

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 59 para 2(2), Article 61 paras 1 and 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina – New Amended Text (Official Gazette of Bosnia and Herzegovina No. 2/04), in Plenary and composed of the following judges:

Mr. Mato Tadić, President,

Mr. Miodrag Simović, Vice-President,

Ms. Hatidža Hadžiosmanović, Vice-President,

Mr. David Feldman,

Ms. Valerija Galić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Having considered the request of **Prof. Dr Nikola Špirić**, First Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, in Case **No. U 4/05**,

Adopted at the session held on 22 April 2005 the following

DECISION ON ADMISSIBILITY AND MERITS

It is established that the provision of Article 21 para 3 of the Statute of the City of Sarajevo (Official Gazette of Sarajevo Canton Nos. 12/98 and 14/98) is not consistent with, respectively, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination.

It is established that constituting of the City Council of the City of Sarajevo on the basis of the following decisions: the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Stari Grad Sarajevo no. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo no. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors Delegated to City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo no. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo no. 01-02-1755/1 of 28 February 2005 is not consistent with, respectively, Article I(2) and Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination.

The Municipal Councils of the following Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo are ordered to select councilors to be delegated to the City Council of the City of Sarajevo in accordance with the Constitution of Bosnia and Herzegovina, within a time-limit of 30 days after the date of service of the present Decision.

The City Council of the City of Sarajevo is ordered, pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to harmonize the provision of Article 21 para 3 of the Statute of the City of Sarajevo with the Constitution of Bosnia and Herzegovina, within a time-limit of three months after the date of publication of the present Decision in the Official Gazette of Bosnia and Herzegovina.

The City Council of the City of Sarajevo and the Municipal Councils of the Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo are ordered to inform the Constitutional Court of Bosnia and Herzegovina of the measures taken, within a time-limit of three months as laid down in Article 75 para 5 of the Rules of Procedure of the Constitutional Court 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.

REASONING

I. Introduction

1. On 15 March 2005, Prof. Dr Nikola Špirić, First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina ("the applicant") filed with the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court") a request for a review of constitutionality of Article 21 of the Statute of the City of Sarajevo (Official Gazette of Sarajevo Canton Nos. 12/98 and 14/98) and the following Decisions on the Selection of the Councilors to the City Council of the City of Sarajevo: the Decision on the Selection of the Councilors Delegated to the City Council of Sarajevo City from amongst the Councilors of the Municipal Council of the Municipality of Stari Grad Sarajevo no. 02-49-137/05 of 3 March 2005, the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo of the Municipal Council of the Municipality of Centar Sarajevo no. 01-49-429/05 of 24 February 2005, the Decision on the Selection of the Councilors delegated to the City Council of the City of Sarajevo from amongst the Councilors of the Municipality of Novo Sarajevo no. 01-02-183/05 of 2 March 2005 and the Decision on the Selection of the Councilors to the City Council of the City of Sarajevo from amongst the Councilors of the Municipal Council of the Municipality of Novi Grad Sarajevo no. 01-02-1755/1 of 28 February 2005.

II. Procedure before the Constitutional Court

2. Pursuant to Article 21 para 1 of the Rules of Procedure of the Constitutional Court, the City Council of the City of Sarajevo and the Municipal Councils of the following Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo were requested on 23 March 2005 to submit their respective replies to the request concerned.

3. The Municipal Councils of the following Municipalities: Novi Grad Sarajevo, Novo Sarajevo and Stari Grad Sarajevo submitted their replies to the request for a review of constitutionality on 6 and 7 April 2005 whereas the Municipal Council of the Municipality of Centar and the City Council of the City of Sarajevo submitted their replies to the said request on, respectively, on 11 April 2005 and 21 April 2005.

