provided for provisions on the support networks of indictees. This constitutes an important difference to the regime implemented by the Security Council in relation to the fight against terrorism, usually described as the "blacklist model"[2542] whereby persons and entities bear certain legal consequences with respect to their property rights, as a result of their simple insertion on the list,[2543] and which also impacts the extent to which judicial review of such measures can take place at the domestic level.[2544] In that regard the law raises doubts regarding compliance with fundamental rights as enshrined in the Constitution and the ECHR, especially in relation to due process and the right to peaceful enjoyment of property.[2545] While it appears acceptable in the case of persons indicted by the ICTY to limit the judicial review process, this would not be the case for support networks in relation to which the law refers to the procedure of the BiH CPC regarding the freezing of funds and economic resources without expressly providing for the possibility of appeal against those measures provided for by the CPC.

In addition, the role of the Council of Ministers (*i.e.*, the Government) in the issuance of measures and the obligation of the Court of BiH "to inform the Ministry of Security of any authorisation granted […] no later than eight days prior to the granting of authorisation"[2546] raises concerns in relation to the

2541 "[A]ides to an indicted person" being defined as "any natural or legal person for which grounds for suspicion exist for providing assistance to an indicted person in evasion of availability to the ICTY", also including "a defence lawyer, medical doctor or religious confessor of an indicted person, if there are grounds for suspicion that that assistance is […] an assistance in evading availability to the ICTY".

2542 *Winkler*, 2007, p. 4.

2543 *Ibid*.

2544 *Winkler*, 2007, p. 12.

2545 Article 1 of Additional Protocol 1.

2546 Article 8 paragraph 4 of the Law.

principle of separation of powers and the independence of the judiciary. Also, the review process as such to be carried out before the Court of BiH remains unclear in that there is no regulation on how proceedings can be brought before the Court. In order to receive clarification on these issues, the Court of BiH could consider submitting the law to the Constitutional Court of BiH for a review of constitutionality in accordance with Article VI.3(c) of the Constitution when it is called upon to deal with a case under this law.

▪ The Orders of the High Representative

When issuing orders with a view to dismantle the ICTY indictees' support network, the High Representative for Bosnia and Herzegovina acted pursuant to his "international mandate" and not by way of substitution for any domestic authority.[2547] The orders are addressed to the competent authorities in accordance with Article II.8 of the Constitution, such as the Border Police or the Entity police forces[2548] and the Central Bank of BiH and the Entities' banking agencies.[2549]

ii. The Completion Strategy and the Transfer of Cases from the ICTY to the Authorities of BiH

▪ Background

In order to achieve the aim as outlined in Resolution 1503, the ICTY not only requires enforced cooperation regarding the arrest and transfer of accused persons, but also assistance from national authorities in the actual prosecution of its own cases, most importantly cases with confirmed indictments transferred under Rule 11*bis* of the RoPE, but also the so called "category 2 cases", *i.e.*, partially investigated cases that never reached the level of a formal indictment before the ICTY.

Given that a number of cases pending before the ICTY relating to crimes committed on the territory of BiH appeared to be suitable for transfer in accordance with Rule 11*bis*, the BiH authorities and the Office of the High

2547 For example, Order of 9 January 2008 seizing travel documents of persons who obstruct of threaten to obstruct the peace implementation process, preamble, first paragraph, <www.ohr.int/decisions/war-crimes-decs/default.asp?content_id=41111>, Order of 10 July 2007, <www.ohr.int/decisions/war-crimes-decs/default.asp?content_id=41138>, preamble, first paragraph, Order of 7 March 2003 blocking all bank accounts of, held by, and/or in the name of Momcilo Mandic, preamble, first para,graph <www.ohr.int/print/?content_id=29419>.

2548 Paragraphs 4 and 5 of the order of 10 July 2007 and paragraphs 4 and 5 of the order of 9 January 2008.

2549 Order of 7 March 2003.

Representative for Bosnia and Herzegovina were approached by the ICTY Chief Prosecutor as early as 2001 to assist in the identification of a suitable institution within the country capable to try cases (to be) transferred by the ICTY. Against that background, the transfer of cases from the ICTY has to be considered an important aspect of cooperation with the ICTY in that it plays a significant role for the completion of the ICTY's mandate and thereby for the overall fulfilment of the ICTY´s mandate. However, it remains doubtful whether it is appropriate to consider the taking over of cases as "cooperation obligations" in accordance with Article II.8 of the Constitution for the reasons outlined below. This aspect of the completion strategy is labelled "partnership and transition" by the ICTY itself rather than being considered in the context of "cooperation obligation".[2550]

▪ The Decisions of the ICTY Referral Bench

The ICTY Referral Bench ordered the transfer of 7 cases to the authorities of BiH.[2551]

The decisions of the Referral Bench address the requirements of Rule 11*bis*, which mainly relate to whether the accused can be expected to receive a fair trial before the domestic court(s).[2552] They do not address the question as to whether the accused is likely to be convicted by the national court and/ or whether the domestic courts are going to use all evidence considered appropriate by the OTP. The Referral Bench pointed out, given that it only had the competence to decide on the transfer to the authorities of a State and not to a specific court in accordance with Rule 11*bis*, that it expects the Court of BiH to be the competent court under BiH law to deal with the cases in the event they are transferred.[2553] However, it should be noted that Article 2 of the Law on Transfer does not contain an express prohibition of further transferring ICTY cases to Entity courts.

2550 See <www.un.org/icty/glance-e/index.htm>.

2551 *Prosecutor ./. Stanković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005; *Prosecutor ./. Janković*, IT-96-23/2-AR11*bis*.2, Decision on Rule 11 bis Referral, 15 November 2005; *Prosecutor ./. Ljubičić*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis*, 12 April 2006; *Prosecutor ./. Rašević and Todović*, IT-97-25/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005; *Prosecutor ./. Mejakić et al*., IT-02-56-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis*, 20July 2005; *Prosecutor ./. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 5 April 2007; *Prosecutor ./. Trbić*, IT-04-88/1-PT, Decision on Motion for Referral Under Rule 11*bis*, 27 April 2007.

2552 See *Johnson*, 2005, p. 18.

2553 See *Stanković* Referral Decision, paragraph 3; see also *Blumenstock/Pittman*, 2008, p. 112.

▪ Compliance by BiH Authorities

7 cases have been transferred by the ICTY to BiH authorities in accordance with Rule 11*bis*. As the decision of the ICTY Referral Bench to transfer a case is made in the form of an order pursuant to Rule 11*bis*, the national authorities do not have any meaningful discretion as to whether to accept the case or not once that decision is made. It follows that the Government of BiH indicated both its willingness and ability to accept all relevant cases that the OTP had requested to be transferred in its submissions in the context of the proceedings before the Referral Bench. Only in the case against *Dragomir Milošević*, requested to be transferred by the OTP, did the Government of BiH maintain that it did not consider it suitable for transfer given the status of the perpetrator and the seriousness of the crimes involved, but, however, the BiH Government indicated its willingness and preparedness to prosecute the case should the Referral Bench decide to transfer it regardless.[2554] In the case against *Milan* and *Sredoje Lukić* the Appeals Chamber of the ICTY held that *Milan Lukić*'s alleged crimes in conjunction with his role as a paramilitary leader made the case unsuitable for transfer under Rule 11*bis*.[2555]

The national authorities complied with the orders for transfer by immediately taking custody of accused persons transferred to BiH and processing the cases in accordance with domestic criminal procedure law, with the assistance of the international community in the fulfilment of cooperation obligations (or rather "commitments") in the area of the transfer of cases. The European Convention on Mutual Assistance in Criminal Matters or other rules of interstate cooperation in criminal matters applicable in a horizontal relationship between States do not automatically apply to aspects of cooperation between the ICTY and domestic authorities since it refers to the relationship of signatory States with each other, and not to the rather unique case of the relationship between an international court and a State.[2556]

The Registry for Section I and Section II of the Criminal and Appellate Divisions of the Court of BiH and of the Special Departments for War Crimes and Organized Crime, Economic Crime and Corruption of the Prosecutor's Office of BiH, was established on the basis of the Agreement between the High Representative and Bosnia and Herzegovina[2557] and fulfilled the relevant obligations of the national

2554 See *Prosecutor ./. Dragomir Milošević*, IT-98-29/1-PT, decision of 8 July 2005, paragraph 15.

2555 *Lukić & Lukić* Appeal Decision, IT-9832/1-AR11bis.1, decision of 11 July 2007, paragraph 25.

2556 *Lukić & Lukić* Referral Decision, paragraphs 108, 111; *Blumenstock/Pittman*, 2008, p. 112.

2557 *OG of BiH* – International Agreements - No. 12/04.

authorities. However, the transition aspect already built into the Agreement establishing the Registry in 2004 was further defined by a new Agreement between the same parties in September 2006[2558] reflecting a clear expectation on the side of the International Community and a corresponding obligation of the national authorities to fully take over such responsibilities with the closure of the Registry, planned to take place in December 2009.

▪ The Processing of Cases at the National Level and the Use of ICTY Evidence before the Court of BiH

The actual transfer of cases creates considerable tension between, on the one hand, the obligation of the national authorities to cooperate with the ICTY, and, on the other hand, the fundamental rights provisions of both the Constitution and the ECHR. The relevant domestic legislation, namely the Law on the Transfer of cases was drafted with considerable involvement of the ICTY and, in some regards, raises concerns regarding the constitutionality and complete compliance with fundamental rights principles at the domestic level. The "adaptation and acceptance" of ICTY indictments in cases transferred by the ICTY in accordance with Article 2 of the Law on Transfer, rather than "(re)confirmation", raises concerns regarding the fundamental rights of the defendant during the pre-trial phase despite the prior assessment of evidence by an ICTY judge or Trial Chamber before confirmation. Given the time lapse between confirmation of the indictment at the ICTY and transfer of the case to Bosnian authorities and other practical problems regarding the evidence at the domestic level, including potential difficulties in obtaining the evidence at the domestic level,[2559] the limited assessment carried out by national judges in accordance with Article 2 of the Law on Transfer appears problematic.

The Prosecutor's Office of BiH has processed and adapted all of the transferred ICTY indictments that were ordered to be transferred by the Referral Bench and submitted them to the Court for "acceptance". Pre-trial custody was ordered in all transferred cases.

Given that there has been no duty on the side of the ICTY to assist national jurisdictions in their investigations and prosecutions (which could have been considered as a reciprocal duty to the duty of BiH and other countries in the region as UN member states to fully cooperate under Article 29 of the Statute),

2558 *OG BiH* – International Agreements – No. 3/07.

2559 *Cryer*, 2005, p. 140: "obtaining evidence for the ICTY has not been easy, although perhaps easier than for domestic courts trying similar crimes"; *Katsaris*, p. 193: "in some instances the Prosecutor's Office had not received all relevant material by the ICTY supporting the indictment".

no clear regulations at the international level are in place and the national authorities are somewhat left to the good will or discretion of the ICTY. The Memorandum of Understanding between the ICTY-OTP and the BiH Prosecutor's Office of 2007[2560] addresses a couple of the concerns of the national authorities by, for example, highlighting the requirements under domestic law in relation to the procedural requirements and the corresponding assistance required by the ICTY-OTP for the prosecution of transferred cases. However, in practice a number of problems were not addressed sufficiently prior to the transfer of the defendants, such as the handing over of the ICTY prosecution case files at the time the accused was transferred to BiH authorities and custody for the accused was ordered at the domestic level.[2561] In accordance with Rule 11*bis* (D)(iii), the OTP is only required to transfer evidence that it considers to be relevant. Accordingly, the BiH authorities cannot formally request additional evidence in support of the case(s) at the domestic level other than going through the Registrar of the ICTY in accordance with Rule 33(B) of the RoPE, allowing the ICTY Registrar to make representations to the Chambers on issues arising in specific cases.[2562] The use of electronic copies of files of the ICTY-OTP is possible after entry into force of the relevant amendment to Article 8(2) of the Law on Transfer.

Despite the broad range of possibilities to use the evidence collected by the ICTY as provided for in the Law on Transfer (Articles 3 – 8) the actual use of such evidence at the domestic level still has to be assessed on a case-by-case basis. The defendant has the right to request the attendance of an (expert) witness if the witness's statement made before the ICTY is introduced as evidence in proceedings before the ICTY.[2563] The Law on Transfer also allows the use of statements of ICTY officials and the examination of relevant investigators (Article 7). However, as the examination of the investigator is expressly subject to the Convention on the Privileges and Immunities of the United Nations (a provision that was presumably introduced at the request of the ICTY itself), in practice the examination of ICTY investigators has not occurred despite the fact that it was requested by the Court of BiH in a number of situations.

2560 <www.tuzilastvobih.gov.ba/files/docs/MOU-POBH-OTP_English-RevisedFinal250805_.pdf>.

2561 *Katsaris*, 2007, p. 192-3.

2562 See case no *IT-05-85 Misc-2*, "Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina Pursuant to Rule 33 (B)", 6 April 2005.

2563 See Article 5 (3) and 6 (4) of the Law on Transfer.

■ The Application of the BiH Criminal Code

The application of the BiH Criminal Code of 2003 to cases transferred by the ICTY to the authorities of BiH, as well its application to other war crimes cases on the basis of Article 4.a of the BiH Criminal Code, constitutes a useful tool for the adjustment of crimes charged under the ICTY Statute to prosecutions at the domestic level and does not violate the principle of non-retroactivity as enshrined in Article 7(1) of the ECHR.[2564]

■ Enforcement of Sentences in Cases Transferred under Rule 11*bis*

It is questionable whether the failure of the Entities' authorities to enforce sentences imposed by the Court of BiH in cases transferred by the ICTY (as was seen in the case against *Radovan Stanković*) violates the duty to cooperate in accordance with Article II.8 of the Constitution and – if the failure constitutes a violation – which level (*i.e.*, State level or Entity level) it should be attributed to. The ICTY did not go further than "expressing its concern" about the escape of *Radovan Stanković*, rather than addressing the issue in the context of cooperation obligations, which was probably due to the fact that the insufficiencies in relation to the enforcement system were well known at the time of both the motion for transfer being made by the OTP as well as at the time of the decision taken by the Referral Bench.[2565] In any event, the failure to enforce imprisonment sentences such as in the *Stanković* case highlights the need to upgrade existing enforcement facilities and/or to establish a new facility at the State level.

b. Other Aspects of Cooperation with the ICTY

(a) The *Rules of the Road* Review Process

The *Rules of the Road* process, based on the Rome Agreement of February 1996 signed by the parties to the conflict, was an important process aiming to prevent arbitrary arrests on the basis of war crimes allegations. It required the parties to the Agreement to submit war crimes case files to the ICTY-OTP

2564 See Constitutional Court of BiH, Decision of 30 March 2007, AP 1785/06 [*Abduladhim Maktouf*], paragraphs 70-79; Court of BiH, Appellate Division, Decision of 4 April 2006, Case No.: KPZ 32/05 [case against *Abduladhim Maktouf*], Court of BiH, Appellate Division, Decision of 13 June 2007, Case No.: X-KRZ-05/51 [case against *Dragan Damjanović*]; Court of BiH, Appellate Division, Decision of 13 December 2006, Case No.: X-KRZ 05/49 [case against *Neđo Samardzić*]; Court of BiH, Appellate Division, Decision of 28 March 2007, Case No.: X-KRZ-05/70 [case against *Radovan Stanković*]; Court of BiH, Appellate Division, Decision of 23 October 2007, Case No.: X-KRZ-05/161 [case against *Gojko Janković*].

2565 *Katsaris*, 2007, p. 205.

for clearance prior to proceeding with them at the domestic level. Initially the Agreement did not constitute an aspect of cooperation with the ICTY in accordance with Article II.8 of the Constitution of BiH as the ICTY-OTP had only subsequently "accepted" to carry out the review functions agreed upon in the Rome Agreement and to establish a "*Rules of the Road* Unit" for that purpose. However, the Rome Agreement required transfer of cases to the ICTY for clearance prior to any arrest warrants issued at the domestic level (on the basis of a category A clearance) and therefore effectively became an aspect of cooperation with the ICTY. During its existence the Unit had reviewed 900 investigation files,[2566] involving a total of 5,789 persons suspected of war crimes.[2567] The ICTY Chief Prosecutor gave approval for 848 persons to be arrested on war crimes charges; however, in many cases arrests still took place in violation of the *Rules of the Road*.[2568] The *Rules of the Road* Unit was closed in September 2004 and transferred its competencies to the Prosecutor's Office of BiH established in 2002.

Article 1.7 of the Election Law of Bosnia and Herzegovina stipulates compliance with the Rome Agreement as a requirement for barring persons from registration to vote or from standing as a candidate or holding any public office in the territory of Bosnia and Herzegovina in cases where they are serving a sentence of any court in BiH or they failed to comply with an order of the courts for serious violations of international humanitarian law. The clearance of their case with so-called "category A" clearance of the ICTY *Rules of the Road* Unit is a requirement, *i.e.*, sufficient evidence had to exist for the processing of the case against them. The reference to review by the ICTY became redundant with the effective abandonment of the Rome Agreement in September 2004, when the Prosecutor's Office of BiH took over the functions of the *Rules of the Road* Unit. The relevant safeguards that the *Rules of the Road* aimed to provide are now enshrined in the relevant BiH criminal procedure code and require the Prosecution to establish sufficient evidence prior to arrests taking place, be it at the pre- or post-indictment stage. Also the judicial review system guarantees due process rights for persons accused and/or arrested by national authorities.

2566 See <www.un.org/icty/glance-e/index.htm>.

2567 *Garms/Peschke*, 2006, p. 3.

2568 See relevant case law of the Human Rights Chamber of BiH, for example, *Damjanović ./. Federation of BiH*, Case No.: CH/98/638, decision of 11 February 2000; *V. Č. ./. Federation of BiH*, Case No.: CH/98/1366, decision of 9 March 2000; on the - negative - effect of the Rules of the Road and of the ICTY jurisdiction on the domestic prosecution of war crimes see *Garms/Peschke*, 2006, pp. 21-23.

(b) Regional Cooperation in War Crimes Cases as Cooperation with the ICTY

Cooperation between the competent authorities in the region can also be considered as an aspect of cooperation with the ICTY, at least in relation to cases transferred by the ICTY in accordance with Rule 11*bis* of the RoPE. The efficient prosecution of war crimes cases at the domestic level is only possible if the relevant authorities provide each other assistance to the extent necessary and required. Cooperation may in general include the extradition of suspects and accused persons, the transfer of cases and other forms of mutual assistance in criminal matters. In relation to cases transferred under Rule 11*bis*, these aspects seem to gain significant importance. However, neither the ICTY Referral Bench nor any other relevant stakeholders addressed matters of regional cooperation in ICTY-transferred cases or other war crimes cases in the context of the obligation of national authorities to cooperate with the ICTY.

(c) Other Requests for Assistance by the ICTY

The BiH authorities have also recently become more involved in providing logistical support to the ICTY in the conduct of its own trials. For example, the Court of BiH facilitated in an expeditious and professional way the arrangements for hearings of the ICTY Trial Chamber at the seat of the Court of BiH in Sarajevo at the request of the ICTY, in the case against *Rasim Delić* between September 2007 and February 2008.[2569] While this logistical support obviously facilitates the implementation of the mandate of the ICTY, it appears to be a rather "soft form" of cooperation and should not be seen as an obligation in the context of Article II.8 of the Constitution.

3. Unrestricted access to human rights monitoring mechanisms established for BiH

"Providing unrestricted access" to all bodies and organisations listed in Article II.8 may in fact be difficult to reconcile with a number of other constitutional provisions, such as the right to fair proceedings[2570] or the independence of the judiciary.[2571] Especially in the light of developments since the entry into force of the Dayton Agreement, a balance has to be found on a case by case basis, taking due consideration of all principles and fundamental rights involved in

2569 See <www.un.org/icty/cases-e/cis/delic/cis-delic.pdf>.
2570 Article II.3(e) of the Constitution of BiH.
2571 Article I.2, as implied in the general commitment to the rule of law as a democratic principle.

a given case as well as the overall development of human rights protections and the increased taking over by national institutions of responsibilities which were initially almost exclusively performed by the international community. For example, extensive monitoring or even "mentoring" of war crimes cases before the Court of BiH tried before panels composed of a majority of international judges by international organisations in 2008 would appear to be outside the scope of Article II.8 of the Constitution, especially considering the changes adopted and implemented since the entry into force of the Dayton Agreement, including, but not limited to, the reform of the national judiciary, the establishment of a functioning appeals system both at the Entity and State levels, the accession of Bosnia and Herzegovina to the Council of Europe, including the review mechanism under the European Court of Human Rights, and the basically positive assessment of the domestic judicial system by the Referral Bench and the Appeals Chamber of the ICTY in proceedings under Rule 11*bis* of the RoPE.[2572] The Decision of the Permanent Council of the OSCE on "co-operation between the OSCE and the ICTY" of May 2005,[2573] according to which the OSCE agrees to carry out the monitoring of cases transferred by the ICTY "within the existing mandates and resources of the respective missions" does not change the mandate of the OSCE as provided for in the Dayton Agreement and therefore needs to be interpreted in light of Article II.8.

4. Cooperation of Competent Authorities with other Bodies under Article II.8

The cooperation of the competent authorities with the supervisory bodies established by any of the international agreements listed in Annex I to the Constitution mainly relates to reporting obligations as outlined in the relevant treaties. States-parties have to report to treaty bodies according to Article 40 of the ICCPR, Article 16 of the ICESCR, Article 9 of the ICERD, Article 18 of CEDAW, Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 44 of the Convention on the Rights of the Child (CRC), all of which are listed in Annex I.

The reporting obligations have to be fulfilled on the basis of the relevant agreements themselves. Others, such as the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, set up a system obliging the States to accept regular inspection visits. The

2572 See, for example, decision of the Referral Bench of 17 May 2005, *Prosecutor ./. Stanković,* No. IT-96-23/2-PT and decision of 22 July 2005, *Prosecutor ./. Janković,* Case No. IT-96-23/2-PT.

2573 Decision No. 673, <www.osce.org/documents/pc/2005/05/14531_en.pdf>.

domestic authorities have cooperated at different levels, however, and especially in relation to reporting obligations, the relevant bodies often criticize the delays in submitting regular reports on the side of Bosnian authorities or the quality of the reports submitted. The obvious case of non-compliance with reporting obligations exists when the State fails to submit the report, but non-compliance can also take the form of incompleteness or inaccuracy of the information provided.[2574] This lack of cooperation constitutes not only non-cooperation in contravention of Article II.8, but also a violation of the relevant international treaty.

2574 See *Dimitrijevic*, 1994, p. 64-6.

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

1. Responsibilities of the Institutions of Bosnia and Herzegovina

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

a) Foreign policy.

b) Foreign trade policy.

c) Customs policy.

d) Monetary policy as provided in Article VII.

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

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

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

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

i) Regulation of inter-Entity transportation.

j) Air traffic control.

2. Responsibilities of the Entities

a) The Entities shall have the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.

b) Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization.

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.

d) Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

3. Law and Responsibilities of the Entities and the Institutions

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

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

4. Coordination

The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.

5. Additional Responsibilities

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

b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

CH/02/12468 *et al*. Š. Kadrić *et al.* “War damages”	20050907
CH/98/375 *et al*. Đ. Besarović *et al*.	20050406
U 5/98-I Izetbegović I	20000417 *OG of BiH*, No. 11/00
U 5/98-II Izetbegović II	20000630 *OG of BiH*, No. 17/00
U 5/98-IV Izetbegović IV	20001231 *OG of BiH*, No. 36/00
U 9/00 The State Border Service	20020130 *OG of BiH*, No. 01/02
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 25/00 Travel Documents	20010710 *OG of BiH*, No. 17/01
U 26/01 The Court of BiH	20020403 *OG of BiH*, No. 04/02

A. Introduction

The division of responsibilities between the State[2575] and the Entities, on the basis of the text of the BiH Constitution itself, gives rise to a number of issues. The relevant provisions of the BiH Constitution have been thoroughly construed through the case-law of the BiH Constitutional Court. Furthermore, as a result of numerous legislative activities and agreements concluded between Bosnia and Herzegovina and the Entities, the existing legal basis does not reflect the existing legal situation in the country, *i.e.*, its constitutional reality.

Article III of the BiH Constitution is a key provision. Paragraph 1 of the said provision creates the impression that it relates to a thorough catalogue of competences, which specify in detail the substantive and legal fields falling within the responsibilities of the State. The impression is even stronger if we take into account Article III.3(a) of the BiH Constitution, which stipulates that "all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities." The said provision, therefore, regulates the residual responsibilities of the Entities. Indeed, it should be noted that Article III.3(a) of the BiH Constitution does not refer to Article III.1 of the BiH Constitution, but to the BiH Constitution as a whole. Accordingly, the Entities have responsibilities only if certain substantive and legal fields do not fall within the responsibility of the State based on Article III.1 of the BiH Constitution or another provision of the BiH Constitution or the provision of Article III.5 of the BiH Constitution. Thus, Article III.5 of the BiH Constitution stipulates "Additional responsibilities" (of the State). Pursuant to Article III.5(a) of the Constitution of Bosnia and Herzegovina, "Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary

2575 Speaking about the division of responsibilities, the notion "the division of responsibilities between the State and the Entities" is firmly implanted in Bosnia and Herzegovina. This notion is not correct in legal terms as "the State" encompasses all administrative-territorial levels of authority, including local communities. It is obvious that this error arises from the disputed definition of the constitutional system of BiH, which is not explicitly mentioned in the BiH Constitution (for more details see "C. State composition (Article I.3)", p. 101). In constitutional terminology, depending on how a constitutional system of a State is organised, there are several ways to express something that is in Bosnia and Herzegovina called the "State". Depending on whether it relates to a confederation or a federation or a centralised unitary state, the notions "a common government", "a federal system of government" or "a central system of government" are used.

to carry out such responsibilities." Pursuant to Article III.5(b) of the BiH Constitution, "[w]ithin six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects." Therefore, Article III of the BiH Constitution must be read in conjunction with the other constitutional provisions which comprise the rules governing the division of responsibilities. Apparently clear and static provisions regulating the division of responsibilities under Article III of the Constitution of Bosnia and Herzegovina are relativised by the provisions governing the division of responsibilities contained in the other Articles of the BiH Constitution.

The BiH Constitutional Court has upheld this mutual relationship of the constitutional provisions related to the distribution of powers. Therefore, the responsibilities of the institutions of Bosnia and Herzegovina are determined not only on the basis of Article III of the BiH Constitution but also on the basis of the division of responsibilities mentioned outside this provision so that the responsibilities which are not explicitly stated in Article III.1 of the BiH Constitution do not necessarily fall within the exclusive responsibilities of the Entities.[2576] The BiH Constitution stipulates certain institutions at the level of Bosnia and Herzegovina and, at the same time, it foresees certain responsibilities of these institutions, which may be found, for instance, in Article IV.4, the responsibilities of the Parliamentary Assembly or in Article V.3 of the BiH Constitution, those of the Presidency of Bosnia and Herzegovina. However, these responsibilities are not necessarily enumerated, *i.e.*, reiterated in Article III.1 of the BiH Constitution. As a result, the Presidency of Bosnia and Herzegovina, pursuant to Article V.5(a) of the BiH Constitution, has civilian command authority over the armed forces, although the responsibilities related to the military issues are not explicitly stated in the context of the institutions of Bosnia and Herzegovina.[2577]

Based on the same principle, in Case No. U 9/00, the BiH Constitutional Court recognised, pursuant to the provisions of Article III.5(a) of the BiH Constitution, first sentence, third constellation, the powers of Bosnia and Herzegovina to establish its own State Border Service. In this context, the BiH Constitutional Court primarily establishes that the mentioned constellations of Article III.5(a), the first line of the BiH Constitution, which operate as the basis for the authority of Bosnia and Herzegovina to assume additional responsibilities, are independent of each other and do not have to be cumulatively met. Consequently, in the third constellation, the approval by the National Assembly of the Republika Srpska

2576 U 5/98-II, paragraphs 12 and 26; also, U 25/00, paragraph 31.
2577 *Ibid*.

is not necessary.[2578] Also, this clearly follows from the linguistic meaning of the mentioned provision and such interpretation is entirely logical. Furthermore, Article IV.4(a) of the BiH Constitution (legal obligations of the Parliamentary Assembly of Bosnia and Herzegovina) does not stipulate an obligation of the National Assembly of the Republika Srpska to give an approval.[2579] The purpose of establishing the State Border Service is to ensure that the State takes all steps necessary to protect its territorial integrity, political independence and international personality, and these notions are inherent in the notion of State sovereignty.[2580] Hence, the Law on State Border Service, which ensures the right of the institutions of Bosnia and Herzegovina to exercise their powers, is not in contravention of Article III.2 of the BiH Constitution and it is consistent with the responsibilities arising from Article III.1 of the BiH Constitution and completed by Article III.5 of the BiH Constitution.[2581]

In addition, the result of this system of the distribution of powers is that the enumeration of responsibilities under Article III.1 of the BiH Constitution does not automatically regulate the sole responsibilities of Bosnia and Herzegovina, as the case related to "special parallel relationships with neighbouring states" shows, which, in fact, falls within the scope of "foreign policy". Accordingly, as to the division of responsibilities between the State and the Entities, it is necessary to take into account the "Rule-Exception" principle in each individual case.

B. Responsibilities of the State outside the scope of Article III.1 of the BiH Constitution

Outside the scope of Article III, certain responsibilities are given as an obligation to Bosnia and Herzegovina and/or the Entities or are assigned to the institutions of Bosnia and Herzegovina by the BiH Constitution.

Pursuant to Article I.7 of the BiH Constitution, there is citizenship of Bosnia and Herzegovina, which is regulated by the Parliamentary Assembly of Bosnia and Herzegovina, and there is citizenship of each Entity, regulated by each Entity. The Entities may issue passports of Bosnia and Herzegovina to their citizens as regulated by the Parliamentary Assembly of Bosnia and Herzegovina (Article I.7(e) of the BiH Constitution).

2578 Paragraph 10.
2579 *Ibid*.
2580 Paragraph 13.
2581 *Ibid*.

> In its Decision No. U 25/00, the subject matter for review by the BiH Constitutional Court was the constitutionality of the Law on Travel Documents of Bosnia and Herzegovina. The BiH Constitutional Court declared that the Law was constitutional. In the decision, the BiH Constitutional Court underlines that there is a clear linguistic and essential distinction in the BiH Constitution between designing passports and issuing passports.[2582] This is another example demonstrating that there are responsibilities assigned to Bosnia and Herzegovina that are outside the scope of Article III of the BiH Constitution. The Parliamentary Assembly of Bosnia and Herzegovina, therefore, has the sole authority over the design of BiH passports, and the Entities, based on the State law, are responsible for issuing passports. Neither Article I.7(a) or (b) of the BiH Constitution, nor any other provision of the BiH Constitution impose an obligation on the Parliamentary Assembly of Bosnia and Herzegovina to ensure that BiH passports may serve as proof of citizenship of an Entity. Consequently, the deletion of the names of the Entities is not in violation of the BiH Constitution.[2583]

Pursuant to Articles IV.2 and V.1 of the BiH Constitution, the Parliamentary Assembly of Bosnia and Herzegovina shall adopt an election law. Articles IV.4(e) and V.3(i) of the BiH Constitution obligate the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina to regulate the matters assigned to these institutions by mutual agreement of the Entities. Pursuant to Article VI of the BiH Constitution, the State shall have the responsibility for the constitutional judiciary of the State. Pursuant to Article V.5(a) of the BiH Constitution, first sentence, each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Besides, the members of the Presidency of Bosnia and Herzegovina shall have competence to select a Standing Committee on Military Matters (Article V.5(b) of the BiH Constitution).

Pursuant to Article VI.1(d) of the BiH Constitution, the Parliamentary Assembly of Bosnia and Herzegovina has a mandate, which has not been used to date, after the initial five year appointment, to provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights. Pursuant to Article VII.1 of the BiH Constitution, the Parliamentary Assembly of Bosnia and Herzegovina establishes the responsibilities of the Central Bank. The Parliamentary Assembly of Bosnia and Herzegovina, after the six-year period from the date on which the BiH Constitution entered into force, may assign the responsibilities that were explicitly ruled out from the scope of responsibilities of this institution. Based on the mentioned provision,

2582 Paragraph 31.
2583 Paragraph 32.

the BiH Constitutional Court has concluded that the Central Bank of Bosnia and Herzegovina is vested with the exclusive responsibility for issuing currency and monetary policy throughout Bosnia and Herzegovina and, therefore, there is no residual responsibility under Article III.3 of the BiH Constitution left in this respect for the Entities.[2584]

> Under the BiH Constitution, Article 98 of the RS Constitution establishing a National Bank of the Republika Srpska and stipulating legal grounds for the status, organisation, management and operations thereof was challenged as it failed to pay due regard to the limitations stemming from Article VII of the BiH Constitution.[2585] In addition, the BiH Constitutional Court declared that Article 76, paragraph 2 of the RS Constitution was unconstitutional and, consequently, it rendered it ineffective, as the mentioned Article stipulated that the National Bank should have responsibility to propose laws, other regulations and general enactments relating to the monetary, foreign exchange and credit system: pursuant to Article VII of the BiH Constitution it may be clearly concluded that the Central Bank of Bosnia and Herzegovina is the sole authority for monetary policy throughout Bosnia and Herzegovina and the notion "policy" in this context must be considered to include legislative proposals in the respective field.[2586]

Besides these responsibilities of the State, which are not explicitly mentioned in Article III.1 of the BiH Constitution, the BiH Constitution contains a number of provisions which **institutionally** regulate the issue of responsibilities of the State. Thus, Article VIII.1 of the BiH Constitution is a reflection of Article III.1(e), as the Parliamentary Assembly of Bosnia and Herzegovina, on the proposal of the Presidency of Bosnia and Herzegovina, adopts a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina. Pursuant to Article VIII.3 of the BiH Constitution, the Federation of BiH shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget (of Bosnia and Herzegovina), except insofar as revenues are raised as specified by the Parliamentary Assembly of Bosnia and Herzegovina.

> In the request for review of the constitutionality in Case No. U 25/00, the applicant sought the review of the constitutionality of the provisions of Article 28 of the Law on Travel Documents of Bosnia and Herzegovina, which stipulates that the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina, inter alia, shall be responsible for deciding on the price of travel documents and for the collection and distribution

2584 U 5/98-I, paragraph 49.
2585 *Ibid*., paragraphs 49, 50.
2586 *Ibid*., paragraph 51 *et seq.*

> of revenue related to passport fees. Namely, the applicant claimed that Bosnia and Herzegovina should not transfer this amount into the budget of Bosnia and Herzegovina. Providing reasons that such a transfer is, nevertheless, encompassed by the BiH Constitution, the BiH Constitutional Court referred to the provisions of Articles IV.4(b) and VIII.3 of the BiH Constitution, which *expressis verbis* stipulate that the Parliamentary Assembly of Bosnia and Herzegovina shall be responsible for deciding upon the sources and amounts of revenues.

The institutional assignment of responsibilities under Article III.1(a) and (e) of the BiH Constitution may be found in Articles IV.4 and V.3 of the BiH Constitution, which stipulate that the Parliamentary Assembly of Bosnia and Herzegovina shall have responsibility for deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina (Article IV.4(b) of the BiH Constitution); approving a budget for the institutions of Bosnia and Herzegovina (Article IV.4(c) of the BiH Constitution); and deciding whether to consent to the ratification of treaties (Article IV.4(d) of the BiH Constitution). On the other hand, the Presidency of Bosnia and Herzegovina, pursuant to Article V.3(a) – (d) of the BiH Constitution, shall have responsibility for conducting the foreign policy of Bosnia and Herzegovina. Under Article V.3(f) of the BiH Constitution, the Presidency of Bosnia and Herzegovina shall have responsibility for proposing an annual budget.

C. International obligations imply responsibilities

Pursuant to Article II.1 of the BiH Constitution, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognised human rights and fundamental freedoms. All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in Article II.2 of the BiH Constitution (Article II.3 of the BiH Constitution). The enjoyment of the rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination (Article II.4 of the BiH Constitution). Pursuant to Article II.6 of the BiH Constitution, Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in Article II(2) of the BiH Constitution. Based on the mentioned international and legal responsibility of the State, the BiH Constitutional Court, in a number of its decisions,

established certain rules on responsibilities.[2587] In order to meet its obligations towards the citizens throughout the country, the State must have appropriate authority if the activity of the Entities is not sufficient.

The BiH Constitution, also, establishes the fundamental constitutional principles and goals for the functioning of Bosnia and Herzegovina, as well as a catalogue of human rights and fundamental freedoms, which should be understood as the guiding principles of the Constitution or as the restrictions on the exercise of the responsibilities of Bosnia and Herzegovina, as well as of the Entities.[2588] All bodies of Bosnia and Herzegovina have the obligation to guarantee the right to property, as that follows from the obligation relating to the protection of private property and the promotion of a market economy (line 4 of the Preamble of the BiH Constitution), as well as the obligation relating to the protection of freedom of movement of goods, services, capital and persons (Article I.4 of the BiH Constitution) and the protection of the right to property (Article II.3(k) of the BiH Constitution) together with the obligation under Article II.6 of the BiH Constitution, which stipulates that the Entities must "apply and conform to the human rights and fundamental freedoms referred to in paragraph 2". The right to property is not only a right which all authorities of BiH must comply with, but there is also a positive obligation on the State to provide for the conditions which will ensure the enjoyment of that right.[2589] Given that Article II.3 of the BiH Constitution stipulates that "all persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms […]" listed in the mentioned paragraph, Article II.3 therefore grants a general authority to the joint institutions of Bosnia and Herzegovina to regulate all matters enumerated in the catalogue of human rights, which cannot be exclusively left to the Entities because the protection must be guaranteed to "all persons within the territory of Bosnia and Herzegovina".[2590]

> With respect to this issue (the State's obligation to guarantee constitutional rights and freedoms), the Human Rights Chamber's position is not consistent. Thus, for instance, the Human Rights Chamber found no responsibility of Bosnia and Herzegovina for violations of human rights and freedoms relating to the disappearance of a military commander of the Army of the Republic of Bosnia and Herzegovina in the Žepa enclave, as his disappearance is attributed solely to Bosnian Serb military units.[2591] As to a possible violation of the wife's right not to be subjected to inhuman

2587 U 5/98-II; U 26/01; U 18/00.
2588 U 5/98-II, paragraph 13.
2589 *Ibid*.
2590 *Ibid*.
2591 CH/99/3196-A (Partial Decision), paragraph 9.

> and degrading treatment under Article 3 of the ECHR, because of the stress caused by the continuing uncertainty concerning her husband's fate, and taking into account the case-law of the BiH Constitutional Court, one may find the responsibility of Bosnia and Herzegovina under Article II.1 of the BiH Constitution in conjunction with Article 3 of the ECHR. In another case, the Human Rights Chamber established the responsibility of the State; however, its responsibility relates to a failure to fulfil its positive obligations to protect rights.[2592]

The BiH Constitutional Court provides reasons as to the authority of Bosnia and Herzegovina to establish a court at State level, which *is not* foreseen by the BiH Constitution, asserting that such a court at State level is necessary for guaranteeing individual rights, such as the right to a fair trial or the right to have an effective remedy, as well as the principles of the rule of law. The central part of the mentioned Decisions reads: "the establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law and in satisfying the requirements of the ECHR to provide a fair hearing and adequate judicial remedy."[2593] As long as the Court of Bosnia and Herzegovina is not operational, there will be no possibility in the legal system of Bosnia and Herzegovina to challenge decisions by the institutions of Bosnia and Herzegovina before an organ that satisfies the requirements of an independent and impartial tribunal.[2594] In these circumstances, Bosnia and Herzegovina, functioning as a democratic State, is authorised to establish, in the areas under its responsibility, other mechanisms, besides those explicitly provided for in the BiH Constitution, and additional institutions as necessary for the exercise of its responsibilities, including the setting up of a court to strengthen the legal protection of its citizens and to ensure respect for the principles of the ECHR.[2595]

Contrary to the aforementioned, in the case of *Softić*, relating to the termination of labour relations by a State Ministry, the Human Rights Chamber took the position that as long as such a court does not exist (in fact, a State-level court), the courts of the Federation of BiH are competent to decide the applicant's case. These courts offer sufficient guarantees for effective judicial protection.[2596] Also, in the case of *Zornić*, the Human Rights Chamber examined the issue

2592 Compare, for instance, CH/97/48, paragraph 164 *et seq.*

2593 U 26/01, paragraph 24.

2594 U 26/01, paragraph 25; compare, as examples, the cases relating to a denial of judicial protection resulting from the termination of employment by the State Ministries: CH/98/1309 *et al*.-A&M, paragraph 133; CH/98/1309 *et al*.-RR, paragraph 10 *et seq.*

2595 U 26/01, paragraph 26.

2596 CH/97/76-A&M, paragraph 69.

as to whether Bosnia and Herzegovina bears any responsibility for any alleged failures of its component Entities. The Human Rights Chamber refused such a possibility, taking into account Article I of Annex 6 to the Dayton Peace Agreement and the division of responsibilities under the BiH Constitution.[2597]

Likewise, the Case No. U 26/01, the BiH Constitutional Court, in Case No. U 18/00, derives the constitutional obligation of the State to ensure constitutional rights and freedoms safeguarded by Article II of the BiH Constitution from the State's responsibility to regulate the substantive and legal fields that is not explicitly mentioned in Article III.1 of the BiH Constitution.

> In Case No. U 18/00, the appellant was injured in a traffic accident which occurred in 1979 on a main road when a stone fell from a cliff, broke the window of the bus where the appellant was, and hit him on the head. As a result he suffered serious bodily injury so that he lost his ability to work. Since then, the competent courts, on various occasions, awarded him compensation for damage payable from the Republic Fund for Main and Regional Roads of Bosnia and Herzegovina. In 1998, once again the appellant filed a civil action and claimed compensation for damage (as his health condition deteriorated). This time, the civil action was rejected for lack of standing to be sued. The Federation of BiH and the Republika Srpska maintained that they were not liable for paying compensation to the appellant. Due to the new constitutional and legal system, the original institution responsible for compensation for damage at the level of the Republic "disappeared".

Starting from Article III.1(i) of the BiH Constitution (responsibility for regulation of inter-Entity transportation) in relation to the right of access to court and effective legal remedies, the BiH Constitutional Court established that Bosnia and Herzegovina was responsible to compensate the appellant for damage. The Republika Srpska cannot be held responsible, as it – unlike the Federation of BiH – failed to adopt the legal regulations with respect to legal succession.[2598] Indeed, the Federation of BiH, through the Dayton Peace Agreement, took over more responsibilities from the Republic of BiH. The Ministry for Transportation and Communications took over the responsibilities and resources of the former institutions and bodies of the Republic of Bosnia and Herzegovina, whereby it took over responsibility for the obligations incurred by the Republic of Bosnia and Herzegovina.[2599] Nevertheless, such a transfer is not significant as, on the one hand, it is in contravention of Article I of the BiH Constitution, according to which the Republic of BiH continues its legal existence under

2597 CH/99/1961-A&M, paragraph 99 *et seq.*
2598 Paragraph 32 *et seq.*
2599 Paragraph 34.

international law as a state and, on the other hand,[2600] pursuant to Article III.1(i) of the BiH Constitution, regulation of inter-Entity transportation falls within the exclusive competence of the State.[2601] The State cannot circumvent its obligation to establish bodies that are within its exclusive competencies under the Constitution of Bosnia and Herzegovina. However, a counter-thesis is also valid: the Entities cannot take over the State's competencies provided by the Constitution of Bosnia and Herzegovina.[2602] Nevertheless, as regards the responsibility of the State, *i.e.*, its standing to be sued, it may be reasoned that only the State, through its legal acts, might provide adequate redress for a violation of the right of access to court and the right to an effective legal remedy. Shortcomings in the judicial systems of the Entities, that is, of the State, may not have an effect upon respect for fundamental rights and freedoms of individuals, which are safeguarded by the Constitution; an individual should not bear an excessive burden when trying to exercise his/her rights in the most effective manner.[2603]

It is often difficult to determine a responsible legal personality (the standing to be sued) due to the complex division of responsibilities between the State and the Entities.[2604] By analysing the case-law of the BiH Constitutional Court or the Human Rights Chamber or the Human Rights Commission within the BiH Constitutional Court it may be seen that this is a very serious issue. Thus, for instance, based on a very complex analysis, the mentioned institutions concluded that the issue of "old foreign currency savings" was to be regulated by the enactment of a State law on public debt as the State was responsible for the protection of the private property of its citizens,[2605] and that the Entities were responsible for regulating the issue of "war damage".[2606]

What conclusion can be made from the aforementioned cases? If it is a case that relates to a substantive and legal constitutional area, which, by its nature, falls within the protection of human rights and freedoms and which, under the BiH Constitution, is originally the responsibility of the Entities, then the State has a *subsidiary responsibility for regulating* the substantive and legal constitutional area. The requirement for "activation" of this subsidiary responsibility (this means, the point in time when the State avails itself of the

2600 *Ibid*.
2601 Paragraph 35.
2602 *Ibid*.
2603 Paragraph 40.
2604 In CH/02/12468 *et al*., paragraph 152, the Human Rights Commission within the BiH Constitutional Court speaks about a *sui generis* federal state.
2605 CH/98/375 *et al*., paragraph 1196 *et seq.*
2606 CH/02/12468 *et al.*, paragraph 140 *et seq.*

right to intervene) is that the Entities fail to fulfil their obligation to protect "the highest level" of human rights and freedoms, as required under the BiH Constitution.[2607] In such a situation, the type and scope of activities at the State level depend on the particularities of each individual case, and a margin of appreciation in the decision-making is granted to the State. In this manner, the exclusive responsibilities of the Entities are transferred into the concurrent responsibilities of the State and the Entities, which are regularly defined in the "so called" framework laws (for more on this see the text below). If the State did not have this subsidiary responsibility for regulating a substantive and legal constitutional area or failed to avail itself of it, the State would breach its positive constitutional obligation to protect human rights and freedoms. In substantive and legal constitutional areas, which fall within the State's exclusive competence, the State itself, without the Entities, has the sole responsibility for protecting human rights and freedoms ("the highest level").[2608] A failure to ensure "the highest level" of protection may not be compensated by any intervention by the Entities, irrespective of whether or not such interventions were actually purposeful.

D. Concurrent competences

1. Overview

The responsibilities of the State stipulated under Article III.1(a) and III.1(b) of the BiH Constitution are not exclusive by nature. Pursuant to Article III.2(a) of the BiH Constitution, the Entities are entitled to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina. In addition, each Entity may enter into agreements with states and international organisations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent (Article III.2(d) of the BiH Constitution). Such special relationships or agreements with other states and international organisations fall within the responsibilities of the State related to foreign policy and foreign trade policy.

The constitutional provisions governing the responsibilities of the Presidency of Bosnia and Herzegovina under Article V.3 of the BiH Constitution ought be understood as general provisions.[2609] Article V.3(b) of the BiH Constitution, which

2607 See, for instance, Case No. CH/02/12468 *et al*.
2608 Compare, for instance, CH/98/375 et al.; U 18/00.
2609 U 5/98-I, paragraph 40.

stipulates that the Presidency of Bosnia and Herzegovina shall have responsibility for appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation of BiH, does not rule out the right of the Entities to make proposals as part of the selection process as long as such proposals are not legally binding for the Presidency of Bosnia and Herzegovina.[2610] Accordingly, the Entities are entitled to establish representations abroad and make proposals relating to ambassadors and other international representatives of Bosnia and Herzegovina as long as this right does not interfere with the authority of Bosnia and Herzegovina to be represented as a (sovereign) State.[2611] On the contrary, *the appointment* of heads of BiH diplomatic missions falls within the exclusive competence of the Presidency of Bosnia and Herzegovina.[2612]

In addition, in Case No. U 5/98-II,[2613] the BiH Constitutional Court provides reasoning as to the residual responsibilities of the Entities under Article III.2(a) of the BiH Constitution, which generally fall within the responsibilities of Bosnia and Herzegovina under Article III.1(a) and (b) of the BiH Constitution.

> Article III.2(b) and Article III.4 of the BiH Constitution rather relate to the necessity of cooperation between the State and the Entities than to effective and exclusive responsibilities. Pursuant to Article III.4 of the BiH Constitution, the Presidency of Bosnia and Herzegovina may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in the BiH Constitution, unless an Entity objects in any particular case. Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organisation. (Article III.2(b) of the BiH Constitution).
>
> Article III.2(c) of the BiH Constitution stipulates rather the responsibility than the authority of the Entities to provide a safe and secure environment for all persons within their respective jurisdictions, by maintaining civilian

2610 Paragraph 43.

2611 Paragraph 41.

2612 Therefore, the provisions of Article IV.B.7(a)(i) and Article IV.B.8 of the Constitution of the Federation of BiH, which stipulate the power of the President of the Federation of BiH to appoint heads of diplomatic missions, are unconstitutional: see, U 5/98-I, paragraph 65 *et seq.*

2613 Paragraph 12.

> law enforcement agencies operating in accordance with internationally recognised standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II of the BiH Constitution, and by taking such other measures as appropriate.

The Entities have **no residual responsibilities** in the area of the "so called" federal disputes,[2614] which falls, pursuant to Article VI.3(a) of the BiH Constitution, within the exclusive jurisdiction of the BiH Constitutional Court. For this reason and taking into account its jurisdiction to issue interim measures in accordance with Article 75 of the Rules of the BiH Constitutional Court (Article 77. a. v.), the BiH Constitutional Court finds no room for the institutions of the Republika Srpska to issue any provisional measure in case of federal disputes.[2615] Article 138 of the RS Constitution, as modified by Amendments LI and LXV, confers a power on the bodies of the Republika Srpska so that in a case where acts of the institutions of Bosnia and Herzegovina or acts of the Federation of BiH, in contradiction with the Constitution of the Republika Srpska and the Constitution of Bosnia and Herzegovina, violate the equality of the Republika Srpska, or when its rights and legal interests are otherwise endangered without its protection being secured, the organs of the Republika Srpska shall, temporarily until a decision of the Constitutional Court of Bosnia and Herzegovina is adopted and in cases when irremediable detrimental consequences might occur, pass enactments and undertake measures for the protection of the rights and interests of the Republika Srpska.

However, taking into account the BiH Constitution, one cannot make an objection in cases where the Entities wish to provide their citizens with a wider range of human rights and freedoms than the one offered by the BiH Constitution itself, including the ECHR. As a result, the BiH Constitutional Court held that Amendment LVII, paragraph 1 of the RS Constitution was not necessarily in contravention of the BiH Constitution, which stipulates that in a case where the RS Constitution and the BiH Constitution contain different provisions for the protection of human rights and freedoms, those that are more favourable to the individual shall be applied. This possibility arises from the relative constitutional autonomy enjoyed by administrative-territorial units of complex states, as also stipulated by Article 53 (former Article 60) of the ECHR.[2616] However, this authority of the Entities must not be understood as the right to

2614 "A federal dispute" is a common expression in constitutional terminology for disputes between various administrative-territorial levels of authority. This expression does not put emphasis primarily on a federal structure of authority but on a complex vertical structure of authority, as there is a distribution of powers between them.

2615 U 5/98-I, paragraph 56 *et seq.*

2616 U 5/98-I, paragraphs 31-34; compare Separate Opinion by Judge *Begić* on the Decision adopted by a majority vote in Case No. U 5/98-I.

assume the exclusive responsibilities of a higher level, but as the right of the Entities to exceed, within their respective responsibilities, a minimum level of protection as foreseen by the BiH Constitution. If an Entity aspires to provide a wider level of protection in an area falling within the responsibility of the State, a delegation of the State's competence is required.[2617]

Concurrent responsibilities also exist in the field of **public security** if it relates to the protection of State borders. Based on the specific responsibility under Article III.1 of the BiH Constitution and the principal right of each State to the self-defence necessary to preserve sovereignty, as referred to in Article III5 of the BiH Constitution, the establishment of a State Border Service fall within the responsibility of the State. This responsibility is not in contravention of the responsibilities and obligations of the Entities to provide a safe and secure environment for all persons in accordance with Article III.2 of the BiH Constitution. This principal obligation is incorporated into the Law on State Border Service as the Law upholds this responsibility of the Entities and provides for a policy of cooperation and assistance between the State Border Service and the Entities' police forces, which should improve the guarantee of public order under jurisdiction of the Entities.[2618]

Systematisation of concurrent responsibilities, if applied to the "so called" implied powers,[2619] may cause difficulties in practice as the **balance of forces** between the State and the Entities, in the complex state system, must not be disrupted. Consequently, appropriate **adjustments** are required to transfer such responsibilities. The Human Rights Commission within the BiH Constitutional Court made a particular effort to define them.[2620] The principle of governing the division of responsibilities between different administrative-territorial levels of authority, which is protected in all confederal and federal structures, is called **subsidiarity**. Under this principle, a higher level of authority (the State) may undertake an activity only if such an activity cannot be undertaken in the same or better way by the next lower level of authority (a situation of necessity). In addition, the State enjoys a certain margin of appreciation in deciding whether or not necessity exists. Such decisions are subject to review by the BiH Constitutional Court.

On the contrary, the State may delegate certain tasks to the Entities, which fall within the exclusive responsibility of the State.[2621]

2617 Compare, CH/98/375 *et al*. and U 14/05.
2618 U 9/00, paragraphs 11-13.
2619 The responsibilities of the State derived from its international obligations.
2620 Compare also CH/02/12468 *et al*., paragraph 152 *et seq.*
2621 Compare, CH/98/375 *et al*. and U 14/05.

2. Framework legislation

The exclusive responsibility of the State to regulate certain substantive and legal areas does not necessarily have to arise from the constitutional obligations of Bosnia and Herzegovina. Moreover, the State may be considered obliged to limit itself to the enactment of **essential uniform regulations**, for instance, in the form of framework legislation. In its Decision No. U 5/98-II, the BiH Constitutional Court implies that Bosnia and Herzegovina is responsible for enacting framework legislation on the **privatisation** of enterprises and banks,[2622] in order to harmonise the Entities' legislation in this field and to include all persons in the privatisation process in a non-discriminatory manner.[2623] The BiH Constitutional Court generally notes that the different legal systems of the Entities, with different types of property or regulations of property law, may indeed constitute an obstacle for the freedom of movement of goods and capital as stipulated in Article I.4 of the BiH Constitution. Moreover, the right to private property safeguarded by the BiH Constitution, as an institutional safeguard throughout Bosnia and Herzegovina, requires framework legislation at the State level in order to specify the standards necessary to fulfil the positive obligations arising from the BiH Constitution. Therefore, such framework legislation should determine, at least, the various forms of property, the holders of these rights, and the general principles for the exercise of property rights in property law that usually constitutes an element of the civil law codes in democratic societies.[2624]

In the opinion of the BiH Constitutional Court, the **official use of languages at the level of the Entities** should be regulated in the same way through framework legislation at the State level in order to establish standards for the protection of individual rights and to fulfil the positive obligation used as an institutional safeguard for a "pluralist society" and the "market economy". In addition, the legislation of BiH must account for the effective possibility of the equal use of the Bosnian, Croatian and Serbian languages, not only before the institutions of Bosnia and Herzegovina but also at the level of the Entities and any subdivisions thereof with regard to the legislative, executive and judicial powers and in public life. The highest standards of Articles 8 through 13 of the European Charter for Regional and Minority Languages should thus serve as a guideline for the three languages mentioned, so that the establishment of private schools would not be sufficient to meet these standards. Lower standards mentioned in the European Charter for Regional and Minority Languages might

2622 *OG of BiH*, No. 14/98.
2623 Compare, U 5/98-II, paragraph 28.
2624 Compare, *Ibid*., paragraph 29.

– taking the appropriate conditions into consideration – thus be sufficient only for other languages.[2625]

Also, **the payment of "old foreign currency savings"** should be regulated through framework legislation at the State level within which the Entities may be active on the basis of orders and approvals by the State. In so doing, the State cannot absolve itself from its principal obligation to guarantee the human rights and freedoms under the BiH Constitution of the persons affected by this problem.[2626]

3. Special case: Entities' special parallel relationships with neighbouring states

Pursuant to Article III.2(a) of the BiH Constitution, the Entities are entitled to establish special parallel relationships with neighbouring states. The aforementioned involves the residual responsibility of the Entities, the use of which must not be in violation of the right at the State level (Article III.3(b) of the BiH Constitution), and, in particular, of the principles of sovereignty and territorial integrity of Bosnia and Herzegovina (Article III.2(a) of the BiH Constitution).

Having regard to the BiH Constitution, one cannot make an objection if the possibility of establishing special parallel relationships with neighbouring states is stipulated in the constitution of an Entity, although there is not a more general reference to the existence of such a right under the BiH Constitution nor does it specifically mention the sovereignty and territorial integrity of Bosnia and Herzegovina. Namely, taking into account the provisions of Article III.2(a) and Article II.4 of the BiH Constitution (the prohibition of discrimination), it is possible to find a constitutionally conforming interpretation of this provision in such a case.[2627] In addition, a limitation on the establishment of special parallel relationships only with one state is not unconstitutional if an *obligation* to enter into such agreements cannot be seen from the text of the respective provision.[2628] Therefore, the full text of Article 4 of the RS Constitution, as modified by Amendment LVI, paragraph 2, could remain in effect; it reads: "the Republika Srpska may, according to the Constitution of BiH, establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics."

2625 U 5/98-IV, paragraph 34.
2626 CH/98/375 *et al*., paragraph 1206 *et seq.*
2627 Compare, U 5/98-IV, paragraph 15 *et seq.*
2628 U 5/98-IV, *Ibid*.

On the contrary, it is inconsistent with the obligations arising from Article 2(1) (c) of the International Convention on the Elimination of All Forms of Racial Discrimination,[2629] Article I.3(a) and Article II.1 of Annex VII in conjunction with Article II.5 and Article III.2(c) of the BiH Constitution, when the Republika Srpska stipulates in Article 68(16) of the RS Constitution that "the Republic [Republika Srpska] shall regulate and ensure cooperation with the Serb people outside of the Republic".[2630] The binding character of the said provision has the effect of creating a specific preference for the Serb population although such preference, within the meaning of Article 1, paragraphs 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination,[2631] is not necessary, as an adequate advancement of the Serb people in the Republika Srpska is, on the basis of their factual majority position, certainly not required.[2632]

2629 Article 2(1) item (c) of the International Convention on the Elimination of All Forms of Racial Discrimination: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: [...] c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;" (quotation: UNHCR, 1998, p. 135).

2630 U 5/98-IV, paragraph 18.

2631 Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination:
"(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. [...]
(4) Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." (Quotation: UNHCR, 1998, p. 135).

2632 Compare also Separate Opinion by Judges *Savić* and *Popović* on the Decision adopted by a majority vote in Case No. U 5/98-IV.

E. Article III.5 – Additional responsibilities

5. Additional Responsibilities

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

(b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to including in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

1. Introduction

Article III.5 of the Constitution of Bosnia and Herzegovina (hereinafter *Constitution*) has been at the centre of many discussions since the entry into force of the Constitution. It is treated under a specific section of this publication given the extent to which it has been the source of a very dynamic evolution of Bosnia and Herzegovina (BiH) constitutional law. By providing that Bosnia and Herzegovina[2633] can assume additional responsibilities over such matters as are agreed by the Entities, the provision is inherently organic and a clear source of flexibility for BiH constitutional law. Many reforms have indeed been based on Article III.5 since the entry into force of the Constitution. The establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), the Indirect Taxation Authority (ITA) or the implementation of reforms in the field of defence are all, for example, related to Article III.5 of the Constitution.

While several questions have been raised through the years in the context of the many reforms that have taken place in BiH, very few of them have been clarified by the Constitutional Court of BiH (hereinafter *Court*). Do all the responsibilities exercised by Bosnia and Herzegovina pursuant to Article III.5 necessarily qualify as "transferred responsibilities"? Does Bosnia and Herzegovina need to be party to an agreement transferring competencies

2633 The terms "Bosnia and Herzegovina" and "institutions of Bosnia and Herzegovina" are used interchangeably throughout this chapter. Each term refers to the central level of government within the constitutional structure of Bosnia and Herzegovina. The Constitution itself refers either to "Institutions of Bosnia and Herzegovina" (see, *inter alia*, Article III.1) or "Bosnia and Herzegovina" (see Article III.3(a) in its English version).

under Article III.5(a)? Can Entities regulate the manner in which they consent to such agreements or can an Entity unilaterally withdraw its consent from such agreements?

This commentary seeks to provide a number of answers to these important questions. Its structure is based on the two main components of Article III.5, namely Article III.5(a) and Article III.5(b).

a. Transfer of responsibilities or assumption of responsibilities?

Before turning to the first category of responsibilities, a number of points need to be made regarding the concepts of the *transfer* and *assumption* of responsibilities. Many in BiH have, through the years, categorised all responsibilities exercised by Bosnia and Herzegovina pursuant to Article III.5 as necessarily belonging to a category of so called “transferred” responsibilities. While it may be legitimate in our view to categorise as such responsibilities that have been transferred to Bosnia and Herzegovina by virtue of an agreement between Entities reached under Article III.5(a), the notion of “transfer” does not however apply to other responsibilities exercised on the basis of the same Article.

When Bosnia and Herzegovina adopts, for example, legislation on the basis of responsibilities that are necessary to preserve its sovereignty and territorial integrity, it occupies its own fields of responsibilities under Article III.5(a). Far from being the result of a transfer by the Entities, such responsibilities clearly fall within the exclusive domain of Bosnia and Herzegovina.

The case law of the Court is rather clear on this point. In U 9/00, the Court indicated:

> […] The applicants are not justified in claiming that, according to Article III.5(a), the Presidency of Bosnia and Herzegovina required the prior consent of the National Assembly of Republika Srpska to submit a proposal for the Law on State Border Service to the Parliamentary Assembly of Bosnia and Herzegovina. Indeed, the aforementioned Article distinguishes between three mutually independent hypotheses: Bosnia and Herzegovina shall assume responsibility for such other matters as (1) are agreed by the Entities; (2) are provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to the provision of Articles III.3 and III.5 of the Constitution of Bosnia and Herzegovina. <u>It is in application of the last of these three cases that the Law on State Border Service was proposed by the Presidency of Bosnia and Herzegovina to the Parliamentary Assembly. In this</u>

> context, only Article IV.4(a) which provides that the Parliamentary Assembly shall enact legislation as necessary to implement decisions of the Presidency must be considered. As this Article does not require the consent of the Entities, the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service is not in conflict with the Constitution of Bosnia and Herzegovina. (emphasis added)[2634]

In U 16/08, where the Court was requested to assess the constitutionality of an amendment to legislation establishing the Court of Bosnia and Herzegovina that extended its jurisdiction, the Court clarified its position further.[2635]

The applicant argued that the challenged provision was, *inter alia*, the result of an unconstitutional transfer of responsibilities from the Entities to Bosnia and Herzegovina and that this "silent transfer" of responsibilities endangered the trust of peoples and Entities in constitutional changes in Bosnia and Herzegovina.[2636] The Court rejected the applicant's argument and concluded that Bosnia and Herzegovina had acted within its field of competencies set forth under the Constitution. In so doing, the Court referred to its earlier decision in U 26/01 in which it had indicated that Bosnia and Herzegovina was authorised to establish additional institutions for the exercise of its responsibilities.[2637]

2. Article III.5(a)

Article III.5(a) provides for three different sources of responsibilities for Bosnia and Herzegovina. It stipulates indeed that Bosnia and Herzegovina shall assume responsibility for such other matters (1) as are agreed by the Entities; (2) as are provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) as are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. The Court observed that Article III.5(a) distinguishes between "three mutually independent hypotheses".[2638] This section will address each source of responsibilities in turn.

2634 U 9/00, paragraph 10; The Court reiterated similar positions in, *inter alia*, U 26/01, paragraph 21 and U 42/03, paragraph 18.

2635 The challenged provision stipulated that the Court of Bosnia and Herzegovina had jurisdiction over offences prescribed by Entity legislation when they endangered, *inter alia*, the sovereignty, territorial integrity, political independence of Bosnia and Herzegovina or when such offences could have serious repercussions on the economy of Bosnia and Herzegovina. See Article 13(2) of the *Law on the Court of Bosnia and Herzegovina* (*OG of BiH*, No. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04, 32/07).

2636 U 16/08, paragraph 11.

2637 U 16/08, paragraph 34-35.

2638 U 9/00, paragraph 10; see also, *inter alia*, U 26/01, paragraph 21.

a. Responsibilities as are agreed by the Entities

To date, Entities have reached two agreements pursuant to Article III.5(a) of the Constitution. These agreements respectively cover matters in the field of indirect taxation[2639] and defence.[2640] Many questions have been raised in relation to such agreements: What form of agreement is required by Article III.5(a)? Does Bosnia and Herzegovina need to be party to such agreements? Can Entities regulate the manner in which they consent to such agreements? Can an Entity unilaterally withdraw from an agreement? A number of answers have started to emerge from the case law of the Court.

(a) Who are the parties to the agreement referred to in Article III.5(a)? Does Bosnia and Herzegovina need to be party?

There have been many discussions as to which legal subjects are entitled to conclude an agreement under Article III.5(a). While the text of Article III.5(a) refers to an agreement between Entities only, some have argued that the main beneficiary of such an agreement, namely Bosnia and Herzegovina, should also be party to such agreements.

It could indeed be argued, by reference to Annexes 6, 7 and 8 to the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter *General Framework Agreement*), that the consent of Bosnia and Herzegovina is required. All such Annexes can qualify as agreements signed by Republika Srpska, the Federation of Bosnia and Herzegovina and the Republic of Bosnia and Herzegovina. Moreover, they all contain provisions by which a number of responsibilities are transferred to the institutions of Bosnia and Herzegovina.[2641]

2639 Agreement unpublished. See *Decision to Consent to the Agreement on Responsibilities in the Indirect Taxation Area* (*OG of FBiH*, No. 64/03); See also Republika Srpska National Assembly, *Conclusions No. 01-1005/03* (*OG of RS*, No. 95/03).

2640 See *Agreement between the Federation of Bosnia and Herzegovina and Republika Srpska on the Transfer of Responsibilities in the Field of Defense* (*OG of RS*, No. 04/06); see also *Decision Approving the Transfer of Responsibilities in the Field of Defense from the Federation of Bosnia and Herzegovina to Bosnia and Herzegovina* (*OG of FBiH*, No. 2/06).

2641 See Articles IV.2 and Article XIV of Annex 6, Article XVI of Annex 7 and Article IX of Annex 8 to the General Framework Agreement for Peace in Bosnia and Herzegovina. Article XIV of Annex 6 provides: "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above." It must be read in conjunction, *inter alia*, with Article II of Annex 6 which establishes a Commission on Human Rights composed of a Human Rights Chamber and an Office of the Ombudsman as well as Article IV.2 of Annex 6, which also provides for additional responsibilities for the institutions

Several arguments, however, support the opposite position. Firstly, the text of Article III.5(a) is clear. It stipulates that Bosnia and Herzegovina shall assume responsibility for such other matters "*as are agreed by the Entities*". When read in conjunction with Article IV.4(e), which stipulates that the Parliamentary Assembly shall have responsibility for such other matters as are assigned to it "by mutual agreement of the Entities" it can be argued that the text of the Constitution tends to suggest that Entities only are entitled to enter into such agreements.

The practice of the parties provides us with additional elements to interpret the text of Article III.5(a). The transfer agreement concluded in the field of defence is particularly interesting in this regard. The text of the agreement makes it clear that it was the Entities themselves that agreed on transferring responsibilities. While the agreement has been signed by the Chairman of the Council of Ministers of BiH (in addition to representatives of both Entities), it indicates explicitly that he had signed the agreement as a witness.[2642]

The arrangements that led to the establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) may, although reached under Article III.5(b), also be of particular interest. This agreement provides for a number of obligations for Bosnia and Herzegovina. It was signed by the Prime Ministers of both Entities on 11 March 2004 and was also signed by the Minister of Justice of Bosnia and Herzegovina on 18 March 2004.[2643] The agreement, however, indicates in its first Article that it is the Entities themselves that agreed to the transfer of the relevant responsibilities. Moreover, the Court seems to have recognized in U 11/08 that the agreement had been reached between the Entities themselves (as opposed to the Entities and BiH).[2644]

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of BiH. It stipulates that following the transfer of the Commission on Human Rights to the institutions of BiH as foreseen under Article XIV of Annex 6, the Ombudsman "shall be appointed by the Presidency of Bosnia and Herzegovina". See also Article XVI of Annex 7 which stipulates: " Five years after this Agreement takes effect, responsibility for financing and operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above". See finally Article IX of Annex 8, which provides : "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provides above".

2642 See *Agreement between the Federation of Bosnia and Herzegovina and Republika Srpska on the Transfer of Responsibilities in the Field of Defence* (*OG of RS*, No. 04/06).

2643 *Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* (*OG of FBH,* No. 16/04 and *OG of RS*, No. 24/04).

2644 U 11/08, paragraphs 24-26.

As far as the arguments based on Annexes 6, 7 and 8 to the General Framework Agreement are concerned, we note that they have been signed by a representative of the "Republic of Bosnia and Herzegovina" as opposed to "Bosnia and Herzegovina" (namely the new central level of government established by the Constitution). This signature seems more to be linked to the particular circumstances that were prevailing on the ground at the time of the negotiations which led to the signature of the General Framework Agreement rather than a clear intention to ensure that the institutions of Bosnia and Herzegovina needed to be party to any subsequent agreements to be reached under Article III.5(a).

In practice, representatives of Bosnia and Herzegovina have been heavily involved in negotiations leading to such agreements. It would be difficult to imagine how such responsibilities could be effectively and efficiently assumed by Bosnia and Herzegovina in the absence of any prior consultation. Although the consent of Bosnia and Herzegovina does not seem to be legally required, practical considerations inevitably continue to push representatives of the Entities and those of Bosnia and Herzegovina to work jointly on most aspects of such agreements.

(b) Can Entities regulate the manner in which they consent to an agreement?

Given that Entities are entitled to reach agreements under Article III.5(a), can they unilaterally determine the conditions under which they will provide their consent? While some have cautioned against making the transfer of responsibilities between the Entities and Bosnia and Herzegovina more difficult by introducing cumbersome procedures at the Entity level,[2645] a provision of the constitution of an Entity requiring that the executive authorities of the Entity need to obtain the consent of the Entity legislature before consenting to a transfer agreement does not seem to pose any problems in our view.

It remains to be seen however whether the Court would feel bound, in assessing the validity of a transfer agreement reached pursuant to Article III.5(a), by the procedural requirements set forth in Entity legislation. The failure of an Entity authority to provide its consent to a transfer agreement in a manner that satisfies the requirements set forth by Entity legislation would not, in our opinion, necessarily vitiate the transfer agreement itself. Such failure may raise a question of law that needs to be resolved within the framework of Entity legislation but

2645 See more generally, European Commission for Democracy through Law (Venice Commission), *Opinion on the Draft Amendments to the Constitution of the Republika Srpska*, (Opinion no. 476/2008) 16 June 2008, paragraphs 22-23.

should nevertheless be distinguished from the broader and separate question of whether the agreement itself satisfies the requirements set forth under the Constitution. The latter question falls under the exclusive competence of the Court, which ultimately retains, in our opinion, the capacity to determine whether a transfer agreement satisfies the requirements of the Constitution.[2646]

Entities have considered through the years a number of draft amendments to their respective legislation by which they sought to identify or limit which competencies could be transferred to the institutions of Bosnia and Herzegovina. While it may be, to a certain extent, possible for an Entity to include such a provision in its legislation, it may easily infringe upon provisions of the Constitution. This would be the case, in our view, with an Entity constitutional provision stipulating the following:

> Only in exceptional circumstances may the responsibilities which are under this Constitution be transferred by the Entity to BiH Institutions in accordance with Article III.5(a) of the Constitution of BiH.

As indicated above, we do not believe that a failure by an Entity authority to abide by such a provision would necessarily invalidate a transfer agreement. The Constitution does not seem to foresee any limit as to which responsibilities may be transferred under Article III.5(a). Moreover, such a provision would be based on the premise that the responsibilities of an Entity find their primary source in the Constitution of the Entity itself rather than the Constitution of BiH. Such a premise raises serious questions of compliance with the Constitution.[2647]

(c) Effects of an agreement

What exactly can be transferred by the Entities to Bosnia and Herzegovina through an agreement reached under Article III.5(a)? Once effective, what impact will such a transfer agreement have on the general system of allocation of responsibilities between the Entities and Bosnia and Herzegovina?

2646 Article III.3(b) of the Constitution would be particularly relevant to any such determination in our view.

2647 See for example Articles I.1, I.3, III.3(a) and III.3(b). It is our view that it is the exclusive role of the Constitution of Bosnia and Herzegovina to determine which responsibilities are assigned to which level of government in Bosnia and Herzegovina. If taken to its extreme, the opposite contention would potentially imply that an Entity is entitled to unilaterally modify the distribution of responsibilities between Bosnia and Herzegovina and itself. This would inevitably raise questions of compatibility with Article X of the Constitution.

i. What can be transferred? The constitutional responsibility itself or the right to exercise a responsibility?

The effect of each agreement should be determined on a case by case basis given that each agreement has its own object and modalities. Two main variables seem to apply for any determination of which elements are being transferred: (1) What does the Constitution allow to be transferred? (2) What does the agreement itself provides?

What is allowed *to be transferred?* Article III.5(a) could be interpreted as only allowing Entities to transfer to Bosnia and Herzegovina a *right to exercise* responsibilities rather than the full responsibilities themselves. We tend to disagree with such an interpretation. Our position is mainly motivated by the need to ensure the highest level of stability and coherence in the constitutional system of the allocation of responsibilities. By allowing Entities to revisit the initial allocation of competencies operated by the Constitution, the transfer agreement mechanism foresees a number of ways by which the stability and coherence of this system can be disturbed.[2648] It is our view that Article III.5(a) should thus be interpreted in a manner that seeks to protect the coherence and sustainability of the system put in place by the Constitution and should not automatically open the door to arrangements that would introduce irrationality into this system.

Moreover, transfer agreements will often be followed by the adoption of legislation and the establishment of complex administrative structures delivering concrete public services to the population. This in itself argues for a clear constitutional framework allowing the transfer of responsibilities to occur in a rational and coherent manner. In the absence of clear provisions to the contrary in the transfer agreement itself, it is argued that a transfer agreement concluded under Article III.5(a) should be construed as transferring the relevant responsibility as a whole together with all accessory responsibilities required for the exercise of the principal responsibility.[2649]

2648 The Court seems to have recognized the exceptional nature of the transfer agreement mechanism under Article III.3(a) and to have already excluded several possibilities by which responsibilities can be transferred by observing that there is no constitutional basis upon which the exclusive responsibilities of Bosnia and Herzegovina can be transferred to the Entities. See U 11/08, paragraph 21.

2649 Some have argued otherwise in relation to the system of transfering responsibilities set forth under the Constitution of the Federation of Bosnia and Herzegovina. See, European Commission for Democracy through Law (Venice Commission), *Opinion on the Transfer of Responsibility in the Field of Higher Education within the Federation of Bosnia and Herzegovina*, (Opinion no. 258/2003), 24 October 2003, paragraph 16. While we agree with the views expressed by the Commission on the need to avoid legal uncertainty, our opinions diverge on the means by which such uncertainty should be avoided.

What does the agreement itself provide for? As indicated above, Entities may wish to agree to a more restrictive set of arrangements.[2650] While the extent to which they are entitled to do so has not been fully clarified yet, the developments in U 14/04 provide a number of preliminary indications. The applicant in this case challenged the constitutionality of laws adopted by the Federation of Bosnia and Herzegovina relating to responsibilities that had been transferred by Entities in the field of indirect taxation.[2651] Following the transfer of such responsibilities, Bosnia and Herzegovina had enacted a *Law on Indirect Taxation System in Bosnia Herzegovina* (hereinafter: Law on Indirect Taxation)[2652] through which it established an *Indirect Taxation Authority* with a *Governing Board* (hereinafter Board) composed of the Finance Ministers of Bosnia and Herzegovina and the Entities as well as three experts. This Board was vested with the authority to give prior approbation to the promulgation or amendment of legislation on indirect taxation to be enacted by the Federation, Republika Srpska or the Brcko District.[2653] In more simple terms, the Entities had maintained their capacity to adopt legislation in the field of indirect taxation, but had conditioned their capacity to do so by transferring a right of prior approval to a body established by Bosnia and Herzegovina.

The laws contested by the applicant in this case purported to amend existing legislation from the Federation of Bosnia and Herzegovina regulating fiscal matters in the field of indirect taxation. Considering that the Board's approval had neither been sought nor given, the applicant argued that the laws adopted by the Federation were unconstitutional. In an important decision, the Court held that the failure by the Parliament of the Federation of Bosnia and Herzegovina to obtain the consent of the Board amounted to a violation of

2650 While the capacity of Entities to do so is not disputed, the extent of such a capacity could be subject to review by the Court. One could well imagine that the Court could, for the reasons outlined above, decide to invalidate certain segments of a transfer agreement should it consider that such segments disturb the overall coherence and sustainability of the system of distribution of responsibilities established by the Constitution.

2651 As indicated above, Entities have transferred certain responsibilities in the field of indirect taxation to Bosnia and Herzegovina through an agreement concluded under Article III.3(a). The agreement is unpublished. See however *Decision to Consent to the Agreement on Responsibilities in the Indirect Taxation Area* (*OG of FBiH*, No. 64/03); See also Republika Srpska National Assembly, *Conclusions No. 01-1005/03* (*OG of RS*, No. 95/03).

2652 *Law on Indirect Taxation System in BiH* (*OG of FBiH*, Nos. 44/03, 52/04, 34/07, 4/08).

2653 See generally the *Law on Indirect Taxation System in BiH* (*OG of BiH*, Nos. 44/03, 52/04, 34/07, 4/08). For the establishment of the Indirect Taxation Authority see, *inter alia*, Articles 3 to 6. For the Governing Board see, *inter alia*, Articles 3, 14 to 20. For the system of prior approbation of the Board for the promulgation or amendment of legislation on indirect taxation by the Federation, Republika Srpska or the Brčko District, see Article 25(4).

Articles III.3(b) and III.5(a) of the Constitution, thus implicitly validating the notion that Entities can transfer less than their whole responsibilities.[2654]

ii. Does the content of a transfer agreement extend the normative field that can be used by the Court to control the constitutionality of an act?

In more simple terms, can the Court rely upon the content of a transfer agreement to control the constitutionality of a given act? The case law of the Court is not entirely clear. The Court took a very restrictive approach in Case U 17/05. In this case, the applicant had requested that the Court examine the compatibility of a number of provisions of legislation adopted pursuant to an agreement reached under Article III.5(b) with the provisions of the agreement itself. The Court noted that it was authorised to examine the constitutionality of the contested provisions only in relation to the provisions of the Constitution (and not in relation to the provisions of the agreement itself). The Court went further and indicated that the provisions of the agreement were not part of the Constitution.[2655]

The Court's position in U 17/05 seems overly restrictive and significantly at odds with previous positions taken in an earlier decision. In U 14/04 it was requested, as outlined above, that the Court examine the constitutionality of laws adopted by an Entity in the field of indirect taxation. The applicant argued that legislation adopted by Bosnia and Herzegovina on the basis of an agreement transferring responsibilities in the field of indirect taxation required that the promulgation or amendment of legislation on indirect taxation by the Entities needed to be approved by a Governing Board. Given that such approbation had not been given, the applicant argued that the Entity laws were unconstitutional. The Court agreed with the position of the applicant and held:

> "28. Therefore, the Constitutional Court points out that the Parliament of the Federation of Bosnia and Herzegovina, by adopting the contested laws, failed to observe the procedure laid down in Article 25 paragraph 4 of the Law on Indirect Taxation System. By doing so, the Federation of Bosnia and Herzegovina *de facto* assumed competences that it, according to the Agreement of 5 December 2003, transferred to the State of Bosnia and Herzegovina. The Constitutional Court holds that such course of action questioned the functioning of Bosnia and Herzegovina on the principle of the "rule of law". In particular, it violated the provision of Article III.3(b) of the Constitution of Bosnia and Herzegovina since the Parliament of the Federation of Bosnia and Herzegovina failed to comply with the procedure laid down in the Law on Indirect Taxation System. This law was adopted by

2654 U 14/04, paragraphs 27-29.
2655 U 17/05, paragraph 16.

> the Parliamentary Assembly of Bosnia and Herzegovina and it indubitably represented "a decision of the joint institutions of Bosnia and Herzegovina". Furthermore, by adopting the contested laws without the consent of the Governing Board of the Indirect Taxation Administration, the Parliament of the Federation of Bosnia and Herzegovina violated the provision of Article III.5(a) of the Constitution of Bosnia and Herzegovina by entering the scope of competences transferred to Bosnia and Herzegovina by the Federation of Bosnia and Herzegovina by means of an agreement.
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> 29. Given the aforesaid, the Constitutional Court concludes that the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Turnover Tax on Goods and Services (*OG of FBiH*, No. 39/04) and the provisions of Articles 1 and 2 of the Law on Amendments to the Law on Special Tax on Non-Alcoholic Drinks (*OG of FBiH*, No. 39/04) are not consistent with the provisions of Articles III.3(b) and III.5(a) of the Constitution of Bosnia and Herzegovina. (emphasis added)"

The Court went much beyond using the provisions of a transfer agreement concluded pursuant to Article III.5(a) in order to assess the constitutionality of a normative act. It relied instead upon provisions of a law that had been adopted by Bosnia and Herzegovina pursuant to such a transfer agreement. The Court explicitly stressed that the failure of the legislature of the Federation of Bosnia and Herzegovina to comply with the system of approbation set forth by State legislation amounted to a violation of Article III.5(a) of the Constitution. There is little doubt that these provisions formed an integral part of the Court's assessment.[2656]

The opinion of the Court in U 14/04 appears to be more suited to the new realities that are necessarily engendered by a transfer agreement. The Court is indeed likely to be called upon to protect the integrity of the new apportionment of responsibilities emerging from such agreements and will inevitably find itself at the centre of any such shift of responsibilities. As we have observed above, the Court has already suspended the validity of acts taken by an Entity in order to protect responsibilities that had been transferred to the State[2657] and has even suspended the effect of legislation through interim measures.[2658] The role of the Court in protecting the coherence of such arrangements is key in this regard and should continue to be exercised.[2659]

2656 See also paragraphs 16-18 of U 14/04, where the Court declared the request to be admissible on the basis of Article VI.3(a) of the Constitution. This seems to reinforce the point that provisions of legislation formed an integral part of the Court's assessment of constitutionality.

2657 See generally U 14/04.

2658 U 14/04, Decision on Interim Measures.

2659 The Court's role may also be of particular importance to control the constitutionality of acts taken by other authorities involved in a newly created system of transferred responsibilities. It is foreseeable, for example, that a body created within the framework of a transfer agreement (such as the Governing Board of the Indirect

iii. Withdrawal from an agreement

It remains unclear whether the transfer agreement mechanism foreseen by Article III.5(a) is reversible by nature. Is it possible for Entities to call back responsibilities that have been transferred to Bosnia and Herzegovina? Can an Entity unilaterally withdraw from a transfer agreement reached under Article III.5(a)?

On the one hand, given that such transfers are based on an agreement reached by both Entities, they should be entitled to decide whether to call back some or all responsibilities initially transferred. Reference could be made to provisions such as Article IX of Annex 8 to the General Framework Agreement. Annex 8 could indeed qualify as an agreement to which the Republika Srpska and the Federation of Bosnia and Herzegovina are parties. This agreement contains provisions that transfer responsibilities to Bosnia and Herzegovina, but which explicitly provide that such responsibilities will be transferred to Bosnia and Herzegovina until the parties "otherwise agree".[2660] Other agreements concluded under Article III.5(a) could thus contain similar provisions.

On the other hand, one may argue that such a possibility would instil an unwelcome level of uncertainty into the BiH constitutional system. From a more practical point of view, a withdrawal would also often lead to the dismantling of important administrative structures established by Bosnia and Herzegovina to carry out the transferred responsibilities. As stated above, the need to maintain an optimal level of coherence and stability in the constitutional system of allocation of responsibilities could very well justify an interpretation of the Constitution that would deny any right for the Entities to call back competencies that have been transferred. While the Constitution allows Entities to transfer responsibilities to BiH, it contains no provision allowing BiH to transfer responsibilities to the Entities. Once transferred, responsibilities could

Taxation Authority) may take acts that could be considered *ultra vires* by some. The Court should, in our opinion, exercise its jurisdiction in such cases. By analogy to the Court's position in U 14/04, where provisions of legislation adopted by Bosnia and Herzegovina on the basis of a transfer agreement were used to constrain the action of an Entity legislature, similar controls should be exercised *vis-à-vis* the action of a body such as the Governing Board. In determining whether a given body has acted outside the scope of its responsibilities, distinctions could be made between acts that directly fall within a body's substantive field of responsibilities and acts that are more technical or administrative in nature. A flexible approach towards the latter would be preferable in order to allow such bodies to evolve within complex administrative environments.

2660 Article IX of Annex 8 to the General Framework Agreement stipulates: "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, *unless the Parties otherwise agree* […]" (emphasis added).

not be transferred back.[2661] In any case, the Court is unlikely to feel bound by subsequent withdrawal acts taken by Entities.

What seems clearer is that unilateral withdrawals by an Entity alone are unlikely to be allowed under the Constitution. Given the consensual basis required to transfer these responsibilities, it is difficult to conceive how an Entity could unilaterally decide to call back responsibilities that have been transferred without the agreement of the other Entity.

(d) Formal requirements

What are the formal requirements to be fulfilled in order for an agreement concluded under Article III.5(a) to be effective? The case law of the Court indicates a willingness on the part of the Court to be rather flexible with respect to formal requirements. In U 14/04, the Court considered the signatures of the prime ministers of both Entities, which had been preceded by decisions of the Entity legislatures consenting to such signatures, to be sufficient.[2662] On the basis of a more recent decision, it may be argued that the signatures of the prime ministers alone would be sufficient.[2663]

b. Responsibilities provided for in Annexes 5 through 8 to the General Framework Agreement

One of the first questions that comes to mind when reading this specific segment of Article III.5(a) pertains to the scope of responsibilities that Bosnia and Herzegovina can claim to be entitled to assume. Is Bosnia and Herzegovina entitled to assume responsibilities for *any* substantive matter covered by Annexes 5 to 8 or only for a few *specifically prescribed* matters?

The wording of Article III.5(a) refers to responsibilities that must be *provided* by such Annexes (emphasis added). Secondly, a careful reading of the relevant provisions of Annexes 5 to 8 shows that such provisions delineate rather precisely the type of responsibilities to be assumed by Bosnia and Herzegovina. This is the case, for example, with Article XIV of Annex 6,[2664] Article IV.2 of

2661 It is interesting to note that the Court has already observed that there is no constitutional basis upon which the exclusive responsibilities of Bosnia and Herzegovina can be transferred to the Entities. See U 11/08, paragraph 21.

2662 U 14/04, paragraphs 26-28.

2663 See U 17/05, paragraph 17. The agreement assessed in this case had been concluded pursuant to Article III.3(b). It remains to be seen whether the views of the Court expressed in U 17/05 would remain, should the Court be requested to assess the validity of an agreement concluded under Article III.3(a).

2664 Article XIV of Annex 6 provides: "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer

Annex 6,[2665] Article XVI of Annex 7[2666] or Article IX of Annex 8.[2667] It could be argued consequently that Article III.5(a) should be interpreted within this framework and that the Entities did not intend to transfer more responsibilities than those that are specifically referred to in the relevant provisions of Annexes 5 through 8.

The Court seems however to have taken a more liberal approach in a number of recent decisions in which it identified responsibilities belonging to BiH that go beyond a strict interpretation of Articles IV.2 and XIV of Annex 6 to the General Framework Agreement for Peace. In U 14/05, the Court indicated that Bosnia and Herzegovina is both competent and obligated to assume responsibilities in those matters that are provided for in Annexes 5 through 8 to the General Framework Agreement for Peace.[2668] It went on to indicate that Article III.5(a), when read in conjunction with the provisions of Annex 6 to the General Framework Agreement, imposed obligations for Bosnia and Herzegovina to take systemic measures in order to secure the exercise of the right to property. In an interesting development, the Court indicated that it follows from Annex 6 that the intention of its drafters was for Bosnia and Herzegovina to be the level of government responsible to create the framework for the protection of human rights and freedoms.[2669] It held further that:

> "[…] when it comes to the issue of property rights of the holders of foreign currency savings accounts, Bosnia and Herzegovina has failed to undertake all necessary measures in order to secure that those persons exercise the very essence of their rights to property as it is referred to in the Constitution of Bosnia and Herzegovina and the European Convention. Bosnia and Herzegovina has failed to create the legislative and institutional framework

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from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above." It must be read in conjunction, inter alia, with Article II of Annex 6, which establishes a Commission on Human Rights composed of a Human Rights Chamber and an Office of the Ombudsman.

2665 Article IV.2 of Annex 6 also provides for additional responsibilities for the institutions of BiH. It stipulates that following the transfer of the Commission on Human Rights to the institutions of BiH as foreseen under Article XIV of Annex 6, the Ombudsman "shall be appointed by the Presidency of Bosnia and Herzegovina".

2666 Article XVI of Annex 7 stipulates: "Five years after this Agreement takes effect, responsibility for the financing and operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above."

2667 Article IX of Annex 8 provides: "Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above."

2668 See U 14/05, paragraph 49.

2669 See paragraph 52.

> for resolving that problem in a unified manner throughout the whole territory of Bosnia and Herzegovina.
>
> 53. Bosnia and Herzegovina, given its responsibilities under Annex 6 to the General Framework Agreement to "secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms", should not have relied on the Entities and the Brčko District to act within their competences in the field of monetary policy in such a way as to resolve that problem in an efficient and effective manner. The Constitutional Court considers that Bosnia and Herzegovina, by enactment of the Framework Law on the Privatization of Enterprises and Banks, gave a "green light" to the commencement of the privatization process in Bosnia and Herzegovina without securing the clear and unified framework for resolving the problem of old foreign currency savings through the privatization process. In other words, Bosnia and Herzegovina cannot be released from the obligation to guarantee the respect for the constituent property rights of the holders of the foreign currency savings accounts without providing sufficient guarantees of an appropriate resolution to this problem in accordance with, among other things, the standards provided for by Article 1 of Protocol No. 1 to the European Convention."[2670]

Noting that several decisions from the *Human Rights Chamber of Bosnia and Herzegovina* and the *Human Rights Commission within the Constitutional Court* had ordered Bosnia and Herzegovina to take measures to provide a principled resolution to the existing problem of old foreign currency savings, the Court concluded that:

> "[…] Bosnia and Herzegovina, even after being ordered to find [a] universal solution for this issue, remained inactive, and thereby it violated its obligations under Annex 6 to the General Framework Agreement concerning respect for and execution of final and binding decisions of the Chamber for Human Rights for Bosnia and Herzegovina."[2671]

The Court relied on a similar line of reasoning in AP 164/04[2672] to conclude that Article III.5(a), when read in conjunction with Annex 6, created obligations for Bosnia and Herzegovina to undertake political measures on the international plane to resolve the issue of old foreign currency savings.[2673]

2670 See U 14/05, paragraphs 52-53.
2671 See U 14/05, paragraph 54, *in fine*.
2672 AP 164/04, paragraphs 91-100.
2673 *Ibid*. We note that the Court had reached similar conclusions with respect to obligations stemming from Annex 6 to the General Framework Agreement for Peace without referring to Article III.5(a) in AP 130/04, paragraph 84-85.

c. Responsibilities 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.

Bosnia and Herzegovina has relied upon the "state sovereignty" segment of Article III.5(a) to establish several new State institutions or systems.

In U 9/00, the Court concluded that legislation establishing a State Border Service was consistent with the Constitution. In reaching its conclusion, the Court referred to Article III.5 of the Constitution and held, *inter alia*, that the notion of State sovereignty included the right for Bosnia and Herzegovina to take all necessary actions for the protection of its territorial integrity, political independence and international personality and that the establishment of a State Border Service contributed to guaranteeing this principle.[2674] In U 42/03, the Court concluded that contested provisions of a law adopted by Bosnia and Herzegovina regulating the public broadcasting system of Bosnia and Herzegovina were constitutional.[2675]

In AP 164/04, the Court paid particular attention to the "state sovereignty" segment of Article III.5(a) to conclude that Bosnia and Herzegovina was obliged to undertake several measures *vis-à-vis* other States in order to resolve the issue of old foreign currency savings. In doing so, the Court indicated that a failure to respect human rights and fundamental freedoms and the non-fulfilment of international obligations would unavoidably lead to the international isolation of Bosnia and Herzegovina and to the potential disappearance of its international personality.[2676]

The "state sovereignty" segment of Article III.5(a) was also relied upon by the Court in order to conclude the constitutionality of a law establishing a court at the level of Bosnia and Herzegovina with jurisdiction, *inter alia*, over

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2674 U 9/00, paragraph 13.

2675 Although the Court had previously held in U 9/00 that the "state sovereignty" clause of Article III.5(a) was one of three mutually independent sources for Bosnia and Herzegovina to assume responsibilities, the Court did not solely rely on the "state sovereignty" segment in both cases U 9/00 and U 42/03. In U 9/00, the Court also referred, *inter alia*, to Articles III.1(f) and III.1(g) of the Constitution, pursuant to which Bosnia and Herzegovina is responsible for immigration, refugees, asylum policy and regulation and international and inter-Entity criminal law enforcement. In U 42/03, the Court also referred, *inter alia*, to the responsibilities of the State for the establishment and operation of common and international communication facilities enshrined in Article III.1(h) of the Constitution.

2676 AP 164/04, paragraph 92. Similar observations were made in U 14/05, paragraph 50.

criminal offences defined in the criminal code of Bosnia and Herzegovina and with jurisdiction to review the administrative acts of the institutions of Bosnia and Herzegovina.[2677] The Court went even further in U 16/08 and concluded to the constitutionality of an amendment to the *Law on the Court of Bosnia and Herzegovina*, enacted by Bosnia and Herzegovina in order to extend the jurisdiction of the Court of Bosnia and Herzegovina to cover criminal offences prescribed by the laws of the Entities and the Brčko District. The amendment stipulated that the Court of Bosnia and Herzegovina had jurisdiction over such offences when they endangered, *inter alia*, the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina or when such offences could have serious repercussions on the economy of Bosnia and Herzegovina.[2678] The Court concluded that the amendment was consistent with Articles 1.2, III.1(g), III.3(a) and III.5(a) of the Constitution.[2679]

The responsibilities of Bosnia and Herzegovina relating to the preservation of its sovereignty, territorial integrity, political independence, and international personality do not, however, exclude the capacity of the Entities to enter into special parallel relationship-agreements with neighbouring states through which they can agree to foster cooperation in the field of defence. In U 42/01, the constitutionality of such an agreement was challenged. The applicant in this case argued that Republika Srpska had violated Article III.5(a) by entering into an agreement on a special parallel relationship with the Federal Republic of Yugoslavia pursuant to which both parties would foster cooperation regarding defence matters.[2680] While recognising that the Entities are entitled, pursuant to Article III.2(a) of the Constitution, to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, the applicant argued that the provision of the agreement on cooperation in the field of defence was incompatible with the principles of sovereignty, territorial integrity and political independence of Bosnia and Herzegovina guaranteed by the Constitution under Article III.5(a). It was also argued that the agreement infringed upon Bosnia and

2677 U 26/01, paragraphs 21-26. It is not entirely clear whether the Court's determination in this case was based solely on the "state sovereignty" segment of Article III.3(a). The Court may have also considered the segment of Article III.3(a) pertaining to matters provided for in Annex 5 through 8 of the General Framework Agreement by considering a number of human rights obligations stemming from Annex 6. For the establishment of the Court of BiH, as well as its jurisdiction, see *Law on the Court of Bosnia and Herzegovina* (*OG of BiH*, Nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07).

2678 See Article 13(2) of the *Law on the Court of Bosnia and Herzegovina* (*OG of BiH*, Nos. 29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 35/04, 61/04 and 32/07).

2679 U 16/08, at, *inter alia*, paragraphs 46-47.

2680 U 42/01, paragraph 8.

Herzegovina's responsibilities under the same Article.[2681] The Court rejected both of the applicant's argument and held that the contested provisions could be interpreted in a manner that was consistent with the Constitution.[2682]

d. Additional institutions may be established as necessary to carry out such responsibilities.

This segment of Article III.5(a) is, in our view, a truism, given that the capacity to establish institutions is a subject matter that usually falls within the categories of implied or accessory responsibilities in many constitutional systems.

This straightforward segment of Article III.5(a) has been applied by the Court in a number of cases. In U 42/03, the Court relied, *inter alia*, on this segment to conclude the constitutionality of State legislation establishing a public broadcasting system.[2683] As indicated above, the Court also concluded in U 26/01 that Bosnia and Herzegovina was competent to establish a court at the level of Bosnia and Herzegovina.[2684] More recently, in U 16/08, the Court reiterated (by reference to its decision in U 26/01) that Bosnia and Herzegovina was authorised to establish additional institutions in the exercise of its responsibilities.[2685]

3. Article III.5(b)[2686]

Does Article III.5(b) constitute a transfer mechanism distinct from that provided under Article III.5(a) or does it merely provide for an obligation for the Entities to begin negotiations? One could argue indeed that Article III.5(b) merely provides for an obligation to negotiate. Should such negotiations result in a decision to transfer responsibilities to Bosnia and Herzegovina, responsibilities would need to be transferred on the basis of the transfer agreement mechanism foreseen by Article III.5(a).

2681 U 42/01, paragraph 8.

2682 U 42/01, paragraph 23. The Court also paid particular attention to the fact that a new *Law on Defence in Bosnia and Herzegovina* had been enacted and had put in place a number of measures assuring Bosnia and Herzegovina's full capacity for the protection of its sovereignty and territorial integrity. The reasoning of the Court is, in our view, not entirely clear on this particular point.

2683 U 42/03, paragraph 23.

2684 U 26/01, paragraph 26.

2685 U 16/08, paragraphs 33 to 35; see also U 26/01, paragraph 26.

2686 Given the similarities between transfer mechanisms made available under Article III.5(a) and Article III.5(b), several elements outlined above in relation to transfer agreements under Article III.5(a) are of particular relevance to this section. We refer the reader to such sections in order to avoid unnecessary repetition. This section will focus only on a few questions deemed to be specific to Article III.5(b).

The case law of the Court seems to interpret Article III.5(b) otherwise. Article III.5(b) has been interpreted as providing a distinct basis for the Entities to conclude agreements transferring responsibilities to the institutions of Bosnia and Herzegovina. The Entities themselves have interpreted Article III.5(b) as such. We note for example that the Entities have decided to establish the HJPC on the basis of an agreement concluded pursuant to Article III.5(b). The Constitutional Court has interpreted Article III.5(b) similarly. In U 17/05, it held:

> "[…] considering the fact that Entities commenced negotiations […], in the present case 'on utilization of energy resources' which were finalized by [the] signing of the Agreement, whereby the state Bosnia and Herzegovina was vested with the competence to form the Company for Transfer of Electric Power and adopt corresponding laws."[2687]

The Court seems to have considered that the agreement reached in this case formed an integral part of the negotiations referred to in III.5(b) and that the effect of such an agreement was to transfer new responsibilities from the Entities to the State of BiH.

If Article III.5(b) constitutes an additional basis upon which the Entities can reach agreements to transfer responsibilities, one may wonder whether the six (6) month period set forth therein limits their capacity to do so? In more simple terms, does the transfer mechanism provided under Article III.5(b) remain available to the Entities after the expiry of the six-month period stipulated therein?

In U 17/05, the Court considered an agreement under Article III.5(b) reached several years after the expiry of the six-month period referred therein to be valid.[2688] The transfer agreement relating to the establishment of the HJPC was reached pursuant to Article III.5(b) and was concluded after the expiry of the six-month period stipulated therein.[2689] The Court confirmed its validity in U 11/08.[2690]

What is the intensity of the obligation to negotiate? As mentioned above, it has been argued, in U 42/01, that the Republika Srpska had violated Article III.5(b) by reaching an agreement on special relationships with the Federal Republic

2687 See U 17/05, paragraph 17.

2688 See U 17/05, paragraph 16.

2689 *Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina* (*OG of FBiH*, No. 16/04, and *OG of RS*, No. 24/04).

2690 U 11/08, paragraph 18-26. We note that the Court seems to have considered that the transfer of responsibilities was effective pursuant to Article III.5(a) despite the fact that the agreement itself explicitly refers to Article III.5(b) (see par 23). The Court stresses elsewhere that the said agreement had been concluded under Article III.5 (see par. 26).

of Yugoslavia according to which both parties agreed to foster cooperation regarding the economy and the utilisation of natural resources. The applicant argued that the agreement prejudiced and limited Republika Srpska's capacity to fulfil its obligations to negotiate under Article III.5(b).[2691] The Court rejected the applicant's argument and held that the contested provisions of the special relationship agreement could be interpreted in a manner consistent with the Constitution. The Court also observed that the provisions of the agreement were general in nature, were not directly applicable and required the formulation of implementing annexes.[2692]

We can conclude at a minimum that the obligation to negotiate stemming from Article III.5(b) does not prevent Entities, within the framework of Article III.2(a), to reach arrangements covering matters referred to in Article III.5(b).

4. Conclusion

Article III.5 has engendered several developments in BiH constitutional law and has opened the field to many institutional reforms. While many questions have been answered by the case law of the Court since the entry into force of the Constitution, many still need to be answered. This is understandable given the fact that the Constitution is a relatively recent legal text. The clarification of the body of law stemming from Article III.5 remains key, as it will inevitably contribute to the stability and sustainability of the many reforms and institutions based or established on the basis of its provisions.

2691 U 42/01, paragraph 8.
2692 U 42/01, paragraph 23.

Article IV – Parliamentary Assembly

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

1. House of Peoples

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.

2. House of Representatives

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

a. Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

b. A majority of all members elected to the House of Representatives shall comprise a quorum.

3. Procedures

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

b. Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.

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

d. All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.

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

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

g. The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.

h. Decisions of the Parliamentary Assembly shall not take effect before publication.

i. Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

j. Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. Powers

The Parliamentary Assembly shall have responsibility for:

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

b. Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.

c. Approving a budget for the institutions of Bosnia and Herzegovina.

d. Deciding whether to consent to the ratification of treaties.

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

A. Introduction

The Parliamentary Assembly of Bosnia and Herzegovina is composed of two chambers, a House of Representatives and a House of Peoples. All legislation requires the approval of both chambers for adoption.[2693] The composition, procedures, and powers of both chambers are mostly defined in Article IV of the BiH Constitution.

1. In retrospect: The first elections held under the Agreement on Elections (Annex 3 to the Dayton Peace Agreement) by the OSCE

The Agreement on Elections provided for in Annex 3 to the Dayton Peace Agreement,[2694] *i.e.*, the special regulations therein, constitutes a key element for establishing peace in Bosnia and Herzegovina. Namely, the Contracting Parties undertook to request an outside experienced actor-protagonist to conduct and to supervise the elections, whereby the right to take part in political life and to take the fate of the State into their own hands would be guaranteed to all citizens; this entails the human right which had been enshrined in a number of international conventions over the decades.[2695] By Annex 3 to the Dayton Peace Agreement, the Parties (RBiH, FBiH and RS) undertook to create framework conditions for free elections by secret ballot. Certain election principles are stated in the main part of Annex 3 to the Dayton Peace Agreement. Moreover, Articles 7 and 8 of the "so called" Copenhagen Document (Document of the Second Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, Copenhagen, 1990), which imposes a detailed set of rules relating to the preparation and conduct of elections, and the implementation of election results, are incorporated into an Attachment

2693 Article IV.3(c) of the BiH Constitution.
2694 Overview by *Riley*, 1997, p. 1188-1191.
2695 *Riley*, 1997, p. 1192 *et seq*., 1196 *et seq*.

to Annex 3 on Elections. Article IV of Annex 3 is of particular importance. The mentioned Article stipulates that refugees and displaced persons, on the basis of the 1991 census, may vote in their pre-war places of residence. Thus, the results of ethnic cleansing would be neutralised at least in the political sense, as it was not possible or as no will existed to do so in physical sense through an urgent return of the population to their pre-war places of residence.[2696]

The OSCE was responsible for conducting the elections at all levels. For this purpose, the OSCE established a Provisional Election Commission. It consisted of the Head of the OSCE Mission, the High Representative or his or her designee, representatives of the Parties, and such other persons as the Head of the OSCE Mission, in consultation with the Parties, may decide. The Head of the OSCE Mission acted as Chairman of the Commission. In the event of disputes within the Commission, the decision of the Chairman was final (Article III.3). The Provisional Election Commission created a legal framework[2697] for elections by adopting Electoral Rules and Regulations. It is evident that unlike the notion of "election law", the notion of "electoral rules and regulations" was used to emphasise the difference between Annex 3 and Annex 4 to the Dayton Peace Agreement. However, the electoral rules, indeed, have an effect of an election law. The Parties undertook to comply fully with the electoral rules and regulations, "any internal laws and regulations notwithstanding"[2698] (Article III.1 of Annex 3 to the Dayton Peace Agreement). During the negotiations in Dayton, there was an idea that the OSCE should be in charge of supervising and not of conducting the elections held by domestic authorities. In addition, the present Annex 3 to the Dayton Peace Agreement should have been Annex 3 to the BiH Constitution.[2699] The aforementioned can clarify the fact that the notion of 'electoral rules and regulations' and not the notion of 'law' were used in quotations. The 'law' would imply the complete domestic regulations of the State, including the BiH Constitution, too. This difference is relevant as to the possibility of placing the bodies of Annex 3 under the jurisdiction of the Constitutional Court of BiH.[2700]

2696 *Riley*, 1997, p. 1190 *et seq*.

2697 Compare, for instance, "Rules and Regulations for General Elections 2000" and "Rules and Regulations for Municipal Elections 2000", authors' archive. In the following text the former rules and regulations will be taken into account, which, however, correspond to the latter ones. These rules and regulations were published in *OG of BiH*, Nos. 18/00, 20/00, 21/00 and 27/00.

2698 Translation taken from the OSCE Mission to Bosnia and Herzegovina website; available at: <http://www.oscebih.org/overview/gfap/bos/annex3.asp>; last viewed on 10 October 2009.

2699 *Auswärtiges Amt*, 1998, p. 52 *et seq*., 63.

2700 See "(b) Legal acts of authorities referred to in Annex 3", p. 826 *et seq*.

The interim mandate of the OSCE is highlighted in several places. The Contracting Parties should replace the provisional Election Commission by a permanent Election Commission (Article V). Pursuant to Article IV.2(a) of the BiH Constitution, members of the House of Representatives of the Parliamentary Assembly of BiH are elected in accordance with an election law to be adopted by the Parliamentary Assembly of BiH. Nevertheless, the first elections were conducted under Annex 3 to the Dayton Peace Agreement. It similarly applies to Article V.1(a) of the BiH Constitution as regards a three-member Presidency. Considering that the State failed to adopt an election law, the mandate of the OSCE was extended on several occasions. However, it is difficult to find a legal basis for extending its mandate. In addition, the time-limited mandate of the OSCE was not irrelevant in assessing the jurisdiction of the Constitutional Court of BiH to review acts adopted by the bodies of Annex 3 to the Dayton Peace Agreement. In the legal sense, statements, *i.e.*, acts adopted at the conferences of the Peace Implementation Council, were not sufficient.[2701] Nonetheless, the expression of will of the Parties Signatory to Annex 3 to the Dayton Peace Agreement was considerable. However, taking into account that the original text contained a time limit for the mandate of the OSCE, there are many things to corroborate the fact that the OSCE did not extend its mandate without a legal basis, even if one agrees that such extension of the mandate may be interpreted only in the original text of the Agreement.

Only in the middle of 2001 did the domestic legislature, under strong pressure from the international community, succeed in adopting the Election Law of Bosnia and Herzegovina,[2702] whereby it fulfilled one of the basic conditions necessary for BiH's accession to the Council of Europe. The adoption of the

2701 Compare, Conclusions adopted by the Council at the Meeting in London on 4th and 5th December 1996:
"Constitutional and Legal Matters and Elections", Article 12: "The Council welcomes the OSCE's decision to extend the mandate of the OSCE Mission to Bosnia and Herzegovina until 31 December 1997. The Council welcomes also the agreement of the authorities in Bosnia and Herzegovina to OSCE supervision of the preparation and conduct of the municipal elections to be held in 1997, and their agreement to extend the mandate of the Provisional Election Commission until the end of 1997."
Conclusions adopted by the Council at the Meeting in Vienna on 10 December 1997: "Summary of Conclusions", paragraph 14: "[...] invited OSCE to extend the mandate […]"; Article VI.3: "[…] expects the authorities in Bosnia to invite the OSCE to supervise elections […]. It therefore requests the OSCE to extend the mandate of its Mission in Bosnia und Herzegovina accordingly." Article VI.4: "[…] Until the Law is adopted and in force and the Permanent Election Commission is established and fully functional, elections will be conducted under the supervision and authority of the Provisional Election Commission and its Rules and Regulations." and Conclusions of the Council's meeting held on 23rd and 24th May 2000 in Brussels, Chapter III, paragraph 8: "[…] The Council notes its dissatisfaction with the failure of the BiH authorities to adopt an Election Law. Owing to this failure, these elections will be conducted and supervised by the OSCE."
All conclusions available at *OHR*, 2000.

2702 *OG of BiH*, No. 23/01.

Election Law of Bosnia and Herzegovina was not disputable only due to the fact that the Venice Commission of the Council of Europe,[2703] in its opinion preceding the adoption of the law, which was based on Articles IV and V of the BiH Constitution, held that the regulation of elections to the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH involved a *prima facie* infringement of international law.[2704] By the entry into force of the Election Law of Bosnia and Herzegovina, responsibility for elections was transferred from the OSCE to local authorities, whereby Annex 3 to the Dayton Peace Agreement was completed, *i.e.*, exhausted. The Election Law, in addition to the Election Commission and Election Complaints and Appeals Council, anticipates judicial protection before the Appellate Division of the Court of Bosnia and Herzegovina (Chapter 6 of the Election Law of Bosnia and Herzegovina).

Under the *aegis* of the OSCE,[2705] general elections were held in 1996, 1998, 2000[2706] and 2002, with special elections for the RS National Assembly in 1997, as well as municipal elections in 1997 and 2000.[2707] Many problems appeared in the first years as to the technical aspect of the election process, such as a lack of data from registers of births. A number of votes of citizens living abroad were not confirmed and some political parties, *i.e.*, their candidates, were not permitted to stand as candidates for elections.[2708] Thus, the 1996 elections were characterised by many irregularities and incidents so that even the Head of the OSCE Mission to BiH reported that the elections could be regarded "as partially democratic" and achieving "a partially democratic result", but not characterised as "free and fair". Some observers expressed their suspicion as to whether the elections achieved the aim sought, namely democratisation.[2709] Even when the technical aspect of the election process was improved, the international community could not hide its disappointment in the results. According to the opinion of a number of observers, the first elections – those conducted in September 1996 – were held too soon after the armed conflict. In addition, many observers were of the opinion that expectations that the elections could have a stabilising effect were unrealistic, even when the 2000 elections are referred to.[2710] Elections were also held before the armed conflict, which were used as democratic grounds for the conflicting parties to conduct their respective nationalist policies. The central position of power was

2703 European Commission for Democracy through Law; <http://www.venice.coe.int>.
2704 For details see p. 59 *et seq*., as to the notion of "democracy".
2705 *Jurčić*, 2000.
2706 *ICG*, 2000.e and *ICG*, 2002.b.
2707 *ICG*, 2000.b.
2708 Reports by the Commission of 4 November 1998, from the authors' archive.
2709 *Riley*, 1997, p. 1209, 1212 *et seq*.
2710 *ICG*, 2000.e, p. 16.

still held by ‘old staff’ which were partially under the control of wanted war criminals.[2711] In addition, the media was in the hands of nationalist-oriented political parties.[2712]

A decision on the existence of the necessary framework conditions called for by Article I Annex 3 to the Dayton Peace Agreement rested in the discretion of the OSCE. In Article II.4 of Annex 3 to the Dayton Peace Agreement, the OSCE was given a six-month time limit after the entry into force of the Agreement to organise and hold elections. To avoid a boycott of the election by a large part of population, *i.e.*, to avoid jeopardising the rather fragile peace in the country, the OSCE bowed to pressure of the relevant Western governments and recognised a number of political parties that were disloyal in constitutional terms[2713] and turned a blind eye to some offensive violations of human rights and freedoms which had a bearing on the implementation of fair and free elections.[2714] The practice proved that the people were so traumatized after the armed conflict that, in the first elections, they attached considerable importance to their personal safety, *i.e.*, to a *collective safety of their own people*. As a guarantee of safety immediately after the armed conflict, voters, paradoxical as it may seem, put their trust in nationalist-oriented parties, which had led them into the armed conflict in the first place. It was evident that, even five years after the armed conflict, economic issues were not essential.[2715] A debate relating to an electoral system was not disregarded. Thus, for instance, it was proposed that political life, although not in its entirety, should be relieved of ethnification, so that it could be partially de-radicalised by separating political parties in three ethnically defined groups and allowing each voter, in addition to his/her vote for “his/her” ethnic group, to also cast a vote for one of the parties representing other ethnic groups.[2716]

The OSCE was indecisive in attempting to blunt the sharp ethnic edges of the electoral system, which led towards a major constitutional crisis after the armed conflict in BiH when the leading Croatian elites in FBiH decided to establish parallel government institutions as they considered that their interests were seriously jeopardised by amendments to the Election Law of Bosnia and Herzegovina.[2717]

2711 *ICG*, 2000.d.
2712 *ICG*, 1998.b, p. 2 *et seq*.; *Marko*, 1999, p. 108 *et seq*.
2713 *Marko*, 1999, p. 109 *et seq*.
2714 *Nowak*, 2000, p. 51.
2715 *Jurčić*, 2000, p. 572 *et seq*.
2716 *ICG*, 1999.a.
2717 For details, see below p. 796.

