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

Mr. Mirsad Ćeman, President
Mr. Mato Tadić, Vice-President
Mr. Zlatko M. Knežević, Vice-President
Ms. Margarita Tsatsa-Nikolovska, Vice-President
Mr. Tudor Pantiru,
Ms. Valerija Galić,
Mr. Miodrag Simović,
Ms. Seada Palavrić,
Mr. Giovanni Grasso

Having deliberated on the appeal of **Ms. Fata Orlović** in case no. **AP-4492/14**, at its session held on 28 September 2017 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **Ms. Fata Orlović, Šaban Orlović, Fatima Ahmetović, Hasan Orlović, Zlatka Bešić, Senija Orlović, Ejub Orlović, Abdurahman Orlović, Muška Mehmedović, Mirsada Ehlić, Melka Mehmedović, Rahima Dahalić, Fatima Orlović and Murtija Hodžić** against the judgment of the Supreme Court of the Republika Srpska No. 82 0 P 008784 14 Rev of 6 August 2014, the judgment of the County Court in Bijeljina No. 82 0 P 008784 13 Gž of 23 October 2013 and judgment of the Basic Court in Srebrenica No. 82 0 P 008784 12 P of 3 June 2013 is dismissed as ill-founded.

REASONING

I. Introduction

1. On 17 October 2014, Fata Orlović, Šaban Orlović, Fatima Ahmetović, Hasan Orlović, Zlatka Bešić, Senija Orlović, Ejub Orlović, Abdurahman Orlović, Muška Mehmedović, Mirsada Ehlić, Melka Mehmedović, Rahima Dahalić, Fatima Orlović and Murtija Hodžić ("the appellants") represented by Fahrija Karkin, a lawyer practicing in Sarajevo, submitted the appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the judgment of the Supreme Court of the Republika Srpska ("the Supreme Court") No. 82 0 P 008784 14 Rev of 6 August 2014, the judgment of the County Court in Bijeljina ("the County Court") No. 82 0 P 008784 13 of 23 October 2013 and judgment of the Basic Court in Srebrenica ("the Basic Court") No. 82 0 P 008784 12 P of 3 June 2013.

II. Procedure before the Constitutional Court

2. Pursuant to Article 23 of the Rules of the Constitutional Court, the Supreme Court, the County Court, the Basic Court and the Serb Orthodox Church of Zvornik-Tuzla Diocese in

Bijeljina, Church Municipality Bratunac from Bratunac and Church Municipality Konjević Polje from Bratunac ("the first defendant, the second defendant and third defendant or defendants") were requested on 28 February 2017 to submit their respective replies to the appeal.

3. The Supreme Court, the County Court and the first defendant submitted their respective replies to the appeal during the period from 6 to 15 March 2017, while the Basic Court, the second defendant and third defendant failed to submit their respective replies within the given deadline.

4. On 20 July 2017, the Basic Court was requested to submit the case-file no. 82 0 P 008784 12 P.

5. The Basic Court submitted the requested case-file on 28 July 2017.

III. Facts of the Case

6. The facts of the case, as they appear from the appellant's assertions and the documents submitted to the Constitutional Court may be summarized as follows.

Introductory remarks

7. On 29 October 2002, the appellants filed the lawsuit with the Basic Court against the defendant – the Serb Orthodox Church, the Church Municipality of Drinjača, for the purpose of "repossession of the plot marked as cadastral plot 996 called Crkvine, recorded in the Register of Deeds no. 235 of the cadastral plot Konjevići." While acting upon the filed lawsuit, the Basic Court rendered ruling no. P: 445/2002 of 4 March 2003, whereby it stated that it lacks jurisdiction in this legal matter and dismissed the lawsuit. While deciding the complaint of the appellants against the ruling of the Basic Court of 4 March 2003, the County Court rendered the ruling no. Gž-442/03 of 25 August 2006, whereby the complaint is granted and the mentioned ruling is quashed and the case is remitted to the Basic Court for renewal of proceeding. After that, the Basic Court rendered the ruling no. 082-0-P-06-000177 of 30 October 2006, whereby the lawsuit was sent back to the appellants for correction and amendment in accordance with the provisions of Article 53 of the Civil Procedure Code ("the CPC"). On 13 November 2006, the appellants submitted the amended lawsuit in accordance with the ruling of 30 October 2006 (recorded as no. 082-0-P-06-000177), which was again sent back to the appellants by the Basic Court in its ruling of 19 March 2007 for the purpose of making amendments to the lawsuit by way of specifying the name of the defendant to be the party to this proceeding. While acting upon the ruling of the Basic Court dated 19 March

2007, the appellants amended their lawsuit in their submission and the defendants have been determined, as follows: 1) the Serb Orthodox Church of the Zvornik-Tuzla Diocese -Bijeljina, 2) the Church Municipality Bratunac – Bratunac and 3) Church Municipality Konjević Polje -Bratunac. In that submission the claim was specified so that the defendant, the Serb Orthodox Church, is ordered to remove the premises of the church from part of the plot marked as cadastral plot no. 996 called "Crkvine" - the house, the building with surface 101m2, the courtyard with surface 500 m2 and the meadow of the 2nd class with surface 11720 m2, title deed no. 235 of the cadastral plot Konjevići owned by the plaintiffs and the part of it is shown on the sketch of the expert witness and to hand part of the plot marked on the sketch of the expert witness to the plaintiffs for the repossession and free disposal, within the period 30 days counting from the day of receiving the judgment under the threat of enforcement measure. Otherwise, the defendant has to accept the fact that the plaintiffs, upon the expiration of 30 days period from the day of the receipt of the judgment, will remove the premises of the church from the marked part of the plot at the expense of the defendant and the plaintiffs are to be compensated for the expenses of the proceeding within 30 days under the threat of enforcement measure".

8. After that, the Basic Court has been postponing the preparatory hearing on several occasions (21 June, 27 September, 29 October, 29 November, and 27 December 2007). Namely, during the preparatory hearing of 27 December 2007, the official note was read aloud and that note was composed on 26 December 2007 by the President of the Court Hajrudin Halilović, wherein it was stated: "On 26 December the plaintiffs' legal representative contacted, via phone, the President of the Court and suggested that the preparatory hearing scheduled for 27 December 2007 be postponed since he had meeting with the RS Prime-Minister and there was a possibility for reaching a mutual settlement of this dispute in the first half of 2008". The preparatory hearings, which were scheduled for 29 January and 28 February 2008, were also postponed at the proposal of the authorised representative of the appellants, and that was stated in the Minutes of the court dated 29 January and 28 February 2008.

