

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 BiH* 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 Tihčić, the Chair of the Presidency of Bosnia and Herzegovina, at the time of filing the request**, having deliberated the request in case no. **U 5/04**, at its session held on 31 March 2006, adopted the following

DECISION ON ADMISSIBILITY

The request lodged by **Mr. Sulejman Tihčić, the Chair of Presidency of Bosnia and Herzegovina at the time of filing the request**, for a review of conformity of Articles IV(1), IV(1)(a), IV(3) (b) and V(1) of the Constitution of BiH with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as with Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 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 27 April 2004, Mr. Sulejman Tihić, at the time, the Chair of the Presidency of Bosnia and Herzegovina (hereinafter: "the applicant"), lodged a request with the Constitutional Court of Bosnia and Herzegovina (hereinafter: "the Constitutional Court") for a review of conformity of the provisions of Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of Bosnia and Herzegovina (hereinafter: "BiH") with the provision of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the European Convention") and Article 3 of Protocol No. 1 to the European Convention.

2. The applicant states that Article IV(1) of the Constitution of BiH reads as follows: "The House of Peoples shall comprise 15 delegates, two-thirds from the F BiH (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs)." Such provision of the structure of the House of Peoples is not in conformity with the right to non-discrimination under Article 14 of the European Convention in conjunction with the right to free elections within the meaning of Article 3 of Protocol No. 1 to the European Convention, which provides for the principle of equal treatment of all citizens in the exercise of their rights to vote and be elected under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Article IV(1) of the Constitution of BiH does not guarantee the right to free elections within the meaning of Article 3 of Protocol No. 1 to the European Convention in view of the fact that it does not ensure equal treatment of all citizens of BiH in the exercise of their right to vote.

3. In fact, according to Article IV(1) of the Constitution of BiH, only the members of three constituent peoples in BiH, *i.e.* Bosniacs, Croats and Serbs, may be the delegates to the House of Peoples of the Parliamentary Assembly of BiH. Not one single member of the Others, *i.e.* who does not belong to one of the three constituent peoples, can be a delegate to the House of Peoples. Thereby, all persons who are not Bosniacs, Croats or Serbs are denied the access to these public offices, thus the citizens of BiH from amongst the Others are directly discriminated against on the ethnical, religious and racial ground. Therefore, without any objective and reasonable justification a distinction was made between the three constituent peoples and the Others in BiH whereby the latter were discriminated against in the exercise of their right guaranteed under Article 3 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4. Furthermore, it follows from the provisions of Article IV(1) of the Constitution of BiH that only Bosniacs and Croats from the F BiH, *i.e.* only Serbs from Republika Srpska ("hereinafter:

“RS”) may be the delegates to the House of Peoples of the Parliamentary Assembly of BiH. This means that the Serbs from the F BiH and Bosniacs and Croats from RS are not provided with the possibility to stand for election to the House of Peoples of the Parliamentary Assembly of BiH, thereby they have been prevented from exercising their passive election right, *i.e.* the right to stand for election in this legislature on the level of the State of BiH. In this manner, the Serbs in F BiH as well as Bosniacs and Croats in RS are directly discriminated against in the exercise of their right guaranteed under Article 3 of Protocol No. 1 to the European Convention.

5. In addition, the applicant states that Article IV(1)(a) of the Constitution of BiH provides for as follows: “The designated Croat and Bosniac delegates from the Federation shall be selected, respectively, by the Croat and Bosniac delegates to the House of Peoples of the Federation. Delegates from the RS shall be selected by the National Assembly of the RS.” This Article of the Constitution of BiH is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention. In fact, it follows from Article IV(1)(a) of the Constitution of BiH, which regulates election of delegates to the House of Peoples of the Parliamentary Assembly of BiH, that the citizens of F BiH from amongst Serb peoples and Others are discriminated against on ethnical, racial and/or religious grounds in relation to Croats and Bosniacs as they have been denied the right to elect the delegates to the House of Peoples of the Parliamentary Assembly of BiH, *i.e.* they are deprived of the active election right guaranteed under Article 3 of Protocol No. 1 to the European Convention. Moreover, this Article confirms the allegations that Serbs from the F BiH and Bosniacs and Croats from RS cannot, according to the procedure under Article IV(1)(a), be elected to the House of Peoples of the Parliamentary Assembly of BiH, whereby they have been prevented from the exercise of the right guaranteed under Article 3 of Protocol No. 1 to the European Convention. After the provisions of the entity constitutions were put in conformity with the decision of the Constitutional Court of BiH on constituency of peoples, Bosniacs, Croats and Serbs are constituent peoples in both entities. Accordingly, they are entitled to elect and stand for election to the House of Peoples of the Parliamentary Assembly of BiH, including also the Serbs from F BiH and Bosniacs and Croats from the RS.

6. The applicant states that Article IV(3)(b) of the Constitution of BiH stipulates as follows: “Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected.” This Article is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention. Actually, only a

Bosniac, Croat and Serb may be elected the chair or deputy chair of the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH. The access to these public offices has been denied to the citizens from amongst the Others, whereby they are directly discriminated against in the exercise of their passive election right on ethnical, religious and racial grounds, which constitutes an interference with the essence of the protected rights guaranteed under Article 3 of Protocol No. 1 to the European Convention.

