

With respect to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59, and 71 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session held on 28, 29, and 30 January 2000, adopted the following

## **PARTIAL DECISION**

**Regarding the Constitution of the Republika Srpska:**

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

- a) The word “border” in Article 2 paragraph 2;**
- b) The words “or extradited” in Article 6 paragraph 2;**
- c) Article 44 paragraph 2;**
- d) Article 98 and Article 76 paragraph 2 as modified by Amendment XXXVIII and**
- e) Article 138 as modified by Amendments LI and LXV.**

**The applicant's request is hereby rejected with respect to the following provisions:**

- a) Amendment LVII item 1, which supplements the Chapter on Human Rights and Freedoms;**
- b) Article 80, paragraph 1 as modified by Amendments XL and L, item 2 and**
- c) Article 90, as supplemented by Amendments XLI, item 1 and LXII.**

**Regarding the Constitution of the Federation of BiH:**

**The Constitutional Court declares the following parts of provisions unconstitutional:**

**The words “heads of diplomatic missions” in Article IV/B.7 a) (I) and  
The words “heads of diplomatic missions” in Article IV/B.8.**

**The applicant's request is hereby rejected with respect to Article II.A.5 paragraph c, as modified by Amendment VII.**

**The provisions or parts of provisions of the Constitutions of the Republika Srpska and the Federation of BiH, 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 publication of this Decision 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 the Republika Srpska”.**

## **R e a s o n s**

### **I. Proceedings before the Constitutional Court**

1. On 12 February 1998 Mr. Alija Izetbegović, at that time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for an evaluation of the consistency of the Constitution of the Republika Srpska (hereinafter "the Constitution of RS") and the Constitution of the Federation of BiH (hereinafter "the Federation Constitution") with the Constitution of Bosnia and Herzegovina (hereinafter "the Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional.

The applicant requested that the Constitutional Court review the following provisions of the Entities' constitutions:

#### **Regarding the Constitution of RS:**

- a) The Preamble to the extent that 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 the Republika Srpska is a State of the Serb people and of all its citizens;
- c) Article 2, paragraph 2, to the extent that it refers to the border between the Republika Srpska and the Federation;
- d) Article 4, which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, and Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure co-operation with the Serb people outside the Republic;
- e) Article 6, paragraph 2, to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;
- f) Article 7, to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language;
- g) Article 28, paragraph 4, which provides for material State support of the Orthodox Church and co-operation between 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 the Republika Srpska;

i) Amendment LVII, item 1 which supplements the Chapter on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms in the Constitution of RS and those in the Constitution of BiH, 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 to the extent that they refer to different forms of property, the holders 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 the Republika Srpska shall perform duties related to defence, security, and relations with other States and international organizations, and Article 106, paragraph 2, according to which the President of the 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 onto the President of the Republika Srpska the power to appoint and recall heads of missions of the Republika Srpska in foreign countries and propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska, as well as Article 90, supplemented by Amendments XLI and LXII, which confers onto the Government of the Republika Srpska the authority to establish the Republic's missions abroad;

m) Article 98, according to which the 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 onto the National Bank the competence to propose statutes relating to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the 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 BiH.

**Regarding the Federation Constitution:**

Article I.1 (1), to the extent that it refers to Bosniacs and Croats as being the constituent peoples;

Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

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

Article III.1 (a), to the extent that it provides for the authority of the Federation to organise and conduct the defence of the Federation; and

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

2. The request was communicated to the People's Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People's Assembly of the Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of BiH submitted its reply 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 the House of Representatives of the Federation presented their views on the case. The public hearing proceeded in Banja Luka on 23 January 1999. The applicant was represented at the public hearing by: Prof. Dr. Kasim Trnka and an expert, Džemil Sabrihafizović; the House of Representatives of the Federation by Enver Kreso and an expert Sead Hodži; the House of Peoples of the Federation by Mato Zovko and an expert Ivan Bender; and the People's Assembly of the Republika Srpska by Prof. Dr Radomir Lukić and an expert Prof. Dr Petar Kunić. On that occasion, arguments were presented by the representatives and experts of the applicant, the House of Representatives, and the House of Peoples of the Federation as well as the People's Assembly of the Republika Srpska.

4. Discussions on the case took place at the following sessions of the Court: 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and 5 and 6 November 1999. At the session held on the 3 and 4 December 1999, the Court concluded that at the following session they would deliberate and vote on the case based on the prepared Draft Decision.

5. Deliberations proceeded at the Court's session on the 28-30 January 2000. In accordance with Article VI.2 (a) of the Constitution of BiH, which provides that a majority of all members of the Court shall constitute a quorum, and also having respect for Articles 35, 37, and 58 of its Rules of Procedure, the Constitutional Court unanimously decided to adopt a partial decision in the case.

