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), 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* nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

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

Having deliberated on the appeal of Mr. **Radomir Kundačina** in case no. **AP 2615/08,** at its session held on 18 January 2012 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal of Mr. **Radomir Kundačina** lodged against the judgment of the Cantonal Court in Sarajevo no. Gž-1957/05 of 4 June 2008 is hereby dismissed as ill-founded.

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 Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 28 August 2008, Mr. Radomir Kundačina ("the appellant"), represented by Mr. Ismet Mehić, a lawyer practicing in Sarajevo, lodged an appeal with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") against the judgment of the Cantonal Court in Sarajevo ("the Cantonal Court") no. Gz-1957/05 of 4 June 2008. The appellant supplemented his appeal on 8 September 2008.

II. Procedure before the Constitutional Court

2. Pursuant to Article 22 (1) and (2) of the Rules of the Constitutional Court, the Cantonal Court and the FBiH Attorney's Office, representing the Federation of Bosnia and Herzegovina – the FBiH Ministry of Defence ("the first defendant"), and Mr. Kadrija Tvica ("the second defendant") were requested on 5 September 2008 to submit their respective replies to the appeal. In addition, on 21 July and 23 August 2011 the Municipal Court was requested to submit to the Constitutional Court the case-file for inspection. Furthermore, pursuant to Article 33 of the Rules of the Constitutional Court, on 8 September 2011 the appellant's authorised representative and the Service for Joint Affairs of the Federation of Bosnia and Herzegovina ("the Service") were requested to provide information and documentation relating to the purchase of the apartment.

3. The second defendant and the Cantonal Court submitted their replies to the appeal on 16 and 26 September 2008, respectively. The first defendant failed to do so. On 5 September 2011 the Municipal Court submitted a copy of the case-file. The Service submitted the requested information

and documentation on 20 September 2011. The appellant's authorized representative failed to submit the requested information.

4. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the appeal were communicated to the appellant on 16 February 2009.

III. Facts of the Case

5. 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.

6. By the Judgment and the Supplement Judgment of the Municipal Court in Sarajevo ("the Municipal Court") no. P-304/04 of 17 and 23 May 2005, the appellant's statement of claim was granted as a whole, whereby it was established that the Contract of Purchase and Sale of the Real Property no. 20/456-408 of 11 November 1991 ("the respective contract") was legally valid. The respective contract was concluded between the appellant as buyer and the State of SFRY-SSNO-VZ Orao Rajlovac as seller ("the predecessor of the first defendant"), whereby the appellant, in accordance with the Law on Securing Housing for the JNA, purchased the 2.5 bedroom apartment at Tešanjska St. no. 5/IV, Marijin Dvor, Sarajevo, apartment no. 36, with a surface area of 69.45 m2 ("the apartment at issue"). In view of the above, the Municipal Court established that the first defendant was obliged to accept that the appellant would be registered in the land register of the Municipal Court in Sarajevo as a full owner of the apartment at issue and to surrender possession of the apartment to the appellant and to compensate him for the costs of the civil proceedings. In addition, the Municipal Court ordered the second defendant to move out of the apartment and to vacate and hand over possession of the apartment to the appellant.

7. In the reasoning of the judgment it is stated that the Municipal Court established that all procedural requirements for conducting the relevant proceedings in accordance with the provisions of Article 39a through 39e of the Law on Sale of Apartments with Occupancy Right ("the Law on Sale of Apartments") were met. Namely, the Municipal Court undisputedly established that on 20 January 2004 the appellant, before instituting the litigation, had addressed the first defendant and, pursuant to Article 39a of the Law on Sale of Apartments, he sought that an order be issued for the registration of his ownership right over the apartment at issue. The Municipal Court also established that the first defendant, by a letter of 13 February 2004, requested that the documentation be supplemented or otherwise it would be deemed that the claim for repossession of the apartment had not been filed.

8. In addition, it is established that, based on the contract on use of the apartment of the Sarajevo Housing Company no. 07/4-26-504/72 of 2 February 1972, the appellant moved into an apartment in Sarajevo at Dženetića čikma no. 16/IV/11 ("the apartment at Dženetića čikma"), where he and his family lived until 1992. After the war, on 29 September 1998, the appellant filed a request for repossession of that apartment. By the Ruling of the Administration Authority for Housing Affairs no. 23/1-372-3391/98 of 5 July 2002, the appellant's occupancy right was confirmed and his right to repossess the apartment was established. Consequently, on 9 September 2002 the appellant entered into possession of the apartment at Dženetića čikma.

