DECISION ON ADMISSIBILITY AND MERITS
(delivered on 5 July 2002)

Case no. CH/01/7248

"ORDO" – RTV "Sveti Georgije"

against

BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 June 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 Article XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is a private radio and television station in Banja Luka in the Republika Srpska named "ORDO" –RTV "Sveti Georgije" ("RTV Sveti Georgije" or the "applicant"). It obtained a provisional broadcasting license on 30 August 1999 from the Independent Media Commission ("IMC"), which was later succeeded by the Communications Regulatory Agency ("CRA"), both institutions established by decisions of the High Representative to regulate communications and the media. On 7 May 2001, violent protests occurred in the city centre of Banja Luka which prevented the groundbreaking ceremony for the laying of the cornerstone to reconstruct the former Ferhadija mosque destroyed by a planted explosive device during the night of 7 and 8 May 1993. On 8 May 2001, RTV Sveti Georgije broadcast a live call-in television programme entitled "These are the fruits of our battle" ("*To je nama naša borba dala*") concerning the events of the previous day. The programme was allegedly intended by RTV Sveti Georgije to focus attention and open a dialogue on the causes and consequences of the events of the previous day. During this programme, viewers called in and expressed their opinions and comments live on the air. Numerous ugly statements were made against both the Islamic and international communities. Many callers were outraged that the groundbreaking ceremony for reconstruction of the Ferhadija mosque was planned on St. George's Day, a major Orthodox religious holiday. Callers felt this communicated intolerance toward Orthodox Serbs and served to provoke the protests on 7 May 2001.

2. In response to the programme of 8 May 2001, the CRA, in a decision of 17 May 2001, suspended the provisional broadcasting license of RTV Sveti Georgije. In that decision the CRA found that RTV Sveti Georgije violated applicable provisions of the Broadcasting Code of Practice and the Terms and Conditions of its license. The CRA concluded that, "the station has given a tendentious, partially incorrect and one-sided view of an important event in [Bosnia and Herzegovina]". Moreover, "the programme, through the failure of responsible editorial and management control, did not only denigrate the religious beliefs of others, but it also caused a considerable risk of public harm". Thereafter, when RTV Sveti Georgije violated the terms of its suspension, the CRA, in a decision of 27 July 2001, revoked RTV Sveti Georgije's provisional broadcasting license. After pursuing an appeal process within the CRA, those decisions became final and binding against RTV Sveti Georgije. In its application before the Chamber, RTV Sveti Georgije challenges the legality and validity of these decisions of the CRA on both substantive and procedural grounds.

3. This application raises issues under Article 10 (freedom of expression) of the European Convention on Human Rights (the "Convention"); Article 1 of Protocol No. 1 to the Convention (right to peaceful enjoyment of possessions); Article 6 of the Convention (right to access to courts); and Article 13 of the Convention (right to an effective remedy).

II. PROCEEDINGS BEFORE THE CHAMBER

4. The application was introduced to the Chamber on 1 August 2001 and registered on the same day. The applicant requested, as a provisional measure, that the Chamber order that the applicant may continue broadcasting until the Chamber issues its final decision in the case. In accordance with Rule 29(1) of the Chamber's Rules of Procedure, the application was initially considered by the First Panel of the Chamber.

5. On 10 August 2001, the applicant submitted a supplemental claim for compensation for pecuniary damage in the amount of 1,124 KM per day commencing on 17 June 2001 and non-pecuniary damage in an unspecified amount. The applicant also renewed its request for the Chamber to urgently issue the provisional measure requested.

6. On 14 August 2001, the Chamber requested additional background documentation from the applicant. On 20 August 2001, the applicant referred the Chamber to the CRA for the documentation requested. On 28 August 2001, in response to its inquiry, the Chamber received background documentation from the CRA.

7. On 6 September 2001, the First Panel decided to refuse the applicant's request for a provisional measure that was contained in the initial application.

8. On 19 September 2001, the Chamber transmitted the application to the respondent Party for its observations on the admissibility and merits with respect to Articles 6, 10, 13, and 17 of the Convention and Article 1 of Protocol No. 1 to the Convention.

9. On 19 September 2001, the Chamber also wrote to the High Representative and invited him to comment on the status of the CRA. The Chamber received the response from the Deputy High Representative for Legal Affairs on 19 November 2001.

10. On 19 November 2001, the Chamber received the respondent Party's observations on the admissibility and merits of the application. On 26 November 2001, in response to its inquiry, the Chamber received supporting documentation from the CRA as well.

11. On 20 November 2001, the Chamber received updated information and supporting documentation from the applicant. In that correspondence, the applicant submitted a new request for a provisional measure. The applicant requested that the Chamber suspend the enforcement of the CRA Council decision of 30 October 2001 until the proceedings before the Chamber are concluded or until the proceedings before CRA on the applicant's appeal are concluded.

12. On 26 December 2001, the Chamber received the applicant's observations in reply to the submissions of the Office of the High Representative ("OHR") and the respondent Party.

13. In accordance with Rule 29(2) of the Chamber's Rules of Procedure[1], the First Panel decided to refer the case to the plenary Chamber on 7 January 2002.

14. On 10 January 2002, the plenary Chamber decided to reject the applicant's second request for a provisional measure.

15. On 13 and 14 February 2002, the Chamber invited the applicant, the respondent Party, and the OHR as *amicus curiae*, to a public hearing on the admissibility and merits of the application - scheduled for 7 March 2002. Included in these letters, the Chamber posed certain questions to the parties for the preparation of their respective oral presentations at the public hearing.

16. On 19 and 21 February 2002, the respondent Party submitted supplemental observations, documentation, and witness proposals in preparation for the public hearing. On the same day the Chamber responded to the respondent Party's witness proposal for the public hearing.

17. On 21 February 2002, the Chamber received a submission from Mr. Freimut Duve, the Representative on Freedom of the Media for the Organisation for Security and Co-operation in Europe ("OSCE") and the former Chairman of the CRA Council.

18. On 4 March 2002, the Chamber received the *amicus curiae* submission of Mr. Michael Bourke, Legal Counsel to the OHR, in preparation for the public hearing.

19. On 7 March 2002, the CRA submitted, on behalf of the respondent Party, a written statement for the public hearing.

20. On 7 March 2002, the plenary Chamber conducted a public hearing on the admissibility and merits of the application. Mr. Miro Mlađenović, the Owner and Director of "ORDO" –RTV "Sveti Georgije", represented the applicant. Mrs. Gordana Milovanović, Agent of Bosnia and Herzegovina before the Human Rights Chamber, represented the respondent Party, along with her team composed of Ms. Asja Rokša, the CRA Broadcasting Advisor, Ms. Helena Mandić, Director of the CRA Legal Department, and Mr. Jakob Finci, member of the CRA Enforcement Panel. Mr. Michael Bourke, Legal Counsel to the OHR, assisted by Ms. La Croix, appeared on behalf of OHR as *amicus curiae*. Firstly, Mr. Mlađenović offered the opening statement on behalf of the applicant. Secondly, Ms. Rokša gave

[1] Rule 29(2) of the Chamber's Rules of Procedure provides, in pertinent part: "Where a case pending before a Panel raises a serious question as to the interpretation of the Agreement …, the Panel may at any time before taking a final decision relinquish jurisdiction in favour of the Plenary Chamber".

the opening statement on behalf of the respondent Party. Thirdly, Mr. Bourke presented the opening statement on behalf of OHR as *amicus curiae*. Next the party representatives answered questions from the members of the Chamber. Mr. Finci and Ms. Mandić additionally answered questions on behalf of the respondent Party, and Ms. La Croix additionally answered questions on behalf of OHR as *amicus curiae*. Finally, Mr. Mlađenović, on behalf of the applicant, and Ms. Rokša, on behalf of the respondent Party, offered brief closing statements.

21. On 23 April 2002, in response to a written request by the Chamber of 18 April 2002, the CRA submitted, on behalf of the respondent Party, additional information and documentation.

22. The plenary Chamber deliberated on the admissibility and merits of the application on 9-10 January, 7 March, 7 May, and 3 June 2002. On 3 June 2002, the plenary Chamber adopted the present decision on admissibility and merits.

III. STATEMENT OF THE FACTS

23. The facts presented are not materially disputed between the parties, except as specifically indicated below.

A. Background facts with respect to the respondent Party

24. Starting in December 1997 at its meeting in Bonn, Germany, the Peace Implementation Council recognised the need for an institution to regulate and promote the media as an integral part of the peace implementation process in Bosnia and Herzegovina. On 11 June 1998, the Independent Media Commission ("IMC") was established by a decision of the High Representative (see paragraph 93 below). The IMC was created as an independent transitional agency with a mandate that included issuing codes of practice for broadcasting, licensing all broadcasters, and ensuring compliance with license conditions and codes of practice. From the beginning, however, it was envisioned that the IMC eventually would hand over its functions to an appropriate state agency in Bosnia and Herzegovina. (CRA Case Analysis June 1998-August 2001[2] at page 3).

25. In May and December 2000, the Peace Implementation Council recognised the need for a more comprehensive approach to communications in Bosnia and Herzegovina. In order to develop a regulatory mechanism for telecommunications and media on the state level, the Council considered combining the competencies of the IMC and the Telecommunications Regulatory Agency ("TRA"). The resulting body is the Communications Regulatory Agency ("CRA"), which acts as the state regulatory agency for telecommunications and broadcasting. The CRA was established by a Decision of the High Representative of 2 March 2001 (Official Gazette of Bosnia and Herzegovina—hereinafter "OG BiH"—no. 8/01 of 22 March 2001; Official Gazette of the Federation of Bosnia and Herzegovina—hereinafter "OG FBiH"—no. 11/01 of 3 April 2001; Official Gazette of the Republika Srpska—hereinafter "OG RS"—no. 12/01 of 26 March 2001) (see paragraph 96 below).

26. According to the mission statement of the CRA, "the Agency is fully independent in decision making. It conducts its work at the state level and in accordance with the principles of legality, objectivity, transparency and non-discrimination." Among its stated purposes, the CRA "*issues* broadcasting and telecommunications licenses in an open and fair manner, promoting the highest level of professionalism and business viability in the broadcasting and telecommunications community in Bosnia and Herzegovina" (CRA Case Analysis June 1998-August 2001 at page 1). The CRA is composed of an Enforcement Panel, a Council, and the Chief Executive Officer ("CEO"). Both the Enforcement Panel and the Council have seven members: 3 international members and 4 national members. The CEO (who served until 18 December 2001 and has not yet been permanently succeeded) was an international lawyer with expertise in telecommunications. The Enforcement Panel and CEO decide upon serious breaches of license conditions and applicable codes. The Council serves as the appellate body that reviews decisions by the Enforcement Panel and CEO, as well as determining general policy matters (*id.* at pages 3-4). According to Mr. Freimut

[2] The *CRA Case Analysis June 1998-August 2001* was prepared by the Broadcast Division of the CRA and published in August 2001. It was widely distributed and is available to the public upon request.