6. In accordance therewith, deliberations were held and votes were taken on the following provisions:

**A. Regarding the Constitution of RS:**

a) Article 2, paragraph 2, to the extent that it refers to the border between the Republika Srpska and the Federation;

b) Article 6, paragraph 2, to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

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

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

e) Article 80, as modified by Amendments XL and L, which confers onto the President of the Republika Srpska the power to appoint and recall the heads of missions of the 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 onto the Government of Republika Srpska the right to decide on the establishment of the Republic's missions abroad;

f) Article 98, according to which the 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 onto the National Bank the authority to propose statutes relating to monetary policy; and

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

#### **B. Regarding the Federation Constitution:**

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

Article IV.B.7 (a)(I) and Article IV.B.8, to the extent that they entrust the President of the Federation with the task of appointing heads of diplomatic missions.

7. At the session held on 28-30 January 2000, the Constitutional Court also commenced with deliberations on the complaints relating to Articles 58, paragraph 1, 59, 60 and 68, item 6 of the Constitution of RS. However, no decision was taken with respect to these Articles and they are therefore not included in this partial Decision.

## **II. Admissibility**

8. The representatives of the RS People's Assembly and the House of Peoples of the Parliamentary Assembly of the Federation of BiH challenged the jurisdiction of the Constitutional Court in the course of the public hearing, while contending that the applicant's request deals in principle with matters concerning the creation of a constitution, but not with matters which are subject to judicial review. The request would therefore lead not only to an amendment to the Constitution but also to a revision of the Washington and Dayton Agreements without respecting the necessary treaty-making and parliamentary procedures and the will of the legitimate representatives of the constituent peoples. Since the request concerns a great number of provisions and fundamental principles, it does not seek a judicial review of the Entities' Constitutions but rather, a direct and fundamental change of these Constitutions.

**The Constitutional Court finds:**

9. According to Article VI. 3 a) of the Constitution of BiH, every member of the Presidency of BiH may refer disputes to the Constitutional Court concerning whether a provision of an Entity's constitution or law is consistent with this Constitution. The request for the review of the conformity of a number of provisions of the Constitution of RS and the Federation Constitution with the Constitution of BiH was submitted to the Court by Mr. Alija Izetbegović, then Chair of the Presidency. In that respect, according to the quoted provision of the Constitution of BiH, the request is admissible.

10. In addition, as far as the nature of judicial review is concerned, the applicant requested that the Constitutional Court declare a number of provisions of the Constitutions of the RS and the Federation null and void on grounds that they are not in conformity with the Constitution of BiH. Thus, the request refers to the competence of the Constitutional Court to review the constitutions of the Entities, which is, according to Article VI. 3 a) second sub-paragraph, within the "exclusive jurisdiction" of the Constitutional Court. It is true that the Constitutional Court cannot create new constitutional norms. However, the Court's task in this case is not to create new constitutional norms, but to declare those norms that are not in conformity with the Constitution BiH null and void. Furthermore, according to Article XII of the Constitution of BiH, the Entities are obliged to amend their constitutions to ensure their conformity with this Constitution in accordance with Article III. 3. b). In any event, judicial review by the Constitutional Court does not depend on the number of challenged provisions, nor is there any normative difference between the provisions and "fundamental principles" of the Constitution. Accordingly, the objections raised against the competence of the Court in this case are not well-founded.

11. It thus follows from the constitutional responsibilities and obligations referred to above that the Constitutional Court has jurisdiction to decide on this dispute.

**III. Merits****A. Regarding the Constitution of the Republika Srpska****a) The challenged provision of Article 2, paragraph 2, of the Constitution of RS reads as follows:**

*An agreement on a change of the border between the Republika Srpska and the Federation of Bosnia and Herzegovina may be subject to confirmation by way of a referendum in the Republic.*

12. The applicant and his representatives stated that this provision is not in conformity with Article I.1 of the Constitution of BiH and with Annex 2 to the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter: the "GFA"), which is binding for BiH according to Article III. 2. (b) of the Constitution of BiH. They claim that the Republika Srpska cannot have borders since it is not a state. The meaning of the term "border" corresponds to the terminology used in the GFA.

13. The People's Assembly of the Republika Srpska and its representatives pointed out that the term "border (granica)" is also used in Article I. 4 of the Constitution of BiH and that Article V.5

(a) of the Constitution of BiH provides for a “territory” of the Entities, which cannot be imagined without borders. With respect to Annex 2 of the GFA, the People’s Assembly contended that the Constitutional Court is not competent to take it as a basis for review of the provision in question.

**The Constitutional Court finds:**

14. Both terms “border” and “boundary”, which are used in the English text of Article I. 1 and 4 of the Constitution of BiH, have been translated – without any distinction – as “granica” in the Bosnian (“Bosniac”)\*, Serbian, and Croatian languages.

15. According to Article 31 of the Vienna Convention on the Law of Treaties, it is necessary to further clarify the terms used in the Constitution BiH by interpreting them in the context of the entire GFA, i.e. including its Annexes. Article III of the GFA refers to “the boundary demarcation between the two Entities”, but uses the term “border” in Article X when referring to frontiers between states. Similarly, the Agreement on Inter-Entity Boundary Line and Related Issues, which is Annex 2 to the GFA, refers to “the boundary between the Federation of BiH and the Republika Srpska (the ‘Inter-Entity Boundary Line’)...”

