The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1) and Article 59(2)(1) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05), in Plenary composed of the following Judges: Mr. Mato Tadić, President, Mr. Tudor Pantiru, Mr. Miodrag Simović and Ms. Hatidža Hadžiosmanović, Vice-Presidents, Mr. David Feldman, Ms. Valerija Galić, Mr. Jovo Rosić, Ms. Constance Grewe and Ms. Seada Palavrić, Judges, having deliberated on the request of **Mr. Sulejman Tihić, Chair of the Presidency of Bosnia and Herzegovina,** having deliberated the request in case no. **U 13/05**, at its session held on 26 May 2006, adopted the following

DECISION ON ADMISSIBILITY

The request lodged by **Mr. Sulejman Tihić, Chair of Presidency of Bosnia and Herzegovina,** for a review of conformity of Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 and 52/05) with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol no. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination, is rejected as inadmissible because the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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

REASONING

1. On 6 September 2005, Mr. Sulejman Tihić, Member of the Presidency of Bosnia and Herzegovina ("the applicant"), filed a request with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") for a review of conformity of Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina ("the Election Law) with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and Article 1 of Protocol No. 12 to the European Convention, and Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination.

2. The applicant states that according to the challenged provisions of the Election Law only a Bosniac or a Croat from the Federation of BiH and a Serb from the Republika Srpska can be a member of the Presidency whereby the Serbs in the Federation and Bosniacs and Croats in the Republika Srpska are prevented from running for elections for these public offices. In fact, a citizen of Serb ethnicity from the territory of the Federation can never be a member of the Presidency of Bosnia and Herzegovina who is directly elected from the Federation nor can a citizen of Bosniac or Croat ethnicity from the Republika Srpska ever be a member of the Presidency who is directly elected from the territory of the Republika Srpska. This implies that in the first case a citizen of Serb ethnicity from the Federation and in the second case a citizen of Bosniac ethnicity or a citizen of Croat ethnicity, both from the Republika Srpska, have been prevented from exercising their passive electoral right, *i.e.* the right to run for elections and be elected to the Presidency of Bosnia and Herzegovina.

3. In addition, it follows from the challenged provisions of Article 8.1 paragraphs 1 and 2 of the Election Law that no citizen from amongst the Others, *i.e.* who does not belong to one of the three constituent peoples, can be a member of the Presidency of Bosnia and Herzegovina. This implies that only a Bosniac, Croat and Serb have the access to these public offices, while the citizens from amongst the Others are prevented from being elected into this office. In that manner the citizens from amongst the Others have been directly discriminated against in the exercise of their passive electoral right on the grounds of ethnicity.

4. The applicant concludes that, by the challenged provisions of the Election Law, certain number of BiH citizens are prevented from representing themselves as candidates for the Presidency, thereby being limited in exercising their passive voting right. On the other hand, all citizens are prevented to avail themselves of their active voting right as members of one or two

constituent peoples are not in the position to vote for the members of the Presidency.

5. Having regard to the above, the applicant proposes that the Constitutional Court adopt the decision by which it would establish that provisions of Article 8.1 paragraphs 1 and 2 of the Election Law are inconsistent with Article 3 of Protocol No. 1 to the European Convention and Article 1 of Protocol No. 12 to the European Convention as well as with Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination. In addition, the applicant suggests that the Constitutional Court order the Parliamentary Assembly of Bosnia and Herzegovina, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring into line the provisions of Articles 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina with the European Convention and the International Convention on Elimination of All Forms of Racial Discrimination.

6. In examining the admissibility of the request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1)(1) of the Rules of the Constitutional Court.

Article VI(3)(a) of the Constitution of Bosnia and Herzegovina reads as follows:

The Constitutional Court shall uphold this Constitution.

a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:

- Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.

- Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article 17(1)(1) of the Rules of the Constitutional Court reads as follows:

A request shall be inadmissible in any of the following cases

1. The Constitutional Court is not competent to take a decision;

7. The Constitutional Court observes that the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law, which reads: “The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either Bosniac or Croat Member of the Presidency, but not for both. The Bosniac and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected", embodies, in fact, a slightly expanded version of Article V of the Constitution of Bosnia and Herzegovina, which reads: “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 the Republika Srpska."

