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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Constitutional Court of Bosnia and Herzegovina

Case U 5/98 Partial Decision III Issue of the "Constituent Peoples"

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 58 and 59 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session on 30 June and 1 July 2000, adopted the following

PARTIAL DECISION

A. With regard to the Constitution of Republika Srpska:

The Constitutional Court declares the following provisions or parts of provisions unconstitutional

a) Paragraphs 1, 2, 3 and 5 of the Preamble, as amended by Amendments XXVI and LIV

b) the wording "State of the Serb people and" of Article 1, as amended by Amendment XLIV.

B. with regard to the Constitution of the Federation of Bosnia and Herzegovina

The Constitutional Court declares the following parts of provisions unconstitutional

a) the wording "Bosniacs and Croats as constituent peoples, along with Others, and" as well as "in the exercise of their sovereign rights" of Article I.1 (1), as amended by Amendment III.

The provisions or parts of provisions of the Constitutions of Republika Srpska and the Federation of Bosnia and Herzegovina which the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina cease to be valid from the date of the publication in the Official Gazette of Bosnia and Herzegovina.

This decision shall be published in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina and the Official Gazette of Republika Srpska.

REASONS

Proceedings before the Constitutional Court

1. On 12 February 1998 Mr. Alija Izetbegović, at that time Chairman of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for the purpose of evaluating the consistency of the Constitution of Republika Srpska (hereinafter called "the RS Constitution") and the Constitution of the Federation of Bosnia and Herzegovina (hereinafter called "the Federation Constitution") with the Constitution of Bosnia and Herzegovina (hereinafter called "the BiH Constitution"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' constitutions he regards as unconstitutional. The applicant requested the Constitutional Court to review the following provisions of the Entities constitutions:

A. With regard to the RS Constitution:

a) The Preamble insofar as it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence and the will and determination to link their State with other States of the Serb people;

b) Article 1, which provides that Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2, insofar as it refers to the so-called border between Republika Srpska and the Federation;

d) Article 4, which provides that Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its member republics, as well as Article 68, which, under item 16, provides that Republika Srpska shall regulate and ensure co-operation with the Serb people outside the Republic;

e) Article 6, paragraph 2, insofar as it provides that a citizen of Republika Srpska cannot be extradited;

f) Article 7, insofar as it refers to the Serb language and Cyrillic alphabet being in official use;

g) Article 28, paragraph 4, which provides for material State support of the Orthodox Church and the co-operation of the State and the Orthodox Church in all fields, in particular for the preservation, fostering and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2, which provides that foreign citizens and stateless persons may be granted asylum in Republika Srpska;

i) Amendment LVII, item 1, which supplements the Chapter on Human Rights and Freedoms and which provides that, in the case of differences between the provisions on rights and freedoms of the RS Constitution and those of the BiH Constitution, the provisions which are more favourable to the individual shall be applied;

j) Article 58, paragraph 1, Article 68, item 6 and the provisions of Articles 59 and 60 insofar as they refer to different forms of property, the bearers of property rights and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1, which provides that the President of Republika Srpska shall perform tasks related to defence, security and relations with other States and international organizations, and Article 106, paragraph 2, according to which the President of Republika Srpska shall appoint, promote and recall officers of the Army, judges of military courts and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers on the President of Republika Srpska the competence to appoint and recall heads of missions of Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers on the Government of Republika Srpska the right to decide on the establishment of the Republic's missions abroad;

m) Article 98, according to which Republika Srpska shall have a National Bank, as well as Article 76 paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers on the National Bank the competence to propose statutes related to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which authorizes organs of Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of Bosnia and Herzegovina.

B. With regard to the Federation Constitution

a) Article I.1 (1), insofar as it refers to Bosniacs and Croats as being constituent peoples.

b) Article I.6 (1), insofar as it refers to Bosnian and Croat as official languages of the Federation;

c) Article II.A.5 (c), as modified by Amendment VII, insofar as it provides for dual citizenship;

d) Article III.1 (a), insofar as it provides for the competence of the Federation to organize and conduct the defence of the Federation;

e) Article IV.B.7 (a) and Article IV.B.8, insofar as they entrust the President of the Federation with the task of appointing heads of diplomatic missions and officers of the military.

2. The request was communicated to the National Assembly of Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998 the National Assembly of Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina submitted its answer on 9 October 1998.

3. In accordance with the Constitutional Court's decision of 5 June 1998, a public hearing before the Constitutional Court was held in Sarajevo on 15 October 1998, at which representatives and experts of the applicant and of the House of Representatives of the Federation presented their views on the case. The public hearing was continued in Banja Luka on 23 January 1999. The applicant was represented in the public hearing by Prof. Dr. Kasim Trnka and the expert Džemil Sabrihafizović, the House of Representatives of the Federation by Enver Kreso and the expert Sead Hodžić, the House of Peoples of the Federation by Mato Zovko and

the expert Ivan Bender, and the National Assembly of Republika Srpska by Prof. Dr. Radomir Lukić and the expert Prof. Dr. Petar Kunić. On that occasion arguments were presented by representatives and experts of the applicant, the House of Representatives and the House of Peoples of the Federation as well as the National Assembly of Republika Srpska.

4. Deliberations on the case took place in the following sessions of the Court: on 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and on 5 and 6 November 1999. At its session held on 3 and 4 December 1999, the Court concluded to start with the deliberation and voting in the present case at the following session, on the basis of the prepared Draft Decision.

5. At its session on 29 and 30 January 2000 the Court adopted unanimously a first partial decision in the case (Official Gazette of Bosnia and Herzegovina, No. 11/00, Official Gazette of the Federation of Bosnia and Herzegovina, No. 15/00 and Official Gazette of Republika Srpska, No. 12/00).

6. At its session on 18 and 19 February 2000 the Court adopted a second partial decision in the case (Official Gazette of Bosnia and Herzegovina, No. 17/00, Official Gazette of the Federation of Bosnia and Herzegovina, No. 26/00 and Official Gazette of Republika Srpska, No. /00).

7. Pursuant to the Court's decision of 5 May 2000, the public hearing was reopened in Sarajevo on 29 June 2000 on the remaining part of this case. The applicant was represented by Prof. Dr. Kasim Trnka and the expert Džemil Sabrihafizović, the House of Representatives of the Federation by Enver Kreso and the expert Sead Hodžić and the National Assembly of Republika Srpska by Prof. Dr. Radomir Lukić and the expert Prof. Dr. Petar Kunić. The representative and the expert of the House of Peoples of the Federation, having been invited to participate according the Court's Rules of Procedure**,** did not participate in the public hearing.

8. Deliberations were continued at the session of the Court on 30 June and 1 July 2000 and votes were taken, on the following provisions:

A. With regard to the RS Constitution:

a) The Preamble, as amended by Amendments XXVI and LIV, insofar as it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence and the will and determination to link their State with other States of the Serb people;

b) Article 1, as amended by Amendment XLIV which provides that Republika Srpska is a State of the Serb people and of all its citizens;

B. With regard to the Federation Constitution

a) Article I.1 (1), as amended by Amendment III, insofar as it refers to Bosniacs and Croats as being constituent peoples.

Admissibility

9. The Court declared the entire request admissible in its Partial Decision in the case of 29 and 30 January 2000 (Official Gazette of Bosnia and Herzegovina, No. 11/00, Official Gazette of the Federation of Bosnia and Herzegovina, No. 15/00 and Official Gazette of Republika Srpska, No. 12/00).

III. Merits

A. With regard to the Constitution of Republika Srpska

a) The challenged provisions of the **Preamble to the RS Constitution**, as amended by Amendments XXVI and LIV, read as follows:

„Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

[...]

Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people;

Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States;"

10. The applicant argues that the quoted provisions of the Preamble are not in conformity with the last *paragraph* of the Preamble to the BiH Constitution, Article II.4, Article II.6 and Article III.3 (b) of the BiH Constitution, since according to that Constitution there are three constituent peoples - Bosniacs, Croats and Serbs - who, together with other citizens, exercise their sovereign rights on the whole territory of Bosnia and Herzegovina without being discriminated against on any ground such as, inter alia, national origin. He also refers to Article 1 of the RS Constitution in order to support his claim that the Preamble to the RS Constitution is not in line with the BiH Constitution. Consequently, in his opinion, it is not justified to call Republika Srpska a national State of only Serb people. Moreover, Republika Srpska could not be called a state "in its full capacity" since it is called an entity in Article I. 3 of the Constitution of BiH.

11. The National Assembly of Republika Srpska mainly raised the objection in its written statement that the Preamble is not an operative part of the RS Constitution and has no normative character. The same would hold true for the Preamble of the Constitution of BiH since it does not form part of the Constitution *stricto sensu* and has, therefore, no normative character. In its opinion the text of a preamble can serve only as an auxiliary method in the interpretation of the constitution of which it is a preface. It may therefore not serve as a basis for the review of the RS Constitution. In the course of the public hearings the representative and expert of the National Assembly furthermore invoked several scholarly opinions on the normative character of the Preamble of the US Constitution and Hans Kelsen's viewpoint that preambles "usually" do not determine any specific norms for human behavior and are, therefore, lacking any legally relevant content, being more of an ideological than legal character. Moreover, they quoted from the Final Award of the Brčko Arbitration that the preamble to the General Framework Agreement for Peace (GFAP) "did not itself create a binding obligation" for the parties. In conclusion, a preamble would not have any normative character since neither individual rights nor specific obligations of the state authorities would follow from its text.

12. Furthermore, the Assembly responded in its written statement that there are many provisions in the RS Constitution which prohibit discrimination and that the word “State” may well be used for a “political-territorial unit” with a constitution which is called a republic. Using the term “state” also in Article 1 of the RS Constitution would not allude to independence of the RS. In the course of the public hearings the representative and expert of the National Assembly also invoked some articles of the BiH Constitution in order to prove the statehood quality of the entities attributed by this Constitution itself, insofar as Article III.3 (a) of the BiH Constitution would refer to “state functions” of the Entities and Article I.7 would speak of the “citizenship” of the Entities. Being questioned the representative of the National Assembly reaffirmed that the RS has to be seen not as a state in terms of public international law, but in those of constitutional law.