Duve, the Chairmain of the CRA Council from 1998 until December 2001, the two-tier structure of the CRA "has been directly related to the absence of an operational State Judiciary in Bosnia and Herzegovina" (Letter submission of 21 February 2002). In order to ensure compliance with international law, the CRA provides "a possibility for independent appeal of decisions" through "a two-instance legal procedure implemented by two collective bodies: the Enforcement Panel and the Council" (*id.*).

27. As explained by the representative of the CRA at the public hearing, the process to obtain a long-term broadcasting license from the CRA has two phases. The first phase was the issuance of provisional licenses by the IMC for all radio and television stations in Bosnia and Herzegovina. The IMC registered and provisionally licensed some 278 stations. It completed the first phase in December 1999. Through the issuance of provisional licenses, the IMC and CRA were able to obtain essential information about the operations of radio and television broadcasters. This information was intended to assist the IMC and CRA in effectively granting permission to broadcasters to use the limited natural resource of the broadcasting spectrum and to limit technical interference between broadcasting stations. The second phase of the licensing process, which commenced in January 2000 and is currently in progress, is the issuance of long-term licenses by the CRA based upon a competitive process. Provisional licenses issued during the first phase were valid until the date of the decision with respect to the issuance of a long-term license in the second phase. Broadcasters desiring a long-term broadcasting license submitted an application to the CRA; the time period for such submissions is now closed. The CRA evaluates those applications, and scores the applicant broadcasters on their technical operations, financial operations, and broadcasting/programming quality. In addition, the CRA takes into account negative points attributed to applicant broadcasters due to any history of past violations of the applicable Code of Practice and Rules of the IMC or CRA. Only those stations with the highest total scores will then be awarded long-term broadcasting licenses by the CRA.

28. When the CRA receives an official complaint about a broadcaster, its decision-making process commences (CRA Case Analysis June 1998-August 2001 at page 9). The complaint is analysed and referred to the appropriate division or department in CRA. If the complaint concerns a possible breach of the Broadcasting Code of Practice, then CRA decides whether to request a programme recording. When there are sufficient grounds to bring a case before the Enforcement Panel, the case is forwarded to the relevant broadcaster for comment and argument. At this time, the CRA fully informs the broadcaster of the allegations with respect to the underlying factual circumstances and the particular articles of the Code of Practice alleged to have been breached. Upon receipt of the broadcaster's comments, the case is prepared in accordance with the Procedures for Handling Cases and presented to the Enforcement Panel (*id.* at page 9). The Enforcement Panel considers the case at its session. It gives "full consideration to all the aspects, factual and legal, of the case", takes into account the comments by the broadcaster, and bases its decision on the applicable codes, rules, and license conditions (*id.*). If the Enforcement Panel decides that a violation of the Broadcasting Code of Practice has occurred, then it determines the appropriate sanction in accordance with Article 4.2 of the Code, taking into account several factors, including the coverage area of the broadcaster, the severity of the violation, the number of articles of the applicable Code and regulations breached, and the broadcaster's history of previous violations (*id.* at pages 9 and 45-46). The decision by the Enforcement Panel is sent to the broadcaster concerned and thereafter made public. The broadcaster may submit an appeal of a decision by the Enforcement Panel to the Council, which acts on appeal like an appellate court. "The Council does not re-open a discussion on the merit[s] of the case, which had already been decided upon.... In every appeal, the Council should only decide whether the Procedure for Handling Cases had been violated, whether an error in law had occurred, or whether a plaintiff is offering entirely new evidence" (*id.* at page 9). The Council may uphold a decision of the Enforcement Panel, or, if one of the grounds on appeal is met, it may change the decision and amend the sanctions imposed. However, "the Council cannot impose a more severe sanction or in [any] other way amend the decision in a manner which is negative for the broadcaster concerned" (*id.*).

29. Of the 278 stations provisionally licensed by the IMC, only 60 have been subject to decisions by the IMC or CRA finding content-based violations of the Broadcasting Code of Practice, Terms and

Conditions of the provisional broadcasting license, or other content irregularities[3] (CRA Case Analysis June 1998-August 2001 at page 48). In its first three years of operation, the Enforcement Panel or Director General/CEO of the IMC and CRA, respectively, issued 126 such decisions resulting in sanctions against the respective stations ranging from warnings (29), to fines (59—twice against RTV Sveti Georgije), to suspension orders (19—thrice against RTV Sveti Georgije), to license revocation (1—against RTV Sveti Georgije) (*id.* at page 10). Eight of these decisions were decided through a *per capsulam* procedure, which the representative of the CRA described at the public hearing as "a letter decision". The IMC and CRA received 41 appeals of these decisions, which were decided by the Council acting as the appellate body. In every appeal except for one, in which the station provided additional evidence, the Council upheld the decisions of the Enforcement Panel and Director General/CEO (*id.* at pages 43-44).

30. With respect to the content of the decisions against broadcasting stations, the IMC or CRA has determined, among the various violations, that Article 1.1 of the Broadcasting Code of Practice (concerning general standards of civility and respect for the ethnic, cultural and religious diversity of Bosnia and Herzegovina) (see paragraph 104 below) has been violated on 18 occasions, including three times by RTV Sveti Georgije (CRA Case Analysis June 1998-August 2001 at page 11). Article 1.2 of the Code (concerning standards of decency and civility) has been violated on 17 occasions, including one time by RTV Sveti Georgije (*id.* at page 16). Article 1.3 of the Code (concerning fair and accurate representations of religion) (see paragraph 105 below) has been violated on five occasions, including two times by RTV Sveti Georgije (*id.* at page 19). Article 1.4 of the Code (concerning fair and impartial programming) (see paragraph 106 below) has been violated on 23 occasions, including two times by RTV Sveti Georgije (*id.* at page 20). Copyright obligations have been violated on 15 occasions, including one time by RTV Sveti Georgije (*id.* at page 33). Twenty stations were involved in multiple breaches of the Code and applicable regulations, including RTV Sveti Georgije on three separate occasions (*id.* at page 42). Two broadcasters have been subject to the highest number of decisions by the IMC or CRA — eight — finding violations of the applicable Code and regulations, and one of those broadcasters is RTV Sveti Georgije (*id.* at page 47).

31. According to the CRA, it "is not a censorship board. It will not tell broadcasters what they should broadcast or force them to give airtime to particular individuals or groups. If, however, a broadcaster decides to cover an issue of public concern, it must ensure that all sides of the issue are presented to its audience and the programme meets the obligations of the Broadcasting Code of Practice" (CRA Case Analysis June 1998-August 2001 at page 48).

B. Background facts with respect to the applicant

32. The applicant is a private company with its main office in Banja Luka, the Republika Srpska. The company is registered with the Court of First Instance in Banja Luka, and among its registered permitted activities is the operation of an electronic media station for radio and television entitled RTV "Sveti Georgije". The radio station was established in 1996 and the television station the following year. RTV Sveti Georgije was broadcasting in Banja Luka and the surrounding north-western region of the Republika Srpska (*Lijevče polje*). It was broadcasting its radio station on the frequency 101.7 mHz and its television station on channel 55.

33. On 30 August 1999, the IMC issued a decision granting a provisional broadcasting license to RTV Sveti Georgije for the period of 180 days. This provisional license was thereafter renewed and remained valid until 26 November 2001, when it was revoked by a final and binding decision of the CRA Council, as explained below. By its express terms, the provisional license was subject to certain terms and conditions, which were annexed to the decision. Article 2.1 of the General Terms and Conditions describes acceptance of the provisional license as constituting "a binding contract on the part of the Licensee to comply with all" the stated terms and conditions. "Validity of this license"

[3] The Chamber notes that the statistical information contained in this paragraph pertains only to decisions by the IMC or CRA finding content-based violations of the Broadcasting Code of Practice, Terms and Conditions of the provisional broadcasting license, or other content irregularities. It does not pertain to decisions by the IMC or CRA with respect to applications for long term broadcasting licenses or non-content-based complaints concerning, for example, technical irregularities (CRA Case Analysis June 1998-August 2001 at page 8).

was further "contingent on compliance with these terms". The provisional license was not transferable, in whole or in part, without the prior written consent of the IMC (Article 9.1).

34. Article 13 of the General Terms and Conditions annexed to RTV Sveti Georgije's provisional license addresses compliance. "The Licensee shall adopt internal procedures that ensure compliance at all times with the IMC codes of practice and the specific and general terms and conditions of this license" (Article 13.1). Moreover, "the Licensee is responsible for compliance with IMC codes in regard to all programming broadcast on the licensed station, regardless of its originating source" (Article 13.6).

35. Article 14 of the General Terms and Conditions sets forth the provisions with respect to sanctions for breaches of the terms and conditions of the provisional license. Article 14.2 provides that "breaches of the Broadcasting Code of Practice or other terms of a broadcast[ing] license, unless otherwise resolved, will lead to appropriate and proportionate sanctions". Those possible sanctions are itemised in Article 14.5, as follows:

> "(a) The requirement to broadcast an apology or correction in the case of content in violation of the Broadcast[ing] Code of Practice;
> "(b) The issuance of warnings;
> "(c) The making of orders;
> "(d) The imposition of financial penalties;
> "(e) The suspension of license;
> "(f) The entry into premises;
> "(g) The seizure of equipment;
> "(h) The closedown of operations;
> "(i) The termination of license."

In addition, Article 14.3 provides that:

> "If, in the judgment of the IMC General Director, based on the Broadcasting Code of Practice, a Licensee poses a clear and immediate threat to public order or safety, the IMC may take prompt action to suspend the Licensee's activities. Failure to comply with such an order may result in termination of the license or other severe penalties."

