The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (2) and Article 64(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05 and 64/08), in Plenary and composed of the following Judges:

Ms. Seada Palavrić, President

Mr. David Feldman, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Ms. Constance Grewe

Mr. Krstan Simić

Mr. Mirsad Ćeman

Having deliberated on the appeal of **Mr. Jean Marc Bogmis** in case No. **AP-555/09**, at its session held on 30 May 2009 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **Mr. Jean Marc Bogmis** is hereby granted.

A violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

Verdict of the Court of Bosnia and Herzegovina no. U 766-08 of 6 January 2009 is hereby annulled.

The case shall be referred back to the Court of Bosnia and Herzegovina which is to follow the expedited procedure and take a new decision in accordance with Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court of Bosnia and Herzegovina is ordered to inform the Constitutional Court of Bosnia and Herzegovina, within sixty days as from the date of delivery of this Decision, about the measures taken in order to enforce this Decision, in accordance with Article 74(5) of the Rules of the Constitutional Court of Bosnia and Herzegovina.

Pursuant to Article 77 paragraph 6 of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Decision on Interim Measure No. AP-555/09 of 15 April 2009 shall remain in force until the Court of Bosnia and Herzegovina has considered evidence and found whether the forcible removal of Jean Marc Bogmis from the country

is justified within the meaning of the requirement referred to in Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

REASONING

I. Introduction

1. On 25 February 2009, Mr. Jean Marc Bogmis ("the appellant"), a citizen of the Republic of Cameroon, placed at the Immigration Centre of Istočno Sarajevo in Lukavica ("Immigration Centre"), represented by the Association rendering legal assistance "Vasa prava" from Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the Verdict of the Court of Bosnia and Herzegovina ("the Court of BiH") No. U-766/08 of 6 January 2009. In addition, the appellant filed a request for interim measure whereby the Constitutional Court would prevent his deportation from Bosnia and Herzegovina to the Republic of Cameroon pending the final decision of the Constitutional Court on his appeal.

II. Procedure before the Constitutional Court

2. On 15 April 2009, the Constitutional Court adopted a Decision on interim measure No. AP-555/09, ordering the competent public authorities of Bosnia and Herzegovina to refrain from undertaking any action aimed at forcible removal of the appellant from Bosnia and Herzegovina pending the final decision of the Constitutional Court on the respective appeal.

3. Pursuant to Article 22 paragraph 1 of the Rules of the Constitutional Court, on 11 March 2009, the Court of BiH and the Ministry of Security of Bosnia and Herzegovina ("the Ministry") were requested to submit their replies to the appeal.

4. On 26 March 2009, the Constitutional Court received the reply to the appeal from the Court of BiH and on 24 March 2009 the reply of the Ministry.

5. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 17 April 2009.

III. Facts of the Case

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

7. The Ruling of the Department for Foreigners – Sarajevo Field Office ("the Department") No. UP-1/19.4.1-07.3-59/08 of 10 October 2008, imposed on the appellant a measure of expulsion from the territory of Bosnia and Herzegovina prohibiting his entry for two years. This ruling became legally binding and enforceable, as the appellant failed to lodge an appeal. Thus the appellant was placed under surveillance and placed at the Immigration Centre.

8. On 21 October 2008, the appellant filed a request for international protection with the Asylum Sector of the Ministry. On 31 October 2008, on the premises of the Immigration Centre, an interview was conducted with the appellant in his mother tongue French, in the presence of the authorized representative employed with the Association "Vasa prava" and the representative of the UNHCR. During the interview the appellant stated that he was a citizen of the Republic of Cameroon in Africa, that he was born in the capital Yaounde, where he had lived with his family. The appellant explained that his father, who had passed away in the 90's, was a prominent and acclaimed member of the opposition political party the Union of the Peoples of Cameroon ("the UPC"). To the question why he decided to leave Cameroon and seek international protection of Bosnia and Herzegovina, the appellant replied that he had left Cameroon for the first time in 1997 when he had gone to Mexico, where he had taken part in a football tournament. He stated that he left Cameroon in order to have a better life. The appellant arrived in Bosnia and Herzegovina, in Sarajevo, on 13 December 1999, on the basis of the letter of invitation sent by a friend of his, who had played for the football club "Đerzelez" at the time. The appellant stated that he had no problems earlier when leaving his country, however the last two times when he visited Cameroon during the period of six months in 2003, he encountered problems. He explained that these problems set in following failed transfers of football players from Cameroon to Bosnia and Herzegovina. Namely, the Cameroon players who had failed to conclude contracts with the clubs in BiH, signed a petition stating that their work conditions were not good, that their contracts were not good, that they had nothing to eat, and that they blamed the appellant for it, and that the appellant took the money from the transfers for himself. The signatories of the mentioned petition, as he further stated, included five players belonging to the football club "Sporting", owned by Emmanuel Bitjeki. The appellant stated that Emmanuel Bitjeki "got very upset"