4. Pursuant to Article 25 para 2 of the Rules of Procedure of the Constitutional Court, all replies save that of the City Council of the City of Sarajevo were communicated to the applicant on

8 April 2005. The reply of the City Council of the City of Sarajevo was communicated to the applicant on 21 April 2005.

III. Request

a) Statements from the request

5. The applicant referred to application of international standards for protection of human rights under Article II(2) of the Constitution of Bosnia and Herzegovina and to the enumeration of rights provided for in Article II(3) of the Constitution of Bosnia and Herzegovina. Furthermore, the applicant referred to the prohibition of discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina and to the respect for human rights under Article II(6) of the Constitution of Bosnia and Herzegovina. The applicant pointed out that the Decision of the Constitutional Court of Bosnia and Herzegovina No. U-5/98 (constituent status of peoples) guaranteed the status of all three constituent peoples on the entire territory of Bosnia and Herzegovina. Moreover, paragraph 1 of Article 11 (a) of Amendment LII to the Constitution of the Federation of BiH provided that "*the constituent peoples and 'Others' shall be proportionally represented in public institutions of the Federation of Bosnia and Herzegovina*". In view of the aforesaid, it was beyond dispute, according to the applicant, that Article 21 of the Statute of the City of Sarajevo ("the Statute") was not consistent with the Decision of the Constitutional Court on the constituent status of peoples and Article 11(a) of Amendment LII to the Constitution of the Federation of Bosnia and Herzegovina because the said article of the Statute did not make any reference to Serbs as a constituent people. The aforementioned provision of the Statute resulted in the following: Of six Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Stari Grad, five were Bosniacs and one was Croat. Of three Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Centar, two were Bosniacs and one belonged to "Others". Of seven Councilors delegated to the City Council of the City of Sarajevo by the Municipal Council of the Municipality of Novo Sarajevo, three were Bosniacs, three were Croats and one belonged to "Others". It followed that the provisions of the applicable Statute, which is not harmonized with the Constitution of Bosnia and Herzegovina, have not been respected since only twenty-three Councilors were selected without selecting the guaranteed minimum of Croat Councilors and those belonging to "Others".

6. The applicant maintained that the representatives of the Serb people were not selected at all to the City Council of the City of Sarajevo. This fact constituted an absolute denial of Serbs as the

constituent people and discrimination against them and it was a clear evidence of the Bosniac domination, particularly if we take into account the fact that, according to the 1991 census, the Serb population in Sarajevo amounted to 156,000 or approx. 30% of the overall population of Sarajevo, which ranked them as the second most numerous people. Furthermore, the applicant alleged that a detailed analysis of the selection of the Councilors to the City Council of the City of Sarajevo would offer even worse results because the selected "Bosnian"/"Muslim" was chosen as the representatives of "Others", which has become the "usual way of getting around the Constitution of Bosnia and Herzegovina".

7. The applicant suggested that the Constitutional Court should, after conducting a relevant procedure, declare Article 21 of the Statute to be unconstitutional and order the City Council of the City of Sarajevo to harmonize the contested article with Amendment LII to the Constitution of the Federation of Bosnia and Herzegovina, within a time-limit of 30 days. In the event that the City Council of the City of Sarajevo fails to comply with the order of the Constitutional Court within the set time-limit, the applicant suggested that the Constitutional Court should harmonize the said provision as an interim measure. Moreover, the applicant suggested that the Municipal Councils' Decisions on the Selection of the Councilors to the City Council should be annulled as being unconstitutional and that the Municipal Councils should be ordered to issue, within a time-limit of 30 days, new decisions that would be harmonized with the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina and the Decision of the Constitutional Court in Case No. U-5/98 (constituent status of peoples). Should the Municipal Councils fail to comply with the order of the Constitutional Court, the applicant suggested that the Constitutional Court should issue an interim measure whereby it would recognize the election results and national affiliation from the candidates' lists for the selection of members of municipal councils/municipal assemblies.