8. In view of the above, it is undisputed that the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law is founded on Article V of the Constitution of Bosnia and Herzegovina and therefore, if the Constitutional Court would examine the merits of the case, it would actually examine the provisions of the Constitution of Bosnia and Herzegovina in relation to the provisions of both European Convention and International Convention on Elimination of All Forms of Racial Discrimination.

9. In that context, the Constitutional Court recalls its case law from the case *No. U 5/04* of 27 January 2006, in which the subject matter of the request was a review of conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the provision of the European Convention. At that time, the Constitutional Court highlighted that, when interpreting its jurisdiction, it must always abide by the text of the Constitution of Bosnia and Herzegovina, which in the relevant case does not allow for a wider interpretation relating to its jurisdiction considering the Constitutional Court’s obligation to “uphold this Constitution” as well as considering that the provision of the European Convention cannot have a superior status in relation to the Constitution

of BiH. This is so because the European Convention, as international document, entered into force on the basis of the Constitution of BiH and thereby the constitutional powers derive from the Constitution of BiH and not from the European Convention.

10. Consequently, although the subject matter of the case at hand is not a review of conformity of the provisions of the Constitution of Bosnia and Herzegovina but of the Election Law, it cannot be ignored that that the challenged provision of the Election Law, *de facto*, derive fully from the provisions of Article V of the Constitution of BiH, which remove any doubts as to its unconstitutionality. For these reasons, the Constitutional Court has no competence to decide because this would otherwise imply a review of conformity of the constitutional provision with the provisions of the international documents relating to the human rights, and it has already took the position that these, *i.e.* the European Convention, could not have a superior status in relation to the Constitution of BiH (Decision in case No. *U 5/04* of 27 January 2006).

11. In view of the provision of Article 17(1)(1) of the Rules of the Constitutional Court, according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as stated in the enacting clause of this Decision.

12. In accordance with Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

13. In accordance with Article 41 of the Rules of the Constitutional Court, this Decision is annexed with Separate Concurring Opinion of Judge David Feldman and Separate Dissenting Opinions of Judges Constance Grewe and Seada Palavrić.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Attachment:

- Separate Concurring Opinion of Judge David Feldman
- Separate Dissenting Opinions of Judges Constance Grewe and Seada Palavrić

U 13/05
Separate Dissenting Opinion
Judge Constance Grewe

I do not agree with the opinion of the majority of the Court since I consider the request of Mr. Sulejman Tihić, Chair of the Presidency of Bosnia and Herzegovina, not only admissible but also partially justified.

I – Admissibility

The request is admissible as it does not challenge a constitutional provision (see U 5/04) but the Law on Election of the Presidency. It alleges that these provisions are not in conformity with Art. 1 of Protocol No. 12 to the European Convention as well as with Articles 2(1)(c) and 5(1)(c) of the International Convention on Elimination of All Forms of Racial Discrimination. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court is competent to decide whether any provision of an Entity's constitution or law is consistent with this Constitution.

"This Constitution" as well as the role of the Constitutional Court to uphold the Constitution, has to be taken in a wide sense. Indeed, the Peace Agreement represents as a whole the *"Constitutional Charter"* of Bosnia and Herzegovina while Annex 4 and the 15 international agreements on human rights from Annex 1 of the Constitution of BiH which are directly applied in Bosnia and Herzegovina, without need for legal transformation , represent formal *"constitutional law*" of that state. In consequence, the Constitution of Bosnia and Herzegovina must be viewed as a unity whose parts are closely connected and some provisions cannot be interpreted separately without taking into consideration the complementary meaning of other provisions. For example, Article I.2 determines that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and free elections. This provision implies the obligation of creating a state structure that can endure the test arising out of the obligation to establish the highest principles – the principles of a democratic state, the rule of law and free elections in the specific sense which these terms mean in the developed democratic countries with long lasting practice in establishing those principles.