9. Bearing in mind that the legal representative of the appellants, who was duly informed, did not attend the preparatory hearing, on 7 June 2008 the Basic Court rendered a ruling whereby it was considered that the lawsuit was withdrawn, in which case the mentioned ruling was rendered ineffective given that the proposal for restoration filed by the legal representatives of the appellants was granted in the ruling of that court dated 11 February 2009. After that, the Basic Court scheduled and held the preparatory hearing on 25 December 2009, including the main hearing held on 20 April

2010 at which, as stated by the court in the Minutes of 20 April 2010, after the presentation of evidence, the legal representative of the appellants stated the following: "The fact is established that on 11 January 2008, the out-of-court settlement was reached between the plaintiffs represented by lawyer Fahrija Karkin and the defendants represented by Prime-Minister Milorad Dodik, and Advisor to the Prime Minister Miladin Dragičević and Mr. Kačavenda, reading as follows: "the defendants are ordered to remove the church built on the cadastral plot 996 at the south-west part of the cadastral plot between the asphalt road and house at the moment when the defendants provide new space for the construction of the church in Konjević Polje, where the defendants are ordered to relocate the church within the time-limit of 15 days from the day of fulfilment of the second requirement under threat of enforcement measure".

10. While deciding the specified claim of the appellants, the Basic Court dismissed the mentioned claim by its judgment no. 082-0-P-06-000177 of 21 May 2010, which was upheld by the judgment of the County Court no. 12 0 P 001490 10 Gž of 17 September 2010. While deciding the appellants' petition for review, the Supreme Court rendered the ruling no. 118 0 P 000701 10 Rev of 1 February 2012 of 1 February 2012, whereby the petition for review was granted and the judgment of the County Court of 17 September 2010 was quashed and the case remitted to the relevant court for renewal of the proceeding. After that, the County Court rendered the ruling no. 12 0 P 00149012 Gž of 24 September 2012, whereby the appellants' complaint against the judgment of the Basic Court of 21 May 2010 was granted and the mentioned judgment of the Basic Court quashed and the case remitted to the Basic Court for renewal of proceeding.

The proceeding completed by the challenged judgments

11. While deciding the renewal of the proceeding, the Basic Court rendered the judgment no. 82 0 P 008784 12 P of 3 June 2013, whereby the applicants' claim was dismissed. The claim read as follows: The fact is established that on 11 January 2008 the out-of-court settlement was reached between the legal representative of the appellants who was duly informed did not show up at the scheduled preparatory hearing of 7 May 2008, the Basic Court rendered the ruling on 7 June 2008, whereby the lawsuit is considered withdrawn, where the mentioned ruling was rendered ineffective as by the ruling of that court dated 11 February 2009 the proposal of the legal representative of the appellants for restoration was granted. Afterwards, the Basic Court scheduled and held the preparatory hearing on 25 December 2009 and main hearing on 20 April 2010 at which, the legal representative of the appellants, after presentation of evidence stated: instead of the claim previously filed where the removal of the church or repossession of land was sought, he amends the

claim, which reads as follows: “The fact is established that on 11 January 2008, the out-of-court settlement was reached between the plaintiffs represented by lawyer Karkin Fahrija and defendants who were represented by the Prime-minister Milorad Dodik, the Advisors to the Prime-minister Dragičević Miladin and Mr. Kačavenda, which reads: “The defendants are obliged to remove the church, which was built on the cadastral plot no. 996, at the south-west part of the cadastral plot between the asphalt road and houses at the moment when the defendants provide new space for construction of the church in Konjević Polje, with obligation imposed on the defendant to relocate the church within 15 days from the day of fulfilment of the second requirement under threat of forcible enforcement”. In the same judgment the appellants are ordered to jointly compensate the first defendant for the costs of the civil proceeding amounting to BAM 11 243.70.

12. In the reasons for the judgment, the County Court stated that the appellants, in their claim of 29 October 2002, initiated the proceeding and specified the claim as follows: the appellants sought that that the Serb Orthodox Church be ordered to hand over part of the plot no. 996 called ‘Crkvine’- the house and the building with surface of around 200 m2, and leave it totally devoid of the contents and construction facilities. The Basic Court also stated that during the proceedings, the claim was specified for several times, where the appellants have finally specified their claim at the hearing of 20 April 2010, as precisely stated in the enacting clause of the judgment. While deciding the specified claim, the Basic Court stated that based on the presented evidence (interrogation of witnesses Miladin Dragičević and Hajrudin Halilović – President of the Basic Court in Srebrenica), it established that during 2008 the talks were conducted between the legal representative of the appellants and witness Miladin Dragičević in his capacity as Adviser to the Prime-Minster of the Republika Srpska Milorad Dodik on “the possible assistance to be provided to the Serb Orthodox Church by the Government of the Republika Srpska in finding peaceful solution to the issue of relocation of the church from the land in question to another location in Konjević Polje”. Namely, the Basic Court argued that as regard the circumstance of reaching the out-of-court settlement, and upon the proposal of the appellants, it presented the piece of evidence of interrogation of Miladin Dragičević in his capacity as witness and that, based on the statement of the mentioned witness, it was established that “Miladin Dragičević and Prime-Minister Milorad Dodik did not conduct talks on behalf of the defendants, but they did so in their capacity as representatives of the Government of the Republika Srpska trying to provide assistance in finding solution to the problem of relocation of the church from the land claimed by the plaintiffs (the appellants)”. The Basic Court also stated that “witness Miladin Dragičević confirmed that bishop Kačavenda, who could have been entitled to represent the defendants, was not present at the meeting. During the meeting, the telephone

conversations was conducted with him, and Mr. Kačavenda said that he was willing to discuss that matter and that the RS Government is not the place to be addressed by the legal representative of the plaintiffs (the appellants)". In this connection, the Basic Court emphasized that the mentioned witness confirmed that the telephone conversation with bishop Kačavenda was just a discussion and not an out-of-court settlement."

13. Bearing in mind the aforesaid, and upon assessment of the presented evidence within the meaning of Article 8 and taking into account the statements of the parties to the proceedings who were interrogated in their capacity as witnesses, the Basic Court concluded that the appellant, upon presentation of evidence, failed to prove that an out-of-court settlement reached between the appellant's and defendants within the meaning of the provisions of Article 1089 of the Law on Obligations. Therefore, the Basic Court dismissed the appellants' claim as ill-founded. The Basic Court based its Decision on the costs of the proceeding on the provisions of Article 386, paragraph 1 of the Civil Procedure Code.

