DECISION ON ADMISSIBILITY AND MERITS
(delivered on 11 January 2002)

Case no. CH/01/7952

Suada SELIMOVIĆ, Nazif SALMAN, Venceslav ILIĆ, Pero ZELIĆ, Silvija ČUPKA, Dušan OBRADOVIĆ, Miomir JOČIĆ and Milorad POTPARIĆ

against

THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 8 January 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned application introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The case concerns the decision by the House of Peoples of the Federation of Bosnia and Herzegovina not to approve the nomination[1] by the President of the Federation of eight judges to the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court"). The applicants allege that age was the decisive factor in the rejection of their appointment.

2. The case raises the issue of discrimination in the enjoyment of the right to equal access to public service under Article 25(c) of the International Covenant on Civil and Political Rights.

II. PROCEEDINGS BEFORE THE CHAMBER

3. The application was submitted on 3 October 2001 and registered on the same day. The applicants requested that the Chamber order the respondent Party, as a provisional measure, to take all necessary steps to prevent the announcement and continuation of the selection procedure to fill the eight vacancies on the Supreme Court resulting from the rejection of their appointment.

4. On 9 October 2001 the Chamber refused the request and on the same day decided to transmit the case to the Federation of Bosnia and Herzegovina (hereinafter "the Federation" or "the respondent Party"). The Chamber also decided to request certain information concerning the appointment process for Supreme Court judges from the Independent Judicial Commission ("IJC").

5. On 26 October 2001 the Chamber received an additional submission by the applicants. The observations of the Federation on the admissibility and merits of the application were received on 29 October 2001. Further observations in reply by the applicants were received on 22 November 2001.

6. On 29 October and 22 November 2001 the Chamber received submissions by the IJC.

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[1] The Chamber notes that the terminology relating to the appointment process of Federation Supreme Court judges suffers, in the English version of the legislation, from certain discrepancies between the constitutional provisions and those in the ordinary legislation and regulatory materials.
The English text of Article IV.C.6 of the Federation Constitution (see paragraph 11 below) distinguishes between "nomination" of the judges by the President with the concurrence of the Vice-President, and their "appointment" or "reappointment", consisting of nomination plus "approval" by the House of Peoples. The Bosnian and Croat versions of the same provisions do not make this distinction and use the terms "imenuje/imenovanje/ponovo imenovani" in both paragraphs (b) and (c) of Article IV.C.6. The term "potvrda" is used where the English text speaks of "approval".
The English text of the Law on Judicial and Prosecutorial Service in the Federation (see paragraphs 13 ff. below) only uses the terms "appoint", "appointment" and "appointing authority", with one exception, when it refers (in Article 20 post-amendment) to the "Book of Rules Regulating the Nomination of Judges" (see paragraph 18 below).
Similarly, the word "nomination" does not appear in the English version of the documents by the Independent Judicial Commission relating to the appointment process, which consistently refer to "appointment" and "confirmation of the appointment".
The Bosnian and Croat texts of the Law on Judicial and Prosecutorial Service in the Federation (see paragraphs 13 ff. below) similarly consistently use the terms "imenovati", "imenovanje" and "organ koj vrši imenovanje", except for reference to the "Pravilnik kojim se reguliše predlaganje sudija" (see paragraph 18 below). The Bosnian and Croat texts of the documents by the Independent Judicial Commission, as well as the documents originating from the Federal Commission, from the Federation President and from the House of Peoples consistently use the term "imenovanje" when referring to the role of the President with the concurrence of the Vice-President, and the word "potvrda" when referring to the role of the House of Peoples in the appointment process.
To sum up, while Bosnian and Croat provisions consistently refer the "predlaganje" to the Commission, the "imenovanje" to the President with the concurrence of the Vice-President and the "potvrda" to the House of Peoples, the English texts are inconsistent: according to the Constitution the President (with the concurrence of the Vice-President) "nominates" and the House of Peoples "approves", while according to all other provisions the Chamber has taken into consideration the Federation Commission "nominates", the President (with the concurrence of the Vice-President) "appoints" and the House of Peoples "confirms".
In the English version of this decision, the Chamber will use the terminology of the Federation Constitution (except, of course, where it quotes the language used in laws and regulations or by other institutions or persons).

7. The Chamber deliberated on the admissibility and merits of the application on 8 and 9 October, 6 November, 3 and 4 December 2001 and 7 and 8 January 2002. On the latter date it adopted the present decision.

III. THE LEGAL FRAMEWORK FOR THE APPOINTMENT OF JUDGES TO THE SUPREME COURT

A. Constitution of the Federation of Bosnia and Herzegovina

8. The Constitution of the Federation of Bosnia and Herzegovina entered into force on 30 March 1994 at midnight (Official Gazette of the Federation - hereinafter "OG FBiH" - no. 1/94).

9. The Federation Legislature consists of a House of Representatives and a House of Peoples. The House of Peoples "compris[es] 30 Bosniac and 30 Croat Delegates as well as Other Delegates, whose number shall be in the same ratio to 60 as the number of Cantonal legislators not identified as Bosniac or Croat is in relation to the number of legislators who are so identified" (Article IV.A.6).

10. Chapter IV.C. of the Constitution deals with the judiciary of the Federation. Article IV.C.4 paragraph 1 reads as follows:

> "All judicial power in the Federation shall be exercised independently and autonomously."

11. Article IV.C.5 paragraph 1 provides:

> "All Judges of all the Courts of the Federation shall be distinguished jurists of the highest moral standing."

12. Article IV.C.6 reads as follows:

> "Except as specifically otherwise provided:
> (a) There shall be an equal number of Bosniac and Croat Judges on each Court of the Federation. Others shall also be appropriately represented on each such Court.
> (b) The Judges of all the Courts of the Federation shall be nominated [*Predsjednik … imenuje*] by the President with the concurrence of the Vice-President and shall require the approval of a majority of the House of Peoples.
> (c) The Judges of all Courts of the Federation shall serve until age 70, unless they resign or they are removed for cause by the consensus of the Judges of the same Court. However, those Judges appointed initially under this Constitution shall serve for a term of five years unless they reach age 70 sooner, but shall be eligible for reappointment [*ponovo imenovani*]."

B. The Law on Judicial and Prosecutorial Service in the Federation

13. The Law on Judicial and Prosecutorial Service in the Federation (OG FBiH nos. 22/00, 20/01, 37/01 and 57/01) was imposed by the High Representative on 17 May 2000. The High Representative's Decision Imposing the Law on Amendments to the Law on Judicial and Prosecutorial Service in the Federation of 17 May 2000, which entered into force on 3 August 2001 (OG FBiH no. 37/01), amended several provisions of the Law (Articles 4 and 20, insofar as relevant here) and added new provisions (Article 20b, insofar as relevant here). On 25 October and 14 November 2001 the Federation Legislature enacted the Law on Amendments to the Law on Judicial and Prosecutorial Service in the Federation in the same text as imposed by the High Representative's Decision.

14. Article 1 of the Law sets forth its purpose and object. Insofar as relevant it reads:

> "With this Law, and in order to establish independent and unbiased judiciary and prosecutor service and to ensure independence and professionalism in performing judicial and prosecutorial function in the Federation of Bosnia and Herzegovina (hereinafter: the Federation), …, regulated are the principles for the exercise of the judicial and prosecutorial service, the Commission for the election and appointment of judges and prosecutors, the mode of operation of the Federation Commission and the cantonal commissions, dismissal of judges and prosecutors, … .

15. Article 4 of the Law establishes minimum requirements for the exercise of the judicial and prosecutorial functions:

> "The laws of the Federation and cantons prescribe special and separate provisions for election and appointment of judges and prosecutors.
> The minimal condition regarding the professional qualification of the judges and prosecutors of Federation, cantonal and municipal courts are that they have completed a law degree and passed the bar examination. Exceptionally, professors of the Faculties of Law in Bosnia and Herzegovina … may be appointed as judges of the Federation Constitutional Court without having passed the bar examination.
> Candidates must not be members of a political organisation.
> The working and ethical capability of the candidates is determined by an evaluation of their previous work and behaviour, whether it was in accordance with demands of their profession and the ethical standards that are necessary for performing judicial and prosecutor function."

16. Articles 5 and following establish the Federal Commission for Election and Appointment of the judges and regulate its composition and activity.

> "The Federal Commission deliberates, votes and then proposes all candidates for the election or appointment of judges and prosecutors at the Federation level." (Article 5 paragraph 2)

17. Articles 16 to 21 regulate the election and appointment of the judges and prosecutors. Article 18 provides:

> "While estimating whether the candidates fulfil all conditions for exercising judicial or prosecution duties, the Federal Commission or relevant Cantonal Commission will determine whether the candidates fulfil all the objective and subjective criteria for these duties projected by the Federal, cantonal and this Law, especially regarding:
> 1) Expert knowledge and work;
> 2) Academic record during university studies, as well as completion of initial judicial/prosecutor training as may be required by law;
> 3) Demonstrated intellectual excellence through academic written work or participation in professional organisations;
> 4) Demonstrated professional excellence through results achieved during previous work;
> 5) Working abilities and ability to resolve in a proper way legal issues;
> 6) Ensuring a reputation of judicial impartiality, conscience, diligence, determination and responsibility while performing working obligations;
> 7) Ability of oral and written expression, which can be established by an interview, test or some other related way;
> 8) Ability to communicate and work with parties;
> 9) Relations with co-workers and behaviour outside the office;
> 10) Ability to perform managerial tasks, if the judge is appointed for such position.
>
> Regarding the criteria from item 1 of the first paragraph account is taken of, above all, expert qualifications, that is visible from the work of the judge and prosecutor and is established on the basis of an evaluation of the quality of the judge's and prosecutor's decisions, from court and prosecution registers or authorised ministries, as well as professional skill, achieved by bachelor's or master post-diploma study, or with the title of D. Sc."