In this Constitutional Charter the European Convention (published in the Official Gazette of BiH, No. 6/99) and its protocols deserve special attention. It is not only directly applicable, such as the agreements from the annexes to the Constitution of BiH, but on the basis of Article II/2 of the Constitution of BiH, it also has priority *"over any other law"*. The term "over any other law", when it comes to the law of Bosnia and Herzegovina, implies that the European Convention is a part of the unity of the state law (legal system). This is supported by the fact that, for example, in Article 3, paragraph 3.b of the Constitution of BiH, the following is stated: "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities".

Additional argument is also the text of Article X of the Constitution of Bosnia and Herzegovina which determines the procedure of amending the Constitution of Bosnia and Herzegovina. This provision requires that no amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present provision. Thus, Article II of the Constitution of Bosnia and Herzegovina has become the only article of the Constitution of Bosnia and Herzegovina, by which the human rights it protects, are not to be changed or reduced in any way.

So it is clear that when considering Article VI(3)(a) of the Constitution of Bosnia and Herzegovina which stipulates that the standard of control is only *"in accordance with this Constitution",* it follows that this standard of control includes also the European Convention and its protocols.

The jurisdiction of the Constitutional Court with regard to its role («*the Constitutional Court shall uphold this Constitution")* and the whole Article VI(3) of the Constitution of Bosnia and Herzegovina should be viewed in the light of internationalization of the whole domestic law and the role of the Constitutional Court. Internationalization of the domestic law, as a general principle, follows from the Constitution of Bosnia and Herzegovina, the position of the European Convention and the other international agreements. In this respect, the internationalization of the domestic law is in the function of its total harmonization with the international standards so that the Constitutional Court «*by upholding the Constitution*», has to consider its jurisdiction in context of all basic principles, so as the democratic principle or the maintain of the highest level of protection of human rights and freedoms.

It follows from the aforesaid that the Constitutional Court should have recognized its competence in this case and declare the request admissible.

II – Merits

As the applicant pointed it out in his statements, he considers that the aforementioned legal provisions are in contradiction with the rights guaranteed by the European Convention, namely, right to non-discrimination and right to free elections from Article 3, Protocol No. 1 to the European Convention. The right to free elections is not applicable in this case since the Presidency is not a legislative body; insofar the request is ill founded.

As to the right to non-discrimination, the challenged provision of Article 8.1 paragraphs 1 and 2 of the Election Law reads: "The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either Bosniac or Croat Member of the Presidency, but not for both. The Bosniac and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected".

It can be concluded from the quoted provision that a citizen, in order to be elected as a member of the Presidency, has to belong to one of the constituent peoples and that the choice of the voters is limited to Bosniac and Croat candidates in the Federation and Serb candidates in the RS as well as Bosniacs and Croats can be elected only from the territory of the Federation and not from the RS just like Serbs can be elected only from the RS and not from the Federation.

In principle, in a multi-ethnic State such as Bosnia and Herzegovina it appears legitimate to ensure that a State organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined. The Constitutional Court of BiH referred to this problem in the following terms in its decision concerning constituent peoples in the Entity constitutions (Decision of the Constitutional Court No. *U 5/98*, Official Gazette of BiH, No. 36/00):

> *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."

If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such rule seems to assume that only members of a particular ethnical group can be regarded as fully loyal citizens of the Entity capable of defending its interests. The members of the Presidency have a veto right whenever there is a violation of vital interests of the Entity from which they were elected. It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation. The identity of interests in this ethnically-dominated manner impedes the development of a wider sense of national affiliation.

Furthermore, members of the three constituent peoples can be elected to the Presidency but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS. Moreover, the Election Law clearly excludes Others, i.e. citizens of BiH who identify themselves as neither Bosniac nor Croat nor Serb, from the right to be elected to the Presidency. This seems clearly incompatible with the equal right to vote and to stand for election under Article 25 of the ICCPR or with the principle to non-discrimination. Article 14 of the European Convention which grants this right, can however only be applied if the discrimination concerns a right guaranteed by the Convention which precisely does not guarantee the right to elect a President or be elected President. Article 3 of the Protocol no. 1 to the European Convention guarantees only the right to elect the legislature.