by the fact that his players did not make it and that he was "prepared to kill if he did not get return on his invested money".

9. The appellant also stated that during his second visit to Cameroon in 2003, where he stayed for two weeks, Emmanuel Bitjeki tried to get him arrested at the airport in Duala through his brother, colonel Ngono Owona ("the colonel"), who worked in police. The appellant stated that the colonel sent a fax message for the competent authorities at the airport to stop the appellant together with the players and not to allow him to return to Bosnia and Herzegovina. Nevertheless, the appellant managed to leave the airport, after some of the players' parents had bribed police officers at the airport. To the question whether Emmanuel Bitjeki tried to harm the appellant during his two-weeks stay in Cameroon the appellant replied that he was unable to locate him as he changed locations constantly, and that the only chance to do so was at the airport. The appellant stated that, except for having information that the fax message read that he should be arrested, he did not have precise information as to what he would be charged with. He also stated that it might take two years before a judgment is made in Cameroon, that prison conditions are not appropriate and that people sleep on cardboards. When asked what would be charges against him, the appellant said "parents, police, colonel", and that "each one of them would come up with something to blame him for", as well as that the colonel called him and said "that he would shoot him and that no one would be able to hold him accountable for that in Cameroon". When asked if the appellant would be personally held responsible in Cameroon, under the laws there, for the mediation in the sale of players, the appellant replied that it was not punishable under the law.

10. The appellant also stated that his mother, Christine Bogmis, was arrested in 2006 and kept in a cell for two days, whereupon the police requested that the appellant surrenders himself. They released her thereafter, without any explanation. When asked if his conflict with Emmanuel Bitjeki was personal owing to the problems with players, the appellant replied positively, and that it also had "a political dimension owing to his father". When asked why he did not file a request for asylum – international protection right away in 2003, the appellant replied that he had not filed a request ever before because he had a visa which was valid through 2005. After his visa had expired, he did not file a request as he was still seeking stay permit, and up until that point he had never been requested to return to Cameroon. As far as affiliation and membership in some religious and political organizations, the appellant stated that he was not a member of any religious organization, and that "he was only interested in football", although he was a member of the UPC, where he had been assistant secretary, taking minutes and following elections since 1992. To the question whether governmental authorities had ever physically or mentally abused him, the appellant said

they had, owing to the polygamy of his father though, whereby once as he was walking down the street police approached him and started hitting him. Finally, the appellant stated during the interview that he feared that by returning to Cameroon he might be killed or locked in prison for a long time, specifically naming Emmanuel Bitjeki, the colonel and parents of the players as possible threats. He also stated that persons get killed on a daily basis in Cameroon, and that if the competent authorities of Bosnia and Herzegovina dismissed his request, they would be sending the appellant off to a certain death.

11. By the Ruling of the Ministry No. UP-1-08/1-41-1-269-2/08 of 5 November 2008, the appellant's request for international protection was dismissed and he was ordered to leave the territory of Bosnia and Herzegovina within 15 days from the entry into force of the ruling. The reasoning of the ruling read that, on the basis of the interview conducted with the appellant on 31 October 2008, and his allegations stated in the request, the Ministry established that the request was ill-founded pursuant to the provision of Article 110 paragraph 2 item c of the Law on Movement and Stay of Aliens and Asylum (*Official Gazette of Bosnia and Herzegovina* No. 36/08; "the Law"). This provision stipulates that the request for international protection shall be dismissed as ill-founded if "the request is based on apparent delusion or abuse of procedure for the purpose of obtaining international protection in Bosnia and Herzegovina". To that end, the Ministry noted that apparent delusion and abuse within the meaning of Article 110 paragraph 3 item d of the Law shall exist in the case when the request for international protection is filed with the aim to delay the enforcement of a decision on expulsion or extradition or surrender from Bosnia and Herzegovina, whereas the very request may have been filed much earlier.