16. Consequently, there is, in these various texts, a consistent terminology, according to which “border” and “boundary” are given different meanings. Under such circumstances, the use of a different terminology in the Constitution of RS cannot be considered consistent with the Constitution of BiH.

17. The Constitutional Court therefore finds that the term “border (granica)” in Article 2, paragraph 2, of the Constitution of RS is not in conformity with the Constitution of BiH and should thus be declared unconstitutional.

**b) The challenged provision of Article 6, paragraph 2, of the Constitution of RS reads as follows:**

*A citizen of the Republic may not be deprived of his/her citizenship, exiled or extradited.*

18. The applicant pointed out that the Republika Srpska has an obligation, under Articles II.8 and III.3 (b) of the Constitution of BiH, to co-operate with the International Crime Tribunal for the Former Yugoslavia (henceforth: the ICTY) and cannot, therefore, forbid extradition of its citizens.

19. The applicant's expert added, at the public hearing of 15 October 1998, that the challenged provision violated Article III. 1. g. of the Constitution of BiH as extradition would fall under international criminal law enforcement, which is to be regulated by the institutions of BiH.

20. The People’s Assembly of the Republika Srpska contended that it flowed from the status of citizenship that extradition of citizens, under the jurisdiction of a foreign state, was prohibited, but that a trial before a domestic court was not excluded if there was a reasonable doubt that a

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\* See the original text of the GFAP

citizen had committed a criminal act on the territory of a foreign state. Nor would the challenged provision prevent the co-operation and unlimited fulfilment of the obligation laid down in Article II.8 of the Constitution BiH.

21. The representative of the People's Assembly added at the public hearing that transfer and surrender to the ICTY was not covered by the term extradition, nor did extradition fall under the responsibility of the joint institutions of BiH.

**The Constitutional Court finds:**

22. According to Article III.1 (g) of the Constitution BiH, the institutions of Bosnia and Herzegovina are responsible for international and inter-Entity criminal law enforcement. There is no doubt that extradition of persons against whom the authorities of other states conduct proceedings for having committed an offence, or who are wanted by the said authorities for carrying out a sentence or detention order, is covered by the term international criminal law enforcement. Article 6 of the Constitution of RS thus regulates a matter that lies within the scope of responsibility of the institutions of BiH. The Constitutional Court must therefore conclude that the words "or extradited" are unconstitutional.

23. Under these circumstances, it is not necessary for the Constitutional Court to examine whether the obligation to surrender and transfer persons to the ICTY is covered by the term "extradition". Whatever the case may be, the wording of Article II. 8 of the Constitution of BiH is quite clear and there can be no doubt that all competent authorities in Bosnia and Herzegovina, i.e. also the authorities of the Entities, have to comply with orders issued pursuant to Article 29 of the Statute of the Tribunal.

**c) The challenged provision of Article 44, paragraph 2, of the Constitution of RS reads as follows:**

*Foreign citizens and stateless persons may be granted asylum in the Republika Srpska if prosecuted for the participation in movements for social and national liberation, for the support of democracy, human rights, and fundamental freedoms or the freedom of scientific and artistic creativity.*

24. The applicant considered this provision not to be in line with Article III.1 (f) of the Constitution of BiH, which specifies that immigration, refugee, and asylum policy and regulation fall within the exclusive responsibility of the institutions of Bosnia and Herzegovina.

25. The RS People's Assembly did not respond to this part of the request in its written statement.

**The Constitutional Court finds:**

26. According to Article III. 1 (f) of the Constitution of BiH, asylum policy and its regulation are the responsibilities of the institutions of Bosnia and Herzegovina. Since only those governmental functions and powers which are not expressly enumerated in Article III. 1 or are otherwise

assigned by the Constitution of BiH to the institutions of Bosnia and Herzegovina shall be those of the Entities in accordance with Article III. 3 of the Constitution of BiH, the Entities do not have the power to regulate asylum policy.

27. The Constitutional Court must therefore declare Article 44, paragraph 2 unconstitutional.

**d) The challenged provision of Amendment LVII, item 1, which supplements the Chapter on Human Rights and Freedoms of the Constitution of RS, reads as follows:**

*In case there are differences between the provisions on rights and freedoms of the Constitution of the Republika Srpska and those of the Constitution of Bosnia and Herzegovina, those provisions shall be applied which are more favourable to the individual.*

28. The applicant considered this provision to be out of line with Article III. 3 (b) of the Constitution of BiH, according to which the Entities shall comply fully with this Constitution, since this Article requires that no inconsistent provisions of the constitutions and law of the Entities may be in effect.

29. At the public hearing the applicant's expert added that as a violation of the supremacy clause of the Constitution of BiH, the challenged provision of the Constitution of RS would give the Constitution of RS the same rank as the Constitution of BiH.