14. While deciding the complaint of the appellants' against the first instance judgments, the County Court rendered the judgment no. 92 0 P 008784 13 Gž of 23 October 2013, whereby the complaint of the appellants was granted with regards to part of the decision on the costs of the proceedings, so that the first instance judgment was modified regarding that part in a manner in which the amount of BAM 11 243.70 was reduced to the amount of BAM 1 029.60, while the rest of the claim of the first defendant seeking compensation for the costs of the proceeding was dismissed (paragraph 1 of the enacting clause). In paragraph II of the enacting clause, the rest of the complaint of the appellants was dismissed and the first instance judgment was upheld. In the reasons for the judgment, the County Court reiterated that in the case at hand the specified claim was aimed at determination of the fact that the out-of-court settlement was reached between the plaintiffs (the appellants) represented by lawyer Fahrija Karkin on the one side, and the defendants represented by the Prime-Minister of the Government of the Republika Srpska Milorad Dodik, Advisor to the Prime-Minister Milorad Dragičević and Mr. Kačavenda on the other side. According to this settlement, they are obligated to remove the church built on cadastral plot no. 996 at the moment when the defendants provide a new space for the construction of the church in Konjević Polje and the defendants are to fulfil that obligation within the time-limit of 15 days from the day of fulfilment of the second requirement under threat of enforcement measure". The County Court noted that the court of first instance, while deciding within the limits of the specified claim, drew a conclusion that the claim is groundless for the reason that the appellant's failed to prove that the

Prime-Minister Milorad Dodik and Advisor Miladin Dragičević were authorized to represent the defendants, i.e. to talk on behalf of the defendants for the purpose of relocation of the church from the real property in Konjević Polje, neither did they have such an authorization under the law. Namely, the County Court noted that the conclusion cannot be drawn from the statements of the interrogated witnesses – Advisor to the Prime-Minister Milorad Dragičević and Hajrudin Halilović, "that out-of-court settlement was reached between the parties to the proceeding in a form of bilateral contract, which is referred to under Article 1089 and Article 1098 of the Law on Obligations". The County Court also pointed to the fact that the court of first instance, based on the statements of the mentioned witnesses, also established that "the telephone conversations were conducted between Miladin Dragičević, the Advisor to the Prime-Minister and Bishop of the Zvornik-Tuzla Diocese Kačavenda, with the aim of solving the disputed issue of relocation of the church in Konjević Polje" and, in that regard, the Court concluded that it does not follow from the statement of the mentioned witness that during that conversation "the agreement was made and out-of-court settlement was reached, which is to be established as sought by the specified claim". Bearing in mind the content of the appellants' claim and established facts of the first instance court, the County Court concluded that the first instance judgment, which decided the matter raised by the specified claim, is correct and lawful, except for the part of the decision on the costs of the proceeding. Therefore, as stated in the enacting clause of the judgment the County Court rendered the decision in accordance with Article 266 of the Civil Procedure Code.

15. In its judgment no. 82 0 P 008784 14 Rev of 6 August 2014, the Supreme Court dismissed the petition for review filed by the appellants against the second instance judgment. In the reasons for the judgment, the Supreme Court repeated the subject of the claim and facts established by the lower instance courts. In that regard, the Supreme Court concluded that the judgments of the lower instance courts are correct and lawful. Namely, the Supreme Court indicated that it indisputably follows from the evidence presented during the proceeding (interrogation of witnesses) that the talks were conducted between the legal representative of the plaintiffs (the appellants) and Miladin Dragičević, the Advisor to the Prime-Minister of the Republika Srpska with regards to relocation of the church from the plot owned by the plaintiffs (the appellants). However, the Supreme Court pointed out that "it does not follow from any part of the statements given by mentioned witnesses that Advisor Miladin Dragičević or Prime-Minister Milorad Dodik expressed their wish to participate in or that they participated in the talks as legal representatives of the defendants, the Serb Orthodox Church, and, in that regard, the Court concluded that it follows from the mentioned statements that "Dragičević and Prime-Minister Dodik did not conduct talks on behalf of the

defendants, but in their capacity as representatives of the Government of the Republika Srpska, which is not authorised by law to represent any religious community in the Republika Srpska, including the Serb Orthodox Church given clear separation of the church and republic." Afterwards, the Supreme Court indicated that under Article 90 of the Law on Obligations it is stipulated that: "The form that the law prescribes for a contract or some other legal transaction is also valid for the proxy for conclusion of that contract, i.e. undertaking of that work", and that under Article 91, paragraph 4 of the mentioned Law, the following is stipulated: "The proxy holder cannot conclude the settlement without special authorisation". Additionally, the Supreme Court noted that it clearly follows from the established facts that Bishop Kačavenda, who could be considered entitled to represent the defendants, was not present at the mentioned meeting. In fact, the telephone conversation was conducted with him during the meeting and on that occasion Kačavenda stated that the Government of the Republika is not "to be addressed by the legal representative of the plaintiffs (the appellants)". Given the aforesaid, and bearing in mind the content of the appellants' claim, the Supreme Court noted that the lower-instance courts drew a correct conclusion that it does not follow from the established facts that some kind of agreement was made, or that some kind of settlement was reached by the parties to the proceeding within the meaning of Article 1089 of the Law on Obligations. Therefore, the Supreme Court concluded that the lower instance courts' decisions, which were rendered upon the specified claim, were correct and that the appellants' petition for review was unfounded and, therefore, the claim was dismissed in accordance with the provisions of Article 248 of the Civil Procedure Code.

IV. Appeal

a) Allegations of the appeal

16. The appellants consider that by the challenged decisions their right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") was violated, as well as the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention. In essence, the appellants claim that their constitutional rights have been violated because of erroneously established facts leading to the wrong conclusion of the ordinary courts regarding the assessment of evidence, and because of misapplication of the substantive law. There is an extensive explanation of the chronological order of the proceedings in the appeal, wherein the challenged decisions are

interpreted and the appellants consider that those decisions are lacking clear reasons. Namely, the appellants noted that they indisputably "proved that the church was illegally built on their land". Therefore, they are of the opinion that in the course of the proceeding they proved that the out-of-court settlement was reached between them and the defendants. The mentioned fact, in their opinion, follows from the statements of witnesses Miladin Dragičević and Hajrudin Halilović." The appellants also consider that the challenged judgments do not contain clear reasons for which their claim was dismissed. Was it because the Prime-Minister of the Republika Srpska Milorad Dodik and his Advisor Miladin Dragičević, including bishop Kačavenda did not have authorizations for conclusion of the out-of-court settlement or the reason was the non-existence of the required written form of the out-of-court settlement." Namely, the appellants noted that it is not the matter of dispute that bishop Kačavenda was not present during the talks, but the telephone conversation was conducted with him and the agreement was made, and that agreement has all characteristics of the out-of-court settlement." The appellants point out that "during the telephone conversation bishop Kačavenda had immediately given his consent to that out-of-court settlement, about which Mr. Dragičević gave testimony before the court.

b) Reply to the appeal

17. The Supreme Court, the County Court and the Basic Court challenged the allegations from the appeal pointing out that the subject of the appellants' claim was to establish the existence of the court settlement reached between the parties to the proceeding. The courts also noted that no conclusion can be drawn from the appellants' allegations that they had presented relevant arguments with regards to the alleged violation of the constitutional rights. The courts are of the opinion that the proper reasons were presented in the challenged decisions.

