

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI 3(a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2(2), Article 61 paras 1 and 2, and 3, Article 62 and Article 63 para 4 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President

Mr. David Feldman, Vice-President,

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru,

Mr. Mato Tadić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić

Having deliberated on the request of **Mr. Sulejman Tihić, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request**, in case no. U-4/04,

At its session held on 18 November 2006 adopted the following

THE SECOND PARTIAL DECISION ON ADMISSIBILITY AND MERITS

The request of **Mr. Sulejman Tihic**, **Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request**, for the review of constitutionality of Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92) is hereby granted.

It is established that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92) are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

Pursuant to Article 63 paragraph 4 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the National Assembly of Republika

Srpska is ordered to bring in line Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92) with the Constitution of Bosnia and Herzegovina within six months as from the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

The National Assembly of Republika Srpska is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within the above specified time-limit, about the measures taken to execute this Decision as required by Article 74 para 5 of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The request of **Mr. Sulejman Tihic, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request**, for the review of constitutionality of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92) is hereby dismissed.

It is established that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92) is in conformity with

Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina.

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

REASONS

I. Introduction

1. On 12 April 2004, Mr. Sulejman Tihic, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request, (“the applicant”), filed a request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) for the review of constitutionality of Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette 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 Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* No. 19/92), Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* No. 4/93) and Articles 1 and 2 of the Law on the Family Patron-Saints’ Days and Church Holidays of the Republika Srpska

(*Official Gazette of Republika Srpska* No. 19/92). On 2 December 2004, the applicant submitted a supplement to the request.

II. Proceedings before the Constitutional Court

2. Pursuant to then applicable Article 21 para 1 of the Rules of Procedure of the Constitutional Court, on 11 May 2004, the National Assembly of Republika Srpska (“the National Assembly”) was requested to submit its reply to the request within 30 days from the receipt of the request from the Constitutional Court. On 8 December 2004, it was also requested to submit its reply to the supplement of the request, also within 30 days.

3. On 8 June 2004, the National Assembly requested the time limit for submitting a reply to be extended to 45 days and, on 29 July 2004, an additional extension until 15 October 2004 was requested. On 3 August 2004, the Constitutional Court, in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court, approved the National Assembly the extension of the time limit for reply until 1 October 2004, as requested.

4. The National Assembly submitted its reply to the request on 30 September 2004 in which it proposed a public hearing to be held in this case.

5. On 6 August 2004, the Croat Caucus and the Bosniak Caucus within the Council of Peoples of the Republika Srpska submitted their replies to the request.

6. On 28 December 2004, the National Assembly requested an extension of time until 16 February 2005 for submission of its reply on the allegations stated in the supplement to the request.

7. Acting in accordance with Article 24 of the then applicable Rules of Procedure of the Constitutional Court, and taking into account the statements from the request and supplement thereof as well as the fact that National Assembly already submitted its reply to the request, and that the time limit for submission of the reply was already extended as requested and the 30 days time limit for submitting the reply to the supplement was given, the Constitutional Court did not find reasons to extend the time limit for submitting the reply to the allegations made in the supplement to the request.

8. Having regard to Article 25 para 2 of the then applicable Rules of Procedure of the Constitutional Court, the reply of the National Assembly was submitted to the applicant on 26 October 2004.

9. Having regard to Article 46 of the then applicable Rules of Procedure of the Constitutional Court, the Constitutional Court decided at its plenary session of 28 January 2005 to hold a public hearing in which the parties to the proceedings would take part. At the same session, the Constitutional Court decided to invite, as prospective *amici curiae*, the OSCE Office in BiH, the UN High Commissioner for Human Rights, the Venice Commission and the OSCE High Commissioner for National Minorities, to present their preliminary observations.

10. On 24 February 2005, the High Commissioner for National Minorities informed the Constitutional Court that he could not take part as *amicus curiae* in the present case for his current responsibility did not include the territory of Bosnia and Herzegovina. On 14 March 2005, the OSCE Office in BiH, the UN High Commissioner for Human Rights, and the Venice Commission, in their capacity as *amici curiae* before the Constitutional Court, presented their joint opinion.

11. On 28 January 2006, pursuant to Article 46 paragraph 1 of the Constitutional Court's Rules, the Constitutional Court held a public hearing to which it invited the applicant's representatives and the representatives of the House of Representatives and the House of Peoples, and the representatives of the National Assembly of RS, and *amici curiae*. At the public hearing, Academician Muhamed Filipović and Ms. Alma Čolo represented the applicant, Mr. Irfan Ajanović represented the House of Representatives, and Professor Dr Hans Peter Schneider, Prof. Dr Rajko Kuzmanović, Krstan Simić, Prof. Dr Dragomir Acović, Nevenka Trifković and Borislav Bojić represented the National Assembly. In addition, Ms. Madeline Reese, Head of Office of the High Commissioner for Human Rights in Bosnia and Herzegovina and Ms. Jasminka Džumhur, a lawyer in the Office of the High Commissioner for Human Rights in BiH, acted as *amici curiae* in the case. No representative of the House of Peoples took part at the public hearing.

12. On 6 February 2006, the applicant submitted to the Constitutional Court his written statement as given at the public hearing, as well as his supplement statement relating to the public hearing. On 13 February 2006, the Constitutional Court submitted the above mentioned

observations to the RS National Assembly.

13. On 6 and 20 February 2006, the RS National Assembly submitted to the Constitutional Court its written statement as given at the public hearing and a video recording of the statement by Mr. Ivan Tomljenović, the Vice-President of RS, relating to the challenged symbols of the Republika Srpska. On 13 and 23 February 2006, the Constitutional Court submitted to the applicant the written observations and a transcript of interview given by Mr. Ivan Tomljenović.

14. On 9 February 2006, *amici curiae* submitted additional observations relating to the public hearing. On 23 February 2006, the Constitutional Court forwarded the *amici curiae*'s additional observations to the applicant and RS National Assembly.