36. On the afternoon of 17 December 1998, during a time of day reasonably expected to coincide with children's programmes, RTV Sveti Georgije broadcast two documentaries, "Drang Nach Balkan" and "Dear Joe". As a result of broadcasting these programmes, the IMC Enforcement Panel, in its unanimous decision of 4 February 1999, found that RTV Sveti Georgije violated multiple provisions of the Broadcasting Code of Practice, *i.e.*, Articles 1.1 (concerning general standards of civility and respect for the ethnic, cultural and religious diversity of Bosnia and Herzegovina), 1.2 (concerning standards of decency and civility), 1.3 (concerning fair and accurate representations of religion), and 1.4 (concerning fair and impartial programming). Both documentaries are believed to have been made and previously broadcast in 1992 or 1993 by Serbian media in the former Socialist Federal Republic of Yugoslavia (IMC Enforcement Panel decision of 4 February 1999 at paragraphs 7 and 9). "Drang Nach Balkan" contains news footage from the recent armed conflict in Slovenia, Croatia, and Bosnia and Herzegovina, as well as news footage from the Second World War. The IMC considered the programme to "inflame hatred against Slovenians, Croatians and Bosniaks, misrepresent their religions and [use] pejorative terms for Croats and Bosniaks" (*id.* at paragraph 7). "Dear Joe" portrays an open letter by the character Jovan to the American people in which Jovan claims that war is being waged against the Serb people by the Muslims, referred to in pejorative terms, and Jovan blames Muslims and Croats for massacres of Serb people, who he says are "freedom loving" and "always on the side of justice" (*id.* at paragraphs 10-11). The IMC further considered this programme to be "designed to inflame hatred and misrepresent other ethnic groups" (*id.* at paragraph 12).

37. For the violations established in the decision of 4 February 1999, the IMC Enforcement Panel fined RTV Sveti Georgije 1000 KM, the maximum financial penalty possible (*id.* at paragraphs 13-14). RTV Sveti Georgije appealed this decision to the IMC Council, and in its unanimous decision of 9 June 1999, the Council upheld the decision. After failing to pay the assessed fine, the IMC Enforcement Panel, in its unanimous decision of 30 September 1999, suspended RTV Sveti

Georgije's provisional broadcasting license for 90 days. RTV Sveti Georgije complied with the decision and ceased its broadcasting on 5 October 1999. The following day it paid the fine. On the same day, the IMC permitted RTV Sveti Georgije to immediately recommence its broadcasting operations.

38. On 5 March 1999, RTV Sveti Georgije broadcast the regular serial programme "Concerning Serb matters" ("*O stvarima srpskim*"), which was read in the format of an open letter or commentary. As a result of broadcasting this programme, the IMC Enforcement Panel found, in its unanimous decision of 13 May 1999, that RTV Sveti Georgije once again violated Articles 1.1 and 1.3 of the Broadcasting Code of Practice (IMC Enforcement Panel decision of 13 May 1999 at paragraphs 9 and 11). The programme of 5 March 1999 contained a series of descriptions of various nationalities. With respect to Muslims and Croats, the programme said it was talking, for example, "about Croat hatred and sad Bosniak hatred that wants Serbs to disappear", "about the nationalism of so-called Croats and so-called Bosniaks as a cause of the falling apart of Yugoslavia", "about the nonsense of Croat and Bosniak national identity", "about alleged old Croatian and old Bosnian linguistic bragging", "about alleged Croat and alleged Bosniak bloody fairy tale" (*id.* at paragraph 4). Thus, the IMC Enforcement Panel concluded that, "the programme repeatedly makes pejorative references throughout the narrative to Bosniaks and Croats in an effort to discredit, not only their religious beliefs, but any historical claim they may have to [Bosnia and Herzegovina]" (*id.* at paragraph 6).

39. Because the violations established in the decision of 13 May 1999, "although serious, are less grave and of a different nature then [sic] the violations in the decision of 4 February", the IMC Enforcement Panel decided that the appropriate sanction against RTV Sveti Georgije was the maximum financial penalty of 1000 KM (*id.* at paragraphs 11-13). RTV Sveti Georgije appealed this decision to the IMC Council, and the Council upheld the decision on 8 September 1999. After failing to pay the assessed fine, on 29 November 1999, the IMC Director General suspended RTV Sveti Georgije's provisional broadcasting license for 90 days. On 30 November 1999, RTV Sveti Georgije ceased broadcasting. On 3 December 1999, it paid the assessed fine. Accordingly, on the same day, the IMC permitted RTV Sveti Georgije to immediately recommence its broadcasting operations.

40. In summarising its decisions against RTV Sveti Georgije, the CRA stated that the programmes "Drang Nach Balkan" and "Dear Joe" broadcast by RTV Sveti Georgije "remain the worst example of broadcasting content during the mandate of the IMC" (CRA Case Analysis June 1998-August 2001 at page 11). The CRA further noted that "at no time in either programme [on 17 December 1998 or 5 March 1999] had there been any effort to moderate or balance extreme views or to warn viewers that the content of these programmes might be found offensive by viewers" (*id.* at page 12). However, RTV Sveti Georgije was not involved in any further incidents or alleged violations of the IMC/CRA Broadcasting Code of Practice, other regulations, or Terms and Conditions of its provisional license until the events discussed below.

C. Background facts with respect to the Ferhadija mosque in Banja Luka

41. The Chamber recalls its decision in case no. CH/96/29, *The Islamic Community in Bosnia and Herzegovina v. the Republika Srpska* (decision on admissibility and merits of 11 May 1999, Decisions January-July 1999), which concerns the destruction of mosques in Banja Luka. In that case it was explained that before the 1992-1995 armed conflict in Bosnia and Herzegovina, some 30,000 Muslims lived in the Banja Luka region and performed their religious practices in 15 mosques situated in Banja Luka (*id.* at paragraph 33). By the end of the armed conflict, only 3,000 to 4,000 Muslims remained in Banja Luka (*id.* at paragraph 36). Although there was no actual military conflict in Banja Luka, between April and September 1993, all 15 mosques in Banja Luka were destroyed. This destruction occurred during the night when the city was blockaded and subject to a curfew (*id.* at paragraph 34). One of the mosques, which had been destroyed in an explosion of a planted explosive device during the night between 7 and 8 May 1993, was the Ferhadija mosque. The Ferhadija mosque was built by Ferhad Paša Sokolović in 1579 in the city centre of Banja Luka. It was one of Banja Luka's best-known landmarks and a beloved monument for the duration of its four-century existence. It was also registered and subject to special protection by the Institute for the Protection of Cultural-Historic and Natural Heritage of Bosnia and Herzegovina (*id.* at paragraph 32).

42. On 3 March 1997, the Islamic Community of Bosnia and Herzegovina submitted a request to the Municipality of Banja Luka for approval to reconstruct the Ferhadija mosque, along with six other destroyed mosques formerly situated in Banja Luka. Until the time the Chamber issued its decision, the Municipality had not officially responded to the request of the Islamic Community, but according to media reports in April 1998, Mayor Umićević of Banja Luka was strongly opposed to reconstruction of the Ferhadija mosque (*id.* at paragraph 41).

43. In its decision of 11 May 1999, the Chamber noted "the repetitive character of these acts of destruction" of the mosques in Banja Luka, and the lack of any attempt by the authorities to prevent the destruction or to investigate it with a view to locating the responsible persons (*id.* at paragraph 162). Moreover, the authorities had banned construction on seven of the sites, thereby effectively preventing reconstruction of any of the mosques by the Islamic Community (*id.*). Taking all of the facts into consideration, in particular the grossly inadequate premises in which Muslim believers may practice their religion in Banja Luka, the Chamber found that the authorities in Banja Luka had discriminated against Muslim believers with respect to their right to freedom of religion due to their religious and ethnic origin (*id.* at paragraph 173). The Chamber further found that the authorities had failed to secure the right of Muslim believers to manifest freely their religion by refusing to allow reconstruction of the mosques and passively permitting violence against Muslim believers during funeral processions and other religious ceremonies (*id.* at paragraphs 185-187). As a remedy for the established violations of the Convention, the Chamber ordered the respondent Party to, *inter alia*, "swiftly" grant the Islamic Community, as requested, the necessary permits for reconstruction of the Ferhadija mosque, as well as six other destroyed mosques in Banja Luka, on their former sites (*id.* at paragraph 213).

44. Implementation of the Chamber's decision of 11 May 1999 has been marred by obstacles, particularly emanating from public officials in Banja Luka. On 29 November 1999, the High Representative issued a Decision removing Mr. Đorđe Umićević from his position of President of the Municipal Assembly of Banja Luka. The Decision explains that Mr. Umićević had "abused his power by persistently and seriously obstructing the implementation of [the] General Framework Agreement for Peace" in Bosnia and Herzegovina. In particular, the High Representative noted that Mr. Umićević had "made a number of controversial comments on the reconstruction of the Ferhadija Mosque aimed at stirring up intolerant and anti-Bosniak feelings". In addition, Mr. Umićević had attempted to obstruct the work of the Human Rights Chamber on the Banja Luka mosques case described above. The High Representative highlighted that Mr. Umićević had attempted to prevent the public hearing before the Chamber in case no. CH/96/29, *Islamic Community v. the Republika Srpska* in that his office had exerted "political pressure" which caused the Chamber to change the location of the hearing four times and Mr. Umićević refused to attend the hearing even though he raised no objection when personally served with the summons. The High Representative further noted that despite the Chamber's order "that permission to rebuild seven mosques in Banja Luka be granted", municipal authorities had refused to give building permission to the Islamic Community to reconstruct the seven mosques in Banja Luka, including the Ferhadija mosque. After various proceedings, on 19 March 2001, the City of Banja Luka, Department for Urban Planning, issued the procedural decision granting urban approval to the Islamic Community to reconstruct the Ferhadija mosque and other facilities on the site of the former mosque in the centre of Banja Luka. However, to date the Ferhadija mosque still has not been reconstructed in Banja Luka.

D. Facts with respect to the 8 May 2001 programme "These are the fruits of our battle"

45. On 7 May 2001 several thousand demonstrators violently prevented the groundbreaking ceremony for the laying of the cornerstone to reconstruct the former Ferhadija mosque, built by Ferhad Paša Sokolović in 1579, in the city centre of Banja Luka. Eight years earlier, to the day, the Ferhadija mosque had been completely destroyed in an explosion of a planted explosive device during the night between 7 and 8 May 1993. The protest on 7 May 2001 lasted all day. Several buses and cars, which had transported attendees of the ceremony to Banja Luka from the Federation of Bosnia and Herzegovina, were stoned and set on fire, resulting in billows of black smoke rising into the sky. According to international news media, Muslim prayer rugs, a flag, and a bakery were set on fire as protestors chanted "This is Serbia" and "We don't want a mosque". A group of representatives of the Islamic and international communities (including Jacques Klein, the Secretary-General's Special Representative and Coordinator of the United Nations Operations in Bosnia and Herzegovina, the

British, Swedish, and Pakistani ambassadors to Bosnia and Herzegovina, Mladen Ivanić, the Prime Minister of the Republika Srpska, Zlatko Lagumdžija, the Minister of Foreign Affairs of Bosnia and Herzegovina, Mufti Čamdžić, the religious leader of the Islamic Community in Banja Luka, as well as other high-ranking officials), were trapped in the *medžlis* building (Islamic Community Centre) near the Ferhadija mosque site. Demonstrators broke through a cordon of police, stoned a group of people in front of the Islamic Community Centre, and injured many people. One person died as a result of injuries suffered in the violent protests.

