

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, Article 62 and Article 63 paras 2, 3 and 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:

Mr. Mato Tadić, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Hatidža Hadžiosmanović, Vice-President

Mr. David Feldman, Judge

Ms. Valerija Galić, Judge

Mr. Jovo Rosić, Judge

Ms. Constance Grewe, Judge

Having deliberated on the request of **Mr. Sulejman Tihic, 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 31 March 2006 adopted the following

## **PARTIAL DECISION ON MERITS**

The request of **Mr. Sulejman Tihic**, **Chairman of the Presidency of Bosnia and Herzegovina at the time of filing this request**, is hereby partly granted.

It is hereby 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* Nos. 21/96 and 26/96), and 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) are not in conformity with Article II.4 of the Constitution of Bosnia and Herzegovina, in conjunction with Articles 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.

It is further established that Article 2 of the Law on Use of the Flag, Coat of Arms and the Anthem (*Official Gazette of Republika Srpska* No. 4/93) in the part in which it is provided that the flag, coat of arms and anthem of the Republika Srpska “**represent statehood of the Republika Srpska**” is not in conformity with Article I.1 and I.2 of the Constitution of Bosnia and Herzegovina, and that Article 3 of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* No. 4/93) in the part that provides that the symbols of the Republika Srpska are used “**in accordance with moral norms of the Serb people**” are not in conformity with Article II.4 of the Constitution of Bosnia and Herzegovina, in conjunction with Article 1.1 and Article 2(a) and (c) of the 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 2 of the Rules of the Constitutional Court, Article 2 of the Law on Use of the Flag, Coat of Arms and the Anthem (*Official Gazette of Republika Srpska* No. 4/93) in the part providing that the flag, coat of arms and anthem of the Republika Srpska “**represent statehood of the Republika Srpska**” and Article 3

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of the Law on the Use of Flag, Coat of Arms and Anthem (*Official Gazette of the Republika Srpska* No. 4/93) in the part providing that the symbols of the Republika Srpska are used “**in accordance with moral norms of the Serb people**” are hereby annulled.

The annulled provisions shall become invalid on the first day following the date of the publication of the present decision in the *Official Gazette of Bosnia and Herzegovina*, pursuant to Article 63 paragraph 3 of the Rules of the Constitutional Court.

Pursuant to Article 63 paragraph 4 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina is ordered to bring Articles 1 and 2 of the Law on Coat of Arms and Flags of the Federation of Bosnia and Herzegovina into line 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*.

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 Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and

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Anthem of the Republika Srpska into line 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*.

Pursuant to Article 74 paragraph 5 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the National Assembly of Republika Srpska are ordered to inform the Constitutional Court of Bosnia and Herzegovina about the measures taken to enforce this Decision within the time-limit referred to in the preceding paragraph.

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 Brčko District of Bosnia and Herzegovina*.

## **REASONS**

### **I. Introduction**

1. On 12 April 2004, Sulejman Tihić, 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-Saint’s 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”) and Parliament of the Federation of BiH (“the Parliament of the Federation”) were requested to submit their replies to the request within 30 days from the receipt of the request from the Constitutional Court. On 8 December 2004, they were also requested to submit within 30 days their replies to the supplement of the request.

3. On 8 June 2004, the National Assembly requested the time limit for giving 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 20 December 2004, the House of Representative of the Parliament of the Federation of BiH (“the House of Representatives”) submitted its reply to the request and to the supplement to the request. The House of Peoples of the Parliament of the Federation of BiH (“the House of Peoples”) failed to submit its reply to the request and to the supplement to the request.

7. 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.

8. 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.

9. Having regard to Article 25 para 2 of the then applicable Rules of Procedure of the Constitutional Court, the replies of the National Assembly and the House of Representatives were submitted to the applicant on 26 October 2004 and on 24 December 2004 respectively.

10. 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.

11. On 24 February 2005, the High Commissioner for National Minorities informed the Constitutional Court that it could not take part as *amicus curiae* in the present case for its responsibility now 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 the capacity of *amici curiae* before the Constitutional Court, presented their joint opinion.

12. On 28 January 2006, pursuant to Article 46 paragraph 1 of the Constitutional Court’s

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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, Academic Muhamed Filipović and Ms. Alma Čolo represented the applicant, Mr. Irfan Ajanović represented the House of Representatives, 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.

13. 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 House of Representatives and the House of Peoples of the F BiH Parliament as well as to the RS National Assembly.

14. 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 12 and 13 February 2006, the Constitutional Court submitted to the applicant the written observations and a transcript of interview given by Mr. Ivan Tomljenović.

15. On 9 February 2006, *amicus curiae* submitted additional observations relating to the public hearing. On 23 February 2006, the Constitutional Court forwarded the *amicus curiae*'s additional observations to the RS National Assembly as well as to the House of Representatives and House of Peoples of the F BiH Parliament.

16. Pursuant to Article 93 paragraph 1 subparagraph 2 and paragraph 3 of its Rules of Procedure, the Constitutional Court decided on 27 January 2006 to exempt Judge Seada Palavrić from further deliberation and decision making in the present case in view of the fact that she had taken part in the enactment of the challenged law of the Federation of BiH.

17. At its session of 31 March 2006, the Constitutional Court decided on the basis of Article 62 of the Rules of the Constitutional Court to adopt this partial decision. As to the part of the request relating to the conformity with the Constitution of challenged provisions of Articles 1 and 2 of the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska and Article 1 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, the Constitutional Court decided to postpone its decision.

### **III. Request**

#### **a) Statements from the request**

18. The applicant states that the challenged provisions of the laws in question are not in conformity with the Constitution of Bosnia and Herzegovina for the following reasons:

#### **Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina**

19. Applicant states that Article 1 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina prescribes the appearance of the coat of arms of the Federation of Bosnia and Herzegovina, which is in the shape of a shield and consisting of three fields: one field contains a shield with gold lilies on the green background, the second field contains a historical Croat coat of arms with 25 quarters of red and white colours, while the third field, which occupies one half of the coat of arms, contains ten white six-point stars arranged in a circle. Article 2 of the said Law prescribes the appearance of the flag of the Federation of Bosnia and Herzegovina with fields of red, white and green colours with the described coat of arms in the middle.

20. Stating the genesis of the coat of arms and flag of the Federation of BiH, the applicant has concluded that the symbol of gold lilies on the coat of arms or flag of the Federation of BiH, although it cannot be solely identified with the Bosniak people, symbolizes only the Bosniaks considering that the political representatives of the Croat and Serb people did not accept the gold lily as their symbol. He further states that the historical Croat coat of arms, square fields of red and white colour, throughout its history, has symbolized Croats, and “as of 1990 it has been the coat of arms of the Republic of Croatia”. The third quarter in the flag and the coat of arms contains ten

white six-point stars denoting ten cantons of the Federation of Bosnia and Herzegovina. With such appearance of the coat of arms and the flag of the Federation of Bosnia and Herzegovina the Serb people and other citizens in the Federation of BiH have been discriminated against on national/ethnic grounds. Actually, in view of the appearance of the coat of arms and the flag, they have been on an unequal footing with the Bosniak people and the Croat people in the Federation without any objective and reasonable explanation. This is contrary to the fundamental constitutional principle that guarantees equality of the Bosniak people, the Croat people and the Serb people and other citizens of Bosnia and Herzegovina throughout its territory. The applicant finds that in the instant case, the issue of discrimination arises in relation to respect of the right to return as guaranteed under Article II.5 of the Constitution of Bosnia and Herzegovina, the right to non-discrimination based on national origin and provision of equal treatment with regard to the right to liberty of movement within the state boundaries. The applicant concludes that prescription of a coat of arms and a flag that would refer only to the Bosniak people and the Croat people creates an air of distrust with the Serb people and other citizens of Bosnia and Herzegovina and prevents their return to their pre-war homes on the territory of the Federation of BiH which in turn does not contribute to the realization of the aim sought to be realized by Article II.5 of the Constitution of Bosnia and Herzegovina.

21. In regard to the above, the applicant finds that Articles 1 and 2 of the Law on Coat of Arms and Flag of the Federation of Bosnia and Herzegovina are not in accordance with Article II.4 in conjunction with Article II.3 and II.5 of the Constitution of Bosnia and Herzegovina.

### **Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska**

22. The applicant states 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. Article 2 of the mentioned Law stipulates the appearance of the coat of arms of the Republika Srpska, which is basically the coat of arms of Nemanjići represented by a double white eagle with a crown over its head. The applicant further states that it can be seen from the Collection of the coats of arms of the Fojnica Monastery (published by *Oslobođenje* in 1972), a book written

by Pavle Andjelić, Ph.D that the double eagle is the symbol of the coat of arms of Nemanjići, which was literally stated in Article 2 of the challenged Constitutional Law of RS. This means that this was the symbol taken from the history of the Serb people. Article 3 of the mentioned Law stipulates that the anthem of the Republika Srpska shall be “Bože Pravde”. The text of the anthem Bože Pravde, which was established under the Constitution as the anthem of the Republika Srpska, originated in 1872. The text of the anthem exalts the Serb people and asks the Lord “to unite the Serb brothers, save the Serb king and the Serb lineage.”

23. 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 Republika Srpska as well. The said provisions also discriminate against other citizens of Bosnia and Herzegovina.

24. Furthermore, the applicant pointed out that a possible reason for lack of features of either Bosniak people or Croat people in the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska was related to the fact that the Bosniak and the Croat people, according to the Constitution of the Republika Srpska, had no status of constituent peoples in the Republika Srpska at the time of enactment of the relevant law. 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.

25. 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, resulting in creation of an air of fear 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

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present case raises an issue of discrimination with regard 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 to liberty of movement within the state boundaries.

### **Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska**

26. The applicant alleges that Article 2 of the Law on the Use of the Flag, the Coat of Arms and the Anthem is not in conformity with Articles I.1 and I.3 of the Constitution of Bosnia and Herzegovina, whereas Article 3 of the said Law is not in conformity with Article II.4 in conjunction with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina.