18. Article 20 provides, insofar as relevant:

> "The Federal Commission (for the purposes of this Article 20, "the Commission") will, for appointments at the level of the Federation, examine all of the applications received by it in accordance with the Book of Rules regulating the nomination of judges/prosecutors and the criteria set out in Articles 4 and 18 of this Law. Additionally, individual oral interviews of candidates shall be conducted in accordance with the procedures set forth in the Book of Rules regulating the nomination of judges/prosecutors.

When proposing candidates to the appointing authority, the Commission is obliged to forward to the appointing authority a complete description of each proposed candidate along with a copy of the relevant application materials.
...
Candidates shall be proposed to the appointing authority in order of preference, so that the first choice of the Commission is proposed as the first candidate, the second choice of the Commission as the second candidate and so on throughout the list. ..."

19. Article 20b reads as follows:
"In cases concerning the proposal and appointment of judges, the following procedure shall apply. The list of proposed candidates shall be sent by the Commission to the appointing authority [*organ koj vrši imenovanje*] of judges as defined in The Constitution of the Federation of Bosnia and Herzegovina. The appointing authority should appoint the candidates in the order in which they are ranked on that list. In the event that it does not follow the Commission's ranking, the appointing authority is required to explain fully in writing its precise reasoning for this, in respect of each individual candidate, to the Commission.
The appointing authority may reject a candidate from the list of proposed candidates only on the ground that the candidate does not meet the minimum statutory criteria, as set out in Article 4 of this Law, for the post for which he or she was proposed. In this event, the appointing authority shall so inform the relevant Commission no later than 10 (ten) days after the date of receipt by it of the list of proposed candidates setting forth the specific criteria that the candidate fails to meet.
The Commission shall then have a period of 10 (ten) days in which to propose another candidate to the appointing authority, or demonstrate that the candidate does in fact meet the minimum statutory criteria or to inform the appointing authority in writing that no other candidate is suitable for proposal, giving reasons.
The provisions of Article 20b shall apply to all proposals outstanding on the date of entry into force of this Law."

C. The Book of Rules Regulating the Nomination of Judges

20. The Book of Rules Regulating the Nomination of Judges was adopted in July 2001 by the Federal Commission and the Cantonal Commissions for the Election and Appointment of Judges, as provided in Article 10 paragraph 3 of the Law on Judicial and Prosecutorial Service in the Federation. It governs "the process of nominating candidates for judicial posts at the Federation, Cantonal, and Municipal court levels" before the Federal and Cantonal Commissions for the Election and Appointment of Judges. Part V of the Book of Rules regulates the nomination procedure, structuring it in three phases: initial review of applicants (Articles 23-25), interviewing applicants (Articles 26-32) and final review of applicants and nomination of candidates (Articles 33-36). These phases are followed by the "Official Letter of Nomination" by the Federation Commission, which is delivered under seal to the appointing authority (Article 37). Articles 39 and 40 regulate the process for additional nominations by the Commission in case of rejection of a candidate by appointing authorities.

D. The Memorandum of Understanding

21. On 4 July 2001 the Memorandum of Understanding concerning "The Standardisation of the Appointment Procedure for Judicial and Prosecutorial Posts in the Federation of Bosnia and Herzegovina and the Republika Srpska", drafted by the IJC, was signed by representatives of the Federation (the Presidents of the Judges Commission and the Prosecutors Commission and the Minister of Justice) and of the Republika Srpska (the Presidents of the High Judicial Council and the High Prosecutorial Council and the Republika Srpska Minister of Justice), as well as by the Director of the IJC as "facilitator". The Independent Judicial Commission had been established by Decision of the High Representative of 14 March 2001.

22. The Memorandum of Understanding introduced a new appointment process for all judicial vacancies throughout Bosnia and Herzegovina. However, according to its submission to the Chamber, "the IJC does not view this as a legal act, but instead, as an interim measure to standardise the appointment process in both Entities within the constraints of the existing legislation".

23. According to the Preamble of the Memorandum of Understanding "the Parties agree to establish practices that promote a fair, objective and transparent appointment process, which meets European standards". The Memorandum proceeds to provide for detailed rules concerning the modalities of the announcement of vacancies and application materials. The Parties entrust the IJC with monitoring the implementation of the Memorandum.

E. Letter from IJC to the Head of Office of the President of the Federation

24. In a letter dated 23 August 2001 addressed to Mr. Goran Krtalić, Head of Office of the Federation President, IJC clarified the new appointment process. In the part relevant to illuminate IJC's understanding of the appointment process for the purposes of the case before the Chamber, this letter reads as follows:

> "…
> Second, the appointing authority may reject a candidate from the Commission's list if the candidate does not meet the statutory criteria contained in Article 4 of the LJPS [Law on Judicial and Prosecutorial Service] (see new Article 20a and 20b). Article 4 contains several bases for minimum conditions (that is, minimum legal/professional qualifications, membership in political organizations, and working or ethical capability). The appointing authority must cite, with specificity, one of these conditions, in order to reject a candidate.
> …
> Third, the appointing authority must select candidates from the list submitted by the Commission and appoint them. However, the appointing authority may depart from the order of ranking on the list but, in such instance, is required to advise the Commission of the reason therefor. Thus, the appointing authority retains full discretion to select from among the list of candidates for judicial/prosecutorial office.
> Fourth, some judicial appointments require confirmation by legislative bodies. Unless otherwise provided by law, the legislative bodies retain full authority to either approve or reject the appointments. As to these appointments, the legislative authorities ultimately determine the fate of the judicial appointments. If the legislative bodies reject the appointments, then the re-advertisement of the posts is the likely consequence.
> …"

F. The Provisional Rules of Procedure of the Constitutional Assembly

25. At its session of 30 May 1994, the Constitutional Assembly of the Federation adopted the Provisional Rules of Procedure of the Constitutional Assembly of the Federation of Bosnia and Herzegovina. These Provisional Rules of Procedure still govern the activity of the House of Peoples. Article 20 paragraph 2 establishes the quorum for the valid operation of the Constitutional Assembly. It reads:

> "The quorum for a session shall consist of a majority of over 50 percent of all the deputies to the Constitutional Assembly, unless otherwise provided by the Federation Constitution and these Provisional Rules of Procedure with regard to decisions about specific issues."

IV. THE PARTICULAR FACTS OF THE FAILED RE-APPOINTMENT OF THE APPLICANTS AS JUDGES TO THE SUPREME COURT

A. Relevant facts concerning the individual applicants

26. The following biographical information on the individual applicants was obtained from the nomination letter dated 10 August 2001 prepared by the Federation Commission for Election and Appointment of Judges.

27. Suada Selimović, of Bosniak ethnic origin, was born in 1933 in Foča. She was appointed judge of the County Court I in Sarajevo in 1960, and thereafter she held appointments as a judge of the District Court in Sarajevo, the Supreme Court of Bosnia and Herzegovina, and the Supreme Court of the Federation of Bosnia and Herzegovina, whose President she was during the two years before the expiry of her mandate on 17 September 2001.

28. Nazif Salman, of Bosniak ethic origin, was born in 1933 in Ljubinje. He was appointed judge of the County Court in Doboj in 1961, and thereafter he held appointments as a judge of the District Commercial Court in Sarajevo, the Supreme Court of Bosnia and Herzegovina, and the Supreme Court of the Federation of Bosnia and Herzegovina.

29. Venceslav Ilić, of Croat ethnic origin, was born in 1937 in Sarajevo. In 1973 he was appointed judge of the District Court in Sarajevo. Later he became a municipal prosecutor in Sarajevo and a judge of the Supreme Court of Bosnia and Herzegovina. Upon the formation of the Supreme Court of the Federation of Bosnia and Herzegovina, he held appointments as a judge of that court, and was the first president of that court.

30. Pero Zelić, of Croat ethnic origin, was born in 1936 in Bugojno. In 1967 he became a judge of the Municipal Court in Bugojno, and thereafter he was a Municipal Public Attorney in Bugojno and a judge of the Supreme Court in Mostar. In 1996 he was appointed judge of the Supreme Court of the Federation of Bosnia and Herzegovina.

31. Silvija Čupka, of Croat ethnic origin, was born in 1935 in Vareš. She became a judge of the Municipal Court in Vareš in 1963 and later held appointments as a judge of the Supreme Court of Bosnia and Herzegovina, a judge of the Court of Associated Labor of Bosnia and Herzegovina, and Deputy Republic Attorney-General. In 1996 she was appointed judge of the Supreme Court of the Federation of Bosnia and Herzegovina.