The undesirable result of the first elections was, according to some views, "a legitimisation of [the] *de facto* violence monopoly" of the ethnocratic parties, as well as a consolidation of ethnic cleansing through the elections.[2718] In order to prevent or to mitigate this sequence of events during the next elections, the international community banned some political parties and/or candidates and compelled political parties to announce their programs and to reveal their financial sources and partially supported the "so called" more moderate parties.[2719] Election results confirmed that the de-ethnification of political life in BiH achieved little success and the international community tried to balance it by releasing enormous funds to support or to help political parties with multi-ethnic programs, appropriate coalitions or governments.[2720] Thus, for instance, the *Serb Democratic Party* (*SDS*)[2721] – which was founded by Radovan Karadžić – could establish a government in the RS only by guaranteeing to the OHR that non-party representatives would be in the government, despite the fact that it had a relative majority. Likewise, only seven years after the armed conflict and with intensified diplomatic efforts by the international community could the "Alliance for Changes", composed of social-democratic parties and non-nationalist satellite parties, become ruling parties at the State level and at the level of FBiH. In this way, for the first time, the parties of the blocks, in addition to the Serb Democratic Party, the *Party of Democratic Action* (*SDA*) and the *Croatian Democratic Union* (*HDZ*), became the opposition parties.[2722] For the first time after 1996, part of the votes for the HDZ, SDA and SDS went to the *Social Democratic Party* (*SDP*) and (in the RS) to the *Party of Democratic Progress*, founded by Mladen Ivanić. However, the nationalist trio maintained considerable influence. After the 2000 elections, in the elections to the RS National Assembly, the SDS, as the strongest party, took 36.1% votes. The SDS, which was almost banned from taking part in political life because of its affinity to protect war criminals and, especially, because it protected Radovan Karadžić, was a winner that took advantage of the radical right party ban, the *Serb Radical Party*, the voters of which cast their votes to SDS.[2723] After the election debacle in 2002, from the point of view of the international community, with the lowest voter turnout (55.5%) ever, the three nationalist blocks of parties regained power at all levels. Thus, the international community felt compelled to negotiate a reform programme, which was inevitable, not against

2718 *Jurčić*, 2000, p. 565; *ICG*, 1998.b, p. 6 *et seq.*

2719 *ICG*, 1998.b, p. 6 *et seq.*

2720 *Jurčić*, 2000, p. 569; *Winkelmann*, 2002, p. 8.

2721 As to the development of the SDS, SDA and HDZ from 1989 until 2000, see *Sakić-Jovanović*, 2001, pp. 20-24.

2722 *Winkelmann*, 2002, p. 8; *Jurčić*, 2000, p. 568, including the 2000 election results, data and analysis; *ICG*, 2000.b about a success- and failure-analysis of the Alliance.

2723 *Jurčić*, 2000, p. 566 *et seq*.

but with those parties.[2724] Raising nationalist rhetoric and radical positions concerning the status of BiH as well as the status of the RS marked the 2006 election campaign.[2725] However, representatives of the international community strongly appealed to all citizens to take part in the elections.[2726] The elections were held in a democratic atmosphere, without incident and, for the first time, without international community assistance.[2727] However, a low voter turnout of 55.31%, similar to the election turnout in the former elections, reflected voter apathy and, in a way, a feeling of helplessness within the voting public. This particularly applies to the FBiH, where voter turnout was only 50.59%.[2728] The election results were excellent, primarily for the *Party of Independent Social Democrats* (*SNSD*), led by Milorad Dodik, which gained 43.31% of the votes and won a majority (41 out of 82 seats) in the RS National Assembly. In the FBiH, the SDA remained the strongest party (25.54%); nevertheless, compared to the previous elections, the SDA lost not only a number of voters who voted for the *Party for Bosnia and Herzegovina* (*SBiH*) (22.16%), led by Haris Silajdžić, but was also defeated, as the SDA candidate did not become the Bosniak member to the Presidency of BiH. This was put down to the moderate policy of Sulejman Tihić, President of the SDA. The SDP also lost a number of votes, so that it gained only 15.17% of the votes for the House of Representatives of the FBiH Parliament. These results were similarly reflected in the results at the State level. After the elections, the international community had no choice but to appeal to newly elected officials to take up responsibility for the fate of BiH.[2729] Regrettably, the European Commission's Progress Report on Bosnia and Herzegovina for 2009,[2730] which is the last year of the ruling parties' governance taking into account that new general elections will be held in 2010, shows that the State has made "little progress".

2724 *ICG*, 2003.

2725 See, OSCE, Interim Report No. 2, from 11 to 20 September 2009, p. 3, available at: <http://www.osce.org/documents/odihr/2006/09/20697_bo.pdf>; last viewed on 17 October 2009.

2726 See OHR Press Release of 29 September 2006, "Shame on Those Who Stay at Home on Sunday", available at: <http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=38171>; last viewed on 17 October 2009.

2727 See Interview with *Christian Schwarz-Schilling*, High Representative for BiH, of 24 February 2007, "BiH must take up the responsibility", available at: <http://www.ohr.int/ohr-dept/presso/pressa/default.asp?content_id=39227>; last viewed on 17 October 2009.

2728 These and other results of the 2006 elections are available at the website of the Central Election Commission: <http://www.izbori.ba/default.asp?col=Statistika&Path=2006Rezultati>; last viewed on 17 October 2009.

2729 See weekly column by *Christian Schwarz-Schilling*, High Representative for BiH, "Time to Move Forward", of 6 October 2006, available at: <http://www.ohr.int/ohr-dept/presso/pressa/default.asp?content_id=38229>, last viewed on 17 October 2009.

2730 The whole text of the Report is available at: <http://ec.europa.eu/enlargement/pdf/key_documents/2009/ba_rapport_2009_en.pdf>, last viewed on 17 October 2009.

B. House of Peoples (Article IV.1)

1. House of Peoples

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.

The House of Peoples has fifteen members, ten elected from the Federation and five elected from the Republika Srpska. The five from the Republika Srpska must all be Serbs and the ten delegates from the Federation must be divided equally between Croats and Bosniaks. The delegates from the Federation are selected by the House of Peoples of the Federation while the delegates from the Republika Srpska are selected by the Republika Srpska National Assembly. Nine delegates constitute a quorum as long as the nine includes three delegates from each constituent people.[2731] The House of Peoples has full legislative powers,[2732] although its primary purpose is to guard the ethnic interests of the three Constituent Peoples through use of the vital interest provision discussed below.

The Venice Commission[2733] has identified several legal problems with the appointment and makeup of the House of Peoples.[2734] Citizens of Bosnia and Herzegovina who are not Serbs, Croats, or Bosniaks have no right to stand as a candidate for election to the House of Peoples. Similarly, even Serbs, Croats and Bosniaks who live in the "wrong" entity are denied the right to stand as candidates. As a result, the corresponding rights of voters are also restricted because they can only vote for candidates of a specific ethnicity.

This restriction on voting is most severe in the Federation where the Croat and Bosniak delegates to the BiH House of Peoples are selected by the respective

2731 *Ibid*., Article IV.1(b).

2732 *Ibid*., Article IV.3(c), (e) and (f) of the BiH Constitution. See also, Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Article 9.

2733 Formally known as the European Commission on Democracy Through Law.

2734 Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004.

Croat and Bosniak caucuses within the Federation House of Peoples. Federation citizens of Serb ethnicity have no role to play in the selection of delegates to the BiH House of Peoples who are elected from the Federation. It is an indirect election based on ethnicity of the candidate and made by electors who themselves were indirectly elected based on their ethnicity. The Venice Commission has concluded that these discriminatory provisions are in conflict with Article 14 and Protocol 12 to the European Convention on Human Rights.

In 2006, two citizens of Bosnia and Herzegovina of Roma and Jewish ethnicities, Mr. *Dervo Sejdić* and Mr. *Jakob Finci*, brought applications before the ECtHR.[2735] The applicants complained that, despite possessing experience comparable to the highest elected officials, the BiH Constitution prevents them from standing as candidates for the BiH Presidency and the House of Peoples of the BiH Parliamentary Assembly solely on the grounds of their ethnic origins. They invoked Article 3 (prohibition of inhuman and degrading treatment), Article 13 (right to an effective legal remedy) and Article 14 (prohibition of discrimination) of the ECHR, and Article 3 of Additional Protocol No. 1 to the ECHR (right to free elections) and Article 1 of Additional Protocol No. 12 to the ECHR (general prohibition of discrimination).

The case was taken over by the Grand Chamber of the ECtHR which held a hearing on 3 June 2009 on its admissibility and merits,[2736] and it took a final decision on this issue on 22 December 2009. It was established that the provisions of the BiH Constitution relating to the House of Peoples of the BiH Parliamentary Assembly discriminate against the so-called Others within the meaning of Article 14 in conjunction with Article 3 of Additional Protocol No. 1 to the ECHR (paragraph 50). The Grand Chamber of the ECtHR concluded that, given the progress that the State has made since signing the Dayton Peace Agreement (paragraph 47), it is no longer justified to entirely deprive the members of the so-called Others of the right to be elected to this legislative house. There are no reasonable and justified reasons to support something like that. The ECtHR also concluded that the ECHR does not require complete abolition of the principle of parity power sharing and the introduction of the principle which would simply reflect the principle of "majority", nor has the time come in Bosnia and Herzegovina for something like that. However, the ECtHR referred to the opinion of the Venice Commission, which offered a modality of retaining the principle of parity power sharing without excluding certain groups

2735 See ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina*, applications nos. 27996/06 and 34836/06).

2736 See the Internet page: <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20090603-1/lang/>; last accessed on 21 October 2009.

at the same time (paragraph 48). The ECtHR resorted to the same reasoning when it comes to the deprivation of the so-called Others of the right to be elected to the BiH Presidency, whereby the Court referred to the provision of Article 1 of Additional Protocol No. 12 to the ECHR (paragraph 56 in conjunction with paragraphs 47-49).

C. House of Representatives (Article IV.2)

2. House of Representatives

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

a. Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

b. A majority of all members elected to the House of Representatives shall comprise a quorum.

The House of Representatives has forty-two members who are directly elected. Twenty-eight must be elected from the territory of the Federation and fourteen from the Republika Srpska.[2737]

A quorum of the House of Representatives is constitutionally defined as a majority of all members elected to the body.[2738] This issue has created controversy in recent years. Until 2007, the Rules of Procedure of the House of Representatives defined a quorum as follows:

> "Twenty-two representatives shall comprise a quorum provided there is a minimum 1/3 of the representatives present from each Entity unless the decision-making procedure in certain matters is otherwise regulated by the BiH Constitution and these Rules of Procedure."[2739]

The 1/3 Entity attendance requirement in the pre-2007 version is not found in the BiH Constitution. This additional requirement in the rules of procedure created the possibility that a number of representatives from one Entity could block the work of the body by boycotting a session even when the quorum required by the BiH Constitution, a simple majority, had been met. The rules of

2737 Article IV.2 of the BiH Constitution.
2738 *Ibid*., Article IV.2(b).
2739 Article 52 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina," *OG of BiH,* No. 20/00.

procedure were amended in 2007 to drop the 1/3 entity attendance requirement and to follow the explicit language of the BiH Constitution.[2740] As a result, it is now clear that a majority of twenty-two representatives constitutes a quorum, regardless of the entity from which they were elected.

D. Procedures (Article IV.3)

3. Procedures

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

b. Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.

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

d. All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.

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

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

2740 Article 67, Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, *OG of BiH,* No. 91/07.

g. The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.

h. Decisions of the Parliamentary Assembly shall not take effect before publication.

i. Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

j. Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

The most complicated and controversial elements in Article IV relate to voting procedures and more specifically the mechanisms that can be used to block legislation.

Paragraph IV.3(d) first declares that all decisions in both chambers must be made by a majority of those present and voting. The language of the paragraph then restricts the simple majority requirement by defining an additional entity voting requirement that applies to voting in both chambers. The simple majority requirement for adoption of decisions is then further restricted by the vital interest mechanism available in the House of Peoples and discussed below.[2741]

1. Entity Voting Requirement

The Entity voting requirement of paragraph 3(d) establishes a three-step procedure. In the first vote on any decision, each chamber must use its best efforts to see that a simple majority in favour "includes at least one-third of the votes of delegates or members from the territory of each Entity."[2742] This language has been the subject of controversy since 1996. Some have interpreted the language of Article IV.3(d) as requiring the support of one-third of all members elected from both Entities. Others interpret it to require the support of at least one-third of those members from each Entity who are present and voting on a particular issue.

The plain language of the BiH Constitution ("one-third of the votes of delegates or members") indicates that the Entity voting requirement is based on the

2741 Article IV.3(e) and (f) of the BiH Constitution.
2742 *Ibid*., Article IV.3(d).

support of those delegates or members who are actually present and voting. However, the requirement has been interpreted by both Chambers of the Parliamentary Assembly as requiring the support of one-third of all delegates or members elected from each Entity. A proper interpretation of the Entity voting requirement has a significant impact on the functioning of the Parliamentary Assembly and its ability to adopt legislation. An Entity voting requirement that demands the support of one-third of all members or delegates elected from an Entity makes it much more difficult to adopt legislation because it enables the delegates or members elected from one Entity to block the legislation in the first step of the process by failing to attend a session.

If the Entity voting requirement is not met in the first vote, then the second step of the process is for the chair and deputy chairs of the chamber to meet as a commission and attempt to obtain approval within three days of the first vote. If the efforts of the commission fail within that timeframe, then the third step is for another vote on the legislation. At this stage, the legislation is approved by a majority of those present and voting, "provided that the dissenting votes do not include two-thirds or more of the delegates or members elected from either Entity."[2743] In this second round of voting, the procedure is clear. Only the act of casting a dissenting vote can prevent the adoption of legislation. The Entity veto can only be exercised by two-thirds of all members or delegates elected from one of the Entities, rather than a percentage of those present and voting, as is the case in the first round.

Under the language of the BiH Constitution, the Entity voting requirement should change on the vote following a failure of the commission to obtain the one-third approval from each entity. On the second vote, the focus changes from the percentage of Entity approval to the percentage of Entity dissent. The change in focus from counting active support for a decision to counting active opposition means that, while the lack of support for a measure within one Entity may prevent the adoption of the measure on in the first vote, the same lack of support may not necessarily prevent its ultimate adoption if opponents fail to muster two-thirds of the Entity votes in opposition.

It is worth recognising that the Entity voting provision, while intended to protect the interests of the Entities within the Parliamentary Assembly, has largely become a tool for protecting Serb interests, which are often equated with the interests of the Republika Srpska,.[2744] In its current composition, the RS delegation to the House of Representatives consists of 12 Serbs and 2

2743 Emphasis added by the authors.
2744 See *Kunrath*, 2009.

Bosniaks and research on this matter illustrates that Entity voting has always followed ethnicity.[2745] Entity voting has essentially become another means for Serb members from the Republika Srpska to assert their "vital interests," but without the corresponding means to challenge that assertion found in subparagraphs (e) and (f) and discussed below.

The Entity voting requirement applies to both houses of the Parliamentary Assembly, but it is most frequently used in the House of Representatives.[2746] The small size, equal ethnic representation, quorum requirement and vital interest provisions that apply in the House of Peoples have, to date, made the Entity voting requirement less of a factor in the House of Peoples.

2. Vital Interest

In addition to the Entity voting requirement, there is the additional possibility for any of the three ethnic caucuses in the House of Peoples to block the adoption of a decision by use of the "vital interest" provision.[2747] Any of the ethnic caucuses within the House of Peoples can declare any proposed decision of the Parliamentary Assembly to be destructive of a vital interest of its people. The BiH Constitution does not define the term "vital interest." Nevertheless, once a threat to a vital interest has been identified and declared by a majority of members of one of the caucuses, the decision must then be adopted by a majority vote of the delegates present and voting within each caucus. A simple majority is no longer sufficient.

Once the vital interest has been declared, another ethic caucus, by majority vote, can object to the declaration of a vital interest in which case the voting process is halted and a commission comprised of a Croat, Bosniak, and Serb delegate is appointed to attempt to resolve the dispute. If the commission fails to resolve the dispute within five days, the matter is referred to the BiH Constitutional Court to review "for procedural regularity."[2748]

The BiH Constitutional Court has repeated the importance of the mechanism for protecting the vital national interest in a State with multi-ethnic, multilingual and multi-religious communities. However, it has also emphasised the adverse effect that this procedure may have on the work of the legislative body and the functioning of the State.[2749]

2745 *Ibid*. See also *Trnka*, 2008 (in German and Bosnian).
2746 *Ibid*.
2747 *Ibid*., Article IV.3(e).
2748 *Ibid*., Article IV.3(f).
2749 U 10/05, paragraph 15.

The BiH Constitution states that the Court shall review the declared threat to a vital interest for "procedural regularity." There have been several declarations of threats to vital interest in the House of Peoples and referrals to the BiH Constitutional Court for review of "procedural regularity." As a result, there are several Constitutional Court decisions that interpret and clarify the procedures related to the vital interest. The Court has developed a regular practice of first reviewing the sequence of procedural events, which brought the matter to the attention of the BiH Constitutional Court. Was there a proper declaration by one of the caucuses, was it opposed by a majority of delegates from another caucus, was a commission appointed, and was the commission unable to resolve the dispute within five days?

A review of the "procedural regularity" might arguably conclude with a review of the House of People's compliance with the required procedural steps – the declaration, the opposition to the declaration and the appointment of the commission.

But the review of procedural regularity operated by the BiH Constitutional Court goes beyond a mere review of the procedures. Instead, the Court has used the procedural review as the threshold test for admissibility.[2750] The Court has found, on at least one occasion (U 9/08), that the declaration of vital interest did not relate to a "decision" within the meaning of Article IV.3(e) of the BiH Constitution. As a result, the declaration of the Bosniak caucus declaring a draft conclusion to be destructive of a vital interest of the Bosniak people was found to not to meet the procedural regularity requirement.

After the Court concludes that the required procedures for declaring a threat to a vital interest have been followed, it proceeds to an analysis of the merits of the vital interest claim itself. Here, the Court engages in a two-part analysis. First, it determines the existence of a vital interest of one or more of the constituent peoples, which might be threatened by the decision. If a vital interest exists, the Court then proceeds to a determination of whether the decision will be destructive of that vital interest.[2751] In at least one case, the BiH Constitutional Court has found the existence of a vital interest, but held that a decision on the matter would not be "destructive" of the interest.[2752] In another case, the Court found no issue of vital interest was raised by the contested decision.[2753]

The term "vital interest" is not defined in the BiH Constitution. It has been left for the Court to interpret on a case-by-case basis. The Venice Commission has

2750 See, for example, U 2/04, paragraphs 15 – 22.
2751 U 2/04, paragraph 28.
2752 U 10/05.
2753 U 7/06.

pointed out that it "seems inappropriate to leave such a task with major political implications to the Court alone without providing it with guidance in the text of the BiH Constitution."[2754] Without such constitutional guidance, the Court has applied a functional analysis to each case.[2755] In this functional analysis, the Court is "guided by the values and principles essential for a free democratic society" while at the same time ensuring that "protection of the vital interest must not jeopardise implementation of the theory of state functionality."[2756]

The Court has stated that it would not attempt to enumerate or define exhaustively the elements of a vital interest.[2757] However, in recent cases, the Court seems to have relied on definitions contained in the Entity constitutions, namely equal rights of the constituent peoples in the decision-making process, education, religion, language, culture, tradition, and cultural heritage.[2758] The term "vital interest" in the BiH Constitution of Bosnia and Herzegovina can therefore be interpreted to include, at a minimum, the definition of vital interests contained in the Entity constitutions. The Venice Commission views this definition to be "excessively broad."[2759]

The Court has emphasised the fact that the interest of constituent peoples in fully participating in the system of government and the operation of public authorities can be seen as a vital interest, recalling that the BiH Constitution itself reflects this by requiring in Article IX.3 that officials appointed to positions in the institutions of Bosnia and Herzegovina to be generally representative of the peoples of Bosnia and Herzegovina.[2760]

3. Dissolution of the House of Peoples

The BiH Constitution allows for the possibility of the dissolution of the House of Peoples, which would then require the election of a new House of Peoples under the provisions of the Election Law. There is no constitutional provision for the dissolution of the House of Representatives. One could therefore argue that the BiH Constitution leaves no room for early dissolution of the House of Representatives.

2754 Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, paragraph 32.

2755 U 2/04, paragraph 31. See also, U 8/04, paragraph 35.

2756 *Ibid*.

2757 *Ibid*.

2758 U 10/05, paragraph 30. See also, U 7/06, paragraph 39.

2759 Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, paragraph 33.

2760 U 10/05, paragraph 25. See also, U 7/06, paragraph 24.

The House of Peoples can be dissolved by its own decision or by decision of the Presidency. On its own initiative, a proposal for dissolving the House of Peoples may be submitted to the Collegium through the Speaker by at least three delegates. The House shall be convened by the Collegium for discussing this proposal after fifteen days from its submission. After being debated, the proposal shall be submitted to vote. It shall be considered adopted if approved by a majority that includes the majority of delegates from at least two peoples. The result shall be announced and communicated to the House of Representatives, Presidency and Council of Ministers.[2761]

The Presidency can dissolve the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina when there has been a change of the political majority in either the National Assembly of the Republika Srpska, in the Bosniak caucus of the House of Peoples of the Federation of Bosnia and Herzegovina, or in the Croat caucus of the House of Peoples of the Federation of Bosnia and Herzegovina. The Presidency shall attempt to take a decision on the dissolution of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina by consensus. If a consensus is not reached, two Members can nevertheless dissolve it.[2762]

4. Immunity

The provisions of paragraph 3(j) grant Delegates and Members immunity for acts carried out within the scope of their duties in the Parliamentary Assembly. This is a functional immunity and differs from the absolute immunity enjoyed by members of parliament under the former Yugoslav system.[2763] Even after the adoption of the Dayton Constitution, the Parliamentary Assembly of Bosnia and Herzegovina continued to recognise absolute immunity for Members of parliament.[2764] Under this system, any civil or criminal action brought against a Member of parliament was suspended for the duration of his or her term of office.[2765] A Member of parliament could not be arrested or detained for any reason.[2766] Only the house of parliament to which the Member belonged could lift the Member's immunity.[2767]

2761 Rules of Procedure of the House of Peoples of Bosnia and Herzegovina, Article 163.

2762 Rules of Procedure of the Presidency of Bosnia and Herzegovina, Article 44.

2763 For a general discussion on parliamentary immunity see, Venice Commission, Report on the Regime of Parliamentary Immunity, CDL-INF(1996) 007.

2764 Law on Immunity (*OG of BiH*, Nos. 1/97, 3/99).

2765 *Ibid*., Article 4.

2766 *Ibid*.

2767 *Ibid*., Article 5.

A new Law on Immunity of Bosnia and Herzegovina was imposed by the High Representative repealing the old law and clarifying the functional nature of immunity.[2768] Under this law, immunity does not provide a general bar to criminal or civil proceedings against Members of parliament, but is available as a defence when such proceedings involve actions taken by a Member of parliament within the scope of his or her duties.[2769] Under this law, the decision on whether or not immunity applies in any given case is to be made by a competent court.[2770] This legislative change fundamentally altered the interpretation of the scope of immunity granted to Members of parliament.

E. Powers (Article IV.4)

> **4. Powers**
>
> **The Parliamentary Assembly shall have responsibility for:**
>
> **a. Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.**
>
> **b. Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.**
>
> **c. Approving a budget for the institutions of Bosnia and Herzegovina.**
>
> **d. Deciding whether to consent to the ratification of treaties.**
>
> **e. Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.**

The powers of the Parliamentary Assembly are set forth in paragraph 4 of Article IV. A series of Constitutional Court decisions have helped to flesh out the full scope of the powers of the Parliamentary Assembly.

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

Two decisions of the BiH Constitutional Court have affirmed the broad powers of the Parliamentary Assembly to enact legislation necessary to implement

2768 Decision Enacting the Law on Immunity of Bosnia and Herzegovina (*OG of BiH*, No. 32/02). The law was subsequently adopted by the Parliamentary Assembly of Bosnia and Herzegovina (*OG of BiH*, No. 37/03).

2769 *Ibid*., Article 4.

2770 *Ibid*., Articles 6 and 7.

the enumerated powers granted to State institutions in Article III.1 of the BiH Constitution.

In the State Border Service case,[2771] the BiH Constitutional Court was asked to review the enactment of legislation creating a State Border Service. The legislation was initially proposed by the Presidency of Bosnia and Herzegovina.[2772] The proposal was rejected by the Parliamentary Assembly, but imposed by the High Representative acting in substitution for the Parliamentary Assembly.[2773] The Court's analysis was, therefore, an analysis of the BiH constitutional authority of the Presidency and of the Parliamentary Assembly to enact such legislation.[2774]

The BiH Constitutional Court held that the Parliamentary Assembly had express authority to enact legislation necessary to implement decisions of the Presidency.[2775] In order to uphold the law, however, it was necessary for the Court to analyse whether the Presidency had the BiH constitutional authority to issue a decision on enactment of a State Border Service.[2776] The Court upheld that authority under Articles III.1 and III.5(a).[2777] The Court ruled that the State, acting through a decision of the Presidency, has broad constitutional authority for the "external activities of Bosnia and Herzegovina."[2778] Those powers, supplemented by the authority of the State to assume responsibilities and establish institutions necessary to protect the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, provided the BiH Constitutional foundation for adoption of the Law on State Border Service. The independent constitutional authority for the Presidency and Parliamentary Assembly to act in this field meant that Entity consent was not required for enactment of the legislation.[2779]

The ruling in the State Border Service case was affirmed and further expanded in the decision regarding the constitutionality of the Law on Statistics.[2780] The Law on Statistics was also imposed by the High Representative, but was later adopted by the Parliamentary Assembly.[2781] The challenge to the law asserted

2771 U 9/00.
2772 *Ibid*., paragraph 5.
2773 *Ibid*., paragraphs 5 and 6.
2774 *Ibid*.
2775 *Ibid*., paragraph 10.
2776 *Ibid*.
2777 *Ibid*.
2778 *Ibid*., paragraph 12.
2779 *Ibid*., paragraph 10.
2780 U 9/07
2781 *Ibid*., paragraph 6.

that the field of statistics is not a State competency and that the Parliamentary Assembly therefore had no independent basis for adopting legislation in this field under the authority of Article IV.4(a). The Court disagreed.

The BiH Constitutional Court analysed the commitments that Bosnia and Herzegovina had made to the Council of Europe and to the European Union through the Stabilisation and Association Agreement.[2782] It held that these international commitments properly fell within the competencies of the State, and specifically the powers of the Presidency to conduct foreign policy. Based on this analysis:

> "The BiH Constitutional Court holds, with no doubt, that the Parliamentary Assembly of Bosnia and Herzegovina has the mandate to enact the challenged law based on Article IV.4(a) in conjunction with Article V.3(a) of the BiH Constitution of BiH in order to enforce decisions in the area of foreign policy, which falls under the exclusive competence of the Presidency of Bosnia and Herzegovina, relating to the process of becoming a member of the Council of Europe and towards the signing of the Stabilization and Association Agreement with the European Union. The BiH Constitutional Court underlines that the Parliamentary Assembly, as an institution of BiH, has responsibilities under Article IV.4(a) for all matters set out in Article III.1 of the BiH Constitution of BiH."[2783]

The ruling in the Law on Statistics case broadened, in two significant ways, the scope of power of the Parliamentary Assembly to legislate under Article IV.4(a). First, the decision recognised the authority of the Parliamentary Assembly to enact legislation for the purpose of implementing broad foreign policy objectives established through decisions of the Presidency.[2784] The Law on Statistics was not enacted pursuant to a specific proposal of the Presidency as was the case with the Law on State Border Service. The basis for constitutional authority for the Law on Statistics was found in the broader international commitments that the Presidency had made through the Council of Europe and European Union accession processes.

Second, while the power of the Parliamentary Assembly was rooted in the Presidency's constitutional authority to conduct foreign policy, the broad language of the ruling would support the Parliamentary Assembly's power to legislate in an area that "significantly facilitates [the] functioning of all of these areas under the competence of the institutions of BiH, including foreign trade policy, customs policy, immigration, refugee and asylum policy and regulation, communication facilities and regulation of inter-Entity transportation, etc.

2782 *Ibid*., paragraphs 16, 17 and 18.
2783 U 9/07, paragraph 19.
2784 *Ibid*.

(emphasis added)."[2785] In the case of the Law on Statistics, there was no doubt that the Entities possessed competencies in the field of statistics. However, the Court held that the legislation was necessary to implement foreign policy commitments and also that the legislation "significantly facilitated" the implementation of core State competencies. On both grounds, the Parliamentary Assembly had the constitutional authority to pre-empt Entity legislation. The State Border Service case and the Law on Statistics case provide a constitutional basis for the expansion of State authority into additional subject areas, which might otherwise be thought to fall within Entity competencies, in order for Bosnia and Herzegovina to meet its various international commitments to the European Union, the Council of Europe, NATO, OSCE and others.

b) Deciding upon the sources and amounts of revenues for the operations of the institutions of the institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina;

c) Approving a budget for the institutions of Bosnia and Herzegovina.

The BiH Constitutional Court examined the provisions of subparagraphs (b) and (c) of Article IV.4 in the context of a constitutional challenge to the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina.[2786] That case recognised that the Parliamentary Assembly is the legislative body of BiH and, based on the powers granted in Article IV.4 of the BiH Constitution, it determines the legislative framework for the activities of other State bodies. The Parliamentary Assembly has the power to determine the budget for all state bodies.[2787] However, in this case, the Court held that the power to make revenue and budget decisions for State institutions did not include the power to establish the salaries of the judges of the BiH Constitutional Court because such power within the hands of parliament might jeopardize the independence of the judiciary.

d) Deciding whether to consent to the ratification of treaties.

The power of the Parliamentary Assembly to consent to the ratification of treaties has been affirmed by the BiH Constitutional Court and has not been seriously questioned.[2788] There was, however, some dispute between the Presidency and members of parliament as to whether parliamentary approval was necessary for the deployment of Armed Forces of BiH (AFBiH) troops

2785 *Ibid*.
2786 U 6/06.
2787 *Ibid*., paragraphs 30 and 32. See also U 25/00, paragraph 34.
2788 U 12/98, paragraph 4.

as part of a peacekeeping operation. The issue arose in 2004 in connection with the deployment of Bosnian troops to Iraq. The Presidency of Bosnia and Herzegovina had entered into an agreement with the United States regarding the deployment of AFBiH troops to join the multi-national force in Iraq. Members of parliament asserted the constitutional right to ratify that agreement. The dispute was resolved when the Parliamentary Assembly adopted the Law on Participation in Peace Support Operations,[2789] which now explicitly requires the approval of parliament for any deployment of troops abroad.

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

The BiH Constitutional Court has recognised that Article IV.4(e) may encompass a broader range of competencies than those specifically enumerated in Article III.1.[2790] The provisions of Article IV.4(e), together with the specific authority to regulate the issuance of passports found in Article I.7(e), provided the constitutional basis for the Court to uphold amendments to the Law on Travel Documents, which asserted more State control over the design and issuance of passports by the Entities.

** The views of the author are his personal views and do not reflect the views of the Office of the High Representative or the European Union Special Representative.*

2789 Law on Participation of Members of the Armed Forces of BiH, Police Officers, Civil Servants and other Employees in Peace Support Operations and other Activities Abroad (*OG of BiH*, No. 14/05).

2790 U 25/00, paragraph 31.

Article V – The Presidency of Bosnia and Herzegovina

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.

1. Election and Term

a. Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

b. 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.

2. Procedures

a. The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

b. The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3).

c. The Presidency shall endeavour to adopt all Presidency Decisions (i.e.**, those concerning matters arising under Article III (l) (a) - (e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.**

d. A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat

Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

3. Powers. The Presidency shall have responsibility for:

a. Conducting the foreign policy of Bosnia and Herzegovina.

b. Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

c. Representing Bosnia and Herzegovina in international and European organisations and institutions and seeking membership in such organisations and institutions of which Bosnia and Herzegovina is not a member.

d. Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

e. Executing decisions of the Parliamentary Assembly.

f. Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

g. Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

h. Coordinating as necessary with international and nongovernmental organisations in Bosnia and Herzegovina.

i. Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

4. Council of Ministers. The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

a. Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

b. No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.

c. The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.

5. Standing Committee

a. Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

b. The members of the Presidency shall select a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Members of the Presidency shall be members of the Standing Committee.

A. Article V.1: Election and Term

1. Election and Term

a. Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

b. 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.

1. The Tri-Presidency

The most striking feature of the Presidency of Bosnia and Herzegovina is that it is an institution comprised of three members, not a single executive position as it is in most countries with a presidential political system. The tri-presidency of BiH, like other State institutions in Bosnia, is designed to divide power between the three constituent peoples.

Each of the three members of the Presidency is a representative of one of the three constituent peoples. A citizen of Bosnia who is not a member of one of the three constituent peoples, for instance a member of a national minority or a Constitutionally defined "Other," is ineligible to be elected to the Presidency.

The members of the Presidency also represent one of the two Entities of Bosnia. The Croat and Bosniak members of the Presidency are elected from the territory of the Federation – meaning that the candidates and the electors are citizens of the Federation.[2791] The Serb member of the Presidency is elected by citizens of the RS from among candidates who are RS citizens.

2. Voting Rights Restrictions

The combination of territorial representation and ethnic representation raises serious human rights concerns. The current provisions deny BiH citizens who are not a member of one of the three constituent peoples the right to stand as a candidate for the Presidency. They deny citizens who are a member of one of the constituent peoples, but who happen to live in the wrong Entity, the right to stand as a candidate for the Presidency and they restrict the rights of citizens to vote for the candidate of their choice based solely on ethnicity. The Council of Europe has pointed out that these discriminatory provisions conflict with the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[2792] As a result, the voting rights restrictions that are imposed by Article V directly contradict the human rights guarantees incorporated in Article II and Annex I of the Constitution. This position has been upheld in the judgment of the ECtHR in the case of *Sejdić and Finci v. Bosnia and Herzegovina*.[2793]

3. Succession

In July of 2000, President Izetbegovic, the Bosniak member of the Presidency, announced that he would resign from his position before the end of his term. Article V.1(a) calls for any vacancy to be "filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly of BiH." However, there was no law at the time that President Izetbegovic announced his intention to resign and therefore no legal mechanism for filling the vacancy.

In response, the Parliamentary Assembly adopted the Law on Succession of a BH Presidency Member.[2794] That law required that a successor be selected from

2791 Each Entity may grant "citizenship" separate from BiH citizenship. See Article I.7 of the Constitution of Bosnia and Herzegovina.

2792 "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative," paragraphs 37 – 40 and 66 – 77. Venice Commission CDL-AD (2005) 004.

2793 See more about this ECtHR case and conclusions from the judgment on p. 85 and 622.

2794 *OG of BiH*, No. 21/00.

among the members of the House of Representatives of the same ethnicity and elected from the same Entity as the outgoing member of the Presidency. Members of the House of Representatives elected from the same Entity and of the same ethnicity as the outgoing member select his successor. The selection by the House of Representatives must be confirmed by the House of Peoples. The law fulfills the only two Constitutional requirements, namely that the replacement candidate be "from the relevant Entity" and that s/he be of the correct ethnicity. The law additionally reflects a policy preference for selecting a replacement from among members of the House of Representatives who have been elected in a direct election, as opposed to filling the vacancy from among members of the House of Peoples, other members of government, or from the private sector.

Shortly after the adoption of the Law on Succession of a Member of the BH Presidency Member, the High Representative imposed amendments to the law.[2795] The High Representative objected to a provision in the law that would have effectively allowed the House of Peoples to block nominations from the House of Representatives and then allow the appropriate ethnic caucus of the House of Peoples to fill the vacancy. This created a possibility that three members of a five-member caucus could select a replacement member of the Presidency. In the case of President Izetbegovic, it created the possibility that three of the five Bosniak members of the House of Peoples could block an appointment by the House of Representatives and then fill the vacancy with their own nominee. The High Representative believed that the possibility that three people, themselves not directly elected, could ultimately appoint a member of the Presidency would be undemocratic.

The High Representative also objected to a provision in the law that would have allowed the House of Representatives to fill a vacancy in the Presidency in the closing days of its mandate. At the time, the elections for the House of Representatives and for the Presidency were staggered, thus creating the possibility that an outgoing House could appoint a replacement member of the Presidency who would serve for two more years, until the next presidential election. This would have been the case for President Izetbegovic who announced that he would step down in October 2000 with elections for the House of Representatives scheduled for November, but presidential elections not scheduled until 2002. The High Representative believed that this provision could encourage a member of the Presidency and his party to decide the timing

2795 The law was adopted on 31 July 2000 and the amendments were imposed by the High Representative on 7 August 2000. The law and the amendments are published in the same *Official Gazette*. See, Decision Amending Law on Filling Vacant Position of a Member of the Presidency of BiH, *OG of BiH*, No. 21/00.

of a retirement based on a calculation about whether the existing House of Representatives or the new one would best suit their interests.[2796] The High Representative believed that the vacancy in such cases should be filled on an interim basis by the outgoing House of Representatives and permanently filled by the new House of Representatives following the election.

The High Representative's decision addressed both objections. It eliminated the possibility that the House of Peoples could ultimately fill the vacancy. As amended, the law now allows the House of Representatives to fill the vacancy without approval from the House of Peoples if the House of Peoples has rejected two previous nominees. The High Representative's amendments also specified that, if the vacancy occurs within 120 days of the end of the House's mandate, the vacancy would be filled on an interim basis by the appropriate speaker or deputy speaker of the House while the permanent replacement would be named after the election by the newly elected House of Representatives. In 2002, the mandates of the House of Representatives and the Presidency were harmonised, thereby eliminating the original reason for this amendment. Now, the interim replacement by the speaker or deputy speaker still takes place within 120 days of the end of the House of Representatives/Presidency mandate, but the vacancy is then automatically filled by the election of the new members of the Presidency.

B. Article V.2: Procedures

2. Procedures

a. The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

b. The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3).

c. The Presidency shall endeavour to adopt all Presidency Decisions (i.e.**, those concerning matters arising under Article III (l) (a) - (e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed.**

d. A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from

2796 This potential for manipulation was eliminated when the House of Representatives and Presidential election dates were harmonized in 2002.

the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

1. Rotation

The first chairmanship of the Presidency was Constitutionally assigned to the member who received the largest number of votes.[2797] Thereafter, the Constitution requires only that the chairmanship be decided "by rotation or otherwise" as determined by the Parliamentary Assembly.[2798] The current requirement that the chairmanship of the Presidency rotate every eight months is found in the Election Law of Bosnia and Herzegovina.[2799]

Decisions taken pursuant to subparagraphs (a) – (e) should be taken by consensus,[2800] and are subject to the vital interest protections contained in Article V.2(d). The powers described in subparagraphs (a) – (e) are all related to matters of foreign affairs, except for the general power to execute decisions of the Parliamentary Assembly, which is found in subparagraph (e).

2. Vital Interest

If the Presidency is unable to achieve consensus on a decision related to powers listed in subparagraphs (a) – (e), the decision may be taken by two of the three members, unless the dissenting member declares that the decision is destructive of a vital interest of the territory from which he/she was elected.[2801] Assertion of the vital interest provision triggers a vote in the Republika Srpska National Assembly or the Bosniak or Croat caucus of the Federation House of Peoples depending on which member of the Presidency asserted the vital interest provision. A confirmation by a 2/3 vote of the relevant body will uphold the vital interest and nullify the presidential decision.

2797 Constitution of BiH, Article V.2(b).
2798 *Id*.
2799 Election Law of Bosnia and Herzegovina, Article 8.3.
2800 Constitution of BiH, Article V.2(c).
2801 *Id*., Article V.2(b).

It should be noted that the vital interest provision in Article V differs from the vital interest provision found in Article IV in that members of the Presidency have constitutional authority to protect the vital interests of the Entity from which they are elected while the Parliamentary Assembly has constitutional authority to protect the vital interests of Constituent Peoples. One is based on territorial interests while the other is based on ethnic interests. The territorial and ethnic principles become confused when exercised by the Presidency because the assertion of the vital interest by a member of the Presidency elected from the Federation is voted on by one of the ethnic caucuses within the Federation House of Peoples.

C. Article V.3: Powers of the Presidency

3. Powers. The Presidency shall have responsibility for:

a. Conducting the foreign policy of Bosnia and Herzegovina.

b. Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

c. Representing Bosnia and Herzegovina in international and European organisations and institutions and seeking membership in such organisations and institutions of which Bosnia and Herzegovina is not a member.

d. Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

e. Executing decisions of the Parliamentary Assembly.

f. Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

g. Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

h. Coordinating as necessary with international and nongovernmental organisations in Bosnia and Herzegovina.

i. Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

The powers of the Presidency are listed in paragraph 3 of Article V, which is appropriately Entitled "Powers." But despite the title, this paragraph does not contain an exhaustive list of presidential powers. The Presidency also has constitutional powers, which are granted by paragraphs 4 and 5 of Article V and by other articles of the Constitution, as discussed below.

1. Article V.3–Powers

The enumerated powers in paragraph 3 are divided into two categories – those that require a "decision" of the Presidency and those that involve actions of a lesser legal status than a decision, actions such as "reporting," "coordinating," and "proposing."

While the powers of "decision" of Article V.3(a) - (e), are subject to the vital interest clause, the additional "powers" listed in paragraph 3, subparagraphs (f) - (i) are not subject to the vital interest provisions and do not even fall under the constitutional obligation for the Presidency to "endeavour" to achieve consensus for action. These Presidential activities include: proposing an annual budget, reporting on expenditures by the Presidency, coordinating with international organisations, and performing other duties as assigned by the Parliamentary Assembly or the Entities.

> **Side note:** Dayton Error
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> There was an error in the transcription of the original version of Article V that was signed by the parties as Annex 4 of the General Framework Agreement for Peace. That error was corrected by the first High Representative and should be noted by practitioners. The original version of Article V.2(c) referenced Article III.1(a) - (e) as the subjects that should be decided by consensus decision by the Presidency and subject to the vital interest provisions. Article III.1 is the Constitutional provision that lists the responsibilities of the institutions of BiH.
>
> The correct reference should be to Article V.3(a) - (e), which lists the powers of the Presidency. Most versions of the BiH Constitution currently in use are based on the corrected English version or the local language translations of that corrected English version, which were produced by the Office of the High Representative in 1997. However, the original version, as submitted to the United Nations following the initialling of the GFAP in Dayton, Ohio, does contain the mistaken reference and can cause confusion.

2. Presidential powers[2802] not found in Article V

The Presidency has additional constitutional powers that are established by constitutional and other legal provisions outside of Article V.

a. Article III.5(a)-Powers

In the State Border Service Decision,[2803] the Constitutional Court upheld the Presidency's decision to submit a proposed law to the Parliamentary Assembly for the creation of a new State Border Service. Eleven members of the House of Representatives had challenged the authority of the Presidency to adopt such a decision. The Court did not identify specific constitutional authority from paragraph 3 of Article V to support the Presidency's decision. Instead, the Court based its ruling on the language of Article III.5(a) of the Constitution, specifically the authority of the State to assume responsibilities necessary to protect the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina.[2804] The Court did not explain in detail how the Presidency derived powers from Article III.5(a).

Apparently, the Court recognised that the power of the State to "assume responsibility for such other matters" is to be executed "in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina." In the case of the State Border Service, the Court recognised the Presidency's competencies in foreign affairs. Therefore, it was appropriate for the Presidency to use Article III.5(a) powers "in accordance with [its] responsibilities" to adopt a decision establishing a State Border Service. The reasoning of this court decision could lead to the further creation of Presidential powers that are not specifically enumerated in the Constitution.

b. Dissolving the House of Peoples

The Presidency has the power to dissolve the House of Peoples of Bosnia and Herzegovina.[2805] The Constitution does not clearly require this decision to be taken by consensus. However, the rules of procedure of the Presidency have interpreted the Constitution to require the Presidency to "endeavour to adopt"

2802 Certain powers of the BiH Presidency referred to in Articles V.4 and V.5 of the BiH Constitution were considered in other chapters of this commentary: see, for instance: "D. Article V.4: Council of ministers", p. 648 and "E. Article V.5: Standing Committee on Military Matters", p. 665.

2803 Case No. 9/00.

2804 *Id.*, at paragraph 10.

2805 Constitution of BiH, Article IV.3(g).

such a decision by consensus. If consensus is not reached, the rules allow the decision to be taken by two members of the Presidency.[2806]

c. Appointment of the Central Bank Governing Board

The Presidency has the power to appoint members of the governing board of the Central Bank.[2807] The Presidency appoints all five members of the governing board to serve for six year terms. Appointments are made at the sole discretion of the Presidency. There is no constitutional requirement for the presidential appointments to be confirmed or approved in any way by the Parliamentary Assembly.

d. Appointment of the Commission on National Monuments

The Presidency also has the authority to appoint members of the Commission on National Monuments. This power is derived from Annex 8 to the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP) and not directly from the Constitution.[2808] The Presidency appoints the five members of the commission.

e. Cooperation of Entities

The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina.[2809] The Presidency has adopted procedures for facilitating inter-Entity cooperation, which include the establishment of an informative conference and the conclusion of a memorandum of understanding between the Entities.[2810]

f. Application of V.2(d) – Vital Interest Provision

The Constitution is unclear as to whether decisions taken by the Presidency under authority other than Article V.3(a) – (e) are subject to the vital interest provisions found in Article V.2(d). The vital interest provisions appear only to apply to the powers listed in Article V.3(a) – (e). But the language in Article V.2(d) could be interpreted broadly enough to make any other formal "decision" subject to its terms.

2806 Rules of Procedure of the Presidency of BiH, Article 44.
2807 Constitution of BiH, Article VII.3
2808 General Framework Agreement for Peace, Annex 8, Article II.2.
2809 Constitution of BiH, Article III.4.
2810 Rules of Procedure of the Presidency of BiH, Articles 55 and 56.

As mentioned above, Article V.2(c) clearly divides the powers listed in Article V.3 into those that require a "decision" (a-e) and those that do not (f-i). Article V.2(c) is also clear that those "decisions" are subject to the vital interest provisions of subparagraph (d). The language of subparagraph (d), however, does not restrict its provisions to decisions taken pursuant to the previous subparagraph. Article V.2(d) could therefore be interpreted to apply to all Presidency decisions, those taken pursuant to Article V.3(a)-(e) and those taken under the authority of any other provision of the Constitution.

D. Article V.4: Council of ministers

4. Council of Ministers. The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives.

a. Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina).

b. No more than two-thirds of all Ministers may be appointed from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives.

c. The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.

1. Introduction

Unlike the Chapters related to other institutions of Bosnia and Herzegovina, the Section related to the Council of Ministers is relatively short. It contains one paragraph that is included in the Chapter related to the Presidency of Bosnia and Herzegovina.

From an historical perspective, the inclusion of the provision on the Council of Ministers within the Chapter concerning the Presidency would seem to reflect the predominance of the Presidency as the main executive institution of Bosnia and Herzegovina. The discussions that led to the signing of the GFAP confirm this. By way of illustration, the Further Agreed Basic Principles of 26 September

1995,[2811] which describe the future institutions of BiH, only include a minimalist reference to the cabinet that would be made up "of such ministers as may be appropriate".

We will see, however, that the practice so far has been to give the Council of Ministers relative prominence over the Presidency.

Sparse provisions on the Council of Ministers also explain why the case law of the Constitutional Court on this subject is relatively limited, and very few articles have been written on the subject. Therefore, most of the content of this contribution is based on the practice of the institutions of Bosnia and Herzegovina over the last twelve years and on the few Decisions of the BiH Constitutional Court that touch upon the work and functioning of the Council of Ministers.

Finally, it is worth noting that the constitutional provision concerning the Council of Ministers only regulates matters pertaining to the nomination, election and composition of the Council of Ministers. It also contains an extremely broad sentence on the competencies of the Council. In practice, many discussions concerning this provision have focused on the composition of and decision-making in the Council of Ministers.

Such provisions must be interpreted in conjunction with other provisions of the Constitution of BiH. In addition, consideration should be given to the various Laws that have regulated the Council of Ministers since the signing of the GFAP:

- The first Law on the Council of Ministers and Ministries of Bosnia and Herzegovina (hereinafter: the 1997 Law) was adopted by the BiH Parliamentary Assembly of Bosnia and Herzegovina in December 1997;[2812]
- In April 2000, the BiH Parliamentary Assembly adopted a new Law on the Council of Ministers (hereinafter: the 2000 Law);[2813]
- On the basis of a draft Law produced in November 2002 by representatives of political parties elected into the House of Representatives of the BiH Parliamentary Assembly (hereinafter: the House of Representatives), the High Representatives enacted a new Law on the Council of Ministers of Bosnia and Herzegovina on December 2, 2002 (hereinafter: the 2002

2811 Further Basic Agreed Principles (additional to those signed on 8 September 1995 at Geneva), 26 September 1995, UN Doc. A/50/718 – S/1995/920, Annex 1, item 6.2 and 6.3.
2812 *OG of BIH*, No. 4/97.
2813 *OG of BIH*, No. 11/00.

Law).[2814] The Law was then adopted by the Parliamentary Assembly of Bosnia and Herzegovina and published in the Official Gazette of Bosnia and Herzegovina.[2815] This Law has been in force since that time and has been amended on a number of occasions subsequently,[2816] in particular to include new ministries or institutions.

The changes and amendments to the Law of 19 October 2007, enacted by the High Representative, should be singled out: they aimed to streamline the work of the Council of Ministers, but their enactment triggered a major political crisis which led to the resignation of the Chair of the Council of Ministers. These changes and amendments were then subject to an authentic interpretation enacted by the High Representative on 3 December 2007.[2817]

The fact that the legislation on the Council of Ministers has been changed little or not at all over the last ten years can also be explained by the interest that the international community has had in reinforcing the Council of Ministers. As an illustration of that interest, the communiqué issued by the Steering Board of the Peace Implementation Council at its Brussels meeting on 7 December 2000 may be recalled. In it, "the necessity of cooperation in the building of a functioning state, particularly through an effective Council of Ministers […] capable of interaction on a basis of equality with other states and other organisations" was emphasised.

2. Nomination and appointment of the members of the Council of Ministers

The nomination of the Chair and of the other members of the Council of Ministers as well as their approval follows a formal procedure described under Article V.4 of the Constitution.

a. Nomination of the Chair of the Council of Ministers

It belongs to the Presidency of Bosnia and Herzegovina to initiate the process of appointment of the Council of Ministers by nominating a Chair of the Council of Ministers. The nomination of the Chair of the Council of Ministers is an essentially political decision. It results from consultations between political parties. Yet a couple of observations must be made about the way in which the power to nominate the Chair has been exercised.

2814 *OG of BIH*, No. 38/02.
2815 *OG of BIH*, No. 30/03.
2816 *OG of BIH*, No. 42/03, No. 81/06, No. 76/07.
2817 *OG of BiH*, No. 94/07.

(a) Chair or Co-Chairs of the Council of Ministers

Article 3, paragraph 1 of the 1997 Law provided for the appointment of two Co-Chairs of the Council of Ministers by the Presidency.[2818] Under the Rules of Procedures of the Council of Ministers in force at the time, "the two Co-Chairs were to take turn as Chair". By doing so, the Law sought to distribute the two positions of Co-Chairs and the position of Vice-Chair between the three constituent peoples. The Constitutional Court had then to decide whether such arrangements were a violation of Article V.4 of the Constitution. They did so in two separate decisions:

In the first decision,[2819] the Court had to decide whether a Co-Chair of the Council of Ministers acting alone could exercise the competencies granted to the Chair of the Council of Ministers under the Constitution. In particular, the Court had to decide whether a Co-Chair could refer a dispute to the Court under Article VI.3 (a) of the Constitution.

> On that occasion, the Court decided that "it could follow from an interpretation that the two Co-Chairs must act jointly that any access to the Constitutional Court by a Chair of the Council of Ministers may effectively be excluded if they block each other. Such an interpretation could then have the effect that none of the two Co-Chairs can exercise this responsibility. This would violate the principle of effectiveness which flows from Article VI.3 of the Constitution (…)".

By doing so, the Court held that the provision of the Law which obliges the Co-Chairs to act jointly conflicts with the constitutional principle of effectiveness and that such a constitutional principle, when there is serious doubt as to the constitutionality of a Law, must be given precedence over such a law.

In a further Decision,[2820] the Court this time had to assess the constitutionality of the provisions of the law providing for the existence of the Co-Chairs, the Vice-Chair and the necessity for the Co-Chairs to obtain an opinion of the Presidency when nominating ministers. The Court ruled that the

> "[...] provisions of the law defining the Co-Chairs and the Vice-Chairs of the Council of Ministers are not in accordance with the Constitution of Bosnia and Herzegovina, since the Constitution establishes the traditional function of a Prime Minister designate who also appoints the ministers […]".

2818 Under this provision, the positions of Co-Chairs were distributed among Serbs and Bosniaks until 1999. *Haris Silajdzić* and *Boro Bosić* were appointed for the first term of two years (1997-1999) while *Haris Silajdzić* and *Svetozar Mihajlović* were appointed from 1999 to 2000.

2819 U 1/98 of 5 June 1998.

2820 U 1/99 of 14 August 1999.

(b) Constituent people's representation and the Chair of the Council of Ministers

As a result of the above referenced Decision of the Constitutional Court, a new Law was adopted in 2000. The 2000 Law explored new methods of representation of constituent peoples within the main executive functions and therefore provided for:

- the obligation for the Chairman of the Council of Ministers not to be from the same constituent people as the Chair of the Presidency; and
- the limitation of the term of office of the Chair to eight months.

In practice, this meant that a new process for electing a Chair and the Council of Ministers as a whole had to be conducted every eight months, or even less if the rotation schedule of the Presidency led to the Chair of the Council of Ministers and the Chairman of the Presidency being representatives of the same constituent people. In practice, five governments were in place over a period of 27 months and only two of them lasted for more than five months. Although this practice did not raise any question with respect to its consistency with the Constitution, it had a serious impact on the continuity of the work of the Council of Ministers and on the ability of the Council of Ministers to perform its duties.

The Law enacted in 2002 therefore sought to depart from such practice by including a new Article 9, paragraph 1 which provides that the Chair of the Council of Ministers is nominated "at each new mandate of the Parliamentary Assembly of Bosnia and Herzegovina respectful of the principle of representation according to IX.3 of the Constitution". This provision of the Constitution, sometimes referred to as the 'general representativeness clause', has often been used to justify parity between constituent peoples in the institutions of Bosnia and Herzegovina[2821] at any given time. However, the new Article 9 paragraph 1 constitutes a unique example of the legal interpretation of that clause in order to justify the rotation of constituent peoples' representatives in a position across mandates of the Parliamentary Assembly. Although such a practice presents the advantage of re-assuring constituent peoples without affecting the continuity of the work of the Council of Ministers, it is unlikely that an aggrieved party would be able to dispute the election of a Chair that would be made in violation of the principle of alternation between constituent peoples.

2821 See below for the application of Article IX.3 to the Council of Ministers as a whole (p. 655).

(c) Decision of the Presidency

When nominating the Chair of the Council of Ministers, the Presidency does not decide by a consensus of its members as this is not a matter that falls under the scope of Article V.2(c) of the Constitution. Any other interpretation could have led to insurmountable blockades in the process of establishing the Council of Ministers. Insofar as the members of the Presidency are directly elected, it could lead to a situation where different parties have the majority in the Presidency and in the House of Representatives, making the election of one candidate impossible. By way of illustration, the election of the Chair of the Council of Ministers in 2006, Mr. *Spiric*, was made over the objection of one member of the Presidency of Bosnia and Herzegovina whose party was not part of the 'coalition' formed after the elections.

b. Nomination of the members

Under Article V.4 of the Constitution, the Chair nominates a Foreign Minister, a Minister of Foreign Trade and other Ministers as may be appropriate. Under Article V.4(b), he or she also nominates Deputy Ministers. As per Article V.4(b), only the Chair and the Ministers constitute the Council of Ministers.

(a) Lists of ministers

Lists of ministers are included in the various Laws on the Council of Ministers. The number of ministerial portfolios has evolved in parallel with the competencies of Bosnia and Herzegovina. While the 1997 Law included the two ministries that are specifically listed in Article V.4 of the Constitution and established the Ministry for Civil Affairs and Communications, the list has substantially increased in the two subsequent laws.

In 2000, the Ministry for European Integration, the Ministry for Treasury and the Ministry for Human Rights and Refugees were created. The creation of the last primarily responds to the need to coordinate the activities of the Entities in respect to refugee return and to the responsibility of Bosnia and Herzegovina to "ensure the highest level of internationally recognised human rights".[2822] It also follows the assumption by Bosnia and Herzegovina under Article III.1(f) of the competencies to set policies and regulate matters related to immigration and asylum.[2823]

2822 See Article II.1 of the Constitution.
2823 Law on Immigration and Asylum of Bosnia and Herzegovina of 23 December 1999 (*OG of BiH*, No. 23/99).

After 2003, the establishment of police bodies and of judicial and prosecutorial institutions at the level of Bosnia and Herzegovina[2824] led to the creation of the Ministry of Justice and the Ministry of Security. As a result, certain portfolios were redistributed between these two ministries and the Ministries of Civil Affairs and Human Rights and Refugees. In addition, the Ministry for European Integration was turned into a Directorate in order to maintain a number of ministries that can be equally divided between constituent peoples. Finally, in 2004, the Law was amended to establish the Ministry of Defence to deal with certain aspects of the defence competencies assumed by the State pursuant to Article III.5(a) of the Constitution.

(b) Distribution of Portfolios

The distribution of portfolios between political parties is essentially a political process and is done by negotiation. It usually goes in parallel with the discussions on a government platform.

(c) Status of the Deputy Ministers

Pursuant to Article V.4(b) of the Constitution, the Deputy Ministers are not members of the Council of Ministers. As such, their votes are not counted when a decision is submitted to a vote. The question of the role of the Deputy Ministers has been raised on several occasions in the last ten years.

Initially, Deputy Ministers were used to ensure equal representation of constituent peoples in every single ministry. As a result, every Minister had two deputies.[2825] The 2002 Law ruled out this possibility[2826] in an attempt to end the practice of dividing every ministry into three ethnically compact sub-ministries. As an exception to this, the Minister of Defence, which we have seen was established at the level of Bosnia and Herzegovina in 2004, has two deputies. This exception was justified by the political sensitivity of this reform.

Another question arose when amendments to the Law were enacted in October 2007, which enabled a Deputy Minister to temporarily perform the duties of a Minister from the day of resignation, dismissal or permanent inability of

2824 Law on the State Border Service, *OG of BiH*, No. 50/04; Law on the State Investigation and Protection Agency, *OG of BiH*, NO. 27/04; Law on the Prosecutor's Office of Bosnia and Herzegovina, *OG of BiH*, No. 24/02; High Representative Decision on Law Establishing the State Court of Bosnia and Herzegovina, No. 50/00, *OG of BiH*, No. 29/00. Adopted by the BiH PA and published in the *OG of BiH*, No. 16/02.

2825 See Article 6, paragraph 5 of the 2000 Law.

2826 See Article 7, paragraph 1 of the 2002 Law.

a Minister until his/her successor takes office.[2827] Before enactment of those amendments, the replacement of the Minister by his or her Deputy was conditioned upon a formal delegation of competence by the Minister. Therefore, in the absence of such a delegation, the work of the Ministry and of the Council of Ministers was conditioned upon the willingness of the Minister to formally delegate his/her competency or continue working pending replacement.[2828]

Aside from the issue of the representation of the Entities and constituent peoples in the Council of Ministers that this provision has raised (discussed further below), the possibility for Deputy Ministers to take over the duties from a Minister without formal delegation would need to be examined in respect to its conformity with the first sentence of Article V.4(a) of the Constitution, which limits the membership of the Council of Ministers to the Chair and the Ministers. It is clear however that the impact that the replacement of the Minister on the overall representation of constituent peoples in the Council of Ministers is mitigated by the enactment of a new Article 18, paragraph 4 which provides that the vote of a Deputy Minister cannot be considered as a vote of any member of a constituent people.[2829]

(d) Eligibility

i. Article IX.3 and V.4(b)

The Constitution limits the right of the Chair of the Council of Ministers concerning the nomination of the Ministers by ensuring representation of the peoples of Bosnia and Herzegovina (Article IX.3) and requesting that no more than two-thirds of all the Ministers be appointed from the territory of the Federation (Article V.4(b)). These two requirements have been unequally applied and have in fact resulted in the application of a principle of parity between constituent peoples. Such an application was incorporated in the 2002 Law,[2830] which provides that "*[t]he overall composition of the Council of Ministers shall, throughout its mandate, be and remain fully respectful of the Constitution of Bosnia and Herzegovina and in particular Article V.4(b) and IX.3 thereof and, subject thereto, shall ensure equal representation of the constituent peoples of Bosnia and Herzegovina*".

2827 See Article 14, paragraphs 4 and 5 and Article 15, paragraphs 3 and 4 that were introduced in the 2002 Law in October 2007.

2828 See Article 7, paragraph 3 of the 2002 Law.

2829 See also paragraphs 11 and 12 of the authentic interpretation enacted by the High Representative on 3 December 2007.

2830 See Article 6, paragraph 1 of the 2002 Law.

It is dubious that the combined application of these two constitutional provisions would lead to a principle of equal representation or parity of the constituent peoples in the Council of Ministers. In this respect, the following needs to be emphasised:

- Article V.4(b) does not establish any principle of constituent people representation. Rather, it puts a ceiling on representation of Ministers residing in the Federation, regardless of their ethnic/national background;
- Article IX.3 contains a general principle of representation of peoples of Bosnia and Herzegovina which applies to all institutions of Bosnia and Herzegovina. Although equal representation does not *per se* violate this provision, it is also clear that the provision does not oblige the granting of equal representation to constituent peoples.[2831]

Again, the case of the amendments to the Law on Council of Ministers of 19 October 2007 enabling a Deputy Minister to temporarily perform the duties of Minister from the day of resignation, dismissal or permanent inability of a Minister until his/her successor takes office illustrates the problem of interpretation of these provisions.

In its opinion on the Law on Changes and Amendments to the Law on the Council of Ministers of BiH of 19 October 2007, the Expert Group of the Government of Republika Srpska claimed that this "*solution violates the provisions of Article V.4(b) and IX.3 of the Constitution of BiH as it created the possibility that at a certain time period the members of the Council of Ministers may only be from the two constituent peoples, i.e.*, *from one Entity*".[2832]

Both provisions of the Constitution are provisions that oblige the appointing authorities, in this case the Chair of the Council of Ministers and the House of Representatives, to respect a certain balance between peoples and Entities. As a result, the Constitution obliges the appointing authorities to re-establish the proper balance in the Council of Ministers expediently whenever such balance is affected by resignation(s) or permanent incapacitation(s). However, the fact that parity is not respected for a temporary period does not seem to be an issue under the Constitution and does not in any way affect the Council of Ministers' ability, under the Constitution, to perform its duty.

2831 The Constitutional Court interpreted Article IX.3 of the Constitution of BiH in its Decision U 8/04 of 25 June 2004 and held the following: "[…] 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.[…]"

2832 For a reference to the Opinion of the Expert Group of the Government of Republika Srpska: <http://www.vladars.net/sr-SP-Latn/Vlada/media/vijesti/Pages/vijest2.aspx>.

Finally, the idea that the combined application of Article V.4(b) and Article IX.3 of the Constitution establish a principle of parity between the constituent peoples of Bosnia and Herzegovina whereby the Serb Ministers are elected from the territory of the Republika Srpska and the Croat and Bosniak Ministers from the territory of the Federation seems to collide with the stance taken by the Constitutional Court of Bosnia and Herzegovina in its Decision U 5/98 of 1 July 2000 in which the Court did not

> "share the views of the representatives of the People's Assembly of the Republika Srpska and the House of Peoples of the Federation that the provisions of the Constitution of BiH (concerning the composition of the two Houses of the Parliamentary Assembly of BiH, the Presidency, the Council of Ministers and the Constitutional Court, as well as the respective electoral mechanisms) allow for the general conclusion that these representation mechanisms reflect the territorial separation of the constituent peoples in the Entities".[2833]

The Court further stated that

> "insofar as a certain number of Ministers shall be appointed from the territory of the Federation or the RS according to V.4(b), […] all these provisions demonstrate nothing but the fact that either the territory or specific institutions of the Entities serve as [a] legal point of reference for the elections of the members of the institutions of BiH."[2834]

ii. Article IX.1

Article IX.1 of the Constitution applies to all appointive, elective or other public offices throughout the territory of Bosnia and Herzegovina. As such it also prevents the Presidency, the Chair of the Council of Ministers and the House of Representatives from appointing a Chair, Ministers or Deputy Ministers who are either serving a sentence imposed by the International Criminal Tribunal for the Former Yugoslavia or who are under indictment by the Tribunal and have failed to comply with an order to appear before the Tribunal.

It is worth noting that the Parliamentary Assembly adopted a different version of this provision in the Election Law of Bosnia and Herzegovina and extended the prohibition contained in Article IX.1[2835] to bar those serving a sentence or

2833 Partial Decision U 5/98 III of 1 July 2000 at paragraph 64.

2834 Partial Decision U 5/98 III of 1 July 2000 at paragraph 67.

2835 Election Law of BiH of 23 August 2001 and in particular Article 1.6 thereof, as amended on 4 March 2006: "No person who is serving a sentence imposed by the International Tribunal for the former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may be recorded in the Central Voters Register or stand as a candidate (the candidate for the purpose of this Law refers to persons of both genders) or hold any appointive, elective or other public office in the territory of BiH.
As long as any political party or coalition maintains such a person in a political party position or function as established in the previous paragraph, that party or coalition shall be deemed ineligible to participate in the elections."

failing to comply with an order to appear in front of the Tribunal from even registering to vote.

Also, the Election Law contains other eligibility criteria while the Law on Council of Ministers establishes a process for vetting the candidates for ministerial positions. Such a process is meant to assess the suitability of candidates for a particular post and does not affect the eligibility of candidates.

Insofar as the eligibility criteria set forth by Article IX.1 of the Constitution are not and were not meant to be exhaustive, these additional legal requirements do not raise questions under the Constitution.

c. Approval by the House of Representatives of the Parliamentary Assembly

The nomination of the Chair of the Council of Ministers by the Presidency of Bosnia and Herzegovina, as well as the nomination of the Ministers and Deputy Ministers by the Chair of the Council of Ministers, needs to be approved by a vote in the House of Representatives. The vote in the House of Representatives is the final step in the election of the Council of Ministers. As such, the procedure is not completed until the House of Representatives have approved the Council of Ministers. In the same way, the procedure of the election of the "Prime Minister designate" as Chairman of the Council of Ministers is not completed until the nomination is approved by the House of Representatives.

(a) Role of the House of Representatives

The fact that only the House of Representatives intervenes to approve these nominations – as opposed to the House of Representatives *and* the House of Peoples – seems to reinforce the argument presented above that the Council of Minister is not the location where the interests of the constituent peoples are to be addressed. In its Partial Decision No. III in the Case U 5/98, the Constitutional Court stated that the fact that there is no ethnic model underlying the provisions of the Constitution concerning the Council of Ministers "*is evident for the Ministers who are finally elected by the House of Representatives of BiH, which certainly does not represent one, two, or even all of the three constituent peoples only, but the citizens of BiH regardless of their national origin*".[2836]

2836 Partial Decision U 5/98-III of 1 July 2000 at paragraph 67.

(b) Role of the House of Peoples

In practice however, the Council of Ministers should have the support of the majority of both Houses. Taking into account the powers of the House of Peoples and in particular the fact that under Article IV.4 of the Constitution, this House shares with the House of Representatives, on an equal footing, the powers to enact legislation, to decide on the source and amount of revenues, to adopt the budget or to consent to the ratification of treaties, it is advisable that the Council of Ministers can count on the support of a majority in this House. To our knowledge, all Councils of Ministers have been able to rely on the support of a majority in both Houses. Short of such support, one can imagine the difficulties that a ruling coalition would face in implementing its program of work. Also, it is worth mentioning that, under Article V.4(a) and (c) of the Constitution, the Council of Ministers report to the Parliamentary Assembly as a whole, and that it belongs to the Parliamentary Assembly as a whole to adopt a vote of no confidence in the Council of Ministers.

(c) Relationship between the Council of Ministers and the Entities

The growing difficulty to construct a Council of Ministers reflects, to a large extent, the interest that the Entities have in controlling the work of the institutions of Bosnia and Herzegovina and, in particular, of the Council of Ministers. The participation of political parties in the Council of Ministers seems to be conditioned on their participation in the Entity governments. As a result, the Council of Ministers acts more and more as a proxy of the Entities. The Council of Ministers has slowly become the place where the Entities put forward their views about the policies of the State. If this situation is not specific to Bosnia and Herzegovina, as noted by *Marc Uyttendaele* concerning the Belgian government, it transforms the State Government into a mirror image of the Entities and therefore defeats the main purpose of Federalism which is to enable every level of government to have a government that is in sync with its sociological reality.[2837] As an illustration of that situation, one could refer to the growing tendency of the RS authorities to adopt resolutions or declarations on matters that fall within the realm of the institutions of Bosnia and Herzegovina. This is not only true for matters that touch upon fundamental questions related to the organisation of Bosnia and Herzegovina[2838] but also more 'mundane' issues such as the support of Republika

2837 *Marc Uyttendaele*, Précis de Droit Constitutionnel Belge, 2001, Brussels, Bruylandt, p. 335

2838 See, for instance, the role played by the RS institutions in the crisis that followed the enactment by the High Representative of amendments to the Law on the Council of Ministers [see text below; see also the Resolution adopted by the RS National Assembly on 22 February 2008 which addresses the issue of the jurisdiction of the State of Bosnia and Herzegovina (*OG of RS*, No. 20/08)].

Srpska to the adoption of a proposed law by the Council of Ministers.[2839] Although these interventions of the Entities in the decision-making process of State institutions are nothing more than political declarations,[2840] the political reality is that they have been followed by the members of the Council of Ministers from the Entity from which it emanates, thereby creating a wrong perception that the responsibilities of the State and its institutions stem from a delegation by the Entities rather than the Constitution, and that the State institutions are in essence "joint institutions" of the two Entities.

3. Functioning of the Council of Ministers

The Constitution does not specifically address the question of decision-making in the Council of Ministers. However, some have argued that the implied principle of 'parity of peoples and the parity of Entities' (sic) constitutes the essence of the organisation of the State of Bosnia and Herzegovina[2841] and have concluded that such an essential principle must be reflected in decisions taken by, *inter alia*, the Council of Ministers.

This was one of the prevailing arguments that led the authorities of Republika Srpska to dispute the amendments enacted by the High Representative on 19 October 2007. As noted above, in order to overcome blockage in the work of the Council of Ministers, these amendments sought to streamline the rules on quorum and voting in the Council of Ministers.

In particular, the amendments made it possible for the Council of Ministers to hold a session if more than one half of its members are present. The previous rule was that the Council of Ministers could only meet if a majority of its members were present, provided that at least two representatives of each constituent people were present. In order to prevent possible obstruction of

2839 See, for instance, the information of the Government of Republika Srpska adopted on 4 September 2008 by which it decided not to support the Draft Law on Cultural Monuments of Bosnia and Herzegovina prepared under the *aegis* of the Minister for Civil Affairs on the basis that there is no Constitutional basis for its adoption at the level of Bosnia and Herzegovina.

2840 The Panel for Protection of Vital National Interest of the Constitutional Court of Republika Srpska has indicated that such acts of the RS National Assembly (RSNA) only represent act(s) by which the political position of the RSNA is expressed and which by their legal nature/character, their content and subject-matter do not constitute legally binding acts and/or general legal acts and therefore cannot be subject to review by the Constitutional Court of RS. See for instance, decisions of the VNI Panel of the Constitutional Court of RS in cases: U 4/05 of 10 June 2005, UV-5/05 of 29 September 2005, UV-2/06 of 7 September 2006 and UV-3/06 of 7 September 2006 available at: <http://www.ustavnisud.org/html/vijece.html>.

2841 A reference to the Opinion of the Expert Group of the Government of Republika Srpska can be found at: <http://www.vladars.net/sr-SP-Latn/Vlada/media/vijesti/Pages/vijest2.aspx>; see also the Opinion adopted by the RS Government.

the work of the Council of Ministers by pure absenteeism, the condition that at least two members from each constituent people should be present for a session to be held was deleted.

Concerning voting in the Council of Ministers, the 2007 amendments included an acknowledgement of the distinction between decisions that are in the final instance taken by the Council of Ministers (appointments, bylaws, etc.) and decisions taken by the Council of Ministers on issues that are in the final instance taken by the Parliament (proposed laws) that were already included in the 2002 Law. However:

On issues going to Parliament: the 2007 amendments changed the system and provided for these issues to be adopted by a majority of those present and voting while, under the 2002 Law, these decisions had to be adopted by a majority of the members of the entire Council of Ministers. In practice, the rule included in the 2002 Law meant that absent ministers were considered as voting against a decision of the Council of Ministers.

On final decisions of the Council of Ministers: the 2007 amendments clarify the requirement that such decisions must be adopted by a consensus of those present and voting and not by a consensus of the entire Council of Ministers. If such a consensus cannot be reached, the amendments provide that a decision could be taken by the majority of those present and voting including one (and not, as previously, two) representative of each constituent people. As a result, even though the number of representatives of constituent peoples required to vote for a decision in the absence of a consensus was decreased from two to one, constituent peoples, if they have representatives at the session, still have a possibility to reject a decision.

A number of political decisions were adopted by the various authorities of Republika Srpska during the two months that followed the enactment of the 2007 amendments. This culminated in the adoption by the National Assembly of Republika Srpska of a Declaration[2842] by which the National Assembly states, *inter alia*, that the 2007 amendments derogate the procedure of decision-making through consensus, *i.e.*, the Constitutional principle of Constitutional parity under Article IX.3 of the Constitution, and concludes that the Constitution has essentially been changed by such amendments insofar as the "the content of the imposed law undermines the interests of constituent peoples".

2842 Declaration on the Latest Measures and Requests of the High Representative for Bosnia and Herzegovina, 30 October 2007, *OG of RS*, No. 98/07 of 6 November 2007, in particular item 3 thereof.

As we have seen, Article IX.3 does not, *per se*, include any rule of decision-making. In its Partial Decision No. III in the matter U 5/98, of 1 July 2000, the Constitutional Court stated that:

> "[...] no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of constituent peoples in the institutions of BiH may be applied as well for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, […] they are legitimized solely by their Constitutional rank and therefore, have to be narrowly construed".[2843]

In light of this, it seems difficult to argue that Article IX.3 offers a guarantee of consensus in the decision-making process inside the Council of Ministers. Whenever the drafters of Annex IV to the GFAP wanted to provide such a guarantee, the mechanism to do so was regulated in the Constitution.[2844] As such, even though the Constitution establishes standards of representation of the Entities and constituent peoples in the Council of Ministers, it is difficult to endorse the idea that consensus decision-making is a Constitutional principle and that any departure from such a principle would undermine the interests of constituent peoples. This conclusion seem to be shared by the Constitutional Court which, in its Decision U 8/04 of 25 June 2004 held the following:

> "Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state, democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever [impose] its will on the majority."

It is also worth mentioning that, in order to bring the political crisis to an end, the High Representative issued an authentic interpretation by which it is recognised that when a final decision is taken by the Council of Ministers by a majority which must include the vote of at least one member of each constituent people, the "*best effort* [shall] *be made in order to ensure that the vote of at least one member of each constituent people* […] *be cast by the Chair of the Council of Ministers and the Deputy Chairs of the Council of Ministers*". In other words, only the vote of the Chair and/or, as appropriate, the Deputy Chairs of the Council of Ministers can be counted as a vote of a particular constituent people. Besides the choice of an authentic interpretation to change the meaning of a clear provision of the 2007 amendments – which would exceed the scope of this commentary – the decision to issue such an interpretation reflects political preoccupations and therefore cannot be seen

2843 Partial Decision U 5/98-III of 1 July 2000 at paragraph 68.
2844 See Article IV.3(d) or V.2(c) and (d) of the Constitution.

as a recognition of an hypothetical right to consensus decision-making in the institutions of Bosnia and Herzegovina.

4. Powers of the Council of Ministers

The responsibility of the Council of Ministers is succinctly described in Article V.4(a) of the Constitution as one of "carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III.1, 4 and 5 and reporting to the Parliamentary Assembly".

The wording concerning the responsibility of the Council of Ministers is consistent with the language used in Article III.1 of the Constitution, which lists the responsibilities of the institutions of Bosnia and Herzegovina.[2845] However, one may wonder how the tasks are distributed between the Council of Ministers, which carries out the policies and decisions of Bosnia and Herzegovina and the Presidency which, pursuant to Article V.3(e) executes the decisions of the Parliamentary Assembly. This problem was also raised by the Venice Commission in its Opinion on the Constitutional Situation in Bosnia and Herzegovina,[2846] wherein it noted the considerable risk of overlap between the responsibilities of the Presidency for executing the decisions of the Parliamentary Assembly (Article V.3(e)) and the responsibility of the Council of Ministers to carry out the policies and decisions at the State level (Article V.4(a)).

The responsibility of the Council of Ministers is to carry out the policies and decisions of Bosnia and Herzegovina in certain fields. In many instances, it is the Council of Ministers that has defined policies. By way of illustration, strategies and policy documents were adopted in a number of fields either on the initiative of the Council of Ministers[2847] or as requested by the Parliamentary Assembly.[2848]

Another specific task assigned to the Council of Ministers can be found in Article V.3(f), which relates to the powers of the Presidency. Under this provision, the Presidency proposes, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly. The emphasis seems to be put

2845 See in particular items (a) to (d) and (f) of Article III.1 of the Constitution of BiH.

2846 European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, 11 March 2005, <http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp?PrintVersion=True&L=E>.

2847 National Justice Sector Strategy, 2008-2012 at: <http://www.mpr.gov.ba/en/str.asp?id=8>.

2848 Decision on the Telecommunication Sector Policy of Bosnia and Herzegovina of 28 March 2002, *OG of BiH*, No. 9/02 of 3 March 2002.

on the role of proponent played by the Presidency. However, the practice has evolved in that respect. It is the Council of Ministers, specifically the Minister of Finance and Treasury that prepares the draft budget and coordinates with the institutions in this respect.[2849]

As such, the practice until recently left the more formal role of endorsement to the Presidency, even though from a strictly Constitutional standpoint, the Presidency remained the proponent. However, over the last two years, the Presidency has interpreted its role in a more robust manner. This is of course largely due to the fact that the Presidency includes two members belonging to parties that are either not represented in the Council of Ministers or do not have the possibility to block its decisions. The procedure of adoption of the budget for 2008 is a case in point: the Presidency refused, on two occasions, to endorse the budget as proposed by the Council of Ministers. Instead of looking for a compromise in the Presidency and to amend the recommended budget accordingly, the Presidency sent the budget back to the Council of Ministers. It is only because the Council of Ministers eventually felt that it could not accommodate the requests of certain members of the Presidency that the final budget proposal was amended by the Presidency. If the 2008 case illustrates that the Presidency has the power to amend the budget recommended by the Council of Ministers, it had never before exercised this power, nor had it taken action that undermined the general integrity of a budget prepared by professionals in the Ministry of Finance.

The importance of the Council of Ministers in the adoption of the budget has even been strengthened with the adoption of the Law on the National Fiscal Council[2850] which establishes a body in which the State and the Entity governments coordinate their fiscal policies and adopt the proposed ceiling (upper limit) of borrowing and the proposed fiscal objectives of the respective budgets for the institutions of Bosnia and Herzegovina and the Entities.[2851]

2849 Law on Financing of the Institutions of Bosnia and Herzegovina, *OG of BiH*, No. 61/04.

2850 Law on the National Fiscal Council in Bosnia and Herzegovina of 5 August 2008, *OG of BiH*, No. 63/08.

2851 See Article 5 of the Law on the National Fiscal Council which provides that the Fiscal Council shall have the following competences and is responsible for: […] (b) Adopting the proposed document of the "Overall Framework for the Fiscal Balance and Policy in Bosnia and Herzegovina", which shall contain the following parameters:
- the Federation of Bosnia and Herzegovina, Republika Srpska, and Brcko District, […]
- the in the consolidated budget, the budgets of: the institutions of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Republika Srpska and Brcko District.
[…]
(d) Monitoring the realization of the set objectives and criteria in issuing and executing the budget, as well as the taking of certain corrective measures and activities; [...]

As a result, we are now facing a somewhat awkward situation whereby a law of the Parliamentary Assembly of Bosnia and Herzegovina seeks to bind the proponent of the budget to respect a decision of a body in which only the Council of Ministers is represented. This seems to upset the distribution of tasks between the executive bodies of Bosnia and Herzegovina by which the Council of Ministers 'recommends' a budget while the Presidency 'proposes' it. The choice to establish such fiscal council by law also raises concerns since it is doubtful whether such a law can bind the Entities in the exercise of their budgetary competencies.

E. Article V.5: Standing Committee on Military Matters

5. Standing Committee

a. Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

b. The members of the Presidency shall select a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Members of the Presidency shall be members of the Standing Committee.

Article V.5 is a highly unusual provision that attempts to create a minimal level of State command and control over the armed forces in Bosnia and Herzegovina while also addressing the reality of an immediate post-war environment where two separate armies – recruited, trained, equipped and commanded at the Entity level – had recently been engaged in hostilities. The result is a confusing, unworkable, and internally inconsistent provision of the Constitution. Following the unification and reorganisation of the Entity armed forces into the Armed Forces of Bosnia and Herzegovina in 2005, the provisions of Article V.5 have little remaining legal significance.

Article V.5 consists of two paragraphs. The first paragraph attempts to define State level civilian command authority over armed forces "in"[2852] Bosnia and

2852 The differing positions regarding the status of the armed forces and the competency in defence-related issues centered on the use of the word "in" rather than the word "of" when describing the armed forces within the territory of Bosnia

Herzegovina. The second paragraph of Article V.5 creates a body called the Standing Committee on Military Matters, under the control of the Presidency of Bosnia and Herzegovina, with responsibility for coordinating the activities of armed forces in Bosnia and Herzegovina. Article V.5 is the only section of the Constitution that mentions the subject of military defence of Bosnia and Herzegovina. Military defence is not mentioned in the division of competencies between the State and Entities found in Article III. Because defence competencies were not explicitly granted to the State or Entities and because the language of Article V.5 is confusing and inconsistent, different political leaders in the two Entities have interpreted Article V.5 differently.

1. Article V.5(a)

The three sentences of Article V.5(a) contain four different legal requirements or prohibitions: 1) Each member of the Presidency shall have civilian command authority over the armed forces; 2) Neither Entity shall threaten or use force against the other Entity; 3) The armed forces of one Entity shall not be permitted to enter or remain on the territory of the other Entity without the consent of the government of the latter and the Presidency of Bosnia and Herzegovina; and 4) All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina.

The differing views of the Entities regarding State-level control of the armed forces resulted in different interpretations of the first sentence of Article V.5(a) and inconsistent approaches to its implementation. The Federation Constitution transferred all civilian command authority over Federation armed forces to the two members of the Presidency of Bosnia and Herzegovina elected from the territory of the Federation.[2853] Command over the Bosniak component of the Federation army was explicitly granted to the Bosniak member of the Presidency of Bosnia and Herzegovina and the Croat member of the Presidency of Bosnia and Herzegovina commanded the Croat component.[2854]

In the **Federation,** the exercise of civilian command authority by the two members of the Presidency of Bosnia and Herzegovina also created an unusual

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and Herzegovina. 'Armed forces in Bosnia and Herzegovina' was interpreted to mean the armed forces of the Entities existing within the territory of Bosnia and Herzegovina while 'armed forces of Bosnia and Herzegovina' would mean the armed forces controlled by the State.

2853 Constitution of the Federation of Bosnia and Herzegovina, Section IX, Article 11(2) and Parliamentary Conclusion No. 1/2-02-442/02, 27 June 2002.

2854 The Federation army was itself the result of a reform process that unified the former army of the Republic of Bosnia and Herzegovina and the Croat Defence Council in 1996.

situation whereby part of a State institution was exercising authority over an army that was otherwise wholly governed by Entity law[2855] and which was, on a day-to-day basis, managed by a Ministry of Defence whose minister was a part of the Entity government.

In contrast, the **Republika Srpska** took the position that the RS army belonged to the Entity,[2856] that all command authority resided in Entity institutions, and that the provisions of Article V.5(a) would only be operative if the territorial integrity of Bosnia and Herzegovina were threatened by external forces.

The Constitutional Court of Bosnia and Herzegovina attempted to clarify the issue in its Partial Decision No. IV of the matter U 5/98.[2857] Among other issues, that case involved a challenge to Entity competency for defence-related matters. The Court decision recognised that the Constitution "does not provide for the existence of the armed forces of Bosnia and Herzegovina as a unified organisational structure of Bosnia and Herzegovina, *i.e.*, it does not define the formation, the organisation or the command over unified armed forces to be a responsibility of Bosnia and Herzegovina" and that the "Constitution of Bosnia and Herzegovina explicitly provides that in Bosnia and Herzegovina there shall be the armed forces of the Entities."[2858]

In attempting to make sense of the command role of the Presidency of Bosnia and Herzegovina and its members, the Court held that

> "the decision on the use of the armed forces of the Entities [in the case of an external threat would] be taken by the member of the Presidency from the respective Entity, apparently with the consent of the Entity authorities, *i.e.*, in coordination with them, which is the essence of this provision [2859] [...] However, the fact that members of the Presidency exercise civilian command authority over the armed forces of the respective Entity when there is an external threat does not change the fact that they remain armed forces of the Entities with supreme command over them ensured within the Entities, pursuant to the Entity Constitutions."[2860]

Given the fact that there are two members of the Presidency elected from the territory of the Federation, the Court decision implicitly recognised the existence of two separate chains of command over the separate Bosniak and

2855 Federation laws on defence and army governed all aspects of the organisation, training, equipping, and mobilizing of the Federation Army. *OG of FBiH*, No. 15/96.
2856 Constitution of the Republika Srpska, former Articles 104 – 107.
2857 Constitutional Court of BiH, Decision No. U 5/98 IV, 18 and 19 August 2000.
2858 *Id.*, at paragraph 57.
2859 *Id*.
2860 *Id*.

Croat components within the Federation Army. The decision also failed to acknowledge that two separate, Entity armies (under three different chains of command) that are separately trained, equipped, and commanded during peacetime would be incapable of effective coordination in defence of the territorial integrity or political independence of Bosnia and Herzegovina, even if there were a political will to do so.

The Court's decision in 2000 seems clearly to have been based on the political realities within Bosnia and Herzegovina just as much as those same realities influenced the original drafting of the provisions. Separately trained, equipped, and commanded Entity armies simply cannot be reconciled with the State's constitutional authority to protect its territorial integrity and political independence. Yet, a judicial recognition of this inconsistency would have required a fundamental shift in political power from the Entities to the State, a shift the Court obviously felt it could not mandate.

In 2003, the International Community, in response to a scandal involving illegal arms shipments by the RS army, initiated a defence reform process. A commission was established by decision of the High Representative[2861] with a mandate to create State-level, civilian command and control over all armed forces in Bosnia and Herzegovina. That process led to the adoption of a State-level law on defence[2862] and the creation of a new, State-level ministry of defence[2863] at the end of 2003. In 2005, both Entities agreed to transfer all defence competencies to the State[2864] and a new, State-level law on army service[2865] was adopted, merging the Entity armies into the new Armed Forces of Bosnia and Herzegovina.

The effect of the transfer of defence competencies by the Entities and the elimination of Entity armies in 2005 was to make most of Article V.5(a) legally irrelevant.[2866] Only the first sentence – "Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces" – continues to have legal effect. The meaning of "civilian command authority" is now clearly defined in State law without being burdened by references to Entity armed forces.

2861 High Representative Decision No. 139/03, 8 May 2003.
2862 *OG of BiH*, No. 43/03.
2863 *OG of* BiH, No. 42/03.
2864 *OG of RS*, No. 04/06.
2865 *OG of BiH*, No. 88/05.
2866 With respect to the effects of this transfer of competences on and the relationship between the Law on Defence and the BiH Constitution cf., in general terms, the commentary above on Article III.5(a), p. 595.

2. Article V.5(b)

Article V.5(b) creates the Standing Committee on Military Matters. Prior to the defence reform process in 2003, the International Community had invested a significant amount of resources into developing the capacities of the Standing Committee on Military Matters as the only State-level body with Constitutional responsibilities in the area of defence. However, the Constitutional Court confirmed that the Standing Committee on Military Matters was a "coordinating body" and not an institution of Bosnia and Herzegovina.[2867] That fact severely limited its potential to assume some of the functions of a ministry of defence.

The role of the Standing Committee on Military Matters was significantly revised and degraded by the defence reform process that began in 2003. The creation of a new Ministry of Defence at the State level made the constitutionally defined role of the Standing Committee on Military Matters irrelevant. Its authority is now defined by the Law on Defence of Bosnia and Herzegovina, which limits the Standing Committee on Military Matters to advising the Presidency on defence and security policy and the appointment of commanders.[2868] But since Article V.5(b) only requires the participation of the members of the Presidency in the Standing Committee on Military Matters and leaves it to the discretion of the Presidency to appoint additional members, even this advisory role could effectively be eliminated if no Entity representatives were appointed to the Standing Committee on Military Matters by the Presidency.

The law does acknowledge the constitutional status of the Standing Committee on Military Matters by recognizing that the Presidency has the constitutional authority to add or subtract from the legislatively defined responsibilities.[2869] And the Law on Defence also does not attempt to define the membership of the Standing Committee on Military Matters, which is the constitutional prerogative of the Presidency.

3. Conclusion

The terms and structure of Article V.5 had value as a confidence and security-building mechanism in the context of a peace agreement. Its value as a constitutional provision was always dubious. Multiple armies, under different chains of command, sharing competencies between the State and the Entities,

2867 Constitutional Court of BiH, Decision No. U 5/98-IV, 18 and 19 August 2000, paragraph 56.
2868 *Id*.
2869 Law on Defence of Bosnia and Herzegovina, Article 32.

where the sharing of competencies was not the same in both Entities, could never be considered a viable, long-term basis on which to build a legitimate State with full control over its sovereignty, territorial integrity, and political independence. State and Entity governments, with help from the International Community, found a way to create a more rational command structure through the transfer of competencies under the Constitutional mechanism defined by Article III.5(a) and through the adoption of a comprehensive legislative framework at the State level. As a result, very little of the original text of Article V.5 continues to have legal effect.

** The views of the author are his personal views and do not reflect the views of the Office of the High Representative or the European Union Special Representative.*

Article VI – Constitutional Court of Bosnia and Herzegovina

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

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

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

(c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

(d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

(a) A majority of all members of the Court shall constitute a quorum.

(b) The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

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

- Whether an Entity's decision to establish a special parallel relationship with a 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.

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

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

4. Decisions

Decisions of the Constitutional Court shall be final and binding.

A. Introduction

Although the former SFRY and RBiH had their respective constitutional courts, the BiH Constitutional Court, by its personnel composition, extensively set jurisdictions and substantive basis for constitutional control, constitutes a legal *novum*, a premise that applies to the entire BiH Constitution, as well as to the BiH Constitutional Court.[2870] Apart from the continuity of the constitutional personality of Bosnia and Herzegovina, very few similarities with the previous republic Constitutional Court have persisted. Equating the rights of citizens to institute proceedings for constitutional control (*actio popularis*) before the former republic Constitutional Court with an individual constitutional appeal before the present day Constitutional Court was driven by an urge to give priority to the RBiH Constitution over the BiH Constitution in terms of legitimacy. "[Developed] protection and refined dogmatic of human rights and

2870 Compare Article 122 and Chapter XIII of the RBiH Constitution from 1993, *OG of RBiH,* No. 5/93; as to the RBiH Constitutional Court see, also, *Šarčević*, 1996, p. 20.

fundamental freedoms have never been virtues of the constitutional systems" of the former Yugoslav Republics.[2871]

The BiH Constitutional Court is a constitutional authority.[2872] The jurisdictions thereof are explicitly stipulated in the BiH Constitution.[2873] The BiH Constitutional Court, as a last instance in the interpretation of the BiH Constitution, shall have the final word in constitutional disputes arising between other constitutional authorities. Despite this, its "constitutional function"[2874] does not include the right to expand its jurisdictions beyond the constitutional mandate. The mission of the BiH Constitutional Court to protect the BiH Constitution forces it at the same time to self-restriction. The BiH Constitutional Court carries a special burden of responsibility, notably that of deciding, in the last instance, the most important constitutional issues in BiH. This requires that the judges of the Court, being the highest in the judicial hierarchy, possess professional excellence, level-headedness, vision and judicial restraint.

The BiH Constitutional Court, by the force of the BiH Constitution, has a special place in the judiciary. It is part of judicial authority. The BiH Constitution does not stipulate solely its jurisdictions but bestows upon it authority to adopt its own "Rules of Procedure". Due to the non-existence of the constitutional Framer's order – which is present in other constitutions[2875] – to regulate through law the procedure and organisation of the BiH Constitutional Court, this highest court in the State, regulates very thoroughly, in its *Rules*[2876] and on its own, the constitutional missions referred to in Article VI of the BiH Constitution. Considering the aforementioned, one may speak of a dualist model of the judiciary of Bosnia and Herzegovina.[2877] Certain structures of the

2871 Statement made in *Šarčević*, 1996, *Ibid*. ("[E]in entwickelter Grundrechtsschutz und eine ausgefeilte Grundrechtsdogmatik [gehörten] niemals zu den Tugenden der Verfassungssysteme" der ehemaligen jugoslawischen Teilrepubliken;).

2872 The BiH Constitution does not carry out such a categorisation of State authorities. Instead, the BiH Constitutional Court itself assigns these attributes not only to the BiH Constitutional Court but also to the other authorities mentioned in the BiH Constitution (U 6/06, paragraph 28).

2873 Compare with, U 66/02.

2874 As specified in U 6/06, paragraph 22.

2875 Compare with, for instance, Article 94, paragraph 2 of the German Constitution ("*Grundgesetz*").

2876 The first ever Rules of Procedure were adopted in 1997 (*OG of BiH*, No. 2/97) and have been amended on several occasions (*OG of BiH*, Nos. 16/99, 20/99, 26/01, 6/02 and 1/04). The revised text was published on two occasions, in 1999 and 2004 (*OG of BiH*, Nos. 24/99 and 2/04). Thereafter, the Constitutional Court of BiH adopted the new Rules of the Constitutional Court of BiH in 2005 (*OG of BiH*, No. 60/05), upon the entry into force of which the Rules of Procedure ceased to be applied. In the meantime, the Rules have also been amended several times (*OG of BiH*, Nos. 64/08 and 51/09)

2877 As to the single and dual system, compare with, *Voßkuhle* in: *Mangoldt/Klein/Starck*, 1999, p. 987 *et seq*. See, also, allegations of the Constitutional Court of BiH in Case No. U 6/06, paragraph 26.

so-called uniform model are recognisable solely in relation to the appellate jurisdiction of the BiH Constitutional Court. Namely, as an instance of review in individual cases, pursuant to Article VI.3(b) of the BiH Constitution, the BiH Constitutional Court discusses constitutional issues. However, ordinary courts are called upon to interpret and apply the BiH Constitution. Yet, one should emphasise that only the BiH Constitutional Court has powers to establish the unconstitutionality of a general act and to render such an act ineffective.[2878]

B. Article VI.1 (composition)

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

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

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

(c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.

(d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

In addition to six national judges, pursuant to Article VI.1(b) and (d) of the BiH Constitution, the composition of the BiH Constitutional Court shall also include (at least on a transitional basis) three international judges, not elected by the domestic authorities, but by the President of the European Court of Human Rights. Still, prior to the election, the President of the European Court must consult with the BiH Presidency. The incorporation of an international element into the domestic Constitutional Court has never been disputable. Admittedly,

2878 Compare with, U 19/00, paragraph 19 *et seq*., paragraph 40; U 106/03, paragraph 33, as well as "b. Obligation to submit a request", p. 867.

the Russian representatives in the Contact Group in Dayton had explicitly opposed the appointment of international judges to the BiH Constitutional Court.[2879] However, during negotiations their opposition had not drawn excessively great attention. There were some criticisms that BiH was losing its sovereignty as a result of the above-mentioned.[2880] Appointing international judges to the highest court of the State is explained by an estimate of the Framer of the Constitution that this Court would have great significance in the difficult times after the armed conflict. When it came to the executive (the BiH Presidency and the Council of Ministers) and the legislative authority (the BiH Parliamentary Assembly), the Framer gave up any "anchoring" in the BiH Constitution of some element of international influence (this influence was subsequently, strongly and indirectly wielded through Annex 10 to the Dayton Peace Agreement). On the other hand, a guarantee was sought for the institutions, which ought to have enjoyed absolute neutrality, in order to ensure their independence from ethno-political influence. That guarantee was found by engaging international experts at the BiH Constitutional Court and the BiH Central Bank. More will be said about the role of the international judges in the second part of this text.

The position of domestic judges arises clearly from Article VI.1(a) of the BiH Constitution. They are elected on the basis of the federal[2881] – and not ethnic – principle of representation. Unlike, for instance, the BiH Presidency, Article VI.1 of the BiH Constitution does not mention in a single place that the proportionate representation of constituent peoples is necessary. Therefore, judges of the BiH Constitutional Court *are not ethnic representatives* of the constituent peoples of which they are members.[2882] Also, Article VI.1 of the BiH Constitution does not require that judges must in any way be members of one of the constituent peoples, or that they have to declare which people they are members of. Accordingly, under the BiH Constitution, it is not necessary for judges from the Federation of BiH to be Bosniaks or Croats, and for the judges from the Republika Srpska to be Serbs. Such requirements and conditions would not be in accordance with the principle of independence of judges.

2879 *Auswärtiges Amt*, 1998, p. 85.

2880 Compare with *Hayden*, 1995: "parody of the sovereignty."

2881 The term is used in terms of "a complex" constitutional system, without any intention whatsoever to prejudge the definition of the constitutional system of Bosnia and Herzegovina.

2882 One can come across different conclusions in Yee, 1996, p. 190: "composition...is... ethnically oriented" or Inglis, 1998, p. 80: "two from each ethnic group". However, it appears that both authors are basing their allegations, nevertheless, on the erroneous interpretation of the provision of Article VI.1 of the BiH Constitution, or that these allegations are deduced from the current practice according to which six domestic judges comprise two Bosniaks, two Croats and two Serbs.

In **electing** judges of the BiH Constitutional Court, what catches the eye is that the procedure is not within the jurisdiction of the State legislature, or of one of its houses, but within the jurisdiction of the Entity legislatures, notably, in the hands of the House of Representatives of the FBiH Parliament (four judges) and the National Assembly of the RS (two judges). Federal representation might be, also, indirectly exercised through an election procedure which would be within the jurisdiction of the State legislature. Namely, given that the BiH Constitutional Court, among other things, is called upon to review the essence of the work of its "sibling" authority (the legislature), a certain asymmetry is showing through in the system and manner of appointment of judges selected by the Constitution maker. Namely, on one hand, the State legislature is subject to the control of the BiH Constitutional Court, and, on the other hand, the State legislature does not have any influence whatsoever on the composition of the mentioned Court through the election of judges.

The election modus could be valued as a recognition of the **special interests of the Entities**. When it comes to a decision on the election of a certain judge from an Entity to the State Constitutional Court, this election, especially in the first years after the entry into force of the BiH Constitution, was determined by national rather than by federal criteria. That is best explained by the strict division of domestic judges to two Bosniaks, two Croats and two Serbs, which was so far considered completely normal and logical. This phenomenon, either way, is upheld also by the relevant provisions of the Entities' Constitutions,[2883] which stipulate that a judge of the BiH Constitutional Court shall be elected by a simple majority. The inadequate politicisation of decisions on the election of judges to the BiH Constitutional Court, along with concurrent disregard for the constitutional mandate of judges and the function of the BiH Constitutional Court, calls into question the independence of the Court, as well as the principle of division of authority as a central element of the principle of a legal state. The ethnically determined practice of the election of domestic judges to the BiH Constitutional Court violates Article VI.1(a) of the BiH Constitution in that this article does not stipulate that each constituent people shall have two positions in the BiH Constitutional Court; rather, it provides for a federal structure of the composition of judges elected by the Entities' legislatures. One may find this unconstitutional practice also in the Rules of the BiH Constitutional Court. A certain number of provisions of the Rules, in contrast to Article VI.1 of the BiH Constitution, "forwent" the principle of federal representation in the BiH Constitutional Court in favour of ethnic representation. Accordingly, Article 42,

2883 Article 75 of the Constitution of the RS in the form of Amendment No. XXXVII and Article IV.A.4.19 of the Constitution of the FBiH.

paragraph 2 of the Rules of the BiH Constitutional Court, present version,[2884] stipulates that a session of the BiH Constitutional Court, in plenary, which is not attended by either of the judges from amongst one constituent people, shall be postponed, whereby, if the same situation takes place again without justified reasons, the next session will be held.[2885] Article 90, paragraph 3 of the Rules of the BiH Constitutional Court, present version,[2886] stipulates that the President and the Vice-President of the BiH Constitutional Court cannot be members of the same constituent people. Article 87 of the Rules of the BiH Constitutional Court, present version, reinforces this rule, which was not the case in the Rules of Procedure of the BiH Constitutional Court which had been in force earlier, by stipulating that *the President of the Constitutional Court shall be elected by rotation of the judges from among the constituent peoples of Bosnia and Herzegovina*. Article 83 of the Rules of Procedure of the BiH Constitutional Court, which had been in force earlier, by relying on the provision of Article VI.1 of the BiH Constitution, stipulated that the President of the BiH Constitutional Court should be elected by rotation from among the judges elected by the legislative authorities of the Entities of BiH. Article 87 of the Rules of the BiH Constitutional Court, present version, by introducing the criterion of *ethnic* representation, does not violate only the federal principle of the election of judges provided for by Article VI.1 of the BiH Constitution. This provision, eventually, makes it impossible for all persons who do not wish to declare their ethnicity, or who are not members of any constituent people, to perform the function of the President of the BiH Constitutional Court.

As a result of its hitherto and present composition, the State legislature would probably not be able to influence the modification of a collegiate body of the judges in the BiH Constitutional Court. For, even the composition of the BiH Parliamentary Assembly was characterised, and still is, by its primary ethno-political element. The population make-up of the Entities will most probably not change significantly in the foreseeable future, despite the process of return of refugees and displaced persons, so that the attitude of the Entities' legislatures toward the election of judges of the BiH Constitutional Court will remain the same for some time to come. Contrary to this, at the State level one may expect

2884 Article 37, paragraph 2 of the Rules of the BiH Constitutional Court, which had been in force before, contains the same provision.

2885 Article 37 of the Rules of Procedure of the BiH Constitutional Court, which had been in force earlier, had a paragraph 3, which restricted the rule from paragraph 2 so that the mentioned paragraph did not include the cases where the request would be rejected or the case would not concern the interest of a constituent people represented by absent judges. Paragraph 3 did not find its way into the new Rules.

2886 Article 86, paragraph 3 of the Rules of the BiH Constitutional Court, which had been in force earlier.

an easy departure from the primarily ethnically determined policies, which – in the event of the transfer of competence for the election of judges of the BiH Constitutional Court from the Entities' to the state level – could also have an effect on the composition of judges of this Court. In order to adopt a balanced case-law which would be above ethnic differences, it would be useful to consider the transfer of competence for the election of judges of the BiH Constitutional Court, in the process of constitutional reform, to the State level.

Judges shall be distinguished jurists, of high moral standing and reputation (Article VI.1(b) of the BiH Constitution). By doing so the Framer opted for a court of "jurists", which, in any case, corresponds to the Yugoslav constitutional tradition. In other respects, the BiH Constitution itself does not stipulate additional conditions for the election of a judge of the BiH Constitutional Court either with respect to one's age, or with respect to minimum professional experience. Accordingly, the judges of the BiH Constitutional Court do not have to have professional experience in the capacity of a judge. Judges appointed after the first line-up shall exercise this function until they reach 70 years of age. This provision ought to secure the independence of judges and the continuity of the case-law.

C. Procedure (Article VI.2)

2. Procedures

(a) A majority of all members of the Court shall constitute a quorum.

(b) The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

Article VI.2 of the BiH Constitution stipulates fundamental principles for conducting procedure before the BiH Constitutional Court and authorises the Court to adopt its own "Rules of Procedure".

The BiH Constitutional Court may exercise its function if a majority of all members are in attendance (**quorum**). When it comes to holding a plenary session, in addition to the existence of quorum in order for it to function, in Article 42, paragraph 2 of the Rules of the BiH Constitutional Court, present version, the BiH Constitutional Court added one more requirement. Namely, despite the session being attended by five judges, under the logic of the Rules, quorum shall not be met if no judges from one of the constituent peoples are present at the session of the Constitutional Court. Doubts about

the constitutionality of this provision have already been presented above.[2887] Explanations as to the doubt about the constitutionality of these provisions should be supplemented also by the fact that all judges – and not solely the judges coming from among a specific constituent people – are called upon and are obliged to protect the ethnic interests of all groups (constituent peoples or ethnic minorities). Unlike the House of Peoples of the Parliamentary Assembly of BiH, the BiH Constitutional Court, by the force of the BiH Constitution, is not drafted on the principle of ethnic, but territorial proportion.

The BiH Constitution does not stipulate a majority within the quorum which is required for a decision to be adopted. Depending on whether decision-making is taking place in a plenary or in chambers, the Rules of the BiH Constitutional Court, present version, define the required majority in a different manner. Under Article 40 of the Rules of the BiH Constitutional Court, present version, a decision of the Constitutional Court at plenary session shall be taken by a majority vote of all judges (paragraph 2). It is the Grand Chamber, in principle, that decides appeals,[2888] by unanimous vote (paragraph 3). A decision of the Chamber, which mainly relates to interim measures, is also adopted by unanimous vote (paragraph 4).

Article VI.2 of the BiH Constitution guarantees two fundamental presumptions for the conduct of the proceedings before the BiH Constitutional Court. Decisions must be **reasoned** and they must be the result of **public proceedings**. Both elements were closely elaborated on in the Rules of the BiH Constitutional Court,[2889] which, in any respect, regulate numerous other aspects of proceedings before this court. Still, "the publicity" of the proceedings before the Court, according to the interpretation of the BiH Constitutional Court, should not be understood in such a way so that all cases require a public hearing to be held. Quite the opposite. Under Article 46, paragraph 1 of the Rules of the BiH Constitutional Court, present version, the BiH Constitutional Court shall hold a public hearing in plenary only when necessary to discuss directly, in the proceedings before the Constitutional Court, an issue relevant for decision-making. The BiH Constitutional Court shall decide at a plenary session on whether it is necessary to hold a public hearing (Article 46, paragraph 2 of the Rules of the BiH Constitutional Court, present version). *The publicity* of the proceedings before the BiH Constitutional Court shall be secured by informing the public of the preparation for and holding of sessions and public hearings before

2887 See commentary in connection with Article VI.1 of the Constitution of BiH, p. 674.
2888 Compare with Article 9 of the Rules of the Constitutional Court of BiH, present version.
2889 Article 11, Article 28, paragraph 2(c) and paragraph 5 of the Rules of the Constitutional Court of BiH, present version.

the BiH Constitutional Court, by issuing statements about the development of the proceedings, by issuing press releases to the media, by holding press conferences, by guaranteeing the right to inspect files etc. *Reasoning and conclusions* make up elementary, integral parts of each decision.

Article VI.2 of the BiH Constitution guarantees the authority of the BiH Constitutional Court to adopt its own "rules of court". The Rules of Court – specifically named the Rules – comprise the rules on the internal structure of the Court, and on the procedure itself. This autonomy is a condition for the independence of the BiH Constitutional Court from other constitutional authorities. Although the autonomy and independence of the BiH Constitutional Court are not *expressis verbis* stipulated in the BiH Constitution itself, these principles, nevertheless, may be deduced from (a) an order to the Constitutional Court to "adopt[…] its own rules of court", (b) the lack of an order to the legislature to stipulate in legal terms the internal structure and procedure before the BiH Constitutional Court, as well as (c) the general constitutional principle of division of authority, which is an inherent element of the principle of the legal state (Article I.2 of the BiH Constitution) of the European constitutional traditions.[2890] Also, this autonomy corresponds to the special rank and position of the BiH Constitutional Court as a constitutional authority. In its case-law, the BiH Constitutional Court declared the Rules of the BiH Constitutional Court to be a constitutional category.[2891] In this manner, the possibility for the legislative or executive authority to wield influence on the BiH Constitutional Court was limited. At the same time, extensive judicial autonomy implied that the BiH Constitutional Court solved "internal issues" in a rather good manner in terms of quality (procedure, organisation and other significant issues) and shaped the competences of the Court by procedural rules.

However, that does not mean that the BiH Constitutional Court has operated in "a vacuum" of State authority. Admittedly, the BiH Constitutional Court, by referring to Article IX.2 of the BiH Constitution, forbade the legislature to reduce the allowances (salaries) of the judges of the BiH Constitutional Court throughout the duration of their respective mandate.[2892] Still, the Parliamentary Assembly of BiH has authority to determine the budget of the BiH institutions and to enact relevant laws, although it may do so solely while abiding by the BiH Constitution.[2893] When it comes to the BiH Constitutional Court in particular, it means that the Court has the right to retain its financial independence and

2890 In connection with this, compare, also, with, U 6/06, paragraphs 23, 28.
2891 U 6/06, paragraph 22.
2892 U 6/06, paragraph 31 *et seq*.
2893 *Ibid*., paragraph 30.

autonomy. That includes the right of financial planning, proposing a budget and allocating the approved budget funds.[2894] On the other hand, the BiH Constitutional Court must, by all means, be subject to audits by a competent authority when it comes to spending the approved budget funds.[2895]

D. Jurisdiction (Article VI.3)

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.

(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.

The Constitutional Court is entrusted with classical constitutional jurisdiction such as abstract and concrete control (review) of constitutionality, resolution of federal disputes and disputes between State authorities, and appellate jurisdiction (under the BiH Constitution and ECHR). Viewed precisely, certain

2894 *Ibid*., paragraph 27.
2895 *Ibid*.

provisions relating to jurisdiction are formulated in a broad and imprecise manner, thus leaving certain room for interpretation. First of all, the clause of Article VI.3(a) of the BiH Constitution "including but not limited to", is an unusual one and confers to the Constitutional Court the jurisdiction to decide any dispute that arises under the Constitution. These are, for example, (a) disputes between the State and an Entity with regard to the constitutionality of the Entity's agreement to establish a special parallel relationship with a neighbouring state and (b) review of the consistency of certain provisions of an Entity's Constitution or laws with the BiH Constitution. Besides these, the Constitutional Court resolves blockades of the Parliamentary Assembly, which occur if the majority of delegates from one constituent people in the House of Peoples declares a decision taken by the House of Representatives destructive of a vital interest of that constituent people, whereas the majority of delegates from another constituent people oppose it (Article IV.3(e)), while the so-called Joint Commission fails to reach a compromise (Article IV.3(f) of the BiH Constitution).

1. Abstract control of constitutionality, organic and federal disputes (Article VI.3(a) of the BiH Constitution)

It is important for the political functioning of a multi-ethnic Bosnia and Herzegovina that the political and national parliamentary minority has the right to institute proceedings of abstract control (review) of constitutionality in order to have a possibility of resolving possible violations of group and minority rights. Most proceedings conducted so far by the Constitutional Court under Article VI.3(a) related to the alleged violations of group rights of the constituent peoples or national minorities. In two out of three decisions on the merits which were taken under Article VI.3(a) of the BiH Constitution in 2003, the Constitutional Court dealt with the violations of ethnic rights of groups. Similarly, in five out of five decisions on the merits which were taken in 2005, the Constitutional Court dealt with the violations of ethnic rights of groups.[2896]

a. Constitutional disputes

The provision of Article VI.3(a) of the BiH Constitution seems at first sight to connect the abstract control (review) of constitutionality, one the one hand, and on the other hand federal disputes and disputes between the State authorities

2896 It is interesting to note that in 2008 the Constitutional Court conducted proceedings under Article VI.3(a) of the BiH Constitution in 6 cases, none of them related to the violations of group rights.

so as to considerably restrict its application. As it appears from the linguistic interpretation, it is necessary to have a dispute between the aforementioned territorial-administrative units and institutions even when it comes to the abstract control (review) of constitutionality.[2897] Similarly, the norm implies that the federal dispute or dispute between the State authorities represents also the abstract control (review) of constitutionality. And, *vice versa*, the abstract control (review) is only possible if there is a particular dispute.

Viewed conceptually, the necessity of connecting federal disputes or disputes between the State authorities and abstract control (review) of constitutionally does not make sense. When it comes to the first case, the Constitutional Court deals with the rights and duties of the State towards the Entities and, *vice versa*, between the Entities themselves, and with the scope and extent of responsibilities of certain authorities. One cannot establish a justified reason why, for example, the review of a law which unconstitutionally restricts a human right or freedom must indispensably depend on the existence of a dispute between the aforementioned Entities or State institutions. An authorised applicant's doubt (Article VI.3(a), second sentence thereof) about the constitutionality of a law is enough. The enumeration of authorities and institutions in Article VI.3(a) (first sentence thereof) cannot be understood as imposing limitations on the authorised applicants with regard to the abstract control (review), since they are enumerated by name in Article VI.3(a), second sentence thereof. Therefore, the jurisdiction of the Constitutional Court is regulated in Article VI.3(a), first sentence thereof, in the manner that the Constitutional Court resolves federal disputes and those between the State authorities regardless of the jurisdiction to institute proceedings of abstract control (review) of constitutionality.

This is also importance for the political involvement of the international personalities in Bosnia and Herzegovina. If a dispute between the aforementioned territorial-administrative entities and "institutions of Bosnia and Herzegovina" (which, surely, do not include the OHR, OSCE and others) is not needed, then the request for a review of constitutionality with a terse reasoning stating that it is not a dispute between the "institutions of Bosnia and Herzegovina' cannot be rejected if an international personality participates in State power in a particular situation. A different conclusion would apply in the case of a dispute between State authorities: based on the linguistic meaning of the provisions of Article VI.3(a), first sentence thereof, the Constitutional Court would not have jurisdiction to decide the scope of responsibilities of other institutions, except those which are conferred to an Entity or Bosnia and Herzegovina.