30. The People's Assembly of the Republika Srpska, in its written statement, denied any violation of the Constitution of BiH, because the challenged provision merely introduces a supposed "positive discrimination" in favour of persons or citizens by making it clear that in the case of differences – which need not at the same time be in contradiction – the more favourable provisions of the said constitutions have to be applied.

**The Constitutional Court finds:**

31. Provisions of the Constitution of RS on rights and liberties that are more favourable to the individual are not necessarily in violation of the Constitution of BiH due to that »difference«. There cannot be any doubt concerning the supremacy of the Constitution of BiH, but the question is whether the Constitution of BiH can be interpreted as prohibiting provisions in the Entity constitutions that are more favourable to the individual. Differences between the Constitution of BiH and the Entity constitutions, as far as protection of fundamental rights is concerned, may occur in two modes. First, a constitution of an Entity, or any subdivision thereof, may provide for additional rights and liberties which are not included in either the Constitution of BiH or the ECHR or in any of the other instruments referred to in Annex 1 to the Constitution of BiH. Second, the constitution of an Entity, or any sub-division thereof, may provide for the same rights as the Constitution of BiH, but – for instance as far as limitations of the right are concerned – the provisions of the sub-national constitution may be more favourable to the holder of that right.

32. It is generally recognised in federal states that component entities enjoy "relative constitutional autonomy", granting their constitutions the right to regulate matters in such a way that they are not in contradiction to the wording of the constitution of the respective state.

Otherwise, sub-national constitutions would be nothing more than a mere declarative repetition. The same principle of “relative constitutional autonomy” can be seen as an inherent principle underlying the entire structure of the Constitution of BiH if one takes into account the allocation of powers or the relative “silence” of this Constitution with respect to the governmental institutions of the Entities.

33. In addition, Article 53 (former Article 60) of the ECHR provides that the protection granted by the European Convention on Human Rights is only a minimum protection and that States are not prevented by the Convention from granting the individual more extensive or favourable rights and freedoms. The same principle must apply to the interpretation of the Constitution of BiH as it indeed makes the European Convention directly applicable in Bosnia and Herzegovina and grants it priority over all other law.

34. It follows from these statements that the Entities are free to provide for more extensive protection of human rights and fundamental freedoms than required under the European Convention and the Constitution of BiH. Amendment LVII, item 1, to the Constitution of RS is therefore not in opposition to the Constitution of BiH.

**e) The challenged provisions of Article 80, paragraph 1 of the Constitution of RS, as modified by Amendments XL and L, item 2, and Article 90 of the Constitution of RS, as modified by Amendments XLI, item 1, and LXII, read as follows:**

**Article 80 of the Constitution of RS (relevant parts)**

(...)

*2) The President of the Republic shall, at the proposal of the Government, by decree appoint and recall heads of missions of the Republika Srpska in foreign countries, and shall propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska.*

**Article 90 of the Constitution of RS (relevant parts)**

*The Government shall decide on the establishment of the Republic's missions abroad.*

35. The applicant considered these provisions to be inconsistent with the Constitution of BiH. In his opinion, appointment of heads of missions of the RS by the President of the Republika Srpska would violate Article III.1.a., which makes foreign policy a prerogative of the institutions of Bosnia and Herzegovina. He further referred to Article III. 2. d. under which Entities may only enter into agreements with States and international organisations with the consent of the Parliamentary Assembly of Bosnia and Herzegovina, and to Article V. 3 (a) through (d) under which the Presidency of Bosnia and Herzegovina shall have the responsibility of conducting foreign policy, appointing ambassadors, and other international representatives of BiH, representing BiH in international and European organisations and institutions and negotiating and ratifying treaties. Since the Entity Constitutions could not limit the responsibilities of the

Presidency of BiH as provided by the Constitution of BiH, the power of the RS President to propose ambassadors would not be in conformity with the Constitution of BiH.

36. The applicant's representative further outlined at the public hearing that all missions abroad have to be missions of the State of Bosnia and Herzegovina. The Entities, in particular the RS Government, would thus have no competence to establish such missions. The same would hold true for the representatives. Since Bosnia and Herzegovina is the state, the representation of BiH, including the Entities, is the responsibility of Bosnia and Herzegovina. With the limits foreseen in the Constitution itself, all representatives have to be finally appointed by the institutions of BiH. And as far as the appointment of ambassadors is concerned, the competence of the Presidency of BiH would be unconstitutionally restricted, if it could appoint only those candidates who were proposed by another institution.

37. The expert of the House of Peoples of the Federation Parliament stated at the public hearing that the responsibility for the appointment of ambassadors is not exclusively vested in the Presidency, which appears from Article V. 3 (b), according to which no more than two-thirds of the ambassadors may be selected from the territory of the Federation.

38. The People's Assembly of the Republika Srpska in its written statement contested the unconstitutionality of the challenged provisions as the missions referred to in these provisions are not those which have diplomatic or consular status but, for instance, economic, cultural, and similar representations. The Constitution of BiH does not prevent the Entities from establishing such missions.