A wider sense of non-discrimination is complied by Article 1 of Protocol No. 12 to the European Convention. The aforementioned Article of the European Convention is refered by the applicant and can be applied to the subject request. It has to be taken into account that Bosnia and Herzegovina ratified Protocol No.12 of the European Convention on 29 July 2003, which guarantees the enjoyment of all rights set forth by laws, without discrimination. This protocol entered into force

on 1 April 2005 and the right to non-discrimination is thereby extended to cover the right to elect a President or stand for election as President.

The question is whether under the specific, fairly exceptional, conditions of BiH such solution can be considered discriminating and if so, whether such discrimination can be justified. The European Court of Human Rights in its decisions *Mathieu-Mohin and Clerfayt vs. Belgium* of 2 March 1987 and *Melnychenko vs. Ukraine* of 19 October 2004 seemed willing to leave to States a particularly wide margin of appreciation in the sensitive area of election law. Equality of voting rights and non-discrimination are among the most important values of a constitutional system. However, illicit discrimination can only be assumed if there is no reasonable and objective justification for a difference in treatment.

In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making the peace in BiH possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the Election Law and in the text of the Constitution at that time therefore does not deserve criticism, even though they are contradictory with the general character of the Constitution of BiH aiming at preventing discrimination.

This justification has to be considered, however, in the light of developments in Bosnia and Herzegovina since the Constitution of BiH entered into force. Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the European Convention and its Protocol No. 12. However, it is obvious that there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups, as a transitional arrangement until the realization of the principles of the civil state.

This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights, regardless whether they refer to the constituent peoples or group of *„Others“*.

Taking into consideration all the aforementioned, the Constitutional Court should have considered the current electoral arrangements in respect to the election of the members of the

Presidency of Bosnia and Herzegovina inconsistent with Article 1 of the Protocol 12 to the European Convention even if they were formulated in conformity with Art. V.1 of the Constitution of Bosnia and Herzegovina. Constitutional interpretation has to take account of the whole Constitution and has to consider it as a unity. Interpretation cannot neglect the legal, international and political context and has to consider the law as a living instrument. In this perspective, Art. V.1 of the Constitution has to be read complimentarily with Article II(2) which states a direct application of rights and freedoms set forth in the European Convention and which requires consequently the respect of Protocol Nr. 12 of the European Convention.

Judge Constance Grewe

CASE NO. U-13/05

Separate Concurring Opinion of Judge David Feldman

1. I concur with the decision of the Constitutional Court in Case No. U 13/05 that the Constitutional Court cannot hold that a piece of legislation implementing a clear, unequivocal and unambiguous constitutional provision is unconstitutional when the legislation precisely and loyally gives effect to that constitutional provision, even if the result might appear to be inconsistent with the requirements of a different provision of the Constitution. Nevertheless, in view of the difficulty of the issues I wish to add a few observations of my own.

2. My first comment relates to the issue of admissibility. For my part, I would have preferred to hold that that the application in this case was admissible. It is in form a challenge to the constitutional validity of a law, since rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms have constitutional status under the Constitution of Bosnia and Herzegovina by virtue of Article II of that Constitution. Such a challenge to a law falls within the jurisdiction of the Constitutional Court under Article VI.3/a of the Constitution of Bosnia and Herzegovina. The position would be different had the challenge been to the constitutional validity of part of the Constitution by reference to other constitutional provisions or values: as the Constitutional Court has held, no such challenge is admissible.

3. I would therefore have preferred to hold that the application was admissible, but would then have dismissed it on the merits as being ill-founded. Nevertheless, as the outcome would have been the same, and the challenge to the law was for practical purposes a challenge to part of the Constitution (since invalidating the Law would have made it impossible ever to give effect to the requirements of the opening sentence of Article V of the Constitution), I did not press my opinion to the point of a dissent.