46. On 8 May 2001, RTV Sveti Georgije broadcast a live call-in television programme entitled "These are the fruits of our battle" ("*To je nama naša borba dala*")[4]. The programme focused on the violent events in Banja Luka on the previous day. It aired between 20:45 and 22:00 hours and was rebroadcast the following day. An employee of RTV Sveti Georgije who is, according to the owner of RTV Sveti Georgije, "an eminent journalist famous for his objectivity", served as the moderator and anchor of the programme. A local painter with a university degree in art, who witnessed the events of 7 May 2001, appeared as a studio guest and offered his opinions and comments. According to the applicant, additional guests were invited, particularly persons who could speak about historical and sociological aspects, but they declined to appear during the programme. The programme opened with unedited snapshots of the violent events of 7 May 2001 "at the sight where the cornerstone for reconstruction of the destroyed Ferhad Paša mosque in Banja Luka was to have been placed". The moderator explained that the programme intended to open a dialogue on "how the event happened, should it have happened, [and] what was the motivation or cause" of the event. The programme further sought to establish "the repercussions for all that has occurred, taking into account the positions of the IC [international community], national authorities, political parties, and common citizens". Also the programme intended to discuss the reactions of political leaders and the media to the events of 7 May 2001. Viewers were informed that they could call the station to express their opinions live on the air.

47. It is not possible to set forth the contents of the entire programme "These are the fruits of our battle" broadcast on 8 May 2001, but the following paragraphs present relevant excerpts. The sections relied upon by the CRA in its decision of 17 May 2001 (see paragraph 74 below) are indicated by underlining.[5] In summary, the repetitive theme of the comments of the viewers and studio guest was outrage directed against the international and Islamic communities for organising the groundbreaking ceremony for reconstruction of the Ferhadija mosque on St. George's Day, a major Orthodox religious holiday. Call-in viewers overwhelmingly felt that this communicated religious intolerance or insensitivity toward Orthodox Serbs and served to provoke the protests on 7 May 2001. Callers claimed to defend the actions of their countrymen who participated in the riots for the primary reason of protesting against intolerance directed toward Orthodox Serbs, rather than for the reason of preventing reconstruction of the Ferhadija mosque or otherwise expressing intolerance toward Muslims and Bosniaks. Some callers also verbally attacked Muslims and Bosniaks, particularly those who fled from Banja Luka during the armed conflict. Other callers expressed their hurt and cynicism at the offensive manner in which Serbs had been portrayed in the reactions to the events of 7 May 2001 by the international community, authorities of the Republika Srpska, and the media. As the programme progressed, callers appeared to become increasingly emblazoned and their comments increasingly aggressive and impassioned. No callers expressed contrary opinions on the air, that is, opinions supporting the actions of the international or Islamic communities or celebrating the reconstruction of the Ferhadija mosque.

48. The moderator opened the discussion by briefly reviewing a variety of regional news reports about the events of 7 May 2001, most of which described Serbs and the residents of Banja Luka as "fascists", "extremists", or "Chetniks". In response to these reports, the studio guest opined that

[4] "*To je nama naša borba dala*" was a popular slogan during the Second World War.

[5] The CRA decision of 17 May 2001 states that it "is drafted in English and in case of question of interpretation the English version shall prevail." However, the English version of the decision includes a translation of quotations from the programme of 8 May 2001 that were originally spoken in the national language. Because both the substance of the programme of 8 May 2001 and the legality of the decision of 17 May 2001 are at issue in this case, the Chamber relies in the English version of this decision on admissibility and merits upon its own English translation of the original text at issue, rather than on the English translation of the selected excerpts prepared by the CRA.

the events were not opposition to reconstruction of the Ferhadija mosque, but rather were the consequence of "a normal reaction to revolt more strongly when continuously provoked". He explained: "You all know that yesterday and the day before was one of the greatest Serb celebrations, St. George's Day, and on that day, from the building of—I don't know its name—Merhamet [a Muslim humanitarian organisation], tapes were played with the Muslim priests' prayer, and yesterday, on a day when all Orthodox people invite friends, cousins, neighbours to lunch in their homes, people came who really, with no, no tolerance—I would repeat that 100 times—came by buses. I can even say that those people were not even aware to where they came, they came simply to disturb a celebration lunch" (emphasis indicates quotation in CRA Decision of 17 May 2001). The studio guest described the organisation of the groundbreaking ceremony for the new mosque on an Orthodox holiday as "a classic example of intolerance" toward Serb Orthodox people. "Imagine", he stated, "that 15 buses with Serbs came to Sarajevo on Bajram to sanctify and lay the cornerstone for a church, demolished in the centre of the city, on a Serb graveyard." He continued, "Ferhadija doesn't bother me. It cannot make a Muslim a greater Muslim or me a lesser Serb. Let them build, but simply, they have made a provocation which is really definitely uncivilised."

49. In response to a press release issued by the Serb Democratic Party (SDS) opposing allegations that it had organised the protests of 7 May 2001, the studio guest clearly took offence to the SDS's description of the protesters as "organised hordes". He stated his position as follows:

> "Right away, in the first report we have seen, like in this newspaper, they mention organised hordes. Please, what kind of hordes could 20-year-old boys be? Are they hordes, including girls, are they hordes? Secondly, this national and religious tolerance, I think if anyone had it in this area, then it would be the Serbs. It is not necessary to mention that there is a kebab shop named "Mujo" in the city centre; it has been spreading and will probably reach all the way to "Boska". Please, for two days, all the political parties have been apologising for that incident instead of having the Reis-ul-Ulema ["The Supreme Authority" of the Islamic Community of Bosnia and Herzegovina] apologise to the Serbs for bringing hordes in 15 buses to defy the Serbs on such a celebration day. For all this time, Serbs have had lots of tolerance. I must say that politicians in their speeches must carry a dose of respect. Also, I respect all other national structures, but please, are we going to spend 20 days apologising because the people who have obtained a permission—isn't that religious tolerance?—who have obtained a permission to build the Ferhadija mosque. But please, to make a circus of this, to bring buses, to make something like that. There is a circus at the entrance to Dairy [a local factory of milk products], a roller-coaster, that's enough. Please, they've obtained a permission, the procedure is well-known: the space is to be marked, foundations are to be set. It could have been made official normally. They can come, but to make this, to make a Teheran out of Banja Luka, I mean really. I do not know to whom all these political parties are apologising. They are apologising to some Klein, I don't know to whom, to [Wolfgang] Petritsch [the High Representative], who has cooked up all of this after all. I don't know what kind of reconciliation that is. Who has reconciled? Have the Muslims, Croats, and we reconciled? Who should have reconciled? Warriors, soldiers, people who took part in the war—should they apologise to each other? Who is apologising on someone's behalf? And again, our politicians and parties, to whom are they apologising, to the Reis-ul-Ulema who has brought 2,000 Muslims into the city centre of Banja Luka on a great Serb celebration in order to provoke people? I really don't know. I repeat, I am a painter, a cosmopolitan. I have friends among Muslims, Croats and Serbs. I am simply aware of my national identity; I know the people I belong to. But please, it should have happened. I don't justify burning down the buses. Naturally, it is not civilised, but please, I think that … we should discuss the causes and not the consequences of this event" (emphasis indicates quotation in CRA Decision of 17 May 2001).

50. At this point, the moderator began to accept live calls from viewers, and he expressly asked callers to make their statements "dignified due to the topic of this programme". The first caller opined that reconstruction of the Ferhadija mosque is "more political than religious" and that the events of 7 May 2001 were predictable and "will happen again, with God's blessing". He focused on the historical and cultural significance of the former Ferhadija mosque. He said he believes that the mosque "has no sacred functions in this town; it bears no significance of a religious object. …It presents only a political game meant to provoke Serb people…. I regret that it has happened, that

those buses have been burned down, because they will use that to characterise Serbs as barbarians."

51. The second caller attempted to draw a distinction between the Turks of the Ottoman Empire and modern Muslims and Bosniaks: "that Ferhad person is basically a Turk who came here to build that mosque…but if Muslims, now Bosniaks, had done that, then we would have nothing against it". He continued:

> "There is no dilemma. He came as an occupier. … That reaches to our past, which is a bloody one, and it is well-known what they have done and been [text unclear]. They constantly make all kinds of traps for Serbs; they simply cause troubles all the time. If there were no problems here, then they simply would have left. However, they are interested here to provoke, to disorient Serb people and to challenge them. They are just not peaceful and tolerant people to live with, but only people to be at war with. However, I think that everything here is done with force. I don't know two brothers who can live together, more less three peoples who have been engaged in bloody wars three times in the last century [text unclear]" (emphasis indicates quotation in CRA Decision of 17 May 2001).

In response to this, the moderator only thanked the caller and repeated that the telephone lines were open for viewers to call in. He reminded viewers that the programme was intended to "discuss the motivations for yesterday's occurrences in Banja Luka and the repercussions for the future".

52. The third caller inquired: "They came a few days ago, right on St. George's Day, and played tapes to bark and make noise in the centre of Banja Luka. Isn't it shameful on their part to come right on our holiday? Could we dare to come to their places and play our Serb songs on their holiday?" The moderator asked, "What is your opinion of religious tolerance and do you condemn them at all in this situation?" The caller responded, "They shouldn't be let in here at all, under no circumstances." The moderator appeared to clarify that "they" referred to "the representatives", and then he stated, "Bosniaks' political representatives think that Banja Luka is their city and that they will all return." The caller replied, "It is theirs, that's what they think, but I don't think so." Next the moderator asked the caller, "Do you think that times have changed and that what happened ten years ago could not be repeated?" The caller said, "It isn't like they think anymore. It was a shame for them to come on our holiday and to fool around, I don't know what, they've played tapes, maybe you've heard them. Well, wasn't that a shame?" (emphasis indicates quotation in CRA Decision of 17 May 2001). The moderator explained, "Well, the international community holds that all religious communities are entitled to that", and the caller replied, "Then they are no better than those."