32. Dušan Obradović, of Serb ethnic origin, was born in 1933 in Kotor Varoš. He became a judge of the District Court in Prnjavor in 1960 and later succeeded to appointments as a judge of the District Court in Banja Luka and a judge of the Supreme Court of Bosnia and Herzegovina. In 1996 he was appointed judge of the Supreme Court of the Federation of Bosnia and Herzegovina.

33. Miomir Jočić, of Serb ethnic origin, was born in 1935 in Andrijevića. In 1963 he was appointed judge of the Municipal Court in Prijedor and thereafter he served as a judge of several other municipal courts, the District Court in Sarajevo, and the Supreme Court of Bosnia and Herzegovina. In 1996 he was appointed as a judge of the Supreme Court of the Federation of Bosnia and Herzegovina.

34. Milorad Potparić, of Montenegrin ethnic origin (designated as "Other"), was born in 1934 in Pljevlja. He became a judge of the Municipal Court I in Sarajevo in 1967 and later a judge of the District Court in Sarajevo. In 1996 he was appointed judge of the Supreme Court of the Federation of Bosnia and Herzegovina.

B. The nomination by the President with the concurrence of the Vice-President

35. On 17 September 2001 the mandates of 15 judges of the Supreme Court, who had been appointed for a five-year term in accordance with Article IV.C.6, paragraphs (b) and (c), of the Federation Constitution in 1996, among them the applicants, expired.

36. On 15 June 2001 the vacancy notices for these posts were published in the official gazettes in Bosnia and Herzegovina. This was followed by the interview process and, on 10 August 2001, resulted in the nomination proposal letter sent by the Federation Commission for Election and Appointment of Judges (the "Federal Commission") to the Federation President and Vice-President. According to the IJC submissions of 29 October 2001 "the appointment procedure for these posts was carried out in accordance with the Memorandum of Understanding, once it took effect. … The IJC monitored every stage of the appointment process, from the placing of the vacancy notice for the positions in the Official Gazettes in BiH on 15 June 2001 (which pre-dated the terms and conditions of the Memorandum of Understanding), through the interview process, where IJC attended every single interview, through the nomination process as carried out by the Federation Judges Commission, until the appointment process by the Federation President and Vice-President and the confirmation process by the Federation House of Peoples".

37. The nomination proposal letter by the Federal Commission states that a total of 20 candidates applied for the vacancy. Only one of them did not meet the criteria of Articles 4 and 18 of

the Law on Judicial and Prosecutorial Service. The Federal Commission then proceeds to put forth its proposal in order of preference, dividing the candidates according to their ethnic origin[2]. In the list of the 11 Bosniak candidates, the applicants Suada Selimović and Nazif Salman occupy the first and second position respectively. Among the five Croat candidates, the applicants Venceslav Ilić, Pero Zelić and Silvija Čupka are ranked in first, fourth and fifth position respectively, the two Serb candidates are the applicants Dušan Obradović and Miomir Jočić, and the only candidate from the group of "Others" is the applicant Milorad Potparić.

38. In the letter of 23 August 2001 to the Head of Office of the President of the Federation (see paragraph 24 above), IJC stated that

> "the age distribution of candidates proposed by the FJC [Federal Judiciary Commission] is not a matter that violates the LJPS [Law on Judicial and Prosecutorial Service] nor undercuts the validity of the appointment process. The FJC had a limited pool of candidates who were, by and large, veteran judges. This is not uncommon, as higher level judicial posts are frequently staffed by senior judges. The credentials of many of the recommended candidates reveal, across the board, an extended and broad experience in the judiciary, preceding the emergence of nationalist political parties. The interviews of the candidates further illuminated professional ability, awareness of the problems affecting the judiciary, and a progressive vision for reforming the judiciary".

39. On 6 September 2001 the President of the Federation sent its decision on the nomination of 15 judges to the Supreme Court to the House of Peoples. This decision does not make any changes to the order of the Federal Commission proposal. The decision nominates seven Bosniak judges, with the applicants Suada Selimović and Nazif Salman in first and second position respectively. The decision next nominates five Croat judges, the applicants Venceslav Ilić, Pero Zelić and Silvija Čupka being in first, fourth and fifth position respectively, then two Serb judges, the applicants Dušan Obradović and Miomir Jočić, and one from the group of "Other" origin, the applicant Milorad Potparić.[3]

C. The session of the House of Peoples

40. On 18 September 2001 the approval of 15 Supreme Court judges nominated by the Presidency of the Federation was on the agenda of the House of Peoples. The following is a transcript of the debate that preceded the vote on this issue.

Mr. Ivo Komšić (Chairman of the House of Peoples):

> "... now we come to the decision, that is to say decisions, of the President of the Federation on the appointment of the judges of the Supreme Court of the Federation of BiH.
>
> Ms. Suada Muminagić, who was the chairman today in the Bosniaks Club, asked for the floor."

Ms. Suada Muminagić (speaking for the Bosniak Club):

> "After a long discussion we had at the Bosniaks Club we could not achieve a unique opinion about the proposals, the opinions were divided. Some were for the acceptance of

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[2] The Federation Constitution (see paragraph 12 above) provides for equal representation of Bosniacs and Croats on the Federation courts. However, as the official nomination letter by the Federal Commission to the President and the Vice-President of the Federation points out, the nomination proposal was made "following the provisions of the Federation of BiH Constitution on ethnic representation ... and having in mind the decision of the Constitutional Court of BiH on constitutionality of peoples of 30 June and 2 July 2000".
In the *Constituent Peoples* decision (Constitutional Court of BiH, Case U 5/98 Third Partial Decision, adopted on 1 July 2000) the Constitutional Court declared that the wording "Bosniacs and Croats as constituent peoples, along with Others, and" as well as "in the exercise of their sovereign rights" in Article I.1.(1) of the Federation Constitution is unconstitutional under the BiH Constitution, because it fails to recognise that all three constituent peoples mentioned in the Preamble of the BiH Constitution in Annex 4 of the Dayton Peace Agreement are constituent peoples at the level of the Entities, too (see, e.g., paragraph 60).

[3] The letter accompanying the nomination decision states that the number of Bosniak, Croat, Serb and Other candidates was established "following the provisions of the Constitution of the Federation of BiH on constitutionality of peoples [*recte*: the provisions of the Constitution of the Federation of BiH and the decision of the Constitutional Court of BiH on the constitutionality of peoples, see FN 2 above], and considering the ethnicity of the proposed candidates".

the proposals entirely and some put objections that is to say objected to the structure of the proposed candidates, or confirmed the appointment. Those proposals are related, in the first line, to the structure of age since mainly the former judges of the Supreme Court were proposed whose mandate, in this way, would have been extended that is to say the reappointment would be made for seven judges who are over 65. That means if they had performed judge's duty at their age they would have worked until they are 70. Of course, that they may work until they are 70 if they are appointed now, but our opinion is that the decision or legal provision does not mean that the judges must be appointed if they are over 65 in order to work until they are 70. We are of the opinion, to be more specific, a part of the Bosniak Club's delegates think that we should have used an opportunity, when 15 candidates were proposed, to choose new people for the Supreme Court, of course, people – judges who fulfill conditions set out for the judges.

Further, objections were that non-equal territorial representation took place, alleging the place where somebody was born, but it does not mean anything. If a person came from a place where he was born then he left that place and spent all his life working at another place, so the new equal representation of the Federation territory needed to be taken care of. And at the end some argumented proposals were made, actually not to the work of some judges about which we, as the Club, did not give our statement.

Since there was no single approach in considering proposals, the Club agreed to go for a hearing as I stated with the different opinions we would leave to each delegate to state his/her opinion on proposals. We know that there would be an individual voting for proposals, meaning, there was not any unique approach in order to reach a harmonized standpoint in respect to the entire list. That would be the report of the delegates of the Bosniaks Club."

Ivo Komšić (Chairman of the House of Peoples):

"Thank you.

I am obliged to point out that we have requested the OHR to interpret the way of appointment, that is to say the confirmation of the decision of the President of the Federation in the Peoples House. We have got the interpretation that we may give a statement individually but not on the entire list, which we got, and not on the decision as a single decision for all candidates proposed. That interpretation is very important for us. Before this session we also had a meeting with the Independent Judicial Commission of the OHR where it was confirmed that we may give our statement for each candidate. I have to say that I feel sorry that we did not have such interpretation before when we appointed judges for the Constitutional Court of the Federation of BH, because we would probably have appointed several very good candidates who were not appointed because we voted for the whole list as a single list. This time our procedure is easier.

We have heard the opinion of one Club, whether the chairman of the other club – Croatian Club would like to say something? Yes – Mr. Tomo Vidović."