9. It is further established that the predecessor of the first defendant, as the appellant's employer, and the SOUR Feroelektro (employer of the appellant's wife) concluded a contract to jointly fund the purchase of the 2.5 bedroom apartment in Sarajevo, *i.e.* the apartment at issue, in the ratio 55:45, with the view to solve the housing problem of the appellant, a civilian serving in the JNA, and his wife. In the contract it is stated that the apartment was provided by the predecessor of the first defendant based on the contract no. 465-3/2 of 18 April 1989 entered with the Sarajevo Military Construction Directorate, as a body competent to purchase apartments for the JNA Housing Fund. In Article 8 of the respective contract it is stated that the apartment shall be owned by the JNA Housing Fund and that *the VZ "Orao" shall be the authority allocating the apartment for use and shall issue a ruling in which [the appellant] will be denoted as a holder of occupancy right over the apartment concerned.* Besides, it is established, based on a certificate issued by the Feroelektro LLC Sarajevo, that the legal predecessor of the Feroelektro LLC Sarajevo (the employer of the appellant's wife) co-funded the purchase of the apartment at issue.

10. Also, it is stated that on 11 November 1991 the appellant, as a buyer referred to in Article 1, concluded the respective contract on the basis of which he purchased the apartment at issue. At the time when the contract was concluded, the building in which the apartment at issue is located was under construction and, as a building inspection certificate was only just issued on 12 February 1999, the appellant could not move into the apartment at issue. Besides, it is stated that the purchase price was YU Dinar 975,859.00, which was reduced by YU Dinar 857,149.00 on the basis of financial contributions to the housing fund and by YU Dinar 29,677.00 on the basis of depreciation, so that the final purchase price of the apartment at issue was determined in the amount of YU Dinar 89,033.00. Furthermore, it is stated that, after examining the payment slips of 10 and 13 February 1992, the Municipal Court established that the appellant had paid in favour of the seller the amount of YU Dinar 89,033.00 for the purchase price of the apartment at issue. Also, it is established that

the seller and the buyer, after concluding the contract, verified the respective contract at the Basic Court I in Sarajevo under number OV-I-452/92 of 14 February 1992 and registered it at the City Revenue Administration, the Centar Department, under number 04-05-413-261/92 of 13 February 1992.

11. It is further stated that it is undisputedly established that the appellant timely filed a request for repossession of the apartment at issue and that his ownership right was confirmed by e Decision of the Commission for Real Property Claims of Displaced Persons and Refugees ("the CRPC"), no. 511-2525-1/1 of 8 October 2002. However, the CRPC subsequently passed the decision no. R511-2525-1/1-90-1233 of 24 April 2003, establishing that the apartment at issue could not be considered as an apartment in respect of which the occupancy right was confirmed. As a result, the appellant's request was dismissed as ill-founded.

12. The Municipal Court underlines that the parties do not dispute that the appellant is the occupancy right holder over the apartment at Dženetića Čikma and that his right has not ceased in any manner stipulated by the provisions of the Law on Housing Relations. It is also stated that the basis of the appellant's request for registration of the ownership right over the apartment at issue was disputed in the proceedings. The court underlines that it is undisputed that the appellant has never acquired the occupancy right over the apartment at issue, in respect of which he requested that his ownership right be established. In addition, it is undisputed that the appellant has neither physically nor factually used that apartment. Furthermore, the parties do not dispute that the second defendant has been using the apartment at issue and that he has failed to offer evidence to the court as to the basis for his use of the apartment in terms of Article 7 and 123 of the Civil Procedure Code. Therefore, according to the conclusion of the court, the use of the apartment at issue by the second defendant should be considered as unlawful.

13. Furthermore, based on the ruling issued by the Administrative Unit for Geodetic and Legal-Property Affairs no. 25-31-4168-E/03 of 13 September 2003 and the ruling issued by the Administrative Unit for Geodetic and Legal-Property Affairs and Cadastre of the Stari Grad Municipality of 25 June 2003, the Municipal Court established that the Milovan Čabrilo's appeal against the ruling establishing that he was not a *bona fide* possessor of the apartment at Dženetića Čikma had been dismissed by the aforementioned rulings as well as his request for enforcement of the Commission's Decision no. 402-971-1/I of 9 July 2002.

14. The Municipal Court concluded that the appellant's claim was well-founded, since he and the first defendant's predecessor concluded a written contract of purchase and sale of the real

property in terms of Article 9(1) of the Law on Real Property Transactions. The aforementioned contract is consistent with the legal norm, which prescribes that a contract on the basis of which the ownership right is transferred shall be made in witting and the contracting parties' signatures shall be verified by the competent court /as done in the contract in question/. The purchase price agreed upon between the contracting parties is stated in Article 2 of the respective contract and Article 5(2) thereof stipulates that the price referred to in paragraph 5 of the same Article shall be the buyer's obligation under the contract. Also, the appellant fulfilled his obligation but the predecessor of the first defendant failed to meet its obligation under the contract, as it did not give consent for registration and thereby acted in contravention of Article 17 of the Law on Obligations.