15. At its plenary session of 31 March 2006 the Constitutional Court adopted a partial decision ("the Partial Decision I") on the basis of Article 62 of the Rules of the Constitutional Court, whereby it was established that Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (*Official Gazette of Federation of BiH* No. 21/96 and 26/96), Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* No. 19/92), in certain parts, are not in conformity with Articles I (1) and I(2) of the Constitution of Bosnia and Herzegovina, i.e. with Article II(4) of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina. On that occasion the Constitutional Court deferred the adoption of a decision on the part of the request relating to establishing the inconsistency of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska with the Constitution of BiH. The Partial Decision I was published in the *Official Gazette of Bosnia and Herzegovina* No. 47/06 on 20 June 2006.

III. Request

a) Statements from the request and supplement to the request

Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

16. The applicant stated that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska provides that the flag of the Republika Srpska shall consist of three colours: red, white and blue. The colours shall be placed horizontally in the following order: red, blue and white. Each colour shall occupy one-third of the flag. The flag of the Republika Srpska contains all features of the flags of the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 respectively. Thus, it contains symbols that are deeply rooted in the historical past of the Serb people. The applicant alleges that the said provisions of the Constitutional Law on the Flag, the Coat of Arms and the Anthem of the Republika Srpska discriminate against the Bosniak people and the Croat people as constituent peoples in the entire territory of Bosnia and Herzegovina and thus in the Republika Srpska as well. The said provisions also discriminate against other citizens of Bosnia and Herzegovina.

17. Furthermore, the applicant pointed out that a possible reason for failing to incorporate the symbols of either the Bosniak or the Croat people into the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska is the fact that at the time of enactment of the relevant law the Bosniak and the Croat people, according to the Constitution of the Republika Srpska, had no status as constituent peoples in the Republika Srpska. This status was recognized by the Constitution of the Republika Srpska only following the adoption of the Decision of the Constitutional Court of Bosnia and Herzegovina on the constituent peoples No. *U-5/98*, at which time the amendments to the Constitution of the Republika Srpska were adopted.

18. The applicant alleges that it clearly follows from the aforesaid that the prescribed appearance of the flag, the coat of arms and the text of the anthem of the Entity of Republika Srpska represent the symbols and emblems of the Serb people. However, they cannot be official symbols and emblems of the entity since the Entity of Republika Srpska is a community of not only the Serb people but also of the Bosniak, Croat and other peoples and citizens who are equal in all respects. By prescribing the said provisions, the Bosniak people, the Croat people and other citizens of Bosnia and Herzegovina have been directly discriminated against on national grounds, which is causing an atmosphere of fear among them and distrust in the authorities of the Republika Srpska,

thereby impeding the return of non-Serbs to their homes of origin in the Republika Srpska. According to the applicant, the present case raises an issue of discrimination with regards to respect of the right to return as guaranteed under Article II(5) of the Constitution of Bosnia and Herzegovina, prohibition of discrimination on national origin and provision of equal treatment with regard to the right of freedom of movement within the state boundaries.

Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of Republika Srpska

19. The applicant alleges that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays are not in conformity with Article II (4) in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina.

20. In Articles 1 and 2 of the said Law, the following family Patron-Saints' days and church holidays are designated as the holidays of the Republika Srpska: Christmas, Day of Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus's Day. The applicant states that these obviously include holidays of only one people, the Serb people (save the Labour Day), and that those holidays are solely orthodox religious holidays and holidays associated with the history of the Serb people and Orthodox faith, e.g. First Serb Uprising, Twelfth-day, Orthodox Christmas, Easter, etc. On the other hand, the applicant states, the working days are the holidays of other peoples and religious denominations such as Eid (*Bajram*), Catholic Christmas, Easter, etc.

21. The above mentioned holidays are celebrated by legislative, executive and administrative bodies of the Republika Srpska, army, police, judicial authorities, etc. The applicant further states that according to this Law, those are the days when the said institutions do not work, as well as the officials from the Republika Srpska elected to the institutions of Bosnia and Herzegovina. Moreover, according to the applicant's allegations, all citizens of the Republika Srpska who are not of Serb origin are forced to celebrate those holidays although they do not regard them as their own holidays. Furthermore, all but the Serbs in the Republika Srpska are prohibited to have their own holidays as official holidays in the Entity they live in, which holidays would avoid giving offence to the constituent peoples in Bosnia and Herzegovina. Hence, according to the applicant, the enactment of official holidays that are the part of the Serbs' history alone creates an air of distrust among other peoples

and citizens and maintains a sense of fear of the ethnic cleansing that they experienced during the aggression in Bosnia and Herzegovina between 1992 and 1995 when they were forced to leave their homes of origin.

b) Statements from the supplement to the request

22. The applicant stated in its supplement to the request that the central goal of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Constitution of Bosnia and Herzegovina is non-discrimination. This is supported by the fact that the provision of Article II(4) has been given additional importance by associating the application of fifteen human rights protection instruments under Annex I to the Constitution of Bosnia and Herzegovina with this Article. Hence, the application of rights and freedoms under Annex I to the Constitution of Bosnia and Herzegovina, as laid down in Article II(4), is secured to all persons without discrimination. The applicant considers that the said constitutional provisions have priority over the laws of, respectively, the State and the Entities, which includes all laws and the Entity Constitutions. Although the state is solely responsible in international law for obligations arising out of each individual instrument listed in Annex I to the Constitution of Bosnia and Herzegovina, the specific constitutional and territorial organization of Bosnia and Herzegovina means that the territorial units of Bosnia and Herzegovina are very often the agents obliged to apply the said instruments in practice. Notwithstanding this, the Republika Srpska preserved and established the symbols and other features and enacted the Law on Family Patron Saints' Days and Church Holidays of the Republika Srpska – this indubitably shows that the Bosniak people and the Croat people in the Republika Srpska are treated differently when compared to the Serb people in the Republika Srpska, which is contrary to Articles 1(1) and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. The said articles, in particular Article 2 (c) and (d), provide for effective measures of *national and local policy* to be undertaken in order to repeal or quash any law or regulation aimed at unequal and discriminatory treatment, and oblige the authorities to support integrationist organizations and movements in order to repeal discriminatory measures.

23. The applicant states in his supplement to the request that he bases his allegations of a violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1 and Article 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All

Forms of Racial Discrimination on the same reasons as those set out in his request for he considers that any prescription of symbols of an Entity that symbolize only one people, or two of the three constituent peoples in Bosnia and Herzegovina, represent measures aimed at distinction, exclusion, restriction or preferential treatment based on a national or ethnic origin. Their goal is to infringe or discredit the recognition, enjoyment or exercise of human rights and fundamental freedoms in all spheres of life on equal terms.