53. The fourth caller commented as follows:

> "Why do Bosniaks, who consider us vandals and destroyers, why do they push so much to build this mosque in the centre of Banja Luka? Isn't it enough for them to build in Kozarac, Kotor Varoš, and maybe even in Čelinac soon? What is their point? Have they forgotten the great Serb celebration in the year 1992 [sic] when it was destroyed? When will they learn their lesson? I think that for our youth, who have done this, it supports their future and it is better this way. I maintain that they shouldn't have been left near there" (emphasis indicates quotation in CRA Decision of 17 May 2001).

Thereafter, the moderator inquired whether the fourth caller believed that the actions of the international community since 1995 have had any effect. He responded, "Look, it is only throwing dust in the eyes of the Serbs and cheating them. We are so tolerant, look, three mosques have been built in Kozarac and nothing has happened, but in Bihać, Travnik, and Zenica, Serbs are being killed and persecuted each day." The moderator asked whether the caller honestly expected the events of 7 May 2001, and he said, "Well, I didn't expect it to be like that, but I'm glad it has happened. It should have happened. … We should stand up for ourselves. Why should we always let them do what they want?" The moderator thanked the caller and stated, "So there was one more viewer calling in and expressing his opinion."

54. Next the moderator asked the studio guest, "When they were shouting, I heard expressions like Turk. What does it mean? We used the terms Bosniaks, formerly Muslims." "Muslims"

answered the studio guest. The moderator pressed, "But we heard them shouting *Balija* [a pejorative term for Muslims] and Turk. What does it mean? How could it be said here, in such an environment?" The studio guest answered, "Simply, the term 'Turk' for Serb people represents someone who commits crimes." "Someone who is not liked," added the moderator. The studio guest elaborated as follows:

> "We know that in the former Yugoslavia, a Muslim was also one of us and a Turk was someone from the outside. This term 'Turk', although it is being wrongly applied because no normal citizen of Turkey who is a Turk—for sure he wouldn't do what ours, let me call them 'Turks', have done, that is, those who came with the Reis-ul-Ulema in Banja Luka. Accordingly, I consider it a compliment for them to be called 'Turks'. Turks are people who—even in Turkey they abolished the veil in 1933, while Tito [Josip Broz, former President of the Socialist Federal Republic of Yugoslavia] did not do it before 1949. Thus, the veil was abolished here in 1949 and in Turkey in 1933. So it is a compliment to call them 'Turks'" (emphasis indicates quotation in CRA Decision of 17 May 2001).

55. The moderator offered no response to these comments, but only welcomed the next caller to the programme. The fifth caller directly placed the blame for the violent events of 7 May 2001 on the international community. He explained,

> "Please, we apologise to the international community for what happened in Banja Luka yesterday. It is very difficult for me to hear that because this international community, [Jacques] Klein and all those like him, has caused all this. Was it necessary for them to come to such a gathering, together with the Minister of Foreign Affairs? This was not the opening of an embassy, but a mosque. How long will they take Islamic money and make Serb people poor and wretched? I blame our politicians; do we have the strength to be independent from such apparent... [text unclear]" (emphasis indicates quotation in CRA Decision of 17 May 2001).

56. The studio guest added:

> "Sir, I tell you now, Mr. Klein and the others who came yesterday, fortunately, have been together with those who have brought them. You know that Muslims take off their shoes when entering a house. Now, can you imagine the situation when 1,000 of them, after five hours of driving, came into that house and took off their shoes? Can you imagine how Mr. Klein and the others felt for five hours? I wish to thank those Muslims for coming and for taking off their shoes" (emphasis indicates quotation in CRA Decision of 17 May 2001).

57. The fifth caller continued:

> "It should not be allowed ever again. The people ... should have caught Klein and all the others and asked them for their reason for coming here, what they are looking for. I wonder what they are looking for anymore in this area, that they should put all three peoples in the same position. Nobody is crazy, and it is clear to everyone what they are doing" (emphasis indicates quotation in CRA Decision of 17 May 2001).

The moderator inquired whether the caller believed the efforts of the international community since the 1990s have been "in vain and the time has come for them to go home". The caller said, "They make no attempts to help people here but only to confront Serbs. You see that they've managed to disperse us throughout the world."

58. The sixth caller asked the studio guest: "What is the lowest limit of tolerance for the Serb people?" He answered as follows:

> "Well, I think we have unfortunately already lowered that limit, and since the Dayton Agreement, the Serb people have been lowering the limit of tolerance. What is the final limit, I do not know, but the final limit of tolerance with a Serb and Serb people is honesty and Christianity in them. That means, the limit may be moved all the time. The only thing is that other people should feel where the limit of the Serb people reaches. My opinion is that this

> would be an honest thing for them to do because we will not say, 'this is how far we will go and then we will go to war'. We will always let it go a little farther, if necessary. But I think they better not test how far, because, really, that tolerance is, how to say, lower every day. We lower it for another instance, but I think for sure that it will not last for a long time" (emphasis indicates quotation in CRA Decision of 17 May 2001).

59. The moderator opened discussion with the seventh caller by asking whether she thought the "experiment" of "America, the melting pot of people where it only matters to be American regardless of origin…has taken place in this area". Rather than responding to this question, the seventh caller pointed out a newspaper article in *Večernje Novosti*, which reported that "the international community did not give permission to build a church in Srebrenica", but "the day before yesterday, cornerstones [for mosques] had been laid in Prnjavor, Lisnja, Puraci, Mrakovica, and Konjkovci" and the previous day in Trebinje. She said, "It all indicates that this has been purely political provocation. … I think that the [religious] objects should be built in proportion to the number of people." The studio guest further commented that although he is only a painter, he could not be convinced, and questioned whether "other Serb people [could] be convinced, that it is only for religious purposes, that they are so faithful to Allah, as to construct seven mosques in one day".

60. The eighth caller stated that she called "on behalf of the mothers" in response to a comment by Jacques Klein, "where were the mothers when…?" She asked, "who is he to call the Serbs and people of Banja Luka hordes, reckless…. I would like him to listen to this and to apologise to the mothers and the Serbs. … I think that nobody expected this, but people were provoked." The moderator asked her whether she expected the events of 7 May 2001, but she did not. "I think no one expected that so many Serbs would appear, and it happened spontaneously." The moderator pressed her, "So you don't think there was some coordination behind it?" "No", she responded, "I think that the people have simply been provoked by green Mercedes, *dimije*—traditional Muslim clothes, and half of Banja Luka is mourning." According to the studio guest, "this woman's statement is beautiful. … I return to the point that it hasn't been a sacred religious manifestation yesterday but a violation. I am a guest in this programme because as a man, a painter, a Serb, and a citizen of Banja Luka, I felt hurt."

61. The ninth caller clearly stated that "the mosque should not be built there". He compared the actions of the international community (presumably those promoting reconciliation and reintegration) to the past actions of Tito when "he tried to put us together, but it didn't work because the roots were too deep and the memory of those 500-600 years of slavery under the Turks was too strong". Regarding the events of the previous day, he said, "it's been a clear provocation. …I'm also aghast at the statements of the authorities of the Republika Srpska. I think the dead turn over in their graves upon hearing such statements by the authorities of the state they died for." When asked by the moderator for his opinion of the future of the region, he elaborated, "Croatia is an independent state; Slovenia is an independent State; Macedonia also; Bosnia separated from Yugoslavia. Why then shouldn't we also separate from Bosnia? Who will stop us? What is the reason for not calling for a referendum to assess the opinion of the RS citizens and to provide them with the life they want to lead? Then there wouldn't be any more provocation for sure."

62. The moderator again pursued his question about "the melting pot of nations", and his studio guest responded as follows:

> "This [event] is an example of [our] reconciliation. Who have reconciled with us after the war—which was mean, evil, ugly, dirty, and such—,… only the people who have had no connection with it. When the soldiers, warriors, and people reconcile among themselves, then the time for building the mosque will come. You see, they have reconciled us and troubles happen daily. Furthermore, if I forgive Muslims and Croats for things done in the last war, then I expect them to forgive me. This means we should use the same patterns of forgiveness. It shouldn't be that I forgive him everything and he doesn't [forgive me]."

63. The tenth caller stated:

> "I would like to congratulate all people from Banja Luka who have thrown a single stone, due to the simple reason that those Muslims were not the ones who were in Banja Luka during

> the war. If they had been, I am convinced that no one would have touched them, and it wouldn't have been reasonable to touch them. Those were the ones who fled from here during the war, and they came back now on St. George's Day to build the mosque, not because of its religious purpose, but to show the Serbs in Banja Luka that they could not do anything to them. … With regard to Muslims who remained in Banja Luka during the war, nobody should give them a cross look because they've suffered enough fear going to bed at night frightened. But those who left, good-bye to them, [they should] stay where they are. … I didn't expect that yesterday's happenings would be like that, but I secretly hoped that they would be thrown out."

64. The eleventh caller asked the studio guest to comment on Jacques Klein's statement describing the events of 7 May 2001 as "savagery" and Serbs as "savages". He responded, "Regarding Klein and all those like him ['*Kleinovi*' and '*Kleinovice*'], all clowns, … their comments, their perspective on Serbs, don't really affect me except for the fact that they are here and I am forced to listen and obey them. I wish that they, as people coming from another civilisation, who have come to this civilisation, would behave accordingly or leave."

65. The twelfth caller, who attended the events of 7 May 2001, offered his "justification" for them: "It is well known what Ferhad Paša's mosque is: it is a monument of tyranny over the Serbs because the Serbs built it as slaves." He suggested that the reconstructed mosque cannot be called "Ferhad Paša's mosque", because that mosque is now gone. Rather, the reconstructed mosque should be called Wolfgang "Petritsch's mosque" and "he should build it". However, first there should be a referendum of the citizens of Banja Luka, and only if 20% of the people support it, should the mosque be reconstructed.

66. As the programme neared its end, the moderator asked the studio guest if he would like to offer any additional comments. The studio guest added, "I feel a kind of inner calm and peace, especially because so many people have called sharing the same opinion. Many people have called to offer a human, civilised, non-aggressive comment. … The reaction has originated in people's hearts and from the civilised national identity of every man who has reacted as every normal human being would to a provocation like that one." The thirteenth caller agreed: "people from Banja Luka have taken part in yesterday's event to the greatest extent and they've done it following their hearts and souls. No one had to organise us, it was motivated by all those organisations who have come in from the outside." He further agreed with the earlier idea of a referendum to assess local support for reconstruction of the mosque; however, he noted that since the Serb Orthodox church that was destroyed during the Second World War could not be rebuilt on its original site in Banja Luka, then this "occupier's mosque" also does not need to be rebuilt on its original site.