Mr. Tomo Vidović (speaking on behalf of the Croat Club):

"Esteemed Chairman, my colleague deputies, today's session of the Club of Croatian deputies focused on the proposal for confirmation of the decision of the President of the Federation on the appointment of judges of the Supreme Court. In relation to the age an assessment followed that the potential of personnel which the Federation has at its disposal at this moment is very poor – of 15 candidates for whose appointment the confirmation was requested to be issued at this session, only three are under 60 years of age. You have heard the information that seven candidates are over 65. That confirms the orientation as correct, and we had at the last session of the People House, to proceed to the establishment of the Judiciary-Prosecutor institute, let me shorten that name, which needs to have one significant function, which is the preparation and training of candidates for the appointment to the, socially very important, judge's position.

These are some observations from which we have tried at the Club to form a principle under which we should not appoint or confirm the appointment of candidates who are over 65, but we are faced with the fact that the mandate of approximately this number of judges has expired and that the Supreme Court at this moment more likely has certain personal difficulties to form a panel and to perform its tasks in relation to its competence.

Therefore, we are taking this circumstance into consideration that deputies would individually decide during the confirmation of appointment of each of 15 candidates, but indeed in a certain way this fact considering the age is some kind of warning for us whether there are no interested people or sufficient number of candidates in the legal field for the judge's positions, that we have this structure of age of the proposed candidates. Thank you."

Ivo Komšić (Chairman of the House of Peoples):
"Thank you. Semiha Borovac, please."

Ms. Semiha Borovac:
"Ms Suada stated that we did not succeed at the Club of Bosniaks in finding a mutual agreement in relation to the opinions about criteria how to propose or to vote on the proposal of the President of the Federation and of his Deputy for the appointment of judges of the Supreme Court, and I am obliged to inform that the SDA deputies in the Club of Bosniaks were in favour of the proposal to support the list of candidates given by the President of the Federation, because the President of the Federation and also the Federal Commission which proposed the candidates, had in mind, first of all, when speaking of the age, the experience of the judges of the Supreme Court which has 24 judges. I may say that we at the last session, when confirming the appointment of judges, appointed a significant number of younger judges of the Supreme Court, I remember Mr. Eterović and some other. May be we have this overlapping because the mandate for several judges has expired, but we had in mind, when we were taking this standpoint, the fact that a judge of the Supreme Court with 50 years of age does not have any chance until he is 50, as the law prescribes, to come to the Supreme Court.
That is why I support this list, and when speaking about the judges, personally I appreciate the experience in connection to the age, as for example for Suada Selimović, the current president of the Supreme Court; then I really can not take into consideration her age in order to eliminate her, as the criteria of elimination, of non appointment to this position. That is why I support this list given by the President of the Federation. After those statements given here I have to notice that the representatives of the Alliance, whose representative is the President of the Federation, now go against his proposal, really it does not look like as some kind of a goodwill job in relation to the proposal and voting. "

Ivo Komšić (Chairman of the House of Peoples):
"We are glad to hear that the SDA supports the President of the Federation.
Who is the next. Who wants to take a floor?
We shall continue with our discussion.
If I may say something in my name, not as the chairman but as a deputy and a representative in the House of Peoples, that besides this criteria, I see that the clubs took into account the age of these appointees for the Constitutional Court and that they took it as one of the criteria to be respected when deciding. I propose that we should take into account how these proposed appointees have affected through their judicial practice the current situation in the judiciary system, which has been assessed as a negative one, no matter if this influence was exercised by their actions or by their inaction. And they just have let some things, decisions and so on, go behind them and they have not acted in accordance with their judicial conscience, as everything is not, everything can not be considered within law, and the very law was imperfect in some of its provisions, their duty, their conscience requested them to intervene, as they were on such positions wherefrom they could have changed it or adapted it to enable a more efficient and fair judiciary.
This is my stand, as a deputy.
Any one else who wants to take a floor?
Please, take the floor.

Šemso Saletović, a deputy:
"Esteemed Presidency, esteemed guests, representatives from the government, respected colleagues deputies, I would like to make an objection to the work of the Federal Commission, which eliminated some candidates, and the explanations they gave.

Those who spoke before me, some of them, those who did not want to say, let me say that is a representation of appointees from territories, all judges who have been taken are the judges who live now and have their residences in Sarajevo, and their places of birth reflect the real picture where they are from. This is a very serious task, the appointment of judges of the Supreme Court, and I consider that the Commission has not given serious explanations in some of the reasoning. I'll mention here only one reasoning where the Federal Commission for Appointments of Judges under number 7, a candidate, and it is written in the reasoning that the application was not signed. I know precisely that the application was signed, I know that, that the president of the court of the Zenica-Doboj Canton, where the president of the court, where the honorable Mr. Adamović as a judge, I am afraid that here it is not, that we have here a kind of revanchism and that, so to say those irresponsible, that the application was not signed.

Believe me that today I'll give my vote for a minimal number of the judges, only to have the court operate, to have an adequate number of the judges for panels, but I think that another announcement should be published and additional candidates be added."

Ivo Komšić (Chairman of the House of Peoples):

Thank you.

Please allow me to provide one more piece of information. You have heard information that the court consists of 24 judges. It is provided for by the Constitution that the court cannot have less than 9 judges, that's what is written in the Constitution of the Federation of BiH. We confirmed during one of our previous sessions seven judges of the Supreme Court and I hope you will have in mind today to elect sufficient number of judges, to confirm the decision of the President of the Federation so that the court could work. And if we decide not to elect all 15 of them, at the end I shall suggest a conclusion immediately to publish a vacancy to supplement the list of 24 judges. As far as I know, the amendment to the law should be passed according to which the number of judges of this Supreme Court would be increased and we shall, thereby, harmonise that vacancy probably with the amendment, i.e. with the amendment to the law.

Does anyone wish to take the floor?

We have heard the opinion of the parties, we have heard the opinion of the Clubs, we have heard a proposal of the President of the Federation.

Mr. Adamović wishes to take the floor, please.

We previously allowed your colleagues to do so as well.

Mr. Vlado Adamović (Chairman of the Federal Commission for the Election and Appointment of Judges):

I apologise to the esteemed Deputies of the House of Peoples. I really did not intend to say anything, but there is a need to say something, you know the game "deaf telephones" may cost a person his or her life. I think we are really playing here "a game of deaf telephones". Accordingly, the way of election and the procedure has been completely supported by the Independent Judicial Commission of the OHR. The thing you might not know, but that I am going to tell you, is that in the meantime, after the first passing the law and amendments to that law, the Book of Rules on Nomination of Judges within the Federation of BiH was made. The significant news is that the Federal Commission included those Rules in the procedure when the vacancy notice was already in the middle of the procedure, which means that, in the middle of that procedure, I am not going to say the will, but the proposal of the international community was complied with in relation to respect for European standards regarding the election of judges in the Federation of BiH. This is one very long process that lasted for several months and its result was the list of candidates which was offered and the President and Vice-President of the Federation, to the general satisfaction, appointed candidates confirming thereby that the work of the Commission was completely in accordance with the Book of Rules and the law. It is understandable that deputies have certain concerns, and I shall start from the last one. [Mr. Adamović discusses the exclusion of the judge Mr. Saletović had referred to].

Furthermore, in relation to the candidates and concerning their age: You know that 70 years is the limit of the mandate for judges in the Federation of BiH. It makes a difference that such a decision was issued because you did it. You know that the international community connects mandates of judges to their age and the age for going to the Supreme Court is 50 years and is not so important, it actually starts.

The 24 judges of the Supreme Court are of such age that the youngest judge is 41 years old and the oldest is 68 years old. What happens with the oldest judges? Gentlemen, they are doyens of court power.

Accordingly, those are persons with long time experience, persons who dealt with application of legal practice. How were they ranked? Not just like that, but according to the law which reads: When estimating whether the candidates fulfil all conditions for exercising judicial duties, the Commission shall take into account their expert knowledge and work, demonstrated intellectual qualifications, demonstrated intellectual excellence through academic written work or participation in professional organisations, academic achievements, ability to analyse and resolve legal issues, demonstrated professional excellence which is based upon results achieved during previous work, including quality and quantity of a judge's decisions and the way on which they act in the cases, ensuring a reputation of judicial impartiality, conscience, diligence, determination and responsibility while performing working obligations; demonstrated high moral values, ability to communicate and with other colleagues, etc. Accordingly, there was a need to fulfil several of these requirements. The objection of the President Komšić in relation to contribution …

Ivo Komšić (Chairman of the House of Peoples):

Representative, representative.

Mr. Vlado Adamović (Chairman of the Federal Commission for the Election and Appointment of Judges):

… the objection of the representative in relation to the contribution of the former members of the Supreme Court in possible legal reform, in harmonising the law and the initiative that certain laws..... in legal reform, harmonising the law, initiative on change of certain laws, unfortunately, was not popular in the former legal practice, since the European Convention was not complied with within this territory in that respect. Recently, the Minister of Justice shall confirm that, the Association of Judges in the Federation of BiH, the Supreme Court of the Federation of BiH and all expert sessions regarding judges actively participated in amendments and passing of laws, at least in the first draft proposals. A few days ago Minister Mehmedagić attended one such meeting in Holiday Inn where we had a long discussed about the Law on Real Estate.

