Before the Constitutional Court of Bosnia and Herzegovina

Expert Opinion on
Deprivation of Nationality

In support of:

***AL HUSIN IMAD*, CASE NO. AP 1222/07**

and others denationalised pursuant to Arts. 40-41 of the BiH Law on Citizenship

Submitted by amici curiae:

HELSINKI COMMITTEE FOR HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA

Sarajevo, Bosnia and Herzegovina

-and-

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STATEMENT OF INTEREST

The **Helsinki Committee for Human Rights in Bosnia and Herzegovina** was founded on 11 February, 1995. It is an independent, non-governmental and non-profit organisation. The aim of the Committee is the protection and promotion of human rights in Bosnia and Herzegovina (BiH). The Committee is a member of the International Helsinki Federation.

The **Allard K. Lowenstein International Human Rights Clinic** at **Yale Law School** is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research on behalf of human rights organisations and individual victims of human rights abuses. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for United States courts and courts in Botswana, Colombia, and Spain. The Clinic has also investigated human rights conditions and prepared and published human rights reports. The Clinic's work is based on the human rights standards contained in international customary and conventional law and is dedicated to furthering the development and enforcement of human rights norms.

I. Introduction

This submission argues that the prohibition against arbitrary denationalisation[1] in the BiH Constitution reflects a widely recognised international norm. Drawing from multiple sources, including treaties, international and national court cases, UN expert body findings, and BiH court cases implementing international law, this submission provides the Constitutional Court of Bosnia and Herzegovina (CCBH) with relevant international standards for upholding the prohibition. This submission also reviews relevant precedent demonstrating that denationalisation for the sole purpose of expulsion violates BiH's obligations under Protocol 4 of

[1] In this submission, the terms "nationality" and "citizenship" will be used interchangeably. The terms "deprivation of nationality" and "denationalisation" refer to actions taken at the initiative of a state to strip an individual of citizenship of that state (referred to as "Withdrawal of citizenship" under the Law on Citizenship of Bosnia and Herzegovina). "Revocation of naturalisation" applies specifically to cases where citizenship was originally obtained through naturalisation rather than birth.

the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

This submission applies this analysis of the prohibition and its related obligations to the November 2005 amendments to the Law on Citizenship of Bosnia and Herzegovina ("Law on Citizenship") and the practices of the State Commission for the Review of Decisions on Naturalisation of Foreign Citizens ("State Commission") arising from these amendments. This submission concludes that the 2005 amendments and the subsequent practices of the State Commission violate the constitutional prohibition against arbitrary denationalisation as well as BiH's obligations under the Protocol 4 of the ECHR not to denationalise citizens for the sole purpose of expelling them.

Amici accordingly recommend that this Court, using the powers available to it under Art. 77 of its rules, take the following interim measures: (a.) suspend the State Commission's work until its mandate and procedures can be reshaped in accordance with the BiH Constitution, BiH law, and BiH's international legal obligations, including those under the ECHR, the European Convention on Nationality, and the BiH Law on Administrative Procedure; and (b.) suspend the legal effects of all denationalisation decisions by the State Commission – including all deportation proceedings against individuals denationalised by the State Commission – pending any final denationalisation decisions taken in accordance with (a). *Amici* further recommend that this Court, exercising its powers under Art. 64 of its rules, quash upon appeal (a.) any denationalisation decision of the State Commission taken pursuant to Art. 41(4)(a) of the amended Law on Citizenship, especially those that cite alleged violations of Art. 3 of Annex IA of the Dayton Accord; and (b.) any denationalisation decision resulting from a process that did not accord the right to a hearing before an independent and impartial tribunal fulfilling the requirements of ECHR Art. 6 and the BiH Law on Administrative Procedure.

II. Factual Background

1. Approximately 16,000 people have been naturalised as BiH citizens since independence in 1992, more than 90% of them from other parts of the former Socialist Federal Republic of Yugoslavia (SFRY). Of the remaining 1,500, approximately half are of "Afro-Asian" origin, mostly from predominantly Muslim countries. This group includes humanitarian workers,

religious preachers and clerics, and students who came to Yugoslavia from Non-Aligned Movement (NAM) countries during the socialist era. Most of these individuals acquired BiH citizenship through marrying BiH nationals. Others acquired citizenship by participating in the Army of the Republic of BiH (ARBiH), pursuant to Article 9(5) of the wartime BiH citizenship law.[2] These foreign Muslim volunteers who participated in the 1992-1995 war ('mujahids') – some of whom were already living in SFRY or BiH as students or for other reasons – have been the focus of sustained public debate in BiH and internationally. Yet, as the figures above suggest, ex-mujahids cannot be more than a fraction of the approximately 800 naturalised citizens of "Afro-Asian" origin.

2. Annex IA of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Accord") required the withdrawal of forces "not of local origin" as well as "foreign Forces, including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighboring and other States"[3] by 13 January 1996. The majority of foreign volunteers appear to have departed after ARBiH dissolved the Elmudžahedin detachment, in which most of them served. The exact number of volunteers who at various points acquired citizenship through marriage or on the basis of their army service is not public, but an estimated 50-100 naturalised ex-combatants remain in BiH with their families, while others have presumably left the country (with or without having taken citizenship) and maintained minimal, if any, contacts with the country.

3. On 16 December 1997, the Office of the High Representative (OHR) for BiH promulgated the first post-war citizenship law ("Law on Citizenship"), approved by the BiH Parliamentary Assembly without possibility of amendment on 27 July 1999.[4] Under the law, every BiH citizen also holds citizenship in one of the country's two entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). The law stipulated two mechanisms for denaturalisation. Under the normal procedure, denationalisations had to be initiated at the entity level but with veto power resting at the state level with the BiH Ministry of Civil Affairs (Art.