2897 Compare with, for example, the reasoning of Decision No. U 5/04, paragraph 14.

b. Authorised applicants

U 1/01 RS Association of Retired Persons	20010710 *OG of BiH*, No. 17/01
U 1/96 Rulebook of the Primary School of the Catholic School Centre in Sarajevo	20000226
U 1/97 Decision of the Tuzla-Podrinje Cantonal Government	19980406 *OG of BiH*, No. 05/98
U 1/98-1 Silajdžić	19981112 *OG of BiH*, No. 22/98
U 10/97 BiH Bar Association	19980406 *OG of BiH*, No. 05/98
U 12/96 Law on News and Publishing Business, Official Gazette of the Republika Srpska	19990226
U 17/01 Labour Law of the Republika Srpska (Basic Court)	20011024 *OG of BiH*, No. 27/01
U 18/01 Law on Privatisation of State-Owned Apartments	20010803 *OG of BiH*, No. 19/01
U 2/96 Decision Establishing the Customs Rates	19980406 *OG of BiH*, No. 05/98
U 20/96 Decision on the Public Attorney's Office of the City of Sarajevo	19990226
U 21/96 Law on Specific Tasks of Municipalities Within the Administrative Bodies of the City of Sarajevo During the State of War	19971222
U 26/96 Council of the Congress of Bosniac Intellectuals	19980914 *OG of BiH*, No. 17/98
U 29/00 "2-year rule"	20010416 *OG of BiH*, No. 10/01
U 29/96 Rulebook on Application of Tax Rates…	19980511 *OG of BiH*, No. 07/98
U 3/97 Municipal Court of Sanski Most	19980406 *OG of BiH*, No. 05/98
U 31/96 Petković	19980511 *OG of BiH*, No. 07/98
U 32/96 Decision on Introduction of Municipal Fee during the State of War	19971222
U 38/01 Law on Pension and Disability Insurance	20020829 *OG of BiH*, No. 24/02
U 4/96 Law on Salaries of Members of the Army and Police of Bosnia and Herzegovina	19999226
U 40/95 SDPBiH	19971222
U 41/02 Rulebook on Certification of Political Parties, Independent Candidates, Coalitions and Lists of Independent Candidates for Participation in Elections	20030820 *OG of BiH*, No. 25/03
U 41/03 I.S. (Article 143 of the FBiH Labour Law)	20011210 *OG of BiH*, No. 38/03
U 43/01 Law on Pension and Disability Insurance	20020423 *OG of BiH*, No. 08/02
U 46/01 N. Z.	20020615 *OG of BiH*, No. 13/02
U 48/01 Coor-Ex	20020829 *OG of BiH*, No. 24/02
U 66/02 FBiH Ministry of Interior	20040130
U 7/97 GFAP	19980511 *OG of BiH*, No. 07/98
U 71/02 Law on Pension and Disability Insurance (SUBNOR)	20030820 *OG of BiH*, No. 25/03
U 9/96 Property Laws	19980914 *OG of BiH*, No. 17/98
U 9/97 Independent-International Institute for Protection of Human Rights and Tracking of Missing Persons - Zenica	19980406 *OG of BiH*, No. 05/98

The authorised applicants under Article VI.3(a) of the BiH Constitution are a member of the Presidency, the Chair of the Council of Ministers, the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, one-fourth of the members of either chamber of the Parliamentary Assembly, or one-fourth of either chamber of a legislature of an Entity. The provision relating to the authorised applicants applies both to the abstract control (review) of constitutionality and disputes between the State authorities and federal disputes.

Taking into account this system, it should be noted that the authorities are not the holders of subjective rights and duties, since they do not have the status as legal entities. Only territorial-administrative units to which they belong have legal capacity. Therefore, although the responsibilities of territorial-administrative units are dealt with in federal disputes and those between the State authorities, the rights and duties of the authorities themselves are often mentioned, since they themselves exercise the competences of public and legal entities. After all, the Constitutional Court does not decide the subjective rights of the aforementioned authorities but the functionality of the political process.[2898]

A considerable restriction of the authorisation to refer a federal dispute or a dispute between the State authorities before the Constitutional Court may lead to a situation in which important disputes relating to the State organisation cannot be resolved by the Constitutional Court only because of the fact that an authorised person who would file the request cannot be found. Despite this conclusion, the Constitutional Court has inclined towards the interpretation being narrowly orientated to the linguistic meaning of Article VI.3(a) of the BiH Constitution.[2899] So, for example, the outcome of an important federal dispute may exclusively depend on the will of an Entity's legislature. If the latter does not want to institute proceedings before the Constitutional Court, the functionality of the State may be permanently burdened with pending disputes of competence.

The Chair of the Council of Ministers is authorised himself to file a request under Article VI.3(a) even, if necessary, if it is against the will of the Co-chair of the Council of Ministers. A joint and reconciled request of the Co-chairs is not needed.[2900] A request cannot be declared inadmissible only because the

2898 Compare, *Löwer, W*, Zuständigkeiten und Verfahren des Bundesverfassungsgerichts (Jurisdiction and procedure of the Federal Constitutional Court) in: *Isensee, J./ Kirchhof, P. (ed.)*, Handbuch des Staatsrechts der Bundesrepublik Deutschland (Manual of Public Law of the Federal Republic of Germany), volume II, 1987, paragraph 56, p. 737 *et seq*., quoted in: *Schlaich/Korioth*, 2001, p. 56, footnote 8.

2899 U 66/02, paragraph 9.

2900 U 1/98.

applicant no longer holds the office based on which he was then authorised to file a request.[2901]

Individual citizens,[2902] enterprises,[2903] political parties,[2904] municipalities,[2905] heads of municipalities,[2906] lower-instance courts or judges,[2907] private institutes,[2908] bar associations,[2909] associations of retired persons,[2910] groups of citizens or citizen associations,[2911] certain ministers, even when they are in dispute with one of the aforementioned authorities, are not authorised to file a request under Article VI.3(a) of the BiH Constitution.[2912] The fact that the groups of citizens or associations try to challenge laws before the Constitutional Court, although they do not sustain damage in legal-subjective terms (Article VI.3(b) of the BiH Constitution), may be explained by the fact that the predecessor of the Constitutional Court, at the time of the (Socialist) Republic of Bosnia and Herzegovina, had jurisdiction to decide the so-called *actio popularis*.

Although the procedure of abstract control (review) of constitutionality is designated as an *objective procedure* in legal-constitutional theory because, on the one hand, an authorised person is only what is needed, not a respondent party, and on the other hand this procedure does not serve to effectuate subjective legal positions[2913] and as a rule it involves the other party to the proceedings, a kind of the applicant's procedural adversary. We have in mind first of all the enactor of the challenged general act (Article 15 paragraph 1(a) of the Rules of the BiH Constitutional Court). A political conflict between the position and opposition is always behind the abstract control (review) of constitutionality; in the procedure of abstract control (review) of constitutionality before the Constitutional Court, they become *natural adversaries*, making thus the abstract control (review) a kind of adversarial procedure.[2914]

2901 U 19/01, paragraph 12.
2902 U 1/96, U 4/96, U 9/96, U 31/96, U 29/00, U 43/01, U 41/02, U 60/02, U 41/03.
2903 U 2/96, U 12/96, U 29/96, U 32/96, U 1/97, U 46/01, paragraph 4, U 48/01.
2904 U 40/95, U 7/97.
2905 U 21/96.
2906 U 20/96.
2907 U 3/97, U 17/01.
2908 U 9/97.
2909 U 10/97.
2910 U 1/01, U 38/01.
2911 U 26/96, U 18/01, U 29/00, U 71/02.
2912 U 66/02.
2913 See *Voßkuhle* in: *Mangoldt/Klein/Starck*, 1999, p. 1052 *et seq*.
2914 *Ibid*.

c. Formal requirements under Article 19 *et seq.* of the Rules of the BiH Constitutional Court

Besides the authorisation to file a request under Article VI.3(a) of the BiH Constitution, the Rules of the Constitutional Court provide for further requirements to take a decision in the abstract control (review) of constitutionality. According to Article 19 of the Rules of BiH the Constitutional Court, a request for institution of proceedings shall contain the title of the challenged act with the name and number of the official gazette in which it was published; the provisions of the Constitution deemed to have been violated; the statements, facts and evidence on which the request is founded; and the signature of an authorised person or applicant. In the event that a request is incomplete or it does not contain the information necessary for the conduct of the proceedings, the Constitutional Court shall request that the applicant make the necessary corrections within a specified time limit not exceeding 30 days. If the applicant fails to make the necessary corrections within the given time limit, the request shall be rejected (Article 20, paragraphs 1 and 2 of the Rules of the BiH Constitutional Court).

As indicated above, Article 19, paragraphs 1 and 3 of the Rules of the BiH Constitutional Court provide that the applicant must state the provisions of the Constitution deemed to have been violated. However, the Constitutional Court does not interpret this requirement too strictly.[2915] The statement of constitutional provisions does not prevent the Constitutional Court from taking into account other provisions of the Constitution as a measure of control (review) of constitutionality, since the legal assessment of the case rests on the discretion of the Constitutional Court. It is indispensable for the constitutional norm in question to be in a real connection with a particular case.[2916]

d. Subject of the request (*ratione materiae*)

U 1/99-1 BiH Council of Ministers I	19990814
U 12/98 Special Parallel Relationship	19990705 *OG of BiH*, No. 11/99
U 1/96 Rulebook of the Primary School of the Catholic School Centre in Sarajevo	20000226
U 2/96 Decision Establishing the Customs Rates	19980406 *OG of BiH*, No. 05/98
U 2/97 Decision on the Condition for the Exercise of Activities and Programmes of Special Social Interest	19980406 *OG of BiH*, No. 05/98
U 22/02 R. B.	20030627
U 23/02 Belkić	20030627
U 26/01 Court of BiH	20020403 *OG of BiH*, No. 04/02

2915 Compare with U 4/04, paragraph 104.
2916 U 6/06, paragraph 21.

U 2/96 Decision Establishing the Customs Rates	19980406 *OG of BiH*, No. 05/98
U 30/96 Dedolli	19971222
U 37/01 Bičakčić *et a*l.	20011102
U 41/02 Rulebook on Certification of Political Parties, Independent Candidates, Coalitions and Lists of Independent Candidates for Participation in Elections	20030820 *OG of BiH*, No. 25/03
U 49/01 Z. B. *et al*.	20011221
U 5/04 S. Tihić "Constitutionality of the BiH Constitution"	20060127
U 5/97 Public Hospital Tuzla	19980406 *OG of BiH*, No. 05/98
U 58/02 MP "Gradina", d.d. Maglaj	20030627
U 6/97 Bijedić	19980406 *OG of BiH*, No. 05/98
U 7/97 GFAP	19980511 *OG of BiH*, No. 07/98

(a) Abstract control of constitutionality

The provision of Article VI.3(a) of the BiH Constitution expressly stipulates the "provision of an Entity's constitution or law" as the subject of the abstract control (review) of constitutionality. The groups mentioned in Article VI.3(a) of the BiH Constitution are not final, which clearly follows from the clause "including but not limited to".[2917] Therefore, the groups in question have the character of an example of jurisdiction.[2918] Although Article VI.3(a) does not expressly indicate the laws of Bosnia and Herzegovina, the Constitutional Court also has jurisdiction to review such legal acts. On the one hand, this follows from the fact that the proceedings of abstract control (review) may be instituted by a member of the Chair of Deputy Chair of either Chamber of the Parliamentary Assembly.[2919] It is obvious that the starting point for the Constitutional Court is the view that the authorisation of these authorities makes sense only if the State laws may be challenged. On the other hand, this jurisdiction of the Constitutional Court rests on the fact that the BiH Constitution shall have priority over all other laws of Bosnia and Herzegovina under Article III.3(b) of the BiH Constitution.[2920] In a later decision, the Constitutional Court did not give rise to the discussion of this jurisdiction.[2921] However, the Constitutional Court has clearly stated that not only certain provisions but the law as a whole may be the subject of a review of constitutionality.[2922] Finally, an additional argument in support of the Constitutional Court's jurisdiction to review the State laws is an *a contrario* conclusion deriving from the provision of Article VI.3(c) of the BiH

2917 U 12/98.
2918 *Ibid*.
2919 U 12/98.
2920 *Ibid*.
2921 U 1/99-1.
2922 *Ibid*., paragraph 2 *et seq*.

Constitution.[2923] Based on the issues referred to the Constitutional Court by any other court in Bosnia and Herzegovina, the Constitutional Court may generally review the "laws", not only the "Entity laws". Therefore, there cannot be found a justified reason for denying the Constitutional Court jurisdiction to review the State laws under Article VI.3(a) of the BiH Constitution either.

Taking into account this system, the Constitutional Court interprets its jurisdiction quite correctly so as to limit itself to general legal acts.[2924] However, these are not only the Entity acts but also State acts.[2925] According to Article 17, paragraph 1, item 8 of the Rules of the BiH Constitutional Court, the Constitutional Court shall only review the legal acts in force.[2926] According to Article 65, paragraph 2, in conjunction with paragraph 1 item 2 of the Rules of the BiH Constitutional Court, the acts which are no more in force may also be reviewed if there is a manifest violation of the provisions of Article II of the BiH Constitution,[2927] or if the consequences of the violation of rights and fundamental freedoms have not been removed.

The first case in which the Constitutional Court reviewed the constitutionality of the provisions of the Entities' Constitutions was Case No. U 5/98.[2928] The fact that the Constitutional Court may declare provisions of the Entities' Constitutions invalid does not mean that Constitutional Court, in the case of the unconstitutionality of the provisions of the Entities' Constitutions, has jurisdiction to "create new constitutional norms".[2929] The Constitutional Court's jurisdiction to declare the provisions of the Entities' Constitutions invalid also derives from Article XII of the BiH Constitution, which stipulates an obligation for the Entities to amend their respective constitutions to ensure their conformity with the BiH Constitution in accordance with Article III.3(b).[2930] The judicial review by the Constitutional Court does not depend on the number of challenged provisions, nor is there any normative difference between the provisions and the "fundamental principles" of the Constitution.[2931] Therefore, the "fundamental principles" of the Constitution are also subject to a review. Each provision of the Entities' Constitution may be the subject of review. However, the provisions of the State Constitution cannot be subject to the

2923 For the foregoing details, see p. 866.

2924 Compare, Article 19, paragraph 1, Article 22, paragraph 1 of the Rules of the BiH Constitutional Court and see also U 58/02, paragraph 15.

2925 Compare with U 22/02, paragraph 11, relating to the Municipal Statute.

2926 Compare also with U 2/96.

2927 U 23/02, paragraph 6.

2928 Compare, paragraph 9 *et seq*. of the First Partial Decision on the admissibility of the request.

2929 U 5/98-I, paragraph 10.

2930 *Ibid*.

2931 *Ibid*.

judicial review of constitutionality, since all provisions of the BiH Constitution are of the same normative level.[2932] Moreover, the GFAP can neither be subject to a review in respect of the Constitution of the Republic of Bosnia and Herzegovina. In Case No. U 7/97, the 1861 Croatian Law Party (*Hrvatska stranka prava 1861*) and the 1861 Bosnia-Herzegovina Law Party (*Bosansko-Hercegovacka stranka prava 1861*) claimed that the GFAP was in violation of Article 398 of the Constitution of the Republic of Bosnia and Herzegovina.[2933] They further claimed that the GFAP undermined the integrity of the State and led to its disintegration (*dismembratio*). The Constitutional Court dismissed the request for review of constitutionality without giving an extensive reasoning but stated that "the Constitution of Bosnia and Herzegovina forms Annex IV of the General Framework Agreement. The Constitutional Court finds that the General Framework Agreement cannot, therefore, possibly contradict the Constitution of Bosnia and Herzegovina". Moreover, "the Constitutional Court is not competent to evaluate the constitutionality of the General Framework Agreement in respect of the Constitution of the Republic of Bosnia and Herzegovina as the Constitutional Court has in fact been established under the Constitution of Bosnia and Herzegovina in order to uphold [...] the Constitution".[2934]

We agree with the aforementioned conclusion of the Constitutional Court. On the other hand, it has been made clear that the Constitutional Court, which was established in accordance with the BiH Constitution, cannot use the RBiH Constitution as a standard of review. Otherwise, the Constitutional Court would have to, based on the relevant provisions of the RBiH Constitution and Constitution of the Socialist Federative Republic of Yugoslavia, review the basis of its existence, including (in a way) the issue of revolutionary[2935] evolution, *i.e.*, rendering ineffective the RBiH Constitution through the BiH Constitution. Therefore, as the Constitutional Court of BiH was established on the basis of the applicable BiH Constitution (Article XII of the BiH Constitution), the Constitutional Court is the only body which is subject to the applicable Constitution. Moreover, the reference to the structural reasons deserves support, since the conclusion that the GFAP cannot contradict the Constitution under Annex 4 may be understandable only if the GFAP and its Annexes are regarded as a single international treaty. The fact that the Constitutional Court upholds such a view would become obvious through the Court's later case-law[2936] in which the

2932 Compare with U 5/04, paragraph 13 *et seq.*, U 7/97; for the foregoing details, see "2. International protection of human rights and freedoms", p. 123; "a. The BiH Constitution and the ECHR", p. 153.

2933 See above, "7. The scope of control", p. 167.

2934 U 7/97, confirmed in U 1/03, paragraph 10.

2935 In this connection, see the aforementioned: "C. Revolutionary genesis of the Constitution?", p. 25.

2936 U 7-11/98, in conjunction with Annex 6; U 40/00 in conjunction with Annex 3.

Court, by referring to Decision No. U 7/97 declined its jurisdiction to review the consistency of the other Annexes with the Constitution (the other Annexes are not mentioned in Decision No. U 7/97). If the GFAP and its Annexes are regarded as a single peace treaty, possible inconsistencies can be resolved by the use of the usual rules relating to legal inconsistencies (*Konkurrenzregeln*), which derive from the principle of a single legal system (a treaty in this case). The system of terms "General Framework Agreement – Annexes" comes close to the hypothesis on their unity. However, by submitting strong arguments, the view according to which the Dayton Peace Agreement is in reality a "package" of independent international agreements regardless of the fact that the General Framework Agreement[2937] binds them together. In that case, inconsistencies may appear at least in parts where the signatory Parties are not the same ones, as is the case with the General Framework Agreement and some of its Annexes. Anyhow, taking into account international law (consensual principle), it is correct that a body, which has been established on the basis of a treaty, does not have the jurisdiction and power (for example, judicial) to act in the field to which another treaty applies, unless otherwise expressly agreed.[2938] This must also apply if the General Framework Agreement and its Annexes are regarded as a single treaty, the reasoning of which would be that the General Framework Agreement is not in any hierarchical relation to certain Annexes.[2939] Taking the legal-international independence of individual annexes as a starting point, a possible inconsistency could arise between the BiH Constitution (regardless of whether it is regarded as part of the GFAP or not) and the RBiH Constitution, since the entry into force of the former is not regulated by the General Framework Agreement but by Article XII of the BiH Constitution.

General administrative acts cannot be reviewed regardless of whether these are municipal acts[2940] or acts of the Entities' Governments.[2941] The same applies to the book of rules and school statutes,[2942] decisions and contracts of public companies,[2943] decisions of managing boards of public hospitals and

2937 So, *Dörr* (above, footnote 43, p. 27), points to (a) different contracting parties in respect of certain Annexes and General Framework Agreement itself and (b) generally, certain expressions hard to be acceptable such as "welcome and endorse" in respect of certain Annexes, which are mentioned in Articles II-VIII of the General Framework Agreement. See also *Gaeta* ((above, footnote 43, p. 27); the author points, inter alia, to the political background of the international legal capacity of the Republika Srpska and Federation of Bosnia and Herzegovina, which, viewed in that manner, requires recognition (p. 158 *et seq.*).

2938 Compare, Article 34 of the Vienna Convention on the Law on Treaties: "A treaty does not create either obligations or rights for a third State without its consent".

2939 Obout this topic ceompare also commentary on p. 818.

2940 U 3/96, U 2/97, U 6/97.

2941 U 58/02, paragraph 15.

2942 U 16/96.

2943 U 30/96.

administrative acts issued by the Election Commission under Article 2.9 of the Election Law of BiH.[2944] The Constitutional Court is not called to put forward proposals for amendments to the Constitution,[2945] nor is it called to give its advice or opinions or adopt views.[2946] In Case No. U 37/01, the Constitutional Court, in accordance with Article VI.3(a) of the BiH Constitution, rejected the appeal, *i.e.*, the request of a group of representatives for review, of a decision of the High Representative to remove Mr. *Edhem Bicakčić* from the office of Director General of "Elektroprivreda Bosne i Hercegovine" ("Electric Power of Bosnia and Herzegovina"), without giving reasons why, in fact, the review was not possible.[2947]

(b) Federal disputes and disputes between the State authorities

Federal disputes and disputes between State authorities must relate to a constitutional issue.[2948] Moreover, an action or non-action (failure to act) of an authority of the State or an Entity must concern another State or Entity authority.[2949] Therefore, the competencies and obligations deriving from ordinary laws have no significance for the Constitutional Court.

(c) Special federal disputes: Parallel relationships of the Entities with neighbouring states

According to Article III.2(a) of the BiH Constitution, the Entities shall have the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina. This right is included in "foreign policy" within the meaning of Article III.1(a) and (b) of the BiH Constitution.[2950] The Constitutional Court may determine the scope and limits of the right to establish special parallel relationships with neighbouring states with regard to the dispute under Article VI.3(a) of the

2944 Article 2.9 of the Election Law of BiH reads as follows: "The Election Commission of Bosnia and Herzegovina is an independent body which derives its authority from and reports directly to the Parliamentary Assembly of Bosnia and Herzegovina. The Election Commission of Bosnia and Herzegovina shall: co-ordinate, oversee and regulate the lawful operation of all election commissions and Polling Station Committees in accordance with this law; 2. issue administrative Regulations for the implementation of this law; […]."

2945 U 49/01.

2946 U 58/02, paragraph 17.

2947 Compare "iii. Possibility of judicial review of the High Representative's authorities", p. 794.

2948 U 66/02, paragraph 6.

2949 *Ibid.,* paragraph 8.

2950 For the foregoing details, see "4. Examining vital national interest (Article IV. 3(f) of the BiH Constitution)", p. 875.

BiH Constitution. The standard of review with regard to this procedure is, in addition to a special legal-constitutional mechanism for the establishment of special parallel relationships with neighbouring states, other constitutional rights. This includes, in particular, the relevant provisions regulating particular constitutional matters, which may be the subject of treaties on special parallel relationships with neighbouring states.

2. Appeal, *i.e.*, constitutional review [Article VI.3(b) of the BiH Constitution and application to the Human Rights Chamber (Article VIII.1 of Annex 6)]

U 29/02 R. T.	20030627

Appellate jurisdiction, *i.e.*, the introduction of an appellate action to the Constitutional Court is a novelty in the legal system of Bosnia and Herzegovina. The former Constitutional Court of the Republic of Bosnia and Herzegovina dealt with *actio popularis*[2951] but not with individual constitutional actions (today known as "appeals"). Through an appeal filed with the Constitutional Court, the appellant is given an opportunity to have reviewed the legal acts of all three State powers, if they are in violation of the appellant's legal and constitutional position. The appeal is always an extraordinary legal remedy; the principle of subsidiarity applies to it. The appeal is an extraordinary legal remedy, since it provides legal protection of a constitutional nature, and does not deal with the legal position guaranteed by ordinary positive legal regulations. The appeal has a subsidiary character, since it is admissible only if protection through effective *regular legal remedies* fails.[2952] When interpreting and applying ordinary laws, the administration, *i.e.*, administrative authorities and ordinary courts, by virtue of Articles II.6 and III.3(b) of the BiH Constitution, have the obligation to respect constitutional law, particularly constitutional human rights and obligations.[2953]

According to the linguistic meaning, an appeal under Article VI.3(b) of the BiH Constitution is formulated in a broader manner than a constitutional appeal (*Verfassungsbeschwerde*) under German Basic Law. Neither the prescribed requirements nor the conditions for making a decision, as laid down in the Rules of the BiH Constitutional Court, restrict the broad linguistic meaning

2951 In this respect, see "1. Abstract control of constitutionality, organic and federal disputes (Article VI.3(a) of the BiH Constitution)", p. 682.

2952 U 29/02, paragraph 23.

2953 See, also, "c. Scope of obligation to comply with the Constitution", p. 103.

of the individual appeal which is to be filed in the case of alleged violations of constitutional rights and freedoms. Therefore, it could be said to be a *constitutional revision*, which means a legal remedy which may be pursued not only by physical persons and legal persons but also by legal public entities for violation not only of constitutional rights and freedoms but also of any constitutional norm. As indicated below, the case-law of the Constitutional Court has not limited the scope of application of Article VI.3(b) of the BiH Constitution, which is the case with a constitutional appeal under the German Basic Law or applications under the ECHR.

The Constitutional Court's jurisdiction to deal with appeals, as individual appeals, is a matter which overlaps with the jurisdictions of the Human Rights Chamber. Both courts, through their general legal acts (rules of procedures) or through their case-law, have developed to a large extent identical and comparable admissibility requirements.

Unlike Article VIII.2 and VIII.3 of Annex 6, Article VI.3(b) the BiH Constitution does not provide for a precise list of requirements for making a decision on the merits. They are regulated in Article 16 of the applicable Rules of the BiH Constitutional Court. According to paragraph 1 of Article 16, the Court shall examine an appeal only if all effective remedies that are available under the law (paragraph 3 of this Article makes an exception) against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him/her. According to paragraph 2 of Article 16, the appeal must not be manifestly (*prima facie*) ill-founded, *i.e.*, with no chance of success. Finally, paragraph 4 of this Article regulates other admissibility requirements (the list of admissibility requirements is specified unlike the list under Article VIII.3(c) of Annex 6):

- the Constitutional Court is not competent to make a decision (comparable with Article VIII.2 (c) of Annex 6);
- the appeal is anonymous (comparable with Article VIII.3(c) of Annex 6);
- the appellant has withdrawn his/her appeal (comparable with Article VIII.3(a) of Annex 6);
- the time-limit for the appeal expired (reiteration of admissibility requirements referred to in paragraph 1; comparable with Article VIII.2(a) of Annex 6);
- the appeal was lodged by an unauthorized person (comparable with Article VIII.2 (c) of Annex 6);

- the Constitutional Court has already decided about the issue concerned and the statements or evidence from the appeal do not provide sufficient grounds for a new decision (comparable with Article VIII.3(b) of Annex 6);
- the appellant abused the right to file an appeal (comparable with Article VIII.2 (c) of Annex 6);
- the legal circumstances have changed (comparable with Article VIII.3(c) of Annex 6);
- the appeal is *ratione materiae* incompatible with the Constitution (comparable with Article VIII.2 (c) of Annex 6);
- the appeal is *ratione personae* incompatible with the Constitution (comparable with Article VIII.2 (c) of Annex 6);
- the appeal is *ratione temporis* incompatible with the Constitution (comparable with Article VIII.2 (c) of Annex 6);
- the appellant has previously initiated the same proceedings before the Human Rights Chamber for Bosnia and Herzegovina (comparable with Article VIII.2 (d) of Annex 6);
- the appellant failed to supplement or specify the appeal within the given time-limit (comparable with Article VIII.2 (a) of Annex 6);
- the appeal is premature (comparable with Article VIII.2 (a) of Annex 6);
- the appellant did not exhaust all remedies available under the law (comparable with Article VIII.2 (a) of Annex 6).

a. Time limit

(a) Constitutional Court

AP 1426/05 Menzilović *et al.*	20061109
AP 218/04 D. N.	20041027
AP 30/03 R. R.	20040423
AP 321/04 N. Đ.	20050217
AP 471/04 H. T.	20041027
AP 852/04 M. A.	20041027
AP 862/04 Pavlović	20060314
AP 96/02 Ivanović	20040317
U 10/03 PP “Gana” Teslić i G. G.	20040323
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 58/03 Z. C.	20040326

According to Article 16, paragraph 1 of the applicable Rules of the Constitutional Court of BiH, the time limit to file an appeal is 60 days. In the event that the 60th day is a Sunday, the appeal may be filed the following day.[2954] The time limit is of preclusive nature and cannot be extended. So an appeal which has been filed after the prescribed time limit, if only of one day, shall be treated as an appeal which has been filed much after the expiry of the time limit.[2955]

The 60-day time limit applies both to an appeal and the supplement to an appeal. As to the submission of new facts, this rule does not apply if they are submitted within a time limit of 60 days after that party was informed of the fact. Furthermore, a timely filed appeal does not stay the 60-day time limit, since that time limit may not be regarded as a time limit to announce the appeal (*Beschwerdeankündigung*). Therefore, the 60-day time limit serves to prepare the appeal on a point of fact and law and to deliver it.[2956]

Taking into account the legal system, the time limit to file an appeal depends also on the requirements for the **exhaustion of effective legal remedies**. In particular, the time limit starts running on the date of the delivery of the decision on the final legal remedy used, within the meaning of Article 16, paragraph 1 of the Rules of the BiH Constitutional Court, whereby a particular case is completed.[2957] Therefore, it is necessary to establish in every particular case which legal remedies can be regarded as "effective" and whether they have been exhausted. The 60-day time limit may be determined based on this.[2958]

It follows from the aforementioned reasoning that a decision on an "ineffective" legal remedy cannot be regarded as the restarting point of the 60-day time limit.[2959] Quite the contrary applies if the appellant, in accordance with the law, is denied the first-instance proceedings which would enable him/her to challenge an administrative act.[2960] In that case, it would be logical that a court decision (mostly a ruling), whereby an action against a general act has been rejected for lack of jurisdiction, does not stop the 60-day time limit from running. Therefore, an action brought to the Court based on the law itself is a manifestly inadmissible legal remedy, which is the reason why it could not be considered effective.[2961] However, in that case, the appeal may be regarded as an appeal of the deprivation of judicial protection. It is not primarily directed

2954 AP 862/04, paragraph 9 *et seq*.
2955 AP 321/04, paragraph 6; AP 852/04, paragraph 3; AP 471/04, paragraph 3.
2956 AP 1426/05, paragraph 27.
2957 U 16/01, paragraph 11.
2958 Fore the foregoing details, see "c. Exhaustion of legal remedies", p. 702.
2959 *Ibid*.; U 8/01, paragraph 2.
2960 U 10/03, paragraph 13 *et seq*.; U 58/03, paragraph 16 *et seq*.; U 19/00, paragraph 18.
2961 U 19/00, paragraph 17.

against the challenged administrative act but against a court decision whereby judicial protection has been denied in an unconstitutional manner.[2962] The 60-day time limit starts running again at the moment of its delivery. In that case, ordinary courts, by directly applying the rights and freedoms under the ECHR, would have to allow the use of a legal remedy regardless of the restrictions prescribed by the positive regulations. In Case No. U 19/00, the Constitutional Court, in accordance with this conclusion, ordered the Supreme Court of the Republika Srpska to declare an action admissible and to take a decision on the merits of the case.[2963]

Therefore the appellant can be required to exhaust only the effective legal remedies. The appellant bears the burden of proving that a legal remedy is not effective. If the Constitutional Court finds that a legal remedy is not effective, but despite this fact the appellant pursues it without a successful outcome, the decision on such a legal remedy does not interrupt the running of the time limit.[2964] It follows that in general the appellant bears the consequences of its own wrong assessment of the effectiveness of the legal remedy used, unless his/her assessment constitutes an "excessive burden imposed on the appellant".[2965]

As a rule, the time limit is determined through a delivery slip. If the appellant refuses to sign the delivery slip on the so-called final decision (with the purpose of manipulating the time limit), that day shall nevertheless be taken as the starting date.[2966] If it is impossible to determine the date of delivery of the final decision, the time limit shall start running on the date or moment when the appellant was informed of the violation of his/her rights.[2967]

(b) Human Rights Chamber

CH/02/10787 Vujmilović	20060403
CH/98/875 *et al*.-A&M Živković	20000512
CH/98/904 *et al*. A. Durmić *et al*.	20000512
CH/98/905 *et al*. A. Jandrić *et al*.	19990709
CH/99/1433 A. Smajić	19991104
CH/99/1838 *et al*.-A&M Karan *et al.*	20030704
CH/99/2805 A. Sefić	20011012
CH/99/3330 A. Y. A.	20000607

2962 *Ibid*., Article 18.
2963 U 19/00, paragraph 40.
2964 AP 96/02, paragraph 11.
2965 U 18/00, paragraph 40.
2966 AP 218/04, paragraph 5.
2967 AP 30/03, paragraph 3 *et seq*.

According to Article VIII.2(a) of Annex 6, the time limit to file an application to the Human Rights Chamber is 6 months. Moreover, the time limit for filing an application starts running from the date on which the (final) decision was served on the applicant. The time limit cannot be understood as a *waiting time limit*, *i.e.*, the applicant is not obliged to wait for six months before submitting an application.[2968]

If, during the proceedings, the applicant requests that the competent authority deliver the decision to him/her in person, not to his/her legal representative, the time limit shall start running from the date on which the decision was served on him/her regardless of the date on which the legal representative received the decision.[2969] According to Rule 46, paragraph 5 of the Rules of Procedure of the Human Rights Chamber, the date of introduction of the application shall in general be considered to be the "date of the first communication from the applicant setting out, even summarily, the subject matter of the application", which means the first communication, which in essence means the application.[2970] The time limit for filing an application cannot be considered to be a formality. It serves to ensure a certain degree of legal certainty and to make it possible for the cases which give rise to issues under the ECHR to be considered within a reasonable time.[2971]

In case of special requirements, the expiry of the time limit does not have to necessarily be an obstacle to the adoption of a decision on the merits. Yet, the applicant must in general state the reasons for exceeding the given time limit.[2972] So, for instance, if the applicant was not aware of the entry into force of Annex 6 of the GFAP, or of the existence of the Human Rights Chamber, since the signatory parties of Annex 6 failed to make available the Human Rights Agreement[2973] to the general public according to Article XV, or if the applicant did not inform his/her attorney of the deprivation of liberty, these can be accepted as reasons for failure to comply with the six-month

2968 CH/01/7488-A&M, paragraph 72; CH/02/8679 *et al.*-A&M, paragraph 155.

2969 CH/02/10787, paragraph 21.

2970 Compare also, CH/01/6979-A&M, paragraph 40 in connection with the case-law of the ECtHR, in Cases *Mercier de Bettens vs. Switzerland*, Application No. 12158/86, 7.12.1987, DR 54, p. 178; CH/99/1433-A, paragraph 12 in connection with ECtHR, *X vs. Ireland*, Application No. 8299/78, 10.10.1980, DR 22, p. 51, paragraph 72.

2971 CH/01/6979-A&M, paragraph 40; CH/02/8679 *et al*.-A&M, paragraph 155.

2972 CH/98/905 *et al*.-A, paragraph 12.

2973 CH/99/1433-A, paragraph 17. Yet, the Chamber has held that although the Human Rights Agreement has never been published in the *OG of FBiH* (nor has it been published in the *OG of BiH*), it may be concluded that the Federation's efforts were sufficient to fulfil its obligation to "effectively publish the provisions of the Agreement" according to Article XV of the Agreement (CH/98/904 *et al*.-A, paragraph 21).

requirement.[2974] Also, a hospitalisation may be accepted as a justified reason for failure to comply with the six-month time limit.[2975] The applicant bears the burden of submitting evidence proving that there have been justified reasons for failure to comply with the time limit.[2976]

The wording of Article VIII.2(a) of Annex 6 allows the Human Rights Chamber to, in addition to the aforesaid, interpret "generously" the six-month time limit in certain cases, as the European Court of Human Rights interprets Article 35 of the ECHR.[2977] Insofar as the applications of the importance of this principle are concerned, the Human Rights Chamber gave up counting the time limit *ex officio*. When the respondent party failed to point to the failure to comply with the time limit, the Human Rights Chamber would declare the applications admissible without considering the timely nature of the application regardless of facts pointing to the failure to comply with the time limit

> So in the *Rizvanović* case, the judgment of the Supreme Court, dated 3 June 1996, had to be treated as final within the meaning of Article VIII.2(a) of Annex 6, since subsequent legal remedies pursued by the applicant were extraordinary and, thus, did not prevent the 6-month time limit from running. The application was filed on 9 August 1997, more than one year after the judgment of the Supreme Court (compare with CH/97/59-A&M, paragraphs 2, 16 *et seq*). Even if the application had been regarded as being late for several months, the time limit would have probably been exceeded. The Human Rights Chamber did not consider admissibility as to the time limit. It was only during the proceedings initiated upon a request for review of the decision on the merits that the respondent party raised an objection relating to the failure to comply with the time limit, which was declared as outside the time limit by the Chamber.[2978]

Likewise, in other cases,[2979] the Human Rights Chamber did not take the real final decision in the proceedings as the relevant decision from which to count the time limit but rather another decision which could not be treated as such if the notion of "final decision" was interpreted in a strict manner, since the pursued legal remedy was not admissible. A decisive fact for such treatment in

2974 CH/98/1335-A (Partial Decision), paragraph 24 *et seq.*; compare also, CH/98/1021-A, paragraph 14; CH/99/1433-A, paragraphs 14, 16 in connection with ECtHR, *K. v. Ireland*, Application No. 10416/83, 17.5.1984, DR 38, p. 160, and *De Becker v. Belgium*, Application No. 214/56, 2 YB No. 214 (230-234); CH/99/2805-A, paragraph 29 *et seq*.

2975 CH/98/896-A&M, paragraph 44.

2976 Compare, CH/99/1433-A, paragraph 18 *et seq.*; CH/00/6134-A&M, paragraph 78 *et seq*.

2977 CH/99/1433-A, paragraphs 13, 16; CH/99/3330-A, paragraph 12.

2978 Compare with CH/97/59-RR, paragraphs 13, 18.

2979 Compare, for example, CH/01/6979-A&M, paragraph 40.

Case No. CH/01/6979 was the manifest and serious violation of rights by the ordinary courts; the Human Rights Chamber did not want to avoid examining the courts' findings because of a failure to meet the formal requirements. The same applied to the cases in which the applicants concluded that there was no effective legal means for solving a particular problem, but they reached such a conclusion only after they had tried to pursue certain legal remedies. What was important in such cases was the fact that the applicant had filed an application within the time limit of six months as of the moment when they became aware of the fact that the national legal system did not provide an effective legal remedy for the resolution of their legal problem.[2980]

If a so-called final decision is lacking, the time limit of six months starts running on the date when a *continuing violation*[2981] ended; or if a violation is considered permanent, the time limit starts running only on the date when the violation ended.[2982] If the applicant finds certain violations of his/her rights in a timely fashion, *i.e.*, within the six-month time limit but he/she alleges a violation of other rights in an untimely fashion, since the six-month time limit has expired, the request is considered to be partially timely, *i.e.*, only the allegations submitted in a timely fashion may be accepted; the remaining part of the application is considered inadmissible.[2983] Indeed, if the applicant submits a supplement to his/her initial claim within a time limit of six months, such allegations are not considered inadmissible.[2984]

The time limit starts running, as already indicated, on the date when the final decision is taken in a case, whereas the applicant holds that the final decision is in violation of his/her rights, *i.e.*, the final decision did not provide a protection of his rights. Therefore, there is a risk of the applicant failing to comply with the time limit of he pursues a legal remedy which the Human Rights Chamber considers as ineffective. It is to be noted that in that case, the six-month time limit starts running (not on the date when the last decision was delivered in terms of chronology) as of the date when a previous decision was served on him/her, the one considered as final by the Human Rights Chamber. Therefore, if the applicant has any doubts about the effectiveness of a legal remedy, and in order to avoid a possible unsuccessful result of its pursuance, the applicant may simultaneously file both an application with the Human Rights Chamber and pursue the legal remedy whose usefulness is not certain in respect of

2980 CH/99/1838 *et al*.-A&M, paragraph 92 *et seq*.
2981 CH/98/896-A&M, paragraph 42; CH/98/1021-A, paragraph 12; CH/98/1027 *et al*.-A&M, paragraph 25.
2982 CH/98/126-A&M, paragraph 32; CH/98/875 *et al*.-A&M, paragraph 58.
2983 CH/99/1900&1901-A&M, paragraph 59 *et seq*.
2984 Compare, CH/00/3880-A&M, paragraph 99.

whether the Human Rights Chamber would considered it as "effective" or not. In the event that the uncertain legal remedy is considered effective, the applicant may withdraw his/her claim. In that case, the time limit for filing an application with the Human Rights Chamber starts running on the date when the applicant receives a decision on that legal remedy.[2985]

b. Formal preclusive time limit (period)

AP 1188/06 Melkić	20070504
AP 1426/05 Mezilović *et al*.	20061109
AP 1718/05 Džindo	20061221
AP 662/04 Halilagić	20051220
CH/96/1 M	19970711
CH/96/21 M	19980406
CH/96/30 M	19970905
CH/96/30 M. Damjanović	19970905
CH/97/59-A&M	19980612
CH/99/3103 Toroman	20060703

The Human Rights Chamber, by referring to the case-law of the European Court,[2986] rejected as inadmissible allegations of the parties to the proceedings in respect of the admissibility and merits if they are submitted in an untimely fashion, since such allegations are contrary to the principle of adversarial proceedings. However, it is assumed in that case that there were no obstacles to submit the allegations in a timely fashion.[2987] Therefore, if the circumstances and facts based on which the objections to admissibility may be raised arise only after the expiry of the time limit, such objections are not subject to the preclusive time limit.[2988]

For a long time, the Constitutional Court remained silent and did not take a position on the possible preclusive time limit in respect of subsequent allegations by parties to the proceedings (submitted outside the time limit of 60 days). It was only in Case No. AP 1426/05 that the Constitutional Court decided that, as a rule, a supplement to the appeal was to be filed within a time limit of 60 days in order to avoid the expiry of the preclusive time limit.[2989] Additional allegations and evidence are admissible only if they constitute "new legal circumstances".[2990]

2985 Compare, *Berg*, *1999,* p. 31 *et seq*.
2986 *De Wilde et al. v. Belgium*, 18.6.1971, Series A no. 12, pp. 53-59; *Artico v. Italy*, 13.5.1980, Series A no. 1237, paragraphs 24-28.
2987 CH/96/1-M, paragraph 60; CH/96/21-M, paragraph 28 *et seq*.; CH/96/30-M, paragraph 22.
2988 CH/97/59-A&M, paragraph 47.
2989 Paragraph 26 *et seq*.
2990 AP 662/04, paragraph 55, AP 1718/05, paragraph 13.

It remained unclear what the notion of "new legal circumstances" comprised. In particular, this term could only include circumstances that were known at the time of the filing of an appeal but could not be submitted for justified reasons (*nova reperta*). This term could also include circumstances that occurred only after the expiry of the time limit (*nova producta*). Given the case-law, it is clear that the principle of a preclusive time limit in the proceedings before the Constitutional Court also includes the allegations and evidence which the appellant failed to submit before the ordinary courts through his own fault.[2991] On the other hand, the case-law of the Human Rights Commission within the Constitutional Court may be interpreted in the manner that the notion of "new legal circumstances" includes both n*ova reperta*, and *nova producta*.[2992]

c. Exhaustion of legal remedies

AP 1105/04 Z. M.	20050217
AP 777/04 S. T.	20040929
CH/97/47-A Poropat	19980610
CH/98/1181-A Janjuz	19990707
CH/98/1205-A Bekrić	19990313
CH/98/492-A Drakić	19990209
CH/99/1909-A Todorović	19990607
U 36/02 S. S.	20040130

Human rights presuppose effective legal protection. Those rights must be real and effective both in law and in practice, not theoretical and illusory. More precisely, legal remedies aimed at the protection of human rights must be physically available, and they must not be disturbed by acts, omissions, delays or negligence by the State authority and must be capable of protecting the rights in question.[2993] Both the Constitutional Court and the Human Rights Chamber must, before taking a decision on merits, decide whether the legal system provides for effective legal remedies and whether they have been exhausted in each particular case before the appellant's address to the highest judicial institution.[2994] Therefore, before addressing the Constitutional Court and Human Rights Chamber, the appellant has to use legal remedies available within the legal system, if they are of such a nature as to redress the violation of the appellant's rights. If the appellant fails to exhaust all effective legal

2991 AP 1188/06, paragraph 16.
2992 CH/99/3103, paragraph 23 *et seq*.
2993 U 36/02, paragraph 25.
2994 Article 16 paragraph 1of the applicable Rules of the Constitutional Court of BiH; Article VIII.2(a) of Annex 6.

remedies, his/her appeal or request shall be inadmissible.[2995] The fact that the appellant is not allowed to address directly to the Constitutional Court and Human Rights Chamber may be explained by the fact that the lower-instance authorities and institutions should be given an opportunity within the internal legal system to redress possible violations of human rights and freedoms under international conventions and the BiH Constitution according to the general rules of international law.[2996] The lower and the earlier the institution which can provide the appellant with the protection, the better the appellant's prospects. Finally, the principle of exhaustion of legal remedies obliges the lower-instances authorities to deal with the legal protection and, at the same time, to disburden the higher-instances which, otherwise, would not have the possibility of dealing with the issues of violation of human rights and freedoms.

If the appellant fails to pursue a legal remedy, his/her appeal or request may be rejected for two possible reasons. If the appellant pursued an effective legal remedy but did not wait for its result, the appeal or the request must be rejected as being **premature**. The appellant has a new possibility to file an appeal with the Constitutional Court after the conclusion of the proceedings. Therefore, the aim of the decision on the appeal or request filed in a premature fashion is to show that other proceedings are still pending, not to show that the appellant failed to exhaust all legal remedies. Accordingly, the inadmissibility of the appeal is of a temporary nature. However, if the appellant fails to pursue an effective legal remedy, and the time limit to pursue it has expired, then the opportunity to file an appeal before the Constitutional Court is definitely excluded.

Accordingly, in Case No. U 24/00 the Constitutional Court terminated the proceedings pending a decision by the Supreme Court of the Republika Srpska instead of rejecting the appeal as inadmissible for non-exhaustion of legal remedies,[2997] whereupon the Constitutional Court took a decision on the merits after the appellant submitted a supplement to the appeal that included the final decision of the Supreme Court of the Republika Srpska. In another case, the appeal was rejected as premature, since the proceedings before the ordinary courts were still pending.[2998] The difference between these cases could be a positive conclusion to the following question: Is the final result of the proceedings before the lower-instance courts visible or not, and is the Constitutional Court aware of it or not?

2995 CH/98/492-A, paragraph 12; CH/99/1909-A, paragraph 9; CH/97/47-D, paragraph 17; CH/98/1205-A, paragraph 6; CH/98/1181-A, paragraph 11.

2996 CH/00/3642-A&M, paragraph 47 in connection with the ECtHR, *De Wilde, Ooms and Versyp vs. Belgium*, 18.11.1970, Series A no. 12, paragraph 50.

2997 Paragraph 15.

2998 U 4/97.

The text below presents the extensive case-law of both courts with regard to the principle of exhaustion of legal remedies.

(a) Constitutional Court

AP 1023/04 B. N.	20050412
AP 106/06 Rasim *et al.* Mujezinović	20060223
AP 1111/04 Kara	20051013
AP 1193/05 Suljagić	20060627
AP 1237/05 Vujanović	20060509
AP 1244/05 Kovačević	20060509
AP 1298/05 Mitrović *et al*.	20060613
AP 1338/05 Zijadić	20060627
AP 1348/05 Marinko *et al.* Dupljanin	20060613
AP 1354/05 Balorda	20060509
AP 1431/05 Čajević	20060912
AP 2331/06 Grahovac	20060920
AP 240/03 Đ. M.	20040318
AP 2498/07 Ožegović	20061213
AP 2500/05 Novalija	20060912
AP 283/03 S. O.	20041014
AP 309/04 R. T.	20050412
AP 311/04 A. G.	20040422
AP 311/04 A. G.	20040422
AP 322/04 M. K.	20041119
AP 325/04 “Vakufska direkcija Sarajevo”	20041027
AP 3297/06 Alijagić	20080110
AP 333/05 M. K. *et al*.	20060426
AP 338/04 D. J.	20040929
AP 551/03 S. A.	20040929
AP 562/04 ZZ “Trebava” Gradačac	20050323
AP 567/04 N. G.	20050628
AP 583/05 N. Ž.	20050615
AP 592/05 S. A. *et al*.	20050628
AP 657/04 TIP “Dekorativa” d.d.	20041130
AP 679/04 Veljko *et al*. Lazić	20050913
AP 684/04 N. Ć.	20050118
AP 696/04 Subotić	20050923
AP 73/02 Sanas	20030725
AP 814/04 GP “Građevinar” d.o.o. Kotor-Varoš *et al*.	20050217
AP 94/04 N. J.	20040317
AP 967/05 Jokić	20060412
AP 996/04 J. E.	20050615
U 107/03 A. G.	20041119
U 12/01 Nikolić	20020803 *OG of BiH*, No. 20/02

U 12/97 Saračević-Šutković	19980914 *OG of BiH*, No. 17/98
U 13/99 "POTKA" d.o.o.	19991105
U 14/99 Hotel "Bosna"	20001231 *OG of BiH*, No. 36/00
U 15/01 Spahić promex	20010504
U 18/00 Hajdarević	20021019 *OG of BiH*, No. 30/02
U 20/02 "NMS Commerce" d.j.l.	20040227
U 22/00 Guskić	20011012 *OG of BiH*, No. 25/01
U 22/00 Guskić	20011012 *OG of BiH*, No. 25/01
U 22/01 Kušec	20011230 *OG of BiH*, No. 33/01
U 23/00 Vrhovac	20010416 *OG of BiH*, No. 10/01
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 3/01 "Čajavec holding" *et al*.	20020312 *OG of BiH*, No. 05/02
U 37/00 I. K.	20010901
U 40/01 Topić	20020910 *OG of BiH*, No. 25/02
U 40/02 DOO "10. oktobar"	20040304
U 59/01 Bičakčić	20020829 *OG of BiH*, No. 24/02
U 75/03 E. T.	20040615
U 8/01 J. M.	20010622

i. Basic elements of the principle of exhaustion of legal remedies

The appellant must reach a so-called final decision (*abschließende Entscheidung*). A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision both on a point of fact and law. Whether a legal remedy is effective depends on each particular case. The appellant bears the burden of proof.[2999] The appellant can establish the ineffectiveness of a legal remedy in two directions: the legal remedy is absolutely ineffective (or does not exist at all), or the legal remedy is ineffective in the particular case. The final decision on the (in)effectiveness of a legal remedy remains with the discretion of the Constitutional Court. In so considering, the Constitutional Court starts from the point of view of the objective observers. Therefore, a legal remedy is considered as ineffective if it is objectively and manifestly inadmissible. The effectiveness depends on whether the appellant, taking into account the legal situation at the moment of pursuing a legal remedy, started from the point that the legal remedy was inadmissible.[3000] In this connection, the principle *ignorantia iuris nocet* applies: the appellant bears the burden of ignorance of the law.[3001] The doubt itself about the effectiveness of the legal remedy does not exempt the appellant

2999 U 13/99.
3000 Compare with the decision of the German Federal Constitutional Court (BVerfGE) 28, 1 (6).
3001 AP 338/04, paragraph 6.

from his/her duty to exhaust that legal remedy.[3002] Yet, an individual must not be overburdened in determining the most effective way of exercising his/her rights.[3003] The rules of legal remedies exhaustion should be interpreted in a flexible manner so as to take into account the particular circumstances of the appellant.[3004] If the appellant could not be certain of the effectiveness of the legal remedy he used, he cannot bear the burden of it if the legal remedy proved to be ineffective in a particular case.

A decision whereby a legal remedy has been rejected because the appellant did not meet the legal requirements with regard to the legal remedy (time limit, payment of fees, form or fulfilment of other legal obligations) cannot be considered as final. The legal remedy must be exhausted not only formally but also substantially. Therefore, such legal remedies do not restart running of the 60-day time limit.[3005]

The appellant nevertheless has the opportunity to establish a violation of his/her right of access to court before the Constitutional Court if he/she can prove that the legal remedy has been rejected in violation of the positive legal regulations, *i.e.*, contrary to the standards of the BiH Constitution. If such an allegation is founded, the decision of the lower-instance court shall be quashed and the case will be referred back for new proceedings and a decision, which, this time, will be taken on the merits of the case.[3006] Otherwise, the appeal shall be rejected as manifestly ill-founded or shall be dismissed on the merits of the case.[3007] Although such court practice is not incorrect in terms of formal requirements, the question arises as to whether the appellant bears an excessive burden in such proceedings. If an ordinary court rejects a legal remedy in an unlawful manner, the appellant must exhaust all further available legal remedies in order to redress the error. In the event that a regular way does not offer him/her a successful result, the matter shall end up being submitted to the Constitutional Court, which shall take a decision on the merits ordering the ordinary court to reopen the proceedings starting from the point that the legal remedy is admissible. These proceedings may last for years. In light of the right to trial within a reasonable time under Article 6 of the ECHR, it would be more balanced if the Constitutional Court, at least in the proceedings in which there is a decision on the merits by the ordinary courts, establishes that the later appellate courts unlawfully deprived the appellant of his/her rights and

3002 AP 583/05, paragraph 7.
3003 U 18/00, paragraph 40.
3004 U 22/00, paragraph 20.
3005 Compare with U 15/01, U 20/00, U 8/01, paragraph 21; AP 562/04, paragraph 7.
3006 U 40/02, paragraph 21 *et seq*.
3007 AP 551/03, paragraph 23; U 75/03, paragraph 17.

concludes the case so as to take a decision on the merits of the case (Article 64, paragraph 2 of the applicable Rules of the BiH Constitutional Court).

A *substantive* exhaustion of legal remedies also implies that the appellant has already presented the allegation or allegations being the subject of the proceedings of the Constitutional Court before the ordinary courts. Otherwise, the courts would not have had an opportunity to take a view on it and provide the appellant with legal protection. Nevertheless, such a court decision may be procedurally treated as final. However, within the meaning of the principle of exhausting legal remedies, it cannot be taken as an adjudged matter in respect of the appellant's allegations (which were submitted to the Constitutional Court), since the courts did not have an opportunity to deal with the matter.[3008]

An incorrect legal remedy instruction indicated in the challenged decision does not automatically mean that the legal remedy, which is not indicated in the legal remedy instruction and which does exist (as effective), should not be exhausted. The principle *ignorantia iuris nocet*[3009] applies again. The appellant may not rely on the allegation that the incorrect legal remedy instruction misled him/her and that this was the reason why he/she failed to exhaust all effective legal remedies.[3010] The Constitutional Court has made exceptions to this rule. In Case No. U 22/00, the Constitutional Court took into account the fact that the appellant did not have a legal representative and that the appellant, as a layman, did not have knowledge of the relevant regulations. However, a decisive fact was the lack of legal remedy instruction in the challenged judgment, which rendered the access to the Supreme Court of the Republika Srpska fully ineffective.[3011]

If the proceedings are terminated by a final decision, and the final decision has not been served on the party, the time limit to file an appeal with the Constitutional Court starts running at the moment when the decision is brought to the appellant's knowledge in another manner.[3012] This practice raises doubts for two reasons: on the one hand, if the final decision, whereby the proceedings of the ordinary court were completed, was not delivered to the party, the decision cannot become formally final and binding, nor can the time limit to file an appeal with the Constitutional Court start running. On the other hand, the question arises as to how the appellant can challenge the decision if he/she was informed of it in another manner, which means that the decision was not

3008 AP 1244/05, paragraph 8; AP 679/04, paragraph 28; AP 1193/05, paragraph 21.
3009 AP 996/04, paragraph 8.
3010 AP 309/04, paragraph 12.
3011 Paragraph 20 *et seq*.
3012 AP 657/04, paragraph 12.

delivered to him/her, since it is assumed that he/she is not aware of its precise content but only of the fact that it has been rendered and that the matter was decided by the final decision. Therefore, this latter argument could not be taken as relevant only if the decision was not delivered to the appellant but the reasoning of which was brought to his/her knowledge in another manner.[3013]

ii. Exceptions to the obligation of legal remedy exhaustion

The principle of legal remedy exhaustion does not apply without exception. On the one hand, all legal remedies do not have to be exhausted if the existing legal remedy formally has no chance of success. Following this rule, in Case No. U 23/00 the Constitutional Court decided that an appeal against the first-instance court's ruling, whereby proceedings for compensation for damage were discontinued, was an ineffective legal remedy. A decisive factor was the fact that the proceedings were discontinued on the basis of a decision of the Government of the Republika Srpska so that the appellate proceedings would have had no effect.

On the other hand, the principle of exhausting legal remedies does not stand in the way of filing an appeal if the case involves an allegation about the violation of the right to trial within a reasonable time, since such an allegation cannot be made in the proceedings pending before the ordinary courts.[3014] However, the same does not apply insofar as administrative procedure is concerned, since the law provides for remedies to be pursued in case of silence of the administration (*i.e.*, the lack of any response from administrative authorities) both in the first-instance proceedings and in appellate proceedings.[3015] At any rate, the allegations concerning a violation of the right to a fair trial within a reasonable time under Article 6 of the ECHR may be granted only by establishing a violation of the right under Article 6 of the ECHR and by giving an order to conduct an urgent procedure in order to finalise the proceeding before the ordinary courts. The Constitutional Court cannot be requested to take a decision on the merits to terminate the proceedings, since they are still pending before the ordinary courts.

Finally, all legal remedies do not have to be exhausted, which is a natural and logical conclusion if a legal remedy has not yet been provided for by law or if the appellant does not have the right of action which would entitle him/her to pursue it according to the relevant provisions of law. In such cases, the

3013 AP 325/04, paragraph 7.
3014 U 14/99, paragraph 4; AP 3297/06, paragraph 27; AP 2498/07, paragraph 20.
3015 AP 1023/04, paragraph 4; AP 2500/05, paragraph 9.

Constitutional Court establishes a violation of the right of access to a court, since the legislature failed to regulate a legal matter in terms of providing for an effective legal remedy against a violation of human rights and freedoms by the State authorities. The Constitutional Court takes a decision whereby it refers the case back to the ordinary authorities which are to provide protection to the appellant in accordance with the reasoning of the Constitutional Court's decision, regardless of the positive-legal regulations.[3016]

The Constitutional Court has resorted to a special solution in certain cases. Therefore, in Case No. U 24/00 the Constitutional Court suspended the proceedings pending a final decision by the Supreme Court of the Republika Srpska instead of rejecting the appeal as inadmissible for being premature (the premature character is essentially grounded on the failure to exhaust legal remedies),[3017] whereupon the Constitutional Court took a decision on the merits after the appellant had filed a supplement to her appeal in order to extend it to the final decision taken meanwhile by the Supreme Court of the Republika Srpska. In another case, the appeal was rejected as premature, since the proceedings before the ordinary courts were still pending.[3018] The difference between these cases could imply an affirmative answer to the question whether a final outcome of the proceedings before the lower-instance courts is visible or not and whether the Constitutional Court is acquainted with this "weather forecast".

iii. Case-law in respect of certain legal remedies

A final decision represents a response to the last legal remedy used which is effective and adequate to examine a lower instance decision both on a point of fact and law. Taking this into account, it is up to the appellant whether he/she will use a legal remedy regardless of whether it is an ordinary or extraordinary legal remedy. Taking this as a starting point, the Constitutional Court declared certain legal remedies *absolutely inefficient*, *i.e.*, *ineffective.* These legal remedies do not have to be exhausted before the appellant's appeal.

The first group includes the legal remedies whose pursuance does not depend on the appellant but on a third person such as a prosecutor. As to most of these legal remedies, the appellant has the right to initiate, not a discretionary right. However, if a third person that has the right of action pursues a legal remedy, and the competent authority/court grants it and opens proceedings, the legal

3016 AP 311/04, paragraph 24 *et seq*.
3017 Paragraph 15.
3018 U 4/97.

remedy is considered effective. The appellant bears the "risk" of success of that legal remedy. Therefore, if a legal remedy is rejected, and the proceedings are not opened, the use of that legal remedy does not prevent the 60-day time limit from running according to Article 16, paragraph 1 of the applicable Rules of the BiH Constitutional Court. Delivery of a previous decision is taken as a starting point from which to count the time limit. A request for legal protection provided for by the Law on Civil Procedures is first of all included in this category of legal remedies.[3019]

As a rule, the legal remedies aimed at the re-opening of proceedings terminated by a final and binding decision are also included in the category of ineffective legal remedies. Similarly to the first group, this group also implies a "risk" borne by the appellant. If the legal remedy is declared inadmissible, the pursuance of that legal remedy and delivery of that decision by the competent authority does not stop the 60-day time limit from running. A request for restitution of a previous state provided for by the Law on Civil Procedure[3020] and a request for renewal of proceedings provided for by the Civil Procedure Code and Criminal Procedure Code[3021] are included in this category of legal remedies. An exception to this rule is a request for the reopening of criminal proceedings by the person convicted *in absentia*.[3022]

The third group of legal remedies includes "typical" extraordinary legal remedies such as a request for an extraordinary review of a court decision provided for by the Law on Administrative Procedure,[3023] or extraordinary review of a final and legally binding judgment provided for by the Criminal Procedure Code.[3024] This group is an exception to the rule from Decision No. U 15/01, according to which it is not relevant whether the used remedy is ordinary or extraordinary, but whether the legal remedy used is capable of redressing a violation or not.

As to the legal remedies under the Civil Procedure Code, the revision-appeal has a special place. Despite its label of "extraordinary legal remedy", the revision-appeal is in principle considered an effective legal remedy, but only if the appellant fulfils the requirements to file a revision-appeal as stipulated by the law.[3025] If the revision-appeal is not admissible in a particular case, the address to the Constitutional Court is nevertheless possible without filing a revision-appeal, as is the case with property disputes in which the value is not

3019 AP 240/03, paragraph 11.
3020 AP 73/02; AP 814/04, paragraph 8 *et seq*.
3021 U 37/00, paragraph 23; AP 94/04, paragraph 13; AP 1348/05, paragraph 10.
3022 AP 2331/06, paragraph 6; AP 283/03, paragraph 11.
3023 U 3/01, paragraph 21.
3024 U 40/01, paragraph 15.
3025 U 12/97.

determined or in which the value does not exceed the amount provided for by law.[3026] The issue of admissibility of the revision-appeal may be relevant to the issue of a violation of the right of access to a court within the meaning of Article 6 of the ECHR.[3027]

The next group of legal remedies which cannot be considered effective includes the remedies with regard to which the competent authorities, *i.e.*, the courts, have discretion to decide on their admissibility, as is the case with the revision-appeal under Article 237, paragraph 3 of the Law on Civil Procedures of the Federation of BiH and Republika Srpska. This provision in principle allows the competent court to declare an inadmissible revision-appeal admissible if "the court holds that a decision on the revision-appeal is to be relevant to the application of the relevant legal provisions in other cases". As the decision of admissibility of the revision-appeal, including a decision on the effectiveness of this legal remedy, finally depends on the assessment of the revision-appeal court, the Constitutional Court considers the revision-appeal under Article 237, paragraph 3 of the Civil Procedure Code of the Entities as an ineffective legal remedy which does not have to be exhausted. If the appellant "takes his chance" provided for by Article 237, paragraph 3 of the Civil Procedure Code of the Federation of BiH and Republika Srpska, and the revision-appeal is granted, the time limit to file an appeal with the Constitutional Court will start running on the date of delivery of the decision on the revision-appeal. This was never an issue. However, if the revision-appeal is rejected as inadmissible, the appellant must take account of the fact that the time limit to file an appeal before the Constitutional Court starts running on the date of delivery of the decision challenged by the revision-appeal. In order not to fail to comply with the prescribed time limit to file an appeal while waiting for a decision on the revision-appeal (to prove as an ineffective legal remedy), the appellant is to file, along with a revision-appeal, an appeal with the Constitutional Court within a time limit of 60 days from the date of delivery of the decision having been challenged by a revision-appeal. In case the Constitutional Court decides to examine the appeal pending the proceedings on the revision-appeal, the Constitutional Court shall, given the fact that the competent court's decision on the revision-appeal is not to be prejudged, reject the appeal as "premature". However, the Constitutional Court shall state in the reasoning of its decision that the appellant, in any case, is entitled to file a new appeal within a time limit of 60 days from the date of delivery of the decision on the revision-appeal regardless of whether the revision-appeal will be rejected or dismissed.[3028] After delivery of

3026 U 22/01, paragraph 15.
3027 U 107/03, paragraph 31.
3028 AP 106/06, paragraph 9.

a decision on the revision-appeal (unfavourable for the appellant), the appellant is to file a new appeal which shall, in strictly formal terms, be considered as a request for review of the initially adopted decision which the Constitutional Court took in respect of the admissibility of the appeal (whereby the initial appeal was declared premature) in accordance with Article 70 of the Rules of the BiH Constitutional Court. The Constitutional Court shall grant this request, since the decision on the revision-appeal shall be treated as "new legal circumstances", it shall quash the initially adopted decision and shall take a new decision on the merits of the case. This extremely complicated "legal gymnastics" does not enhance legal certainty. In order for the appellant to rely on and place trust in certain legal remedies (*Zurechenbarkeit*), the latter should be declared either effective or ineffective, and certainly not conditionally effective. At any rate, such practice of the Constitutional Court does not correspond to the practice of the European Court according to which the legal remedy in such a situation would be declared ineffective due to its questionable effectiveness.[3029] Accordingly, the revision-appeal provided for by Article 237, paragraph 3 of the Civil Procedure Codes of the Federation of BiH and Republika Srpska should be considered an ineffective legal remedy, which is the reason why an appeal should be filed against the previous decision. If the appellant, in addition to the appeal with the Constitutional Court, files a revision-appeal and if the revision-appeal is rejected or dismissed in a decision on the revision-appeal, that decision cannot affect the proceedings conducted before the Constitutional Court in respect of the appeal, since the final appellant's legal situation remains unchanged. In such a case where the outcome of the revision-appeal is favourable for the appellant, then the appeal does not make sense any more, since the appeal renders ineffective the legal situation challenged by the revision-appeal. This fact could be treated as "changed legal circumstances" within the meaning of Article 16, paragraph 8 of the Rules of the BiH Constitutional Court, on which grounds the appeal could be declared inadmissible.

Effective legal remedies – and thereby considered mandatory in terms of their exhaustion, according to the practice of the Constitutional Court – are, *inter alia*, as follows:

- Civil action against an employer for social security contributions-related debt;[3030]
- Action against SFOR for violation of the right to freedom and security under Article 5 of the ECHR;[3031]

3029 Compare, *Van Oosterwijck vs. Belgium*, 6 November 1980, Series A no. 40, paragraph 27.
3030 AP 1338/05, paragraph 9.
3031 AP 696/04, paragraph 37.

- Plea for immunity from criminal prosecution;[3032]
- Request for judicial protection in minor offence proceedings;[3033]
- Appeal against the judgment of the Entities' Constitutional Courts;[3034]
- Action for the establishment of legal standing to be sued in the enforcement procedure;[3035]
- Complaint with the Commission for Implementation of Article 143 of the Labour Law of the Federation of Bosnia and Herzegovina for unreasonable length of the proceedings;[3036]
- Complaint with an employer within a time limit of 15 days after delivery of the decision to terminate employment relations or awareness of a violation of the rights under an employment contract.[3037] Exception: in the event that the employer places the employee on layoff status without serving a related-layoff decision on the employee, such a state is regarded as unlawful and the time limit does stop running as long as it lasts;[3038]
- Detainee's complaint with the prison warden for prison conditions;[3039]
- Appeal against a new judgment in the proceedings in which the Constitutional Court already quashed the challenged judgment and referred the case back for new proceedings and decision.[3040]

(b) Human Rights Chamber

CH/00/3835 Gavrilović	20051115
CH/00/3921 Mogdan	20060607
CH/00/4020 Solex d.o.o. Kakanj *et al*.	20050905
CH/01/6694 Supur	20076026
CH/01/7057 Radić 6 June 2005	20050606
CH/01/7228 Đurčić	20070508
CH/01/7255 *et al.*-Planinić	20070605
CH/01/7374 Vidaković	20070605
CH/01/7481 Ibrišimović	20070605

3032 U 59/01; AP 322/04, paragraph 12.
3033 U 16/01, paragraph 12; U 20/02, paragraph 13.
3034 AP 684/04, paragraph 7.
3035 AP 1111/04, paragraph 30 *et seq.*; AP 967/05, paragraph 23 *et seq.*; AP 1431/05, paragraph 47 *et seq*.
3036 AP 1354/05, paragraph 8.
3037 AP 333/05, paragraph 8; AP 567/04, paragraph 33; AP 592/05, paragraph 9.
3038 AP 311/04, paragraph 27 *et seq*.
3039 AP 1237/05, paragraph 6.
3040 AP 1298/05, paragraph 15.

CH/01/8125 *et al*. Demirović *et al*.	20051214
CH/01/8380 Lazarević	20051107
CH/02/10599 Praštalo	20060605
CH/02/10618 Šašić	20060911
CH/02/10625 Janjić 11 January 2006	20060111
CH/02/10720 Kopljak	20060116
CH/02/11278 G. M.	20051003
CH/02/11296 Bečić	20061219
CH/02/11297 Turanović 19 December 2006.	20061219
CH/02/12346 Merdanović	20051214
CH/02/12353 Salkić	20061219
CH/02/12357 Tulumović	20061219
CH/02/12432 Kečalović	20060206
CH/02/8227 Mihajlović	20050704
CH/02/9597 Hasanbašić	20050705
CH/02/9905 *et al.* Dabić *et al.*	20051215
CH/02/9953 *et al*. Kolovrat *et al.*	20060306
CH/03/13385 Vraneš	20060605
CH/03/13515 Jelić	20070227
CH/03/13697 Grozdanić	20060605
CH/03/14138 Čilić	20061219
CH/03/14149 Marjanović	20061220
CH/03/14262 Šljamo	20051215
CH/03/14284 H. B.	20051106
CH/03/14354 Musić	20061219
CH/03/14506 Josipović	20050307
CH/03/14606 Mrkajić	20060801
CH/03/14730 Janičić	20070207
CH/03/15191 Tomić	20060703
CH/96/17-A&M Blentić	19971105
CH/96/21-A Čegar	19970411
CH/96/29-A&M Islamic Community of BiH, Banja Luka Mosques Related Cases	19990611
CH/96/30-A Damjanović	19970411
CH/97/41-A&M Marčeta	19980406
CH/97/42-A&M Eraković	19990115
CH/97/45-A&M Hermas	19980218
CH/97/51-A&M Stanivuk	19990611
CH/97/58-A&M Onić	19990212
CH/97/59-A&M Rizvanović	19980612
CH/97/62-A&M Malčević	20000908
CH/97/80-A Veličkovski	19990611
CH/97/93-A&M Matić	19990611
CH/98/1171-A&M Čuturić	19991008
CH/98/1493-A&M Pilipović	20030606
CH/98/645-A&M Blagojević	19990611

CH/98/663-A Mutapčić	19981015
CH/98/756-A&M Đ. M.	19990514
CH/98/800-A&M Gogić	19990611
CH/98/892-A&M Mahmutović	19991008
CH/99/2050 R. J.	20060510
CH/99/2763 Halilović	20051107
CH/99/3196-A&M Palić	20010111

i. Introduction

The Human Rights Chamber's interpretation and application of the requirements of exhausting legal remedies were subject to the dynamic developments of social and political circumstances in the period of its activities. In the beginning, when the number of received applications was small, and when the national legal system was flagrantly inefficient, the Human Rights Chamber announced that it would apply a "proactive" approach to the obligation of exhausting legal remedies in favour of the applicant. When it comes to the applicants' omissions, the Human Rights Chamber interpreted and applied the exhaustion of remedies requirement very generously. In any case, this related to its discretion. Such an approach was particularly present in cases of particular importance for the protection of human rights and fundamental freedoms.[3041] At the end of its term, the Human Rights Chamber received a certain amount of criticism for interpreting the principle of exhausting legal remedies too generously, which made it responsible for a backlog of cases. The Chamber was aware of that risk long before. In its 1999 year-end report, the Chamber pointed out that, taking into account its legal nature, the Chamber was a subsidiary judicial body and that it could deal with a case only after preliminary preparation and "filtration" by the ordinary courts. Nevertheless, in practice, the Chamber was often considered as the only efficient judicial institution, since distrust of the national legal system was present among the general population. This was the reason why, contrary to the principle of exhausting legal remedies, individuals directly addressed the Chamber in order to seek legal protection.[3042] At the final stages of their activities, the Human Rights Chamber and the Human Rights Commission within the Constitutional Court of BiH ended up tightening the criteria relating to this principle and came closer in that manner to the practice of the BiH Constitutional Court.

3041 Compare, for example, CH/01/7674-A, paragraph 24 relating to the claims for severance pay under Article 143 of the Labour Law.

3042 *HRC*, 1999, p. 12.

ii. Basic elements of the principle of exhaustion of legal remedies

In deciding the issue as to whether an applicant has exhausted his/her legal remedies or not, the context of human rights protection must be taken into account. Consequently, the rule in question must be interpreted with a certain degree of flexibility and without unreasonable formalism. The rule in question is not absolute in nature, nor can it be applied automatically. Quite the contrary, the circumstances of each particular case must be taken into account so that not only is the issue of the formal existence of certain legal remedies in the national legal system important, but also their functioning in the general legal and political context. Finally, the personal situation of the applicant is also significant.[3043] Furthermore, according to the generally recognised rules of international law, there may be special circumstances exempting the applicant from his/her obligation to exhaust all of the domestic legal remedies at his/her disposal. Moreover, the obligation of exhausting legal remedies may not apply to the cases where the constitutional practice involves a reiteration of actions or the adoption of administrative acts that are inconsistent with the ECHR, whereas the State authorities tolerate them. This, in fact, makes the proceedings useless or ineffective.[3044] The fact that a decision on one or more of the legal remedies used has not been taken yet and that theoretically the applicant has other legal remedies at his/her disposal (for example, a request for the reopening of proceedings) does not create obstacles to the adoption of a decision on the merits if the circumstances of a particular case indicate that the applicant's prospects of success seem hopeless because he/she has been trying for too long to exercise his/her rights and there is no justified or apparent reason for non-adoption of a final decision by the courts.[3045] It is not possible to surrender the exhaustion of legal remedies if the used legal remedy does not have a suspensive effect.[3046] Also, it is not possible to surrender the exhaustion of legal remedies if an action brought before the administrative court for silence of the administration implies considerable costs of the proceedings.[3047] If a person is deprived of liberty "*incommunicado*", that person cannot be considered to

3043 CH/96/17-A&M, paragraph 19; CH/96/29-A&M, paragraphs 142-143; CH/97/45-A&M, paragraphs 71, 73, both in conjunction with quotation from ECtHR, *Akdivar et al. v. Turkey*, 16 September 1996, Reports 1996, paragraph 69, with further reference; CH/99/3196-A&M, paragraph 46; CH/98/800-A&M, paragraph 45; CH/98/892-A&M, paragraph 73; CH/99/2050, paragraph 16; CH/00/3921, paragraph 36.

3044 CH/97/45-A&M, paragraph 71, ECtHR, *Akdivar et al. v. Turkey*, 16 September 1996, Reports 1996, paragraph 67.

3045 Compare, CH/97/42-A&M, paragraph 40 *et seq.*; CH/97/62-A&M, paragraph 48 *et seq*.

3046 For a *vice-versa* case, see: CH/98/1184-A, paragraph 7.

3047 CH/98/645-A&M, paragraphs 43-45.

have an effective legal remedy at his/her disposal.[3048] A claim for damages for unlawful detention does not have to be the subject of consideration by the national authorities if they constantly reject appeals filed for unlawful detention.[3049] Moreover, legal remedies cannot be considered effective if the competent courts continuously – by referring to the practice of higher-instance courts – decline their jurisdiction to take a decision on the case.[3050] Because of this the Chamber did not request the Islamic Community of Bosnia and Herzegovina to formally address the competent administrative authorities of the Republika Srpska before addressing the Chamber in order to obtain a permit to rebuild a number of destroyed mosques. The reason was that the religious facilities were being destroyed with a discriminatory aim on the one hand, and that, meanwhile, the competent administrative authorities were allocating such construction sites to other persons or entities or were allocating them for unlawful use or for use other than the one designated or their purpose was changed in urban development plans. Finally, a proof of ineffectiveness of legal remedies – requirements for the issuance of building permits for the reconstruction of religious facilities – is the fact that the Chamber's order with regard to a building permit in the case of a destroyed mosque in Banja Luka was ignored.[3051]

Therefore, the remedies available to an applicant must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness.[3052] A *de lege lata* non-existing legal remedy does not have to be exhausted. Up to 8 May 2002, when the Court of Bosnia and Herzegovina commenced, there had been no effective legal remedy for damages caused by the administrative acts of the institutions of Bosnia and Herzegovina.[3053] From that moment on, the applicants, before addressing the Chamber, had to address the Court of Bosnia and Herzegovina and request compensation for damage regardless of the fact that this Court did not have a typical civil department.[3054]

The case of *M.J.* (CH/96/28) is an evident example of a legal remedy existing in theory but that is ineffective in practice. In particular, the applicant, who blindly trusted the functionality of the national legal system, tried 7 times

3048 CH/96/1-A [IV. Reasons for the Chamber's Decision], paragraph 3.
3049 CH/00/3880-A&M, paragraph 100.
3050 CH/98/659 *et al.*-A&M, paragraph 152.
3051 Compare with CH/98/1062-A&M, paragraph 73 *et seq.*; CH/99/2656-A&M, paragraphs 72-76.
3052 CH/98/800-A&M, paragraph 45; CH/97/93-A&M, paragraph 55 *et seq.*; CH/98/892-A&M, paragraph 73; CH/00/3642-A&M, paragraph 47 in connection with the ECtHR, *Vernillo v. France*, February 1991, Series A no. 198, paragraph 27.
3053 Compare with CH/01/7248-A&M, paragraphs 156, 158.
3054 CH/00/3835, paragraphs 49, 52.

without success to have enforced a final and legally binding decision, wherein the eviction of an unlawful occupant of the apartment was ordered. Even when a new unlawful occupant of the apartment replaced the former one, the applicant tried to have a new enforceable decision.[3055] On the other hand, the cases relating to double occupancy rights (occupancy right holder and temporary occupant of the apartment) were questionable, where an effective legal remedy was available in theory to the applicants, who had filed claims for repossession of apartments based on new law provisions, but in practice they did not comply with the prescribed preclusive time limitations. The Chamber held that these remedies were ineffective in practice.[3056]

The applicant must submit evidence proving that he/she has exhausted all legal remedies, or that the legal remedies have not been exhausted through no fault of the applicant.[3057] In case of doubt, the applicant must clarify in the civil proceedings that he/she had acted lawfully, *i.e.*, that the legal remedies were not exhausted through no fault of the applicant.[3058] If the effectiveness of a legal remedy is questionable, the applicant must try to exercise his/her rights before the competent authority.[3059] Arbitrary claims about the ineffectiveness of a legal remedy,[3060] lack of confidence in the competent authorities,[3061] or the applicant's claim about his/her personal unfavourable financial situation does not absolve the applicant from the exhaustion of a legal remedy.[3062] If a legal remedy is filed with a non-competent authority, the applicant cannot claim that he/she has exhausted the legal remedy if the law does not oblige the non-competent authority to refer the case to the competent authority.[3063] If the applicant claims that the legal remedy provided for by law is not effective, generally or in his/her case, in practice the applicant must submit evidence in support of such a claim. Likewise, if the applicant fails to pursue a legal remedy within the time limit as stipulated by the law, the legal remedy shall not be considered as having been exhausted unless the applicant submits evidence proving that the exhaustion of the legal remedy is related to a strict time limit which renders it ineffective in practice.[3064]

3055 For the foregoing details, compare on p. 517; see also CH/97/51-A&M, paragraph 42.
3056 CH/97/58-A&M, paragraph 39 *et seq*.
3057 CH/02/8227, paragraph 11; CH/03/14606, paragraph 11; CH/03/14138, paragraph 15.
3058 CH/02/10625, paragraph 11; CH/01/7374, paragraph 15 *et seq*.
3059 CH/03/13515, paragraph 15 *et seq.*; CH/02/10599, paragraph 25.
3060 CH/03/13697, paragraph 13.
3061 CH/02/12353, paragraph 11.
3062 CH/02/12357, paragraph 15; similarly, as to the proceedings costs, see CH/01/7057, paragraph 8.
3063 CH/03/14284, paragraph 11; CH/02/11278, paragraph 12.
3064 Compare with CH/98/638-A&M, paragraph 58 *et seq*.

The respondent party bears the burden of proving that there was a remedy available to the applicant both in theory and in practice at the relevant time and offered reasonable prospects of success (in terms of effectiveness).[3065] If the respondent does not submit evidence proving this, the application shall be declared admissible even in the case of doubt.[3066] However, if the respondent party submits evidence proving that there is an effective legal remedy, the applicant must submit evidence proving that he/she has exhausted it, or that the legal remedy was not effective or for some reason, inadequate or ineffective in the particular circumstances, and that therefore there was no requirement to pursue it.[3067] Finally, the Chamber may reject an application for non-exhaustion of legal remedies, without observations submitted by the respondent party, if the applicant fails to provide information as to why he/she considers an available legal remedy as being ineffective.[3068] The reason to conclude that a legal remedy is ineffective exists if an institution, despite indications of the failures by representatives of the State and damage caused to the applicant, fails to take any action or fails to undertake necessary investigation or fails to provide protection in any other manner. In such circumstances, the burden of proof remains with the respondent party to show what has been done in response to the scale and seriousness of the matters complained of.[3069] Therefore, by way of example, if a police officer alleges that other police officers maltreated him, such allegations constitute a *de facto* report to the competent institution. If, in addition to this, marks of physical injuries are visible on his body, the officers of the Ministry of Interior must consider such allegations as a reason for opening *ex officio* an investigation including the competent public prosecutor’s office. An example of such failure to act is the case where State authorities remain completely passive towards numerous allegations of bad conduct or damage caused by State agents, *i.e.*, the circumstances which may absolve the applicant from the request to exhaust domestic remedies[3070]

> In Case No. CH/97/45-A&M, the Chamber established that the situation in Bosnia and Herzegovina shortly after the armed conflict had still been marked by physical insecurity, and the central authority had not been

3065 CH/96/3-A [IV. Law], CH/96/21-A, paragraph 12; CH/99/3196-A&M, paragraph 48; CH/97/45-A&M, paragraph 71 with a quotation from ECtHR, *Akdivar et al. v. Turkey*, 16 September 1996, Reports 1996, paragraph 68; CH/98/756-A&M, paragraph 63; CH/98/892-A&M, paragraph 75.

3066 Compare with CH/96/21-A, paragraph 14; CH/96/30-A, paragraph 19; CH/97/69-A&M, paragraph 36.

3067 CH/96/21-A, paragraph 12 and CH/97/45-A&M, paragraph 71, both in connection with a quotation referred to in ECtHR, *Akdivar et al. v. Turkey*, 16 September 1996, Reports 1996, paragraph 68.

3068 CH/98/663-A, paragraph 19.

3069 CH/96/21-A, paragraph 12 and CH/97/45-A&M, paragraph 71.

3070 CH/98/1374-A&M, paragraph 115.

> capable of ensuring the protection of rights when it came to the conduct of the public authority at the lowest level. Therefore, the applicant's case was not an exception. Taking this into account, the Federation had to submit evidence proving, for example, through a certain number of court cases, that legal remedies available in theory were effective in practice. This time they fell short of doing so.[3071] In Case No. CH/98/1027 et al.-A&M, the Chamber additionally established that at the time when the applicant had been deprived of liberty, the relevant legal provisions were declared invalid, while the Federation's conduct did not leave an impression that the remedies available in theory were effective in practice.[3072]

The exhaustion of legal remedies must be substantive. The complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the ECHR should have been used.[3073]

Otherwise, if there is not an effective legal remedy available under the domestic legal system, which is to be exhausted by the applicant, the Human Rights Chamber is entitled, in the event that a violation of the rights and freedoms laid down in Annex 6 has been found, to order payment of compensation for damage for the established violation. Therefore, a claim for monetary compensation or other relief for violation of human rights and freedoms should form an integral part of the decision whereby the violation has been established, not a separate claim.[3074]

iii. Exception to the obligation of legal remedies exhaustion

According to the case-law of the Chamber, extraordinary legal remedies must be exhausted.[3075] In the beginning, the "revision" was treated as one of such extraordinary legal remedies,[3076] whilst at a later point the Chamber regarded it as an effective legal remedy if the applicant had a legal right to pursue it.[3077] If the applicant also intends to avail himself/herself of the right to revision under

3071 Paragraph 74 *et seq*.
3072 Paragraphs 81, 117 *et seq*.
3073 Compare, CH/97/45-A&M, paragraph 71, with a quotation referred to in ECtHR, *Akdivar et al. v. Turkey*, 16 September 1996, Reports 1996, 66 with further reference.
3074 Compare, CH/96/21-M, paragraph 25; CH/97/41-A&M, paragraph 49; CH/99/2150, Decision on the Request for Review, paragraph 98.
3075 CH/98/1324-A&M, paragraph 54.
3076 CH/98/1366-A&M, paragraph 59; CH/99/2177-A&M, paragraph 94.
3077 CH/02/11297, paragraph 10 *et seq*.

Article 237, paragraph 3 of the Civil Procedure Code of the Federation of BiH or Republika Srpska, the application filed with the Human Rights Commission within the BiH Constitutional Court shall, in any event, be admissible.[3078] The legal remedies regarded as ineffective are the following ones: request for protection of lawfulness under the Criminal Procedure Code and Civil Procedure Code,[3079] request for an extraordinary review of judgment under the Criminal Procedure Code or Law on Administrative Disputes,[3080] request for protection of constitutional rights and freedoms under Article 65 of the Law on Administrative Disputes of the Republika Srpska,[3081] or request for renewal of the proceedings under the Criminal Procedure Code[3082] or Law on Minor Offence Procedure[3083] and the extraordinary legal remedies in which admissibility is at the discretion of the competent authority, such as the pardon plea.[3084]

Furthermore, not all legal remedies against violations of human rights and fundamental freedoms which are "covered" by the law are regarded as effective legal remedies. In the Case *Šećerbegović et al.*, the Chamber absolved the applicant from the obligation to exhaust all legal remedies, since the violation of his rights directly derived from the law. Therefore, if the applicant had instituted proceedings, the courts could not have taken a decision other than that as provided for by law. There was no practice involving an individual challenging a law before the ordinary courts, and the respondent party did not present any case pointing to the effective exhaustion of legal remedies in practice.[3085] However, the applicant did not avail himself of an appeal, *i.e.*, action for silence of the administration (administrative authorities before which the applicant had initially tried to effectuate his claim). However, the chances are quite slim that the administrative court in administrative dispute proceedings would take a favourable decision for the applicant, since the applicant would have to face the problem of constitutionality of the law. It is very difficult to keep a balance between, on the one hand, the necessity to ensure effective legal protection and the obligation of "exhausting domestic legal remedies" in each particular case and on the other hand other numerous factors in a "young" legal state implying the exhaustion of legal remedies. However, cases such as *Šećerbegović et*

3078 CH/02/9953 *et al*., paragraph 19, in which the Commission followed the case-law of the BiH Constitutional Court.
3079 CH/01/7488-A&M, paragraph 80; CH/02/12432, paragraph 19.
3080 Compare, CH/99/2177-A&M, paragraph 94; CH/03/14506, paragraph 10.
3081 Compare, CH/99/2177-A&M, paragraph 94.
3082 Unless the request is granted (CH/02/9597, paragraph 14 *et seq*.) or the applicant was tried *in absentia* (CH/02/10618, paragraph 22).
3083 CH/02/12346, paragraph 15; CH/00/4020, paragraph 15.
3084 Compare, CH/97/59-A&M and *HRC*, 1999, p. 5.
3085 CH/98/706 *et al.*-A&M, paragraph 73 *et seq*.

al. provide an opportunity to request the lower instance courts for didactical reasons to directly apply the ECHR as stipulated by the BiH Constitution. If the ordinary courts were not forced to face unconstitutional laws in cases they deal with, they would not have an opportunity to acquire knowledge of the significance of human rights and freedoms within the "new" legal system in Bosnia and Herzegovina, which have a priority over all other legal acts. In the *Pilipović* case, the Chamber followed this practice: despite a number of decisions of the Supreme Court of the FBiH whereby it quashed lower-instance decisions in order to point to the lower-instance courts' obligation to apply the ECHR as a priority, the Chamber, taking account of the linguistic meaning of that provision, did not want to oblige the applicant to exhaust further legal remedies.[3086] Finally, such cases, in an "ideal atmosphere of rule of law", end up before the Constitutional Court through a "referral" of the case (Article VI.3(c) of the BiH Constitution) or through an appeal (Article VI.3(a) of the BiH Constitution). However, one may say that the Chamber , with the aim of providing prompt and effective legal protection in such cases, used to take final decisions by itself and, thus, deprived the national institutions of the possibility of facing the problem of providing an effective legal protection. The practice relating to this was slightly adjusted at a later point. In a case, the Human Rights Commission within the BiH Constitutional Court rejected an application as inadmissible on the grounds that the before addressing the Chamber the applicant should have requested that the relevant law provisions be interpreted by the ordinary courts in accordance with the ECHR standards.[3087]

The third group of ineffective legal remedies includes the cases implying an unreasonable length of proceedings. If the applicant claims that the length of proceedings are excessive, the Chamber is entitled to take a decision on the merits with regard to the allegations. The fact that the proceedings are still pending does not create an obstacle to take a decision on the merits, since the allegations on such a violation cannot be redressed by the adoption of a final decision by the ordinary authorities/courts.[3088]

iv. Special cases of effective and ineffective legal remedies

The following classification of effective legal remedies is particularly present in the case-law of the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court:

3086 CH/98/1493-A&M, paragraph 81 *et seq*.
3087 CH/99/2763, paragraph 17 *et seq*.
3088 CH/99/2386-A&M, paragraph 26.

- If there is an *arguable claim* that a person has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.[3089] It is no less important that such an investigation should be capable of clarifying the whereabouts or fate of the victim. This thorough and effective investigation has to be initiated by the competent authorities of their own motion as soon as it is apparent that such a disappearance has taken place;[3090]

- As to **labour disputes**, particularly those that ended in the termination of employment relations during the armed conflict or immediately after the armed conflict, it was difficult for the applicants to submit evidence of the existence or pursuance of effective legal remedies. The following guidelines were determined through the case-law: in the event that an employee has not received a decision on the termination of employment relations, but he/she was informed of it in another manner (including the reasons for dismissal), the time limit to pursue a legal remedy starts running from the date when the reasons for employment termination were brought to his/her knowledge.[3091] In the event that the employee has no information on the termination of his/her employment relations, he/she has an obligation immediately after returning to the pre-war place of residence to contact his/her employer within the time limit prescribed by the law, to get information on his/her employment status and, if necessary, institute appropriate proceedings for protection of his/her employment rights.[3092] Consequently, the employee must actively contribute to the legal protection of his/her rights before addressing the Human Rights Chamber and Human Rights Commission within the BiH Constitutional Court;[3093]

- **Claim for compensation for damage** in case of death of a close relative either within criminal proceedings or, isolated, within civil proceedings;[3094]

- **Inheritance** claim before instituting civil proceedings against debtor, a presumed heir of the deceased;[3095]

3089 CH/99/3196-A&M, paragraph 47, in connection with the ECtHR, *Kurt v. Turkey*, 25 May 1998, Reports 1998-III, paragraph 140.

3090 CH/99/3196-A&M, paragraph 47 *et seq*.

3091 CH/03/14354, paragraph 40 *et seq*.

3092 CH/03/14149, paragraph 33 *et seq*.

3093 CH/01/7228, paragraph 15 *et seq.*; CH/01/7255 *et al*., paragraph 26 *et seq.*; CH/01/6694, paragraph 14 *et seq*.

3094 CH/99/2150, Decision on the Request for Review, paragraph 96 *et seq*.

3095 CH/01/8380, paragraph 14 *et seq*.

- **Challenge of administration silence** in the first-instance proceedings regardless of whether an administrative authority fails to take a decision or responds on request in an informal letter;[3096]
- **Action to establish the legal standing** to be sued in the enforcement proceedings in the event such objection has been raised;[3097]
- Prisoner's complaint with the prison warden **about prison conditions**;[3098]
- **Claim for disturbance of possession** of a returnee whose possessions are again unlawfully occupied following his/her return;[3099]

The following legal remedies were regarded as ineffective by the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court:

- **If ill-treatment was committed by the police officers** (Article 3 of the ECHR), a civil action against the perpetrators in order to obtain compensation for damages suffered or adequate civil proceedings against such persons are not regarded as effective legal remedies which the injured person must exhaust.[3100] Such action or criminal report against responsible police officers does not satisfy the standards under Article 3 of the ECHR in terms of being capable of providing redress in respect of the applicant's complaints, but a legal remedy against the government must be at the injured party's disposal, which is capable of helping him/her in the given situation, *i.e.*, ceasing mistreatment.[3101] Claims for compensation for damage must also include compensation for non-pecuniary damage such as compensation for the fear and pain suffered and harm suffered to honour and reputation.[3102] If an injured party has a justified fear that a possible complaint for mistreatment by police officers during detention could provoke further mistreatment, such person is not obliged to file a complaint to the prison warden; he/she does not have to avail himself/herself of that legal remedy.[3103] Disciplinary proceedings against police officers may be regarded as an effective legal remedy only if the disciplinary body conducts

3096 CH/02/9905 et al., paragraph 117.
3097 CH/03/14262, paragraph 33 *et seq*.
3098 CH/03/15191, paragraph.
3099 CH/01/7481, paragraph 23.
3100 Compare, CH/98/1374-A&M, paragraph 119, in connection with the ECtHR, *Pine Valley Developments Ltd et al. v. Ireland*, 29 November 1991, Series A no. 222, paragraph 48; CH/00/3642-A&M, paragraph 52.
3101 Compare, CH/00/3642-A&M, paragraph 53.
3102 Compare with CH/98/1374-A&M, paragraph 123; CH/99/1900&1901-A&M, paragraph 53.
3103 CH/00/3642-A&M, paragraph 49 in connection with ECtHR, *Aksoy v. Turkey*, Application No. 21987/93, 19 October 1994, DR 79-A, p. 71.

the proceedings in a professional and impartial way. If it is lacking and if it remains unclear whether the injured party has been given a real and legal possibility of challenging the results of the disciplinary proceedings before the competent authorities, such legal remedies do not have to be exhausted and such an objection cannot be raised;[3104]

- Appeal against the first-instance decision whereby a labour dispute was referred to the **Commission for Implementation of Article 143 of the Labour Law,**[3105] or the appeal against the first-instance judgment whereby an action against a decision of this Commission has been rejected as inadmissible.[3106]

d. Manifest ill-foundedness

(a) Constitutional Court

AP 152/05 "UNIS TELEKOM" d.d. Mostar	20051220
AP 156/05 T. K.	20050518
AP 690/04 Mirvić	20051013
U 10/99 Knežević	20001231 *OG of BiH*, No. 36/00
U 11/00 B. Š.	20000818
U 15/99-2 Zec	20010612 *OG of BiH*, No. 13/01
U 19/00 Kemokop *et al*.	20010504
U 2/99 Kadenić & Mesinović	19991122 *OG of BiH*, No. 20/99
U 46/01 Marka	20020615 *OG of BiH*, No. 13/02
U 53/02 O. S.	20030725
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 7/01 Kušec	20010803 *OG of BiH*, No. 19/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 03/00
U 8/00 Hreljić	20000818 *OG of BiH*, No. 22/00
U 8/97 Zunđa	19980406 *OG of BiH*, No. 05/98

According to Article 16, paragraph 2 of the Rules of the BiH Constitutional Court, an appeal is admissible if it is not "manifestly (*prima facie*) ill-founded".

As to constitutional appeals, the German Federal Constitutional Court relies on Article 93.I No. 4a of the Basic Law and Article 90.I of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz – BverfGG*) according to which the person who files a constitutional appeal must claim that one of his/her fundamental rights has been violated (*Grundrechte*) or similar rights (particularly those related to the procedural guarantees). Relying on this rule,

3104 CH/00/3642-A&M, paragraph 50 *et seq*.
3105 CH/02/10720, paragraph 50.
3106 CH/03/14730, paragraph 29.

the Federal Constitutional Court has developed a hypothesis that the challenged act must be such as to affect directly and immediately the appellant's position safeguarded by the Constitution.[3107] The claim concerning a violation must be sufficiently substantiated. The part relating to the description of facts must indicate a conclusion that the violation of rights might have at least taken place. All of this must be presented with a certain degree of accuracy and clarity. Therefore, the German Constitutional Court sets high standards with regard to claims about an alleged violation and its substantiation.

Likewise, one can find similar formulations in the early case-law of the Constitutional Court, which indicated that a constitutional appeal is admissible only if a violation of constitutional rights is deemed possible. In Cases Nos. U 6/98, U 2/99, U 7/99-1, and U 15/99, the Constitutional Court noted that appeals "may give rise to possible issues" under Article 6, paragraph 1 of the ECHR, or they "give rise to the issues" under Article 6, paragraph 1 of the ECHR.[3108] Furthermore, in Case No. U 7/99-1, the Constitutional Court noted that "it cannot be excluded that the possible violation of the aforesaid provisions has occurred on the discriminatory grounds". In another case, the appeal was rejected without further reasoning, since the challenged decision was not in violation of the appellant's constitutional rights.[3109] Occasionally, the Constitutional Court only notes that the appellant claims that his/her rights that are safeguarded by the Constitution and the ECHR have been violated and that the Constitutional Court therefore has jurisdiction over the appeal.[3110]

Article 16, paragraph 2 of the applicable Rules of the BiH Constitutional Court requires an **overall examination** of well-foundedness. If after the examination of the case it turns out that there is a doubt that the alleged violation of the constitutional rights has occurred, the appeal shall be rejected as inadmissible without further reasoning. This requirement for taking a decision on the merits therefore overlaps in substantive terms with the issue of *ratione materiae*[3111] admissibility of the appeal.

A violation of constitutional rights may only be alleged by a person who claims that his/her legal position is affected. The interference with the constitutional rights must be directed against the appellant. Allegations about the violations of constitutional rights of third persons are therefore not admissible.[3112] In

3107 *Schlaich/Korioth*, 2001, paragraph 207.
3108 Compare also with AP 156/05, paragraph 9; AP 690/04, paragraph 14.
3109 U 8/97.
3110 U 10/99; U 8/00; U 11/00; U 19/00, paragraph 12; U 7/01, paragraph 12.
3111 In this connection, compare with the reasoning relating to the *ratione materiae* competence.
3112 U 46/01, paragraph 5; compare also with AP 152/05, paragraph 8.

Case No. U 2/99, the Constitutional Court concluded that the heir of the occupancy right holder which had lived in a joint household with the deceased occupancy right holder could have the legal standing to file an appeal. As the appellant was authorised to transfer the occupancy right to herself based on the relevant law, she also had a legal interest in instituting proceedings to repossess the apartment after the death of the occupancy right holder. Unlike the aforesaid case, the Constitutional Court has concluded that a group of parliamentarians were not authorised to file an appeal under Article VI.3(b) of the BiH Constitution in order to provide protection for a third person.[3113] The fact that the aforesaid group was authorised to file a request under Article VI.3(a) of the BiH Constitution was irrelevant insofar are the legal standing to file an appeal was concerned.

(b) Human Rights Chamber

CH/00/4033-A Hodžić	20030506
CH/00/4036 *et al*. Krsmanović	20051107
CH/00/4820-A Čajević	20001012
CH/00/5480-A&M Dautbegović	20010706
CH/02/8781 Vareškić	20070626
CH/03/13490 Pljevaljčić	20060801
CH/96/21-M Čegar	19980406
CH/96/30-A Damjanović	19970411
CH/97/34-A&M Šljivo	19980910
CH/97/59-A&M Rizvanović	19980612
CH/97/68-A Simić	10080910
CH/98/1373-A&M Bajrić	20020510
CH/98/192-A Vujmilović	19981014
CH/99/2117-A Herak	20010906

As to the case-law of the Chamber, it is not easy to make a difference between the *ratione materiae* competence and the issue as to whether an application is manifestly ill-founded to such an extent that it renders consideration of the merits superfluous. The Chamber decides this based on an overall examination of well-foundedness; it considers whether a request "gives rise to relevant issues" within the ambit of the ECHR.[3114] Similarly, *ratione materiae* competence depends on the issue as to whether a violation complained of in the application is possible at all. In practice, in the strict sense of the word, this does not relate to a prerequisite or condition for taking a decision on the

3113 U 37/01, item III/2.
3114 Compare with, for example, CH/96/21-A, paragraph 16; CH/96/30-A, paragraph 18: "*raise (serious) issues*."

merits. The aim of this condition is to save overall and demanding examination of the well-foundedness of the application if there are no *prima facie* elements pointing to the violation of the rights of the applicant.[3115] Yet, the applicant does not have to specify the rights he/she considers to have been violated.[3116] However, the applicant must substantiate his/her application in a satisfactory manner. If the applicant fails to do so, particularly if the Chamber requests it explicitly, his/her application shall be rejected as inadmissible, since it is *prima facie* ill-founded.[3117] If there is uncertainty about the subject matter of the case, the Chamber cannot establish the violation of the safeguarded rights and freedoms.[3118]

If the well-foundedness of the objection to the admissibility of the application cannot be clarified completely, the Chamber accepts that the application is admissible but transfers the extensive consideration of such objections to its consideration of the merits of the application.[3119] The mere initiation of proceedings for the pardon or mitigation of a sentence does not render the application with the Chamber against the death penalty manifestly ill-founded, since the outcome of these proceedings remains uncertain.[3120] Similarly, the Chamber is not prevented from taking a decision on the merits and establishing a violation of the applicant's rights because the death penalty has been pronounced, although there are legal amendments aimed at replacing the death penalty with a prison sentence. The reason for this is the fact that it is not certain when such amendments are to enter into force.[3121]

The application is also *prima facie* ill-founded, and thus inadmissible, if the violation does not exist anymore. This is the case if the applicant reaches a court[3122] or out-of-court[3123] settlement whereby the action is regarded as withdrawn.[3124]

3115 Compare with CH/97/34-A&M, paragraph 61 in connection with ECtHR, *Airey v. Ireland*, 9 October 1979, Series A no. 32, paragraph 18.

3116 *Gemalmaz*, 1999, p. 304.

3117 CH/97/68-A, paragraph 25; CH/98/192-A, paragraph 8; CH/99/2117-A, paragraph 41; CH/00/4033-A, paragraph 7; CH/00/4820-A, paragraph 9; CH/00/5480-A&M, paragraph 103.

3118 CH/98/1373-R, paragraph 32.

3119 CH/97/59-A&M, paragraph 48 *et seq.*, in connection with CH/96/45-A&M, paragraph 23.

3120 CH/97/59-A&M, paragraph 56 *et seq*.

3121 *Ibid*., paragraph 58.

3122 CH/00/4036 *et al*., paragraph 24.

3123 CH/03/13490, paragraph 12 *et seq*.

3124 CH/02/8781, paragraph 11 *et seq*.

e. Lack of jurisdiction of the Constitutional Court

AP 1337/05 Huskić	20060912
AP 142/04 Z. H.	20040304
AP 154/04 F. B.	20041027
AP 1568/06 Ivanović	20060912
AP 1882/05 Rujević	20051013
AP 2386/05 Zečević	20060509
AP 2529/05 Memić	20060509
AP 253/05 Bugari	20060223
AP 256/05 Dostanić	20051220
AP 2635/06 NGO "Exercise and protection of the rights of disabled persons 92/95" *et al*.	20061020
AP 513/04 A. H.	20041027
AP 83/06 Čović	20060209
AP 867/04 E. J.	20050118
CH/01/8608 *et al*. Rakočević *et al*.	20050706
U 21/01 Krivić	20011012 *OG of BiH*, No. 25/01

According to Article 16, paragraph 4, item 1 of the applicable Rules of the BiH Constitutional Court, an appeal is inadmissible if the Constitutional Court is not competent to take a decision. Neither the former version of the Rules of the Constitutional Court, nor Annex 6 of the GFAP provide for such a provision. In addition to the aforementioned provision, item 9 of the same paragraph (*ratione materiae* competence), item 10 (*ratione personae* competence) and item 11 (*ratione temporis* competence) also relate to the lack of competence of the Constitutional Court. The three last provisions can be found in Article VIII.2(c) of Annex 6, relating to the compatibility of the application with Annex 6.

Article 16, paragraph 4, item 1 of the Rules of the BiH Constitutional Court is therefore a general provision which could be used to take decisions on those cases relating to the Constitutional Court's incompetence that are not regulated in other provisions. This could be the cases of the Constitutional Court's incompetence *ratione loci*. The practice of the Constitutional Court indicates that the Constitutional Court made use of Article 16, paragraph 4, item 1 of the Rules of the BiH Constitutional Court for resolving the cases relating to the Constitutional Court's incompetence in which another reason for incompetence was *explicite* provided for by the Rules. In that way, the dividing line between the provisions relating to the incompetence became too thin and, very often, unclear.

One of these groups includes the appeals *ratione personae* incompatible with the BiH Constitution. The appeals are inadmissible, since the author of the

challenged act cannot have the status as respondent party before the BiH Constitutional Court, *i.e.*, it does not have the legal standing to be sued. So, in the case of an appeal filed against a decision of the Human Rights Chamber, the Constitutional Court declared itself incompetent by referring to Article 16, paragraph 2, item 1 of the Rules of the BiH Constitutional Court, although the Constitutional Court's lack of competence in such cases is clearly stipulated by item 12.[3125] Furthermore, in a case relating to the appeal against a decision of the Ombudsman of the Federation of BiH, the Court referred to item 1, although the Court was obviously not competent *ratione personae*.[3126] The same applies to the decisions of the Real Property Claims Commission established in accordance with Annex 7, either at the time when that body was composed of international members,[3127] or at the time when it was exclusively composed of national members.[3128]

The next group of cases, which are incorrectly included in item 1 of this provision, are the cases in which the appellants have failed to exhaust effective legal remedies.[3129]

Finally, in certain cases relating to the *ratione materiae* competence of the Constitutional Court, the Constitutional Court referred to item 1, since the case did not relate to the protection of any constitutional right or freedom, or the nature of the challenged act was not such as to require an examination (Article VI.3 (b) related to *judgments*).[3130]

f. Withdrawal of appeal or application

AP 116/04 Y. A.	20040723
AP 1460/05 Ličina	20060727
AP 383/04 M. LJ.	20040929

According to Article 16, paragraph 4, item 3 of the applicable Rules of the BiH Constitutional Court, an appeal is inadmissible if the appellant has withdrawn his/her appeal (similar to Article VIII.3(a) of Annex 6). Unlike the Constitutional

3125 AP 513/04 (paragraph 3 *et seq.*); similarly, in connection with the Human Rights Chamber: AP 867/04, paragraph 3 *et seq*.

3126 AP 256/05, paragraph 5.

3127 U 21/01, paragraph 12 *et seq.*; AP 142/04, paragraph 8 *et seq*.

3128 AP 1882/05, paragraph 7; as to the opposite practice of the Human Rights Commission within the BiH Constitutional Court, see also: CH/01/8608 *et al*., paragraph 111 *et seq*.

3129 Compare with AP 253/05, paragraph 5; AP 2386/05, paragraph 4; AP 1337/05, paragraph 7; AP 2529/05, paragraph 4; AP 154/04, paragraph 5.

3130 AP 83/06, paragraph 5; AP 2635/06, paragraph 6; AP 1568/06.

Court, which rejects the appeal as inadmissible, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court terminate the proceedings. From the procedural and technical point of view, it would be correct to terminate the proceedings, since if the appeal is withdrawn, it does not exist anymore and the proceedings cannot be conducted either. Cases to which item 3 has been applied are first of all those in which the appellants "understood" that they were not the victims of an alleged violation of human rights and freedoms, but that a third persons was.[3131] The second frequent group of cases includes those in which the appellants reached settlements during the proceedings,[3132] and the third frequent group includes the cases in which the appellants have simply failed to allege the reasons for withdrawal.[3133]

g. *Res iudicata*, anonymity and other cases of pending proceedings (*lis alibi pendens*)

AP 100/06 Rakić	20060314
AP 1237/05 Vujanović	20060509
AP 281/04 S. M.	20050217
CH/00/3738-A Jandrić	20001012
CH/01/8569 *et al*.-A&M Pašović *et al*.	20031107
CH/96/29-A&M Islamic Community of BiH, Banja Luka Mosques Related Cases	19990611
CH/97/48 *et al.*-A&M Poropat *et al*.	20000609
CH/97/78-A Dubravac	19990910
CH/97/93-A&M Matić	19990611
CH/98/1066-A&M Kovačević	20010511
CH/98/1366-A&M V.Č.	20000309
CH/98/377 *et al.*-A&M Đurković *et al*.	20031107
CH/98/489 *et al*. M. Đ. *et al.*	20060507
CH/98/575-A&M Odobašić	20010511
CH/98/698-A&M Jusufović	20000609
CH/98/756-A&M Đ.M.	19990514
CH/99/1946-A S. K.	19990707

Res iudicata exists if the Constitutional Court has already decided the issue concerned, and the statements and evidence from the appeal do not provide sufficient grounds for a new decision (Article 16, paragraph 4, item 6 of the applicable Rules of the BiH Constitutional Court). Article VIII.3(b) of Annex 6 provides for a similar provision.

3131 AP 116/04, paragraph 4.
3132 AP 1460/05, paragraph 4.
3133 AP 383/04, paragraph 4.

The ideal of the *res iudicata* mechanism does not fully correspond to Article 16, paragraph 4, item 6 of the applicable Rules of the BiH Constitutional Court, since this admissibility requirement does not necessarily imply a decision on the merits. Furthermore, in case of an adoption of an **admissibility decision** whereby an appeal is rejected on formal grounds, since it does not meet the admissibility requirements (exhaustion of legal remedies[3134] or expiry of the time limit[3135]), a new appeal shall be declared inadmissible if the appellant does not submit new evidence or allegations which would justify the adoption of a new decision by the court.

According to **Article VIII.2(b) of Annex 6**, the Chamber "shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure or international investigation or settlement." Besides, according to Article VIII.2(d), the Chamber may "reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the General Framework Agreement." This provision incorporates three different and partially overlapping prerequisites for taking a decision on the merits. These prerequisites serve first of all to economise the proceedings and to avoid taking contradictory decisions by parallel judicial institutions or judicial institutions at the same level.[3136]

Article VIII.2(b) of Annex 6 contains the **res iudicata** principle. According to this principle, the Court cannot decide a case about which another competent court has already taken a legally binding decision on the merits. However, if the matter is the same, but the parties to the proceedings are not the same, the Chamber is not prevented from taking a new decision on the merits.[3137]

Taking into account that Article VIII.2(b) of Annex 6 relies on Article 35.II(b) of the ECHR, the Chamber refers to the relevant case-law of the European Commission for Human Rights according to which the case relates to a "substantially same application" if, *inter alia*, the applicant in the other international procedure was identical to the one that had introduced a petition to the European Commission for Human Rights.[3138] The case is substantially the

3134 AP 281/04, paragraph 4; AP 100/06, paragraph 5.
3135 AP 1237/05, paragraph 7.
3136 CH/98/1066-R, paragraph 43.
3137 Compare with CH/98/1066-R, paragraph 40; CH/98/377 *et al*.-A&M, paragraph 216; as to the exceptions, see Case CH/98/489 *et al*., paragraph 792 *et seq*.
3138 CH/97/48 *et al*.-A&M, paragraph 149, in connection with EComHR, *Council of Civil Service Unions et al. v. the United Kingdom*, Application No. 11603/85, 20 January 1987, DR 50, p. 228 [236-237].

same if the Chamber already examined another case with the identical parties to the proceedings, subject and claim within the application.[3139] "Another procedure or international investigation or settlement" mentioned in Article VIII.2(b) of Annex 6 should be interpreted in light of the whole of Article VIII, particularly Article VIII.2(d), according to which the "procedure" includes the procedure provided for by different international mechanisms than that provided for by the GFAP. Consequently, this provision does not include the proceedings before the Ombudsman under Annex 6.[3140]

The principle of **dispute elsewhere pending** (*lis alibi pendens*), which is incorporated in Article VIII.2(d) of Annex 6 prevents the person who has already initiated proceedings against a legal person from initiating identical proceedings against the same person before another court.[3141] Unlike Article VIII.2(b), which directly prevents the Chamber, in fulfilling the prescribed requirements, from taking a decision on the merits ("*shall*"), item (d) makes it possible for the Chamber to have a certain margin of appreciation ("*may reject or defer*").[3142] Furthermore, Article VIII.2(d), unlike item (b), relates to the body provided for by the GFAP; accordingly, in each particular case, the Chamber has the discretion to freely decide whether it shall take a parallel decision, which means an additional decision to that already taken by another body.[3143]

In the event that another commission within the meaning of Article VIII.2(d), (for example, CRPC) has already taken a decision, the case is not **"pending" any more** within the meaning of that provision, so that the Chamber is not prevented any more from taking a decision on the merits.[3144] A report of the Ombudsman under Annex 6 contains in fact recommendations which are not legally binding upon the parties, nor can they become final and legally binding. If the parties do not comply with the recommendations, the Ombudsman may forward its report to the High Representative and Presidency of the signatory parties of Annex 6 for further action. The Ombudsman may also initiate proceedings before the Human Rights Chamber, but this action is discretionary.[3145]The reports of the Ombudsman do not prevent the Chamber itself from taking a decision on the same matter.[3146] In the cases where the same applications were brought both before the Chamber and the CRPC, *i.e.*, the Commission to Preserve National Monuments (Annex 8), the Chamber declared the application

3139 CH/99/1946-A, paragraph 9; compare also with CH/00/3738-A, paragraph 10.
3140 CH/98/1066-R, paragraph 42.
3141 CH/98/1066-R, paragraph 45.
3142 CH/98/1066-R, paragraph 46.
3143 CH/98/1066-R, paragraph 47.
3144 CH/98/575-A&M, paragraph 38.
3145 CH/98/1066-R, paragraph 41.
3146 CH/98/1066-R, paragraph 48.

admissible if the application was different from that brought before the CRPC, *i.e.*, the Commission to Preserve National Monuments.[3147]

Neither Article VIII.2(b), nor Article VIII.2(d) of Annex 6 prevent the Chamber from taking a decision on the merits if the Commission to Preserve National Monuments from Annex 8 of the GFAP orders preservation of a building and adopts adequate recommendations, since this Commission is not competent to establish violations of human rights and freedoms, nor did this Commission, insofar as the case of the *Ferhadija* Mosque is concerned, deal with these issues.[3148] This also applies to the responsible bodies for the search of missing persons process under Article V of Annex 7 of the GFAP, the State Commission for Missing Persons and the International Committee of the Red Cross.[3149]

Unlike the ICTY, the Chamber does not decide on individual criminal responsibility for serious violations of humanitarian law, but it decides issues as to whether one or more signatory Parties to Annex 6, after the entry into force of the agreements on human rights and fundamental freedoms, is/are responsible for violations of human rights and fundamental freedoms guaranteed by that Agreement. In theoretical terms, even if the overlap of jurisdictions could occur, as to, for example, whether the parties violated the so-called *Rules of the Road*,[3150] or whether a court was not independent and impartial, the jurisdictions are completely different and serve a different purpose.[3151]

h. Prohibition of abuse of appeal

AP 13/03 B. K.	20040404
AP 2060/05 Suljagić	20060920
U 157/03 “Kemokop” d.o.o. Dugo Selo *et al*.	20041109

The appeal is inadmissible if the appellant abused his/her right to file an appeal (Article 16, paragraph 4, item 7 of the applicable Rules of the BiH Constitutional Court). Article VIII.2(c) of Annex 6 provides for a similar provision. The Constitutional Court uses this provision with precaution if the case relates, for example, to a manifestly insolent appeal or the appeal of a “wanton litigant”. In any event, the appeals which were declared inadmissible

3147 CH/97/78-A, paragraph 10; CH/97/93-A&M, paragraph 53 *et seq.*; CH/98/756-A&M, paragraph 59 *et seq.*; CH/96/29-A&M, paragraph 138 *et seq*.; CH/98/698-A&M, paragraph 73. As to the Annex 8-Commission, compare details in: *Küttler*, 2003, p. 61 *et seq.*, p. 114, and *Berg*, 1999, p. 33 *et seq.*, with reference to the Strasbourg case-law.