18. The first defendant noted that the allegations of the appeal are based on the contestation of the established facts and application of the substantive law and, in the opinion of the first defendant, those allegations are ill-founded. She is of the opinion that the constitutional rights the appellants refer to were not violated in the proceeding at hand. Therefore, the proposal was given that the appeal be dismissed as ill-founded.

V. Relevant Law

19. The **Law on Obligations** (*Official Gazette of SFRY*, 29/78, 39/85, 45/89, 57/89, and *Official Gazette of Republika Srpska*, 17/93, 3/96, 39/03 and 74/04), in the relevant part, reads:

Article 90

The form that the law prescribes for a contract or some other legal transaction is also valid for the proxy for conclusion of that contract, i.e. undertaking of that work.

Article 91

1) A proxy holder is entitled to undertake only those legal transactions he/she was authorized to.

(...)

4) The proxy holder can neither contract bill liability nor conclude the contract of guarantee, deed of arrangement, and contract on the selected court nor waive a right without compensation.

Article 1089

(1) Under the deed of arrangement individuals, who are in dispute or are uncertain about a certain legal relation, suspend the dispute, i.e. remove the uncertainty by mutual conceding, and determine their mutual rights and obligations.

20. The **Law on Civil Procedure** (*Official Gazette of Republika Srpska*, 58/03, 85/03, 74/05 and 63/07) in the relevant part, reads:

Article 7

Parties shall be obliged to present all facts on which they base their claims and present evidence proving those facts.

Article 8

The court shall decide which facts shall be considered as proved, on the basis of free evaluation of evidence. The court shall conscientiously and meticulously evaluate each individual piece of evidence and all evidence in their entirety.

Article 123

Each party shall be obliged to prove the facts on which s/he bases his claim.

The court shall determine the facts upon which the case shall be decided on the basis of free evaluation of evidence.

VI. Admissibility

21. Pursuant to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

22. Pursuant to Article 18(1) of the Rules of Constitutional Court, the Court shall examine an appeal only if all effective remedies that are available under the law against a judgment or decision challenged by the appeal are exhausted and if the appeal is filed within a time limit of 60 days as from the date on which the decision on the last remedy used by the appellant was served on him.

23. In the present case, the subject-matter of the appeal is the judgment of the Supreme Court no. 82 0 P 008784 14 Rev of 6 August 2014 against which there are no other remedies available under the law. Furthermore, the appellant received the challenged judgment on 3 September 2014 and the appeal against this decision was filed on 17 October 2014, *i.e.* within 60 days' time-limit as provided for by Article 18(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18(3) and (4) of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded nor are there any other formal reasons that would render the appeal inadmissible.

24. Having regard to Article VI (3)(b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the present appeal meets the admissibility requirements.

VII. Merits

25. The appellants challenge the mentioned decisions claiming that they have violated his right under Article II(3)(e) and (k) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention and Article 1 of Protocol No. 1 to the European Convention.

Right to a fair trial

26. Article II(3)(e) of the Constitution of Bosnia and Herzegovina in the relevant part reads:

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

(...)

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

27. Article 6 paragraph 1 of the European Convention, as relevant, reads:

(1) *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]*

28. The Constitutional Court notes that the proceeding was initiated for the purpose of establishing the fact that an out-of-court settlement was reached. The issue is related to civil dispute and, therefore, the appellants enjoy the right to a fair trial under Article II(3) (e) of the Constitution of Bosnia and Herzegovina.

29. The Constitutional Court observes that the appellants consider that their right to a fair trial was violated because of erroneously established facts connected with wrong presentation of evidence and arbitrary application of the procedural and substantive law. In this connection, the Constitutional Court reminds that pursuant to the case-law of the European Court of Human Rights and the Constitutional Court, it is not these Courts' task to review ordinary court's findings of facts and application of the substantive law (see the European Court of Human Rights, *Pronina v. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court cannot generally substitute its own appraisal of the facts or evidence for that of the regular courts but it is the regular courts' task to appraise the presented facts and evidence (see European Court of Human Rights, *Thomas vs. United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to ascertain whether the constitutional rights (fair trial, access to court, effective remedies, *etc*.) were violated or disregarded and whether the application of a law was obviously arbitrary or discriminatory.

30. The Constitutional Court, therefore, according to the aforementioned position, may exceptionally, when it is obvious that ordinary courts acted arbitrarily in particular proceedings, as in the proceedings of establishment of facts and application of relevant positive and legal regulations (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 311/04* of 22 April 2005, para. 26), engage itself in examination of the manner in which the competent courts established facts and applied positive legal regulations to such established facts. Within the context of the aforesaid, the Constitutional Court recalls that it indicated in a number of its decisions that the apparent arbitrariness in the application of relevant regulations can never lead towards a fair

proceedings (see, the Constitutional Court, Decision on Admissibility and Merits no. *AP 1293/05* of 12 September 2006, para. 25 and further on, and *mutatis mutandis,* the European Court of Human Rights, *Anđelković vs. Serbia*, judgment of 9 April 2013, para 24.). In view of the above, the Constitutional Court shall examine whether the facts were erroneously established, i.e. whether the procedural or substantive law was arbitrarily applied as indicated by the appellants.

31. As regards the case at hand, the Constitutional Court observes that ordinary courts gave sufficient and clear reasons for their decisions and those clear reasons do not seem to be arbitrary in any segment. Namely, the Constitutional Court primarily observes that ordinary courts, while deciding the claim of the appellants within the limits clearly defined within the meaning of Article 2 paragraph 1 of the Civil Procedure Code, dismissed the claim, considering that the appellants failed to prove that there was an out-of-court settlement, including the rights and obligations of the parties to the proceeding stated in the claim, was reached between them, represented by lawyer Fahrija Karkin and the defendants, represented by the Prime-Minister of the Republika Milorad Dodik, and Advisor to the Prime-Minister Miladin Dragičević and bishop Kačavenda. Moreover, the County Court and Supreme Court, while giving the reasons for their opinion that the complaints and petition for review are groundless and while upholding the first instance judgment except for the part relating to the costs of the proceeding, they gave clear reasons, contrary to the statements from the appeal, for their opinion that the appellants, through presentation of evidence (interrogation of witnesses), proved that the talks were conducted between the legal representative of the appellants and the Prime-Minister of the Republika Milorad Dodik, and Advisor to the Prime-Minister Miladin Dragičević for the purpose of solving the issue of relocation of the church from the real property owned by the appellants and that, through the mentioned presentation of evidence, they failed to prove that the Prime-Minister and his Advisor conducted talks on behalf of the defendants and that during those talks the out-of-court settlement was reached. Namely, the Constitutional Court observes that in this regard the Supreme Court, in the reasons for its decision as a final decision in the proceeding in question, pointed to the provisions of Article 91 paragraph 4 of the Law on Obligations, whereby it is prescribed that "out of court settlement cannot be reached without special authorization" and, in that regard, concluded that in the case at hand it does not follow, from any of the parts of the statements of the witnesses (Miladin Dragičević and Hajruding Halilović), that Prime-Minister Milorad Dodik, and his Advisor Miladin Dragičević were granted authorization by the defendants to conclude, on their behalf, an out of court settlement that is the subject of the specified claim". Moreover, the Constitutional Court observes that ordinary courts clearly indicated that it follows from the presented evidence that bishop Kačavenda, who could, in the end, represent

the defendants did not directly participate in the talks, but Advisor Miladin Dragičević contacted him by phone. Given the aforesaid, the ordinary courts concluded that the settlement could not be reached.