b) Reply to the request

8. In their replies to the request, the Municipal Councils of the Municipalities of Novi Grad Sarajevo, Stari Grad Sarajevo, Novo Sarajevo and Centar Sarajevo maintained that the Decisions on the Selection of the Municipal Councilors to the City Council of the City of Sarajevo were issued on the basis of applicable regulations and that the full composition of the City Council of Sarajevo City was not feasible on the ground of refusal of one political party to put up its candidates. In addition, they contested the competence of the Constitutional Court to review constitutionality of the said Decisions of the Municipal Councils. According to Article VI(3)(a), the Constitutional

Court may only review constitutionality of general legal acts and, since the contested Decisions of the Municipal Councils are individual legal acts, the Constitutional Court is not competent to review them. The City Council of the City of Sarajevo argued that the Draft Decision on Amendments to the Statute of the City of Sarajevo was adopted in order to harmonize the Statute with the Decision on the Constituent Peoples of the Constitutional Court of Bosnia and Herzegovina. However, the procedure of harmonization of the Statute was to commence upon completion of the verification of the mandate of all twenty-eight Councilors in the City Council of the City of Sarajevo. Therefore, the City Council of the City of Sarajevo suggested dismissal of the request for a review of constitutionality as being ill-founded and that the City Council should be given a time-limit for completion of the procedure of adopting amendments to the Statute of the City of Sarajevo.

IV. Relevant law

9. Constitution of Bosnia and Herzegovina

Preamble of the Constitution of Bosnia and Herzegovina

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article II(4)

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.

10. Annex I to the Constitution of Bosnia and Herzegovina - Additional Human Rights Agreements to be applied in Bosnia and Herzegovina

Annex I para 6

1965 International Convention on the Elimination of All Forms of Racial Discrimination

11. International Convention on the Elimination of All Forms of Racial Discrimination

Article 2 para 1(c)

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

Article 5 para 1(c)

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

c) 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.

12. **Statute of the City of Sarajevo** (Official Gazette of Sarajevo Canton Nos. 12/98 and 14/98)

Article 21

The City Council shall be composed of 28 councilors ("the City Councilors").

Each Municipal Council of the Municipalities forming the City of Sarajevo shall select 7 delegates into the City Council from among the municipal mayors.

Bosniacs, Croats and Others shall have guaranteed individually a minimum of 20% of places in the City Council regardless of the election results.

If the minimum of the guaranteed places referred to in paragraph 3 of this Article has not been reached upon the selection of City Councilors, the City Councilors shall be selected from among candidates enumerated on the lists of the political parties represented in municipal councils according to the election results.

V. Admissibility

13. Article VI(3)a) of the Constitution of Bosnia and Herzegovina, in its relevant part, reads as follows:

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 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

14. The Constitutional Court shall first examine whether it is competent to decide the admissibility of the request at hand within the competences vested in it by Article VI(3)(a) of the Constitution of Bosnia and Herzegovina. In this respect, it is stressed that the wording of Article VI(3)(a) ends with "*including but not limited to*". Consequently, the framer of the Constitution envisaged a certain structure to the Constitutional Court, which is in a way fixed by the provisions of the Constitution of Bosnia and Herzegovina constituting legal grounds for existence and functioning of the Constitutional Court. The framer of the Constitution could not predict the scope of all the functions of the Constitutional Court at the time when the Constitution of Bosnia and Herzegovina was being adopted. This failure is often associated with the issue of jurisdiction of the Constitutional Court. If the framer of the Constitution was to prescribe in detail the requirements for adoption of decisions by the Constitutional Court, the question as to whether this would impose restrictions on the actions of the Constitutional Court would arise. Hence, the wording "*including but not limited to*" under Article VI(3)(a) of the Constitution. The Constitutional Court is one of the most responsible institutions of the system, which represents an additional protection mechanism and ensures a consistent respect of the human rights pursuant to the international conventions and other international agreements. The Constitutional Court must be a just and reliable guardian of the Constitution of Bosnia and Herzegovina, its values and human rights. There are many issues under

the Constitution of Bosnia and Herzegovina that need to be clarified and, in this respect, the Constitutional Court is the only body competent and qualified to provide interpretations.