[2] An amendment enacted in May 1993 allowed foreign members of the Bosnian armed forces to "obtain" ("stiče") citizenship without having to fulfil the standard naturalisation requirements (BH Gazette 11/93, 10 May 1993).
[3] The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A (Agreement on the Military Aspects of the Peace Settlement), Article 3(1)-(2).
[4] HR Decision on the Law on Citizenship of Bosnia and Herzegovina (BH Gazette 4/97, 23 Dec 1997).

30). The criteria for denaturalisation under the normal procedure included acquisition of citizenship through fraudulent means, prohibited service in a foreign military, and failure to fulfil naturalisation conditions after the law's entrance into force (Art. 23). Parallel to this process, Arts. 40-41 of the Law on Citizenship established a special State Commission for the Review of Decisions on Naturalisation of Foreign Citizens ("State Commission"), composed of six BiH citizens and three international members, charged with reviewing and, where appropriate, revoking naturalisations granted between 6 April 1992 and 14 December 1995.

4. In November 2005, the BiH Parliamentary Assembly dramatically altered the statutory framework of denationalisation,[5] using emergency voting procedures that allowed proposed changes to be passed in one reading without possibility of amendment.[6] The amendments restructured the State Commission[7] and dramatically broadened its powers. The State Commission now has many of the same denationalisation powers as the BiH Ministry of Civil Affairs, such as the ability to revoke naturalisations obtained through fraudulent means or without having met the naturalisation criteria of the law, or of nationalisations of citizens who subsequently performed prohibited service in a foreign army (Art. 41(4)).[8] The State Commission has additional denationalisation powers unique to it: it can revoke naturalisation in the case of a "lack of genuine link" (Art. 41(4)(c)) with BiH or if a person fails to submit information to the State Commission when required (Art. 41(3)). Perhaps the most significant change relates to the State Commission's power to revoke naturalisation in cases where "regulations in force in the territory of Bosnia and Herzegovina at the time of the naturalisation had not been applied" (Art. 41(4)(a)). Under the previous law, the State Commission also had to demonstrate that an individual was clearly aware that they did not fulfil the naturalisation conditions at the time, and if the person had subsequently fulfilled those conditions by the time

[5] BiH Gazette 82/05.
[6] Rules of Procedure of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, Art. 122; Rules of Procedure of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, Art. 127.
[7] The State Commission's temporal jurisdiction was extended to include all nationalisations prior to January 2006 (Art. 40(1)). It must now be chaired and co-chaired by employees of the BiH Minister of Security and BiH Minister of Civil Affairs, respectively. The three international members are now chosen in consultation with "other appropriate international organisations" in addition to the Council of Europe (Art. 40(2)).
[8] The only area where the Commission has less authority than the Ministry of Civil Affairs is in cases of conviction for certain serious crimes listed in Art. 23(4)-(6), where the Commission may only *recommend* denationalisation to the Council of Ministers.

of the State Commission's decision, they retained their citizenship. Under the 2005 amendments, the burden is now reversed: an individual who has subsequently fulfilled the conditions of naturalisation will still lose his or her citizenship unless he or she (a.) had "clear" ignorance of the regulatory impropriety; (b.) has not engaged in any conduct that would otherwise justify denationalisation; and (c.) has not concealed any "relevant facts" contrary to the regulations on the status of persons in BiH (Art. 41(7)).

5. Under the 2005 amendments, the State Commission's decisions are no longer open to standard administrative appeal processes under the BiH Law on Administrative Procedure (Art. 41(8)). Administrative appeals generally have suspensive effect and are subject to a number of procedural safeguards, including guaranteeing appellants the right to participate in fact-finding processes.[9]

6. Decisions of the State Commission can be reviewed by the Court of BiH ("State Court") in accordance with the BiH Law on Administrative Disputes. Applicants in the State Court do not have a right to a hearing, and appeals of administrative decisions do not have automatic suspensive effect.[10]

7. As of 15 January 2008, the State Commission has examined 1,300 nationalisations and revoked 649 of them. As discussed below (*infra*, ¶¶ 28, 34), denationalisation decisions of the State Commission reviewed by *amici* commonly make two kinds of arguments. First, some decisions allege that the individuals concerned are former members of ARBiH and that therefore their denationalisation is required by Annex IA of the Dayton Accord. Second, some decisions allege that the individuals concerned obtained BiH citizenship improperly because they had *previously* obtained BiH citizenship in 1992; the individuals concerned insist that they have no knowledge of the alleged 1992 nationalisations, and the State Commission has not produced any documentary evidence to support this claim.

[9] Law on Administrative Procedure (BH Gazette, 29/02, 12/04), Arts. 133, 219, 225.
[10] Law on Administrative Disputes of Bosnia and Herzegovina (BH Gazette 19/02), Arts. 29, 18.

8. Deportation proceedings have commenced against some of those denationalised by the State Commission. Some of these individuals, including the named appellant in this case, argue that if deported to their countries of origin, they face the threat of torture or inhuman, cruel, or degrading treatment.

III. Arbitrary Deprivation of Nationality Violates the BiH Constitution and International Law

A. The BiH Constitution's Prohibition on Arbitrary Deprivation of Nationality Reflects a Widely Accepted International Legal Norm and Should be Interpreted in Light of Relevant International Standards

9. Art. I(7)(b) of the BiH Constitution stipulates, "No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless."[11] This provision is binding on all institutions of BiH and the Entities; all legislation, including the Law on Citizenship, must conform to it.