39. At the public hearing the representative of the People's Assembly of the Republika Srpska referred, in particular, to the legislative history of the challenged provision of Article 80 and outlined that a previous version contained the wording "diplomatic and consular missions". The words "diplomatic and consular" were specifically omitted to bring this provision in line with the Constitution of BiH. Since the Entities have the right to conclude treaties according to Article III. 2 (d) of the Constitution of BiH, they also have the right to establish economic, cultural and other missions abroad that do not have diplomatic or consular status. Finally, he stressed that the RS President has only a right to propose candidates for the appointment of ambassadors and other international representatives of BiH from the RS and, as such, that the appointment itself is left to the Presidency of BiH.

#### **The Constitutional Court finds:**

40. The Constitutional Court finds that foreign policy and foreign trade policy as enumerated in Article III. 1 (a) and (b) are essentially a prerogative of the institutions of Bosnia and Herzegovina. Nevertheless, the Entities are assigned residual powers in these spheres as can be seen, in particular, from Article III. 2 (a) and (d) of the Constitution of BiH, which refers to the establishment of special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina and to the conclusion of agreements with states and international organisations with the consent of the Parliamentary Assembly. The powers of the Presidency of BiH referred to under Article V. 3 must therefore be interpreted with respect to these residual powers of the Entities.

41. It thus follows that the Entities have the right to establish representations abroad as long as this right does not interfere with the authority of Bosnia and Herzegovina to be represented as a state. Furthermore, as can be seen from the given legislative history of challenged provisions, the appointment and recall of the heads of missions according to these provisions is not intended to interfere with the essential prerogative of the state of Bosnia and Herzegovina.

42. Hence, following an established principle of interpretation, whereby all legal regulations have to be read in conformity with the Constitution as long as this is possible, the Constitutional Court finds that Article 80 of the Constitution of RS, as far as the appointment and recall of heads of missions of RS in foreign countries is concerned as well as the contested provision of Article 90 of the Constitution of RS, can be interpreted to be consistent with the Constitution of BiH.

43. With respect to the proposals for appointment of ambassadors and other international representatives of Bosnia and Herzegovina from the RS, the Constitutional Court finds that Article V. 3 (b) of the Constitution of BiH is based on the idea that ambassadors and other international representatives shall be appointed partly from the territory of the Federation of BiH and partly from the territory of the RS. Under these circumstances, a residual power is left to the Entities' institutions to make proposals as part of the selection process regarding these representatives. However, such proposals must be regarded as nothing more than proposals and cannot restrict the right of the Presidency of BiH to appoint ambassadors and other international representatives from either the persons proposed by Entity institutions or persons who have not been proposed by them.

44. Hence, the challenged provision of Article 80 with regard to the competence of the RS President to propose ambassadors and other international representatives of BiH does not infringe the competence of the Presidency of BiH to appoint these persons and is therefore in conformity with the Constitution of BiH.

**f) The challenged provisions of Article 98 of the Constitution of RS and of Article 76, paragraph 2 as modified by Amendment XXXVIII read as follows:**

**Article 98**

*The Republic shall have a National Bank.*

*The status, organisation, management and operation of the National Bank shall be regulated by law.*

**Article 76, paragraph 2**

*The National Bank shall also have the right to propose laws, other regulations and general enactments relating to the monetary, foreign exchange and credit system.*

45. The applicant contended that the challenged provisions were not in conformity with Article VII of the Constitution of BiH. Monetary policy and foreign trade policy are the exclusive responsibility of the joint institutions of BiH. The Central Bank of Bosnia and Herzegovina is the only monetary institution responsible for the entire territory of BiH.

46. The People's Assembly of the Republika Srpska in its written statement replied that a National Bank of the Republika Srpska did not exist any more and that the applicant's assertions in relation to this institution have become obsolete.

47. The applicant's representative further outlined at the public hearing that the fact that the National Bank did not exist any longer did not legally mean that the respective provisions of the Constitution of RS did not violate the Constitution of BiH.

**The Constitutional Court finds:**

48. As the People's Assembly failed to repeal the challenged provisions of the Constitution of RS, they are indeed still in force, notwithstanding the fact that there is not at present any National Bank of the Republika Srpska. The Constitutional Court therefore should examine the constitutionality of these provisions.

49. It is clear from the wording of Article VII of the Constitution of BiH that the Central Bank of Bosnia and Herzegovina is vested with the exclusive responsibility for issuing currency and monetary policy throughout Bosnia and Herzegovina and therefore there is no residual power left in this respect for the Entities under Article III. 3. of the Constitution BiH. The challenged provisions of Article 98 of the Constitution of RS, however, make it a task of the legislation of the RS to regulate the status and operations of the National Bank of the RS without due regard to the limitations imposed by Article VII of the Constitution of BiH.

50. Hence, the challenged provisions of Article 98 of the Constitution of RS cannot be read in conformity with the Constitution of BiH and must therefore be declared unconstitutional.