15. Also, the Municipal Court underlines that the agreed purchase and sale of the apartment was based on the provisions of Article 9 of the Law on Securing Housing for the JNA, which was applicable at the time when the respective contract was concluded and the appellant, together with his wife, was entitled to resolve his housing problem by purchasing the apartment by their own funds. Moreover, the Municipal Court points out that the defendants' reference that the appellant, when concluding the respective contract, should first satisfy the requirements under Article 11 of the Law on Housing Relations, the provision of which relates to the manner in which an occupancy right can be acquired, and that the apartments owned by the Housing Fund of the former JNA could be purchased under the conditions and manner strictly determined by the provisions of the Law on Securing Housing for the JNA and the Rules on JNA Apartments and the Rules on Purchase of Apartments owned by the JNA Housing Fund, is irrelevant for decision making in the present case. It is stated that the appellant had not to be an occupancy right holder in order to satisfy his/her housing needs through his/her own funds by constructing, purchasing or acquiring an apartment, as prescribed by Article 9 of the Law on Securing Housing for the JNA. Therefore, as stated by the court, the appellant could also buy the apartment under construction and, accordingly, the provisions of the Law on Housing Relations and the Law on Sale of Apartments with Occupancy Right, referred to by the first defendant and the second defendant, are not applicable in the present case. The Municipal Court highlights that the allegations that the respective contract is null and void within the meaning of Article 103 in conjunction with Article 109 of the Law on Obligations is ill-founded, as such a request, in terms of invoking a nullity or termination of the respective contract within the meaning of Article 133 of the Law on Obligations, was not filed by the defendants neither in the civil proceedings nor in any other proceedings before the court.

16. Finally, the Municipal Court states that the apartment at issue constitutes the appellant's property within the meaning of Article 1 of Protocol No. 1 to the European Convention ("the European Convention") and, accordingly, the appellant should be afforded judicial protection in court proceedings and, therefore, the defendants denial of the appellant's claim on the basis of the fact that the appellant is the occupancy right holder over the apartment at Dženetića Čikma is irrelevant for these proceedings.

17. The Cantonal Court passed the judgment no. Gž-1957/05 of 4 June 2008 granting the defendant's appeal and modifying the first instance judgment and dismissing the appellant's claim as a whole. In addition, the Cantonal Court obliged the appellant to compensate the second defendant for the costs of civil proceedings in the amount of KM 1,956.00. In the reasoning of its judgment the Cantonal Court states that the Municipal Court had no stronghold in the evidence examined and the undisputed allegations stated by the parties and, therefore, the first instance judgment was passed by an incorrect application of the substantive law. The Cantonal Court also states that the First Instance Court correctly asserted that the respective contract was consistent with the requirements prescribed by Article 9 of the then applicable Law on Real Property Transactions, since it was concluded in written form and verified by the competent tax administration office and the contract price was paid in whole. Furthermore, the Cantonal Court underlines that irrespective of the reasons for which the appellant has not moved into the apartment at issue, all that is not sufficient to recognise, on the basis of such a legal transaction, the appellant's ownership right over the apartment at issue. Namely, according to the Cantonal Court, the legal position of the First Instance Court, according to which the Law on Housing Relations and the Law on Sale of Apartments with Occupancy Right are not applicable to the present case, proves to be unacceptable.

18. The Cantonal Court points out that contrary to the incorrect legal position of the Municipal Court and irrespective of the existence of the formally-legally valid contract of purchase of the apartment, the appellant could not acquire a valid legal basis for acquiring the ownership right over the apartment only on the basis of such a contract and without fulfilling the requirements foreseen by the provision of Article 39a of the Law on Sale of Apartments. In addition, the Cantonal Court highlights that the Law on Securing Housing for the JNA, referred to by the Municipal Court, already provided in Article 20 that the occupancy right holder residing in an apartment of the JNA Housing Fund could purchase the apartment on the basis of a contract made with the authority responsible for the apartment. Article 2 of the Rules on Purchase of Apartments of the JNA Housing Fund provided that a request for the purchase of an apartment of the JNA Housing Fund should be

filed by the occupancy right holder or the person to whom the apartment of the JNA Housing Fund was allocated under a purchase obligation. The Cantonal Court underlines that the two aforementioned regulations include the holder of the occupancy right, as a person entitled to purchase an apartment of the JNA Housing Fund. Taking into account that the appellant has never moved into the apartment at issue, he could not acquire the occupancy right in terms of Article 11 of the Law on Housing Relations and, accordingly, the issue of legal validity of the contract of purchase of the apartment was correctly raised in the course of the first instance proceedings with regard to Article 103 in conjunction with Article 109 of the applicable Law on Obligations.

19. Furthermore, the Cantonal Court emphasizes that, even if the position of the Municipal Court that the respective contract is legally valid were proven correct, the appellant would not be entitled to purchase the apartment at issue in terms of the Law on Sale of Apartments, as he actually lacked a basic precondition for the continuation of the procedure for purchasing the apartment at issue within the meaning of the provision of Article 15 of the mentioned Law, which is that he failed lawfully to move into the apartment at issue. Also, the Cantonal Court states that, since *it was undisputedly established in the course of the first instance proceedings that the appellant regained possession of the apartment at Dženetića Čikma, which he had purchased, it follows that his claims prove to be entirely unfounded*. The Cantonal Court concludes that bearing in mind that the appellant has never moved into the apartment at issue, he therefore could not acquire the occupancy right over that apartment and, consequently, he could not purchase it in accordance with the applicable substantive and legal regulations and, as a result, his request for a determination of legal validity of the respective contract and his request for an eviction of the second defendant and the handover of the apartment to the appellant is dismissed by the court.