10. This constitutional provision also reflects a widely accepted norm of international law, expressed in many international treaties and declarations and in the *opinio juris* and practice of various states. The prohibition on arbitrary denationalisation was enshrined in international law as early as 1948, when the Universal Declaration of Human Rights (UDHR), which articulates is one of the inspirations of the BiH Constitution,[12] provided that: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[13] More recently, the European Convention on Nationality (ECN) has required that nationality rules be based on the principle, *inter alia*, that "no one shall be arbitrarily deprived of his or her nationality."[14] BiH signed the ECN on 31 March 2006 and is under a legal obligation not to undertake acts that would "defeat [its] object and purpose," pending ratification.[15] The object of the ECN is to

[11] General Framework Agreement for Peace in Bosnia and Herzegovina, Annex IV, Art. I(7)(b).
[12] General Framework Agreement, Annex IV, Preamble.
[13] Universal Declaration of Human Rights, Art. 15(2).
[14] European Convention on Nationality, Art. 4(c).
[15] Vienna Convention on the Law of Treaties, Art. 18. Although one may argue that signing the ECN should not affect a previously adopted law, the *affirmative* extension of the Commission's one-year mandate by OHR *after* the signing of the treaty raises serious questions about BiH's respect for the ECN. See "Decision Enacting the Decision

"establish[] principles and rules relating to the nationality of natural persons … *to which the internal law of States Parties shall conform*" (emphasis added).[16] The prohibition on arbitrary denationalisation in the BiH Constitution reflects the same obligation contained in these documents, using virtually identical language.

11. The widely recognised nature of the norm against arbitrary denationalisation is also apparent from its adoption in various national, regional, and global contexts. Many national court decisions have affirmed the applicability of the norm, often in explicit reference to UDHR Art. 15(2). The Federal Court of Canada recently noted that the norm was binding and reflected customary international law as far back as 1960, citing Art. 15(2).[17] The High Court of Australia[18] and several United States federal courts[19] have relied on Art. 15(2) as evidence of a customary international norm. The Court of Appeals of England and Wales has also cited Art. 15(2) to support the "virtually self-evident" notion that arbitrary deprivation of nationality is *prima facie* a form of persecution for the purposes of the Convention on the Status of Refugees.[20] At the regional level, human rights instruments such as the American Convention on Human Rights[21] and the revised Arab Charter on Human Rights[22] prohibit arbitrary deprivation of nationality, using language virtually identical to the UDHR, ECN, and BiH Constitution. The norm is also continuously reaffirmed at the global level, as apparent from multiple resolutions of the former UN Commission on Human Rights.[23]

Extending the Mandate of the State Commission for the Review of Decisions on Naturalization of Foreign Citizens," OHR, 15 February 2007: http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=39147.

[16] European Convention on Nationality, Art. 1.

[17] *Taylor v. Canada*, 2006 CarswellNat 2702 (Federal Court, 2006). See also *Manzi v. Canada*, 2005 CarswellNat 1805 (Cour d'appel federale 2005).

[18] *Koroitamana v Commonwealth of Australia*, [2006] HCA 28 (2006); *Re Minister for Immigration and Multicultural and Indigenous Affairs v. Ex Parte Amos Bade*, [2005] HCA 36 (2005).

[19] *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002) at 25 (cited as one of "[n]umerous instruments [that] support the proposition that forced exile violates international law"). *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D.Ma. 1995).

[20] *EB (Ethiopia) v. Secretary of State*, [2007] EWCA Civ 809, ¶¶ 66-68.

[21] American Convention on Human Rights, Art. 20(3).

[22] League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), Art. 29(1) ("No one shall be arbitrarily or unlawfully deprived of his nationality").

[23] Human rights and arbitrary deprivation of nationality, C.H.R. res. 2005/45, U.N. Doc. E/CN.4/RES/2005/45 (2005) ("*express*[ing] *deep concern* at the arbitrary deprivation of persons or groups of persons of their nationality"); Human rights and arbitrary deprivation of nationality, C.H.R. res. 1999/28, U.N. Doc. E/CN.4/RES/1999/28 (1999); Human rights and arbitrary deprivation of nationality C.H.R. res. 1998/48, U.N. Doc. E/CN.4//RES/1998/48 (1998); Human rights and arbitrary deprivation of nationality, C.H.R. res. 1997/36, U.N. Doc. E/CN.4/RES/1997/36 (1997).

12. The sources cited above indicate that the BiH Constitution's prohibition on arbitrary denationalisation is not only binding on state and entity institutions, it is also consistent with and reflects a widely recognised principle of international law. Indeed, these sources also strongly support the conclusion that the prohibition is established in customary international law, binding on all states. As such, the norm – and especially the definition of arbitrariness – should be interpreted in light of relevant international standards. Although there is no single universally accepted comprehensive definition of "arbitrariness" with regard to denationalisation, important guidance can be found in international law on citizenship and nationality as well as in attempts to define arbitrariness with reference to other norms in international human rights law.