32. Bearing in mind all stated above, particularly the fact that, at the main hearing held on 20 April 2010, the appellants finally specified the claim, whereby they sought that the fact be established that on 11 January 2008 the out-of-court settlement was reached, as precisely stated in the enacting clause of the judgment and that ordinary courts, given the principle prescribed under Article 2 of the Civil Procedure Code according to which the court shall, in civil proceeding, decide within the limits of the claims which have been filed during the procedure, dismissed the claim considering that the appellants did not prove that the claim has grounds within the meaning of Article 126 in conjunction with Article 123 of the Civil Procedure Code, the Constitutional Court observes that as regards such position, while noting that the civil proceeding court decides within the limits of the claim (Article 2 of the Civil Procedure Code), contrary to the allegations from the appeal, the ordinary courts presented clear and sufficient reasons with regards to the conclusion that the appellants' claim is not well founded. Therefore, the Constitutional Court considers unfounded the appellants' allegations relating to erroneously and incompletely established facts and misapplication of the substantive law regarding evaluation of evidence and application of the burden of proof rule. Moreover, the Constitutional Court holds that given the circumstance of the case at hand and facts of the case, it does not follow that ordinary courts arbitrarily applied both the substantive and procedurals law.

33. In view of the aforesaid, as regards the reasons for the challenged decisions, the Constitutional Court sees no arbitrariness in the actions of ordinary courts which the appellants pointed to in their appeal, and concludes that the appellants' allegations about violation of the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention are unfounded.

34. Bearing in mind the aforesaid, the Constitutional Court infers that the right of the appellants to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention was not violated by the challenged judgments.

Right to property

35. The appellants consider that their right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention was violated by the challenged decisions. In connection with this, the Constitutional Court observes that

the appellants bring the invocation of the violation of the mentioned right into the context with erroneously established facts and misapplication of the substantive and procedural law, about which the Constitutional Court has given its opinion in the preceding paragraphs of this decision. Taking into account the aforesaid, the Constitutional Court considers that the appellants' allegations about violation of Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention are also unfounded.

VIII. Conclusion

36. The Constitutional Court concludes that given the circumstances of the case at hand, the appellants' right to Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention was not violated when it comes to application of both the procedural and substantive law, in the case where the ordinary courts, by application of the burden of proof rule regulated under the Civil Procedure Code's provisions, which are clear, unambiguous and accessible, dismissed the claim of the appellants by presenting clear arguments and reasons. As to the circumstances of the case at hand, there is nothing else which would lead to a conclusion that, while rendering the challenged judgments, the courts applied the law in an arbitrary manner.

37. The Constitutional Court concludes that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, in the case where the appellants bring the violation of that right with erroneously established facts and misapplication of the substantive and procedural law, and where the Constitutional Court had already concluded that there was no arbitrariness in that regard.

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

39. Under Article 43 of the Rules of the Constitutional Court, annex to this Decision makes Separate Dissenting Opinion of Judge Seada Palavrić joined by the President Mirsad Ćeman, Vice-President Margarita Tsatsa-Nikolovska and Judge Tudor Pantiru.

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

Mirsad Ćeman
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE DISSENTING OPINION OF JUDGE SEADA PALAVRIĆ JOINED BY PRESIDENT MIRSAD ĆEMAN, VICE-PRESIDENT MARGARITA TSATSA-NIKOLOVSKA AND JUDGE TUDOR PANTIRU

In the Decision no. AP 4492/14 of 28 September 2017, the Constitutional Court dismissed an appeal lodged by Fata Orlović, Šaban Orlović, Fatima Ahmetović, Hasan Orlović, Zlatka Bešić, Senija Orlović, Ejub Orlović, Abdurahman Orlović, Muška Mehmedović, Mirsada Ehlić, Melka Mehmedović, Rahima Dahalić, Fatima Orlović and Murtija Hodžić against the judgment of the Supreme Court of the Republika Srpska no. 82 0 P 008784 14 Rev of 6 August 2014, the judgment of the County Court in Bijeljina no. 82 0 P 008784 13 of 23 October 2013 and the judgment of the Basic Court in Srebrenica no. 82 0 P 008784 12 P of 3 June 2013.

The reasoning of the Constitutional Court may be boiled down to the conclusion that given the circumstances of the case at hand, the appellants' right to a fair trial referred to in Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention was not violated when it comes to application of both the procedural and substantive law, in the case where the ordinary courts, by application of the burden of proof rule regulated under the Civil Procedure Code's provisions, which are clear, unambiguous and accessible, dismissed the claim of the appellants by presenting clear arguments and reasons. As to the circumstances of the case at hand, there is nothing else which would lead to a conclusion that, while rendering the challenged judgments, the courts applied the law in an arbitrary manner. In addition, the Constitutional Court concludes that there is no violation of the right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention, in the case where the appellants bring the violation of that right with erroneously established facts and misapplication of the substantive and procedural law, and where the Constitutional Court had already concluded that there was no arbitrariness in that regard.

With all due respect of the majority decision, I cannot agree with the reasoning the Constitutional Court provided for its decision.

First of all, I note that the Constitutional Court acted quite formalistically and limited its consideration of the relevant appeal solely to the civil proceedings finalised by the challenged judgement of the Supreme Court of Republika Srpska. However, with due respect of the majority decision, I believe the Constitutional Court should have perceived the issue of the violation of constitutional rights of the appellants, primarily of the first appellant Fata Orlović, as a whole. Namely, **the case of Fata Orlović** is unique in Bosnia and Herzegovina. Upon the return to their home after many years of exile, only the appellant and her descendants and relatives, as members of the minority (Bosniacs) on the territory of the Republika Srpska but the pre-war majority in Konjević Polje (before the war the national composition in Bratunac whose territory includes Konjević Polje was as follows: Muslims (Bosniacs) 56,02%, Serbs 39,46%, Croats 0,41%, Yugoslavs 2,06%, Others and unspecified 2,02%, while the majority today are Serbs), found an Orthodox Church built in the courtyard of their home. That is how "the case of Fata Orlović" became generally known both to citizens and courts of the entire Bosnia and Herzegovina.