20. Also, the Cantonal Court highlights that by passing the judgment granting the appellant's claim, the appellant would be able to purchase two apartments, which is contrary to Article 10 of the Law on Sale of Apartments, and the defendants' right to property would be violated. For these reasons the Cantonal Court, by applying Article 229(4) of the Civil Procedure Code, modified the judgment of the Municipal Court.

IV. Appeal

a) Allegations of the appeal

21. The appellant considers that the challenged judgment of the Cantonal Court is in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, his right to home under Article II(3)(f) of the Constitution

of Bosnia and Herzegovina and Article 8 of the European Convention, and his 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 appellant asserts that the substantive law was applied in an arbitrary fashion. The appellant states that he, acting in accordance with Article 39a of the Law on the Sale of Apartments, addressed the competent body of defence of the Centar Municipality and requested that he be registered as the owner of the apartment he had purchased. However, the aforementioned body refused to give consent to the appellant's request. The appellant holds that the First Instance Court, acting upon the appellant's action filed after his request for registration had been dismissed, properly adopted his claim. In addition, according to the appellant, *the second instance proceedings were unfairly conducted* by the Second Instance Court. In the appellant's view, the proceedings were unfair as the Cantonal Court, in its judgment, *disregarded the factual and legal reasons of the First Instance Court*, which, in the appellant's opinion, were *absolutely correct and well-founded*. In this context, the appellant underlines the correct conclusion of the First Instance Court, stating that *by purchasing the apartment at Tešanjska Street during its construction stage the appellant finally met his housing needs but could not move into the apartment as the construction thereof was under way and, therefore, the provisions of the Law on Housing Relations and the Law on the Sale of Apartments with Occupancy Right could not be applied in such cases, given that the apartment constitutes the property of the appellant within the meaning of Article 1 of Protocol No. 1 to the European Convention*. The appellant holds that the Second Instance Court groundlessly applied the legislation enacted after the war in BiH, *i.e.* it applied the regulations retrospectively with regard to the subject-matter of the dispute, thereby jeopardising the appellant's right through the unfair proceedings. In addition, the appellant asserts that the Cantonal Court *forgets that the appellant's previous apartment, which he presently uses, was allocated and sold to Milovan Čabrilo, who in 2003 requested that the appellant be evicted from the said apartment, while the proceedings upon the appellant's action were pending, but the competent body, the Ministry of Urban Planning and Environmental Protection of the Sarajevo Canton, by its Ruling of 13 September 2003, dismissed the Milovan Čabrilo's request seeking eviction of the appellant from the apartment at issue*. In view of the aforementioned, the appellant seeks that the Constitutional Court quashed the judgment of the Cantonal Court.

b) Reply to the appeal

22. In the reply to the appeal, the Cantonal Court underlines that the challenged judgment is not in violation of the appellant's constitutional rights and maintains the factual and legal position as stated in the judgment passed by the Cantonal Court.

23. In its reply to the appeal, the second defendant states that the appellant has never acquired the status of occupancy right holder over the apartment at issue. In addition, according to the second defendant, the appellant has no valid legal basis to acquire the ownership right over the apartment at issue, *i.e.* the appellant, apart from the existence of the formal and legal contract of purchase of the apartment, has not met any mandatory condition prescribed by the provisions of Article 39a of the Law Amending the Law on Sale of Apartments. In addition, the Law on Securing Housing for the JNA already provided that only the holder of an occupancy right can purchase the apartment over which he/she has the right of occupancy. Furthermore, the Rules Governing the Purchase of Apartments of the JNA Housing Fund also provide that a request for the purchase of an apartment of the JNA Housing Fund shall be filed by the occupancy right holder or the person to whom the apartment of the JNA Housing Fund has been allocated.

24. In its reply to the appeal, the Service alleges that it examined the appellant's case, which was taken over from the former FBiH Ministry of Defence, and established that on 7 November 2002 the appellant and his wife, after it had been established that they were entitled to regain possession of the apartment at Dženetića Čikma, filed a request to purchase the apartment at issue in accordance with the provisions of the Law on Sale of Apartments. It is stated that *on 16 June 2003 the Contract of purchase and sale of the apartment with occupancy right no. 20-06-34-9-3475 was entered into between the former FBiH Ministry of Defence as seller and Radomir and Marica Kundačina as buyers*. *The mentioned contract was signed by both contracting parties and verified by the Public Attorney of the former FBiH Ministry of Defence and the seller's signature, i.e. the signature of Minister Miroslav Nikolić, was affixed on the Contract concerned and verified by the Municipal Court in Sarajevo Ov. I. no. 315/04 of 20 July 2004*. In addition, it is stated that on 13 August and 8 September 2004, respectively, the FBiH Ministry of Defence sent an invitation to the appellant to take over the respective contracts in order to verify the signature on the contracts at the Municipal Court in Sarajevo, but the appellant failed to comply with the invitation.