B. Even When in Accordance with Domestic Legislation, Denationalisation Must Not be Arbitrary

13. It is self-evident that an act of denationalisation not in accordance with domestic law is *prima facie* arbitrary. But according to *international* standards for arbitrariness under human rights law, state acts may still be arbitrary even when they conform to domestic law. The explanatory report of the ECN makes clear that substantive grounds for denationalisation must not only be prescribed by law, but also "foreseeable" and "proportional",[24] and the ECN provides an exhaustive list of permissible grounds for denationalisation (see *infra*, ¶ 16). The UN Human Rights Committee (HRC), the body established by the International Covenant on Civil and Political Rights (ICCPR) to monitor states' compliance with its provisions, has considered the notion of arbitrariness in multiple contexts, including detention, freedom of movement, and interference with privacy, family, or home. In both General Comments interpreting the ICCPR's provisions as well as in its findings on individual complaints, the HRC has repeatedly emphasised that the standard is not reducible to conformity with domestic law. The concept of arbitrariness is intended to emphasise that "*even interference provided for by law* should be in accordance with the provisions, aims and objectives of the [ICCPR] and should be, in any event, reasonable in the particular circumstances" (emphasis added).[25] In considering arbitrary

[24] Explanatory Report of the European Convention on Nationality, ¶ 36.
[25] Gen. Comment No. 27: Freedom of Movement (Art. 27), Human Rights Committee, ¶ 21, 67th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.9 (18 Oct. 1999). *See also* Gen. Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), Human Rights Committee, ¶ 4, 32nd Sess., U.N. Doc. HRI/GEN/1/Rev.1 at 21 (8 Apr. 1988) (stating that "the concept of arbitrariness is intended to

detention in particular, the HRC's analysis of the ICCPR *travaux préparatoires* concludes that "'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability," and that in order not to be arbitrary, a state action must also be "reasonable in all the circumstances."[26] Such reasonable actions "must be proportional to the end sought and be necessary in the circumstances."[27]

14. The strongest international norm limiting states' discretion in their nationality legislation is the absolute prohibition on racial, ethnic, religious, political, and similar discrimination. The 1961 Convention on the Reduction of Statelessness prohibits states from "depriv[ing] any person or group of persons of their nationality on racial, ethnic, religious or political grounds."[28] The International Convention on the Elimination of All Forms of Racial Discrimination forbids discrimination in the right to nationality.[29] Both of these treaties are applicable law in BiH, through both ratification and the Dayton Accord (Appendix to Annex VI) and therefore must shape any interpretation of the prohibition on arbitrary denationalisation in the BiH Constitution. Similarly, the ECN specifies that implementing this norm requires looking beyond the mere letter of the law: "The rules of a State Party on nationality shall not contain distinctions or include *any practice which amount to discrimination* on the grounds of sex, religion, race, colour or national or ethnic origin" (emphasis added).[30]

15. Beyond the prohibition on discrimination, evolving international standards provide some guidance for determining when duly enacted national legislation may nevertheless allow for arbitrary acts of denationalisation. Specifically, states should ensure that "both … the

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guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances")

[26] *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, Human Rights Committee, ¶ 5.8, 39th Sess., U.N. Doc. CCPR/C/39/D/305/1988 (15 Aug. 1990). See also *A. v. Australia*, Communication No. 560/1993, Human Rights Committee, ¶ 9.2, 59th Sess., U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997); CCPR/C/59/D/560/1993 (April 30, 1997) (stating that "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as *inappropriateness* and *injustice*") (emphasis added).

[27] *Toonen v. Australia*, Communication No. 488/1992, Human Rights Committee, ¶ 8.3, 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (4 Apr. 2004).

[28] Convention on the Reduction of Statelessness, Art. 9. BiH ratified the Convention on 13 December 1996.

[29] ICERD, Art. 5(3).

[30] European Convention on Nationality, Art. 5(1).

substantive grounds for deprivation [of nationality] and the procedural safeguards" are not arbitrary.[31] The substantive and procedural aspects of the prohibition of arbitrary denationalisation are discussed below.

C. International Law Generally Recognises a Limited Range of Specific Substantive Grounds for Denationalisation

16. Evolving international norms on nationality as well as longstanding state practice confirm that there is a limited range of permissible substantive grounds for denationalisation. The ECN provides an exhaustive list of permissible grounds for denationalisation that encompasses the generally accepted bases for loss of nationality. Art. 7(1) of ECN stipulates:

> "A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases: (a.) voluntary acquisition of another nationality; (b.) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant; (c.) voluntary service in a foreign military force; (d.) conduct seriously prejudicial to the vital interests of the State Party; (e.) lack of a genuine link between the State Party and a national habitually residing abroad; (f.) where it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled; (g.) adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents."

The exhaustive approach of this provision is clear from the convention's Explanatory Report: "The provision is formulated in a negative way in order to emphasise that … loss of nationality at the initiative of a State Party cannot take place unless it concerns one of the cases provided for under this article."[32] BiH's legal obligation not to undermine the ECN counsels for applying the BiH Constitution in a way that either conforms to the ECN's exhaustive list of substantive grounds for denationalisation or, at the very least, subjects any other substantive grounds to rigorous evaluation on a case-by-case basis to ensure consistency with the object and purpose of the ECN as well as the general standards for arbitrariness in international human rights law mentioned in ¶ 13.

[31] Explanatory Report of the European Convention on Nationality, ¶ 36.
[32] European Convention on Nationality Explanatory Report, ¶ 58.