3148 CH/96/29-A&M, paragraph 138 *et seq*.

3149 CH/01/8569 *et al*.-A&M, paragraph 66.

3150 See more on p. 209 *et seq*.

3151 CH/98/1366-RR, paragraph 19 *et seq*.

for these reasons would have been declared inadmissible for other reasons too. So, for example, there is an abuse of the right to file an appeal if the appellant files the appeal despite the fact that the lower-instance court quashed (in favour of the appellant) the challenged judgment and referred the case back for new proceedings and decision, whereas the appeal is not filed with the aim of protecting the appellant's constitutional rights and freedoms but with the aim of attacking and offending the court. Such an appeal cannot lead to a practical and constructive aim.[3152] Likewise, there is an abuse of the right to file an appeal if the appellant challenges a decision which the Human Rights Commission within the BiH Constitutional Court took in the appellant's favour.[3153] In another case, the appellant filed a new appeal after the Constitutional Court had taken a decision instead of initiating proceedings before the Supreme Court of the Republika Srpska, as it was ordered to do by the Constitutional Court.[3154]

i. As to the changed legal circumstances

AP 1010/04 D. K.	20050518
AP 275/05 Miljkić	20060627
AP 290/05 Stegić	20060209
AP 3/05 S. S.	20051220
AP 376/04 DOO "Karavan" Sokolac	20050412
AP 621/04 R. H.	20050412
AP 921/04 Lj. B.	20041217
AP 946/05 Berisalić	20060509

According to Article 16, paragraph 4, item 8 of the applicable Rules of the BiH Constitutional Court, an appeal is inadmissible if the violation of human rights and fundamental freedoms no longer exists , or if the appellant receives adequate redress. The Constitutional Court refers to item 8 of these Rules in cases where the Court itself, before taking a decision on the merits, removes the unconstitutional state through, for example, a temporary measure,[3155] by quashing the unconstitutional norm,[3156] or if, during the proceedings before the Constitutional Court, a judgment is rendered or enforced so that the unconstitutional state has been removed.[3157]

3152 AP 13/03, paragraph 7 *et seq*.
3153 AP 2060/05, paragraph 11 *et seq*.
3154 U 157/03, paragraph 13 *et seq*.
3155 AP 921/04, paragraph 11; AP 1010/04, paragraph 8.
3156 AP 376/04, paragraph 9 *et seq.*; in that case, the appellant must again address the ordinary courts in order to have a decision in his/her favour based on the changed legal circumstances.
3157 AP 275/05, paragraph 9 *et seq.*; AP 621/04, paragraph 6 *et seq.*; AP 290/05, paragraph 10; AP 946/05, paragraph 5; AP 3/05, paragraph 8.

j. *Ratione materiae* competence

AP 121/04 E. P.	20050412
AP 190/02 J. R. S.	20040723
AP 424/04 "Marka"	20041130
AP 700/05 Stanić	20060412
AP 73/02 Sanas	20030725
CH/01/6662-A Huremović	20010406
CH/01/7674-A Kunić and 108 Others	20011109
CH/03/14599 Drašković	20060206
CH/03/14599 Drašković	20060206
CH/97/113-A Kovač	19980722
CH/97/67-A&M Zahirović	19990708
CH/98/1366-A&M V.Č.	20000309
CH/98/1387-A S. K.	19990514
CH/98/660-A&M Babić	20010208
CH/98/681-A Alagić	19981015
CH/99/2117-A Herak	20010906
CH/99/2150-R Unković	20020510
U 10/99 Knežević	20001231 *OG of BiH*, No. 36/00
U 104/03 K. M.	20040419
U 11/00 B. Š.	20000818
U 15/99-2 Zec	20010612 *OG of BiH*, No. 13/01
U 19/00 Kemokop *et al*.	20010504
U 2/99 Kadenić & Mesinović	19991122 *OG of BiH*, No. 20/99
U 53/02 O. S.	20030725
U 6/98 Jurić	19991122 *OG of BiH*, No. 20/99
U 7/01 Kušec	20010803 *OG of BiH*, No. 19/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No. 03/00
U 8/00 Hreljić	20000818 *OG of BiH*, No. 22/00
U 8/97 Zunđa	19980406 *OG of BiH*, No. 05/98

According to Article 16, paragraph 4, item 8 of the applicable Rules of the BiH Constitutional Court, an appeal is inadmissible if it is incompatible *ratione materiae* with the BiH Constitution. It is necessary to examine in each particular case whether the issue raised in the appeal is included in the realm of protection of one of the constitutional rights and freedoms or other constitutional rights.[3158]

As to the **appellate potential** (*Rügepotential*), which means those constitutional norms of which the appellant may generally complain, Article VI.3(b) points to a significant difference between Article 93.I No. 4a of the German Basic Law and Article 34 of the ECHR. In any case, the appellate potential is not limited to human rights and fundamental freedoms under the BiH Constitution; Article

3158 AP 424/04, paragraph 4; see reasoning concerning a manifest ill-foundedness.

VI.3(b) of the BiH Constitution relates, "over issues under this Constitution". The appellant, by putting the matters like this, may in principle make an allegation of a violation of any norm, except a norm under the Constitutions of the Entities.[3159] One can find no restrictions in the Constitutional Court's case-law developed so far. As to the appeals, the appellate potential, set so broadly, ultimately does not go far beyond the appellate potential which the Federal German Court has developed by interpreting the notion of general freedom of action (Article 2.I of the Basic Law) through its case-law.[3160] Based on the case-law, the individual is authorised to file a constitutional appeal, *i.e.*, the constitutional appeal is admissible only if it finds a violation of constitutional rights and freedoms such as those enumerated in Article 93.I no.4a of the Basic Law. However, the general freedom of action is also included in these rights. It is violated every time the law puts limitations on basic rights or similar rights *or, generally, the Constitution*, if it violates the principle of the legal state or provisions relating to distribution of responsibilities relating to legislative activity. The same principle applies to constitutional appeals against court judgments, although the Federal Constitutional Court is limited to the examination of arbitrariness (*Willkürverbot*).[3161]

As to the application's compatibility *ratione materiae* with human rights and freedoms (Annex 6), the Chamber, in accordance with Article VIII.2(c), considers, *inter alia*, whether the alleged violations are possible at all, and thus whether the alleged right is guaranteed by Annex 6 and whether it is included in the field of protection of a right.[3162] Taking into account the relatively different appellate potentials of the rights and freedoms under the BiH Constitution and Annex 6, it is possible that an application is incompatible *ratione materiae* with Annex 6, whereas appeals with the Constitutional Court, with the same complaints, are admissible *ratione materiae*.[3163] The Constitutional Court and the Human Rights Commission within the BiH Constitutional Court have set different standards so that the scope of application of human rights and fundamental freedoms is different, which has a direct impact on the issue of *ratione materiae* admissibility of certain appeals.[3164]

3159 Compare with U 53/02, paragraph 27.

3160 Decision of the German Federal Constitutional Court (BVerfGE) 80, 137, and *Schlaich/Korioth*, Bundesverfassungsgericht, paragraph 211 *et seq.*, with further reference.

3161 A critical outline at *Schlaich/Korioth*, Bundesverfassungsgericht, paragraph 214 with further reference.

3162 Compare with CH/99/2117-A, paragraph 43; CH/99/2150-R, paragraph 93 *et seq*.

3163 See AP 190/02, paragraph 21 relating to the right to citizenship.

3164 Compare, with regard to a decision to cease to hold judicial office, CH/03/14599, paragraph 20 *et seq.*: Article 6 of the ECHR is not applicable. Contrary to this, U 104/03, paragraph 21 *et seq*.; AP 121/04, paragraph 10; AP 700/05, paragraph 8: Article 6 of the ECHR applicable.

A person who files an application before the Human Rights Chamber or the Human Rights Commission within the BiH Constitutional Court must allege a violation of the rights guaranteed by Annex 6 of the GFAP. In case he/she fails to do so, the application is in principle inadmissible *ratione materiae*. Nevertheless, in examining possible violations of Annex 6, the Chamber does not consider itself bound by the allegations of the parties to the proceedings, but, in the event there are precise reasons, it also examines *propio motu* possible violations of the rights other than those alleged by the applicant. The admissibility of the application is precisely determined in this respect.[3165]

The allegations of violations of rights and freedoms provided for by international mechanisms for the protection of human rights and freedoms, which are indicated in the Appendix to Annex 6 of the GFAP (for example, the rights to work, just remuneration, adequate housing situation, etc.), without an applicant's allegations of discrimination in enjoyment of these rights, are always incompatible *ratione materiae* with Annex 6.[3166]

k. The subject of dispute

(a) Constitutional Court

AP 1603/05 Lončar	20061221
U 1/00 Kurtović	20010203
U 1/97 Decision of the Tuzla-Podrinje Canton	19980406 *OG of BiH*, No. 05/98
U 10/97 BiH Bar Association	19980406 *OG of BiH*, No. 05/98
U 106/03 I. D.	20041027
U 12/01 Nikolić	20020803 *OG of BiH*, No. 20/02
U 12/97 Saračević-Šutković	19980914 *OG of BiH*, No. 17/98
U 12/99 Kurtović	20010203
U 14/00-1 Manojlović	20011230 *OG of BiH*, No. 33/01
U 14/99 Hotel "Bosna"	20001231 *OG of BiH*, No. 36/00
U 15/00 Delić	20010416 *OG of BiH*, No. 10/01
U 16/96 Rulebook of the Primary School of the Catholic School Centre in Sarajevo	20000226
U 19/00 Kemokop *et al.*	20010504
U 2/97 Decision on the Conditions for the Exercise of Activities and Programmes of Special Social Interest	19980406 *OG of BiH*, No. 05/98

3165 CH/97/61-A, paragraph 19; CH/98/1214-A, paragraph 9; CH/98/1366-A&M, paragraph 57.

3166 CH/98/681-A, paragraph 12; CH/97/113-A, paragraph 10; CH/98/1387-A, paragraph 12 *et seq.*; CH/97/67-A&M, paragraph 115 *et seq.*; CH/01/6662-A, paragraph 4; CH/01/7674-A, paragraphs 20-22; CH/98/660-A&M, paragraph 24 *et seq.*; CH/98/1366-A&M, paragraph 57; see also "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.

U 20/00 Kušec	20010710 *OG of BiH*, No. 17/01
U 22/01 Kušec	20011230 *OG of BiH*, No. 33/01
U 22/02 R. B.	20030627
U 23/00 Vrhovac	20010416 *OG of BiH*, No. 10/01
U 24/00 Avdić	20020130 *OG of BiH*, No. 01/02
U 29/00 "2-year rule"	20010416 *OG of BiH*, No. 10/01
U 29/96 Rulebook on Application of Tax Rates	19980511 *OG of BiH*, No. 07/98
U 3/01 Čajavec Holding *et al*.	20020312 *OG of BiH*, No. 05/02
U 3/96 Decision on the Conditions for the Exercise of Activities and Programmes of Special Social Interest	19980406 *OG of BiH*, No. 05/98
U 3/97 Muicipal Court of Sanski Most	19980406 *OG of BiH*, No. 05/98
U 34/01 Bičakčić	20010821 *OG of BiH*, No. 20/01
U 36/00 Kurtović	20010203
U 38/01 Law on Pension and Disability Insurance	20020829 *OG of BiH*, No. 24/02
U 39/00 Assembly of the Herzegovina-Neretva Canton	20010926 *OG of BiH*, No. 24/01
U 4/97 Zunđa	19981112 *OG of BiH*, No. 22/98
U 40/01 Topić	20020910 *OG of BiH*, No. 25/02
U 46/01 Marka	20020615 *OG of BiH*, No. 13/02
U 5/97 Public Hospital Tuzla	19980406 *OG of BiH*, No. 05/98
U 5/99 Posavina Canton	20000131 *OG of BiH*, No. 03/00
U 58/02 MP "GRADINA", d.d. Maglaj	20030627
U 6/97 Bijedić	19980406 *OG of BiH*, No. 05/98
U 7/00 Hadžisakić	20010224 *OG of BiH*, No. 06/01
U 9/96 Property Laws	19980914 *OG of BiH*, No. 17/98

An issue closely related to the *ratione materiae* admissibility is the issue of admissibility of the subject of the appeal in legal-formal terms. According to Article VI.3(b) of the BiH Constitution, the appeal must relate to a "constitutional issue" coming from the view taken by any court in Bosnia and Herzegovina.

i. Court decision

According to Article VI.3(b), admissible subjects of dispute are in any case **judgments** of the courts in Bosnia and Herzegovina. By the term "judgment", the Constitutional Court means all types of court decisions regardless of their form, such as the court's ruling by which the court replaces an administrative act.[3167] Regardless of the fact that this interpretation is serving a purpose, it is also covered by the linguistic interpretation of this provision, since the term *judgment* does not only relate to the judgment in the narrower sense of the term but in principle to all other *court decisions.*[3168]

3167 U 15/00; U 23/00.
3168 *Dietl/Lorenz*, 2000, p. 441.

Admissible subjects of the dispute are also judgments of the constitutional courts' of the Entities.[3169] In the view of the BiH Constitutional Court, there is no comprehensible and justified reason for not considering the constitutional courts of the Entities as "courts in Bosnia and Herzegovina". Furthermore, the effectiveness of the appellate jurisdiction of the Constitutional Court would be considerably limited if an appeal could not be filed against the decisions of the Constitutional Courts of the Entities either.[3170] In Case No. U 5/99, the subject of an appeal filed by the Posavina Canton was a dispute between the Posavina Canton and the Federation. The Posavina Canton lost the case. In the proceedings before the BiH Constitutional Court, the Canton referred to the supremacy of the State Constitution over the Constitution of the Federation (Article III.3(b) of the BiH Constitution) and the "continuation of laws" under Annex II.2 and 3 to the BiH Constitution. According to Annex II.2 and 3 to the BiH Constitution, 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 (paragraph 2). The same applies to the proceedings in courts, which were pending at that moment (paragraph 3). The Constitutional Court "was hitting something beyond its target", by establishing the unconstitutionality of Article 78 of the Constitution of the Canton – it should only have established the unconstitutionality of the judgment of the Constitutional Court of the Federation of BiH. Taking this into account, the principle of prohibition of arbitrariness should apply, which is generally applicable to the review of lower-instance judgments.[3171] In Case No. U 39/00, the Constitutional Court limited its examination to the consistency of the decision of the FBiH Constitutional Court with the BiH Constitution, and did not examine the issue of to what extent the linguistic differences between the Constitution of the Canton and the FBiH Constitution are consistent with the latter one. The Constitutional Court correctly left out the consideration of the issue as to whether the linguistic differences were consistent with the BiH Constitution.

In a separate opinion, Judge *Arsović*, expressed the view that the Constitutional Court is not generally called upon to review the decisions of the constitutional courts of the Entities, since these are not the "courts" within the meaning of the BiH Constitution. Their mandate and essence differ considerably from the ordinary lower-instance courts. Therefore, the "constitutional court" is not a "court", since it cannot exist at all without the label "constitutional". Furthermore, subordinating

3169 U 5/99, U 39/00.
3170 U 5/99.
3171 Compare "7. The scope of control", p. 167.

the constitutional courts of the Entities under the control of the Constitutional Court does not correspond to the State structure of Bosnia and Herzegovina. Moreover, a judgment of the constitutional courts of the Entity cannot be in violation of the BiH Constitution, since these courts have the obligation to make decisions in accordance with the Entities' constitutions. Finally, the Constitutional Court, within its jurisdiction under Article VI.3(a) and (c) of the BiH Constitution, may uphold the BiH Constitution at a sufficient extent.

The attempt of the separate opinion to reduce the provision of Article VI.3(b) of the BiH Constitution, which is broadly conceived in linguistic terms, by the teleological interpretation fails. It also fails because of the fact that the BiH Constitution imposes an obligation on the overall State power, either at the State level or at the Entity level, to respect human rights and constitutional obligations. This "link" is an expression and indispensable prerequisite for the federal structure of the State. Taking this into account, the hypothesis that the constitutional courts of the Entities should be excluded from the term "any court in Bosnia and Herzegovina" (either under Article VI.3(b), or under Article II.6 of the BiH Constitution), is not convincing despite the respect for the particularities of that branch of judicial power.

It is difficult to find an answer to the question as to how and to which extent the Constitutional Court may declare an appeal admissible in the case of a violation of the right of access to court or a violation of the right to a fair trial within a reasonable time if there is not "a judgment of any other court in Bosnia and Herzegovina". Furthermore, the same question relates to appeals against **other acts of public authorities**, such as administrative acts or laws. According to the linguistic meaning, Article VI.3(b) of the BiH Constitution does not indicate the silence of the judicial power or authorities other than courts, or the acts of other public authorities other than judicial authorities. It seems that the wording, according to which 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", imposes limitations on the Constitutional Court in terms of confining itself to taking court decisions. Taking this into account, the term itself "appellate jurisdiction", which was chosen by the Constitutional Court, taking into account the linguistic meaning of the provisions of Article VI.3(b) is not quite correct. *Dietl/Lorenz* translates "*appellate jurisdiction*" as a competence at the appellate instance, thus making a distinction from the "*original jurisdiction*". This means that the Constitutional Court could never declare an appeal admissible and decide it if the previous lower-instance court had not decided the same matter. In other words, if a judgment is lacking, there is no "subject of the dispute". This could have double significance: on the one

hand, proceedings before the Constitutional Court could never be instituted if there was not an effective legal remedy against the act of the public authority (impossibility of access to a court), or the length of the proceedings would be unreasonably excessive; on the other hand, as to the wording "judgment of any other court in Bosnia and Herzegovina", the BiH Constitutional Court, according to Article VI.3(b) of the BiH Constitution, could never deal with the acts of administrative authorities or the constitutionality of laws.

The text which follows deals with the extent to which the Constitutional Court moved away from a strict linguistic interpretation of the provisions of Article VI.3(b) of the BiH Constitution in order to make it possible for the Constitutional Court's case-law to develop.

ii. "Silence", the courts' failure to act

Taking into account Article 6, paragraph 1 of the ECHR, the Constitutional Court has correctly extended the meaning of Article VI.3(b) of the BiH Constitution to the cases in which a court has failed to take a decision, while the appellant alleges that his/her constitutional rights and freedoms have been violated.[3172] Therefore, if a court fails to act upon a claim, *i.e.*, lawsuit, although Article 6, paragraph 1 of the ECHR imposes such an obligation on it, the lack of a judgment does not create an obstacle to addressing the Constitutional Court. Therefore, the Constitutional Court, taking into account the obligation of respecting the right of access to court (Article 6, paragraph 1 of the ECHR) and the constitutional order imposing an effective protection of human rights (Article VI.3, first sentence thereof, in conjunction with Article II.2 and 3 of the BiH Constitution), filled a clear legal lacunae in Article VI.3(b) of the BiH Constitution.[3173] By doing so, the Court further gave itself the right to have *original* jurisdiction, if it is necessary to effectively protect human rights and freedoms.

> In Case No. U 23/00, the first-instance court discontinued the court proceedings based on a general administrative act issued by the Government. The act of the Government was in fact an order to discontinue all court proceedings in the field of insurance pending a decision to resolve the issue of a legal successor. Taking into account the reasons for the discontinuation of the proceedings, the Constitutional Court did not request the appellant to exhaust also the appeal against the ruling on discontinuation of the proceedings in order to enable continuation of the proceedings. The Constitutional Court therefore considered that legal remedy to be ineffective.

3172 U 23/00.
3173 As to this term and method, see *Larenz/Canaris*, 1995, p. 191 *et seq*.

By taking this decision, the Constitutional Court satisfied the recommendations of the Venice Commission which, in respect of the obligation of transferring the competence from the Human Rights Chamber to the Constitutional Court, was an advocate of the extensive interpretation of Article VI.3(b) of the BiH Constitution..[3174] In order to maintain the same level of protection of human rights and freedoms in Bosnia and Herzegovina following the end of the term of the Chamber, the appellate jurisdiction under Article VI.3(b) of the BiH Constitution should be interpreted as giving the Constitutional Court the competence to decide a case in the event there is no court protection at a lower instance.[3175]

iii. Administrative acts

When it comes to the possibility of challenging *administrative* decisions, the Constitutional Court has adopted a clear conclusion in Case No. U 46/01: judicial and administrative decisions may be the subject of review by the Constitutional Court, if all legal remedies have been exhausted.[3176] In that particular case, the appellant, however, did not have the right to file an appeal, since she was not directly affected by the acts she challenged. The administrative acts may be challenged under Article VI.3(b) of the BiH Constitution as it also follows from *a contrario* conclusion adopted in Cases Nos. U 7/00 and U 14/00. In these decisions, the Constitutional Court quashed, in addition to the challenged administrative/judicial decisions, unconstitutional administrative acts. Therefore, the Constitutional Court considered itself competent to examine the constitutionality of the challenged acts and, if necessary, to quash them. However, a direct address to the Constitutional Court with the aim of challenging an administrative act is possible only if the appellant submits evidence proving that "he/she was not given opportunity to exhaust any effective and adequate legal remedy" before the competent authorities of the Entities, as it is provided for by Article VI.3(b) and Article 11, paragraph 3 of the applicable Rules of the Constitutional Court.[3177] In that case, the subject of the dispute before the Constitutional Court is not only the deprivation of the "right of access to a court" to challenge administrative acts, but also the act itself. An individual does not

3174 *Report of the Working Group on the Merger of the Human Rights Chamber and the Constitutional Court of Bosnia and Herzegovina Sarajevo,* 16. June 2000, CDL (2000) 47-fin, available on: <www.venice.coe.int/docs/2000/CDL(2000)047fin-e.asp>, paragraph 21 *et seq*.

3175 *Ibid*., paragraph 34.

3176 Paragraph 5.

3177 U 58/02, paragraph 16: in this decision, the Constitutional Court considered the possibility of treating the request under Article VI.3(a) of the BiH Constitution as an appeal under Article VI.3(b) of the BiH Constitution.

have to submit evidence proving that he/she has been deprived of access to a court, but only that an effective and adequate legal remedy does not exist.

iv. Laws and other norms

As to the admissibility of the appeals filed against *laws and other norms*, the Constitutional Court had taken a view on it only indirectly or in an *obiter dictum* form. As we have explained above,[3178] the Constitutional Court rejects requests of private and physical persons for abstract control (review) of constitutionality under Article VI.3(a) of the BiH Constitution without dealing with such requests under Article VI.3(b) of the BiH Constitution. Similarly, in such cases, the Constitutional Court tersely decides that there is no "judgment of a court in Bosnia and Herzegovina". However, the Constitutional Court has taken the view in an *obiter dictum* several times that it may act under its appellate jurisdiction provided for in Article VI.3(a) of the BiH Constitution only after the disputable issue has been challenged in another proceedings in which, indeed, all legal remedies have been exhausted.[3179]

This points to the fact that the Constitutional Court is not strictly limited to the court decision when it comes to the subject of disputes. The mentioned decisions could also be interpreted as obliging the appellant first to institute proceedings before the ordinary courts in cases of appeals against laws and other norms. However, it is generally known that there is no court competent to act upon an action against laws. Nevertheless, an individual could be required to reach an individual legal act based on the disputable law and norm which could be the subject of judicial proceedings. In that case, the court could be incited to institute proceedings of concrete (*incidental*) control of constitutionality under Article VI.3(c) of the BiH Constitution, or the individual could, after the exhaustion of all legal remedies, challenge the final decision before the Constitutional Court by claiming that the individual legal act is based on an unconstitutional law. The Constitutional Court would then, within the court dispute, examine the challenged law provision in accordance with the standards laid down in the BiH Constitution. In that case, Article VI.3(b) of the BiH Constitution could be understood as a special reflection of the principle of exhaustion of legal remedies and principle of subsidiarity. Unlike Article VIII.2(a) of Annex 6 of the of the GFAP relating to the Human Rights Chamber, the BiH Constitution does not stipulate the obligation of exhausting the legal remedies.

3178 For the foregoing details, see, "b. Authorised applicants, p. 684.
3179 U 3/96; U 9/96; U 16/96; U 29/96; U 1/97; U 2/97; U 3/97, relating to a decision of the Municipal Council.; U 5/97, relating to the managing board of a hospital; U 6/97; U 10/97.

This obligation can be found in Article 16, paragraph 1 of the applicable Rules of the BiH Constitution. This provision stipulates, *inter alia*, that 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". The view that the Constitutional Court must not undermine the competence of the ordinary courts in terms of remedial possibilities of legal means is behind this provision. Besides, the Constitutional Court should be given the possibility to evaluate the case based on the conducted proceedings, established facts, and legal assessments by the ordinary courts, since in any case this provides guarantees for a fair and legal decision.

It remains to examine whether the interpretation of the provisions of Article VI.3(b) of the BiH Constitution extending the scope of possible subjects of dispute to the laws, *i.e.*, would it be in conflict with Article VI.3(a) and (c) of the BiH Constitution. According to these latter ones, only certain authorities or their parts, *i.e.*, the courts, are authorised to, *inter alia*, request the Constitutional Court to review legal norms. *A contrario*, we come to the conclusion that the individuals are not "armed" with this right. Such conclusion, however, is not indispensable. Even if an individual had the right to challenge the constitutionality of norms and laws before the Constitutional Court under the appellate jurisdiction, there is a significant difference between these provisions. Based on the described principle of subsidiarity, an individual is authorised to challenge the constitutionality of a norm only indirectly, within a particular legal dispute. Only if waiting for the final decision placed an "excessive burden" on him, one may address the Constitutional Court and directly request the review of the constitutionality of the norm. Article VI.3(a) and (c) of the BiH Constitution secures to certain authorities and their parts privileged access to the Constitutional Court; that principle is generally subject to the principle of exhaustion of legal remedies and, particularly, to the principle of subsidiarity when it comes to legal norms. If we take account of this principle, a broader interpretation of the provisions of Article VI.3(b) of the BiH Constitution, which is, finally, friendly-minded towards the principle of protection of human rights, is not in conflict with other constitutional norms relating to the competencies.

In Case No. U 22/02, the appellant, referring to Article VI.3(c) of the BiH Constitution, challenged a decision of the Supreme Court of the Republika Srpska, whereby a request for a review of the constitutionality of the provisions of the Statute of the Town of Banja Luka was dismissed. Article VI.3(c) of the BiH Constitution was obviously the wrong legal mechanism. Nevertheless, the Constitutional Court considered the request as an appeal under Article VI.3(b) of the BiH Constitution. However, the reasons for admissibility of the appeal

were in a way confusing.[3180] In particular, according to the Constitutional Court's reasoning, the applicant submitted no evidence proving that the implementation of the Statute had affected her rights guaranteed by the BiH Constitution, while, at the same time, she had no possibility of availing herself of any effective and adequate legal remedy in the competent authorities of the Republika Srpska. *A contrario* conclusion would mean: if the applicant was directly affected by the implementation of the Statute, without having the possibility of availing herself of an effective and adequate legal remedy in the competent authorities of the Republika Srpska, she could challenge the constitutionality of the Statute under Article VI.3(b) of the BiH Constitution. However, the Constitutional Court of BiH has given further reasoning by stating: "In the present case, the Constitutional Court cannot consider the decision of the Constitutional Court of the Republika Srpska as an adequate and effective legal remedy nor can it consider it as a 'judgment' under Article VI.3(b) of the Constitution of Bosnia and Herzegovina, since a contrary interpretation of the rule of exhaustion of legal remedies under Article 11, paragraph 3 of the Rules of the Constitutional Court, in conjunction with Article VI.3(b) of the Constitution of Bosnia and Herzegovina, would lead to the avoidance of limitations as to the authorised persons to initiate proceedings of abstract control of constitutionality under Article VI.3(a) of the Constitution of Bosnia and Herzegovina". It thus follows that an individual in no way has the right to challenge the constitutionality of laws and other general legal acts. This contradiction, at first sight, could be resolved only by making a distinction between the abstract and concrete controls (reviews) of constitutionality: while the abstract control of constitutionality is reserved for the authorities or their parts enumerated in Article VI.3(b) of the BiH Constitution, an individual may initiate proceedings of concrete control of constitutionality under Article VI.3(b) of the BiH Constitution only if he/she is directly affected by that legal norm (legal interest), if he/she has no effective and adequate legal remedy at his/her disposal or – according to the German legal theory – if he/she is not expected to reach a final individual legal act (since that would be an excessive burden imposed for him/her) based on which he/she could directly challenge the constitutionality of the applicable norm.

In the later case-law, the Constitutional Court tried to give an answer to the question of legal possibilities for individuals in the particular court proceedings, if he/she considers that the cause of a violation of his/her constitutional rights and freedoms is directly an unconstitutional law. In Case No. U 19/00, the Constitutional Court established that the Law on Minor Offences of the Republika Srpska was not compatible with Article 6 of the ECHR, since it did not provide,

3180 Paragraph 11.

at least at one instance, an effective legal remedy within the meaning of the right to a fair trial. The result of the decision of the Constitutional Court was a referral of the case back to the Supreme Court of the Republika Srpska, which was ordered to conduct fair proceedings based directly on the standards laid down in Article 6 of the ECHR, although there were no legal grounds for it.[3181] Therefore, one may conclude that an individual has the right to raise the issue of the unconstitutionality of a norm in the proceedings so as to request the competent court/authority to directly apply the relevant provisions of the BiH Constitution in order to redress the violation of the constitutional rights and freedoms, which has not been caused by the application of the law but the law itself. The aforementioned reasoning implies the obligation for the individual to exhaust all effective legal remedies. This court practice was confirmed three years later in Case No. 106/03.[3182] However, in that case, the Constitutional Court added a further conclusion. In particular, the Constitutional Court noted that the BiH Constitution is the supreme legal act of the State,[3183] which has obligatory force not only for the administrative power as a whole, including executive power, but also the judicial and legislative powers. According to Article VI.1 of the BiH Constitution, the Constitutional Court must uphold the Constitution. When facing the problem of the inconsistency of applicable legal norms with the BiH Constitution, the competent courts have the obligation to institute proceedings for a concrete control (review) of constitutionality. In doing so, they have discretion to assess whether the law is an unconstitutional one, but they do not have discretion to decide whether they will institute proceedings before the Constitutional Court within the meaning of Article VI.3(c) of the BiH Constitution. In other words, the courts are obliged to apply the Constitution of Bosnia and Herzegovina in each particular case and, in doing so, to be mindful of the consistency of general legal acts with the supreme legal act of the State, *i.e.*, the Constitution of Bosnia and Herzegovina. In that way the courts control the lawfulness in the country, which is one of the basic functions and obligations deriving from the principle of the legal state as its inherent element (Article I.2 of the BiH Constitution).[3184] However, this additional reasoning of the Constitutional Court appears to be confusing, taking into account a previous conclusion in the same decision. In particular, taking into account the view taken by the competent court, on the one hand it is not technically feasible to decide the case directly based on the BiH Constitution (as the Court holds that the relevant law norm is not constitutional) and on

3181 Paragraph 33.
3182 Paragraph 29.
3183 Paragraph 34.
3184 Paragraph 33.

the other hand, to have an obligation to institute the proceedings of concrete control (review) of constitutionality under Article VI.3(c) of the BiH Constitution. These two possibilities exclude one another, if they are not alternative but obligatory solutions. This precise inconsistency was presented and rectified in Case No. 1603/05. In particular, the Constitutional Court decided to apply an interpretation in the spirit of legal unity so that it made clear that the ordinary courts have the obligation to apply positive legal regulations. If they have a doubt about the constitutionality of an applicable legal norm, they must, because of legal certainty, "refer the issue" to the Constitutional Court within the meaning of Article VI.3(c) of the BiH Constitution.[3185] Although the Constitutional Court did not say anything about it, one should take as a starting point the fact that the ordinary courts, during the proceedings for review of the constitutionality of a norm under Article VI.3(c) of the BiH Constitution, should discontinue the proceedings.[3186]

If nothing else, this case-law has clearly established that an individual must exhaust all legal remedies even if he/she considers that the legal grounds for his/her case are unconstitutional. It is possible that in the course of these proceedings, the proceedings of a concrete control (review) of constitutionality under Article VI.3(c) are initiated, which leads to the Constitutional Court. If it turns out that this legal way as a whole is ineffective, it remains to file an appeal with the Constitutional Court under Article VI.3(b) of the BiH Constitution, which shall decide the constitutionality of that norm as well. It is to be noted that the Constitutional Court has not clearly established yet the manner in which possible unconstitutionality would be established (in enacting a clause or only through the reasoning, with or without *ex officio* application of Article VI.3(c) of the BiH Constitution).

(b) Human Rights Chamber

When it comes to the issue of the subject of dispute (Article VIII.1 in conjunction with Article II.2 of Annex 6), the provisions relating to the jurisdiction of the Human Rights Chamber do not impose any limitations. Any action of the contracting parties of Annex 6 or their failure to act, which has led to a violation of the safeguarded rights of the applicants, may be challenged. Similarly to the Constitutional Court, there are indeed certain limitations with regard to access to the Chamber, being of a formal nature, such as the obligation to exhaust legal remedies.

3185 Paragraph 37.
3186 For the foregoing details, compare with "3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution", p. 866.

I. Competence *ratione personae* (Article 16, paragraph 4, items 5 and 10)

(a) Constitutional Court

AP 555/04 Brčko District	20041130
AP 1096/05 Omerović *et al*.	20060223
AP 1103/06 Antonić	20080513
AP 1115/07 Čehajić *et al*.	20070716
AP 1209/07 Radmilović	20070605
AP 14/06 Divković	20060412
AP 163/02 M. G.	20040929
AP 1948/05 Hodžić *et al*.	20070116
AP 2644/05 Beogradska banka	20061109
AP 2654/05 Tuzla Canton	20061020
AP 516/06 Drpljanin	20060412
AP 556/07 Radovanović	20070913
AP 710/05 V. K.	20050628
AP 928/07 Živković *et al*.	20071213
AP 96/01 Penzioni fond	20020510
U 13/01 HRC VII: Public Prosecutor's Office of the Canton of Sarajevo	Not published
U 15/04 "Muscular Dystrophy Association of the Republika Srpska" *et al*.	20041030
U 16/04 M. S.	20041030
U 29/01 Elektroprivreda BiH *et al.*	20030926
U 3/97 Municipal Court of Sanski Most	19980406 *OG of BiH*, No. 05/98
U 3&4/98 HRC I	19981112 *OG of BiH*, No. 22/98
U 4/99 Blind Persons' Association Lukavca	19990928 *OG of BiH*, No. 16/99
U 5/02 FMO – Army of the FBiH	20040121
U 5/99 Posavina Canton	20000131 *OG of BiH*, No. 03/00
U 51/01 Public Prosecutor's Office of the Canton of Sarajevo	20020910 *OG of BiH*, No. 25/02
U 7-11/98 HRC II-VI	19999615 *OG of BiH*, No. 09/99

Competence *ratione personae* requires both parties to the proceedings to have legal standing (standing to sue and to be sued). Article 16, paragraph 4, item 10 corresponds in that sense to Article VIII.2(c) of Annex 6.

The competence *ratione personae* with regard to the appellants, which means their authorization to file an appeal (the so-called standing to sue) according to Article 16, paragraph 4, item 5 of the Rules of the BiH Constitutional Court is not a visible limitation. Therefore, a decision on the merits is conditional of both items (5 and 10) which may be elaborated together.

i. Authorisation to file an appeal (standing to sue)

A frequent reason why the appeal is rejected for lack of authorisation to file an appeal under item 5 is the fact that the appellant was not a party to the proceedings before the ordinary courts so that the final court decision does not affect him/her at all.[3187] There is also a lack of authorisation to file an appeal if not only an injured party (a party to the proceedings) but also his/her representative files an appeal in his name[3188] or he/she files an appeal before the Constitutional Court without a valid power of attorney.[3189] The authorised appellant's representative must not transfer his/her power of attorney to a third person without consent given by the appellant.[3190] If the appellant dies in the course of the proceedings, the authorization for further representation ceases in principle to be in force,[3191] unless his/her successors replace him/her (Article 65, paragraph 2 of the applicable Rules of the BiH Constitutional Court).[3192]

In principle physical and legal persons have legal standing to file an appeal. By the nature of things, physical persons may refer to all constitutional human rights and freedoms under the BiH Constitution and ECHR. Legal persons may refer to those constitutional human rights under the BiH Constitution and ECHR which apply to them.

Unlike an application with the ECtHR or a constitutional appeal with the German Federal Constitutional Court, Article VI.3(b) of the BiH Constitution and the relevant provisions of the Rules of the BiH Constitutional Court do not impose any limits relating to the right to file an appeal. In this respect, according to the linguistic interpretation, this provision does not exclude the public authorities as possible appellants. The Constitutional Court's jurisprudence relating to this issue was inhomogeneous for a long time. As reasoned by the Constitutional Court in the beginning, public legal persons such as the Fund for Pension and Disability Insurance[3193] were denied the authorisation to file an appeal on the grounds that in principle the ECHR and relevant provisions of the BiH Constitution provide protection only to private physical and legal persons,

3187 AP 1209/07, paragraph 5; AP 556/07, paragraph 8; AP 1096/05, paragraph 5.
3188 AP 1115/07, paragraph 18.
3189 AP 1948/05, paragraph 12; AP 14/06, paragraph 3.
3190 AP 516/06, paragraph 3.
3191 AP 163/02, paragraph 3; AP 928/07, paragraph14.
3192 As to a contradictory case-law approach, see AP 855/04, paragraph 17, according to which it appears that the Constitutional Court took the view that a general power of attorney, signed before death, was valid after death, in terms of filing an appeal if the legal successors did not withdraw it.
3193 AP 96/01.

non-governmental organisations and associations of citizens, and not to State authorities and public institutions which perform public duties. In addition to this, State authorities and public institutions, based on Article 1 of the ECHR and Article II.6 of the BiH Constitution, have an obligation to protect human rights and fundamental freedoms of citizens. This reasoning with regard to the standing to sue was applied in the case in which the Ministry of Defence of the Federation of BiH filed an appeal[3194]

In other decisions, the Constitutional Court recognised the standing to sue of the State authorities, administrative-territorial units and public entities. In Case No. U 5/99, the Constitutional Court tacitly recognised a Canton's authorisation (the canton was represented by the Chairman of the Cantonal Assembly) to file an appeal. In particular, the Constitutional Court took a decision on the merits, and, in the "Admissibility" part of the decision, dealt only with the issue of whether the Constitutional Court of BiH had jurisdiction to review a decision of the Constitutional Court of the Federation of BiH.[3195] It may be concluded that in Case No. U 51/01 the Constitutional Court also took as a starting point the fact that the State authorities had the right to file an appeal under Article VI.3(b) of the BiH Constitution.

> In this case, the Prosecutor's Office of the Sarajevo Canton filed an appeal with the Constitutional Court against a judgment of the Supreme Court of the Federation of BiH, whereby it had decided that another court had territorial competence over a case relating to the criminal offence of war crimes against civilians, and not the court before which the Prosecutor's Office had instituted proceedings. The Prosecutor's Office took the view that any court has jurisdiction to conduct proceedings relating to the criminal offence of war crimes against civilians, regardless of the provisions of the national legislation with regard to the territorial competence. Besides, the Prosecutor's Office argued that the procedural law was violated, which the Supreme Court of the Federation of BiH confirmed but did not want to rectify the error to the detriment of the accused person. Such conduct, in the view taken by the Prosecutor's Office, was unlawful. Finally, it was stated that the Supreme Court of the Federation of BiH wanted to bring war criminals on trial before the court which would be ethnically biased. Therefore, such a decision was in violation of international criminal law, which in BiH has priority over ordinary laws. Finally, the Prosecutor's Office argued that the Supreme Court of the Federation of BiH overemphasised the scope of protection of Article 6 of the ECHR and thereby undermined the independence of the courts.

3194 U 5/02, paragraph 25.
3195 Similarly, see U 3/97, in which the first-instance court filed an appeal.

The Constitutional Court declared the appeal admissible without going into the issue of the authorisation of the Prosecutor's Office of the Sarajevo Canton to file an appeal. Therefore, it is obvious that the standing to sue was tacitly accepted in this case too. In so doing, the Constitutional Court indicates that it is aware of the fact that the State authorities enjoy constitutional rights and freedoms.[3196] However, it appears confusing when the Constitutional Court finally decides that "there can be no question of a violation [of] T. P.'s constitutional right to a fair trial under the European Convention or the Constitution" since the appeal against the judgment of the Supreme Court of the Federation was not filed by the accused but the Prosecutor's Office.[3197] Finally, the decision is quite correct. The Constitutional Court has concluded that "Article 6 of the ECHR and Article II.3(e) of the BiH Constitution protect the rights of the accused and not the public prosecutor". However, if the Constitutional Court understood it, the question arises as to why it did not reject the appeal for formal reasons, *i.e.*, for lack of standing to sue. In examining the appeal, the Prosecutor's Office did not refer to its own right to a fair trial but to an over extensive interpretation of Article 6 of the ECHR in the appellant's favour. The Prosecutor's Office therefore complained that the ordinary courts had given too much human rights protection to the accused. This is a very unusual pattern in the judicature relating to human rights. In particular, in light of the European jurisprudence on human rights, it does not correspond to the idea of protection of human rights and thus would not fall within the jurisdiction of the Constitutional Court, since the sole motive for protection of human rights is to protect individuals against violations of human rights and freedoms by the State. A contrary situation in which a State authority, through an excessive and purposeless protection of human rights, deprives an individual of the right to a fair trial, to its own detriment and to the detriment of the general welfare, under normal circumstances, is not known. Nevertheless, the Prosecutor's Office argued that such judicial abuse of human rights served to achieve aims with no legal recognition. Therefore, it finally required the Constitutional Court to review the lawfulness of the conduct relating to the standards laid down in the Constitution. In addition to a violation of international criminal law and the independence of judiciary, the Prosecutor's Office complained about the abuse of safeguarded human rights in criminal proceedings. In that case, the Constitutional Court was not called upon to establish, as it was in a usual situation, minimum human rights, but rather maximum human rights and to prohibit an extensive interpretation of these rights to the detriment of the general welfare. Equal treatment of all perpetrators of criminal offences and protection of the legal state could be mentioned as the general welfare in this case.

3196 Paragraph 28.
3197 Paragraph 29.

Thus “the magic placed on human rights” disappears. The appeal under Article VI.3(b) of the BiH Constitution does not correspond completely to the usual individual appeal according to the German or Strasbourg “pattern”, but it equalises with the **constitutional review**. The Constitutional Court reviews, under Article VI.3(b) of the BiH Constitution, the consistency with the BiH Constitution in any possible direction: formal and substantive constitutional law, general constitutional principles, protection of human rights and freedoms, but more than that, it examines the issue as to whether these rights have been violated. Such broadly conceived authorisation to file an appeal could make sense in a case in which it is not possible to find another manner (or the options are lacking) to rectify arbitrary decisions manifestly taken to the detriment of prevailing public interests. So, for example, in case of an arbitrary acquittal, there is the possibility for the relatives of the murdered person to claim that the murdered person’s right to life has been violated or that their own rights have been violated.[3198] However, if there is not a private appellant who has an interest in challenging the arbitrariness of the acquittal before the Constitutional Court, such a judgment would remain in force if the requirements for the reopening of criminal proceedings to the detriment of the acquitted person have not been fulfilled. However, the legal requirements for the reopening of criminal proceedings under Article 328 of the Criminal Procedure Code of BiH are strictly formulated so that they do not cover the arbitrariness of the decision-making procedure. Given such circumstances, an appeal of the Prosecutor’s Office could make sense in order to protect the general public’s trust in the functionality of the judiciary, and the legal order would not be called into question. Finally, a request to quash an unfair decision could be explained by the application of the principle of the rule of law.

In other cases the Constitutional Court rejected appeals filed by the Co-Chair of the Council of Ministers of Bosnia and Herzegovina and the Public Attorney’s Office of Bosnia and Herzegovina against two decisions of the Human Rights Chamber, but only because the State official failed to allege certain objections in the proceedings before the Human Rights Chamber.[3199] The issue of authorization to file an appeal was not raised. In Cases Nos. U 7/98-U 11/98, in which appeals were filed by the Co-Chairman of the Council of Ministers of Bosnia and Herzegovina and the Public Attorney’s Office of the Federation of BiH and, at a later point, in Case No. U13/01, in which the Attorney’s Office of the Sarajevo Canton filed an appeal against decisions of the Human Rights Chamber, the Constitutional Court rejected all of the appeals without dealing with the issue of lack of legal standing to file an appeal. The Constitutional

3198 As to the examples, see p. 197 *et seq*.
3199 U 3&4/98.

Court declared itself generally incompetent to review the constitutionality of the decisions of the Human Rights Chamber.[3200] In these decisions, the Constitutional Court did not yet clarify the authorization of the State authorities and the State itself to file an appeal under Article VI.3(b) to file appeals under Article VI.3(b) of the BiH Constitution. It may be recognised, to say the least, that the right to appeal under Article VI.3(b) cannot be limited systematically to private appellants. In a case relating to an appeal filed by the *Blind Persons' Association Lukavac* against a ruling of the Cantonal Court, the Constitutional Court started from its jurisdiction to deal with the case and, thus, from the authorisation of a private-legal "association of citizens" to file an appeal, unless the brief reasoning of the Constitutional Court had to be interpreted in such a manner that the Constitutional Court did not deal at all with the issue of the appellant's standing to sue.[3201]

The Decision in Case No. AP 39/03 finally clarified the situation so that the Constitutional Court gave the State, other administrative-territorial units, State authorities and entities of public law the authorization to file appeals under Article VI.3(b) of the BiH Constitution. The Constitutional Court gave reasons for this extension of the standing to sue by stating that the linguistic meaning of the BiH Constitution did not exclude the aforementioned entities, which was the reason why the constitutional protection must go beyond the protection provided for by the ECHR system. If the Constitutional Court had not made it possible for the State authorities to file an appeal, this would have constituted a reduction in its appellate jurisdiction provided for by Article VI.3(b) of the BiH Constitution. The State authorities are parties to a number of judicial proceedings so that Article VI.3(b) entitles them to file appeals with the Constitutional Court, since the said Article of the Constitution in no way distributes constitutional rights according to the nature of the parties to the proceedings.[3202] Consequently, access to the Constitutional Court within the meaning of Article VI.3(b) of the BiH Constitution is secured to the State and other administrative-territorial units, State authorities and entities of public law.[3203]

Such an interpretation of Article VI.3(b) of the BiH Constitution should be given support. Unlike Article 93.I, item 4 of the Basic Law and Article 90.I of the Law on the Federal Constitutional Court, Article VI.3(b) of the BiH Constitution does

3200 For the foregoing details, see "m. Particularly important: There are no judicial proceedings before the Constitutional Court after proceedings have already been held before the Human Rights Chamber and vice versa", p. 764.

3201 U 4/99.

3202 AP 39/03, paragraphs 13-15.

3203 Indirectly, the Brčko District: AP 555/04, paragraph 6 *et seq.*; the Government of the Entity and municipal authority: AP 17/05, paragraph 7; the Canton: AP 2654/05, paragraph 7.

not require an allegation of a violation of human rights and freedoms to be made, but it deals with "*constitutional issues*". Therefore, it is not about the question of whether human rights have been violated, nor is it a question about the standing to sue in this respect. Limitations on the authorisation to file appeals, which the Constitutional Court has developed with regards to human rights, are therefore not indispensable in terms of the BiH Constitution. An objective consideration of the linguistic meaning of Article VI.3(b) of the BiH Constitution leads to the conclusion that the Constitutional Court is not competent to decide all legal constitutional issues only if the proceedings are initiated by private physical persons and legal persons but also if the proceedings are initiated by other persons regardless of whether they have a legal public character.

Taking this as a starting point, it remains to examine whether there are other circumstances, if not by the linguistic meaning of Article VI.3(b) of the BiH Constitution, for which this provision should be interpreted as limiting the authorisation of certain persons to file appeals. According to the teleological interpretation, those who are holders of such rights should be the only ones that can make allegations of violations of human rights and freedoms. Accordingly, physical persons may refer to all rights under the BiH Constitution and the ECHR. Legal persons may refer to those rights which belong to them by the nature of things. It is true that the BiH Constitution does not provide for any provision which is similar to Article 19.III of the Basic Law. However, the applicable content of a right derives from the nature of the right. Consequently, a legal person cannot complain of the prohibition of torture, but it can complain of a violation of property rights. There are cases where it is not easy to establish whether and to what extent a right applies to legal persons. Moreover, the question arises as to whether private persons can refer to the constitutional provisions other than those guaranteeing human rights and freedoms. It is a question of the admissibility of the case rather than a question of having the standing to file an appeal. In general, the starting point is the fact that every private person, as a part of society, is protected through the constitutional principles, such as the principle of the legal state, although the legal-subjective side of human rights and freedoms and holders of these rights do not fit into this concept. So, the Constitutional Court stayed on course in Decision No. U 42/03 when, by referring to its Decision No. U 5/02, it prohibited the State and Entities to refer to Article 10 of the ECHR.[3204] In particular, one should make a distinction between the authorisation to make allegations (*Beschwerdebefugnis*) on the one hand, which means the possibility of a violation with regard to the enjoyment of a right, and on the other hand the authorisation to file an appeal (*Antragsbefugnis*), which means the right to

3204 U 42/03, paragraph 24.

have a violation of the BiH Constitution established by the Constitutional Court. Taking this into account, the State authorities may not refer to human rights before the Constitutional Court, but they may make allegations of violations of other constitutional provisions, *i.e.*, they may, for example, make allegations of the violation of the BiH Constitution by a court decision. The above described case in which the Prosecutor's Office complained of excessive protection of human rights before the criminal court to the detriment of the legal state and the general interest in criminal prosecution can be mentioned in support of such a conclusion.

Moreover, a systemic limitation on the authorisation to file an appeal with the Constitutional Court may derive from Article VI.3(b) of the BiH Constitution. The State authorities and their parts which may initiate proceedings of abstract control (review) of constitutionality, federal disputes and disputes between the State authorities under Article VI.3(a) of the BiH Constitution, should not be allowed, based on Article VI.3(b), to avoid fulfilling the requirements of Article VI.3(a) of the BiH Constitution. The same applies when it comes to Article VI.3(c) of the BiH Constitution. This provision clearly regulates the conditions under which a court may refer a question to the Constitutional Court. In this respect, Article VI.3(a) and (c) of the BiH Constitution is a *leges speciales* relating to Article VI.3(b) of the BiH Constitution. Therefore, if the requirements to institute proceedings under Article VI.3(a) and (c) are fulfilled, then access to the Constitutional Court under Article VI.3(b) should not be allowed either.

Taking into account such a development of the case-law, it would make more sense to designate Article VI.3(b) as the jurisdiction over cases relating to constitutional review rather than the constitutional appeal; otherwise, an individual appeal could easily be reduced in a thoughtful manner according to the pattern of the ECHR or Basic Law of the Federal Republic of Germany, so that this provision would cover the whole scope of competences of the Constitutional Court under this provision.

ii. Respondent party with regard to the appellant (standing to be sued)

The case-law relating to the legal standing to be a respondent party in the proceedings before the Constitutional Court is immense. Most of those cases concern foreign legal entities which are not subject to the jurisdiction of BiH courts, such as the responsibility of a foreign bank[3205] or of another state for settlement of a matter in which an appellant is interested.[3206] The

3205 AP 2644/05, paragraph 9.
3206 AP 710/05, paragraph 6.

Constitutional Court also established that appeals were incompatible *ratione personae* with the BiH Constitution if they were directed against the incorrect public authorities[3207]

(b) Human Rights Chamber

CH/00/3476-A&M M. M.	20030307
CH/00/4008 Kadrić	20050905
CH/00/4116 *et al*.-A&M Spahalić *et al.*	20010907
CH/00/5738-*strike out* FBiH v. Republika Srpska	20020408
CH/00/6562 Mašić *et al*.	20051109
CH/01/6775 Hrvić	20070605
CH/01/7221 “Čajavec holding”	20070626
CH/01/7262 Žunić	20061219
CH/01/7979 Hidanović	20060405
CH/01/7986 Mehmedović	20060111
CH/02/11943 Mićanin	20060111
CH/02/12004 Dimić	20061002
CH/02/12008 Galešić	20060206
CH/02/12347 Alagić	20070626
CH/02/12468 *et al*. Š. Kadrić *et a*l.	20050907
CH/02/12480 Mrđanin	20051214
CH/02/8780 Sarač	20070509
CH/02/8953-A&M Halilović	20031010
CH/02/9456 Mećiragić	20060911
CH/02/9853 Diviča	20020902
CH/03/10990 Z. T.	20061106
CH/03/12889 Alibašić	20070627
CH/03/13103 Salihović	20070627
CH/03/14255 P. B.	20060306
CH/03/14433 Pedljić	20051107
CH/03/14932 Husković	20060406
CH/96/29-A&M Islamic Community of BiH, Banja Luka Mosques Related Cases	19990611
CH/97/67-A&M Zahirović	19990708
CH/98/1027 *et al.*-A&M R.G. *et al.*	20000609
CH/98/1297-A&M D. B. *et al*.	20031010
CH/98/375 *et al.* Đ. Besarović *et al*.	20050406
CH/98/399 *et al*. Halilović *et al.*	20050512
CH/99/1961 Zornić	20010208
CH/99/2007-A&M Rakita	20030309
CH/99/2289-A&M M. G.	20031010

3207 AP 1103/06, paragraph 23: lack of the canton’s responsibility for the conduct of the court proceedings outside the reasonable time limit, since the case was not within the court’s territorial competence.

The authorisation to file an application to the Chamber shall be determined under Article VIII.1 of Annex 6. According to this provision, the Chamber "shall receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of paragraph 2 of Article II".

So, both parties to the proceedings before the Chamber and the possible subject of the application are determined in that way. An application is *ratione personae* inadmissible if *the applicant* does not claim to be the victim of human rights violations under the circumstances of the case or if he/she claims to have filed an application *on behalf* of the victims that died or went missing (the authorisation to file an application/standing to sue) or if the complaints on violations of human rights under Article 2, paragraph 2 of Annex 6 do not fall under the scope of responsibility of *one of the respondent parties* (the right respondent party/standing to be sued).[3208] If the applicant is also a signatory party of Annex 6, then the request to prove the status as victim is struck out. The signatory parties are regarded as exercising the right of action not for the purpose of their own rights but to be responsible for the protection of Annex 6, based on objective criteria.[3209]

i. Authorisation to file an application (standing to sue)

An individual applicant must claim to be the victim of human rights violations under the circumstances of a case. Therefore, a director of a legal entity, or a director of a school cannot be the applicant and claim at the same time that the human rights and freedoms of their legal entity, *i.e.*, a school, have been violated. Under such circumstances, they can only be the representatives of the applicants.[3210] Similarly, a father cannot be the applicant and claim at the same time that the human rights and freedoms of his adult daughter have been violated. In such a case, he can only be her legal representative.[3211] If the legal interest of a person was nothing but "touched", based on the enforcement of a decision, his/her human rights and freedoms have not been violated so that he/she cannot claim to be the victim of human rights violations.[3212] A holder of

3208 Compare, *HRC*, 1999, p. 5.
3209 CH/00/5738-*strike out*, paragraph 23 *et seq.*, referring to Article 33 of the ECHR and EComHR, *Austria v. Italy*, Application No. 788/60, 4 YB 140, 1961.
3210 CH/03/14433, paragraph 5; CH/02/9456, paragraph 15.
3211 CH/02/11943, paragraph 13 *et seq*.
3212 CH/01/7262, paragraph 13 *et seq*.

shares of a legal entity cannot complain about a violation of his/her property rights if he/she holds that the decision determining the proportion between private capital and State-owned capital in that company is unfair. In that case, the only "person" that has a right of action is the company.[3213] If an applicant acts both in the name of the alleged victims and in his/her own name, he/she has to be provided with authorisation to do so.[3214] *Actio popularis* is therefore excluded.[3215] Accordingly, a registered association of retired persons cannot claim to be the victim of human rights violations for the alleged failure of a public authority to raise the pension amount. In order for the association to act in the capacity of a legal representative of individual pensioners and institute proceedings before the Chamber, it has to be provided with their power of attorney.[3216] The same applies to a group of representatives of the municipal council who challenged the municipal council's ruling on property deprivation since they did not claim to be the victims themselves of human rights violations, nor did they represent possible victims of human rights violations.[3217] However, a religious community may be the victim of a violation of the right to prohibition of discrimination relating to property rights and freedom of religion.[3218]

If the applicant dies after he has filed an application, and a wish and interest in the outcome still exist, his/her legal successors may undertake the conduct of the proceedings relating to the application in the manner that the legal successors' status as applicants is recognised, since the deceased person cannot keep that status.[3219] Such formulation by the Chamber should not fully attain what was provided for by Article VIII.1 of Annex 6. This Article does not relate to the legal successor in terms of taking over the position of the applicant but to the representation of ("*on behalf of*") the alleged victims that are deceased or went missing. Therefore, this is a special case of procedural legal standing. Therefore, in case of succession, the proceedings must involve a "legal", and not a "presumed" legal successor, which is conditional on a decision on inheritance issued by the competent court[3220]

3213 CH/02/12008, paragraph 9 *et seq*.
3214 *Berg*, 1999, p. 19 *et seq*.
3215 *Aybay*, 1997, p. 541.
3216 CH/98/736, paragraph 10 *et seq*.
3217 CH/98/938-A, paragraph 12.
3218 CH/96/29-A&M, paragraphs 128-131 in connection with EComHR, *Chapell v. the United Kingdom*, 14 July 1987, DR 53, p. 241, 246; *X. and Church of Scientology v. Sweden*, 5 May 1979, DR 16, p. 68, 70; CH/98/1062-A&M, paragraph 66; CH/99/2177-A&M, paragraph 84; see also, an analysis at *Küttler*, 2003, p. 103 *et seq*.
3219 CH/96/3 *et al.*-M, paragraph 26, also, referring to the case-law of EComHR, *Veit v. Germany*, Application No. *10474/83,* 47 DR 106, p. 116, and ECtHR, *De Weer v. Belgium*, 1980, Series A no. 35, paragraph 37; CH/96/2 *et al*.-A&M, paragraph 49.
3220 CH/02/12004, paragraph 14.

In the later case-law, the Human Rights Commission within the Constitutional Court of BiH made a distinction as to whether "the victim of a violation" of human rights died before or after the application had been filed with the Chamber.[3221] If the person had died before filing an application, the legal successor could not file an application before the Chamber in their own name.[3222] An exception applies to the cases in which a violation under Articles 2, 3 and 8 of the ECHR is claimed.[3223] If the "victim of human rights violations" dies after filing an application, his/her close relatives, *i.e.*, legal successors, can continue with the proceedings, if they succeed to prove before the Chamber that the death cannot affect the decision on the merits. This is the case if close relatives, *i.e.*, heirs, succeed in proving their own legal interest.[3224] Otherwise, the request of close relatives, *i.e.*, heirs, can be treated as a new application.[3225] As to the payment of compensation for damages, the close relatives, *i.e.*, legal successors, continue with the already instituted proceedings if the case relates to the pecuniary damage caused to the deceased person or non-pecuniary damage of the close relatives, *i.e.*, successors, which they sustained due to the violation of human rights of the deceased person.[3226]

Articles II.2 and VIII.1 of Annex 6 do not impose limitations on the applicants insofar as citizenship is concerned so that citizenship of Bosnia and Herzegovina is not a necessary requirement to initiate proceedings.[3227] It turned out that in the cases relating to missing persons and unlawful deprivation of liberty, a wide scope of authorisations to file applications with the Chamber was necessary for the effective protection of human rights and freedoms, since the victims themselves were not capable or were not capable any more to personally address the Human Rights Chamber.[3228]

With the exception of the case of "inter-Entities" proceedings which the FBiH instituted against the Republika Srpska,[3229] all applications were filed by the victims of human rights violations, *i.e.*, their close relatives, or legal entities such as religious communities, communities of interest or news agencies.[3230]

3221 CH/02/8780, paragraph 30.
3222 CH/03/14255, paragraph 16, with reference to the ECtHR case-law.
3223 CH/00/6562, paragraph 178 *et seq*.
3224 CH/99/2289, paragraph 39 *et seq*.; CH/02/12347, paragraph 22 *et seq*.
3225 CH/01/7221, paragraph 21 *et seq*.
3226 CH/00/6562, *Ibid*.
3227 CH/98/1027 *et al*.-A&M, paragraph 112.
3228 See, for example, CH/96/1, CH/96/15.
3229 CH/00/5738-*strike out*.
3230 For evidence, see at *Nowak*, 2004, p. 6 *et seq*.

Unlike procedural law, which applies to the ordinary judiciary, an application filed by a person with no legal procedural capacity may be declared admissible if that person is factually capable of understanding his/her situation, or if the nature of allegations renders the application indispensably admissible.[3231]

ii. Respondent party in the proceedings before the Chamber (standing to be sued)

Article VIII.1, in conjunction with Article II.2 of Annex 6, is precise when it comes to the scope of possible respondent parties in the procedure before the Chamber: Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. All other respondent parties, such as other States,[3232] legal-private entities[3233] or a lawyer of the party to the proceedings,[3234] cannot be *ratione personae* responsible for human rights violations. Furthermore, all applications filed against other entities, besides those from Annex 6, such as certain holders of power, authorities or parties, cantons and municipalities, and individuals acting on behalf of certain authorities, are inadmissible.[3235] Admittedly, the Chamber **does not consider itself bound by the designation of a respondent party** in an application because it is difficult for the applicant to determine which signatory party is to be held responsible for the alleged violations of human rights and freedoms. In that case, the Chamber examines *propio motu* whether a signatory party which is not marked as respondent party in the application can be held responsible for human rights violations, includes it in the proceedings[3236] and finds a violation within the scope of responsibility of that party.[3237] In order to establish the responsibility of one of the parties, it is necessary to examine distribution of responsibilities between the responsible parties under the BiH Constitution; this issue falling within the scope of "admissibility" may, in such cases, be considered under the part of the decision relating to the "merits".[3238] The responsibility of the signatory Parties to Annex 6 may derive both from *de iure* competence under the BiH

3231 CH/02/12480, paragraph 14; CH/03/12889, paragraph 22 *et seq*.
3232 CH/01/7986, paragraph 11.
3233 CH/00/4008, paragraph 12; CH/03/10990, paragraph 5 *et seq.*: a husband's responsibility for violations of the rights of his wife.
3234 CH/03/14932, paragraph 17; CH/01/6775, paragraph 37 *et seq*.
3235 See, for example, CH/03/13103, paragraph 21 *et seq*.
3236 CH/96/2 *et al.*-A&M, paragraph 4; CH/96/22-A, paragraph 12; CH/97/67-A&M, paragraph 93.
3237 See, for example, CH/96/31-A, paragraph 11, with CH/96/31-M; the last one: CH/03/14055-A&M, paragraph 48 *et seq*.
3238 CH/96/22-A, paragraph 21; CH/99/1961-A&M, paragraphs 78, 97 *et seq.*; CH/98/1297, paragraph 31; CH/98/399 *et al*., paragraph 464 *et seq.*; CH/02/12468 *et al*., paragraphs 97-104 and paragraphs 143-163.

Constitution and *de facto* competence, for example, when acts of a responsible party produce effects outside its own boundaries.[3239]

It was more difficult to establish the responsibility of certain signatory Parties to Annex 6 in the applications filed against real actions (*Realakte*) or legal acts in the issuance of which an international organisation participated. The applications which were filed against the actions of international organisations and which had more or less the authorisation to intervene in the legal system of the State will be elaborated on in a special chapter of this work.[3240] The grey-zone of responsibilities included applications which primarily related to the national authorities' acts adopted on the basis of recommendations, motivations or pressure from the International Community such as, for example, the dismissal of police officers who were decertified by the IPTF;[3241] deprivation of high-ranking military officers' right to run for elections by the national Election Commission with the reasons that SFOR removed them from their positions, *i.e.*, revoked their mandate;[3242] or if the case related to the application of laws which the High Representative promulgated.[3243] In such cases, the Chamber established the responsibility of the signatory Parties to Annex 6 and declared the applications admissible. The responsibility of the FBiH to construct a combat training centre on the applicants' private property without previous expropriation of that property cannot be avoided solely because of the fact that consent by the SFOR was necessary for the construction of the centre, and besides that SFOR and other international organisations had an advisory role in that process.[3244]

The signatory Parties to Annex 6 are held responsible for **business actions** taken by the **public companies**. A public company is a company over which the State, *i.e.*, Entities, including lower instance administrative authorities, have direct influence in terms of business administration and management.[3245] The same applies to public institutions such as **public hospitals**[3246] or schools, particularly if the public holder of duties and responsibilities has a possibility of having influence on the settlement of disputes.[3247] Otherwise, the signatory

3239 CH/99/1961-A&M, paragraph 82 *et seq.*, in connection with the ECtHR, *Loizidou v.Turkey*, 23 Mach 1995, Series A no. 310, "Preliminary objections".

3240 See "q. Particularity: Competence to review international interventions", p. 782.

3241 CH/03/12932-A.

3242 CH02/12470-A&M.

3243 CH/97/60 *et al.*-A&M, paragraph 126 *et seq*.

3244 CH/99/2425 *et al.*-A&M, paragraph 118.

3245 CH/97/67-A&M, paragraph 100 *et seq.*; compare also, *Berg*, 1999, p. 22 *et seq*.

3246 CH/99/2696-A&M, paragraph 50.

3247 Someone's dismissal: CH/00/3476-A&M, paragraph 46.

Parties of Annex 6 are not held responsible for the actions of legal persons of private law[3248] if they perform duties required through an order.[3249]

The Federation of BiH is responsible for acts issued by the **cantons and municipalities**.[3250] **The Entities** are responsible for human rights violations which occurred due to the application of the laws of the RBiH, which are still in force in that Entity, since they have responsibility for this matter according to the distribution of responsibilities under the BiH Constitution. This applies regardless of the fact that the Entities did not enact new laws, or that they did not uphold them through their parliamentary procedures.[3251] Similarly, Bosnia and Herzegovina is responsible for decrees issued by the institutions of the RBiH at the transition stage, which means at the moment when the institutions acted in the capacity of authorities.[3252] In the Chamber's view, this conclusion applies even if meanwhile new institutions are established (BiH), which, according to a new distribution of responsibilities, do not have legislative or executive power any more, although the decree is still in force.[3253] It is hard to justify such a far-reaching responsibility, all the more so since the Chamber accepts that the legal matter in question, within new arrangements under the BiH Constitution, can be included in the field of organisation of the Entities, which is the reason why only the RS and the FBiH have the authorisation to undertake legislative and administration activities in terms of regulating and implementing laws.[3254]

The conclusion relating to the "subsequent effects" of the laws passed from the time of RBiH until Dayton, which could be attributed to Bosnia and Herzegovina, is not convincing. Admittedly, these laws have been, according to Article II.2 of Annex II to the BiH Constitution, continuously applied. Meanwhile, as of the entry into force of the BiH Constitution, the Entities became responsible for the abolishment and modification of laws. It is a contradictory point if BiH is held responsible for the legal situation but it has no more influence to change that situation. Similarly, Decision No. CH/97/48 *et al.* becomes questionable for the same reasons. In that Decision, which relates to the so-called old foreign currency cases, the Chamber found that Bosnia and Herzegovina was to be held responsible based on an "implicit provision" that the State takes positive actions

3248 CH/99/2007-A&M, paragraph 45.
3249 CH/01/7979, paragraph 49 *et seq*.
3250 CH/96/3 *et al.*-M, paragraph 30; CH/96/18-A, paragraph 12; CH/96/22-M, paragraph 32; CH/97/67-A&M, paragraph 101.
3251 Compare with the cases concerning the Federation of BiH: CH/96/22-M, paragraph 31; CH/96/08-A [V. THE LAW]; and CH/96/3 *et al*.-M, paragraph 2.
3252 CH/96/3 *et al*.-M, paragraph 46 *et seq.*; CH/96/22-M, paragraph 52; see also CH/96/18-A, paragraph 12 in connection with the application of the regulations of the Federation of BiH.
3253 CH/97/60 *et al.*-A&M, paragraph 124; see also, CH/98/706 *et al.*-A&M, paragraph 71.
3254 CH/97/60 *et al.*-A&M, paragraph 176.

due to a legal vacuum created by the adoption of the RBiH acts which could be attributed to Bosnia and Herzegovina. Bosnia and Herzegovina should have tried to resolve the problem of "old foreign currency savings" by passing a framework law. However, the Chamber finally ordered the FBiH, not the State, to take actions in order to improve the legal situation.[3255] This case-law changed at a later point so that based on the distribution of responsibilities, the State was exclusively held responsible for the resolution of the problem of "old foreign currency savings", which had the discretion to transfer certain duties to the Entities.[3256]

As to the Brčko District, which has been under the control of Bosnia and Herzegovina as of the Arbitration Decision taken in March 2000,[3257] the Chamber held that the State (Bosnia and Herzegovina) was responsible for the activities of its authorities only as of the moment when the institutions of the District, including Bosnia and Herzegovina, as legal successors of the Republika Srpska,[3258] overtook *de facto* control over certain areas. Until that moment, human rights violations had been attributed to the Republika Srpska. This also applied to the proceedings initiated at an earlier point but finalised after the control was *de facto* taken, but only in the case of allegations that a right to a fair trial within a reasonable time was violated.[3259]

Taking into account that the Chamber was not a signatory Party to the Agreement on Human Rights, the signatory Parties to Annex 6 cannot be held responsible for the activities and decisions of the Chamber so that such applications were incompatible *ratione personae* with Annex 6.[3260]

m. Particularly important: There are no judicial proceedings before the Constitutional Court after proceedings have already been held before the Human Rights Chamber and *vice versa*

What is now regulated by the applicable Article 16, paragraph 4, item 12 of the Rules of the Constitutional Court – that the Constitutional Court is not competent to decide a case which had already been decided by the Human Rights Chamber – was the subject of heated discussions for a certain period of time. The same applies to the reverse, which means if the Human Rights

3255 CH/97/48 *et al.*-A&M, paragraph 141 *et seq*., 164 *et seq*., 203; see the controversial separate opinion.
3256 CH/98/375 *et al*., paragraphs 1157-1263 and paragraphs 1199-1210.
3257 See above "E. Brčko District– Constitution and Law", p. 877.
3258 CH/02/8953-A&M, paragraph 45.
3259 CH/00/4116 *et al.*-A&M, paragraph 108 *et seq*.
3260 CH/98/1184-A, paragraph 10; CH/00/5796-A, paragraph 88; CH/02/9853, paragraph 6.

Chamber receives a case which has already been decided by the Constitutional Court, it will not accept it. Unlike the Constitutional Court, which took an unambiguous point of view on this matter before amending its Rules, the Human Rights Chamber took more time to do so.

(a) Case-law of the Constitutional Court

AP 1170/05 Dolinić	20060613
AP 1204/05 „Dardanija“ d.o.o. Sarajevo	20060627
AP 1206/05 M. S.	20050615
AP 133/02 V. P.	20040304
AP 141/01 D. M.	20040304
AP 1517/06 Savić	20060627
AP 190/02-J. R. S.	20040723
AP 2479/07 Karup	20080125
AP 2486/05 Savka *et al*. Cvetković	20070523
CH/03/14474 Dolinić	20040607
U 13/01 HRC VII: Cantonal Prosecutor’s Office Sarajevo	Not published
U 7/98 Public Attorney’s Office of the Federation of BiH	19990226
U 8/98 Public Attorney’s Office of the Federation of BiH	19990226

The Constitutional Court was faced relatively early with the issue of whether it could examine the constitutionality of decisions of the Human Rights Chamber (including their compatibility with the ECHR). In 1998, the Constitutional Court received a number of appeals against decisions of the Human Rights Chamber; all appellants were State authorities.

> For example, in Case No. U 7/98, the Public Attorney’s Office of the Federation of Bosnia and Herzegovina[3261] complained about the decision which the Human Rights Chamber had taken in the *Damjanović* case.[3262] In that Decision, the Human Rights Chamber obliged the Federation to pay damage-compensation. The appellant claimed that the decision of the Human Rights Chamber was in violation of national laws and international conventions. Moreover, the appellant claimed that *Damjanović* did not request any State authority to pay him compensation for damage. Moreover, the death sentence had been pronounced before the General Framework Agreement. In Case No. U 8/98, the Public Attorney’s Office of the Federation of Bosnia and Herzegovina challenged the decision in the *Marčeta* case.[3263] In that case, the Human Rights Chamber ordered the Federation to pay compensation for damage. The appellant considered it

3261 For historical reasons, the Public Attorney’s Offices have more extensive competences than those of the Federal Republic of Germany.

3262 CH/96/30.

3263 CH/97/41.

> unjustified, arguing that the regulations relating to the manner of payment of damage and the amount of damage are not the subject of the ECHR or its Protocols but of national laws.

The Constitutional Court gave almost identical reasons in Decisions Nos. U 7/98 through U 11/98. The Constitutional Court confirmed that it was called upon, according to Article II of the BiH Constitution in conjunction with Article VI.3(b) of the BiH Constitution, to protect human rights guaranteed by the Constitution against decisions of the BiH courts which violate such rights. Article II.1 of the BiH Constitution provides for an additional mechanism for the protection of these rights in Annex 6 of the GFAP "as being part of the whole system of protection of human rights and fundamental freedoms in Bosnia and Herzegovina". The Constitution and Annex 6, as stated by the Constitutional Court, were adopted at the same time and they supplement each other; as to the link between the Constitution and Annex 6, "it can be concluded with certainty" that the provisions of Annex 6 "cannot be contrary to the Constitution". The relation between the Constitutional Court and the Human Rights Chamber as institutions called upon to protect human rights is not regulated by the Peace Agreement, nor is it regulated under national law. Taking into account the norm relating to the jurisdiction of the Constitutional Court under Article VI.3(b) of the BiH Constitution ("*judgment of a court in Bosnia and Herzegovina*"), the Human Rights Chamber does perform "judicial functions". However, according to the terminology of Annex 6, the Human Rights Chamber is neither a "court", nor an institution of Bosnia and Herzegovina, since Article XIV of Annex 6 provides that five years after the Agreement enters into force, the responsibility for the continued operation of the Human Rights Commission shall transfer to the institutions of Bosnia and Herzegovina – unless otherwise agreed. Therefore, the Human Rights Chamber is not an institution of Bosnia and Herzegovina.

Moreover, the Framer of the Constitution, taking into account Article VI.3(c) of the BiH Constitution (concrete/incidental control of norms), which, just like Article VI.3(b), deals with a "court in Bosnia and Herzegovina", surely did not have the intention to oblige the Human Rights Chamber to refer questions relating to human rights to the Constitutional Court. *A contrario* conclusion means that the Human Rights Chamber is not a court in Bosnia and Herzegovina. Both the decisions of the Constitutional Court (Article VI.4 of the BiH Constitution) and the Human Rights Chamber (Article XI.3 of Annex 6) are final and binding. Both regulations were adopted at the same time so that their authors did not intend to confer the jurisdiction to either of these institutions to review the decisions of the other one. They held that the Human Rights Chamber and the Constitutional Court were to operate as parallel institutions insofar as human rights matters were concerned, although none of them were

authorised to interfere with the activities of the other one. Individuals can choose between the institutions to file a request. It must be admitted that such parallelism leaves room for contradictions in the case-law. Moreover, this leaves a dilemma for individuals as to which institution he/she should address. However, the Constitutional Court concluded that this is regulated in a such manner in the Peace Agreement, that it had a temporal character and that it should be accepted as such. In Case No. U 13/01, the Constitutional Court confirmed this view once again.

> In his separate opinion, Judge *Begić* reminds of the divergent view of the Venice Commission insofar as this matter is concerned, and he argues as follows: "The Human Rights Chamber is a constitutional authority established in accordance with Article II.1 of the BiH Constitution. The participation of [an] international factor in the Human Rights Chamber is not contrary to its character as a 'court in Bosnia and Herzegovina'. By not reviewing the decisions of the Human Rights Chamber , the Constitutional Court does not surrender a significant part of its mandate that obliges it to be [the] upholder of the Constitution. Finally, the fact that the Constitutional Court declined the competence to review decisions of the Human Rights Chamber brings into question [the] 'fundamental democratic procedural principle of adjudicating in two instances' in the sphere of human rights and fundamental freedoms, including certainly 'institutional two-instances'. Moreover, the characterization of the Constitutional Court's decisions as 'final and binding' does not exempt the Constitutional Court as the supreme judicial institution from the obligation to be guardian of the Constitution, since the decisions of other bodies and institutions of Bosnia and Herzegovina have also that same characteristic [although after all they are subject to the jurisdiction of the Constitutional Court]".

The Constitutional Court continued applying this practice to the institution that succeeded the Human Rights Chamber – **the Human Rights Commission within the BiH Constitutional Court**.[3264] However, there were individual exceptions to this rule. For example, in Case No. AP 1236/05, the Court rejected an appeal as being *ratione materiae* (not *ratione personae*) inadmissible[3265] despite a decision on the merits by the Human Rights Commission within the BiH Constitutional Court. Also, in Case No. AP 2486/05, the Constitutional Court ordered an interim measure whereupon it took a decision on the merits, although the Human Rights Commission within the BiH Constitutional Court had previously taken a decision on the merits whereby it determined precise legal redress.[3266] The lack of competence to review the decisions of the Human Rights Chamber and Human Rights Commission applies regardless of whether

3264 AP 1206/05, paragraph 3 *et seq*.
3265 Paragraph 8 *et seq*.
3266 Paragraph 17 *et seq*., paragraph 33 *et seq*.

a party who files an appeal with the Constitutional Court for an alleged violation of his/her subjective legal status, has already participated in the proceedings before the Human Rights Chamber or Commission.[3267] A third person who has been affected by a decision of the Human Rights Chamber or Human Rights Commission has the right to institute proceedings before the competent authority in order to protect the rights which he/she claims to be entitled to. Following the exhaustion of legal remedies, the same case can be brought before the Constitutional Court, but the Constitutional Court cannot review the decision of the Human Rights Chamber or Human Rights Commission.[3268]

However, if the Human Rights Chamber or Human Rights Commission dealt only with the admissibility of a case, the appeal filed with the Constitutional Court can be declared admissible provided that all other requirements necessary to have a decision by the Constitutional Court have been met. For example, in Case No. AP 1170/05, the Constitutional Court rejected an appeal as *prima facie* ill-founded,[3269] whereas the Human Rights Commission within the BiH Constitutional Court rejected the same appeal filed by the same person for failure to exhaust all legal remedies.[3270] The same applies if the Human Rights Chamber or Human Rights Commission within the BiH Constitutional Court declares itself incompetent *ratione materiae*.[3271] However, if the Human Rights Chamber or Human Rights Commission rejects an application as being *prima facie* ill-founded, the Constitutional Court cannot take a decision on the same matter,[3272] since the inadmissibility declared on the grounds of manifest ill-foundedness contains, after a first summary examination, a *quasi* statement on the merits of the case. If the Human Rights Chamber and Human Rights Commission within the BiH Constitutional Court rejects as *prima facie* ill-founded an application against the second-instance judgment and the appellant, at a later point and regarding the same matter, challenges the judgement on the revision-appeal before the Constitutional Court, the Constitutional Court must first examine whether the decision on the revision-appeal amounted to a precise change in the case or not (the so-called *nova producta*). However, this is not the case if a decision on the revision-appeal has upheld in the second-instance judgment.[3273]

If both an application and appeal on the same matter are filed before the Human Rights Chamber, *i.e.*, the Commission, and before the Constitutional Court at

3267 AP 1517/06, paragraph 2 *et seq*.
3268 AP 2479/07, paragraph 20.
3269 Paragraph 66 *et seq*.
3270 CH/03/14474, paragraph 4.
3271 AP 190/02.
3272 AP 1204/05, paragraph 6.
3273 AP 1204/05, paragraph 6.

the same time, and if the Human Rights Chamber, *i.e.*, the Commission, has not decided the application yet, then the Constitutional Court will decide the case only where the appeal had been filed before the application was filed with the Human Rights Chamber.[3274]

(b) The case-law of the Human Rights Chamber

CH/00/4441-D Sijarić	20000606
CH/01/8065 Nikolić	20060111
CH/02/12525 Nuhanović	20060403
CH/03/14743 Banjić	20060911
CH/03/14799 Halilović	20061106
CH/03/8065 Mitrović	20060206
CH/99/2327-D Knežević	20010911
CH/99/2412-D Zec	20001012

At the beginning, the Human Rights Chamber, unlike the Constitutional Court, did not take a clear position on the issue as to whether it was competent to review the Constitutional Court's decisions. In the *Sijarić* Case,[3275] the Human Rights Chamber did not accept to decide the case, involving the same parties and the same request, which had previously been dealt with by the Constitutional Court. In the reasoning of its decision, the Human Rights Chamber stated that the Constitutional Court's jurisdiction under Article VI.3(b) of the BiH Constitution and its own jurisdiction under Annex 6 overlapped in that case. Neither the BiH Constitution nor Annex 6, as stated by the Human Rights Chamber, provide for a hierarchy of these institutions. Moreover, the relation between the matters over which these two institutions have jurisdiction is in no way regulated. Finally, the Constitutional Court itself initiated its competence to review the decisions of the Human Rights Chamber.

It is obvious that here the Human Rights Chamber did not rely on any of the criteria under Article VIII.2 of Annex 6 to accept the case. Instead, the Human Rights Chamber pointed out that the list provided for in that Article was not final, so that it had recourse to the possibility of accepting the complaints or not accepting them at its own discretion.[3276] The Human Rights Chamber first confirmed this jurisprudence in its subsequent decisions.[3277] However, at a later point the jurisprudence of the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court came closer to the jurisprudence of the Constitutional Court. In cases where the Constitutional Court dealt

3274 AP 133/02, paragraph 5; AP 141/01, paragraph 7.
3275 CH/00/4441-A.
3276 CH/00/4441-A, paragraph 13 *et seq.*
3277 CH/99/2327-A, paragraph 12 *et seq.*; CH/99/2412-A, paragraph 12 *et seq.*

only with admissibility, the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court declared themselves competent to decide the same matter unless the Constitutional Court considered the case as manifestly ill-founded[3278] or if the Constitutional Court was *ratione materiae* incompetent, since the possibilities of filing appeals under Annexes 4 and 6 overlap, so that the applicant would have the same legal protection before the Human Rights Commission within the BiH Constitutional Court and before the Constitutional Court.[3279] Where it happened that the same case was received at the same time by both institutions, the Human Rights Commission within the BiH Constitutional Court did not take into account the moment of filing the application but only the answer to the question whether the Constitutional Court has already decided the same matter.[3280]

(c) Comment

As Article II.1 of the BiH Constitution explicitly refers to Annex 6, and taking into account the fact that Article VI.3 of the BiH Constitution does not explicitly provide for a competence to establish human rights violations, it seems that a correct conclusion would be that the Human Rights Chamber, until the moment of admission of Bosnia and Herzegovina to the Council of Europe, was to be the last instance insofar as human rights protection was concerned. So *Szasz* as an *insider* in negotiations relating to the Human Rights Agreement sees the possibility for the Constitutional Court to deal with the ECHR only within the scope of its jurisdiction provided for in Article VI.3(c) of the BiH Constitution.[3281] The origin itself of the plan relating to the BiH Constitution and Annex 6 shows that the review of the Constitutional Court's decisions by the Human Rights Chamber should not be possible, neither "in practice"[3282] nor in theory. The solution accepted finally in Dayton is different from the proposals discussed within previous various peace initiatives.[3283] They provided for the clear supremacy of the *Court of Human Rights*. The Court of Human Rights was supposed to operate as a national court and the supreme review court dealing with human rights, including the review of decisions of the Constitutional Court, whose function would primarily be the resolution of disputes between different State authorities (the so-called organic disputes). The Court of Human Rights was supposed to operate in a special composition until the moment of admission of Bosnia and Herzegovina to the Council of Europe, at which point

3278 CH/01/8065, paragraph 15 *et seq.*; CH/02/12525, paragraph 17.
3279 CH/03/8065, paragraph 14.
3280 CH/03/14799, paragraph 12 *et seq.*; CH/03/14743, paragraph 19.
3281 *Szasz*, 1996, p. 308.
3282 *Nowak*, 2001, p. 11.
3283 *Szasz*, 1996, p. 310.

the European Court would assume that function.[3284] In this context, *Nowak* saw the possibility of reviewing decisions of the BiH Constitutional Court by the Human Rights Chamber.[3285] However, the difference in the applicable regulations becomes clear if we see the relation between the Constitutional Court and the Court of Human Rights which has never been established,[3286] although it was provided for by the Constitution of the Federation of BiH. According to the Constitution of the Federation of BiH, the Court of Human Rights should have been integrated in the Constitution and should have had exclusive jurisdiction over human rights matters. Given such a system, the Constitutional Court of the Federation of BiH would have to refer issues to the Court of Human Rights and its decisions would have been binding upon the Constitutional Court of the Federation of BiH.[3287] However, such organisation was not integrated in the BiH Constitution and the regulations relating to the Human Rights Chamber were excluded from the Constitution and were included in Annex 6.

In practice, both courts accepted the recommendation of the Venice Commission.[3288] Given the applicable regulations, the BiH Constitutional Court rightfully declared itself competent to protect human rights as a part of the constitutional standards. The Constitutional Court is the upholder of the Constitution (Article VI.3 of the BiH), and the court of instance providing redress in respect of constitutional matters (Article VI.3(b) of the BiH Constitution). Because of such a progressive interpretation, a dilemma about the competitive competencies has arisen, and the applicable regulations were of little use.

In this context, the Constitutional Court's argument that the decisions of the Human Rights Chamber are final and binding is not convincing enough. The inflation of these terms, which occurred due to their frequent use in the Dayton Peace Agreement[3289] and in the constitutions of the Entities,[3290] leaves

3284 *Szasz*, 1995, p. 252 *et seq*.
3285 *Nowak*, 2001.a, p. 781.
3286 Although the national judges were selected, this court has never been established because the Committee of Ministers of the Council of Europe, following a recommendation by the Council of Europe, Human Rights Chamber and Ombudsman for Bosnia and Herzegovina, has never selected international judges, and the court itself, due to the Dayton Peace Agreement, became pointless, since that court, in conceptual terms – not in legally formal terms – was replaced by the Human Rights Chamber (compare, *Nowak*, 2000, p. 48).
3287 Compare also *Mol*, 1998, p. 34 *et seq*.
3288 CDL-INF, 1996, 0009, of 18.11.1996, item 4.4.2.
3289 In addition to the decisions of the Constitutional Court (Article VI.4 of the BiH Constitution), the decisions of the Human Rights Chamber (Article XI.3 of Annex 6), and, according to Annex 3, the decisions of Provisional Election Commission (Article 606 of the Election Rules) are "*final and binding*", whereas the decisions of the CRPC are only "*final*" (Article XII.7 of Annex 7).
3290 At the level of the Federation, the decisions of the Constitutional Court and Supreme Court are "final and binding" (Article IV.C.12. paragraph 1, Article IV.C.16. paragraph 1. of the Constitution of the FBiH). On the other hand, the RS Constitution provides that the decisions of the Constitutional Court are "universally binding and enforceable" (Article 119, paragraph 1 of the RS Constitution).

considerable room for interpretation. This formulation was probably supposed to describe the final character of the decision within a certain legal framework, thus to prevent the use of ordinary legal remedies, not the extraordinary legal remedies.

After all, a visible internationalisation of the protection of human rights is present in the decisions of the Constitutional Court and, as a conclusion deriving from this, a restriction of the competencies of the Constitutional Court when it comes to review. Otherwise, it would be difficult to understand why the Human Rights Chamber has been established by a special Annex. A textual link between these two Annexes can be found in the question of whether the Human Rights Chamber is "a court in Bosnia and Herzegovina". Taking into account this formulation pointing to the attachment to a certain territory, it would be difficult not to consider the Human Rights Chamber as "a court in Bosnia and Herzegovina", all the more so since the legislature knows and makes a clear distinction between this formulation and the formulation pointing to a connection to the institutions ("*of Bosnia and Herzegovina*", Article VI.3(a) of the BiH Constitution). The conclusion that the Human Rights Chamber is not defined as a "court" in the Annex and that therefore it is not a court within the meaning of Article VI.3(b) of the BiH Constitution, although it performs the functions of a court, is not convincing enough. This linguistic argument, particularly in this context, cannot suspend the functional argument. In fact, the term "*Chamber*" was chosen in order to show the difference between the Human Rights Chamber and the "*Human Rights Court*" in the Constitution of the BiH Federation. Finally, the argumentation that the Framer of the Constitution probably did not intend to leave the possibility for the Human Rights Chamber to "refer an issue" to the Constitutional Court so that the Human Rights Chamber can in no way be "a court in Bosnia and Herzegovina" within the meaning of Article VI.3(c) of the BiH Constitution and thus within the meaning of Article VI.3(b) of the BiH Constitution, is not sustainable either. When it comes to the Human Rights Chamber, there were no discussions on the possibility for the Human Rights Chamber to declare invalid the laws in case of violations of the ECHR and, particularly, in case of violation of the Constitution (which is not a direct standard or measure of examination for the Human Rights Chamber). This competence exclusively belongs to the Constitutional Court so that the "referral of issues" to the Constitutional Court by the Human Rights Chamber would truly make sense. Taking into account the teleological point of view, it is possible to apply a differentiated approach relating to the Human Rights Chamber without going into contradictions.

The review of the Human Rights Chamber's decisions by the Constitutional Court under Article VI.3(b) of the BiH Constitution and *vice versa* is neither

binding nor recommended because of the presence of international members both in the Human Rights Chamber and the Constitutional Court. On the other hand, cooperation between the Human Rights Chamber and the Constitutional Court in terms of referring issues to the Constitutional Court by the Human Rights Chamber within the meaning of Article VI.3(c) of the BiH Constitution would make sense in cases in which the violation of human rights has been committed because of an unconstitutional law, not a law contrary to the Convention. Instead of this, in cases in which the violation is based only on a law contrary to the Convention , the Human Rights Chamber could only order the parties to change their legal status.[3291] The Contracting Parties to Annex 6 often refused to comply with such orders given by the Human Rights Chamber, *i.e.*, delays often occurred. On the other hand, by rendering judgments giving a time limit for harmonization under Article VI.3(c) of the BiH Constitution, the Constitutional Court could, following the expiry of the time limit, change the legal situation by itself by direct annulment of the law being unconstitutional and contrary to the Convention, without any actions taken by the Contracting Parties to Annex 6.

Historical, systemic and teleological arguments apply to the same extent to the reverse situation – from the Constitutional Court to the Human Rights Chamber. However, the Human Rights Chamber avoided taking a final position in such a manner. Given the Constitutional Court’s practice, according to which it even protects human rights under Article II of the BiH Constitution, the presence of the international members of the Constitutional Court was to be taken into account, but also the procedural efficiency and respect for the Court which is rather a national court so that the Human Rights Chamber could not have a superior place compared to the Constitutional Court.

Given the overall situation, we must conclude that the parallelism of the mechanisms for the protection of human rights and freedoms did not have a harmful effect on their protection in Bosnia and Herzegovina. Quite the contrary, these courts complemented each other in the service of citizens, they motivated and inspired each other, being aware of the positive and negative sides. A strong international element present in the Human Rights Chamber during the early stages had significant importance, since it contributed to the prompt establishment of a court, highly competent to protect human rights, which enjoyed the confidence of citizens. Organizational impulses coming from the Human Rights Chamber and its own case-law were encouraging for the BiH Constitutional Court, whose activities had had from the very beginning a rather national character. The end of the activities of the Human Rights

3291 See, for example, CH/01/8507, paragraph 53.

Chamber provoked criticism by a number of persons, including the Human Rights Chamber 's members themselves. However, given the fact that in a way the Human Rights Chamber continued existing within the BiH Constitutional Court by the transfer of its personnel and its case-law, we can say that it was a successful – much desired in other fields – *exit strategy*.

n. Competence *ratione temporis*

(a) Constitutional Court

AP 129/04 Hadža *et al.*	20050527
AP 16/02 Odobašić	20030926
AP 2361/06 Vojniković	20080110
AP 250/04 A. R.	20040929
AP 752/04 S. P. *et al.*	20050118
CH/99/3375-A&M E. Ž.	20031205
U 2/98 Srabović	19980605
U 23/00 Vrhovac	20010416 *OG of BiH*, No. 10/01
U 30/01 Marković	20020829 *OG of BiH*, No. 24/02
U 45/03 V. B.	20040517
U 88/03 "Medimpex" d.o.o.	20040721
U 9/99 Z. O.	19990312

The competence of the Court commenced by the entry into force of the BiH Constitution, *i.e.*, 14 December 1995. Therefore, the BiH Constitutional Court, in principle, cannot review any act issued by the public authorities before that date.[3292] Moreover, all violations of rights which had occurred in the period before the entry into force of the BiH Constitution, cannot be subject to the Court's consideration.[3293] This also applies in case of complaints that the competent authorities did not take any action in respect of the allegations on the violation of the rights.[3294]

However, the limit is not so sharp when it comes to the proceedings that lasted even after the entry into force of the Constitution. On the one hand, there are proceedings in which decisions were taken only after 14 December 1995. On the other hand, the proceedings which commenced before the key date (14 December 1995) but the final decision has not been taken yet may be the subject of consideration by the BiH Constitutional Court. In such cases, the right of access to court or to a court decision within a reasonable time was violated only after the aforementioned date, or the violation of human rights is

3292 Compare, for example, U 2/98 or U 9/99.
3293 U 30/01, paragraph 19; AP 2361/06, paragraph 9.
3294 AP 250/04, paragraph 7.

still in effect.[3295] The Parties are obliged to conduct all proceedings which had been instituted and conducted before that date within the meaning of Article 6 of the ECHR.[3296] So, for example, the BiH Constitutional Court is not *ratione temporis* competent to consider a case where an employee was dismissed in 1993 and where the ECHR was violated. However, the appellant is entitled to make an allegation of the violation of her right to a fair trial if the proceedings concerning that issue lasted even until 14 December 1995.[3297] The facts relating to the events prior to the entry into force of the Constitution can be relevant to the events which occurred after the entry into force of the Constitution as additional information, evidence and explanation. Therefore, it is an important issue how long certain proceedings lasted before 14 December 1995.[3298]

(b) Human Rights Chamber

CH/00/5794 Sekulić	20050606
CH/02/9312 Pejman	20050905
CH/96/15-A Grgić	19970215
CH/96/1-A Matanović	19960913
CH/96/29-A&M Islamic Community of BiH (Banja Luka Mosques Related Cases)	19990611
CH/96/30-A Damjanović	19970411
CH/97/42-A&M. Eraković	19990115
CH/97/67-A&M. Zahirović	19990708
CH/97/69-A&M. Herak	19980612
CH/97/74-A Balić	19980910
CH/98/522-A Čabak	19981015
CH/98/706 *et al.*-A&M. Šećerbegović *et al.*	20000407
CH/98/948-M Mitrović	20020906
CH/99/1568-A&M. Ćoralić	20011207
CH/99/1722 Puzić	20050307
CH/99/1950-A Čakarević	20000208
CH/99/1985-A Budimović	20000511
CH/99/2356-A Bjekić	20000513
CH/99/3375-A&M. E. Ž.	20031205

The Parties to Annex 6 are obliged not only to provide adequate structures for the effective protection of human rights but also to provide adequate means to prevent and penalise the violations of rights. However, this obligation applies

3295 Compare, U 23/00.
3296 U 45/03, paragraph 17.
3297 AP 16/02, paragraph 14 *et seq*.
3298 AP 2349/06, paragraph 31; AP 752/04, paragraph 20, see also AP 129/04, paragraph 41 *et seq.*: a missing person case; U 88/03, paragraph 19: right matured before the key date, but it was allocated only after this date.

only if a violation occurred after 14 December 1995, or it continued after that date.[3299] The Parties are obliged to ensure that the applicable laws are brought into line with the ECHR and to invalidate norms incompatible with the Convention before the entry into force of Annex 6.[3300] In terms of time, the Human Rights Chamber is considered incompetent to take into consideration facts which took place before the entry into force of Annex 6, which means before 14 December 1995; they are not included in the scope of application of Annex 6 within the meaning of Article VIII.2(c) of Annex 6; they are *ratione temporis* outside the scope of Annex 6.[3301] Insofar as the proceedings terminated before 14 December 1995 are concerned, neither the Human Rights Chamber nor the Human Rights Commission can review the proceedings and their legal grounds according to the standards of Annex 6.

The exceptions to this rule are the cases of "constant and continuing violations". Therefore, a case falls within the scope of application of Annex 6, and thus within the scope of *ratione temporis* competence of Human Rights Chamber, if the violation continued to exist after 14 December 1995.[3302] The facts relating to the events prior to the entry into force of Annex 6 may be relevant as background to the events after that date.[3303] So, for example, the disappearance of a person falls within the scope of competence of the Human Rights Chamber if there is a justified assumption that the missing person was still alive or in prison after 14 December 1995.[3304] The issue as to whether the state authorities deprived that person of liberty or released him/her before the entry into force of Annex 6 may be relevant and taken into consideration.[3305] A continuing violation exists even if the whole proceedings were conducted and terminated before 14 December 1995 but a decision was delivered to the applicant only after that date, since the judgment in question came formally into force only on that date.[3306]

3299 CH/96/15-M, paragraph 17; CH/99/1568-A&M, paragraph 39, with reference to EComHR, *Svinarenkov v. Estonia*, Application No. 42551/98, 15 February 2000.

3300 CH/98/706 *et al.*-A&M, paragraph 67, with reference to ECtHR, *De Becker v. Belgium*, 27 March 1962, Series A no. 4, p. 24-26.

3301 CH/96/29-A&M, paragraph 132.

3302 CH/96/1-A, paragraph 2 under "The Reasons for the Chamber's Decision"; CH/96/29-A&M, paragraph 132; CH/99/1900&1901-A&M, paragraph 49; CH/00/3880-A&M, paragraph 97; CH/99/3375, paragraph 72.

3303 CH/96/29-A&M, paragraph 132; CH/97/42-A&M, paragraph 37; CH/97/67-A&M, paragraph 105; CH/00/3880-A&M, paragraph 98.

3304 CH/96/1-A, item IV; CH/98/522-A, paragraph 12 *et seq.*; CH/99/3196-A&M, paragraphs 41, 44; compare also with CH/99/2150-R, paragraph 86 *et seq.*, in respect of the different application of these principles.

3305 CH/96/1-M, paragraphs 32, 35; CH/96/15-A, paragraph 4. and "IV. The Law"; failing reasons for extension of detention of the key date, inadmissible: CH/97/74-A, paragraph 18.

3306 CH/98/948, paragraph 23.

In cases where the decisions of dismissal were delivered during the war (and thus took effect) but the injured parties challenged them only after 14 December 1995, the Human Rights Chamber has temporal competence. However, such applications are manifestly ill-founded, since the applicants complain about the violation of the right to a fair trial where decisions on the merits were not taken (the civil right was not determined) but their lawsuits against dismissal were rejected as being barred by the statute of limitations.[3307] However, the Human Rights Chamber is competent if a decision on the termination of a labour relationship had been taken before the entry into force of Annex 6 but it was served on the applicant after 14 December 1995, and only then took effect.[3308] The cases where the continuation of violation also exists and which can be considered by the Human Rights Chamber are those where the applicants were not dismissed from service but they were laid off, and were not reinstated after the war, since the employer employed another person "suitable" in terms of ethnic affiliation; such cases are frequent.[3309]

In case of **execution** of a death penalty pronounced before the key date, the proceedings that amounted to the pronouncement of the death sentence are reviewed in terms of their compatibility with Annex 6, even if the judgment was rendered before the key date.[3310]

The deprivation of other real rights at the moment in which the deprivation took place is considered as terminated and thus it does not constitute a continuing violation of the property.[3311] However, a continuing violation of a property right can exist if the applicant complains not only about the deprivation of rights (before the key date) but also about the failure to receive damage compensation prescribed by law – for example, a suitable replacement apartment – and the failure to award compensation also extends to the period after the entry into force of Annex 6.[3312]

The Human Rights Commission within the BiH Constitutional Court is *ratione temporis* incompetent to consider the applications which were filed after the expiry of the term of the Human Rights Chamber. The term of the Human Rights Chamber terminated on 31 December 2003. The legal successor of the Human

3307 CH/99/1950-A, paragraph 10 *et seq*., CH/99/1985-A, paragraph 10 *et seq*., CH/99/2356-A, paragraph 9 *et seq.*

3308 CH/98/948-A, paragraph 23.

3309 CH/97/67-A&M, paragraph 106.

3310 CH/96/30-A, paragraph 13; CH/96/30-M, paragraph 29 *et seq*.; CH/97/69-A&M, paragraph 37.

3311 CH/98/411-A, paragraph 8; CH/98/1040-A, paragraph 17; CH/99/3227-A&M, paragraph 45.

3312 CH/99/3227-A&M, paragraph 46.

Rights Chamber – the Human Rights Commission within the BiH Constitutional Court – operated from 1 January 2004 and it was not competent to receive new applications (Articles 1, 2 and 5 of the Agreement according to Article XIV of Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina).[3313] Such applications are not *ratione temporis* in accordance with the mandate under Annex 6.[3314]

o. Limitation on the possibility of review: Bound by the allegations from the application/appeal

(a) Constitutional Court

AP 1125/05 Đaković	20070116
AP 2482/06 Despenić	20080311
U 35/03 Z. G.	20040721

According to Article 32 of the Rules of the Constitutional Court, the BiH Constitutional Court is bound by the appellant’s request when examining possible violations of human rights and freedoms. The BiH Constitutional Court shall thus examine only those violations that are stated in the appeal. However, the appellant’s failure to specify the relevant provisions of the BiH Constitution and the ECHR is not an obstacle to an extensive examination by the BiH Constitutional Court if the appellant sufficiently substantiates his/her appeal.[3315] Furthermore, in Case No. AP 1125/05, the Court outlined that it was *proprio motu* necessary to assess whether a constitutional right (in the case in question, Article 5 of the ECHR) had been violated, since it was adequate in the circumstances, although the appellant’s appeal did not go to such lengths.[3316]

(b) Human Rights Chamber, Human Rights Commission

CH/00/3468-A&M. Kovačević	20051215
CH/01/6979-A&M. E. M. & S. T.	20020308
CH/96/1-M Matanović	19970711
CH/97/34-A&M. Šljivo	19980910
CH/97/59-A&M. Rizvanović	19980612
CH/98/1335-A&M. *et al*. Rizvić *et al*.	20020308

3313 The entire text of the Agreement is available on the website: <www.hrc.ba/bosnian/home.htm>.

3314 CH/99/1722, paragraph 13. The same applies to the amendments to the initial request, which were requested after the termination of the mandate of the Human Rights Chamber: CH/00/5794, paragraph 12; CH/02/9312, paragraph 10.

3315 U 35/03, paragraph 19, AP 2482/06, paragraph 10.

3316 Paragraph 29.

CH/98/1366-A&M. V. C.	20000309
CH/98/659 *et al*.-A&M. Pletilić *et al*.	19990910
CH/99/2150-R Unković	20020510

At the beginning, the Human Rights Chamber refrained from considering violations of rights other than those alleged explicitly in the application.[3317] However, shortly afterwards, the Human Rights Chamber did not request the applicant to specify the rights under Annex 6, which the applicant alleged to have been violated, but it assessed *ex officio* all issues that gave raise to possible violations of rights if the applicant's allegations contained sufficient reason for it.[3318] This corresponds to the European Court's case-law, according to which the court itself decides how it will assess the submitted facts. In doing so, the court is not bound by the view of the applicant or the State.[3319]

p. Setting priorities

AP 1232/05 Karić	20060509
AP 129/04 Hadža *et al.*	20050527
CH/01/7621 *et al*. Muminović *et al.*	20050801
CH/01/8365 *et al.*-A&M	20030303
CH/01/8507 Softić	20051215
CH/99/2198 Vujičić	20021010
U 106/03 I. A.	20041027

Article VIII.2(e) of Annex 6 allows the Human Rights Chamber, in accepting and dealing with applications, to give priority to the cases relating to particularly severe or systemic violations or to the cases relating to violations of the prohibition of discrimination. Therefore, in addition to the usual requirements to be fulfilled in order to decide a case, the Human Rights Chamber included a **filter for evaluation of purposefulness** (*Opportunitätsfilter*) as an accessory means. The Human Rights Chamber needed all of this in order to correctly lay emphasis on its jurisprudence to serve the performance of its mandate as well as possible. In that way, the Human Rights Chamber has provided an instrument enabling it to use its resources for a purpose, instead of being a "slave" to the chronological order of applications in deciding the allegations on the violations of human rights and fundamental freedoms. The discretion

3317 CH/96/1-M, paragraph 60.

3318 CH/97/59-A&M, paragraph 53; CH/97/34-A&M, paragraph 63; CH/98/659 *et al*.-A&M, paragraph 188; CH/98/1366-A&M, paragraph 58; CH/01/6979-A&M, paragraph 33; CH/98/1335-A&M *et al*., paragraph 156; CH/99/2150-R, paragraph 83; CH/00/3468, paragraph 39.

3319 Compare with ECtHR, *Phillips v. the United Kingdom*, 5 July 2001, Reports of Judgments and Decisions 2001-VII, paragraph 38.

provided in this way was reinforced by Article VIII.3 of Annex 6. According to Article VIII.3, the Human Rights Chamber may at any point in its proceedings decide to suspend consideration of, reject or strike out an application on the ground not only that the applicant does not intend to pursue his application (a) but also when the matter has been resolved; (b) or for any other reason established by the Human Rights Chamber it is no longer justified to continue the examination of the application; (c) provided that all of this is consistent with the objectives regulating issues of human rights.

Because of this room for manoeuvre, the following used to happen in practice: when processing the received applications, the Human Rights Chamber made efforts to harmonise the main purpose of human rights protection, *i.e.*, **justice for each particular case** for a high purpose, which is the improvement of the **overall situation in the field of human rights and freedoms in the country**. The jurisprudence of the Human Rights Chamber has shown that sometimes the efforts to achieve both aims do not have to go together. In the beginning, the Human Rights Chamber had a wide-range of competences on paper but had neither a good nor a bad reputation. It was necessary to gain the citizens' trust. This was the reason why the Human Rights Chamber fought for every complaint and generously used to turn a blind eye to all deficiencies relating to admissibility. However, shortly afterwards, it had to employ another method of work, that is, filtration and **leading decisions** (*decisions of first impression)* and merging similar applications. Wherever possible, the Human Rights Chamber even used to discontinue proceedings by pointing to leading decisions. All of this was done with the aim of reaching justice for individuals, and the Human Rights Chamber wanted to leave available resources for other more significant proceedings in order to have better final results in the field of human rights protection than it would have had if it had meticulously treated each particular case.[3320]

Defining such focal points of the work was possible and necessary. In particular, in post-war Bosnia and Herzegovina, **systematic human rights violations** occurred in certain matters such as the repossession of property or the search for missing people. Their cause could be removed only by orders to enforce legislative or institutional corrections with the aim of resolving at one stroke a series of individual appeals. However, such conduct caused a number of difficult and burdening situations.[3321] In the "Srebrenica cases", the Human

3320 As to this issue, compare with a nevertheless justified legal approach: CH/99/2198; and *Nowak*, 2004, p. XIII, *HRC*, 2000, p. 9. (as to the cases relating to JNA) and *HRC*, 2003, p. 12 *et seq*.

3321 Compare, for example, CH/99/2198, paragraph 15 *et seq.*: repossession of property but refusal of damage compensation, since it is not priority for the Human Rights Chamber.

Rights Chamber took a leading decision[3322] to provide a redress (construction of a memorial centre, but not individual damage compensation) which rendered impossible any further individual assistance for the applicants which addressed the Human Rights Chamber at a later point.[3323] A dilemma regarding such a manner of work in the field of human rights, whose primary aim is the improvement of the overall situation, becomes clear if we question to what extent any decision upon subsequent similar applications was legitimate at all, since the leading decision has already been taken. If it is well known that the length of judicial proceedings must not be excessive within the meaning of Article 6, paragraph 1 of the ECHR, why then establish something in another series of individual cases? The first reason for establishing the violation in each particular case is the discrepancy between regulations on paper, on the one hand, and reality on the other hand. The other reason is the fact that in the end each particular case is different from the previous one at least to some extent so that every case deserves particular consideration. Finally, the repetitive establishment of violations of human rights in a number of individual cases finally results in a change of consciousness and the development of respect for human rights by those responsible and competent.

Unlike the Human Rights Chamber, with a time limited mandate, the BiH Constitutional Court has a justified reason why it cannot rely on an adequate rule of purposefulness in its jurisprudence (*Opportunitätsregeln*) but it is obliged to effectuate **justice for each individual case**. This is a durable and long-term mandate that the Constitutional Court does meet.[3324] However, the Court has the advantage, since it may act as an immediate corrective through the power of its competencies, by placing itself in the constitutional framework and, if necessary, by directly declaring invalid (**the Constitutional Court's jurisdiction to declare laws invalid**) the laws violating human rights of several persons instead of obliging the legislature to make corrections, as the Human Rights Chamber used to do. After an initial hesitation, the Court extended the possibility under Article VI.3(a) and (c) of the BiH Constitution to Article VI.3(b) of the BiH Constitution by declaring itself competent to examine, within the concrete control (review), norms which are contrary to constitutional human rights and freedoms not only by acting in each individual case but also by declaring null and void, if necessary, the same norms.[3325]

3322 CH/01/8365 *et al*.
3323 CH/01/7621 *et al*., paragraph 6 *et seq*.
3324 Compare, AP 1232/05, paragraph 45 *et seq*.
3325 U 106/03, paragraph 34.

q. Particularity: Competence to review international interventions

CH/00/4027&CH/00/4074-A Municipal Council of the Municipality Opštinsko vijeće Opštine JZ Mostar v. OHR	20000309
CH/02/12499 Nalog za privremene mjere – Fijuljanin	20030111
CH/02/12499-A&*strike ou*t Fijuljanin	20030304
CH/97/60 *et al.*-A&M. Miholić *et al*.	20011207
CH/98/1266-A Čavić	19981218
CH/98/230 *et al*.-A. Suljanović *et al.*	19980514
U 13/02 Jelavić	20020510
U 16/00 "2-Year Rule"	20010202
U 21/01 Krivić	20011012 *OG of BiH*, *No. 25/01*
U 25/00 "Travel Documents"	20010323
U 26/01 "Court BiH"	20010928
U 32/01 Central profit banka	20011024 *OG of BiH*, *No. 27/01*
U 37/01 Bičakčić *et al*.	20011102
U 40/00 "PEC Rules and Regulations"	20010612 *OG of BiH*, *No. 13/01*
U 41/01 Dobrinja	20040130
U 7-11/98 HRC II-VII	19999615 *OG of BiH*, *No. 09/99*
U 9/00 "State Border Service"	20001103

With regard to the appeals directed against interventions of various international actors, the Constitutional Court and Human Rights Chamber have developed an innovative case-law in the field where constitutional law entwines with international law. Neither the BiH Constitution nor Annex 6 clearly provides for this competence. However, there is no provision which explicitly stipulates that such competence is not possible. The problem area relating to the review of international interventions in the internal legal system is even today the subject of heated discussions in cases relating to missions with the aim of achieving or maintaining peace. In principle, there is an agreement that a kind of compliance with the international standards is needed as well as the appropriate mechanisms for control and their application. Both the BiH Constitutional Court and Human Rights Chamber have looked at their practice possible ways to control, on a limited scale, the international influence on internal affairs without jeopardising the effectiveness of a mixed structure agreed in Dayton and composed of national and international protagonists.