25. Besides, the Service states the proceedings relating to the apartment at Dženetića Čikma were conducted upon an action filed by Milovan Čabrilo before the Municipal Court in Sarajevo. In his claim, Milovan Čabrilo requested that the Contract of Purchase and Sale of the Real Property and the property right over that apartment be recognised as legally valid. The proceedings were

concluded by Judgment no. P: 257/03 of 23 July 2004, whereby the claim was dismissed. The Cantonal Court upheld the first instance judgment by its judgment no. Gz-455/05 of 16 April 2008, and the Supreme Court of the Federation of BiH, by its judgment no. 070-0-Rev-09-000053 of 2 March 2010, dismissed the relevant revision-appeal.

V. Relevant Law

26. **Law on Housing Relations** (*Official Gazette of SR BiH* nos. 14/84, 12/87, and 36/89), as far as relevant, states the following:

Article 11

A citizen shall acquire a right of occupancy on the day of a lawful movement into an apartment.

A lawful movement into an apartment is a movement effected on the basis of a contract on the use of apartment entered into on the basis of an appropriate act or other act established by the mentioned law, which constitutes a legally binding basis for the movement into apartment. […]

Acquiring an occupancy right contrary to the provisions of the mentioned law shall not generate legal effect.

Article 12

The occupancy right holder may have a right of occupancy right to one apartment.

Members of the close family household of the occupancy right holder as well as a person who ceased to be a member of that family although remaining to live in that household (Article 6 paragraph 1) may not be a sole occupancy-right holder to another apartment.

It is prohibited to be an occupancy-right holder simultaneously to more than one apartment.

27. **Law on Securing Housing for the JNA** (*Official Gazette of the SFRY* no. 84/90), as relevant, reads:

Article 1

This Law shall regulate the housing needs of [...] civilian members of the Yugoslav National Army ("JNA") [...]

Article 9

Active military and civilian personnel of the JNA shall satisfy their personal or family housing needs through their own funds by construction, purchase and buying of an apartment. [...]

Article 20

The holder of an occupancy right residing in an apartment of the JNA Housing Fund may purchase the apartment on the basis of a contract made with the authority responsible for the apartment. [...]

Article 21

(1) The purchase price for an apartment owned by the JNA Housing Fund shall be determined on the basis of the apartment's re-assessed construction value, its quality, equipment, location and other similar factors. The price thus determined shall be reduced by the amortisation of the apartment, but not more than 50% of the total amount of amortisation.

(2) When an apartment owned by the JNA Housing Fund is purchased by active military or civilian personnel of the JNA, the purchase price referred to in paragraph 1 of this Article shall be reduced by

1) the adjusted (re-assessed) amount of the costs of construction land and improvement of construction land;

2) the adjusted (re-assessed) amount of the monthly contributions paid to the JNA Housing Fund for the person for whom the apartment is purchased, i.e. for a member of his/her family household who is in active service with the JNA and who is satisfying his/her housing needs together with that person, if it is more favourable to him/her. The reassessment shall be made in accordance with growth in personal income of the person for whom the contributions were paid for the relevant period. [...]

Article 23

1) Any person who purchases an apartment shall be obliged to file, within 30 days starting from the day on which a purchase contract has been concluded, a request for registration of the right to property and mortgage or other entries in the land books, i.e. in other public registers of real property or rights thereto.

2) Members of the family household of the purchaser of the apartment shall be entitled to live in that apartment in accordance with the law.

28. **The Law on Sale of Apartments with Occupancy Right** (*Official Gazette of FBiH* nos. 27/97, 11/98, 22/99, 27/99, 7/00, 61/01, 15/02, 54/04, 36/06, 51/07 and 72/08), in its relevant part, reads as follows:

Article 10

Under conditions prescribed by this Law the occupancy right holder, his/her spouse or a member of his/her close family household may purchase only one apartment.

Any contract concluded in violation of the provision referred to in paragraph 1 of this Article shall be null and void.

Article 15

The apartments over which the former JNA and the SSNO (Federal Secretariat of National Defence) had the right to dispose thereof shall be sold by the Government of the Federation of Bosnia and Herzegovina in accordance with this Law.

Article 39

It shall be considered that the holder of the right under the contract of purchase and sale of the apartment at the disposal of the FBiH Ministry of Defence, entered with the former SSNO in accordance with the Law on Securing Housing for the JNA (Official Gazette of the SFRY, no. 84/90) and the by-laws for its implementation, has concluded a legally binding contract if the contract of purchase and sale of the apartment was made in writing and entered into before 6 April 1992 and if it was submitted for verification to the competent tax administration and if the purchase price was established in accordance with the then applicable Law and paid in full within the time limit specified in the contract.

Article 39a

The Government of the Federation of Bosnia and Herzegovina shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court if the occupancy right holder over the apartment at the disposal of the FBiH Ministry of Defence uses the apartment legally and if s/he entered into a legally binding contract of purchase and sale of the apartment with the SSNO before 6 April 1992 in accordance with the laws referred to in Article 39 of this Law.