27. The applicant alleges that Article 2 of the Law provides that the flag, the coat of arms and the anthem of the Republika Srpska shall represent the statehood of the Republika Srpska. The said provisions imply the statehood of the Republika Srpska, which it does not have under the Constitution of Bosnia and Herzegovina. Actually, this stands in opposition to Article I.1 of the Constitution of Bosnia and Herzegovina, according to which *Bosnia and Herzegovina shall be a democratic state, which 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*. Moreover, Article 2 of the said Law stands in opposition to Article I.3 of the Constitution of Bosnia and Herzegovina, which provides that *Bosnia and Herzegovina shall consist of the two Entities - the Federation of Bosnia and Herzegovina and the Republika Srpska*.

28. The applicant states that this means that, according to the constitutional provisions, only Bosnia and Herzegovina represents a state pursuant to the principles of international law while the Republika Srpska is only an Entity in its composition. Consequently, one cannot speak of “**representation of statehood of the Republika Srpska**” since Republika Srpska has none. After all, the provisions of the Constitution of the Republika Srpska, which read that “*the Republika Srpska shall be a State of the Serb people*”, were amended in the procedure of implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina on constituent peoples in the

entire territory of Bosnia and Herzegovina.

29. The applicant deems that Article 3 of the said Law is not in conformity with Articles II.3 and II.5 of the Constitution of Bosnia and Herzegovina for it provides that the flag, the coat of arms and the anthem of the Republika Srpska shall, *inter alia*, “**be used with the moral norms of the Serb people**”. Such provision, claims the applicant, gives preferential treatment to the Serb people and it associates the use of the symbols of the Republika Srpska with only one of the three constituent peoples in Bosnia and Herzegovina, thereby discriminating against the Bosniak people, the Croat people and other citizens of Bosnia and Herzegovina on national grounds without any objective and reasonable justification.

#### **Law on the Family Patron-Saint’s Days and Church Holidays**

30. The applicant alleges that Articles 1 and 2 of the Law on the Family Patron-Saint’s 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.

31. In Articles 1 and 2 of the said Law, the following family patron-saint’s 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’ 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 holidays of other peoples and religious denominations such as Eid (*Bajram*), Catholic Christmas, Easter, etc.

32. 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 elected from the Republika Srpska to the institutions of Bosnia and Herzegovina. Moreover, according to the applicant’s allegations, all citizens of the Republika Srpska who are not of the Serb origin are forced to celebrate those holidays although they do not regard them their own holidays.

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Furthermore, all but the Serbs in the Republika Srpska are prohibited to have their own holidays which would be the official holidays in the Entity they live in, the holidays that would not be offensive to the constituent peoples in Bosnia and Herzegovina. Hence, according to the applicant, the enactment of such holidays that are part of the Serbs' history only create an air of distrust among other peoples and citizens and maintains a sense of fear of ethnic cleansing that was experienced during the aggression on 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**

**33.** 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 the prohibition of 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. 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. In the present case, it means 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. In view of the fact that the state is solely responsible for obligations arising out of each individual instrument under Annex I to the Constitution of Bosnia and Herzegovina and in view of the specific constitutional and territorial organization of Bosnia and Herzegovina, it follows that the territorial units of Bosnia and Herzegovina are very often the subjects obliged to apply the said instruments in practice. Notwithstanding this, the Federation of Bosnia and Herzegovina and the Republika Srpska preserved and established, respectively, the symbols and other features; the Republika Srpska additionally enacted the Law on the Use of the Flag, Coat of Arms and Anthem of the Republika Srpska and the Law on Family Patron Saint's Days and Church Holidays of the Republika Srpska – this indubitably shows that the Serbs in the Federation of Bosnia and Herzegovina and the Bosniak people and the Croat people in the Republika Srpska have been treated differently with regard to the Bosniak people and the Croat people in the Federation of Bosnia and Herzegovina and the Serb people in the Republika Srpska, which has been 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, particularly Article 2 (d) and (e), provide for that effective measures of *national and local policy* must be undertaken in order to repeal or quash any law or regulation aimed at an unequal and discriminatory treatment and that the authorities are obliged to support integrationist organizations and movements in order to repeal discriminatory measures.

34. The applicant states in his supplement to the request that he bases his allegations on the 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 features of an Entity that symbolize only one people, or two of the three constituent peoples in Bosnia and Herzegovina, represent measures that aim 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 the human rights and fundamental freedoms in all domain of life on equal terms.

35. 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 Federation of BiH and the Republika Srpska failed to take appropriate measures to fulfil the obligations assumed under Articles II.1 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.

36. The supplement to the request contains the signature of the applicant verified with the appropriate seal.

**c) Reply to the request and supplement to the request**

**Reply of the National Assembly of the Republika Srpska**

37. The National Assembly at its session held on 28 July 2004 ascertained the reply to the statements from the request.

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38. As to the admissibility of the request, the National Assembly states that in the request the applicant failed to state precisely what violation under Article II(3) was committed and which incorporates 12 rights. The National Assembly therefore finds that hence, *prima facie*, the requirement under Article 18 para 1 of the Rules of Procedure of the Constitutional Court was not met; namely, "the provisions of the Constitution which are deemed to have been violated" were not stated. In addition, in the request one may observe that it consists of a mere adduction of provisions of the Constitution of Bosnia and Herzegovina deemed to have been violated without a single fact and, particularly, without evidence on which it is based. Therefore, the request does not meet another requirement under Rules of Procedure of the Constitutional Court. At the same time, the National Assembly finds that the request does not meet the requirement under the last subparagraph; namely, it was not "verified by the seal of the applicant". Hence, Mr. Tihic filed the request concerned in capacity as citizen of Bosnia and Herzegovina and not as Member of the Presidency of Bosnia and Herzegovina, which is in contravention to Article 16 paragraph 2 item 5 of the Rules of Procedure. Actually, the said person has no right of action. In accordance with the above, the National Assembly proposes that the request be rejected within the meaning of Article 60 of the Rules of Procedure of the Constitutional Court.

39. With respect to the position on the merits, the National Assembly claims that it is beyond dispute that the challenged laws were adopted in the period between 1992 and 1993. The National Assembly recalls that the continuity of the Constitution of the Republika Srpska was confirmed in the Basic Principles agreed on in Geneva on 8 September 1995. Subparagraph 2 sub-item 2 of the Constitution of Bosnia and Herzegovina reads that *each entity will continue to exist under its present Constitution, however, amended to accommodate these basic principles*. Pursuant to Article XII, paragraph 2, of the Constitution of Bosnia and Herzegovina, the Entities harmonized their respective Constitutions with the Constitution of Bosnia and Herzegovina under the international supervision during 1996. The National Assembly further states that the highest authority of the Council of Europe – the European Commission for Democracy through Law (the so-called Venice Commission) – presented its opinion regarding the compatibility of the Entity Constitutions, the Constitution of the Republika Srpska included, in the document CDL (96) and (48). The opinion of the said Commission is binding. The Constitution of the Republika Srpska was last revised by the High Representative of Bosnia and Herzegovina in 2002.

40. In the reply to the request it is further stated that Annex II, item 2, of the Constitution of Bosnia and Herzegovina provides that *all laws... shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina*. Hence, the National Assembly finds that the Constitution of BiH itself ratified through the said norm all legislation that was enacted prior to the entry into force of the Constitution.

41. The National Assembly claims that the challenged laws have their *iustus titulus* in Article 8 of the Constitution of the Republika Srpska. This Article provides that *"the Republika Srpska shall have the flag, the coat-of-arms and the anthem. The flag, the coat-of-arms and the wording of the anthem shall be determined by constitutional law"*. As already stated, the last amendments to the Constitution of the Republika Srpska introduced by the High Representative did not challenge the existence of symbols in the Entities since they do not infringe the constitutionality of peoples and the constitutional rights and freedoms of citizens of any nationality. The conclusion to be inferred is that all amendments to the Constitution of the Republika Srpska verified the provision of Article 8 thereof.

42. The National Assembly believes that the constituent status of peoples was implemented in the Republika Srpska through the constitutional amendments of 2002. In particular, Amendment LXXVI provides that all relevant duties and institutions of power shall be proportionally assumed by each constituent people. Out of six highest duties (Prime Minister, President of People's Assembly, Chair of Council of Peoples, President of Supreme Court, President of Constitutional Court and Public Prosecutor), four were assigned to the representatives of the Bosniak people and Croat people. In addition to the highest duties in the Entity, proportional representation in public services has been established and being implemented in public services.

43. In the reply to the request it is stated that statement of the applicant that the flag of the Republika Srpska is the flags the Principality and the Kingdom of Serbia is ill-founded as red, blue and white are the so-called "pan-Slavist colors" and they can be found, in a different arrangement, on the flags of Croatia, Slovenia, Slovakia and Russia and, with specific modification, Bulgaria. In view of the fact that all constituent peoples in Bosnia and Herzegovina are of Slovene 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 red colour was on the flag of the Socialist Republic of Bosnia and Herzegovina from 1946 until the dissolution of Yugoslavia. Accordingly, none of the colours from the flag can be disputable as such. Assuming that the applicant does not mind colours but their disposition, this is related to a feeling for beauty and not to discrimination, and feeling for beauty is not a constitutional category. It is further stated in the reply that “the fact that the flag of Serbia has the same disposition 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”. One of the assumptions is that Mr. Tihic does not mind either the colours or their distribution 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 initiative of Mr. Tihic, are free to identify themselves with one of the colours on the present flag of the Republika Srpska.

44. With respect to the coat of arms of the Republika Srpska, the National Assembly states that Article 2 of the Constitutional Law states in explicit terms that the coat of arms of the Republika Srpska is the coat of arms of Nemanjici and it is heraldically blazoned to be interpreted as the symbol and designation of the Serb people. It is true that the double eagle is part of history of the Serb people. In its present form, the coat of the Republika Srpska originates from the Medieval Serbian Empire and, in a larger historical sense, from the emblems of the Byzantine Empire. However, blazoned in the Constitutional Law of the Republika Srpska in heraldic terms, it was never (and it is not now) the coat of arms of Serbia. The emblems are not mere illustrations they are the expression of the awareness of the identity and existence through centuries. Further it is stated that every town and municipalities in Bosnia and Herzegovina have their respective coat of arms, which reflects tradition and specific qualities and it is only logical that an entity should have its symbols. The applicant’s allegation that Article 3 of this Law gives preferential treatment to the Serb people whereby the Bosniak people and the Croat people have been discriminated against on national grounds is ill-founded and it lacks arguments to support it. The National Assembly states that practice refutes the applicant’s claim that other peoples are not allowed to express their

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respective flags and coats of arms. It is stated in the reply to the request that all religious buildings – mosques in the Republika Srpska have a green flag with half-moon. In addition, every political party shows their respective flags and coat of arms in prominent places. It is stated by the National Assembly that the arguments in support of the coat of arms and the flag can also be applied to the anthem, which is one of the symbols that also reflects cultural and historical heritage.