17. In evaluating whether the denationalisation provisions of the Law on Citizenship conform to the BiH Constitution, the practice of other states and the conclusions of major treatises on the subject are also relevant. A recent survey of laws on loss of nationality amongst 24 (mostly European) states[33] reveals that grounds for denationalisation in all of them conform to the categories enumerated by ECN, although there may be deviations arising from differences in wording.[34] These findings confirm the work of earlier major treatises on comparative nationality law with regard to the limited and specific nature of grounds for denationalisation. Paul Weis' classic work, *Nationality and Statelessness in International Law*, surveyed nationality legislation in a number of states and found five common bases for denationalisation: entry into foreign civil or military service or acceptance of foreign distinctions; departure or sojourn abroad; conviction for certain crimes; political attitude or activities; and racial and national grounds (subsequently clearly prohibited under international law).[35] In more recent years, Ruth Donner's *The Regulation of Nationality in International Law* found the following common grounds for denationalisation: naturalisations acquired by fraud; failure to abandon allegiance to country of origin in cases of war with said country; engaging in actions against the security of the nation; prolonged sojourn abroad denoting severance of link with the country; participation in activities in foreign countries generally reserved for nationals of those countries; lack of good character, denoted by criminal convictions after naturalisation; disloyal acts, especially in times of war.[36] These surveys confirm that longstanding state practice on denationalisation generally conforms to the authorised categories enumerated by the ECN, as should any such legislation in BiH.

D. Robust Procedural Safeguards are Necessary to Prevent Arbitrary Denationalisation

[33] G.-R. de Groot, "Loss of nationality: a critical inventory," in *Rights and duties of dual nationals: evolution and prospects*, ed. D. Martin and K. Hailbronner (Hague: Kluwer Law International, 2003), pp. 201-299. The states surveyed were: Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Mexico, Moldova, Netherlands, Norway, Portugal, Poland, Spain, Sweden, Switzerland, Turkey, UK, and the US.

[34] Only Mexico (obviously not party to the ECN) allows for denationalisation on grounds outside of those envisioned by the ECN, by providing that naturalisation decrees may be nullified if not all conditions for naturalisation were fulfilled or if naturalisations were issued in violation of the country's Nationality Act. The concerned individual must still be allowed to give his opinion on the matter. *Ibid.*, p. 220.

[35] P. Weis, *Nationality and statelessness in international law* (Alphen ann den Rijn: Sijthoff & Noordhoff, 1979[1956]), pp. 118-19.

[36] R. Donner, *The regulation of nationality in international law* (Irvington-on-Hudson: Transnational Publishers, 1994), pp. 151-2.

18. To ensure that denationalisations are not arbitrary – i.e., that they are reasonable, proportionate, necessary, and based on predictable grounds (see ¶ 13, *supra*) – procedural safeguards must include, at a minimum, the right to a fair hearing by a competent and independent tribunal as well as a right of appeal. In the context of nationality and statelessness, the BiH's obligations under the Convention on the Reduction of Statelessness require that denationalisation be in accordance with laws that "shall provide for the person concerned the right to a fair hearing by a court or other independent body."[37]

19. The ECHR enshrines rights to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in determining an individual's "civil rights and obligations" (Art. 6). This provision has been interpreted to exclude matters concerning nationality, on the grounds that "civil rights and obligations" refers only to private law issues whereas nationality matters would be considered to fall in the realm of state actions governed by "public law."[38] This interpretation comes from the now-defunct European Commission of Human Rights, which found in a two-page 1971 decision that "it is a prerogative of the State to regulate citizenship and the relevant rules constitute public law," though the Commission did not explain its reasoning or cite any authorities for its interpretation.[39] The European Court of Human Rights has subsequently adopted this position, though without explicitly reviewing its merits.[40] This has produced a strange outcome whereby individuals are entitled to procedural protections in purely private litigation but not in many proceedings "*vis à vis* the administration, where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State."[41] Moreover, the European Court's own jurisprudence has elsewhere substantially eroded the more general distinction between public law and private rights, including numerous cases where state action was found to fall under the umbrella of "civil rights."[42]

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[37] Convention on the Reduction of Statelessness, Art. 8(4).
[38] *Imad Al Husin*, 5 April 2007, AP-746/07, ¶¶ 7-10.
[39] *X. v. Austria*, Eur Comm H.R. 5212/71.
[40] See, e.g., *Soc v. Croatia*, ECtHR 47863/99 at 6.
[41] *Maaouia v. France*, ECtHR 39652/98 (Loucaides, dissenting).
[42] See, e.g., *Le Compte, Van Leuven and De Meyere v Belgium*, ECtHR 6878/75 (suspension of medical licenses), *Raimondo v Italy*, ECtHR 12945/87 (land confiscation); *Skärby v. Sweden*, ECtHR 14/1989/174/230 (application of planning laws), *Guchez v. Belgium*, 40 D.R. 109 (Eur. Comm. H.R. 1984) (right to practice architecture as profession); *Lombardo v. Italy*, ECtHR 12490/86 (judge's right to pension).

20. While the ECHR by itself may not require Art. 6 procedural guarantees for acts of denationalisation, the BiH *constitutional* norm against arbitrary denationalisation strongly favours the applications of Art. 6 guarantees. This Court has embraced Art. 6 as establishing benchmarks for general procedural fairness: "[E]ven if some rights could clearly be classified as being in the field of public law which falls outside the scope of Article 6 of European Convention, it is necessary, within the national framework, to secure the minimum procedural guarantees of the conduct of proceedings in accordance with Article 6 … ."[43] This application of Art. 6 to public law acts is grounded in a concern over protecting individuals from the overwhelming power of arbitrary state action. This Court has "reiterate[d] that the individual must be protected from the arbitrary actions of the state and that *any* failure in this regard may call for an application of Article 6 of the European Convention. The main purpose of this Article, as well as of the entire European Convention, is indeed the protection of individuals from the arbitrary actions of the state" (emphasis added).[44] Moreover, this Court has elsewhere rejected a narrow reading of the term "civil rights" as excluding public law issues, sensibly finding that the right to stand in a parliamentary election was a "civil right" deserving of Art. 6 procedural guarantees.[45] Loss of nationality, even more so than the right to stand in an election, implicates the concerns over the potentially devastating effects of arbitrary state power and, by the Court's past reasoning, should be accompanied by the procedural guarantees of Art. 6.