Article 39d

A person who cannot exercise his/her right under this Law with the Government of the Federation of Bosnia and Herzegovina may initiate proceedings before the competent court.

Article 39e, paragraphs 2 and 3

(...)

Instead of the registration of the ownership right under the concluded contract, the holder of the right under the contract of purchase and sale, who entered into the legally binding contract referred to in Article 39(1) of this Law and who remained in military service of any armed forces outside the territory of Bosnia and Herzegovina after 14 December 1995 and who has not acquired a new occupancy right or a right commensurate with that right, shall be entitled to compensation payable by the Federation of Bosnia and Herzegovina in the amount paid under the contract, plus the accrued interest payable on ordinary deposits.

Instead of the registration of the ownership right over the apartment, the holder of the right under the contract of purchase and sale, who entered into the legally binding contract referred to in Article 39(1) of this Law and whose apartment has been occupied in accordance with the applicable laws by a user who has entered into an agreement on use of the apartment or a contract of purchase and sale of the apartment, shall be entitled to compensation payable by the Federation of Bosnia and Herzegovina as specified in paragraph 2 of this Article, apart from the holder of the right under the contract of purchase and sale referred to in paragraph 1 of this Article.

VI. Admissibility

29. 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.

30. Pursuant to Article 16(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.

31. In the present case, the subject matter of the appeal is the judgment of the Cantonal Court no. Gž-1957/05 of 4 June 2008, against which there are no other effective remedies available under the law. Furthermore, the appellant received the challenged judgment on 30 June 2008 and the appeal was filed on 28 August 2008, *i.e.* within 60 days time-limit as provided for by Article 16(1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 16(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.

32. Having regard to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16 (1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court establishes that the appeal meets the admissibility requirements.

VII. Merits

33. The appellant challenges the judgment claiming that the aforementioned judgment is in violation of his right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, his right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, and his 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.

Right to a fair trial

34. Article II(3) of the Constitution of Bosnia and Herzegovina as relevant, 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.

35. Article 6 paragraph 1 of the European Convention reads:

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 (...).

36. Constitutional Court finds it undisputable that appellant's civil rights were decided in the contentious proceedings in question and therefore Article 6 paragraph 1 of the European Convention as well as Article (II)(3) of the Constitution of Bosnia and Herzegovina are applicable.

37. As to the appellant's allegations about a violation of the right to a fair trial, that relate to the manner in which the Cantonal Court applied substantive law, the Constitutional Court recalls that according to the case-law of both European Court of Human Rights ("the European Court") and the Constitutional Court, it is not the task of these Courts to review the ordinary courts' findings relating to facts and application of the substantive law (see European Court, *Pronina vs. Russia*, Decision on Admissibility of 30 June 2005, Application no. 65167/01). Namely, the Constitutional Court is not called upon to substitute ordinary courts in the assessment of facts and evidence, but, in general, it is the task of ordinary courts to assess the presented facts and evidence (see European

Court, *Thomas vs. The United Kingdom*, Judgment of 10 May 2005, Application no. 19354/02). It is the Constitutional Court's task to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, *etc*.) have been violated or disregarded, and whether the application of law was, possibly, arbitrary or discriminatory. Thus, within its appellate jurisdiction, the Constitutional Court deals exclusively with the issue of a possible violation of the constitutional rights or the rights under the European Convention in the proceedings before the ordinary courts. In the case at hand, the Constitutional Court will examine whether the proceedings as a whole were fair as required by Article 6 paragraph 1 of the European Convention, that is whether the right to property was violated (see Constitutional Court, Decision no. *AP 20/05* of 18 May 2005, the *Official Gazette of BiH* no. 58/05).

38. The task of the Constitutional Court in the instant case, within meaning of the right to fair trail under Article 6 paragraph 1 of the European Convention, is to evaluate whether the application of the law by the Cantonal Court was arbitrary. The case at hand, as to the issue of the right of fair trail, concerns therefore possibility of application of Article 39a of the Law on Sale of Apartments on the instant case (provision was published in the Law on Amendments to the Law on Sale of Apartments – *Official Gazette of F BiH* no. 27/99 that became effective on 5 July 1999). Thus, the issue involves a dispute that occurred through the interpretation of that provision, which is exclusively a legal issue.

39. Constitutional Court notices that the appellant instituted proceedings which was the subject of the appeal by invoking application of Article 39a of the Law on Sale of Apartments although he claims in the appeal, *inter alia*, that the Law on Sale of Apartments, as the law adopted after the war, cannot be applied in his case being that the contract he requested to be established as legally valid, was concluded before the war. Furthermore, the Constitutional Court reiterates that for application of provision of Article 39a of the Law on Sale of Apartments, according to which t*he Government of the Federation of Bosnia and Herzegovina shall issue an order for the registration of the occupancy right holder as the owner of the apartment with the competent court*, it is necessary that the conditions are cumulatively met, as follows: that a person is occupancy right holder over the apartment in question; that a person uses apartment legally and that prior to 6 April 1992 a person has concluded a legally binding contract on purchase of apartment with the Federal Secretariat of National Defence (SSNO) in accordance with the laws provided for by Article 39 of the Law on Purchase of Apartments.