12. Furthermore, the Ministry stated that in the present case the appellant filed a request for international protection with the competent authority only after it had been determined by the legally binding ruling of the Department No. UP-1/19.4.1-07.3-59/08 of 10 October 2008 that he is to be expelled from the territory of Bosnia and Herzegovina for the period of two years, and after it had imposed a measure of placing him under surveillance in order to enforce the ruling on expulsion. In this respect, the Ministry noted that the request for international protection may have been filed much earlier, considering the fact that the appellant has stayed in Bosnia and Herzegovina since 1999, that is that the appellant may have filed a request for international protection back in 2003, when he started facing problems he described during the interview, that is in 2005 when his stay visa was due to expire.

13. By the lawsuit of 18 November 2008, the appellant instituted an administrative dispute with the Court of BiH in order to quash the mentioned ruling of the Ministry, on the grounds of erroneous application of the provisions of the procedure, erroneously established facts of the case and erroneous

application of the substantive law. The appellant requested that the Court of BiH adopts a verdict granting a refugee status to the appellant, or refer back the case to the Ministry for renewed procedure, with the obligation of the Ministry, in the capacity of the defendant, to adopt a new, well reasoned decision, based on the law. On 29 December 2008, the appellant supplemented the lawsuit informing the Court of BiH that, according to the information related to the case that he obtained recently, the appellant was accused in Cameroon of homosexuality and that he was banned from entering and staying in the territory of Cameroon, and as a proof he provided the Court of BiH with the Letter of the Directorate for the Surveillance of the Territory of Cameroon dated 14 January 2007. Also, the appellant stated in the supplement to the appeal that in the meantime, a preliminary investigation was initiated against him for illegal religious activities in Cameroon, in support of which he attached a summons for interrogation dated 20 March 2006.

14. The Court of BiH adopted a verdict No. U-766/08 of 6 January 2009, thereby dismissing the appellant's lawsuit as ill-founded. The reasoning of the verdict read that it was determined by the final and legally binding ruling of the Department of 10 October 2008 that the appellant is to be expelled from the territory of Bosnia and Herzegovina, and that the appellant filed a request for international protection on 21 October 2008 following a decision on expulsion. The Court of BiH stated that, considering these undisputed facts, the Ministry correctly applied provisions of Article 110 of the Law by dismissing the appellant's request for international protection. The Court of BiH further suggested that by filing the request the appellant apparently attempted to abuse the procedure and obtain the international protection of Bosnia and Herzegovina, as, on the basis of the decision on expulsion, he was compelled to leave Bosnia and Herzegovina. The Court of BiH also stated that once the competent body establishes that grounds stipulated by Article 110 of the mentioned law exist, the request for international protection shall be dismissed as ill-founded, in which case the competent body is neither authorized nor obliged to examine whether conditions stipulated by Article 105 of the mentioned law for acquiring a refugee status existed, or whether conditions for subsidiary protection existed, that is to say whether conditions stipulated by this provision regarding the granting of international protection to an alien existed.

15. The Court of BiH further stated that it was unclear why the appellant failed to seek a stay permit following the expiry of his visa in 2005, but instead he stayed illegally in Bosnia and Herzegovina up until the adoption of the ruling on expulsion. For these reasons, the Court of BiH established that the appellant ill-foundedly insisted in his lawsuit on existence of reasons for granting international protection and stated ill-foundedly that a violation of the rules of procedure was committed in the proceedings, and that the facts

of the case were erroneously established. In view of the aforementioned, the Court of BiH concluded that the challenged ruling was based on correct application of the Law, which was in force at the time of adoption of the challenged ruling, and, by applying provision of Article 37 paragraph 1 of the Law on Administrative Disputes of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 19/02 and 83/08), it decided as stated in the enacting clause of the challenged verdict.