In this regard, I recall that the provisions of Article II(5) of the Constitution of Bosnia and Herzegovina guarantee that all refugees and displaced persons have the right to freely return to their homes of origin, and that 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. In addition, the provision of Article II(4) of the Constitution of Bosnia and Herzegovina guarantees all citizens non-discrimination on any ground.

Hence, the return of refugees and displaced persons and repossession of their pre-war property are safeguarded by Article II(5) of the Constitution of Bosnia and Herzegovina in accordance with Annex 7 to the General Framework Agreement on Peace in Bosnia and Herzegovina. It is indisputable that Annex 7 (Agreement on Refugees and Displaced Persons) entered into by the Republic of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and the Republika Srpska, as Parties thereto, by which all three Parties agreed in Article 1, first of all, that all refugees and displaced persons have the right freely to return to their homes of origin, and *that they have the right to have restored to them property of which they were deprived in the course of hostilities since 1991* and to be compensated for any such property that cannot be restored to them. It is underlined that the *early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina*.

The parties committed to undertake all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating, without delay, conditions suitable for return of refugees and displaced persons, the Parties obligated themselves to immediately undertake the measure of the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, *of ethnic or religious hostility or hatred*; and that choice of destination shall be up to the individual or family, and the principle of the unity of the family shall be preserved. The Parties shall not interfere with the returnees' choice of destination, nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking in the basic infrastructure necessary to resume a normal life. By the provision of Article 7 of Annex 7 the Parties established an independent Commission for Displaced Persons and Refugees and by Article 12, *inter alia*, they agreed that any person requesting the return of property who is found by the Commission to be the lawful owner of that property shall be awarded its return. Any person requesting compensation in lieu of return who is found by the Commission to be the lawful owner of that property shall be awarded just compensation as determined by the Commission. The parties also agreed that in determining the lawful owner of any property, the Commission shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with *ethnic cleansing*.

I recall that, to comply with the obligations assumed under Annex 7, *inter alia*, in 1998, the Republika Srpska passed the Law on Cessation of Application of the Law on use of Abandoned

Property (with subsequent amendments and supplements – "the Law on Cessation of Application") by the force of which *the Law on Use of Abandoned Property of 1996 was rendered ineffective.* Article 1 of the Law on Cessation of Application stipulates that it is applied to the real property which was vacated as of 30 April 1991, whether or not the real property or apartment was declared abandoned provided that the owner, possessor or user lost possession of the real property or the occupancy right holder lost possession of the apartment before 19 December 1998. Article 5 of the same Law prescribes *that the owner, possessor or user of the real property who abandoned the property shall have the right to repossess the real property with all the rights which s/he had before 30 April 1991 or before the real property became abandoned. Article 9 of the Law stipulates that the owner, possessor or user of abandoned real property, as referred to in Article 6, or his/her authorised representative, shall have the right to* ***file a claim at any time for the repossession or disposal in another way of his/her abandoned property*** to the Ministry of Refugees and Displaced Persons in the municipality on the territory of which the real property is located (Article 10 of the Law), and that the right of the owner to file a claim shall not be subject to the statute of limitation. Provisions of Article 13 of the Law stipulates that the ***decision on return of the real property to the owner,*** possessor or user ***shall contain information*** on the owner, possessor or user to whom the real property is returned; information on the real property subject to return; **the time limit within which the real property will be returned**; a decision terminating the right of the temporary user; the time limit for the current user to vacate the property, ***or for handing over of the land***… Article 14 of the Law, *inter alia*, stipulates that the owner, possessor or user may immediately reoccupy real property that is vacant, and in case of the return of arable land into possession, the time limit for its handing over may be extended, as an exception, until the harvest is collected.

For all of the above, in my opinion, it follows that a refugee or displaces person – to repossess the real property ***with all the rights which s/he had before 30 April 1991 or before the real property became abandoned*** – has to file a claim to the competent Ministry in accordance with Annex 7 or the Law on Cessation of Application. To repossess the real property ***with all the rights which s/he had before 30 April 1991 or before the real property became abandoned*** a refugee or displaced person does not have to take part in any judicial proceedings. The Parties to the Annex 7, as a public authority, have themselves taken on the positive obligation, and amongst others the Republika Srpska by the Law on Cessation of Application, to act upon any request by a refugee or displaced person for repossession of real property and as soon as it establishes that the person concerned is the owner or possessor, it shall secure for him/her the repossession of the real property with all the rights which s/he had before 30 April 1991 or before the real property became abandoned. In the appellants' case that purports that the real property where the Orthodox Church was built during the war has to be restored to them in the same state it was at the time the appellants left it because of hostilities in Bosnia and Herzegovina in the period from 1992 to 1995, thus, with no encumbrance or usurpation by anyone.

However, this has not occurred. When the appellants were reinstated into possession of their property, the Orthodox Church was located on the real property in front of their home even though the public authorities were obligated to remove the church given that the appellants, in accordance with the Annex 7 and the Law on Cessation of Application, filed a claim for reinstatement into possession of their real property, and not the request for compensation in lieu of return (although the

appellants, as far as the public knowledge grasps, the compensation has never been offered and they would not accept it either). Thus, they requested a natural restitution. Although there was no need to explain why they want to return to their home, including all associated land, it is not difficult to understand that they wanted to get back to their roots as any human being would. They lived there with the members of their family who are no longer alive, who, even worse, were killed during the war, as the appellants claim, and that is the only place where they can revive their memories and "see" them again.

After all, that feeling was described in the best possible manner by the poet Aleksa Šantić (Serb) who, during the expulsion/immigration of Bosniacs during his lifetime, wrote a poem "Ostajte ovdje" (Remain Here) in which he invites: "*Remain here! The sun of foreign skies Will not warm you as warmly as our own; The mouthfuls of bread are bitter over there Where none is your own, where there are no brothers. Who will find a mother better than one's own? Your mother is this very land; Look across the limestone crags and fields. Everywhere are the graves of your ancestors. Here everyone knows you and loves you and there, No one will know you, our own limestones are better even bare, Than the flower fields where stranger walks.*"