Gentlemen, what was offered on this list... all criteria were taken into account – national composition of the Supreme Court, which is determined by the Constitution and it is very difficult to balance it. It has not been balanced yet and it shall only be possible with six judges to balance the full national composition, in accordance with the Protocol that was lately concluded between the representatives of executive power, after the adoption of the Law on Extension of Systematisation within the Supreme Court by the second House, with six judges that shall come since it has been adopted by this House. Furthermore, the age structure shall be completely balanced by judges from 45 up to 65-70-80, i.e. 70 years old. That is not 80 years, 90 – but the legally prescribed age limit. In addition to that, the gender structure shall be balanced, and the structure concerning which persons over 65 should remain in the Supreme Court, which is what the esteemed representative spoke about. One of such examples is Mr. Duško Obradović, who is 67. If you were to take a poll among the judges in the Federation of Bosnia and Herzegovina, according to the list, all of them shall tell you that he is a top-quality expert in his branch. If you publish tomorrow a vacancy stating that it is a vacancy for replacement of judge Duško Obradović, I guarantee you that none of the judges shall apply to that vacancy for replacement of that judge for the reason we are deeply aware that this man is a doyen in that branch. There is a limited number of persons in the Supreme Court who are working in that branch, but it is about, as people say, a brain trust because it is a Supreme Court which is very difficult to reach in a person's carrier.

I really ask you to support the proposal because the Law, the Rules and the Constitution have not been violated at all. On the contrary, everything was taken into account. Thank you.

Ivo Komšić (Chairman of the House of Peoples):

Thank you for that explanation.

Does anyone else wish to speak? No.

I conclude the deliberations on this item of the agenda and we go to individual statements regarding each candidate, i.e. regarding the Decision of the President of the Federation.

We are going to individual voting."

41. Thereafter, the House of Peoples voted on the approval of the judges nominated by the Federation President. According to the record of the session, the vote gave the following results (the Chamber is aware that the number of deputies present appears to oscillate between 44 and 48):

The applicant Suada Selimović, ranked first among the appointees of Bosniak ethnic origin, received 12 votes in favour and 3 against, with 32 abstentions, her nomination thereby not being approved;
the applicant Nazif Salman, ranked second among the appointees of Bosniak ethnic origin, received 12 votes in favour and 1 against, with 34 abstentions, his nomination thereby not being approved;
judge Sadudin Kratović, ranked third among the appointees of Bosniak ethnic origin, received 39 votes in favour and none against, with 7 abstentions, his nomination thereby being approved;
judge Hatidža Hadžiosmanović-Mahić, ranked fourth among the appointees of Bosniak ethnic origin, received 45 votes in favour and none against, with 2 abstentions, her nomination thereby being approved;
judge Malik Hadžiomeragić, ranked fifth among the appointees of Bosniak ethnic origin, received 47 votes in favour and none against, his nomination thereby being approved;
judge Hajrudin Hajdarević, ranked sixth among the appointees of Bosniak ethnic origin, received 47 votes in favour and none against, his nomination thereby being approved;
judge Emina Bahtijarević, ranked seventh among the appointees of Bosniak ethnic origin, received 47 votes in favour and none against, her nomination thereby being approved;
the applicant Venceslav Ilić, ranked first among the appointees of Croat ethnic origin, received 12 votes in favour and 1 against, with 32 abstentions, his nomination thereby not being approved;
judge Tadija Bubalović, ranked second among the appointees of Croat ethnic origin, received 47 votes in favour and none against, his nomination thereby being approved;
judge Lada Simić-Luković, ranked third among the appointees of Croat ethnic origin, received 44 votes in favour and none against, with 2 abstentions, her nomination thereby being approved;
the applicant Pero Zelić, ranked fourth among the appointees of Croat ethnic origin, received 14 votes in favour and 1 against, with 33 abstentions, his nomination thereby not being approved;
the applicant Silvija Čupka, ranked fifth among the appointees of Croat ethnic origin, received 12 votes in favour and 1 against, with 33 abstentions, her nomination thereby not being approved;
the applicant Dušan Obradović, ranked first among the appointees of Serb ethnic origin, received 16 votes in favour and 1 against, with 30 abstentions, his nomination thereby not being approved;
the applicant Miomir Jočić, ranked second among the appointees of Serb ethnic origin, received 11 votes in favour and 1 against, with 35 abstentions, his nomination thereby not being approved;
the applicant Milorad Potparić, the only appointee of "Other" ethnic origin, received 14 votes in favour and 2 against, with 30 abstentions, his nomination thereby not being approved.

42. By letter of 19 September 2001, the Chairman of the House of Peoples, Ivo Komšić, informed the President of the Supreme Court of the approval of the decisions on the nomination of seven judges (Sadudin Kratović, Hatidža Hadžiosmanović-Mahić, Malik Hadžiomeragić, Hajrudin Hajdarević, Emina Bahtijarević, Tadija Bubalović and Lada Simić-Luković) and of the failed approval of the decisions on the nomination of the eight applicants (Suada Selimović, Nazif Salman, Venceslav Ilić, Pero Zelić, Silvija Čupka, Dušan Obradović, Miomir Jočlć and Milorad Potparić).

V. COMPLAINTS

43. The applicants claim that the decision by the Federation House of Peoples not to approve their nomination to the Supreme Court of the Federation constitutes discrimination on grounds of age in the enjoyment of their right to equal access to public service in violation of Article 25(c) of the ICCPR in conjunction with Article II(2)(b) of the Agreement.

VI. SUBMISSIONS OF THE PARTIES

A. Federation of Bosnia and Herzegovina

1. As to the admissibility

44. The respondent Party considers there are no obstacles for the Chamber to declare the application admissible. It stresses in particular that the applicants, except for the possibility to initiate a proceeding before the Constitutional Court of Bosnia and Herzegovina, do not have a judicial remedy in this matter.

2. As to the merits

45. The respondent Party considers that the merits of the case depend, to a certain extent, on the interpretation of Article 20b of the Law on Judicial and Prosecutorial Service in the Federation (see paragraph 19 above). Namely, under the Federation Constitution the "appointing authority of judges as defined in the Constitution of the Federation of Bosnia and Herzegovina" is considered to be the President and Vice-President of the Federation as well as the House of Peoples of the Parliament of the Federation. Since the judges are not elected until the House of People confirms them, regardless of the fact that the President and Vice-President stuck to the order of candidates as established by the Federation Judiciary Commission, the fact remains that the House of Peoples did not stick to the proposed order of candidates. On the contrary, it confirmed the appointment of candidates who were in a lower position on the list and did not confirm appointment of the candidates who were in a higher position on the list.

46. According to the respondent Party, the House of People was obliged to submit to the Commission in writing and in details the specific reasons for each candidate whose appointment as a judge of the Supreme Court was not confirmed.

47. The respondent Party further argues that from the transcript of the meeting of the House of Peoples it may be concluded that the only objection to the appointment of the judges who were not confirmed was in relation to the age of the proposed candidates. If this is the case, and since the House of Peoples did not give any reasoning for its decision not to confirm the appointed judges, "we could speak about discrimination against the eight non-confirmed judges on the basis of their age, without reasonable, actually without any, justification".

48. Moreover, the respondent Party notes that the vote in the House of Peoples resulted in a greater number of votes in favour of the confirmation of the applicants than against it, the rejection of the proposed confirmation being based on the abstention of the majority. Referring to a "position of the OHR", the respondent Party questions the validity of the vote.

49. In conclusion, the respondent Party "leaves it to the esteemed Chamber to estimate and to establish whether the respondent Party by its conduct relating to the confirmation or non-confirmation of the applicants as judges of the Supreme Court of the Federation of Bosnia and Herzegovina has violated their right guaranteed under Article 25(c) of the International Covenant on Civil and Political Rights in conjunction with Article II(2)(b) of the Agreement".

B. The applicants

50. The applicants welcome "the observations of the respondent Party [to the effect] that the application is admissible and well-founded on the merits".

51. They submit that the transcript of the session of the House of Peoples of 18 September 2001 clearly shows that the delegates' choice, in voting on the decision on the confirmation of the applicants' appointment, was influenced exclusively by the age of the applicants. Specifically, the applicants allege:

> "The session was going on in accordance with the position previously agreed at the meetings of the Bosniak and Croat delegates clubs. From the presentations given at the House of Peoples session by Ms. Suada Muminagić and Mr. Tomo Vidović, the representatives of these clubs, it is evident that the majority of the members of both clubs chose not to vote for the confirmation of the applicants' appointment because of their age (this was the only argument in the presentation of Mr. Tomo Vidović, and from the presentation of Ms. Suada Muminagić it was evident that it was the only argument accepted by the majority of the Bosniak club delegates. Other arguments, unclearly formulated and without details, were not the subject of the choice of this club as it follows from the presentation of Ms. Muminagić and were not related to the applicants). The House of Peoples Chair mentioned in general and across-the-board manner, ... , that some (it seems political) responsibility of all appointed judges was taken into consideration in relation to the current situation of the judicial system. This isolated opinion can be a reason for the choice of this delegate only. The individual voting results clearly indicate that delegates abstained only while voting on the appointment of the elderly judges (...) without presenting any concrete arguments that would disqualify these judges, and that is the most convincing proof of the reason for not confirming the appointments. "

52. The applicants also argue that, by failing to follow the proposed order of appointment of the candidates without stating in written form and in detail which criteria the non-appointed judges failed to meet, the House of Peoples violated the Book of Rules and its duty in accordance with Article 20b of the Law on Judicial and Prosecutorial Service in the Federation of Bosnia and Herzegovina.