45. Furthermore, the National Assembly in its reply states that the challenged provisions of the Law on Family Patron-Saint's Days and Church Holidays does 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 fact of existence of a norm in Article 2 paragraph 2 of the Law on Family Patron-saint's 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 grounds 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"*.

46. The National Assembly finds that the request consists of two parts: legal and political and that the legal part does not contain a single fact let alone a piece of evidence. What is more, evidence (return of refugees) refutes the applicant's allegations. The National Assembly recalls that the Constitutional Court of Bosnia and Herzegovina, in case no. *U-12/02*, defined its position on discrimination (paragraphs 32 through 38). The National Assembly of the Republika Srpska agrees with the position expressed therein in its entirety. Therefore, the National Assembly believes that in fact the applicant discriminates by stating that only other constituent peoples have not been allowed to return to their homes due to fear and mistrust in the authorities of the Republika Srpska thus preferring only the constituent peoples. At the same time, National Assembly shares the view expressed by Judge Mirko Zovko in his dissenting opinion in case no. *U-5/98*: *"I am not in favour of the glorification of the rights of a citizen who is constituent versus a citizen who is not constituent since the right of each citizen... is protected in an identical way"*. The identical position has been taken in Article 10 of the Constitution of the Republika Srpska, which provides that *"the citizens of the Republika Srpska shall be equal in their freedoms, rights and duties..."*

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*without any discrimination".*

47. The applicant's allegations that the return of the citizens to their homes of origin was prevented as a result of alleged fear, the National Assembly finds to be in opposition to well-known facts that, as such, do not need to be proved. The implementation of the property legislation on the territory of the Republika Srpska, it is claimed in the reply, was achieved in 99.5% of the cases. Currently, thirty-six municipalities in the Republika Srpska fully implemented property legislation and, to that end, received certificates issued by the international community. It is further stated that in the Republika Srpska the priority was given to return of refugees in the reconstruction and rehabilitation of their homes.

48. Finally, the National Assembly is of the opinion that it is necessary for the significance of the adoption of the decision to directly examine the request in question, and request that the public hearing is held, and after that adopt the decision dismissing the request.

#### **Reply of National Assembly to the supplement to the request**

49. The National Assembly in its reply to the supplement to the request repeated its arguments from the reply to the request and added some additional arguments. In the opinion of the National Assembly there is no discriminatory intention, nor is such effect produced by the symbols. Otherwise, if the meaning of the symbols is not separated from its appearance elements, argumentation with the clause on the prohibition of discrimination arising under Article II.4 of the Constitution of BiH would be meaningless. In that manner someone could always find that some of the elements on the coat of arms of the Republika Srpska are discriminatory, for example, religious elements such as cross which could insult atheists, composition with the arms could insult pacifists etc. It is further stated in the reply that nobody can dispute that two entities in the state of Bosnia and Herzegovina are distinguished in terms of the authorities and citizens. The symbols that are identical and which neglect these differences are quite useless because the main purpose of the symbols is to make the difference between different public authorities and organizations on the same territory.

50. As to Article 3 of the Law on the Use of the Flag, Coat of Arms and Anthem in which the term "**moral norms of the Serb people**" are used, the National Assembly states that this term is

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used in the close relation with the title of the entity “Republika Srpska” and that it is the part of the same sentence which forbids violation of the “reputation and dignity”. Therefore, if the legal document is interpreted in the good faith “in accordance with usual meanings within sense of Article 31 of the Vienna Convention on the Law on Peaceful Agreements” the words “Serb people” must be understood as “Serb citizens” which implies all citizens of Republika Srpska. Similarly, the description of the flag, coat of arms and anthem as “state emblems” in Article 2 of the same Law must be understood within meaning of “entity emblems” following the established principles of interpretation, under which all legal regulations must be interpreted in accordance with the Constitution of Bosnia and Herzegovina as long as it is possible (Decision of the Constitutional Court No. *U-5/98-IV* of 19 August 2000). In the opinion of the National Assembly, there are no discriminatory elements in any of the challenged laws, and the issues as to the extent to which the citizens of the entity may or wish to identify with these symbols depends on their personal feeling which is an individual and not a constitutional issue.

51. In the reply it is further stated that if the statements of the applicant on the existence of the different treatment are confirmed, there is objective and rational explanation for it. Such treatment is justified by the fact that symbols which allegedly characterize the Serb element only express their connection with the title “Republika Srpska”. All sub-national entities in the world make the same thing: give names to and design their symbols in accordance with the official denomination for example: Flemings and Walloons in Belgium, Catalans and Basque in Spain, etc. Why then would it be considered unconstitutional the sub-national entity Republika Srpska uses “Serb” symbols?

52. As to Articles 1 and 2 of the challenged Law on the Family Patron-Saint’s Days and Church Holidays, the National Assembly has stated that it is necessary, firstly, to clarify that the acceptance of the Greece Orthodox Calendar in the Republika Srpska does neither offend nor discriminate anyone since it is absolutely necessary to use only one calendar as well as reasonable to use the traditional calendar of the vast majority of citizens. In this respect, it is objectively impossible that all three peoples are equally treated by entitling them to use different calendars. Therefore, in their opinion, the celebration of two New Years is undisputed. 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 “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“.

**53.** In the opinion of the National Assembly such symbols in the Republika Srpska are necessary for creation of one united, peaceful and tolerant entity, as “collage” symbols which would occur by mixing of the symbols of the three constituent peoples represent more division or fragmentation of the citizens rather than union. Such symbols are necessary in order for Republika Srpska to distinguish itself from Bosnia and Herzegovina, and such differences, reflected in the clear and distinct symbols, cannot be challenged as Republika Srpska has its constitutional right to establish special parallel relations with neighbouring countries based on international law.

54. The National Assembly states in connection with Article 3 of the Constitutional Law on the Flag, Coat of Arms and the Anthem of the Republika Srpska, particularly in connection to the anthem, 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 that text, in their opinion, can be seen as correct only as historical and obsolete document, as the inheritance of the past. Today there is neither “Serb crown” nor “Serb lineage”. This text should not be understood as political proclamation for the glorification of only the people of Serb original excluding all other constituent peoples but rather as transcendental imagination distant from the real contents.

55. As to the statements from the supplement to the request regarding 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 contract the Republika Srpska is just entity and not a State. It would be

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contradictory to argue that the Republika Srpska is an Entity as far as the rights, privileges and competencies are concerned. Moreover Article 1.1 of the stated convention guarantees on equal footing only the recognition, enjoyment or exercise of “human rights and fundamental freedoms” in the political, economic, social cultural or any other field of public life. But the disputed Laws do not grant or regulate human rights or fundamental freedoms. There is no basic or guaranteed right by the Constitution of BiH, to claim specific symbols for any constituent people. Thus, the disputed laws by their mere content and substance cannot be in conflict with the International Convention on the Elimination of All Forms of Racial Discrimination. Also Articles 2 a, b, c d and e of this convention does not have any border meaning than Article II(4) of the Constitution of Bosnia and Herzegovina. It only repeats normative devices, commands and obligations imposed on public authorities which can also be derived directly from an appropriate interpretation of Article II.4 itself.

56. Finally, in the opinion of the National Assembly the annulment of the existing symbols and imposition of the identical or almost identical symbols would lead to the situation in which the entities would lose their identity and feature and such situation would lead to the development of new tensions and hostilities between constituent peoples rather than integration and peaceful development. It is finally stated that the citizens cannot be deprived of their official symbols without destroying their identity.

**Reply of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina**

57. The House of Representatives in their reply to the request and supplement to the request states that the Constitutional Commission of that House, at the session held on 22 November 2004, examined the request in question. On that occasion, it is stated in the reply, this commission took position that the request was fully justified and proposed the House of Representatives, in accordance with the decision of the Constitutional Court on the constitutionality of the Peoples and Others in Bosnia and Herzegovina, to change the entity emblems, coat of arms and flags of the Federation of BiH.

**Reply to the request by the Croat Caucus and the Bosniak Caucus within the Council of Peoples of the Republika Srpska**

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58. Both the Croat Caucus and the Bosniak Caucus within the Council of Peoples of the Republika Srpska maintain that the applicant's initiative is both legal and legitimate and that the challenged laws should be brought promptly into line with the Decision on Constituent Peoples in Bosnia and Herzegovina.

**d) Amicus curiae Submission**

59. In its submission, *amicus curiae* initially reasoned from the constitutional and legislative framework in which the challenged laws were adopted, pointing out that the challenged laws were adopted before the decision of the Constitutional Court on "constituent peoples" and the decision on the names of towns and municipalities in the Republika Srpska No. *U 44/01*, *i.e.* 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 taking the same view regarding the holidays of the entity as "they were not represented in the meaningful sense in the legislative process".

60. Furthermore, in its analysis *amicus curiae* points out that the use of symbols or integral parts thereof is an important issue considering its origin stemming from the conflict and aiming at the domination of one ethnic group within a certain geographic area. *Amicus curiae* therefore points to a necessity to ascertain, with regard to the non-discrimination principle, whether there is a legitimate aim in a democratic society and whether the use of legitimate means is proportionate to the prevention of the rights violation taking into account that the symbols are used at the places where all persons should have access to the rights guaranteed under the European Convention and the Constitution of Bosnia and Herzegovina such as schools, public buildings, courts, public areas, hospitals, etc.

61. *Amicus curiae* referred to the Constitutional Court's decision no. *U-44/01* in which the Constitutional Court declared unconstitutional the names "srpski" within the names of towns in the Republika Srpska and concluded that the use of symbols which were *prima facie* exclusive was analogous to the use of names which were demonstrative of the predominance of one ethnic group. It was also stated that the groups to be compared were the same as in the previous decision and that it was incumbent on the authorities to demonstrate that the difference in treatment was objective and justifiable within the meaning of Article II(4) of the Constitution of Bosnia and Herzegovina.