IV. Appeal

a) Allegations stated in the appeal

16. The appellant holds that the challenged verdict of the Court of BiH No. U-766/08 of 6 January 2009 is in violation of his rights as follows: the right not to be subjected to torture, or inhuman or degrading treatment or punishment under Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"), in connection with the right to an effective legal remedy under Article 13 of the European Convention, the right not to be discriminated against under Article II(4) of the Constitution of Bosnia and Herzegovina and Article 14 of the European Convention, as well as prohibition of general discrimination under Protocol No. 12 to the European Convention, and the right referred to in Article 1 (a) and (b) of Protocol No. 7 to the European Convention, in connection with Article 13 of the European Convention, that, as an alien staying in the territory of Bosnia and Herzegovina, he may not be expelled, except on the basis of the decision adopted in accordance with the law, and that he has the right to present the reasons against his expulsion and for his case to be examined. The appellant alleged that the challenged verdict of the Court of BiH was unlawful, and he stated that he feared for his life, and that by returning to his country of origin he would be killed, or at best incarcerated and exposed to inhuman treatment and torture. In support of his allegations, the appellant referred to the reports on Cameroon published by the governmental and nongovernmental international organizations such as UNHCR, Amnesty International, Under Secretary for Democracy and Global Affairs of the United States of America and the European Country of Origin Information Network (ECOI), stating that they all corroborated his allegations stated in the appeal regarding the situation in police, judiciary and prisons in Cameroon and the threat for his own life and his personal security, in the event of his expulsion, against which the appellant warned during the proceeding before the administrative and judicial bodies of Bosnia and Herzegovina. Also, the appellant stated that he had unofficial information that senior Cameroon officials spread rumors that the appellant had become a new leader of the tribe Bassa, and that as such, from Bosnia and Herzegovina, he had entered

into an alliance with the Southern Cameroon Peoples Organization (SCAPO) in order to destabilize the Cameroon Government. In addition to the threat for his life and security, the appellant stated that he was not allowed to give his opinion about the issues that the Court of BiH relied on while adopting the challenged verdict, in deliberating on the appellant's lawsuit. The appellant stated that the Court of BiH did not address the essence of his allegations and claims, nor did it consider them, rather it based its decision exclusively on the fact that the appellant may have filed a request for international protection much earlier, which, in the appellant's opinion, resulted in the violation of constitutional rights and rights guaranteed by the European Convention.

b) Reply to the appeal

17. The reply to the appeal by the Asylum Sector of the Ministry read that the jurisdiction of the Asylum Sector did not comprise issues related to expulsion from BiH, as the appellant tried to make it look. The issues related to expulsion from BiH lie within the jurisdiction of another organizational unit of the Ministry, that is the Department for Foreigners, which bears features of an independent administrative organization. To that end it was emphasized in the reply that the appellant did not appeal the decision imposing a measure of expulsion and a ban of entry to BiH for the period of two years. The appellant therefore ill-foundedly referred to the right to an efficient legal remedy under Article 13 of the European Convention in the proceedings upon the request for international protection, as he failed to exhaust it at the time the competent body adopted a decision imposing a measure of expulsion, on the basis of which forcible removal of an alien from the country is to be enforced. That further implies that there was no violation of Article 1 (a) and (b) of Protocol No. 7 to the European Convention. The appellant failed to exercise his right to present reasons challenging the expulsion, and for his case to be examined with respect to the measure imposed against him by the Department. It is further concluded in the reply that there is no possibility to forcibly enforce the decision dismissing the request for international protection. That is to say decisions dismissing the request for international protection prescribe a time limit of 15 days for voluntary enforcement, that is for the appellant to leave the territory of BiH voluntarily. Only if an alien does not leave the BiH territory voluntarily, the competent organizational unit of the Ministry, i.e. the Department, shall commence forcible enforcement of the decision on expulsion. As far as the appellant's request for international protection, they stated that the fact that the appellant filed this request after the measure of expulsion had been imposed on him, amounted, within the meaning of Article 110 paragraph 2 of the Law, to a sufficient degree of suspicion so as to constitute delusion or abuse of procedure in order to obtain international protection. Only after the employees of the State Investigation Agency, on 10 October 2008,