15. The Constitutional Court interpreted its jurisdiction in several decisions. The following decisions, *inter alia*, reflect the position of the Constitutional Court with regard to its competence: (a) the Constitutional Court is competent to review whether a judgment (decision) of an Entity Constitutional Court is consistent with the Constitution of Bosnia and Herzegovina (Constitutional Court, *U-5/99*, Decision of 3 December 1999; Official Gazette of Bosnia and Herzegovina No. 3/00); (b) the Constitutional Court is competent to review constitutionality of laws passed by the High Representative when substituting himself for the national authorities (Constitutional Court, *U-9/00*, Decision of 3 November 2000; Official Gazette of Bosnia and Herzegovina No. 1/01); (c) the Constitutional Court shall have appellate jurisdiction over issues under this Constitution "*arising out of a judgment of any other court in Bosnia and Herzegovina*" not only in case of a judgment but also in case when a court decision was not issued within a reasonable time (Constitutional Court, *U-23/00*, Decision of 2 February 2001; Official Gazette of Bosnia and Herzegovina No. 10/01); (d) the Constitution of Bosnia and Herzegovina is to be read and interpreted in the context of other relevant Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina (Constitutional Court, *U-32/01*, Decision of 22 June 2001; Official Gazette of Bosnia and Herzegovina No. 27/01); (e) the Constitutional Court, in appellate procedure, is competent to make a concrete review of constitutionality within the meaning of Article VI(3)(c) of the Constitution of Bosnia and Herzegovina (Constitutional Court, *U-106/03*, Decision of 26 October 2004).

16. It follows from the quoted case-law that the Constitutional Court, as an institution which upholds the Constitution, is competent to review constitutionality of all acts regardless of their adopters if the issue raised is under one of the Constitutional Court's competences set out in Article VI(3) of the Constitution of Bosnia and Herzegovina. In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of violation of human rights. In the case at hand, the request for a review of constitutionality relates to issues under, respectively, the Constitution of Bosnia and Herzegovina and International Agreements that guarantee protection and exercise of human rights and constitutional principles such as the principle of constituent peoples and the right to non-discrimination.

17. Furthermore, the Constitutional Court points out that the applicant is the First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina. The request for a review of

constitutionality relates to adoption of a decision as to whether the provisions of the contested acts are consistent with the Constitution of Bosnia and Herzegovina. Finally, the request contains all the necessary facts and statements on which it is founded.

18. In view of the provisions of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 16 para 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court has established that the request in question was filed by an authorized person and that the formal requirements under Article 16 para 2 of the Rules of Procedure of the Constitutional Court have been met in the case concerned.

VI. Merits

19. The appellant contested the constitutionality of, respectively, Article 21 of the Statute and the Decisions on the Selection of Municipal Councilors to the City Council of the City of Sarajevo by alleging that they violated the principle of constituent peoples and the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina with respect to Serbs as a constituent people in Bosnia and Herzegovina. Although the applicant alleged that he contested the constitutionality of Article 21 of the Statute of the City of Sarajevo in its entirety, the Constitutional Court shall review constitutionality of paragraph 3 of Article 21 of the Statute of the City of Sarajevo only since this is the only relevant provision in view of the allegations made in the request for a review. Additionally, the Constitutional Court points out that its review shall be limited to the Constitution of Bosnia and Herzegovina and it shall not review the contested acts with regard to the Constitution of the Federation of Bosnia and Herzegovina as this does not fall under its competence.

20. Article 21 para 3 of the Statute of the City of Sarajevo reads as follows:

Bosniacs, Croats and Others shall have guaranteed individually a minimum of 20% of places in the City Council regardless of the Election Results.

21. The Constitutional Court shall first examine the constitutionality of the contested provision with respect to the principle of constituent peoples.

22. The Constitutional Court recalls that since the creation of the modern statehood of Bosnia and Herzegovina, the principle of multi-ethnicity (Bosniacs, previously Muslims, Serbs and Croats) has been one of the most important elements that found its place in the Constitution as the supreme legal act of a State.