*Amicus curiae* concluded that in the present case it was extremely difficult to argue that there could be a legitimate aim in restricting the enjoyment of a right which was related to return, that even if this could be argued, then to do so would lead to discrimination on grounds of ethnicity and that any objective justification raised must be adjudicated in the light of a very narrow margin of appreciation that must be applied.

62. In the conclusion, *amicus curiae* submitted that the challenged laws led to the adoption of symbols which were not representative of all the constituent peoples. In such circumstances and in the context in which they were adopted, it was inevitable that there would be an impact on those who were not included in the enactment of the challenged laws. In addition, it is concluded that the adoption of symbols which were representative of one ethnic group has inhibited the right to return, and that the reasons for the inhibition of that right embody potential and real violations of substantive rights within the European Convention while the reason for the violation lies in discrimination on the grounds of ethnicity.

63. Finally, *amicus curiae* presents its view that there is a violation of the right to return caused by discrimination on the grounds of ethnicity and also a violation of Article II(4) of the Constitution of Bosnia and Herzegovina.

#### **IV. Public Hearing**

##### **Applicant's position presented at the public hearing**

64. The applicant has maintained his position stated in the request that “choosing” the symbols which are deeply rooted in the historical past of only one people or which are identical to the features and symbols of another state, where that people are dominant, has represented discrimination against all other peoples and citizens who live in the territory of the relevant entity, and such circumstance is without reasonable and objective justification. The applicant has underlined that Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina obligates the parties to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. In the opinion of the applicant, the enactment of the mentioned symbols do not contribute to the voluntary return and harmonised reintegration of refugees and displaced

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persons in the Entities. The applicant substantiates his allegations by the presentation of official statistics of the BiH Ministry for Human Rights and Refugees, which indicate a minor return of the Bosniaks to the Republika Srpska (Bileća 3.65%, Gacko 9.95%, etc.) as well as a minor return of the Serbs to the Federation of BiH (Tomislavgrad 0.17%, Usora 5.26%, etc.). In addition, the applicant emphasizes that the challenged laws are contrary to the Constitution of Bosnia and Herzegovina taking into account that the principle of constituent status of all peoples of Bosnia and Herzegovina throughout its territory is incorporated in the Constitution of Bosnia and Herzegovina, and this right has been infringed by the challenged laws as well as by the practice provided for by these laws. Hence, the Entities should have amended the challenged laws but have failed to do so.

65. The applicant deems unconstitutional any legal activity imposing one sided elements of symbolic identification on other nations, with the intention that symbols of one nation only are imposed and become obligatory for all citizens of a state *i.e.* that respect for these symbols is being imposed on members of other nations. In addition, it is emphasized that in countries such as Bosnia and Herzegovina, only the symbols of universal consensus or those that are neutral as to the tradition, beliefs, and ritual practice of each present and constituent peoples, or those symbols which contain the traditional elements of symbolic expression of each of these peoples, can function as the symbols of the state. In that context, according to the applicant, any symbol used in the existence of the state or in public should reflect its ethnic, national, religious and traditional structure. This is valid to even greater extent in the entities; its symbols should contain the elements of common tradition and symbols of all peoples living in these territories. It is also stated that the Republika Srpska cannot introduce such symbols which reflect a specific approach to experiencing the state, national and cultural tradition inherent to the Serbs only so that other peoples cannot take part thereof in an equal way without discrimination. This is applicable for the symbols of the Federation of BiH as well.

66. The applicant has also underlined that the previous war resulted in genocide, war crimes and crimes against humanity which are constitutionally punishable as well as under international law in such way that the soldiers – war crimes perpetrators, under the heraldic signs and insignias (coats of arms and flags), were wearing the symbols or were being consecrated or were carrying flags with these heraldic symbols at the head of these criminal armies. According to the applicant, it would therefore be very good to clarify the previous violations of human rights and international

humanitarian law, within a longer historical span, by “the same perpetrators” towards “the same victims”, thereby, historically seen, a certain significant continuity of effect would be demonstrated.

67. As for the argument of the RS National Assembly that the disputed symbols of the Republika Srpska do not jeopardize any of the rights of others and in particular the right to return, it has been stated that such a position is untenable because there is no sustainable return at all and if there is some return it is rather formally achieved through the restoration of ownership rights under the pressure of international community and very little or almost nothing through the reintegration of those people into the society being developed in the Republika Srpska, which includes the disputed symbols as well. It has been stated that the most important reasons for the non-return of people are related to psychological, emotional and cultural-religious sphere originating from the absolute domination of the Serb national feelings, Serb symbols, and the “provident” Orthodox practice, being imposed on the entire society in the Republika Srpska. Furthermore, it has been stated that the Bosniaks and Croats refuse to send their children to the schools that celebrate their own Patron-Saint’s Days and which operate under the auspices of the Orthodox saints. They also do not want to look at two headed eagles on public institutions or to sing or listen to old Serb anthem called “Bože Pravde” or to stand under the sign of tinder-box steels (the cross with four Ss imprinted in Cyrillic letter “C” which, when read or interpreted, always mean “only unity may save the Serb”) as this is not only the part of their tradition, but the reason for their refusal is that those, who had those signs and were wearing those symbols, are the executors of the most serious crimes against the Bosniaks and Croats who are now to integrate into the society of the Republika Srpska.

68. With reference to the presentation on the heraldry by the representative of the RS National Assembly, the applicant referred to the allegation that “due to the general Slavic origin, the signs in the existing symbols of the Republika Srpska do not offend the historical, cultural, spiritual or religious integrity of Bosniaks and Croats” and stated that this allegation does not only represents fabrications and scientifically verified inaccuracies but also a calculated lie. The applicant stated that there are no eagles and birds in the heraldry of Croats and Bosniaks, and there is almost no reference to tinderbox steels or other signs that are a distinguishing feature of the Serb and Orthodox state, religious and national tradition. The applicant supported his claim by saying that general Slavic symbols do not exist as such, because, by having a look at the heraldic history of

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Slavic peoples (Russians, Ukrainians, Byelorussians, Slovenians, Croats, Serbs, Bosniaks, etc.), one can see that the heraldic signs were created among these peoples and their states by the emergence of states and aristocracy. The Slavic states, as it is stated, emerged at some later period of the Middle Ages (in VIII through IX century), at the time when heraldic tradition was already formed and when those peoples, i.e. the states, started recognizing the signs of that particular state under which power they were developing or which religion and culture they had already accepted.

69. With reference to the Law on the Family Patron-Saint's 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 the procedure was initiated before the Constitutional Court of the Republika Srpska for the review of constitutionality of the Law on Public Holidays of the Republika Srpska and the procedure of its enactment given the fact that the law was proclaimed by the decree of the President of the Republika Srpska and that the procedure was not followed with regards to the raised issue of "vital national interest". The applicant suggested that the Constitutional Court review the compatibility of the challenged Law on Family Patron-Saint's Days and Church Holidays, which is still in application. At the end of the hearing the applicant suggested that the Constitutional Court postpone the discussion on this law until the decision of the Constitutional Court of the Republika Srpska is adopted.

70. After being asked by the Court whether there were any specific data or evidence to prove that refugees do not want to return to the Republika Srpska because of the symbols, the applicant replied that the specific names of persons refusing to return for those reasons cannot not be offered, but it was undisputable that the symbols represent one of the reasons for refugees' refusal to return to the Republika Srpska.

### **Position of the House of Representatives of the F BiH Parliament**

71. The representatives of the House of Representatives of the F BiH Parliament reiterated their standpoint supporting the request of the applicant. It was also stated that the House of Representatives and its working bodies, primarily the Constitutional commission, in the period

between 2002 and 2004, were issuing conclusions whereby they pointed to the necessity for harmonizing the said symbols with the Constitution of Bosnia of Herzegovina, European Convention and International Conventions on Elimination of all Forms of Racial Discrimination. However, the House of Peoples of the F BiH Parliament failed to react to the said initiatives, which stopped them according to the Constitution of the Federation of BiH. Thus, except for the raised initiative no further progress was made.

72. The House of Representatives delivered a written submission supporting the statements given at the public hearing, wherein they stated that the design of the coat of arms and the flag of the Federation of Bosnia and Herzegovina point to only to two constituent peoples: Bosniaks and Croats, and in no way contains any insignia of Serb people or Others in Bosnia and Herzegovina. It was also stated that they disagree with the allegations from the request relating to the part where the meaning of golden lilies is explained, stating that the use of two terms in the request is evident: the term “golden lily” (in singular) and the term “golden lilies” (in plural), and therefore it is not clear what this refers to. The term “golden lily” is determined to be used in the coat of arms and the flag of the Federation of BiH, while the term “golden lilies” was the part of the coat of arms and the flag of the Republic of Bosnia and Herzegovina during the war period (1992-1995) and used only by the Army of Bosnia and Herzegovina, which was an armed force in the war. Finally, they said that they agree with the view that any prescribing of Entity insignia that symbolizes only one or two out of three constituent peoples in Bosnia and Herzegovina would be inconsistent with the decision of the Constitutional Court on constituent status of peoples.

#### **Position of the RS National Assembly**

73. The representatives of the RS National Assembly objected to the participation of *amicus curiae* in the present proceedings before the Constitutional Court as they held that their taking part has no grounds under either the Constitution of BiH or the Rules of the Constitutional Court.

74. The Constitutional Court rejected this objection by the RS National Assembly in view of its previous practice to invite *amicus curiae* to take part in a public hearing before the Constitutional Court as well as Article 47 paragraphs 2 and 3 of the Rules of the Constitutional Court which

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provides for that the Constitutional Court shall also invite persons who may submit expert opinions and statements relevant for taking of a decision.

75. The RS National Assembly reiterated its standpoints from the 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 have been discriminatory, *i.e.* that they have discriminatory effects. It was also stressed that no person has been put in a situation of being unable to return to the Republika Srpska because of the symbols, and the best example is the applicant who was the Deputy Chairman of the National Assembly and who accepted those symbols at the time of his term of office. Furthermore, it was stated that the challenged symbols of the Republika Srpska, either all or parts of them, always belonged to all the peoples – Serbs, Croats and Bosniaks. It was also pointed out that the symbols are not *prima facie* exclusionary, as the flag of the Republika Srpska is in Pan-Slavic colours. They pointed out that these symbols, not the existing ones, but rather some of their elements, such as cross, lily, colour of flag etc., are deeply rooted in the history of all three peoples of Bosnia and Herzegovina.