53. The applicants further argue that the Rules of Procedure of the House of Peoples are violated since the House took the position that the appointment of the applicants had been refused by a majority of abstentions. The applicants recall that the House of Peoples does not have its own Rules of Procedure and uses the Provisional Rules of Procedure of the Federation Constitutional Assembly, which provides opportunities for the manipulation of the vote of the delegates. These Provisional Rules of Procedure do not contain complete provisions on the appointment of the judges. Moreover, the Provisional Rules of Procedure do not provide for decisions taken by counting the votes of those delegates who abstained.

VII. OPINION OF THE CHAMBER

A. Admissibility

54. Before considering the merits of the case, the Chamber must decide whether to accept it, taking into account the admissibility criteria set out in Article VIII(2) of the Agreement. The Chamber notes that the respondent Party has expressed itself in favour of the admissibility of the application. The Chamber notes that such an indication by the respondent Party does not preclude it from examining the admissibility of an application on its own motion. In the present case, no ground of inadmissibility under Article VIII(2) of the Agreement being readily discernible, the Chamber will declare the application admissible.

B. Merits

55. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. The applicants allege discrimination on grounds of age under Article II(2)(b) of the Agreement in relation to Article 25(c) of the International Covenant on Civil and Political Rights (ICCPR).

56. Under Article II(2)(b) of the Agreement, the Chamber has jurisdiction to consider 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 the rights and freedoms provided for in the 16 international agreements listed in the Appendix.

57. Article 25 of the ICCPR, insofar as relevant to the present application, reads:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
> ...
> c. To have access, on general terms of equality, to public service in his country."

Article 2 of the ICCPR, insofar as relevant, provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

58. When examining a complaint of discrimination, the Chamber has consistently considered it necessary first to determine whether the applicant was treated differently from others in the same or relevantly similar situations. Any differential treatment is to be deemed discriminatory if it has no reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, e.g., CH/97/67 *Zahirović*, decision on admissibility and merits delivered on 8 July 1999, Decisions January-July 1999, paragraphs 120 ff.).

1. Differential treatment

59. In the present cases, the Chamber has no difficulty to establish that the applicants were in fact treated differently from others in a relevantly similar situation. The applicants' appointment was rejected, while the other seven candidates appointed to the Supreme Court by the President of the Federation were confirmed. This differential treatment impacts on the applicants' access to public service as Supreme Court judges.

2. Age as the ground for the differential treatment

60. The Chamber must next examine whether this differential treatment occurred on a ground prohibited by the Agreement. Moreover, Article 25 of the ICCPR protects the right of access to public service "without any of the distinctions mentioned in Article 2" of the ICCPR. The Chamber notes that "age" is neither among the grounds of discrimination listed in Article 2 ICCPR, nor among those listed in Article II(2)(b) of the Agreement. Both provisions, however, prohibit discrimination on the grounds listed and on grounds of "other status".

61. As to Article 2 of the ICCPR, the Chamber notes that, while it is not aware of any case-law of the UN Human Rights Committee involving age discrimination, the Committee's General Comment on Article 25 suggests that age is a relevant status for the purposes of Article 2 and Article 25 ICCPR (*The Right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25*): 12/07/96. CCPR General Comment 25, adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996). In paragraph 4 of its General Comment the Committee states:

> "Any conditions which apply to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen."

62. The Chamber also recalls the constant case-law of the European Commission of Human Rights that age, although it is not expressly mentioned in Article 14 of the Convention, is a "status" for the purposes of the prohibition of discrimination enshrined in that Article (see, e.g., *N. v. United*

Kingdom, Application No. 11077/84, decision on admissibility of 13 October 1986). The Chamber has no doubts that similarly, age, although it is not expressly mentioned in the Agreement, is an "other status" for the purposes of Article II(2)(b) of the Agreement, particularly so since the list of grounds of discrimination expressly mentioned in the two provisions is identical.

63. The Chamber also considers it necessary to examine whether the applicants were actually treated differently on the basis of their age. The Chamber notes that the decision not to approve the nomination of the applicants was adopted by a parliamentary body composed of more than forty voting members, each of whom might have had his or her own motives as to why he or she voted in favour or against the approval of the applicants' re-appointment, or abstained. The individual members of the House of Peoples, except for five of them, did not take the floor and provide reasons as to why they chose to vote the way they voted on the applicants' appointment. The Chamber further notes that although the alleged ground of differential treatment, being more than 65 years old, was the same with regard to all applicants (but one), the number of votes in favour and against approval or abstaining varied from one applicant to the other. Finally, the Chamber notes that the transcript of the interventions in the House of Peoples suggests that reasons different from the applicants' age may have played a role in the decision not to approve their nomination. Ms. Muminagić, speaking for the Bosniak club, conceded that the Bosniak club could not reach a single position on the appointments. She stated that the objections within her club to the applicants' appointment concerned "in the first line, the age structure", implying other reasons as well. The same speaker referred to choosing "new people for the Supreme Court". Mr. Vidović, the speaker for the Croat Club, stated that the Croat Club had agreed on the principle that nominees over 65 should not be approved. The Chairman of the House of Peoples, speaking in his capacity as a deputy, stated that he held the nominees co-responsible for the unsatisfactory state of the Federation judiciary. Mr. Saletović spoke of misgivings about the distribution of the candidates as to territorial origin.

64. However, the Chamber cannot disregard the objective result of the vote in the House of Peoples: among the fifteen nominees seven were born in 1936 or earlier, and none of them was confirmed, while all the appointees born after 1936, with the exception of Venceslav Ilić, who was born in 1937, were confirmed.

65. In conclusion, the objective datum of the outcome of the vote, in connection with the declarations of the speakers for the Bosniak and Croat clubs in the House of Peoples, provide sufficient evidence supporting the allegation that the applicants' age was the decisive factor in the decision not to approve their nomination. The Chamber thus accepts that the differential treatment of the applicants was based on their age, a status relevant under Articles 2 and 25 of the ICCPR and Article II(2)(b) of the Agreement.

3. Justification of the differential treatment

66. The Chamber must now establish whether this differential treatment has a reasonable and objective justification, or, in other words, whether it pursues a legitimate aim, having regard to the principles which normally prevail in democratic societies, and second, whether there is a reasonable relationship of proportionality between the means employed and the aims sought to be realised.

67. The applicants claim that, in rejecting their appointment, the House of Peoples violated Article 20b of the Law on Judicial and Prosecutorial Service in the Federation. The respondent Party supports this view. Both Parties also argue that the House of Peoples wrongly applied the Provisional Rules of Procedure in interpreting the vote on the applicants' appointment.

68. The Chamber has examined the question whether the House of Peoples complied with the applicable laws in deciding not to approve the applicants' nomination in two respects: with regard to the age-limit of 70 years in Article IV.C.6(c) of the Federation Constitution and with regard to Article 20b of the Law on Judicial and Prosecutorial Service in the Federation. The Chamber does not consider it appropriate to examine whether the House of Peoples correctly interpreted its vote under its Provisional Rules of Procedure. In this respect, the Chamber accepts that the outcome of the vote is as it was communicated by the Chairman of the House of Peoples, i.e. that the applicants' appointment was in fact rejected.

69. As to the first question, the Chamber finds that Article IV.C.6(c) of the Federation Constitution is clear in the sense that, while as a general rule judges shall serve until they reach the age of 70, the judges "appointed initially under this Constitution" shall serve for a five year term. Upon expiry of that five year term, they are eligible for re-appointment, but such re-appointment is not as of right, and the requirement of "removal for cause" does not extend to the decision not to re-appoint them. Accordingly, the decision not to approve the applicants' re-appointment cannot be considered to be in violation of Article IV.C.6(c) of the Federation Constitution.

70. As to the second question, raised by both the applicants and the respondent Party, it turns on whether "the appointing authority of judges as defined in The Constitution of the Federation" is only the President of the Federation ("with the concurrence of the Vice-President", Article IV.C.6(b)), or the President with the concurrence of the Vice-President and the House of Peoples. In this regard, the Chamber firstly recalls the precise wording of Article IV.C.6(b) in both the English and the Bosnian and Croat versions of the provision:

> "(b) The Judges of all the Courts of the Federation shall be nominated by the President with the concurrence of the Vice-President and shall require the approval of a majority of the House of Peoples."
>
> "(b) Sudije sudova Federacije imenuje Predsjednik Federacije uz saglasnost Potpredsjednika i uz potvrdu većine delegata u Domu naroda."