7. The applicant asserts that Article V(1) of the Constitution of BiH reads as follows: “The Presidency of BiH shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the F BiH, and one Serb directly elected from the territory of the RS”. This Article is not in conformity with Article 14 of the European Convention and Article 3 of Protocol No.1 to the European Convention. It follows from this provision 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 BiH. It means that only a Bosniac, Croat and Serb have the access to these public offices, whereas the citizens from amongst the Others are prevented from being elected into this authority. In that manner they have been directly discriminated against in the exercise of their passive election right on the ground of ethnicity, religion and race. Also, only a Bosniac and Croat from the F BiH and a Serb from the RS can be members of the Presidency of BiH, thereby the Serbs in the F BiH and Bosniacs and Croats in the RS have been prevented from standing for election to these public offices.

8. A citizen of Serb origin from the F BiH can never be a member of the BiH Presidency who is directly elected from the F BiH nor can a citizen of Bosniac or Croat ethnicity from RS ever be a member of the Presidency who is directly elected form the RS territory. This means that in the first instance, the citizen of Serb origin from the F BiH and in the second instance the citizen of Bosniac and Croat origin from the RS have been prevented from exercising their passive election right, *i.e.* the right to run for election to the Presidency of BiH. In this manner, a number of citizens have been discriminated against by having been prevented by the constitutional provisions from exercising their political rights, particularly the rights of taking part at the elections.

9. In support of the assertions advanced in this request is the reasoning of the third partial decision of the Constitutional Court of BiH, no. *U 5/98*, from which it follows that “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 offices.

10. Moreover, all provisions reserving a public office for a Bosniac, Croat or Serb without any possibility for election of a citizen from amongst the Others are in violation of Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination which, according to Annex I to the Constitution of BiH, has to be applied in BiH and does not represent merely an obligation of the State of BiH but also guarantees individual rights, political rights, particularly the right to participate in elections – the right to vote and stand for elections according to the system of general and equal right of vote, the right to participate in the government, as well as in the management of public offices at all levels and the right of access under the equal conditions to public offices. It is clear from the definition of Article 1 of the European Convention that the expression “racial discrimination” is related to any exclusion, limitation, differentiation or giving priority on the grounds of race, color, birth, national or ethnical origin serving for or intending to violate and/or compromise the recognition, enjoyment or exercise under the equal conditions of human rights and fundamental freedoms in the political, economic, social and cultural field, or in any other sphere of public life.

11. The applicant proposes that the Constitutional Court adopt the decision as follows: a) to establish that Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BiH are not in conformity with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention and b) to order the Parliamentary Assembly of BiH to bring into line Articles IV(1), IV(1)(a), IV(3)(b) and V(1) of the Constitution of BiH, in accordance with Article 63(2) of the Constitutional Court’s Rules, with Article 14 of the European Convention and Article 3 of Protocol No. 1 to the European Convention no later than three months from the date of publication of the Constitutional Court’s decision.

12. In examining the admissibility of the present request, the Constitutional Court invoked the provisions of Article VI(3)(a) of the Constitution of BiH and Article 17 (1)(1) of its Rules.

Article VI(3)(a) of the Constitution of BiH reads as follows:

The Constitutional Court shall uphold this Constitution.

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between BiH and an Entity or Entities, or between institutions of BiH, 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 BiH.*
- *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;*

13. In view of the applicant's allegations it appears that he requests examination of conformity of certain provisions of the Constitution of BiH with European Convention and its Protocols. Therefore, the Constitutional Court must establish whether it is competent to examine constitutional provisions to establish their compatibility with the European Convention. Admissibility of the present request depends primarily upon the relation between the Constitution of BiH and the European Convention. The status of the European Convention stems from Article II(2) of the Constitution of BiH which clearly states that the rights and obligations provided for by the European Convention are directly applicable in BiH. This provision points to the general phenomenon of the internalization of the domestic legal system in BiH. It follows from the case-law of the European Court of Human Rights that the domestic law must meet the requirements stipulated by the European Convention. According to Article VI(3) of the Constitution of BiH, the Constitutional Court “shall uphold this Constitution”. In order for the Constitutional Court to uphold the Constitution of BiH, it may refer to the text of that Constitution and to the European Convention which derives also from Article VI(3)(c) of the Constitution of BiH.

14. In order to establish jurisdiction of the Constitutional Court under Article VI(3)(a) of the Constitution of BiH, it is necessary to establish that there is “a dispute” within the meaning of this constitutional provision. The present case does not involve “any dispute that arises under this Constitution between the Entities or between BiH and an Entity or Entities, or between institutions of BiH” but a possible conflict between international and domestic law. In addition, where as in the present case an examination of conformity of certain provisions of the Constitution of BiH with the European Convention is requested, the Constitutional Court notes that the rights under the European Convention cannot have a superior status to the Constitution of BiH. The European Convention, as an international document, entered into force by virtue of the Constitution of BiH, and therefore the constitutional authority derives from the Constitution of BiH and not from the European Convention itself.

15. Although the Constitution of BiH does not expressly provide for the Constitutional Court’s jurisdiction as to the interpretation of the Constitution, it is clear that the Constitutional Court cannot exercise its jurisdiction unless it has first interpreted the relevant constitutional provisions and the provisions of the law subject to abstract review by the Constitutional Court on a request lodged with the Constitutional Court, as well as the provisions relating to its own jurisdiction. The Constitutional Court must always adhere to the text of the Constitution of BiH, which in the present case does not allow for wider interpretation of its jurisdiction, in view of the obligation of the Constitutional Court to “uphold this Constitution”.

16. In light of the aforesaid, the Constitutional Court concludes that it falls out of the scope of its competence to decide in the present case on the conformity of certain provisions of the Constitution of BiH with the European Convention and its Protocols.

17. 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.

18. Pursuant to Article VI(4) of the Constitution of BiH, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of BiH