had found the appellant to have no passport and after a measure of expulsion had been imposed on him, had the appellant filed a request for international protection. The Asylum Sector holds that the position of the Court of BiH is correct and based on the law. The appellant may have filed a request for international protection in 2003 when he started encountering problems back in his country, as he stated during the interview, or in 2005 when his stay visa was due to expire. They further stated that the appellant, by referring to the reports from the country of origin that he presented in the appeal, referred to erroneous and incompletely established facts of the case in the proceeding before the Court of BiH, or in the proceeding conducted before the Asylum Sector. In this respect they stated that the appellant had never provided the body, with which he filed a request for international protection, with evidence that by returning to his country of origin he would be exposed to inhuman treatment and torture. They stated that the European Court of Human Rights, in their procedures of deportation or extradition, applied exceptionally high standard, stating that a very possibility of abuse in the country to which a person is being sent off is not sufficient, and that the circumstances of the case must be of exceptional nature, that is such as to render the person directly subject to abuse. Also, they stated that the appellant referred to some facts subsequently, that is he referred to certain facts that the competent bodies were unaware of at the time of adopting decisions. Thus, for instance, during the interview the appellant did not state that they considered him a homosexual in his country of origin, whereas during the proceeding before the Court of BiH he made the mentioned allegation and provided evidence to support it. Likewise, in the lawsuit against the ruling he referred to the statements of his friends, fellow countrymen, regarding which the reply carried information that they were statements of physical persons, and not official acts and positions of authorities that would render the appellant's requests credible and well-founded. Also, the Asylum Sector holds the appellant's allegations ill-founded, according to which he had to go into hiding during his visits to Cameroon, for the reason that he failed to corroborate them with the allegations from the interview. They concluded that the appellant failed to provide any evidence with respect to the violations he referred to in the appeal, whereby he would argument his claims about the violation of the mentioned rights. That is to say he failed to prove that possible arbitrariness and discriminating application of the law was manifest.

18. The reply by the Court of BiH read that in the present case the appellant still has not exhausted effective legal remedies, as he filed a request for review of the court verdict, in accordance with Article 49 of the Law on Administrative Disputes. This procedure is still pending.

V. Relevant Law

19. **The Law on Movement and Stay of Aliens and Asylum** (*Official Gazette of Bosnia and Herzegovina* No. 36/08), in its relevant part, reads as follows:

Article 91

(The principle of no-return, "no-refoulement")

(1) Aliens shall not be returned or expelled in any manner whatsoever to the borders of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not they have formally been granted international protection. The prohibition of return or expulsion (non-refoulement) shall also apply to persons in respect of whom there is a reasonable suspicion for believing that they would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment. Aliens may not be sent to a country where they are not protected from being sent to such a territory either.

Article 105

(Definition of international protection)

(1) For the purpose of this Law, international protection indicates the status that competent BiH authority recognizes to the refugees or persons fulfilling the conditions for subsidiary protection.

(2) A refugee is an alien who according to the 1951 Convention Relating to the Status of Refugees and 1967 Protocol, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country he/she is citizen of and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or stateless person outside the country of his/her habitual residence and cannot or due to fear is unwilling to return to that country.

(3) A person holding subsidiary protection is an alien who does not fulfill the criteria defined in paragraph (2) of this Article, but in respect of whom substantial grounds have been shown for

believing that the person concerned would face a real risk to be exposed to the death penalty, i.e. execution, torture or inhuman or degrading treatment or punishment in the country of origin or country of habitual residence, as well as the existence of a serious individual threat to a civilian's life or person due to indiscriminate violence in situations of international or national armed conflict and is unable or, owing to the fear, is unwilling to avail himself of the protection of that country.

Article 110

(Rejection of requests for international protection)

(1) The Ministry shall reject the request for international protection as unfounded if the application is based on reasons that do not provide grounds for granting the status as per Article 105 (Definition of the term "international protection") of this Law.

(2) The Ministry shall also reject the request for international protection as unfounded in the following cases:

c) If the request is based on obvious deception or abuse of the procedure for the purpose of obtaining international protection in BiH;

(3) Obvious deception or misuse of the procedure as per paragraph 2, subparagraph c of this Article is considered to be the following:

d) If the request for international protection has been filed for the purpose of delaying the execution of the decision on expulsion or extradition, or transfer from the territory of BiH, and the request could have been filed substantially earlier;

20. **The Law on Administrative Disputes of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina* No. 19/02), in its relevant part, reads as follows:

Article 8

An administrative dispute may only be conducted against the final administrative act.