(a) Legal acts of the High Representative (Annex 10 of GFAP)

In the first years after Dayton, the High Representative hesitated to intervene as a leading authority in matters over which national institutions had competence. This changed after the 1997 Bonn Conference for Implementation of Peace[3326] when the representatives of the international community received adequate support for more vigorous and determined activities to implement the peace agreement. Since then the High Representative has relied on an extensive interpretation of his powers under Annex 10 and he has imposed laws, has declared invalid the decisions of lower-instance courts, has forbidden certain persons to hold political office[3327]or removed officials from office – even those holding office at the highest levels of power. Citizens' reactions to such actions have varied. The representatives of various elites were also divided in their opinion. Some national officials were even thankful to the High Representative because he assumed the responsibility to make such unpleasant decisions. What is more, they tried to support the activities of the High Representative in such a way as to make their support depend on the High Representative's interventions against their political opponents.[3328] Just before the end of High Representative *Petritsch*'s era, the protagonists started to attach importance to the transfer of the responsibilities for the peace process implementation to national officials under the motto of "*ownership*".[3329] This tendency disappeared shortly after *Lord Ashdown* took office, which was the reason why he was exposed to vicious criticism. The debate on this topic culminated in an article published in the *Journal of Democracy*[3330] in July 2003, in which the author rebuked him for behaving as a liberal colonial leader preventing the development of democratic structures. During the period of *Schwarz-Schilling*, an attempt to withdraw the High Representative was made in the hope that the political elites would act reasonably after assuming responsibility. This attempt failed and it weakened the OHR, whereupon *Lajčák* and *Inzko* were unable to succeed in recovering its lost authority. The fundamental goal of these two High Representatives was to fulfil the conditions to close the OHR.

3326 Fn. 28, p. 25.

3327 So-called *vetting*; compare with *ICG*, 2003, p. 32 *et seq*.

3328 *Marko*, 2001, p. 74; *Knaus/Martin*, 2003, p. 68.

3329 As to this change in strategy and an overview of the activities of the High Representative, see: *La Ferrara*, 2000, p. 191 *et seq*. Compare also, the High Representative's speech given before the Steering Board Ministerial Meeting, of 22 September 1999, available at: <www.ohr.int/ohr-dept/presso/presssp/archive.asp> (OHR online press-archive), and the manuscript of the speech of SDHR at the "Ownership Panel" of 3 July 2001 in Konjic (the authors' archive).

3330 *Knaus/Martin*, 2003; article and reactions available at: <www.journalofdemocracy.org> and <www.esiweb.org>. Compare also, the author's summary in FAZ, of 25 July 2003, p. 9, titled "Wohlwollende Despoten" ("Good-Natured Despots"), as well as the reactions and discussions on a particular case of removal from office *Michael Martens*, "Die Macht der Gewohnheit" ("The Power of Habit"), FAZ of 30.8.2003, p. 3.

i. Legal grounds: Agreement on Civilian Implementation (Annex 10)

When the Parties to Annex 10 of the GFAP (Republic of Bosnia and Herzegovina, Republic of Croatia, Federal Republic of Yugoslavia, Federation of Bosnia and Herzegovina and Republika Srpska) were signing the Agreement they probably might not have fully understood its hidden potential. However, it is obvious that certain international representatives and persons who participated in the peace negotiations – if not all of them – were not quite aware of the future role of the High Representative at the moment of signing the Agreement. The role of the High Representative in Dayton was the subject of heated discussions between the Europeans and the United States. The Europeans were of the opinion that a strong High Representative was a condition for the success of civilian implementation, and they wanted to prevent any attempt at saying that Bosnia and Herzegovina was under military occupation. The United States attached more attention to the heads of the SFOR, being afraid of civilian interference with (their) military part of the tasks.[3331]

As with many other provisions of the Dayton Framework Agreement and its Annexes, the Agreement on Civilian Implementation of the Peace Agreement contains certain phrases which need an interpretation, or rather, which can be interpreted. So Annex 10 entrusted the High Representative to "*facilitate*" the Contracting Parties' own effort and to mobilise the activities of the (international) organizations involved in the civilian aspects and, as appropriate, to coordinate their activities (Article I.2). The High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, ("*as entrusted by a U.N. Security Council resolution*"), should achieve this by, *inter alia*, monitoring the implementation of the peace settlement (Article II.1(a)), by maintaining close contact with the Parties to "promote"[3332] (Article 1(b)) their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organisations and agencies participating in those aspects by "*facilitating, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation*" (Article II.1(d)).[3333] According to Article IV, the Parties "shall fully" cooperate with the High Representative and his or her staff, as well as with the international organizations and agencies.[3334]

3331 Compare, Ministry of Foreign Affairs of Germany (*Auswärtiges Amt*), 2002, p. 74. *et seq*., 88. *et seq*., 94.
3332 Translation provided by the authors.
3333 Translation provided by and emphasis placed by the authors.
3334 Translation provided by the authors.

If we have a look at the **history of the High Representative's decisions,** we will see that his activities do cover all fields of the State and society.[3335] He pulls all the strings or they intersect in his hands. However, in practice, the OHR was not only the coordinator, strategist or someone who gave encouragement, but it evolved into a body of supervision, order-issuing authority and a body which imposes sanctions. We could even say that three powers are united in the body of the High Representative. The aforementioned provisions make a poor basis for such broad powers to which the High Representative refers today. So it seems that *Malcolm* was not the only one considering pessimistically that with the exception of the Human Rights Chamber and the IPTF, the High Representative does not have *real powers of enforcement, beyond the powers to advise, monitor and coordinate*.[3336] The real potential of Annex 10 can be seen in its Article V "*Final Authority to Interpret*". The Parties transfer to the High Representative the *final authority to interpret* this Agreement on Civilian Implementation of the Peace Settlement.[3337] Therefore, the High Representative interprets himself the norms regarding his powers. In practice, this power became something like a "competence-competence".[3338] *Ipso facto* the potential for deep international interventionism is contained in the wording of Annex 10. The High Representative extensively used this monopoly on interpretation by arrogating executive, legislative and judicial functions. It is true that this right is limited to the Agreement on Civilian Implementation of the Peace Settlement, *i.e.*, Annex 10. However, as this Annex confers the powers to the High Representative to monitor, coordinate and promote the civilian implementation of the whole Peace Agreement, the High Representative's power deriving from the final authority to interpret under Annex 10 was finally extended to all non-military agreements under the other Annexes.[3339] Such a transfer of binding interpretation to a third person is not unusual in itself. It

3335 Compare, Review of Decisions (<www.ohr.int/decisions/archive.asp>), tabular review of events relevant to the OHR and Mission Implementation Plan (<www.ohr.int>); last visited 29 August 2008, the authors' archive.

3336 See *Malcolm*, 1996, p. 269 *et seq.* ("*real powers of enforcement, beyond the powers to advise, monitor and coordinate*", translation provided by the authors).

3337 Article V of Annex 10 of DPA: "*The High Representative is the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement*." This was reconfirmed in Article 27 of the Resolution 1031 (1995) of the UN Council of Security (see p. 784 *et seq*.). According to Article XII of this Agreement, the Parties transferred a similar right relating to the final authority to interpret the military aspects of the Peace Settlement to the Commander of IFOR (Annex 1A DPA).

3338 *La Ferrara*, 2000, p. 189.

3339 In this context, it is to be noted that what *Stahn* (2001, p. 109) says is not quite correct, who obviously considers the High Representative as a final authority to interpret all civilian aspects. *Šarčević* (2001, p. 508) is also imprecise when considering the High Representative as a "last constitutional and legal instance to interpret the Agreement", including the Constitutional Court itself (U 41/01, paragraph 16).

was just understandable in this case that none of the Parties was entrusted with such a task, since it appeared that they were not capable to reach an agreement upon it.

When intervening, the High Representative usually refers to the aforementioned Article V ("*final authority*") and Article II.1(d) of Annex 10 ("*facilitate*").[3340] Simultaneously, he brings up the support (strictly political) of the *Peace Implementation Council – PIC*.

> The PIC, which was established at the London Peace Implementation Conference in December 1995, consists of 55 countries and international organisations which support the peace process by providing financial assistance[3341] and by providing staff and take leading political decisions.[3342] The members of the Council meet every 6 to 12 months. The *PIC Steering Board*, as the executive arm of PIC, consists of Germany as the Presidency of the European Union, the European Commission, France, the United Kingdom, Italy, Japan, Canada, the Organisation of the Islamic Conference (represented by Turkey), Russia and the United States. The High Representative chairs weekly meetings of the Ambassadors to BiH of the Steering Board members. In addition, the Steering Board meets at the level of political directors every three months.[3343] The Steering Board nominates the High Representative. The UN Security Council must approve the nomination. After *Carl Bildt* (12/95-6/97), *Carlos Westendorp* (6/97-7/99), *Wolfgang Petritsch* (8/99-5/02), *Lord Paddy Ashdown* (6/02-1/06), *Christian Schwarz-Schilling* (2/06-7/07) and *Miroslav Lajčák* (8/07-3/09), *Valentin Inzko* is the seventh High Representative in Bosnia and Herzegovina.

The PIC supports an extensive interpretation of the mandate of the High Representative considering that the High Representative, within the meaning of Article II.1(d) of Annex 10, may "facilitate" the resolution of difficulties relating to the civilian implementation of the peace settlement by, *inter alia*, as the High Representative judges necessary, *taking binding decisions*. Such decisions, according to the interpretation by the PIC, may relate, *inter alia*, to activities aiming at securing the implementation of the peace settlement, such as measures against State officials if the High Representative considers that

3340 Compare, decisions of the OHR at: <www.ohr.int/decisions/archive.asp>, situation on 29 August 2008, the authors' archive.

3341 The budget of the OHR is financed by the countries of the International Community. The representation for 2004 and 2007/08 is the same: out of 21,1 million EUR, EU 53 %, USA 22%, Japan 10%, Russia 4%, Canada 3,03 %, Organisation of the Islamic Conference 2,5%, others: 5,47%.

3342 As to the role of the members of the PIC, see *Winkelmann*, 2002, p. 8.

3343 Status as of 1 December 2009. See more about this at: <http://www.ohr.int/ohr-info/gen-info/#6>.

they violate the obligations set down in the Peace Agreement or regulations relating to its implementation.[3344] Having resort to an adequate interpretation of the term "*facilitate*" under Article II.1(d) of Annex 10, this may be understood as broadly as the High Representative finally can interpret – although he cannot amend – the provisions of other civilian agreements – (including Annex 4, *i.e.*, the BiH Constitution). As to the competencies of the High Representative, the OHR, internally, says: "We can change all except the [BiH] Constitution." Insofar as the BiH Constitution is concerned, "the intervention through interpretation" obviously competes with the competences of the BiH Constitutional Court under Article VI.3 of the BiH Constitution.[3345] The interventions of the High Representative in other Annexes, particularly the BiH Constitution, therefore arise in practice as precise legal acts relating to the constitutional rights and obligations of citizens and institutions. These interventions are significant: the High Representative imposes laws, amends the Constitutions of the Entities, he can "freeze" the bank accounts of the parties, quashes decisions of the lower-instance courts, forbids certain persons to be appointed to certain offices or removes persons from office (even members of the Presidency) or persons holding certain social positions. The question which arises in this context is to know where the limit is of the intervention powers, whether there is a limit at all and who will supervise, if necessary, so that the limit will not be exceeded.

It is to be noted that initially the High Representative, in giving reasons for his decision as the legal grounds for his acting, did not refer to the resolutions of the **UN Security Council**. The current resolutions are not quite equivocal so that the High Representative has made efforts to indicate only Annex 10, *i.e.*, the Agreement of the Parties, as a basis of his powers. Admittedly, "the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions",[3346] (Article I.2 of Annex 10) so that some stand for a view that neither the High Representative nor other international authorities (IPTF, IFOR) were created by the Dayton Agreement but by subsequent decisions of the UN and NATO and that the Agreements concluded in Dayton constitute only the Parties' consent to the specific mandate of the aforementioned bodies in Bosnia and Herzegovina.[3347]

3344 See the Bonn Peace Implementation Conference 1997, of 10 December 1997, item XI.2, in *OHR*, 2000, p. 199. As to the composition and political meaning of the PIC, compare with *Dörr*, 1997, p. 137, and *La Ferrara*, 2000, p. 18 *et seq*.

3345 On the other hand, some amendments to the laws which the High Representative undertook due to the unconstitutionality of laws such as the Decision on Amending the Law on Filing a Vacant Position of the Member of the Presidency of Bosnia and Herzegovina, *OG of BiH*, No. 21/00, is not more nor less contrary to the Dayton Peace Agreement than any other act of the High Representative – quite the opposite to what is said by *Šarčević* (2001, p. 508).

3346 Translation provided by the authors.

3347 *Szasz*, 1996.a, p. 78; *Stahn*, 2001, p. 109 *et seq.*, 112 *et seq*.

If we scrutinize the resolutions which the Security Council adopted within Chapter VII of the UN Charter - *S/RES/1031* of 15.12.1995,[3348] it becomes obvious that the High Representative is a body established by an agreement, that it is not a sub-body of the UN Security Council and that its authorities do not initially derive from the current resolutions of the UN Security Council despite the fact that the appointment to the position of High Representative depends upon the approval by the UN Security Council.[3349]

> S/RES/1031 reads: "The Security Council, [...] Acting under Chapter VII of the Charter of the United Nations, [... ¶] 26. Endorses the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation [...], and agrees the designation of Mr. Carl Bildt as High Representative; [¶] 27. Confirms that the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement; [...]."[3350]

The clearest way to show the qualitative difference between the role of the Security Council and the High Representative is a comparison between the passages relating to the High Representative and corresponding passages of the same resolution relating to IFOR, whereby the Security Council "authorises" the Member States to ensure peace within the meaning of the indicated Annexes, explicitly and despite the fact that Annexes 1A and 2 provide the contracting basis for it.

> Article 14 *et seq*. of Resolution S/RES/1031 stipulates: "The Security Council, [...] Acting under Chapter VII of the Charter of the United Nations, [... ¶] 14. Authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish a multinational implementation force (IFOR) under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 [...]; [¶] 15. Authorizes the Member States [...] to take all necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement [...]."[3351]

At a later point, when the authority of the High Representative commenced to be intensively called into question, the High Representative decided that his authority would rely not only on Annex 10 of the GFAP but also on the

3348 OHR, 2000, p. 531.

3349 See *Dörr*, 1997, p. 137; *Hayden*, 1998, footnote 1.

3350 Emphasis put by the authors.

3351 Compare with other relevant resolutions: S/RES/1021 and S/RES/1022 of 22.11.1995, S/RES/1026 of 30.11.1995, S/RES/1034 and S/RES/1035 of 21.12.1995 and S/RES/1037 of 15.01.1996.

resolutions of the UN Security Council. He has done so by indicating that the Security Council, in Article 4 of Resolution 1174(1998) of 15 June 1998, "[…] reaffirms that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997."[3352] Finally, the UN Security Council "explicitly confirmed" the PIC Declaration from Bonn (on the interpretation of the powers of the High Representative) in a number of resolutions: 1247 (1999), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005) and 1722 (2006).

The OHR's view was confirmed by the BiH Constitutional Court at the advanced stage of political discussions between the OHR and the Court. In Case No. AP 953/05,[3353] the Constitutional Court deals with the issue whether the powers of the High Representative derive from, in addition to Annex 10, international law, whether the UN Security Council's resolutions should be regarded as decisions within the meaning of Article 39 of the UN Charter and whether then Bosnia and Herzegovina, as a member state of the UN, is obliged, according to Article 25 of the UN Charter, to implement these decisions. The Court admits that it is not entirely clear that the relevant provisions of the Security Council Resolutions are decisions of the Security Council. It is not stated that they are decisions. However, they clearly go beyond mere recommendations, and Article 39 recognises only two formal acts in which the Security Council can promulgate acts under Chapter VII, namely recommendations and decisions. The BiH Constitutional Court therefore accepts that the relevant provisions of the Resolutions are decisions for the purposes of Article 25 of the Charter. In international law, the High Representative thus has power to make binding decisions, and authorities of Bosnia and Herzegovina have an obligation to co-operate with the High Representative, by virtue of both the General Framework Agreement for Peace and the Security Council Resolutions.[3354]

The arguments of the Court should not be rejected. However, there is a clear difference from the IFOR (SFOR), which is *authorised.* The argument that a resolution is more than a recommendation and as such it should be a decision which has normative force and thus must be implemented, is not convincing. In fact, the question should be the opposite one, *i.e.*, whether the text of a

3352 Compare, for example, "Order to enforce decisions of the Constitutional Court of Bosnia and Herzegovina relating to an appeal by *Milorad Bilbija* and others, AP 953/05", of 23 March 2007.

3353 Compare with the excerpts from the judgment, p. 791 *et seq*.

3354 See AP 953/05, paragraph 62.

resolution must set a norm, whether its aim is to achieve a legal effect. Taking into account the fact that the words selected in respect of the mission of IFOR are different (authorization), the mere *confirmation* of the existence of the powers of the OHR on the basis of the agreement between the Parties does not have the normative force which is necessary in order for this confirmation to be considered as legally constituent – if only subsequent – for the competencies of the OHR. It is beyond any doubt that that the confirmation and endorsement of the mandate of the High Representative give to his activities an additional political legitimacy but they do not constitute its mandate.

Again, if we accept that the role of the Security Council relating to Annex 10 is purely affirmative – thus not constituent – this would mean that the Parties to Annex 10 may at any time revoke the mandate of the High Representative. Taking into account the current situation which is relatively normalised in the country, we doubt that the Security Council would authorise – against the will of the Parties to Annex 10 – and thus impose the continuation of the civilian aspect of the Peace Agreement pursuant to Section VII of the UN Charter.

The difference in question finally does not change anything in the fact that Annex 10 obliges the Parties to comply with the orders given by the High Representative. If they consider the intervention as wrong, or they do not consider it as necessary any more, it is necessary to reach an agreement on the termination of his mandate by terminating Annex 10.

ii. Bosnia and Herzegovina as a protectorate?

Due to the strong international presence in the constitutional system of Bosnia and Herzegovina, this country is openly referred to as a "protectorate",[3355] or – after making this expression relative, which is politically more correct – it is called a "*de facto*"[3356] or as a "subsidiary *de facto*-protectorate",[3357] or a "quasi"[3358] or "semi-protectorate"[3359] of the international community. According to the usual definition, the notion of "protectorate" cannot be applied to Bosnia and Herzegovina for three reasons: first, the international administrator is not a single state but the

3355 *Pajić*, 1998, p. 126 *et seq*.

3356 *Hayden*, 1998 ("Discrediting the peace").

3357 *Vitzthum/Mack*, 2000, p. 116.

3358 *Marko*, 2001, p. 80; *Nowak*, 2001, p. 100.

3359 Compare the Joint Declaration of 24 European politicians issued on the occasion of the eighth anniversary of the Dayton Agreement, as published by FENA Agency on 17 December 24 2003. There are highly positioned officials of the European political scene among the signatories, such as *Doris Pack*, the then President of the Delegation of the European Parliament for South East Europe, as well as *Tadeusz Mazowiecky*, the former Prime minister of Poland and UN Special Representative for Human Rights (at the beginning of the war).

"international community". Secondly, unlike the conventional protectorate, the foreign affairs of BiH are in the hands of domestic State authorities and numerous internal affairs are under the control of an external administrator. Therefore, it seems that it is more appropriate to compare the situation in BiH with the modern concept of trusteeship within the meaning of the UN Charter.[3360] Finally, Article I.1, in conjunction with line 6 of the Preamble of the BiH Constitution, defines Bosnia and Herzegovina as a sovereign state. Furthermore, apart from the individual cases of *power sharing* among international members in domestic organisations, there are no other elements in the BiH Constitution indicating that the country has waived its sovereignty.

After the initial decisive measures, the seemingly unlimited authorities of the High Representative have been immediately questioned, not only by the affected persons, but also by some political opinions and international observers. *Hayden*[3361] formulates this authority in a very provocative manner: "The method selected by the HR to promote 'democracy' in Bosnia is to create a dictatorship of virtue. Ironically, the course chosen by the HR seems most similar to that of the communist regimes of the former Yugoslavia, a coincidence that may bode ill for the future of Bosnia".[3362] Yet, an open and public debate about the High Representative actually started as a reaction to the previously mentioned fierce criticism in an article which was published in the "*Journal of Democracy*". In the "*Travails of the European Raj*" it is stated that there is "an astonishing similarity between the rule of the High Representative in Bosnia and Herzegovina and good-natured despots from the time of British liberal colonialism in India in the 19th century."[3363] In this context, the High Representative pointed to two essential differences: firstly, the international community gains no profit from Bosnia and Herzegovina. Since as early as 1995 the international community has been investing its funds into the country's reconstruction and around 17 billion US dollars have been invested so far; secondly, his mandate is based on the Dayton Agreement, which means on the agreement of the Parties involved in the BiH conflict. Moreover, the possibility for time-limited interventions is still

3360 *Stahn*, 2001, p. 115 *et seq.*, 136 *et seq*. *Winkelmann* is also against calling this State "the protectorate", 2002, p. 21. Compare also W*ilde*, 2001, who, through historical, legally based and comparative analysis of the examples of international administration states as follows: "*[P]rotection – and colonialism – in a new guise, ostensibly serving objectives set by the member states of international organizations collectively, rather than by European states individually*"), (translation provided by authors).

3361 *Hayden*, 1998, Introduction.

3362 "*The method selected by the HR to promote 'democracy' in Bosnia is to create a dictatorship of virtue. Ironically, the course chosen by the HR seems most similar to that of the communist regimes of the former Yugoslavia, a coincidence that may bode ill for the future of Bosnia*" (translation provided by authors).

3363 *Knaus/Martin*, 2003, p. 62 (translation provided by authors).

required.[3364] There are different views about this issue in Bosnia and Herzegovina depending on the ethnic affiliation of the observer. Whilst the Bosnian Serbs[3365] would rather give up further intervention, Bosniaks are of the opinion that the High Representative does not use his authorities sufficiently.[3366] Some observers have expressed their concerns that the debate about the High Representative's mandate (which is, indeed, often conducted based on unfounded knowledge of the situation in BiH[3367]) is misused for the purpose of undermining and weakening the reputation of the High Representative.[3368] In the meantime, the analysts have confirmed the seemingly paradoxical presumption that a temporary strengthening of interventionism is required for the purpose of withdrawing the international forces from BiH as soon as possible.[3369]

During the mandate of *Lord Ashdown*, the international community introduced a completely new component into the strategy of peace agreement implementation: the long-term target being the integration of the country into the European Union and the mid-term target is the entry of the country into the transatlantic security framework. Thus, in the 2004 Mission Implementation Plan (MIP),[3370] the High Representative defined his major goal, stating that it is necessary "to ensure that Bosnia and Herzegovina is a peaceful, viable state on course to European integration". The MIP set out six core tasks and a series of lower level programmes aimed at accelerating the development of Bosnia and Herzegovina according to the Stabilisation and Association Agreement

3364 Compare the transcript of press clippings: "Still there is a debate about Ashdown", published in "Deutsche Welle Radio" of 10 July 2003 (available in English on Internet/page <www.esiweb.org>); *Lord Paddy Ashdown*, "We want to achieve legislation stamped 'Made in Bosnia'," FAZ of 10 July 2003, and BiH Radio 1, interview with *Lord Paddy Ashdown* of 12 July 2003, with the not completely correct statement that the rule of the High Representative is subject to control by the BiH Constitutional Court and ECtHR (both clippings available in English at: <www.esiweb.org> and <www.ohr.int>).

3365 Compare, for instance, the statements of *Dragan Mikerević*, the then RS Prime minister, given to different BiH media of 16 July 2003 (available in English on Internet-page: <www.esiweb.org>, CHRB), and statements of *Mladen Ivanić*, the then Minister of Foreign Affairs of BiH and former RS Prime minister: "Ivanić: Bosnien-Hercegovina muss seine Probleme selbst lösen" ("Ivanić: Bosnia and Herzegovina itself must start resolving its problems"), FAZ of 2 September 2003, p. 6.

3366 Compare, *Josip Blažević*, "ESI and OHR", Nezavisne novine of 22 July 2003 (available in English at: <www.esiweb.org>); *Gojko Berić*, "Let Paddy Reign", Oslobođenje of 24 July 2003.

3367 Compare the quotations from different BiH media of 16 July 2003 (available in English at: <www.esiweb.org>) and placatory examples of misuse of official duty by *Veren Ringler*, "Despoten an der Drina" ("Despots on Drina River"), Profile of 11 July 2003, p. 2 (available in English on Internet-page <www.esiweb.org>).

3368 See, *Josip Blažević* (Fn. 3367, p. 792), as well as the readers' letters, *prof. dr. Schalast*, "Nicht das Ansehen beschädigen" ("Not to harm the reputation"), FAZ of 11 September 2003, p. 8.

3369 *ICG*, 2003, p. ii, 41 *et seq.*

3370 Mission Implementation Plan – MIP; authors' archive.

(with EU), which includes the following goals: entrenching the rule of law, ensuring that extreme nationalists, war criminals, and their organised criminal networks cannot reverse peace implementation; reforming the economy; strengthening the capacity of BiH's governing institutions, especially at the State-level; establishing State-level civilian command and control over the armed forces, reform the security sector and pave the way for integration into the Euro-Atlantic framework; promoting the sustainable return of refugees and displaced persons.[3371]

As described above, the change has occurred both in the political discussions and in the settling of accounts between the High Representative and his opponents in the country. The reforms were no longer carried out under the slogan "implementation of peace agreement", but they have rather become a necessary requirement on the way to Europe and Transatlantic Alliance. The interconnecting of the peace implementation with this form of integration objectives does not arise from the text of the peace agreement. This interconnection indicated that the High Representative, at the end of his mandate, was moving in a "grey zone" in which the legality and legitimacy of his rule were brought into question because, according to his own statements, he was no longer undertaking important measures for the purpose of peace implementation only, but those decisions were also issued for the purpose of the country's integration. However, those measures are in violation of the constitutional rights and constitutional principles, for the sake of which the international community was engaged in Bosnia and Herzegovina.[3372] We must agree with the opinion of International Community, which is a stakeholder or perhaps a leader of this policy, that the permanent peace in a country or region is possible only through an integration process leading to EU and NATO membership. The peace that would be achieved in Bosnia and Herzegovina through the integration process would also mean a continuation of the success achieved by the previous European integration processes performing similar tasks.[3373]

3371 MIP 2004, of 23 March 2004 (authors' archive), as well as the analyses of activities of the High Representative by ICG, "Bosnia's Nationalist Governments" of 22 July 2003 (available at Internet-page <www.crisisweb.org>), p. 30 *et seq.*

3372 See a critical opinion by *Knaus/Martin* (2003, p. 69 *et seq.)* of the double and permanently changing dynamics in defining the goals (implementation of peace-corruption/terrorism) and new definition of authorities in accordance with that view, as well as the shortage of active mechanisms to control the mandate of the High Representative. See, also, *Stahn*, 2001, p. 114.

3373 Also, *Marko*, 1999, p. 112.

iii. Possibility of judicial review of the High Representative's authorities

U 7/97 GFAP	19980511 *OG of BiH*, No. 07/98
U 9/00 BiH Law on State Border Service	20020130 *OG of BiH*, No. 01/02

As to the issue of whether it is possible to review the authorities of the High Representative existing on the basis of Annex 10, *i.e.*, whether it is possible to review the constitutionality of those authorities, the Constitutional Court, while referring to the Constitution as its criterion, has indirectly given a negative reply to this question in its major decision on the constitutionality of the Law on State Border Service:[3374]

> "5. The Law on State Border Service was enacted by the High Representative on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.
>
> Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative – *whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court* – has intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina."[3375]

The above statement of reasons of the BiH Constitutional Court relies on the reasoning for the decision in Case No. U 7/97,[3376] although an explicit reference

3374 U 9/00.
3375 Emphasis placed by the authors.
3376 See p. 690.

in this regard has not been made in this decision. However, that approach was not fully followed given the fact the BiH Constitutional Court, at some later point, declared that it has no competence to review the constitutionality of laws which, instead of being promulgated by the parliament, were imposed by the High Representative *in the exercise of his powers* (*sic*).

iv. Possibility for judicial review of imposed laws

• Standpoint of the BiH Constitutional Court

U 13/02 Jelavić	20020510
U 16/00 "2-year rule"	20010202
U 25/00 Travelling documents	20010323
U 26/01 Court of BiH	20010928
U 6/06 Salary Law	20080329

The aforementioned decision on the Law on State Border Service (U 9/00) reads as follows:

> "6. Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form - since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 (*OG of BiH*, No. 2/2000) - or in substance, since, whether or not it is in conformity with the Constitution of Bosnia and Herzegovina, it relates to the field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4(a) of the Constitution of Bosnia and Herzegovina. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed..
>
> 7. The competence given to the Constitutional Court to "uphold the Constitution" according to the first paragraph of Article VI.3 of the Constitution of Bosnia and Herzegovina, as further specified by subparagraphs (a), (b) and (c) and as read in conjunction with Article I.2 of the Constitution of Bosnia and Herzegovina, which provides that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections", *confers on the Constitutional Court the control of the conformity with the Constitution of Bosnia and Herzegovina of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina*." (emphasized by authors).

The BiH Constitutional Court, in its later decisions on the requests for review of the constitutionality of laws imposed by the OHR, has limited itself to

invoking its judicial practice in the Case No. U 9/00. The same happened in Decision No. U 16/00, in which the BiH Constitutional Court concluded that the disputed regulation (an occupancy right holder may obtain full ownership over the apartment *only after two years of living* in that apartment) was in accordance with the substantive constitutional law (right of ownership and prohibition of discrimination).[3377] In Decision No. U 25/00, according to its previous case-law, the BiH Constitutional Court was not examining whether the High Representative, according to Annex 10, *may amend an already existing law* – the issue was about the Law on Travelling Documents.

> "29. As to whether it was necessary for the High Representative to issue decision although there was the Law on Travel Documents adopted by the Parliamentary Assembly, it is an issue of legislative activity of parliamentary institutions of Bosnia and Herzegovina. Accordingly, the High Representative *substituted for the domestic authorities within their constitutional powers.* The Court has already given its opinion about the admissibility of the case (see above 22)".[3378]

The applicants claimed that the High Representative had exceeded his powers, stating that it was not necessary to pass a new law.[3379] However, the High Representative pointed that the so-called Bonn powers do not provide for any restrictions on the passing of a law, not even in the field where the relevant law already exists.[3380] Subsequently, the BiH Constitutional Court repeated the same thing in its Decision No. U 26/01. The Law on the Court of BiH was declared unconstitutional in that decision. The mentioned law was examined from the aspect of *whether a state has jurisdiction* to establish such a court.[3381]

> In her separate dissenting opinion regarding the Case No. U 9/00, Judge *Savić* challenges the jurisdiction of the BiH Constitutional Court to examine the acts of the High Representative. In fact, she states that the decision of the High Representative on passing the Law on State Border Service is not a law within the meaning of the BiH Constitution. On the one hand, Judge *Savić* claims that the High Representative is not mentioned in the BiH Constitution at all, but that the basis for his activities is contained in Annex 10 to the GFAP. On the other hand, it is not sufficient that an act constitutes a law in substantive and legal terms. A decisive factor is the formal character of the law. However, in formal terms, this decision is not

3377 In this way the refugees were to be urged to return to their pre-war homes instead of instantly selling their apartments. Due to its questionable effect in practice, the clause referring to the period of two years was, in the meantime, annulled once again by the decision of the High Representative of 17 July 2001.

3378 Referring to paragraph 22, wherein the content of Decision No. U 9/00 is discussed.

3379 U 25/00, paragraph 8.

3380 Paragraph 15.

3381 U 26/01, paragraph 13 *et seq*.

> a law of BiH since it was not adopted within the prescribed procedure. The fact that it is published in the *Official Gazette of BiH* does not mean that the mistake has been corrected. The arguments under paragraph 6 of the Decision, according to which the Parliamentary Assembly may fully or partially amend the law in the future, are wrong. As to the law entering into force with immediate effect, the High Representative passed it on an interim basis explicitly until such time as the Parliamentary Assembly adopts this Law under its procedure without amendments and no conditions attached, the Judge concluded.

The BiH Constitutional Court has continued the mentioned judicial practice. By adopting its Decision No. U 6/06, the Court proved that its jurisdiction to quash laws is not only *pro forma*, related to the laws imposed by the OHR – it is obvious that the Court had its own interest in this regard. Upon the Request submitted by two members of the BiH Presidency, the Court quashed the provisions of the Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina,[3382] which also regulated the salaries of judges at the BiH Constitutional Court and its expert legal personnel. The Court concluded that its independence was jeopardised (Article I.2 in conjunction with Articles VI.2(b) and VI.3 of the BiH Constitution). Moreover, the reduction of salaries during a term of office is contrary to Article IX.2 of the BiH Constitution.[3383]

• Standpoint of the Human Rights Chamber

CH/97/60 *et al*.-A&M. Miholić *et al*.	20011207

In the Case *Miholić et al.*,[3384] deliberation was conducted on whether the law provisions dealing with ownership rights are compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the law, the (former) members of the JNA were banned from acquiring ownership rights over apartments in the Federation of BiH.[3385] As to the field of ownership rights that are of a highly conflicting and sensitive nature, the High Representative was often undertaking initiatives and promulgating amendments to laws, substituting for the work of the domestic legislature. In the Case *Miholić et al.*, Article 3(a) of the Law on the Cessation of Application of the Law on Abandoned Apartments was subject to control, *i.e.*, subject to

3382 The Law on Salaries and Other Compensations in Judicial and Prosecutorial Institutions at the Level of Bosnia and Herzegovina was imposed by the High Representative on 9 December 2005.

3383 U 6/06, paragraph 22 *et seq*., and paragraph 32 *et seq*.

3384 CH/97/60 *et al.*

3385 Compare this set of facts also with “c. JNA apartments”, p. 522.

the law provision imposed by the High Representative. In the proceedings before the Human Rights Chamber, the Federation of BiH referred to the fact – not making a big mistake – that the disputed law provision was not enacted by this authority.[3386] Further, the Federation of BiH pointed out that in one of its earlier decisions the Human Rights Chamber declared itself incompetent *ratione personae* to review the decisions of the High Representative.

The Human Rights Chamber did not accept the arguments of the Federation of BiH. By relying on the judicial practice of the BiH Constitutional Court in Case No. U 9/00, the Human Rights Chamber found an essential difference between the decisions of the High Representative on removal from office on the one hand and his legislative activities on the other.[3387] The decisions whereby the Human Rights Chamber declared itself incompetent to review the decisions of the High Representative on removal from office cannot be applied to all cases, the Human Rights Chamber stated. The Human Rights Chamber applies a substitution formula (replacement) which was used by the BiH Constitutional Court in its judicial practice but only in cases where it was concluded that a disputed law provision may be considered a law provision enacted by the Federation.[3388] The regulation which was passed by the High Representative constitutes a change in the law and the federal legislature can amend it at any time. The fact that this regulation was published in the *Official Gazette of the Federation of BiH* – as it is a usual procedure for the acts of federal legislature – indicates that this regulation, both formally and substantively, has the character of an internal state act.[3389] Unlike the aforesaid, when the High Representative removes officials from office he does not substitute any of the domestic State authorities because, except for the High Representative, none of the State authorities within the constitutional frame of Bosnia and Herzegovina, the Republika Srpska or the Federation of BiH are vested with powers to remove elected officials. Also, it must be pointed out that upon issuing a decision on removal from office or on banning the elected officials from holding public offices, the internal State authorities or electors cannot change such a decision by re-electing the removed officials. Accordingly, these decisions do not constitute a domestic law and they do not fall within the scope of the responsibilities of any of the Parties that may be sued under Annex 6. Therefore, the appeals against the said decisions are inadmissible *ratione personae*.[3390]

3386 Paragraph 126.
3387 CH/97/60 *et al*., paragraph 127 *et seq*.
3388 Paragraph 131.
3389 *Ibid*.
3390 Paragraph 132.

v. Possibility for judicial review of individual acts of the High Representative

• Standpoint of the BiH Constitutional Court

AP 347/04 M. Š.	20041130
AP 759/04 R. Đ.	20040929
AP 777/04 S. T.	20040929
AP 784/04 P. Ć.	20040929
AP 905/04 S. Š.	20041130
AP 953/05 *et al*. Bilbija *et al*.	20060708
U 37/01 Bičakčić *et al*.	20011102
U 41/01 Dobrinja	20040130

As to proceedings regarding the request No. U 37/01, it was proved for the first time that the substitution formula has its weak points. Until then the idea of substitution, *i.e.*, the idea of acting in the stead of domestic State authorities, as a basis for jurisdiction of the BiH Constitutional Court, was not raising any issues since the High Representative was mainly acting in the way in which some other domestic State authority has acted or could have acted. Thus, his activities could be viewed as some sort of substitute measures. As long as a substitute authority acts within the scope of its jurisdictions and in compliance with the authorisations of the body it substitutes for such activities, it shall not be questionable either in constitutional or in legal terms. However, in Case No. U 37-01, it was not quite clear for whom the High Representative substituted. Similar to other decisions on removal from office, on 23 February 2001, the High Representative issued a decision:

> "to remove Mr. *Edhem Bičakčić* from his position as a General Manager of the company 'Elektroprivreda', and to bar him from holding any official, elective or appointive public office unless or until such time as I may, by further Decision, expressly authorise him to hold the same.
>
> "This Decision has immediate effect and will not require any further procedural steps. Mr. *Bičakčić* must vacate his office immediately. "[3391]

It means that *Bičakčić* was not only removed from office but he was also barred from performing any public duty to which he could be elected or appointed, unless the High Representative issues another decision and explicitly allows him to do so. In the reasons for the said decision it is stated that while in office as Prime Minister of the Federation of BiH – that is the office he was holding before he took over the position from which he was removed, Mr. *Bičakčić* abused

3391 *OG of FBiH*, No. 9/01 of 23 March 2001.

his official authority[3392] and thereby seriously obstructed not only the internal political goals but also the implementation of the peace agreement. In doing so, as stated in the reasoning, *Bičakčić* formed the Federation Employment Agency and permitted the diversion of employment funds for unauthorised purposes; he illegally authorised the transfer of 825.000 KM (=DM) from the Federation budget to a private association; he improperly established a bank account in the name of the Federation Government and used that account to fund activities at his sole discretion and without accountability or transparency – he was making financial transactions as per his personal judgment and without being obliged to report to anyone; he also illegally ordered Customs to waive charges brought against customs evaders who, in a regular procedure, would be ordered to pay fines. However, he ordered that tax evaders should be repaid the customs duties and other charges. In fact, such kind of activities constitute illegal acts such as abuse of the prime minister's office, the use of public funds for illegal purposes (finally, in favour of the SDA party, of which he is a member), undermining the democratically legitimized institutions and causing damage to democratic processes, including the damage caused to the Radio and TV stations. Although no objections were made as to the possible illegal conduct of *Bičakčić* in his new position, the High Representative considered that it was necessary to remove him from office; otherwise, the necessary principles of the "transparency and lawfulness of public life" would be undermined, including the peace process itself.

In the appeals which were lodged by *Bičakčić* and 37 delegates of the Federation of BiH House of Peoples almost at the same time and which were similarly worded, an effort was made for the first time to examine another area of activity of the High Representative – removal of holders of public functions who were obstructing essential processes from the aspect of constitutionality.

> In appeals dated 23 February 2001[3393] Bičakčić describes himself – and other people have also described him in a similar manner – as an exemplary politician working on the implementation of the peace agreement. (Indeed, the international community, despite occasional doubts, was willingly cooperating with the former prime minister). The appellants alleged that the High Representative was not acting on a legal basis since neither in Articles V and II.1(d) of Annex 10, nor in paragraph XI.2 of the Bonn PIC

3392 Based on the aforesaid, the investigative judge of the FBiH Supreme Court initiated the criminal proceedings against *Bičakčić* and others due to the abuse of authority and falsification of documents (Ki 28/01 of 5 April 2001). *Bičakčić* appealed to the Constitutional Court against this investigation (U 34/01) and he was even successful, which, again, is hardly sustainable from the aspect of the ECtHR (compare the dissenting opinion of Judges *Hans Danelius* and *Joseph Marko*).

3393 Authors' archive.

> Declaration could the basis for his actions be found. His powers to interpret Annex 10 do not extend to legislative, executive or judiciary measures. Moreover, the Bonn powers apply to public officials only and this excludes his public office as General Manager of "Elektroprivreda". The appellants further alleged that dismissal was a measure that could have been only imposed by the ordinary judiciary. The High Representative, based on the Bonn powers, must not violate human rights or exceed his mandate under Annex 10. The procedure which was applied by the High Representative, as well as his decisions, are in violation of the appellants' rights referred to in Articles 1 and 3 (prohibition of degrading treatment), Article 6 (right to a fair trial, presumption of innocence, right to legal assistance, etc.), Article 13 (right to an effective legal remedy), Article 14 of the ECHR (prohibition of discrimination), and Article 3 of the Additional Protocol No. 1 to the ECHR in conjunction with the Copenhagen principles which are included in the Annex (passive electoral right and freedoms) in conjunction with Article II.6 (obligation of application) of the BiH Constitution. The appellants concluded that the decision lacked any legal basis in domestic law, the ECHR or the BiH Constitution.

The decision of 2 November 2001 (which was not to be published) was laconically short. The BiH Constitutional Court rejected the appeals of the parliamentary delegates, as well as the individual appeal by declaring that it has no jurisdiction to decide on this matter. The challenged decision "cannot be considered a decision of the court", "within the meaning of Article VI.3(b) of the Constitution. The parliamentary delegates are not authorised to lodge appeals according to Article VI.3(b) of the Constitution. On the other hand, their request does not fall within the scope of application of Article VI.3(a) of the Constitution.

Nothing new happened in the case of the arbitration decision on Dobrinja. Pursuant to Article VI.3(b) of the Constitution, in addition to the arbitration award, the decision of the High Representative was also challenged and, according to Annex 10 of the GFAP, the arbitrator was engaged in order to specify the Inter-Entity Boundary Line – IEBL in the Sarajevo suburb Dobrinja. The Inter-Entity boundary line, specified under Annex 2 and also presented on the attached map, proved to be unrealistic since it was not dividing only the settlement but also the buildings. By invoking its earlier jurisprudence in Cases U 9/00 (State Border Service), U 21/01 (CRPC) and U 7/97 (GFAP), the BiH Constitutional Court declared that it has no jurisdiction to decide the said matter.[3394] Due to the parallel effect of the Annexes to the GFAP and the GFAP integrity, no conflict among the Annexes is possible.[3395] The Court

3394 U 41/01, paragraph 16 *et seq.*
3395 Paragraph 17.

further stated that it is not competent to decide disputes arising from other Annexes – in this case from Annex 2. The engagement of an arbitrator is not a substitution for domestic legislation but rather an act which is adopted based on the specific powers of the High Representative in accordance with Annex 10.[3396] As to the arbitration award, it was adopted based on the decision of the High Representative with no possibility of review, the Court further stated. Therefore, it is impossible to review this decision as it would be a regular practice in international law.[3397]

Unlike the aforesaid, at the end of September 2004 the BiH Constitutional Court, in many of its decisions, has significantly deviated from its judicial practice.[3398] The appeals lodged in the spring of 2004 against a series of decisions of the High Representative on removal from office were no longer rejected just because of the fact that appellants had failed to appeal against *judicial* decisions, as in Case No. U 34/01, but now those appeals were rejected exclusively as *premature.* Namely, the appellants did not make an attempt to challenge decisions on their removal from office before the competent courts and, pursuant to the Constitution of the Federation of BiH, the courts are obliged to directly apply the ECHR and ensure the protection of rights and freedoms guaranteed under the Convention.[3399] In this case the Court also established that, from a formal point of view and because of the consequences sustained by the injured parties, these challenged decisions, just like other similar decisions of the High Representative, have given rise to serious thinking about respect for human rights and freedoms under the BiH Constitution and ECHR. *Inter alia*, the impossibility to challenge the decisions of the High Representative does not allow an individual to pursue any effective legal remedy which raises doubts about the guaranties under Article 13 of the ECHR. Moreover, it is possible that the right to prohibition of discrimination was violated, which is referred to under Article II.4 of the BiH Constitution.[3400] Finally, the challenged decisions do not contain any instruction of legal remedy. However, all State authorities in Bosnia and Herzegovina are subject to the obligation, while directly applying the ECHR, to review all acts that may be deemed to have violated individual human rights and freedoms and these authorities are obliged to provide and offer protection from possible violations.[3401]

3396 Paragraph 18 *et seq*.

3397 Paragraph 20.

3398 Compare, AP 759/04, AP 777/04, AP 784/04, AP 766/04, all dated 29 September 2004, including AP 905/04 and AP 347/04 of 30 November 2004, although not published in the *OG of BiH*, but placed on the Internet-page of Constitutional Court: <www.ustavnisud.ba>.

3399 Compare, the enacting clause and paragraph 10 and further part of the decision.

3400 *Ibid*., paragraph 8.

3401 *Ibid*., paragraph 9.

It means that it was only a matter of time before the affected persons would address the BiH Constitutional Court. Namely, upon exhausting all available legal remedies, the affected persons may appeal to the BiH Constitutional Court against the impossibility of challenging the decisions of the High Representative. And, indeed, that moment occurred when the appeal No. AP 953/05 was lodged and that was the moment when the BiH Constitutional Court, in order to be consistent, could and had to give its opinion about this matter. The appellants were two high-ranking officials from the RS (*Bilbija* and *Kalinić*) who were removed from their offices by a decision of the High Representative in 2004 and they were also barred from performing any public duties. He even barred them from performing any duties in the political party. All courts at the State and Entity level declared that they were not competent to review the decisions of the OHR on removal from office; no one was surprised by their statements. During the proceedings before the BiH Constitutional Court the appellants stated that Bosnia and Herzegovina (*not* the OHR) has violated, *inter alia*, their right to an effective legal remedy which is safeguarded under Article 13 of the ECHR because from the moment of being removed from office they were not given any court protection before any independent authority in the State.[3402]

On 8 July 2006 the BiH Constitutional Court arrived at a Solomon-like decision in which it found a violation of Article 13 to the ECHR for which Bosnia and Herzegovina is held responsible since there is no effective legal remedy in Bosnia and Herzegovina against the decisions of the High Representative.[3403] Even when the State has transferred some competencies to international organisations, it still has a positive obligation to secure rights and freedoms under Article 1 of European Convention.[3404] The Court further stated that the appellants' human rights and freedoms, on the ground of the special position of the High Representative in BiH, cannot be excluded or limited. Although it was obliged to do so, Bosnia and Herzegovina failed to conduct activities urging the international and legal authorities to ensure a mechanism of protection from the interventions of the High Representative which are in violation of human rights and freedoms. At the same time, by referring to its earlier jurisprudence, the BiH Constitutional Court shall not review the decisions of the High Representative.[3405] When it comes to the mutual effect of international and constitutional law within the person of the High Representative in BiH and possible restrictions on human rights and freedoms in Bosnia and Herzegovina

3402 AP 953/05, paragraph 13 *et seq*.

3403 Paragraph 51.

3404 AP 953/05, paragraph 52 *et seq.*, with reference to the ECtHR, *Matthews v. the United Kingdom*, Application no. 24833/94, judgement 18 February 1999, paragraphs 29 and 32.

3405 Paragraph 40 *et seq.*

based on the mandate of the High Representative, the BiH Constitutional Court argues as follows (the relevant part of the reasoning is quoted because of its significance exceeding the limits of the BiH context):

> "62. […] successive Security Council Resolutions made under Chapter VII of the UN Charter have recognised the High Representative as having authority under Annex 10 to the General Framework Agreement for Peace to make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council. The Member States of the UN have an obligation under Article 25 of the UN Charter to carry out the Resolutions of the Security Council in accordance with the Charter. It is not entirely clear that the relevant provisions of the Security Council resolutions are decisions of the Security Council. They do not say that they are decisions. However, they clearly go beyond mere recommendations, and Article 39 recognises only two formal acts which the Security Council can promulgate under Chapter VII, namely recommendations and decisions. The BiH Constitutional Court therefore accepts that the relevant provisions of the High Representative are decisions for the purposes of Article 25 of the Charter. In international law, the High Representative thus has power to make binding decisions, and authorities of Bosnia and Herzegovina have an obligation to co-operate with the High Representative, by virtue of both the General Framework Agreement for Peace and the Security Council resolutions.
>
> 63. Furthermore, in international law by virtue of Article 103 of the UN Charter the obligations of Bosnia and Herzegovina to comply with decisions of the Security Council override conflicting obligations arising under other treaties. This appears to mean that, in the event of a conflict, even human rights obligations may be overridden by a Security Council resolution under Chapter VII of the Charter. The only possible exception so far recognised in the literature is an obligation which amounts to *ius cogens*, a peremptory norm of international law: see Article 30(1) of the Vienna Convention on the Law of Treaties; the decision of the Court of First Instance of the European Court of Justice, *Kadi v Council of European Union* (Case T-315/01, 21st September 2005); Separate Opinion of Judge *ad hoc Lauterpacht* in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (International Court of Justice, 13th September 1993, General List No. 91, at paragraph 100); *Bernhardt*, commentary on Article 103 of the Charter, in *Bruce Simma et al.*, *Charter of the United Nations - A Commentary*, 2nd edition, at p. 1295. See also the decision of the European Court of Human Rights in *Air Bosphorus v Ireland* (Application No 45036/98, 30th June 2005).
>
> 64. The BiH Constitutional Court has carefully considered whether this deprives the appellant of any rights to which they might otherwise have been entitled, or protects the State of Bosnia and Herzegovina against positive obligations on which the BiH Constitutional Court can adjudicate and which it can enforce. In this connection, the BiH Constitutional Court draws attention to the following matters:
>
> 65. First, a decision that the authorities of Bosnia and Herzegovina owe positive obligations to the appellant would not in any way affect a decision of the High Representative, or call in question the legal effectiveness of his

> binding decision to dismiss the appellant from his post. The BiH Constitutional Court accepts the effectiveness of the decision of the High Representative. Indeed, had it not been effective the case would not have come before the Court.
>
> 66. Secondly, Article 103 of the Charter of the United Nations deals only with a sub-set of possible conflicts of laws in public international law, namely conflicts between the obligations of Member States of the United Nations arising under different treaties. It does not attempt (and indeed would be powerless to attempt) to determine the effect of any such conflict on the obligations of the authorities of Member States under their national constitutional or legal orders.
>
> 67. Thirdly, the obligations of the authorities of Bosnia and Herzegovina and the human rights within the jurisdiction of Bosnia and Herzegovina are clearly enumerated within the Constitution of Bosnia and Herzegovina. While the Constitution had its origin in an international treaty, Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, it has functioned for over eleven years as the national Constitution, the highest legal act of the state of Bosnia and Herzegovina. It has a dual nature. It has an international aspect as one of the foundations for the existence and international recognition of Bosnia and Herzegovina in the international community of states. But it has a purely national aspect when perceived from within the country as the highest source of validity for the laws and institutions of Bosnia and Herzegovina. It is as a national, not an international, instrument that the BiH Constitutional Court, as the highest judicial authority within Bosnia and Herzegovina, interprets and gives effect to it.
>
> 68. Having taken these matters into account, the BiH Constitutional Court considers that the obligations of Bosnia and Herzegovina in public international law to co-operate with the High Representative and to act in conformity with decisions of the UN Security Council cannot determine the constitutional rights of people who are within the jurisdiction of Bosnia and Herzegovina [...]"

The Court arrived at the following conclusions. The international and legal context of this case contains no aspects because of which the Court would be forced to adopt a conclusion which would be different from the conclusion reached on the basis of interpretation within the domestic constitutional framework.[3406] Therefore, by the force of domestic law and the international effect of principles on human rights and freedoms, the State has a positive obligation to guarantee that human rights and freedoms will be respected. It is questionable whether Bosnia and Herzegovina has undertaken any steps in order to ensure effective legal protection from individual acts taken by the High Representative, in other words such activities are not recognisable.[3407] "*Bosnia and Herzegovina, through the Steering Board of the Peace Implementation Council and Security Council of the United Nations, a body in charge of nominating and confirming*

3406 Paragraph 71.
3407 Paragraph 72.

the appointment of the High Representative, was obliged to make an effort in pointing to the alleged violations of constitutional rights of individuals on the grounds of non-existence of an effective legal remedy and thus ensure the protection of constitutional rights of its citizens."[3408] There is no effective legal remedy in Bosnia and Herzegovina against the decisions of the High Representative which concern individual rights. Despite its positive obligation to protect constitutional rights, Bosnia and Herzegovina has taken no steps through the authorities having competence to nominate and appoint the High Representative for the purpose of ensuring the mentioned legal protection.[3409] In this context, the BiH Constitutional Court recalls the opinion of the Venice Commission of 21/22 March 2005 on decertified police officers. The Venice Commission established that it was obvious that neither the courts nor any other BiH State authorities are competent to review or annul the decisions on decertification. Therefore, according to the opinion of the Venice Commission, the process of reviewing the decisions that cannot be challenged before the BiH authorities must be conducted by the United Nations. The Security Council should set up a special body mandated to review such challenged decisions.[3410] Finally, the following is stated in the reasoning:

> "76. Therefore, the BiH Constitutional Court concludes that the appellants' right to an effective legal remedy under Article 13 of the European Convention has been violated in the instant case, and therefore it is true that Bosnia and Herzegovina has a positive obligation to protect the constitutional rights of appellants in this regard."

• Standpoint of the Human Rights Chamber

CH/00/4027 & CH/00/4074-A Municipal Council of the South-West Municipality v. the OHR	20000309
CH/98/1266-A Čavić	19981218
CH/98/230 *et al*. D. Suljanović *et al.*	19980514

Pursuant to its permanent case-law, the Human Rights Chamber maintains that it is not called upon to review whether the decisions on removal from office are in accordance with the rights defined under Annex 6. Pursuant to Articles II.2 and VIII.1 of Annex 6, the Human Rights Chamber is (only) competent to establish whether there were violations of Annex 6 within the field of responsibilities of the Parties under Annex 6.[3411] According to the standpoint of the Human Rights Chamber, the authorities of the High Representative are based on the

3408 Paragraph 73.
3409 Paragraph 74.
3410 Paragraph 75.
3411 Compare, CH/98/1266-D, paragraph 18.

GFAP and on various resolutions of the UN Security Council.[3412] The Human Rights Chamber particularly points to Article I.2 of Annex 10, wherein it is stated that the Parties requested the designation of a High Representative, to be appointed consistent with the relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilise and, as appropriate, coordinate the activities of the organisations and agencies involved in the civilian aspects of the peace settlement by carrying out the tasks set out in Annex 10 as entrusted by a U.N. Security Council Resolution.[3413] Pursuant to Article V of Annex 10, the High Representative is the final authority in theatre regarding the interpretation of the Agreement on the civilian implementation of the peace settlement".[3414] The Resolution *1031(1995)* of the UN Security Council endorses the establishment of a High Representative. The Human Rights Chamber also points to the Bonn powers: "it is beyond doubt that the actions of the High Representative or IPTF, are not subject to any review in relation to the carrying out of their functions under the General Framework Agreement. For this to be the case, the General Framework Agreement would have to provide specifically for any such review.[3415] The actions complained of were carried out by the High Representative in the performance of his functions under the General Framework Agreement, as interpreted by the Bonn Peace Implementation Conference. There is no provision for any intervention by the respondent Party in those actions. In addition, the High Representative cannot be said to be acting as, or on behalf of, the State or the Entities when acting in pursuance of his powers. As a result, the actions giving rise to the present application cannot be considered to be within the scope of responsibility of the respondent Party.[3416] The Human Rights Chamber therefore concludes that these applications are incompatible *ratione personae* with the Agreement within the meaning of Article VIII.2(c) thereof.[3417]

vi. Possibility of judicial review of acts passed by the OHR in "a grey zone"

In Decision No. U 13/02, the subject of review before the BiH Constitutional Court was a legal act of the High Representative which could not be easily defined as a law, neither in formal nor in substantive terms. By its "Decision on allocating jurisdiction for the investigation, prosecution and trials of incidents

3412 CH/98/1266-A, paragraph 4.
3413 Paragraph 5.
3414 Paragraph 6 (translation from the decision CH/98/1266-A, paragraph 6).
3415 CH/98/230&CH/98/231-A, paragraph 39; CH/98/1266-A, paragraph 18.
3416 CH/98/1266-A, paragraph 19.
3417 CH/98/1266-A, paragraph 20; compare, CH/00/4027&CH/00/4074-A paragraph 9 *et seq*.

of violence and intimidation in the Federation during the past month to the Cantonal Prosecutor and Cantonal Court”, No. 101/01 of 27 April 2001,[3418] the High Representative passed special regulations on the jurisdiction of criminal prosecution bodies for a number of criminal acts. The reason was related to the attempts of a number of Croat politicians from the Federation aspiring for independence in the spring of 2004. Under the leadership of *Ante Jelavić*, who was a Croat member in the BiH Presidency at that time, the mentioned politicians attempted to establish parallel Croat institutions because the Croat leadership considered that the Croat interests were insufficiently protected in the Federation and at the State level. In this context, a conflict occurred between the Croat representatives and SFOR peacekeeping troops and OHR and there was a use of force. The incident occurred when the mentioned representatives tried to confiscate the evidentiary material from several branches of the Hercegovačka Bank being suspected of financing the interests of Croat groups whose aim was secession. In order to ensure a criminal prosecution of responsible persons by independent judges and prosecutors, the OHR was of the opinion that, regardless of applicable regulations on jurisdiction under the relevant law on criminal proceedings, it was necessary to assign the mentioned cases to the criminal prosecution bodies of the Canton of Sarajevo and some cases were to be directly forwarded to the Court of the Federation of BiH. The bodies having territorial and subject-matter jurisdiction over the said cases had to allocate those cases to the bodies mentioned in the decision.

The BiH Constitutional Court declared that it has no jurisdiction to take a decision in the *Ante Jelavić* case where the violation of procedural rights under Article 6 of the ECHR was established. With reference to the issue whether all available legal remedies had been exhausted, the majority of judges considered that the decision on the jurisdiction of the Criminal Panel could no longer be challenged by pursuance of ordinary legal remedies and that all legal remedies available under law had been already exhausted.[3419] In the proceedings relating to this case, a primary issue was not the decision of the High Representative, although his decision was a decisive one when it came to resolving the issue of lawfulness of jurisdiction of the court that was assigned the task to criminally prosecute the appellant. In its decision of 10 May 2002, the BiH Constitutional Court established that there was a violation of the right to a fair trial under Article 6 of the ECHR because the proceeding conducted by the court lacked territorial jurisdiction. Taking into account the previous case-law of the Court concerning the possibility of reviewing OHR legal acts it was necessary to assess the decree of the OHR as a law in order to make such a

3418 Decision available on the Internet-page: <www.ohr.int>.
3419 U 13/02, paragraph 19 *et seq.*

conclusion, (the substitution formula applied in Case No. U 9/00). Otherwise, this specific (incidental) review of the acts issued by the OHR would not be permitted either, although it occurred in this case. The BiH Constitutional Court declared this act as a legislative act in substantive terms since the regulations on territorial jurisdiction of judiciary fall within the competence of the federal legislature according to Article IV.A.5/1(d) of the Federation of BiH Constitution. As far as this case is concerned, those are indeed the regulations dealing with a specific situation where a doubt exists that the specific criminal offences have been committed by way of undertaking certain actions. Hoverer, this specific act is not related to specific perpetrators. This difference has been of decisive importance for the Court in order to make a difference between a general act and an individual concrete act.[3420] Accordingly, the BiH Constitutional Court established that there was a violation of the appellant's right under Article 6 of the ECHR since the ordinary criminal court, while establishing its jurisdiction, failed to take into consideration the applicable regulations on criminal proceedings, but rather relied on the decision of the High Representative, which, in itself, is unconstitutional. To be precise, the High Representative, who is bound by the Constitution even when imposing the law, restricted the appellant's procedural rights referred to in the Law on Criminal Proceedings. Moreover, due to the coercive nature of his measure, the High Representative also violated the principle of democracy under Article I.2 of the Constitution of the Federation of BiH.[3421]

vii. Commentary

At first sight, **the Human Rights Chamber** was assigned a more significant criterion for determining its jurisdiction in regards to the acts of the international community in the country since the Human Rights Chamber's jurisdiction had been explicitly limited to establishing human rights violations *in areas falling within the jurisdiction of the Parties*. Therefore, the Human Rights Chamber may fully release the Parties under Annex 6 from responsibility in cases where the High Representatives removed the holders of public functions from their office. Indeed, when it comes to these acts, no responsibility of the Parties is to be implied *ex-ante* in any form. By relying on the jurisprudence of the BiH Constitutional Court, the Human Rights Chamber subsequently specified the area of the Parties' responsibility under Annex 6 using the substitution formula arising from the concept of functional duality. When the High Representative passes domestic laws, the responsibilities of the Parties under Annex 6 arise from their capacity to modify those acts. Accordingly, the responsibility does

3420 U 13/02, paragraph 34.
3421 U 13/02, paragraph 41.

not arise from the fact that the Parties (to say the least) are the framers of the High Representative's organs and that, as a consequence, the Parties should allegedly control him. In fact, Bosnia and Herzegovina, the Republika Srpska and the Federation may be held responsible only in a situation where some act, after being imposed by the High Representative, was not harmonised with the Constitution. Consequently, the Human Rights Chamber has recognised this kind of responsibility, *i.e.*, the responsibility for failure to act, but only with respect to legal acts that could have been be modified or made ineffective by the Parties under Annex 6. If the Parties have no possibility to pass such acts, then neither could they be held responsible for amending or annulling those acts. In this way, the Human Rights Chamber has proved that its previous case-law relating to the decisions on removal from office by application of the substitution formula hasn't changed as yet. This kind of approach helped the Human Rights Chamber ensure that the Parties under Annex 6 are not exposed to an excessive burden. While the domestic legislature could still be expected and requested to amend the law which is in violation of the ECHR, it would be too much to hold the Parties responsible for the measures taken by the High Representative by virtue of his international and legal mandate for the reason that those measures (provisionally) have no legal basis in domestic law, they are not accessible to domestic authorities, which means that the said authorities cannot make the relevant amendments.

The judicial practice of the BiH Constitutional Court is more complex. It has been developed for years and, with the passing of time, the BiH Constitutional Court has been intensifying its efforts in dealing with issues and complex matters in which constitutional and international law were interconnected. In Case No U 9/00, the BiH Constitutional Court tried, for the first time, to make a distinction between the authority of international and domestic actors, *i.e.*, between the different Annexes of the Dayton Agreement. The Court was still explicitly restricting its own authority, claiming that it is not called upon to review the grounds for and exercise of the authority of the High Representative since the foundation for his activity lies in international law, although, occasionally and provisionally, he substitutes for the work of domestic institutions ("functional duality"). As to the Court's statement that it is not called upon to review *the exercise* of the authority of the High Representative, given the fact that the laws are still subsequently reviewed we should interpret this statement in a way that the issue of whether a certain decision should have been adopted is not to be considered before the BiH Constitutional Court, but only the manner in which the relevant decision was adopted. In other words: the timing of the High Representative's intervention is subject to his own assessment which is not to be reviewed by the judiciary. However, the High Representative is to

comply with the Constitution when using his powers and his actions are subject to review by the BiH Constitutional Court.

A starting point and basis for such an opinion is the statement that the BiH Constitutional Court has jurisdiction "whenever […] this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina".[3422] However, there is no legal way of addressing the BiH Constitutional Court. Neither does the Constitution nor any other domestic law contain some general clause in this regard, such as the one under Article 40, paragraph 1 of the German Law on Administrative Judiciary (*Verwaltungsgerichtsordnung*).[3423] As to the question whether it is a legal act within the meaning of Article VI.3, the BiH Constitutional Court, in Case No. U 9/00 and in Case No. U 13/02, pointed out that "according to the form and content", those are the laws of Bosnia and Herzegovina. The author of the act is not relevant when it comes to the issue of jurisdiction. In this respect, the judicial practice of German courts after World War II is different from the practice of the BiH Constitutional Court. The German courts declared that they had no jurisdiction to review the acts of the Alliance forces that had placed Germany under administrative rule after the war, arguing that those acts, for instance, "by their substantive content [...] constitute the law of the French Military Government",[3424] or they could not be considered, for instance, as a measure of the Land Central Bank undertaken based on the order of foreign military government.[3425]

The Court considered that by invoking Article VI.3 of the BiH Constitution it would be able to clarify the situation and establish clear relations. Thus, in the *Bičakčić* case (U 37/01) the request of the parliamentary delegates was dismissed, for it exceeded the scope of application of Article VI.3(a), and the individual appeal was also dismissed for the reason that the appellant failed to appeal against the decision of "any court in Bosnia and Herzegovina". A subsequent assessment of regulations on jurisdiction within the scope of a substation formula required a more detailed explanation. Given this unspecific legal phrase under Article VI.3(a) "including, but not limited to", at first sight it is hard to recognise a clear borderline concerning the subject of review. Taking into account the systematic and teleological interpretations, as well as the legal-comparative approach to this regulation, it appears that the field of

3422 U 13/02, paragraph 32.

3423 This provision generally regulates the issue of guaranteeing the administrative proceedings in administrative cases.

3424 "Badischer Staatsgerichtshof" of 27 November 1948, quoted in Stahn, 2001, p. 169.

3425 Decision of the German Constitutional Court ("*Bundesverfassungsgericht*") AZ: 1 BvR 95/51, BVerfGE 1, 10 [11].

application of Article VI.3(a) is limited to federal and organic disputes, including the abstract control (review) of the constitutionality.[3426] Accordingly, as to individual acts such as the decisions on removal from office that were issued by the High Representative, they do not fall within the scope of Article VI.3(a). However, when it comes to a prospective application of Article VI.3(b), the argument –although being correct in itself – that the decisions on removal from office issued by the High Representative are not the judgments of domestic courts is not sufficiently strong. It is because the BiH Constitutional Court has already decided that Article VI.3(b) would be widely interpreted and that it would accept appeals in which the appellants complain against the inactivity of the judiciary (which means that it is acceptable to lodge appeals according to Article VI.3(b) of the BiH Constitution although there is no "judgment"). Moreover, within the frame of guaranteeing legal protection (Article 6, *i.e.*, Article 13 of ECHR), the BiH Constitutional Court accepted the appeals lodged against *administrative acts*, which could not be challenged before domestic courts. Even if the intention was to avoid making a hasty conclusion that none of the courts in Bosnia and Herzegovina are to deal with the decisions of the High Representative, this Court could have, nevertheless, rejected the relevant appeal on the grounds of non-exhaustion of legal remedies. The formal and legal argumentation used in this regard (in Case No. U 37/01) means avoidance of confrontation with a legal problem, in particular because it was not obligatory at all. That argumentation wrongly implies that there are clear limitations concerning the jurisdiction of the BiH Constitutional Court and thus makes an impression that the High Representative partially acts in a legal vacuum. As to the case where the High Representative substitutes for the work of domestic authorities, he is subject to control by the BiH Constitutional Court, but in other cases he is not.

The decision of the Court in Case No. U 13/02, to say the least, is not of excellent quality and is not sustainable as a precedent. Similar to the decision on admissibility, the decision on merits is also questionable and is not justified at all. Even in a case where the appellant could no longer challenge this decision by ordinary legal remedies, it is still debatable whether the appeal was to be declared admissible. Pursuant to the ECHR, when examining the fairness of the proceedings, the Court should take the whole proceedings into its consideration. For the purpose of meeting the requirement of the cost-effectiveness of the proceedings, there should be no separate challenging of individual procedural decisions before the BiH Constitutional Court.[3427] It seems that the discussion

3426 Compare, above "1. Abstract control of constitutionality, organic and federal disputes (Article VI.3(a) of the BiH Constitution)", p. 688 *et seq.*

3427 Compare, dissenting opinion of Judge *Danelius*, authors' archive, referring to the dissenting opinion of Judges *Danelius* and *Marko* in Case No. U 37/01.

on the legal nature of the OHR decisions, including its results, was aimed at the result only. Instead of naming the mentioned decisions laws (a necessary requirement for establishing the court's jurisdiction), it would be more convincing if those decisions were considered as special measures dealing with territorial jurisdiction. It must be pointed out that the issue indeed pertained to a special measure of provisional international administration under Annex 10, whose aim was to sanction those who do not comply with the Dayton Constitution and who launch attacks on the State and this goal was to be achieved in cooperation with politically independent criminal prosecution bodies. Moreover, the decision does not deal with the issue of whether Article 6 of the ECHR guarantees the right to a judge having territorial jurisdiction or just the right to any legally appointed judge.[3428] That is the reason why the Court referred to the violation of an ordinary law, *i.e.*, the law on criminal proceedings, which obviously do not have the rank of the Constitution and therefore, they could not have supremacy over the OHR decisions, which are classified into the rank of laws. Finally, pointing to violations of the principles of democracy by publicising the imposing nature of the OHR acts is totally unfounded. It is unacceptable that the powers for passing international intervention acts and the necessity to pass those acts in accordance with Annex 10 are intentionally disregarded based on half of the sentence (literally speaking) although that kind of interventionism – as, by the way, explicitly admitted by the BiH Constitutional Court – has no democratic legitimacy *per definitionem* and should not have it in the context of international law.

Unlike the aforesaid, rejecting the appeals that have been lodged against the decisions on removal from office *as premature* by arguing that the appellant has failed to defend himself from the OHR decisions in some other way is legally founded in the context of the gradual reacquiring of State sovereignty.[3429] The Court reserved the right to review the individual acts upon the exhaustion of ordinary legal remedies.

When the appellants, after unsuccessful attempts before ordinary courts, had finally reached the BiH Constitutional Court, this Court opted for a "diplomatic solution". In its judgment, Case No. AP 953/05, the Court found that the right to an effective legal remedy under Article 13 of the ECHR was violated by this specific act of the High Representative, since there is no legal remedy against this act, and Bosnia and Herzegovina did nothing to introduce such a remedy. This statement opens room for many different conclusions, as well as the fact

3428 Compare, once again, dissenting opinion of Judge *Danelius* and arguments of the State Prosecutor's Office contained in the reasoning of the decision.

3429 Compare the references from the footnote No. 1724, p. 382.

that neither does the Court decide on the merits of the case nor does it order the introduction of a relevant judiciary body, nor does it forward the case to some other court to take a decision on merits.

Firstly: Legal protection is required against the decisions of the OHR. Domestic constitutional law, which has declared numerous international conventions as directly applicable, imposes the ensuring of legal protection even against the acts of the High Representative, whose powers arise from Article 10, *as well as* from the applicable UN Security Council Resolutions under Chapter VII of the Charter. Domestic law foresees no regulation for exclusion, neither could some general exclusions nor restrictions of human rights and freedoms be found in international law.

Secondly: Without presenting an opinion about the subject of proceedings. Which criterion is to be applied to individual acts of the High Representatives in order to ensure legal protection, and are exceptions possible with regards to some usual levels of protection of human rights and freedoms arising from the necessity to implement the peace agreement – those are the questions that the Court has failed to answer. It is a fact that the BiH Constitutional Court *was not giving its opinion* about the constitutionality of the challenged acts.

Thirdly: Need for a judicial body that would possess international legitimacy. At the moment of the issuance of this decision there was no relevant body to protect the appellants (including the BiH Constitutional Court). By pointing to the recommendation of the Venice Commission, the BiH Constitutional Court indicates that neither this Court nor some other domestic State body can establish such kind of judicial instance *without the participation of the Security Council and possibly the PIC*.

Fourthly: The content of the positive obligation to provide protection. The responsibility of the State for violations of the appellants' rights under Article 13 of the ECHR *is not* contained in the fact that the State has failed to provide appropriate legal protection because, as per the Court's opinion, the State has no such authorisation. However, the State should have intervened by addressing the legally (UN Security Council) and politically (PIC) authorised bodies so as to demand the establishment of a relevant judicial body that would be internationally authorised and thus ensure the appropriate legal protection for its citizens.

Fifthly: The substitution formula is still applied. Upon adopting this decision, the Court has not yet exceeded the limits of international law (concerning its competence). The internal domestic legislature is authorised to subsequently

amend the law imposed by the OHR and the BiH Constitutional Court is authorised to examine that law and eventually make it ineffective. However, the specific individual acts of the OHR are based on international-legal authorisations, so the internal State bodies are not authorised to examine whether those acts are consistent with the Constitution or not.

However, the High Representative considered that the decision in Case No. AP 953/05 jeopardized his own authority guaranteed under the Dayton Agreement and soon after its publication in the official gazettes he issued a resolute order.[3430]

> In this order, the OHR stated that the PIC Steering Board (27 February 2007) is concerned that "domestic" actors in Bosnia and Herzegovina have challenged actions undertaken on the basis of Dayton Agreement and UN Security Council Resolutions under Chapter VII of the United Nations Charter. Therefore, all institutions of Bosnia and Herzegovina should be reminded that their international obligations under the GFAP and the United Nations Charter must be respected. The Steering Board authorised the High Representative, in close coordination with the Steering Board Ambassadors, to take appropriate actions to ensure that Bosnia and Herzegovina fulfils these international obligations.
>
> The OHR accepted the theory of functional duality developed by the BiH Constitutional Court in its Decision U 9/00 and also agreed to waive his immunity concerning his legislative acts and consented to the review of certain of his acts within the framework of the above mentioned theory and is willing to continue doing that. However, the decisions on removal from office, according to the mentioned theory, cannot be subject to review since they are based on the authorities under Annex 10. The Court rightfully referred to the international-legal ground for the powers of the High Representative, including the Resolution of the UN Security Council, and refused to review certain decisions of OHR; in other words the Court declared that it was not competent to review the mentioned decisions.
>
> There is no State that can hold the High Representative accountable in any way; he is not an organ of Bosnia and Herzegovina or any other State and his actions cannot engage the responsibility of any State, including Bosnia and Herzegovina. Further, the High Representative – to his satisfaction – concluded that the Court, due to the violations that have been established, may only reproach the State for not bringing the alleged violations of constitutional rights to the attention of the responsible international bodies.

3430 "Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija and others, No. AP 953/05 of 23 March 2007" (available at : <www.ohr.int>).

> Pursuant to Article V of Annex 10, as interpreted by the High Representative, the legal force of his decisions and orders does do not arise from any transfer of competence regardless of whether those competencies have interfered with the legal order of the State, Entity, Canton or District or somewhere else.
>
> Moreover, the OHR is aware that the wrong interpretation of the judgment by the State bodies, institutions and organs of Bosnia and Herzegovina, may place them, when implementing the Decision of the Court, in violation of their aforementioned international obligations. Given the aforesaid, by exercising his powers relating to the coordination of activities under Annex 10, the OHR has an exclusive responsibility to ensure that the implementation of the judgment of the BiH Constitutional Court does not jeopardise the peace agreement, and in particular the powers of the High Representative to sanction those individuals whose conduct impedes such implementation.
>
> It is also necessary to recall that it is already open for individuals to address the OHR to have their ban (on holding public offices) lifted and that such lifting of the ban has occurred in 50 cases.

In addition to such considerations, by issuing a series of orders, the High Representative has confirmed his role in the process of construction of the peace agreement The Presidency of Bosnia and Herzegovina shall address to the High Representative, as Chair of the Steering Board of the Peace Implementation Council, all matters raised in said Decision that ought to be considered by the international authorities (Article 1). Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the GFAP civilian aspects; and all such measures shall be viewed as conduct undermining the implementation (Article 2). Notwithstanding any contrary provision in any legislation in Bosnia and Herzegovina, any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or takes issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent (Article 3, paragraph 1). Any proceeding referred to in paragraph 1 of this Article shall be effectively and formally notified to the High Representative by the concerned court without delay (Article 3, paragraph 2). “For the avoidance of any doubt or ambiguity”, the OHR, in the exercise of its international mandate, releases the public authorities in Bosnia and Herzegovina from any liability in respect of any direct or indirect responsibility for the decisions of the OHR (Article

3, paragraph 3).[3431] The provisions of the Order are laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the courts of Bosnia and Herzegovina or its Entities or elsewhere. Furthermore, no proceedings may be brought in respect thereof before any court whatsoever at any time hereafter (Article 4).

The reaction of the High Representative was very explicit and strong. An institution entrusted with the civilian implementation of the peace agreement needs to prevent similar situations in the future which may lead to the disappearance of authority of the High Representative, authority that has already been considerably undermined. In pursuance of this goal the OHR has recognized its fine self-limits, as well as the limits between international law and domestic law in the relevant judgment. It is understandable that the OHR is afraid that this legal differentiation may cause misunderstanding even among educated lawyers if that issue is to be addressed before the courts and administrative bodies, and this could be particularly manifested under the influence of interest groups. Therefore, by giving explicit instructions and restrictions, the High Representative wishes, once again, to clarify which kind of consequences this judgment may cause in terms of judicial practice.

If the hypothesis referred to in Case No. AP 953/05 (necessity of legal protection against the acts of the OHR; lack of competence of the domestic courts, and the necessity of the establishment of a judicial institution with international legal authority) are viewed together with the formula on substitution developed by the very Court, what comes to light is the *contradiction* which has existed in the case law of the BiH Constitutional Court from the very beginning: the hypothesis according to which the legislative activity of the High Representative may be reviewed, and the rest of the measures may not, makes no sense either in formal-legal terms, or in terms of the purpose of the peace agreement. For, powers for the legislative intervention of the OHR do not originate from the Constitution of BiH, but from Annex 10. The formula of substitution mixes different categories, aspiring to create a practical and applicable criterion for the distinction of cases.

The legal basis for the powers for intervention of the High Representative *always* lie in Annex 10, irrespective of the individual measure concerned (law

3431 The European Court of Human Right has supported this position of the OHR in the case *Berić et al. v. Bosnia and Herzegovina* (Application No. 36357/04, judgment of 16 October 2007, paragraph *26 et seq.*) dealing with the issue of police officers decertified by the IPTF (which was also referred to by the Constitutional Court). The ECtHR gave an opinion that Bosnia and Herzegovina, according to the European Convention on Human Rights, has no competence *ratione personae* and therefore cannot be held responsible for the decisions of the High Representative.

or concrete measure against an individual). Thereby, a decision of the High Representative enacted in the form of law for implementation of the peace agreement is as significant as an individual act. Thus, it is impossible to understand why a possibility would exist for the internal State authorities, including the BiH Constitutional Court, to review a decision in the form of law, to declare it null and void or to render it ineffective, and not to be able to do likewise with concrete individual measures. If we consider Annex 10 a relevant norm granting to the High Representative *power* to act, then such a norm – which applies to all of the acts of the High Representative in general – is not sufficiently specified, particularly if one bears in mind that the interpretation of Annex 10 as given by the High Representative himself is considered as the applicable legal basis (which *de facto* reads: the High Representative may do anything he deems necessary). However, likewise, the fact that Annex 10 does not enumerate all the instruments that the international "assistant to those in distress" requires in order to exercise his duties is also part of the GFAP construction. Therefore, it would be more appropriate to claim that on the basis of the legal construction of "Annex 4-Annex 10 of the DPA" and their mutual relations, all measures of the High Representative, with the exception of the advisory function, ought to be viewed as *orders or substitute measures*. The power thereof arises from Annex 10 of the DPA. To adopt a measure necessary in a given situation, regardless of whether it concerns the provisional imposing of a law or a political sanction or such like, if possible, the High Representative relies on the *legal basis of the power* which a competent body or a State authority has under the domestic law, and which would otherwise, under the domestic law, be competent for its adoption. From that viewpoint, the fact that Annex 10 does not contain a specific basis for powers does not appear problematic.

The law, a concrete individual measure or some other measure, which is not possible to precisely define, constitutes instruments of activity of the public authority, in which stead, due to the exceptional circumstances, the High Representative must act. However, differentiation of such measures, depending on whether such national instruments exist or not, is not completely fair. This kind of differentiation is only factual in nature. Certain acts of the High Representative have no legal basis in the national law, on which a domestic authority could otherwise rely had such a legal basis been created. Therefore, theoretically speaking, the domestic legislature, *i.e.*, the contracting parties to Annex 6, could fill such a legal gap. It is equally possible to shape the legal basis for both the dismissal of an elected official or a member of parliament and for the ban to exercise such office for a certain period of time. The same goes for "the freezing" of bank accounts, thwarting the funding of political parties

through public funds, or temporary suspension of a possibility to challenge a certain act in court.

> Examples from the German law may perhaps clarify the aforementioned: Under Article 41 of the Basic Law, the *Bundestag* shall decide whether a member of the *Bundestag* shall lose his/her membership. This decision may be challenged before the German Federal Constitutional Court (BVerfG). Article 61 of the Basic Law regulates issues of filing a lawsuit against the president and of the German Federal Constitutional Court adopting a decision on his/her dismissal. Under Article 64 of the Basic Law, the federal minister may be dismissed by the President of the Federal Republic of Germany at the proposal of a federal chancellor. Article 67 of the Basic Law provides for a possibility to vote no confidence in the federal chancellor.
>
> In the case *Bičakčić* there was a legal basis for the removal from office of a director general. The position of the director of the enterprise, under the Law on Elektroprivreda Power Supply Company and the Statute on Elektroprivreda Power Supply Company, is a public position.[3432] The Steering Board of the enterprise may remove from office the director with the consent of the Government. Therefore, the High Representative had substituted in this case either the first-instance administrative authority (the Steering Board of the enterprise) or the Supreme Court of FBiH, as a judicial control body. If we take the first case as an example: *Bičakčić* would in that case have to first address the Supreme Court of FBiH, whereby his appeal with the BiH Constitutional Court of BiH would again be dismissed as premature. If we take another case as an example – in the context of the substitution formula – then the appeal against the judgment of the Supreme Court of the Federation of BiH would, under Article VI.3(b), indeed come within the competence of the BiH Constitutional Court of BiH. Whether the removal from office falls under the protection of the constitutional human rights and fundamental freedoms (problem area related to *ratione materiae*) is another issue. Likewise, it is not certain whether the removal from office constitutes a "criminal sanction" within the meaning of Article 6, paragraph 1 of the ECHR.
>
> Yet there is a lack of domestic legal basis for other types of interventions. Thus, *e.g.*, a *permanent ban on exercising public office*, in the proceedings in which it was issued, does not exist in the domestic law, nor is it in accordance with elections (Annex 3) or with the Election Rules enacted in accordance with Annex 3. Article 604 of the Election Rules, which were in force at the time of removal from office, provides as a sanction only the impossibility for such a person to run for office at the next first elections.

3432 The Law on Elektroprivreda Power Supply Company, *OG of RBiH*, Nos. 1/93 and 13/94; Statute of Elektroprivreda Public Power Supply Company, *OG of RBiH*, No. 5/94 and *OG of FBiH*, No. 35/99 and 10/01.

> The new Election Law of Bosnia and Herzegovina, in addition to fines and removal from the list, only provides for a sanction of withdrawal of a permit for elections.[3433] However, the ban to exercise public office and denial of the right to be elected are provided for in the Spanish Criminal Code,[3434] as one of the sanctions for certain criminal acts, only if concerning a serious criminal act and if such a criminal act is prosecuted in compliance with the principles of a legal state.

If, however, internal State instruments do exist, then the High Representative, when enacting a certain act, acts in the stead of the State institution. The substitution formula would have to be applied, thereby making the action of the High Representative subject to State control. The substitution formula *as such*, thus, does not bestow on the High Representative special rights or rights he needs in an emergency situation in order to implement the peace agreement and the rights he has under Annex 10 in conjunction with the PIC declarations and with the support of the UN Security Council.

Also, the mission and purpose of the GFAP are not in granting to the High Representative special rights with international and legal grounds solely in such matters where he, more-or-less, *does not* act as a substitute for domestic authorities, and that conversely, *i.e.*, when some measure of his could have been theoretically enforced by a domestic entity, he be subject to domestic control. For, activities of the High Representative aimed at consolidating peace will not be less threatened if he acts in the manner provided for by domestic law (*e.g.* enacting a law), and then to have his activity reviewed by domestic authorities. Would, in such a case, the High Representative dare to intervene once more in order to correct such a domestic decision again and to direct it in the opposite direction, if it proved contrary to his intentions? In such a case a delicate political process would set in, making it impossible in political terms for the High Representative, despite his existent powers and powers based on international law, to implement his positions.

As part of the peace implementation in Bosnia and Herzegovina in the area where international and constitutional laws overlap and come into contact with each other, the substitution formula – which only, seemingly, creates clear relations – brought about a situation in which, to a question of who has the last say, both sides can reply in terms of the principle of *political opportunism*. It is important for the domestic authorities, in particular for the BiH Constitutional Court, to affirm themselves as institutions slowly and gradually, without falling into a fatal trap while doing so, such as for instance the criticism

3433 "*De-certification*", Articles 6.9, 6.10. and 14.6. of the Election Law of BiH.
3434 Article 39 *et seq.*, Código Penal, Ley Orgánica 10/1995 of 23 November 1995.

addressed by the other contracting party to Annex 10. What is important for the High Representative is that he does not exceed the extent of necessary interventionism, and or compromise unnecessarily domestic institutions which are developing steadily, particularly in instances when they are fulfilling the mandates entrusted to them by the Constitution.

> In the already mentioned delicate cases, at the end of the mandate of the first composition line-up of the judges of the BiH Constitutional Court – this refers primarily to the Case No. U 13/02 – an open tug of war occurred between the High Representative and the BiH Constitutional Court. In the mentioned cases, the Court failed to seek the opinion of the High Representative prior to making a decision, unlike the usual practice, despite the fact that the HR had explicitly requested so and the fact that the Court in its decisions indirectly/incidentally declared the High Representative's decisions unconstitutional. The High Representative, who was – one might not say unjustifiably – alarmed by the media reports, urged that a request be submitted for review of a decision in the Case No. U 13/02, under Article 67 of the Rules of the BiH Constitutional Court (present version) and requested, thereafter, distancing from undertaking other steps aimed at publishing the decision. The Human Rights Chamber of the BiH Constitutional Court, made up of the President and two Vice-presidents, succumbed to the pressure and decided (according to the subsequent interpretation of the BiH Constitutional Court in a new line-up of judges) to propose at a plenary session (attended by all judges) the review of the respective decision under Article 67 of the Rules of the BiH Constitutional Court (present version). The BiH Constitutional Court was no longer in agreement on the respective matter in its former line-up. Only 17 months thereafter the newly appointed judges decided not to grant the proposal for review, reasoning that the judges making the proposal had not actually been behind the respective proposal, but instead they had only forwarded it as mediators, at the request of the High Representative, which is not in accordance with Article 67 of the Rules of the BiH Constitutional Court (present version).[3435] Under Article 67 of the Rules of the BiH Constitutional Court (present version), the review of an unpublished decision may be proposed only by the Editorial Commission or by a judge, but not by third persons.

Indeed, in all of this we must not forget that certain decisions of the High Representative with regard to respect for the principles of a legal state and democracy, and constitutional guarantees, have been, at the very least, questionable. Even the argument that this, in principle, concerns purely political decisions, which had damaged certain persons, such as for instance the removal

3435 Compare with a decision of 20 December 2003 in Case No. U 13/02, which was not planned for publication, paragraph 7, the authors' archive.

from office of a minister or of some other officials, is of little use. For, if the respective decisions had damaged the elected representatives of the people, as was the case with, for instance, the then Croat member of the Presidency *Anto Jelavić*, one may say that the very principle of democracy was brought into question. On the other hand, the High Representative cannot be held liable, even indirectly, by those who have the responsibility to respect his acts. The control (review) carried out by the ambassadors of the PIC member countries in Bosnia and Herzegovina cannot compensate for this lack of democracy. If the High Representative determines sanctions without respecting the fundamental guarantees of the right to a fair trial while doing so, this may provoke serious violations of different human rights and freedoms, such as, *e.g.*, the right to freedom of exercising profession, the right to be elected, the right to a fair trial under Article 6 of the ECHR, as well as the principle *nulla poena sine lege* (Article 7 of the ECHR). The procedures for removal from office that the OHR had instituted for other international organisations barely respect the right to a fair trial within the meaning of Article 6 of the ECHR.[3436]

Therefore, we can only welcome the BiH Constitutional Court's standing up for the rights of citizens, starting from the Case No. AP 953/05 and onwards, and establishing a violation of the right to an efficient legal instrument, as there is no judicial body that the persons damaged by the OHR decisions may address and request independent review of the decision concerned. Holding the State to account over this shortcoming at first sight appears paradoxical, as the very

3436 "OHR Field Officer's Guide for Removals and Suspensions" from March 2001 (authors' archive) reads as follows: "*Requests submitted to the High Representative for him to exercise his powers of removal or suspension have to comply with certain standards. Setting out the procedural steps which must be followed in normal cases will firstly help in regard to the process pursuant to which the relevant facts of an individual case may be established. This will serve to reduce significantly the risk of mistakes being made leading to wrong and unfair Decisions being come to. In turn it will ensure that Decisions for which the High Representative must take the ultimate responsibility are indeed come to on the basis of well established facts. Finally, ensuring that these basic procedural steps are taken will serve to demonstrate that the High Representative's Decision-making process reflects as far as possible the spirit of the European Convention on Human Rights*" (underlined by authors). According to the rules, the High Representative shall pronounce a sanction of removal of an official or shall suspend him/her temporarily from office only if the requesting international organisation gives an opportunity to the damaged person to give his/her opinion orally or in writing in relation to the charges against him/her. In the so-called *non-compliance report* charges must be proved; a detailed chronology of all conversations together with protocol, *i.e.*, with a summary of conversations and correspondence is necessary; intervention of the international supervisory bodies must be documented; and the existing evidentiary material must be attached to it. Besides, the organisation should propose possible replacements. According to the respective internal document of the OHR (authors' archives), the procedure resumes with the notice in which the OHR gives a possibility to the damaged person to give his/her opinion about the charges, and explicitly points out a possibility of removal from office. According to this, the reason for removal can be solely "the thwarting of the Dayton peace process".

Court notes that neither the existing domestic courts may review the OHR acts, nor can the State independently found such an institution. However, argument of the BiH Constitutional Court that the State here has to, nevertheless, act based on its positive obligation to provide the protection referred to in Article 1 of the ECHR, and try to secure with the competent international legal authorities the establishment of a legal remedy, indeed is an appropriate response to the relation between the international and constitutional law in the Dayton construction, which reveals a certain tension. In the international and legal sense the acts of the High Representative and respect for human rights are compulsory. The State must do its best, using instruments at its disposal, to strike a balance between these two obligations which are partially contradictory to one other, *i.e.*, antagonistic.

The BiH Constitutional Court does not address the issue as to whether the acts of the OHR have been harmonised in substantive and legal terms with the constitutional rights and freedoms and other constitutional norms. As a justification for restriction of constitutional rights and freedoms, nevertheless one could say that the High Representative has at his disposal powers in the event of emergency, and that such powers allow him to employ special instruments. The consequence being restriction of the constitutional rights and freedoms in some cases, which is only temporary in character and should be accepted as such. In a similar case, while writing about the Trusteeship Administration of the UN, *Tomuschat* (no date) spoke of a "delicate balance", "for the Trusteeship Administration, without exceptions, is established for the reason that [a] population in a certain region, due to internal instability or external threat, is not able to take their destiny into their own hands. [...] Apparently it is necessary to correct such power in a democratic sense by way of appropriate rights of the domestic population to participate. Nevertheless, concessions will be needed while guaranteeing the respect for principles of a legal state, as, most probably for purely factual reasons, it will be proven that creation of a perfect judicial system is impossible". Yet, such argumentation, after normalisation of the situation in the country, shall no longer be convincing.[3437]

viii. Validity of the legal acts of the OHR upon the completion of the mandate

Given that there are expectations for the mandate of the High Representative to be completed in the medium term, a question that arises more often is whether his legal acts, particularly his individual decisions, such as deprivation of the right to be elected, will be valid. The representatives of the international

3437 Likewise *Knaus/Martin*, 2003, p. 69.

community are concerned that the relevant domestic political circles could come up with a hypothesis (and be successful at it) that all of the acts of the High Representatives would cease to be valid once Annex 10 has been brought to a close. If we only come to think of the series of the laws imposed by the High Representative that the domestic legislature has not enacted as yet to this day, such legal consequence would prove fatal for Bosnia and Herzegovina. Also, the legal uncertainty which would be brought about thereby would be intolerable. Legislative coactivity between the High Representative and the domestic legislature is so closely interwoven that the abrupt cessation of validity of acts under Annex 10 would bring law practitioners before insolvable problems. The unsustainable hypothesis on the abrupt cessation of validity of the acts of the High Representative is anyway unjustified and ill-founded in legal terms. To be more precise, it is necessary to distinguish the following: in cases where the High Representative acted as a legislator, regardless of whether he imposed ordinary laws or amendments to the constitutions which are lower in rank than the Constitution of BiH, and where such acts were published in Official Gazettes, according to the position of the BiH Constitutional Court and the Human Rights Chamber, they are the domestic law regardless of whether they were consequently enacted by the competent domestic legislature. Thus, legislative acts of the High Representative published in the Official Gazettes shall be valid without limitations even after the Annex 10 of the GFAP has been brought to a close, and the domestic legislature may amend these regulations or render them ineffective in the appropriate legislative procedure.

It is much more difficult to answer the question whether the acts of the High Representative, in which he ordered individual measures, are valid. These acts, partly, have not been published in the Official Gazettes. No formula of substitution of the BiH Constitutional Court may be applied to them, so we cannot consider these acts as domestic law. Their unlimited validity appears problematic precisely in the cases where the High Representative has banned the damaged persons to exercise public offices until he has lifted the ban.[3438] Unless the High Representative renders the respective acts ineffective before the end of his mandate, the consequences for the damaged persons would be a lifetime ban on exercising public offices. However, the High Representative, obviously partially and under the pressure of the debate about police officers that the IPTF had decertified, has started employing the practice of lifting

3438 The High Representative made this type of decision all along until recently. Compare with, "the Decision removing Mr. *Predrag Čeranić* from his present position in the Intelligence-Security Agency of Bosnia and Herzegovina" of 30 May 2008, accessible at: <www.ohr.int/decisions/removalssdec>.

certain bans by groups, *i.e.*, in groups,[3439] or individually.[3440] This is where the High Representative enacted regulations that might be perhaps applied to other similar acts – and not only to the acts of the High Representative.[3441]

Article 19.9.b of the Election Law of BiH recognises similar regulations in relation with permission for the political parties to participate in elections. The respective regulations are based on an idea that sanctions against certain persons, that were imposed on the grounds that the respective persons had thwarted the peace process, ought to be valid only during the mandate of the High Representative. Thus, for as long as this mandate is necessary, such sanctions, imposed in a state of emergency, shall be justified, and they should be valid up until the end of the mandate (at most). In analogy to this, it appears that it is possible to apply this *ratio* to similar acts of the High Representative, for instance to "the freezing" of bank accounts.

Space between the legislative acts and individual acts is filled with activities and measures of the High Representative, the legal nature of which are not so easy to define. An example for this is for instance the modification of the lawfully determined subject-matter judicial jurisdiction for a certain group of cases.[3442] If such measures, which in substantive and legal terms at the level of an ordinary law, have not been published in the Official Gazettes as yet, a question arises whether they are only of a transitional nature. It seems that it

3439 Compare with, *e.g.*, "Decision annulling the ban on exercising the office in political parties imposed in the decisions of the High Representative on removing an official" of 7 July 2006.

3440 See, *e.g.*, "Notice on the Decision of the High Representative annulling the ban imposed on *Dragan Meter* by the Decision of the High Representative of 29 November 1999" of 29 June 2007.

3441 Article 19.9.a of the Election Law of BiH reads as follows:
"Until the High Representative's mandate terminates or he or she so decides the exclusions in the following four paragraphs shall have effect:
No person who has been removed by the Provisional Election Commission or the Election Appeals Sub-Commission, for having personally obstructed the implementation of the General Framework Agreement for Peace or violated the Provisional Election Commission Rules and Regulations shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No person who has been removed from public office by the High Representative shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No military officer or former military officer who has been removed from service pursuant to Chapter 14 of the Instructions to the Parties issued by COMSFOR under Article VI, paragraph 5 of Annex 1A to the General Framework Agreement for Peace, shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No person who has been de-authorized or de-certified by the IPTF Commissioner for having obstructed the implementation of the General Framework Agreement for Peace, shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office".

3442 Compare with the facts of the case in Case No. U 13/02.

would be necessary, for the sake of legal certainty, to finally regulate this set of questions before the completion of the mandate.

(b) Legal acts of authorities referred to in Annex 3

In order to carry out its tasks, the Provisional Election Commission referred to in Chapter 600 of the Election Rules founded its Election Appeals Sub-Commission.[3443] It derived its authorisations from authorisations of the Provisional Election Commission, and it acted as a juridical body and it had the obligation to report to the Head of the OSCE Mission, who appointed four of its members (Article 601). The only international, *i.e.*, foreign member of the Sub-Commission, was at the same time its Chairman, and the Sub-Commission was made up of three national members in addition to the Chairman (Article 601. II). The Sub-Commission was supposed to make sure that the actors observed the Election Rules, to decide on appeals in the election process, to control violations of the GFAP principles (particularly those referred to in Annex 3) and non-compliance with the Election Rules, and to impose sanctions accordingly, *i.e.*, fines, as well as sanctions in terms of removing certain candidates from the lists until a certain political party has been banned from elections, *i.e.*, banned from participating in the elections (Articles 602, 604). In practice, the Sub-Commission most often tackled appeals, however it sometimes employed its powers to impose sanctions.[3444] Before the 1998 General Elections, the Sub-Commission removed from lists a total of 37 candidates for the Houses of Representatives of BiH, the RS, the Federation of BiH, and several cantons, who would have, otherwise, most probably won the mandates.[3445]

The Human Rights Chamber and the BiH Constitutional Court tackled appeals, *i.e.*, complaints lodged against the acts of the bodies referred to in Annex 3.

i. Standpoint of the Human Rights Chamber

CH/00/3933-A Serbian Radical Party	20001208
CH/02/12470-A&M. Obradović	20031010
CH/98/230 *et al.* A. Suljanović *et al.*	19980514

3443 Compare with <www.oscebih.org/easc/eng/easc.htm>, with information on the Sub-Commission and its respective decisions.

3444 Compare with, for instance, judgment 99-ME-12/99-ME-13 of 19 November 1999, following an appeal by SRS, SSRS, available at: <www.oscebih.org/easc/eng/easc-decisions/1999/99-ME-12,13.pdf>, authors' archive.

3445 Compare with the review by the Sub-Commission "Candidates removed who would have received a mandate in the 1998 General Elections in BiH", authors' archive.

The Human Rights Chamber was charged with the task to decide on two appeals of persons who had voted via post in the elections for the National Assembly of the RS, which had been organised by the OSCE in November 1997, whose votes – just as the votes of many other citizens – were invalid due to procedural errors. The Provisional Election Commission, by referring to the principle of simultaneous vote referred to in the Election Rules, declared as invalid the votes of voters from abroad which arrived late, although the delay had occurred as the result of the competent service of the OSCE giving wrong information to the respective voters. The Sub-Commission upheld the decision of the Provisional Election Commission. The reasoning stated that, admittedly, it did not concern a serious violation of the principle of free and fair elections as laid down in the GFAP. Nevertheless, the principle of simultaneous vote must be observed, and as a result thereof these votes must be declared invalid, for even if the appellants were not personally at fault for not being able to meet the deadline for casting their votes, factually speaking the deadline was not observed and thus the votes cannot be recognised, and the appellants cannot be an exception in that sense.[3446]

The Human Rights Chamber rejected the request due to the lack of competence *ratione personae* for review of the OSCE acts in general and in particular for the review of acts within the scope of Annex 3.[3447] Unlike the allegations of the applicants and ombudsman, the competence of the Human Rights Chamber neither arises from Article IV of the Framework Agreement,[3448] nor from Article II of Annex 3 of the GFAP.[3449] The terminology of these regulations, as further stated in the reasoning of the Human Rights Chamber, is largely reminiscent of other sections in Annexes to the GFAP, such as Article I.2 of Annex 10 and Article I.2 of Annex 11 in connection with the role and tasks of the High Representative, that is IPTF, that the contracting parties had entrusted them with.[3450] "Undoubtedly", it is not possible to review the acts of the High Representative, or of IPTF from the aspect of achieving their tasks set forth in the GFAP. Otherwise, the very

3446 Compare with CH/98/230-A, paragraph 20.

3447 *Ibid*., paragraph 36.

3448 Article IV of the Framework Agreement: "The Parties welcome and endorse the elections program for Bosnia and Herzegovina as set forth in Annex 3. The Parties shall fully respect and promote fulfilment of that program".

3449 Article II of Annex 3: "1. OSCE. The Parties request the OSCE to adopt and put in place an elections program for Bosnia and Herzegovina as set forth in this Agreement. [¶] 2. Elections. The Parties request the OSCE to supervise, in a manner to be determined by the OSCE and in cooperation with other international organisations the OSCE deems necessary, the preparation and conduct of elections for […] the National Assembly of the Republika Srpska […]. [¶] 3. The Commission. To this end, the Parties request the OSCE to establish a Provisional Election Commission ("the Commission"). [¶] 4. […]".

3450 CH/98/230-A, paragraph 37 *et seq.*

GFAP would have provided for a regulatory framework for such review.[3451] By this analogy, according to the opinion of the Human Rights Chamber, the same applies to Annex 3 and bodies operating within the scope of the mentioned Annex, as well as to their respective legal acts.[3452] By concluding the GFAP, the contracting parties, with the support of the international community, had set up a series of bodies and institutions that the respective parties should support during the implementation and achievement of the goals of the peace agreement. Under the GFAP, the contracting parties were obliged to implement decisions of the respective bodies and institutions. Therefore, the tasks of the OSCE, under Annex 3, in essence were to conduct the General Elections in Bosnia and Herzegovina, and cannot be reviewed in the scope provided for in Annex 3.[3453] According to the standpoint of the Human Rights Chamber, Annex 3 is a closed system in terms of institutions and in respect of all legal acts enacted within the scope of the Annex.[3454] The disputed acts came into being exclusively as part of the exercise of the competencies of the OSCE, Provisional Election Commission (PEC) and the Election Appeals Sub-Commission (EASC) under Annex 3 to the GFAP, which does not provide for any participation of the defendants (BiH and the RS) in conducting elections, so that the disputed act does not fall within the jurisdiction of the defendants.[3455] Although the rights of the appellants referred to in Article 3 of the Additional Protocol No. 1 to the ECHR may have been violated, the defendants are not responsible for that, so that the challenged acts are beyond the domain over which, under Articles II and VIII.1 of Annex 6, the Human Rights Chamber has jurisdiction,[3456] the Human Rights Chamber concluded. This jurisprudence was upheld at a later stage by the Human Rights Chamber in Case No. CH/00/3933-D.

According to the opinion of the Human Rights Chamber, the legal situation changed when the responsibility for conducting elections was re-transferred from Annex 3 to the domestic institutions or, more precisely, to the Permanent Election Commission, after the entry into force of the Bosnia and Herzegovina Election Law. The very fact that the OHR and SFOR, under Article 19.9.a of the Election Law,[3457] still have the decisive influence when it comes to approving

3451 *Ibid*., paragraph 39.
3452 Compare with *Ibid*., paragraph 40.
3453 *Ibid*., paragraph 41.
3454 Compare with *Ibid*., paragraph 41.
3455 *Ibid*., paragraph 42.
3456 *Ibid*., paragraph 43.
3457 Article 19.9.a (amendments from 2002; *OG of BiH*, No. 20/02) of the Election Law of BiH reads as follows:
"Until the High Representative's mandate terminates or he or she so decides, the exclusions in the following four paragraphs shall have effect:
No person who has been removed by the Provisional Election Commission or

candidates for elections, in the opinion of the Human Rights Chamber, does not absolve Bosnia and Herzegovina from responsibility under Annex 6. The decisive fact is that the Election Commission and the Court of Bosnia and Herzegovina impose a ban for participating in the elections in accordance with the domestic Election Law.[3458]

ii. Standpoint of the BiH Constitutional Court

U 40/00 PEC (Provisional Election Commission) Rules	20010612 *OG of BiH*, No. 13/01
U 41/00 Serbian Radical Party	20010203, unpublished

• No review of election rules referred to in Annex 3

The Provisional Election Commission amended the Election Rules, thereby taking a step which some parts of the international community marked as premature,[3459] wanting to weaken the ethnically-conditioned divisiveness in the government. The disputed amendment had the following effect: all delegates in the cantonal assemblies could now elect delegates of their canton into the House of Peoples of the Federation of BiH irrespective of their own ethnic affiliation, so that, eventually, the delegates belonging to one people came to decide on the delegates of other people in the House of Peoples. While it appeared on paper as if all peoples had been equally damaged by this regulation, in practice it damaged primarily the Croats as the least numerous group. Since the cantonal delegates in the House of Peoples of the Federation of BiH vote on the delegates to be elected into the House of Peoples of BiH, this amendment indirectly affected the make-up of the House of Peoples at the

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the Election Appeals Sub-Commission, for having personally obstructed the implementation of the General Framework Agreement for Peace or violated the Provisional Election Commission *Rules and Regulations* shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No person who has been removed from public office by the High Representative shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No military officer or former military officer who has been removed from service pursuant to Chapter 14 of the *Instructions to the Parties* issued by COMSFOR under Article VI, paragraph 5 of Annex 1A to the General Framework Agreement for Peace, shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office.
No person who has been de-authorized or de-certified by the IPTF Commissioner for having obstructed the implementation of the General Framework Agreement for Peace, shall be permitted to be a candidate in the elections or hold an elected mandate or an appointed office."

3458 CH/02/12470-A&M, paragraph 120.

3459 Compare with, *e.g.*, *Jurčić*, 2000, p. 571.

State level, so that in this case there was an indirect link with the Constitution of BiH. *Ante Jelavić*, a Croat member of the Presidency at the time, considered that this amendment to the election rules threatened the interests of the Croats in BiH. The claim that the principle of ethnic representation, set forth in the Constitution of FBiH and the Constitution of BiH, is violated if representatives of one people are not elected solely by members of the respective people, but also by members of other peoples, is not to be fully disregarded.[3460]

> The HDZ was so embittered that this party called on the Croat population to vote on election day on the referendum on the declaration about the rights and status of the Croats in Bosnia and Herzegovina. This declaration was issued by the *Croat People's Parliament* at the end of October 2000, and the Parliament was established by the HDZ and several minor Croatian parties.[3461] The International Community considered this act as the establishment of "parallel institutions" in the Federation of BiH, which altogether brought about the most critical security situation in BiH since the end of the war. Out of protest, Croatian soldiers moved out of joint military barracks in the FBiH. When the OHR and the SFOR, in a joint action, took control of 10 branch offices of the *Herzegovina Bank*, as it was suspected that the *Croatian Defence Council* – HVO was illegally funded through an account in that bank, unrest set in, culminating in violence, which, apparently, was managed by the Croatian senior officers in the Federation intelligence agencies.[3462] And, finally, *Ante Jelavić* was removed from the office of the member of the Presidency of BiH, on the grounds of his, alleged, participation in the setting up of the Croatian People's Council, as a legislative body of the Croatian Self-Administration (so to say "the third entity").[3463]

In the request for the review of constitutionality of 6 December 2000, *Jelavić*, firstly, complained about the amendments to the Election Rules (Article 12.12 of the Election Rules), and, secondly, about the procedural regulation according

3460 *Jurčić*, 2000, p. 571; *Winkelmann*, 2002, p. 17.

3461 *Jurčić*, 2000, p. 571.

3462 Compare with the decision of the High Representative of 5 April 2001 on introducing a Provisional Administration in the Hercegovačka Bank.

3463 See the decision of the High Representative of 7 March 2001, available at: <www.ohr.int/decisions/archive.asp>, authors' archive. In this context a criminal proceeding was afterwards conducted against *Jelavić*, as a result of which he stayed in prison for 15 months effective as of February 2004 (Compare with report in "Slobodna Dalmacija" of 23 April 2004, pp. 1, 3, 4 [quoted from OHR Media Round-up, of 23 April 2004]). He was released after depositing bail. A criminal proceeding has never been completed (two decisions that were adopted so far are available at: <www.sudbih.gov.ba>) since *Ante Jelavić*, shortly before the publishing of a first instance judgment, fled to Croatia, where he has lived to this day. Extradition is impossible as there is no inter-state agreement between Croatia and BiH (Compare with report in "Slobodna Bosna" No. 435 of 15 October 2005, available at: <www.bhdani.com> or in "Globus" No. 912 of 28 May 2005).

to which the decisions of the Sub-Commission are final (and accordingly no appeal whatsoever may be lodged before the court against the respective decision). He asserted that these regulations violated Article IV.1(a) of the Constitution of BiH,[3464] as a principle of ethnic representation in the houses of peoples, which was set forth in section IV.A of Articles 6 through 10 of the Constitution of FBiH; besides, these regulations also violated the right to legal protection referred to in Articles 13 and 6, paragraph 1 of the ECHR in conjunction with Article II.2 of the Constitution of BiH.

In the Decision No. U 40/00 – which was, for the aforementioned reasons, adopted in a situation marked by high tensions – the BiH Constitutional Court declared itself incompetent to review the Election Rules. Basically this standpoint was reasoned in the following manner:[3465] the Provisional Election Commission, which was established under Annex 3, according to the goal and systematics of the peace agreement, is not an institution of Bosnia and Herzegovina. For the purpose of building and maintaining peace, in addition to the Constitution, also established were special international or partially international institutions which have an interim or long-term mandate. They should not be integrated into the normal domestic institutional framework of Bosnia and Herzegovina; instead, they should act together, *i.e.*, in parallel with them. The composition, as well as the manner of appointment of members of these international institutions, demonstrates the basic idea that the mentioned institutions should be separated from the normal institutional framework of Bosnia and Herzegovina. This differentiation, the goal of which is the preservation of peace, is also reflected in the fact that the Constitution, laid down in Annex 4, is in parallel demarcated from other foreign (*quasi*) international institutions, set up by other Annexes. That constitutes an indication that there is no hierarchy of international and domestic institutions, but that it concerns a relationship in which these institutions complement one another, and that was the original intention. The court refers to its earlier jurisprudence in relation to the systematics of the GFAP in cases Nos. U 7/97 (GFAP), U 7/98, U 8/98 and U 9/98 (Human Rights Chamber), U 9/00 (OHR as a legislator), which it considers as the basis for this systemic-teleological interpretation. Taking into account the last judgment, apparently it is necessary to establish some sort of differentiation, given that the BiH Constitutional Court declared itself competent, precisely in that case,

3464 Article IV.1 of the Constitution of BiH: "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. [...]"; translation taken from: <www.ustavnisud.ba>.

3465 Paragraph 9 *et seq.*

to review the constitutionality of laws that the High Representative enacted in the stead of the Parliament of Bosnia and Herzegovina. The BiH Constitutional Court sees the decisive difference between the High Representative and the Provisional Election Commission in the type of legal basis in the corresponding Annexes: unlike the High Representative, the Provisional Election Commission, as the Court asserted, did not allow itself to intervene on behalf of the domestic legislator, instead, based on the *specific and authentic authorisation* referred to in Annex 3, it enacted the Election Rules. Paragraph 16 of Decision No. U 40/00 carries the following reasoning:

> "Unlike this last case mentioned above, the present case did not concern interference with legislative prerogatives assigned by the Constitution to the domestic legislation of Bosnia and Herzegovina, but the Rules and regulations of the PIC had been enacted under the specific authorisation granted to the PIC in Annex 3 of the General Framework Agreement. Furthermore, Article III of this annex explicitly states that the Election Rules and regulations enacted by the PIC shall be observed 'irrespective of any internal laws and regulations' […]".

In *obiter dictum* the BiH Constitutional Court appeals to the legislature, given that it is especially important to secure constitutional and legal protection for democratic elections, to enact without hesitation the election law, the review of which would then fall within the jurisdiction of the BiH Constitutional Court.

The decision was made despite fierce opposition of two "Croatian" and two "Serbian" judges, who had provided reasons for their opposition in thorough separate opinions, convincing in their own way.

> Thus Judge *Popović* considered that the decision "in formal and legal sense […] had deficiencies". Departing from its competencies, the Court, as a matter of fact, engaged in politics when asserting that while drafting the agreement it was "desirable", even necessary, in addition to the Constitution, to establish special international or partly international institutions for the restoration of peace. Judge *Popović* in his legalist critique also overlooked that the goals and intentions of the authors of the peace agreement were relevant for the interpretation of the Constitution. Similarly, *Popović* also sounded formal when criticising the appeal of the BiH Constitutional Court on the legislature to expand the constitutional protection to the area of elections by enacting the domestic election law. Admittedly the caution by the Court was unusual, yet it was appropriate, considering the constant procrastination and delays.
>
> What could indeed be discussed at length is the critique articulated not only by judge *Popović* but also by Judges *Zovko* and *Miljko*, as well as Judge *Savić*, who held that this decision of the Court was contrary to the case U 9/00, which is regarded as a precedent. And, indeed, it is possible to find several parallels, that is, similarities, with the case U 9/00, which were accurately outlined in the separate opinions. The three arguments certainly carry the most weight. Firstly, judge *Savić* points out that, under Article 3 of Annex 3, it is necessary to fully observe the Election Rules, and this should not be jeopardised either by

the domestic laws or by-laws. However, this does not apply to the Constitution, the Judge claimed. Also, *Miljko* and *Zovko* make us think when they say that the decision brings about the situation in which the Constitution would be subject to violation in such a significant and vital area touching upon the individual and group rights, such as democratic elections, until a domestic law has been enacted. And, finally, an objection that only the first elections after the conclusion of the peace agreement should be conducted in accordance with the election rules of the OSCE, also makes certain sense. However, since the domestic legislator had failed in enacting its own election law, that does not have to mean right away that the election rules, regarding all the elections to follow, should automatically, or under the theory of the substituting State body referred to in Case No. U 9/00, be subject to the control (review) of the BiH Constitutional Court.

- **No review of judgments of the Election Appeals Sub-Commission**

In one more procedure related to Annex 3 (U 41/00) the Serbian Radical Party of the Republika Srpska attempted to challenge its removal and ban from participation in the local elections in April 2000 and in the general elections in November 2000. Besides, this party requested that the general elections be quashed as being unconstitutional. The ban on this party was imposed on the grounds that the appellant, *i.e.*, the very party, had refused to suspend the head of the party (or, to be more precise, the then president of the party *Nikola Poplašen*).[3466] According to the opinion of the Provisional Election Commission, the Serbian Radical Party had violated Article 7.35. of the Election Rules, by allowing *Poplašen* to sign, on behalf of the party, the statement of compliance with the principle of the peace agreement and the Election Rules, which was necessary for the participation in elections, despite the fact that the High Representative had removed *Poplašen* in March 1999 from the office of the President of the Republika Srpska,[3467] among other things, on the grounds that he had obstructed the implementation of the election results from 1998. When it comes to the other two party officials, the request of the Provisional Election Commission and the High Representative relied on the decision of the Sub-Commission of 21 September 1998[3468] by which all persons from the list of the Serbian Radical Party of the Republika Srpska had been banned from participating in the general elections of 1998. Following this removal from the list, *Blagojević* and *Tadić* had again conducted themselves inappropriately and encouraged violent actions with the aim to destabilise Bosnia and Herzegovina, as stated thereafter.

3466 Compare with *ICG*, 1999.i.

3467 See Decision Removing Mr. *Nikola Poplašen* from the Office of the President of Republika Srpska of 5 March 1999, available solely in English language at: <www.ohr.int/decisions/archive.asp?m=&yr=1999>.

3468 Nr. 98-GE-184, 98-GE-120, available at: <www.oscebih.org/easc/eng/easc1998.htm>.

After the Provisional Election Commission did not allow them to participate in the elections, the Serbian Radical Party of the Republika Srpska addressed the Sub-Commission, which dismissed their request by its decision of 19 November 1999. The decision read that the decision of the Provisional Election Commission, admittedly, interfered with the individual rights of the appellants, and with the collective rights of the party. Nevertheless, the Sub-Commission may subject the decisions of the Provisional Election Commission to review only to a limited extent, since the Sub-Commission has a subordinate status, its authorisations arise from the authorisations of the Provisional Election Commission and it reports to the Head of the OSCE Mission in BiH. The Sub-Commission further argued that, in view of the aforementioned, it can declare the decision of the Provisional Election Commission null and void only if it violated the law or if it did not have an appropriate legal basis. Yet, in the mentioned case, the Provisional Election Commission still remained within the scope (*discretion*) it was provided for under Annex 3, and under the Election Rules, as claimed in the decision.

The Serbian Radical Party of the Republika Srpska claimed in the appeal that its rights referred to in Article II.4 (principle of equality), Article II.3(i) (principle of freedom of association) of the Constitution of BiH were violated, as well as the rights referred to in some documents attached to Annex 3 (Copenhagen documents) or, more precisely, the right to candidature to public offices in the general and equal elections without discrimination, the right to found a political party, the right to put forward its candidature as a party against other political parties, and to run its election campaign in a fair and free manner. The appeal was – following a repetitive exchange of reasoning – removed from the list of appeals to be decided on at the plenary session, as the appellant had addressed the Human Rights Chamber earlier.[3469]

iii. Commentary

As far as the acts that the bodies referred to in Annex 3 had enacted, the Human Rights Chamber, in its decision, was able to rely on a practical and usable manner of differentiating in these cases – violations of rights and freedoms by the contracting parties referred to in Annex 6 as a basic criterion. Efforts that the BiH Constitutional Court had to invest in the reasoning were much greater. In the Case No. U 40/00, more clearly than in previous decisions, the Court expressed the idea of protection which is, as a matter of fact, the basis for division of tasks referred to in the Dayton Agreement which hit the very core of the problem regarding competences. Special international or

3469 CH/00/3933-A.

partly international institutions with a provisional or long-term *mandate for restoration and preservation of peace* had been created in Dayton, the Court stated. Still, the use of this argument was again unfortunately chosen in defining characteristics of "the institutions of Bosnia and Herzegovina" (Article VI.3(a) of the Constitution of BiH). Namely, the BiH Constitutional Court holds that the Provisional Election Commission, precisely because of internationalisation, *is not a domestic institution*. However, should Article VI.3(a) be completely and correctly interpreted, then it is not relevant whatsoever for the abstract control of constitutionality whether some international institution is taking part or not.[3470] Perhaps here one could espouse a view that, taking into account examples stated in Article VI.3(a), the BiH Constitutional Court may review only the internal domestic legal acts. However, not even such an interpretation could bring about a definitively applicable result, for we could designate as an internal domestic legal act also such acts which, admittedly, had been enacted by an international body, but which must be applied by the domestic authorities. Perhaps the argument that the review of the Election Rules was out of the question was too bold, as the contracting parties, under Article III.1 of Annex 3, are obliged to comply with the Election Rules, any internal laws and regulations notwithstanding. For, if we come to analyse this sentence in more detail, then the parties referred to in Annex 3, admittedly, must not refer to the domestic *ordinary* law which would be contrary to this Annex ("*laws*" = zakoni). However, by using argumentation *a contrario*, that would be possible for high ranking law, such as, for instance, the constitution. Perhaps in that manner, nevertheless, the force of the linguistic meaning of this provision, that it is necessary to respect the matters explicitly stated in the text, is slightly being disturbed, especially if we bear in mind the circumstances under which this agreement came into being.

Eventually, the BiH Constitutional Court did not even have to adopt a decision on whether it is competent to review *decisions of the Sub-Commission*, because the appellant, prior to addressing the BiH Constitutional Court, addressed the Human Rights Chamber. The application of such a practice, particularly in this case, is nevertheless questionable, since it was not possible to obtain legal protection before the Human Rights Chamber. Namely, in the cases Nos. CH/98/230 and CH/98/231, the Human Rights Chamber had already declared itself incompetent to review whether the decisions of the Sub-Commission were in accordance with the ECHR. If one bears in mind the existing case law of the BiH Constitutional Court in decisions regarding the issues of the

3470 See above "1. Abstract control of constitutionality, organic and federal disputes (Article VI.3(a) of the BiH Constitution)", p. 682.

High Representative, and the case law of the Human Rights Chamber and, in particular, of the Provisional Election Commission, it would certainly be difficult to find the basis for the competence regarding the assessment of decisions of the Sub-Commission. However, argumentation had to exceed the formal and legal scope. As far as the legal practice related to the issue of Annex 3, it would suffice to point to a fundamentally different character of the Human Rights Chamber and the Sub-Commission. While the Human Rights Chamber is an independent juridical body, the Sub-Commission is subordinated to the Provisional Election Commission. Because of its composition, its authority does not come even close to the authority enjoyed by the latter. Besides, the decisions of the Sub-Commission were being quashed in practice by the Head of the OSCE Mission, in the capacity of the Chairman of the Provisional Election Commission (Article III.3 of Annex 3). Accordingly, the Sub-Commission, for instance, by its decision of 15 September 1997 (ME-156), banned the Serbian Democratic Party from participating in the local elections in Pale, thereby providing a reasoning that *Radovan Karadžić* still had a certain function in the Pale branch office of the respective party, despite the fact that an indictment was issued against him before the Hague tribunal.[3471] In such cases, the OSCE Mission in BiH used a certain political manoeuvring space for its own assessment, *i.e.*, for a certain autonomy in assessing the colliding interests as well as in deciding on the existence of prerequisites for the first free and fair elections. While, on one hand, the intention was to ensure compliance with the high substantive and legal election standards, on the other hand, the aspiration was to avoid the risk and not to provoke any sort of unrest which would jeopardise the already unstable peace. Accordingly, what was manifested here was the dilemma between strict observance of justified and legitimate standards, on one hand, and at times, a painful compromise with the purpose of a much-needed preservation of a peaceful situation, on the other hand. When it comes to the question of whether the acts enacted under Annex 3 may be reviewed by the BiH Constitutional Court, it means the following: unlike in the case of the Human Rights Chamber, the protection from the decisions of the Sub-Commission – which is not independent – that is from decisions of the Provisional Election Commission – which has a political character – was, in principle, nonetheless, necessary. However, bearing in mind political flexibility, which was necessary for a successful strategy of *peace building* within the scope of elections, had it accepted the competence, the Court would have stepped onto a very difficult area in legal terms. Staying out of Annex 3, and thereby granting sovereignty to the OSCE, should have secured a manoeuvring space in this area. Ultimately, the most elegant solution here would be a sort

3471 *Nowak*, 2000, pp. 36, 52.

of "a *Solange* decision" from the German case law.[3472] That solution would look as follows: for as long as the Sub-Commission is able to protect the human rights and freedoms related to elections, the BiH Constitutional Court would waive its competence for the review of its decisions. Should the Commission fail to protect the absolutely tiniest standard in that area, that would no longer constitute a part of the permanent strategy of *peace building* and, therefore, would require that correction be made by the BiH Constitutional Court.

(c) Legal acts of the Commission for Real Property Claims (*Commission for Real Property Claims* –Annex 7 to the GFAP)

CH/00/6143 *et al*.-A&M. Turundžić & Frančić	20010208
CH/00/6142-A&M. Petrović	20010309
CH/00/6144-A&M. Leko	20010309
CH/02/9130-A Samardžić	20030110
CH/01/7224-A&M. Vučkovac	20030207
CH/00/1669 *et al*. S. G. *et al.*	20060913
CH/01/7996 V. B.	20060913

The CRPC is a body which decided on the claims for restitution of real property, including the possession over real property with occupancy rights in Bosnia and Herzegovina. The restitution was related to the cases in which such property, effective as of 1 April 1992, had not been voluntarily sold or transferred onto another person in some other way, and the applicant had not been in possession of the respective property at the time of decision-making (compare with Article XI of Annex 7). The CRPC was making decisions on the basis of certain available evidence (primarily, on the basis of the land registry excerpts and the contracts on occupancy rights), and was not carrying out investigations or disputes related to the opposing parties.[3473] The CRPC particularly did not tackle the issues as to whether some presented contract was legally valid, or whether property or an occupancy right for which restitution was sought had been transferred to another person after 1 April 1992. Therefore, the scope of examination and the force of the decision-making of the CRPC were

3472 Lack of competence to discuss on the merits is prohibited so long as certain standards are observed.

3473 Compare with, for instance, in the proceeding on the confirmation of occupancy right: Articles 2, 4, 9 and 10 of the "Book of Regulations on Confirmation of Occupancy Rights of Displaced Persons and Refugees" (abbr.: "BoR OR"), as well as Article 10 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees of FBiH (*OG of FBiH,* Nos. 43/99 and 51/00, of 27 October 1999). Legal instruments that are allowed are referred to in Articles 9-11 of the BoR OR, *i.e.*, Article 42 *et seq.*, "Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons and Refugees".

limited. Given a very large number of procedures, that is the ongoing cases which were to be decided on,[3474] more extensive substantive and legal control was in no terms possible. In order to solve the issues that the CRPC had no competence over, the damaged person had to address the competent domestic authorities. While assessing the situation in relation to ownership, the CRPC did not recognise any unlawful transfers of property, including those where the owner consented to do so under duress in order to obtain a permit to leave or documents, or those that occurred in some other form as part of ethnic cleansing (Article XII 3 of Annex 7).

The CRPC cannot, according to its own assessment, choose between restitution and damages, but, to this end, the claim of a person is obligatory (compare with Article XII.2 of Annex 7). If the CRPC, based on available evidence, concluded that the right to restitution existed (and if the plaintiff requested restitution), then an appropriate enforcement document is to be issued. The person whose right was recognised would, as a matter of fact, face true problems just then. For, the enforcement document issued by the CRPC must be executed with the assistance of a competent domestic authority, which in practice proved very difficult – with either delays occurring, or the proceeding as a whole proved unsuccessful.[3475] Administrative authorities were obliged, upon a request, to issue some sort of a conclusion permitting the enforcement. In the event that someone wishes to object to the decision on the restitution of property, the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees provides for two procedures, depending on whether the legal interest of a complainant, which is being raised in order to stop the enforcement of the CRPC decisions, had existed at the time of the "relevant date" (1 April 1992), or it had come into being only thereafter. In the former case, which does not rule out a possibility that the very decision of the CRPC was erroneous, the CRPC (and the CRPC only) reviews its earlier decision (*reconsideration*) and, possibly, quashes it (the procedure of submitting a request for review). During the course of the procedure of review, the administrative authority shall temporarily postpone the enforcement, only if receiving an official notice from the CRPC (Article 11 in conjunction with Article 10, paragraph 1 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees). In the latter case, (occurrence of the legal interest after the relevant date), thereby, in the event when the CRPC decision cannot be erroneous *per definitionem* (what is relevant here is the existence of the right of the relevant date), there is no possibility to

3474 June 2001: 301,347, i.e., 176,243 applications; source: <www.crpc.org.ba/new/en/main.htm>; in July 2003 total of 302,109 decisions; source: <www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/bo/main.htm>.

3475 Compare with, CH/00/6143 et al.-A&M, CH/00/6142-A&M; CH/00/6144-A&M.

review the CRPC decision, which, accordingly, remains unmodified. However, the damaged person may only challenge the decision on enforcement before administrative authorities. To resolve the issue whether the disputed right to property was, in the meantime (that is since 1 April 1992 and onwards), lawfully and voluntarily transferred onto another person, the administrative authority shall refer the case for a proceeding before a competent court. At the same time, throughout the entire period of the war there existed a refutable legal presumption about the forcible/unlawful transfer of the property right, and if anyone claims otherwise, he/she must prove so. Next, the court shall decide whether the damaged person has successfully challenged the presumption on forcible transfer and, possibly, resorts to necessary measures in order to reinstate a lawful property situation.[3476] As a rule, the judicial proceeding does not defer the enforcement, and thus it stays the course. The enforcement, however, *may* be deferred by the court which received the case for deliberations, if a contract on the right transfer had been entered into and verified after 14 December 1995.[3477]

This legal situation, which is already complex in itself, has additionally been complicated by the Law on Cessation of the Application of the Law on Abandoned Real Property, which is also applicable to the respective cases. Therefore, there are two legal ways for the restitution of property: Annex 7 and the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees regulate the procedure which is concurrent with the one conducted before the State bodies for the restitution of property under the Law on Cessation of the Application of the Law on Abandoned Real Property. Which procedure gets to be applied shall depend solely on the choice of the damaged person. A person addressing the CRPC in accordance with Annex 7 and the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees shall have a certain priority, as the enforcement of the CRPC decisions cannot be halted by any legal instrument whatsoever.[3478] Institution of a proceeding before a domestic body, pursuant to the Law on Cessation of the Application of the Law on Abandoned Real Property, does not prevent the party from instituting a procedure before the CRPC at the same time. In order to prevent double or even contradictory decisions in the same case, in case of instituting a procedure before the CRPC, a proceeding

3476 Article 12 in conjunction with Article 10, paragraph 2; Article 13 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees.

3477 Article 12.a, paragraph 2 of the Law on Enforcement of Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees.

3478 Compare with allegations in CH/02/9130-A, paragraph 29. *et seq.*; CH/01/7224-A&M, paragraph 46. *et seq.*

before a domestic body must be terminated irrespective of the stage it was at.[3479] In practice this parallelism has brought about great legal uncertainty. Oftentimes the parties had conducted concurrently both proceedings for years, including enforcement proceedings in both concurrent procedures.[3480]

On 31 December 2003, the international CRPC had completed its mandate, and its competence, in accordance with Article XVI of Annex 7 was transferred to Bosnia and Herzegovina, Federation of BiH and the Republika Srpska.[3481] In practice it meant that the Commission was now made up of national members solely and that it was tasked to decide the existing, already filed requests for the review of the first-instance decisions of the CRPC (*reconsideration*). Therefore, a body at the State level assumed responsibility for the pending cases, that is appeals, and the entities were entrusted with a task to resolve the cases regarding the pending first-instance requests. That is the reason why the Federation of BiH enacted the Law on Transfer and Resolution of Pending Requests for the Repossession of Apartments with Occupancy Right or of Owned Real Property, which were Filed with the Commission for Real Property Claims of Displaced Persons and Refugees.[3482]

i. Case law of the BiH Constitutional Court: no review of the CRPC decisions

AP 1882/05 Rujević	20051013
AP 2633/05 Ahmetović	20060412
CH/01/7728-A&M. V. J.	20030404
U 21/01 Krivić	20011012 *OG of BiH*, No. 25/01
U 32/01 Central profit banka	20011024 *OG of BiH*, No. 27/01

In Cases Nos. U 21/01 and U 32/01, the appeals came before the BiH Constitutional Court against the (final) decisions of the CRPC, adopted following the requests for review. In both cases the appellants complained by referring to the Law on Housing Relations. By referring to the earlier case law in the cases concerning the relationship between the Constitution of BiH and other Annexes – U 7/97 (GFAP), U 7/98 (Human Rights Chamber) and U 40/00 (Provisional Election Commission) – the BiH Constitutional Court pointed out

3479 Article 14 paragraph 2 of the Law on Cessation of the Application of the Law on Abandoned Real Property.

3480 Compare, CH/00/1669 *et al.*, paragraph 129. *et seq.*; CH/01/7996, paragraph 47. *et seq.*

3481 Agreement on the Transfer of Competencies and Continuation of Funding and Work of the Commission for Real Property Claims of Displaced Persons and Refugees (*OG of BiH*, No. 32/04).

3482 *OG of FBiH*, No. 6/04; see, Article 2.

that the Constitution of BiH was an integral part of the peace agreement. On the basis of the structure of the GFAP, the BiH Constitutional Court further claimed that there can be no contradiction among Annexes as they are all equivalent, so that the GFAP and the Constitution cannot be contradictory to one another. Moreover, there is no hierarchy among the authorities established by the Annexes to the peace agreement, rather they operate concurrently and complement one another. The Human Rights Chamber cannot be considered a court in Bosnia and Herzegovina, hence the BiH Constitutional Court is not competent to review the decisions of the Human Rights Chamber. For, the Human Rights Chamber exercises its function beyond "an ordinary judicial structure of Bosnia and Herzegovina". In analogy to this, the same goes for the CRPC, *i.e.*, this commission operates beyond the judicial system of Bosnia and Herzegovina. Under Article XII.7 of Annex 7, as well as under the Law on Enforcement of Decisions of the Commission for Real Property Claims of the Displaced Persons and Refugees, its decisions shall be final and binding, the BiH Constitutional Court went on to conclude.

The Court has held onto this case law even after the CRPC competencies had been transferred to the domestic authorities, without addressing that very circumstance at the initial stage.[3483] Not even the fact that the HRC within the BiH Constitutional Court of BiH had changed its case law following the transfer of the CRPC competencies to the domestic authorities, in the sense that the HRC within the BiH Constitutional Court of BiH had declared itself competent to review the decisions adopted by the domestic authorities ("domestic" Commission referred to in Annex 7 or administrative bodies), did not result in the change of the case law of the BiH Constitutional Court. The only thing right now was that the Court felt compelled to reason in more detail why it had held onto the same case law.[3484] The BiH Constitutional Court reasoned that the transfer of competencies to the domestic internal framework does not change the legal nature of the decisions of the Commission. Also the mandate of "the domestic CRPC" was laid down in Annex 7, so that it had the same constitutional and legal status. "The domestic CRPC" is neither the institution of Bosnia and Herzegovina, nor is it competent to exercise competencies, on the basis of some domestic law, that were assigned by the force of the Constitution to the state of BiH; thus, it is not integrated in the legal system of Bosnia and Herzegovina. Besides, the BiH Constitutional Court concluded that "the national CRPC" is not "a court" within the meaning of Article VI.3(b) of the Constitution of BiH, but an institution *sui generis*.[3485]

3483 AP 1882/05, paragraph 7.
3484 AP 2633/05.
3485 AP 2633/05, paragraph 9 *et seq.*

ii. Standpoint of the Human Rights Chamber, *i.e.*, of the HRC within the BiH Constitutional Court of BiH

CH/00/4194-A Radić	20000607
CH/01/7728-A&M. V. J.	20030404
CH/01/8050 Savić	20050907
CH/02/9178 *et al*.-Smiljanić *et al*.	20051109
CH/98/1266-A Čavić	19981218
CH/98/230 *et al*.-A. Suljanović *et al*.	19980514

In the appellate proceeding *V. J.* (CH/01/7728-A&M), unlike the previous procedures which concerned solely the enforcement of the CRPC decisions by the domestic authorities, the Human Rights Chamber had to, for the first time, tackle the issue of whether the Federation of BiH might be held accountable over the deficiencies in procedures before the CRPC. These appeals brought the Human Rights Chamber into a great dilemma. In essence, it was undisputed that the procedure before the CRPC – given the effect of the CRPC's enforcement decisions – did not meet the standards required by the right to a fair trial. The procedure did not contain any guarantees whatsoever, as any other dispute, which would allow the actual possessor (the one holding the disputed property) to challenge the repossession of the right of the old possessor for instance, by communicating that there was a contract on exchange of real property. The actual possessor is therefore only instructed to submit a complaint in the course of the enforcement procedure conducted by the domestic administrative body. In addition, we have to mention the fact that the CRPC's enforcement decisions are impossible to challenge before the domestic State bodies or courts. Thus, the damaged person, wishing to challenge the CRPC's decisions, had no possibility to address an impartial tribunal.

According to the standpoint of the Human Rights Chamber, this deficiency nonetheless cannot be counted as a responsibility of the contracting parties referred to in Annex 6. Thus the competence of the Human Rights Chamber for establishing a violation of Article 6 of the ECHR is not well-founded. In this reasoning the Human Rights Chamber elaborates on its permanent jurisprudence regarding the issue of responsibility of the contracting parties referred to in Annex 6 concerning the acts of the international bodies enacted pursuant to other annexes to the GFAP. The Human Rights Chamber stated that it is *ratione personae* competent solely for the appeals lodged against one of the three public and legal entities which, under Annex 6, may have the standing to be sued. The permission alone for engagement of certain international organisations (SFOR, OSCE, OHR etc.), as well as the delegation of powers to

these organisations, which are necessary for their respective mandate, cannot establish the responsibility of the parties referred to in Annex 6.[3486] The Human Rights Chamber further asserted that the responsibility for the operation of the CRPC, in any case, cannot be deduced from the fact that the Federation of BiH appoints four commissioners to the CRPC and contributes to the CRPC budget since the mentioned obligations arise directly from Articles IX.1 and X.2 of Annex 7.[3487] Under Article XV of Annex 7, the CRPC is authorised to regulate on its own procedures for its operation and, while doing so, to hold onto all prerogatives for decision-making. According to the provisions of Annex 7, the Federation of BiH has no influence whatsoever on it.[3488] The Federation of BiH enacted legal provisions for the enforcement of CRPC decisions, thereby fulfilling its obligations referred to in Annex 7. Still, under Annex 7, the Federation of BiH was not allowed to provide for any possibility for the decisions of the CRPC to be reviewed by some domestic body.[3489] The sole obligation is that the Federation of BiH has is to enforce the CRPC's decisions. It has no right or obligation to question the lawfulness of these decisions, the Human Rights Chamber concluded.

Following the transfer of the CRPC's competencies to the BiH institutions, the HRC within the Constitutional Court of BiH altered its jurisprudence in the following way: Bosnia and Herzegovina is now obliged to organise the implementation of Annex 7, and to undertake all necessary measures in order to do so. That implies the appointment of members of the Commission, the funding of the Commission, as well as the creation of the legal basis for its operation within the domestic legal framework.[3490] The HRC within the BiH Constitutional Court, thus, declared itself competent for the review of decisions of the CRPC, and thereby, for instance, in the Case No. CH/01/8050, it established that the applicant's right of access to court was violated, since the national Commission (which took over the competence of the CRPC) is not an independent institution under Article 6 of the ECHR. Therefore, according to the standpoint of the HRC within the BiH Constitutional Court, it is necessary to provide a legal instrument, *i.e.*, the legal path to some court within BiH in order to review the decisions of the domestic Commission.[3491]

3486 CH/01/7728-A&M, paragraph 114 *et seq.*, referring to CH/00/4027 *et al.*-A; CH/00/4194-A; CH/98/230 & 231-A; CH/98/1266-A; CH/00/3771 *et al.*-A, paragraphs 13, 19 and 22.

3487 *Ibid.*, paragraph 119.

3488 *Ibid.*, paragraph 120.

3489 *Ibid.*, paragraph 121.

3490 CH/01/8050, paragraph 65 *et seq.*; see also CH/02/9178 *et al.*, paragraph 120 *et seq.*

3491 CH/01/8050, paragraph 84 *et seq.*

iii. Commentary

It is possible to observe that there has been a cut in both jurisprudences, *i.e.*, two tracks: before and after the institutional transfer of Annex 7 into the domestic framework. Prior to that, both courts considered themselves incompetent to review the decisions of the CRPC. The BiH Constitutional Court reasoned, *i.e.*, argued, without considering the characteristics of the constitutional regulations on its competence. Its central argument was, however, teleological, which the BiH Constitutional Court confirmed systematically: the purpose of setting up the CRPC, as a special body for settling ownership issues, was as a matter of fact to assign this delicate area of the peace agreement to a neutral judicial body, immune as much as possible to political and ethnic-national influences. This goal has been additionally underlined by excluding Annex 7 from the domestic constitutional framework. This type of argumentation implies at the same time that the core of this area, nevertheless, touches upon the constitutional system. The teleological argument is, therefore, possible to overcome.

The starting position for the argumentation of the Human Rights Chamber is somewhat different from that of the BiH Constitutional Court. Its approach in the reasoning is not teleological in nature. The very text containing the basis of competences of the Human Rights Chamber leaves very little space for manoeuvre. A violation of Annex 6 may be found only if the parties themselves had caused the violation of this Annex, or if the violation of this Annex can be attributed to them due to action by a third body, for instance the CRPC. However, the Human Rights Chamber did not want to attribute the operation of the CRPC to the area of responsibility of the Federation for justified reasons. According to the permanent jurisprudence of the Human Rights Chamber, operation of the international actors cannot be attributed to anyone else, nor can anyone else be charged or held responsible for it. Failure to make the necessary corrections of activities of third persons, for instance failure to amend the imposed law in order to bring it in line with the Constitution, may be possibly the basis for establishing the responsibility of the contracting parties under Annex 6. However, the Human Rights Chamber held that in this case the obligation of correction did not exist. Obligations assumed by signing Annex 7 prohibit the Federation of BiH to review the acts of the CRPC and, also, to correct them even if necessary. The CRPC Rules of Procedure are based solely on Annex 7, and – unlike the imposed laws – are not the domestic legal acts, the Human Rights Chamber asserted.[3492]

3492 Nevertheless, the Human Rights Chamber had at its disposal a realistic way out of this dilemma: namely, the obligations of the Federation of BiH laid down in the Constitution are competing here against the obligations referred to in Annex 7. If we view Annex 7 as an international agreement, then one could argue that within

In view of the aforementioned, in the period after the CRPC was transferred into the domestic framework, that is after 1 January 2004, the jurisprudence of both courts went through changes, however their case-law took different directions. The BiH Constitutional Court still considered as relevant the teleological argumentation, and still held itself incompetent. On the other hand, the HRC within the Constitutional Court of BiH considered as crucial the fact that the activity of the (presently) "domestic" CRPC since 1 January 2004 may be attributed to the State. The equal rank of Annexes 6 and 7 and their institutions had no role whatsoever here.

The practical consequence of the change of jurisprudence of the HRC within the BiH Constitutional Court was such that all those who considered that a decision of the "domestic" CRPC was unfair got a chance to file an administrative lawsuit with the Court of Bosnia and Herzegovina, as an extra-legal instrument. The next consequence of the change of the jurisprudence of the HRC within the Constitutional Court of BiH would be a possibility for those receiving a negative verdict from the Court of Bosnia and Herzegovina (as a "court in Bosnia and Herzegovina", within the meaning of Article VI.3(b) of the Constitution of BiH), adopted in an administrative dispute following the lawsuit against a decision of "the domestic" CRPC, to address the BiH Constitutional Court pursuant to Article VI.3(b) of the Constitution of BiH. If proven that the CRPC activity, including the Court of Bosnia and Herzegovina, in certain areas, is in contravention of the rights and freedoms guaranteed by the Constitution – even after taking into account some sort of an extraordinary situation, and even after weighing all opposing interests – the BiH Constitutional Court can, nevertheless, refer to its mandate as a guardian of the Constitution and declare as null and void even a CRPC act.

Such jurisprudence of the HRC within the BiH Constitutional Court came late. Namely, before the decision of the HRC within the BiH Constitutional Court , in Case No. CH/01/8050 (from 2005), in numerous cases, under Annex 7, legally valid decisions had already been adopted. Therefore, the only help up until that point regarding the CRPC decisions was the reasoning provided by the BiH Constitutional Court offered in the decisions Nos. U 21/01 and U 32/01. Namely, in the mentioned decisions, the BiH Constitutional Court drew the attention of all persons damaged in any way in the procedures for repossession

the State the Constitution has a greater binding force than the obligations under international law. If the CRPC adopted apparently wrong decisions or in order to prevent blunt injustice there existed a possibility in the Federation of BiH to, at least, request from the respective entity to find a balance between these concrete obligations, even if that would imply non-compliance with the CRPC decisions in individual cases, it would thereby violate Annex 7.

of property – the above-mentioned – to the intertwinement of the domestic law and Annex 7, and that, for the sake of clarification of some issues that the CRPC excluded from discussion, it is possible, even necessary, for them to address the ordinary courts. Only in this way is it possible to challenge its (CRPC's) decisions before the BiH Constitutional Court, that is before the Human Rights Chamber, *i.e.*, the HRC within the BiH Constitutional Court.

(d) Intervention by SFOR (Annex 1-A to the GFAP)

i. Standpoint of the Human Rights Chamber

CH/00/3771 *et al*.-A Hajder *et al*.	20021105
CH/00/4194-A Radić	20000607
CH/02/12499- Interim Measure Fijuljanin	20030111
CH/02/12499-A&*strike out* Fijuljanin	20030304

The Human Rights Chamber was also obligated to give its opinion about the applications filed against the legal acts of the Stabilisation Force in BiH (SFOR). Those cases were related to private disputes initiated due to damage caused[3493] by SFOR or trespass,[3494] including the case of deprivation of liberty and several month-long detentions of a person who was considered a terrorist.[3495]

From the beginning, the Chamber declared itself not competent to deal with the mentioned cases for the reason that SFOR is not a contracting party that may be sued under Annex 6.[3496] The Chamber merely confirmed this position thereafter. In cases where SFOR uses the appellants' land for military training purposes only and where it does so directly on the basis of Article VI of Annex 1-A to the GFAP,[3497] without a special permit from the appellant or without any

3493 CH/00/4194.
3494 CH/00/3771 *et al*.
3495 CH/02/12499.
3496 CH/00/4194-A, paragraph 7.
3497 Article VI of Annex 1-A GFAP: "Deployment of the Implementation Force [¶] Recognizing the need to provide for the effective implementation of the provisions of this Annex, and to ensure compliance, the United Nations Security Council is invited to authorize Member States or regional organizations and arrangements to establish the IFOR acting under Chapter VII of the United Nations Charter. The Parties understand and agree that this Implementation Force may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina, to help ensure compliance with the provisions of this Annex. The Parties understand and agree that the IFOR shall have the right to deploy on either side of the Inter-Entity Boundary Line and throughout Bosnia and Herzegovina […]. The IFOR shall have complete and unimpeded freedom of movement by ground, air, and water throughout Bosnia and Herzegovina. It shall have the right to bivouac, manoeuvre, billet, and utilize any areas or facilities to carry out its responsibilities as required for its support, training, and operations,

kind of the appellant’s participation, the activities of SFOR cannot be attributed to a party against which the application was submitted (in the instant case it is the Federation).[3498]

Indications of a correction of the Chamber’s practice may be noticed in the *Fijuljanin* Case (CH/02/12499). American SFOR troops arrested the appellant under suspicion that he was planning an attack against their military base. Without any judicial intervention and without instituting criminal proceedings, the U.S. military troops kept him in detention for almost three months. Only after the protest of *Amnesty International*, the appellant was allowed to have limited contact with his lawyer. The Chamber adopted an interim measure whereby the Federation of BiH was ordered to address SFOR and formally request the handover of the appellant to the competent bodies of the Federation.[3499] This request of the BiH Presidency was first rejected with an explanation that the investigation was underway. Two weeks later SFOR handed over the appellant to the Federation authorities. Despite SFOR’s disapproval and the fact that the investigation was underway, the Federation authorities released him immediately.[3500]

As to the merits of this case, the Chamber declared that a part of the application concerning the arrest operation conducted by SFOR was resolved.[3501] At the same time, the Chamber noted that the core issue was the question whether, according to the positive obligations of protection which were undertaken by the signatories of Annex 6, the signatories must undertake measures to protect the appellant’s rights even during the time of his detention in the SFOR military base. Given the fact that one of the signatory parties fulfilled its obligation from the Interim Measure and made a formal request to SFOR and was successful in handing over the appellant to the Federation authorities, the Chamber concluded that the major point of the complaint was already resolved.

In conclusion, this kind of practice constitutes a political compromise between the compliance with the provisions of its own competence on the one hand, and the necessity to intervene in the case of a flagrant violation of substantive law under Annex 6, on the other. SFOR is not subject to obligations under

with such advance notice as may be practicable. The IFOR and its personnel shall not be liable for any damages to civilian or government property caused by combat or combat related activities. […]”.

3498 CH/00/3771 *et al*.-A, paragraph 13, with further reference to CH/98/230 *et al*.-A, paragraph 42 *et seq.*; CH/98/1266-A, paragraph 19 *et seq.*

3499 CH/02/12499-*interim measure order*.

3500 Compare, the OHR Media Reports of 31 January 2003: Oslobođenje, p. 6, Dnevni avaz, p. 2, Glas srpski, p. 3, including CH/02/12499-A&M, paragraph 18, *et seq*.

3501 CH/02/12499-A&*strike out*, paragraph 35.

Annex 6. The measures that could be taken by SFOR have been placed within the exclusive legal frame of Annex 1-A to the GFAP, in other words these measures exceeded the frame of the Constitution and Annex 6. In view of the aforesaid, pursuant to Annex 1-A, SFOR has significant authorities which are additionally strengthened by valid resolutions of the UN Security Council as provided for under Chapter VII of the UN Charter. Such a special role of SFOR did not allow the Human Rights Chamber to call for the responsibility of signatory parties under Annex 6 due to the activities undertaken by SFOR. This is even more applicable after taking into account the judicial practice of the Chamber in similar cases under other Annexes of GFAP. Nevertheless, the Chamber could not be indifferent as to the situation where the appellant was practically kidnapped in the territory of Bosnia and Herzegovina and then kept in detention for months outside the reach of the legal state and where all domestic legal regulations were violated. At the same time, it could be almost rightly ascertained that SFOR acted in accordance with the law and applicable standards. The explanation for this perceptible contradiction is the fact that, during that specific period of time, two kinds of standards were applied in BiH: human rights standards according to the BiH Constitution and Annex 6 that were applied irrespective of the actual circumstances in the country and the war regulations under Annex 1-A which were applicable during the "crisis periods". The sovereignty of Bosnia and Herzegovina and State responsibility were limited by Annex 1-A, both in functional and territorial terms. Individuals who, due to SFOR activities, had fallen into the gap exceeding the scope of the State sovereignty were not entitled to protection by domestic authorities. This principle was applied to the owners of land in the *Hajder et al.* Case, as well as to the Case of *Fijuljanin*, who was detained at the SFOR Eagle Base.

Therefore, the issuance of interim measures in the *Fijuljanin* case should not be misunderstood to mean that the Chamber called Bosnia and Herzegovina or the Federation to take responsibility for SFOR activities. It is rather that this measure was a *kind of request addressed to the State to launch a political appeal to SFOR*. The Chamber could not find a legal basis in Annex 6 for a possible formal action of the State in this case. If the signatory parties under Annex 6 cannot be held responsible for SFOR activities, then a conclusion follows that neither were they obliged to interfere with their activities. This Chamber's act was the subject of fierce internal discussions, but in the end the desired aim was achieved.

ii. Standpoint of the BiH Constitutional Court

AP 2582/05 Tešić *et al*.	20070116
AP 642/03 S. F.	20041217
AP 696/04 Subotić	20050923

Fijuljanin also addressed the BiH Constitutional Court concerning his arrest by SFOR, but the Court rejected his appeal as inadmissible given the fact that the Chamber had already taken a decision in the same case.[3502] However, a year later a similar appeal was lodged. *Subotić* complained that he was arrested by SFOR and detained for six days while being denied all the rights safeguarded under the ECHR.[3503] It was stated in the appeal that Bosnia and Herzegovina has a positive obligation to protect the appellant's constitutional rights and freedoms that have been violated in this case. The Constitutional Court declared the appeal admissible with the argument that the mere fact that the violation, which was the subject of appeal, may be attributed to SFOR, which is operating in BiH under an international mandate and enjoying immunity, does not release the State from the obligation under Article II.1 of the BiH Constitution to provide the highest level of protection of internationally recognised human rights and freedoms.[3504] Bearing in mind that the injured party had no other legal remedies at his disposal and that he was trying in vain to obtain protection from domestic authorities, the BiH Constitutional Court had to declare itself competent.[3505]

As to this case, the Court established that there were violations of Articles 3 and 5, paragraphs 1, 2, and 4 and Article 8 of the ECHR in the field for which Bosnia and Herzegovina is responsible and ordered the payment of compensation for damage. As to the responsibility for the conduct of SFOR which was contrary to the ECHR, it may be attributed to domestic authorities since they knew that the appellant was deprived of his liberty but they, nevertheless, took no measures to release him during the time of his detention; after his release the authorities made no attempt to seek compensation from SFOR on behalf of the injured party. After his release the authorities failed to initiate any investigation into the circumstances of the appellant's arrest, neither did they try to urge SFOR to compensate the appellant for the sustained damage. The Constitutional Court gave the following arguments in this regard:

3502 AP 642/03, paragraph 20.
3503 AP 696/04.
3504 AP 696/04, paragraph 37.
3505 AP 696/04, paragraph 34 *et seq.*, 101.

By referring to the *Fijuljanin* case, the Court presented the arguments that the appeal of Bosnia and Herzegovina, which was sent to SFOR upon the request of the Human Rights Chamber, was successful since the person deprived of liberty was immediately released.[3506] The Constitutional Court acknowledges that SFOR has special authority under Annex 1-A to the GFAP and that BiH temporarily waived its sovereign rights concerning the mentioned authority. Bosnia and Herzegovina must comply with this waiver in accordance with international law. However, the Constitutional Court ascertained that this waiver of rights cannot release the State of the responsibility not to tolerate violations of the constitutional rights and freedoms of one of its citizens because those obligations have the same effect as the already described obligations of the State under international law – accordingly, those are the obligations of the State under the BiH Constitution which, itself, is an integral part of GFAP. The Constitutional Court asserts that that the waiver of the authority and its transfer to international organisations is in accordance with the ECHR provided that, under such circumstances, the rights from the ECHR are protected. A state which has waived its authority and transferred it to international organisations, *i.e.*, a state that has no factual control over foreign forces operating in its own territory, is held responsible and it must take appropriate steps to protect victims.[3507] Based on the positive obligation of the State to protect human rights and freedoms under Article 1 of the ECHR, the State is under the obligation to thoroughly examine all allegations on arbitrary arrests even in a situation where it is not possible to eventually clarify whether the violations of the rights could be attributed to the State authority or not.[3508] Furthermore, the Constitutional Court asserts that the domestic authorities, based on the positive obligation under Article 1 of ECHR, were obliged to initiate an investigation in this case of unlawful deprivation of liberty although in the end it is not possible to establish whether the violation of rights could be attributed to the domestic authorities or not. The domestic authorities were obliged to initiate the investigation regardless of a small chance to achieve success in such a difficult situation and regardless of the lack of proportionality between the forces of SFOR and

3506 AP 696/04, paragraph 49.

3507 AP 696/04, paragraph 50 *et seq.*, with reference to ECtHR, *Matthews v. the United Kingdom* of 18 February 1999, Reports of Judgments and Decisions 1999-I, and *Ilascu v. Moldova and Russia* of 8 July 2004, Reports of Judgments and Decisions 2004-VII.

3508 AP 696/04, paragraph 53, with reference to ECtHR, *X and Y v. Holland* from 1985, Series A no. 91, Platform *Ärzte für das Leben v. Austria* from 1988, Series A no. 139, *McCann et al. v. the United Kingdom* of 27 September 1995, Series A no. 324, as well as CH/02/9851 *et al*.-A&M, M. Ć. *et al*, paragraph 60, and ECtHR, *Ilascu v. Moldova and Russia* of 8 July 2004, Reports of Judgments and Decisions 2004-VII.

the domestic authorities.[3509] Article 1 of the ECHR provides for an obligation of the State to act and not for an obligation to achieve success. However, the domestic authorities did absolutely nothing to investigate the case, secure the release of the detainee or make it possible for the detainee to be granted just satisfaction for the damage he sustained. Immunity of international military forces tasked with ensuring peace and security instead of domestic authorities in the country or with implementing a peace agreement does not release the respective State of its positive obligation to protect individual rights.[3510]

With reference to a house search that was conducted in the same way, the Constitutional Court of BiH subordinated the activity of international actors to the principle of proportionality. The Constitutional Court stated that pursuant to Article 3 of the Agreement between the RBiH and NATO on the Status of NATO and its Personnel, NATO personnel having, under this Agreement, privileges and immunity, should comply with the laws of RBiH provided that it is in accordance with the assigned mandate, and not to conduct any activities which are in contravention of the nature of their mandate. The BiH criminal proceedings regulations have envisaged special proceedings for house searches. In another appeal lodged with the BiH Constitutional Court, in a case relating to SFOR, the search was conducted by SFOR with permission of the person subject to the search and in the presence of local police. As to the said case, the Constitutional Court established that the search by SFOR was necessary and justified. In the *Subotić* Case, the Constitutional Court concluded that the search of the house cannot be considered lawful even if Annex 1 to GFAP is taken into account in the course of the examination of the lawfulness of the search since by SFOR activities the domestic laws were also violated including the standards of international law.[3511]

Unlike the Human Rights Chamber, the Constitutional Court recognises no gaps in sovereignty. The Court makes no requests to the State to launch a political appeal to international actors. The Court holds the State responsible for their acts as soon as it fails to exert its influence when it comes to the elimination of or compensation for the violation of constitutional rights and freedoms. This practice of the Constitutional Court was confirmed thereafter.[3512]

3509 AP 696/04, paragraph 54, with reference to CH/98/668-A&M, paragraphs 80 and 85.

3510 AP 696/04, paragraph 55, with reference to U 28/00; the issue was about the responsibility for the acts of UNPROFOR.

3511 AP 696/04, paragraph 92 *et seq*., with reference to AP 642/03, paragraph 41, *et seq*.

3512 AP 2582/05.

(e) Activity of IPTF (Annex 11 to the GFAP)

The mission of the *International Police Task Force* (IPTF) under Annex 11 to the GFAP, which was completed at the end of 2002 and transferred to the EUPM (*European Union Police Mission*), was tasked with supporting domestic authorities in the civilian aspects[3513] of establishing security and order in BiH (Article I. of Annex 11), primarily by establishing a new organisation of police in both Entities. At the end of the war, a considerable amount of IPTF activity was the support of the police forces, totalling 44,000 members, out of which the majority were demobilised soldiers without necessary police education and without knowledge of the importance of human rights and the legal state among; some were even war criminals.[3514] The legal basis for the Mission in international-legal terms, *i.e.*, the basis which the FBiH also referred to, was the 1996 Bonn-Petersburg Agreement which was signed by the FBiH and IPTF Deputy Commissioner.[3515] These competencies were confirmed by the PIC, the IPTF Commissioner and finally by the UN Security Council.[3516]

During the certification process, conducted in accordance with IPTF polices, which were specifically drafted to serve this purpose, 3.6% of police officers in BiH were either denied certification or were subsequently decertified.[3517] The time period for denial of certification or for subsequent decertification was not limited. The only legal remedy against decertification or denial of certification by the IPTF Commissioner was the possibility of filing a complaint within eight days from the day of delivery of the decision, and this complaint was to be lodged with the commission consisting of the representatives of the United Nations Mission in BiH (UNMBiH). A person filing a complaint had to formulate that complaint on the basis of the statement of reasons given in the relevant decision without having a look at the documents and without having any knowledge of the evidence. It was not possible to hold a verbal discussion or present an opinion before the commission. Based on the commission's recommendation, the Commissioner adopted a final and binding decision on the complaint.

3513 As it is known, Annex 1 provides that IFOR/SFOR is tasked with maintaining *military* security.

3514 Compare the opinion of the European Commission for Democracy through Law (Venice Commission), Opinion no. 326/2004 on a possible Solution to the Issue of Decertification of Police Officers in BiH, CDL-AD(2005)024, paragraph 21.

3515 Additional data in CH/03/12932, paragraph 20 *et seq*.

3516 UNSC Resolution No. 1088/1996; compare with data from CH/03/12932, paragraph 23 et seq.

3517 As to the procedure and subsequent allegations, compare with the opinion of the Venice Commission, Opinion no. 326/2004 on a possible Solution to the Issue of Decertification of Police Officers in BiH, CDL-AD(2005)024, paragraph 7 *et seq*.

According to the information obtained from UNMBiH, in total 16,762 police officials were granted IPTF certification and 598 officials were denied certification. Out of this number 150 decisions were challenged before the domestic courts.

i. Standpoint of the Human Rights Chamber, *i.e.*, the Human Rights Commission within the BiH Constitutional Court

CH/03/12932-M Džaferović	20040507

Some injured parties claimed that they were denied certification along with a violation of their human rights and freedoms. There was one case before the Human Rights Chamber, Case No. CH/03/12932, whereupon the appellant claimed that the certification procedure was in contravention of the standards under Article 6 of the ECHR, *i.e.*, that he was not provided access to an independent court, or in other words, "a tribunal". Some of the decertified officials addressed the domestic courts, which adopted very unequal decisions in similar cases.[3518] At the end of its mandate, the Human Rights Chamber declared the application of an injured party admissible in accordance with Article 6 of the ECHR.[3519] However, the Human Rights Commission within the BiH Constitutional Court, which adopted a decision on the merits, refused to grant the applicant's request.[3520] Admittedly, the procedure before the IPTF and the Ministry of Internal Affairs is not a fair procedure within the meaning of Article 6 of the ECHR and a denial of certification cannot be challenged before a domestic court and therefore the right of access to court is limited.[3521] However, based on the explicit international obligations under Annex 11 and based on the resolutions and declarations of international authorities concerning this Annex – which is different from what the Human Rights Chamber originally established – the Federation *could not* be held responsible for the activities of the IPTF.[3522] Moreover, the fact that the peace in BiH was jeopardised was the reason for the UN Security Council and the Federation to initiate a process of police reform in order to establish security and order in the territory of the Federation. Therefore, the Commission concluded that the restrictions on the right to a fair trial and right of access to court may be accepted for the purpose of achieving a priority goal of ensuring peace.[3523]

3518 CH/03/12932, paragraph 50 *et seq.*
3519 Compare, CH/03/12932-M, paragraph 63.
3520 CH/03/12932-M, paragraph 70 *et seq*.
3521 CH/03/12932-M, paragraph 68 *et seq*.
3522 CH/03/12932-M, paragraph 79 *et seq*.
3523 CH/03/12932-M, paragraph 89 *et seq*.

ii. Standpoint of the Constitutional Court

AP 2484/05 Rizvanović *et al.*	20060509
AP 597/04 F. H.	20040826
CH/03/14814 Ramić	20070627

The jurisprudence of the BiH Constitutional Court changed its course in relation to the IPTF decisions on decertification. Thus, the Court first rejected an appeal due to non-exhaustion of legal remedies since the injured party could have also addressed the ordinary domestic courts.[3524] Afterwards, some of the injured parties who had used ordinary legal remedies managed to reach the BiH Constitutional Court, but this Court dismissed those appeals as (*prima facie*) ill-founded. However, at this stage it could be noticed, between the lines, that the BiH Constitutional Court – taking into account the decision of the Human Rights Commission within the Constitutional Court in the *Džaferović* Case – gave its support to the opinion that ordinary courts were not competent to review IPTF acts at all. However, as to the lawfulness of restrictions on the right of access to court under Article 6 of the ECHR, the Constitutional Court gave no opinion at all (*Rizvanović et al.*).[3525] As to an old case of the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court on which the Constitutional Court had to give its opinion a year after adoption of the decision in the *Rizvanović* Case, the Constitutional Court rejected the request again due to non-exhaustion of legal remedies without giving the reasons for such a decision.[3526]

iii. Commentary

This drifting in judicial practice may be viewed in the context of fierce debates being conducted during the years when the mentioned decisions were adopted in respect of the destiny of the allegedly unjustifiably decertified police officers. Political insecurity was reflected in the legal assessment of the highest courts when it comes to the legal basis for the mentioned cases. As to the possibility for the courts to review the acts of international factors (in particular the acts of OHR and SFOR), a change occurred both in the jurisprudence of the Chamber in the *Džaferovic* Case (the applications were first declared as being incompatible *ratione personae* with Annex 6 and then this practice changed) and in the jurisprudence of the BiH Constitutional Court. As to the question of whether there will be a certain level of consolidation in the judicial practice

3524 AP 547/04, paragraph 15.
3525 See, for instance, AP 2484/05, paragraphs 5, 15, *et seq*.
3526 CH/03/14814, paragraph 16.

within the frame of Annex 11 (and, generally, in relation to the whole context of GFAP), we will probably obtain the answer in the future.

The Venice Commission and the Council of Europe Commissioner for Human Rights[3527] evaluated the decertification procedure as dissatisfactory. Referring to the jurisprudence of the Human Rights Commission within the BiH Constitutional Court and to its own standpoints, the Venice Commission based its opinion of 24 October 2005[3528] on the fact that Bosnia and Herzegovina cannot be held responsible for violations of the ECHR in the decertification procedure. However, all persons that suffered damage should be provided with equal mechanisms of protection and in this case this responsibility lies with the IPTF and the UN as founder of the IPTF.[3529] Although a new organisation of the police force was necessary for the purpose of country's stabilisation and although significant difficulties occurred in connection with this organisation, it is impossible to foresee why the injured parties were denied a fair trial.[3530] In this opinion it is further stated:

> "It must be underlined that in this respect, the UN-IPTF has carried out tasks which are certainly more similar to those of a State administration than those of an international organisation proper. It is inconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that it could act or have acted as a State authority and at the same time be exempted from any independent legal review (reference is made to Article II.5 of Annex 11 to the GFAP[3531]). In the Venice Commission's opinion, transparency and accountability of transitional territorial administration by international organisations are an extremely important element of their credibility and authority. Peace and security cannot but be fostered by transparent and fair proceedings".[3532]

In view of the fact that according to the opinion of the Venice Commission the domestic courts are definitely not competent to review the disputed decertification decisions, it would be appropriate for the UN to undertake the review of 150 decertification decisions, which were challenged before the domestic courts. For instance, this task could be carried out in a way that

3527 Report of the CoE Commissioner for Human Rights on the Issue of Decertification of Police Officers, CommDH(2007)2, Strasbourg, 17 January 2007.

3528 Opinion, European Commission for Democracy through Law (Venice Commission), Opinion no. 326/2004 on a possible Solution to the Issue of Decertification of Police Officers in BiH, CDL-AD(2005)024.

3529 *Ibid*., paragraph 20 *et seq*.

3530 *Ibid*., paragraph 47 *et seq*.

3531 Article II.5 of Annex 11 to the GFAP: "The IPTF shall at all times act in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms, and shall respect, consistent with the IPTF's responsibilities, the laws and customs of the host country."

3532 Translation by authors.

the UN Security Council establishes a special judicial body/tribunal consisting of independent experts.[3533] The Council of Europe Commission agreed with the opinion of the Venice Commission and pointed to further alternatives of possible solutions.[3534]

After many years of political struggles between Jean-Marie Guéhenna, the Under-Secretary-General for Peacekeeping Operations, and the Office of the High Representative,[3535] on 30 April 2007, 793 police officers were finally granted permission, based on the informal position of the UN Security Council (which was taken at the time when Great Britain was presiding), to seek reinstatement to their former positions provided that the re-employment was possible in accordance with the new laws regulating the police profession. Inasmuch as the UN Security Council excluded the possibility for annulment of the IPTF decertification decisions or their subsequent review, it has also failed to admit that a wrong decision might have been made. The solution which was accepted at that time gave no chance to injured parties to be rehabilitated or for their ruined dignity and reputation to be regained through the process of review of each individual decision, and it creates a problem that the *status quo ante* is hardly to be achieved again.[3536] Therefore, the content of the decisions was not brought into question and the Security Council limited itself to issuing an incomplete and informal declaration on abolishing the ban preventing injured parties from serving as **police officers** for life being imposed along with a decision on decertification.

(f) General reflections on the issue of review of international interventions by domestic authorities

All international actors, including the High Representative, the Human Rights Chamber, the Interim Commission and its Sub-Commission as well as the CRPC, SFOR and IPTF, were operating in the areas of interactions between domestic and international law. The above statement appears to be true given the already mentioned *legal basis* for their activities on the one hand, and *the*

3533 Opinion, the European Commission for Democracy through Law (the Venice Commission), Opinion no. 326/2004 on a possible Solution to the Issue of Decertification of Police Officers in BiH, CDL-AD(2005)024, paragraph 53 *et seq.*

3534 See the Report about the Special Mission of the European Council Commissioner for Human Rights with regards to the issue of decertified police officers, CommDH(2007)2, Strasbourg, 17 January.2007, paragraph 43 *et seq.*

3535 Compare the documentation of ESI, Picture Story, On Mount Olympus, from February 2007, available at: <www.esiweb.org>.

3536 Compare, ESI, Turning point on Mount Olympus of 16 May 2007, <www.esiweb. org>. There you can also find the letter of the British Chair to the UN Security Council sent to the BiH Permanent Representative to the United Nation; authors' archive.

scope of their activity on the other. The legal acts of the mentioned institutions should build up their activity within domestic law and consequently, depending on specific regulations, they should exert their influence on the constitutional order, too. That takes place at different levels. Thus, the High Representative, while substituting for domestic authorities, imposes laws in the form of "decisions". He also removes leading and elected politicians from office and, while doing so, he places himself above the existing domestic procedures or procedural guarantees. The Human Rights Chamber supplements the work of the Constitutional Court in the field of the appellate jurisdiction as to establishing cases of violations of human rights and freedoms in which case victims of violations should be subsequently compensated by the competent domestic authorities. The Interim Election Commission is tasked with passing the election rules which are applicable as domestic law until the time these rules are passed by the domestic legislator. The Sub-Commission, which is subordinated to the Election Commission, is in charge of processing the complaints against the election procedure and, thus, it operates on behalf of the future permanent election commission and temporarily replaces the legal remedy which should be based on domestic law. The CRPC gives opinions on the legal status of real properties and cooperates with domestic state authorities, which are obliged to comply with the CRPC decisions to an unlimited degree. SFOR and IPTF are in charge of military security, *i.e.*, are in charge of law enforcement activities relating to the maintenance of public peace and order. These institutions also assist the domestic authorities in the process of the implementation of laws and in the process of building functional institutions.

It is true that the sources of competencies of international actors are outside the scope of the BiH Constitution and, to be more precise, those sources are incorporated into Annexes 1, 3, 6, 7, 10 and 11 to the GFAP. However, it does not imply that the mentioned actors operate outside the constitutional system. This idea is also presented in the decision of the Constitutional Court No. U 9/00, being referred to as the "functional duality" of the activities of the High Representative. However, given that every act of public authority may become a constitutional issue (like issues of the legal state, fundamental rights, legislative jurisdiction, etc.), it means that all the activities of international and *quasi*-international actors may be subject to the jurisprudence of the BiH Constitutional Court provided that the norms of its jurisdiction offer proper grounds for that to happen.

However, this kind of observation is in contravention of the motives of the contracting parties due to which they have temporarily excluded the previously mentioned areas of activity from the constitutional framework and relocated

them to fall within the scope of special Annexes, which are parallel to the Constitution. Had there be an intention to integrate these areas of activity into the constitutional-legal system, including the consequences of such an act and particularly the possibility for review of all legal acts by the competent State authorities, then it could be excepted that this issue should be regulated in terms of legal technique as well, as it was envisaged in the previous drafts of the constitution. Consequently, a systematic division indicates that there is a legal division as well, *i.e.*, a division that concerns a temporary transfer of authorities for execution of certain State tasks. This idea, as is evident, appears in different parts of the valid Annexes and the Constitutional Court very often refers to this idea in its decisions on the merits and it serves as a tool assisting the Court in interpreting its arguments. The systematic division is actually a reflection of the division of tasks between domestic and (*quasi*) international institutions, which the contracting parties wanted to have for a limited period of time. In the initial phase of internal social stratification within a fragile state, such a division was to ensure the necessary basis for successful implementation of the peace agreement. Accordingly, the assistance of international actors has a *protective function*.

When it comes to the meaning and aim of the division of tasks under the Dayton Agreement, there is a possibility to take into consideration the changes that occurred in the real life of the country, as well as the unexpectedly long duration of the factual basis that caused this division, and then on this basis to decide whether the international actors should continue exercising their authorities as if there is a state of emergency or not. Therefore, some issue that is originally and typically a constitutional issue (such as legislation, judiciary, etc.), according to teleological interpretation of the entire Dayton Constitution, may break away from being subject to the application of the Constitution and, consequently, from the jurisdiction of the Constitutional Court. Contrarily, some may argue that despite the systematic division and due to the expiration of time and significant changes in the country, the continuation of trusteeship is no longer appropriate. Moreover, a conclusion may be made that "the trustee" behaves against the agreement and that in such a situation the domestic institutions – such as, for instance, the Constitutional Court of BiH – are called to defend the constitutional system.

A solution to this ambivalent situation concerning the exercise of the authorities in the event of a state of emergency on the one hand, and compliance with the constitutional system on the other, might be related to an already indicated dynamic of restoration of the temporarily internationalised tasks which should fall within the competence of the State, *i.e.*, within the competence of domestic

actors, which is parallel to gradually subordinating the HR's activities and the activities of other international actors to the constitutional system.[3537] That approach causes particular difficulties for the High Representative since under Annex 10, which is different from Annexes 3, 6 and 7, the time limitation is not provided *explicite*. The reason for this might also be the fact that at the very beginning the plan was that the High Representative should have a less active and less interventionist role. However, the progressive restoration of responsibilities bears a risk. In the best possible scenario, if it happens that international factors are not capable or not willing to cooperate or to focus on the real problems, the inactivity of international representatives will cause only temporary paralysis to the reconstruction process.

The presented case-law of the highest courts in BiH concerning these issues is differently coloured and is not even free from contradictions. It shows the phases of seeking process, in which both the domestic and international factors have tried to determine a legal and politically justified solution to the problem which, at that time, was poorly explored and may be defined in the form of the following questions: Does the international community of states operate on the basis of the relevant convention and/or on the basis of the UN Security Council mandate and Chapter VII to the UN Charter when it comes to ensuring peace and stabilisation in the country? How should the issues of competence, review, obligations to respect human rights and guarantees be addressed in the event of such a mission operating in an area which is full of tensions, in the area of interactions between constitutional and international law?

Based on the previous analysis of judicial practice, it is possible to single out the following questions:

(i) Does the international administration operate in a legal vacuum or it is bound by certain legal norms?

(ii) If certain legal norms are still binding and if they have to be complied with, who is going to be held responsible for making sure that the representatives of the international administration comply with those norms, in other words that they behave accordingly?

(iii) If there is a responsibility criterion, who will be vested with the competence to determine the responsibility of the international administration?

(iv) As to the competence for review, will it be vested with domestic or international authorities and which standards are going to be applied?

3537 In this regard, see also *Vitzthum/Mack*, 2000, p. 116.

i. Obligatory nature of norms

All the parties – both the actors of international administration irrespective of the Annex to the GFAP regulating their activity and the courts that are the subject matter of this text – have a unified opinion that in a state of emergency the administration is also subject to norms, in other words certain norms are also binding on the administration. This principle applies to certain provisions of the Annexes. Additionally, the mentioned actors are also bound by other norms of international and constitutional law although within a limited scope, which means that these norms are binding on them.

ii. Responsibility for violation of rights

The issue of responsibility in the event of international authorities violating legally binding norms is a very complicated issue. In such cases, the Human Rights Chamber, given its specific mandate under Annex 6, was mostly restrained and was always accurately re-examining whether the activity of international actors may be attributed to some of the signatory parties under Annex 6. Only in the case of an affirmative answer to that question, the Human Rights Chamber would assume responsibility. As a rule, the Chamber denied the possibility of attributing this responsibility to international actors by referring to the international basis for their authorities given that they neither operate as their representative nor based on the waiver of signatory parties concerning the said authorities. By relying on the judicial practice of the BiH Constitutional Court, the Chamber finally acknowledged the responsibility of international actors only in cases where the signatory parties under Annex 6 had the possibility to exert their influence on the international actors but failed to do so. For instance, there is one case of a law imposed by the OHR which is in contravention of the ECHR and which the domestic authorities could have amended. Also, in the event of a reversal, the transfer of responsibilities which were originally outside the scope of the competence of domestic authorities (elections under Annex 3 and property under Annex 7), the Human Rights Chamber, *i.e.*, the Commission for Human Rights within the BiH Constitutional Court, considered those responsibilities as acquired, (from a certain moment), *i.e.*, as a responsibility assumed by domestic institutions. However, in cases concerning IPTF and SFOR, the Human Rights Chamber remained totally indecisive. As far as the IPTF is concerned, at the beginning the Chamber was denying any responsibility of the domestic authorities but at the end of its mandate the Chamber declared admissible an application of a decertified police officer. The Human Rights Commission within the BiH Constitutional Court, which was to decide on the merits of that case, took a step back and

denied any responsibility of the Federation for the actions of the IPTF. Given the serious human rights violations by SFOR in the *Fijuljanin* case, the Chamber first showed an intention to move away from its explicit judicial practice, which denied any responsibility of the signatory parties under Annex 6, and requested the State to issue an interim measure and intercede by asking SFOR to release the applicant. After the applicant's release, the decision on the merits was no longer required.

The initial position of the BiH Constitutional Court was different. The Court did not deal with questions as to whether the domestic authorities are responsible for interventions of international actors, but it rather asked itself whether it is competent to review such acts. Thus, the BiH Constitutional Court commenced cautiously to refer to the formula which concerns "functional duality" (a formula on the activity of international actors which, in certain situations, substitute for domestic authorities) and thus implicitly concluded that the domestic actors were also responsible for domestic laws even when imposed by the High Representative in his decisions while substituting for the domestic authorities. As for other bodies under the GFAP, which are in charge of elections (Annex 3), property repossession (Annex 7) and human rights and freedoms (Annex 6), the BiH Constitutional Court gave a negative reply to the question as to whether it is authorised to review the mentioned laws because of systematic and teleological parallelism among the GFAP Annexes. The issue of responsibility of domestic authorities, regardless of the authorities pertinent to control, *i.e.*, review, was never the subject of discussion. This issue – which is very interesting – became a topic of discussion only after the personnel of the Human Rights Chamber had merged with the BiH Constitutional Court and after the BiH Constitutional Court had started making a distinction between the issue of responsibility for human rights violations committed by international actors on the one hand, and the issue of competence of domestic authorities to review such acts, on the other. All at once, the BiH Constitutional Court changed its course towards protection of human rights. After being freed from the chains of its own competence and aimed at providing maximal protection for constitutional rights and freedoms, the BiH Constitutional Court established that despite the special authorities and international law on which these authorities are based, an individual must not remain unprotected. The domestic authorities that had been denying any responsibility were now held responsible for ensuring this protection. The BiH Constitutional Court stated that it was an irrelevant fact that the domestic authorities were not competent to review the acts of international actors and that they could not prevent conduct which is in contravention of the legally binding norms. In the event that a State would indifferently observe the OHR or SFOR violating the rights of their citizens,

then the respective State would also be, to say the least, held responsible for those violations. Based on the positive obligations to protect the constitutional rights and obligations which are certainly competing with the international-legal obligations under Annex I-A and Annex 10 but not suppressing them, the State must undertake all necessary and permitted steps in order to ensure that an individual is protected. The Court further stated that otherwise the State will be held responsible for failing to do so. The Court concluded that even if the possibilities in this regard are limited to investigations, support to injured parties, appeals and letters to the competent bodies of international law and to other kinds of international activity, they prove to be effective very often.

iii. Authorisation to conduct review

Responsibility for the international administration's activities in the event of a state of emergency being in conflict with international and/or constitutional law does not mean automatically that there is authorisation to control their acts or even to abolish them. This is at the same time the most critical point in the relationship between domestic authorities and international administrators. It is one thing to establish that the conduct of international actors is in contravention of the ECHR and that the State should insist that the human rights and freedoms of its citizens are respected. However, the situation becomes dangerous for international administrators when domestic institutions stand against their acts, when they start preventing them, making them relative or when they abolish them, in other words when they have authorisation to do so. In this way the effectiveness of the peace mission is *per se* brought into question.

In fact, international law implies that the activities of international administrators shall be subject to judicial review.[3538] It might be possible to interpret such an obligation (by analogy) by referring to the international instrument pertaining to the administrator or to the international law of occupation. In any case, this obligation arises from the minimum standards of human rights protection. The majority of national legal systems, including international law, contain the basis according to which one of the fundamental and universal rights is the right of access to court, which decides disputes involving an individual as a private legal person, regardless of whether the norms according to which the proceedings will be decided fall within the scope of civil or public law. The international regulations concerning State related immunity imply the existence of an international administrator, *i.e.*, a trustee in areas where he substitutes for domestic authorities and, in fact, there is no obstacle for reviewing the acts of an international administrator.[3539]

3538 *Frowein*, 2000, p. 12.
3539 *Stahn*, 2001, pp. 137-149.

The Constitutional Court has yet to determine a clear direction when it comes to its judicial practice. Currently, there is a spectre of different positions, starting from the Court being restrained and all the way to full review and abolishment of the acts of international administration. For instance, the BiH Constitutional Court has thoroughly examined whether the deprivation of liberty and house-search by SFOR in the *Subotić* case were conducted by way of violating the rights safeguarded under the Convention and finally concluded that there were violations of various rights from the ECHR. The Court also considers that it was competent to review the laws imposed by the OHR and to consequently abolish them. However, the Constitutional Court is not willing to review the merits of individual measures taken by the High Representative but rather limits itself to establishing that for this purpose it is necessary to establish a special judicial body, which would be internationally and legally legitimized (*Bilbija & Kalinić*). The contradiction of this approach according to which the laws may be reviewed but not the acts has already been mentioned in the previous parts of this text. Moreover, taking into account the decision in the *Subotić* case which was adopted ten months earlier, one should also mention that treating SFOR and OHR acts in a different manner cannot be justified by arguments that SFOR allegedly acts on a different, even a weaker basis. It is quite the opposite and the SFOR mandate is even stronger and firmer than the OHR mandate (which means *authorisation* and not only acknowledgment). The fact that SFOR, unlike the OHR, operates in the military sphere only, which means not as an executive or legislative authority operating in the civilian field, should not be an obstacle for the authorisation of the BiH Constitutional Court to review the acts of SFOR since that authorisation is widely perceived in any event. Furthermore, the SFOR mandate only slightly and insignificantly interfered with the BiH Constitutional Court's competence to review SFOR acts. By contrast, examining the merits of the case and prospective abolishment of SFOR individual acts would bring its effectiveness into question. In theory, that principle could also be applied to the procedure of reviewing the constitutionality of norms. However, the OHR should remain reassured, at least temporarily, that its laws, as long as they are in compliance with the BiH Constitution, will not be touched since that would require the majority vote in the parliament, a difficult achievement nowadays.

Due to the constant changes of the case-law, which was compiled based on Annex 6, and an unstable and undetermined political course being in place for a long period of time, the BiH Constitutional Court was unsure which position to adopt in cases pertaining to IPTF decisions. In connection with this, the latest decision of the BiH Constitutional Court may be an encouragement to the view that the decertification process conducted by IPTF (similar to

individual measures taken by OHR) is not a matter of concern and that the BiH Constitutional Court should focus on the recently initiated processes regarding the re-employment of decertified persons. As to the *Džaferović* case, the Human Rights Commission within the Constitutional Court should not have adopted a decision on the merits because in that decision the Commission concluded that the Federation of BiH is not to be held responsible for the acts of the IPTF. Therefore, the related application should have been declared inadmissible *ratione personae*. The reason for adopting such a decision lies in the fact that the Human Rights Commission within the Constitutional Court should have upheld the previous decision on admissibility adopted by the Human Rights Chamber, whereby the application was declared admissible. As to the opinion on the merits, the Human Rights Commission within the Constitutional Court established that there was a restriction on the procedural rights of the injured party (right of access to court), but it considered that the said restriction was justified in the context of higher interest, which is ensuring of peace. In fact, the Human Rights Commission within the BiH Constitutional Court gave a negative reply to the question about the competence of authorities under Annex 6 for reviewing the acts of the IPTF.

iv. Criteria

As to the cases where the Constitutional Court of BiH and the relevant authorities under Annex 6 submitted the activity of international actors to review on the merits, the courts were applying the BiH Constitution and conventions which, with their constitutional and legal position, constitute the substantive constitutional law. In the *Subotić* Case, the Constitutional Court did not mention, as an argument, the state of emergency related authorities by which, as a rule, constitutional rights are limited, although the Constitutional Court probably intended to state that SFOR should also act in a way appropriate to the situation. Unlike the aforesaid, in the *Džaferović* Case, the Human Rights Commission within the BiH Constitutional Court explicitly relativised the procedural rights of the injured party under Article 6 of the ECHR for the sake of a higher interest, namely stabilisation of the country.

With respect to the protection of human rights and fundamental freedoms, a restricted reference to Article 15 of the ECHR might be made as well. However, even when it comes to a fair balance or interpretation of terms such as proportionality and the general/public interest, there is certain manoeuvring space that allows for consideration of special circumstances pertaining to the transition of state and society.

It is rightly mentioned that the debate on the issue of reviewing the activities of international actors in Bosnia and Herzegovina is not related to the significance or necessity of such interventions.[3540] However, the international actors themselves have mentioned several times that even the best experts working in peace keeping missions and having the best intentions cannot always avoid making mistakes.[3541] For just this reason, compliance with the minimum international standards and establishment of proper control mechanisms is a clever move. Accordingly, both of the aforesaid is required, in particular after taking into account the fact that in some areas international organisations, being granted their interventionist authorities, interfere with the domestic legal framework. Even if those interventions are basically justified, a possibility of reviewing those interventions by a very neutral institution is still required from the point of view of injured persons, and this institution should be able to review and amend the acts of the international community and, at the same time, it should be able to offer an additional legitimacy and legal force to those acts. It is also necessary to mention that the international community in BiH, including other areas as well, acts in a manner as to setting the highest standards, which means not only in the field of protection of human rights but also in the field of fundamental constitutional principles such as the legal state and democracy. In order for a peace keeping mission to be effective, it is necessary that it carefully moves, like walking the knife edge, between the highest law achievements and the general interest of the country where these international actors operate in the interest of permanent elimination of troubles and problems. However, international actors should be cautious not to fall within the scope of double moral standards which would immediately amount to a loss of their credibility.[3542] As to the practice of removing officials from office, *Alija Izetbegović*, the former member of the collective Presidency, noted: "In Sarajevo, [the international forces] remove an official from his office, label him dishonest, do not present any proof of this and then talk to us about human rights and […] they want us to trust them".[3543] Furthermore, as to the practice in BiH, it has been proved all over again that whenever the High Representative has shown an insufficient amount of respect for the national Constitution, the nationalistic political power holders always know how to use it in order to weaken his authority. It has been explicitly proved in the already

3540 *Winkelmann*, 2002, p. 18.

3541 *Winkelmann*, 2002, p. 18; *Jurčić*, 2000, p. 574.

3542 Compare, *Knaus/Martin*, 2003, p. 63 *et seq.*

3543 Dnevni avaz, Sarajevo, of 2 December 1999, quoted according to *Knaus/Martin*, 2003, p. 66 ("*In Sarajevo entheben sie jemanden des Amtes, stempeln ihn als unehrlich ab, führen keinerlei Beweise an, und dann erzählen sie uns was von Menschenrechten... und wollen, dass wir es ihnen glauben*"); translation of authors.

mentioned debate entitled "*The European Raj*". Therefore, taking into account that the High Representative's authorities on exercising his powers lay on a shaky basis which is of a more political than legal nature, the international community cannot afford to disrespect his authority.

Based on their international component, both courts, as last resorts, could have exercised their right to review all of the acts of international actors and not only the legislative activities conducted on behalf of domestic authorities (principle of functional duality). If we, as a starting point, take into consideration the fundamental Dayton idea that the former warring parties have only limited capacity to reconstruct the country by their own efforts and that, as a consequence, the engagement of international neutral actors is required, then the idea which was realised in Dayton, *i.e.*, the idea on the mixed courts involving both domestic and international factors, proves to be a consequential and functional solution to the problem. This principle does not apply only to the process of reviewing the domestic internal legal acts but also to the process of reviewing the international interventions. That idea is a firm compromise aimed at preserving the principle of power sharing, or – as scenically described by Anglo-Saxon lawyers – the principle of *checks and balances*: the international element within the highest judicial body in the country guarantees appropriate respect for the general interest: peace keeping. In this way the interventions of international actors may be subject to review in a responsible manner with respect for the principles of lawfulness and constitutionality according to the domestic legal system. In the latest judicial practice of the Constitutional Court it has been, however, concluded that the international community did not operate within a legal vacuum. However, the Constitutional Court is not willing, without the mandate granted by the Security Council or PIC, to take over the responsibility for making sure that international actors comply with constitutional standards.

3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution

Article VI.3(c) of the BiH Constitution

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

AP 1603/05 Lončar	20061221
U 10/01 Cantonal Court Zenica	20010405
U 106/03 I. D.	20041027
U 11/05 Blagić	20060526
U 17/01 "RS Law on Labour"	20011024 *OG of BiH*, No. 27/01
U 17/06 Supreme Court of Federation	20060929
U 19/00 Kemokop *et al.*	20010504
U 26/00 "F BiH Law on Labour"	20020423 *OG of BiH*, No. 08/02
U 3/06 Municipal Court Sarajevo	20060531
U 50/01 Cantonal Court Široki Brijeg	20040130
U 55/02 Basic Court Doboj	20040219 *OG of BiH*, No.03/04

Article VI.3(c) regulates the procedure of referring issues to the Constitutional Court in the event that the lower courts have doubts concerning the constitutionality of a regulation which is decisive for the resolution of a judicial case. This procedure should provide for the constitutional monopoly of the BiH Constitutional Court.

So far the lower courts have rarely used this possibility and therefore the Constitutional Court has had almost no opportunity to precisely define the admissibility requirements for such procedure in its own judicial practice. A series of requirements can be found in the constitutional provision itself and those requirements have been partially and additionally defined in Article 19, paragraph 4 of the Rules of the Constitutional Court.

a. Authorisation to submit a request

All courts in Bosnia and Herzegovina are authorised to refer issues to the Constitutional Court of BiH, which means that it is not correct that only supreme courts are authorised to do so. The courts of the Brčko District belong to this group as well. The judicial instance at which the court decides is irrelevant.[3544] Individuals are not authorised to submit requests as is directly evident from the text of the regulation,[3545] and the very purpose and meaning of the regulations point to the aforesaid fact. The protection of individual rights is safeguarded under Article VI.3(b), and not under Article VI.3(c) of the BIH Constitution.

b. Obligation to submit a request

It cannot be interpreted in a simple way whether, except for the authorisation to submit a request, the ordinary courts have the obligation to refer the

3544 Compare, U 50/01, paragraph 20: reviewing court.
3545 U 22/02, paragraph 10.

issues under Article VI.3(c) of the BiH Constitution. At the beginning, the Constitutional Court supported the opinion that the State authorities, including the courts, due to the supremacy of the BiH Constitution, should simply disregard an ordinary positive law, which, in their opinion, is unconstitutional, and directly invoke the BiH Constitution and adjudicate the matter. In that way, the courts would preserve lawfulness, which is one of the judiciary's major functions and obligations in accordance with the principles of the legal state. Moreover, according to the opinion of the BiH Constitutional Court, in the event of reasonable doubt concerning the constitutionality of a law which should be applied to a specific case, the courts are under an obligation to initiate a procedure of concrete/incidental review of constitutionality as provided for under Article VI.3(c) of the BiH Constitution.[3546]

The abovementioned standpoint was subsequently modified by the Court.[3547] Namely, the Constitutional Court continues supporting the opinion that ordinary courts, due to the normative-hierarchical supremacy of the BiH Constitution, should not apply unconstitutional ordinary law. However, an ordinary court must, by itself, submit the disputed norm to review. If, upon the conducted analysis, the court concludes that a norm of ordinary law is in accordance with the Constitution, the court will apply that norm in the relevant case. However, if the court arrives at a conclusion that the mentioned norm is unconstitutional, then it must not simply disregard it by invoking the Constitution. That court must refer the issue of the norm's constitutionality to the BiH Constitutional Court to take a decision in accordance with Article VI.3(c) of the BiH Constitution.[3548]

During that time – although the Constitutional Court has given no clear opinion about this issue – the proceedings before the lower court should be suspended pending the decision of the Constitutional Court of BiH. Hence, it remains unclear whether an ordinary court may simply disregard the norm of ordinary law deemed to be unconstitutional and decide the case directly on the basis of the BiH Constitution without referring that issue of the norm's constitutionality to the Constitutional Court of BiH. Clear regulation, such as Article 100 of the German Basic Law (Constitution), does not exist in the BiH Constitution. Article 100 of the German Basic Law regulates the so-called constitutional monopoly to the benefit of the German Constitutional Court. The purpose and meaning of that norm lies in the fact that the Federal Constitutional Court should be given the last word in the interpretation of the Constitution's text. Contradictory interpretations of the constitutional text must be avoided for the

3546 U 106, paragraph 33.
3547 Compare, AP 1603/05.
3548 Compare, AP 1603/05, paragraph 33, 2nd sentence, paragraph 37.

purpose of legal unity and legal certainty and lower courts must not be given the possibility to be placed above the will of the legislature.[3549]

Given that a similar norm does not exist in BiH, the solution should be found in the existing constitutional framework. The supremacy of the Constitution (Article III.3(b), the first sentence of the BiH Constitution) and, in this case, the principle of legal certainty (as a part of the principle of the legal state according to Article I.2 of the BiH Constitution) is a decisive argument in the interpretation. In specific judicial cases where adjudication is conducted on the rights and freedoms safeguarded under the ECHR, the opinion is partially supported that ordinary courts, due to the so-called direct application of the ECHR, may, based on the ECHR, adjudicate the relevant case directly, even if failing to comply with the ordinary domestic law which is in contravention of the Convention. Moreover, the mentioned courts are not obliged to refer to the Constitutional Court the issue relating to the compatibility of the norm under ordinary law with the ECHR, which means that they do not need to wait for the decision of the Constitutional Court. Otherwise, this “direct applicability” would be irrelevant, *i.e.*, the question of its purposefulness would arise.

However, this conclusion cannot directly be drawn from the obligation of direct application of the ECHR, which is imposed by the BiH Constitution. Direct application of the rights from the ECHR, according to Article II.2 of the BiH Constitution, means as follows: in order to apply those rights and freedoms in BiH, no legal basis is required on the part of the legislature such as is the case with other conventions under international law. Therefore, it should be examined whether the norm, whose application will result in a decision on dispute, is indeed in accordance with the ECHR.

It is another issue whether the courts may simply by-pass the ordinary law which they consider to be in contravention of the ECHR without referring that issue to the Constitutional Court, which should adopt a relevant decision. If this rule would apply to the ECHR, it should apply to all other constitutional norms as well. It is because the Constitution is directly applicable in the whole territory of the State and, accordingly, in the territory of Entities. The BiH Constitution suppresses lower norms which are in contravention of the Constitution (Article III.3(b), the first sentence of the BiH Constitution). The effectiveness of the BiH Constitution and constitutional rights and freedoms from the very catalogue of the BiH Constitution or the ECHR or international agreements under Annex 1 to the BiH Constitution is not dependant on whether

3549 Compare, *Schlaich/Korioth*, 2001, paragraph 128 *et seq.*, including other arguments.

the lower courts should wait for the decision of the BiH Constitutional Court, *i.e.*, it has no direct significance for the effectiveness of the BiH Constitutional Court. Generally speaking, the effectiveness depends on whether the higher ranked law is respected, which, in some disputable case may eventually lead to non-application of some norm after the suspension of the proceedings and referring the case to the Constitutional Court. However, in some cases urgent action is required. In such cases the injured party may seek, even from the Constitutional Court, the issuance of an interim measure.

It is true that the protection of human rights in *a concrete, individual case* would be more effective or at least faster if ordinary courts, without waiting for the adoption of the decision by the Constitutional Court, would simply by-pass an ordinary law which is inconsistent with the Constitution or the ECHR. However, such an interpretation would raise doubts for a number of reasons: On the one hand, as to the referred cases where the Constitutional Court would find that the disputed norm is consistent with the ECHR, the procedural issues would arise and it would be hard to resolve them. The legally binding decisions could be altered only in the renewed proceedings. On the other hand, the lower courts might be tempted not to refer the disputable issues to the Constitutional Court. Namely, the lower courts, independent of the decisions of the Constitutional Court, would be able to finalise the proceedings by respecting and directly applying the ECHR. However, such an approach might have undesirable effects: a norm that is contrary to the ECHR would remain in force and be applied to other cases. Only by ensuring the monopoly of the Constitutional Court would it be possible to prevent different, even contradictory interpretations of the same norm and ensure legal unity and legal certainty. It is in BiH where the aspect of legal unity has its major significance, given the fact that within the judicial system of BiH, except for the Constitutional Court of BiH, there is no supreme reviewing judicial instance at the State level which would take care of a unified application of the same norms in the Entities.

For all the above reasons, the solution presented in the decision of the Constitutional Court No. U 106/03 is not convincing since that decision gives implications of different treatment depending on whether the disputed norm is in violation of the BiH Constitution or the ECHR. The BiH Constitution is neither more nor less applicable in Bosnia and Herzegovina than are the human rights and fundamental freedoms under the ECHR. The suggested opinion relies on a wrongly understood term “direct” application”. The directness of application should be perceived only in connection with the mutual interaction of international law (ECHR) and constitutional law. In order to apply the ECHR, no act on its application is required nor any order of the domestic legal system.

Therefore, the courts are obliged to examine not only whether some disputed norm is consistent with the fundamental rights under the ECHR, but also whether it is consistent with the remainder of constitutional law. If the examination results in a conclusion that the relevant norm is inconsistent, then the *courts will be obliged* to suspend the ongoing proceedings and refer the issue to the Constitutional Court to take a decision on the compatibility of that norm with the ECHR. After the relevant decision is adopted the lower court may resume the proceedings, in which case the legal standpoint of the Constitutional Court must be complied with.

c. Review Criteria

As to the Constitutional Court, its review criterion is definitely the Constitution of BiH. Moreover, Article VI.3(c) of the Constitution explicitly refers to the ECHR and its additional protocols, which is understandable if the principle of applicability under Article II.2 of the BiH Constitution is taken into consideration. Given that the international-legal instruments for the protection of human rights and fundamental freedoms under Annex 1 to the BiH Constitution are also applied in BiH,[3550] they are considered to be criteria as well. Finally, the provisions referred for review should be examined by taking the laws of BiH as a criterion, too. This explicit reference to State laws, as criteria for review, is important because in that way a hierarchy of norms is underlined once again, as stipulated under Article II.2, second sentence, and Articles II.6, III.3(b) and VI.3(a) of the BiH Constitution. Therefore, the administrative acts or collective agreements from the field of labour law are not appropriate criteria for review within the framework of Article VI.3(c).[3551]

d. Subject of review

The subject of review, *i.e.*, the referred case, may be a law that should be reviewed as to whether it is consistent with the BiH Constitution or with other mentioned criteria. On the other hand, it may be some general regulation of international law whose existence or effect, according to the standpoint of the court referring the case, should be clarified by the Constitutional Court. Accordingly, from the aspect of systematic interpretation of this provision, a request is inadmissible where the ordinary courts refer the issue as to clarifying which one of two contradictory judicial decisions should be applied to a specific case before the criminal court because such an issue does not make

3550 See "b. Isolated applicability of agreements referred to in Annex I to the BiH Constitution", p. 155.
3551 U 3/06, paragraph 7.

an admissible case for review. This also applies if the enforcement of one of these two judgments on criminal sanction would eventually lead to a violation of Article 6 of the ECHR and Article 4 of the Additional Protocol to the ECHR because parallel criminal proceedings are still under way.[3552]

(a) Concrete review of a norm

The notion of law, within the meaning of Article VI.3(c) of the BiH Constitution, is interpreted according to substantive and formal criteria. General acts (administrative acts regulating a large number of cases) are not to be considered the "laws" within the mentioned meaning.[3553] Quite the contrary, the laws that were passed prior to the enactment of the Constitution of BiH (in the German terminology the so-called *vorkonstitutionelle Gesetze*) may be the subject of review.

> The Constitutional Court, while relying on its own case-law relating to Article VI.3(b) of the BiH Constitution, deliberated on the issue of its competence *ratione materiae* to review the constitutionality of a law which entered into force prior to the enactment of the Constitution of BiH (Case No. U 55/02, paragraphs 19-22). In such a case the legislature, prior to the entry into force of the BiH Constitution, had "no opportunity" to harmonise the law with the new constitutional text. The case-law which is based on the principle *ratione temporis*, in conjunction with Article VI.3(b) of the BiH Constitution, is not applicable because of the fact that the laws in force at the moment of enactment of the BiH Constitution are not in contravention of the Constitution and therefore they remain in force (Annex II.2 to the BiH Constitution). On the one hand, the Republika Srpska, as a signatory party to the BiH Constitution, has recognised all the laws being in force by 14 December 1995 within the meaning of Annex II.2 to the BiH Constitution and, on the other hand, there is the BiH Constitutional Court, which, as a State-level body, is competent to review the constitutionality of law if needs be. Further, the Constitutional Court maintained that this interpretation has its foundation in the principles of legal unity and legal certainty. The system of concrete review has a very important role given the fact that legal uncertainty and legal disharmony are prevented by obligatory clarifications of divergences in judicial practice. Among other things, the concentration of these authorities (the constitutional monopoly) being assigned to the Constitutional Court should ensure that the courts comply with the laws. As to the fact that the courts in Bosnia and Herzegovina are not competent to conduct an incidental review of the constitutionality of a law, the Constitutional Court concluded that its authority also includes the laws that had entered into force before the

3552 Compare, U 10/01, paragraph 19 *et seq*.
3553 U 3/06, paragraph 7.

> enactment of the applicable Constitution and the goal is to provide full protection for the constitutional system in Bosnia and Herzegovina. In this reasoning, the Constitutional Court relies on the arguments presented in the German case-law and literature. However, for well-founded reasons, the BiH Constitutional Court has chosen an approach that is different from the approach of the German Federal Constitutional Court, which only accepts to conduct reviews of laws that entered into force upon the enactment of the Basic Law.[3554]

Taking into account the "legal continuity" provided for under Annex II.2 of the BiH Constitution ("to the extent not inconsistent with the BiH Constitution"), the Constitutional Court of BiH is almost challenged to review the constitutionality of laws that remained in force even after the enactment of this Constitution if someone submits a concrete or an abstract request for review of constitutionality. As for the general legal norms, the "responsibility" of the legislature for the constitutionality of some norm which was passed earlier is not that important, neither is "the possibility of its abolishment" if inconsistent with the constitution. Unlike the individual acts whose conclusively proven facts cannot be changed retroactively after the enactment of the Constitution, as to the laws that remained in force and whose effect continued after the entry into force of the Constitution, a review by the Constitutional Court is required, as well as the possibility of rendering unconstitutional provisions as invalid. To be precise, this task cannot be assigned to the lower courts with a mere remainder of the rule *lex posteriori*. Otherwise, the lower courts could be simply given the possibility not to amend such laws since they violate a higher ranked law, *i.e.*, the BiH Constitution. Both principles are equally important. In fact, there is a problem in determining the contradiction between the law and the Constitution in order for some norm to be eventually abolished. If we properly perceive the basic aim of the Constitutional Court's monopoly aimed at safeguarding the legal unity and legal certainty, which is the Constitutional Court's view as well, then it is of no relevance whether the law was passed before or after the enactment of the Constitution. What is of relevance in this situation is the fact that the said law will be in force until it is abolished by the competent legislature or until declared unconstitutional by the Constitutional Court of BiH. Taking into account that Bosnia and Herzegovina is in the double process of transformation, facing enormous changes in the organisation of the State as defined by the Constitution of BiH, including changes in the economy and social sphere, the Constitutional Court cannot avoid playing the role of a safeguard of the new constitutional system nor the role of clarifying and resolving dilemmas in that regard.

3554 *Schlaich/Korioth*, 2001, pp. 128-130.

(b) International verification

Apart from the review of the constitutionality of certain norms and their compatibility with the Constitution of BiH, Article VI.3(c) of the BiH Constitution permits the lower instance courts to refer issues for the purpose of clarifying the existence and scope of rules of international public law.[3555] The international verification also serves to avoid divergent judgments when the same rule, *i.e.*, the norm is applied.

The term "general rules of international law" may include different forms of international common law which has universal validity, as well as general law principles, *i.e.*, the principles which may be found in the same form within the legal systems of several states and which may be transferred to fall within the scope of international legal activities. Unlike the aforesaid, the remainder of international law, for instance international contract law, cannot be subject to review by the Constitutional Court, *i.e.*, such an issue cannot be referred to the Constitutional Court of BiH. That is to say that the ordinary courts are tasked with the interpretation and application of the said laws, but their judgments may later reach the Constitutional Court of BiH after application of Article VI.3(b) of the BiH Constitution. The Constitutional Court of BiH does not review a general rule under the international law which is a subject of the issue referred, but it determines the existence and scope of that rule within the domestic legal system.

e. Relevance for deciding

Pursuant to Article VI.3(c) of the BiH Constitution, an issue referred must be related to the law on the validity of which the decision of ordinary court depends.[3556] The same applies to the existence or scope of a general rule of public international law. The decision of the Constitutional Court must be specifically relevant for the decision of the lower instance ordinary court.[3557] The referral of abstract issues is not permitted.

f. Form

Pursuant to Article 19, paragraph 4 of the Rules of the Constitutional Court, a referred issue must, above all, contain the title of the challenged act with the name and number of the Official Gazette in which it was published. Furthermore,

3555 With regard to the same topic within the German Basic Law, *i.e.*, Article 100, see *Sturm* in: *Sachs*, 1999, paragraph 25.
3556 Compare also U 26/00, paragraph 16.
3557 U 17/01, paragraph 14; U 55/02, paragraph 23; U 17/06, paragraph 15.

it must point to the provisions of the Constitution or the ECHR or a law of Bosnia and Herzegovina deemed to have been violated by a norm that is decisive for the mentioned judicial decision, in other words it must point to a general rule of international law whose existence (or scope) is important for the decision of the court referring the issue. Accordingly, the burden rests with the relevant court to substantiate certain claims and present the issue referred, but that burden is not explained in detail. Finally, pursuant to Article 19, paragraph 4 of the Rules of the Constitutional Court of BiH, that request is to be signed by an "authorised person". Given the fact that an authorised person refers the issue on behalf of the court, that person shall not be a judge assigned to that case, in which instance the request would be inadmissible.[3558] The authorised person may be a president of the Court.

4. Examining vital national interest (Article IV. 3(f) of the BiH Constitution)

Article IV of the BiH Constitution – Parliamentary Assembly

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

1. House of Peoples

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). [...]

3. Procedures. [...]

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

d) All decisions in both chambers shall be by majority of those present and voting. [...]

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

f) When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by

3558 U 11/05, paragraph 6 *et seq.*

> **the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.**

Pursuant to Article IV.3(f) of the BiH Constitution, the Constitutional Court of BiH shall review a request for "procedural regularity" if there is a blockage in the process of harmonisation of a legal act arising from the fact that the majority of representatives of one constituent people in the House of Peoples declared that the decision is destructive to the national interest. That assessment did not get the support of the majority of representatives of an (other) ethnic group and the commission which was established for the harmonisation purposes has failed to reach an agreement, *i.e.*, to achieve success. A list of the substantive elements of a "vital national interest" or a definition of that term does not exist in the BiH Constitution. However, the Constitutional Court does not see the vital national interest as a term having no meaning, but rather considers that it protects certain principles without which a society with the differences protected under the constitution could not function efficiently. According to the opinion of the Constitutional Court of BiH, an integral part of a vital interest of an ethnic group depends on or is viewed within the context of its "constituency". In the very text of the Constitution there is a clear borderline according to which the Constitutional Court shall review the legislative procedure only in order to establish whether there was any procedural irregularity. The Constitutional Court extended its jurisdiction and included the issues as to whether the subject of dispute is the case which falls within the mechanism of the protection of a "vital national interest" and whether the national vital interest of any of the three constituent peoples has been violated. The Constitutional Court, as the highest court in the country, concluded that it had to protect the Constitution and resolve possible blockages within the legislative procedure. The Constitutional Court notes that according to Article VI.3(a) of the BiH Constitution, this Court is definitely responsible for the review of the constitutionality of laws (*ex post*), as well as for the preventive review which is aimed at resolving issues of blockages in the legislative procedure, which are the same as those existing in other legal systems like, for instance, in the French legal system. This step of the BiH Constitutional Court, which was taken with full confidence, is very important for the efficiency of the government as a whole.

E. Brčko District – Constitution and Law

AMENDMENT I
TO THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

In the Constitution of Bosnia and Herzegovina, a new Article VI(4) shall be added after Article VI(3) and read as follows:

"4. Brčko District of Bosnia and Herzegovina

The Brčko District of Bosnia and Herzegovina, existing under the sovereignty of Bosnia and Herzegovina and falling under the responsibility of the institutions of Bosnia and Herzegovina as arising from the Constitution, which territory is jointly owned by the Entities, shall be a local self-government unit with own institutions, laws and regulations, and powers and statute laid down finally in the decisions of the Arbitration Tribunal for the Dispute over the Inter-Entity Boundary Line in Brčko Area. Relations between the Brčko District of Bosnia and Herzegovina and the institutions of Bosnia and Herzegovina and the Entities may be additionally specified by law enacted by the Parliamentary Assembly of Bosnia and Herzegovina.

The BiH Constitutional Court shall have jurisdiction to decide any dispute in relation to the protection of the established status and powers of the Brčko District of Bosnia and Herzegovina that arises under this Constitution and decisions of the Arbitration Tribunal between an Entity or Entities and the Brčko District of Bosnia and Herzegovina or between Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina.

Any such dispute may be referred by a majority of representatives of the Assembly of the Brčko District of Bosnia and Herzegovina including at least one fifth of the members elected from amongst each constituent people.

The current Article VI(4) shall become Article VI(5).

Amendment I to the Constitution of Bosnia and Herzegovina shall enter into force eight days after its publication in the Official Gazette of BiH".

1. Origin

Bosnia and Herzegovina, which is fighting for its stability, is characterised by three constituent peoples, *i.e.*, Croats, Serbs and Bosniaks. The multiethnic coexistence of these three peoples is best illustrated in the town of Brčko and its environment – which are defined as the "Brčko District" in the context of public and international law – since all elements of the related problems are concentrated there. The Brčko District is an area on the Sava river with 80,000 inhabitants constituting the border area of Croatia and Bosnia and

Herzegovina. The international legal establishment of the Brčko District took place for strategic and geographic reasons at the end of 1995. It forms part of the Posavina corridor and operates as a condominium of both constituent parts (Entities) of Bosnia and Herzegovina, *i.e.*, the Federation of Bosnia and Herzegovina on the one hand and Republika Srpska on the other hand. The District encompasses elements of statehood and communal self-government within the internationally limited sovereignty of the State of the Republic of Bosnia and Herzegovina which, in the context of international and public law, constitutes one of the most complicated creations in the world.

Bosnia and Herzegovina is not yet a sustainable State.[3559] It is a "State whose development is obstructed",[3560] although its sustainability is not in danger in the military sense. As it has already been said, the members of the Peace Implementation Council that assist the peace process in terms of material, financial and personnel support, have given thought to close the Office of the High Representative.[3561]

It appears that the inability of national political parties to come to an agreement on Brčko during the negotiations in Dayton[3562] and the subsequent Arbitral Tribunal's Final Award for the Dispute over the Inter-Entity Boundary in Brčko Area, dated 5 March 1999, made Brčko, as a micro-universe of Bosnia and Herzegovina, become a laboratory for the moderate inter-entity.[3563] The population is 46% Serb, 43% Bosniak and 11% Croat; they live together in the District (440km²) and are employed at all levels of the State powers. They have an integrated educational system and joint police structure, which means that there is cooperation which is not possible in other regions of the country.

Originally (before the war) Brčko was a Croat and Bosniak majority populated area. During the war, Serb military formations occupied the town. After the entry into force of the regulations relating to the Brčko District, Brčko was populated by a Serb majority.[3564] Brčko was one of the richest towns of Bosnia and Herzegovina. Its position points to the fact of how important it is. It represents a road to Central Bosnia and the Southern Balkans and a connection with Croatia and Central Europe by the Zagreb-Beograd highway. The only port

3559 *Solioz*, 2005, p. 17 *et seq*.; *Solioz*, 2004, *passim*; *Solioz*, 2003, *passim*.
3560 *Hornstein-Tomić*, 2005, p. 43 *et seq*. ("*verhinderter Staat*", translation provided by A. A.).
3561 *Frankfurter Allgemeine Zeitung* of 29 June 2009.
3562 *Holbrooke*, 1998, p. 272 *et seq*.
3563 *Karpen*, 2008, p. 500-512; *ICG*, 1999; *Karnavas*, 2003, p. 111-131; *Domić*, 2008, p. 162; *Vitzthum*, 2001, p. 87 *et seq*.; *Vitzthum*, 2003, p. 118 *et seq.*; *Konrad-Adenauer-Stiftung*, 2005; *Mujkić*, 2008, p. 83 *et seq*.
3564 About the war from the ethnic point of view, *Bisić*, 1999; for a good introduction to the history of this country, see *Keßelring*, 2005, p. 69 *et seq*.

of Bosnia and Herzegovina on the Sava river – which is an important riverway to Belgrade and the Danube – is in Brčko. The District connects the western and eastern part of Republika Srpska in terms of economy and military strategy. A Croat and Bosniak majority population lived in the Posavina corridor before the war. Due to occupation by Serbs, Brčko became a Serb *fiducia* in the end of the war. The southern part of the District was under the administration of the Federation. Until 8 March 2000 when the Brčko District was established[3565] based on the Final Award of 5 March 1999, power had been exercised by two Entities and three towns (Ravne/Brčko, Brka, Brčko Grad) which formed an integral part of the Entities. After a single administration had been established, the aforementioned geostrategic problems were resolved. The District Brčko as a condominium of the Federation of Bosnia and Herzegovina and Republika Srpska represents a unit of local self-government with integrated multiethnic and democratic laws, administration, police and judicial power. Moreover, the District Brčko is a demilitarised zone. The remaining part of the Posavina corridor forms an integral part of the Federation of Bosnia and Herzegovina and its Posavina Canton. Within the federal system of government, the Brčko District constitutes a particular case. It is a kind of third Entity.[3566]

The legal position of the Brčko District and, after all, Bosnia and Herzegovina itself is characterised by a conflict of national and international law where international law dominates. This applies regardless of whether it constitutes a direct legal basis for the existence of the State or solely a legal basis for the authority to control and the rights of "intervention" in the national legal system by the High Representative. International law is determined by the Dayton Agreement, dated 14 December 1995,[3567] its Annexes, and the Arbitral Tribunal's Final Award on the Dispute over the Inter-Entity Boundary in Brčko Area, dated 5 March 1999.[3568] Insofar as the application of national regulations is concerned, the BiH Constitution – as Annex 4 of the Dayton Agreement, which was approved by BiH, the FBiH and the RS – applies, then the Constitutions of FBiH[3569] and RS[3570] and, finally, the Statute of the Brčko District, which was adopted by the Assembly on 8 March 2000.[3571]

3565 See *Decision on the establishment of the Brčko District of BiH*, dated 8 March 2000, available at:<http://www.ohr.int/decisions/statemattersdec/archive.asp?m=&yr=2000>.

3566 *Rehs*, 2006, p. 59, footnote 114 with further reference.

3567 See: <http://www.oscebih.org/overview/gfap/bos/> (lasted visited on: 30 August 2009).

3568 *OHR*, 2007.

3569 *OG of FBiH*, No. 1/94 with multiple amendments.

3570 *OG of RS*, No. 6/92 with multiple amendments.

3571 See: <http://www.ohr.int/ohr-offices/brcko/> (last visited on: 30 August 2009); *OG of BD*, No. 1/00 with multiple amendments.

2. International position of the Brčko District

a. International interference

The High Representative is entrusted with the implementation of the peace process in Bosnia and Herzegovina, which is regulated by the Dayton Peace Agreement.[3572] He is legally accountable to the UN and the Peace Implementation Council through which the international community in Bosnia and Herzegovina supports this process in terms of financial means and personnel.[3573] The Deputy High Representative is his representative in the District, *i.e.*, the supervisor.[3574] The UN Security Council described the situation in BiH as follows: "The Security Council […] recognizes the unique, extraordinary and complex character of the present situation in Bosnia and Herzegovina, requiring an exceptional response."[3575] This particularly applies to Brčko. The Peace Implementation Council is composed of 55 governments and organizations, including, *inter alia*, the UN, the EU, NATO, the OSCE, Council of Europe, and the World Bank.[3576] The prospect for the country to join the European Union is beyond any doubt a driving force of the State policy. However, the fulfilment of the Copenhagen requirements is a long-term goal. Moreover, taking into account the real situation, one may say that the EU does not have to automatically be considered as a driving force for carrying out State reform.[3577]

b. Brčko as per the Dayton Agreement

The Dayton Peace Agreement was created after long negotiations between Bosnia and Herzegovina, Croatia and Serbia. "The peace agreement for Bosnia is the most ambitious document of its kind in modern history, perhaps in history as a whole. A traditional peace treaty aims at ending a war between nations and coalitions of nations, while here it is a question of setting up a state on the basis of little more than ruins and rivalries of a bitter war".[3578] This Agreement is a set of independent international agreements put together in a whole through the General Framework Agreement in Bosnia and Herzegovina. It was not possible to come to an agreement on Brčko so that the regulation

3572 Article II.1(a) of Annex 10 of the Dayton Peace Agreement; (*Rehs*, 2006, p. 59, footnote 114. with further reference).
3573 Article II.1 and Article III(f) of Annex 10 of the Dayton Peace Agreement; (*Rehs*, 2006, p. 59, footnote 114 with further reference).
3574 *Smyrek*, 2006, p. 157 *et seq*.
3575 Resolution No. 1031 of 15 December 1995, item 39.
3576 *Rehs*, 2006, p. 39; compare also, *Wnendt*, 2005, p. 75 *et seq.*; *Vitzthum*, 2003.a, pp. 823-846; *Vitzthum/Mack*, 2007, pp. 81-136.
3577 *Western Balkans*, 2005, p. 149; *Reiter*, 2005, p. 63 *et seq*.
3578 *Bildt*, 1998, p. 392.

of the issue of Brčko was submitted to arbitration, where the parties were to come to an agreement. Details were regulated in Annex 2 of the Dayton Peace Agreement. The agreement contains 5 items:

- The Parties agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line between the Federation of Bosnia and Herzegovina and Republika Srpska;
- The Federation shall appoint one arbitrator, and the Republika Srpska shall appoint one arbitrator. A third arbitrator shall be selected by agreement of the Parties' appointees or if they do not agree, the third arbitrator shall be appointed by the President of the International Court of Justice. The third arbitrator shall serve as the presiding officer of the arbitral tribunal;
- Unless otherwise agreed by the Parties, the proceedings shall be conducted in accordance with the UNCITRAL rules. The arbitrators shall apply relevant legal and equitable principles;
- The area indicated above shall continue to be administered as currently;
- The arbitrators shall issue their decision no later than 14 December 1996, *i.e.*, one year from the entry into force of the Dayton Agreement. The decision shall be final and binding, and the Parties shall implement it without delay.

c. Final Award

The Arbitral Tribunal was not able to take a decision within the prescribed time limit, so the Award on the Dispute over the Inter-Entity Boundary in the Brčko Area was taken on 14 February 1997,[3579] whereby the High Representative for Bosnia and Herzegovina, who was established under Annex 10 of the Dayton Peace Agreement, was ordered, *inter alia*, to appoint his Deputy (Supervisor) for Brčko, who would have powers as large as those of the High Representative, which are expressly defined in the Supplemental Award on the Dispute over the Inter-Entity Boundary in the Brčko Area, dated 15 March 1998.[3580] On 5 March 1999 the Arbitral Tribunal took a Final Award,[3581] including an Annex[3582]

3579 UN Doc. S/1997/126. available at: <http://www.ohr.int/ohr-offices/brcko/arbitration/archive.asp?sa=on>.
3580 *OHR*, 2007; available at: <http://www.ohr.int/ohr-offices/brcko/arbitration/archive.asp?sa=on>.
3581 38 ILM 534 (1999) or *OHR*, 2007; available at: <http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=42567>.
3582 *Ibid*.

which was amended on 18 August 1999[3583] The 1997 and 1998 Decisions are incorporated in the Final Award.

The Final Award consists of 10 chapters and 69 paragraphs. The first two chapters describe the factual situation – the position of Brčko and the necessity to find a solution – and give the summary of conclusions. Chapter III includes Chapter I and describes the difficulties impeding repatriation of different ethnic groups and the establishment of a local multi-ethnic government. Paragraph 9 and some parts of paragraphs 34 and 36 (Chapter IV) govern the basic structure of the District. It should have a single unitary multi-ethnic democratic government to exercise those powers previously exercised by the two Entities and the three municipal governments. The single District government consists essentially of (a) the District Assembly; (b) an Executive Board, to be selected by the Assembly; (c) an independent judiciary, to consist of two courts, trial and appellate, and (d) a unified police force operating under a single command structure, with complete independence from the police establishments of the two entities. The District falls under the exclusive sovereignty of Bosnia and Herzegovina. All powers and rights of both Entities are suspended and transferred to the District (paragraphs 9, 10, 34, 36 and 61). Paragraph 37 *et seq*. deals with the authority and the responsibilities of the Supervisor, out of which one of the most important responsibilities is to prepare and to adopt a new "Statute for District Government" (paragraph 38). The said Statute entered into force on 7 December 1999.[3584]

In Chapter V, the Arbitral Tribunal took the liberty to give some "recommendations" to the High Representative and the International Community for rebuilding the District, although it was clear that the Arbitral Tribunal could not go further than giving "the recommendations". It is strenuously emphasised that one of the major causes of tension in the Brčko area is its general economic depression and high rate of unemployment (paragraph 49). Chapter VI separately deliberates on the manner in which the Arbitral Tribunal takes into account the various interests of the parties involved: the Republika Srpska, the Federation of Bosnia and Herzegovina and the International Community. The legal effect of the Final Award is described in Chapter VII. In paragraph 34 it is already stated that the District Government will be an institution existing under BiH sovereignty, it will be subject to BiH control in those areas that are included under the responsibility of the joint institutions of Bosnia and Herzegovina. Other issues (paragraph 58) encompassed by the Final Award are consistent with the BiH Constitution as part of the Dayton Peace Agreement.

3583 *Ibid*.
3584 39 ILM 879 (2000); see also *OHR*, 2007.

This particularly relates to Article I.3 of the BiH Constitution, which stipulates that Bosnia and Herzegovina consists of two Entities. The entire territory of Brčko is held in "condominium" by both Entities, and, consequently, it does not constitute a third entity (the "condominium" arrangement). Pursuant to Article V.5 of Annex 2 to the Dayton Peace Agreement, the decision shall be final and binding, and the Parties shall implement it "without delay." Pursuant to paragraph 61 of the Final Award, both entities shall be deemed to have delegated all of their powers of governance in the prescribed area to the District Government as of the effective date designated by the Supervisor. According to Article III.3 of the BiH Constitution, subsequently (after the delegation of powers), all authorities of the District, from the constitutional point of view, shall continue to be "governmental functions and powers of the Entities." Chapters VIII through X contain interim and final provisions.

The Annex to the Final Award, as an integral part thereof, provides guidelines on the structure of the District, to be taken into account by the Supervisor in preparing the Statute of the Brčko District. The Annex is composed of 13 paragraphs. All residents of the District who are citizens of BiH shall have the right to decide to be also a citizen of one or the other entity (but not both), regardless of where they live in the District. No resident of the District shall be treated by either Entity as being subject to entity taxes or compulsory military service (paragraph 1). As to the election of members of the District Assembly (paragraph 2), the Supervisor may, if he deems it necessary, devise and incorporate into the Statute (1) an "ethnic formula" designed to minimize the incentive for any ethnic group to seek to increase its population in the District in order to achieve exclusive political control, and/or (2) a provision relating to the protection of "vital interests", as also regulated by Article IV.3(e) of the BiH Constitution, in terms of preventing over-voting in cases where "essential issues" of each people arise. The Executive Board (a collegiate body) and a District Manager are responsible for the management of the Brčko District (paragraphs 3 and 4). In addition, the Statute may also incorporate an "ethnic formula" relating to Executive Board membership. Paragraph 5 relates to the judicial and penal system of the District. Paragraph 6 stipulates that a three-member law revision commission shall be appointed with responsibility for drafting a uniform system of laws throughout the District. Paragraphs 8 and 9 relate to the Law Enforcement and Customs Service. Voting and symbols of the District are regulated in paragraphs 10 and 11. The education Curriculum is ethnically regulated in a uniform manner (paragraph 12). The Supervisor shall have authority to transfer the ownership of public assets to the District Government and to establish a system of regulation for the operation of public utilities and enterprises.

d. Legal Status of the District

In order to understand the legal status of the District it is necessary to view Bosnia and Herzegovina in the context of international law. It has already been clear that it is difficult to analyse Bosnia and Herzegovina, as a State and legal subject, within the context of the theory of public law and public international law. In science, there has been no clearly differentiated opinion about this issue.[3585] It is questionable whether Bosnia and Herzegovina is a federal state or a confederation, or whether Bosnia and Herzegovina may be deemed to be a sovereign country or a protectorate of the international community. According to one opinion, Bosnia and Herzegovina is not a sovereign State but a confederation consisting of two sovereign States, the Federation of Bosnia and Herzegovina and the Republika Srpska.[3586] The said opinion is contrasted by the fact that line 6 of the Preamble of the BiH Constitution and Article III.2(a) of the BiH Constitution address sovereignty. In any event, the State as a whole is not called a "federal state", but a "state". The Federation of Bosnia and Herzegovina and the Republika Srpska are not called "states" or "countries", as is the common situation in federal law, but they are defined as "*Sub-State-Entities*".[3587] Therefore, according to another opinion, Bosnia and Herzegovina is, in any case, a *quasi* or *de facto* federal state.[3588] A relatively clear division of responsibilities between the State and the Entities, presuming the existence of the responsibilities of the Entities,[3589] are typical elements of a federal system of government.

Most academics see Bosnia and Herzegovina as a sovereign State and not as a protectorate,[3590] not only because of the reference made in the BiH Constitution, that is Annex 4 to the Dayton Peace Agreement, but because of the facts that the State is a full member of the United Nations and that it joined the Council of Europe in 2002.[3591] In addition, Article III of the BiH Constitution lists a number of responsibilities of the State (foreign policy, monetary policy, migration policy, etc.), which, in essence, are the responsibilities of any State. Nevertheless, an opinion is often expressed[3592] that Bosnia and Herzegovina is a protectorate. However, unlike typical protectorates, Bosnia and Herzegovina is not under UN

3585 Compare, especially, *Smyrek*, 2006, p. 162 *et seq.*; *Savić*, 2003, p. 17 *et seq.*; *Miljko*, 2003, p. 31 *et seq.*; *Par Firass Abu Dan*, 2003, p. 167 *et seq.*; also, *Sokol/ Smerdel*, 1998, p. 286 *et seq*.

3586 *Smyrek*, 2006, p. 163.

3587 Article III.2 of the BiH Constitution; Chapter I paragraph 1of the Final Award.

3588 *Smyrek*, 2006, p. 164.

3589 Article III.3(a) of the BiH Constitution.

3590 *Smyrek*, 2006, p. 167 with additional evidence.

3591 *Breutz*, 2004, p. 15.

3592 *Smyrek*, 2006, p. 139.

auspices, but rather it is under the auspices of the international community or international organisations, established as the Peace Implementation Council based on the 1995 Dayton Peace Agreement. Finally, Bosnia and Herzegovina is not a typical protectorate, which implicitly includes internal autonomy and foreign dependence.

In any case, the State is fairly limited operation-wise in the area of its internal and foreign policy. As a result, Bosnia and Herzegovina may be denoted as a semi-protectorate or – by a legal *passe-partout* – as a "*sui generis State*".[3593]

Similar relationships are applicable to the Brčko District. Pursuant to Paragraph 9 of the Final Award,[3594] Bosnia and Herzegovina has sole authority over the Brčko District. As a self-governing administrative unit, which is part of both the Federation of Bosnia and Herzegovina and the Republika Srpska, the Brčko District is a territory independent from both Entities, as all powers were delegated to the District itself (paragraph 10 of the Final Award). Pursuant to paragraph 11 of the Final Award, Brčko is held in "condominium" by both Entities. Thus, the territory of the Federation of Bosnia and Herzegovina, as well as the territory of the Republika Srpska encompass the District as a whole.[3595] In this way, the territory is divided so that it is equivalent to the parts held by each Entity: 51% is under the Federation of Bosnia and Herzegovina and 49% under the Republika Srpska. Indeed, the notion "condominium" – with a particular legal structure – is misleading,[3596] as both Entities are given no possibility to have any influence on the District. The authority holders are solely the Supervisor and the District Government. The District is under the sole sovereignty of the State of Bosnia and Herzegovina. Consequently, the District, besides the Federation of Bosnia and Herzegovina and the Republika Srpska, is *de facto* an equal third entity, which is limited, as it is not afforded the right to vote at the State central level. Therefore, "a *sui generis status*" is the only possible solution left.

3593 For more details see "A. Continuation according to international law (Article I.1), p. 88.
3594 38 ILM 534 (1999) and *OHR*, 2007.
3595 Paragraph 11 of the Final Award; *Domić*, 2008, p. 162 with additional evidence.
3596 *Domić*, 2008, p. 162.

3. Status of the Brčko District relating to public law

a. Sources

As Brčko is an area under the exclusive sovereignty of the State of Bosnia and Herzegovina and as it is held in "condominium" by both Entities, in order to exercise the public authority in all three branches, it is necessary to take into account the following legal sources:[3597]

- Dayton Peace Agreement;
- Arbitration Award, which is based on the Dayton Peace Agreement;
- BiH Constitution;
- Constitutions of both Entities; and
- Statute of the Brčko District of BiH, which is based on the Final Award.

The last three aforementioned sources will be addressed below.

b. Constitution of Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina was adopted as Annex 4 to the Dayton Peace Agreement. As a result, it has an international and legal quality and it is the "Octroyed Constitution".[3598] The Constitution establishes the State as a strongly decentralised federal State with very weak State institutions at the State level. Pursuant to Article I.1 of the BiH Constitution, Bosnia and Herzegovina shall continue its legal existence under international law as a State with its present internationally recognized borders and it shall remain a Member State of the United Nations and may, as a State, remain or become a signatory party to the Agreements listed in Annex I to the BiH Constitution. Pursuant to Article I.3 of the BiH Constitution, Bosnia and Herzegovina shall consist of the two Entities. The critics consider that the State is weak, inefficient and ineffective. On the one hand, modification of the BiH Constitution is necessary in order to reinforce the central authority but, on the other hand, it has no prospect of success as political consensus within the State, between the peoples and the State administrative-territorial units (of Bosnia and Herzegovina, the Entities, the cantons and the municipalities) cannot be achieved due to a lack

3597 *Karnavas*, 2003, pp. 116, 117.
3598 *Rehs*, 2006, p. 54; see also *Šarčević*, 2004, p. 493-539; *Seizović*, 2009, p. 2.

of integrative motivation.[3599] This is corroborated by the fact that the text of the BiH Constitution – Annex 4 to the Dayton Peace Agreement – has not yet been published in the *Official Gazette of Bosnia and Herzegovina*. The BiH Constitutional Court (Article VI of the BiH Constitution) is probably the most effective instrument at the State level.[3600] It establishes a balance between democracy and ethnocracy,[3601] between the powers of the High Representative and of the institutions of the State, which are distributed in accordance with the principle of separation of powers, and it safeguards the human rights and freedoms.

On 25-26 March 2009, the Constitution of Bosnia and Herzegovina was modified by constitutional Amendment I,[3602] which reads as follows:

> "In the Constitution of Bosnia and Herzegovina, a new Article VI(4) shall be added after Article VI(3) and read as follows:
>
> '4. Brčko District of Bosnia and Herzegovina
>
> The Brčko District of Bosnia and Herzegovina, existing under the sovereignty of Bosnia and Herzegovina and falling under the responsibility of the institutions of Bosnia and Herzegovina as arising from the Constitution, which territory is jointly owned by the Entities, shall be a local self-government unit with own institutions, laws and regulations, and powers and status laid down finally in the decisions of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary Line in Brčko Area. Relations between the Brčko District of Bosnia and Herzegovina and the institutions of Bosnia and Herzegovina and the Entities may be additionally specified by law enacted by the Parliamentary Assembly of Bosnia and Herzegovina.
>
> The Constitutional Court of Bosnia and Herzegovina shall have jurisdiction to decide any dispute in relation to the protection of the established status and powers of the Brčko District of Bosnia and Herzegovina that arises under this Constitution and decisions of the Arbitral Tribunal between an Entity or Entities and the Brčko District of Bosnia and Herzegovina or between Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina.
>
> Any such dispute may be referred by a majority of representatives of the Assembly of the Brčko District of Bosnia and Herzegovina including at least one fifth of the members elected from amongst each constituent people.'
>
> The current Article VI(4) shall become Article VI(5). […]."

When it comes to the outline of the mentioned amendment, it was expected that its paragraph 1, regulating the status of the Brčko District, would be classified, primarily and in a principled manner, under Article III of the BiH Constitution,

3599 *Seizović*, 2009, p. 2; *Seizović*, 2007; *Luchterhandt*, 2006; *Solioz*, 2005, p. 117, 122.
3600 *Marko*, 2002, p. 385 *et seq*.
3601 *Marko*, 2002, pp. 175-188.
3602 *OG of BiH,* No. 25/09.

as it entails the substantive constitutional law, which stipulates the rights and obligations of the institutions of Bosnia and Herzegovina and the Brčko District. Indeed, such a classification may give rise to the impression that it relates to a third entity, which would not correspond to the "condominium" held by the Entities. Therefore, the classification under Article VI, which relates to the BiH Constitutional Court, is a lesser evil.

The BiH Constitution was amended in compliance with Article X of the BiH Constitution. In the reasoning, the following arguments are offered as to amendments referred to in paragraph 1 of Amendment I to the BiH Constitution: amendments to the BiH Constitution are necessary to end the mandate of the Brčko Arbitral Tribunal, as also foreseen by the Final Award. This actually implies paragraph 13 thereof, which stipulates that both the Entities – as stated therein – "implement without delay" this "final and binding" Arbitral Tribunal's award. The Arbitral Tribunal will remain in existence until such time as the Supervisor, with the approval of the High Representative, has notified the Arbitral Tribunal that the two Entities have fully complied with their obligations to facilitate the establishment of the new institutions of the District, and that such institutions are functioning, effectively and apparently permanently, within Brčko. Until then, the Arbitral Tribunal will retain authority, in the event of serious non-compliance by either Entity, to modify the Final Award as necessary – *e.g.*, by placing part or all of the District within the exclusive control of the other Entity. Accordingly, amendments to the BiH Constitution are required for the further development of the provisions of Article V of Annex 2 to the Dayton Peace Agreement, which stipulates that, since then, the status, rights and obligations of the Brčko District have been constitutionally established and protected at the State level by the BiH Constitutional Court.

As to Articles 2 and 3 of Amendment I to the BiH Constitution, the following reasons are offered: the BiH Constitutional Court shall have jurisdiction to decide any dispute in relation to the protection of the established status and powers of the Brčko District of Bosnia and Herzegovina that may arise under the BiH Constitution and decisions of the Arbitral Tribunal between an Entity or Entities and the Brčko District of Bosnia and Herzegovina or between Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina. Furthermore, the Assembly of the Brčko District of Bosnia and Herzegovina has the authority to institute proceedings in such disputes.

In addition, the first sentence of paragraph 1 of Amendment I to the BiH Constitution defines the status of the Brčko District in accordance with the Final Award. This provision, also, establishes that the powers and status are laid down finally in the decisions of the Arbitral Tribunal and that those cannot be

modified by new amendments to the BiH Constitution. In the second sentence it is stipulated that the Parliamentary Assembly of Bosnia and Herzegovina may, by law, define the relationship between the Brčko District and the institutions of Bosnia and Herzegovina.

Paragraph 2 of Amendment I to the BiH Constitution prescribes that the Constitutional Court shall have jurisdiction to decide any dispute in relation to the protection of the established status and powers of the Brčko District of Bosnia and Herzegovina that may arise under the BiH Constitution and decisions of the Arbitral Tribunal between an Entity or Entities and the Brčko District of Bosnia and Herzegovina or between Bosnia and Herzegovina and the Brčko District of Bosnia and Herzegovina.

Paragraph 3 of Amendment I to the BiH Constitution governs proceedings before the BiH Constitutional Court relating to the Brčko District. The Assembly is entitled to refer any dispute to the BiH Constitutional Court by a majority of representatives of the Assembly, including at least one fifth of the members elected from amongst each constituent people. This provision must be read together with Article VI.3 of the BiH Constitution, given that the list of persons authorised to file a request with the BiH Constitutional Court, as specified in Article VI.3(a) of the BiH Constitution, is actually extended.

Even prior to the enactment of the Amendment to the BiH Constitution the Brčko District was entitled to constitutional protection. Thus, the physical and legal persons,[3603] including the District itself,[3604] were already filing appeals with the BiH Constitutional Court seeking protection of their constitutional rights and freedoms. Consequently, there was no significant difference between the Brčko District and other administrative-territorial levels of authority in Bosnia and Herzegovina. Moreover, the authorised persons under Article VI.3(a) have been entitled under Article VI.3(a) of the BiH Constitution to initiate[3605] proceedings of abstract review of constitutionality relating to the laws of the Brčko District.[3606] In conclusion, the BiH Constitutional Court was interpreting the provisions of the BiH Constitution, which also concern the Brčko District itself.

However, this principle does not apply to the special parallel relations of Entities with neighbouring countries (Article VI.3(a), the first line of the BiH Constitution) for the reason that the Brčko District is not an Entity. The

3603 Compare, AP 3299/96.

3604 AP 2430/06.

3605 These proceedings may be initiated only by the State and Entity authorities and not by the authorities of Brčko District since the Brčko District is not an autonomous Entity within Bosnia and Herzegovina.

3606 Compare, U 14/05.

protection is not provided with respect to disputes between the authorities within the Brčko District (compare with Article VI.3(a) of the BiH Constitution). Moreover, there is no protection provided for disputes involving protection of a "vital national interest" of the people (Article IV.3(f) of the BiH Constitution). The lastly mentioned deficiency can hardly be explained.

It is questionable whether the courts of Brčko District are entitled to initiate proceedings of incidental review of constitutionality in accordance with Article VI.3(c) of the BiH Constitution. According to the linguistic meaning of this constitutional provision that review would not be a problem since this provision refers to the courts *in* Bosnia and Herzegovina. However, Article 40 of the Revised Statute of Brčko District gives a false idea[3607] since it provides for the jurisdiction of the courts of Brčko District to decide on the constitutionality of any provision of any law, by-law or rule book of the Brčko District; on the constitutionality of any decision or resolution of the Assembly of Brčko District; on the constitutionality of any provision of any law, by-law or rule book of the Entities or the State and on the constitutionality of any legal act of any institution of the District, or any legal act of any institution of Bosnia and Herzegovina or either Entity having an effect in the District.[3608] Thus, when it comes to the issue of constitutional review, by this Statute the constitutional jurisdiction of the BiH Constitutional Court is contrasted with the Anglo-American decentralised model. Until the enactment of the Amendment, such authorisation or order to the courts of Brčko District could have been justified by a need to guarantee effective legal protection. After the Brčko District has been placed under the jurisdiction of the Constitutional Court this legal solution can no longer be justified.

The greatest value of Amendment I to the BiH Constitution is the fact that the status of Brčko District was raised to the constitutional level and that the BiH Constitutional Court became "a guardian" of that status. The weakness of this Amendment is the requirement of a quorum for initiation of proceedings before the BiH Constitutional Court, which means that at least one fifth of the members elected from amongst each constituent people must be present. In this way each constituent people has been granted a right of veto. There have been negative experiences associated with a comparable provision concerning the decision-making procedure in the Parliamentary Assembly of Bosnia and Herzegovina (Article IV.3 (d) of the BiH Constitution), and this becomes even more evident in a similar clause on obligatory compromise when it comes to

3607 *OG of DB*, No. 17/08.

3608 About this issue compare with "3. Procedure for referral of issues according to Article VI.3(c) of the BiH Constitution", p. 866.

the elements of "vital national interest"[3609] (compare Article IV.3(e), (f) of the BiH Constitution). This constitutional veto will eventually lead to a procedural blockage and, consequently, to a political blockage.

c. Constitutions of Entities

The issues of whether Bosnia and Herzegovina is a federal State or union of States, whether the Entities are the "States"[3610] (this term is usually avoided in legal acts) or something similar may be a topic of discussion. In any case, the Brčko District, as a part of the Federation of Bosnia and Herzegovina and Republika Srpska is not a State organisation,[3611] but an administrative unit of local self-government.[3612] Brčko is a "condominium"[3613] of both Entities, although the rights and responsibilities relating to the administration of Brčko District have been transferred to the State.[3614] Regardless of the fact that Brčko District is under the exclusive sovereignty of the State of Bosnia and Herzegovina and regardless of the fact that the Entities' Constitutions are not applicable in the Brčko District, they must be taken into consideration just like the whole legal system of Entities must be taken into consideration. From the constitutional point of view, the authorities of the Brčko District will continue to represent the authorities of the Entities.[3615] These authorities must be executed in close coordination with Entity administrations and the Supervisor is entitled to monitor this process.[3616] Moreover, the Entities' laws were applicable in the territory of the Brčko District until a certain moment.[3617] Finally, there are special provisions on an independent police force of the Brčko District[3618] and the provisions entitling the Army of the Republika Srpska to pass through the District.[3619]

d. Statute of the Brčko District

The Final Award contains certain tasks for the establishment of the District and determination of the content of the Statute as a basic act of its system. The initial

3609 Detailed information about this topic contained in the book: *Rathfelder*, 2006, p. 166 *et seq.*
3610 For instance, in its Case No. U 5/98-III, the BiH Constitutional Court has firmly denied it.
3611 *Smyrek*, 2006, p. 162.
3612 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 9.
3613 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 11.
3614 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 61.
3615 *Ibid*.
3616 38 ILM 534 (1999) and in: *OHR*, 2007, paragraphs 10, 43.
3617 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 39.
3618 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 40.
3619 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 42.

task of the Supervisor[3620] was appointing a joint implementation commission to assist him in preparing a new "Statute for the District Government" and a detailed plan and schedule for the formation of the District Government. The representatives of the State, Entities, (temporary) management bodies of Brčko and experts are assigned to the governmental structure of the Brčko District. On 3 March 2000, the Supervisor issued the Statue of the Brčko District which came into effect upon being published,[3621] on 9 March 2000. At the same time the Brčko District government officials were appointed.[3622] This being done, the Brčko District was considered established. In order to prove that the Brčko District is not a third entity there is the fact that the Statute is not ranked as a constitutional act. On the other hand, the Statute – just like a constitutional act – constitutes a legal basis of the District. Namely, it regulates legal issues such as: citizenship, military service, distribution of power, legislative authority and judiciary tasks – which are also regulated by the Entity Constitutions. Both Entities have transferred their constitutional authority to the District and its bodies. Furthermore, the basic principle which regulates the status of the Brčko District is not subject to change as referred to in Article 1, paragraph 5 of the Statute. The District has, *de facto*, the status of an Entity and, consequently, the Statute is the 14th Constitution in Bosnia and Herzegovina.

Pursuant to Article 1, paragraph 1 of the Statute, the Brčko District is a single administrative unit of local self-government. That was the basis for the presumption – given the ambitions of Bosnia and Herzegovina to join the EU – that the European Charter of Local Self-Government will be taken into consideration in the course of assessing the status.[3623] At the present time a conclusion may be drawn that the basic requirements of the European Charter of Local Self-Government have been met. However, it is quite understandable that all the standards were not applied, neither was it possible to apply all of them. The District is a small town with a small territory in a fragile country. The Convention's principles may be also well-applied in the clearly structured federal states, but that is not the case with Bosnia and Herzegovina, which contains the elements of a federal state and elements of a federation of states.

The additional weakness of the legal system of the Brčko District could only be removed over time. The principle of local self-government is based on a clear

3620 38 ILM 534 (1999) and in: *OHR*, 2007, paragraph 38.

3621 *OG of DB*, No. 1/00, with few improvements in *OG of DB*, No. 23/00. The text of this first version of the Statute is available at: <http://www.ohr.int/ohr-offices/Brčko/default.asp?content_id=5368> (last visited: 29 September 2009). The Revised Statute of Brčko District is published in *OG of DB*, No. 17/08; the text of this version is available at: <http://www.ohr.int/ohr-offices/Brčko/arbitration/default.asp?content_id=39070> (last visited: 29 September 2009).

3622 For more details, refer to *Domić*, 2008, p. 160 *et seq*.

3623 *Breutz*, 2004, p. 16 *et seq*.

division of responsibilities between the State and the District. That is to say that there are weaknesses in the constitutional system of Bosnia and Herzegovina. An unclear responsibility of assignment not only applies to the relationship between Bosnia and Herzegovina and the Entities but also to the relationship between the Brčko District and the State, *i.e.*, the Entities. Brčko is included under the sovereignty of Bosnia and Herzegovina and the Entities are not to govern the District. However, neither the BiH Constitution nor the constitutions of the Federation of Bosnia and Herzegovina and Republika Srpska draw a clear boundary line. This is also considered as a weakness of the existing legal system of the State. The same applies to the field of economic law.[3624] The Brčko District passed its own regulations in this field – and the Entities did the same – for Bosnia and Herzegovina is not assigned the exclusive legislative responsibility in this field, which is in accordance with Article III.3(a) of the BiH Constitution. However, one would not say that those are the responsibilities of local self-government. The Entity Constitutions should create a secure environment and take care of this issue. On the other hand, "a unified" or life sustaining environment having "the same" value should be created in Bosnia and Herzegovina. In fact, the point of the matter is a need for formation of legislation at the State level. Thus, coordination between the Brčko District, the Entities and Bosnia and Herzegovina becomes more important.[3625]

Another weakness of the Statute is the lack of an extensive catalogue of human rights and freedoms. The BiH and Entity Constitutions contain this catalogue of human rights and freedoms and the Statute contains only rudimentary freedoms in connection with business activities (Article 13) and gathering (Article 15), and it also contains the right to education (Article 16), two procedural rights (Article 17) and the right to public information (Article 18). One thing is for sure: the constitutional rights and freedoms under the BiH Constitution are directly applied (Article 13), however, incorporating the related instruction in the Statute would contribute to legal transparency and, based on that instruction, the human rights and freedoms under the Entities' Constitutions would become applicable.[3626] That would help the citizens of the District to get rid of the feeling that they are "second-class citizens". This becomes particularly relevant because of the fact that the citizens of Brčko (as per their choice) are the citizens of one of the two Entities, although the legal system of the respective Entity is not applied in the District.

The Statute is divided into 6 chapters and 73 articles. Chapter I contains "General Provisions". These provisions include the status of Brčko (Article 1), name, flag,

3624 *Breutz*, 2004, p. 17.
3625 38 ILM 534 (1999) and in: *OHR*, 2007, No. 43.
3626 *Breutz*, 2004, p. 18.

coat of arms and anthem (Articles 2 through 4), the determination of territory, public representation, alphabet and language (Articles 5 through 7). Article 8 defines that the District is a demilitarized area, but the movement of Entity armed forces through the territory of the District is regulated in accordance with the laws of the State and the District. Article 9 encompasses the area of public functions and powers, in which case the responsibilities of Brčko District are not clearly separated from those assigned to the State and Entities, although this matter should have been regulated. Article 10 gives authority to the Brčko District to enter into cooperative agreements with the Entities despite a clear "withdrawal of power" from the Entities. The same principle applies to joining and entering into agreements with national and international associations of cities and municipalities and with cities and municipalities (Articles 11, 12). The mentioned freedom-related rights, the right of participation in the public power affairs and political rights are included in Articles 13, 15, 16 and 17 of the Statute. Pursuant to Article 14 of the Statute, District residents are not subject to military service regardless of whether it is compulsory or voluntary military service. The military reserve may be stipulated by law. Article 19 obliges all District authorities to diligently resolve all the requests of its residents. The following parts of the Statute deal with public authority: Chapter III, Section A – General Provisions, Chapter B – The Brčko District Assembly, Chapter C – The Brčko District Government, and further on, as a special governmental area: Chapter IV – The District Police and, finally, Chapter V- The District Judiciary. Chapters V and VII contain the interim and final provisions.

4. Organisation and procedure in the district organs

a. General provisions

The general provisions are contained in Chapter III, Section A, and – as just mentioned – in the transitional provisions of Chapters VI and VII. Article 20 contains the structural principle of division of powers. Article 21 defines that public employment with the District shall be based on professional merit and open competition and that it shall reflect the composition of the population, *i.e.*, the composition of ethnic groups in the District. The same principle – without a special quota or a special distribution formula but rather as a compliance with an obligation – applies to the whole government of the District (compare with Article 48) and, as per the Election Law, it applies to the Assembly as well, which means it applies to each body or organ in the whole territory of Bosnia and Herzegovina. Accordingly, democracy in Bosnia and Herzegovina is based on ethnic grounds. Pursuant to Article 22 of the Statute, all the councillors of the District Assembly, public officials, prosecutors and judges must submit to

the Department of Public Records of the District Government an annual financial disclosure report on their total current income, sources, assets, and liabilities in accordance with the law. The public authority was established promptly after the Final Award had been issued. In 1999, the Supervisor appointed an interim town administration and Assembly (the Council). The Councillors were elected for the first time in 2004. An independent Judicial Commission (Article 64) also assumed its responsibilities.

The transitional provisions of the Statute contain some important provisions. Thus, pursuant to Article 70 of the Statute, the Entities' laws remain in force in the Brčko District until made ineffective by a legal act of the Brčko District. All municipal administrations existing within the territory of the District ceased to exist on 9 March 2000 when this Statute entered into force (Article 71, paragraph 1). Pursuant to Article 71, paragraph 2 of the Statute, the Brčko District is the legal successor to the Republika Srpska Brčko Municipality as well as to the administrative arrangements of Brka and Ravne-Brčko. All contracts and agreements entered into by the municipal governments shall be examined and then either cancelled or re-concluded (Article 71, paragraph 3). All pending proceedings shall be completed in accordance with the law of Brčko District (Article 72).

b. Assembly of Brčko District

Pursuant to Article 23 of the Statute, the Assembly of Brčko District is the legislative body of authority. It determines general policy and performs ordinary parliamentary tasks (Article 23, paragraph 2). In other words, the Assembly is in charge of passing the laws and budget and it elects mayors and other employees in accordance with the law and keeps control of the whole administration.[3627] The Assembly is composed of thirty-one (31) councillors (previously there were 29) and they are elected in general, free, fair, and direct elections by secret ballot in accordance with the laws of Bosnia and Herzegovina and the District (Article 24). Pursuant to the Election Law,[3628] the *d´Hondt* method is used for the election procedure and election system. According to the Election Law, each constituent people shall be entitled to a

3627 For more details see *Karpen*, 2004, p. 27-32, and *Möller*, 2004, p. 25 *et seq*.

3628 Compare *OG of DB*, No.23/01; Annex to Final Brčko Award No. 2 stipulates that if he deems it necessary, the Supervisor may devise and incorporate into the Statute (1) an "ethnic formula" designed to minimize the incentive for any ethnic group to seek to increase its population in the District in order to achieve exclusive political control, and/or (2) a provision for "vital interests" protection. Such a formula was not brought in the Statute although it is mentioned in Article 21 of the Statute, wherein it is prescribed that the composition of Brčko District authorities shall reflect the ethnic composition of the population.

minimum of three terms of office. The Assembly Councillors were elected for the first time in 2004 since the Assembly's term of office is four years (Article 23). The election commissions of the District and Bosnia and Herzegovina shall be in charge of monitoring the elections. The composition of administration shall reflect the multiethnic structure according to the data of the last census.

The Assembly is a hard-working body. It passed 170 laws during the period from 1999 to 2003.[3629] In its work, the Assembly relied on the work of the Judicial Commission. This small but very efficient Commission[3630] commenced operating on 1 June1999. The work of this commission was based on the following principles:[3631] clear division of powers, free access to non-corrupt administration, conformed performance of public tasks with due respect for the principle of multi-ethnicity, respect for independence and professionalism of the judiciary. The Commission conducted a comprehensive legal reform, it developed 40 draft laws until the completion of its mandate at the end of 2004 and these laws were passed by the Assembly. The legislation included the areas of civil, administrative, labour and social welfare laws. The following laws should be mentioned: the Law on Ownership and Other Real Rights,[3632] the Law on Repossession of Abandoned Property,[3633] and the Law on Conflict of Interest in the Institutions of Brčko District of BiH.[3634] This law also applies to the Assembly itself. The Assembly also passed legal acts necessary for its operations: the Rules of Procedure,[3635] the Rules of Administrative Proceedings,[3636] and the Law on the Councillors of the Assembly of the Brčko District of BiH.[3637] The Annual budget is passed on a regular basis,[3638] as well as the policy guidelines.

For some decisions to be made, for instance, concerning the Brčko District Laws or the Brčko District Budget (Article 34, paragraph 1), a three-fifths majority of the total number of Councillors is required. In order for some amendments to the Statute to be made, a three-fourths majority of the total number of Councillors is required (Article 34, paragraph 2). Under Article 40, laws must

3629 *Karpen*, 2004, p. 30.
3630 Compare with the extensive report in *Karnavas*, 2003.
3631 *Karnavas*, 2003, p. 116.
3632 *OG of DB*, No. 11/01.
3633 *OG of DB*, No. 5/01.
3634 *OG of DB*, No. 2/03. Newly enacted Law on Conflict of Interest of Brčko District: *OG of DB*, No. 43/08.
3635 Article 36 of the Statute.
3636 Article 26 of the Statute.
3637 *OG of DB*, No. 29/04.
3638 For instance: "*Brčko District Interim Assembly General Policy 2003*", which deals with the following issues: economy, agriculture, finances, State ownership, property values, culture, education, health care, social well-fare, judiciary, environment, police, housing, urban planning and construction, sport, human rights, medicine, veterans and common utility services.

not have retroactive effect. The principle "*nulla poena sine lege*" (Article 40, paragraph 2) is applicable. Article 41 regulates the procedure of normative control. The Statute and the Brčko District laws must be consistent with the BiH Constitution and the laws of Bosnia and Herzegovina. The Courts of the Brčko District have the right to decide whether the laws are consistent with the BiH Constitution, and whether a certain norm of the laws of the Brčko District is consistent with the Statute.[3639] Articles 42-45 stipulate in detail the revenue-related matters.

c. Government

The Brčko District Government is addressed in Chapter III, Section C, of the Statute. The Government shall be governed by a Mayor (Articles 46, 47 *et seq*.), elected by the Assembly. The District Government Departments are provided for in Article 47, paragraph 2. The Heads of Departments (Article 48) shall be selected or dismissed by the Mayor based on professional criteria. Every employee of the Government is expected to perform their functions with diligence and dedication. Ethical obligations are regulated in the Code of Conduct of Government employees.[3640] In addition, a similar legal act[3641] exists for all employees within the authorities of the Brčko District, including the Government. Just as this act applies to all Councillors of the Assembly, so does the obligation to avoiding conflicts of interest (Article 52) applies to the employees of the Government, especially those in leadership positions. The Mayor is responsible for the entire District Government (Article 50). Within the framework of the Mayor's policy-making powers, each Head is responsible for the professional performance of duties within the Department (Article 51). Articles 53-57 regulate the relations between the Assembly and the Government, *i.e.*, the election and resignation or removal from office of the Mayor, discussing financial reports, etc.

The most important procedural regulations were adopted soon after the establishment of the District, although many of them were amended several times, *e.g.*, the Law on Public Government of the Brčko District,[3642] the Law on Administrative Procedure of the Brčko District,[3643] the Law on Enforcement Procedure[3644] etc. All administrative decisions are deliberated on by the legal

3639 On the constitutionality of this competence, see also "b. Constitution of Bosnia and Herzegovina", p. 886.
3640 Of 10 November 2003.
3641 Of 6 January 2004.
3642 *OG of DB,* No. 1/00.
3643 *OG of DB,* No. 3/00.
3644 *OG of DB,* No. 8/00.

service, and all appeals or complaints by the Appeals Commission.[3645] The Revenue Agency (Article 42) is directly responsible to the Assembly. Naturally, the Government relies on the Assembly when it comes to the budget plan (Article 43, paragraph 2).

Considering the priority given to safety and order, the entire Chapter IV of the Statute was devoted to the Brčko District Police. The Chief of Police and Deputies shall be appointed and dismissed by the Mayor with the consent of the Assembly (Articles 60, 34). The police deals on its own with the issue of disciplinary offences; the Police Commission is the second instance.[3646] In the event of a pursuit of criminal suspects (Article 61), the District Police and the Entities' Police Authorities shall cooperate in enforcing the law. Persons with a criminal record were banned from discharging any public office in the Brčko District.[3647] In a rather thorough analysis of the legal system, the Brčko District Law Revision Commission drafted the most significant bills in relation to different administrative areas, and introduced them to the Assembly.[3648] These involved, first, the extremely difficult issues of unifying the education system, in particular of the school system, in ethnic, regional and religious terms, then the issues of economic, labour, social welfare and healthcare laws,[3649] and land-registry law, the law on enterprises and bankruptcy proceedings.

d. Judiciary in the capacity of a third authority

Without the Judicial Commission participating in the work, the complex building of the judiciary would not succeed. The structure of the judiciary was stipulated in paragraph 4 of the Annex of the Final Award.[3650] Under this paragraph, the Supervisor shall make the initial appointments of the judges and prosecutors of the District. Upon the entry into force of the Statute, this should be done by the Judicial Commission in agreement with the Supervisor. This obligation was incorporated into Article 64, paragraph 1 of the Statute. However, the provision of item 4 paragraph 2 of Annex of the Final Award, according to which a department should be set up within the District Government to take over duties performed up until then by the Ministers of Justice of the Entities, has never been implemented. The entire judicial administration shall be managed

3645 *Seizović*, 2009, p. 6; compare, also, with paragraph 8 of Annex of the Final Arbitration Award (38 ILM 534 [1999] and in: *OHR*, 1997).

3646 *Karnavas*, 2003, p. 124; *Breutz*, 2004, p. 17.

3647 In general, cooperation between the police forces of the Entities represents a very bad example (*ICG*, 2005).

3648 On this, see the report of the Chairman in *Karnavas*, 2003.

3649 Compare with *Biernert*, 2004, pp. 33-35.

3650 In the form dating back to 18 August 1999.

by the independent *Judicial Commission* (Article 64 of the Statute).[3651] The third authority, therefore, is made up of this commission, the first instance court and the Appellate Court, the Prosecutor's Office and a department for legal assistance. The Judicial Commission is made up of 7 members.[3652] This was the first time ever that all judicial positions were filled. In order to elect a judge, after the model of reassignment of judges following the unification of Germany,[3653] a public vacancy announcement would be issued to which all judges had to apply. Only if a judge did not have a "poor record", he/she had a chance to be re-elected. The Prosecutor's Office shall be independent from the Judiciary and the District Police (Article 63). Prosecutors shall represent the interests of the District, and shall take part, first and foremost, in criminal proceedings. The previous positions of judges for pre-trial investigation were abolished. The public prosecutors took over their duties. By doing so, the carrying out of the proceedings – modelled after the American system – became more of a burden to the parties to the proceedings. In order to guarantee unhindered access to court, a special department for legal assistance was set up.[3654] Special attention was paid to the new organisation of the lawyer's profession.[3655] Lawyers of the Brčko District were particularly resistant to the realisation and implementation of the results of the Judicial Commission. It took a lot of time and money to establish the Law Society of the Brčko District, modelled after the American Bar Association. Procedural laws for certain areas of the judiciary had to be drafted all over again, such as, for instance, the Criminal Procedure Code[3656] and the law related to the field of administration (Law on Administrative Disputes of the Brčko District).[3657] The judiciary has its own budget, which it introduces and defends before the Assembly. Following the adoption thereof it uses the budget independently (Article 69).

3651 On certain steps, compare with *Soll*, 2004, pp. 47-52.
3652 *Karnavas*, 2003, p. 121, notably, presidents of the first and second instance courts, chief prosecutor, and the head of the legal assistance department, presidents of the constitutional courts and two citizens of the District.
3653 *Karnavas*, 2003, p. 122.
3654 *Karnavas*, 2003, p. 123.
3655 *Soll*, 2004, p. 51.
3656 *Karnavas*, 2003, p. 123.
3657 *OG of DB* No. 4/00.

5. International control and the Supervisor

a. Status of the Supervisor

The ruling authority in the Brčko District, "armed" with impressive power, is the *Supervisor*.[3658] Although his office has been set up as "the Office of the High Representative – North"[3659] and although he holds the title of "a Deputy High Representative",[3660] he is not *de facto* subordinated to the Office of the High Representative. The Supervisor of the Brčko District practically enjoys independence and – restricted to the region – the same powers as the High Representative himself.

Therefore, his position cannot be explained without taking a look at the status and the function of the very High Representative. In principle, the position is based on two pillars: Annex 10 of the Dayton Peace Agreement and "the Bonn Powers". Annex 10 of the Dayton Peace Agreement deals with the implementation of the Agreement itself ("*Agreement on Civilian Implementation*"). The appointment of a person to run the Office of the High Representative, however, did not follow even on the basis of the Agreement itself, nor did the Agreement provide for the appointment of a High Representative. The parties-signatories to Annex 10 of the Dayton Peace Agreement, in accordance with Article I.2 thereof, *requested* his appointment in accordance with the relevant resolutions of the Security Council, meaning that it was not necessary for the Council itself to make his exclusive appointment.[3661] Accordingly, the first holder of this office, the Swede *Carl Bildt*, was selected in London, in December 1995, and, on the basis of the Resolution of the Security Council No. 1031 from December 1995, he was appointed. In practice, the Peace Plan Implementation Conference, made up of 55 states and international organisations, at which the Peace Implementation Council was established, was in charge of the office of the High Representative. From the very beginning the institutional relation between the High Representative and the UN was not completely clarified.[3662] Pursuant to Article II of Annex 10 of the Dayton Peace Agreement, the High Representative had the following duties: to monitor the implementation of the peace settlement, to maintain close contact with the parties to the Agreement, to co-ordinate the activities of the civilian organisations and agencies in Bosnia and Herzegovina, to facilitate the implementation of the Agreement, to participate in meetings

3658 Also, see details in *Smyrek*, 2006, p. 157 *et seq.*; *Rehs*, 2006, p. 89.
3659 In addition to other positions of the High Representative.
3660 No. 104 I B of the Vienna Conference on the Implementation of Peace Accords and Judicial Judgments from February 1997.
3661 *Rehs*, 2006, p. 89.
3662 *Rehs*, 2006, p. 90.

of donor organisations; to report periodically to the UN and the member states to the Peace Implementation Council, to issue guidelines and receive reports from the International Police Task Force Commissioners, founded by Annex 11 of the Dayton Peace Agreement. Pursuant to Article III.3 of Annex 10 of the Dayton Peace Agreement, the High Representative shall have, under the laws of Bosnia and Herzegovina, all the rights and powers necessary to discharge his office. His comprehensive competences are guaranteed by Article V of Annex 10 of the Dayton Peace Agreement. He is a supreme instance giving a binding interpretation of the Agreement.

At a conference in Bonn in December 1997, organised because of the unsatisfactory development of the situation in Bosnia and Herzegovina, on the basis of the Conclusion of 10 December 1997, the Peace Implementation Council has permanently expanded the powers of the High Representative.[3663] Under this Conclusion, the High Representative has the right to adopt decisions binding on the authorities of Bosnia and Herzegovina, interim measures if the State authorities are not able to come to an agreement and, in general, "other measures" to secure the implementation of the Peace Accord. Extensive interpretation of "the Bonn Powers" of the High Representatives – as well as those of the Supervisor, in the capacity of the Deputy High Representative – led to the OHR (and OHR-North) undertaking, and still doing so, measures of an executive and legislative nature, such as dismissing State officials in case they are not ready to cooperate.[3664]

When it comes to such extensive powers, the same applies to the Supervisor. The first holder of that office was appointed by the High Representative in 1997. His duties practically corresponded to the duties of the High Representative.[3665] He had to ensure the implementation of the Agreement and the strengthening of democratic institutions. Further, he was in a position to render ineffective any law which was in conflict with the Dayton Peace Agreement, the BiH Constitution or orders of the Supervisor. The powers, which were exclusively specified in the Supplemental Award to the Arbitration Award for Dispute over Inter-Entity Boundary in the Brčko Area of 15 March 1998,[3666] included the right to remove from office any public official if they prove uncooperative. Anyhow, in the same decision, he was exclusively delegated the powers equivalent to those conferred upon the High Representative, such as "the Bonn Powers".

3663 See the Internet page: <www.ohr.int/pic/default.asp?content_id=s5182>.

3664 *Rehs*, 2006, *p.* 94. To see more on this, also see "(a) Legal acts of the High Representative (Annex 10 of GFAP)", p. 783.

3665 Vienna Conference of 7 March 1997; the text of the conference can be found in: *OHR*, *2007*.

3666 38 ILM 534 (1999) and in: *OHR*, 2007, compare with Conclusion No. 24.

One may come to a conclusion that the Supervisor is the supreme authority in the Brčko District. With approval of the High Representative, he reports to the Tribunal that the Entities have fully met their respective obligations, and that the District authorities are functional and sustainable. Until such time, the Tribunal shall retain its obligations.[3667]

b. As to individual competences

The period after the war was marked by different stages of activity of the Office of the High Representative. The year 1995 was a year of stabilisation, reconstruction and humanitarian assistance.[3668] When it proved that the delegated powers did not suffice, the pace was forced by delegating the Bonn Powers.[3669] Since 2001, the High Representative put stress on strengthening the institutions, encouraging the development of the economy and accelerating the return of displaced persons and refugees. At stage 4, since 2002, he offered institutional assistance rather than issued orders.[3670] It all affected the work of the Supervisor, although, generally speaking, the joint work of ethnic groups, parties, authorities, and the Supervisor in Brčko advanced at a faster pace than in the rest of the State, notably in the Entities. If one takes a look at certain provisions of the Final Award, one may observe right away the numerous powers provided for the Supervisor. His most important competences are as follows: drafting the plan for the transformation of the District (paragraph 8); development of the District (paragraph 9); monitoring coordination among the District Government, the Entities and the State (paragraph 10); influencing the completion of the work of the Arbitral Tribunal (paragraph 13); preventing the sale of property of refugees and displaced persons (paragraph 18); the multiethnic make-up of the District Government (paragraphs 30, 32, 33); preparation of democratic elections (paragraph 36); establishing a joint commission to implement the Final Award (paragraph 38); abolishing the inter-entity boundary in the District (paragraph 39); restricting police powers (paragraph 40); securing the demilitarised zone (paragraph 41); overcoming resistance to the new legal system (paragraph 47); encouraging ethnic groups to return (paragraph 48); setting the deadline by which the Entities' powers within the District shall be considered delegated (paragraph 61); determining coercive measures and sanctions in case of failure to implement the Final Award (paragraph 66); reserve competences of the Arbitral Tribunal, including adoption of a new final award in the event that the powers of the Supervisor are not sufficient.

3667 Paragraph 67 of the Final Award: 38 ILM 534 (1999) and in: *OHR*, 2007.
3668 *Solioz*, 2005, p. 93.
3669 *Solioz*, 2005, p. 93; *Rehs*, 2006, p. 98 *et seq*.
3670 *Solioz*, 2005, p. 94.

c. Supervisor in a web of international law and domestic regulations

The High Representative, as well as his Deputy – the Supervisor – are "international factors" in Bosnia and Herzegovina and the District. From the very outset the officials of the Office of the High Representative have interpreted extensively the rights laid down in the Dayton Peace Agreement and in Bonn. They have the competence to give binding interpretations, and to operate without restrictions in the legislative and executive field. They may, in operational terms, have dual effect. That means that they may act as a substitute to BiH authorities and the authorities of the District, or they may directly use the powers referred to in the Bonn conclusions. Both offices make up an international office, which was established under an international agreement.[3671] Their numerous powers stand in contrast to Bosnia and Herzegovina being referred to as a sovereign state in Article I of the General Framework Agreement for Peace in Bosnia and Herzegovina. Nevertheless, eventually, it comes down to how one understands the notion "sovereign".[3672] Bystanders are hesitant to view Bosnia and Herzegovina as a "protectorate" of the international community.[3673] *Graf Vitzthum* and *Mack*[3674] speak of Brčko as of a new (essential and para-entity) territorial creation under the direct international administration. *Rehs*[3675] introduces the legal nature of the international civilian administration in Bosnia and Herzegovina as an international authority, a hybrid made up of different structural elements and features without any model hailing from the past. For something of this kind, lawyers came up with the term "international institution *sui generis*". If one takes into account the time constraints of the international mandate in Bosnia and Herzegovina, one may as well speak about an international law entity, which is changing from a protectorate over to a sovereign State.[3676] Something like this sounds friendlier and elicits more hope.

3671 *Rehs*, 2006, p. 89.
3672 *Smyrek*, 2006, p. 28 *et seq*.
3673 *Domić*, 2008, p. 203.
3674 *Vitzthum/Mack*, 2007, p. 115.
3675 *Rehs*, 2006, p. 117.
3676 *Domić*, 2008, p. 207.

F. DECISIONS (ARTICLE VI.5)

Decisions of the Constitutional Court shall be final and binding.

AP 1018/04 Agency "Puma 21" Sarajevo	20050722
AP 802/04 B. Z. *et al.*	20041119
AP 979/04 N. A.	20050722
U 44/01 D. B.	20050722
U 49/03 D. T.	20050722

The decisions of the Constitutional Court of BiH will be presented in this chapter including the systematised experiences from its case-law. The case-law of the Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court will also be presented, although their case-law has no decisive significance because it is partially based on the same foundations and as such it found its place in the jurisprudence of the Constitutional Court as well.

1. Major decisions

a. Constitutional Court of BiH

(a) Appeals

AP 129/04 Hadža *et al.*	20050527
AP 158/06 Gajić *et al.*	20071018
AP 2582/05 Tešić *et al*.	20070116
AP 938/04 Trnjaković	20051117
U 1/99-1 BiH Law on Council of Ministers I	19990814
U 1/99-2 BiH Law on Council of Ministers I	20000129
U 14/00-1 Manojlović	20011230 *OG of BiH*, No.33/01
U 15/99-1-M Zec	20010612 *OG of BiH*, No.13/01
U 18/00 Hajdarević	20021019 *OG of BiH*, No 30/02
U 23/00 Vrhovac	20010416 *OG of BiH*, No 10/01
U 24/00 Avdić	20020130 *OG of BiH*, No 01/02
U 28/01-2-M Jugović	20020312 *OG of BiH*, No 05/02
U 6/00 Dolinić *et al.*	20020524 *OG of BiH*, No 10/02
U 7/00 Hadžisakić	20010224 *OG of BiH*, No 06/01
U 7/99-1 Smajić	20000131 *OG of BiH*, No 03/00
U 8/99 Modričkić	19991105

Pursuant to Article 64 of the applicable Rules of the Constitutional Court, the Constitutional Court has two options when deciding on the merits: according to paragraph 1, upon a successful appeal, the Constitutional Court shall quash the

decision of the lower instance court or of some other administrative body,[3677] and refer the case back to the court or to the body which took that decision.[3678] In cases where the appellant has complained about the length of proceedings the Constitutional Court shall give a subsequent order for a new decision to be adopted as a matter of urgency.[3679] Sometimes the BiH Constitutional Court substitutes for the lower instance courts and decides on the merits of the case and it is authorised to do so according to paragraph 2 of the mentioned provision. Accordingly, the Court was not only quashing the decisions of the lower instance courts, but there is also a case where the Court gave an order to an illegal occupant of an apartment, which was the subject of a dispute, to vacate the apartment within 60 days under threat of forcible execution,[3680] or the Court also gave an order to the State authorities to make it possible for the owner of the apartment to repossess the apartment.[3681] The BiH Constitutional Court of BiH may also declare ineffective the contract on exchange of apartments if its applicability is in violation of the appellant's rights,[3682] or it may give an order to the BiH Council of Ministers to pay the disability pension due to the fact that the Council has failed to legally regulate that legal matter in a timely manner.[3683] If it is necessary, the BiH Constitutional Court determines the authority which is to help the appellant in the exercise of his/her rights and this is particularly related to the situations where the jurisdiction between the State and the Entities is not clearly defined.[3684] In Case No. U 23/00, the BiH Constitutional Court notes that in the event of a violation of the right to a decision within a reasonable time, this Court may impose a measure on financial compensation in the same manner as is done by the European Court. In the proceedings conducted upon Appeal No. U 15/00,[3685] the Constitutional Court concluded that the right to a judicial decision on the merits was violated, since the RS Supreme Court, although in renewed proceedings, quashed the wrong decision of the administrative authority, but every time it nonetheless referred the case back to the administrative authorities for complete establishment of the facts. Accordingly, the Constitutional Court quashed the ruling of the RS Supreme Court and ordered that the court "decide on the merits of the case under the summary procedure and to comply with the appellant's right to a decision within a reasonable time as referred to under Article 6 of the European Convention".

3677 Compare, for instance, U 23/00, U 28/01, U 6/00.
3678 U 7/00, U 14/00.
3679 U 23/00.
3680 U 7/99-1, the 2nd paragraph of the enacting clause, also in U 8/99 and U 24/00.
3681 U 7/00.
3682 U 15/99-1.
3683 U 18/00.
3684 U 18/00.
3685 Compare, p. 266.

In addition to preventive measures and measures of natural restitution, the Constitutional Court is also authorised to order compensation for damage sustained due to human rights violations. When compared with the judicial institutions under Annex 6, such orders indicate that there are two essential differences: on the one hand, the Constitutional Court cannot order redress *ex officio*, but it can only do that upon the appellant's claim. On the other hand, the orders intended to remove the reasons for filing appeals are issued only under exceptional circumstances.[3686] The BiH Constitutional Court followed that rule in its practice and was very restrained when it comes to the issuance of such orders. The Constitutional Court asserted that its basic task is to eliminate human rights violations, to prevent such violations or to oppose them, in which case the redress payment is of secondary importance. Very often it happens that the Constitutional Court refuses to award a redress payment, stating that there is sufficient satisfaction if it establishes that there have been violations of fundamental rights.[3687]

However, the redress payment is awarded, as a rule, in two groups of cases. Firstly, as to the cases where the proceedings take an unreasonable amount of time, the Constitutional Court has set its own criteria corresponding to the situation in BiH and relied on the case-law of the European Court. According to those criteria, for each year of prolonged duration of proceedings a compensation amounting to 150 KM is imposed.[3688] On the other hand, the relatives of the missing persons are regularly awarded compensation, which is paid through the Fund for providing assistance to the families of the missing persons.[3689] Furthermore, the Court orders redress payment in cases where constitutional rights have been flagrantly violated. For example, in Case No. AP 2582/05, where the Court awarded redress payment to three appellants whose rights to redress were violated by unlawful deprivation of liberty and the amount to be paid was 600 KM. Additionally, an amount from 2800 KM to 6000 KM was also to be paid as a redress for violation of the right to home and the right to prohibition of torture under Articles 3 and 8 of the ECHR.[3690]

(b) Procedure of reviewing the constitutionality of norms

If the Constitutional Court, in the proceedings of constitutionality review, concludes that some challenged act is entirely or partially unconstitutional or is in contravention of the ECHR or in violation of some other law of Bosnia

3686 Article 76, paragraph 2 of the Rules of the BiH Constitutional Court *et seq.*
3687 AP 158/06, paragraph 41.
3688 AP 938/04, paragraph 48 *et seq*.
3689 AP 129/04, paragraph 67.
3690 AP 2582/05, paragraph 100.

and Herzegovina,[3691] the authority that issued that legal act may be given a time-limit not exceeding 6 months to harmonise the challenged act (Article 63, paragraph 4 of the applicable Rules of the Constitutional Court of BiH). If this order is not complied with within the specified time-limit, the Constitutional Court shall declare the act null and void in its separate decision (paragraph 5). The act will become ineffective on the day of publication of the decision in the Official Gazette (paragraph 6). In the proceedings on Case No. U 1/99, for the first time the Constitutional Court used the possibility to order a time-limit for enforcement of the decision (U 1/99-1). Five months later, the Court had to declare the related provisions null and void since the legislature had failed to take any action in that regard (U 1/99-2).

b. Retrospective: Instruments of the Human Rights Chamber

CH/00/6134-A&M Štrbac *et al.*	20020906
CH/00/6183 *et al*.-A&M Bilbija *et al.*	20040606
CH/00/6436 *et al*.-A&M Krvavac *et al.*	20020705
CH/01/6979-A&M E. M. & S. T.	20020308
CH/01/8365 *et al.*-A&M	20030303
CH/01/8507 Softić	20051215
CH/02/8679 *et al.*-A&M	20021011
CH/96/17-A&M Blentić	19980722
CH/96/1-M Matanović	19970711
CH/96/29-A&M BiH Islamic Community (mosque case in Banja Luka)	19990611
CH/96/3 *et al.-M* Medan *et al.*	19971103
CH/96/30-M Damjanović	19970905
CH/97/35 Friendly settlement Malić	19980525
CH/97/40-M Galić	19980612
CH/97/45-A&M Hermas	19980218
CH/97/58-A&M Onić	19990212
CH/97/59-A&M Rizvanović	19980612
CH/97/67-A&M Zahirović	19990708
CH/97/69-A&M Herak	19980612
CH/98/1324-A&M Hrvačević	20020308
CH/98/1335 *et al*.-A&M Rizvić	20020308
CH/98/1366-R V.Č.	20001109
CH/98/1374-A&M Pržulj	20000113
CH/98/1789-RR Gadža	20001106
CH/98/367-A&M Janković	20000512
CH/98/375 *et al*. Đ Besarović *et al*.	20050406
CH/98/638-A&M Damjanović	20000211
CH/98/892-A&M Mahmutović	19991008

3691 Article VI.3(a) and (c) of the BiH Constitution.

CH/99/2177-A&M BiH Islamic Community (graveyard case in Prnjavor)	20000211
CH/99/2198 Vujičić	20021010
CH/99/2315-A&M Hadžisaković	20031010
CH/99/2336 S. P.	20010702
CH/99/2656-A&M BiH Islamic Community (mosque case in Bijeljina)	20001206
CH/99/3196-A&M Palić	20010111

(a) Overview[3692]

If we for the moment disregard a friendly settlement of dispute,[3693] which was almost insignificant in practice,[3694] we may say that the Human Rights Chamber had several options: to separately decide on the admissibility of an application[3695] and, where applicable, to decide on the merits or, at the same time, to decide on the admissibility and merits of an application. For the purpose of procedural efficiency, the Chamber commenced very soon deciding on both admissibility and merits in a single decision.[3696] If the Chamber reached the phase of deciding on the merits, pursuant to Article XI.1(a), it was first deciding on whether the alleged victim managed to reasonably prove that the mentioned state of facts indicate that there was a violation of obligations from Annex 6. After that, the Chamber was determining whether there was a violation of obligations from the Agreement on Human Rights and who was to be held responsible. In the event that a violation was established, pursuant to Article XI.1(b) of Annex 6, the Chamber used to issue different orders to the respondent parties (the so-called remedies), which, according to both the type and effects, exceeded the scope of the phrase used by the European Court in Strasbourg – *just satisfaction*.[3697] The Chamber associated these orders with an obligation of reporting. The respondent party was obliged to inform the Chamber, within a specified time-limit, about the measures taken and about the phase reached concerning the enforcement of the Chamber's decision.[3698] If the State authorities failed to enforce the judicial decision for a long period of time, the Chamber used to order the relevant party to undertake effective measures for enforcement.[3699] The Chamber would also inform the OHR about the failure of

3692 Compare, as a supplement, *Berg*, 1999, p. 12 *et seq*, and *Küttler*, 2003, p. 84 *et seq.*
3693 Article IX to Annex 6 in connection with rules 44, 53 *et seq.*
3694 The only case: CH/97/35 *Malić.*
3695 Article VIII.2 of Annex 6 in connection with rules 49 and 52, decision on admissibility.
3696 *Nowak*, 2004, p. xiii; *Küttler*, 2003, p. 88.
3697 *Nowak*, 2004, p. xiv.
3698 Compare, for instance, CH/96/30-M, paragraph 46; CH/97/69-A&M, paragraph 65; CH/97/59-A&M, paragraph 76.
3699 Compare, CH/96/17-A&M, paragraph 39 in relation to a conclusion on eviction.

the relevant party.[3700] Only after adoption of its major decisions which, as per the expectations of the Chamber, were supposed to have a wide-spread effect and influence on other similar or identical cases, would the Chamber suspend proceedings dealing with similar cases as stipulated under Article VIII.3 of Annex 6 and, at some later point, resume its work on these cases if needed. In practice, the Chamber was not using the possibility of adopting a formal decision on suspension of proceedings and the cases which were predestined for something like that were usually, for efficiency purposes, suspended by the Chamber in the way that the Chamber was giving priority (temporarily) to other applications. Pursuant to Article VIII.3 of Annex 6, the Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out an application on the ground that (a) the applicant does not intend to pursue his application; (b) the matter has been resolved; or (c) for any other reason established by the Chamber, it is no longer justified to continue the examination of the application; provided that such a result is consistent with the objective of respect for human rights. Due to the rapid increase in its caseload, the Chamber commenced using that possibility more and more in 2002 and by the end of its mandate the Chamber had 1,000 decisions that were adopted in the above manner.[3701] The Chamber was frequently adopting strike out decisions in cases where the applicant withdraw his/her request or in the event of the applicant's failure to respond to the communications from the Chamber (leading to a conclusion that the applicant did not intend to pursue the case). In numerous disputes arising from the resistance of the State authorities to return the pre-war apartments to refugees and displaced persons, the Chamber, over the years, had changed its judicial practice, keeping in mind the question of whether the applicant managed to repossess his/her apartment in the proceedings before the Chamber. At the beginning of its work, although the applicant succeeded in recovering possession of the property, the Chamber used to adopt decisions on the merits awarding redress to the applicants for delays in the proceedings of property repossession and for non-pecuniary damage.[3702] At some later point the Chamber turned to a different practice and in cases where the applicant succeeded in repossessing his/her property but still wanted compensation, the Chamber adopted the so-called strike out decisions.

What was relevant and decisive for this change in jurisprudence was the possibility for the Chamber to strike a balance between individual interests of applicants and the general interest, which was based on the Chamber's authorities under

3700 *HRC*, 2000, p. 12.
3701 *Nowak*, 2004, p. xii *et seq.*
3702 For instance, CH/00/6436 *et al.-A&M*.

Article VIII.2(e) of Annex 6 permitting the Chamber to determine its priorities. However, the Chamber admitted that in individual cases there could be unjust treatment of individual applicants. Anyway, the Chamber decided to dedicate more of its efforts to other numerous and different cases and thus it sacrificed the aforementioned in order to achieve that goal. The reason for this change was, among others, the fact that over the years the legislation dealing with this sphere was amended. Moreover, the State authorities were more and more frequently enforcing the CRPC decisions in which the pre-war property, *i.e.*, the pre-war possessions of the applicants were being determined in an obligatory manner. The Chamber commenced dealing with aspects such as the *bona fides* or *mala fides* of applicants, the waiting time for repossession or other special situations of unjust treatment – such as the maltreatment of applicants, forcible evictions, life circumstances of an applicant until the moment of repossession of property or the proved effect of legal remedies in a certain place of living. In this case the Chamber had an opinion that this effect raises suspicion, particularly in situations where the repossession of property occurred after the intervention of the High Representative, OSCE, IPTF or UNHCR or some other international organisations. Finally, according to the standpoint of the Human Rights Chamber, the cooperation of certain State authorities was very important to the entire process of return. Furthermore, the Chamber considered that such actions are in accordance with the goal of protecting human rights. That is to say that not only a specific individual case should be taken into consideration, but also a general obligation of the Chamber to support the signatories to Annex 6 in their efforts to ensure the highest level of protection of human rights in accordance with international standards.[3703]

Pursuant to Article VIII, paragraphs 2 or 3 of Annex 6, it was possible to challenge the decisions on inadmissibility, rejection or dismissal of the applications under the very strict criteria of Article X.2 of Annex 6 in conjunction with the Rules of the Human Rights Chamber Nos. 63 and 64. Those decisions were being adopted by the judges sitting in plenary session. The judges, while taking into account the recommendation of the deciding panel, were first deciding on the admissibility of request for review (*decision on request for review)*. If the request would be found to be admissible, the decision on review was adopted, which was relatively infrequent in practice.[3704]

3703 CH/99/2198-*strike-out*, paragraph 15 *et seq*; CH/99/2336-*strike-out*, paragraph 15; compare also CH/98/1789-RR, which, in this transitional phase of judicial practice, contains different opinions of both Chambers; CH/99/2315-A&M, paragraph 58; see also *Nowak*, 2004, p. xii *et seq.*

3704 Compare, *Küttler*, 2003, p. 94 *et seq.*

(b) Legal remedies in the event of violations of human rights and freedoms[3705]

i. General remarks

Pursuant to Article XI.1(b) of Annex 6, the Chamber could order the steps to be taken by the defendant in favour of the applicant whose rights and freedoms had been violated. The Chamber could, for instance, order one to cease and desist from certain activities, payment of monetary compensation (*monetary relief*) both for pecuniary and non-pecuniary damage, and impose temporary measures (pending the enforcement of a decision on admissibility and merits). These powers of the Chamber significantly exceeded the powers of the European Court under Article 41 of the ECHR. Namely, under the said article, "a just satisfaction" in the best case scenario may constitute monetary compensation.[3706] However, thanks to its special mandate prescribed by Annex 6 of the Dayton Peace Agreement, the Chamber reacted in an increasingly clear and precise manner to the established violations of human rights and freedoms, and ordered that the defendant act positively in order to exercise as best as possible a legal remedy in the event of a violation.[3707] Also in this case, the implementation on the spot proved an advantage. Unlike the BiH Constitutional Court, the Chamber, nevertheless, could not independently declare laws null and void, or quash court judgments, but only order the responsible defendant to undertake administrative, judicial or legislative steps in order to provide assistance to the injured party in a situation where human rights or freedoms had been violated.[3708] Under the rule, the Chamber was limited to assisting an individual appellant, and avoided issuing measures and orders with far-reaching impact. Accordingly, for instance, in the case of *Zahirović*, despite finding that the court deliberating on the appellant's civil action was not independent within the meaning of the ECHR, the Chamber only ordered that it was necessary to provide court protection to the *applicant* before an independent and impartial tribunal.[3709]

The Human Rights Commission within the BiH Constitutional Court partly ordered the enforcement of measures exceeding the case at hand, particularly in procedures which were in some way examples of general and systemic violations of human rights and freedoms. Accordingly, for instance, it ordered

3705 Compare, as a supplement, with *Strauss*, 1999.
3706 CH/98/1366-R, paragraph 22, with references to the ECtHR, *Saïdi v. France* of 20 September 1993, Series A no. 261-C, paragraph 47.
3707 Compare with CH/98/1366-R, paragraph 23.
3708 Compare with CH/96/3 *et al*.-M, paragraph 49.
3709 CH/97/67-A&M, paragraph 148 and observation by *Berg*, 1999, p. 13 *et seq*.; similarly, CH/98/892-A&M, paragraph 98.

that a law violating standards of human rights and freedoms be amended,[3710] or even to do so with the specific contents of the laws necessary to regulate a legislative area that has been insufficiently regulated up until that point.[3711]

ii. "Natural restitution" and prevention

Legal remedies, the goal of which was to redress established violations of human rights and freedoms, if possible – even in the form of "natural restitution" – are numerous and distinct by their contents. Such measures were also partly preventive by nature, their goal being to remove possible threats of violations of human rights and freedoms. In a great many proceedings concerning the restoration of the pre-war possession of apartments and other real estate, the Chamber, for instance, declared as ineffective the retroactive quashing of contracts on the purchase and sale of real estate, or reversed adjournment of trials ordered by the executive authority.[3712] Acts declaring apartments abandoned were quashed, and it was ordered that the housing premises be restored to the applicants,[3713] or the Chamber imposed an obligation for the courts to complete in an expedited manner the court proceedings that were under way at the time.[3714] However, the restoration of the possession over real estate is not compulsory, thus if due to the construction or similar measures on the respective real estate, which is the subject of restoration, the repossession appears inappropriate or impossible, there is a possibility of compensation to be effected in some other manner.[3715]

The Chamber dismissed the requests of the applicants for the defendant to apologise over inhuman and degrading treatment or forced labour in a detention imposed unlawfully, thereby providing reasoning that the decisions of the Chamber are public and that, within the context of its respective mandate, they are a sufficient satisfaction.[3716] By the by, in cases concerning a violation of human rights and freedoms, which may be characterised as less serious, the Chamber held that establishing a violation solely makes for a sufficient satisfaction.[3717] In cases where a death sentence had been pronounced during wartime, which is contrary to the ECHR, the Chamber ordered that the execution

3710 CH/01/8507.
3711 CH/98/375 *et al*.
3712 CH/96/3 *et al*.-A&M, paragraph 49 *et seq*.
3713 CH/97/40-M, paragraphs 64-66; CH/97/58-A&M, paragraph 60 *et seq*.
3714 CH/98/367-A&M, paragraph 33.
3715 CH/00/6134-A&M, paragraph 119 *et seq*.
3716 CH/97/45-A&M, paragraph 118.
3717 Compare with, for instance, CH/98/1324-A&M, paragraph 84.

not be carried out, and that the death penalty be abolished.[3718] In cases where a problem concerned the disappearance of persons, the Chamber ordered an extensive investigation to be carried out, which would make possible for all the facts related to the disappearance of a victim to be established in order for the perpetrators to be held responsible. In addition, if a victim were still alive, he/she had to be set free immediately, and if not alive, then the Chamber ordered that his/her remains be surrendered. Finally, the Chamber ordered that all information and results of the investigation as to the fate of a victim and the whereabouts thereof be made available to the relatives.[3719] While considering the decision on Srebrenica, the Chamber additionally developed its case law in relation to the missing persons, referring to the international case law related to the respective issue.[3720] In addition to the obligation that the survivor-victims be set free, that an extensive investigation be carried out with the aim to collect information about the events from July 1995, and that the location where the remains of the victims were to be established and that those responsible be brought to justice,[3721] the Chamber ordered that its decision be published in the *Official Gazette of the Republika Srpska* in the local language.[3722] Instead of individual compensation to the relatives of the victims – which the Chamber used to order in previous cases related to missing persons – this time the Chamber decided to order the Republika Srpska to pay a collective compensation to all the relatives of the missing persons from Srebrenica. Speaking to the point, it concerned a monetary compensation which amounted in total to KM 4 million. This amount was to be paid in instalments to the Foundation for the Construction and Maintenance of the Memorial Centre in Potočari and the Cemetery for the Victims from Srebrenica.[3723] By the Decision of the High Representative, the Foundation, as well as the Memorial Centre and the Cemetery had been established earlier. The legal remedy, which exhaustion was so ordered, was rather disputable for the Chamber, which resulted in a heated discussion among the judges. In paragraph 214 of this decision, the

3718 CH/96/30-M, paragraph 46; CH/97/69-A&M, paragraph 65; CH/97/59-A&M, paragraph 76.

3719 CH/96/1-M, paragraph 63; CH/99/3196-A&M, paragraph 88 *et seq*., with references to the decision of the UN Human Rights Committee, *Elena Quinteros v. Uruguay*, Communication no. 107/1981 of 17 September 1981, Reports of the Human Rights Committee (1983), paragraph 16.

3720 CH/01/8365 *et al*.-A&M, paragraph 205 *et seq*., with references to the Inter-American Court of Human Rights (IAMRG), *Aloeboetoe et al. v. Suriname* of 10 September 1993, Series C no. 15, paragraphs 42, 48, 79, 98-107, 116; *Castillo Páez v. Peru* of 27 November 1998, Series C no. 43, paragraphs 87-90, 107, 112; *Blake v. Guatemala* of 22 January 1999, Series C no. 48, paragraphs 56-57, 65; *Barrios Altos v. Peru* of 14 May 2001, Series C no. 75, and of 30 November 2001, Series C no. 87, paragraphs 41-44, 46-47.

3721 CH/01/8365 et al.-A&M, paragraph 211 *et seq*.

3722 Paragraph 213.

3723 Paragraph 214 *et seq*.

Chamber emphasised that, due to lack of time, it was unable to address the establishment of violations of the rights and freedoms of the victims. However, the subject of this decision of the Chamber were also violations of the rights of relatives referred to in Articles 3 and 8 of the ECHR, which occurred due to permanent uncertainty in relation to the fate of the victims; the result of a passive position of State bodies. Therefore there were requests for collective compensation to be paid to one or more organisations dealing with the establishment of the fate of victims, *e.g.*, with identification of mortal remains of victims from mass graves. Additionally, indeed, such an order would have constituted a more direct help in redressing the established violations than the construction of a monument or cemetery worthy of the victims. On the other hand, one should not disregard the significance of such a memorial centre for the overall process of reconciliation, given that it is a concrete manifestation and a way to pay tribute to victims who had been wronged.

In the case where the right to life was violated by arbitrarily pronouncing an acquittal for a person charged with the criminal act of murder, the Chamber did not order for the criminal proceeding to be conducted anew, as that would be contrary to the principle of trust in the acquittal which was pronounced once, and the acquitted person must have the possibility, after a prolonged period of time, to be able to rely on the pronounced sentence. Otherwise, had the Chamber ordered that the criminal proceedings for involuntary manslaughter be conducted anew, the principle of legal validity would have been violated, thereby constituting an exception to the principle *ne bis in idem* (Article 4 of Additional Protocol No. 7 to the ECHR).[3724] In the case where serious violations of the right to a fair trial under Article 6 paragraph 1 of the ECHR were established, the Chamber ordered that proceedings be conducted anew,[3725] *i.e.*, that all necessary steps be taken in order to make it possible for the applicant to renew the appellate proceedings if he/she so wished.[3726] Exhaustion of such a legal remedy was ordered even in a case where the Chamber established that, due to *the conduct of criminal proceedings anew*, Article 6 paragraph 1 of the ECHR was violated.[3727] In the case where a police officer abused a person while on duty (Article 3 of the ECHR), the Chamber ordered that an investigation be instituted against the perpetrator with the aim for the police officer, if necessary, to be criminally prosecuted.[3728] The Chamber, also, ordered that the

3724 Compare with CH/01/6979-A&M, paragraph 84.
3725 CH/98/1335 *et al*.-A&M, paragraphs 298, 308; CH/98/1366-A&M, paragraph 95.
3726 CH/98/934-A&M, paragraph 5: legal remedies; Also, compare with CH/98/1366-R, paragraph 25.
3727 CH/98/638-A&M, paragraph 90; compare the tactics in separate opinions.
3728 CH/98/1374-A&M, paragraph 170 *et seq*.; CH/98/1786-A&M, paragraph 140 *et seq*.

police officer be dismissed from service.[3729] In the event that the deprivation of liberty had been unlawful, as the necessary opinion of the Prosecutor of the ICTY had not been obtained in a timely fashion, the subsequent submission of the consent of the prosecutor did not affect retroactively the unlawfulness of the detention. However, regardless of such a conclusion, the Chamber gave up the order for the payment of compensation.[3730] Yet, if the request for an opinion of a prosecutor of the ICTY was not sent at all, then the deprivation of liberty would still be unlawful. In such a case the Chamber ordered that the person be released from custody immediately,[3731] *i.e.*, if that had already taken place, to be paid pecuniary compensation.[3732]

In order to make possible the reconstruction of mosques destroyed during the war, the Chamber issued orders which differed on a case by case basis. Such was, for instance, the order to quash the regional plan of the municipality which was in collision with the reconstruction plans,[3733] or the order to prevent construction of other facilities on the land at issue, that is to prevent removal of remnants of the facility (by third persons), or to issue a construction permit. Contrary to this, the Chamber did not want to impose a general prohibition of discrimination against the Muslim population in Banja Luka, for such a prohibition of discrimination, in the opinion of the Chamber, has already arisen from Annex 6.[3734] In other cases the Chamber prohibited the defendant from exhuming corpses from a cemetery, or from quashing a decision on closing a cemetery, or the Chamber would order the defendant not to prevent any burials at the cemetery at issue in the future.[3735]

In the case of the secondary commercial school where the Chamber, due to the failure to recognise a diploma, established that the right to education was violated and ordered that the diploma be officially recognised. In that case the Chamber also established that a violation of *goodwill* occurred, *i.e.*, of "a good reputation" of the mentioned secondary commercial school, which was committed by the State bodies through their press releases. As a result thereof, the Chamber ordered, *i.e.*, obliged the Republika Srpska to publish the decision of the Chamber on the respective issue in the press in which its bodies had published their press releases earlier.[3736] In *Zahirović*, the Chamber

3729 Compare with CH/98/1786-A&M, paragraph 139; compare also with the separate opinion of judge *Popović.*
3730 CH/98/1335 *et al*.-A&M, paragraphs 297, 307, 309.
3731 CH/98/1335 *et al*.-A&M, paragraph 302.
3732 CH/98/1335 *et al*.-A&M, paragraph 313.
3733 CH/99/2177-A&M.
3734 CH/99/2656-A&M, paragraph 122 *et seq*.; CH/96/29-A&M, paragraph 211 *et seq*.
3735 CH/98/892-A&M, paragraph 98; CH/99/2177-A&M, paragraph 111.
3736 CH/00/6183 *et al*.-A&M, paragraph 197 *et seq*.

ordered the Federation of BiH to re-employ the applicant, commensurate to his qualifications and with a treatment equal to that of other employees. In addition, the Chamber requested that his civil action be decided by an independent and impartial tribunal.[3737] In the case of the *Algerian Group*, the Chamber requested from the Federation of BiH, and from BiH, to adopt in an expedited fashion a decision in the proceedings that had already been initiated, and it also ordered that the country, through diplomatic channels, plead for the respect of fundamental human rights and freedoms of the applicants who were transported to Guantanamo, and particularly to get in touch with them, to offer them assistance of consular services, and to undertake all possible steps in order to prevent the pronouncement and execution of a death penalty.[3738]

iii. Compensation

CH/00/6144-A&M Leko	20010309
CH/01/6979-A&M E. M. & S. T.	20020308
CH/02/9270 Ganibegović	20060705
CH/96/30-M Damjanović	19970905
CH/96/30 Compensation, Damjanović	19980316
CH/96/30 Additional compensation, Damjanović	19990416
CH/96/30-A Damjanović	19980722
CH/97/41-A&M Marčeta	19980406
CH/97/46 Compensation, Kevešević	19990824
CH/97/51-A&M Stanivuk	19990611
CH/97/59-A&M Rizvanović	19980612
CH/97/67-A&M Zahirović	19990708
CH/97/69-A&M Herak	19980612
CH/98/126 *et al*.-A&M Marić *et al*.	19990310
CH/98/1373-A&M Bajrić	20020510
CH/98/1374-A&M Pržulj	20000113
CH/98/659 *et al*.-A&M Pletilić *et al*.	19990910
CH/98/756-A&M Đ. M.	19990514
CH/98/896-A&M Čvokić	20000609
CH/98/946-A&M H. R. & Momani	19991105
CH/99/1568-A&M Ćoralić	20011207
CH/99/1900&1901-A&M D. Š. & N. Š.	20020412

When it comes to the adoption of a decision on pecuniary compensation to the applicant, the Chamber uses rather wide prerogatives both in relation to a formal presumption about compensation,[3739] and in relation to the amount

3737 CH/97/67-A&M, paragraph 147 *et seq*.
3738 CH/02/8679 *et al*.-A&M, paragraph 327 *et seq*.
3739 CH/98/756-A&M, paragraph 103.

thereof.[3740] Thus, in that sense, the Chamber may not be viewed as equivalent to a civil court.[3741] Even if the request for pecuniary compensation was not made formally, nevertheless it did not prevent the Chamber from awarding compensation.[3742] Similarly, if the request has been made, the nature and amount stated in the request are not binding on the Chamber.[3743] The basis for each and any decision may only be the established facts arising from a decision of the Human Rights Chamber. Accordingly, the presumed non-pecuniary damage, which is claimed to have resulted from a violation of human rights, is not taken into account if the Chamber has not indeed established such damage in its decision.[3744]

Compensation awarded by the Human Rights Chamber is not related to and does not depend on the compensation that an individual might claim under the national legal regulations. What is more, the Chamber may award compensation even if an individual has never tried to obtain compensation earlier by exhausting the other legal remedies available under the national legal system. The rule on exhausting other available legal remedies referred to in Article VIII.2(a) of Annex 6, is not, therefore, applied in such cases, since the competence of the Chamber in such cases directly arises from Article XI of Annex 6, and that, actually, it constitutes the obligation of efficient protection of human rights.[3745]

The Chamber may award compensation only for the applicant, not for the relatives thereof.[3746] The applicant may also be awarded compensation for the costs of the proceedings, including the costs of a lawyer.[3747] Compensation is awarded only for violations that occurred in the period after 14 December 1995. If the defendant fails to pay compensation within the time limit determined by the Chamber, the payment of interest may be imposed effective from the moment of expiry of the mentioned time limit.[3748] This should be distinguished from the obligation to pay a certain amount for each day the defendant defaulted on paying compensation,[3749] as that is a sort of mixture of payment of compensation and a fine as a means of force the payment of pecuniary compensation.

3740 CH/97/51-A&M, paragraph 72 *et seq*.
3741 Compare with CH/97/46-Compensation, paragraph 16.
3742 CH/99/1568-A&M, paragraph 63.
3743 CH/98/659-A&M, paragraph 211.
3744 Compare with CH/96/30-C, paragraph 24; CH/96/30-AC, paragraph 16; CH/98/126 *et al*.-A&M, paragraph 60.
3745 CH/96/30-C, paragraph 13 *et seq*., with references to the ECtHR, *De Wilde et al. v. Belgium*, Series A no. 14, paragraph 15; CH/97/59-A&M, paragraph 81.
3746 CH/98/1374-A&M, paragraph 180; CH/98/946-A&M, paragraph 143.
3747 Compare with CH/98/1374-A&M, paragraph 185.
3748 CH/00/6144-A&M, paragraph 68.
3749 CH/97/67-A&M, paragraph 151; CH/98/756-A&M, paragraph 103.

In the event of a delay in restoring possession over apartments and real estate, in addition to the obligation to undertake all actions in order to restore possession quickly, the Chamber may award compensation also for mental suffering, as well as compensation of the costs which were incurred in the meantime as a result of the use of alternative accommodation.[3750]

In the beginning the injured party was even given a time limit within which it had the possibility to file (other) claims for compensation, partially even after the adoption of a decision on the merits.[3751] If the given time limit elapsed and the applicant failed to request an extension of the time limit, all possible claims for compensation would be ruled out.[3752] Subsequently, the Chamber adopted the practice whereby it would advise the applicant during the proceedings of the possibility to claim compensation, in order to be able to address all possible requests in the decision on the merits. Likewise, the Chamber seldom awarded the compensation of damage or costs that the applicant claimed to have incurred (*e.g.*, costs of a lawyer) concerning which no evidentiary material was submitted within the given time limit.[3753]

In Case No. CH/01/6979, the Chamber awarded the compensation of KM 15,000 for the suffering of a victim's wife, and an additional KM 50,000 for the loss of a husband. Compensation is paid also in the event of a tarnished reputation or defamation of character, caused, for instance, by reports in the media.[3754] Accordingly, the Chamber awarded compensation of KM 15,000 to a person who was threatened for several years with execution, which is contrary to the ECHR, for fear the person endured owing to possible execution.[3755] For unlawful detention in duration of seven months (Article 5 of the ECHR) and during which the injured person was exposed to severe maltreatment (Article 3 of the ECHR), which caused permanent damage to his health, the Chamber awarded compensation in the amount of KM 30,000.[3756] For ten-months of unlawful detention, during which the injured person was exposed to discriminating treatment, compensation of KM 30,000 was awarded,[3757] and for 18 months of unlawful detention, whereby no additional violations were found under the ECHR, compensation of KM 25,000 was awarded.[3758] The Chamber also awarded pecuniary compensation for lost items if sufficient evidence

3750 Compare with CH/98/659 *et al*.-A&M, paragraphs 212, 236 *et seq*.
3751 Compare with for instance, CH/96/30-M, paragraph 46.
3752 CH/97/69-A&M, paragraph 67.
3753 Compare with CH/97/59-A&M, paragraph 84.
3754 Compare with CH/98/1374-A&M, paragraph 175 *et seq*.
3755 CH/96/30-C, paragraph 26.
3756 CH/98/1373-A&M, paragraph 121.
3757 CH/97/41-A&M, paragraph 72.
3758 CH/99/1900&1901-A&M, paragraph 84.

about the responsibility of State bodies existed.[3759] For inappropriately lengthy proceedings, within the meaning of Article 6 of the ECHR, the Human Rights Commission within the BiH Constitutional Court, relying on the case law of the European Court, established in 2006 the criteria for the establishment of just compensation for each year of unreasonably lengthy proceedings. In "ordinary" proceedings amounts of KM 343 to 515 were awarded for each year of unreasonably lengthy proceedings, and in the so-called urgent proceedings double the amount was awarded for each year.[3760]

2. Imposing an interim measure

a. Constitutional Court

AP 1/05 Interim measure B. N.	20050118
AP 1001/06 Interim measure Pruščanović	20060627
AP 1042/04 Interim measure M. and Z. M.	20050118
AP 1404/05 Interim measure Pita	20050913
AP 1784/06 Interim measure Petrović	20060627
AP 1785/06 Interim measure Maktouf	200600912
AP 1812/05 Interim measure Mijović	20050913
AP 1812/07 Interim measure Radonja	20070716
AP 1925/05 Interim measure Bajramović	20051013
AP 2078/05 Interim measure Macanović	20051030
AP 2473/06 Interim measure Memić	20061020
AP 2479/07 Interim measure Karup	20071018
AP 2479/07 Decision on Admissibility Karup	20080125
AP 2848/06 Interim measure Ljevo	20061109
AP 2849/06 Interim measure Kovačević	20061109
AP 34/08 Interim measure Vasić	20080214
AP 614/04 Interim measure "Unigrad" d.o.o.	20040729
AP 71/04 Interim measure Đ. H. *et al*.	20040130
AP 712/04 Interim measure S. K.	20040826
AP 764/06 Interim measure Črepnjak	20060912
AP 785/08 Interim measure Martinović *et al*.	20080917
AP 831/04 Interim measure S. M. *et al*.	20041014
AP 87/04 Interim measure A. S.	20041130
AP 918/04 Interim measure A. U.	20041027
AP 953/04 Interim measure D. R.	20041119
AP 960/04 Interim measure S. L.	20041110
U 12/98 Special parallel relations	19990705 *OG of BiH*, No. 11/99
U 15/99-1 Decision on Merits Zec	20010612 *OG of BiH*, No. 13/01

3759 CH/98/896-A&M, paragraph 105.
3760 CH/02/9270, paragraph 68 *et seq*.

U 15/99-2 Interim measure Zec	19991203
U 28/01-1 Interim measure Jugović	20010704 *OG of BiH*, No. 16/01
U 28/01-2 Decision on Merits Jugović	20020312 *OG of BiH*, No. 05/02
U 47/01 Interim measure Haznadar	20011102
U 34/01 Bičakčić	20010821 *OG of BiH*, No. 20/01

Pursuant to Article 77, paragraph 1 of the Rules of the Constitutional Court (present version), the Chamber, composed of the President and two Vice-Presidents – national judges (Article 10 paragraph 1), may at the request of a party impose an interim measure to be in effect up until the adoption of a decision on the merits, if, according to the opinion of the BiH Constitutional Court, it is in the interest of a party, or if necessary for the correct conduct of proceedings. Pursuant to paragraph 2, the President of the Court may, in exceptional cases, if it is not possible to convene a session of the Chamber, adopt an interim measure himself/herself. At the plenary session (Article 8) or at the Grand Chamber, composed of 5 judges (Article 9), an interim measure may be adopted at one's own initiative or at the request of a party (paragraph 3). The interim measure shall remain in force up until the moment another differing decision has been adopted at a plenary session (paragraph 6). Interim measures are adopted in urgent cases and remain in force up until the adoption of a decision on the merits, or up until the adoption of another differing decision at the plenary session.

> The new regulations in relation to interim measures allow the Court to use that instrument more quickly and under less strict conditions. Under Article 75 of the Rules of the Constitutional Court, present version, only the BiH Constitutional Court in plenum, i.e., at a plenary session, could fully or partially suspend the enforcement of decisions, laws (acts) or individual acts (interim measures) temporarily, pending the final decision in the case, if, as a result of their enforcement, detrimental consequences that cannot be overcome might set in.

At the beginning, the Constitutional Court rather seldom used the possibility of adopting interim measures. As a matter of fact, there was no need for it, predominantly, and a decision on the request for adoption of an interim measure was adopted together with a decision on the merits. The cause for such use of this instrument did not relate solely to the above-mentioned procedural and substantive obstacles for adoption of an interim measure but also to omissions in the organisation of the Court that existed for quite some time. Accordingly, in Case No. U 15/99, only 6 weeks after the submission of a request, the Court adopted an interim measure in order to stop the enforcement of an eviction order, which was upheld, at the last instance, by the Supreme Court of the Republika Srpska. The reasoning only read that if an interim measure was

not adopted, the enforcement would have detrimental consequences for the appellant, which would be impossible to remove. Another reason why there were a low number of positively solved requests for adoption of an interim measure was, oftentimes, insufficiently founded requests.[3761] This problem still exists, which is shown in statistics: up until May 2008, the Constitutional Court imposed an interim measure in only 26 cases, and it rejected 279 such requests as ill-founded or inadmissible.[3762]

The Constitutional Court reviews the 'well-foundedness' of requests for interim measures separately from the well-foundedness of an appeal. Therefore, the reasons that the Constitutional Court relies on when deciding on a request for adoption of an interim measure differ from the reasons the Constitutional Court relies on when adopting a decision on the subject-matter of a dispute. The reasons and evidence stated by the appellants with respect to the alleged violations of constitutional rights and freedoms when making a decision in the case at hand cannot be analogously applied while deciding on the well-foundedness of a request for an interim measure.[3763] As a matter of fact, the appellant must present and prove as evident that the failure to adopt an interim measure would result in detrimental consequences for him, which would be impossible to subsequently remove.[3764] A threat of possible damage must be acute, serious and plausible.[3765] While deciding on an interim measure, the Court also ought to take into account whether imposing an interim measure would have detrimental consequences for the other party to the proceedings,[3766] so as to possibly weigh out the interests of both parties.

To the question of whether the competence of the Constitutional Court to adopt a decision on the merits is a necessary precondition for the competence of the Constitutional Court to adopt an interim measure, no clear answer has surfaced as yet on the basis of the Court's constitutional practice. The constitutional practice of the Court in this area is not yet standardised. In several decisions the Constitutional Court holds that a decision on interim measures does not prejudge "the outcome of the proceedings", which may refer both to a decision on admissibility, and to a decision on the merits.[3767] Accordingly, the Court asserts that it may reject an appeal as inadmissible even after the adoption of an interim measure since the summary review of the chances of success

3761 Compare with U 12/98.
3762 Internal documentation, authors' archive.
3763 AP 831/04, paragraph 10.
3764 AP 918/04, paragraph 8.
3765 AP 34/08, paragraph 9.
3766 Compare with U 47/01, paragraph 12.
3767 See, for instance, AP 1785/06, paragraph 11.

when imposing an interim measure is not carried explicitly.[3768] What is more, in several cases, the Constitutional Court adopted an interim measure, thereby stopping the enforcement of a decision (for instance, the second instance administrative ruling) although the proceeding before the ordinary court (administrative dispute) had not been completed at all, and the objective of the measure was the completion of a proceeding before the ordinary court.[3769] Therefore, this case law speaks for the fact that admissibility of an appeal is not a precondition for adoption of an interim measure. Contrary to this, there were decisions on imposing an interim measure wherein the court presented arguments that the interim measure requires that the Court be competent for the adoption of a decision on the merits, including a review of whether the appeal was manifestly ill-founded.[3770]

Indeed, it would be correct to consider that the Constitutional Court, when adopting an interim measure, should be competent also for adoption of a decision on the merits.[3771] For, by adopting an interim measure the Court interferes – as it has observed itself – with the ordinary course of affairs; for instance, it halts the enforcement of a judgment or a ruling provided for by law.[3772] If the ordinary proceeding has not been completed, because a revision appeal has been lodged, or appellate proceedings are underway,[3773] then the intervention of the BiH Constitutional Court, for the sake of temporary suspension of the enforcement, may possibly make sense. The reason for this is that in that manner, irreparable detrimental consequences for the case could be prevented, which would no longer be possible to remove if the challenged judgment that was being awaited, would, nevertheless, be quashed in the proceedings before the Constitutional Court. The necessity for the Constitutional Court to intervene in cases like this is based on the fact that certain legal means have no effect of delay.[3774] According to the case law of the European Court, legal remedies, which have no suspending effect in cases where irreparable detrimental

3768 See, for instance, AP 960/04; AP 2479/07.

3769 See, for instance, AP 614/04 or AP 71/04. In several similar cases the Constitutional Court considered appeals as premature, given that the proceedings before the ordinary courts were still underway (AP 1042/04, paragraph 7; AP 87/04, paragraph 8). However, according to the case law it is not possible to interpret any sort of criterion, in the ongoing proceedings, for a decision on when an interim measure would be admissible and well-founded, and when an appeal would be rejected as premature.

3770 AP 34/08, paragraph 9.

3771 Compare with the German Federal Constitutional Court (*Bundesverfassungsgerichtshof*): *Schlaich/Korioth*, 2001, paragraph 452 *et seq*.

3772 Compare with AP 34/08, paragraph 9.

3773 See *e.g.*, Case Nos. AP 614/04 and AP 71/04.

3774 For instance, in Case No. AP 71/04, whereby the lawsuit before the administrative court did not have a suspending effect on the final administrative ruling.

consequences would occur, as a result thereof, may not be considered effective. A legal remedy is effective if it leads not only to the establishment of a violation of the right but also if it is able to prevent or remove the consequences of such violations.[3775] The very possibility to compensate for damage by way of a legal remedy for the decision which was unjustly adopted does not make the respective legal remedy effective under the ECHR.[3776]

The notion of *irreparable detrimental consequences*, which is used in the case law of the Constitutional Court, has not been defined in a sufficiently clear manner. Interim measures, in principle, have the purpose to freeze the *status quo* pending the adoption of a decision on the merits by the Constitutional Court in order to prevent any possible damage for the appellant that would be no longer possible to redress. Partially, in these decisions the Constitutional Court reasons the necessity of adopting an interim measure: it is, for instance, necessary, claims the Court, if the eviction of a family from an apartment would result in serious social and health consequences,[3777] or if enforcement of a criminal judgment would cause health problems for the appellant.[3778] Also, promptly bringing a person before a judge in order to establish the lawfulness of detention may be necessary in some cases and may be ordered in a decision on an interim measure.[3779] Detrimental consequences, which are no longer possible to remove, may also take place if the defendant obtains the right to purchase the apartment which is the subject-matter of the dispute in the proceeding before the Constitutional Court.[3780] A mere presumption of damage, which is no longer possible to redress, is not sufficient.[3781]

In other decisions, the Constitutional Court does not address what makes it so that damages are no longer possible to redress, but arbitrarily accepts the assertion about such damages.[3782] The Court considered at times that even a mere allegation about the alleged serious violation of human rights would suffice;[3783] whereas at times it concluded otherwise, *i.e.*, that the weight of

3775 See, for instance, *Airey v. Ireland* of 9 October 1979, Series A no. 32, paragraph 19.
3776 *Donnelly v. United Kingdom* of 5 March 1979, DR 4, paragraph 78 *et seq*.
3777 AP 712/04, paragraph 11 *et seq*., AP 1001/06, paragraph 10; completely different in: AP 1812/05, paragraph 12; AP 712/04 or AP 1001/06.
3778 AP 2849/06, paragraph 8 *et seq*.; contrary in AP 86/05, paragraph 9; AP 2849/06.
3779 AP 953/04, paragraph 22. Compare with, however, also AP 641/03, paragraph 8, and AP 953/04.
3780 AP 1404/05, paragraph 14. Similarly, AP 1925/05, paragraph 14. Distinct in AP 2078/05, where a possibility for the seized vehicle to be sold was not the reason for adoption of an interim measure (paragraph 10, also compare with AP 1404/05).
3781 AP 764/06, paragraph 9.
3782 AP 1784/06, paragraph 12; U 28/01, paragraphs 18-20.
3783 AP 1812/07, paragraph 18.

a violation is irrelevant if presented in an insufficiently credible manner.[3784] Missing one year of studies due to the enforcement of a criminal judgment that is challenged before the Constitutional Court is not a reason to issue an interim measure.[3785]

The fact that the Constitutional Court, for the purpose of adopting an interim measure, at times makes relative the notion of "completion of the proceedings" (in other words, the principle of exhaustion of legal remedies), indeed does not serve the legal certainty. Namely, in the case law the court used to declare itself incompetent to review the constitutionality of certain stages of certain proceedings. In this respect, the Constitutional Court claimed that the Court might decide on the existence of violations of constitutional human rights and freedoms only after the completion of the entire proceedings, as well as after the exhaustion of all legal means.[3786] In Case No. AP 785/08, contrary to this, the Constitutional Court decided that also "the ending by a legally binding decision" of a certain "decisive" stage of the proceeding might be the subject-matter of a decision on the merits, and that not even the adoption of an interim measure in such a case might be ruled out.[3787]

Taking into account the aforementioned and the mentioned constitutional case-law, but also the linguistic meaning of Article 77 of the Rules of the BiH Constitutional Court, present version, (in particular paragraph 8[3788]) in conjunction with the provision of Article VI.5 (formerly Article VI.4) of the BiH Constitution , one would get the impression that an interim measure may be sought before the BiH Constitutional Court only before the adoption of a decision on the appeal, that is before the adoption of a final decision.[3789] Nevertheless, according to the most recent case-law of the BiH Constitutional Court,[3790] an interim measure may be considered also during the proceedings of adopting a decision on the request for review of the decision of the BiH Constitutional Court pursuant to Article 70 *et seq.* of the Rules of the BiH Constitutional Court, present version. That leads one to reach a problematic

3784 AP 2473/06, paragraph 10.

3785 AP 2473/06, paragraph 10.

3786 Accordingly, Article 6 of the ECHR; see, also "ii. Proceedings related to the "determination" of civil rights and obligations", p. 237.

3787 Compare with AP 785/08, paragraph 13. Also in U 34/01; see also the separate opinions of Judges *Danelius* and *Marko*.

3788 The mentioned paragraph 8 of Article 77 of the Rules of the BiH Constitutional Court, present version, reads as follows: "The proceedings for adoption of an interim measure shall be urgent, and a decision granting a request for adoption of an interim measure shall be binding pending the adoption of a final decision by the Constitutional Court".

3789 As to the meaning of the term "final decision" see the comment under: "3. Effect and review of decisions", p. 927.

3790 See, for instance, Case No. AP 3993/08.

conclusion that “a final decision”, at least when it comes to the adoption of an interim measure, shall be taken only when the proceedings for the review of a decision have been completed (if instituted). Such a conclusion would be, among other things, contrary to the principle of one-instance proceedings before the BiH Constitutional Court.

b. View in retrospect: The Human Rights Chamber, *i.e.*, the Human Rights Commission within the BiH Constitutional Court

CH/01/8050 Interim measure Savić	20050706
CH/96/29-A&M Islamic Religious Community of BiH, cases related to mosques in Banja Luka	19990611
CH/98/659 *et al*.-A&M Pletilić *et al*.	19990910
CH/98/710-A&M D. K.	19991210
CH/99/2177-A&M Islamic Religious Community of BiH, cases related to Muslim cemeteries in Prnjavor	20000211
CH/99/2425-A&M Ubović *et a*l. the Glamoč cases	20010907
CH/99/2656-A&M Islamic Religious Community of BiH, cases related to mosques in Prijedor	20001206

Pursuant to Article X.1 of Annex 6, the Human Rights Chamber could issue provisional measures. Article VIII.2(f) of Annex 6 obliged the Chamber to decide on a request for provisional measures treating it as a priority. Rule No. 36 specified the procedure. This regulation, first and foremost, provided that the President of the Chamber shall be the one to make decisions outside of sessions. The Chamber issued provisional measures if there were *prima facie* indications that some protected right had been violated, and that the Chamber had competence over it,[3791] and if it appeared plausible that the applicant, in the event of not issuing the measure, would suffer serious and great damage that might no longer be redressed.[3792] The notion of *damage* must be interpreted restrictively, since the provisional measure interferes with the ordinary course of affairs. When assessing whether some provisional measure is justified, the so-called double hypothesis comes in handy. Consequences that would take place if the request for provisional measures were not approved and the application were granted as well-founded, on one hand, are measured against the consequences that would take place if a provisional measure were to be issued and the application were to be dismissed as ill-founded, on the other hand.[3793]

3791 The case law of the Human Rights Commission within the BiH Constitutional Court: CH/02/8050, paragraph 26 *et seq*.
3792 *HRC*, 1999, p. 4; CH/02/8050.
3793 CH/02/8050.

Due to special circumstances in the State, from the very outset, the Chamber did not have inhibitions in truly using this important instrument of efficient protection of human rights and freedoms.[3794] Adoption of such a measure and the intensity thereof significantly exceeded the limit which was usually observed by the European Court in Strasbourg.[3795] The Chamber, also, succeeded – among other things, due to the aforementioned special powers of the president – in making timely decisions in this respect. Provisional measures, first and foremost, had the purpose of maintaining the *status quo* in some proceeding pending the adoption of a decision on the merits by the Chamber, in order to prevent the occurrence of some type of damage for the applicant which may no longer be repaired,[3796] and to enable the conduct of the proceeding and the subsequent decision.[3797] Contrary to this, the Chamber restrained itself from issuing provisional measures that would entail the obligation of a change of the *status quo*, such as, for instance, an eviction order in favour of an applicant.[3798]

Provisional measures are binding on the parties; and unlike the provisional measures issued by the European Court, non-compliance with a provisional measure of the Chamber was unlawful. Therefore, for instance, eviction of a certain person, despite or contrary to the prohibition imposed by the Chamber through a provisional measure, for that very reason was not "provided for by law" within the meaning of Article 8.II of the ECHR. Such a conclusion applies even under the presumption that the eviction (without a provisional measure), would, nevertheless, be lawful, since it referred to an unlawful possessor of an apartment.[3799]

Pursuant to Article XI.1(b) of Annex 6, the Chamber may issue a provisional measure together with a decision on the merits, for instance, in order to regulate the status pending the legally binding decision or the enforcement thereof.[3800]

In practice, provisional measures were mainly used in cases where the subject-matter of the dispute concerned property, namely for the sake of protection against eviction, and in cases where an appellant was threatened with execution. Although the orders of the Chamber, within the scope of provisional legal protection, were mainly complied with, there were, nevertheless, also cases of blatant non-compliance with such orders. Such was the case with the

3794 Examples in *HRC*, 1999, p. 4.
3795 *Berg*, 1999, p. 10.
3796 *HRC*, 1999, p. 7; CH/99/2425 *et al*.-A&M, paragraph 7.
3797 CH/02/8050.
3798 *HRC*, 2000, p. 7, example: CH/98/659 *et al*.-A&M, paragraph 5.
3799 *HRC*, 2000, p. 7, CH/98/710-A&M, paragraph 36.
3800 *HRC*, 2001, p. 6.

Algerian Group,[3801] or cases carrying allegations as to the existence of religious discrimination (religious facilities, funerals etc.). In such cases the Chamber issued a series of provisional measures.[3802]

3. Effect and review of decisions

a. The Constitutional Court

AP 802/04 B. Z. *et al*.	20041119
AP 979/04 Belobrk	20050722
AP 1018/04 "Puma 21" Agency Sarajevo	20050722
U 44/01 D. B.	20050722
U 49/03-1 D. T.	20050722
U 49/03-2 D. T.	20040826
U 49/03-3 D. T.	20060526
U 6/06 Law on Salaries	20080329

(a) Effect of decisions

Pursuant to Article VI.4 of the Constitution of BiH, decisions of the Constitutional Court shall be final and binding. Being final implies that they may not be challenged as there is no legal remedy available to be used against them before a higher national instance. Thereby these decisions become formally legally binding. This relates to the decisions of the Chamber (three judges, Article 10 of the Rules of the Constitutional Court, present version), the Grand Chamber (5 judges, Article 9 of the Rules of the Constitutional Court, present version) and the plenum, *i.e.*, the plenary session (9 judges, Article 8 of the Rules of the Constitutional Court, present version). Being legally binding, the decisions are impossible to revoke as such. The review of a decision, under Article 70 *et seq*. of the Rules of the Constitutional Court, present version, is not a classical review procedure, and thereby it does not constitute a legal remedy, since it presumes the existence of new facts.[3803] Legal validity means *res iudicata* in relation to the very subject-matter of the dispute and to the parties to the proceedings (substantive legal validity). Regarding decisions within the scope of abstract control (review) of constitutionality, under Article VI.3(a) and (c) of the Constitution of BiH, substantive legal validity has effect *inter omnes*.

3801 *Nowak*, 2004, p. xv *et seq*. with further references.
3802 Compare with, for instance, CH/96/29-A&M, paragraph 12; CH/99/2177-A&M, paragraph 10; CH/99/2656-A&M, paragraphs 2, 10.
3803 See details under "3. Effect and review of decisions", p. 928.

With undisputed effect which is binding *inter partes*, and *inter omnes* when it comes to abstract control (review) of constitutionality, Article 74, paragraph 1 of the Rules of the Constitutional Court, present version, adds the fact that such a decision must be respected by all physical and legal persons. Under paragraph 2 of this regulation, all State bodies are obliged to enforce the decisions of the Constitutional Court within the scope of their respective competencies. According to the very text of the regulation, there is no single private or public law person, physical or legal, in the State that is exempted from the binding effect that decisions of the Constitutional Court have. Decisions are binding in general. The BiH Constitutional Court is the sole authority that may change its jurisprudence. However, the Court has done so explicitly only once.[3804]

In principle, only the enacting clause of the decision has a binding effect, not the reasoning thereof. The exception is Article 64, paragraph 5 of the Rules of the Constitutional Court, present version: in the procedure following an appeal, under Article VI.3(b) of the Constitution of BiH, the Constitutional Court has two options: it may quash the challenged decision and refer the case back to the competent authority,[3805] or it may take a decision on the merits on its own and bring the procedure to an end.[3806] In the former case, "the responsible" authority is obliged to take into account not only the enacting clause but also the legal position arising from the reasoning (paragraph 5). However, this applies only to an individual and a specific case, and under Article 74 of the Rules of the Constitutional Court, present version, it is not applicable to all physical and legal persons. Therefore, Article 64, paragraph 5 is *lex specialis* in relation to Article 74 of the Rules of the Constitutional Court, present version. The authority by which the Constitutional Court is obliged to adopt a new decision (usually it is a court) in this case is, also, *required*, when applying and interpreting the norm to be decisive for the disputed case at hand, to follow the legal position of the Constitutional Court. Thus, in the present case, the order of the Constitutional Court achieves legal force.[3807] The present judgment is not formally binding on other authorities, although the case law of the Constitutional Court has prejudicial effect.

(b) The review of decisions of the BiH Constitutional Court

Article 70 of the Rules of the Constitutional Court, present version, provides for a possibility for the Court to review the decisions adopted if: a) a new circumstance occurred, b) which would decisively affect the outcome of the

3804 See, U 49/03.
3805 Article 64, paragraph 1 of the Rules of the Constitutional Court, present version.
3806 Article 64, paragraph 2 of the Rules of the Constitutional Court, present version.
3807 Compare with U 6/06, paragraph 22.

proceeding, c) which would be unknown to the court, and d) a party (presenting the mentioned circumstance), at the time of adoption of a decision, could not have been aware of the mentioned circumstance. The request for review may only be filed by a party to the proceeding, not by a third person,[3808] or a judge *ex officio*. Further, the request may be filed within six months from the moment the party learned of the mentioned circumstance. The review will be ruled out if one year has elapsed from the adoption of the decision (according to the old version, it was five years).

One should make a distinction between the ruling on admissibility of the request for review and the new decision on the merits.[3809] The Constitutional Court reviews *prima facie* whether the new circumstances might have affected the outcome of the proceeding within the context of the challenged decision.[3810] A question whether some circumstance is "new" requires interpretation, since it is not possible to observe clearly from the text whether Article 70 relates solely to the so-called *nova reperta*, or also to the so-called *nova producta*, or to something else. According to the legal theory, *nova producta* constitutes a new circumstance which, objectively speaking, came into existence following the adoption of a certain decision. *Nova reperta* is a new circumstance solely in subjective terms, because it was inaccessible for justified reasons to the interested party or to the very court.[3811] Considering these positions, it is undeniable that the error on the part of the court (for instance, if the court, due to negligence, failed to consider a part of the appeal[3812]) may not be treated as a new circumstance. It is interesting to mention that the amended case law of the Constitutional Court is treated as a new fact within the meaning of Article 70 of the Rules of the Constitutional Court. Accordingly, in Case No. U 49/03 the Constitutional Court granted the request for review wherein the appellant claimed that the Constitutional Court, following a decision adopted on his first appeal, amended its case law, which required a review of the decision.[3813]

Such case law is disputable with respect to the principle of legal certainty. The mechanism of internal review of the judgments of the Constitutional Court should not be employed for the correction of erroneous judgments. Knowledge

3808 U 44/01, paragraph 8.
3809 AP 802/04, paragraph 8.
3810 *Ibid*., paragraph 9.
3811 In Case No. AP 979/04 the Constitutional Court had no chance to take into account the position of the defendant, since it was delivered only after the adoption of a judgment, due to difficulties during delivery to the Constitutional Court (paragraph 11).
3812 AP 1018/04, paragraph 11.
3813 U 49/03, paragraph 10.

that some legal opinion, which was represented in the decision, was not justified would not constitute "a new circumstance". If the Court views amendments to its case law as amendments within the scope of the constitutional reality, which has changed and evolved in the new direction (it is questionable whether it may occur in one year, and it does not constitute "a changed circumstance" within the meaning of Article 70), then in this case, if one was consistent, it would not be appropriate to retroactively adapt the earlier decisions, which were justified at the time of their adoption.

b. The Human Rights Chamber, *i.e.*, the Human Rights Commission within the BiH Constitutional Court

The decisions of the Human Rights Chamber, under Article XI.3 of Annex 6, are also final and binding. Annex 6, as well as the Rules of Procedure of the Human Rights Chamber, did not further specify that aspect. On the entry into force of the Rules of Procedure of the Human Rights Commission within the BiH Constitutional Court in 2005, a regulation similar to that existing in the Rules of the Constitutional Court, present version, was introduced into Rule No. 62.[3814]

The decisions of the Human Rights Chamber, in the best case scenario, might have been subject to review within the Chamber, under Article X, paragraph 2 of Annex 6, *i.e.*, they might have been modified. The review procedure was specified in Rule No. 63 *et seq*. of the Rules of Procedure of the Human Rights Chamber. Unlike the review procedure within the BiH Constitutional Court, the initiation of which presumed the existence of new facts unknown to the Constitutional Court which might have affected the outcome of the procedure, a presumption for filing a request for review before the Chamber related to presenting doubts about the interpretation and application of Annex 6, or it may have related to the general interest, some general situation which would justify a decision on review (Rule No. 64, paragraph 2). As of 1 January 2004, when the Human Rights Commission within the BiH Constitutional Court had enacted its own Rules, the review was ruled out. Under the mentioned Rules, as well as under the Rules from 2006 and 2007, it was possible to review only the decisions of the Human Rights Chamber, and not the decisions of the Human Rights Commission within the BiH Constitutional Court adopted subsequently.

3814 The complete text of the Rules of the Chamber and the Commission is available at: <www.hrc.ba>.

4. Enforcement of decisions

a. Introduction

Bosnia and Herzegovina received a set of instruments in Dayton for the protection of human rights with a potential that is unique in the world. When it comes to the UN Conventions on Human Rights, Bosnia and Herzegovina has a substantial advantage in efficiency when compared to other signatories to the mentioned conventions. The reason for this is the sweeping powers of the Human Rights Chamber and – presently the only one in existence – the BiH Constitutional Court, with the goal of implementing rights that were laid down in the aforementioned conventions.[3815] The extensive enacting clauses of decisions of both courts, including their possibility to issue orders for the enforcement of specific measures, by their intensity and directness, exceed even the capacities of the European Court, as well as those of the constitutional courts of other states.

Yet, there was a threat for these protection mechanisms to prove completely ineffective in reality, for, on one hand, the competent national actors opposed the implementation of human rights and freedoms as soon as it appeared contrary to their respective interests, and, on the other hand, the clear competencies and norms on powers with the goal of implementing these high standards were lacking. Therefore, the protection of human rights in Bosnia and Herzegovina immediately after the Dayton has been losing its credibility.[3816]

Under Annex 11, the IPTF was not stipulated as an executive authority; it should have served for the support, oversight, monitoring, investigating, counselling and training of the order and security authorities and the executive authorities of the Entities and to possibly assess whether public order and peace, *i.e.*, security were threatened. In the beginning, no one placed great hopes on the OHR and OSCE. These two institutions, admittedly including the Ombudsmen of BiH, as well as the Human Rights Chamber, reported on a regular basis about the State and the Entities' authorities violating human rights and freedoms, but no one got the impression that they wished to use their powers. Soon after the end of the war, primarily, it was IFOR, *i.e.*, namely SFOR, that raised hopes, since their sweeping powers for the preservation of public security, not only in exclusively military areas, were laid down in Annex 1-A.[3817] For years the Human Rights Chamber and the BiH Constitutional Court

3815 Compare, in general, *Heintze*, 1998.
3816 Compare with *Nowak*, 1996, p. 103 *et seq*.; *Sadiković*, 1999, p. 20.
3817 Compare with *Nowak*, 1996, p. 101 *et seq*.

had the additional support of different actors that were present here (OHR, SFOR, OSCE, IPTF); the objective was to permanently advance the respect for and implementation of their decisions.

b. Appropriate provisions

(a) Constitutional Court

AP 1103/06 Antonić	20080513

Decisions of the Constitutional Court are enforceable. In a decision, the Constitutional Court may determine the manner as well as the time limit for enforcement (Article 74, paragraph 4 of the Rules of the BiH Constitutional Court, present version). This entitles the Court to undertake all appropriate and necessary measures in order for the decisions of the Court to be complied with. Thereby, decisions are not subject to some enforcement procedure which is known in other procedural laws; rather such decisions are directly enforceable. The Constitutional Court may order other authorities too to enforce its decisions. The type of orders for enforcement that are possible and usual shall depend on the type of the proceedings.

In the **appellate proceedings**, pursuant to Article VI.3(b) of the Constitution of BiH, the BiH Constitutional Court may quash the challenged decision and refer the case back to the responsible authority in order to adopt a new decision in an expedited procedure, during which adoption the responsible authority will observe the legal position of the Constitutional Court.[3818] The other procedural possibility is for the Constitutional Court to adopt a decision on the merits and thereby to conclude the proceedings. In the latter case, the Court shall determine the entity to enforce its decision. Not a single (State) authority may refuse to enforce the decisions. When determining the responsible authority, the Constitutional Court shall, under Article 74, paragraph 2 of the Rules of the Constitutional Court, present version, observe the division of jurisdiction under the Constitution of BiH and the law. Accordingly, for instance, in the event of a violation of Article 6 of the ECHR – unreasonable length of proceedings – on one hand, the Court will order the competent court to complete the proceedings urgently or within a given time limit, and, on the other hand, order the instance of authority in charge of the responsible judicial body, possibly, to pay a just compensation.[3819]

3818 Article 64, paragraphs 1 and 5 of the Rules of the Constitutional Court, revised text.

3819 See, for instance, AP 1103/06, paragraph 42.

In the **procedure of control (review) of the constitutionality of norms,** under Article VI.3(a) and (c) of the Constitution of BiH, the Constitutional Court shall, in principle, quash the challenged unconstitutional provisions[3820] and determine the legal effect of a decision *ex tunc* or *ex nunc*.[3821] Provisions which are not in conformity with the Constitution of BiH shall be rendered ineffective the day after the date of publication of the decision in the *Official Gazette of Bosnia and Herzegovina*.[3822] Exceptionally, the Constitutional Court may determine the time limit for bringing in line the unconstitutional provisions, and such time limit must not exceed six months.[3823] If the responsible authority fails to correct the unconstitutional provisions within the given time limit, the Constitutional Court shall establish by its decision that the provisions, which are not in conformity, shall cease to be in effect.[3824] Here, also, the quashed provisions are rendered ineffective the day after the date of publication in the *Official Gazette of Bosnia and Herzegovina*.[3825]

The enforcement of **final and binding individual acts**, which were issued on the basis of some regulation, which had been rendered ineffective in accordance with Article 63 of the Rules of the Constitutional Court, present version, may neither be ordered nor carried out. If the process of enforcement has already been initiated, it shall be suspended.[3826] If it is established that by amending an individual act no consequences of the application of the regulations which had been declared unconstitutional were removed, the Constitutional Court may, at the request of the injured party, through the *restitutio in integrum* order, ensure the compensation of damage or some other type of satisfaction.[3827]

Any person with a legal interest may request the enforcement of a decision of the Constitutional Court.[3828]

The procedure of enforcement, under Article 74, paragraph 5 of the Rules of the Constitutional Court, present version, is linked to the obligation of the competent authority to submit a communication. Namely, the authority, which is to enforce the decision, is obliged to submit a communication about the measures undertaken, or about the status and the stage of the implementation of the decision, within a given time limit. In the event that the enforcement has

3820 Article 63, paragraph 2 of the Rules of the Constitutional Court, present version.
3821 Article 63, paragraph 1 of the Rules of the Constitutional Court, present version.
3822 Article 63, paragraph 3 of the Rules of the Constitutional Court, present version.
3823 Article 63, paragraph 4 of the Rules of the Constitutional Court, present version.
3824 Article 63, paragraph 5 of the Rules of the Constitutional Court, present version.
3825 Article 63, paragraph 6 of the Rules of the Constitutional Court, present version.
3826 Article 75 of the Rules of the Constitutional Court, present version.
3827 Article 76, paragraph 1 of the Rules of the Constitutional Court, present version.
3828 Article 74, paragraph 3 of the Rules of the Constitutional Court, present version.

not been carried out, in the event of delay or in the event that a communication on enforcement has not been submitted, the Constitutional Court will establish that its decision has not been enforced, and it may also determine the manner in which the particular decision needs to be enforced. This ruling shall be communicated to the competent State prosecutor, that is to the authority competent to carry out the enforcement as determined by the Constitutional Court.[3829] Communicating the ruling to the State Prosecutor's Office may provoke the institution of a criminal procedure, for, under Article 239 of the Criminal Code of BiH,[3830] refusal, prevention or some other form of obstructing the official person from enforcing an enforceable decision shall constitute a criminal act with a prescribed punishment of six months to five years imprisonment.

(b) Human Rights Chamber, *i.e.*, Human Rights Commission within the BiH Constitutional Court

Under Annex 6, the Human Rights Chamber has no means whatsoever at its disposal for the enforcement of its decisions. The signatories to Annex 6, under Article XI.6 of Annex 6, are obliged to fully implement the decisions of the Chamber. Besides, under Article XI.5 of Annex 6, the Chamber is obliged to inform the OHR, the Secretary General of the Council of Europe and the OSCE about its decisions. In the decision, the parties to the proceedings are regularly given a time limit within which to inform the Chamber of the activities they undertook in order to enforce the decision. The objective thereof is to make it possible for the Chamber to follow the enforcement of its decisions. If no report has been submitted, or if it carries confirmation as to the omissions in the enforcement of a judgment, the Chamber shall inform the OHR. In general, in addition to the OHR, the Chamber also informs the OSCE and IPTF of the adoption of provisional measures, in order for all the organisations to be able to follow up on whether the defendant has complied with the said measures.[3831]

A norm was enacted as part of the Rules of the Human Rights Commission within the BiH Constitutional Court from 2005 which is similar to the norm referred to in Article 74 of the Rules of the BiH Constitutional Court, present version. Namely, the Commission establishes the measures and orders to be employed, as well as the time limit within which to enforce the decision (Rule No. 62, paragraph 2). All State authorities are obliged to enforce the decisions of the Commission within the scope of their legal and constitutional competence (Rule No. 62, paragraph 1).

3829 Article 74, paragraph 6 of the Rules of the Constitutional Court, present version.
3830 *OG of BiH*, No. 3/03, 32/03, 37/03, 54/04 and 61/04.
3831 *HRC*, 2000, p. 12.

c. Enforcement of decisions in practice

(a) BiH Constitutional Court

AP 1/05 Novaković	20060401
AP 1226/05 Leko *et al*.	20061117
AP 129/02 N. H.	20050128
AP 129/04 Hadža *et al*.	20060527
AP 214/03 Privredna banka d.d. Sarajevo	20060401
AP 53/03 Kuburić	20060401
AP 602/04 Kožulj *et al*.	20060527
AP 701/04 Krupić	20060401
AP 703/04 PP "IDS" Novi Travnik	20060401
AP 854/04 "Vilkom" d.j.l.	20060401
U 4/04-M (partial decision) Tihić "Flag, coat of arms and anthem of FBiH i RS"	20061118
U 44/01 Names of "Serbian" cities	20040227
U 44/01 Names of "Serbian" cities	20040922
U 5/98 Izetbegović III – Constituent peoples	20000914 *OG of BiH*, No. 23/00

Part of the enforcement of the decisions of the Constitutional Court is also the obligation of the relevant authorities, which were ordered to carry out the enforcement, to submit a report on enforcement.[3832] Enforcement of the decisions of the Constitutional Court in practice depends to a large extent on the type of a decision, *i.e.*, on the legal remedies that were ordered. When it comes to decisions in the procedures of abstract control (review) of constitutionality, wherein the BiH Constitutional Court established violations of the Constitution of BiH, then it is necessary to emphasise that the regulation laid down in Article 63 of the Rules of the Constitutional Court, present version, which contains the rule and the exception, is a reaction to the desperate practice of enforcement in the early years. Thereby the rule relates to the direct quashing of an unconstitutional regulation, and the exception relates to setting the time limit for the legislature to adjust and correct regulations. It proved that the legislature was usually not able or was unwilling to comply with the order of the Constitutional Court to harmonise unconstitutional regulations. Accordingly, for instance, in Case No. U 44/01, the Constitutional Court first determined a three-month time limit for harmonisation of the names of the cities regulated by law. After the expiry of the time limit, during which the legislature remained passive, the BiH Constitutional Court, by its decision, established that the provisions,

3832 The Constitutional Court shall issue a ruling of non-enforcement of the decision if the responsible authority fails to submit to the Constitutional Court the report on enforcement, even under the presumption that other authorities or the injured persons themselves confirm that the decision has been enforced (AP 129/02, paragraph 7).

which were not in conformity, ceased to be in effect, and acted instead of the legislature, *i.e.*, substituted it so as to (re)establish the constitutional names of the cities – which were, mainly, in effect earlier – until such time as the legislature adopted some different regulation.

Although the representatives of the international community in Bosnia and Herzegovina do not have a formal role in the implementation of the decisions of the Constitutional Court – unlike their role in Annex 6[3833] – their contribution in this sense, should, nevertheless, not be disregarded. Precisely the procedures of abstract control (review) of constitutionality of norms before the Constitutional Court, at times, had wide-ranging and profound consequences for the State organisation and the strengthening of the legal state in Bosnia and Herzegovina. Although legally binding and directly enforceable, and with specific orders for action, these decisions oftentimes became *politicum*, so that the national actors, usually with great resistance, initiated reforms necessary for the implementation of such judgments. A prominent example of this is the 3rd partial judgment in Case No. U 5/98, which obliged the Entities to implement thorough constitutional reforms. The High Representative considered that the constitutional amendments enacted by the Entities' legislatures in this respect were not satisfactory and sufficient, and he corrected them himself.[3834]

Since 2001 the Constitutional Court has adopted 22 decisions on the merits within the scope of abstract and concrete control (review) of norms in accordance with Article VI.3(a) and (c) of the Constitution of BiH. Violations were established in 12 cases. Four times the Court quashed the challenged general act right away, and in eight cases it set the time limit for harmonisation.[3835] Of the eight cases, six cases were related to the harmonisation of unconstitutional provisions. Three of the six decisions, that is 50%, had already been implemented at the time of their publication.[3836]

When it comes to appeals under Article VI.3(b) of the Constitution of BiH the statistics look better.[3837] In the period from 1 January 2005 to 1 June 2008, the Constitutional Court adopted a total of 261 decisions on the merits, wherein it established violations of fundamental rights. Of that number, 23 decisions have not been enforced (about 9%) at the time of collecting data for these

3833 See Article XI.5 of Annex 6.

3834 Compare with *Decision on Constitutional Amendments in Republika Srpska* and *Decision on Constitutional Amendments in the Federation*, both dated 19 April 2002 <www.ohr.int/decisions/archive.asp>.

3835 Article 63, paragraph 4 of the Rules of the Constitutional Court, revised text.

3836 Internal statistics, authors' archive.

3837 Statistics and authors' archive.

statistics. According to the internal statistics of the BiH Constitutional Court on implementation of decisions for the period from 1 January 2007 to 1 January 2008, in 2007 the Constitutional Court adopted a total of 99 decisions on the merits wherein it established violations of human rights. Of this number, 43 judgments were implemented in full by 1 June 2008, and in the remaining 43 cases certain activities have been undertaken towards their enforcement, or such judgments were declared objectively impossible to implement; only in three cases have the authorities competent for enforcement failed to undertake any activities whatsoever in this respect.[3838]

Apart from a minor number of cases where decisions were openly ignored,[3839] it is necessary to mention that decisions awaiting enforcement are usually those decisions in which implementation is complex, for the process requires joint action by more authorities,[3840] or the implementation involves more persons, or it entails substantial expenditure.[3841] Statistics presented above and which appear optimistic at first sight, nevertheless, require a certain correction considering particular individual cases.

At the time of preparing the statistics, of all the adopted decisions of the Constitutional Court in the period from 1 January 2005 to 1 June 2008, of 261 decisions only 23 have not been enforced. The 23 decisions involved a total of 487 appellants. Two significant decisions mentioned above as unenforceable[3842] involve a total of 459 appellants. The remainder of 21 unenforceable decisions involve 28 appellants.

Also questionable is the conduct of the ordinary courts with respect to the orders by the Constitutional Court to complete cases in an expedited procedure when establishing a violation of the right to a fair trial within a reasonable time. In any case, the Constitutional Court examines whether the ordinary courts have complied with such orders. Thus the Court established a number of times that the completion of proceedings was not expedited noticeably even following the proceedings before the Constitutional Court and the granting of an appeal.[3843]

3838 Compare with, for instance, AP 701/04.
3839 Compare, in this respect, with AP 214/03, paragraph 7; AP 1/05.
3840 Compare with, for instance, decisions on the fate of missing persons: AP 129/04; AP 1226/05.
3841 Compare with, for instance, decision on “war damage”: AP 703/04.
3842 AP 129/04; AP 1226/05.
3843 Compare with, for instance, AP 53/03; AP 602/04.

(b) Human Rights Chamber

CH/00/5092 Čišić	20070905
CH/00/6101 Maglajac	20050907
CH/02/12468 *et al*. Š. Kadrić *et a*l. “War damage”	20060613
CH/02/12555 *et al*. Husković *et al*.	20061220
CH/02/8679 *et a*l.-A&M	20060405
CH/02/9129 Salapura	20060607
CH/03/14688 *et al*. Kahvić *et al*.	20040908
CH/03/14688 *et al*. Kahvić *et al*.	20060208
CH/03/15010 Stjepanović	20051215
CH/96/15-A Grgić	19970215
CH/96/1-M Matanović	19970711
CH/96/21-M Čegar	19980406
CH/96/29-A&M Islamic Religious Community of BiH, cases related to mosques in Banja Luka	19990611
CH/96/31-M Turčinović	20080311
CH/98/514 Putnik	20070509
CH/99/2177-A&M Islamic Religious Community of BiH, cases related to Muslim cemeteries in Prnjavor	20000211
CH/99/2289-A&M M. G.	20050803
CH/99/3196-A&M Palić	20050907

Precisely in the initial stage of work, the resistance of the State authorities in enforcing decisions of the highest judicial bodies was significant. In the first years, both the State and the Entities refused to cooperate with the Human Rights Chamber by preventing the conduct of the very proceedings, and by not always enforcing its decisions, *i.e.*, when the decisions were contrary to State or Entity interests.[3844] The Chamber would only receive replies to its requests for an official stance after renewed enquiries, if at all.[3845] In some cases, the Chamber would have difficulties suppressing doubt that the contracting parties had falsified documents in order to prove that they were not responsible for some purported violation of obligations referred to in Annex 6.[3846] In other cases, agents for the defendant failed to appear at oral hearings, or left the hearings, without giving a chance to either the Chamber or the appellant to cross examine them.[3847] The delaying tactics also involve the case of a short-term “resignation” of the agent for the defendant. In the case of the *Ferhadija*

3844 Compare with *HRC*, 1998, p. 16 *et seq*.; *HRC*, 1999, p. 1, 8-11; *HRC*, 2000, p. 12; *HRC*, 2002, p. 5.

3845 Compare with, for instance, CH/96/1-M, paragraph 3 *et seq*., paragraph 31; CH/96/15-A.

3846 Compare with, for instance, CH/96/1-M, paragraph 38 *et seq*.

3847 Compare with, for instance, CH/96/29-A&M, paragraph 21; CH/96/21-M, paragraph 7.

Mosque it happened no less than on two occasions.[3848] In the same case, due to pressure by the Mayor of Banja Luka and one of the witnesses to the proceedings, no less than on two occasions the Chamber was prohibited from using a public place for a public hearing.[3849] It even happened that a judge would fail to attend sessions of the Human Rights Chamber, in order to comply with some directive of the National Assembly of the Republika Srpska, which was rather symptomatic.[3850] In another case there was an attempt to prevent a burial from taking place, which implied a violation of a provisional measure of the Human Rights Chamber, so that it was possible for the burial to take place only with the support of the IPTF.[3851] Given mass obstructions, the fact that the publication of decisions of the Chamber usually brought about disturbingly little interest from the contracting parties came as no surprise.[3852] The dismal result of the enforcement of decisions in the initial years of its work had seriously brought into question the effectiveness and credibility of the Chamber.[3853] The Republika Srpska had particularly contributed to the failure of the Chamber in the first years of its operation. Despite the solid legal basis referred to in Annex 6, lack of significance of decisions in practice would soon bring about the dissolution of the institution. When it comes to the State, insufficient cooperation with the Chamber had been the result more of deficiencies in the organisation of the State, and deficiencies of financial and personnel-related matters within the competent bodies, and less the result of a boycott.

Only in 1999 did cooperation of the Chamber with the signatories to Annex 6 improve with respect to the proceedings, with the assistance of their agents, but not in relation to the implementation of the decisions of the Chamber.[3854] In 2000 it was related, primarily, to the Federation of BiH,[3855] whereas in the Report from 2001 the Chamber mentioned difficulties in the implementation of its decisions, primarily, in the Republika Srpska and at the State level. At the end of 2002 the signatories to Annex 6 fully complied with the orders of the Chamber in 95 out of 151 cases ordering certain activities; in 28 cases they partially complied with the orders, and in the remainder of 28 cases they did not whatsoever.[3856] Statistics shows that on 31 December 2003, regarding 669

3848 Compare with CH/96/29, paragraphs 12, 20.
3849 Compare with CH/96/29, paragraph 18 *et seq*.
3850 Compare with CH/96/29-A&M, paragraph 24; the order to boycott was a reaction to the arbitration decision on the status of the Brčko District, which the then elite of the Bosnian Serbs disliked. See p. 102.
3851 Compare with CH/99/2177-A&M, paragraph 33.
3852 *HRC*, 1998, p. 17.
3853 *Nowak*, 2004, p. xvi *et seq*.
3854 *HRC*, 2000, p. 5.
3855 *HRC*, 2001, p. 5 *et seq*.
3856 *HRC*, 2003, p. 17.

applications filed, the Chamber adopted 240 *decisions on the merits*, of which number in 212 cases the parties were ordered to undertake certain measures. In the remaining 28 decisions no violations whatsoever were found (18), or no orders were issued despite the established violations (10). Of 212 decisions containing one or more orders, the contracting parties referred to in Annex 6 implemented in full 117 (55%), and 38 partially (18%). The remaining 57 decisions (27%) have not been implemented up until the mentioned time.[3857] Here, one should mention the decisions which are irrelevant for enforcement, which is more than 1,200 decisions on inadmissibility, and 1,000 strike out decisions[3858] – as part of these 2,200 decisions 5,574 applications were solved. These figures do not reflect in percentage the share of applications wherein – had the Chamber decided on the merits – violations of Annex 6 would have been established, *i.e.*, which would have been well-founded eventually. For, a significant number of decisions on striking out related to requests which were similar to requests that the Chamber had deliberated on earlier, wherein violations had been found. The reason why the Chamber had not deliberated on the merits in such cases at all was the fact that some of these cases had been partially or fully resolved as time passed without the involvement of the Chamber, whereby requests were withdrawn, or because the Chamber no longer deemed the decision on the merits relevant (cases of restitution of property); or because it concerned the cases where the operative part of the decision of the Chamber, as well as the order from some other decision, may have been applied to other applicants, so that the decision on the merits – according to the opinion of the Chamber – was simply not necessary (for instance, the *Srebrenica* cases).

The Chamber would usually order the parties to submit within a given time limit a report on what steps they have undertaken in order to implement the decisions of the Chamber. The applicants were also advised of their right, if necessary, to request an order for the undertaking of other measures. If the parties failed to submit their respective report within a given time limit, the Chamber would forward the case to the Office of the High Representative. The parties to the proceedings also informed the OHR on a regular basis of the current state of affairs. In addition, the Chamber also forwarded its decisions to the Secretary General of the Council of Europe, as well as to the OSCE.

Soon after the Chamber commenced operating, the OHR assumed responsibility to oversee the implementation of the decisions of the Chamber. That implied

3857 *Human Rights Chamber for BiH* – 1996-2003 – Decisions on Admissibility and Merits – Status of Compliance, 31 December 2003, authors' archive.

3858 *Nowak*, 2004, p. xi *et seq*.

also the necessity to undertake measures in order to ensure compliance with the decisions of the Chamber. The implementation of the decisions was coordinated by the Office of the High Representative in cooperation with the responsible authorities and other international organisations. In cases where implementation was problematic, the High Representative would intervene directly. That implied the following: first it was examined whether the domestic legal regulations frustrated the implementation. If that was not the case, the OHR would request from the competent authorities to implement the decision directly. In cooperation with the national authorities and in coordination with the international actors in the field, necessary steps would be discussed. On the basis of the opinion of experts, if necessary, the OHR would officially request the implementation of a decision. If all these measures failed to yield a satisfactory result, the High Representative would also use the option of dismissing those who were politically responsible for the situation.[3859]

Thus, the OHR had a significant role in implementing provisional measures. In the *Turčinović* Case,[3860] a violation of the provisional measures of the Human Rights Chamber was redressed through the intervention of the OHR.[3861] The OHR also amended the provisions of Article 3(a) of the Law on Cessation of the Application of the Law on Abandoned Apartments, when it comes to the so-called JNA cases, as it was established that they violated the human rights of applicants. In the same manner in some other cases, on the basis of the decisions of the Chamber, first and foremost in the area of property and occupancy rights, the OHR undertook legislative activities.[3862] Also the Mayor of Banja Luka was dismissed, among other things, for manifestly refusing to implement the decision of the Chamber in the case of the *Ferhadija* Mosque.[3863] After enormous pressure by the OHR and thanks to the efforts of the IPTF, only in 2001 the bodies of the members of the *Matanović* family, which had gone missing in 1995, were found in a well and then buried.[3864]

The defendants would usually limit themselves to enforcing a particular decision of the Chamber, and avoided the consequent implementation of decisions in similar cases, so that injured persons would usually have to obtain individual decisions from the Chamber.[3865] The implementation of decisions of the Chamber

3859 *OHR*, Memorandum on the procedure of enforcement of the decisions of the Chamber, authors' archive.
3860 CH/96/31.
3861 *HRC*, 1998, p. 11 *et seq*.
3862 Compare with *Nowak*, 2004, p. xvi *et seq*.
3863 *HRC*, 2000, p. 1, 5 *et seq*.; compare also *Nowak*, 2004, p. xvi *et seq*.
3864 *HRC*, 2000, p. 4; *HRC*, 2004, p. 13.
3865 *HRC*, 2000, p. 5, for instance, *Zahirović.*

was deficient also in the areas requiring administrative or structural changes, for instance, in the process of privatisation or economic reform.[3866]

In the report for 1999, in accordance with the aforementioned, the Chamber established that in almost all the cases where the decisions of the Chamber were eventually implemented, intensive measures of the OHR were necessary.[3867] Other international actors in the State, such as the IPTF and OSCE, also assisted in the practical implementation of the decisions of the Chamber in a similar manner. In 2002, attempting to connect and strengthen coordination of its activities (*streamlining*), the international community transferred the major part of responsibility for implementation of the decisions of the Chamber to the OSCE.[3868]

"By handing over the baton" to the Human Rights Commission within the BiH Constitutional Court, the policy of implementation of decisions somewhat changed. In 2004 the Commission focused on decisions on admissibility, thereby adopting only 47 decisions on the merits. In that period, the number of procedures establishing the reasons for which decisions were not implemented was lower. From 2005 to 2007[3869] the Commission conducted the procedure establishing the state of affairs, or any other activities of the authorities under Annex 6, in connection with the enforcement of its decisions, solely upon request. In that period the Commission issued 24 rulings on a failure to implement decisions, although between January 2004 and December 2006 it decided on the merits of 1,962 filed requests.[3870] A small number of the rulings on the failure to implement in comparison with the mentioned number of decisions on the merits should not be misleading or obscure the true statistics on implementation. That the number of unimplemented decisions is indeed much higher is also attested to by the evaluation of reports of the defendants under Article 64, paragraph 4 of the Rules of the Human Rights Commission within the BiH Constitutional Court (version from 2005), which was drafted at the initiative of the Constitutional Court in July 2007. While minor monetary amounts were paid out in all cases, the carrying out of natural restitution and reinstatement to work created huge problems. What is more, the fact that the European Court established on several occasions a violation of the right of access to court as a result of the failure to enforce decisions of the authorities

3866 *Nowak*, 2004, p. xvi *et seq*.
3867 *HRC*, 2000, p. 4.
3868 *Nowak*, 2004, p. xvi *et seq*.
3869 On 1 January 2007 the Constitutional Court of BiH took over the pending cases (around 600 cases) from the Human Rights Commission within the BiH Constitutional Court.
3870 Statistics of the author.

under Annex 6,[3871] for which BiH was responsible, suggests that not all injured persons exercised their right to appeal with the Human Rights Commission within the BiH Constitutional Court over a failure to enforce decisions.

When looking at the period from 1996 to 2003, one can establish that the implementation of decisions of the authorities under Annex 6 was, in the main, carried out as a result of political pressure, and to avoid certain political consequences, and to a lesser degree as a result of conviction. Thereby it is necessary to emphasise that injured persons or voters, in general, seldom exerted such pressure. Such pressure was, mainly, exerted by the international community, which threatened reducing or cancelling financial assistance, or even with dismissing the persons responsible. Between 2004 and 2007 the Human Rights Commission within the BiH Constitutional Court found itself in situations that ranged from open obstruction to technical inability to implement decisions. Primarily, in cases concerning the establishment of truth (for instance about missing persons) or compensation of damage, the parties responsible oftentimes, in general, resisted the enforcement (refused or ignored) or, to say the least, essentially opposed the enforcement.[3872] There were cases of manifest non-compliance with orders, such as, for instance, in case CH/02/12468 *et al*., whereby the ordinary court, which was ordered to adopt a new decision, refused to do so and tried to advise the Commission that it had interpreted erroneously the regulations to be applied.[3873] Even excessively lengthy proceedings would seldom be completed within the time limit ordered by the Human Rights Commission within the BiH Constitutional Court.[3874] In other cases, due to the manner of the functioning of the budget system, the defendant was unable to pay the ordered damages.[3875] In property-related issues, owing to the experiences of poor implementation of the Human Rights Chamber's judgments, the Human Rights Commission within the BiH Constitutional Court started applying the practice of ordering the payment of damages in the amount of the market price value in the event of a failure to carry out the reinstatement within the given time limit.

3871 For instance, *Jeličić v. Bosnia and Herzegovina* of 13 October 2006; *Karanović v. Bosnia and Herzegovina* of 20 November 2007; indirectly also *Sobota-Gajić v. Bosnia and Herzegovina* of 6 November 2007.

3872 Also compare with the cases on missing persons CH/02/12555, or the order by the Chamber to clarify the fate of colonel *Palić* in Case No. CH/99/3196; CH/03/15010, paragraph 107 in connection with the order No. 7; see also CH/02/8679 on the Algerian Group, prisoners from Guantánamo, as well as CH/03/14688 *et al*.

3873 Compare also with CH/98/514, CH/99/2289.

3874 See, for instance, CH/02/9129.

3875 Compare with CH/00/5092 and CH/00/6101.

5. Closing observations and summary

CH/98/375 *et al*. Đ. Besarović *et al*.	20050406

Overall, one may say that both courts had at their disposal a rather wide range of instruments in order to be able to react, targeting various violations of human rights and freedoms. Neither court focused solely on the mere establishment of violations. By using the possibility to issue certain measures and orders, both the BiH Constitutional Court and the Human Rights Chamber could issue specific instructions, and, if necessary, they could combine such instructions with interim legal protection measures (interim measures). The goal was to act preventively in relation to violations of human rights and freedoms, and to redress the established violations in the future, or for damages for such violations to be paid. The competences of the BiH Constitutional Court, being a national court within the constitutional framework, are greater than the competences of the Human Rights Chamber, since the BiH Constitutional Court may directly quash unconstitutional acts (for instance, judgments and laws). The Human Rights Chamber and the Human Rights Commission within the BiH Constitutional Court had to limit themselves to obliging domestic authorities to, for instance, adopt a new decision, or to amend the law. Thus, their intervention within the national legal system, when it comes to the authorities under Annex 6, was only indirect, whereas the intervention of the BiH Constitutional Court might as well be direct.

When it comes to the history of implementation of decisions of both courts, one may agree with *Nowak*,[3876] who said that the rate of implemented decisions of the Human Rights Chamber, in terms of *quantity*, was "impressive indeed", whereby, one should not overlook the fact that such implementation was insufficient in terms of *quality*. The implementation usually depended – as admitted by the Chamber[3877] – almost entirely on the more-or-less massive intervention by the OHR, SFOR or other international factors. The situation is similar when it comes to the judgments of the BiH Constitutional Court, regardless of the fact that they have direct effect in the national legal system. Nevertheless, the critique by *Sekulić*,[3878] who said that success in implementing human rights in individual cases, which was made possible under the pressure of the international factor, and against resistance put up by the other ethnic groups, is symbolic in nature, and is not in conformity with the concept of these two highest courts.

3876 *Nowak*, 2001.a, p. 791.
3877 Compare with *Nowak*, 2004, p. xvi *et seq*.
3878 *Sekulić*, 1999, p. 280.

> The practice in implementation of decisions in the initial years has taught both courts that their respective decisions must be accurate. The more specified a decision – precisely in relation to the necessary measures for removal of the unconstitutional situation – the less room for the obstruction thereof. Namely, the cause of failure to enforce decisions is not always the resistance of the competent authorities, but also very often the lack of expert knowledge and experience. Assistance in technical implementation, in the form of instructions to undertake certain specific measures, may be understood as intervention which falls under the jurisdiction of the executive authority or legislation. However, one should emphasise that the BiH Constitutional Court and the HRC for BiH, *i.e.*, the Human Rights Commission within the BiH Constitutional Court, must leave enough room for the authorities in charge of the implementation of their respective decisions to manoeuvre, and that they should not excessively interfere with the very enforcement. In other words, their intervention should end by providing solely a necessary framework required by the Constitution. A successful example of such joint action of various State authorities is the decision of the Human Rights Commission within the BiH Constitutional Court in the Case CH/98/375, in which the Commission provided eight specific orders, the joint goal of which was to enact a law at the State level.
>
> Due to the non-existence of a developed legal culture in which State authorities would comply with the decisions of courts, in particular with decisions of the highest courts, a strong instrument was employed in Bosnia and Herzegovina in the form of a threat of sanctions in the event of failure to enforce or hinder the enforcement of constitutional decisions, which goal was the fight against obstructions (see, Article 239 of the Criminal Code of BiH). Practical experiences with the mentioned criminal code are less convincing and good. The State Prosecutor's Office has encountered difficulties, primarily in the efforts to individualise responsibility for the implementation of decisions of the BiH Constitutional Court and the Human Rights Chamber, *i.e.*, the Human Rights Commission within the BiH Constitutional Court.[3879]

It is clear that the decisions of the independent judicial authorities, seeking political, economic and social changes against the will of political elites, and as often as not against the will of various ethnic groups, will encounter resistance, particularly when bearing in mind the fact that BiH is a State which has been permanently divided and which has gone through a double process of transition. The fact that the implementation of judgments required the assistance of international actors is also important and it should not be forgotten as part of

3879 In 2006, on behalf of the Human Rights Commission within the BiH Constitutional Court and the Constitutional Court of BiH, the authors attended an official meeting with representatives of the Prosecutor's Office of BiH where this problem area was addressed.

the concept of mechanisms for peace stabilisation. However, this assistance does not bring into question either the efficiency or necessity of this instrument for the strengthening of the legal state. In strong democracies also, where the principle of the legal state is respected, enforcement of court judgments depends largely on the strength and persuasiveness of the very judgments issued, and on such judgments being accepted. Implementation of a judgment, considered to be unjust and inappropriate, does not meet with resistance solely in countries in transition. Yet, institutional obedience is apparently greater in the environments where a balance has been struck between the different levels and types of authorities than in the environments where, following decades of non-democratic authority, years-long conflict, with elements similar to civil war, had taken place.

One should also mention that the decisions of the Human Rights Chamber and the BiH Constitutional Court in key areas of State organisation, return of refugees, overcoming the past, legal protection and protection against discrimination, as a rule, were *conditio sine qua non* for the political activities of national and international authorities. Only the effect that decisions of these almost entirely independent and respected judicial bodies have had – since they were a model, and served for identification of certain activities – made possible for the initiation of reform in the mentioned key areas and for individual rights to be respected in a peaceful environment and atmosphere.

Article VII – Central Bank

Central Bank. There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

1. The Central Bank's responsibilities will be determined by the Parliamentary Assembly. For the first six years after the entry into force of this Constitution, however, it may not extend credit by creating money, operating in this respect as a currency board; thereafter, the Parliamentary Assembly may give it that authority.

2. 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, all of whom shall serve a six-year term. The Governor, who shall not be a citizen of Bosnia and Herzegovina or any neighboring state, may cast tie-breaking votes on the Governing Board.

3. Thereafter, the Governing Board of the Central Bank of Bosnia and Herzegovina shall consist of five persons appointed by the Presidency for a term of six years. The Board shall appoint, from among its members, a Governor for a term of six years.

A. Introduction

There is only one central bank in Bosnia and Herzegovina (BiH). In most countries, that would be an unexceptional statement. But in BiH it makes the Central Bank of Bosnia and Herzegovina (hereinafter: CBBiH) rather unusual amongst financial sector organisations. The fact that there would be only one central bank in the country was specified in Annex 4 of the Dayton Peace Agreement, the Constitution of Bosnia and Herzegovina. The Constitution of BiH adopted following Dayton further elaborated the status of the CBBiH. Article III specified monetary policy as one of the responsibilities of the institutions of BiH while Article VII set out some of the key characteristics and responsibilities of the CBBiH.

On 30 October 1996, the Presidency of BiH appointed three local members of the Governing Board. They were *Manolo Čorić* (RS) and *Kasim Omićević* and *Jure Pelivan* (Federation of BiH). All of them were very senior and experienced

persons. On 5 November 1996 the IMF, in consultation with the BiH Presidency, appointed *Serge Robert* of France as Governor. The IMF Resident Representative in BiH, *Alessandro Zanello*, assumed the responsibilities of Governing Board Secretary. While the CBBiH as an institution did not commence its central banking functions until August 1997, its Governing Board was established nine months before that. Its first task was to develop a complete CBBiH Law based on the principles set out in the Constitution.

They worked extremely intensively over the next six months. There was also a lot of international input, primarily from the IMF and the US Treasury. Once the decision was taken at an early stage that BiH would introduce a currency board arrangement, and this was specified in the Constitution, many of the key policy elements of the law were determined. Currency boards operate under clear and detailed 'rules' and these are all incorporated into the CBBiH Law. The discussions and negotiations on the draft law were therefore about secondary issues but there were lengthy debates nonetheless on the following issues:[3880]

- the degree of decentralisation there would be in the CBBiH's structure (the CBBiH has a Head Office in Sarajevo, three Main Units in Banja Luka, Mostar and Sarajevo and two branches in Brčko and Pale);
- whether or not the CBBiH would also be the banking supervisor (two Entity Banking Agencies were established with the CBBiH having a relatively minor 'coordination' role);
- the way in which the country's international reserves would be managed (as one pool or two? A single pool managed by the Head Office was agreed to);
- the name and design of the new Bosnian currency (the name was set out in the law, the *Konvertibilna Marka* (*convertible mark*). The design process took many months of discussion.

The Board developed a full legal text of ten chapters and seventy-six articles in this six-month period which was endorsed by all four Governing Board members. It was formally adopted by the Presidency on 28 May 1997 and adopted by the Parliamentary Assembly on 20 June 1997. While there was a lot of international input into the CBBiH Law, the law was a good example of co-operation and co-ordination by locals and internationals as the law was approved and promulgated through the Bosnian political process.

3880 Based on the following articles in '1997-2007', the CBBH's Tenth Anniversary Monograph: *Serge Robert*, 'Setting up the CBBH' (pages 6-9); *Kasim Omicevic*, 'The Legal Framework of the CBBH' (pages 24-37). CBBiH, Sarajevo, 2007.

Article 2 of the 1997 Law on the Central Bank of Bosnia and Herzegovina specified the following objectives and tasks for the CBBiH:

1. The objective of the Central Bank shall be to achieve and maintain the stability of the domestic currency by issuing it according to the rule known as a currency board.

2. The basic tasks of the Central Bank performed under the authority of its Governing Board shall be:

(a) to formulate, adopt and control the monetary policy of BiH by issuing the domestic currency at the exchange rate as stipulated in Article 32 of this Law with full backing in freely convertible foreign exchange;

(b) to hold and manage the official reserves of the Central bank in a safe and profitable way;

(c) to promote or to establish and maintain appropriate payment and settlement systems;

(e) to coordinate the activities of the agencies responsible for bank licensing and supervision in the Entities;

(g) to receive deposits from BiH and from commercial banks to meet reserve requirements. The Central bank may also hold deposits of the Entities and other public institutions and other reserves of commercial banks of these so desire;

(h) to put into and to withdraw from circulation the domestic currency … adhering strictly to the currency board rule defined in Article 2, Section 3 of this Law.

Following further intensive work by the first Governing Board, with considerable technical assistance from the IMF, the CBBiH commenced its operations on 11 August 1997. The financial environment in which it started was a very complex one. Two central bank-like institutions existed in the National Bank of BiH in Sarajevo and the National Bank of the RS (both were branches of the former National Bank of Yugoslavia that had become separate institutions during the war), the government-owned Payments Bureaus played a major role in the banking and payments systems, though there were essentially three separate regional Bureaus in BiH, and there were four currencies in use in the country, the Bosnian Dinar, the Yugoslavian Dinar, the Croatian Kuna and the German Mark.

In August 1997, the IMF offered *Peter Nicholl*[3881] the position of Governor of the CBBiH. Mr. Nicholl had taken part in the analytical and drafting work that preceded the passing of the Reserve Bank of New Zealand (RBNZ) Law in 1987. This law put in place a new legal and operational structure under which the RBNZ has operated since that time and explicitly gave the RBNZ operational independence for the first time.

B. Constitutional Musts and the CBBiH Law

For public sector organisations, including central banks, one of the most important things that will impact the way they will be governed and perform is the statutory basis under which they operate. The need for very specific and clear laws, structures and processes is probably greater in new countries or in countries going through transition, such as BiH, than in countries with long established traditions of sound behaviour where institutions are largely trusted by citizens. A public sector agency like a central bank should therefore take a very close interest in its statute as a well-structured statute can be an immense help to the institution by giving clear guidelines for its role and operations. A good law can also protect the institution and its Governor from political criticism and interference and from public criticism. The criticisms will still come but they are easier to respond to if the behaviour or decisions of the institution are clearly consistent with its statute.

The Parliamentary Assembly was mandated to adopt a Law on the CBBiH to regulate its responsibilities. The Constitution mandated that there would be a single central bank in BiH. It also mandated that for the first six years it would operate as a strict currency board. In particular, the Constitution specified that the Central bank could not extend credit to anyone during this six-year period.[3882] The Constitution was also quite specific on the structure of the CBBiH's Governing Board.

There were a number of important aspects to be taken into account in drafting the CBBiH Law.

3881 *Peter Nicholl* was Governor of the CBBiH from November 1997 to December 2004.

3882 During the initial six-year period, both the Presidency of BiH and the Parliament supported the continuation of these currency board arrangements. At the time of the publication of this document the mentioned arrangements are still been in force.

1. Strict Currency Board

In the first place, the statute would have to set out a clear objective. The objective should be unambiguous and achievable. This allows everyone to know what the institution is charged with doing and what it will (or should be) judged against. It is appropriate that the objective of monetary policy is set by the politicians as part of their overall mix of policy objectives and tools.

This is the case in the CBBiH Law. The CBBiH operates as a **very strict currency board.** Its target is a fixed exchange rate against the anchor currency[3883] and the maintenance of convertibility of the local currency. The main reasons this type of monetary policy was adopted in BiH are first, it provided a firm nominal anchor for the country's monetary policy. This was considered critical for the very uncertain post-war economic environment BiH faced. Second, it took into account the difficulty there would be in making political decisions in the complex political environment in BiH. Additional reasons were that in 1997 there were virtually no financial markets through which to implement market-based monetary policy and currency boards were working well in the Baltic States.

This objective satisfied the key characteristics of clarity, achievability and accountability. It has had a significant and positive impact on the way the CBBiH is structured, performs and is judged.

2. Constraints to be regulated by law

If Parliament wishes to constrain the central bank's operational discretion, the constraints ought to be specified in the law. While it is not necessarily recommendable to constrain the operational independence of a central bank, *if* the Parliament or the Government do want to impose constraints, they should do so in the law so that everybody knows what those constraints are, and not do it by pressuring the central bank in other less transparent ways.

The CBBiH Law does place a number of operational limitations on the CBBiH:

- no lending to the government;
- no "lender of last resort" facility for banks;
- no dealing in BiH securities.

3883 The KM was fixed against the German Mark (DM) at an exchange rate of 1-1. This allowed the two currencies to be used in parallel, which was what happened in the early years. When the DM was replaced by the Euro, the KM link was changed to the Euro at the rate that the DM had been fixed to the Euro, which is 1 Euro = 1.95583 KM.

There were good reasons for these constraints in 1997. First, the past experiences of Bosnians had led them to have little trust in their institutions. Second, the political, economic and social situation in BiH was very unstable when the CBBiH Law was being drafted and this made discretionary policies doubtful, to say the least.

This illustrates that the precise legal structure of the central bank's objective and the degree of operational independence it is given do need to be adapted to the local realities and environment. These things can also change over time. For example, it is possible that as the economic and political situations in BiH become more stable and the breadth and depth of the financial markets develop, some of the current operational restrictions set out in the CBBiH law could be relaxed or removed. But the preconditions for doing this have still not been met in BiH and the strict currency board remains the best monetary policy option for BiH as it gives the country an important element of economic stability in an environment that still has considerable instability.

3. Operational Independence

Subject to the requirements and, in the case of BiH, the limitations imposed by the bank's statute, the central bank should be given clear operational independence. This is critically important for consistent and unbiased performance. This independence needs to be clearly and unambiguously specified in the bank's law.

Article 3 of the CBBiH Law satisfies this criterion and this operational independence has been critical for the successful establishment and development of the CBBiH. But operational independence also needs to be implemented in practice. This was an issue in BiH. At times, the Governor had to assert the CBBiH's independence quite firmly, in order to ensure that that the CBBiH's independence was respected. This was necessary in two directions. Politicians needed to be convinced that the CBBiH was not legally required to and was not in practice going to take political direction in its day-to-day actions. In almost all such cases, political pressures could be defeated by reference to the CBBiH Law imposing certain actions or prohibiting certain others. Without such clear guidance from the law, these political battles in the early years of the CBBiH may have been difficult or impossible to win. Secondly, the CBBiH staff, who were used to working in a completely different environment, needed to be convinced that the Bank didn't need to and was not going to seek the minister's view before taking an action. The Bank would inform him/her after having taken a certain measure.

The independence of the CBBiH from politics is now well-entrenched. It continues to be bolstered strongly by the international institutions in BiH and this will continue. It also has a high level of public support. Calls to use the CBBiH more actively for development purposes, and such calls do arise from time to time, are usually seen as attempts by the politicians to gain control of the central bank's policy levers. They have not to date gained any widespread public support – more often the opposite in fact.

A central bank also needs to have financial independence to give substance to its statutory operational independence. In the CBBiH Law, the CBBiH had financial independence. It was not part of the State budget process, it had potential sources of income and it only paid a dividend to the State budget after its capital reached a specified level (10% of its KM liabilities). However, the initial capital of KM 25 million, that according to the CBBiH law should have been paid in within a month of the CBBiH commencing its operations, was not paid in for over a year. The CBBiH also started with a very small balance sheet – KM 132 million in total – so its income level was very low. Because of this, in the first two years, the CBBiH's income was much less than its expenditure and it had to find donor support in order to fully establish itself. This experience showed how important financial independence is.

Operational independence was sometimes compromised when seeking donor funding to open new branches, increase the number of computers, hire necessary staff, etc. The donors were extremely generous and helpful and did not impose onerous conditions on their funding – but they usually had some conditions. However, it was preferable to seek financial support from donors than to seek funding from the government as it was likely that the government would have imposed conditions that could have compromised the CBBiH's independence.

From 1999 on, the CBBiH's income exceeded its expenditure and this has continued ever since. For several years, the profit was added to the CBBiH's capital, as provided for in the CBBiH Law, in order to strengthen its balance sheet. The CBBiH started paying a dividend to the State budget in 2005 (based on its profit in 2004) and has done so each year since then. In 2007, the CBBiH's profit was KM 142.6 million (more than its total balance sheet when it started in 1997) and it paid a dividend to the State budget in April 2008 of KM 59.9 million.

4. The Main Participants' Roles

The law should specify clearly the roles of the major participants. In the case of a central bank, these participants are usually the parliament, the government, the governing board and the governor. If this is not done, there are two broad types of problems that can arise: two or more parties may claim responsibility for certain areas (*i.e.*, you will get overlaps and duplication) or for some areas, particularly contentious areas, nobody may want to take responsibility (*i.e.*, you will get vacuums). In both cases, disputes will arise and are likely to be won by power rather than by law.

The CBBiH Law meets this condition. The Governing Board in the CBBiH has a relatively large strategic and policy role. But the key point is that the main roles of the main participants in BiH, the Parliament, the Presidency, the CBBiH Governing Board and the Governor, are all clearly set out in the law. This facilitated not only the survival of the CBBiH in Bosnia's complexities but also the set up of an efficient and effective institution.

In the CBBiH, the Board sets the strategic direction of the bank, approves all internal by-laws, and approves the broad organisational structure. A proposal to separate the roles of the Chairman and the Governor was rejected because of the significant policy and operational roles of the Board. But in order to separate the important performance monitoring role of the Board, a Board Audit Committee was established. Initially the Governor was a member but it was chaired by one of the other Board members. Later, it has been changed to consist entirely of non-executive members.

The important role that outside or independent directors can and should play in an institution has been rightfully emphasised. The CBBiH had four board members initially. The three 'local' members had all had extensive central banking, business or political experience. But none of them were current central bankers or politicians. They played a very significant role in establishing a culture of efficient performance and cost consciousness within the CBBiH.

5. Accountability

Independence must be accompanied by accountability. People who have been given operational independence sometimes forget this. It should never be independence to do whatever you choose. The actions of the institution have to be consistent with its law and its statutory objectives. The statutory objective of monetary policy in BiH is clear. It is therefore easy to see if the Central Bank

has met the currency board requirements set out in the law or not. We know this from hard experience as the CBBiH did breach some of these requirements in its first nine months of operation. This did damage the credibility of the CBBiH, especially in some parts of the country. It was only after the problems that had led to these breaches were solved, and were seen to be solved by everyone, that the CBBiH and its currency, the KM, began to be accepted and used throughout the whole country. The KM is now the dominant transaction-currency everywhere in the country.

Article 11.1 of the CBBiH Law says that any Board member, including the Governor, can be removed if they 'violate the currency board rule established in this law'. This could be used to remove someone, including the Governor, who acted inconsistently with the bank's statute. It has not been used in BiH to remove a Governor or Board member (despite the early breaches), but the existence of this rule was important in practice to remind the Board members of a possible breach of their responsibilities.

C. Internal decision making and monitoring

The internal decision making structures within any institution, including a central bank, clearly need to be consistent with the respective law or legal framework under which they operate and to take into account the local environment. But this usually leaves considerable scope for variation.

The CBBiH has quite detailed and formalised decision-making and performance monitoring structures. For example, the CBBiH has a formalised annual planning process and plan execution is monitored on a regular basis during the year by the senior management and the board. This planning and monitoring process has been important for prioritising the CBBiH's objectives, for setting and meeting deadlines, and for focusing staff efforts. It has also made the staff see that their good – and their poor – efforts will be noticed by the senior management and the board.

D. Implementation

There are many cases in BiH where foreign advisors produced good modern laws and created modern institutions on paper, little happened in practice. The CBBiH was different because there was a high degree of local involvement from the beginning, including in the drafting of the CBBiH Law and all of its internal by-laws. This gradually, over a year or two, was converted into a high degree

of local ownership. Governor Nicholl was the only foreigner in the management structure of the CBBiH. The Bank started with 70 staff and this rose over the next few years to 250. All the rest of the staff was Bosnian. Being the only international, Governor Nicholl therefore had to work with and through the local board and management. Many of them had had previous central banking experience, though within a rather different economic system. The level of technical skills in areas like accounting, law, computing, etc., was never a problem. But the 'old' system under which most of them had worked did not encourage initiative.

The other important influence on a central bank is the 'central banking club'. There are strong collegial links amongst central bankers. For example, the CBBiH became a member of the Bank for International Settlements, the central banks' central bank, in its first year of operations. This was funded by the Dutch authorities. A Central Bank Governors' Club of the Balkans, Black Sea and Central Asia was formed and met twice a year. CBBiH staff were invited to visit or attend courses at many other central banks in Europe. This support from fellow central banks not only helped the CBBiH achieve efficient operations quickly; it made the local staff of the CBBiH proud to be members of this 'central banking club'. Few, if any, other State institutions have this support network from their colleagues in other countries.

Article VIII – Finances

(1) The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina.

(2) If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis.

(3) The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly.

A. Introduction

To the vast majority of onlookers, Article VIII of Annex 4 (the Constitution of Bosnia and Herzegovina) does not reveal too much. If the onlooker is not aware of BiH's Entities and the tax raising and fiscal power conferred onto them, it may simply be assumed that fiscal policy and tax raising powers lie at the BiH level.

The effect of Article VIII was to award quite restrictive revenue raising powers to the BiH level, which effectively rendered the Council of Ministers and the BiH parliament impotent in fiscal matters. As this is the case, the legitimacy of tax and revenue raising legislation currently at the BiH level would appear to be questionable.

Article VIII, by itself, does not permit the current BiH-level tax and revenue legislation, nor the BiH-level institution of the Indirect Taxation Authority, and the BiH-level single account for collection of indirect tax revenues. Consequently, the commentary to this part of Annex 4 also needs to refer to Article III.5(a) of Annex 4 and how this was utilised for the first time to enhance, albeit with considerable restriction, the fiscal role and revenue raising powers at the BiH level.

Additionally, this commentary will at times, by necessity, refer to the work of the International Community. It will make reference to coordination issues that it had to wrestle with and resolve and will have to make reference to other parts of Annex 4 (as already done) and indeed, other aspects of the Dayton

Agreement and settlements reached several years after that event, including the 2000 Brčko Final Award.

B. Article VIII, its content, the competency it confers and its functionality

Article VIII is made up of three parts.

> "1. The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of Institutions of Bosnia-Herzegovina and the international obligations of Bosnia and Herzegovina"

Most of this is self-explanatory. A constitutional procedure for setting the budget is set out, with it originating in draft form from the BiH Presidency. A key factor to note is that is refers only to "a budget covering expenditures […]". No reference whatsoever is made to determining the amount of revenues available at the BiH level. Further reference is made to this below.

> "2. If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis"

This provision allows for provisional funding to be provided on a legal basis to the BiH institutions, mirroring the previous year's budget. It was not unusual for the BiH budget to be passed late. Indeed, the complexity of BiH politics lends itself to this. The tax and fiscal reform process, which will be later referred to, improved this to a considerable extent. The 2002 budget was not finally passed until June 2002. The 2006 budget was adopted in January 2006.

The ability to adopt, on a provisional basis, the previous year's budget did however have a significant impact upon BiH's State Institution reform processes. In a State where all of its institutions have been established, rolling forward the previous year's expenditure plans for a few months may not have notable consequences. However, if new institutions were planned, as they had not been included in the prior year budget, these could not (apart from extracting minimal finances from reserves) be legally financed.

> "3. The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly"

Until the indirect tax reform process was well underway, the lion's share of BiH-level funding was made up of contributions from the Entities, as is specified above, with two thirds of this Entity contribution coming from the FBiH and one third coming from RS.

This Entity contribution was made after determining the amount of revenues that BiH raised itself " […] as specified by the Parliamentary Assembly". The Entity Constitutions, as noted above, conferred competencies for fiscal, most of the revenue and tax raising powers at the Entity level.[3884]

Revenues available to the BiH level include the ID card (CIPS) revenues, which had a one time surge when they were initially issued, issuance of BiH passports (also a one time surge and then upon renewals), telecoms fees, fees levied by Embassies, etc. These clearly are not significant, do not allow for fiscal policy setting and beyond renewals of passports and ID cards and the like, are relatively unpredictable.

It is acknowledged that Article III.1(c) of the BiH Constitution stipulates that Customs Policy is one of the responsibilities of the Institutions of Bosnia and Herzegovina. This only involved the setting of customs tariffs and rates; the separate Entity (and Brčko District) Customs Administrations administered and collected customs duties, which were paid directly into the Entity or District Treasuries.

Article VIII.3 did not require the Brčko District to contribute to the BiH budget. This clearly arose as Annex 4 came into existence in 1995, almost five years before the Brčko District Final Award. As Brčko became (relatively) more prosperous, arguably benefitting and exploiting its almost "city state" fiscal status, this lead to principally the RS but at times the Federation accusing it of haemorrhaging its own revenue sources; arguably creating a "double whammy" effect on the Entities and BiH Budgets. More revenues were being "diverted" into Brčko and consequently less was available for the Entities' own budgets and for transfers to BiH.

Concern was frequently expressed by the International Financial Institutions (IFI), particularly the IMF, that this ran the risk of the budget being set without any fiscal responsibility or regard to where the revenues would be derived from.

3884 There was a legal/academic debate as to whether the BiH level authorities may have been able to assert competency to raise revenue, although it was generally accepted that most fiscal competencies had been awarded to the Entity level (e.g., Article 62 of the RS Constitution stipulates "The Republic and Municipalities shall establish public revenues and expenditures my means of a budget. Budget resources shall be raised from taxes, fees, and other levies specified by Law" and Article 63 states "The duties to pay taxes and other levies shall be universal and it shall be defined in accordance with taxpayer's income bracket". The Federation Constitution contains similar provisions. Part III, Article 1 deals with the exclusive responsibilities of the Federation. Sub paragraph (f) is titled "Regulating finances and financial institutions of the Federation and fiscal policy of the Federation." As noted elsewhere in this commentary, the BiH Constitution does not award comparable fiscal/tax levying rights. Post Dayton political realities reinforced this, including the Brčko District, which by the 2000 Brčko Final Award was de facto awarded those fiscal competencies of the Entities.

However, while it is beyond the scope of this analysis, the two-thirds and one-third contributions from the Entities were never seen as an unlimited cash reserve. The political parties and ethnic groups that comprise the BiH Parliament are made up of those that serve in the Entity parliaments and many politicians were aware that an increased BiH budget would mean less (subject to the transfer payment being made, triggering a funding crisis) funding available at the Entity level.

This also caused several clashes between those in the International Community who were working on the development and expansion of Institutions at the BiH level and the IFIs who at times erred on the side of the status quo.

1. The need for reform and the Transfer of Competency Agreement

The fiscal limitations imposed by Annex 4 on the BiH level as summarised above clearly demonstrated the need for reform. This reform led to the first transfer of competency agreement from the Entities to the BiH level under Article III.5(a) of Annex 4.

A summary of the reform process that was followed which led to this transfer agreement needs to be set out as this forms a vital part of this commentary. Without this, the current Constitutional framework cannot be understood. In addition, key factors that indicated the need for this reform have been mentioned to facilitate understanding.

From the fiscal perspective, the Entities and the Brčko District functioned as if they were sovereign states. Each set its own tax rates for direct taxation (income tax and corporate tax, social security) and for indirect tax (sales tax, excise taxes). Only customs rates and duties were unified across BiH.

This allowed each area to compete for revenues. For example, part of the indirect tax regimes included a separate charge imposed on petrol and diesel. The Brčko District did not impose two of these, causing citizens from both the RS and the Federation who lived near its borders to divert their shopping patterns, adding to the Brčko budget and reducing amounts in those of the Entities. The RS also had a lower sales tax rate on certain items that arguably distorted consumer patterns. While customs rates were the same, as each area had its own administration, different interpretations of categories and types of goods could easily cause differential rates to be charged across BiH for the same types of goods. The area into which goods were destined received the customs revenue.

Those goods subject to excise taxes (tobacco, coffee, alcohol, petrol, etc.), when manufactured or imported into one area, and sold to consumers in another area, would be subjected to this tax twice. This acted as an illegal barrier to inter-Entity trading and was a disincentive to compliance.[3885]

It had essentially proved impossible to harmonise either laws across the fiscal areas and often, more importantly, interpretation, implementation and application of these laws. Proposals and suggestions for a dual-Entity value added tax (VAT) system made by both the RS and IMF were rejected as unworkable by the OHR-chaired International Advisory Group – Taxation (IAG-T).[3886]

The International Community had been well aware of these issues and wanted to ensure real progress was made. The three-way indirect tax system clearly had to be removed, and with appropriate coordination, the International Community, through the OHR-chaired IAG-T, came to a unified stance that there should be one Administration for all indirect taxes across BiH and one legal system that regulated this (BiH level).

International Community lobbying of the Ministries of Finance and their relevant domestic counterparts led to an understanding and acceptance of core principles of negotiation which were set out in a High Representative Decision of 12 February 2003 entitled "Decision Establishing the Indirect Tax Policy Commission".

This Commission worked from March until August 2003 and was tasked with drafting legislation set out in Article 2, specifically:

a) the merger of the separate customs administrations in Bosnia and Herzegovina into one single customs administration of Bosnia and Herzegovina;

b) the establishment of a single State-wide value added tax;

c) the establishment of an Indirect Taxation Administration (ITA), that should operate at the State level, include the single customs administration and be responsible for the collection and administration of indirect taxes, including customs duties and value added tax;

d) A single account for collection of all BiH indirect tax revenues.

3885 See, U 68/02.

3886 Rigorous debate between the International Financial Institutions and key members of the IAG-T established that a dual VAT system would be unworkable. Of significant importance, the European Commission stated that its member states only have a single VAT system and not two or more parallel VAT systems and that a prospective EU member such as BiH should only have one VAT system.

The Commission drafted two pieces of Legislation, the "Interim Law on Merging the Customs Administrations and Establishing the Indirect Tax Authority" and the "Law on the Indirect Taxation System in Bosnia and Herzegovina" (ITA Law).

The Interim Law was adopted to allow the initial commencement and preparatory work to commence and politically was a first tentative step along the reform process. It allowed for the institution of the Indirect Tax Authority to exist in 2003 so that it could be included in the BiH Budget for 2004. This law was also considered constitutional as Annex 4[3887]and the Entity Constitutions did not prevent a BiH-level customs administration from operating as long as revenue flows were not altered.

For the adoption of the ITA Law to take legal effect required the transfer of competency agreement under Article III.5(a) of the Constitution of Bosnia and Herzegovina.

This transfer agreement[3888] sets out the following:

1. In accordance with the Constitution of Bosnia and Herzegovina the Entity of the Federation of Bosnia and Herzegovina and the Entity of the Republika Srpska hereby give their consent for responsibilities regarding their indirect taxes, including issues concerning administration to be transferred to the institution of the State of Bosnia and Herzegovina.

2. The mentioned allocation of competencies shall, among other things, comprise competency for making and implementing the policy of indirect taxation in Bosnia and Herzegovina as well as the collection and distribution of indirect taxes.

3. Bosnia and Herzegovina shall assume the competencies that the Entities transferred to it.

3887 As noted in this commentary, customs policy (*i.e.*, customs rates, duties) was explicitly set at the BiH level. The Entity constitutions (see comments made above) explicitly granted tax raising/fiscal power to the Entities, but did not state who or what body should collect the revenues. The power/competency to set customs tariffs was already at the State level so this was not viewed as being a constitutional issue so long as the agreement/consent was given by the BiH parliament and authorities (and note both Entities must vote in favour of a measure in the BiH Parliament for a law to come into force). This view was shared by the OHR, the Entity Governments and the Indirect Tax Policy Commission.

3888 Agreement unpublished. See *Decision to Consent to the Agreement on Responsibilities in the Indirect Taxation Area* (*OG of FBiH*, No. 64/03); see also Republika Srpska National Assembly *Conclusions No. 01-1005/03* (*OG of RS*, No. 95/03).

4. While establishing the institutional and organisational basis for a unique system of indirect taxation, Bosnia and Herzegovina shall be obliged to ensure that the policy of indirect taxation is determined by the Steering Board, comprising of representatives of Entity Governments.

The actual mechanics of transfer under Article III.5(a) of the Constitution of Bosnia and Herzegovina are beyond the scope of this commentary on Article VIII; however, it was effected by parliaments in both Entities approving the transfer agreement.[3889]

The significant aspects of the transfer agreement are that responsibility for the Entities' indirect taxation are all transferred to the BiH level (administration, collection, distribution) but with regard to indirect taxation policy, the BiH level is required to ensure that this policy is determined by a "Steering Board" comprising representatives of the Entity governments. This Steering Board effectively means that a "dual key" system was established for determining and setting indirect taxation policies. These are set out in the Law on the Indirect Taxation System of Bosnia and Herzegovina (ITA Law), which is referred to below.

It must also be noted that Brčko did not participate in the transfer of competency agreement. Legal analysis and the prevailing legal views[3890] at the time noted that Article III.5(a) refers only to Entities making agreements, not a District or any other level of government, meaning that Brčko was not able to participate. Additionally, an analysis conducted of the Brčko Final Award[3891] observed that Brčko was awarded competencies that lay at the Entity level. Logically, if such competencies were no longer at the Entity level, Brčko could no longer have these as it would then exercise more competencies than those of the Entities.

3889 For details about Article III.5(a) of the Constitution, see "2. Article III.5(a)", p. 594.

3890 This view is comprised of internal OHR legal discussions circa 2002/2003. It was observed that Article III.5(a) only refers to Entities making agreements.

3891 The Brčko Final Award essentially is viewed to have conferred to the District the competencies of the Entities. The logic is that if the Entities no longer have a competency, *i.e.*, they agree to transfer a competency to the BiH level, then Brčko itself can no longer have such a competency.
This was derived from the Statute of the Brčko District of Bosnia and Herzegovina. Article 1(2) – "The District derives its powers of local self-government by virtue of each Entity having delegated all of its powers of governance as previously exercised by the two Entities and the three municipal governments within the pre-war Opstina, as defined in Article 5, to the District Government". (Note Article 5 defines the Brčko District's territory).
The underpinning logic of the legal argument was held that if the Entities no longer retained competencies for indirect taxation, then such competencies could no longer be delegated to or retained by the Brčko District.

2. The Law on Indirect Tax System in Bosnia and Herzegovina (ITA Law)[3892]

The Law on Indirect Tax System in Bosnia and Herzegovina (ITA Law)[3893] was passed in late 2003 by the BiH parliament. Article 38 expressly states that this law could not come into force unless the transfer of competency agreement had been approved by both Entities. The text states "Publication shall take place immediately after the entry into force of an agreement by the Federation and Republika Srpska by which they transfer responsibility under Article III.5(a) of the Constitution of Bosnia and Herzegovina so as to allow for the establishment of a single indirect taxation system in Bosnia and Herzegovina, or immediately following the adoption of this Law, whichever occurs later."

This law repealed the Interim Law referred to above and legally created the Indirect Tax Administration and paved the way for this BiH-level institution to assume full responsibilities for all indirect taxation.

Article 14 establishes the Governing Board (Board) of the ITA. This is effectively the Steering Board referred to in the transfer of competency agreement. This Article sets out the Board's general responsibilities.

Article 16 sets out the membership of the Board. This includes as *ex-officio* officers the three Ministers of Finance – those of the Entities and the BiH level Minister. Three other expert officials, one from each of the Entities and the BiH level are also provided for, and there is an observer from the Brčko District.

Article 19 is the most critical. This sets out the rules for voting and making decisions at the Board. If decisions cannot be taken by consensus and a vote is required, specific qualified majority votes are required.

For decisions affecting customs tariffs, a majority is required including the vote of the BiH-level Minister of Finance.

For decisions affecting the rates of indirect taxes (VAT, excise duties), a majority is required including the votes of both Entity Ministers of Finance.

For decisions affecting the allocation of revenue, a majority is required including the votes of all three Ministers of Finance.

The latter two of these qualified majority voting rules comprise the "dual key" referred to above. Essentially, this means that without securing the agreement

3892 *OG of BiH*, No. 44/03.
3893 *OG of BiH*, No. 44/03.

of both Entity Ministers of Finance, no indirect tax rate or changes to allocations of revenue can be made. During the transitional period of reform, there was a "first chairman" who was not a citizen of BiH who had the ability to impose Board Decisions if there was an impasse. However, even these powers of the first chairman were expressly forbidden from use where qualified majority votes for indirect tax rates and revenue allocations were required.

Due to this dual key approach, it means that while, for example, the VAT law is a BiH-level law and passed by the BiH Parliament, changes to this law or any other law that would impact on indirect tax rates or allocation of indirect tax revenues cannot be made without appropriate Board approval. This has been argued by some commentators to undermine the competency of the BiH parliament as this means that changes to tax rates or revenue allocation cannot be made by the parliament alone. However, this argument may be countered by observing that prior to the transfer of competency agreement and establishment of the Board, the BiH parliament had no rights whatsoever to pass laws in the sphere of indirect taxation. The participation of federal Entities in the legislative process in federal states is, moreover, not unusual, especially in regulatory areas which fall under a shared competence.

Article 21 of the ITA Law addresses the distribution of indirect tax revenues. This is the key element that serves to vary the provision in Article VIII that the BiH level derives a substantial part of its funding from the two thirds and one third Entity funding that has been discussed above. The order of allocation of indirect tax revenues is as follows:

- The amount needed to cover the current year BiH budget is allocated to the BiH level. This change was radical. It meant that the BiH level benefits from the first tranche of the funds available and was no longer dependent on transfers from the Entities;
- The balance of funds is allocated to the Entities and the Brčko District based on final consumption data as revealed by VAT returns;
- The amount needed to satisfy BiH's international debt obligations from each Entity is taken directly from the single account (after determining the total share of revenues available to each Entity).

This allocation mechanism raised concerns within the International Financial Institutions.[3894] As the BiH level has the first tranche of funds, it seemed to create

3894 The IMF was particuarly concerned about this. However, upon their further appreciation of the BiH Parliament's qualified majority voting rules, this ceased to be an overriding concern.

a licence for the BiH level to set ever higher budgets without paying attention to the resources needed at the Entity and District level. In a downturn year, or in a year of excessive BiH-level spending, the Entities may be deprived of sufficient funds to meet their obligations. However, due to how the BiH Parliament's own qualified majority voting rules with majorities needed from both Entities for the budget (or any law) to be passed, this has so far served as a check on such unsustainable expenditure growth.

3. The Law on Payments into the Single Account and Distribution of Revenues (Single Account Law)[3895]

Revenue allocation is also further regulated in the Law on Payments into the Single Account and Distribution of Revenues (Single Account Law).[3896]

Articles 12, 13 and 14 of the Single Account Law specify the daily mechanics of revenue allocation. The BiH level receives the primary allocation based on its agreed budget, as set out above.

4. The Transfer of Competency Agreement and the Constitutional Court

During 2004, before the adoption of the BiH-level Sales Tax[3897] and Excise Tax Laws, which came into force from 1 January 2005, the Federation Parliament passed amendments to their own Sales Tax and Excise Tax Laws without the prior approval of the Board and in violation of the terms of the transfer of competency agreement.

The BiH Council of Ministers applied to the Constitutional Court to set these amendments aside, pending a full hearing and review. The Constitutional Court temporarily set aside these changes and later upheld that the Federation had acted *ultra-vires* by making these changes.[3898]

No other Constitutional Court issues arose during the indirect tax reform process.

3895 *OG of BiH*, No. 55/04.

3896 *OG of BiH*, No. 55/04.

3897 While VAT was introduced one year later from 1 January 2006, due to the myriad of un-harmonised indirect tax laws at the BiH, Entity and District levels, BiH-level laws for the then current indirect tax system were adopted. The single account was activated one year before the introduction of VAT and it was essential that the same rules and tax base were applied across BiH when this happened to avoid discrepancies in the allocation of revenues at the Entity and District level.

3898 See, U 14/04.

C. Concluding Comments

Article VIII of the BiH Constitution does not explain how the BiH level is funded and financed. It is totally unlike Article VII, which expressly created the Central Bank and the operation of monetary policy at the BiH level.

The complex nature of BiH and its multiple levels of government need to be understood. Added to that, the nature and background of the first transfer of competency under III.5(a) of the BiH Constitution and the key laws that further define the current fiscal architecture need to be assimilated.

Article IX – General provisions

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

2. Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

3. Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

U 5/98-III "Izetbegović III – Constituent peoples"	20000914 *OG of BiH*, No. 23/00
U 10/05 Ž. Jukić "Public Broadcasting System"	20050722
U 4/05 N. Špirić "City Council of the Town of Sarajevo"	20050422
U 6/06 Salary Law	20080329
U 7/05 S. Tihić "City Council of the Town of Istočno Sarajevo"	20050212

A. About Article IX

Article IX of the BiH Constitution regulates the issue of assuming and distributing public offices.

Pursuant to **paragraph 1** of this Article, no person who is serving a sentence imposed by the International Criminal Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina. This provision should be viewed together with the provision of Article II.8 of the BiH Constitution which stipulates a general obligation of competent authorities to cooperate with the Tribunal. Finally, when it comes to the issue of Article IX.1 of the BiH Constitution, the point of the matter is the **constitutional prohibition of performing the profession**. Namely, the goal of this prohibition is to prevent persons indicted for the most serious criminal

offenses or "uncooperative" indicted persons from performing some public functions in Bosnia and Herzegovina after Dayton. Furthermore, the activities of the Tribunal constitute a relevant filter for application of this provision. This instrument for **overcoming the past** through the exclusion of the discredited persons is applied in addition to an already pronounced or expected criminal sanction. Paragraph 1, unlike paragraph 2, is so widely formulated that it bans performance of any public function, not only on the State level but also on the **entity, cantonal** or **municipal** level. Moreover, a mere **nomination** of such a person as a candidate for public office is banned in order to avoid a situation where a person who is already appointed to or elected for some public office would have to be subsequently removed from that office, which would be against the democratically expressed wish of the people or electoral gremium. The **"public office**" must be extensively interpreted since it is more precisely defined by the attributes "*appointive*" and "*electoral*" (a position to which a person is *appointed* or for which he is *elected)*, as well as by the general provision "other public office". In any case, this term refers to public offices of **legislative, executive and judicial authority**. Performing a function in a **public company** or in a company with the State as a majority owner should also fall within the scope of this provision, at least when it comes to the leading positions. The goal and purpose of this provision is to prevent "the discredited" persons from exerting any influence on the future destiny of the country. Moreover, from the public viewpoint, in order for this provision to be applied, it is only sufficient to have an impression that those persons have some influence, which means that this does not necessarily mean that those persons must have such an influence. However, when it comes to the highest leading positions in State companies, there is always an objective possibility for those persons to exert influence on the future development of Bosnia and Herzegovina, including a subjective feeling of a community that such a possibility always exists.

Pursuant to **paragraph 2** of this Article, compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure. The aim of this provision is to avoid the danger of **disloyal influence** on the holders of public office in State institutions through direct or indirect pressure or financial blackmail. During their tenure the protected public office holders are entitled to the keep financial insurance they had at the time of assuming office. The BiH Constitutional Court has taken a position that the application of the prohibition against diminishing compensation is not subject to any kind of limitation (such as the economic power of the State). However, a question rises as to whether it would be permitted, with respect to budget-technical corrections, to reduce the compensation for public office

holders (for instance, in percentage), which would apply to everyone. If one takes into consideration that the goal of this provision is to prescribe specific measures aimed at preventing the violation of the principle of division of power, then, for the purpose of budget consolidation, a *general* and *equal* reduction of compensation would be justified.

When it comes to the circle of persons protected under this provision, the notion of "**public office**" from paragraph 1 must be limited for at least two reasons. On the one hand, the provision is solely related to the holders of public office in the institutions of Bosnia and Herzegovina. Accordingly, this provision cannot protect the holders of public office at the Entity, cantonal or municipal level. On the other hand, this provision refers to the holders of public office having a mandate. Thus, the provision does not refer to ordinary civil servants. Moreover, this provision may protect only those public office holders assuming office either through appointment or election or in some other similar way for a limited period of time in a legislative, executive or judicial body of authority. This also applies to the judges of the BiH Constitutional Court.[3899]

Thus far,[3900] the provision of Article IX.1 of the BiH Constitution has not been a subject of the judicial practice of the Constitutional Court of BiH. The provision of Article IX.2 of the BiH Constitution was considered in one case dealing with the reduction of salaries of the judges of the BiH Constitutional Court, which the Constitutional Court of BiH assessed as being in contravention of Article IX.2 of the BiH Constitution.[3901] As far as other judicial cases are concerned, the BiH Constitutional Court primarily used this provision as an auxiliary instrument in defining term: "vital national interest of the constituent peoples" under Article IV.3(e) and (f) of the BiH Constitution.[3902]

Paragraph 3 under Article IX of the BiH Constitution provides for a general clause regulating the ethnic proportion within State institutions: officials appointed to positions in the institutions of Bosnia and Herzegovina, as a rule, reflect the composition of peoples of Bosnia and Herzegovina. Understanding and interpreting this provision largely depends on other constitutional provisions, such as, for instance, the constitutional aim of establishing democracy and pluralism, (the 3rd line of the Preamble of the BiH Constitution and Article I.2 of the BiH Constitution), the prohibition of discrimination (Article II.4 of the BiH Constitution) or the notion of a vital national interest of constituent peoples

3899 U 6/06, paragraph 34.
3900 Status: 31 October 2009.
3901 U 6/06 in relation to Article IX.2 of the BiH Constitution.
3902 Compare, for instance, U 7/05, paragraph 40.

(Article IV.3(e) and (f) of the BiH Constitution). As to the type and position of public office which must be filled according to the system of representation, paragraph 3 is limited to State institutions. However, that rule did not prevent the Constitutional Court to apply this constitutional provision in cases dealing with public office at lower levels.[3903]

The BiH Constitutional Court has also extensively interpreted this provision with respect to the **protected circle of persons**. This provision is not only related to the representatives of the constituent peoples, but also to the representative of Others and to national minorities.[3904] However, the constitutional obligation is not required for introducing the **ethnic proportion** or **quota system** as may be concluded from the reasoning of the Decision of the Constitutional Court of BiH No. U 7/05. Namely, in this Decision the BiH Constitutional Court argued that the manner of election of delegates for the Assembly of the Town of Istočno Sarajevo, according to the liberal principle "one-man-one-vote", is in accordance with the BiH Constitution for the reason that none of the constituent peoples enjoy any privileged position.[3905] It seems that the Constitutional Court of BiH ignored the fact that in such cases the Bosniaks, Croats and Others, due to their *de facto* minority position, will never have any political role in the relevant assembly as long as the ethnic criterion constitutes the sole and exclusive point of reference for casting a vote. It appears that the BiH Constitutional Court did not consider the previously adopted opinion and explicit position of the BiH Constitutional Court that "efficient participation of the constituent peoples in the bodies of authority" constitutes a very important element of "vital national interest".[3906] That is to say that by such a conclusion the BiH Constitutional Court has apparently opted for not guaranteeing and not protecting the so-called positive discrimination. Accordingly, this new constitutional practice of the BiH Constitutional Court interprets Article IX.3 of the BIH Constitution as a provision prohibiting only negative discrimination. In other words, should the legislature opt for a proportional system of power in certain case; in other words, if one opts for a system "reserving" a certain percentage or number of public offices for the members of certain ethnic groups, then one must comply with the principle of prohibition of negative discrimination. Thus, if certain privileges for participation in power are granted only to certain groups, the composition of peoples of Bosnia and Herzegovina will not be reflected as

3903 In Case U 7/05 the issue was about the Assembly of the Town of Istočno Sarajevo.

3904 U 10/05, paragraph 25.

3905 Compare U 7/05, paragraph 47.

3906 U 5/98-III, paragraph 50; U 10/05, paragraph 25 *et seq*.

required under Article IX.3 of the BiH Constitution.[3907] By applying this practice, the BiH Constitutional Court has derogated from its previous constitutional practice in Case No. U 5/98-III, as well as from the leading ideas and thinking about pluralistic society (the 3rd line of the Preamble of the BiH Constitution). It will be considered that the impossibility of the so-called factual[3908] minorities to politically participate in the bodies of authority is in accordance with the BiH Constitution until the factual majority ensures formally and legally special rights of participation for itself.

3907 U 4/05, paragraph 33 *et seq.*

3908 The notion of "factual minority" is used for the reason that the constituent people may not be considered national minority in constitutional and legal terms. See also "(g) The constituent status and 'the vital national interest'", p. 72.

Article X – Amendment

1. Amendment Procedure.

This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

2. Human Rights and Fundamental Freedoms.

No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

A. Paragraph 1: Amendment Procedure

Paragraph 1 regulates the procedure for making amendments to the BiH Constitution. Amending the BiH Constitution requires that the relevant decision be taken by the Parliamentary Assembly, "**including a two-thirds majority vote of those present and voting in the House of Representatives**". Therefore, unlike, for example, the provision of Article IV.2(b) of the BiH Constitution, the majority referred to in Article X.1 of the BiH Constitution is determined exclusively in relation to those members that are present and voting in the House of Representatives. Accordingly, if 22 members constitute a quorum required in this House for decision-making, amending the BiH Constitution requires that at least 15 members vote.[3909]

Other aspects of this procedure are regulated by the Rules of Procedure of both Houses of the Parliamentary Assembly of BiH.[3910] Namely, the procedure for amending the BiH Constitution may be proposed by the BiH Presidency, Council of Ministers, House of Representatives of the Parliamentary Assembly of BiH and House of Peoples of the Parliamentary Assembly of BiH; also, the general provisions related to the adoption of laws apply to the further

3909 Some authors interpret this provision differently, that is to say that amendments to the BiH Constitution require a two-third majority vote of "all members" (see, for instance, *Trnka*, 2000, p. 41).

3910 Compare Article 132 *et seq*. of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (*OG of BiH*, Nos. 33/06, 41/06, 91/06 and 91/07); and Article 127 *et seq*. of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (*OG of BiH*, Nos. 33/06, 41/06, 91/06 and 91/07).

procedure. Draft amendments to the BiH Constitution are always submitted to the BiH Presidency and the Council of Ministers for their comments. There is an exception in cases where those authorities submit a proposal for amendments to the BiH Constitution. In both Houses of the Parliamentary Assembly of BiH, deliberations on proposals for amendments to the BiH Constitution are held in public.

Pursuant to Article X.1 of the BiH Constitution, amendments to the BiH Constitution are also "a legislative decision" within the meaning of Article IV.3(c) of the BiH Constitution. Nevertheless, taking into account that Article X.1 of the BiH Constitution requires a qualified majority, it is lex specialis in relation to the first sentence of Article IV.3(d) of the BiH Constitution, where a simple majority is required to adopt laws. Thus, the constitution maker – as in any democratic constitution – imposed the more strict criteria for amending the Constitution than those related to the adoption of or amendments to laws.

However, it cannot be noted from the BiH Constitution itself, on the face of it, whether decisions amending the BiH Constitution must be subject to the standards, *i.e.*, a mechanism for the protection of vital national interest of one or more constituent peoples in the House of Peoples (Article IV.3(e) and (f) of the BiH Constitution). One should explain why this dilemma exists. Namely, the issue related to a violation of vital national interest based on a decision amending the BiH Constitution, in the worst-case scenario, shall be decided by the Constitutional Court of BiH, pursuant to the second sentence of Article IV.3(f) of the BiH Constitution. In such cases, the Constitutional Court of BiH usually examines, on the one hand, whether a matter relates to a vital national interest and, if so, whether, on the other hand, there is a violation of the vital national interest. However, in such a situation, it would be necessary first to clarify how far the BiH Constitutional Court's jurisdiction reaches. Namely, in the case described earlier, the Constitutional Court of BiH should examine the conformity with the Constitution of BiH of a (potential) constitutional provision (the constitutional mechanism of "vital national interest", which stems from line 10 of the Preamble to the BiH Constitution in conjunction with Article IV.3(e) and (f) of the BiH Constitution). The Constitutional Court of BiH, pursuant to the first sentence of Article VI.3 of the BiH Constitution, is a "guardian" of the BiH Constitution. Accordingly, it has no jurisdiction[3911] to render ineffective such provisions or to declare them unconstitutional.[3912] Therefore, the Constitutional

3911 Compare U 5/04, paragraph 15; U 13/05, paragraph 9 *et seq*.

3912 A legal consequence of the BiH Constitutional Court's decision establishing a violation of the vital national interest of one or more constituent peoples implies the continuation of proceedings under a special procedure before the legislative authority in accordance with the second sentence of Article IV.3(e) of the BiH

Court of BiH could not have jurisdiction to review the provisions that originally derive from the constitution maker. Nevertheless, there are counter arguments, too. First, the Constitutional Court of BiH could have jurisdiction to indicate inconsistencies to the constitution maker between the relevant constitutional provisions. In addition, constitutional provisions amending the original text of the BiH Constitution have completely different importance until they have been published (Article IV.3(h) of the BiH Constitution). Furthermore, Article IV.3(e) of the BiH Constitution, according to its linguistic meaning, makes no distinction between decisions amending *the BiH Constitution* and decisions enacting laws and other legislative acts. Finally, the constitution maker consciously stipulated that decisions amending the BiH Constitution require a qualified majority only in the House of Representatives of the Parliamentary Assembly of BiH given that a qualified majority (as necessary) is already incorporated in the House of Peoples of the Parliamentary Assembly of BiH (Article IV.3(e) and (f) of the BiH Constitution). Accordingly, the constitution maker had no need to emphasise it through a special provision. These reasons corroborate the view that amendments to the BiH Constitution are subject to the procedure foreseen for the protection of vital national interest in the House of Peoples of the Parliamentary Assembly of BiH.[3913]

Anyway, in adopting future constitutional amendments, one should pose the question as to whether constitutional amendments, from a legal point of view, can be voted **(a) without or (b) against the votes (outvoting) of all delegates,** i.e.**, all members of the Parliamentary Assembly of BiH (aa) from among one constituent people or (bb) one Entity**. The answer to this question depends on the following: whether all members are present when voting is carried out and whether it regards the House of Representatives or the House of Peoples.

Theoretically, when all members of the House of Representatives are present, members of one constituent people may be outvoted unless they have at least one-third of the votes plus one more vote (*i.e.*, at least 15 votes), or two-thirds of the votes from one Entity (*i.e.*, at least 19 members from the FBiH or

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Constitution, and it does not entail that the Constitutional Court of BiH should declare such provisions unconstitutional or render them ineffective.

3913 Also, it is obvious that the (unsuccessful) attempt to amend the BiH Constitution, the "so called" April Package, proceeded from the point that the Constitutional Court of BiH has jurisdiction to decide this issue. Namely, Article 10.d(XI) of Amendment No. I to the BiH Constitution foresees that constitutional amendments are subject to the vital national interest veto for all three constituent peoples in the House of Peoples of the Parliamentary Assembly of BiH (for critics on the "so called" April Package, 2006, in relation to the right of veto, see *Ademović*, 2007, *online*-archive; *Marko*, 2006, p. 2).

10 members from the RS). On the other hand, one Entity cannot be outvoted in a case where all members from one Entity vote "against". Such a result matches the meaning and purpose of Article VI.3(e) of the BiH Constitution, *i.e.*, the protection of a vital national interest of the Entities. Contrary to the aforementioned, there is no possibility of outvoting one constituent people in the House of Peoples of the Parliamentary Assembly of BiH, provided that the Constitutional Court of BiH (this includes its jurisdiction to take a decision on the merits of a case), within the procedure prescribed in Article IV.3(e) and (f) of the BiH Constitution, corroborates that amendments to the BiH Constitution are destructive to the vital national interest of the respective people. In such a case, the adoption of amendments to the BiH Constitution is possible only if the majority of the delegates to the caucus of a certain constituent people vote "in favour", which is unlikely as they at the same time call for protection of their vital national interest. However, in case the Constitutional Court does not establish that amendments to the BiH Constitution are destructive to the vital national interest of the respective people, amendments can still be adopted in the House of Peoples contrary to the will of one constituent people.

Taking into account the number of delegates, *i.e.*, members of each constituent people in both chambers of the Parliamentary Assembly of BiH, these conclusions are reflected as follows: Bosniaks and Serbs[3914] are in a position that they can block amendments to the BiH Constitution at any time, and Croats can do so only if their vital national interest is threatened. On the face of it, such a result is discriminatory as to the Croat people. However, the basic principle of Article IV.3(d) of the BiH Constitution shows that only the vital interest of the Entities is protected in the House of Representatives, and the (ethnic) vital interests of groups are not considered. However, what can become problematic in respect of this matter is that, unlike the exercise of the right to protect vital national interests, the justification of which can always be reviewed by the Constitutional Court of BiH, there is no possibility of legal review as to whether or not the exercise of the "so called" Entity veto is justified.[3915] Therefore, the functionality of the Parliamentary Assembly of BiH may be hindered by way of the "Entity veto" exercised in an arbitrary manner. This particularly emerges in cases where the "Entity veto" is exercised seemingly for protection of the Entities' vital interest, while the protection of the vital national interest of one of

3914 Bosniaks have more than 15 members in the House of Representatives and, consequently, a two-thirds majority, as required, cannot be achieved without them (Article X.1 of the BiH Constitution). Serbs have more than 10 votes from the RS and, accordingly, the required Entity's majority cannot be achieved without their votes (the last sentence in Article IV.3(d) of the BiH Constitution). The national composition of the Parliamentary Assembly of BiH may be found at: <www.parlament.ba>.

3915 As to "ethnicization" of the Entities' right of veto, see also *Yee*, 1996, p. 187.

the constituent peoples is hidden behind the "Entity veto". Taking into account ethnic homogeneity, the danger comes mainly from the Republika Srpska.[3916]

However, the absence of delegates, *i.e.*, members who come from an Entity, that is to say representatives of a constituent people, will lead to a different voting outcome. Article 133, paragraph 1 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina stipulates that amendments to the BiH Constitution shall be subject to the basic legislative procedure. Also, neither the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (Article 67 paragraph 2),[3917] nor the BiH Constitution (Article IV.2(b) and the first sentence of Article IV.3(d)) contain any provision for regulating an issue that might be raised in case members who come from one Entity or who belong to one constituent people failed to comply with the obligation[3918] to attend sessions. Indeed, it is true that the House of Representatives ought to make efforts in order to secure at least one-third of members from each Entity (the second sentence *et seq*. of Article IV.2(d) of the BiH Constitution). Furthermore, this chamber cannot adopt a decision contrary to the will of a two-thirds vote of the members from one Entity. However, all those provisions imply that members, in general, should attend sessions and vote. The BiH Constitution does not contain any provision for regulating any consequences stemming from the fact that one-third of the members from each Entity are not present at all. Consequently, the BiH Constitution can be amended irrespective of whether or not members from one Entity or members representing one constituent people are present and, if so, how many of them are present, provided that the quorum requirement (Article IV.2(b) of the BiH Constitution) and the majority requirement (Article X.1 of the BiH Constitution, Article IV.3(d) of the BiH Constitution) are satisfied.[3919]

Contrary to the aforementioned, the House of Peoples of the Parliamentary Assembly of BiH cannot function at all if delegates of any one constituent

3916 Compare, Venice Commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, may be found at: <www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp>.

3917 Article 67, paragraph 2 stipulates that quorum requires a majority of those present and voting.

3918 Every member is obliged to be present at sessions of the House of Representatives (Article 7, paragraph 1 of the Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina).

3919 Such interpretation is also supported by the Explanatory Note on the High Representative's Decision enacting the Law on Changes and Amendments to the Law on the Council of Ministers of Bosnia and Herzegovina, enacted by the High Representative's decision of 19 October 2007, aimed to prevent blockages of the Council of Ministers by ministers' absenteeism (available at: <www.ohr.int/decisions/archive.asp?m=&yr=2007>).

people are absent, given that this chamber may adopt decisions only if a quorum is present, which consists of nine members, provided that at least three Bosniak, three Croat, and three Serb Delegates are present.[3920] Neither the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, nor the BiH Constitution, stipulate a mechanism for resolving situations where it is necessary to end a blockage in the House of Peoples caused by the absenteeism of delegates of any one constituent people. Pursuant to Article 74, paragraph 4 of the Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, an issue that cannot be considered due to the absence of the required majority shall be postponed to the next session.

Finally, we may conclude as follows: when it comes to amendments to the BiH Constitution, any one constituent people, but not an Entity, may be outvoted in the case that a session of the House of Representatives is attended by all members. The justification for using the Entity veto power is not subject to legal review. Consequently, the functionality of the State depends on the will of delegates elected from either Entity to the House of Representatives. When all delegates to the House of Peoples are present, one constituent people can be outvoted only if amendments to the BiH Constitution are not destructive to the vital national interest of that people. The BiH Constitution provides protection against arbitrary use of the mechanism for the protection of the vital national interest. The House of Representatives will not be prevented from its work in the case that all delegates representing one people or one Entity are absent, provided that the quorum requirement and the majority requirement are satisfied. On the contrary, the work of the House of Peoples will be blocked if delegates representing one constituent people are not present. Consequently, the functionality of the State at present is not ensured if the decision-making process in this chamber is blocked through a boycott of sessions.

B. Paragraph 2: Human rights and fundamental freedoms

Like the German Basic Law (*Grundgesetz*), the rights and freedoms safeguarded by Article II of the BiH Constitution are protected by a special clause in Article X.2 of the BiH Constitution, which prohibits that the rights and freedoms safeguarded by Article II of the BiH Constitution may be eliminated

3920 Article IV.1(b) of the BiH Constitution; Article 61, paragraph 2 of the Rules of Procedure of the House of Peoples of Bosnia and Herzegovina.

or diminished by constitutional amendments.[3921] The **eternity clause** of the BiH Constitution exceeds the scope of protection stipulated under Article 79, paragraph 3 of the German Basic Law, which does not directly prescribe the prohibition on changing the catalogue of human rights and freedoms. On the other hand, the formulation given in Article X.2 of the BiH Constitution is to a certain extent lagging behind the German constitutional solution as it does not encompass the basic constitutional principles, as those included in Article 20 of the German Basic Law (for instance, the principle of democracy). Namely, in the case of the BiH Constitution, those principles are outside the scope of Article II (for example, Article I.2 of the BiH Constitution).

3921 *Szasz*,1995, p. 255 *et seq*.

Article XI – Transitional Arrangements

Transitional arrangements concerning public office, law, and other matters are set forth in Annex II to this Constitution.

Article XI of the BiH Constitution refers to the transitional provisions set forth in Annex II to the BiH Constitution. Annex II to the BiH Constitution, therefore, is an integral part of the BiH Constitution and, compared to the remainder text of the Constitution, is not different in respect of its legal nature and legal force.

Article XII – Entry into Force

1. This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.

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

The General Framework Agreement for Peace in Bosnia and Herzegovina was signed on 14 December 1995 by the then president of the Socialist Republic of Yugoslavia, *Slobodan Milošević*, the then president of the Republic of Bosnia and Herzegovina, *Alija Izetbegović*, and the then president of the Republic of Croatia *Franjo Tuđman*, as well as by five states as witnesses: the Republic of France, the Federal Republic of Germany, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America, including also the European Union in its capacity as a witness.[3922] Pursuant to Article XII, the Constitution of Bosnia and Herzegovina entered into force at the moment of being signed. The Constitution of Bosnia and Herzegovina entered into force by the signing of the English version of this document. First of all, it should be emphasised that the validity of the BiH Constitution was not considerably questioned.[3923]

The BiH Constitution entered into force irrespective of its (prospective) ratification by the competent domestic authorities and irrespective of the (prospective) publication of its English version and versions of this document in the official languages in the Official Gazettes of the State and Entities. The reason for not having the versions of this document in the official languages is primarily the fact that the discussions on the BiH Constitution were held in English. It is true that in Article XI of the General Framework for Peace in Bosnia and Herzegovina it is stated that the Agreement shall be made in the "Bosnian, Croatian […] and Serbian languages". However, there is no trace

3922 For more details about the Constitution-making process, see the previous statements: "A. Enactment of the Constitution within the international legal agreement", p. 19.

3923 As to dilemmas about the legitimacy of the Constitution of BiH, compare the comments: "D. Doubts about legitimacy", p. 30.

of the existence of those three equal and authentic versions. Although the non-existence of these language versions has not created great problems in the process of implementation of the BiH Constitution, the BiH political elites may not be proud of the fact that there are no official versions of the most important legal document in the official languages.

"Changes" and "amendments" are legal terms used to define certain changes in a legal act, in which case the relevant legal act which is given a new form will remain in force.[3924] However, "changing" and "amending" the RBiH Constitution by the Dayton Constitution did not mean that any provision of the RBiH Constitution would remain in force, although the use of the term "amendments" leads to such an observation of this problem (the RBiH Constitution *versus* the Dayton Constitution).[3925] The reason for making such a conclusion is the use of the term "supersede", which makes it clear that the new constitution will take the place of the former constitution. At the same time, the use of the term "amending" should be viewed in the context of the principle of State continuity (Article I.1 of the BiH Constitution). If the Framer of the Constitution had intended to leave in force some provisions of the Republic Constitution then the Framer would have acted it in some other manner when it comes to the legislative-technical terms. The entire replacement of the constitutional act is referred to in Article 2 of Annex II to the BiH Constitution, according to which: All laws, regulations, and judicial rules of procedure shall remain in effect, but not the constitutional provisions.[3926] Moreover, even the Constitutional Court of BiH has taken the position that the Republic Constitution ceased to be in effect.[3927]

By signing the General Framework Agreement for Peace in Bosnia and Herzegovina (Article 5 of the General Framework Agreement for Peace in Bosnia and Herzegovina in conjunction with Annex 4) the Republic of Bosnia and Herzegovina recognised itself, as well as the Federation of Bosnia and Herzegovina and the Republika Srpska. *Vice versa*, by signing the BiH Constitution, based on Article I.1 of the BiH Constitution, the Federation of Bosnia and Herzegovina and Republika Srpska have recognised the continued

3924 *OG of RBiH*, Nos. 5/93, 8/93, 21/93, 6/94, 8/94, 10/94, 13/94, 30/94, 30/95, 37/95 and 49/95.

3925 For a critical opinion on the "replacement" of the RBiH Constitution: *Šarčević*, 1996, p. 120 *et seq*.

3926 In this regard, see also *Festić*, 2000, p. 169 *et seq.*

3927 See AP 915/08, paragraph 8. If application of the clause on the continuity of legal regulations is limited to the sub-constitutional law then the opinion of the Constitutional Court of BiH (U 13/04, paragraph 3) is unsustainable that Article XI.1 of the BiH Constitution is *lex specialis* in relation to Article 2 of Annex II to the BiH Constitution.

and uninterrupted international personality of Bosnia and Herzegovina.[3928] Pursuant to Article I.3 of the BiH Constitution, the Federation of Bosnia and Herzegovina and Republika Srpska have been recognised as Entities,[3929] including their respective constitutions (Article XII.2 of the BiH Constitution). In fact, this amounted to their degradation in terms of the State organisation since they were granted a sort of status similar to federal units.[3930] Consequently, Article XII.2 of the BiH Constitution has placed an obligation on the Entities to amend, within three months from the entry into force of this Constitution, their respective constitutions and thus ensure their conformity with this Constitution in accordance with Article III.3(b).

The Entities have failed to comply with their obligation to amend their constitutions. Only after the decisions of the Constitutional Court in Case No. U 5/98 had been adopted and due the fact that in the course of a long lasting and unsuccessful negotiations process[3931] the Entities fully rejected harmonising their decisions did the High Representative decide to impose the changes and amendments to the Entities' Constitutions by bringing them in conformity with the BiH Constitution.[3932] Furthermore, even after the imposition of "international measures" for harmonisation of the Entity Constitutions, the Entities have taken no measures on their own in order to bring their constitutions in line with the BiH Constitution. Over time a practice has been established limiting the harmonisation of Entity Constitutions with the BiH Constitution only to the proceedings of abstract control of constitutionality before the BiH Constitutional Court in accordance with Article VI.3(a) of the BiH Constitution.[3933]

3928 See the different opinion of *Kuzmanović*, according to which Bosnia and Herzegovina was divided into three parts in 1992, and by the Dayton Agreement a new "union" of Bosnia and Herzegovina was created (*Kuzmanović*, 1999, p. 373 *et seq*); similar opinion, *Kunić*, 1997, p. 2. *et seq*.

3929 Compare *Marko*, 2006 a, p. 518, who refers to the "constitutional recognition of the existence of the Republika Srpska, as well as the Federation of Bosnia and Herzegovina".

3930 *Marko*, 2006.a, p. 518.

3931 Compare, *Decision establishing interim procedures to protect vital interests of Constituent Peoples and Others, including freedom from Discrimination* of 11 January 2001.

3932 Compare, *Džihanović*, 2001, p. 6, and *Pejanović*, 2004, p. 6. See, also, Decision on Amendments to the Constitution of the Federation of Bosnia and Herzegovina and Decision on Amendments to the Constitution of the Republika Srpska, both decisions are dated 19 April 2002.

3933 Compare, for instance, U 4/04.

Annex I to the BiH Constitution

Additional Human Rights Agreements To Be Applied in Bosnia and Herzegovina

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide

2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto

3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto

4. 1957 Convention on the Nationality of Married Women

5. 1961 Convention on the Reduction of Statelessness

6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination

7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto

8. 1966 Covenant on Economic, Social and Cultural Rights

9. 1979 Convention on the Elimination of All Forms of Discrimination against Women

10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

12. 1989 Convention on the Rights of the Child

13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

14. 1992 European Charter for Regional or Minority Languages

15. 1994 Framework Convention for the Protection of National Minorities

Annex I to the BiH Constitution incorporates a list of 15 international agreements on the protection of human rights and freedoms and international humanitarian law. These agreements apply directly in Bosnia and Herzegovina and represent substantive constitutional law. On the one hand, this clearly follows from the name itself of Annex I, which indicates that it concerns "additional" agreements on human rights which "apply" in Bosnia and Herzegovina. Furthermore, Article II.4 of the BiH Constitution provides that the enjoyment of rights and freedoms shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground regardless of whether, as provided for by Article II.7, the State is a member party or it is to become a member party to an international agreement listed in Annex I to the BiH Constitution. Finally, the constitutional obligation under Article II.4 of the BiH Constitution in conjunction with Annex II to the BiH Constitution to apply these Agreements refers to the fact that they have constitutional ranking.[3934]

3934 As to the exact information on the signing, ratification and publication of certain international instruments listed in Annex I to the BiH Constitution, and Protocols, including the ECHR, see the Council of Ministers of BiH 2003, p. *17 et seq.*, available at: <www.coe.int>; see also: "H. article II.7 – international agreements", p. 540.

Annex II to the BiH Constitution

Transitional agreements

1. Joint Interim Commission

a) The Parties hereby establish a Joint Interim Commission with a mandate to discuss practical questions related to the implementation of the Constitution of Bosnia and Herzegovina and of the General Framework Agreement and its Annexes, and to make recommendations and proposals.

b) The Joint Interim Commission shall be composed of four persons from the Federation, three persons from the Republika Srpska, and one representative of Bosnia and Herzegovina.

c) Meetings of the Commission shall be chaired by the High Representative or his or designee.

2. Continuation of Laws

All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

3. Judicial and Administrative Proceedings

All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.

4. Offices

Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.

5. Treaties

Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall

> **be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.**
>
> The idea to establish a Joint Interim Commission referred to in Article 1 of Annex II to the BiH Constitution, which was supposed to be composed of four persons from the Federation of BiH, three from Republika Srpska and one representative of Bosnia and Herzegovina, was a good one. The Commission had the mandate to "discuss practical questions related to the implementation of the Constitution of Bosnia and Herzegovina, of the General Framework Agreement and its Annexes and to make recommendations and proposals." Meetings of the Commission were supposed to be conducted by the High Representative or his designee. This Commission, which was formed by *Carl Bildt*, turned out to be completely ineffective due to the lack of readiness of local political parties to cooperate. In response to the failure of the Commission, the High Representative strengthened his role as the authority encouraging development of the peace process and the most responsible person concerning its implementation.

Article XI, in conjunction with Annex II to the BiH Constitution, concerns a number of provisions which essentially represent the consistent continuation of the provision on the continuity of the international personality of Bosnia and Herzegovina under Article I.1 of the BiH Constitution: Bosnia and Herzegovina has never ceased to exist and it still exists as a sovereign State with a modified internal structure. Therefore, "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 (Article 2 of Annex II to the BiH Constitution). The provisions regulating the normative conflict between the former Republic laws and the Dayton Peace Agreement are not incorporated in the transitional arrangements, including Article 2 of Annex II to the BiH Constitution. In this connection, the BiH Constitutional Court must clarify every individual legal situation relating to normative incompatibility.

However, the continuity of laws also includes the continuity of State obligations without any restrictions.[3935] All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution entered into force had to continue in or to be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies (Article 3 of Annex II to the BiH Constitution).

3935 AP 130/04, paragraph 68.

Based on Article 3 of Annex II to the BiH Constitution, the BiH Constitutional Court declared itself competent to decide on the normative control of laws in certain cases before the Constitutional Court of the Republic of BiH.

> In Case No. U 40/95, the Social Democratic Party of Bosnia and Herzegovina filed a request for review of the constitutionality of the Law on Transformation of Socially-Owned Property.[3936] The applicant claimed that the challenged law provided, in an unlawful manner and in violation of Article 25, paragraph 1 of the Constitution of the Republic of BiH, that the whole of socially owned property was transformed into State owned property, where the user of the property was deprived of his rights. In addition to this, the applicant claimed that employees, pensioners and other persons who contributed to the creation of such property on another basis should have their ownership rights recognised. Finally, the applicant claimed that the challenged law was in violation of items 1 and 2 of Amendment LXIII to the Republic of BiH Constitution guaranteeing the socially-owned property.

Admittedly, the BiH Constitutional Court applied new Rules of Procedure and the applicable BiH Constitution to this case and similar cases and had to reject[3937] the requests for lack of standing to file a request for abstract control (review) of constitutionality. The Court had to terminate the proceedings, since the present BiH Constitutional Court, unlike the former one, does not possess competence to control norms *ex officio*.[3938]

Until superseded by an applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with the applicable law (Article 4 of Annex II to the BiH Constitution). Given the restricted legitimacy of international treaties which the Republic of BiH (without the Republika Srpska and the so-called Herceg-Bosna) signed and ratified during the war, the institutions established under the Dayton Constitution were bound by these treaties only if the competent Dayton authorities approved them subsequently. Accordingly, Article II.5, first sentence thereof, of the BiH Constitution, provides that "any treaty ratified by the Republic of Bosnia and Herzegovina between 1 January 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall

3936 *OG of BiH*, No. 33/94.

3937 U 40/95, U 12/96.

3938 U 14/96. According to Articles 398 and 304, paragraph 1, item 7 of the Constitution of the Republic of BiH and item 4, line 2 of Amendment LXXI to the Constitution of the Republic of BiH, the Constitutional Court of RBiH could initiate *ex officio* proceedings for review of constitutionality of general legal acts (Article 255, paragraph 3 of the revised text of the Constitution of the Republic of BiH).

be denounced." However, it is not clear whether the treaties which are not disclosed *per constitutionem* are automatically denounced or the Presidency must denounce them as soon as it is informed that the case relates to a ratified treaty which was not denounced. From the point of view of international law, either approach should be correct.

Furthermore, within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty (Article 5, second sentence thereof, of Annex II to the BiH Constitution). Therefore, the legislature could denounce the treaties to which the Presidency of BiH gave its consent.

A number of conclusions useful for the interpretation of "Transitional arrangements" could be drawn from the BiH Constitutional Court's Decision No. U 12/98. The BiH Constitutional Court dealt with the constitutionality of two Decrees on the Ratification of the Agreement, which had been signed before the entry into force of the BiH Constitution. The BiH Constitutional Court has held that Article 5 of Annex II to the BiH Constitution does not apply to the international agreements which had been signed prior to and ratified after the entry into force of the BiH Constitution.[3939] These treaties were ratified by Decree in accordance with Article 34 of the Law on Government of the Republic of BiH,[3940] which was applicable when the BiH Constitution entered into force. However, even if the BiH Presidency had the competentence to ratify treaties based on former legal solutions, the BiH Constitutional Court considered that such ratification was unconstitutional, since the aforementioned provisions of the Law on Government had been replaced by Articles V.3(d) and IV.4(d) of the BiH Constitution and, therefore, could not constitute a legal basis for ratifying the treaties. In particular, according to Article V.3(d) of the BiH Constitution, the BiH Presidency shall have responsibility for ratifying the treaties of Bosnia and Herzegovina (with the consent of the Parliamentary Assembly), and Article IV.4(d) of the BiH Constitution explicitly refers to the competence of the Parliamentary Assembly of BiH to decide whether to consent to the ratification of treaties. The provisions relating to the competencies referred to in the Law on the Republic of BiH Government are contrary to these provisions. Therefore, according to Article 2 of Annex II to the BiH Constitution, by the entry into force of the BiH Constitution, they could no longer be the basis for ratifying international treaties by the Republic of BiH Government. The fact that neither the BiH Presidency nor the Parliamentary Assembly of BiH were established

3939 U 12/98.
3940 *OG of RBiH*, Nos. 13/94 and 3/96.

according to the BiH Constitution, could not lead to the conclusion that the institutions of the Republic of BiH, which, according to the Republic of BiH Constitution, were competent for ratification and which were still operational at the time when the BiH Constitution entered into force, could temporarily ratify such treaties. According to Article II.4 of the BiH Constitution, the Republic institutions could operate only until the moment of their replacement by new institutions. As to the responsibility for ratification of international treaties, the Government of the Republic of BiH was replaced *per constitutionem* by the BiH Presidency and BiH Parliamentary Assembly. The manner in which the BiH Constitutional Court observes the aforementioned problem means *a contrario* that the provision on continuity of legal and administrative proceedings (Article 3 of Annex II to the BiH Constitution) does not apply to the pending procedures for the ratification of undergoing international treaties, which could be concluded from the linguistic interpretation of this provision.

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U 44/01	Sejfudin Tokić	27.02.2004.	*OG of BiH*, No. 18/04	44, 47, 48, 75, 81, 488, 492, 505, 506, 507, 508, 543, 904, 927, 929, 935

Decision No.	Applicant	Date of issue	Published	Page
U 66/02	Federalno ministarstvo unutarnjih poslova (FBiH Ministry of Interior)	30.01.2004.	*OG of BiH*, No. 11/04	673, 684, 685, 686, 692
U 68/02	Sejfudin Tokić	25.06.2004.	*OG of BiH*, No. 38/04	96, 113, 114, 115, 116, 544, 961
U 83/03	Nikola Špirić	22.09.2004.	*OG of BiH*, No. 60/04	52, 53, 357, 428, 522, 524

BiH Constitutional Court – Article VI.3(c) of the BiH Constitution

Incidental Control of Norms

Decision No.	Applicant	Date of issue	Published	Page
U 17/06	Vrhovni sud FBiH (Supreme Court of the FBiH)	29.09.2006.	*OG of BiH*, No. 14/07	276, 277, 867, 874
U 26/00	Opštinski sud u Cazinu (Labour Law of the FBiH)	21.12.2001.	*OG of BiH*, No. 08/02	165, 166, 454, 457, 487, 493, 867, 874
U 50/01	Kantonalni sud u Širokom Brijegu (Cantonal Court Široki Brijeg)	30.01.2004.	*OG of BiH*, No. 24/04	867
U 55/02	Osnovni sud u Doboju (Basic Court of Doboj)	26.09.2003.	*OG of BiH*, No. 03/04	336, 338, 347, 409, 418, 431, 867, 872, 874

BiH Constitutional Court – Article IV.3(f) of the BiH Constitution

Vital National Interest

Decision No.	Applicant	Date of issue	Published	Page
U 2/04	Mustafa Pamuk	28.05.2004.	*OG of BiH*, No. 38/04	44, 48, 629, 630
U 7/06	Mustafa Pamuk	31.03.2006.	*OG of BiH*, No. 34/06	39, 44, 49, 55, 72, 629, 630
U 8/04	Mustafa Pamuk	25.06.2004.	*OG of BiH*, No. 40/04	44, 47, 48, 61, 72, 74, 75, 83, 461, 462, 630, 656, 662
U 10/05	Velimir Jukić	22.07.2005.	*OG of BiH*, No. 64/05	44, 46, 47, 48, 61, 72, 73, 74, 365, 367, 368, 369, 461, 463, 464, 487, 496, 628, 629, 630, 969, 972

Human Rights Chamber for Bosnia and Herzegovina

Commission for Human Rights within the BiH Constitutional Court

Annex 6 of DPA

Decision No.	Applicant and Respondent	Date of issue	Published	Page
CH/00/3880	Marjanović *versus* RS	08.11.2002.	<www.hrc.ba>	172, 173, 203, 206, 211, 214, 215, 216, 228, 229, 230, 231, 234, 291, 292, 293, 315, 328, 331, 700, 717, 776
CH/00/10999	Dervović *versus* BiH & FBiH	09.05.2007.	<www.hrc.ba>	275, 282, 391, 419
CH/01/6979	E.M. & S. T. *versus* FBiH	08.03.2002.	<www.hrc.ba>	142, 179, 181, 182, 184, 449, 451, 486, 494, 495, 497, 698, 699, 700, 778, 779, 907, 914, 916, 918
CH/01/7248	Ordo *versus* BiH	05.07.2002.	<www.hrc.ba>	248, 252, 254, 267, 268, 269, 272, 275, 281, 300, 301, 302, 365, 366, 369, 370, 371, 372, 373, 382, 391, 426, 717
CH/01/8050	Savić *versus* BiH & FBiH	07.09.2005.	<www.hrc.ba>	95, 99, 267, 270, 275, 286, 842, 843, 845, 925
CH/01/8110	D. R. *versus* BiH & RS	07.03.2003.	<www.hrc.ba>	100, 103, 287, 292, 391, 423, 425, 430, 525, 526
CH/01/8365 *et al.*	Selimović *versus* RS	07.03.2003.	<www.hrc.ba>	138, 139, 155, 164, 192, 197, 201, 328, 330, 779, 781, 907, 913
CH/01/8569 *et al.*	Pašovic *et al.* *versus* RS	07.11.2003.	<www.hrc.ba>	138, 192, 197, 201, 328, 330, 505, 506, 731, 734
CH/02/8202	M. P. *et al.* *versus* BiH & FBiH	16.03.2003.	<www.hrc.ba>	334, 348, 357, 486, 495, 496, 522, 524
CH/02/8679 *et al.*	Boudellaa, Lakhdar, Nechle, Lahmar *versus* BiH & FBiH	11.10.2002.	<www.hrc.ba>	119, 120, 143, 151, 179, 189, 190, 191, 192, 195, 196, 199, 200, 206, 208, 219, 220, 222, 223, 225, 253, 307, 308, 309, 310, 442, 443, 444, 446, 447, 698, 907, 916, 938, 943

Decision No.	Applicant and Respondent	Date of issue	Published	Page
CH/02/8923 *et al.*	Kličković *et al.* *versus* BiH, FBiH & RS	10.01.2003.	<www.hrc.ba>	412, 460, 486, 493, 535, 536
CH/02/9138 *et al.*	Ašanin *et al.*	09.11.2005.	<www.hrc.ba>	100, 101, 102, 103, 276, 282
CH/02/11139	Miljanović *versus* RS	15.03.2007.	<www.hrc.ba>	350, 351
CH/02/12401	Kuduzović *versus* FBiH	08.05.2007.	<www.hrc.ba>	239, 241
CH/02/12468 *et al.*	Š. Kadrić *et al.* *versus* BiH & FBiH	13.06.2006.	<www.hrc.ba>	52, 53, 88, 90, 113, 114, 115, 249, 257, 392, 421, 428, 525, 529, 574, 584, 585, 588, 757, 761, 938, 943
CH/02/12499	Fijuljanin *versus* BiH & FBiH	04.03.2003.	<www.hrc.ba>	782, 846, 847
CH/03/9628	Katolička biskupija Vrhbosna *versus* FBiH	06.06.2003.	<www.hrc.ba>	392, 404, 415, 416, 486, 489, 491
CH/03/12932	Džaferović *versus* FBiH	07.05.2004.	<www.hrc.ba>	762, 852, 853
CH/03/13106 *et al.*	AD Boksit „Milići" *et al.* *versus* RS	27.06.2007.	<www.hrc.ba>	96, 392, 425
CH/03/14418	Tomić *versus* BiH & RS	13.09.2006.	<www.hrc.ba>	96, 98, 335, 343, 350, 352
CH/03/15083	Fazlić *versus* FBiH	11.09.2006.	<www.hrc.ba>	354, 356, 536, 538
CH/96/1	Matanović *versus* RS	13.09.1996.	<www.hrc.ba>	142, 183, 206, 208, 701, 717, 760, 775, 776, 778, 779, 907, 913, 938
CH/96/28	M.J. *versus* RS	03.12.1997.	<www.hrc.ba>	282, 335, 339, 392, 404, 409, 413, 417, 423, 516, 517, 717
CH/96/29	Islamska zajednica BiH *versus* RS (BiH Islamic Community *v.* RS (mosque case in Banja Luka))	11.06.1999.	<www.hrc.ba>	358, 361, 362, 393, 404, 417, 429, 486, 492, 494, 505, 714, 716, 731, 734, 757, 759, 775, 776, 907, 915, 925, 927, 938, 939

Decision No.	Applicant and Respondent	Date of issue	Published	Page
CH/96/30	Damjanović *versus* FBiH	05.09.1997.	<www.hrc.ba>	139, 140, 153, 154, 155, 161, 179, 180, 185, 186, 187, 188, 190, 269, 701, 714, 719, 727, 765, 775, 777, 907, 908, 913, 916, 917, 918
CH/97/35	Malić *versus* FBiH	05.12.1997.	<www.hrc.ba>	128, 486, 907, 908
CH/97/60 *et al.*	Miholić *et al.* *versus* BiH & FBiH (član 3a JNA predmeti)	07.12.2001.	<www.hrc.ba>	393, 398, 428, 430, 522, 523, 762, 763, 782, 797, 798
CH/98/375 *et al.*	Besarović *et al.* *versus* BiH & FBiH & RS	06.04.2005.	<www.hrc.ba>	52, 53, 55, 88, 91, 96, 97, 100, 102, 114, 115, 139, 141, 394, 417, 418, 421, 424, 428, 525, 531, 532, 574, 584, 585, 588, 590, 757, 764, 907, 912, 944, 945
CH/98/874	Pemac *et al.* *versus* BiH & FBiH	08.02.2005.	<www.hrc.ba>	335, 348, 357, 394, 426, 428, 522, 524
CH/98/1309 *et al.*	Kajtaz *et al.* *versus* FBiH	07.09.2001.	<www.hrc.ba>	248, 258, 276, 277, 279, 281, 454, 458, 486, 496, 582
CH/99/2425	Ubović *et al.* *versus* FBiH (Glamoč predmeti)	07.09.2001.	<www.hrc.ba>	335, 338, 394, 417, 421, 424, 762, 925, 926
CH/99/3196	Palić *versus* BiH and RS	11.10.2001.	<www.hrc.ba>	179, 182, 183, 184, 192, 193, 197, 201, 202, 206, 207, 328, 330, 581, 715, 716, 719, 723, 776, 908, 913, 938, 943

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Biographies

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Constance Grewe, Prof. Dr., born in 1946 in Stuttgart (Germany). She is a professor of public law at the Université de Strasbourg (France), Vice-President of the Constitutional Court of Bosnia and Herzegovina. She researches in the fields of comparative constitutional law, fundamental and human rights, and judicial review. Her principal publications are as follows: C.GREWE/ H.RUIZ FABRI: *Droits constitutionnels européens* [*European Constitutional Rights*], P.U.F., Droit fundamental, Paris 1995; C.GREWE/ O.JOUANJAN/ E. MAULIN/ P. WACHSMANN (Hg.), *La notion de « justice constitutionnelle » [Notion of "constitutional justice"],* Dalloz 2005; C.GREWE/ C.GUSY (ed.), *Menschenrechte in der Bewährung. Die Rezeption der Europäischen Menschenrechtskonvention in Frankreich und Deutschland im Vergleich* [*Human rights through evidence. Comparison between the recognition of the European Convention for the Protection of Human rights and Fundamental Freedoms in France and Germany*], Nomos, Baden-Baden 2005. Verfassungsvergleichung und –angleichung in Europa, insbesondere auf dem Gebiet des Grundrechtsschutzes [Constitutional comparison and constitutional approximation to Europe, in particular in the area of human rights protection], in: J. SCHWARZE (ed.), *Rechtseinheit und Rechtsvielfalt in Europa,* Institut für Ausländisches und Internationales Privatrecht – Institut für Öffentliches Recht – Europa-Institut Freiburg e.V. 2007, 133-150; The Relationship between the EU and Member States in Constitutional Case Law: A Comparison between Western and Eastern Europe, in: C. Barnard (ed.), *The Cambridge Yearbook of European Studies* 2007-2008, Volume 10, Hart Publishing, Oxford 2008, 189-198.

Joseph Marko, Prof. Dr., born in 1955, studied law and political science, as well as the English language. Among other things, he is engaged as a full-time professor at the Institute of Austrian, European and Comparative Public Law and Political Science of the Faculty of Law, University of Graz, Austria (1997-). He is the Director of the Law School Centre for South-East European Studies and the Scientific Director of the interdisciplinary Master Programme "European Integrations and Regionalism" of the University of Graz (Austria) organised in cooperation with the European Academy in Bolzano (Italy) and the European Institute for Public Administration (Luxemburg). During his rich professional career he has served, among other things, as an international judge and the Vice-President of the Constitutional Court of Bosnia and Herzegovina (1997-2002). He was a member of the Advisory Committee under the Framework Convention on the Protection of National Minorities (1998-2002), as well as Co-Director of the Research Department on "Regional Autonomies and National Minorities" of the European Academy Bolzano (1998-), as well as a Legal and Political Advisor to the High Representative Dr. Christian Schwarz-Schilling (2007). Since 2009 he has been a member of the Council on Foreign Affairs of

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Jeremy McBride, Professor, Barrister, Monckton Chambers (2006-), London. Visiting Professor, Central European University (1997-); professeur invité, Institut International des Droits de l'Homme (2001-); Deputy Chair of the Scientific Committee of the European Union's Fundamental Rights Agency (2008-); Coordinator of the Expert Council on NGO Law of the Council of Europe's Conference on INGOs (2008-); expert on human rights law for the Council of Europe, the Organisation for Security and Co-operation in Europe and UNDP; Editor, *Butterworths Human Rights Cases* and Consultant Editor, *Commonwealth Human Rights Law Digest*; co-founder and Chair of INTERIGHTS (the International Centre for the Legal Protection of Human Rights). Formerly Reader in International Human Rights Law, University of Birmingham (1978-2006); Visiting Professor, University of Santa Clara, California (1977-98); Visiting Professor, University of Stockholm (1990-6); and Senior International (UNDP) Consultant to the National Human Rights Office of Latvia (1996-98).

Mechtild Lauth, LL.M., born in 1967 in Cologne, currently serves as Legal Officer in the European Union's Judicial Cooperation Unit (Eurojust) in The Hague (The Netherlands). Previously she held the position of Legal Advisor to the Registrar of the Special Tribunal for Lebanon in The Hague and Senior Researcher and Project Coordinator of the German Institute for Human Rights in Berlin. Between 2001 and 2007 she worked with the Office of the High Representative for Bosnia and Herzegovina and later with the Registry for War Crimes and Organised Crime of the Court of Bosnia and Herzegovina as the Head of the Legal Section. She has published on a number of human rights topics as well as on war crimes prosecutions in Bosnia and Herzegovina.

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Ric Bainter, LL.B., is a legal counsel to the Office of the High Representative for BiH. He has worked in Bosnia and Herzegovina since January 2000 in a variety of capacities including Legal Counsel to the Provisional Election Commission and Chief of Staff and Senior Legal Counsel to the Defence Reform Commission. He is an attorney licensed to practice law in the United States since 1988. He has also lectured in international law at the University of California, San Diego.

Edouard d'Aoust, licencie en droit, born in 1964 in Brussels (Belgium). Head of the Department for Legal Affairs, Office of the High Representative and European Union Special Representative for BiH since 2003. Has extensive experience in Bosnia and Herzegovina, where he has worked since the end of the war. In particular, he worked as a member of the Cabinet of the former High Representative, Mr. Wolfgang Petritsch. Before 2001 he held the position as Chief Legal Counsel to the Provisional Election Commission of the OSCE.

Peter Nicholl was born in 1944 in Hamilton, New Zealand. He obtained a BCA degree in economics from Victoria University, Wellington in 1971 and BCA (Honour) degree with first class honours in economics from Victoria University in 1974. Reserve Bank of New Zealand (1972-1994); Chief Economist, Deputy Governor and Deputy Chief Executive of the Reserve Bank of New Zealand (1995-1997); Executive Director on the Board of the World Bank in Washington D.C; Governor of the Central Bank of Bosnia and Herzegovina (1997-2004); Financial Forum of BiH award as Person of the Year (2000), Golden BAM award by financial magazine "Banks in BH", award of British financial magazine "Finance Central Europe – Governor of the Year for 2003" (2003); Chairman of the Governing Board of the Indirect Taxation Authority in BiH (2006-2008), US Treasury Advisor (2006-).

Mark Campbell, born in 1969 in Manchester (England), BA (Hons) Economics and History, Chartered Institute of Taxation (CTA), Post Graduate Diploma in Law (Pg Dip L), Post Graduate Diploma in Legal Practice (Pg Dip LPC). Mark worked for five years (2001-2006) at the Office of the High Representative (OHR) as the Senior Economic Advisor to the Principal Deputy High Representative and played a pivotal role in all key political, economic, legal and constitutional aspects of the introduction of Value Added Tax in Bosnia and Herzegovina. Prior to working at the OHR, Mark was a senior manager with the consulting firms KPMG and Price Waterhouse and was based in Zagreb, Croatia, Almaty, Kazakhstan and Baku, Azerbaijan. Mark currently is engaged in legal and advisory work in England after recently successfully completing post graduate legal studies and making a return to England after 11 years of expatriate life.

Ulrich Karpen, Prof. Dr., born in 1938. Employed as a Professor of Public Law and Political Science with the Faculty of Law of the University of Hamburg (Germany). Discharged a number of distinct legal and political functions, with the following being prominent: membership in the State Parliament in Hamburg (1991-2001), Chairman of the Legal Commission and the Vice-President of the Committee for University Education and Science, and membership in (President of) the German Association for Legislation (1987-1991). He has extensive experience in transition countries and developing countries (Georgia, Albania, Ukraine, Belarus, Russia). In Bosnia and Herzegovina he worked, amongst others, in the Internal Advisory Group of the OSCE (1999-2000), as an advisor with the Brčko Assembly (2003-2004), as a lecturer at the Sarajevo Summer School (2008), and a member of the OSCE Mission in Sarajevo (2009). He is an author of a great many scientific and professional publications, such as: National Legislation in the European Framework, Baden-Baden, 1998; Elektronische Wahlen? Einige verfassungsrechtliche Fragen [*Electronic elections? Some constitutional issues*], European Association of Legislation (EAL), Deutsche Gesellschaft für Gesetzgebung (DGG), Volume 10, Baden-Baden (Nomos), 2005; Training of the Interim Assembly of the Brčko District, in: Legal reform in the Brčko District of BIH, Eur. Publ. Law Centre, Volume III, London, 2005.