The Chamber notes that the English text of this provision does not use the term "appointment" and thereby allows different interpretations as to whether the "appointing authority of judges as defined in The Constitution of the Federation" referred to in Article 20b of the Law on Judicial and Prosecutorial Service is only the President with the concurrence of the Vice-President, or whether it also embraces the House of Peoples. The Chamber finds, however, that the text of the Bosnian and Croat versions of Article IV.C.6(b) of the Federation Constitution suggests that the "President with the concurrence of the Vice-President" "*imenuje*" (appoints or nominates) the judges, while the "*potvrda*" (approval or confirmation) by the House of Peoples is an additional requirement, external to the "*imenovanje*", i.e. "appointment" or rather "nomination" under Article IV.C.6(b) of the Federation Constitution. The "appointing authority of judges as defined in The Constitution of the Federation" for the purposes of Article 20b according to the Bosnian and Croat versions of the Constitution and the Law on Judicial and Prosecutorial Service would therefore appear to be the President of the Federation with the concurrence of the Vice-President.

71. Secondly, the Chamber finds confirmation for its reliance on the Bosnian and Croat text of Article VI.C.6(b) of the Constitution in the substance of Article 20b of the Law on Judicial and Prosecutorial Service in the Federation. This provision limits the power of "the appointing authority" to reject candidates proposed by the Federal Commission to the candidate's failure to meet the minimum requirements under Article 4 of the Law and, in such a case, requires the appointing authority to "[set] forth the specific criteria the candidate fails to meet". Moreover, it requires "the appointing authority" to "explain fully in writing its precise reasoning", where the appointing authority decides to change the ranking of the proposed candidates. Particularly with respect to the latter requirement, the Chamber is of the opinion that Article 20b of the Law on Judicial and Prosecutorial Service cannot be meant to require a parliamentary body to "explain fully in writing its precise reasoning" for the refusal to approve a nomination. As noted above, the House of Peoples consists of more than sixty deputies, each of them entitled to his own opinion as to why to vote in favour or against the confirmation of a judge. Moreover, the Provisional Rules of Procedure the House of Peoples operates under do not provide for any procedure by which the opinions of its deputies could be merged into a written explanation of "its precise reasoning". The Chamber concludes that the requirements of Article 20b of the Law on Judicial and Prosecutorial Service apply only to the Federation President and Vice-President, and not to the House of Peoples. The decision not to approve the nomination of the applicants can therefore not be said to be in violation of the Law.

72. The Chamber's finding that the decision not to approve the applicants' nomination does not violate the laws applicable to the appointment process is only a preliminary step, not the end, of the examination of the question whether the differential treatment the applicants were subjected to was supported by a reasonable and objective justification.

73. The Chamber notes that the respondent Party has not made any submissions as to a possible legitimate aim sought to be realised by the differentiation among the nominees on the basis of an age limit different from the one already provided for in the Constitution. However, an aim supporting the decision not to approve the applicants' nomination can be evinced from the transcript of the parliamentary debate preceding the vote. Ms. Muminagić spoke of the need, felt by a majority of the deputies forming the Bosniak club, to appoint "new people for the Supreme Court". Mr. Vidović expressed the concern of members of the Croat club about the apparent lack of competent new generations of judges. Mr. Komšić, finally, explicitly stated that, in light of the unsatisfactory work of the judiciary, it was desirable to renew the composition of the Supreme Court.

74. The renewal of the composition of the Supreme Court, the court at the top of the judicial hierarchy, in view of improving the functioning of the entire judicial system, is a legitimate aim for the parliament, at least in a system in which the parliament is given a constitutional role in the appointment of Supreme Court judges. However, the Chamber cannot find that the House of Peoples pursued this aim by reasonable means. It is not by eliminating judges who have passed a certain, arbitrarily chosen, age threshold that new ideas and a new approach to the exercise of the judicial function can be ensured and a fresh new wind made to blow through the corridors of the Supreme Court.

75. The insistence of the speakers of the Bosniak and Croat club on the "age structure" of the Supreme Court, instead of an approach based on an assessment of whether the nominees have demonstrated, through their work, that they have embraced the principles inspiring the Federation Constitution and the Dayton Peace Agreement, judicial independence, rule of law and human rights, highlights the unreasonableness of the criteria chosen. There is a significant difference between a "renewed" Court and a "younger" Court. Having chosen differential treatment on grounds of age as the sole means to promote a better Supreme Court, or a Supreme Court of their better liking, the House of Peoples has failed to accomplish a reasonable relationship of proportionality between the aim pursued and the means adopted.

76. On these grounds, the Chamber finds that the applicants have been discriminated against in the enjoyment of their right to have access, on general terms of equality, to public service in their country.

VIII. REMEDIES

77. Under Article XI(1)(b) of the Agreement the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In this connection the Chamber shall consider issuing orders to cease and desist, monetary relief as well as provisional measures.

78. The applicants request compensation for the moral damage suffered due to the issuance of the discriminatory decisions in the amount of 10,000 KM.

79. The Chamber has found that the decision of the House of Peoples not to approve the applicants' nomination to the Supreme Court was based on discriminatory grounds in violation of the Agreement. This decision cannot be considered valid and final. The Chamber notes that the selection procedure for the filling of the vacancies left on the Supreme Court by the failed appointment of the applicants, as well as by its enlargement to 30 members, is already on its way. It will therefore order the respondent Party to include the applicants in this selection procedure, without requiring them to re-apply and to again undergo the interview process. Should the applicants have missed any dead-line for the submission of their application or other steps in the selection procedure, this fact is to be disregarded.

80. As to the claim of compensation for non-pecuniary damages, the Chamber is of the opinion that the finding of discrimination against the applicants constitutes sufficient satisfaction for the moral damage suffered.

IX. CONCLUSIONS

81. For the above reasons, the Chamber decides,

1. by 12 votes to 2, to declare the application admissible;

2. by 8 votes to 6, that the decision of the House of Peoples not to approve the nomination of the applicants to the Supreme Court of the Federation of Bosnia and Herzegovina constitutes a violation of their right not to be discriminated against in the enjoyment of their right to equal access to public service, protected by Article 25(c) of the International Covenant on Civil and Political Rights in conjunction with Article II(2)(b) of the Human Rights Agreement, the Federation thereby being in breach of Article I of the Human Rights Agreement;

3. by 9 votes to 5, to order the respondent Party to include the applicants in the selection procedure for the filling of 14 vacancies on the Supreme Court, published in the Official Gazette of the Federation of Bosnia and Herzegovina on 20 December 2001, without requiring them to re-apply and to again undergo the interview process;

4. by 13 votes to 1, to reject the applicants' claim for compensation; and

5. unanimously, to order the Federation to report to it not later than 11 February 2002 on the steps taken to comply with the above orders.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Partly dissenting opinion of Mr. Rona AYBAY, joined by Mme. Michèle PICARD and Messrs. Dietrich RAUSCHNING and Viktor MASENKO-MAVI

Annex II Partly dissenting opinion of Mr. Mehmed DEKOVIĆ

Annex III Dissenting opinion of Mr. Viktor MASENKO-MAVI, joined by Mr. Dietrich RAUSCHNING

Annex IV Dissenting opinion of Mr. Andrew GROTRIAN, joined by Mr. Jakob MÖLLER

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Rona AYBAY, joined by Mme. Michèle PICARD and Messrs. Dietrich RAUCHNING and Viktor MASENKO-MAVI.

PARTLY DISSENTING OPINION OF MR. RONA AYBAY, JOINED BY MME. MICHÈLE PICARD AND MESSRS. DIETRICH RAUSCHNING AND VIKTOR MASENKO-MAVI

We disagree with the decision of the majority of the Chamber who were in favour of finding violation on the grounds of discrimination.

The facts upon which our dissent is based are clearly stated in paragraph 63 of the decision. Namely, the decision of The House of Peoples in question "*was adopted by a parliamentary body composed of more than forty voting members each of whom might have had his or her own motives as to why he or she voted in favour or against the approval of the applicants' re-appointment, or abstained .The individual members of the House of Peoples, except for five of them, did not take the floor and provide reasons as to why they chose to vote the way they voted on the applicants' nomination..."*

We are of the opinion that in view of the foregoing it is clear that the underlying motives which led the individual members who voted against the approval of the applicants' appointment cannot possibly be ascertained. Therefore, we can not conclude that the applicants whose appointments were not approved had been discriminated against.

In this regard it is also important to note that a considerable number of members of the House did not take part in the voting process.

On the other hand, consideration should be given to the fact that when a list is submitted to a parliamentary body for approval in order to complete the appointment process envisaged by a Constitution, the parliamentary body whose approval is sought would not be in a position to give its consent automatically. To think otherwise would be to put the parliamentary body in the position of a *"rubber stamp"* with no real power to express its own will as is the case with so called popularly elected "legislatures" in totalitarian regimes.

The House of Peoples, under the Constitution of the Federation has the power to disapprove of the appointment of certain nominees on the basis of the individual discretion of its members expressed by the votes they cast during the final stage of the appointment process. In other words, the right to vote of the members of a parliamentary body should not be scrutinised and put under pressure by outside forces and institutions.

Whether some of the nominated judges who were over a certain age should or should not be approved and appointed by the House of Peoples is, therefore, beyond the judicial review of any court unless serious procedural defects exist in the voting process.