The final administrative act, in terms of this Law, shall be the act by which the competent institution referred to in Article 4 of this Law decides on a certain right or duty of a citizen or legal person in some administrative issue (hereinafter: the final administrative act).

Article 37 paragraph 2

An action shall be approved or rejected as ungrounded. If the action is approved the Court shall annul the disputed final administrative act.

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 other court in Bosnia and Herzegovina.

22. Pursuant to Article 16, paragraph 1 of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective legal remedies available under the law against a judgment/decision challenged by the appeal are exhausted and if the appeal was lodged within a time-limit of 60 days as from the date on which the decision on the last effective legal remedy used by the appellant was served on him/her.

23. In the present case, the subject challenged by the appeal is the Verdict of the Court of BiH No. U-766/08 of 6 January 2009, against which there are no other effective legal remedies available under the law. The appellant received the challenged verdict on 2 February 2009. The appeal was lodged on 25 February 2009, *i.e.* within a time-limit of 60 days as laid down in Article 16 paragraph 1 of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16 paragraphs 2 and 4 of the Rules of the Constitutional Court because it is not manifestly (*prima facie*) ill-founded, nor is there any other formal reason that would render the appeal inadmissible.

24. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina and Article 16, paragraphs 1, 2 and 4 of the Rules of the Constitutional Court, the Constitutional Court has established that the present appeal meets the admissibility requirements.

VII. Merits

25. The appellant complains that the challenged decision violated his rights protected by Article II(3)(b) and Article II(4) of the Constitution of Bosnia and Herzegovina and rights protected by Articles 3,

13, and 14 of the European Convention, as well as his rights referred to in Article 1 (a) and (b) of Protocol No. 7 to the European Convention and Article 1 of Protocol No. 12 to the European Convention.

The right of a person not to be subjected to torture or inhuman or degrading treatment or punishment

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

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:
(...)
b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment.

27. Article 3 of the European Convention reads as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

28. The appellant states that he sees the violation of Article 3 of the European Convention in the existence of real risk for him to be subjected to torture and inhuman and degrading treatment or punishment, if forced to leave Bosnia and Herzegovina and extradited to his country of origin. In support of this claim, in his lawsuit and the supplement to the lawsuit by which he instituted administrative dispute before the Court of BiH, the appellant offered evidence that in his country of origin he was accused of homosexuality and that he was banned from entering and staying in the territory of Cameroon, that the preliminary investigation was initiated against him for illegal religious activities, in support of which he submitted reports on Cameroon published by governmental and non-governmental organizations, with respect to the situation within the police, judiciary and prisons in Cameroon and threats to the appellant's life and his personal security, in the event of his expulsion.

29. The Constitutional Court observed that by the verdict of the Court of BiH No. U-766/08 of 6 January 2009, the proceedings upon the appellant's request for international protection in Bosnia and Herzegovina was completed. By its challenged verdict, the Court of BiH established that the appellant's

request was ill-founded, as it held that the request was based on manifest delusion or abuse of procedure, and that it was filed with the aim to delay the enforcement of the decision on expulsion from BiH, whereas the request may have been filed much earlier. Also, the Constitutional Court observed that the Court of BiH, in the challenged decision, failed to consider the allegations of the appellant that his expulsion from Bosnia and Herzegovina to the country of origin would be inconsistent with the right guaranteed by Article II(3)(b) of the Constitution of BiH and Article 3 of the European Convention.

30. The Constitutional Court refers to the case *Saadi v. Italy*, application no. 37201/06 (judgment of 28 February 2008), whereby the European Court of Human Rights considered the application of the applicant who was a citizen of Tunisia and who filed a request for asylum in Italy, and who was suspected of involvement in the work of the terrorist organizations, was convicted for various offenses in Italy, as well as in absence, in Tunisia. An order was issued for him to be deported from Italy to Tunisia. International organizations for the protection of human rights published evidence that a record number of cases of serious abuse/maltreatment of Muslims were recorded in Tunisia, as well as cases of denial of the right to a fair trial. Italian authorities exchanged diplomatic *notes verbales* with authorities in Tunisia, stating that obligations of applying agreements for the protection of human rights arise from the laws of the state. The applicant stated that his deportation to Tunisia would result in the violation of obligations of Italy arising from Article 3 of the European Convention. Finding that the conviction of the appellant for terrorism was related to the offenses committed in Tunisia, the European Court noted that there was a real risk of subjecting the applicant to the treatment which is inconsistent with Article 3 of the European Convention, and it took a legal position that the deportation of the applicant to Tunisia would constitute a violation of Article 3 of the European Convention.