40. In regards to the aforementioned, the Constitutional Court notes that the Cantonal Court established that the appellant failed to meet condition under Article 39a of the Law on Sale of Apartments that he is the occupancy right holder over the apartment in question. In fact, the Cantonal Court established that the appellant, since he concluded the contract on purchase of apartment over which he never had occupancy right (apartment was under construction and appellant has never moved into it since the apartment received use permit only in 1999) as pursuant to Article 11 of the Law on Housing Relations which was in effect at the time of conclusion of the disputed contract, *a citizen shall acquire a right of occupancy on the day of a lawful movement into an apartment and a lawful movement into an apartment is a movement effected on the basis of a contract on the use of apartment entered into on the basis of an appropriate act or other act established by the mentioned law, which constitutes a legally binding basis for the movement into apartment. […]*

41. As to conditions *that a person is to be using the apartment legally and that he/she has concluded prior to 6 April 1992 a legally binding contract on purchase of apartment with Federal Secretariat of National Defense (SSNO) in accordance with the laws as provided for by Article 39 of the Law on Purchase of Apartments*, the Constitutional Court notes that the Cantonal Court concluded that the appellant does not meet these conditions either. Namely, the Cantonal Court found as correct the conclusion that the contract on purchase of disputed apartment met all conditions provided for by provision of Article 9 of, at the time, valid Law on Real Property Transactions as it was concluded in written form, verified by the competent tax administration and purchase price was paid out. Cantonal Court has however, concluded that all of this was not enough for the first instance court, independent of reasons which prevented the appellant to move into disputed apartment, to acknowledge the appellant's right of ownership over the apartment based on that legal transaction. Indeed, the Cantonal Court emphasized as unacceptable the legal position of the Municipal Court that in this case the provision of the Law on Housing Relations and Law on Sale of Apartments cannot be applied and which in turn, provide that the key condition for purchase of apartment is that the citizen is the occupancy right holder over the apartment that is the subject of purchase and that he/she is using it at the time of contract conclusion, since the contract in question at the time of the conclusion, at which time the Law on Housing Relation, determining the occupancy right holder was and the Law on Securing Housing in JNA were in effect, failed to meet conditions that would make it legally valid. In addition to the fact that the appellant at the time of conclusion of disputed contract did not use the apartment, the Cantonal Court reminded that Article

20 of the Law on Securing Housing in JNA, the appellant refers to, that provides that the *holder of an occupancy right residing in an apartment of the JNA Housing Fund may purchase the apartment on the basis of a contract made with the authority responsible for the apartment,* also requires as a condition for conclusion of legally valid contract on purchase of apartment from the fund of JNA, that the person who purchases the apartment is the occupancy right holder and that he/she uses that apartment at the time of conclusion of the contract on purchase of apartment.

42. Constitutional Court notes that the Cantonal Court emphasized that both regulations on purchase of apartment, both pre-war and after-war, imply capacity of occupancy right holder and *de facto* user of the apartment, as a person that is entitled to right to purchase of apartment from the housing fund of JNA and that considering the appellant has never moved into the apartment, he could not have acquired the occupancy right for the purpose of Article 11 of the Law on Housing Relations so that during the first instance proceedings the issue was raised as to the validity of the contract on purchase of apartment also from the aspect of Article 103 in conjunction with Article 109 of the Law on Contractual Obligations.

43. Having in mind these reasons, the Constitutional Court notes that the Cantonal Court concluded that the appellant does not meet conditions to establish that the contract, which he concluded with the predecessor of the first defendant, is established as legally valid nor that it meet cumulatively placed conditions for application of Article 39a of the Law on Sale of Apartments i.e. that the Government of F BiH issue him approval for registration.

44. In addition to the above, the Constitutional Court notes that the Cantonal Court also stated that considering that it was "during the first instance proceedings indisputably established that the appellant was returned the apartment in Dzentica Cikma Street which he purchased, his requests are shown to be fully ill-founded." Constitutional Court notes that the Cantonal Court reminded that at the time of the conclusion of the contract one citizen could not have been occupancy right holder over two apartments. Appellant has at the time of conclusion of the disputed contract already been occupancy right holder over apartment in Dženetića Čikma Street which he reinstated into his possession after return to Bosnia and Herzegovina and purchased it. Consequently, the Cantonal Court indicated that also Article 10 of the Law on Sale of Apartments, that concerns possibility of purchase of only one apartment over which there is occupancy right holder, that provides that *the occupancy right holder, his/her spouse or a member of his/her close family household may purchase only one apartment and that any contract concluded in violation of the provision referred to in paragraph 1 of this Article shall be null and void.* Therefore, by the adoption of judgment

granting the appellant's claim, the appellant would be allowed to purchase two apartments, which is inconsistent with Article 10 of the Law on Sale of Apartments, and in that manner there would be violation of the defendants' right to property. Cantonal Court concluded that for these reasons the appellants' request for establishing legal validity of the contract in question and request for moving out of the second defendant and repossession and disposal of the disputed apartment to the appellant, is ill-founded and it dismissed it as such.