67. The moderator commented that Croatian press on the events of 7 May 2001 characterised Serbs with "Chetnik attributes" while the Belgrade press was "mostly objective". The studio guest interrupted to elaborate on his opinion: "You know how much we, the Serbs, are interested in mosques. The point is that it has happened because those people have come, led by the Reis-ul-Ulema, and acted in an uncivilised manner, disturbing a holy day for Serbs. …The mosque hasn't burned Ferhadija down, but it's simply been their rudeness. …They should apologise to the Serbs for making such a circus in Banja Luka on a holy day, and they should apologise to the people living in Banja Luka."

68. The moderator next directed the discussion toward public criticism of the inability of the police to control the crowd during the events of 7 May 2001. The studio guest reacted,

> "I honor the police and the Ministry of the Interior of the RS. Were they supposed to beat the Serbs? People have reacted as they should have, they've tried to prevent that, … [but] the times when they could make us fight with each other are long gone. … What should they have done, shoot at Serbs? …The authorities of the RS have acted without caution. They could have deliberated more about that and drawn the Reis-ul-Ulema's attention to change the date. I think there hasn't been enough political wisdom expressed by the authorities of the Republika Srpska."

69. The moderator closed the programme with a brief summary of the discussion:

> "Tonight we have spoken about yesterday's event and its consequences, causes, and repercussions. ... We have been talking informally, unburdened by politics. We have provided you with a different dimension of the event, that is, comments on what happened and you, as viewers, have been given an opportunity to call us and express your opinions. Whether the people from the international community and political activists will understand and interpret this programme correctly is up to them." The programme ended with excerpts of recordings from the events of 7 May 2001 "which placed Banja Luka on top of the world's current events."

70. At the public hearing, Mr. Mlađenović, the owner of RTV Sveti Georgije, admitted that the format of the 8 May 2001 programme—a live, unedited, uncensored, call-in programme—was "risky". He further described the subject matter of the programme as "very dangerous". He explained that the station "wanted to touch upon a complex" and "very delicate question from different aspects" in order to show that the events of 7 May 2001 were "a consequence of a badly prepared event" by the international community and political parties. He admitted that in the course of the programme, "there were very ugly statements. However, from the perspective of a professional journalist, I thought it would be useful for the political forces in this country to see the consequences of one irresponsible and rashly organised event." "It is more useful to see the negative consequences than to hide the facts from the public," he opined. In the opinion of Mr. Mlađenović, "the programme anchor has an obligation to warn any call-in viewer who speaks provocatively, thus at the same time practically presenting the position of the editorial board for which he or she works. It is noticeable for serious analysis of the aforementioned programme that the programme anchor did just that and did it on several occasions." Mr. Mlađenović thought the anchor twice "discreetly warned the audience to be respectful in this very delicate question which assumed that kind of reaction".

71. With respect to the conduct of the anchor during the programme, Mr. Mlađenović elaborated at the public hearing as follows:

> "The reality of Bosnia and Herzegovina is tragic and unpleasant. We must, as journalists, find the strength to face it. That programme had the exclusive purpose to show the real us. If my journalist was controlled, and he was, in response to progressively aggressive attacks by those who called in, he behaved such not because of a position on behalf of the editorial station, but because he has been brought up in that way. He let people say what they wanted, and if you remember that programme, he just slightly warned them to be more polite. Those who called in were very unpleasant. But that is the fact of reality which the journalist should keep in mind. I think, it was useful."

When pressed at the public hearing for a reason why the anchor did not specifically and immediately react to ugly statements, Mr. Mlađenović responded, "It is possible that because of our good intentions, we weren't so cautious in that respect." None the less, "if I thought that I had done something wrong, I would have additionally intervened. Now I am sure that the programme was useful for political representatives and representatives of the international community".

E. Facts with respect to the revocation of the applicant's provisional broadcasting license

72. On 9 May 2001, pursuant to its supervisory authority, the CRA requested the applicant to provide it with a tape of the television programme of 8 May 2001 described above. RTV Sveti Georgije complied with that request. On 11 May 2001, the CRA informed RTV Sveti Georgije of allegations that the programme had violated the Terms and Conditions of its provisional broadcasting license. The CRA explained that a formal investigation against RTV Sveti Georgije had been initiated, and it provided RTV Sveti Georgije with an opportunity to respond to these allegations until 14 May 2001.

73. On 14 May 2001, RTV Sveti Georgije acknowledged receipt of the CRA's letter of 11 May 2001. In that letter, RTV Sveti Georgije "confirm[ed] that, for God knows how many times, [it] was made aware of all rules cited in [the] request". RTV Sveti Georgije noted that it had not planned the topic of its programme of 8 May 2001, but rather this programme was "the most current event" and

included broadcasts of "press conferences" on the events of the previous day in Banja Luka. "The programme was broadcast without any editing or limitations".

74. On 17 May 2001, the CRA Enforcement Panel issued a unanimous decision suspending for ninety days the provisional broadcasting license issued to RTV Sveti Georgije on 30 August 1999 as a result of multiple violations of the Broadcasting Code of Practice and the Terms and Conditions of the provisional license (CRA Enforcement Panel decision of 17 May 2001 at paragraph 19). At the public hearing, Mr. Jakob Finci confirmed that the Enforcement Panel viewed a videotape of the broadcast of 8 May 2001 prior to rendering its decision of 17 May 2001. In the decision, the CRA described in detail the underlying facts, including excerpts of the contents of the programme aired on 8 May 2001 (*id.* at paragraphs 5-6) (see underlined text in paragraphs 48–58 above). The representative of the CRA stated at the public hearing that "the parts of the programme which not only do not fulfil the standards but also violate the rules and regulations of the IMC and the CRA are established in the decision of 17 May [2001] … and may be seen in the decision as those parts of the transcript are inclusive in the very decision, which did not include a complete transcript of the programme". The CRA further noted in the decision allegations that RTV Sveti Georgije committed a copyright violation by broadcasting the National Basketball Association (NBA) games on 28 January and 6 February 2001 (CRA Enforcement Panel decision of 17 May 2001 at paragraph 7). RTV Sveti Georgije was charged with breaching the IMC General Terms and Conditions of License and the IMC Broadcasting Code of Practice. It was offered an opportunity to respond to the charges, and the CRA considered its arguments. None the less, with respect to the alleged content violations, the CRA concluded as follows:

> "In its broadcast the station has given a tendentious, partially incorrect and one-sided view of an important event in BiH. The programme, through the failure of responsible editorial and management control, did not only denigrate the religious beliefs of others, but it also caused a considerable risk of public harm. The station has thus violated Articles 1.1, 1.3 and 1.4 of the IMC Broadcasting Code of Practice and the Terms and Conditions of its license" (*id.* at paragraph 15).

75. With respect to the alleged copyright violations, the CRA concluded in the decision of 17 May 2001 that "RTV Sveti Georgije has failed to provide evidence that it has obtained the rights to broadcast the NBA games" and "is thus in violation of the terms and conditions of its license regarding copyright obligations" (*id.* at paragraph 17). In reaching its decision on the proper sanction for the violations, the CRA "consider[ed] the nature of the violations, and the station's record of repeated breaches, but also the fact that the station has not violated the Code since May 1999" (*id.* at paragraph 18). In the conclusion, the CRA expressly "reminded" the applicant that "any future violation of any kind may result in a revocation of the license" (*id.* at paragraph 20).

76. On 30 May 2001, RTV Sveti Georgije submitted an appeal against the decision of 17 May 2001, which it viewed as promoting censorship and violating its right to freedom of expression. RTV Sveti Georgije argued that "the whole proceedings had been conducted in an atmosphere unfavourable to reasonable deliberation on the allegedly committed breaches". It further complained that the excerpts of the programme of 8 May 2001 quoted in the decision were "very selective and taken out of context". RTV Sveti Georgije emphasised that the programme was aired after events of 7 May 2001 (and thus cannot be seen to have incited the events) and that all viewers, without any discrimination, were given an opportunity to comment. "The intention of this TV station was to discover why the events occurred through the story of one of the participants and live viewers, whether it is possible that such riots will break out again, and what is the real background of the incident, which occurred without any participation of this TV station." RTV Sveti Georgije requested permission to appear at the session of the CRA Council in order to offer supplementary argument and examine relevant materials to the challenged decision.

77. On 7 June 2001, the CRA Council issued a unanimous final and binding decision that upheld the decision by the CRA Enforcement Panel of 17 May 2001 (CRA Council decision of 7 June 2001 at paragraph 4). The CRA Council noted that the applicant's appeal had challenged the decision of 17 May 2001 only with respect to the content violations and not with respect to the copyright violations (*id.* at paragraph 2). Mr. Boris Martinović verbally presented the appeal by RTV Sveti

Georgije against the decision of 17 May 2001. The CRA Council stated that it agreed with the reasoning and conclusion of the CRA Enforcement Panel (*id.* at paragraph 3).

78. After oral and written communications with the CRA, RTV Sveti Georgije claims it ceased broadcasting on its television station on 1 July 2001. However, in order to prevent loss of work to its employees emitting "snow" on its channel, RTV Sveti Georgije formally requested on 27 June 2001 that the CRA issue it a license to broadcast an electronic newspaper in teletext (*i.e.*, an internet program) entitled "TV Banja Luka Journal", based upon the same information previously provided in RTV Sveti Georgije's application for a provisional broadcasting license. RTV Sveti Georgije said it established this electronic newspaper "in order to broadcast local information, service information and advertising". RTV Sveti Georgije received no immediate response from the CRA to its request of 27 June 2001, and thereafter, it broadcast the new electronic media programme, which it alleges "had nothing in common with TV 'Sveti Georgije' except the founder". On 2 July 2001, RTV Sveti Georgije also broadcast the following announcement:

> "RTV Sveti Georgije collegiate body has decided to cease broadcasting on 1 July 2001 for a 90-day period. Considering all obvious failures in the work of the so-called CRA, we stress that we will protect our usurped rights related to the international principle of freedom of the media at all judiciary institutions in the country and in the world, of which our audience will be timely informed. Pursuant to a decision of the ORDO Company, channel 55 shall be ceded to the experimental programme of a new electronic project 'TV Banja Luka Journal' for the 90-day period" (CRA Case Analysis June 1998-August 2001 at page 32).