13. Finally, the expert of the National Assembly of the RS outlined that the sovereignty of the Entities would be an essential characteristic of their statehood and that the Dayton Peace Agreement acknowledged the territorial separation. Moreover, their peoples would have a collective right of “self-organization” of their own state so that the entities would act “according to the decisions taken at the level of the common institutions only if they conform with their own interests.” And the expert of the National Assembly of RS concluded in the public hearing: “It is entirely clear that the RS can be called a state because her statehood is the expression of her original, united, historical national movement, of her nation which has a united ethnic basis and forms an independent system of power in order to live really independently, although as an independent entity in the framework of a complex state community.”

14. Contrary to these positions the expert of the House of Representatives of the Federation parliament outlined in the public hearing that Bosnia and Herzegovina is “the” state and no part of the Constitution nor any of the Annexes of the GFAP would call the entities anything else than entities. From the point of view of public international law only BiH was the state which continues to exist under its name BiH, however with “its internal structure modified.” Thus, the principle of territorialization of sovereignty, in particular the right to secession could not be applied in a multi-ethnic community. Contrary to the wording “state function” in the translation used by the expert of the National Assembly of RS, the English text of Article III.3 (a) of the Constitution of BiH would read “governmental functions.” And since there are a number of institutions, such as municipalities or notaries, which certainly do not enjoy the attribute of statehood although they exercise governmental powers, it follows that entities could even exercise “state functions” without being states.

15. The representative of the applicant further outlined in the public hearing that indeed different positions in constitutional theories exist as to whether the preamble of a constitution has normative character or not. However, it would be undisputed that a preamble forms part of a constitution if it includes either constitutional principles or clear regulations of certain matters or if the preamble was adopted by the same institution under the same procedure. Moreover, he invoked the Decision of the Constitutional Council of the Republic of France of 16 June 1971, according to which the provisions of the Preamble of the French Constitution do have a normative and binding character.

16. In response to the applicant's statement the representatives of the National Assembly of RS outlined that this example is the only exception to the general rule that a Preamble does not form part of a constitution since the French Constitution does not include provisions on human rights and freedoms in the normative part of the Constitution and the preamble thus, by referring to the French Declaration of the Rights of Man and Citizens, incorporates those provisions into the Constitution. The Preamble of the Constitution of BiH, however, would - neither in form nor

substance - meet the requirements of legal norms and could thus never serve as a constitutional basis to review the Entities' constitutions.

The Constitutional Court finds:

17. As far as the normative character of preambles of constitutions is concerned, two intimately linked questions were raised by the objections of the representatives of the National Assembly of Republika Srpska in their conclusion that this Court is not responsible to review both the Preamble of the Constitution of RS as well as other provisions of the constitutions of the Entities in light of the text of the Preamble of the Constitution of BiH: firstly whether a preamble not being included into the "normative" part of the constitution is an "integral" part of the text of that constitution and secondly, whether it can have normative character at all since preambular language would not determine rights or obligations.

18. As far as the scholarly opinions on the legal nature of preambles of constitutions in general are concerned which were quoted by the representatives of the parties in abstracto, it is certainly not the duty of this Court to decide on such scientific debates, but to restrain itself to the judicial adjudication of the dispute before it. Hence, the Constitutional Court has to decide on the basis of the Constitution of BiH and its context within the GFAP. In this regard the Court is not convinced by the reference of the representative of the National Assembly to the Award in the Brčko arbitration. It is true that the reasoning of the tribunal starts at para. 82 with the wording "that preambular language [i.e. to the GFAP], however, did not itself create a binding obligation; ... ". However, the argument goes on that the "parties' obligations appear in the text of the GFAP, which modified the 51:49 parameter (by including a slightly different distribution) and left unresolved the territorial allocation in the Brčko corridor area. That lack of resolution is the reason for this arbitration. In short, the GFAP has ratified neither continued RS control of the disputed area nor territorial continuity for the RS." Seen from the context of the entire argumentation that the commitment to certain Pre-Dayton "Agreed Basic Principles" in the Preamble to the GFAP did not create specific obligations of the parties since this was left to the arbitration according to Annex II, it is therefore simply an overgeneralization of the party in this dispute before the Constitutional Court to conclude that a Preamble or even the Preamble to the GFAP has no normative force as such.

19. Contrary to the constitutions of many other countries, the Constitution of BiH in Annex 4 of the Dayton Agreement is an integral part of an international agreement. Therefore, Article 31 of the Vienna Convention of the Law on Treaties -- providing for a general principle of international law which is, according to Article III.3 (b) of the Constitution of BiH, an "integral part of the law of Bosnia and Herzegovina" -- has to be applied for the interpretation of all its provisions, including the Constitution of BiH. The relevant provisions of this article read as follows:

"Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[…]"

According to the wording of paragraph 2 of that Article the text which has to be interpreted includes the preamble and annexes. Hence, the Preamble of the Constitution of BiH must be seen as an integral part of the text of the Constitution.

20. The same holds true for the Preamble of the RS Constitution, but for another reason since the text of the Preamble of the RS Constitution was modified by Amendments XXVI and LIV (Official Gazette of the RS, No. 28/94 and No. 21/96) whereby it was expressis verbis stated that "these amendments form an integral part of the Constitution of Republika Srpska [...]"

21. It is, by the way, also a circular reference in the argumentation of the representatives of the National Assembly of RS that the text of a preamble is not an "integral part" of the respective constitution with the underlying assumption that it has no "normative" character since it is separated from the "normative" part of the constitution. The entire question is thus reduced to the problem of the normative character of constitutional provisions as such.

22. Already in Partial Decision I in the case, at para. 10 (Official Gazette of Bosnia and Herzegovina, No. 11/00, Official Gazette of the Federation of Bosnia and Herzegovina, No. 15/00 and Official Gazette of Republika Srpska, No. 12/00) the Constitutional Court held that its power of judicial review does not depend on the number of contested provisions, nor that there is any normative difference between provisions and "fundamental principles" of the Constitution.

23. What is, however, the "nature" of constitutional principles to be found both in the provisions of the preamble and the so-called "normative part" of a constitution? As the Canadian Supreme Court held in "Reference re Secession of Quebec" [1998], 2.S.C.R. at paragraphs 49 through 54, "these principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.... Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. [...] The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions." Thus, "the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments." And answering the rhetorical question what use the Supreme Court may make of these underlying principles incorporated into the Constitution by the preamble, the Court reaffirmed its position held in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997], 3.S.C.R.3, at para. 95: "As such, the preamble is not only a key to construing the express provisions of the Constitution Act, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law."

24. Finally, by referring to the principle of a "promotion of a market economy" according to paragraph 4 of the Preamble to the Constitution of BiH, this Constitutional Court also held in Partial Decision II in the case, at para. 13 (Official Gazette of Bosnia and Herzegovina, No.

17/00, Official Gazette of the Federation of Bosnia and Herzegovina, No. 26/00 and Official Gazette of Republika Srpska, No. /00) that the Constitution of BiH contains "basic constitutional principles and goals for the functioning of Bosnia and Herzegovina which must be seen as constitutional guidelines or limitations for the exercise of the responsibilities of Bosnia and Herzegovina as well as the Entities." Moreover, already in case U-1/98 (Official Gazette of Bosnia and Herzegovina, No. 22/98) the Court concluded from Article VI.3 first sentence of the Constitution of BiH -- that the Constitutional Court shall uphold this Constitution -- the principle of effectivity of the entire text of the Constitution which must apply therefore also to the Preamble. Hence, the "normative meaning" of the Preamble of the Constitution of BiH cannot be reduced to an "auxiliary method" in the interpretation of that very same constitution.

25. In conclusion, it cannot be said thus in abstract terms that a preamble has no normative character as such. This argument of the representatives of the parties is therefore no sound argument to contest the responsibility of the Constitutional Court to review the Entities´ constitutions in light of the text of the Preamble of the Constitution of BiH.

26. Since any provision of an Entity's constitution has to be consistent with the Constitution of BiH, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank than the Constitution of BiH as long as the aforesaid Preamble contains constitutional principles delineating -- in the words of the Canadian Supreme Court -- spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are then not merely descriptive, but are also invested with a normative powerful force thereby serving as a sound standard of judicial review for the Constitutional Court. It has thus to be established *in substance* by the Constitutional Court which specific rights or obligations follow from the constitutional principles of the preambles of both the Constitution of BiH and the RS Constitution.

27. The Constitutional Court observes that the Preamble of the RS Constitution, as amended after the Dayton Agreement had been signed, refers to the "inalienable right of the Serb people to selfdetermination" in order to decide "independently" on its political and "State status" in paragraph 1, to "State independence" in paragraph 2, to "create its democratic State" in paragraph 3 and to a "democratic right, will and determination of the Serb people from Republika Srpska [...] to link its State completely and tightly with other States of the Serb people" in paragraph 5. Speaking in express terms of a "right of the Serb people" and of "state status" and "independence" of RS, the Court cannot see that the text of the Preamble of the RS Constitution is of a merely descriptive character since these constitutional provisions in conjunction with Article 1 of the RS Constitution obviously determine collective rights and the political status of Republika Srpska.

28. Moreover with regard to the question, whether Entities can be called states due to their sovereignty, as the expert of the National Assembly of RS has outlined, the Court finds that the existence of a constitution, the name of "Republic", or citizenship are not >per se< proof of the existence of statehood. Although it is quite often the case also in federal states that their component entities do have a constitution, and that they might even be called a republic or do grant citizenship, all these institutional elements are granted or guaranteed by the Federal constitution. The same holds true for Bosnia and Herzegovina.

29. Article I.1 of the Constitution of BiH clearly establishes the fact that only Bosnia and Herzegovina continues "its legal existence under international law as a state, with its internal structures modified as provided herein." In consequence, Article I.3 establishes two so-called Entities, the Federation of Bosnia and Herzegovina and Republika Srpska as component parts of the state of Bosnia and Herzegovina. And, as can be seen from Article III.2 (a) of the BiH Constitution for instance, the Entities are subject to the sovereignty of Bosnia and Herzegovina.

Despite examples of component units of Federal states which are also called states themselves, in the case of Bosnia and Herzegovina it is thus clear hat the BiH Constitution did not recognize Republika Srpska and the Federation of Bosnia and Herzegovina as "states", but called them "Entities" instead.