(signed)
Mr. Rona AYBAY

(signed)
Mme. Michèle PICARD

(signed)
Mr. Dietrich RAUSCHNING

(signed)
Mr. Viktor MASENKO-MAVI

ANNEX II

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Mehmed DEKOVIĆ.

PARTLY DISSENTING OPINION OF MR. MEHMED DEKOVIĆ

By the Chamber's Decision under conclusion 4, the applicants' claim for compensation based on moral damage suffered has been rejected.

I have voted against the mentioned conclusion. The majority of the Chamber found that there has been, with regard to the applicants, "a violation of their right not to be discriminated against in the enjoyment of their right to equal access to public service ..." (see paragraph 81(2) of the Decision). Disregarding this, the Chamber rejected the claim for compensation based on the applicants' moral sufferings opining that "the finding of discrimination against the applicants constitutes sufficient satisfaction for the moral damage suffered" (see paragraph 80 of the Decision). I opine that the Chamber's finding is unacceptable. Firstly, one of the fundamental human rights is the right not to be discriminated against on any grounds. However, this is not the case with the applicants. Namely, although according to the regulations in force the applicants could have performed the judicial service until age 70, their re-nomination was not approved exclusively because they had reached age 65. Instead that in the process of confirmation of candidates the principles of professionally, former success in work, ethical and other necessary criteria for carrying out a complex and responsible judicial service prevail, the House of Peoples preferred, as it is justifiably emphasised in the Chamber's decision, to take an arbitrary age criteria. Additionally, taking into account that the most qualitative judges were not confirmed (presidents of panels and departments) than we have here undoubtedly the form of discrimination with serious consequences not only for the applicants but generally for social relations, which for a certain time impose the question on place and role of executive and legislative authorities on one hand and the judicial authorities on other hand regarding the nomination and dismissal of judges. Therefore, the Chamber's finding that being discriminated against is sufficient satisfaction for the applicant's moral damage suffered, without awarding adequate pecuniary compensation, can not in any case represent an adequate compensation for applicant's moral damages suffered.

(signed)
Mr. Mehmed DEKOVIĆ

ANNEX III

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Viktor MASENKO-MAVI, joined by Mr. Dietrich RAUSCHNING.

DISSENTING OPINION OF MR. VIKTOR MASENKO-MAVI, JOINED BY MR. DIETRICH RAUSCHNING

I join the dissenting opinion of my colleague Mr. Rona Aybay. However, I would like to add some observations of my own as to why I cannot follow the decision of the majority in the part related to the merits of the present judgment. The protected rights of the applicants secured by the relevant international instruments were not violated, and the claim of the applicants cannot be convincingly supported by any existing set of standards.

It is evident from the case-file that in the applicants' case there were no irregularities in the appointment process, all existing domestic rules related to the legal framework for the appointment of judges to the Supreme Court were observed. The applicants, however, failed to pass the last stage of this process. The legislative body – having full authority to approve or reject the nominated candidates – decided in fact (by way of abstention of its members) not to approve the applicants' nomination to the Supreme Court. In the discussion related to the approval of the nominated candidates some members of the legislative body raised, among other issues, the issue of the age of the candidates. The transcript of the discussion shows that apart from the age issue other issues were discussed as well, but it is clear that the age issue was an important aspect of the discussion.

Before answering the question whether the raising of the issue of the age of the applicants by the members of the legislative body constitutes discrimination or not, it is necessary to point out that the regulation of the appointment process of judges in the Federation is similar to that which exists in many other countries, and the independence of the judiciary cannot be questioned by the fact that the legislative body has a final word in this process. One can argue, of course, that in a country of an emerging democracy, where nationalist parties dominate politics, where the representatives of these parties prevail in the legislative body, it would have been more appropriate to leave the issue of the appointment of judges to an independent professional commission composed in its majority of judges themselves. But the mere fact that in the Federation the legislative body is the final approving authority of the candidates is not in itself a threat to the principle of independence of the judiciary.

The part related to the merits of the decision raises many doubts and the arguments of the majority are not convincing, neither from the point of their content nor from the point of their structure. It is unfortunate that the decision does not contain an in-depth examination of the provisions of Article 2(1) and Article 25(c) of the International Covenant on Civil and Political Rights. In paragraph 57 the decision specifies these Articles of the ICCPR as the relevant ones for the case, but afterwards the majority pulls out from a hat the criteria established by the case-law of the European Court of Human Rights in respect of Article 14 of the European Convention. The final conclusion of the majority is that there has been a violation of Article 25(c) of the Covenant due to the fact that the House of Peoples did not confirm the nomination of the applicants to the Supreme Court.

Article 25 (c) of the Covenant should be read in conjunction with Article 2, which establishes a general non-discrimination clause. A closer scrutiny of Article 25(c) reveals that it secures the right to have access to public service. Furthermore, this right of access should be guaranteed on general terms of equality and only to the citizens of the State in issue. This Article cannot be interpreted, for sure, as entitling an individual to occupy a particular office. The applicants were not deprived of their right to have acces to public service, they were put on the list of the candidates, their integrity, competence, experience were recognised by the nominating bodies. However, the issue of their age in the final stage of approval was raised in light of the fact that some of them following their appointment would be in service only for three or four years because they would reach the mandatory retirement age.

According to the majority opinion the legislative body has raised the issue of age of the applicants arbitrarily, failed to accomplish a reasonable relationship of proportionality between the aim pursued (creation of a new, „younger" court) and the means adopted. In other words, they have been discriminated against on the ground of their age, which is prohibited by Article 2 (1) of the Covenant.

This Article lists certain factors (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) which cannot be accepted as grounds for distinction. Age is not mentioned within these factors and the majority is of the opinion that the prohibition of distinction on the ground of age is covered by the „other status" factor. It is true, that the list of grounds prohibiting discrimination is an open-ended one and some other grounds, like age, can be considered as covered by the „other status" factor. But even in the latter case this would not mean that reasonable and justifiable distinction on the ground of age would not be possible. Distinction on the ground of age is not alien to present legal systems, and the prohibition of discrimination on the ground of age cannot imply that state authorities are prevented to appoint to the public service persons of the appropriate competence and right age. In the present case the legislative body of the Federation has simply used its discretion provided to it by the Constitution.

(signed)
Mr. Viktor MASENKO-MAVI

(signed)
Mr. Dietrich RAUSCHNING

ANNEX IV

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Andrew GROTRIAN, joined by Mr. Jakob MÖLLER.

DISSENTING OPINION OF MR. ANDREW GROTRIAN, JOINED BY MR. JAKOB MÖLLER

I disagree with the decision of the majority of the Chamber finding a violation of the Agreement on the basis that the applicants were discriminated against on the ground of their age.

The applicants allege that they were discriminated against by the decision of the House of Peoples, which did not approve their nomination as judges. In my view such a decision by a parliamentary body, is in principle subject to review by the Chamber if it is alleged to violate the human rights provisions in the Agreement, since those provisions are binding on all governmental bodies in Bosnia & Herzegovina, including parliamentary bodies. However whilst such review is competent it must necessarily be limited in scope in view of the nature and procedures of the body taking it. In particular it will rarely be possible to ascertain the precise reasons for a decision taken by vote in such a body. In this respect I refer to the comments in para. 63 of the decision also quoted in the separate opinion of Mr Aybay. The nature of a parliamentary decision approving or not approving a judicial appointment is such that the body taking it should be afforded a wide margin of appreciation. In my view the Chamber should therefore treat the decisions of such a body with respect and should only find a violation of the Agreement in a case such as the present one if it is clearly established on all the facts that the decision in question was discriminatory.

In the present case I am satisfied, essentially for the reasons set out in paras. 63-65 of the decision, that the applicants were treated less favourably than other candidates for appointment on the ground of their age. Age may not have been the only factor motivating the decision of the House of Peoples, but taking into account the interventions in the debate and the outcome, I find it clear that age was an important factor. It was probably decisive. I therefore agree with the majority that the applicants were subject to differential treatment, as compared with other candidates, on the basis of an "other status" within the terms of Article II(2)(b) of the Agreement.

I differ from the majority, however, in that I do not find it established that this difference of treatment was illegitimate. The majority accept that a legitimate aim was being pursued by the House of Peoples, in respect that they were seeking to improve the functioning of the Supreme Court by renewing its composition (see para. 74). I agree with them on this point. They find, however, that the means employed (the imposition of an age threshold) was not reasonable. On this point I disagree. In my view the House of Peoples was entitled to take the view that the imposition of an age threshold was an appropriate means of bringing new blood into the Supreme Court. It is at least reasonably arguable that such an approach was preferable, particularly for a political body, to the alternative suggested by the majority, namely an assessment of the judicial performance of individual candidates (see para. 75). A parliamentary body such as the House of Peoples is not well equipped to conduct such an assessment. A system of appointment involving such an assessment may also carry the risk of unacceptable political interference with the judiciary.

I am not therefore satisfied that the House of Peoples went beyond its margin of appreciation under the Agreement and would therefore find that there has been no violation of the Agreement.

(signed)
Mr. Andrew GROTRIAN

(signed)
Mr. Jakob MÖLLER