Those feelings are at the core of every human being. Therefore, those feelings have obviously been the reason to emphasise at the very beginning of Annex 7 that any return of refugees and displaced persons is an important objective for the solution of conflict in Bosnia and Herzegovina. However, is it possible to objectively expect the solution of conflicts in Bosnia and Herzegovina in the situation where, even 22 years after the end of hostilities, i.e. signing of the General Framework Agreement on Peace in Bosnia and Herzegovina, the Orthodox Church has not been removed from the appellants' property? What does this tell us of the public authorities, whichever they might be? Is this to be understood in such a manner that, after the appellants were expelled, a general conviction was that they will never come back, and for that reason the Serb Orthodox Church was built on their land (although, as far as I know, not a single religion supports ceasing someone else's property, particularly for the construction of a religious facility on the land belonging to the members of different religious affiliation)? Was it possible for the church, even the Orthodox one, to be constructed on the appellants' land without a knowledge or support of the public authorities? Given that the public authorities consistently have not been ordering or carrying out the removal of the very same Orthodox Church from the appellants' land for 22 years – the only possible conclusion in this situation is that the public authority is the one that gives support that the church remains on the appellants' property. If this conclusion is well-founded, and it appears so, how should one understand the obligation the Republika Srpska assumed under Annex 7 and also under Article II(5) of the Constitution of Bosnia and Herzegovina? According to Annex 7, to demonstrate their commitment to securing full compliance with the human rights and fundamental freedoms of all persons within their jurisdiction and creating, without delay, conditions suitable for return of refugees and displaced persons, the Parties shall immediately take the following confidence building measures: the repeal of domestic legislation and administrative practices with discriminatory intent or effect; the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of *ethnic or religious hostility or hatred*…

It is true, as stated above, that the Republika Srpska passed the Law on Cessation of Application by which it only formally complied with a part of its obligation relating to the annulment of domestic legislation with discriminatory intent or effect. However, to have this obligation truly complied with, it is necessary to implement the Law on Cessation of Application, i.e. it is necessary to reinstate the appellants' into possession of their real property with all the rights they had over it before they fled as refugees, i.e. it is necessary to remove the Orthodox Church.

Getting back to the procedure that resulted in the challenged judgements which are subject-matter of the appeal in the Constitutional Court's Decision no. AP 4492/14, as I already have said, a refugee or displaced person – ***to repossess his/her real property with all the rights which s/he had before 30 April 1991, or before the real property became abandoned*** – *had to file a claim with the competent Ministry in accordance with Annex 7 or the Law on Cessation of Application, as the appellants did.* However, as the fact stands that it has not been acted upon their request in its entirety, as their courtyard was "restored" to them but with the Orthodox Church in front of their home, the appellants had lodged 15 years ago, to be precise on 29 October 2002, a lawsuit against the defendant the Serb Orthodox Church, the Church Municipality of Drinjača, for the purpose of "repossession of the plot marked as cadastral plot 996 called Crkvine, recorded in the Register of Deeds no. 235 of the cadastral plot Konjevići".

Frankly speaking, it did not come as a surprise that the Basic Court originally declared its lack of subject-matter jurisdiction to proceed in this legal matter and rejected the suit, given that the restoration of property to the refugees and displaced persons falls within the responsibility of the Ministry which is a part of the Government, i.e. public authorities of the Republika Srpska.

During 2010, the Basic Court dismissed the claim of the appellants and that decision was upheld by the County Court and on 1 February 2012 the Supreme Court granted the petition for review and remitted the case to the second instance court, which subsequently granted and quashed the first instance judgment of 21 May 2010 and remitted the case for renewal of the proceedings to be conducted by the court of first instance. While conducting the renewed proceeding, on 3 June 2013, the Basic Court dismissed the appellants' claim again and ordered them to compensate the first defendant for the costs of the civil proceeding to the amount of BAM 11 243.70 i.e. the Serb Orthodox Church of Zvornik-Tuzla Diocese in Bijeljina which, by illegal construction of the church possessed the land of the appellants - the courtyard in front of the house of the appellant and refused to return it to them. While deciding the complaint of the appellants, the County Court granted only the part of the complaint relating to the costs of the proceeding and ordered the appellant to compensate the first defendant as follows: instead of the amount of BAM 11 243.70 the amount of BAM 1 029.60 is to be paid, while the rest of the first instance judgment relating to dismissal of the claim was upheld. On 6 August 2014 the petition for review filed by the appellants on 6 August 2014 was dismissed by the Supreme Court, in which case there are no indications that the defendants, from the very beginning of the proceedings, during which the claim has been amended for several times, until the end of the proceedings, managed to refute the appellant's ownership right over the land on which the Orthodox church was illegally built. So, the appellants had to wait for 12 years for the final decision of ordinary courts to be rendered, where 8 years passed until the rendering of the first instance judgment and all of this was happening without any favourable result for the appellants. The only result of the fight for the repossession of the appellants' property is, regretfully, the fact, which that is well-known to the public of Bosnia and Herzegovina, that the appellant got seriously ill.

It could be undisputedly concluded that the excessive burden was placed on the appellants in order to find persons with legal standing to be sued and specify the claim which will ensure that the Orthodox church is removed from their land, and all of that was without any reason as the public authorities were under *positive obligation* to resolve the issue of relocation of the Orthodox Church from their land upon their claim to the Ministry for Human Rights of RS for repossession of their property, in accordance with obligations the Republika Srpska took over under Annex 7. That this issue involves a positive obligation of public authority – the Republika Srpska it follows form the definition of positive obligation adopted by the European Court of Human Rights, according to which understanding the basic characteristic of positive obligations *is that they in practice require national authorities to take the necessary measures to safeguard a right or, more precisely, to take the necessary measures to safeguard a right or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual*. Such measures may be judicial. This is where the state is expected to lay down sanctions for individuals infringing the Convention to issue regulations for a specific activity or for a category of persons. However, they may also consist of practical measures. Hindrance in fact can contravene the Convention just like a legal impediment regardless is it negative or positive obligation of the public authority. So, it is definitely insufficient that the Republika Srpska, within the scope of its positive obligations from Annex 7, according to which the Constitution of Bosnia and Herzegovina, in its Article II(5) guarantees the right to refugees and displaced persons to return to their pre-war homes and to repossess their property, has adopted the Law on Cessation of Application. Further specific measures are still required so that the appellants, as a category of refugees and displaced persons, are ensured the right to repossess their property in full, including the rights they used to have on the day when they abandoned them because of the war circumstances. In the case at hand it means that it is necessary that the Republika Srpska, as a public authority, while fulfilling its positive obligation, resolve the issue at once when it comes to illegally built Orthodox Church on the land of the appellants and that land to be handed over to them, including all rights they used to have in that regard on 30 April 1991, i.e. on the day when they had to leave it as refugees and displaced persons.

Bearing in mind the aforesaid, I am of the opinion that the Constitutional Court should have granted the appellants' appeal and order the Republika Srpska to finally fulfil its positive obligation, while giving sufficient time to the Republika Srpska to do so.