76. In the heraldry-related part of the presentation, the representatives of the RS National Assembly stated that what refers to the coat of arms is also relevant to the flag of the Republika Srpska and, to some extent, to its anthem. It was particularly emphasized that the coat of arms and its owner (the one represented by the coat of arms) make a single entity and are of the same identity which concerns both the past and future and that the coat of arms is like a signature, which may contain all the letters of the owner's name or it may focus on few draws that represent a unity. The symbols, because of such nature, cannot be annulled by a decision of the court or executive authority without interfering with the issue of identity, because, as it is stated, a person who uses a coat of arms that does not represent his identity is brought in the position of imposed identity. The coat of arms and the flag of Bosnia and Herzegovina are mentioned as an example in this regard. In the opinion of the representatives of the RS National Assembly, the aforesaid signs represent nobody because they are neutral.

77. It was also stated that if there are any arguments as to the standpoints of the applicant that

the symbols make an impediment for the return to the Republika Srpska, then it should be first said that the name “Republika Srpska” is disputable as such, not the symbols. If it is accepted that the symbols were derived from the name of the Republika Srpska, which was established by the “Dayton Constitution” and which as such cannot be changed, then the symbols cannot be changed either. The RS National Assembly is of the opinion that the symbols represent the results of compromise achieved in Dayton and the question was posed what would happen if the symbols were annulled since the Constitutional Court cannot invent new symbols.

78. The proposal was made to suspend the proceedings in the part of the request where the Law on the Family Patron-Saint’s Days and Church Holidays was challenged since the new Law on Public Holidays was passed according to which all constituent peoples are entitled to celebrate their religious holidays.

79. After being asked by the applicant to elaborate on the arguments that the symbols of the Republika Srpska represent all the constituent peoples, *i.e.* that they do not offend the feelings of Bosniaks and Croats, the National Assembly replied that there is no opinion or an agreed position on the symbols of Serbs, Croats or Bosniaks, and that therefore, those are not only the symbols of Serb people, but also of the entire Bosnia and Herzegovina and as such they cannot irritate anyone.

80. Furthermore, as for the question of the applicant whether the challenged laws were enacted in accordance with the Constitution of the Republika Srpska where it was stipulated that the Republika Srpska is the entity of Serb people, the National Assembly stated there is no dispute about that. However, at the same time this does not mean, if the Republika Srpska was the entity of the Serb people (prior to the amendments to the Constitution of the Republika Srpska), that the symbols are Serb symbols.

81. As for a question from the Constitutional Court relating to the anthem of the Republika Srpska to offer an explanation on the neutrality in terms of the constitutional principle of non-discrimination of all citizens of Bosnia and Herzegovina, the National Assembly confirmed that the text of the anthem of the Republika Srpska is disputable, which may be resolved by keeping the current melody of anthem and selecting another text. They also acknowledged that some wordings

of anthem may raise certain doubts in terms of neutrality, but the coat of arms and the flag do not discriminate anyone for which, as they emphasized, plenty of arguments were offered.

82. As for the request of the Constitutional Court to elaborate on the meaning of four Ss (“C”) on the coat of arms of the Republika Srpska, i.e. to explain whether those letters mean that “only the unity may save the Serb” as said among ordinary people, the National Assembly stated that it is not the letters on the coat of arms that are in dispute, but the tinder-box steels, the device used to kindle the fire. They acknowledged the existence of some generally accepted opinions among ordinary people when it comes to the meaning of tinder-box steels on the coat of arms of the Republika Srpska, but those are just tinder-box steels, and therefore they do not represent anything else.

83. After being requested by the Constitutional Court to elaborate on the fact that general understanding of those symbols differs, because, when it comes to the discriminatory effect, the issue that matters the most is a generally accepted opinion and not the opinion of experts, the National Assembly replied that nobody can confront someone’s opinion about the symbols since the symbols require some time to be understood or a research study. Furthermore, they replied that since the applicant presented the thesis that the challenged symbols are not the symbols of Bosniaks and Croats, then it was somehow expected that he will say what their symbols are. Only then the public and the representatives of the Republika Srpska would be able to reply that the proposal is unacceptable to them and that such requests could have been offered for discussion at the time of enactment of laws. It was also replied that the argument of applicant is unacceptable in which he alleged that he was not able to initiate the issue of challenged laws in the Assembly procedure. It was also stated that it is true that the perception of symbols may be different, but majority of people do not understand the symbols nor do they know the text of the anthem. Thus, in essence, the symbols are always the instrument of politicians and serve them to carry out their ideas and initiatives.

84. At the request of the Constitutional Court to explain the difference between the coat of arms of the Republika Srpska and the Kingdom of Serbia, the National Assembly replied that the coat of arms of the Kingdom of Serbia is identical to the coat of arms of today’s Republic of Serbia and the difference between those coat of arms and the coat of arm of the Republic of Srpska is that in

addition to two-headed eagle there are also two lilies on the coat of arms of the Kingdom of Serbia. There is the crown on the head of eagle on the coat of arms of the Republika Srpska, which is missing on the coat of arms of the Kingdom of Serbia. Moreover, it was emphasized that all contained inside the shield of the coat of arms represents its indispensable part.

85. After being asked by the Constitutional Court whether there is the difference between the colors on the flags of the Republic of Serbia and Republika Srpska, the explanation was given that the colours and their layout are the same, but that the coat of arms of the Republic of Serbia is displayed on the flag of the Republika Srpska.

86. After being 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, it was replied that nobody knows that for sure, but it is presumed to be so. It was also replied that the standpoints presented at the hearing on behalf of the National Assembly would not be supported by Bosniaks, but the Croats would support those standpoints because the issue of constitutionality of the challenged laws has never been raised by them.

87. To contribute to their standpoints presented at the public hearing, the National Assembly submitted the statement of Mr. Ivan Tomljenović, Vice-President of the Republika Srpska which he gave on 29 January 2006 during his appearance at the Weekly News program broadcasted by the local TV station in the Republika Srpska. Mr. Tomljenović stated that he does not consider the challenged symbols of the Republika Srpska offensive, but he admitted that they are not satisfactory since all three peoples are equal and constituent in the Republika Srpska. He also said that the challenged symbols of the Republika Srpska do not contain anything that would even partially be satisfactory to Croats and Bosniaks. He stated that the challenged symbols represent only one people. Mr. Tomljenović also said that he had expected the current arrangements concerning symbols would change when the situation becomes more stable and that there would be no problems, but it is evident that the situation is not like that since the problem reached the Constitutional Court. Furthermore, in his reply to the question whether the symbols jeopardize the return to the Republika Srpska or the reasons are of economic nature, Mr. Tomljenović stated that the issue is of subjective nature, but that there are people who refuse to return to the Republika

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Srpska because of the symbols, in particular because of the anthem that defends the salvation of the Serb people, Serb King and Serb lineage. Mr. Tomljenović said that the anthem is about the salvation of Serbs and since it is the anthem of the Republika Srpska it would be a good thing if Croats and Bosniaks also consider Republika Srpska their homeland. As a final point Mr. Tomljenović said that he attends the manifestations at which the anthem “Bože Pravde” is played and where the symbols of the Republika Srpska are displayed, but that he had expected from the beginning that those symbols would change over time.

### **Position of *Amicus Curiae***

88. As for the question of the Constitutional Court whether *amicus curiae* is in the possession of any concrete facts or evidence relating to the allegations that the refugees do not want to return to their pre-war homes, *amicus curiae* stated that she was in possession of such facts, i.e. the evidence. Such facts, according to *amicus curiae*, appeared in the data obtained by the Office of the High Commissioner for Human Rights through the program of making an assessment of the situation in the municipalities in Bosnia and Herzegovina with regards to the respect of human rights. The objective of the program was identification of the problem in the field of human rights in the municipalities of Bosnia and Herzegovina and work on finding methods how to solve these problems in cooperation with the municipalities and local communities. There are many municipalities, such as Zvornik, Derventa, Prijedor, Stolac, etc., for which the prospective returners clearly said they did not want to return to because of the feeling of insecurity they had on entering the public buildings, hospitals, schools, municipal buildings and because the first thing they saw was the flag, which was flying at the place where the ethnic cleansing had been conducted. *Amicus curiae* states that those reports were available and that they could be made available to the Constitutional Court, if the need arose.

89. At the request of the National Assembly to elaborate on the presented standpoints concerning the discrimination from which the conclusion could be drawn that any exclusion leads to discrimination, *amicus curiae* stated that she disagreed with such a conclusion because, in principle, one is allowed to take affirmative steps in order to promote the minority rights and to achieve equality. *Amicus curiae* also referred to the statement of Venice Commission presented in its

opinion on the Constitution of Bosnia and Herzegovina that the affirmative steps must in no way be taken to promote majority rights. It was furthermore stated that the Constitutional Court and European Court of Human Rights had elaborated on the test of discrimination many times, that discrimination may be either direct or indirect, and that there was no need to prove an intention to discriminate, but that it was only necessary to prove the effect and potential effect of an act or measure. In reference to this, *amicus curiae* referred to part of its written submission relating to evidence of discrimination. *Amicus curiae* pointed also to the part of its written submission where it was stated that the Constitutional Court had already taken decisions on discrimination, notably in the Decision on constituent status of peoples and Decision on use of prefix “Serb”, despite the evidence not having been collected in these cases. Therefore, *amicus curiae* argued that the Constitutional Court could rely on those decisions in order to find discrimination in this case, though it was also pointed out that the applicant himself had presented some evidence of discriminatory effect in this case. *Amicus curiae* said that the key fact was that the symbols represented one group exclusively, and therefore the burden of disproving discrimination should be placed on the enactor of the challenged laws.

90. After being asked by the National Assembly whether there were data on the basis of which one could draw the conclusion that the challenged symbols did not represent all constituent peoples, *amicus curiae* replied that the legal argument that all the challenged laws were enacted without full participation of all constituent peoples was a sufficient legal argument.

91. At the request of the Constitutional Court to elaborate on the conclusion of discrimination, *amicus curiae* replied that the European Convention obliges the states to create an environment in which everyone will be entitled to the enjoyment of human rights including the right to return and all the rights must be viewed in connection with Article 14 of the European Convention.