31. The Constitutional Court further emphasizes that, on the basis of the judgment of the European Court of Human Rights in the case *Saadi v. Italy*, it is clear that the courts "must examine all foreseeable consequences of return (of the appellant) to the receiving country bearing in mind the general situation and his personal circumstances" (paragraph 130, with reference to the case *Vilvarajah v. the United Kingdom*, judgment of 30 October 1991, European Court of Human Rights, series A, No. 215, paragraph 108). When using all reliable evidence, this comprises assessment of the situation in the receiving country and the consideration of the appellant's position that might be foreseen in such circumstances (paragraph 131 of the *Saadi* judgment). If the appellant claims to be "a member of the group that is

systematically exposed to abuse… protection offered by Article 3 of the Convention comes into play when the applicant establishes, if necessary on the basis of the sources (such as reputable international organizations and government sources), that there are serious reasons to believe that the mentioned practice and his or her affiliation with the mentioned group exist" (paragraph 132 of the *Saadi* judgment).

32. The Constitutional Court notes that a positive obligation arises from Article 3 of the European Convention, according to which the Court of BiH was obliged to examine evidence that the appellant offered in the present case corroborating his assertions that by expelling him to the country of origin he would be subjected to torture, inhuman or degrading treatment or punishment within the meaning of Article 3 of the European Convention. However, the Constitutional Court observes that the Court of BiH dismissed the appellant's lawsuit in the course of the administrative dispute, without examining in essence the appellant's claims that there was a real risk for his rights guaranteed by Article 3 of the European Convention to be violated by expelling him to the country of origin. In view of the aforementioned, the Constitutional Court holds that the appeal raises a serious issue within the scope of Article 3 of the European Convention, according to which it is the positive obligation of the state, i.e. of the Court of BiH in the present case, to examine all foreseeable consequences of the return of the appellant to the country of origin, that is to say as to whether the appellant, by forcible expulsion from Bosnia and Herzegovina, would be exposed to a real risk of being subjected to torture or inhuman or degrading treatment or punishment. The Constitutional Court considers that this important issue has remained open in the challenged verdict of the Court of BiH.

33. Therefore, the Constitutional Court concludes that by adopting the challenged decision the Court of BiH violated Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention.

Other allegations

34. Since the Constitutional Court has referred back the Case No. U-766/08 to the Court of BiH for a renewed procedure, and in the light of the conclusion related to the violation of Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, the Constitutional Court concludes that it is not necessary to consider separately the remainder of the allegations stated in the appeal.

VIII. Conclusion

35. The Constitutional Court concludes that there is a violation of the appellant's right not to be subjected to torture or inhuman or degrading treatment or punishment guaranteed by Article II (3) (b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention, as the Court of BiH while adopting the challenged decision failed to act in accordance with the positive obligation referred to in Article 3 of the European Convention, according to which it is obliged to examine the allegations and evidence that the appellant offered in support of his assertions that there is a real risk that by expelling him to the country of origin he would be subjected to torture or inhuman or degrading treatment or punishment within the meaning of Article 3 of the European Convention.

36. Having regard to Article 61, paragraphs 1 and 2, and Article 64 paragraph 1 of the Rules of the Constitutional Court, the Constitutional Court decided as set out in the enacting clause of this Decision.

37. Having regard to Article 77 paragraph 6 of the Rules of the Constitutional Court, the Decision on Interim measure no. AP-555/09 of 15 April 2009 shall remain in force until the Court of BiH has considered evidence and found whether the forcible removal of Jean Marc Bogmis from the country is justified within the meaning of the requirement referred to in Article II(3)(b) of the Constitution of Bosnia and Herzegovina and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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

Seada Palavrić
President
Constitutional Court of Bosnia and Herzegovina