30. Hence, contrary to the assertions of the representatives of the National Assembly of RS, the Constitution of BiH does not give room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation." Citizenship of the entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their "sovereign" statehood. In the same way the "governmental functions", according to Article III.3 (a) of the Constitution of BiH, are thereby allocated either to the common institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH.

31. The ideas of a collective right of "self-organization" so that "decisions taken at the level of the common institutions" have to be administered "only in case they conform with the Entities' interests" do neither conform with the legislative history nor the text of the Dayton Constitution. Moreover, the claim of the expert of the National Assembly of BiH that the RS can be called a state because of the "historic national movement, of her nation with a uniform ethnic basis forming an independent system of power" must be taken as proof that the challenged provisions of the Preamble of the RS Constitution, in connection with the wording of Article 1, do "aim at the independence of the RS". This can be seen in particular also from the language of Item 8 of the "Declaration on Equality and Independence of Republika Srpska" of the National Assembly of Republika Srpska on 17 November 1997 (Official Gazette of Republika Srpska, No. 30/97):

> *"8. The* National Assembly of Republika Srpska stresses again its determination *to contribute in every way, on the basis of the Agreement on Special and Parallel Relations between the* FR Yugoslavia *and* Republika Srpska*, to the strengthening of the relations of the Serb people from the two sides of the river Drina, and* to its final union*.*
>
> *The National Assembly is hereby warning about the creation of alliances of such forces in Republika Srpska and in Yugoslavia that are in favor of the further dismembering of Yugoslavia and disintegration of Republika Srpska, which never supported this Agreement, and which must be identified by the people. Their goal is never to see* Republika Srpska and Yugoslavia united into one state*, to leave the Serb people eternally disunited and divided into regions of some kind, separated from the orthodox religion and our traditional, spiritual and historic values. Their goal is to assimilate Republika Srpska into a unitary BiH.*
>
> *[...]"*
>
> *(emphasis added)*

The quotation of this paragraph in full length reveals the obvious context of this passage of the Declaration of the National Assembly of RS, namely the power-play between the two factions of the SDS at this time. Nevertheless, this is an official act of the legislative organ of the RS which, in particular through this indirect way, clearly reveals the intent of the legislative body. It could

be argued, of course, that this intent must be seen in light of the power-play at that specific time. But this official act of the National Assembly of RS, published in the Official Gazette of RS, was never formally declared invalid nor renounced in any other way by the newly elected assemblies until the decision of this Court and can therefore serve as proof for the "intent" of the legislative body of the Republika Srpska with which the text of the Preamble of the Constitution of RS must be interpreted.

32. The Constitutional Court thus finds that all the references in the provisions of the Preamble of the RS Constitution to sovereignty, independent decision-making, a state status, state independence, the creation of a state and to completely and tightly linking RS with other States of the Serb people violate Article I.1 in conjunction with 3, Article III.2 (a) and 5 of the Constitution of BiH which provide for the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina so that it is not necessary for the Court in this context to review the contested provisions of the Preamble of the RS Constitution in light of the text of the Preamble of the Constitution of BiH, in particular its paragraph referring to Bosniacs, Croats and Serbs as constituent peoples.

33. The Constitutional Court thus declares paragraphs 1, 2, 3 and 5 of the Preamble of the RS Constitution unconstitutional.

b) The challenged provision of Article 1 of the RS Constitution in the wording of Amendment XLIV reads as follows:

"Republika Srpska shall be the State of the Serb people and of all its citizens."

34. The applicant argues that the said provision is not in line with the last paragraph of the Preamble of the BiH Constitution and with Article II.4 and Article II.6 of the BiH Constitution. He claims that, according to the said provisions of the BiH Constitution all the three peoples, namely Bosniacs, Croats and Serbs, are constituent peoples on the whole territory of BiH. Consequently, the RS could not be determined as a national state of only one people - the Serb people. Moreover, today's functioning of the RS on that basis, i.e. as a "nationally exclusive" power, would prevent the realization of the fundamental rights of all expelled persons to return to their homes of origin in order to restore the national structure of the population which had been disturbed by war and ethnic cleansing.

Arguments of the Parties relating to the question whether Bosniacs, Croats and Serbs have to be considered constituent peoples also on the level of the Entities:

Arguments with regard to the unclear meaning of the term "constituent people" and the legislative history:

35. With regard to the meaning of the signature of Annex 4 by the representative of the Federation of BiH "in the name of its constituent peoples and citizens" the expert of the applicant outlined that there was already the Washington Agreement which had established the constituent status of Bosniacs and Croats on the territory of the Federation. The formula given by the declaration was a result of the wish to secure by this signature the legal continuity of the constituent peoples from the Washington to the Dayton Agreement.

36. The representative of the applicant further supported in the public hearing the claim that all the three peoples must be constituent on the entire territory of BiH with the fact that "the statehood of BiH had always been founded on the equality of peoples, religions, cultures and citizens which traditionally live on this territory." Throughout the entire history of BiH ethnic criteria had never been applied to organize the state structure, nor had national territories been an

element of the constitutional order. According to the last census of 1991 a multi-ethnic society existed on the entire territory of BiH.

37. The expert of the House of Peoples of the Federation Parliament outlined in the public hearing that, in the arbitration process, the international community certainly had the existence of three constituent peoples in mind and that the constituent status was determined in the way it is written in the respective constitutions. When drafting the Washington Agreement and the Constitution of BiH there was no intention to define a third constituent people in the Federation. If somebody wanted to establish the constituent status of the three peoples in the Entities, already the name of the RS would have been an obstacle.

38. The representative of the National Assembly of the RS stated in the public hearing that it was of no use to discuss the constituent status insofar as it was nowhere established in the normative part of the Constitution as a legal principle or norm. He stressed that the right to collective equality which is concluded from the term “constituent people” the applicant derives is nowhere mentioned in the human rights documents.

39. Furthermore he raised the objection that the last sentence of the Preamble of the Constitution of BiH does not literally state that Bosniacs, Croats and Serbs are constituent on the entire territory of BiH. By adding the wording „on the entire territory” the meaning of the entire sentence was significantly changed. In his opinion the constituent status of one or two peoples in one Entity does not mean that they are not constituent in Bosnia and Herzegovina, but quite the other way round: “If a people is constituent in one of the Entities, then it is constituent in Bosnia and Herzegovina also, insofar as the Entities form the territory of BiH.” However, nowhere in the Constitution could a provision be found that all peoples are constituent in the Entities.

40. Moreover, this could “never be the case” if the adoption procedure of the Constitution of BiH was taken into consideration as well as the process of creating the Entities as special territorial units in the framework of BiH: The re-establishment of common state structures, in his opinion, happened first between two constituent peoples, the Bosniacs and the Croats who created the Federation of BiH by the Washington Agreement of 1994 and whose Constitution explicitly mentions that only Bosniacs and Croats are constituent in this community whereas Republika Srpska remained apart until September 1995. She then participated in New York and Geneva as an equal member when the basic principles on the future state community were determined. On that occasion the existence of Republika Srpska was recognized by the statement that she will continue to exist in conformity with today’s Constitution under the condition of amendment with the stated principles. And finally, it came to the Dayton Agreement which was concluded by representatives of the former Bosnia and Herzegovina, the Federation of BiH and Republika Srpska. It was signed on behalf of the Federation by the authorized person with the formula that “the Federation of BiH adopts the Constitution of BiH in Annex 4 of the General Agreement in the name of her constituent peoples and citizens.” It thus follows in the opinion of the expert of the National Assembly “beyond doubt that the Serb people is constituent only in the RS” since they are not mentioned in the Federation Constitution. Therefore the last sentence of the Preamble of the Constitution of BiH means beyond doubt that Serbs, Bosniacs, Croats and other citizens are constituent at the level of Bosnia and Herzegovina when they decide on matters within the competence of the common institutions which had, by consensus of the Entities, been allocated to them through the Constitution of BiH, but not when they decide on original responsibilities of the Entities. It would therefore be obvious that Bosniacs and Croats are not constituent in the RS, whereas Serbs are not constituent in the Federation of BiH.

Arguments relating to the institutional structures of the common institutions of BiH:

41. According to the written statement of the National Assembly of the RS the Constitution of BiH itself determines the RS as the electoral unit for the Serb member of the Presidency and for the five Serb delegates to the House of Peoples of the Parliamentary Assembly of BiH. These provisions guarantee the national equality of Serbs in relation to the other two nations, whose representatives in the same bodies are elected from the Federation of BiH and not from the RS.

42. In response to this statement the representatives of the applicant and the House of Representatives of the Federation Parliament pointed out that exactly those provisions of the BiH Constitution guarantee the constituent status and thereby the equality of all the three peoples on the entire territory of BiH since they are equally represented in those institutions whose power is exercised on the entire territory of BiH. The electoral mechanisms for these institutions were, however, of only a technical nature.

Arguments relating to the interpretation of the "authentic text" of Article 1 of the RS Constitution:

43. The expert of the National Assembly raised the objection in the public hearing that the text of Article 1 of the RS Constitution neither defines the Serb people as constituent nor does it determine that the RS is a national state of only the Serb nation, but that the authentic text would read quite differently, namely "the RS is the state of the Serb people and all other [sic!] citizens". In contrast to the allegations of the applicant, the text of the contested provision would thus have a different meaning.

44. On the question whether the definition of Article 1 of the RS Constitution could be seen as a compromise formula in the conflict between individual rights and group rights, the representative of the applicant answered that the term "konstitutivnost" was broader than individual rights of members of a people, but narrower than sovereignty. Sovereignty would require exclusive power on a certain territory including the right to self-determination and secession. According to the representative's view, however, it is impossible to exercise the principle of territorialisation of sovereignty or the right to secession in a multi-national community such as Bosnia, having regard in particular to the high degree of balance and mixture of the national structures. Consequently, the term "konstitutivnost" would rather guarantee collective national rights and full national equality between the peoples.

Arguments relating to the function of the Dayton Agreement:

45. The representative of the applicant outlined in the public hearing that it is not a coincidence that the provision of the BiH Constitution which follows upon the provision on the state structure of Bosnia and Herzegovina (Article I) demands that Bosnia and Herzegovina and the Entities "ensure the highest level of internationally recognized human rights and fundamental freedoms" (Article II). Long- lasting stabilization in this region was thus precisely built on respect for human rights and freedoms.