51. With respect to the right to propose laws, other regulations, and general enactments relating to the monetary, foreign exchange, and credit system in accordance with Article 76, paragraph 2 of the Constitution of RS, it is evident from the wording of Article VII of the Constitution of BiH that the Central Bank is the sole authority for "monetary policy" throughout Bosnia and Herzegovina. Since the word "policy" must, in this context, be considered to include legislative proposals in the respective field, the challenged provision of Article 76, paragraph 2 is not in conformity with the text of the Constitution of BiH.

52. The Constitutional Court thus finds Article 76, paragraph 2 of the Constitution of RS to be unconstitutional.

**g) The challenged provision of Article 138 of the Constitution of RS, as modified by Amendments LI and LXV, reads as follows:**

*When acts of the institutions of Bosnia and Herzegovina or acts of the Federation of Bosnia and Herzegovina, in contradiction to the Constitution of the Republika Srpska and the Constitution of Bosnia and Herzegovina, violate the equality of the Republika Srpska, or when its rights and legal interests are otherwise endangered without its protection being secured, the organs of the Republic shall, temporarily until a decision of the Constitutional Court of Bosnia and*

*Herzegovina is adopted and in cases when irremediable detrimental consequences might occur, pass enactments and undertake measures for the protection of the rights and interests of the Republic.*

53. The applicant considered the challenged provision, to the extent that it would enable the authorities of the RS to “arbitrarily adopt enactments and undertake measures”, to be contrary to paragraph 6 of the Preamble of the Constitution of BiH, which refers to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina, and also to Article I.2 of that Constitution, which provides that Bosnia and Herzegovina shall be a democratic State operating under the rule of law.

54. The applicant's representative further outlined at the public hearing that the challenged provision may endanger the entire legal system of BiH. It would be in complete contradiction to the Constitution of BiH if the Entities could unilaterally undertake measures against the decisions of the institutions of BiH. To allow the Entities any discretionary power not to implement decisions of the institutions of BiH if they deem that their interests may be violated would lead to a total blockage and the disintegration of the constitutional order of BiH.

55. The People's Assembly of the Republika Srpska in its written statement contested the unconstitutionality of the challenged provision. First and foremost, the Preamble of the Constitution of BiH was not included in the normative part of the Constitution and could not, therefore, serve as a basis for review of Amendments LI and LXV. In addition, these amendments could not violate Article I. 2 of the Constitution of BiH, as the measures to be taken were of a temporary nature and only applicable if the rights and interests of the RS could not be protected in any other way and would last only until the adoption of a final decision of the Constitutional Court.

**The Constitutional Court finds:**

56. According to Article VI. 3 (a) of the Constitution of BiH, the Constitutional Court shall have “exclusive jurisdiction” to decide “any dispute” that arises between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina. Furthermore, according to Article 75 of the Constitutional Court's Rules of Procedure, the Court may, until a final decision on a dispute has been taken, fully or partially suspend enforcement of decisions, laws or individual acts, if their enforcement may have detrimental consequences which cannot be overcome.

57. Since the Constitutional Court has “exclusive jurisdiction”, when serving as a protection mechanism in the case of “any dispute” as referred to above, and given that Article 75 of its Rules of Procedure allows for preliminary measures to be granted by the Constitutional Court, there is no room left for unilateral measures to be taken by the institutions of the RS.

58. The Constitutional Court thus finds that Article 138 of the Constitution of RS, as modified by Amendments LI and LXV, is unconstitutional.

## **B. Federation Constitution**

### **a) The challenged provision of Article II. A. 5 c), paragraph c of the Federation Constitution, as modified by Amendment VII, reads as follows:**

*The acquisition and termination of citizenship of the Federation of Bosnia and Herzegovina shall be regulated by a Federal Law under the following conditions:*

(...)

*(c) All citizens of the Federation of Bosnia and Herzegovina are, according to the Constitution of Bosnia and Herzegovina, citizens of Bosnia and Herzegovina and, depending on the citizenship requirements prescribed by the Constitution of Bosnia and Herzegovina, have the right to hold citizenship of another state.*

59. The applicant's complaint is based on the following wording of Article II. A.5, paragraph c, as modified by Amendment VII, of the Federation Constitution: "All citizens of the Federation shall be entitled to hold the citizenship of another state". He argued that this provision was not in conformity with Article I. 7 (d) of the Constitution of BiH, according to which citizens of Bosnia and Herzegovina may hold citizenship of another State, provided that there is a bilateral agreement approved by the Parliamentary Assembly between Bosnia and Herzegovina and that State governing this matter. Since the Federation Constitution entitles a citizen also to have the citizenship of another state without any limitations, he contends that the challenged provision violated the Constitution of BiH.

60. At the public hearing the applicant's representative further argues that allowing a citizen to hold citizenship of another state is the exclusive responsibility of the state of BiH under Article I. 7 d. of the Constitution of BiH. The expert of the House of Peoples of the Federation Parliament stated that dual citizenship was allowed by the Constitution of BiH.