In support of my position, I would like to remind that the Constitutional Court dealt with similar issues. So, in its Decision no. AP-2275/05 of 26 January 2007, as regards the relevant part, the Constitutional Court granted the appeal and established that there was a violation of the right to return to home under Article II(5) of the Constitution of Bosnia and Herzegovina *because the administrative bodies and Supreme Court failed to give any weight to the evidence that the appellant had lived at the address of the disputed apartment until 1992 and that he abandoned the apartment in question due to the war in Bosnia and Herzegovina. In consequence, there has been insufficient judicial or administrative protection for the right asserted by the appellant to return to what he claims was his home of origin.*

Moreover, in its Decision no. AP-2763/09 of 22 March 2013, the Constitutional Court granted the appeal and established that there was a violation of Article II(3)(k) of the Constitution of

Bosnia and Herzegovina and Article 1 of Protocol No.1 to the European Convention, pointing out as follows: *Taking into account the appellants' assertions relating to the circumstances surrounding the destruction of their house and the supporting evidence presented by the appellants (it should be noted that the incident occurred during the war and that the appellants were members of an ethnic minority in that region), the Constitutional Court holds that the investigation into the incident was necessary for the protection of the appellants' property. Given that no investigation was carried out (the incident was not even registered in the official records of the Police Station situated in the immediate vicinity of the place where the incident had occurred), the Constitutional Court considers that the Republika Srpska failed to fulfil its positive obligation and, as a result, the appellants' right to property under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention was violated.*

As a last argument, I remind that the European Court of Human Rights, in the case of *Đokić vs Bosnia and Herzegovina,* found that there was a violation of the applicant's right to property under Article 1 of Protocol No. 1 to the European Convention and ordered Bosnia and Herzegovina to pay the appellant the compensation for the apartment which was not returned to him, neither was he compensated for it by domestic authorities, although the appellant requested compensation. The European Court of Human Rights reasoned its decision stating that the Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest (see: *James and Others, above* mentioned, paragraph 40). In this connection, the taking of property in pursuance of a policy calculated to enhance social, economic and other polices can properly be described as being "in the public interest" even if "a *taking* of *property effected* in *pursuance* of *legitimate social*, *economic* or *other policies may* be 'in the *public interest*,' *even if* the *community* at *large has* no direct use or enjoyment of the *property* taken (ibid., paragraph 45). As regard the case at hand, the Court is willing to accept that the disputed measures were aimed at enhancing social justice, as claimed by the defendant, and therefore it pursue a legitimate aim.

While responding to the question whether a fair balance was struck by such interference with the property of the applicants, the European Court of Human Rights noted: Interference with a peaceful enjoyment of possessions must strike a fair balance between the demands for protection of possessions and requirement of protection of the public interest (see, *inter alia*, *Sporrong and Lönnroth*, stated above, § 69). Although it is true that the States enjoy a wide margin of appreciation when deciding these issues (See: *Immobiliare Saffi vs Italy* [GC], no. 22774/93, § 49, ECHR 1999-V; *Radanović vs. Croatia*, no. 9056/02, § 49, 21 December 2006; and *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd vs. Great Britain* [GC], no. 44302/02, § 75, ECHR 2007-X), **the Court is of the opinion that in the case at hand no fair balance was struck** for the following reasons. I will point to the first reason from amongst the reasons stated by the European Court of Human Rights and according to that reason that court is aware of the fact that Sarajevo, where most of military apartments is located, was exposed to blockades, everyday shelling attacks and sniper fire during the war (see judgments of ICTY, in the case of *Galić*, IT-98-29-T, 5 December 2003, and IT-9829-A, 30 November 2006, and judgments ICTY-a in the case of *Dragomir Milošević*, IT-98-29/1-T, 12 December 2007, and IT-98-29/1-A, 12 November 2009). There are also many evidence on direct and indirect participations of the Yugoslav Army in military operations in Bosnia and Herzegovina (see paragraphs 15-17, above). This explains strong local opposition to the return of persons serving in the Yugoslav Army to pre-war homes (see paragraph 10 above), but does not justify it. In that regard, the Court notes that there are no indication that the applicant, as a member

of the Yugoslav Army, participated in military operations in Bosnia and Herzegovina or in any war crimes. He was subjected to differential treatment exclusively because of the fact that he served in the Yugoslav Army forces. It is well-known that the character of the recent war in Bosnia and Herzegovina is of that kind that serving in some armed force mostly reflected the ethnic affiliation. The RBiH Army force, that is loyal to the central authorities of Bosnia and Herzegovina, despite some exceptions, was mostly composed of Bosniacs. The same applies to the HVO (consisted of Croats mostly) and RS Army force (consisted of Serbs mostly). Similar models are noticed in the neighbouring countries. **Therefore, the disputable measures, although they seem to be impartial, resulted in a differential treatment of people based on their ethnic origin. In similar situations, as a matter of principle, the Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society** (see *Sejdić and Finci* vs *Bosnia and Herzegovina* [GC], no. 27996/06 and 34836/06, § 44, 22 December 2009.; *D.H. and Others vs Czech Republic* [GC], no. 57325/00, § 176, ECHR 2007-XII; and *Timishev vs Russia*, nos. 55762/00 and 55974/00, § 58, ECHR 2005-XII).

Bearing in mind the aforesaid, and the relevant case-law of the Constitutional Court and European Court of Human Rights in this field, in my opinion, in the appellants' case there is, without any dispute, a violation of the right to return under Article II(5) of the Constitution of Bosnia and Herzegovina and violation of right to property under Article 1 of Protocol no. 1 to the European Convention because public authorities failed to fulfil its positive obligation and ensure that the appellants, as a special and vulnerable category, return of their property in accordance with Annex 7 and Law on Cessation of Application. In fact, the public authorities did not grant them the repossession of their property, along with the rights they used to have over that property until 30 April 1991, i.e. on the day when they left it in their capacity as refugees or displaced persons, as on the plot which is indisputably owned by them and in front of the very house, which is their home, for already 22 years since the signing of the Peace Agreement, an illegally built Orthodox Church has been in existence although the appellants are members of the Bosniac people – after the war minority on the territory of the Republika Srpska and they are forced to look at the church in their courtyard on every day basis and also listen to the rituals and endure offences of the church visitors. This is hard for them regardless of the high degree of tolerance they have when it comes to both ethnic and religious affiliation. Therefore, in my opinion, the appellants' appeal should have been granted and the Republika Srpska should have been ordered, as a public authority, to fulfil its positive obligation and ensure that the church is removed from the land of the appellants' during reasonable period of time.

It follows that I am absolutely incapable of agreeing with the conclusion adopted by the majority of judges of the Constitutional Court with regards to this issue. With due respect, I use this opportunity to express my dissent.

This Separate Dissenting Opinion was joined by the President Mirsad Ćeman, Vice-President Margarita Tsatsa-Nikolovska and Judge Tudor Pantiru. In addition to joining the opinion, the Vice-President Margarita Tsatsa-Nikolovska also underlined that in the given situation competent authorities (the Basic Court, County Court and Supreme Court) applied "excessive formalism" in adopting their decisions, without treating the essential issue of existence of ownership, interference with and violation of as provided for by and protected both under the law and Constitution and Article 1 of Protocol no. 1 to the European Convention, which was sought by the appellants in the proceedings. Any agreements and the existence of such should have been

treated only as the manner of remedying the violation of the ownership right that has already occurred.