23. In addition, the composition of population of Bosnia and Herzegovina suggests that it is a pronouncedly multiethnic state. This is supported by the figures from the last census in Bosnia and Herzegovina that was held in 1991. According to the 1991 census, 760,852 persons or 17.4% of the total population of Bosnia and Herzegovina declared themselves as Croats, 1,902,956 persons or 43.5% of the total population declared themselves as Muslims and 1,366,104 persons or 31.2% of the total population declared themselves as Serbs. According to the 1991 census, the area of the then City of Sarajevo was inhabited as follows: Croats 34,873 or 6.6% of the total population, Muslims 259,470 or 49.2% of the total population, Serbs 157,143 or 29.8% of the total population, Yugoslavs 56,470 or 10.7% of the total population and Others 19,093 or 3.6% of the total population.

24. According to the aforementioned census, the composition of the population in the municipalities comprising the present-day City of Sarajevo (Stari Grad, Centar, Novo Sarajevo and Novi Grad) was as follows: a) Municipality of Stari Grad: 1,126 persons or 2.2% of the total population declared themselves as Croats, 39,410 persons or 77.7% of the total population declared themselves as Muslims, 5,150 persons or 10.1% of the total population declared themselves as Serbs, 3,374 persons or 6.6% of the total population declared themselves as Yugoslavs and 1,684 persons or 3.3% of the total population declared themselves as Others; b) Municipality of Centar: 5,428 persons or 6.8% of the total population declared themselves as Croats, 39,761 persons or 50.1% of the total population declared themselves as Muslims, 16,631 persons or 21% of the total population declared themselves as Serbs, 13,030 persons or 16.4% of the total population declared themselves as Yugoslavs and 4,436 persons or 5.6% of the total population declared themselves as Others; c) Municipality of Novo Sarajevo: 8,798 persons or 9.3 % of the total population declared themselves as Croats, 33,902 persons or 35.7% of the total population declared themselves as Muslims, 32,899 persons or 34.6% of the total population declared themselves as Serbs, 15,099 persons or 15.9% of the total population declared themselves as Yugoslavs and 4,391 persons or 4.6% of the total number of the population declared themselves as Others; d) Municipality of Novi Grad: 8,889 persons or 6.5% of the total population declared themselves as Croats, 69,430 persons or 50.8% of the total population declared themselves as Muslims, 37,591 persons or 27.5% of the total number of the population declared themselves as Serbs, 15,580 persons or 11.4% of the total population declared themselves as Yugoslavs and 5,126 persons or 3.8% of the total population declared themselves as Others.

25. The last sentence of the Preamble of the Constitution of Bosnia and Herzegovina reads as follows: "*Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...*". The Constitutional Court took the view in its Third Partial Decision No. 5/98 (Decision of 1 July 2000, para 19; published in the Official Gazette of Bosnia and Herzegovina No. 23/00) that the Preamble constituted an integral part of the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court emphasized the following in the aforementioned decision: "*... As any provision of an Entity's constitution must be consistent with the Constitution of Bosnia and Herzegovina, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of Bosnia and Herzegovina for as long as the aforesaid Preamble contains constitutional principles delineating [...] spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions...*" (ibid. para 26). The Constitutional Court concluded in the same decision the following: "*... 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 homogenization through segregation based on territorial separation...*" Additionally, the Decision of the Constitutional Court No. U 5/98 clearly stated that the Bosniacs, Croats and Serbs were constituent peoples on the entire territory of Bosnia and Herzegovina and that the provisions of the Entity's Constitutions excluding the principle of constituent peoples were unconstitutional. The aforementioned decision also stated 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 that had existed prior to the war without any territorial separation that would bear ethnic inclination...*" (ibid, para 73).