46. The representative of the House of Peoples of the Federation Parliament repeated his objections as regards the admissibility of the present request also in relation to the function of the Dayton Peace Agreement. He stated that the review of the constitutions of the Federation of BiH and of the RS would lead to a total revision of the Dayton Agreement. The basic goal of the GFAP in its present form which has been accepted both by the RS and the Federation of BiH is in fact to secure peace in this region. And he concluded: "The constituent status of all the three peoples in both Entities would return Bosnia and Herzegovina into a position of 1991, when all the three peoples had been constituent according to the former Constitution of BiH. It is not necessary to repeat how this finished ... The applicant seems to forget what has happened in BiH during the eight years which have passed since."

Arguments of the Parties relating to the question whether Article 1 of the RS Constitution results in discrimination in the enjoyment of individual rights :

47. In the public hearing the representatives of the applicant further outlined that Article 1 distinguishes members of the Serb people and citizens, thereby creating two distinct categories of persons. This would lead to an "automatic exclusion" of non-Serb persons. Moreover, following the privileged position of the Serb people according to Article 1, the RS Constitution would then "reserve" certain rights for members of the Serb people only, namely the right to self-determination, the cooperation with Serb people outside the RS, the privileged position of the Orthodox Church and the "exclusive right" to use the Serb language officially although the equality of languages in the institutions of BiH would be a minimum standard so that everything below this standard means discrimination. This fact and the ethnically uniform executive power of the RS – for which Article 1 would provide the legal basis – would prevent the return of expelled persons and the restoration of property as well as the restoration of a multi-ethnic society. In particular the return of refugees is seen by the representatives of the applicant not only as an individual right, but also as an essential element of the constitutional order with the goal to re-establish the multi-ethnic composition of the population according to the census of 1991 before the war started.

48. The representatives of the National Assembly of the RS argued in the public hearing that individual equality is guaranteed by a number of provisions of the RS Constitution such as Articles 10, 16, 19, 33, 34, 45 and 48 and, with particular regard to Article II.6 of the BiH Constitution, that Article 1 of the RS Constitution would certainly not prohibit the enjoyment of human rights as required by the quoted Article of the BiH Constitution. In conclusion, no provision of the RS Constitution would prevent any non-Serb citizen from enjoying all his rights equally nor would there be any provision preventing a non-Serb from holding a public office on the ground of national origin.

49. Furthermore, the representatives of the National Assembly of the RS reminded the parties of the text of Article 1 of the RS Constitution arguing that exactly the compromise formula would ensure that every non-Serb is equal and that in actual fact also non-Serb persons can participate in the executive power. As far as the return of refugees is concerned the expert of the National Assembly outlined that the entire history of the RS has to be taken into account and that the return of refugees is a much more complex problem, including the social and economic conditions, so that this problem could not be reduced to a question of discrimination against citizens of non-Serb origin.

The Constitutional Court finds:

50. As far as the "ordinary meaning" (Article 31, para.1 of the Vienna Convention of the Law on Treaties) of the term "constituent people" is concerned the Court finds it established - as outlined by the representatives of the National Assembly of RS – that there is neither a definition of the term "constituent peoples" under the BiH Constitution nor that the Preamble's last sentence expressis verbis includes the phrase "on the entire territory."

51. However, with regard to the question elaborated by the Court supra (at para. 23 to 26) whether the last line of the Preamble, in particular the designation of "Bosniacs, Croats and Serbs, as constituent peoples (along with Others)," contains a constitutional principle in conjunction with other provisions which might serve as a standard of review, the Court finds:

52. However vague the language of the Preamble of the Constitution of BiH may be because of this lack of a definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i. e. as peoples. Moreover, Article II.4 of

the Constitution prohibits discrimination on any ground such as, inter alia, association with a national minority and presupposes thereby the existence of groups conceived as national minorities.

53. Taken in connection with Article I of the Constitution, the text of the Constitution of BiH thus clearly distinguishes constituent peoples from national minorities with the intention to affirm the continuity of Bosnia and Herzegovina as a democratic multi-national state which remained, by the way, undisputed by the parties. The question thus raised in terms of constitutional law and doctrine is what concept of a multi-national state is pursued by the Constitution of BiH in the context of the entire GFAP and, in particular, whether the Dayton Agreement with its territorial delimitation through the establishment of the two Entities also recognized a territorial separation of the constituent peoples as argued by the RS representatives?

54. First, Article I.2 of the Constitution of BiH determines that Bosnia and Herzegovina shall be a democratic state which is further specified then by the commitment in paragraph 3 of the Preamble "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society." This constitutional commitment, legally binding for all public authorities, cannot be isolated from other elements of the Constitution, in particular the ethnic structures, and must therefore be interpreted by reference to the structure of the Constitution as a whole (see, Canadian Supreme Court "Reference re Secession of Quebec" [1998], 2.S.C.R., at para 50). Therefore, the elements of a democratic state *and* society and the underlying assumptions -- pluralism, fair procedures, peaceful relations following from the text of the Constitution -- must serve as a guideline to further elaborate the question as to how BiH is construed as a democratic multi-national state.

55. It is not by chance, that the Canadian Supreme Court outlined in re Secession of Quebec, [1998], 2.S.C.R., at para. 64 that the Court must be guided by the values and principles essential to a free and democratic society which embodies, inter alia, respect for the inherent dignity of the human person, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. Moreover, it is a generally recognized principle to be derived from the list of international instruments in Annex I to the Constitution of BiH that a government must represent the whole people belonging to the territory without distinction of any kind thereby prohibiting -- in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of BiH through Annex I -- a more or less complete blockage of its effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-national state, democratic decision-making would be transformed into ethnic domination of one ore even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them thereby enabling a numerical minority represented in governmental institutions to enforce its will on the majority forever.

56. In conclusion, it follows from established constitutional doctrine of democratic states that democratic government requires -- beside effective participation without any form of discrimination -- compromise. It must be concluded thus under the circumstances of a multi-national state, that representation and participation in governmental structures -- not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights -- does not violate the underlying assumptions of a democratic state.

57. Moreover, it must be concluded from the texts and underlying spirit of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities that not only in national states, but also in the context of a multi-national state such as

BiH the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, not a legitimate aim in a democratic society. It is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as determined by Article I.2 of the Constitution of BiH in conjunction with paragraph three of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but - quite contrary - must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.

58. The differentiation of collective equality as a legal notion and a minority position as a matter of fact is also reflected in the explanatory report of the European Charter of Regional and Minority Languages which has to be applied in BiH according to Annex I of the Constitution of BiH. Although Article 1 of the Charter clearly distinguishes official languages from minority languages, the explanatory report under the heading of "Basic concepts and approaches" outlines at para. 18 that the term "minority" refers to situations in which the language is spoken either by persons who are not concentrated on a specific part of the territory of a state or by a group of persons, which, though concentrated on part of the territory of the state, is numerically smaller than the population in this region which speaks the majority language of the state: "Both adjectives therefore refer to factual criteria and not to legal notions."

59. Even if constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats and Serbs as constituent peoples by the Constitution of BiH can only have the meaning that none of them is constitutionally recognized as a majority, or, in other words, that they enjoy equality as groups. It must thus be concluded in the same way as the Swiss Supreme Court derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups that the recognition of constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II.3 and 4 of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities.

60. In conclusion, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation.

61. It is beyond doubt that the Federation of Bosnia and Herzegovina and Republika Srpska were -- in the words of the Dayton Agreement on Implementing the Federation, signed in Dayton 10 November 1995 -- recognized as "constituent Entities" of Bosnia and Herzegovina by the GFAP, in particular through Article I.3 of the Constitution. But this recognition does not give them a carte blanche! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination, national homogenisation or a right to uphold the effects of ethnic cleansing.

62. Moreover, contrary to the arguments of the representatives of the National Assembly of RS and the House of Peoples of the Federation, the legislative history and the text of the Dayton Constitution obviously show that the then existing constitutions of the Entities had not been accepted as such without considering the necessity of amendments. It was stated in the Agreed

Basic Principles of Geneva, 8 September 1995, under paragraph 2. sub-paragraph 2 that "Each entity will continue to exist under its present constitution", however, as "amended to accommodate these basic principles." And this principle was further elaborated in the constitutional system of Dayton by the supremacy clause of Article III.3 (b) - according to which "the Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, [...]" - as well as the obligation of the Entities according to Article XII paragraph 2 that "Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b)."

63. Moreover, insofar as the term constituent peoples was inserted into the draft text of the Dayton Constitution only at a later stage of the negotiations, it must thus be concluded that the adopters of the Dayton Constitution would not have designated Bosniacs, Croats and Serbs as constituent peoples in marked contrast to the constitutional category of a national minority if they wanted to leave them in such a minority position in the respective Entities as they had, in fact, obviously been placed in at the time of the conclusion of the Dayton Agreement as can be seen from the figures presented below. Had the adopters of the Constitution recognized this fact they would not have inserted their designation as constituent peoples with the underlying assumption of their collective equality or they would have omitted the phrase of constituent peoples altogether insofar as the provisions on the ethnic composition of the common institutions of BiH refer to Bosniacs, Croats and Serbs directly and do not need an additional designation as **"**constituent**"** peoples. Again this designation in the Preamble must thus be seen as an overarching principle of the Constitution of BiH with which the Entities, according to Article III.3 (b) of the Constitution of BiH, have fully to comply.

64. **With regard to the institutional structures of the common institutions of BiH** the Court does not share the arguments of the representatives of the National Assembly of RS and the House of Peoples of the Federation that the provisions of the BiH Constitution concerning the composition of the two Houses of the Parliamentary Assembly of BiH, the Presidency, the Council of Ministers and the Constitutional Court as well as the respective electoral mechanisms allow for the generalizing conclusion that these representation mechanisms mirror the territorial separation of the constituent peoples in the Entities.

65. A strict identification of territory and certain ethnically defined members of common institutions in order to represent certain constituent peoples is not even true for the rules on the Presidency composition as laid down in Article V, first paragraph: "The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of Republika Srpska." One must not forget that the Serb member of the Presidency, for instance, is not only elected by voters of Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation. He thus represents neither Republika Srpska as an entity nor the Serb people only, but all the citizens of the electoral unit Republika Srpska. And the same is true for the Bosniac and Croat Members to be elected from the Federation.