### **The Constitutional Court finds:**

61. The applicant referred in his request to the wording of Article II. A. 5 as it was prior to Amendment VII. However, the challenged provision in the wording of Amendment VII no longer allows dual citizenship without limitations but refers to the citizenship requirements prescribed by the Constitution of BiH and is therefore merely a declarative repetition of the rights already granted by Article I. 7 (a) and (d) of the Constitution of BiH.

62. This challenged provision must therefore be considered to be in conformity with the Constitution of BiH.

### **b) The challenged provisions of Article IV. B. 7 a) (I) and Article IV. B. 8 of the Federation Constitution, to the extent that they deal with the appointment of heads of diplomatic missions, read as follows:**

#### **Article IV. B. 7 a) (Relevant parts):**

*Except as otherwise provided in this Constitution:*

*(a) The President of the Federation shall be responsible for:*

*(i) The appointment of ..., heads of diplomatic missions... in accordance with Articles IV.B.5, IV.B.8, and IV.C.6;*

*(...)*

**Article IV. B. 8 (relevant parts)**

*The President of the Federation, in consensus with the Vice-President, shall appoint heads of diplomatic missions upon consultation with the Prime Minister or the nominee for that position....*

63. The applicant contended that the authority granted to the President of the Federation to appoint the heads of diplomatic missions was not in conformity with Article V. 3 b of the Constitution of BiH, which gives the Presidency of BiH the authority to appoint ambassadors.

64. At the public hearing the expert appointed by the House of Peoples of the Parliamentary Assembly of the Federation of BiH pointed out that in his request the applicant interpreted the challenged provisions and appropriate rules of the Constitution of BiH without taking into consideration their context. He did not deny the responsibilities according to the Constitution of BiH as far as appointments are concerned, but challenged that they are exclusive because such an interpretation would ignore the responsibilities of the Entities foreseen by the Constitution in this field.

**The Constitutional Court finds:**

65. According to Article 58 of its Rules of Procedure, the Constitutional Court deliberated only on those parts of the above-mentioned provisions that related to the power of the President of the Federation to appoint heads of diplomatic missions according to Article IV. B. 7 a) (i) and Article IV. B. 8 of the Federation Constitution. The Constitutional Court recalls the statements made in paragraphs 40-44, in particular in paragraph 43, supra. According to Article V. 3 b of the Constitution of BiH, the Presidency of BiH has the power to appoint ambassadors without limits to its decision-making. As the challenged provisions of the Federation Constitution, unlike those of the Constitution of RS, vest the power to appoint in the hands of the President of the Federation, these provisions clearly stand in opposition to the Constitution of BiH.

66. The Constitutional Court thus finds the words “heads of diplomatic missions” in Article IV. B. 7 a) (I) and the words “heads of diplomatic missions” in Article IV. B. 8 to be unconstitutional.

67. The Constitutional Court was unanimous in adopting the conclusions relating to Article 2 paragraph 2, Article 6 paragraph 2, Article 44 paragraph 2, Article 80 as modified by Amendments XL and L, Article 90 as supplemented by Amendments XLI and LXII, Article 98 and Article 76 paragraph 2, as modified by Amendment XXXVIII, and Article 138 of the Constitution of RS, as well as Articles II.A.5, as modified by Amendment VII, Article IV.B.7 (a

(I) and Article IV.B.8 of the Federation Constitution. As regards to Amendment LVII, item 1 to the Constitution of RS, the Constitutional Court adopted its conclusion by 6 votes *in favour* and one separate opinion.

68. The decisions regarding the publication in the Official Gazettes of Bosnia and Herzegovina, the Republika Srpska, and the Federation of BiH and the day when the provisions that are declared unconstitutional cease to be in effect 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, and Judges: Dr Hans Danelius, Prof. Dr Louis Favoreu, Prof. Dr Joseph Marko, Zvonko Miljko, MA, Azra Omeragić and Mirko Zovko.

With respect to Article 49 of the Constitution of RS and pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Judge Kasim Begić has delivered his separate opinion, the text of which is annexed to this Partial Decision.

U 5/98-I  
29 and 30 January 2000  
Sarajevo

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

## **CONSTITUTION OF THE REPUBLIKA SRPSKA**

### **Article 2, paragraph 2**

**Provision of the Constitution of RS, referring to the “border” between the Republika Srpska and the Federation of BiH, is not in conformity with the Constitution of BiH (Article III of the General Framework Agreement for Peace in Bosnia and Herzegovina speaks of “boundary lines” between the two Entities, while Article X uses the term border in the sense of borders between states).**

### **Article 6, paragraph 2**

**Provisions of the Constitution of RS regulating that an RS citizen may not be extradited, are unconstitutional as this falls within the competence of institutions of BiH.**

### **Article 44, paragraph 2**

**Provision of Article 44 paragraph 2 of the Constitution of RS is unconstitutional as, according to the Constitution of BiH (Article III.1 (f)), policy and regulation of asylum falls within the competence of institutions of BiH. Accordingly, Entities have no authority to regulate the asylum policy.**