26. The aforementioned constitutional principle of multi-ethnicity of Bosnia and Herzegovina, i.e. the principle of constituent peoples in the entire territory of Bosnia and Herzegovina that was elaborated in more detail in the aforementioned decision of the Constitutional Court, must be linked with the contested provisions of the Statute in view of the fact that all pieces of legislation in Bosnia and Herzegovina must be harmonized with the Constitution of Bosnia and Herzegovina as the highest legal act. It clearly follows from the contested provision of the Statute that it excludes Serbs from the composition of the City Council of the City Sarajevo; in other words, it does not provide to Serbs a minimum of 20% seats in the City Council of the City of Sarajevo irrespective of the election results, which is guaranteed to other constituent peoples – Bosniacs, Croats, and Others.

Failure to designate Serbs as a constituent people that must participate in the City Council of the City of Sarajevo irrespective of the election results is absolutely unacceptable in view of the fact that, pursuant to the Preamble of the Constitution of Bosnia and Herzegovina and the aforementioned Constitutional Court's decision on constituent peoples, Serbs are a constituent people in the entire territory of Bosnia and Herzegovina.

27. The City Council of the City of Sarajevo is a significant body in the organizational structure of the City of Sarajevo and the fact that one of the constituent peoples is not guaranteed minimum representation in the City Council irrespective of the election results cannot be disregarded. Paragraph 2 of Amendment XXVI to the Constitution of the Federation of Bosnia and Herzegovina stresses the importance of the bodies of the City of Sarajevo and their multi-ethnic character (Official Gazette of the Federation of Bosnia and Herzegovina No. 13/97), reading as follows: "*The composition and the manner of decision-making of the bodies of the City of Sarajevo shall reflect multi-ethnicity and particularity of the City of Sarajevo as the Capital of the Federation of Bosnia and Herzegovina*". The competencies of the City Council of the City of Sarajevo are fundamental to the functioning of the City of Sarajevo (e.g. according to Article 24 of the Statute, the City Council adopts the City Statute, decisions, other regulations and general acts and provides interpretation for them, appoints and dismisses the Mayor and Deputy Mayor, adopts the budget and regulations regarding city taxes, manages and disposes of the property of the City of Sarajevo, etc.). Therefore, it is necessary that Serbs, as Bosniacs and Croats, are given minimum guarantees for the participations in the City Council irrespective of the election results since that is the only the way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina. This can only be achieved if the Statute designates Serbs as one of the constituent peoples in the same line with Bosniacs, Croats and Others.

28. In support of this statement, the Constitutional Court refers to its Decision on Constituent Peoples No. U-5/98 of 1 July 2000, whereby it declared as unconstitutional the provisions of the Entity Constitutions that did not respect the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples. The Constitutional Court prohibited any special privileges to be granted to one or two of these peoples, any domination in governmental structures, or any ethnic homogenization through segregation based on territorial separation. The Constitutional Court holds that it would be superfluous to elaborate on this point that the "group of Others" from the contested provision 21 paragraph 3 of the Statute does not mean that Serbs have the status of one of the constituent peoples

since the Constitutional Court concluded in its Third Partial Decision in Case No. U 5/98 (ibid, para 104) that “... *this category is only a half-hearted substitute for the status of a constituent people and the privileges they enjoy in accordance with the Constitution of the Federation...*”.

29. Hence, Serbs as one of the constituent peoples must be guaranteed a minimum number of seats in the City Council irrespective of the election results, as guaranteed to other constituent peoples (Bosniacs, Croats and Others). In addition, the Constitutional Court emphasizes that if the City Council or any other body is constituted on the grounds of regulations that are not consistent with the principle of constituent peoples, the constituting would itself be inconsistent with the Constitution of Bosnia and Herzegovina. However, an issue arises as to what would happen if the minimum representation provided for all constituent peoples could not be achieved through the election of the city councilors from amongst the councilors from each municipality. Should this take place, the current arrangement under Article 21 para 4 of the Statute reads that the City Councilors shall be elected from amongst the candidates from the lists of political parties represented in the Municipal Councils and based on the election results.