66. In a similar, but in no way identical, manner Article IV.1 of the Constitution of BiH provides that the House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from Republika Srpska (five Serbs) to be "selected" (sic!), according to sub-paragraph (a), by the Croat and Bosniac Delegates to the House of Peoples of the Federation, whereas the Delegates from Republika Srpska shall be selected by the National Assembly of Republika Srpska. Apart from the difference that they shall be "selected" by the respective parliamentary bodies of the Entities and not directly "elected" like the members

of the Presidency of BiH by popular vote, the Court finds it a striking difference that the Serb Delegates shall be selected by the National Assembly as such without any differentiation along ethnic lines. This provision therefore includes a constitutional guarantee that non-Serb Members of the National Assembly have the same right as the Serb Members to participate in the selection of the five Serb Delegates to the House of Peoples of BiH. Hence, there is no strict uniform model of ethnic representation underlying these provisions of the BiH Constitution. Had this been the intent of the framers of the Constitution, they would not have regulated these selection processes differently.

67. The same conclusions can be drawn from the composition of the House of Representatives of BiH. Again two-thirds of the 42 Members shall be elected this time from the territory of the Federation, one-third from the territory of Republika Srpska. However, these provisions do not prescribe the ethnicity of the candidates and, in actual fact, Bosniac Members were elected from the territory of the RS and Serb Members from the territory of the Federation in the last general election in 1998. Insofar as a certain number of Ministers shall be appointed from the territory of the Federation or the RS according to Article V.4 (b), whereas certain numbers of members of the Constitutional Court have to be elected by the respective parliamentary bodies of the entities according to Article VI.1 (a), all these provisions show nothing else but the fact that either the territory or specific institutions of the entities serve as legal point of reference for the selection of the members of the institutions. This is again obvious for the Ministers who are finally elected by the House of Representatives of BiH which certainly does not represent one, two or even all of the three constituent peoples only, but all the citizens of BiH regardless of their national origin.

68. Moreover, no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH can be applied also for other institutions or procedures. Quite on the contrary, insofar as these special collective rights might violate the non-discrimination provisions as will be shown below, they are legitimised only by their constitutional rank and therefore have to be narrowly construed. In particular, it cannot be concluded that the BiH Constitution provides for a general institutional model which could be transferred to the Entity level or that similar ethnically defined institutional structures on Entity level need not meet the overall binding non-discrimination standard according to Article II.4 of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples.

69. Of course, it cannot be denied on the basis of this analysis of the institutional structures of the common institutions of BiH that all the three constituent peoples are, in somewhat different ways, given special collective rights as far as their representation and participation in the institutions of BiH are concerned. In the final analysis, however, there is certainly no specific model of ethnic representation underlying the provisions on the composition of the institutions and the respective electoral mechanisms which would allow for the generalizing conclusion that the Constitution of BiH represents a territorial apportionment of constituent peoples on entity level by regulating the composition of the common institutions of BiH. Hence, this institutional system certainly does not prove or give a constitutional basis for upholding the territorial apportionment of the constituent peoples on Entity level.

70. **With regard to the "authentic text" of Article 1 of the RS Constitution**, the representatives of the National Assembly of RS correctly outlined that this provision neither calls the Serb people a "constituent people" nor defines the RS as a "national" state of the Serb people only. The Court finds that it contains indeed a compromise formula calling the RS a >state< of the Serb people and all its citizens - not "other" (sic!) citizens as the representative had outlined in the public hearing, this lapsus linguae being revealing enough of the spirit underlying the contested provision - thereby using a mix of the ethnic and non-ethnic principle for the

legitimation of exercising the governmental powers and functions of the Entity. Furthermore, it is true that the RS Constitution does not *prima facie* provide for any ethnic distinction in the composition of the governmental bodies so that the compromise formula of Article 1 in connection with this institutional structure might allow for the equal representation of all citizens.

71. This conclusion, however, starts from a wrong point of comparison insofar as equality of groups is not the same as equality of individuals through non-discrimination. Equality of the three constituent peoples requires equality of the groups as such whereas the mix of the ethnic principle with the non-ethnic principle of citoyenneté in the compromise formula should avoid that special collective rights violate individual rights by definition. It thus follows that individual non-discrimination does not substitute equality of groups. Quite on the contrary, the regulations of Article 1 of the RS Constitution, in particular in connection with other provisions such as the rules on the official language, according to Article 7 of the RS Constitution and Article 28 paragraph 3 which declares the Serb Orthodox Church the Church of the Serb people --thereby creating a constitutional formula of identification of Serb "state", people and church -- put the Serb people into a privileged position which cannot be legitimised since the Serb people are neither on the level of Republika Srpska nor on the level of Bosnia and Herzegovina in the factual position of an endangered minority which has to preserve its existence. The privileged position of the Serb people under Article 1, therefore, violates the express designation of constituent peoples made by the BiH Constitution as already outlined above (see supra at para 52).

72. **With regard to the functional interpretation of the Constitution of BiH**, the Court does not share the views presented by the National Assembly and the House of Peoples representatives that reviewing the Entities' constitutions as requested by the applicant would lead to a revision of the Dayton Peace Agreement and of the status quo of the then existing Federation and RS "in order to keep peace on these territories." The Court has already pointed out that the Entities' constitution had not been accepted as such by the Parties to the Agreement (see paragraphs 61 and 62).

73. Indeed, from the functional point of view, the Dayton Constitution is part of a peace agreement as the name "General Framework Agreement on Peace in Bosnia and Herzegovina" clearly indicates. Thus, as can be seen already from the wording of Article VII of the GFAP and the Preamble, alina 1 to 3 of the BiH Constitution "peaceful relations" are best produced in a "pluralist society" on the basis of the enjoyment of human rights and freedoms and, in particular, through the freedom of all refugees and displaced persons to return to their homes of origin as guaranteed by Article II.5 of the Constitution of BiH. Moreover, this provision explicitly refers also to Annex 7 which in its Article I expressis verbis states that "the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina." It thus follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby to re-establish the multi-ethnic society which had existed before the war without any territorial separation with ethnic inclination.

74. In the final analysis, based on the text of the Preamble in connection with the institutional provisions of the Dayton Constitution, regarding the legislative history and taking the functions of the entire GFAP – of which the Constitution is a part - into due account, the Constitutional Court finds that the provision of Article 1 of Republika Srpska Constitution violates the constitutional status of Bosniacs and Croats designated to them through the last line of the Preamble and the positive obligations of the RS which follow from Article II.3 (m) and II.5 of the Constitution of BiH.

75. It would thus not be necessary for the Constitutional Court to pursue the allegation of the applicant that Article 1 of the Constitution of RS is also discriminatory by providing the constitutional basis for the violation of individual rights in a discriminatory manner as prohibited by Article II.4 of the Constitution of BiH. However, insofar as the request of the applicant is not only concerned about the collective equality of the constituent peoples, but also with the discrimination against individuals, in particular against refugees and displaced persons regardless of their ethnic origin, the Court will review Article 1 of the RS Constitution also in light of this allegation of the applicant.

76. Hence, the Court will, first of all, elaborate the standard of review in more detail.

77. The language of Article II.4 of the Constitution of BiH obviously follows the text of Article 14 of the ECHR with an adaptation insofar as the list of rights and freedoms whose enjoyment shall be secured is concerned: “The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

78. As follows from this text, this list includes both the rights and freedoms provided for in Article II itself and those in the international agreements listed in Annex I to the Constitution. Hence, these are the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols as follows from the reference in paragraph 3, including the rights enumerated in the same paragraph. Moreover, paragraph 5 of Article II includes particular individual rights for all refugees and displaced persons freely to return to their homes of origin and to have restored to them property of which they were deprived in the course of hostilities since 1991. These individual rights provided for in paragraph 5 are, however, not different or additional rights, but a special affirmation of the right to property, the right to liberty of movement and residence and the right not to be subjected to inhuman or degrading treatment already enumerated in paragraph 2 of Article II of the Constitution of BiH.

79. Moreover, as follows from the reference in Article II.5 to Annex 7 of the General Framework Agreement, its further elaboration of the criteria of the non-discrimination rule has to be taken into account. In particular its Article I.3 (a) regulates that the parties, i.e. also the Entities, have to repeal all “legislation and administrative practices with discriminatory intent or effect.” How is it possible thus to show discriminatory “intent or effect”? There are, of course, several ways the following of which have certainly to be pursued:

a) the law discriminates on its face, i.e., by its explicit terms using the criteria such as language, religion, political or other opinion, national origin, association with a national minority or any other status for the classification of categories of people which will then be treated differently on that basis. However, it would lead to obviously absurd results if every difference on those grounds were prohibited. There are situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities are sometimes needed to correct factual inequalities. Hence, the European Court of Human Rights elaborated as standard of interpretation that the principle of equality of treatment is violated if the distinction has no reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. Hence, a difference of treatment in the exercise of a right must not only pursue a legitimate aim with regard to the principles which normally prevail in democratic societies. The non-discrimination provision is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

The proportionality principle thus requires four steps of consideration: whether there is a reasonable public aim, whether the means employed can achieve the legitimate goal, whether the means are necessary, i.e. the least burdensome means to achieve the goal, and, finally, whether the burdens imposed are proportional in comparison to the intensity of the aim.

b) the law, although neutral on its face, is administered in a discriminatory way;

c) the law, although it is neutral on its face and is applied in accordance with its terms, was enacted with a purpose of discriminating, as shown by the law's legislative history, statements made by legislators, the law's disparate impact, or other circumstantial evidence of intent;

d) the effects of past de jure discrimination are upheld by the respective public authorities on all state levels, not only by their actions but also through their inaction.

80. The last rule obviously shows that the non-discrimination provision is not restricted to a strictly >negative< individual right not to be discriminated against by the public authorities, but also includes >positive< obligations to take action. That this is a particular responsibility of the Entities can already be seen from Article III.2 (c) of the Constitution which rules that "the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate." And with particular intent to provide for the creation of suitable conditions for the return of refugees and displaced persons Article II.1 of Annex 7 poses the obligation on the parties to undertake "to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group." The list of measures, enumerated in Article I.3 (a), then specifies this general positive obligation including not only the repeal of domestic legislation and administrative practices with discriminatory intent or effect, as already quoted above, but also "the protection of ethnic and/or minority populations" against acts of retribution by public officials as well as private individuals.