4. My second comment relates to an argument that the Constitutional Court should be willing to declare that provisions of a law are inconsistent with rights under the European Convention even if that would not affect the constitutional validity of the law in question. I can appreciate that it might be useful for the Constitutional Court to be able to make advisory declarations of this kind in

order to facilitate the process of bringing the laws (or, indeed, the Constitution) of Bosnia and Herzegovina into line with the State's international obligations. However, in my view that would be an inappropriate extension of judicial activity beyond the proper functions of a court (even a special court such as the Constitutional Court). The function of judges is to decide what the law is and to enforce the limits of the powers of public bodies and people's rights and obligations under the law and the Constitution. It would be anomalous, in my view, for this Court to declare that a legal norm is inconsistent with a constitutional norm in circumstances where, notwithstanding the inconsistency, the former legal norm remains valid and in full force. In the absence of clear constitutional authority to act in a purely advisory capacity, it seems to me that judicial power is restricted to determining legal and constitutional issues, and does not extend to advising State institutions on matters which have no practical impact on their powers or on people's rights and obligations.

5. My third comment relates to the argument that, if the Constitutional Court had held the application to be admissible, it should have held that the arrangements set out in Article V of the Constitution and in Article 8.1 paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05 and 52/05) were discriminatory and therefore unconstitutional. Although it is not necessary to the present decision to express any concluded view about this, I would not want it to be thought that any difference between the treatment of members of the various constituent peoples and Others inevitably amounts to discrimination on ethnic or national grounds contrary to Article 14 of, or Protocol No. 12 to, the European Convention. The jurisprudence of the European Court of Human Rights and of the Constitutional Court clearly establishes that a difference of treatment violates the right to non-discrimination only if there is no objective and rational justification for the difference. A difference of treatment has an objective and rational justification if it is intended to advance a legitimate aim and is rationally related to that aim, and the extent of the disadvantage to those adversely affected is not disproportionate to the importance of the legitimate aim.

6. Does the difference in treatment advance a legitimate aim? Special protection for the ability of members of the three constituent peoples to participate actively in government was one of the fundamental features of the General Framework Agreement for Peace. Article V of the Constitution of Bosnia and Herzegovina accordingly restricts people's rights to stand for election to the Presidency and to vote for candidates for election to the Presidency in order to bolster the positions of the three constituent peoples by ensuring that the Presidency shall consist of one member of each

of the constituent peoples. This way of securing the collective representativeness of the institution is not a classic form of electoral democracy. As many of the responsibilities of the Presidency are concerned with the representation of the whole of Bosnia and Herzegovina, not merely the Entities or the constituent peoples, it might be argued that democracy would normally require that the members of the Presidency should all be elected by all the people of the country, including Others, and that all the people should be eligible to be candidates for election, on a state-wide rather than an Entity and ethnicity basis.

7. Nevertheless, the arrangements agreed in the General Framework Agreement for Peace and reflected in Article V of the Constitution can be seen as a special form of representative democracy (sometimes called 'consociation') modified to suit the special needs of the country. In my view, putting in place a model of democracy suitable for the special and pressing needs of the country is a legitimate aim, and there is a rational connection between the aim and the means adopted to pursue it.

8. I therefore move to the question whether the challenged provisions of the Law on Elections interfere disproportionately with the right to be free of discrimination. The deviation from the normal system of elections applies only to the Presidency, not to a law-making body. In relation to the Parliamentary Assembly, the normal principles of electoral democracy apply, with some relatively minor modifications. It is therefore not at all clear to me that the challenged provisions would have been held to be inconsistent with Protocol No. 12 to the European Convention, even if the Court had considered the application to be admissible.

David Feldman
Judge
23 June 2006

Judge Seada Palavrić

Acting in pursuance of Article 41(2) of the Rules of the Constitutional Court of Bosnia and Herzegovina, I hereby give the following:

S T A T E M E N T
ON JOINING SEPARATE DISSENTING OPINION

I hereby join the Separate Dissenting Opinion of Judge Constance Grewe in case U 13/05 in its entirety.

Sarajevo
12 July 2006

Seada Palavrić
Judge
Constitutional Court of Bosnia and Herzegovina