79. On 3 July 2001, the CRA denied RTV Sveti Georgije's request of 27 June 2001 and informed it that no programming could be aired without its permission; consequently, the decision to broadcast the new electronic media programme was "invalid" and all broadcasting on channel 55 should cease. The CRA further informed RTV Sveti Georgije that continuing to broadcast on channel 55 had violated the pending decision on suspension (issued on 17 May 2001 and confirmed on 7 June 2001) and that the entire case would be transmitted to the CRA Enforcement Panel. In responding to these allegations in its letter of 5 July 2001, RTV Sveti Georgije insisted that the CRA issue, in accordance with proper procedures, a decision on its request to broadcast the new electronic media programme. It clarified that "TV Sveti Georgije ceased its broadcasting as of 1 July 2001" and that "the Banja Luka Journal has absolutely nothing to do with TV Sveti Georgije except for the founder".

80. On 12 July 2001, the CRA again wrote to RTV Sveti Georgije and reminded it of the decision of 17 May 2001 wherein it is stated that "any future violation of any kind may result in a revocation of the license". The CRA informed RTV Sveti Georgije that it had reached "a preliminary conclusion" that RTV Sveti Georgije had violated the suspension order by transmitting the electronic media programme, and it provided RTV Sveti Georgije with an opportunity to respond to this allegation by 16 July 2001. On 14 July 2001, RTV Sveti Georgije responded to the CRA. It quoted from the Decision of the High Representative of 2 March 2001 and sought clarification on the legal status of CRA. It further requested documents from the CRA "in order to clarify the competencies of the individual in relation to the established or non-established bodies of the CRA, because [it had] reached the unpleasant conclusion that this actually concerns initiatives of individuals rather than prescribed procedures in accordance with the legal system of Bosnia and Herzegovina."

81. On 23 July 2001, the CRA informed RTV Sveti Georgije that it would transmit the case to the CRA Enforcement Panel for its consideration of a possible violation of the suspension order of 17 May 2001. On 25 July 2001 the applicant requested an oral hearing before the CRA Enforcement Panel and informed the CRA about its application to the Chamber.

82. On 27 July 2001, the CRA Enforcement Panel issued a unanimous decision revoking the provisional broadcasting license issued to RTV Sveti Georgije on 30 August 1999 and ordering that it cease broadcasting (CRA Enforcement Panel decision of 27 July 2001 at paragraph 16). In the reasoning, the Enforcement Panel explained the process applied by CRA to issue provisional and long-term broadcasting licenses. The process of granting long-term broadcasting licenses (which are based upon previously issued provisional broadcasting licenses) is currently in progress. According to the CRA, the only way a station currently may obtain a broadcasting license is through the grant of a long-term broadcasting license; as a result, applications for new provisional licenses are impossible

(*id.* at paragraph 13). The decision states that RTV Sveti Georgije cannot unilaterally transfer its broadcasting rights and any broadcasting by another station on the frequency granted to RTV Sveti Georgije is illegal (*id.* at paragraph 14). Moreover, the continued broadcasting during the period of suspension "is a clear violation of the suspension order". With respect to the sanction for the violation, the decision states: "Considering the nature of the violation, and the station's record of repeated breaches, the station's license should be revoked" (*id.* at paragraph 15).

83. The Protocol of the CRA Enforcement Panel of 27 July 2001 states that "the case of RTV Sveti Georgije was prepared and presented in a *per capsulam* procedure for the Enforcement Panel's consideration" (CRA Enforcement Panel Protocol of 27 July 2001 at paragraph 2). The representative of CRA explained at the public hearing that "'a *per capsulam* procedure' means that the members of the Enforcement Panel have not organised a session. A liberal translation would be 'by letter decision', and it was done in this manner because it was a follow-up to RTV Sveti Georgije's non-compliance with previous decisions" of CRA. In addition, although RTV Sveti Georgije had requested an oral hearing, the Chairman of the Enforcement Panel "decided that there were no special circumstances which warranted the granting of such request" (*id.* at paragraph 1).

84. On 10 August 2001, RTV Sveti Georgije submitted its appeal against the decision of the CRA Enforcement Panel of 27 July 2001. RTV Sveti Georgije challenged the "transparency" of the IMC and CRA since all procedures remain "inside the organisation". RTV Sveti Georgije further warned the CRA that it cannot decide upon rights and responsibilities by a letter, but rather such decisions should be issued by "some relevant institution and with a right to appeal". RTV Sveti Georgije "completely denied" all the allegations against it, and argued that the reasoning of the decision was based upon "a completely falsely established factual situation and a subjective evaluation of all statements".

85. On 30 October 2001, the CRA Council issued a unanimous final and binding decision upholding the decision of the Enforcement Panel of 27 July 2001 (CRA Council decision of 30 October 2001 at paragraphs 5 and 7). The Council stated that it agreed with the reasoning and conclusion of the Enforcement Panel (*id.* at paragraph 4). In the decision, the Council noted that the applicant had requested that its representative present its appeal, and the Council granted that request, but the applicant's representative failed to appear before the Council (*id.* at paragraph 3). At the public hearing before the Chamber, Mr. Mlađenović confirmed that RTV Sveti Georgije's representative failed to appear at the oral hearing "for inexplicable reasons" and "without informing the applicant". As a result, he was terminated by RTV Sveti Georgije.

86. On 7 December 2001, the CRA informed RTV Sveti Georgije that as of 26 November 2001 (14 days after the announcement on 12 November 2001 of the decision of 30 October 2001), it was obliged to cease broadcasting. According to the monitoring team of CRA, RTV Sveti Georgije had continued to broadcast its television programme. As a result, the CRA notified RTV Sveti Georgije that it must cease broadcasting at the latest on 11 December 2001 at midnight or the CRA would be forced to take action to ensure compliance with its decision. On 10 December 2001, RTV Sveti Georgije acknowledged receipt of the CRA's letter of 7 December 2001. It further notified the CRA of its application before the Chamber and suggested that the "best solution for finding a way out of this situation is to wait for the decision of the Human Rights Chamber". The CRA responded on 19 December 2001 that the decision of the CRA Council is "final and binding" and RTV Sveti Georgije's application to the Chamber cannot delay implementation of that decision.

87. On 16 January 2002, CRA staff members physically enforced the decision of 30 October 2001 by switching off the radio and television transmitter of RTV Sveti Georgije and posting an official notice with the stamp of CRA on the site. According to RTV Sveti Georgije, the posted notification threatens that a violation of the official seal constitutes a criminal offence under Article 382 of the Criminal Code of the Republika Srpska (OG RS no. 22/00 of 31 July 2000).

F. Facts with respect to the denial of a long-term broadcasting license for the applicant

88. In the midst of the further proceedings and activities leading up to the CRA's eventual implementation of its decision of 27 July 2001, which revoked RTV Sveti Georgije's provisional broadcasting license, a decision was also taken by the CRA with respect to RTV Sveti Georgije's

application for a long-term broadcasting license. RTV Sveti Georgije had submitted its application for a long-term broadcasting license to the CRA on or about 17 June 2001.

89. On 12 October 2001, the Chief Executive Officer of the CRA issued a decision denying RTV Sveti Georgije's application for a long-term broadcasting license in the Banja Luka region and ordering it to cease all broadcasting operations (CRA Chief Executive Officer decision of 12 October 2001 at paragraphs 8-9). In accordance with the Merit-Based Competitive Process for the Awarding of Long-Term Broadcasting Licenses, established under IMC Rule 04/2000 adopted on 26 September 2000 and amended on 29 October 2001, the CRA reviewed the programme quality, financial information and viability, and technical operations of RTV Sveti Georgije (see paragraph 27 above). In none of these three required categories was RTV Sveti Georgije awarded even the minimum number of possible points. With respect to programme quality, the CRA "found that the station does not meet the minimum requirements". With respect to financial information and viability, the CRA found that the station "operates with constant loss although it has secured sources of funding". With respect to technical operations, the CRA found that "the station possess[es] neither human resources nor technological resources required for technical operations" (CRA Chief Executive Officer decision of 12 October 2001 at paragraph 6(a)-(c)). In total, RTV Sveti Georgije achieved 11.5 points (*id.* at paragraph 7). The minimum qualifying points in the Merit-Based Competitive Process is 24 out of a possible 50 points. Since RTV Sveti Georgije failed to achieve the minimum number of possible positive points, the CRA did not deduct any negative points that might have been applicable with respect to RTV Sveti Georgije's prior non-compliance with the IMC/CRA regulations (*id.* at paragraph 6(d)).

90. On 27 and 28 October 2001, RTV Sveti Georgije submitted appeals against the decision of the Chief Executive Officer of the CRA of 12 October 2001. In those appeals, it challenged the decision of 12 October 2001 in full, including the competence of the CRA to issue the decision. On 7 December 2001, the CRA Council issued a unanimous final and binding decision in which it upheld the decision of 12 October 2001 denying a long-term broadcasting license to RTV Sveti Georgije.

IV. RELEVANT LEGAL PROVISIONS

A. Instruments of the United Nations[6]

1. International Covenant on Civil and Political Rights

91. The Constitution of Bosnia and Herzegovina (set out in Annex IV to the General Framework Agreement for Peace in Bosnia and Herzegovina, which entered into force on 14 December 1995) provides in its Annex I "additional human rights agreements to be applied in Bosnia and Herzegovina". The agreement listed at no. 7 of Annex I is the International Covenant on Civil and Political Rights of 1966. That Covenant states in paragraph 2 of Article 20, as follows:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

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

92. Annex I to the Constitution of Bosnia and Herzegovina also lists at no. 6 the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Article 4 of that Convention provides, in pertinent part:

> "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:
>
> "(a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; ...."
>
> Article 5 provides, in pertinent part:
>
> "In compliance with the fundamental obligation laid down in ... this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...
>
> "(d) other civil rights, in particular: ...
>
> "viii. the right to freedom of opinion and expression; ...."

B. Decisions of the High Representative creating the IMC and CRA

1. Decision of the High Representative of 11 June 1998 creating the IMC

93. On 11 June 1998, the High Representative issued a Decision establishing the IMC (Paragraph 1). It appears that this Decision was not published in any Official Gazette. The Decision states that the IMC "shall establish a regulatory regime for broadcasting and other media in Bosnia and Herzegovina and will create the appropriate structures to fulfill this obligation" (Paragraph 2). "All broadcasters and other media" will be subject to the Codes of Practice issued by the IMC (Paragraph 3). The IMC was charged with establishing "a licensing regime for all broadcasters" (Paragraph 4). The High Representative further assigned the IMC "the function and responsibility" to "license all broadcasters", draw up appropriate Codes of Practice, "manage and assign spectrum for broadcasting purposes", "ensure adherence to license conditions and Codes of Practice", "set

[6] The Chamber includes these instruments of the United Nations in this decision because the respondent Party relies upon them as documents which contribute to the legal framework in which the IMC and CRA function.

license fees", and "require the disclosure and provision of such information as is necessary for the due performance of its regulatory obligations" (Paragraph 5).