81. In the final analysis, all public authorities in BiH have not only to refrain from any act of discrimination in the enjoyment of the individual rights and freedoms referred to, in particular on the ground of national origin, but also a positive obligation to protect against discriminatory acts of private individuals and, with regard to refugees and displaced persons, to create the necessary political, social and economic conditions for their harmonious reintegration.

In light of these standards the Court finds:

82. It is true that the RS Constitution contains a number of specific provisions which provide for the prohibition against discrimination in the enjoyment of those individual rights of the RS Constitution as are quoted by the representatives of the National Assembly of RS. Although this must be seen as a necessary requirement, the proclamation of non-discrimination is, however, in light of the above elaborated criteria of review by no means sufficient. Moreover, these non-discrimination provisions related to the list of rights of the RS Constitution cannot "per se" guarantee the effective enjoyment of the rights listed in the Constitution of BiH, the ECHR, or the international instruments listed in Annex 1 to the Constitution of BiH.

83. With regard to the first standard of review – that Article 1 must not discriminate on its face by using national origin for the classification of different categories of persons which will then be treated differently without reasonable justification – the Court cannot follow the allegations of the representatives of the applicant that the wording of Article 1 would lead to an "automatic

exclusion" of persons of non-Serb origin. It is the very nature of the compromise of the ethnic and non-ethnic principle for the legitimation of the exercise of >state<-power that this formula of Article 1 does not create two distinct, mutually exclusive categories of persons. A contrary interpretation would lead to the obviously absurd result that in particular members of the Serb people would >ex constitutione< not be citizens of the RS.

84. Nevertheless, the first element of the provision -- "Republika Srpska shall be the state of the Serb people" -- must trigger strict scrutiny with regard to the other standards of review. Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence such as the comparison of population figures or the numbers of returns which shows such a disparate impact as to indicate that the effects of past de jure discrimination, in particular of ethnic cleansing, are upheld by the authorities or that they violate their obligation to provide for protection also against violence of private individuals and to create the respective "political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group"?

85. With regard to the factual situation in the RS, the Constitutional Court could, according to Article 22 of its Rules of Procedure, ascertain the following facts:

86. As far as population figures are concerned, the number of Bosniacs, Croats, Serbs and "others" living on the territory of the RS is as follows:

Ethnic Breakdown of the Population on Republika Srpska territory according to 1991 Census in comparison with 1997 (Source, IMG, on the basis of the 1991 census and UNHCR estimates for 1997).

	1991	1997
Serbs	**54.30 %**	**96.79 %**
Bosniacs	**28.77 %**	**2.19 %**
Croats	**9.39 %**	**1.02 %**
Others	**7.53 %**	**0.00 %**

87. As can be seen from these figures, the ethnic composition of the population living on the territory of the RS dramatically changed since 1991. Had the Serb population made up a small absolute majority in 1991 as far as the statistics for a hypothetical territory of RS are concerned, they did not live territorially concentrated. The territory where the RS was established later under the GFAP did form an area with "mixed population" as this was the case all over the territory of the former Republic of Bosnia and Herzegovina. Due to massive ethnic cleansing in the course of the war prior to the conclusion of the Dayton Agreement, the population figures of 1997 show that the RS is now an ethnically almost homogeneous entity. As the figures for the regions in the Eastern part of the RS show, the attribute "almost" can be dropped. With the exception of Srpski Brod and Trebinje all municipalities had a record of 99% and more of Serb population in 1997.

88. The conclusion from these figures is supported by a comparison of the figures for the overall return of refugees and displaced persons to the RS with those of the so-called "minority"-return. By 31 January 1999 (UNHCR, Statistics Package of 1 March 1999) in sum 97,966 refugees and displaced persons had returned to the RS. The ethnic breakdown of this figure again reveals that only 751 Croats and 9,212 Bosniacs had returned in comparison to 88,003 Serbs. Hence, the so-

called “minority”-return amounted to 10.17% of the small percentage of those who had returned at all.

89. Contrary to the allegations of the representatives of the RS National Assembly that problems with the return of refugees and displaced persons could not be reduced to discriminatory patterns vis-à-vis citizens of non-Serb origin, but would be much more complex including the social and economic conditions, this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by the overall severe economic and social conditions which are the same for all persons willing to return to the RS. Such a discrepancy can thus only be explained by the ethnic origin of refugees and displaced persons and provides a clear proof of differential treatment vis-à-vis refugees and displaced persons *solely* on the ground of ethnic origin.

90. These figures thus provide sufficient evidence of a “discriminatory effect” in the sense of Article I.3 (a) of Annex 7 so that the results of past de jure discrimination through ethnic cleansing are upheld in the RS.

91. Moreover, there is also clear evidence that the discriminatory pattern to be seen from this circumstantial evidence can reasonably be linked with the institutional structures of RS authorities and their discriminatory practice.

92. First of all, despite the fact that about 25% of the members of Republika Srpska National Assembly are non-Serbs, the ethnic composition of the RS Government is ethnically homogeneous: All the 21 ministers including the Prime Minister are of Serb origin (Source: Ministry for Civilian Affairs and Communications of BiH). The same is true .for the ethnic composition of the RS police forces and the judiciary composed of judges and public prosecutors as can be seen from the following chart (Source: IPTF with figures of 17 January 1999 made available to the Court).

	Serbs	Bosniacs	Croats
Judges and Public Prosecutors	**97.6%**	**1.6%**	**0.8%**
Police forces	**93.7%**	**5.3%**	**1.0%**

93. As far as the number of judges and prosecutors is concerned, all nine persons comprising the number of Bosniacs and Croats out of a total of 375 were located in Brčko and installed only under the supervisory regime of the international community. Moreover, as can be seen from para. 84 of the Brčko Arbitration Award of 1997, the Tribunal concluded from the RS “Basic General Principles” the “fairly obvious purpose -- and the result – [...] to keep Brčko an `ethnically pure´ Serb community in plain violation of Dayton's peace plan.”

94. Finally, after numerous reports of the OHR, the ICG, the Human Rights Ombudsperson for BiH etc on numerous incidents in the RS, the Human Rights Ombudsperson for BiH stated in her Special Report, No. 3275/99 “On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina as of 29 September 1999 that “return related incidents at issue and the passive attitude of the police and other competent authorities were predicated solely on the basis of the national origin of those affected.” She thus finally concluded that “returnees have been discriminated against on the ground of their national origin in the enjoyment of their rights guaranteed by Articles 3 and 8 of the Convention, Article 1 of Protocol No. 1 to the Convention and equality before the law and equal protection before the law as provided in Article 26 of the International Covenant on Civil and Political Rights (ICCPR).”

95. In conclusion the Court finds that, after the Dayton-Agreement came into force, there was and is systematic, long-lasting, purposeful discriminatory practice of the public authorities of RS in order to prevent so-called >minority< returns either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation or violent attacks solely on the ground of ethnic origin, let alone the failure "to create the necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration" which follows from the right of all refugees and displaced persons freely to return to their homes of origin according to Article II.5 of the Constitution of BiH. Moreover, the ethnically almost homogeneous executive and judicial power of the RS is a clear indicator that this part of the provision of Article 1 with the wording "the RS is the state of the Serb people" has to be taken literally and provides the necessary link with the purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing. Finally, also the remark of the expert of the National Assembly in the public hearing that "the RS can be called a state because her statehood is the expression of her original, united, historical national movement, of her nation which has a *united ethnic basis* and forms an independent system of power" (emphasis added) gives evidence of the discriminatory intent of Article 1 of the RS Constitution, in particular if seen in connection with its Preamble.

96. However, ethnic segregation can never be a >legitimate aim< with regard to the principles of "democratic societies" as required by the European Human Rights Convention and the Constitution of BiH. Nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation serve as a means to "uphold peace on these territories" – as asserted by the representative of the National Assembly – in light of the express wording of the text of the Constitution that "democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society."

97. It thus follows also from the "totality of these circumstances" that the wording of Article 1 of the RS Constitution as quoted above violates the right to liberty of movement and residence, the right to property and the freedom of religion in a discriminatory way on the grounds of national origin and religion as guaranteed by Article II paragraphs 3 and 4 in connection with paragraph 5 of the Constitution of BiH.

98. The Constitutional Court thus finds the wording "State of the Serb people and" in Article 1 of the RS Constitution unconstitutional.

B. Federation Constitution

a) The challenged provision of **Article I.1 (1) in the wording of Amendment III** of the Federation Constitution reads as follows:

"Bosniacs and Croats as constituent peoples together with others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina, defined by Annex II of the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities."

99. The applicant considers that the provision of Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina according to which Bosniacs and Croats are constituent peoples of the Federation is not in conformity with the last paragraph of the Preamble of the Constitution of BiH nor with its Article II.4 and 6 insofar as pursuant to these provisions all the three peoples, Bosniacs, Croats and Serbs, are constituent peoples on the entire territory of BiH. Therefore, the Federation Constitution could not designate only Bosniacs and Croats as constituent peoples. Moreover, the contested provision would prevent the realization of the

fundamental rights of all refugees and displaced persons to return to their homes of origin in order to restore the ethnic structure of the population which had been disturbed by war and ethnic cleansing.

100. The arguments of the parties with regard to the legislative history of both the Washington Agreement and the Dayton Agreement, the conclusions that could be drawn from the institutional structures of the common institutions of BiH and the functional interpretation of the Dayton Agreement were already outlined above in connection with the contested provision of Article 1 of the Constitution of the RS (see paragraphs 35 to 46 supra). It remains to set out the arguments with specific reference to the text of Article I.1 (1) of the Federation Constitution.

101. Hence, in the public hearing the representative of the applicant required the constituent status of all the three peoples also in the Federation of BiH and full equality of languages and scripts. He stressed, however, that the Federation Constitution contained some specific features, in particular with regard to this problem. The Federation Constitution does, besides the constituent status of Bosniacs and Croats, guarantee equality to the category of "Others" also with the consequence that they are proportionally represented in all institutions of the Federation. This would "partly amortize the problem."

102. The expert of the House of Representatives outlined in the public hearing that the Preamble of the Federation Constitution would speak about peoples and citizens who are equal. In his opinion this includes not only Bosniacs and Croats, but peoples, hence all the three peoples. Furthermore, according to the original text as well as the later amended text of the Federation Constitution also the category of "Others" does have constituent status. In substance, the category of "Others" would mean Serbs as can be seen from the institutions of the Federation where under the label of "others" practically Serbs are represented. Hence, the >intentio constitutionalis< would be fully satisfied if others were not the category of others but the third constituent people of BiH. However, although the representation of the category of others practically speaking leads mainly to the representation of Serbs, this would not be sufficient. Therefore, also the Federation constitution had this imperfection.

The Constitutional Court finds:

103. As far as the interpretation of the last paragraph of the Preamble to the Constitution of BiH with regard to Bosniacs, Croats, and Serbs as constituent peoples, the legislative history, the institutional structures of the common institutions of BiH and the function of the Dayton Agreement are concerned, the Court refers to its findings in connection with Article 1 of the RS Constitution (at paragraphs 50 to 74 supra).

104. As far as the compromise formula of ethnicity and citoyenneté is concerned, the same holds true for the Federation Constitution. However, there is a marked difference with regard to Article 1 of the RS Constitution insofar as Article I.1 of the Federation Constitution provides for the category of "Others." But this category of "others" is only a half-hearted substitute for the status of constituent peoples and the privileges they enjoy according to the Federation Constitution as will be shown.

105. Unlike the Constitution of the RS, the Federation Constitution does provide for the proportional representation of Bosniacs, Croats and "Others" in several governmental bodies. In some cases, however, it reserves a privilege to Bosniac and Croat representatives to block the decision-making process. These institutional mechanisms must trigger strict scrutiny of review not only with regard to collective equality as far as constituent peoples are concerned, but also as to whether the individual right to vote according to Article 3 of the 1st Additional Protocol of the ECHR is guaranteed without discrimination on ground of national origin. Moreover, the

provision of Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination has to be applied in BiH according to Annex I to the Constitution of BiH and therefore not only imposes an obligation on the State of BiH, but guarantees individual rights according to paragraph (c) of that provision, namely "political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service." From the definition in Article 1 of the Convention it is clear that "the term `racial discrimination´ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Paragraph 4 of Article 1 prescribes that "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination [...]".

106. Hence, the basic legal problem raised in this regard is the question whether the "special rights" provided in the Federation Constitution for the two constituent peoples, the Bosniacs and Croats, violate the enjoyment of individual political rights insofar as they seem to provide for a "preference based on national or ethnic origin" in the sense of Article 5 of the Convention.

107. The Federation Constitution contains the following "special rights" for members of the two constituent peoples so that their designation as "constituent" may be discriminatory in the sense of the Convention:

108. According to Article II.B.1 there shall be three Ombudsmen, one Bosniac, one Croat, and one Other. As far as parliamentary representation is concerned, there are no ethnic requirements for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 prescribes that those delegates have to be elected "by the respective legislators", i.e. Bosniacs, Croats and Others of the cantonal legislators. According to Article IV.A.18 only delegates of the two constituent peoples may claim that a decision of the House of Peoples may concern their "vital interest" with the effect of a >suspensive veto< insofar as the Constitutional Court of the Federation of BiH has finally to resolve the dispute in case of different majorities. Moreover, according to Article VIII.1, a majority of the Bosniac or Croat delegates in the House of Peoples may veto amendments of the Constitution. Article IV.B.3 prescribes that the Chairman of a House of the Legislature has to be "from another constituent people" thereby reserving these offices to members of the constituent peoples.

109. With regard to executive offices, Article IV.B.2 provides for the election of the President and Vice-President with a caucus of the Bosniac Delegates and a caucus of the Croat Delegates to the House of Peoples each nominating one person. Article IV.B.5 reserves one-third of the Ministerial positions to "Croats." Article IV.B.6 again confers veto-power on the representatives of the constituent peoples. Article IV.B.4 as revised by Amendment XII prescribes that no deputy minister can belong to the same constituent people as his minister.

110. As far as the judiciary is concerned Article IV.C.6 prescribes that there shall be an equal number of Bosniac and Croat judges on each court of the Federation whereas "others" shall be proportionally represented. Accordingly Article IV.C.18 establishes a Human Rights Court with three judges, on Bosniac, one Croat, and one Other.

111. As far as federal structures are concerned, Article V.8 provides for a minimum representation for each constituent people in cantonal governments whereas cantonal judges shall, according to Article V.11, be nominated in such a way that the composition of the judiciary as a whole shall reflect that of the population of the Canton.

112. The provisions of the Federation Constitution providing for minimum or proportional representation and veto powers for certain groups do certainly constitute a "preference" in the sense of Article 5 of the Race Discrimination Convention. However, insofar as they create preferential treatment in particular for members of the two constituent peoples, they cannot be legitimised under Article 1 paragraph 4 since these "special measures" are certainly not "taken for the sole purpose of securing adequate advancement of" Bosniacs or Croats "requiring such protection" in order to ensure the equal enjoyment of rights.

113. As can be seen from the legislative history of the Federation Constitution, these institutional safeguards were introduced with the aim of power-sharing which is a legitimate aim for the political stabilization and democratisation through >consensus government.< However, to what extent can institutional devices for the representation and participation of groups with the aim of power-sharing infringe individual rights, in particular voting rights ? Can there be a "compromise" between individual rights and collective goals such as power-sharing? In trying to answer this question, two extreme positions which mark the ends of a scale for weighing contradicting rights and goals or interests must serve as starting points.

114. Do, for instance, language rights, i.e. legal guarantees for members of minority groups to use their mother tongue in procedures before courts or administrative bodies really constitute a "privilege" that members of the "majority" do not have insofar as they have to use the "official language" which is their mother tongue anyway? Such an obviously absurd assertion takes the unstated norm of the ethnically conceived nation-State for granted by "identifying" the language of the "majority" with the state. Contrary to the ideological underpinnings of the ethnically conceived nation-State - the alleged necessity of "exclusion" of all elements which disturb ethnic homogeneity - such "special rights" are thus necessary in order to maintain the possibility of a pluralist society against all trends of assimilation and/or segregation which are explicitly prohibited by the respective provisions of the Racial Discrimination Convention which has to be applied directly in Bosnia and Herzegovina according to Annex 1 to the Constitution of BiH.

115. However, if a system of government is established which reserves all public offices only to members of certain ethnic groups, the "right to participation in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service" is seriously infringed for all those persons or citizens who do not belong to these ethnic groups insofar as they are outright denied to stand as candidates for such governmental or other public offices.

116. The question is thus raised, to what extent the infringement of these political rights might be legitimised. Political rights, in particular voting rights including the right to stand as a candidate, are fundamental rights insofar as they go to the heart of a democratic, responsible government required by the provisions of the Preamble, paragraph 3, and Article I.2 of the Constitution of BiH and the respective provisions of the European Convention on Human Rights and the other international instruments referred to in Annex I to the Constitution of BiH. A system of *total exclusion* of persons on the ground of national or ethnic origin from representation and participation *in executive and judicial bodies* gravely infringes such fundamental rights and can therefore never be upheld. Hence, all provisions reserving a certain public office in the executive or judiciary exclusively for a Bosniac or Croat without the possibility for "others" to be elected *or* granting veto-power to one or the two of these peoples only seriously violate Article 5 of the Racial Discrimination Convention and the constitutional

principle of equality of the constituent peoples. These institutional mechanisms cannot be seen as an "exemption" in the sense of Article 1 paragraph 4 of the Racial Discrimination Convention insofar as they favour the two constituent peoples who form "the majority" of the population. Nor are they necessary for these two peoples in order to achieve full or "effective" equality in the sense of Article 1 paragraph 4 of the Racial Discrimination Convention.

117. Provisions granting minimum or proportional representation in governmental bodies are thus not per se unconstitutional. The problem is to whom they give preferential treatment! Therefore, the very same devices for "others" in the Federation Constitution are certainly in conformity with Article 1 paragraph 4 of the Racial Discrimination Convention under the present circumstances in the Federation of BiH.

118. Minimum or proportional representation *in the Federation legislature* must be seen from a different angle. Insofar as there is a bicameral parliamentary structure with the first Chamber based on universal and equal suffrage without any ethnic distinctions and the second Chamber, the House of Peoples, providing also for the representation and participation of others, there is *prima facie* no such system of *total* exclusion from the right to stand as a candidate.

119. In the Case of Mathieu-Mohin and Clairfayt v. Belgium (9/1985/95/143) the majority of the European Court of Human Rights ruled that Article 3 of the 1st Protocol of the ECHR is not violated insofar as the French-speaking electors in the district Halle - Vilvoorde were "in no way deprived of" the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors "by the mere fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council." In the words of the dissenting opinion, "the practical consequence is that unless they vote for Dutch-speaking candidates, the French-speaking voters in this district will not be represented in the Flemish Council." Article 3 of the 1st Protocol, unlike the American Voting Rights Act 1964, thus does not guarantee a right to vote for "a candidate of one's choice."

120. It could thus be argued that there is no violation of Article 3 of the 1st Protocol if a Croat voter has to cast his vote for a Bosniac or Serb candidate, etc. However, there is at least one striking difference in the electoral mechanisms of Belgium on the one hand, and the Federation of BiH on the other, in particular as far as the right to stand as a candidate is concerned. The Belgian system does not exclude per se the right to stand as a candidate *solely* on the ground of language. Every citizen can stand as a candidate, but has - upon his election - to decide whether he will take the oath in French or in Flemish. It is therefore the subjective choice of the individual candidate whether to take the oath in French or in Flemish and thereby to "represent" a specific language group, whereas provisions of the Constitution of the Federation of BiH provide for >*a priori*< ethnically defined Bosniac and Croat delegates, caucuses and veto powers for them.

121. Moreover, the European Court stated that - although states have "a wide margin of appreciation in this sphere" - it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with: "It has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate" so as to "thwart the free expression of the opinion of the people in the choice of the legislature."

122. The Constitutional Court has thus to assess the constitutional provisions of the Constitution of the Federation of BiH in light of the factual and legal differences with the leading case of the ECHR and its interpretation of the 1st Protocol that states have no (!) margin of appreciation insofar as the "essence" and "effectiveness" of the free expression of the opinion of the people in the choice of their legislature are concerned.

123. As was already outlined supra, there are no ethnic requirements for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 prescribes that those delegates have to be elected "by the respective legislators", i.e. Bosniacs, Croats and Others of the cantonal legislators. According to Article IV.A.18 only delegates of the two constituent peoples may claim that a decision of the House of Peoples may concern their "vital interest" with the effect of a >suspensive veto< insofar as the Constitutional Court of the Federation of BiH has finally to resolve the dispute in case of different majorities. Article IV.B.3 prescribes that the Chairman of a House of the Legislature has to be "from another constituent people" thereby reserving these offices to members of the constituent peoples.

124. In light of the criteria established supra, the Court finds that the institutional structure of representation through the bi-cameral system as such would not violate the respective provisions of the 1st Protocol. What raises, however, serious concerns is the combination of exclusionary mechanisms in the system of representation and decision-making through veto-powers on behalf of ethnically defined "majorities" which are, however, in fact minorities and are thus able to force their will on the parliament as such. Such a combined system of ethnic representation and veto-power for one ethnic group - which is defined as a constituent people, but constitutes a parliamentary minority - does not only infringe the collective equality of constituent peoples, but also the individual right to vote and to stand as a candidate for all other citizens to such an extent that the very essence and effectiveness of "the free expression of the opinion of the people in the choice of the legislature" is seriously impaired. In the final analysis, the designation of Bosniacs and Croats as constituent peoples according to Article I.1 (1) of the Federation Constitution serves as the constitutional basis for constitutionally illegitimate privileges given only to these two peoples in the institutional structures of the Federation.

125. There is an argument that, since the text of the Preamble of the BiH Constitution insofar as it refers to constituent peoples was modelled upon the Article I of the Federation Constitution, the latter provision cannot violate the former. However, this argument does not take into account that the Preamble of the BiH Constitution designates all three peoples as constituent, whereas Article I of the Federation Constitution designates only two of them as constituent with the discriminatory effect outlined above.

126. Thus, although even the preamble of the Federation Constitution expressly prescribes the equality of all peoples, i.e. including the constituent peoples, their full equality as required under the Constitution of BiH is not guaranteed since they are not given the same effective participation in the decision-making processes of the Federation Parliament.

127. In conclusion, Bosniacs and Croats, on the basis of the contested Article I.1 (1) enjoy a privileged position which cannot be legitimised since they are neither on the level of the Federation nor on the level of Bosnia and Herzegovina in the factual position of an endangered minority which has to preserve its existence.

128. It would thus not be necessary for the Constitutional Court to pursue the allegation of the applicant that Article I.1 (1) of the Federation Constitution is discriminatory by providing also the constitutional basis for the violation of other individual rights than the right to vote and to stand as a candidate in a discriminatory manner as prohibited by Article II.4 of the Constitution

of BiH. However, insofar as the request of the applicant is not only concerned with the collective equality of the constituent peoples, but also with the discrimination against individuals, in particular against refugees and displaced persons regardless of their ethnic origin, the Court will review Article I.1 (1) of the Federation Constitution also in light of this allegation of the applicant.

129. The constitutional problem raised by the applicant in this respect is the question whether the contested provision does have a discriminatory intent or effect with regard to the enjoyment of individual rights guaranteed by the Constitution of BiH. As this is the case with Article 1 of the RS Constitution, the wording of this provision does not create mutually exclusive categories of persons so that it is not prima facie discriminatory. Nevertheless, the explicit designation of Bosniacs and Croats triggers strict scrutiny with regard to the other standards of review elaborated in detail above (see paragraphs 79 to 81). Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence – such as the comparison of population figures or the numbers of returns – which shows such a disparate impact as to indicate that the effects of past de jure discrimination, in particular of ethnic cleansing, are upheld by the authorities or that they violate their obligation to provide for protection also against violence of private individuals and to create the respective "political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group"?

130. With regard to the factual situation in the Federation of BiH, the Constitutional Court could, according to Article 22 of its Rules of Procedure, ascertain the following facts:

As far as population figures are concerned, the number of Bosniacs, Croats, Serbs and "others" living on the territory of the Federation is as follows:

Ethnic Breakdown of the Population on Federation territory according to 1991 Census in comparison with 1997 (Source, IMG, on the basis of the 1991 census and UNHCR estimates for 1997).

	1991	1997
Bosniacs	**52.09%**	**72.61%**
Croats	**22.13%**	**22.27%**
Serbs	**17.62%**	**2.32%**
Others	**8.16%**	**2.38%**

131. As can be seen from these figures, the proportional number of Croats living on the territory of the Federation remained almost the same. The proportional number of Bosniacs increased to more than a two-thirds majority, whereas that of Serbs dramatically decreased. Had the territory of the Federation obviously formed an area with "mixed population" of the three constituent peoples and others in 1991, the population figures of 1997 clearly show that the Federation is now a bi-national >entity< of the members of only two of the three constituent peoples.

132. The conclusions from these figures are supported again by a comparison of the figures for the overall return of refugees and displaced persons to the Federation with those of the so-called "minority"-returns.

133. In order to encourage the local authorities to allow minority returns, representatives of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Sarajevo canton and the international community, on 3 February 1998 adopted the Sarajevo Declaration. The goal of the Declaration was to allow at least 20,000 minority returns in 1998 which is, by the way, in itself sufficient evidence of discriminatory intent. However, the actual number of returns decreased and the overall results stayed far below the expected figures of 20,000 “minority”-returns for 1998.

134. By 31 January 1999, only 19,247 Serb refugees and displaced persons had returned to the Federation of BiH in comparison to 380,165 Bosniacs and 74,849 Croats (Source: UNHCR, Statistics Package of 1 March 1999). Hence, the so-called >minority<-return of Serbs amounts to 4.05% of all those who have returned.

135. Again, this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by the overall economic and social conditions but provides clear evidence of differential treatment vis-à-vis refugees and displaced persons solely on the ground of ethnic origin.

136. Although the provisions of the Federation Constitution, provide for proportional representation of “others” in the governmental bodies of the Federation and the representatives of the applicant had acknowledged in the course of the public hearing that the constitutional category of “others” provides for access of people of Serb origin to governmental bodies, Serbs and “others” in the sense of census figures are still underrepresented in the police forces not only with regard to the 1997 population figures, but much more in comparison with 1991. Hence, in particular the small number of Serbs in the Federation police forces could raise doubts about their “impartiality” with regard to ethnic origin.

Ethnic Breakdown of the Federation police forces and the judiciary composed of judges and public prosecutors (Source: IPTF with figures of 17 January 1999 made available to the Court).

	Bosniacs	Croats	Serbs	Others
Judges and Public Prosecutors	**71.72%**	**23.26%**	**5.00%**	**no figures**
Police forces	**68.81%**	**29.89%**	**1.22%**	**0.08%**

137. That these doubts are not unfounded from the outset can again be seen from numerous reports of the OHR, the ICG, the Ombudsperson for BiH etc. on numerous incidents in the Federation and the following discriminatory practices of the Federation authorities which help to explain the small number of so-called “minority”-returns so that the Human Rights Ombudsperson for BiH stated in her Special Report, No. 3275/99 “On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina as of 29 September 1999: “return related incidents at issue and the passive attitude of the police and other competent authorities were predicated solely on the basis of the national origin of those affected.” She thus finally concluded that “returnees have been discriminated against on the ground of their national origin in the enjoyment of their rights guaranteed by Article 3 and 8 of the Convention, Article 1 of Protocol No. 1 to the Convention and equality before the law and equal protection before the law as provided in Article 26 of the ICCPR.”

138. In conclusion the Court holds that, after the Dayton-Agreement came into force, there was and is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Federation of BiH in order to prevent so-called “minority”-returns either through direct

participation in violent incidents or by not fulfilling their obligation to protect people against harassment, intimidation or violent attacks solely on the ground of their ethnic origin, let alone the failure "to create the necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration" which follows from the right of all refugees and displaced persons freely to return to their homes of origin according to Article II.5 of the Constitution of BiH.

139. It thus follows from the "totality of circumstances" that the designation of Bosniacs and Croats as constituent peoples in Article I.1 (1) of the Constitution of the Federation has a discriminatory effect and also violates the right to liberty of movement and residence and the right to property as guaranteed by Article II paragraphs 3 and 4 in connection with paragraph 5 of the Constitution of BiH. Moreover, the aforementioned provision of the Federation Constitution violates Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality following from the text of the Constitution of BiH as outlined above.

140. The Constitutional Court thus declares the wording "Bosniacs and Croats as constituent peoples, along with Others, and" as well as "in the exercise of their sovereign rights" of Article I.1 (1) of the Constitution of the Federation unconstitutional.

141. The Constitutional Court adopted its decision concerning paragraphs 1, 2, 3 and 5 of the Preamble of the RS Constitution, as amended with Amendments XXVI and LIV, Article 1 of the RS Constitution, as amended with Amendment XLIV, and Article I.1 (1) of the Constitution of the Federation of BH, as amended with Amendment III, by 5 votes *pro* to 4 votes *con*.

142. The decisions regarding the publication in the Official Gazettes of Bosnia and Herzegovina, Republika Srpska and the Federation of Bosnia and Herzegovina and regarding the day when the provisions which are declared unconstitutional cease to be valid are based on Articles 59 and 71 of the Rules of Procedure.

The Court ruled in the following composition:

Prof. Dr. Kasim Begić, President of the Constitutional Court, judges Hans Danelius, Prof. Dr. Louis Favoreu, Prof. Dr. Joseph Marko, Dr. Zvonko Miljko, Azra Omeragić, Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić and Mirko Zovko.

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, a concurring opinion was expressed by judge Hans Danelius and a dissenting opinion by judges Dr. Zvonko Miljko, Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić and Mirko Zovko. These opinions are annexed to this Partial Decision.

U 5/98 III
1 July 2000
Sarajevo

President of the Constitutional Court
of Bosnia and Hercegovina
Prof. Dr. Kasim Begić