92. At the request of the Constitutional Court to elaborate on the conclusion referring to the importance of the context of time in which the challenged laws were enacted, *amicus curiae* replied that the time context was essential since the challenged laws had been enacted at the time when all constituent peoples were not entitled to constituent status under Entity Constitutions, and therefore they were not equally participating in the enactment of laws either in the Republika Srpska or in the

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Federation of BiH. The decision of the Constitutional Court on the constituent status of peoples confirmed the principle of peoples' constituency and ordered the amendments to the Entity Constitutions. Therefore, the laws that were enacted prior to the interpretation of the Constitutional Court must be amended.

## V. Relevant Law

### 93. 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.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.*
- 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.*

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*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).*

**94. Decision Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (*Official Gazette of the Federation of BiH No. 16/02*)

*The Constitution of the Federation of Bosnia and Herzegovina is hereby amended as follows:*

*Amendment XXVII*

*Bosniaks, Croats, and Serbs, as constituent peoples, along with Others, and the citizens of the Federation of Bosnia and Herzegovina, which is a constitutive part of the sovereign state of Bosnia and Herzegovina, being determined to ensure full national representation, democratic relations and the highest level of internationally recognized rights and freedoms, hereby pass the Constitution of the Federation of Bosnia and Herzegovina.*

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*This amendment changes the last sub-paragraph of the Preamble of the Constitution of the Federation of Bosnia and Herzegovina, which was changed by Amendment II to the Constitution of the Federation of Bosnia and Herzegovina.*

*Amendment XXVII*

*Vital national interests of the constituent peoples shall be defined, as follows:*

*-(...)*

*- identity of a constituent people*

*-(...)*

*- education, religion, language, promotion of culture, tradition and cultural heritage*

*-(...)*

**95. 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*

**96. 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*

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*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*

**97. The Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina** (Official Gazette of the Federation of BiH Nos. 21/96 and 26/96)

## *Article 1*

*The Coat of Arms is in the shape of a shield and consisting of three fields: the left upper field, which occupies one quarter of the Coat of Arms, contains a shield with gold lilies on the green background mounted in gold band; the right upper field, which occupies one quarter of the Coat of Arms, contains a historical Croat coat of arms with 25 quarters of red and white colour mounted in red band; the lower field, which occupies one half of the coat of arms, contains ten white six-point stars arranged in circle; the shield with gold lilies and historical Croat coat of arms are placed in the white field; the coat of and the blue filed are fitted in gold band.*

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*Article 2*

*The flag of the Federation of Bosnia and Herzegovina is rectangular with fields of red, white and green colour and the coat of arms of the Federation of Bosnia and Herzegovina referred to in Article 1 of this Law. The white field is three times larger than the red field and green field. The proportion between the width and the length is 3:5.*

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

*Article 2*

*The coat of arms of the Republika Srpska is the coat of arms of Nemanjici represented by a double white eagle with a crown over its head. A red shield with a cross and four white tinder-box steels between the arms of the cross is on the eagle's chest.*

*Article 3*

*The anthem of the Republika Srpska shall be **Bože Pravde**.*

**99. The Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska** (Official Gazette of the Republika Srpska No. 4/93)

*Article 2*

*The flag, the coat of arms and the anthem of the Republika Srpska shall represent the statehood of the Republika Srpska.*

*Article 3*

*The flag, coat of arms and anthem of the Republika Srpska shall be used in accordance with this law, public order, moral norms of the Serb people and in the manner which shall not disturb respect and dignity of the Republika Srpska.*

(...)

## **VI. Admissibility**

100. Taking into account the conclusion on adoption of a partial decision pursuant to Article 62 of the Rules of the Constitutional Court, the Constitutional Court shall not examine the admissibility in respect of Article 1 of the Constitutional Law on Flag, Coat of Arms and Anthem of Republika Srpska nor shall it examine the admissibility in respect of the Law on Family Patron-Saint's Days and Church Holidays in Republika Srpska

101. 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.

102. The applicant requested the Constitutional Court to review the conformity of Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina, Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, Articles 2 and 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska.

103. At the time when the request was submitted, the applicant acted in the capacity of Chairman of the Presidency of Bosnia and Herzegovina and therefore was authorized to submit the request according to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina.

104. The National Assembly challenges the admissibility of the request as, *inter alia*, the applicant did not specify an allegedly violated right laid down in Article II.3 of the Constitution of Bosnia and Herzegovina as the aforementioned Article encompasses 12 rights. However, the Constitutional Court has established that the applicant alleged that the challenged provisions of the aforementioned laws primarily violated the right laid down in Article II.4 in conjunction with Articles

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II.3 and II.5 of the Constitution of Bosnia and Herzegovina. Moreover, in his supplement dated 2 December 2004 the applicant requested the establishment of the violation of Article II.4 of the Constitution of Bosnia and Herzegovina in conjunction with Articles 1 and 2. a), b), c), d) and e) of the International Convention on Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina. The fact that the applicant did not specify a right provided for in the list consisting of 12 rights under Article II.3 of the Constitution of Bosnia and Herzegovina, and that he alleges the violations of other Articles of the Constitution of Bosnia and Herzegovina and International Agreement under Annex I to the Constitution of Bosnia and Herzegovina, does not mean *a priori* that the request is lacking in necessary elements provided for in Article 18 para 1 of the Rules of Procedure of the Constitutional Court. Therefore, the Constitutional Court must dismiss the aforementioned allegations of the National Assembly as unfounded.

105. As to the National Assembly's allegations with respect to the admissibility of the request, according to which the request does not contain the facts and evidence on which the request is based, the Constitutional Court holds that such allegations are arbitrary and lacking in specification. Without wishing to go into the merits of the case in this part dealing with admissibility, the Constitutional Court concludes that the request contains relevant facts and evidence without going into their fundamental nature in this part of the proceedings. The Constitutional Court therefore must dismiss the aforementioned allegation of the National Assembly as unfounded.

106. The National Assembly alleges that the applicant's request was not certified by the seal of the applicant and that the request was therefore submitted by an unauthorized person, i.e. Mr. Sulejman Tihic as a citizen of Bosnia and Herzegovina and not as a Chair of the Presidency of Bosnia and Herzegovina. The National Assembly holds that this is in violation of Article 16 para 2 item 5 of the then applicable Rules of Procedure of the Constitutional Court and that the request should be rejected in the sense of Article 18 para 1 of the then applicable Rules of Procedure of the Constitutional Court. The Constitutional Court recalls that according to Article 18 para 1 of the then applicable Rules of Procedure of the Constitutional Court the certification of the signature by a seal of the applicant was one of the necessary requirements under Article 18 para 1 of the Rules of Procedure of the Constitutional Court. On 2 December 2004 the applicant submitted to the

Constitutional Court a supplement to the request signed and certified by the seal of a member of the Presidency of Bosnia and Herzegovina. The Constitutional Court therefore concluded that the applicant certified subsequently the allegations set forth in the request submitted on 12 April 2004, which was not in violation of then applicable Rules of Procedure of the Constitutional Court. Accordingly, the Constitutional Court must dismiss the aforementioned allegations of the National Assembly as unfounded. Moreover, according to Article 19 para 1 of the Rules of the Constitutional Court, which entered into force in the meantime, a request for institution of proceedings arising under Article VI.3 (a) of the Constitution, shall contain the signature of an authorized person or applicant but not a certification by the seal.

107. 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**

108. The Constitutional Court shall review whether Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina, Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the 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. The Constitutional Court shall also examine whether Articles 2 and 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska are in conformity with Article I.1 and I.3 of the Constitution of Bosnia and Herzegovina.

109. According to the case-law of the European Court of Human Rights an act or a regulation is discriminatory if it differentiates between individuals or groups in similar situations without objective

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and reasonable justification, i.e. if there was not a legitimate aim and a reasonable proportionality between the means used and the aim sought to be achieved.

110. As to the criteria for non-discrimination, the Constitutional Court has used those established by the European Court of Human Rights, which includes the constitutional rights, the rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) and the rights set forth in the international human rights instruments under Annex I to the Constitution of Bosnia and Herzegovina. According to the aforementioned case-law of the Constitutional Court, Article II.4 of the Constitution of Bosnia and Herzegovina offers a larger protection against discrimination than Article 14 of the European Convention (see Decision of the Constitutional Court of Bosnia and Herzegovina, no. *U-44/01* published in *Official Gazette of Bosnia and Herzegovina* No. 18/04).

111. Article II.4 of the Constitution of Bosnia and Herzegovina provides for the right to non-discrimination either in relation to the rights laid down in the European Convention or in relation to the rights and freedoms set forth in the international instruments under the Annex I to the Constitution of Bosnia and Herzegovina. In that way the scope of protection of the rights and freedoms of the citizens of Bosnia and Herzegovina is expanded and the State of Bosnia and Herzegovina and its both Entities are even more firmly obliged to ensure the highest level of internationally recognized human rights as provided for in Article II.1 of the Constitution of Bosnia and Herzegovina, without discrimination on any ground. According to the case-law of the European Court of Human Rights, Article 14 is clarified as follows:

“Discrimination exists if it results in a different treatment of individuals in similar situations and if that treatment has no objective and reasonable justification. In order to be justified, the treatment must pursue a legitimate aim and there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realized”. (European Court for Human Rights, *Marckx v. Belgium*, op. cit, page 16, paragraph 33).

In the instant case, the applicant did not exclusively refer to Article 14 but primarily to Article II.4 of the Constitution of Bosnia and Herzegovina. Taking this into account, the question of

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existence of discrimination must be viewed in the context of the provisions of the Constitution of Bosnia and Herzegovina. On the other hand, the principle of protection of certain scope of issues that are being viewed as collective rights of the constituent peoples, i.e. the rights treated as vital national interests of the constituent peoples, is absolute. The Constitutional Court emphasizes that the Constitutional Court's task is clearly prescribed by Article VI providing that the Constitutional Court "shall uphold this Constitution".

Taking into account the aforementioned, the principle of non-discrimination under Article II.4 has a considerably different meaning, i.e. offers a wider scope of protection than that offered by Article 14 of the European Convention and Protocol No. 12 to the European Convention. According to the established practice, Article II.4 of the Constitution of Bosnia and Herzegovina offers a basis for the Constitutional Court to apply 15 international instruments for the protection of human rights, including the **International Convention on the Elimination of All Forms of Racial Discrimination**.