45. Having in mind the above, the Constitutional Court does not find arbitrariness in the conclusion of the Cantonal Court that no conditions were met in the instant case that the appellant's claim is granted by applying Article 39a of the Law on Sale of Apartment.

46. Constitutional Court also finds no arbitrariness in the conclusion of the Cantonal Court that the appellant would not be entitled to a right to purchase the apartment for the purpose of the Law on Sale of Apartments as he indeed lacked the basic precondition for continuation of the procedure of purchase of apartment, within meaning of provision of Article 15 of the referenced law, that being the lawful movement into the disputed apartment.

47. Constitutional Court concludes that the Cantonal Court gave clear and precise reasoning in the challenged decision for its positions and gave logical and convincing argument for application of relevant law (Law on Sale of Apartments and Law on Housing Relations as well as Law on Securing Housing in JNA) which does not seem in any part to be arbitrary or unacceptable in itself. Constitutional Court notes that the Cantonal Court gave detailed and clear reasoning as to why it granted the complaints of the defendants and amended the judgment of the Municipal Court by dismissing the appellant's claim in full and amending the judgment and supplemental judgment of the Municipal Court no P 304/04 of 17 and 23 May 2005. Cantonal Court also clarified that it took its decision based on authorizations under Article 229 item 4 of the Law on Contentious Proceedings that provide that the second instance court, if it establishes that the facts of the case in the first instance proceeding were correctly established but that the substantive law was erroneously applied, grant the complaint and amend the challenged judgment. From this it follows, which is clearly and unambiguously stated in the challenged judgment, that the Cantonal Court has not taken the challenged decision, contradictory to the allegations of the appeal, so that it has "neglected the factual and legal reasons of the fist instance court".

48. Based on the above, the Constitutional Court finds that the Cantonal Court did not interpret positive-legal regulations arbitrarily. Further, the Constitutional Court concludes that the reasoning of challenged judgment meets standards "of reasoned judgment" within the meaning of guarantees

of a right to fair trial. Having in mind the above, the Constitutional Court finds that in relation to the appellants' allegation, there is no violation of the right to fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention.

Right to home

49. Article II(3) of the Constitution of Bosnia and Herzegovina reads 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:

(...)

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

50. Article 8 of European Convention reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

51. As to the appellant's allegations that the challenged judgment of the Cantonal Court violated his right to home, guaranteed by Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention, the Constitutional Court emphasizes that the basic goal of Article 8 of the European Convention is to protect individuals from the authorities' arbitrary interference with their rights guaranteed under this article (see the European Court of Human Rights, *Kroon vs. the Netherlands*, judgment of 27 October 1994, Series A, 297-C).

52. In determining whether the instant case concerns violation of Article 8 of the European Convention, it primarily needs to be determined whether the disputed apartment represents "home" of the appellant within the meaning of Article 8 paragraph 1 of the European Convention.

53. As to the instant case whether the disputed apartment can be considered appellant's "home", the Constitutional Court notes that it is undisputed that the appellant has never moved into nor lived in the disputed apartment in Tesanjska Street nor he was in any manner in possession of that apartment. Namely, the appellant has lived with his family prior to and after the war in the apartment located in Dženetića Čikma Street while during the court proceedings in question the second defendant is residing in the disputed apartment.

54. Considering the above and since it was established undisputed during the proceedings that the appellant has never lived in the disputed apartment, the Constitutional Court concludes that the disputed apartment does not represent appellant's "home" and that therefore there was no violation of the appellant's right under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention.

Right to property

55. As to allegations of the appellant on violation of the constitutional right to property, that provisions of the Law on Housing Relations and Law on Sale of Apartments cannot be applied in this case, as the disputed apartment represents property of the appellant within meaning of Article 1 of Protocol no. 1 to the European Convention, the Constitutional Court reiterates that in this decision, when examining compliance with appellant's right to fair trial, it has already taken conclusion in regards to application of substantive law by the regular courts and therefore finds that it is not necessary to separately examine same issue within the constitutional right to property as well.

VIII. Conclusion

56. The Constitutional Court concludes that the decision of the Cantonal Court did not violate the appellant's right to fair trail under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention, since the Cantonal Court did not apply the substantive law in an arbitrary manner.

57. Constitutional Court also concludes that the decision of the Cantonal Court did not violate the appellant's right to home under Article II(3)(f) of the Constitution of Bosnia and Herzegovina and Article 8 of the European Convention as the appellant never resided nor was in the possession of the disputed apartment due to which this apartment cannot be considered his home.

58. Pursuant to Article 61(1) and (3) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause of the present decision.

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

Prof Dr Miodrag Simovic
President
Constitutional Court of Bosnia and Herzegovina