21. Recent jurisprudence of other regional human rights bodies suggests an emergent norm concerning fair trial rights for deprivation of citizenship. The Inter-American Court of Human Rights recently found that Art. 8 of the American Convention on Human Rights – which guarantees the "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the determination … of his rights of a civil, labor, fiscal, or other nature" – applies in the context of denationalisation.[46] In the case before it, the Inter-American Court found at least three violations of Art. 8: the state's failure to inform the individual concerned of the allegations against him; the

[43] *Meat Industry «Lijanovići» LLC*, 28 Nov 2003, U-148-03, ¶ 51.
[44] *Ibid.*, ¶ 52.
[45] *DEPOS – Demokratski pokret Srpske*, 29 Sept 2006, AP-2679/06, ¶ 21.
[46] *Ivcher Bronstein v. Peru*, Inter-Am. Ct. H.R., ¶¶ 103-4, (Ser. C) No. 74 (2001).

inability of the individual concerned to present witnesses to support his position; and the sudden change, on a "temporary basis," of the composition of the relevant judicial organ that would be charged with reviewing the decision.[47] The absence of any of these basic features of notice, ability to present evidence on one's behalf, and predictability of process should be sufficient to render an act of denationalisation arbitrary. The Inter-American Court's approach provides a useful example of how procedural guarantees can be fairly and practically applied to denationalisation proceedings elsewhere.

22. Adequate procedural safeguards against arbitrary denationalisation require not only a fair hearing, but also a robust right of appeal. The ECN also stipulates: "Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law."[48] The right of appeal "has indeed been estimated to be of prominent importance."[49]

IV. Denationalisation for the Sole Purpose of Expulsion Violates the BiH Constitution and Protocol 4 of the European Convention on Human Rights

23. Article II(2) of the BiH Constitution stipulates: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. *These shall have priority over all other law*" (emphasis added). Although ECHR does not explicitly protect the right to nationality, the European Court of Human Rights noted in *Naumov v. Albania* that "in some cases the revocation of the citizenship followed by expulsion may raise potential problems under Article 3 of Protocol No. 4" of the ECHR,[50] which provides, "No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national."

[47] *Ibid.*, ¶¶ 106-7, 113-5.
[48] ECN, Art. 12.
[49] European Convention on Nationality Explanatory Report, ¶ 87.
[50] *Naumov v. Albania*, ECtHR 10513/03, p. 8.

24. A useful and relevant precedent in determining when denationalisation may violate Protocol 4 is the ruling of the Human Rights Chamber of BiH ("Chamber") in the *Boudellaa et al.* case. The *Boudellaa* case considered, *inter alia*, the legality of the denationalisation of a group of BiH citizens of Algerian origin before their handover to U.S. forces, who subsequently transferred them to indefinite detention in Guantánamo Bay, Cuba. The Chamber declared denationalisation a violation of ECHR Protocol 4, Art. 3, if undertaken for the "sole purpose" of expulsion. The Chamber reached this conclusion based on reading the absolute prohibition on the expulsion of nationals in conjunction with ECHR Art. 17, which provides that "[n]othing in this Convention may be interpreted as implying … any right to engage in an activity or perform any act aimed at the destruction of any of its rights and freedoms." Otherwise, the Chamber argued, "if States could simply withdraw the citizenship of one of their citizens in order to expel him without being in violation of Article 3 of Protocol No. 4 to the Convention, then the protection of the right enshrined in that provision would be rendered illusory and meaningless."[51]

V. The Amended Law on Citizenship and the Practices of the State Commission Violate BiH's International Legal Obligations, the BiH Constitution, and BiH Law

A. The State Commission Exercises Sweeping Denationalisation Powers Under the 2005 Amendments, Violating the Constitutional Prohibition Against Arbitrary Denationalisation

25. The core of the 2005 amendments to the Law on Citizenship is the State Commission's power to denationalise individuals in situations where the "regulations in force in the territory of Bosnia and Herzegovina at the time of the naturalisation had not been applied" (Art. 41(4)(a)).[52] This power to denationalise in cases of regulatory impropriety is extraordinarily broad. The language of the provision refers to *any* regulation, not simply immigration or citizenship rules. It requires neither any intent on behalf of the individual to have violated BiH law nor knowledge that the appropriate regulations were not applied; indeed, the individual need not have been the

[51] *Hadž Boudellaa et al. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, CH/02/8679, ¶¶ 192-3.

[52] The law further stipulates that denationalisations on this basis may not proceed if the individual had "clear" ignorance of the impropriety and neither engaged in any conduct that would otherwise justify denationalisation nor concealed any "relevant facts" contrary to regulations on the status of persons in BiH (Art. 41(7)). Without the right to a hearing, however, applicants are unable to raise such claims on their own, leaving these rules essentially toothless.

cause of the impropriety. Under a plausible reading of this provision, a clerical error in the naturalisation process of which the applicant was neither aware nor even the cause can be grounds for denaturalisation.

26. As discussed above (*supra*, ¶¶ 13, 16), relevant international standards provide at least three different benchmarks for assessing the potential arbitrariness of substantive grounds for denationalisation: (a.) if substantive grounds are not among the enumerated grounds for denationalisation given in ECN Art. 7(1); (b.) if they are outside the enumerated categories of ECN Art. 7(1) and are inconsistent with the ECN's object and purpose; or (c.) if they exhibit general characteristics of arbitrariness under international human rights law, such as unpredictability, lack of proportionality, and unreasonableness under the circumstances.

27. The power to denationalise in cases of regulatory impropriety does not remotely resemble any of the substantive grounds for denationalisation enumerated in ECN Art. 7(1). It does not conform to any of the denationalisation provisions of the 24 mostly European countries surveyed in 2003.[53] Moreover, the breadth of the regulatory impropriety provision is a recipe for unforeseeable and disproportionate outcomes; therefore, it exhibits general characteristics of arbitrariness under international human rights law. Such sweeping discretion is not necessary given the State Commission's ample power to denationalise on other grounds, such as fraud, lack of "genuine link," prohibited foreign military service, or failure to meet naturalisation requirements (Art. 41(4)).

28. Concerns over the breadth of Art. 41(4)(a) of the Law on Citizenship are not merely hypothetical. Most of the decisions of the State Commission examined by *amici* invoke Art. 41(4)(a) to support the argument that individuals violated Art. 3, Annex IA, of the Dayton Accord and thus committed a regulatory impropriety justifying denationalisation.[54] Art. 3 required the withdrawal of forces "not of local origin" from BiH as well as "foreign Forces,

[53] The closest thing to the regulatory impropriety provision is the Mexican rule allowing the revocation of nationalisations obtained in violation of the country's nationality act (see fn 34, *supra*). Yet even this is much narrower (as it applies to violations of only one law as opposed to *any* regulation) and allows for greater procedural guarantees (by requiring that the concerned individual be able to state his position on the matter).

[54] See, *inter alia*, UP-01-07-99-2/06 (Imad Al Husin); UP-01-07-18-2/06 (Fadhil Al Hamdani); UP-01-07-23-2/06 (Abdelilah Karrache); UP-01-07-25-2/06 (Aiman Awad); UP-01-07-100-2/06 (Zoheir Choulah); UP-01-07-373-2/06 (Mounir Hanouf).

including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighboring and other States." Thus, according to the State Commission, naturalised citizens in the ARBiH who remained in the country after the deadline specified in Art. 3 violated a "regulation[] in force" in the sense of Art. 41(4)(a) of the Law on Citizenship and thus may thus be denaturalised.

29. The State Commission's practice is arbitrary for at least three reasons: First, the Art. 3 provision requiring the withdrawal of "foreign Forces" cannot be plausibly read to include naturalised BiH *citizens*.[55] Second, such a strained reading of Art. 3 – which does not mention denationalisation but speaks only of physical "withdrawal" – would conflict directly with other explicit provisions of the Dayton Accord requiring compliance with the absolute prohibition against expelling citizens enshrined in ECHR Protocol 4 (see also *infra*, ¶ 36). The BiH Constitution (which is also part of the Dayton Accord) makes clear that ECHR and its protocols are not only applicable in BiH but "shall have priority over all other law" (Art. II(2)). Multiple other provisions of the Dayton Accord explicitly require BiH to comply with ECHR and its protocols as well as with the Constitution.[56] Third, the State Commission's mandate allows it to review nationalisations only according to regulations "in force … *at the time of the naturalisation*" (Art. 41(4)(a), emphasis added) – yet the naturalisations cited above all took place *before* the withdrawal deadline specified by Art. 3. These decisions of the State Commission purport to resolve complex and serious questions of statutory and treaty interpretation with unclear reasoning and virtually no reference to statutes or court decisions, and (as discussed below) without any meaningful participation by the individuals concerned. These are all hallmarks of arbitrariness as understood in international human rights law and as applicable to the BiH constitutional prohibition against arbitrary denationalisation. Both the

[55] The Law on Citizenship provides that citizenship may be lost by international agreement (Art. 16(e)). This provision cannot serve as a basis for the State Commission's interpretation of Dayton, however, since the plain language of Art. 3 says nothing about denationalising BiH citizens and because the powers of Art. 16(e) are not included in the State Commission's mandate.

[56] General Framework Agreement for Peace in Bosnia and Herzegovina, Art. 7 ("Parties agree to and *shall comply fully* with the provisions concerning human rights," including ECHR Protocol 4, emphasis added); Art. 5 ("The Parties shall *fully respect and promote* fulfillment" with the Constitution, emphasis added); Annex 6, Art. 1 ("The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols").

breadth of Art. 41(4)(a) of the Law on Citizenship as well as the actions undertaken pursuant to it described above are thus incompatible with Art. I(7)(b) of the BiH Constitution.

B. The Lack of Fair Hearing and Meaningful Appeal Violates the Constitutional Prohibition Against Arbitrary Denationalisation and the Law on Administrative Procedure

30. The State Commission fails to provide any significant procedural safeguards. Individuals are required to submit their nationalisation and other relevant papers and then receive a decision by post or through publication in the official gazette. There is no other form of notice, participation, or hearing, and the deliberative process of the State Commission is not open.