Article 1.1 of the International Convention on the Elimination of All Forms of Racial Discrimination 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.*

The Constitutional Court emphasizes that the term "racial discrimination" means also different treatment based on national and ethnic origin. Moreover, this Article involves the respect of freedoms in the political, economic, social, and cultural or any other field of public life.

In view of such constitutional definition, the term "discrimination" must be interpreted in a wider manner than the term "discrimination" provided for in the European Convention, which relates to member States which are, as a rule, mono-national nation-states, and not institutionally multiethnic

ones such as Bosnia and Herzegovina with the constitutional principle of protection of collective rights and the notion of constituent peoples. The concept of discrimination should be viewed in this context; in other words the issue is raised with regards to existence of right in relation to which the constituent peoples are discriminated. The provisions on non-discrimination between the constituent peoples, i.e. the principle of protection of certain scope of collective rights, are incorporated in the Constitutions of the Entities so that it is not an exclusive principle provided for in the Constitution of Bosnia and Herzegovina. The Constitutional Court has expressed its position on this issue in a number of its decisions in which it dealt with the issue of vital national interest provided for in Article IV.3 (f) of the Constitution of Bosnia and Herzegovina and has always stressed the right to political representation of the constituent peoples as a fundamental right of the constituent peoples.

112. Notwithstanding the fact that the obligations set forth in international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina relate to the Member States, it is indisputable that those obligations also relate to the Entities in Bosnia and Herzegovina as, within the meaning of Article II(1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. Also, Article II(6) of the Constitution of Bosnia and Herzegovina provides, in part dealing with the implementation of the constitutional provisions guaranteeing the protection of human rights and fundamental freedoms, that in addition to Bosnia and Herzegovina both Entities shall apply and conform to the human rights and fundamental freedoms. Moreover, the Constitutions of the Entities provide that both Entities are competent to decide on the symbols of the Entities. It follows that the Entities, in exercising that competence, have the obligation to ensure the respect of human rights and fundamental freedoms as stated above. The Constitutional Court outlines that the aforementioned constitutional provisions impose a clear positive obligation on the Entities 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.

113. The Constitutional Court concludes that the challenged laws regulate the issue of symbols and that, in principle, the symbols are closely related to the fostering and preservation of tradition, culture, distinctive characteristics of every people and that they have an influence on assembling and

joining in one idea and one belief. It is beyond any doubt that the symbols convey certain emotions and meaning which are experienced in a specific way by those who recognize their history, tradition and culture in those symbols. The symbols are not pure images and decorations but each of them carries certain deeper and hidden meaning. The fact that heraldry is the science which studies coats of arms and symbolic meaning of the elements designed on the coats of arms should be noted in support of the aforementioned. Heraldry has its own interpretation for each single element designed on a coat of arms, for example the way in which the colors are disposed on the coats of arms but also all other elements. Moreover, a flag represents the symbol which sublimates achievements, hope and ideals of all citizens of a country. As such the flag must have respect for all citizens, that is, in the instant case, the citizens of the Entity as a unit of the territorially single and internationally recognized country. In order to make it possible for the citizens of Bosnia and Herzegovina to see it and feel it in that way, the flags of the Entities must be the symbol of all their citizens. Moreover, the anthem of the Republika Srpska must produce the same feeling in the citizens of the Republika Srpska, its words and music must represent all citizens of the Republika Srpska. The question which the Constitutional Court must answer in the further elaboration of its decision is whether the symbols of the Federation of Bosnia and Herzegovina and Republika Srpska as determined by the challenged laws represent all citizens of the Entities, that is whether all citizens of Bosnia and Herzegovina can identify with the challenged symbols.

114. The Constitutional Court reiterates that all challenged laws were passed in a political and temporal context preceding the Decision on the “constituent status of the peoples” adopted by the Constitutional Court, 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.

115. The Constitutional Court also stresses the fact that the challenged laws of the Republika Srpska were passed during the hostilities in Bosnia and Herzegovina when the Republika Srpska was “the State of the Serb people and of all its citizens” according to then applicable Article 1 of the Constitution of the Republika Srpska, which is a significant point for the analysis of the challenged symbols in connection with the question of the identification of its citizens with the

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challenged symbols.

116. Regardless of the fact that in the instant case the Constitutional Court shall be focused on the question whether the challenged symbols discriminate against because of their appearance and temporal and legal context under which the laws determining the symbols and their use were passed, the Constitutional Court considers it necessary to emphasize the facts which the *amicus curiae* presented in her observations during the public hearing. Namely, she stated that a number of refugees and displaced persons did not want to return to their homes of origins because of the symbols which reminded them of the war and because they considered them provocative and offensive. In this respect, the Constitutional Court points to the indisputable fact that the challenged symbols of the Federation of Bosnia and Herzegovina and Republika Srpska, in their present forms or their basic elements, were used during the war in Bosnia and Herzegovina. The Constitutional Court points to this fact particularly in the context of the question to know whether all citizens of Bosnia and Herzegovina may identify with the challenged symbols taking into account the fact that Serbs in the Federation of BiH, 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.

117. According to the jurisprudence of the Constitutional Court, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniaks, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation (see Decision of the Constitutional Court, Case no. *U-5/98 III* of 1 July 2000, item 60).

118. The Constitutional Court, in its decision in Case no. *U-5/98* on the recognition of the rights of the constituent peoples on the whole territory of Bosnia and Herzegovina, established that the recognition of constituent peoples and its underlying constitutional principle of collective equality imposes an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner, but

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also a constitutional obligation of non-discrimination in terms of a group right. The territorial delimitation of the Entities cannot confer constitutional legitimacy on ethnic domination, or national homogenization or a right to uphold the effects of ethnic cleansing (see Decision of the Constitutional Court, in Case no. *U-5/98 III* of 1 July 2000, item 61).

119. The Constitutional Court points 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, 48<sup>th</sup> session (1996).

120. The Constitutional Court shall first review the conformity of the challenged provisions 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 Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

**Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina**

121. The Constitutional Court holds that the reply of the House of Representatives to the allegations set forth in the request, which *de facto* admits the request as well-founded, does not make obstacles to the Constitutional Court to review the conformity of the challenged Laws with the Constitution of Bosnia and Herzegovina.

122. The applicant holds that although the “gold lilies” cannot be solely identified with the Bosniak people, the political representatives of the Croat people and Serb people did not accept the gold lily as their own symbol. In this way, the gold lilies in the coat of arms and the flag of the Federation of Bosnia and Herzegovina symbolize the Bosniak people only. As the coat of arms and the flag of the Federation of Bosnia and Herzegovina contains solely the historical symbol of the Croat people with 25 quarters of red and white colors without containing the symbols of the Serb people and other citizens of Bosnia and Herzegovina, the applicant is of the opinion that the challenged Articles of the law in question are not in conformity with the Constitution of Bosnia and Herzegovina.

123. The Constitutional Court points out that it is indisputable that Bosniaks identify with the “gold lily” portrayed on the present coat of arms of the Federation of Bosnia and Herzegovina and that Croats identify with the “chessboard”. Moreover, the Constitutional Court observes that the Croats and Bosniaks in the Federation of Bosnia and Herzegovina have the legitimate right to preserve its 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. The House of Representatives confirmed this in its reply to the request, which was reiterated during the public hearing before the Constitutional Court.

124. Taking into account the significance of the aforementioned symbols, the Constitutional Court holds that in the instant case these symbols represent *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.*

125. Bearing in mind the principles mentioned above and the principles in the Decision in Case no. *U-5/98* on the constituent status of the peoples, as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds that Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina have a discriminatory character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others, and that the obligation under the International Convention on the Elimination of All Forms of Racial Discrimination according to which *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* has not been respected in the instant case.

126. Taking into account the aforesaid, the Constitutional Court holds that the existing coat of arms and flag of the Federation of Bosnia and Herzegovina do not symbolize all constituent peoples, citizens and “Others” in the Federation of Bosnia and Herzegovina.

127. The Constitutional Court concludes that Articles 1 and 2 of the Law on the Coat of Arms and the Flag of the Federation of Bosnia and Herzegovina 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 Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

### **Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska**

128. The National Assembly, challenging the applicant’s allegations in respect of the coat of arms of the Republika Srpska, pointed to the similarities and differences between the coat of arms of the Republika Srpska and the coat of arms of the former Kingdom of Serbia which is identical to the coat of arms of Serbia. The National Assembly alleges that the present coat of arms of Serbia has a shield with two gold lilies which are not present on the shield of the coat of arms of the Republika Srpska. Moreover, there is a crown on the head of the eagle on the shield of the Republika Srpska,

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whereas there is no such crown on the shield of the coat of arms of Serbia. The National Assembly holds that, even if one accepts that the coat of arms of the Republika Srpska and Serbia, that is the Kingdom of Serbia are the same ones, this should not be a disputable point as the identification takes place at the Entity level, not the State level. As to the anthem of the Republika Srpska, the National Assembly is of the opinion that the existing text of the anthem is a historical and out-dated document and the various pleas to “God” or “Lord” have a character of a prayer rather than a folk song directed against those who are not Serbs. The National Assembly confirmed at the public hearing that the anthem of the Republika Srpska is disputable in terms of its “neutrality” and that therefore the words could be changed, whereas the melody could remain the same.

129. The challenged Article 2 of the Constitutional Law of the Republika Srpska provides that the coat of arms of the Republika Srpska is the coat of arms of Nemanjići represented by a two-headed white eagle with a crown over its head. The Constitutional Court holds that it is an indisputable historical fact that the aforementioned coat of arms symbolized the royal family “Nemanjići” which reigned from 12<sup>th</sup> century to year 1371. The difference between the coat of arms of the Kingdom of Serbia and the existing Serbia on the one hand and the coat of arms of the Republika Srpska on the other hand is that the shield of coat of arms of the Republika Srpska has not two gold lilies portrayed on the shield of the coat of arms of Serbia; moreover, the crown over the two-headed eagle is portrayed on the shield of the coat of arms of the Republika Srpska, whereas that crown is placed outside the shield of the coat of arms of Serbia. Although what makes a coat of arms authentic is its design on its shield according to the heraldic interpretation, it is indisputable that in the instant case the coats of arms have more elements that make them similar than element that make them different. Therefore, they point to the cultural and historical identity of the Serb people only. According to the heraldic interpretation, the coat of arms and its owner (the one it represents) are unity, they have the same identity in terms of the past and the future. It is therefore indisputable that the existing coat of arms of the Republika Srpska represents only the identity of the Serb people in Bosnia and Herzegovina.