30. To that end, the Constitutional Court points out that the political parties at all levels of authority are obliged to observe the principles of the Decision on Constituent Peoples No. U 5/98 that are primarily based on the 1991 census. Having regard to provision of Article I(2) of the Constitution of Bosnia and Herzegovina, which provides that Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections, the political parties are clearly obliged to respect the principles of the Decision on the Constituent Peoples in view of the fact that the representatives of political parties exercise power after free and democratic elections. Otherwise, the political parties that fail to observe the said principles shall be in a position where the election results would not correspond to the number of mandates to which a certain political party is entitled in a legislative body.

31. In terms of constituting the City Council of the City of Sarajevo based on the contested decisions of the municipal councils, the Constitutional Court stresses that the legal system of Bosnia and Herzegovina does not allow for an effective remedy to contest decisions of municipal councils on the selection of councilors to the city council on the ground that such decisions constituted a city council which is not consistent with the Constitution of Bosnia and Herzegovina. The Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina Nos. 23/01, 7/02, 9/02 and 20/02) affords protection of the election right and this protection refers to the respect of the rules and regulations as established by this law. Namely, Article 6 para 1 of the said Law provides: *"The*

protection of the electoral right is secured by the election commissions, the Election Complaints and Appeals Council and the Appellate Division of the Court of Bosnia and Herzegovina", whereas Article 6 para 2 thereof provides: "*Any individual, political party or coalition who has a legal interest, or whose right established by this law was violated, can file a complaint with the competent authority no later than three (3) days after the violation occurred, except as otherwise provided by law*". In that regard, the Constitutional Court holds that the principle of the rule of law under Article I(2) of the Constitution of Bosnia and Herzegovina is a goal that, in the present case, provides a foothold for the Constitutional Court to examine whether the contested decisions of the Municipal Councils resulted in the constituting the City Council of the City of Sarajevo in the manner which is not in accordance with the Constitution of Bosnia and Herzegovina.

32. Considering that the City Councils that adopted the contested decisions derive their competence from the unconstitutional provision of the Statute, the Constitutional Court concludes that the constituting the City Council of the City of Sarajevo based on the decisions of the Municipal Councils was not done in accordance with the Constitution of Bosnia and Herzegovina. Therefore, in order to constitute the City Council of Sarajevo City in keeping with the Constitution of Bosnia and Herzegovina, the Municipal Councils of the Municipalities: Stari Grad Sarajevo, Centar Sarajevo, Novo Sarajevo and Novi Grad Sarajevo shall have to select the Councilors to the City Council of Sarajevo City in line with the Constitution of Bosnia and Herzegovina.

33. The Constitutional Court shall also examine the applicant's assertion that the contested provision of Article 21 para 3 of the Statute discriminated against Serbs, which is prohibited under Article II(4) of the Constitution of Bosnia and Herzegovina.

34. Article II(4) of the Constitution of Bosnia and Herzegovina sets forth the principle of non-discrimination with regard to the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution. Accordingly, the Constitutional Court shall examine whether the contested provision of Article 21 para 3 of the Statute discriminated against Serbs with regard to a group of political rights guaranteed under Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination of 1995, which is referred to in paragraph 6 of Annex 1.

35. Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination prescribes a positive obligation of the States to prohibit by all appropriate means any form of discrimination, whereas Article 5 para 1(c) of the aforementioned convention guarantees political

rights; in particular, the right 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. In reply to the question whether the contested provision of the Statute discriminated against Serbs with regard to their ethnical origin, the Constitutional Court refers to its Decision on Constituent Peoples No. U 5/98 of 1 July 2000 (ibid, para 115), which reads as follows: "*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 denied the right to stand as candidates for such governmental or other public office*". The Constitutional Court refers to paras 125 and 126 of the quoted decision in which the following conclusion was reached: "*... In the final analysis, the designation of Bosniacs and Croats as constituent peoples in accordance with Article I(1)(1) of the Constitution of the Federation serves as the constitutional basis for constitutionally illegitimate privileges given only to these two peoples within the Federation's institutional structures...*" as well as that: "*... Bosniacs and Croats, on the basis of the challenged Article I(1)(1), enjoy a privileged position which cannot be legitimized 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 must preserve its existence...*".