### **Articles 98 and 76, paragraph 2**

**Despite the fact that the National Bank no longer exists, the RS People’s Assembly failed to repeal provisions relating thereto and they still remain in effect. According to Article VII of the Constitution of BiH, the Central Bank of BiH shall be the sole authority for issuing currencies and for monetary policy throughout BiH. Entities, pursuant to Article III.3 of the Constitution of BiH, have no authority in this respect. The Central Bank, in pursuance of Article VII of the Constitution of BiH, is the sole authority for monetary policy throughout BiH, which includes proposed bills in this respect. The challenged provision of the Constitution of RS regulating that the RS National Bank shall have the right to propose laws, other regulations and general enactments relating to monetary, foreign exchange and credit system is therefore unconstitutional.**

### **Article 138 (as modified by Amendments LI and LXV)**

**Provision of Article 138 of the Constitution of RS, empowering the RS authorities to pass enactments and undertake measures for the protection of rights and interests of the RS against enactments of institutions of BiH or the Federation of BiH, is unconstitutional. The above referenced stands since the Constitutional Court of BiH shall have exclusive jurisdiction to serve as a protective mechanism in case of “any dispute of this kind” pursuant to Article VI.3 (a) of the Constitution of BiH and since Article 75 of the Constitutional Court’s Rules of Procedure provides a possibility for an interim measure to be adopted.**

**CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA**

**Article IV.B.7.a. (I) and Article IV.B.8**

**Provisions of the Constitution of the Federation of BiH which provide that the president of the Federation shall be responsible for nominating heads of diplomatic missions, are unconstitutional since the Presidency of BiH has responsibility for appointing ambassadors without restriction in its decision-making right, pursuant to Article V.3 (b) of the Constitution of BiH.**

## ANNEX

### **Separate opinion of Prof. Dr. Kasim Begić on the Court's Decision regarding Amendment LVII Item 1 of the Constitution of the Republika Srpska – Chapter on Human Rights and Fundamental Freedoms –**

In relation to the Court's decision on Amendment LVII, item 1 of the Constitution of the Republika Srpska, which supplements the Chapter on Human Rights and Fundamental Freedoms, it is my opinion that there are a series of arguments which put into question the essential rationale of the Court's Decision. According to this rationale, the Amendment involves the supposed "positive discrimination" and "relative constitutional autonomy" of the Constitution. Actually, the essence of the controversy regarding both Amendment LVII and the entire Chapter on Human Rights, according to my opinion, consists of an entirely different approach of the Constitution of the Republika Srpska in comparison to the Constitution of Bosnia and Herzegovina. Thus, the aforementioned Amendment, in relation to the remaining provisions, has a declaratory character and represents merely a "decoration" for the catalog of human rights established long before the Constitution of Bosnia and Herzegovina entered into force.

The arguments for this finding are as follows:

(1) In the Constitution of the Republika Srpska the European Convention for the Protection of Human Rights and Fundamental Freedoms is mentioned only incidentally, in this Amendment, and in the context that certain constitutional articles on human rights and freedoms shall be "exercised in conformity with corresponding provisions, Articles 8 through 11, of the European Convention for the Protection of Human Rights and Fundamental Freedoms". The arguments, according to which the reference to the Constitution of Bosnia and Herzegovina and the alleged introduction of "positive discrimination", would implicitly incorporate the European Convention for the Protection of Human Rights and Fundamental Freedoms into the Constitution of the Republika Srpska, are not convincing because the European Convention is explicitly incorporated in the Constitution of Bosnia and Herzegovina (Article II Item 2) as the fundamental grounds for accomplishing international standards of protection of rights and freedoms in Bosnia and Herzegovina.

(2) Unlike the Constitution of Bosnia and Herzegovina, the Constitution of the Republika Srpska fails to contain a clear provision under which the European Convention for the Protection of Human Rights and Fundamental Freedoms would apply directly and have priority over "all other law". This fact puts their alleged constitutional autonomy into question.

(3) Furthermore, the Constitution of the Republika Srpska fails to even implicitly include the list of rights accentuated in Article II of the Constitution of Bosnia and Herzegovina and, in particular, the provisions on the international standards of protection of rights and freedoms (including a series of conventions that are an integral part of the Constitution) and the right of

refugees and displaced persons to return to their homes of origin. The supposed “positive discrimination” is thereby directly derogated.

(4) Finally, in this field the alleged balance between the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with respect to the Constitution of Bosnia and Herzegovina should be kept in mind. Namely, the Constitution of the Federation of Bosnia and Herzegovina follows the catalog of human rights and the human rights instruments laid down in the Constitution of Bosnia and Herzegovina, including international standards and international protection mechanisms (the Human Rights Commission and other judicial organs that include international members, ombudspersons, as well as the access to “international human rights monitoring mechanisms established by any international agreement...”), while the Constitution of the Republika Srpska fails to provide any solution in this respect.