130. The Constitutional Court does not consider that the National Assembly’s arguments presented in the reply to the request and during the public hearing, according to which all citizens of the Republika Srpska identify with the coat of arms and flag of the Republika Srpska, are sufficiently credible. The Constitutional Court holds that these allegations of the National Assembly are even in

contradiction to a certain extent with the National Assembly's allegation that the symbols may not be annulled by a decision of a court or executive authority without going into the issue of identity, that the existing symbols derive from the name "Republika Srpska" itself and that the symbols may not be changed as the name "Republika Srpska" may not be changed. Such allegation is contradictory to the allegation that the symbols of the Republika Srpska express only a link of the Serb people with the name "Republika Srpska". The aforementioned allegation of the National Assembly was expressed in the context of the explanation according to which all "sub-national entities worldwide give the names to their symbols and design their symbols according to the official denomination"; in that respect, the National Assembly offered the example of Walloons and Flemings in Belgium and Basques in Spain. The National Assembly implies in that way that those are the "Serb" symbols.

131. As to the symbols of the Republika Srpska, the Constitutional Court points to the fact that the symbols in question are the official symbols of a territorial unit which has the status of "Entity", that they constitute a constitutional category and as such must represent all citizens of the Republika Srpska, who have equal rights according to the Constitution of the Republika Srpska. These symbols appear on all features of the public institutions of the Republika Srpska, that is the National Assembly of the Republika Srpska, public institutions etc. They are not the local symbols of one people, which are to reflect the traditional and historical heritage of that people but the official symbols of the multinational Entity. As such they must reflect the character of the Entity. Taking into account the aforesaid, the Constitutional Court holds that the arguments of the National Assembly, according to which other constituent peoples in Republika Srpska are not denied the right to use their own symbols, i.e. they freely may display their symbols on religious institutions, cannot be accepted.

132. The Constitutional Court reiterates that it does not deny the right of the Serb people in Republika Srpska to preserve its tradition, culture and identity through the symbols of the Republika Srpska, but an equal right must be given to 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 identity of the constituent peoples, education, religion, language, promotion of culture, tradition and cultural heritage.

133. The text of the present anthem of the Republika Srpska was written at the time of “knez” Milan Obrenović in 1872. It became the official national anthem at the time of his crowning when the original words “God, save the Knjaz-Milan” were changed reading as follows “God, save the King Milan”. That anthem was in use until the proclamation of the Kingdom of Yugoslavia, which is also an indisputable fact. The anthem has the words which exalt the Serb King: “*God, our Master! Guide and prosper the Serbian crown and Serbian race*”; appeal for the harmony of the Serb people: “*Bind in closest links our kindred, Teach the love that will not fail, May the loathed fiend of discord Never in our ranks prevail. Let the golden fruits of union, Our young tree of freedom grace*”; and talks about the Serb Kingdom: “*Through five hundred years of durance, we have knelt before Thy face.*” This points to the fact that the anthem of the Republika Srpska symbolizes solely the Serb people in Republika Srpska, as confirmed by the National Assembly as undisputed.

134. Taking into account the significance of the aforementioned symbols, the Constitutional Court holds that in the instant case they mean *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.*

135. Bearing in mind the principles mentioned above and the principles in Decision in Case no. U-5/98 on the constituent peoples, as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds 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, and that the obligation according to which *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* has not been respected in the instant case.

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136. The Constitutional Court concludes that Articles 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska 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.

**Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska**

137. The challenged provision of Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska provides that the flag, the coat of arms and the anthem of the Republika Srpska “**represent the statehood of the Republika Srpska**”.

138. As to the aforementioned Article, the National Assembly alleges that the description of the flag, coat of arms and anthem as “State symbols” must be understood as “Entity symbols” following the established principles of interpretation according to which the legal regulations must be interpreted in accordance with the Constitution of Bosnia and Herzegovina as far as it is possible (Decision of the Constitutional Court, no. *U-5/98-IV* of 19 August 2000).

139. The Constitutional Court holds that it is indisputable that the aforementioned provisions stress the statehood of the Republika Srpska. The Constitutional Court recalls that Article 1 of the Constitution of the Republika Srpska, which read as follows: *Republika Srpska shall be the State of Serb people and of all its citizens*, was changed by the amendments to the Constitution of the Republika Srpska, which were passed in order to fully implement the principle of constituent peoples set forth in Decision in Case No. *U-5/98* so that Article 1, in its relevant part, reads as follows: *The Republika Srpska shall be unique and indivisible constitutional and legal entity*. The Constitutional Court is not competent to review conformity of the laws with the Constitutions of the Entities but it considers it necessary, in the context of this reasoning, to point to what appears to it to be a flagrant incompatibility of the challenged Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska with the Constitution of the Republika Srpska.

140. Moreover it is also undisputed that, according to Article I.1 of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall continue “its legal existence under international law

as a state, with its internal structure modifies herein.” According to Article I.3 of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina shall consist of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. According to Article III.2 of the Constitution of Bosnia and Herzegovina, the “Entities shall have right to establish parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina”; “(...) each Entity may also enter into agreement (...) with the consent of the Parliamentary Assembly”. Unlike the constituent units of federal states which are by themselves called states, according to the Constitution of Bosnia and Herzegovina, the Republika Srpska and the Federation of BiH are not the “States” but the “Entities”. Articles I.1 and I.3 guarantee the sovereignty and territorial integrity, political independence and international subjectivity of the State of Bosnia and Herzegovina.

141. In view of the aforesaid, the Constitutional Court concludes that Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska, in the part providing that the flag, coat of arms and anthem of the Republika Srpska **represent the statehood of the Republika Srpska**, is not in conformity with Article I.1 and I.3 of the Constitution of Bosnia and Herzegovina.

### **Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska**

142. Article 3 of that Law provides *inter alia* that the symbols of the Republika Srpska are used **“in accordance with the moral norms of the Serb people”**.

143. The National Assembly alleges that the term the **“moral norms of the Serb people”** is used in close relation with the name of the Entity “Republika Srpska” and that it is the part of the same sentence which forbids violation of the “reputation and dignity”. Therefore, it argues that the words “Serb people” must be understood as “Serb citizens” in the spirit of the interpretation in good faith in accordance with the usual meaning given to the expressions used in documents, in their context and in the light of their aim and purpose laid down in Article 31 of Vienna Convention on the Law of Treaties.

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144. The Constitutional Court cannot accept the National Assembly's argument that the words "Serb people" must be understood as "Serb citizens" by applying the manner in which the provisions of treaties are interpreted as provided for by Article 31 of the Vienna Convention on the Law of Treaties. The present case does not concern any treaty but the Constitution of the Republika Srpska, whose text must not have any ambiguities in terms of identification of any people, i.e. it must not provide for any provision which would be subject to different interpretations, which is the case here. The Constitutional Court holds that the interpretation of the term "Serb people" is unacceptable for the same reasons for which the Court declared Article 1 of the Constitution of the Republika Srpska (which provided that "*Republika Srpska shall be the state of Serb people*") unconstitutional in Decision in Case no. U-5/98 providing that "*the regulations of Article 1 of the Constitution of the Republika Srpska, particularly in conjunction with other provisions such as the rules on the official language under Article 7 of the Constitution of the Republika Srpska and Article 28 paragraph 3 which declares the Serb Orthodox Church to be the Church of the Serb people – thereby creating a constitutional formula of identification of the Serb 'state', people and Church and putting the Serb people into privileged position since it is neither at the level of the Republika Srpska nor at the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence. The privileged position of the Serb people under Article 1, therefore, violates the explicit designation of constituent peoples under the Constitution of Bosnia and Herzegovina as already outlined above in para 52.*"

145. Having regard to the significance of these symbols, the Constitutional Court holds that in the present case the statement that these symbols are to be used "**in accordance with the moral norms of the Serb people**" without mentioning other constituent peoples, citizens and others, represents "*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.*"

146. Bearing in mind the principles mentioned above and the principles in Decision no. U-5/98 on

the constitutionality of the peoples as well as the political and temporal context in which the legislator adopted the challenged law, the Constitutional Court holds that Article 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska has a discriminatory character and is not in conformity with the constitutional principle of equality of the constituent peoples, citizens and others, and that the obligation according to which “*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*” has not been respected in the instant case.

147. The Constitutional Court concludes that Article 3 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska in the part providing that the symbols shall be 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 2 (a) and (c) of the International Convention on the Elimination of All Forms of Racial Discrimination under Annex I to the Constitution of Bosnia and Herzegovina.

### **Other allegations**

148. In view of the conclusion of the Constitutional Court with respect to the 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 on the 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**

149. Bearing in mind the principles mentioned above and the principles expressed in Decision no. U-5/98 on the constituent status of the peoples as well as the political and temporal context in which the legislator adopted the challenged laws in the Federation of BiH and Republika Srpska, the Constitutional Court holds that challenged provisions have discriminating character and are not in conformity with the constitutional principle of equality of the constituent peoples, citizens and Others, and that the obligation under the International Convention on the Elimination of All Forms of Racial

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Discrimination according to which “*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*” has not been respected in the instant case.

150. The Constitutional Court concludes that it is the 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 Bosniak and Croat peoples in Republika Srpska and other citizens of Bosnia and Herzegovina. The Constitutional Court further holds that it cannot consider as reasonable and justified the fact that any of the constituent peoples has 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 fulfill obligations in the same manner as provided for in the Constitution of Bosnia and Herzegovina and Constitutions of the Entities. Moreover, it is of a particular importance the fact that the identity of the constituent peoples, education, religion, language, fostering culture, tradition and cultural heritage are defined in the Constitution of the Federation of BiH and Constitution of the Republika Srpska, as the vital national interests of the constituent peoples.

151. Having regard to Article 61 paras 1 and 2, Article 62 and Article 63 paras 2, 3 and 4 of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

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

Mato Tadić  
President  
Constitutional Court of Bosnia and Herzegovina