31. As mentioned above (¶ 20, *supra*), precedents of this Court and relevant international standards make clear that implementing the constitutional prohibition against arbitrary denationalisation requires the use of procedural guarantees outlined in Art. 6 of the ECHR, including a hearing before an impartial and independent tribunal. Moreover, the lack of a hearing conflicts with the Law on Administrative Procedure, which requires that proceedings be public unless explicitly provided for by law (Art. 7). The Law on Administrative Procedure also accords parties the rights to a hearing (Arts 10, 140-149), to participate in the determination of disputed or unclear facts that are dispositive (Arts. 133-134), and to inspect relevant case files (Art. 72). Although the Law on Administrative Procedure may be displaced by specific laws regulating special procedural issues, such legislation must be both "necessary for acting differently as per these issues" and "may not be in contradiction with the principles" of the Law on Administrative Procedure (Art. 2). The 2005 amendments cannot be read to have displaced the general requirements of the Law on Administrative Procedure, since they do not describe – let alone seek to justify as necessary – any such derogations. Moreover, the lack of any meaningful participation of individuals in the citizenship review process clearly violates such principles of the Law on Administrative Procedure as participation, transparency, and reasonableness.

32. The 2005 amendments also eliminated the standard remedy of administrative appeals governed by Arts. 15, 213-237 of the Law on Administrative Procedure.[57] The only recourse for a person who is denationalised by the State Commission is to file an administrative dispute in the State Court, subject to the Law on Administrative Disputes. Unlike administrative *appeals* (which are directed to administrative agencies), administrative *disputes* (which are directed to the State Court) do not guarantee individuals the right to a hearing, and administrative disputes do not have automatic suspensive effect.[58] This is largely because the State Court's administrative-disputes mechanism is designed to review decisions *after* they have become "final" within the administrative procedure process (Law on Administrative Disputes, Art. 8).

33. The abolition of the right to administrative appeal from decisions of the State Commission conflicts with Art. 15(1) of the Law on Administrative Procedure: "A party shall have the right to [administrative] appeal against a decision taken in the first instance. Only the law may provide that in certain administrative matters an appeal shall not be allowed, and this *only if the protection of rights and rule of law is ensured in some other way*" (emphasis added). The 2005 amendments do not offer any adequate substitute for administrative appeals and the rights they protect, including the right to a hearing. Indeed, the State Court's less thorough administrative-disputes process is further impaired if it can rely only on the factual record produced by the State Commission – itself the outcome of non-transparent proceedings that effectively excluded the individuals in question.

34. The problems caused by the lack of any procedural guarantees in the State Commission's practice are most obvious in decisions reviewed by *amici* alleging that individuals were improperly naturalised because they failed to disclose *previous* naturalisations in 1992.[59] This failure to disclose the alleged 1992 naturalisations, according to the State Commission, constitutes concealment of relevant facts contrary to the regulations on the status of persons in BiH, which is grounds for denationalisation under Art. 41(4)(b) of the Law on Citizenship. On this basis, the decisions therefore revoke *both* naturalisations. All of the individuals in question

[57] Law on Citizenship, Art. 41(8).
[58] Law on Administrative Disputes, Arts. 29, 18.
[59] See, *inter alia*, UP-01-07-99-2/06 (Imad Al Husin); UP-01-07-23-2/06 (Abdelilah Karrache); UP-01-07-25-2/06 (Aiman Awad).

argue that the alleged 1992 naturalisations are fabricated, but without the right to a hearing, they are unable to present their arguments and unable to force the State Commission to substantiate its claims. Indeed, in at least one prior case of denationalisation by the Ministry of Internal Affairs of the Federation of BiH based on the same factual allegations, the Supreme Court of the Federation of BiH determined that the alleged 1992 naturalisation was "fictitious" and unsupported by any records or documentation.[60] Moreover, the State Commission explains nowhere in the decisions reviewed by *amici* why the invalidity of the alleged *second* naturalisations is a reason to cancel the alleged *first* naturalisations. Finally, insofar as the alleged first naturalisations were granted before independence, they are outside the temporal mandate of the State Commission and cannot be revoked by it (Law on Citizenship, Art. 40(1)).

35. In sum, the 2005 amendments create a mechanism by which an individual may be divested of citizenship and then can seek review but without ever having the right to present evidence or arguments before a competent and impartial tribunal. This situation cannot be acceptable in light of this Court's holding that "[i]n cases where a decision is adopted by administrative bodies, there must be an opportunity to contest the same before a court which functions in accordance with Article 6 of European Convention."[61] The State Commission's lack of any procedural guarantees and the short-circuited review mechanism for the State Commission's decisions violate Arts. 2 and 15(1) of the Law on Administrative Procedure, respectively, and are incompatible with Art. I(7)(b) of the BiH Constitution. Any future denationalisation procedure contemplated by the Parliamentary Assembly should at a minimum adhere to Art. I(7)(b) of the BiH Constitution, ECHR Art. 6, and the Law on Administrative Procedure and include rights to a hearing by an impartial and independent tribunal and access to an adequate appeal mechanism.

C. <u>The State Commission's Denationalisations on the Basis of the Dayton Accord Violate Protocol 4 of the European Convention on Human Rights</u>

36. Denationalisation for the sole purpose of expulsion is tantamount to exiling an individual from the territory of a state of which she is a national, in violation of ECHR Protocol 4, Art. 3 and therefore of Art. II(2) of the BiH Constitution (discussion *supra*, ¶¶ 23-4). As noted above

[60] *Imad Al Husin*, U-4454/01, 7 June 2006.
[61] *Meat Industry «Lijanovići» LLC*, ¶ 49.

(*supra*, ¶ 29), the State Commission relies heavily on an improper reading of Annex IA, Art. 3, of the Dayton Accord as a basis for depriving some individuals of their citizenship. As the very purpose of the provision is to *remove* forces and individuals from BiH territory, the logic of the State Commission's decisions dictates that full compliance with Art. 3 would require not only denationalisation, but deportation as well. Denationalisation in these cases is thus being undertaken for the sole purpose of expulsion and therefore violates ECHR Protocol 4.