36. The Constitutional Court holds that the aforementioned paragraphs can be applied to the present case. It clearly follows from the contested provision of Article 21 para 3 of the Statute that Bosniacs, Croats and Others would be guaranteed a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results. Serbs were not granted such privilege and they were also one of the constituent peoples just like Bosniacs, Croats and Others. On the contrary, Serbs are not even mentioned in the text of the contested provision. In view of the fact there is no justified reason why Bosniacs and Croats were guaranteed such privileged status with the election of members to the City Council of the City of Sarajevo, the Constitutional Court holds that it would be superfluous to conduct further examination to arrive at the conclusion that the provision of Article 21 para 3 of the Statute violates the right of Serbs not to be discriminated against as provided under Article II(4) of the Constitution of Bosnia and Herzegovina in relation to the political rights under Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination of 1995.

37. Moreover, the Constitutional Court notes that other provisions of the Statute that are not mentioned in the request speak only of Bosniacs, Croats and Others as constituent peoples and that, as a result, they are granted certain privileges. For instance, Article 35 paras 1, 2, 3, and 4 of the Statute provides that the City Council of the City of Sarajevo, when it comes to the questions of vital national interest, shall adopt its decisions by a majority of votes including at least four members of the City Council from amongst Bosniacs, Croats and Others. It further provides that certain decisions may affect the national interest of Bosniacs, Croats and Others in the area of housing issues, infrastructure/public services and use of local land. Paragraphs 3 and 4 of the aforementioned article provide that the issues of vital national interest shall be resolved by a commission consisting of one representative of each constituent people to be selected by the Croat and Bosniac Councilors in the City Council. Article 48 para 2 of the Statute provides that the Mayor shall appoint Heads of the City Administration in such way that Bosniacs, Croats and Others shall be given the guaranteed minimum of 15-20% of the positions. Article 75 of the Statute provides that in case amendments to the Statute relate to Articles 8, 15, 17, 21, 35 para 4, 40 para 1 and 72 of the Statute, they shall be considered adopted if two thirds of the City Councilors voted in favor of the amendments and with at least four City Councilors from amongst each of the following groups: Bosniacs, Croats and Others. Moreover, the Constitutional Court notes that the provision of the contested Article 21 para 3 of the Statute was literally copied from Amendment II to the Constitution of the Sarajevo Canton (Official Gazette of Sarajevo Canton No. 16/97) which is still in force and provides for the composition of the City Council of the City of Sarajevo. However, the said provisions were not contested by the request concerned and the Constitutional Court may not review them for it must act within the bounds of the posed request as laid down in Article 31 of the Rules of Procedure of the Constitutional Court.

38. For these reasons, the Constitutional Court concludes that the provisions of Article 21 para 3 of the Statute are not consistent with the last sub-paragraph of the Preamble of the Constitution of Bosnia and Herzegovina, Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination.

VII. Conclusion

39. The provision of Article 21 para 3 of the Statute and the constituting of the City Council of the City of Sarajevo on the grounds of the contested decisions on the selection of Councilors are not consistent with the last sub-paragraph of the Preamble of the Constitution of Bosnia and

Herzegovina, Articles I(2) and II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 5 para 1(c) of the Convention on the Elimination of All Forms of Racial Discrimination and the Decision of the Constitutional Court on Constituent Peoples No. *U-5/98* because the contested provision does not include Serbs as the constituent people but only Bosniacs, Croats and because it does not provide the same guarantees to Serbs as it does to Bosniacs, Croats and Others of having a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results.

40. Pursuant to Article 61 paras 1 and 2 and Article 63 para 2 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decided unanimously as set out in the enacting clause above.

41. According to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina