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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

FINAL DECISION
OF THE EUROPEAN COURT OF HUMAN RIGHTS

As to the Admissibility
of Application no. 41183/02
by Ruža JELIČIĆ
against Bosnia and Herzegovina

In relation to which
the Venice Commission
made Third Party submissions
(CDL-AD(2005)024)

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41183/02
by Ruža JELIČIĆ
against Bosnia and Herzegovina

The European Court of Human Rights (Fourth Section), sitting on 15 November 2005 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr K. TRAJA,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*.

Having regard to the above application lodged on 19 August 2002,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the European Commission for Democracy through Law (the Venice Commission) and the International Committee for Human Rights pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules of Court,

Having regard to the parties' oral submissions at the hearing on 28 June 2005,

Having deliberated, decides as follows:

THE FACTS

The applicant, Ms Ruža Jeličić, is a citizen of Bosnia and Herzegovina who was born in 1953 and lives in Banja Luka, Bosnia and Herzegovina. She was represented successively by two lawyers, both practising in Banja Luka: Mr D. Đurić and, following his death, Mr P. Radulović. At the oral hearing on 28 June 2005 the applicant was assisted by her advisor, Mr S. Nišić. The respondent Government were represented by Ms Zikreta Ibrahimović, Agent, and Ms Monika Mijić, Deputy Agent.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Relevant background to the present case

Since 1965 individuals were allowed to open foreign-currency savings accounts in the former Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY"). Hard-pressed for hard currency as it was, the SFRY made it attractive for its expatriate workers and other citizens to deposit their foreign currency with SFRY commercial banks: such deposits earned high interest and were guaranteed by the State (section 14 § 3 of the Foreign-Currency

Transactions Act 1985 and section 76 § 1 of the Banks and Other Financial Institutions Act 1989).

From the entry into force of the Foreign-Currency Transactions Act 1977 until 15 October 1988, commercial banks could re-deposit foreign currencies with the National Bank of the SFRY in Belgrade and could obtain interest-free, national-currency loans in return. However, such re-depositing was apparently only a paper transaction so that a large part of foreign currency remained, in reality, with the commercial banks. The commercial banks then used foreign currency for payments abroad (for financing imports and foreign services for their clients). On the other hand, foreign currency which was actually deposited with the National Bank of the SFRY was used for paying foreign debts of the SFRY.

Problems resulting from the foreign and domestic debt of the SFRY caused a monetary crisis in the 1980s, with hyperinflation in the SFRY economy. Once the banking and monetary systems were on the verge of collapse, the SFRY took emergency measures including legislative restrictions on the repayment of foreign-currency deposits to individuals.

While a major part of the original deposits may have ceased to exist before or during the process of dissolution of the SFRY and the disintegration of its banking and monetary systems, the SFRY's statutory guarantee for those deposits was never revoked by it. Indeed, it was taken over by the successor States on different dates after their respective declarations of independence.

The Republic of Bosnia and Herzegovina (legal predecessor of present-day Bosnia and Herzegovina) declared its independence in March 1992. It took over the statutory guarantee of foreign-currency deposits from the SFRY on 11 April 1992 (section 6 of the SFRY Legislation Application Act 1992): the conditions and methods of honouring the obligations based on this guarantee were to be regulated by a separate law. Meanwhile, a withdrawal of foreign-currency deposits was virtually impossible.

In 1998 Bosnia and Herzegovina authorised the Federation of Bosnia and Herzegovina and the Republika Srpska (its constituent entities) to dispose of proceeds from the privatisation of state-owned companies and banks located in their respective territories making them, at the same time, accountable for the accrued debts of those companies and banks (section 4 of the Privatisation of Companies and Banks Framework Act 1998). On 8 April 1998 and 8 January 2002 the Federation of Bosnia and Herzegovina and the Republika Srpska passed legislation providing for the transfer of the banks' liabilities for "old" foreign-currency savings (foreign currencies deposited before the dissolution of the SFRY) to their respective governments at the completion of the privatisation of their banking sectors (section 35 § 1 of the Opening Balance Sheets Act 1998 of the Federation of Bosnia and Herzegovina and section 20 of the Opening Balance Sheets Act 1998 of the Republika Srpska, as amended on 8 January 2002).

On 2 June 2004 the Agreement on Succession Issues entered into force. Article 7 of Annex C to that Agreement stipulated that "[g]uarantees by the SFRY or its National Bank of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This negotiation shall take place under the auspices of the Bank for International Settlements".

In 2004 the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina (the third constituent unit of Bosnia and Herzegovina which was established on 8 March 2000) undertook to settle the claims arising from "old" foreign-currency savings by payment in cash and in state bonds (the Settlement of Domestic Debt Acts of 2004 of the Federation of Bosnia and Herzegovina, of the Republika Srpska and

of the Brčko District of Bosnia and Herzegovina). It would appear that payment has not yet started.

Meanwhile, many "old" foreign-currency savings holders (not all) are entitled to use such savings to purchase state-owned apartments, business premises and companies. It would appear that a small number have done so. It would also appear that Bosnia and Herzegovina undertook to place money obtained in the privatisation and succession processes into escrow accounts and to withdraw from those accounts only for the clearance of domestic debt (including debt arising from "old" foreign-currency savings) following prior consultation with the International Monetary Fund.

A small number of individuals, including the applicant in the present case, have obtained court judgments ordering the release of their "old" foreign-currency savings. However, those judgments have not been enforced for different reasons (while some periods are covered by a statutory moratorium, the others are not).

2. The present case

On 31 January 1983 the applicant deposited a certain amount of German marks ("DEM") in two foreign-currency savings accounts at the former *Privredna banka Sarajevo Filijala Banja Luka* (the present-day *Nova banjalučka banka*; hereinafter referred to as "the applicant's bank", "her bank" or simply "the bank"), located in what is now the Republika Srpska. One account was an automatically renewable three-year term savings account earning 12.5% interest a year and the other was an ordinary savings account.

The applicant attempted to withdraw her savings on several occasions to no avail. The bank explained to her that her money had been re-deposited, prior to the dissolution of the SFRY, with the National Bank of the SFRY in Belgrade.

On 3 October 1997 she brought a civil action to recover her savings including accrued interest. On 26 November 1998 the Banja Luka Court of First Instance issued a judgment ordering the applicant's bank to pay to her the full sum in her accounts (DEM 300,169), which amount included accrued interest, plus default interest and legal costs.

On 5 February 1999 the Banja Luka Court of First Instance mistakenly held that the bank had not appealed against the judgment of 26 November 1998 and thus issued an order enforcing that judgment.

On 25 February 1999 the Banja Luka Court of First Instance established that the bank had in fact submitted an appeal against the judgment in issue. On 4 November 1999 the Banja Luka District Court rejected that appeal.

Meanwhile, the applicant filed an application with the Human Rights Ombudsperson who referred the application to the Human Rights Chamber. The two institutions were set up by the Agreement on Human Rights (Annex 6 to the 1995 Dayton Agreement) in order to assist Bosnia and Herzegovina and its entities in honouring their obligations under that Agreement, namely to secure to all persons within their jurisdiction the highest level of internationally recognised human rights (including those provided in the European Convention on Human Rights – hereinafter "the Convention").

On 12 January 2000 the Human Rights Chamber found a violation of Article 6 of the Convention and of Article 1 of Protocol No. 1 to the Convention arising from a failure to enforce the judgment of 26 November 1998. The Human Rights Chamber held the Republika Srpska responsible and ordered it to ensure full enforcement without further delay.

On 22 March 2000 the Banja Luka Court of First Instance issued a fresh enforcement order.

On 28 July 2000 the Republika Srpska Supreme Court rejected a further appeal by the applicant's bank.

On 8 November 2000 the Republika Srpska Payment Bureau refused to enforce the judgment relying on the Foreign-Currency Transactions Act 1996, the Opening Balance Sheets Act 1998 and the Instruction of the Republika Srpska Government of 4 October 1999.

On 31 December 2001 the balance in the applicant's bank account was 149,319.55 euros ("EUR").

On 18 January 2002 the privatisation of the applicant's bank was completed and the applicant's foreign-currency deposit became a public debt of the Republika Srpska pursuant to section 20 of the Opening Balance Sheets Act 1998, as amended on 8 January 2002.

On 7 March 2002 the applicant apparently converted a part of her savings (EUR 10,225.84) into privatisation coupons and sold those coupons on the secondary market pursuant to the Privatisation of Companies Act 1998. She claimed to have received EUR 4,400. She also claimed to have converted, on an unspecified date, DEM 60,000 (approximately EUR 30,000) into coupons which coupons she sold on the secondary market for approximately EUR 12,000.

B. Relevant international and domestic law and practice

1. Legislation of the former Socialist Federal Republic of Yugoslavia ("the SFRY")

(a) Foreign-Currency Transactions Act 1977 (*Zakon o deviznom poslovanju i kreditnim odnosima;* published in the Official Gazette of the SFRY – "OG SFRY" – no. 15/77; amendments published in OG SFRY nos. 61/82, 77/82, 34/83, 70/83 and 71/84)

This Act was in force until 1 January 1986. Section 51 § 2 provided as follows:

"The National Bank of the SFRY shall be bound, at the request of an authorised bank, to accept citizens' foreign-currency deposits held in accounts at such authorised bank, and at the same time to grant the authorised bank an interest-free credit in the amount of the dinar counter value of the foreign currency deposited."

(b) Civil Obligations Act 1978 (Zakon o obligacionim odnosima; published in OG SFRY no. 29/78; amendments published in OG SFRY nos. 39/85, 45/89 and 57/89)

This SFRY Act is still in force in Bosnia and Herzegovina. The following are the relevant provisions:

Section 1035

"1. A contract for a monetary deposit is formed when the bank agrees to accept and the depositor agrees to deposit a certain sum of money in the bank.

2. Under such a contract, the bank shall have the right to use the deposited money and the obligation to return it in accordance with the terms set out in the agreement."

Section 1038 § 2

"Unless otherwise agreed ... the depositor shall have the right to withdraw all or part of the balance of the deposit at any time."

Section 1043 § 1

"If the money is deposited in a savings account, the bank or financial institution shall issue the depositor with a savings book."

Section 1045

"Interest shall be paid on savings deposits."

(c) Foreign-Currency Transactions Act 1985 (*Zakon o deviznom poslovanju;* published in OG SFRY no. 66/85; amendments published in OG SFRY nos. 13/86, 71/86, 2/87, 3/88, 59/88 and 82/90)

This SFRY Act was in force in the Republic of Bosnia and Herzegovina (the legal predecessor of present-day Bosnia and Herzegovina) until 11 April 1992. The following were the relevant provisions:

Section 14, as read until 21 December 1990

"1. Domestic nationals and legal persons may keep foreign currency in a foreign-currency ordinary or savings account at an authorised bank and use it for making payments abroad, in accordance with the provisions of this Act.

2. Foreign nationals may keep foreign currency in a foreign-currency ordinary or savings account at an authorised bank.

3. Foreign currency in foreign-currency ordinary or savings accounts shall be guaranteed by the SFRY."

Section 14, as amended on 21 December 1990

"1. Domestic nationals may keep foreign currency in a foreign-currency ordinary or savings account at an authorised bank and use them for making payments abroad, in accordance with the provisions of this Act.

2. Foreign nationals may keep foreign currency in a foreign-currency ordinary or savings account at an authorised bank.

3. Foreign currency in foreign-currency ordinary or savings accounts shall be guaranteed by the SFRY.

4. The conditions and procedure applicable to the obligations arising under the guarantee shall be regulated by a separate SFRY law."

Section 71, as amended on 21 December 1990

"1. Domestic nationals may ... deposit convertible currencies in a foreign-currency ordinary or savings account at an authorised bank.

2. Foreign currency kept in foreign-currency ordinary or savings accounts may be used by domestic nationals to pay for imported goods or services for their own and close relatives' needs, in accordance with the legislation concerning foreign trade.

...

4. Foreign currency referred to in paragraph 2 of this section may be used by domestic nationals for the purchase of foreign-currency bonds, to make testamentary gifts for scientific or humanitarian purposes in the SFRY or to pay for life insurance with an insurance company in the SFRY.

5. The National Bank of the SFRY shall regulate the operation of the foreign-currency ordinary or savings accounts of domestic and foreign nationals."

Section 103, as read until 15 October 1988

"1. The National Bank of the SFRY shall, on request by an authorised bank, accept in its deposit the foreign currency that has been deposited by domestic and foreign nationals in foreign-currency ordinary or savings accounts after the entry into force of this Act.

2. The procedure for depositing foreign currency with or withdrawing foreign currency from the National Bank of the SFRY and the conditions under which such deposits or withdrawals may be made shall be regulated by the Federal Executive Council in accordance with the recommendations of the National Bank of the SFRY."

Section 103, as amended on 15 October 1988 and on 21 December 1990

"Banks approved to engage in foreign-trade transactions may retain foreign currency ... in overseas accounts or sell it to the National Bank of the SFRY or on the single monetary market with a right of redemption at the exchange rate applicable at the date of purchase."

(d) The 1985 Decision on the procedure to be followed when depositing foreign currency with or withdrawing foreign currency from the National Bank of the SFRY and the conditions under which such deposits or withdrawals may be made (*Odluka o načinu i uslovima deponovanja i vraćanja deviza građana iz depozita Narodne banke Jugoslavije;* published in OG SFRY no. 73/85)

Section 5 provided as follows:

"1. By reference to the deposited foreign currency ... the National Bank shall authorise credits to the banks in dinars in an amount equal to the deposited foreign currency, which shall be established on the basis of the average daily exchange rate applicable at the end of the month in which the foreign currency is deposited.

2. When withdrawing foreign currency on deposit, the bank shall repay the National Bank the used dinar credits in an amount equal to the amount of foreign currency withdrawn from deposit, which amount shall be established on the basis of the exchange rate applicable when the foreign currency was deposited."

(e) National Bank Act 1989 (*Zakon o Narodnoj banci Jugoslavije i jedinstvenom monetarnom poslovanju narodnih banaka republika i narodnih banaka autonomnih pokrajina;* published in OG SFRY no. 34/89; amendments published in OG SFRY nos. 88/89 and 61/90)

Section 4 read as follows:

"SFRY shall guarantee the obligations of the National Bank of the SFRY."

(f) Banks and Other Financial Institutions Act 1989 (*Zakon o bankama i drugim finansijskim organizacijama*; published in OG SFRY no. 10/89; amendments published in OG SFRY nos. 40/89, 87/89, 18/90, 72/90 and 79/90)

Section 76 § 1 provided as follows:

"... [T]he SFRY shall guarantee foreign-currency ordinary or savings accounts of domestic and foreign nationals."

2. Legislation of the Republic of Bosnia and Herzegovina (the legal predecessor of present-day Bosnia and Herzegovina)

(a) SFRY Legislation Application Act 1992 (*Uredba sa zakonskom snagom o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakoni*; published in the Official Gazette of the Republic of Bosnia and Herzegovina – "OG RBH" – no. 2/92)

This Act entered in force on 11 April 1992. Pursuant to sections 1 and 6, the Republic of Bosnia and Herzegovina took over, *inter alia,* the Banks and Other Financial Institutions Act 1989 mentioned above and the financial rights and obligations of the former SFRY stemming from that Act.

(b) Foreign-Currency Transactions Act 1992 (*Uredba sa zakonskom snagom o deviznom poslovanju; published* in OG RBH no. 2/92)

Section 144 read as follows:

"Conditions and methods for repayment of credits used by authorised banks on the basis of foreign currency deposited with the National Bank of the SFRY prior to the entry into force of this Act and for return of the foreign currency from the deposit at the National Bank of the SFRY shall be regulated by separate legislation."

(c) The 1996 Decision on Foreign-Currency Policy (*Odluka o ciljevima i zadacima devizne politike*; published in OG RBH no. 13/96)

Section 7 of this Decision provided that the issue of foreign-currency savings deposited with the National Bank of the SFRY, including the interest on these savings, "shall be resolved by the enactment of legislation concerning the public debt of Bosnia and Herzegovina or in another way within the overall consolidation of the public debt of Bosnia and Herzegovina and in consultation with the international community".

3. Resolution 93 (6) of the Committee of Ministers of the Council of Europe on the Control of Respect for Human Rights in European States not yet Members of the Council of Europe of 9 March 1993

The Resolution reads as follows:

"The Committee of Ministers of the Council of Europe,

Acting under the Statute of the Council of Europe signed in London on 5 May 1949;

Having regard to the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;

Considering that it is desirable that all European states become members of the Council of Europe and Parties to the European Convention on Human Rights and the Protocols thereto;

Wishing to make arrangements under which the Council of Europe can contribute to the setting up by European states which are not yet members of the Council of Europe and which so desire, as a transitional measure, within their internal legal system, of a body responsible for the control of respect for human rights that takes into account the substantive provisions of the European Convention of Human Rights;

Considering that the establishment of a transitional human rights control mechanism drawing on the competence and experience of the control organs of the European

Convention on Human Rights might promote the process of accession to the Council of Europe;

Having consulted the European Court and Commission of Human Rights which have both indicated their agreement,

Resolves to contribute towards the control of respect for human rights in European non-member states, in accordance with the following principles:

Article 1

At the request of a European non-member state, the Committee of Ministers may, after consultation with the European Court and Commission of Human Rights, appoint specially qualified persons to sit on a court or other body responsible for the control of respect for human rights set up by this state within its internal legal system (hereafter called the "control body").

Article 2

The number of members of the control body set up by the requesting state shall be such that the number of members appointed by virtue of this resolution will be greater than the number of other members.

Article 3

The law applicable by the control body shall include the substantive provisions of the European Convention on Human Rights.

Article 4

Practical arrangements concerning the participation described in Article 1 shall be specified in an agreement concluded by the Secretary General of the Council of Europe with the requesting state on behalf of the Committee of Ministers.

Article 5

The arrangements under this resolution shall cease once the requesting state has become a member of the Council of Europe except as otherwise agreed between the Council of Europe and the state concerned."

4. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Agreement")

Three principal parties to the 1992-5 war in Bosnia and Herzegovina (the then Republic of Bosnia and Herzegovina, the Republic of Croatia and the then Federal Republic of Yugoslavia) signed the Dayton Agreement on 14 December 1995. It entered into force on the same day. There are twelve Annexes to the Agreement, including the Constitution of Bosnia and Herzegovina (Annex 4) and the Agreement on Human Rights (Annex 6).

(a) Constitution of Bosnia and Herzegovina (Annex 4 to the Dayton Agreement)

The Constitution entered into force on 14 December 1995. Declarations on behalf of the then Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska approving the Constitution were attached to it. The following are its relevant provisions:

Article I § 1

"The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders..."

Article I § 3

"Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska."

Article II § 1

"Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the [Dayton] Agreement."

Article II § 2

"The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

Article II § 6

"Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in [Article II § 2 above]."

According to Article II § 8, all competent authorities in Bosnia and Herzegovina will cooperate with, and provide unrestricted access to, the European Court of Human Rights and the other supervisory bodies established by any of the numerous international agreements listed in Annex I to the Constitution.

Article III § 2 (b)

"Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina..."

Article III § 3 (b)

"The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."

Article VI § 3

"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 neighbouring 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.

b. The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

c. The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision."

Article VI § 4

"Decisions of the Constitutional Court shall be final and binding."

(b) Jurisprudence of the Constitutional Court of Bosnia and Herzegovina

On 26 February 1999 the Constitutional Court adopted its decision in the case no. U 7/98. The following is the relevant part:

"...According to Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) has jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. Article II of the Constitution of Bosnia and Herzegovina deals with the protection of human rights and fundamental freedoms in Bosnia and Herzegovina. In particular, Article II.2 provides that the rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) and its Protocols shall apply directly in Bosnia and Herzegovina and have priority over all other law. Moreover, Article II.3 specifies various human rights which shall be enjoyed by all persons within the territory of Bosnia and Herzegovina. It follows that issues of protection of human rights fall, in principle, within the Constitutional Court's jurisdiction, and that the Constitutional Court has the competence, under Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, to decide over such matters on appeals against decisions of other courts.

However, Article II.1 of the Constitution of Bosnia and Herzegovina also provides that, in order to ensure the highest level of internationally protected human rights and fundamental freedoms, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina. Since the Constitution of Bosnia and Herzegovina specifically refers to that Commission and to the provisions contained in the Agreement

on Human Rights, which is Annex 6 to the General Framework Agreement, the provisions of the Agreement on Human Rights must be considered as recognized by the Constitution of Bosnia and Herzegovina itself as being part of the whole system of protection of human rights and fundamental freedoms in Bosnia and Herzegovina.

Moreover, it is significant that the Constitution of Bosnia and Herzegovina and the Agreement on Human Rights were adopted at the same time, on 14 December 1995, as Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina. The provisions of these two Annexes should therefore be considered to supplement each other, and in view of the link between these two Annexes, it can be concluded with certainty that the rules contained in the Agreement on Human Rights cannot be contrary to the Constitution of Bosnia and Herzegovina.

The Agreement on Human Rights provides in its Article VIII that the Human Rights Chamber shall have jurisdiction to examine questions of alleged human rights violations, subject to the conditions set out in that Article.

It is thus clear that human rights issues fall under the jurisdiction of both the Constitutional Court and the Human Rights Chamber. There is no mention in the Constitution of Bosnia and Herzegovina or in any other law of a specific hierarchy or other relationship between the Constitutional Court and the Human Rights Chamber. The question therefore arises whether, despite the absence of any express rules, such a hierarchy or relationship should be considered to exist and, in particular, whether one of these institutions should be considered competent to review the decisions of the other concerning human rights issues. This question already arose in Cases No. U 3/98 and U 4/98, but in its decisions in those cases, adopted on 5 June 1998, the Constitutional Court did not find it necessary to resolve the question, since the appeals had to be rejected for other reasons.

The appellate jurisdiction of the Constitutional Court is based on Article VI.3 (b) of the Constitution of Bosnia and Herzegovina, which provides for such jurisdiction in regard to "a judgment of any other court in Bosnia and Herzegovina".

Although the Human Rights Chamber exercises its judicial functions with respect to alleged violations of human rights in Bosnia and Herzegovina, the Human Rights Chamber is an institution of a special nature. According to Article II.1 of the Agreement on Human Rights, the Human Rights Chamber is one of the two parts of the Commission on Human Rights for Bosnia and Herzegovina. According to Article XIV of the Agreement on Human Rights, the Commission on Human Rights will only function in its present form during a transitional five-year period, unless the Parties to the Agreement agree otherwise. In the legal terminology of the Agreement on Human Rights, the Human Rights Chamber is neither a court nor an institution of Bosnia and Herzegovina. Indeed, Article XIV of the Agreement specifically refers to the transfer of responsibility to "the institutions of Bosnia and Herzegovina".

It is significant that the Constitution of Bosnia and Herzegovina refers to the concept of a "court in Bosnia and Herzegovina" not only in Article VI.3 (b) but also in Article VI.3 (c). The latter provision provides for the jurisdiction of the Constitutional Court over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible, in particular, with this Constitution or

the European Convention and its Protocols. It is quite certain that the authors of this provision did not intend the Human Rights Chamber to be included among those institutions which should be competent to refer human rights issues to the Constitutional Court for preliminary consideration.

It is also important to take into account certain provisions in the Constitution of Bosnia and Herzegovina and the Agreement on Human Rights which regulate the legal effects of the decisions of the Constitutional Court and the Human Rights Chamber. According to Article VI.4 of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding. Similarly, Article XI.3 of the Agreement on Human Rights does not provide for any reviews of the decisions of the Human Rights Chamber, except in some cases by the Human Rights Chamber itself; they are thus final and binding. As these two provisions were adopted at the same time, the correct interpretation must be that the authors did not intend to give either one of these institutions the competence to review the decisions of the other, but rather considered that, in regard to human rights issues, the Constitutional Court and the Human Rights Chamber should function as parallel institutions, neither of them being competent to interfere in the work of the other and it being left in some cases to the discretion of applicants to make a choice between these alternative remedies.

It is true that such a system could result in conflicting jurisprudences concerning some human rights issues. It may also have the disadvantage of creating a dilemma for the individuals whether to appeal to the Constitutional Court or to bring a case before the Commission on Human Rights. This, however, is a consequence of the system created by the Constitution of Bosnia and Herzegovina and the Agreement on Human Rights. Moreover, the dilemmas that might arise are mostly of a temporary nature, since the responsibility for the operation of the Commission on Human Rights will be transferred, after the initial transitional period, to the institutions of Bosnia and Herzegovina dealing with human rights, unless the Parties to the Agreement agree otherwise.

It thus follows that the Constitutional Court has no jurisdiction in the present case and that the appeal must be rejected..."

(c) Agreement on Human Rights (Annex 6 to the Dayton Agreement)

The Agreement on Human Rights was signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska on 14 December 1995, when it entered into force. The following are the relevant provisions:

Article I

"The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex..."

Article II

"1. To assist in honouring their obligations under this Agreement, the Parties hereby establish a Commission on Human Rights (the "Commission"). The Commission shall consist of two parts: the Office of the Ombudsman and the Human Rights Chamber.

2. The Office of the Ombudsman and the Human Rights Chamber shall consider, as subsequently described:

a. alleged or apparent violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, or

b. alleged or apparent discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.

3. The Parties recognise the right of all persons to submit to the Commission and to other human rights bodies applications concerning alleged violations of human rights, in accordance with the procedures of this Annex and such bodies. The Parties shall not undertake any punitive action directed against persons who intend to submit, or have submitted, such allegations."

Article III

"...

2. The salaries and expenses of the Commission and its staff ... shall be borne by Bosnia and Herzegovina...

...

4. The Ombudsman and all members of the Chamber shall not be held criminally or civilly liable for any acts carried out within the scope of their duties. When the Ombudsman and members of the Chamber are not citizens of Bosnia and Herzegovina, they and their families shall be accorded the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.

5. With full regard for the need to maintain impartiality, the Commission may receive assistance as it deems appropriate from any governmental, international, or non-governmental organization."

Article VII §§ 1 and 2

"1. The Human Rights Chamber shall be composed of fourteen members.

2. Within 90 days after this Agreement enters into force, the Federation of Bosnia and Herzegovina shall appoint four members and the Republika Srpska shall appoint two members. The Committee of Ministers of the Council of Europe, pursuant to its Resolution (93) 6, after consultation with the Parties, shall appoint the remaining members, who shall not be citizens of Bosnia and Herzegovina or any neighbouring state, and shall designate one such member as the President of the Chamber. "

Article VIII

"1. The Chamber shall receive by referral from the Ombudsman on behalf of an applicant, or directly from any Party or person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by any Party or acting on behalf of

alleged victims who are deceased or missing, for resolution or decision applications concerning alleged or apparent violations of human rights within the scope of Article II § 2.

2. The Chamber shall decide which applications to accept and in what priority to address them. In so doing, the Chamber shall take into account the following criteria:

a. Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted and that the application has been filed with the Commission within six months from such date on which the final decision was taken.

b. The Chamber shall not address any application which is substantially the same as a matter which has already been examined by the Chamber or has already been submitted to another procedure of international investigation or settlement.

c. The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition.

d. The Chamber may reject or defer further consideration if the application concerns a matter currently pending before any other international human rights body responsible for the adjudication of applications or the decision of cases, or any other Commission established by the Annexes to the [Dayton] Agreement.

e. In principle, the Chamber shall endeavour to accept and to give particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds.

f. Applications which entail requests for provisional measures shall be reviewed as a matter of priority in order to determine (1) whether they should be accepted and, if so (2) whether high priority for the scheduling of proceedings on the provisional measures request is warranted.

3. The Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that (a) the applicant does not intend to pursue his application; (b) the matter has been resolved; or (c) for any other reason established by the Chamber, it is no longer justified to continue the examination of the application; provided that such result is consistent with the objective of respect for human rights."

Article XI

"1. Following the conclusion of the proceedings, the Chamber shall promptly issue a decision, which shall address:

a. Whether the facts found indicate a breach by the Party concerned of its obligations under this Agreement; and if so

b. What steps shall be taken by the Party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non- pecuniary injuries), and provisional measures.

...

3. Subject to review [by the full Chamber of a panel's decision], the decisions of the Chamber shall be final and binding.

...

5. The Chamber shall issue reasons for its decisions. Its decisions shall be published and forwarded to the parties concerned, the High Representative described in Annex 10 to the [Dayton] Agreement while such office exists, the Secretary General of the Council of Europe and the OSCE.

6. The Parties shall implement fully decisions of the Chamber."

Article XIV

"Five years after this Agreement enters into force, the responsibility for the continued operation of the Commission shall transfer from the Parties to the institutions of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above."

On 10 November 2000 the Parties to the Agreement on Human Rights extended the mandate of the Human Rights Chamber until 31 December 2003. Pursuant to their agreement of 25 September 2003 the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina was created with a mandate to decide on cases received by the Human Rights Chamber until 31 December 2003.

5. The 2000 Statute of the Brčko District of Bosnia and Herzegovina

This Statute entered into force on 8 March 2000. The following are its relevant provisions:

Article 1 §§ 1 and 2

"The Brčko District (hereinafter the "District") is a single administrative unit of local self-government existing under the sovereignty of Bosnia and Herzegovina.

The District derives its powers of local self-government by virtue of each Entity having delegated all of its powers of governance as previously exercised by the two Entities and the three municipal governments within the pre-war Opština, as defined in Article 5 [below], to the District Government."

Article 5

"The territory of the District encompasses the complete territory of the Brčko Municipality with the boundaries as of 1 January 1991."

Article 71 § 2

"The Brcko District of Bosnia and Herzegovina is the legal successor to the Republika Srpska Brčko Municipality as well as to the administrative arrangements of Brka and Ravne - Brčko."

6. The 2001 Agreement on Succession Issues ("the Succession Agreement")

This Agreement was concluded by Bosnia and Herzegovina, the Republic of Croatia, the then Federal Republic of Yugoslavia (now Serbia and Montenegro), The former Yugoslav Republic of Macedonia and the Republic of Slovenia as successor States to the SFRY. It entered into force on 2 June 2004. Annex C to that Agreement regulates the matter of the financial assets and liabilities of the SFRY. Article 7 of this Agreement provides as follows:

"Guarantees by the SFRY or its [National Bank] of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This

negotiation shall take place under the auspices of the Bank for International Settlements."

7. Legislation of Bosnia and Herzegovina

(a) Privatisation of Companies and Banks Framework Act 1998 (*Okvirni zakon o privatizaciji preduzeća i banaka u Bosni i Hercegovini;* published in the Official Gazette of Bosnia and Herzegovina – "OG BH" – nos. 14/98 of 27 July 1998 and 12/99 of 2 August 1999; amendments published in OG BH nos. 14/00 of 22 May 2000 and 16/02 of 11 July 2002)

This Act has been in force since 4 August 1998. The relevant provisions read as follows:

Section 2 § 1

"In accordance with the [Dayton Agreement], this Act expressly recognises the right of the Entities to privatise non-privately owned companies and banks located on their territory..."

Section 4

"1. Proceeds from the privatisation of companies and banks located in the territory of one Entity shall be at the disposal of that Entity or the legal persons authorised to receive them under the laws of that Entity.

2. Claims against companies and banks to be privatised shall be deemed as a liability of the privatising Entity."

(b) Criminal Code 2003 (*Krivični zakon Bosne i Hercegovine*; published in OG BH nos. 3/03 of 10 February 2003 and 37/03 of 22 November 2003; amendments published in OG BH nos. 32/03 of 28 October 2003, 54/04 of 8 December 2004 and 61/04 of 29 December 2004)

This Code has been in force since 1 March 2003. Section 239 of this Code read as follows:

"An official person in the institutions of Bosnia and Herzegovina, institutions of the entities and institutions of the Brčko District of Bosnia and Herzegovina, who refuses to enforce the final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina or Court of Bosnia and Herzegovina or Human Rights Chamber of Bosnia and Herzegovina, or if he prevents enforcement of such a decision, or if he frustrates the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years."

(c) Temporary Postponement of Enforcement Act 2004 (*Zakon o privremenom odlaganju od izvršenja potraživanja na osnovu izvršnih odluka na teret Budžeta institucija Bosne i Hercegovine i međunarodnih obaveza Bosne i Hercegovine;* published in OG BH no. 43/03 of 29 December 2003)

This Act was in force from 6 January 2004 until 31 March 2004. It postponed the payment of claims arising from court and administrative decisions against Bosnia and Herzegovina and from international obligations of Bosnia and Herzegovina which concerned, *inter alia*, the "old" foreign-currency deposits (sections 1 and 2).

8. Laws of the Republika Srpska

(a) Constitution of the Republika Srpska

The following are its relevant provisions:

Article 1

"...The Republika Srpska is one of the two equal entities of Bosnia and Herzegovina.

Serbs, Bosniacs, Croats (as constituent peoples), Others and citizens shall participate in the exercise of public authority in the Republika Srpska on an equal basis and without discrimination."

Article 3

"The Republika Srpska has all competence which was not expressly transferred by the Constitution of Bosnia and Herzegovina to the latter's institutions."

Article 5

"The constitutional order of the Republika Srpska shall be based on:

- guaranteeing and protection of human rights and freedoms in accordance with international standards..."

Article 66

"The rights and duties of the Republika Srpska shall be exercised by the organs specified in its Constitution.

The powers and responsibilities of the Republika Srpska authorities shall be based on and delimited by human rights and freedoms..."

Pursuant to Article 115, the Constitutional Court of the Republika Srpska is competent, *inter alia*, to decide on conformity of the laws of the Republika Srpska with its Constitution. However, unlike the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of the Republika Srpska is not competent to decide upon individual human rights' applications.

Article 120, in so far as relevant, reads:

"...Anyone may lodge a petition to the Constitutional Court to initiate the constitutionality and legality review procedure.

The President of the Republic, the National Assembly and the Government may initiate the review procedure before the Constitutional Court without restriction, while other bodies, organisations and communities may do so under conditions prescribed by law.

The Constitutional Court may initiate the constitutionality and legality review procedure *ex officio*.

When the Constitutional Court considers a law not to be in accordance with the Constitution, or that another regulation or general enactment is not in accordance with the Constitution or law, such law, regulation or general enactment shall cease to have effect on the day of the publication of the Constitutional Court's decision."

(b) Foreign-Currency Transactions Act 1996 (*Zakon o deviznom poslovanju;* published in the Official Gazette of the Republika Srpska – "OG RS" – no. 15/96 of 8 July 1996; amendments published in OG RS no. 10/97 of 30 April 1997)

This Act was in force from 16 July 1996 until 2 December 2003. The following were the relevant provisions:

Section 60 § 1

"Domestic and foreign nationals may keep foreign currency on foreign-currency ordinary or savings accounts at authorised banks."

Section 61 § 1

"The authorised bank shall guarantee foreign currency on foreign-currency ordinary and savings accounts with all of its assets."

Section 62

"The authorised bank shall assess and pay interest on foreign-currency deposits in foreign currency or, upon the request of a domestic or foreign national, in new dinars."

Section 63

"Domestic and foreign nationals may withdraw foreign currency from their foreign-currency ordinary or savings accounts.

Domestic and foreign nationals may sell their claims arising from foreign currency deposited on their foreign-currency ordinary or savings accounts to a domestic or foreign national or legal person through an authorised bank."

Section 135 § 1

"The state shall guarantee, pursuant to this and other Republika Srpska legislation, foreign currency deposited prior to the entry into force of this Act on foreign-currency ordinary and savings accounts at an authorised bank."

Section 136

"The authorised bank shall pay interest on foreign-currency deposits referred to in section 135 § 1 of this Act to a domestic national in dinars or, upon his or her request, in foreign currency and to a foreign national in foreign currency or, upon his or her request, in dinars."

Section 137a

"Sections 62 and 63 of this Act shall not apply to foreign-currency savings deposited at commercial banks located in the Republika Srpska prior to 6 April 1992.

The manner of payment to and compensation of those old foreign-currency savers shall be regulated by special legislation."

On 4 and 5 December 2001 the Constitutional Court of the Republika Srpska declared section 137a of the Foreign-Currency Transactions Act 1996 void as from 16 January 2002 because it treated unequally the "old" foreign-currency savers and the savers who had deposited foreign currencies after 6 April 1992 and, in addition, because it imposed restrictions on the use of private property without providing just compensation.

(c) Opening Balance Sheets Act 1998 (*Zakon o početnom bilansu stanja u postupku privatizacije državnog kapitala u bankama;* published in OG RS no. 24/98 of 15 July 1998; amendments published in OG RS no. 70/01 of 31 December 2001)

This Act has been in force since 23 July 1998. Section 20, as amended on 8 January 2002, provides that banks' liability for foreign currencies deposited prior to 31 December 1991 will shift to the Finance Ministry of the Republika Srpska upon the completion of privatisation.

(d) Privatisation of Companies Act 1998 (*Zakon o privatizaciji državnog kapitala u preduzećima;* published in OG RS no. 24/98 of 15 July 1998; amendments published in OG RS no. 62/02 of 7 October 2002, 38/03 of 30 May 2003 and 65/03 of 11 August 2003)

This Act has been in force since 23 July 1998. The following are the relevant provisions:

Section 19 §§ 1 and 2, as amended on 19 August 2003

"A person who has "old" foreign-currency savings in a bank located in the Republika Srpska and who is a citizen of the Republika Srpska at the date of the entry into force of this Act shall be entitled to coupons for the purchase of shares pursuant to this Act.

A person who is entitled to coupons in accordance with this section may decide to convert into coupons his or her entire savings or a part thereof."

Pursuant to sections 22 § 2 and 25 § 3, coupons may be sold and a conversion of "old" foreign-currency savings into coupons is definite.

(e) The 1999 Instruction of the Republika Srpska Government (*Zaključak;* published in OG RS no. 24/99 of 4 October 1999)

This Instruction entered into force on 19 August 1999. The Republika Srpska Government instructed the Ministry of Justice to challenge in courts all judgments ordering reimbursement of the "old" foreign-currency savings. In the meantime, the enforcement of such judgments was suspended.

On 14 September 2001 the Constitutional Court of the Republika Srpska declared this Instruction void as from 2 November 2001 because the Government, by suspending the enforcement of judgments, had acted outside its competence and had interfered with that of the judiciary.

(f) Postponement of Enforcement Act 2002 (*Zakon o odlaganju od izvršenja sudskih odluka na teret sredstava budžeta Republike Srpske po osnovu isplate naknade materijalne i nematerijalne štete nastale uslijed ratnih dejstava i po osnovu isplate stare devizne štednje;* published in OG RS no. 25/02 of 20 May 2002; amendments published in OG RS no. 51/03 of 1 July 2003)

This Act was in force from 28 May 2002 until 29 December 2003. It postponed the enforcement of all court decisions which had been delivered prior to its entry into force and which concerned, *inter alia*, the "old" foreign-currency savings (*i.e.* savings deposited at banks located in the Republika Srpska prior to 31 December 1991) (sections 1 and 2 of this Act).

(g) Enforcement Proceedings Act 2003 (*Zakon o izvršnom postupku;* published in OG RS no. 59/03 of 18 July 2003; amendments published in OG RS no. 85/03 of 23 October 2003)

This Act has been in force since 1 August 2003. The following are the relevant provisions:

Section 231

"Provisions contained in other acts concerning applications for suspension or termination of enforcement shall not be applied in enforcement proceedings."

Section 231a

"The application of section 231 of this Act shall be suspended until the enforcement of court decisions concerning "old" foreign-currency savings is regulated by special legislation..."

(h) Foreign-Currency Transactions Act 2003 (*Zakon o deviznom poslovanju;* published in the OG RS no. 96/03 of 24 November 2003)

This Act has been in force since 2 December 2003 (it replaced the Foreign-Currency Transactions Act 1996 indicated above). Section 64 of this Act, in so far as relevant, reads:

"Methods for the repayment of debts arising from old foreign-currency savings ..., which were transferred to the Republika Srpska pursuant to the Opening Balance Sheets Act 1998, shall be regulated by special legislation."

(i) Temporary Postponement of Enforcement Act 2003 (*Zakon o privremenom odlaganju od izvršenja potraživanja iz budžeta Republike Srpske;* published in OG RS no. 110/03 of 20 December 2003)

This Act was in force from 29 December 2003 until 23 July 2004. It postponed, *inter alia,* the settlement of the claims arising from foreign-currency savings deposited at banks located in the Republika Srpska prior to 31 December 1991 (sections 1 and 2 of this Act).

(j) Settlement of Domestic Debt Act 2004 (*Zakon o utvrđivanju i načinu izmirenja unutrašnjeg duga Republike Srpske;* published in OG RS no. 63/04 of 15 July 2004)

This Act has been in force since 23 July 2004. The following are the relevant provisions:

Section 1

"This Act defines the procedure, manner and deadlines for the settlement of the Republika Srpska's domestic debt (hereinafter "the domestic debt"), owed to natural and legal persons and totalling 1,761,700,000 Bosnian markas[1]."

Section 3

"For the purposes of this Act, the domestic debt includes:

...

[1] It is approximately 900,739,593 euros.

b. Debt arising out of foreign-currency savings deposited at banks located in what is now the Republika Srpska prior to 31 December 1991 (hereinafter "old foreign-currency savings") totalling 774,900,000 Bosnian markas[2]."

Section 11

"Old foreign-currency savings are foreign-currency savings as at 31 December 1991 in banks' branch offices located in what is now the Republika Srpska, reduced by an amount transferred to special accounts for the purposes of purchasing shares, apartments and other state-owned items, and also by any amount paid until the deadline set in section 12 of this Act expires, but in any case not exceeding 774,900,000 Bosnian markas.

Old foreign-currency savings referred to in the first paragraph of this section do not include foreign-currency savings deposited in branch offices of *Ljubljanska banka* and *Invest banka* located in what is now the Republika Srpska which shall be dealt with in the succession process."

Section 12

"The Government of the Republika Srpska shall within 90 days from the entry into force of this Act further regulate conditions, procedure and deadlines for the verification of the liabilities referred to in section 11 of this Act.

The liabilities arising out of old foreign-currency savings referred to in section 11 of this Act shall be converted into Bosnian markas at the official exchange rate set by the Central Bank of Bosnia and Herzegovina applicable on 31 August 2004."

Section 13

"Interest earned after 1 January 1992 which was not paid or disposed of in any other manner shall be written off in its entirety and shall not constitute a liability of the Republika Srpska.

Liabilities arising out of old foreign-currency savings which were not verified pursuant to section 12 of this Act shall be written off and shall not constitute a liability of the Republika Srpska.

If liabilities verified pursuant to section 12 of this Act exceed [774,900,000 Bosnian markas], the difference shall be written off by a proportionate reduction of individual liabilities and shall not constitute a liability of the Republika Srpska."

Section 14

"Debt referred to in section 11 of this Act shall be settled by cash and state bonds."

Section 15

"Old foreign-currency savings holders with up to 100 Bosnian markas[3] shall be reimbursed in cash upon the verification of their savings up to 16,000,000 Bosnian markas.

..."

[2] It is approximately 396,198,621 euros.

[3] It is approximately 51 euros.

Old foreign-currency savings holders with up to 1,000 Bosnian markas[4] shall be reimbursed in cash up to 39,100,000 Bosnian markas.

Old foreign-currency savings holders referred to in [the previous] paragraph shall be reimbursed within the period of 4 years of the 2004 tax year.

..."

Section 16

"The remaining sum of 719,800,000 Bosnian markas shall be reimbursed in treasury bonds on the following conditions:

a. bonds shall become due within 30 years;

b. bonds shall be bought out in 10 equivalent annual payments starting nine years before becoming due; and

c. bonds shall earn no interest."

Section 17

"Bonds issued for the purposes of the settlement of the Republika Srpska's domestic debt may not be used in the privatisation process. Until old foreign-currency savings are converted into bonds, they may be used in the privatisation process in accordance with the privatisation legislation."

Section 22 § 4

"Bonds referred to in this Act ... shall be transferable without restrictions ..."

9. Status of the applicant's bank

The present-day *Nova banjalučka banka* has undergone significant changes since 1983 when the applicant deposited her money. In 1983 it was a branch (*filijala*) of the state-owned *Privredna banka Sarajevo*. In 1987 its name was changed to *Privredna banka Sarajevo Osnovna banka Banja Luka*. In 1990 it became a separate bank, named *Banjalučka banka*. Lastly, on 18 January 2002 it was privatised and subsequently changed its name to *Nova banjalučka banka*.

COMPLAINT

The applicant complained because the judgment of 26 November 1998 ordering the release of her "old" foreign-currency savings was not enforced. She invoked Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter "the Convention"). The application was also communicated *ex officio* under Article 6 of the Convention.

[4] It is approximately 511 euros.

THE LAW

The applicant obtained a judgment ordering her bank to release her foreign-currency savings and to pay default interest and legal costs. On 18 January 2002 the Republika Srpska took over this debt as it arose from "old" foreign-currency savings (section 20 of the Opening Balance Sheets Act 1998, as amended on 8 January 2002). However, the actual payment of the debt has been prevented by the Republika Srpska legislation since 28 May 2002 (Postponement of Enforcement Act 2002, the Temporary Postponement of Enforcement Act 2003 and the Settlement of Domestic Debt Act 2004). The applicant complained about this situation. Her complaint raises issues under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Article 6, insofar as relevant, reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 1 of Protocol No. 1 reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Article 35 § 2 (b) of the Convention

The following is the relevant part:

> "The Court shall not deal with any application submitted under Article 34 that ... is substantially the same as a matter that ... has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

1. The parties' submissions

The Government submitted that proceedings before the former Human Rights Chamber (hereinafter "the Chamber") were "international" within the meaning of Article 35 § 2 (b) of the Convention and, no relevant new information having been submitted by the applicant, invited the Court to declare the present application inadmissible on this ground. Their main arguments were as follows: (a) the Chamber was set up provisionally (pending Bosnia and Herzegovina's accession to the Council of Europe and its ratification of the Convention); (b) the Agreement on Human Rights, pursuant to which the Chamber was set up, was an international treaty; (c) eight of the Chamber's fourteen members were foreigners; (d) there was no possibility of appeal against a Chamber's decision to the Constitutional Court of Bosnia and Herzegovina or to any other court in Bosnia and Herzegovina; (e) the Chamber's funding came almost exclusively from international donors; and (f) the Chamber's decisions were forwarded to the Organisation for Security and Co-operation in Europe (OSCE) and the Office of the High Representative (OHR) for monitoring of compliance.

In its written and oral submissions, the Government expressly relied on an 1998 opinion of the European Commission for Democracy through Law (hereinafter "the Venice Commission") in which it found that the Chamber, on account of its quasi-international (*sui*

generis) and provisional character, could not be regarded as a "court of Bosnia and Herzegovina" within the meaning of the Constitution of Bosnia and Herzegovina (*Opinion of the Venice Commission on the admissibility of appeals against decisions of the Human Rights Chamber of Bosnia and Herzegovina,* adopted in October 1998, CDL-INF(1998)018).

As to the enforcement, the Government submitted, relying on detailed figures, that the Chamber's decisions had been mainly implemented although certain required legislative changes were still ongoing.

The applicant submitted that the Chamber, having been competent to hear cases only against Bosnia and Herzegovina and its entities, was not an international "procedure" within the meaning of Article 35 § 2 (b) of the Convention.

2. The third parties' submissions pursuant to Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court

The Venice Commission in its written submissions to the Court of 15 June 2005 first submitted that the 1995 Dayton Agreement, clearly an international treaty, was a framework agreement and that the Annexes thereto, including the Agreement on Human Rights (Annex 6), were intended to provide its substance. The Agreement on Human Rights, regardless of having been signed by one state only – Bosnia and Herzegovina – and its constituent entities, was thus also an international treaty.

The Venice Commission continued that, notwithstanding certain elements which could suggest that the Chamber was an international body (for example, its composition and the international character of Annex 6 pursuant to which it was set up), proceedings before the Chamber could not be considered "international" for the purposes of Article 35 § 2 (b) of the Convention. On the contrary, they should be considered "domestic" within the meaning of Article 35 § 1 of the Convention. In the Venice Commission's view, the decisive feature of the Chamber, ruling out its international nature, was that the Chamber exercised its supervision within the national boundaries of Bosnia and Herzegovina only (its mandate did not concern obligations between States, but obligations undertaken by Bosnia and Herzegovina and its entities).

The International Committee for Human Rights (hereinafter "the ICHR") maintained that the Agreement on Human Rights (Annex 6) was a unilateral undertaking of Bosnia and Herzegovina, rather than an international treaty, because it had not been signed by other states than Bosnia and Herzegovina (as opposed to the 1995 Dayton Agreement itself and several other Annexes thereto). Furthermore, it was an established practice in the application of Annex 6 that the Republic of Croatia and Serbia and Montenegro (the parties to the 1995 Dayton Agreement) had not assumed any international obligations under that Annex.

The ICHR further submitted that constituent units of Bosnia and Herzegovina were capable of being parties in the proceedings before the Chamber and that the salaries and expenses of the Chamber and its staff were to be borne by Bosnia and Herzegovina (Article III § 2 of the Agreement on Human Rights). As to its partly international composition (eight of the Chamber's fourteen members were foreigners), the ICHR submitted that it was deemed to be necessary, at least in an initial period, in order to reinforce the appearance of its impartiality and also to train the members appointed from Bosnia and Herzegovina in the practice and procedure of the Convention.

The ICHR concluded that proceedings before the Chamber should be considered "domestic" for the purposes of Article 35 § 1 of the Convention.

3. The Court's assessment

As noted by the European Commission of Human Rights, the Convention seeks to avoid a plurality of international proceedings relating to the same cases (see *Calcerrada Fornieles and Cabeza Mato v. Spain*, no. 17512/90, Commission decision of 6 July 1992, Decisions and Reports (DR) 73, p. 214 and *Cereceda Martin v. Spain*, no. 16358/90, Commission decision of 12 October 1992, DR 73, p. 120). Under Article 35 § 2 (b) of the Convention the Court cannot deal with any application which has already been investigated or is being investigated by an international body.

The Court is required, therefore, to determine whether the Chamber was or was not an "international" body within the meaning of Article 35 § 2 (b). In this respect, the Court considers the legal character of the instrument founding the body to be a logical starting point for its assessment. However, it considers the following factors, concerning as they do the essential nature of the body, to be determinative of the issue: the body's composition, its competence, its place (if any) in an existing legal system and its funding.

In the instant case, the Court notes that the Chamber was set up pursuant to the Agreement on Human Rights, which is Annex 6 to the 1995 Dayton Agreement. While it is clear that the Dayton Agreement and several annexes thereto, having been signed also by the Republic of Croatia and by the then Federal Republic of Yugoslavia, are international treaties, the question is whether those annexes which were approved or signed by Bosnia and Herzegovina and its entities only (such as the Constitution of Bosnia and Herzegovina – Annex 4, the Agreement on Human Rights – Annex 6, and the Agreement on Refugees and Displaced Persons – Annex 7) are also international treaties.

The Dayton Agreement contains 11 articles only, which mostly set out the obligations for the three Contracting States to "welcome and endorse" and to "fully respect and promote fulfilment of the commitments" made in the annexes thereto. The substance of the commitments is contained in the annexes. The Court considers, as did the Venice Commission and indeed the Government, that the annexes to the Dayton Agreement are an integral part thereof and thus also international treaties.

As to the composition of the former Chamber, the Court observes that eight of the Chamber's fourteen members were foreign nationals ("international members"), were appointed by the Committee of Ministers of the Council of Europe and were accorded the same privileges and immunities enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations. It is important that the Chamber's international members were not appointed by other two States Parties to the Dayton Agreement (the Republic of Croatia and Serbia and Montenegro), but by the Council of Europe, an international organisation. Indeed, citizens of the Republic of Croatia and Serbia and Montenegro were expressly precluded from sitting as the Chamber's members (Article VII § 2 of the Agreement on Human Rights). It follows that the Chamber, by its composition, did not resemble international mixed arbitral tribunals (see, on the contrary, *X and X v. Germany*, application no. 235/56, Commission decision of 10 June 1958, Yearbook 2, p. 256). As noted by the ICHR, the appointment of the foreign members to the former Chamber was motivated by a desire, *inter alia,* to reinforce its appearance of impartiality and to bring to the Chamber knowledge and experience of the Convention and its case-law.

The Court also observes that it was the agreements of Bosnia and Herzegovina and its entities only (namely, without the approval of the Republic of Croatia and Serbia and Montenegro) which extended the mandate of the Chamber until 31 December 2003 (in 2000); changed the Chamber's organisation by adding two more panels composed of members appointed from Bosnia and Herzegovina (in 2003); and terminated the Chamber's mandate as of 31 December 2003.

It is also noteworthy that while the Chamber received strong financial support from a range of bilateral and multilateral donors, crucial in the post-war years, Bosnia and Herzegovina assumed the formal obligation to fund the Chamber (Article III § 2 of the Agreement on Human Rights).

Moreover, and importantly, the Chamber's mandate did not concern obligations between States but strictly those undertaken by Bosnia and Herzegovina and its constituent entities. Pursuant to Article II § 1 of the Agreement on Human Rights, the Chamber was designed to assist Bosnia and Herzegovina and the entities in honouring their obligations under the Convention and various other human rights' treaties. As pointed out by the Venice Commission, the Chamber's competence was that of a "domestic" body.

The Court further notes that no "host agreement" has been concluded between the Chamber and Bosnia and Herzegovina.

It is true that the Chamber was set up as a transitional measure, pending Bosnia and Herzegovina's accession to the Council of Europe, and that there was no possibility of appeal against a Chamber's decision to the Constitutional Court of Bosnia and Herzegovina or to any other court in Bosnia and Herzegovina. Nevertheless, the Court is of the opinion that the Chamber constituted a part, albeit a particular part, of the legal system of Bosnia and Herzegovina: Article VII § 2 of the Agreement on Human Rights provided that the Committee of Ministers of the Council of Europe should appoint foreign members to the Chamber pursuant to its Resolution (93) 6. The Committee of Ministers thus presumed that it was appointing members to a body set up by Bosnia and Herzegovina "within its internal legal system" (see the Resolution (93) 6 in the "Relevant international and domestic law and practice" above). Indeed, the Committee of Ministers did so having consulted Bosnia and Herzegovina and its entities (its Resolution (96) 8).

It is also the case that in 1998 the Venice Commission considered the Chamber not to be an "other court in Bosnia and Herzegovina" within the meaning of Article 6 § 3 (b) of the Constitution of Bosnia and Herzegovina. However, as appears from its written submissions to the Court in this case, its views have evolved since then.

The fact that international organisations, such as the OSCE, supervise the execution of the Chamber's decisions is a factor explained by the post-war context of the establishment of the Chamber. It does not alter its essentially domestic character.

The Court concludes that while the Chamber was set up pursuant to an international treaty, the remaining factors noted above allow it to consider that the applicant's proceedings before the Chamber were not "international" within the meaning of Article 35 § 2 (b) of the Convention and, further, that proceedings before the Chamber should be considered a "domestic" remedy within the meaning of Article 35 § 1 of the Convention.

The Government's objection is therefore dismissed.

B. Article 35 § 1 of the Convention

This provision reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

1. The parties' submissions

The Government objected that the applicant had failed to exhaust domestic remedies. Since one can neither simultaneously nor consecutively pursue a case before both bodies, by submitting her appeal to the Chamber, the applicant forfeited her right to appeal to the

Constitutional Court of Bosnia and Herzegovina (hereinafter "the Constitutional Court"; see the Constitutional Court's decision no. U 7/98 of 26 February 1999 and the Chamber's decision no. CH/00/4441 of 6 June 2000).

The applicant maintained that the Chamber was a domestic court. She was thus not obliged, in her opinion, to give preference to the Constitutional Court over the Chamber.

2. The third parties' submissions pursuant to Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court

The Venice Commission in its written submissions to the Court of 15 June 2005 submitted that, as in the case of the Agreement on Human Rights (Annex 6 to the 1995 Dayton Agreement), the Constitution of Bosnia and Herzegovina (Annex 4 to that Agreement) was an international treaty. In that regard, the Venice Commission referred to a decision of the Constitutional Court which applied the Vienna Convention on the Law of Treaties[5] when interpreting the Constitution of Bosnia and Herzegovina (Constitutional Court's decision no. U 5/98 I of 30 January 2000, § 15).

As to the Constitutional Court, which was set up pursuant to the above Constitution and despite its partly international composition, the Venice Commission in its written submissions to the Court of 15 June 2005 considered that it was devised as a domestic court and not as some international tribunal[6]. In addition, the jurisdiction of the Constitutional Court, like the jurisdiction of the Chamber, is limited to the territory of Bosnia and Herzegovina.

The Venice Commission concluded that proceedings before the Constitutional Court could not be considered "international" within the meaning of Article 35 § 2 (b) of the Convention. They must instead be considered "domestic" for the purposes of Article 35 § 1 of the Convention and must thus be exhausted before bringing a case before the European Court (provided that in the specific case complaints to the Constitutional Court would be admissible).

The ICHR took the view that the Constitution of Bosnia and Herzegovina was a unilateral undertaking of Bosnia and Herzegovina, rather than an international treaty, because the approval of the Republic of Croatia and of Serbia and Montenegro (the parties to the 1995 Dayton Agreement) was not required either for its entry into force or for amendments thereto.

Taking into consideration also that the jurisdiction of the Constitutional Court is the jurisdiction of a constitutional court in the purest sense, the ICHR concluded that proceedings before the Constitutional Court should be considered "domestic" for the purposes of Article 35 § 1 of the Convention.

3. The Court's assessment

The Court recalls that an applicant is required to make normal use of domestic remedies which are effective, sufficient and accessible. It is also recalled that, in the event of there being a number of remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance (see *Croke v. Ireland* (dec.), no. 33267/96, 15 June 1999). In other words, when a remedy has been pursued, use of

[5] The Vienna Convention on the Law of Treaties "applies to treaties between States" (Article 1 of that Convention).

[6] The Venice Commission referred to Article VI § 3 (b) of the Constitution of Bosnia and Herzegovina: "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".

another remedy which has essentially the same objective is not required (see *Moreira Barbosa v. Portugal* (dec.), no. 65681/01, ECHR 2004-... (extracts)).

In the present case, the applicant pursued an appeal before the Chamber. The Court has decided that the appeal was a "domestic" remedy within the meaning of Article 35 § 1 of the Convention. The parties did not contest its effectiveness and indeed nothing indicates that it was an ineffective remedy for the present applicant. That the Chamber's decision in the instant case has not been enforced does not render that remedy ineffective: the evidence is that the Chamber's decisions were, in general, enforced and, indeed, that is consistent with the figures provided by the Government in this respect.

Even assuming that an appeal to the Constitutional Court could be considered to be an effective domestic remedy in the present case within the meaning of Article 35 § 1 of the Convention, for the reasons outlined in detail above (see also the Constitutional Court's decision no. AP 288/03 of 17 December 2004), the applicant was entitled to choose between two effective domestic remedies (*Airey v. Ireland* judgment of 9 October 1979, Series A No. 32, § 23) and her application cannot be rejected because of that choice.

C. Article 34 of the Convention

Its relevant part reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto..."

The Government also submitted that even if the applicant could have claimed to be the victim of a violation of the Convention prior to the entry into force of the Settlement of Domestic Debt Act 2004 of the Republika Srpska, she could not claim to have been so thereafter. While the Act in issue implicitly precluded the enforcement of all judgments ordering the release of "old" foreign-currency savings, it provided the applicant with an opportunity to receive 1000 Bosnian markas (approximately 511 euros – "EUR") in cash in four annual instalments and the remaining sum in state bonds.

The applicant stated that, since her case concerned a failure to enforce the judgment of 26 November 1998, the impugned situation could be rectified only by the full enforcement of that judgment without delay (as ordered by the Chamber in 2000).

The Court recalls that, where an applicant complains of the non-enforcement of a final and enforceable judgment in his or her favour (as in the present case), the applicant can continue to claim to be a victim of a breach of the Convention until the relevant national authorities have acknowledged the breach (either expressly or in substance) and afforded redress for it (see *Amuur v. France*, judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, § 36 and *Voytenko v. Ukraine*, no. 18966/02, § 34, 29 June 2004).

While in 2000 the Chamber, a competent domestic body, expressly acknowledged breaches of the Convention and ordered the Republika Srpska to ensure the full enforcement of the judgment of 26 November 1998 without further delay, the judgment in issue has not yet been enforced and the applicant has not yet been afforded any redress.

This objection of the Government must thus also be dismissed.

D. Merits

The Government accepted that the enforcement of the judgment of 26 November 1998 had been prevented by the Republika Srpska's legislation since the ratification of the Convention by Bosnia and Herzegovina on 12 July 2002 (the period in the Court's competence *ratione*

temporis) and that it clearly constituted an interference with the applicant's human rights as defined in Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

Nevertheless, taking into consideration that the public debt of the Republika Srpska was almost as high as its two annual budgets, the statutory intervention was necessary. The Government also submitted that a fair balance had been struck between the interests of the community and the applicant's human rights as the following possibilities had been left open to the applicant: (a) she was entitled to convert her savings into privatisation coupons pursuant to the Privatisation of Companies Act 1998 of the Republika Srpska and utilise those coupons in the privatisation process or sell them on the secondary market under certain conditions; and (b) the Settlement of Domestic Debt Act 2004 of the Republika Srpska provided the applicant with a possibility of receiving 1000 Bosnian markas (approximately EUR 511) in cash in four annual instalments and the remaining amount of her "old" foreign-currency savings in state bonds payable in 10 annual instalments between 2025 and 2034.

The applicant disagreed with the Government. She submitted that a failure to enforce a judgment could never be justified given that courts, when taking their decisions, take into consideration all relevant circumstances.

The applicant further alleged that, as a result of that failure to enforce, she was unable to pay EUR 15,000 for an eye operation in a Russian clinic so that her son had consequently lost his sight.

Lastly, she maintained that the financial difficulties of Bosnia and Herzegovina were not as serious as the Government suggested. Indeed, she accused the Government of weak public sector management and of being captured by narrow private interests.

E. Conclusion

The Court concludes that the present application raises questions of law which are sufficiently serious for its determination to depend on an examination of the merits, the objections raised by the Government having been dismissed and no other ground for declaring the application inadmissible having been established.

For these reasons, the Court unanimously

Declares the application admissible, without prejudging the merits of the case.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President