24. Finally, the applicant states that notwithstanding the positive obligations arising out of Articles II(1) and II(6) of the Constitution of Bosnia and Herzegovina, the competent authorities of the Republika Srpska failed to take appropriate measures to fulfill the obligations assumed under Articles II(1), II(4) and II(6) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a), (b), (c), (d) and (e) of the International Convention on the Elimination of All Forms of Racial Discrimination listed in Annex I to the Constitution of Bosnia and Herzegovina

b) Reply to the request

25. With reference to the allegations from the request relating the flag of the Republika Srpska as it is stipulated by Article 1 of the Constitutional Law on the Coat of Arms, Flag and Anthem of Republika Srpska, it is pointed in the reply that the allegation that the flag of Republika Srpska is the flag of the Principality and the Kingdom of Serbia is ill-founded as red, blue and white are the so-called "pan-Slavic colours" and they can be found, in different arrangements, on the flags of Croatia, Slovenia, Slovakia and Russia and, with specific modification, on the flag of Bulgaria. In view of the fact that all constituent peoples in Bosnia and Herzegovina are of Slavic origin, it is claimed in the reply that the colours themselves cannot be the subject matter of dispute. Red and white are heraldic colours of the Croat and the Serb people and they cannot be disputable as such, whereas the colour red was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. The National Assembly has drawn a conclusion from the aforesaid that none of the colours from the flag can be disputable as such and that the arrangement of colours cannot be associated with discrimination, but rather with aesthetic feelings, aesthetic feeling is not a constitutional category. It is furthermore stated that "the fact that the flag of Serbia has the same arrangement of colours does not have to imply anything since Serbia and Bosnia and Herzegovina were one country for long period of time in history, including the period of King Tvrtko

I". One of the assumptions is that the applicant does not mind either the colours or their arrangement but he would just like to see a specific symbol on the flag as is the case with the flag of the Federation of Bosnia and Herzegovina. As the flag of the Republika Srpska contains no symbols and the flag of the Republika Srpska should not be compared to the ranking and commanding flags and standards, an absence of anything representing two constituent peoples cannot be regarded as evidence for the claim of discrimination. Hence, the Bosniak people, in the spirit of the applicant's initiative, are free to identify themselves with one of the colours on the present flag of the Republika Srpska.

26. Furthermore, the National Assembly in its reply states that the challenged provisions of the Law on Family Patron-Saints' Days and Church Holidays do not violate the constitutional right of the Bosniak people, of the Croat people and of Others in any aspect, nor do they endanger national equality and vital interests of constituent peoples and Others in Bosnia and Herzegovina. The National Assembly believes that the applicant overlooked the provision in Article 2 paragraph 2 of the Law on Family Patron-Saints' Days and Church Holidays that *the citizens of the Republika Srpska shall have the right and choice to celebrate their religious holidays three days in a year without discrimination on any ground or status*. Moreover, it is stated that this Law provides in its Article 4 that *the statute of a municipality may determine that one day shall be celebrated as a holiday in that particular municipality*.

27. As to Articles 1 and 2 of the challenged Law on the Family Patron-Saints' Days and Church Holidays, the National Assembly has stated that it is necessary, first, to clarify that the acceptance of the Greek Orthodox Calendar in the Republika Srpska neither offends nor discriminates against anyone since it is absolutely necessary to use only one calendar and it is also reasonable to use the traditional calendar of the great majority of citizens. In this respect, it is objectively impossible to treat all three peoples equally by entitling them to use different calendars. Therefore, in their opinion, the celebration of two New Years is unchallengeable. "The ten religious holidays are based on Christian faith and therefore the Orthodox Serbs and Croat Catholics may celebrate them. Only Bosniaks, as Muslims, are affected by these days. At the same time, they are entitled to celebrate the three additional days of their own choice every year on the days of their religious holidays". Consequently, the Bosniaks are not discriminated against but privileged as they are entitled not to sixteen but to nineteen non-working days. This is an illustration that an unequal

treatment does not necessarily represent discrimination. Hence, if the differential effect of the relevant law to the constituent peoples is to be found, the grounds of differential treatment are both reasonable and justified. Finally, it is stated in the conclusion that “Republika Srpska remains in any event – whether one likes it or not – symbolically, a mother Entity for the Serbs“.

28. As to the statements from the supplement to the request regarding the International Convention on Elimination of All Forms of Racial Discrimination, the National Assembly replies that this Convention is not directly applicable to the Republika Srpska. Article II(4) of the Constitution of Bosnia and Herzegovina invokes this Convention as an international agreement listed in Annex I to the Constitution of Bosnia and Herzegovina. The wording of this Convention, however, is quite clear: it binds and obliges only “state parties” like Bosnia and Herzegovina and not other kinds of political communities. In contrast to that, the Republika Srpska is just an entity and not a State. Also Article 2 (a), (b), (c), (d) and (e) of this Convention does not have any broader meaning than Article II(4) of the Constitution of Bosnia and Herzegovina and it only repeats normative devices, orders and obligations imposed on public authorities, which can also be derived directly by an appropriate interpretation of Article II(4) of the Constitution of Bosnia and Herzegovina.

c) Submission of *Amici curiae*

29. *Amici curiae* elaborated on the constitutional and legislative framework in which the challenged laws were adopted, pointing out that the challenged laws were adopted at the time when neither the Serbs in the Federation of BiH nor the Bosniaks and the Croats in the Republika Srpska had the opportunity to express their position regarding the symbols and the holidays as “they were not represented in the meaningful sense in the legislative process”. In their submission *amici curiae* pointed out that the context of use of symbols is also of special importance considering the use of symbols in the conflict in Bosnia and Herzegovina by way of emphasizing the dominance of one ethnic group within a certain geographic area. The rest of the submission elaborated on the issue of existence of discrimination in connection with the right to return and a concluded that there was a violation of the right to return which was caused by the existence of discrimination on the grounds of ethnicity, in other words that there was a violation of Article II(4) of the Constitution of Bosnia and Herzegovina and European Convention.

IV. Public Hearing

30. In its Partial Decision I (paragraphs 64 through 93) the Constitutional Court has presented in detail the additional submissions that were presented at the public hearing. The submissions from the public hearing that are important for this decision will be presented in paragraphs to follow.

Applicant's positions

31. At the public hearing the applicant emphasized his position that any symbol used in the existence of the state or in public should reflect its ethnic, national, religious and traditional structure and that the Republika Srpska cannot introduce symbols which reflect a specific approach to experiencing the state, national and cultural tradition inherent to the Serbs only so that other peoples cannot be symbolically represented in an equal way without discrimination.

32. It was said that the Bosniaks and Croats do not want to send their children to the schools that celebrate their own Patron-Saints' Days and which operate under the auspices of the Orthodox saints or to stand under symbols that were carried by those who committed crimes against Bosniaks and Croats.

33. With reference to the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska, which ceased to be in force by entry into force of the Law on Public Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, no 103/05), the applicant stated that a procedure had been initiated before the Constitutional Court of the Republika Srpska for review of the constitutionality of the Law on Public Holidays of the Republika Srpska and the procedure of its enactment, in view of the fact that the Law was promulgated by Decree of the President of the Republika Srpska and that the procedure laid down in the Constitution of the Republika Srpska for dealing with a claim during the legislative process that the proposed Law was destructive of a "vital national interest" of the Serb people had not been followed. The applicant suggested that the Constitutional Court could therefore still properly review the compatibility of the challenged Law on Family Patron-Saints' Days and Church Holidays, which was still in operation, with the Constitution of Bosnia and Herzegovina. At the end of the hearing the applicant suggested

that the Constitutional Court might postpone its decision on this law pending the adoption of the decision of the Constitutional Court of the Republika Srpska.

Positions of the National Assembly

34. The RS National Assembly reiterated its standpoints from its reply to the request and the supplement to the request and presented some additional views. The RS National Assembly reiterated that the applicant had failed to present any evidence supporting the allegations that the challenged laws had been discriminatory, *i.e.* that they had discriminatory effects. It was also stressed that no person had been put in the position of being unable to return to the Republika Srpska because of the symbols, and the best example was the applicant who had been the Deputy Chairman of the National Assembly of the Republika Srpska and who had accepted those symbols at the time of his term of office. Furthermore, it was stated that the challenged symbols of the Republika Srpska, either wholly or in part, had always belonged to all the peoples – Serbs, Croats and Bosniaks. It was also emphasized that the symbols are not *prima facie* exclusive, as the flag of the Republika Srpska is in Pan-Slavic colours. They pointed out that some of the symbolic elements such as the cross, lily, the colour of the flag, etc., are deeply rooted in the history of all three peoples of Bosnia and Herzegovina.

35. When asked by the Constitutional Court whether there is a difference in respect of the colours and their arrangement as between the flags of the Republic of Serbia and of the Republika Srpska, the explanation was given that the colours and their arrangement are the same, but that the flag of Republic of Serbia also contains the coat of arms of the Republic of Serbia.

36. The proposal was made to terminate the proceedings relating to the part of the request challenging the Law on the Family Patron-Saints' Days and Church Holidays since the new Law on Public Holidays had been enacted according to which all constituent peoples are entitled to observe their respective religious holidays.

37. When asked by the Constitutional Court whether the representatives of all three constituent peoples took part in the enactment of the challenged laws of the Republika Srpska, the

representatives of the National Assembly replied that they had no reliable information about that but they presumed it to be so. It was also said that the standpoints presented at the hearing on behalf of the National Assembly would not be supported by Bosniaks; however, the Croats would support them since they had never raised an issue relating to the constitutionality of the challenged laws.

Positions of *amici curiae*

38. Most of the presentation by *amici curiae* during the public hearing repeated the submissions in their written opinion, already set out in this decision, and emphasized the importance of taking into consideration the temporal context in which the challenged laws were enacted. *Amici curiae* said that for them a key fact is the issue of identification with symbols representing one group exclusively, and therefore the burden of proving the legitimacy of measures, within the assessment of a justification of discrimination in the challenged laws, should be placed on the enactor of the challenged laws.

V.Relevant Law

39. Constitution of Bosnia and Herzegovina

Article I.1

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

Article I.2

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

Article I.3

Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.

*Article II.1**Human Rights*

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

Article II.3

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.*

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- k. The right to property.*
 - l. The right to education.*
 - m. The right to liberty of movement and residence.*

Article II.4

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

Article II.5

All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

Article II.6

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

Article III. 3(b)

The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and

Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

Article XII.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).

40. **Amendments LXVI-XCI to the Constitution of the Republika Srpska** (*Official Gazette of the Republika Srpska No. 21/02*)

Amendments LXVII, paragraph 1

1. *The Republika Srpska shall be a unique and inseparable constitutional-legal entity*

The Republika Srpska shall perform its constitutional, legislative, executive and judiciary duties independently.

The Republika Srpska shall be one of two equal Entities in Bosnia and Herzegovina.

Serbs, Bosniaks and Croats, as constituent peoples, Others and citizens shall participate in the exercises of power in the Republika Srpska equally and without discrimination.

41. **International Convention on the Elimination of All Forms of Racial Discrimination**, in its relevant part, reads as follows:

Article 1.1.

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 2

(a) *Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;*

(b) *Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;*

(c) *Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*

(d) *Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;*

(e) *Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.*

42. The Constitutional Law on the Use of Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska No. 19/92*)

Article 1

The flag of the Republika Srpska shall consist of three colours: red, white and blue. The colours shall be placed horizontally in the following order: red, blue and white. Each colour shall occupy one-third of the flag”, the proportion of width and length of the flag shall be 1:2.

43. Law on Family Patron-Saints’ Days and Church Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska No. 19/92*).

Article 1

The following family Patron-Saints’ days and church holidays are designated as the holidays of the Republika Srpska in Articles 1 and 2 of the said Law: Christmas, Day of

Republic, New Year, Twelfth-day, St. Sava, First Serb Uprising, Easter, Whitsuntide, May Day – Labour Day and St. Vitus’ Day.

Article 2

The holidays referred to in Article 1 of this Law shall be: Christmas – 6, 7 and 8 January, Day of Republic – 9 January, New Year – 14 and 15 January, Epiphany, St. Sava – 27 January, First Serb Uprising – 14 February, Easter Holidays: Good Friday – one day and Easter – two days, May Day – Labour Day – one day, Whitsuntide – two days, St. Vitus’s Day - 28 June.

The citizens of the Republika Srpska are entitled to take three days to observe their holidays on the days of their religious holidays.

44. **Law on Holidays in Republika Srpska** (Official Gazette of the Republika Srpska No. 103/05), in its relevant part, reads as follows:

Article 13

The Law on Family Patron-Saints’ Days and Church Holidays (Official Gazette of the Republika Srpska No. 19/92) shall cease to be in force on the date of entry into force of this Law.

45. **Decision of the Constitutional Court of the Republika Srpska No. U-60/05** (Official Gazette of the Republika Srpska No. 14/06), in its relevant part, reads as follows:

It is hereby established that the procedure of passing and publishing the Law on Holidays of the Republika Srpska and Law Amending the Law on Territorial Organization both published in Official Gazette of the Republika Srpska No. 103/05 of 21 November 2005 is not compatible with the Constitution of the Republika Srpska.

46. **Constitution of the Republika Srpska** (Official Gazette of the Republika Srpska, Amended Text No. 21/92).

Article 120 para 5

If the Constitutional Court finds that a law is not compatible with the Constitution or if other regulation or general act is not compatible with the Constitution or law, the law, regulation or general act shall cease to be in force on the date of publishing of the decision of the Constitutional Court.

VI. Admissibility

47. According to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to whether any provision of the Entity's Constitution or law is consistent with this Constitution. Such disputes may be referred *inter alia* by a member of the Presidency of Bosnia and Herzegovina.

48. Taking into account that a part of the applicant's request was resolved by Partial Decision I, the Constitutional Court, in this Decision, shall deal with the review of conformity of Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays in Republika Srpska with the Constitution of Bosnia and Herzegovina.

49. The applicant was a member of the Presidency of Bosnia and Herzegovina at the time of filing this request, and therefore he is authorized to file a request in question based on Article VI(3)(a) of the Constitution of Bosnia and Herzegovina.

50. In its Partial Decision I, the Constitutional Court did not deliberate on the admissibility of request in relation to the challenged provisions that are the subject of review in this decision. However, in a part of its Partial Decision I dealing with the admissibility of the case, the Constitutional Court dismissed as ill-founded the objections of the National Assembly by which the admissibility of the request in question was challenged. Given that all the objections were relating to the request as a whole and not only to the provisions whose constitutionality the Constitutional Court

was reviewing in its Partial Decision I, the Constitutional Court, in this part relating to the objections of the National Assembly on the admissibility of the request, makes a reference to paragraphs 104, 105 and 106 of its Partial Decision I.

51. As for the proposal of the National Assembly to terminate the proceedings for review of constitutionality of Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of Republika Srpska, the Constitutional Court established that on 28 November 2005 the Law on Holidays of Republika Srpska entered into force, which, in its Article 13, provides that the *Law on Family Patron-Saints' Days and Church Holidays (Official Gazette of the Republika Srpska No. 19/92) shall cease to be in force on the date of entry into force of this Law*. However, the Constitutional Court of Republika Srpska, in its decision No. *U-60/05* of 31 January 2006, established that the procedure under which the said law had been adopted and published was not in accordance with the Constitution of Republika Srpska. That decision was published in the *Official Gazette of Republika Srpska* no. 14/06 of 20 February 2006. Article 120 paragraph 5 of the Constitution of Republika Srpska provides that *when the Constitutional Court assesses that a law is not in accordance with the Constitution, or that another regulation or general enactment is not in accordance with the Constitution or law, such law, regulation or general enactment shall cease to be effective on the day of the publication of the Constitutional Court's decision*. Therefore, the Law on Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 103/05) ceased to be in effect on 20 February 2006. Accordingly, the provision stipulating that *the Law on Family Patron-Saints' Days and Church Holidays shall cease to be in force by the entry into force of the Law on Holidays of Republika Srpska* ceased to be in force. The Constitutional Court therefore concludes that the Law on Family Patron-Saints' Days and Church Holidays (*Official Gazette of the Republika Srpska*, no. 19/92), which is the subject of this part of the request, is still in force and applicable in Republika Srpska. Taking into account the aforesaid, the Constitutional Court dismissed the request of the National Assembly to terminate the proceedings for review of the Law on Family Patron-Saints' Days and Church Holidays since the requirements for termination of the proceedings under Article 65 of the Rules of the Constitutional Court have not been met.

52. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina

and Article 17 para 1 a of the Rules of the Constitutional Court, the Constitutional Court has established that the request is admissible and that there is no formal reason under Article 17 para 1 of the Rules of the Constitutional Court that would render the request inadmissible.

VII. Merits

53. The Constitutional Court shall review whether Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of Republika Srpska are in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 a) and c) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

54. In its Partial Decision I the Constitutional Court elaborated in detail the term "discrimination" with a special reference to the issue of discrimination within the ambit of Article II(4) of the Constitution of Bosnia and Herzegovina and International Convention on Elimination of All Forms of Racial Discrimination. It also emphasized that under Article II(1) and II(6) the Entities have a clear positive obligation to amend or put out of force the laws and regulations which are incompatible with the provisions of the Constitution of Bosnia and Herzegovina, Constitutions of the Entities and general rules of international law, which form an integral part of the Constitution of Bosnia and Herzegovina. Taking into account the fact that the above argumentation is relevant to this Decision as well, the Constitutional Court makes reference to paragraphs 109-113 of Partial Decision I.

55. In this decision, as in its Partial Decision I (paragraph 113) the Constitutional Court, points to the importance of symbols in fostering and preservation of tradition, culture and distinctive characteristics of every people. Given that the symbols represent the achievements, hopes and ideals of a state, they have to be respected by all its citizens, in this specific case by the citizens of Entities. In order to be seen in that way by all the citizens of Entities in Bosnia and Herzegovina, the flag of the Republika Srpska must be the symbol of all of its citizens and the holidays celebrated in the Republika Srpska must be regulated in such a way that none of the constituent peoples is treated in a preferential manner. The question which the Constitutional Court must answer in the further elaboration of its decision is whether the flag of Republika Srpska represents all the citizens of

Entities and whether the manner in which the holidays in the Republika Srpska are defined by law is preferential with respect to any of the constituent peoples when compared with two other peoples.

56. The Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska and the Law on Family Patron-Saints' Days and Church Holidays were passed in a political and chronological context preceding the Decision on the "constituent peoples" adopted by the Constitutional Court in case no. *U-5/98*, and before the amendments to the Entity Constitutions were passed on the basis of that Decision, which established the mechanisms for equal participation in decision-making procedures in the field of legislation of all three constituent peoples in both Entities as well as the mechanisms for the protection of their vital national interests. The Constitutional Court placed emphasis on that argument in its Partial Decision I.

57. As to the issue of possible identification of all citizens of Republika Srpska with the challenged symbols, the Constitutional Court reiterates that the challenged laws of the Republika Srpska were passed at the time of war in Bosnia and Herzegovina, when Republika Srpska, according to the then applicable Article 1 of the Constitution of the Republika Srpska, was the "State of Serb people and of all its citizens".

58. In its Partial Decision I, whereby it was found that the coat of arms and flag of the Federation of Bosnia and Herzegovina and the coat of arms and anthem of the Republika Srpska were unconstitutional, the Constitutional Court took into account the fact that the challenged symbols had been used during the war in Bosnia and Herzegovina thus it was questionable whether all citizens of Bosnia and Herzegovina could identify with such symbols, all the more so since Serbs in the Federation of Bosnia and Herzegovina and Bosniaks and Croats in Republika Srpska were not given the opportunity, during the procedure of passing the challenged laws, to raise those issues and to take position as to whether they could identify with such symbols. Taking into account that the flag of the Republika Srpska is defined by the Law whose Articles 2 and 3 were declared unconstitutional by the Constitutional Court, it is indisputable that the aforementioned argument is applicable to this Decision as well. The same argument may apply to the Law on Family Patron-Saints' Days and Church Holidays given the time when it was adopted.

59. The Constitutional Court found it necessary to point, in this decision as well, to the General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination: "In

order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of the Governments. In accordance with Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their rights to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens” (General Recommendation of the United Nations Committee on the Elimination of Racial Discrimination , 48th session (1996)).

As to Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska

60. The applicant alleges that the flag of the Republika Srpska has all features of the flags of, respectively, the Principality of Serbia of 1878 and the Kingdom of Serbia of 1882 and that therefore it is about a symbol which is deeply-rooted in the historical past of the Serb people.

61. The National Assembly challenged the view according to which the flag as a symbol of the Republika Srpska is rooted exclusively in the past of the Serb people. The National Assembly argued that such a view was not well founded. It substantiated its argument by alleging that the three colours, i.e. red, blue and white, portrayed on the flag of the Republika Srpska are so-called Pan-Slavic colours and that those colours are also displayed on the Croatian flag albeit in a different arrangement. Red and white are heraldic colours of the Croat and the Serb people and they cannot be challengeable as such, whereas the colour red was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. The National Assembly has drawn a conclusion from the aforesaid that none of the colours from the flag can be challengeable as such and that the arrangement of colours cannot be associated with discrimination, but rather with aesthetic feelings, and aesthetic feeling is not a constitutional category. Taking into account that all constituent peoples in Bosnia and Herzegovina are of Slavic origin, the National Assembly argued that the colours themselves could not be the subject of a constitutional dispute and that their

arrangement represents an aesthetic category rather than a constitutional matter. One of the assumptions is that "the applicant does not mind either the colours or their arrangement but he would just like to see a specific symbol on the flag as is the case with the flag of the Federation of Bosnia and Herzegovina. As the flag of the Republika Srpska contains no symbols and the flag of the Republika Srpska should not be compared to the ranking and commanding flags and standards, an absence of something cannot be regarded as evidence for the claim of discrimination if the latter does not represent either of two constituent peoples. Hence, the Bosniak people, in the spirit of the applicant's initiative, are free to identify themselves with one of the colours on the present flag of the Republika Srpska".

62. The Constitutional Court finds that it can accept as well founded the National Assembly's arguments that the flag of the Republika Srpska, as defined in Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, does not represent only the Serb people in the Republika Srpska as the colours displayed on that flag are Pan-Slavic colours which are related to the history of all the Slavic peoples, including the constituent peoples of Bosnia and Herzegovina. The Constitutional Court recalls that the flag of the Republika Srpska and the flag of Serbia are not identical as the flag of Serbia, unlike the flag of Republika Srpska, also contains a coat of arms. Moreover, the fact, which was stated in the applicant's request, that the flag was used during the war and that war was waged under that symbol, does not mean *per se* that the colors on the flag and their arrangement are unconstitutional. The Constitutional Court therefore concludes that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 1.1. and Article 2. a), b), c), d) and e) of the International Convention on the Elimination of All Forms of Racial Discrimination under in Annex I to the Constitution of Bosnia and Herzegovina. Taking into account the aforesaid, the Constitutional Court cannot accept the applicant's allegations that the Republika Srpska failed to fulfill its positive obligations under Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina by failing to change the above Article. Taking into account the above conclusion, the Constitutional Court find it must dismiss the applicant's allegations that other constituent peoples, when compared to the Serb people, are discriminated against in enjoyment of their right to return under Article II(5) of the Constitution of Bosnia and Herzegovina, as ill-founded.

As to Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska

63. The National Assembly, challenging the allegations of the applicant, alleges *inter alia* that Article 2 para 2 of the aforementioned Law grants all citizens of the Republika Srpska a right on their own choice to celebrate three days per year on the date of their religious holidays without discrimination on any grounds. The National Assembly holds that if one would gather from this Law different effects for constituent peoples, this differential treatment has reasonable and justifiable grounds, “not to mention in this context that Republika Srpska remains in any event – whether one likes it or not – symbolically, a mother Entity for the Serbs“.

64. It is indisputable that the challenged provisions of Article 2 paragraph 2 of the Law in question give a possibility to the citizens of the Republika Srpska to have three days off on the days of their religious holidays without discrimination on any ground. However, the holidays in question, as established by the challenged provisions of the above stated Law, are almost exclusively orthodox religious holidays and holidays related to the historical past of the Serb people alone. These days in are days off work in the Republika Srpska and as such are celebrated throughout the Entity and in all public institutions and were imposed, from the position of the authorities, on all citizens of the Republika Srpska that do not belong to Serb people and Orthodox religion. Therefore, these holidays have the character of Entity holidays and not religious holidays, while at the same time, religious and national holidays of the Bosniak and Croat people and other citizens of the Republika Srpska on the territory of the Entity are working days and do not have the same Entity holiday status as the holidays of the Serb people of the Orthodox religion.

65. The principle of the collective equality of the constituent peoples, as already stated in this decision, arises from the designation of the Bosniak, Croats and Serbs as constituent peoples and prohibits any special privileges for one or two of those peoples, any domination in the authority and any ethnic homogenization through segregation based on territorial separation.

66. The Constitutional Court recalls that Article 2.c) of the International Convention on the Elimination of All Forms of Racial Discrimination, provides the obligation of the Member States that *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.

67. The National Assembly stated that holidays represent a legitimate means of preserving the tradition and identity of the Serb people. The Constitutional Court finds that the Serb people in the Republika Srpska has the legitimate right to preserve its tradition and identity through legislative mechanisms but equal rights must be given to the other constituent peoples in the Republika Srpska and other citizens of the Republika Srpska. The Constitutional Court further holds that it cannot consider as reasonable and justified a privileged position for the Serbs in Republika Srpska in the preservation of their tradition and identity on account of their belief that the Entity in a symbolic way is the mother of the Serbs. The Serbs are but one of three constituent peoples of that Entity, and enjoy rights and fulfill obligations under the same conditions and in the same manner as the two other constituent peoples and other citizens in Republika Srpska as provided for in the Constitution of Bosnia and Herzegovina and Constitution of the Republika Srpska. Therefore, the National Assembly's allegation that depriving citizens of the existing symbols would lead to the destruction of their identity is unfounded as the Constitutional Court has concluded that the existing symbols in the Republika Srpska do not represent all citizens of the Republika Srpska but the Serb people only.

68. The Constitutional Court holds that the holidays provided for in the challenged provisions of the law in question only exalt the history, tradition, customs and religious and national identity of the Serbs and that at the same time such values are imposed on the members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska. These means of preserving the tradition and identity of the Serb people are not proportional to the aim sought to be achieved. Taking into account that Republika Srpska has the obligation to *revoke, i.e. annul every law and every regulation with the aim of introducing racial discrimination or making it permanent where it exists*, the Constitutional Court concludes that Articles 1 and 2 of the Law on Family Patron-Saints' Days and Church Holidays of the Republika Srpska are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others in Bosnia and Herzegovina, are discriminating and therefore are in inconformity 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 for Elimination of all Forms of Racial Discrimination under Annex I. to the Constitution of Bosnia and Herzegovina.

Other allegations

69. In view of the conclusion of the Constitutional Court with respect to the alleged violation of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that it is not necessary to examine other allegations set forth in the request.

VIII. Conclusion

70. The Constitutional Court concludes that Articles 1 and 2 of the Law on the Family Patron-Saints' Days and Church Holidays of the Republika Srpska (*Official Gazette of the Republika Srpska*, no. 19/92) are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others, have discriminating character and are not in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The challenged provisions of the Law on the Family Patron-Saints' Days and Church Holidays include the holidays which only reflect and exalt the Serb history, tradition, customs and religious and national identity, while the same values are imposed on the members of other constituent peoples, other citizens and Others on the territory of the Republika Srpska. The Constitutional Court emphasizes that the Serb people in Republika Srpska has the legitimate right to preserve its tradition and identity through legislative mechanisms, but an equal right must be given to other constituent peoples of the Republika Srpska and to other citizens of the Republika Srpska.

71. The Constitutional Court holds that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of the Republika Srpska* no. 19/92) is in conformity with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2 (a) and (c) of the International Convention for Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The Constitutional

Court cannot accept the applicant's allegations that Republika Srpska failed to meet its positive obligations under Article II(1) and II(6) of the Constitution of Bosnia and Herzegovina by failing to change the challenged Article. Taking into account the above conclusion, the Constitutional Court considers that the applicant's allegations that other constituent peoples, when compared to the Serb people, are discriminated against in enjoyment of their right to return under Article II(5) of the Constitution of Bosnia and Herzegovina are to be dismissed as ill-founded. The Constitutional Court finds it can accept the National Assembly's argument that the flag of the Republika Srpska, as defined in Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, does not represent only the Serb people in the Republika Srpska as the colours displayed on that flag are Pan-Slavic colours which are specific for the history of the Slavic peoples, including the constituent peoples of Bosnia and Herzegovina. The Constitutional Court recalls that the flag of the Republika Srpska and flag of Serbia are not identical as the flag of Serbia, unlike the flag of Republika Srpska, contains a coat of arms. Moreover, the fact, which was stated in the applicant's request, that the flag was used during the war and that war was waged under that symbol, does not mean per se that the colors on the flag and their arrangement are unconstitutional.

72. Pursuant to Article 61 paras 1, 2 and 3 and Articles 62 and 63 para 4 of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause.

73. According to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Hatidza Hadziosmanovic
President
Constitutional Court of Bosnia and Herzegovina

Judges David Feldman and Constance Grewe separated their opinions.

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**Case No. U-4/04 Request of Mr Sulejman Tihic, Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request: Second Partial Decision****Separate opinion of Judges David Feldman and Constance Grewe**

1. We write this separate opinion to record our reservations in relation to the decision of the Constitutional Court in the Second Partial Decision in Case No. U-4/04. In this decision, the Constitutional Court holds that Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (*Official Gazette of Republika Srpska* No. 19/92), hereafter ‘Law on the Flag’, is in conformity with the prohibition on discrimination in Article II.4 of the Constitution of Bosnia and Herzegovina and Articles 1.1 and 2.a) and c) of the International Convention on the Elimination of All Forms of Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina. The Constitutional Court also holds that Articles 1 and 2 of the Law on the Family Patron-Saints’ Days and Church Holidays of the Republika Srpska, (*Official Gazette of Republika Srpska* No. 19/92), hereafter ‘Law on Family Patron-Saints’ Days’), is not in conformity with the same provisions of the Constitution of Bosnia and Herzegovina and the International Convention.

2. We have no disagreement with the decision of the Constitutional Court in relation to the Law on Family Patron-Saints’ Days. Our reservation relates to the part of the decision concerning the Law on the Flag.

3. In its decision in this case, the Constitutional Court holds that the design of the flag prescribed by Article 1 of the Law on the Flag is not discriminatory because the colours are pan-Slavic colours, so all constituent peoples in the Republika Srpska, being of Slavic origin, can identify with it. The design of the flag is not identical with that of Serbia. Most significantly, the Court concludes that the fact that the war of 1992-1995 was waged under the symbol does not *per se* make it unconstitutional, and the positive obligations of the Republika Srpska to prevent discrimination did not require the National Assembly of the Republika Srpska to change the Law on the Flag so as to adopt a new design.

4. We have found this an immensely difficult case, and after much heart-searching and after carefully considering the arguments we have the misfortune to have reached a different conclusion from that of the majority.

5. There is no doubt that the colours of the flag—red, blue and white—are pan-Slavic colours, as other flags in the region demonstrate. It does not discriminate directly between the constituent peoples. However, it does not seem to us to follow that the effect of the flag is entirely non-discriminatory. A legal rule, such as that prescribing the appearance of a flag, may appear to treat different peoples equally, yet have a discriminatory effect if in the prevailing circumstances it has a different impact on different peoples. The differential effect of an apparently neutral rule by reason of the circumstances of the people to whom it applies is sometimes called ‘indirect discrimination’.

6. Is the flag’s design prescribed in Article 1 of the Law on the Flag of this kind? After considerable hesitation, and after giving great weight to the views of those judges who have formed

a different view, we have concluded that it does give rise to indirect discrimination. The design has different meanings for people and affects people and peoples differently, depending on their different experiences during the war of 1992-1995. The symbolic and psychological effects of the design cannot be separated from people's memories of the circumstances in which the flag was used at that time.

7. We are particularly influenced by two factors which seem to us to make it inevitable that the flag of the Republika Srpska will have a different impact on different peoples, and a seriously detrimental effect on some of them.

8. First, the Law on the Flag, and the design for the flag prescribed by it, were put in place by the National Assembly of the Republika Srpska in 1992 after the Republika Srpska was established to enable Serbs in the territory of the former Republic of Bosnia-Herzegovina to separate themselves from the claims of the Bosniac and Croat leaders of the Republic to establish Bosnia and Herzegovina as a sovereign State independent of the Socialist Federative Republic of Yugoslavia. The flag of the Republika Srpska can therefore be seen from the perspective of Bosniacs and Croats as a symbol of the separation of the Serb people from the Bosniac and Croat peoples in Bosnia and Herzegovina. It is also, of course, a symbol of the opposition of the Serb people's leaders to the establishment of an independent sovereign State of Bosnia and Herzegovina. This in itself would be likely to lead the constituent peoples to view the significance of the design of the flag differently. One can understand that the Serb people would see it as a symbol of solidarity of Slav peoples, while the Bosniac and Croat peoples would see it as a symbol of opposition to the existence of the State of Bosnia and Herzegovina.

9. Secondly, as is now widely acknowledged, atrocities were committed during the war of 1992-1995. They were committed by all parties. In our view, however, it is significant for the purposes of this case that many Bosniacs and Croats suffered greatly at the hands of Serb military personnel who operated under the flag of the Republika Srpska, and wore uniforms which incorporated the design and colours of the flag, typically on the caps and sleeves. For the Bosniac and Croat peoples, therefore, it would be surprising if the flag were to be regarded as one with which they could comfortably identify.

10. The meaning of the design of the flag cannot be divorced from the emotions, perceptions and memories of those who see it in use on a day-to-day basis. The different constituent peoples understandably bring different emotions, perceptions and memories to the task of interpreting the meaning of the flag. When the emotions, perceptions and memories of the Bosniac and Croat peoples are as strong and as traumatic as those likely to be associated with this particular flag, it seems to us that one can sensibly speak of the flag and the Law having an indirectly discriminatory effect.

11. A further question then arises. Can the differential impact of the flag on the different constituent peoples be justified? Any such justification would have to show that there was an objective and rational justification for the differential effect, and that it was proportionate to a legitimate aim, in the sense that the differential effect was no greater than necessary to achieve the legitimate aim.

12. The National Assembly of the Republika Srpska advanced few arguments to the Constitutional Court in relation to the issue of justification, since it put at the forefront of its submissions the argument that the flag does not discriminate at all. Nevertheless, we would be prepared to accept that it is a legitimate aim for a flag to reflect the historical political ideals of the

Serb people. But we are not persuaded that the use of the design is proportionate to that end, bearing in mind the emotional reaction which the flag is likely to produce among non-Serbs and the fact that it would have been easy to design a different flag after the coming into force of the Constitution of Bosnia and Herzegovina. For example, the order of colours could have been changed, or the shape of the flag varied, or other colours or symbols added to reflect the fact that the Bosniacs and Croats are also constituent peoples.

13. We conclude that the National Assembly of the Republika Srpska had a positive obligation under Article II.4 of the Constitution of Bosnia and Herzegovina to take reasonable steps within a reasonable time to make such changes to Article 1 of the Law on the Flag as would have been sufficient to diminish the detrimental impact of the design on the emotions and psychology of members of the Bosniac and Croat peoples. The National Assembly did not violate its positive obligation by failing to take action immediately after the Constitution of Bosnia and Herzegovina came into force in December 1995. However, once the Constitutional Court had established, in the *Constituent Peoples* Case No U-5/98, that the Bosniac, Croat and Serb peoples are constituent peoples throughout the territory of Bosnia and Herzegovina and are entitled to benefit from a principle of collective equality throughout the territory, the institutions of both Entities should have taken steps to remove symbols, as well as names, having a discriminatory effect on one or more of the constituent peoples. More than six years after that decision was published, the flag remains unchanged.

14. For these reasons we found ourselves unable to share the view of the majority on this point. While being very conscious of our temerity in differing on a matter on which local feelings are closely engaged from Judges who are far more familiar than we are with the ethos and feelings of citizens of the country, we feel driven to record our dissent, with the greatest respect to those who hold another view.

David Feldman

Constance Grewe

2nd December 2006