94. Paragraph 6 of the Decision sets forth the possible remedies or sanctions that may be utilised by the IMC, as follows:

> "In securing compliance with licenses and Codes of Practice the Independent Media Commission may apply appropriate remedies including:
>
> "I. the requirement to publish an apology,
> "II. the issuance of warnings,
> "III. the making of orders,
> "IV. the imposition of financial penalties,
> "V. the suspension of license,
> "VI. the entry to premises,
> "VII. seizure of equipment,
> "VIII. the closedown of operations or
> "IX. the termination of license.
>
> "The Independent Media Commission may enlist the support and assistance of all law enforcement agencies in Bosnia and Herzegovina and will seek assistance from the Peace Stabilization Force or its successors."

95. With respect to its structure, the Decision provides that the IMC will have a Council and a Director General appointed by the High Representative (Paragraph 7). An Enforcement Panel will be constituted from members of the Council, including representatives from both Entities. "The Enforcement Panel shall consider and determine grave and serious breaches of Codes and licenses, save in circumstances when immediate action is required, and then the Director General shall take such decisions as are necessary" (Paragraph 8). The IMC "shall act in accordance with the principles of objectivity, transparency, non discrimination, and proportionality" (Paragraph 9).

2. Decision of the High Representative of 2 March 2001 creating the CRA

96. On 2 March 2001, the High Representative issued a Decision Combining the Competencies of the Independent Medial Commission and the Telecommunications Regulatory Agency, thereby "produc[ing] a single communications regulator having jurisdiction over both broadcasting and telecommunications" named the Communications Regulatory Agency (Article 1.1) (OG BiH no. 8/01 of 22 March 2001; OG FBiH no. 11/01 of 3 April 2001; OG RS no. 12/01 of 26 March 2001). The CRA was granted sole regulatory responsibility over the field of communications in Bosnia and Herzegovina (Article 1.2).

97. The structure of the CRA was designed similarly to the structure of the IMC (see paragraph 95 above). The Decision provides that the CRA shall be managed by a Chief Executive appointed by the High Representative (Article 2.1). "The Chief Executive shall be responsible for the day-to-day operations of the CRA including, but not limited to, the implementation of relevant law and policy, technical oversight, industry affairs, administration and staffing" (Article 2.1). "The organization of the CRA shall include a broadcasting division and a telecommunications division among possible others" (Article 2.2).

98. The CRA shall have a Council with seven members (four national members and three international members) appointed by the High Representative (Article 2.3). "The Council shall guide the CRA with regard to strategic issues of policy implementation" (Article 2.3). "The Council shall adopt codes of practice and rules for broadcasting and telecommunications and shall adopt internal procedural rules. Additionally, the Council shall serve as an appellate body for CRA decisions." (Article 2.3).

99. The CRA shall also have an Enforcement Panel with seven members (four national members and three international members) appointed by the High Representative (Article 2.4). "The Enforcement Panel is empowered to deal with any cases concerning violation of licensing conditions or other rules applied by the CRA and to impose appropriate remedies and sanctions." (Article 2.4).

100. With respect to enforcement measures, the Decision states in Article 3 that: "In securing compliance with CRA codes of practice, rules, regulations and decisions, the CRA shall have the authority to impose such enforcement measures as shall be in accordance with European regulatory practices."

101. Article 4 of the Decision provides for the independence of the CRA, as follows:

> "The CRA shall be an independent body with the status of a legal person in Bosnia and Herzegovina and shall carry out its duties pursuant to the principles of telecommunications policy as enumerated in Article 3 of the Law on Telecommunications and the Telecommunications Sector Policy of Bosnia and Herzegovina. In fulfillment of its duties, the CRA shall act in accordance with the principles of objectivity, transparency and non-discrimination."

Article 5 of the Decision further describes the CRA "as a state-level agency", the overall budget of which is an "integral part" of the budget of Bosnia and Herzegovina.

102. With respect to precedence and continuity, Article 6 of the Decision provides, in pertinent part, as follows:

> "6.1 This Decision, subject to the constitution of Bosnia and Herzegovina, shall have precedence over all inconsistent laws, regulations and decisions or specific provisions thereof at all levels of government in Bosnia and Herzegovina. This Decision replaces the High Representative's Decision on the establishment of the Independent Media Commission, issued 11 June 1998. The responsibilities and obligations ascribed therein to the IMC are hereby transferred to the CRA.
>
> "6.2 All acts, codes, rules, guidelines and decisions made by the IMC and the TRA shall remain in force unless replaced or amended by decisions made by the CRA."

C. Code, Guidelines, and Procedure of IMC and CRA

1. IMC Broadcasting Code of Practice

103. On 1 August 1998, the Broadcasting Code of Practice of the IMC entered into force. It was amended thereafter on 9 June 1999, 8 September 1999, and 10 February 2000. The Preamble states that "this Code sets out the rules and standards for programme content which apply to television and radio broadcast stations and their staff in Bosnia and Herzegovina." It "is intended to conform with the right to freedom of expression as envisaged by the European Convention on Human Rights and other instruments incorporated in the Constitution of Bosnia and Herzegovina, while respecting generally accepted standards of decency, non-discrimination, fairness and accuracy." "Broadcasters are responsible for the content of all material transmitted by them, whatever its source".

104. Article 1.1 sets out the general programme standards and requirements, as follows:

> "Programmes shall meet generally accepted community standards of civility and respect for the ethnic, cultural and religious diversity of Bosnia and Herzegovina.
>
> "Broadcasters shall not broadcast any material which by its content or tone:
>
> "(1) carries a clear and immediate risk of inciting ethnic or religious hatred among the communities of Bosnia and Herzegovina, or which by any reasonable judgment would incite to violence, disorder or rioting, or which could encourage crime or criminal activities.
>
> "(2) carries a clear and immediate risk of causing public harm: such harm being defined as death, injury, damage to property or other violence, or the diversion of police, medical services or other forces of public order from their normal duties."

105. Article 1.3 sets out the programme standards and requirements with respect to religion, as follows:

> "The belief and practice of religious groups must not be misrepresented, and every effort must be made to ensure that programmes about religion are accurate and fair. Programmes must not denigrate the religious beliefs of others."

106. Article 1.4 sets out the programme standards and requirements with respect to fair and impartial programming, as follows:

> "Broadcasters shall ensure due accuracy, fairness and impartiality in all programming, including news. They must not broadcast programmes that by any reasonable judgment are intended to promote or, over the course of time systematically promote, the interests of one political party, or any group or individual to the exclusion of other parties, groups or individuals. Comment should be clearly distinguished from news. No one opinion or point of view must be allowed to prevail on controversial matters of public policy."

107. Article 4.2 sets out the sanctions for failure to comply with the Code, as follows:

> "In case of violation of this Code, the IMC may apply one or more of the following sanctions:
>
> "i. the requirement to publish an apology,
> "ii. the issuance of warnings,
> "iii. the making of orders,
> "iv. the imposition of financial penalties,
> "v. the suspension of license,
> "vi. the entry to premises,
> "vii. seizure of equipment,
> "viii. the closedown of operations or
> "ix. the termination of license."

108. Article 5.2 provides that the Code "shall have precedence over any existing laws or regulations on media applied in Bosnia and Herzegovina, which are in contradiction with it."

2. IMC Guidelines on Reporting Provocative Statements

109. The IMC adopted its Guidelines on Reporting Provocative Statements on 9 June 1999. The Guidelines were later amended on 29 October 2001, with no material changes relevant to this case. The introduction states that the IMC issued these Guidelines "to help broadcasters better understand how the IMC interprets Article 1 of its Broadcasting Code" concerning statements which risk inciting ethnic or religious hatred or causing public harm (see paragraph 104 above) and how to ensure compliance with the Broadcasting Code. Stations are warned that "failure to comply with this and other provisions of the Broadcasting Code may lead to severe consequences, including suspension or termination of a station's license."

110. Paragraph 1 of the Guidelines provides as follows:

> "Reporters, program editors and station managers are expected to recognize the kind of public statements which, if reported and presented emotionally and without careful consideration of the likely effect on the audience, can incite violence, encourage intolerance and hatred, and cost lives."

Paragraph 2 offers examples of such "public statements", including "emotional or angry statements by public officials, party leaders or other prominent individuals … that a neutral observer would interpret as a direct or implicit call for violent protest" or "angry, threatening or otherwise highly emotional comments by participants in a contact telephone programme … that, by the same reasonable standard, could be interpreted as a call for violence or a provocation of hatred".

111. Paragraph 6 of the Guidelines states, in pertinent part:

> "Differing viewpoints give the audience a basis for rational thought and action. Whenever a station deals with a statement that calls for violence, urges intolerance or makes sensational accusations,

> the station has an obligation to vigorously and promptly seek alternative or opposing viewpoints, and to broadcast those viewpoints in the same program or immediately thereafter. ...
>
> "In tense situations, broadcasting another point of view hours or days later is not acceptable. If the station cannot immediately reach people who can provide other viewpoints or factual context, it should delay reporting the statement or provide appropriate context on its own." (emphasis in original).

112. Paragraph 7 of the Guidelines sets forth precautions the station may take "when dealing with any angry or emotional statement that a neutral observer might interpret as a direct or indirect, explicit or implicit, call to violence or hatred". For example, "if the statement occurs during an interview ... or an event being broadcast live, the station should directly and immediately challenge the individual making the statement to accept responsibility for its possible consequences." The final advice offered to stations when dealing with provocative statements is as follows:

> "Often a station's most immediate and effective way to demonstrate its responsibility to the public is a brief commentary of its own urging public calm and restraint and condemning those who would provoke violence."

3. IMC Guidelines on Accuracy and Balance

113. The IMC adopted its Guidelines on Accuracy and Balance on 21 October 1999. The Guidelines were later amended on 29 October 2001, with no material changes relevant to this case. The IMC adopted these Guidelines "to help broadcasters better understand how the IMC interprets Article 1.4 ... of its Broadcasting Code" concerning standards and requirements with respect to fair and impartial programming (see paragraph 106 above) and how to ensure compliance with the Broadcasting Code. Stations are warned that "failure to comply with this and other provisions of the Broadcasting Code may lead to severe consequences, including suspension or termination of a station's license."

114. The Guidelines commence with the statement that "accuracy and balance are two of the main characteristics that distinguish good journalism from bad, and journalism from propaganda." They elaborate as follows:

> - "Accuracy requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue, even if some of the facts conflict with a journalist's beliefs and feelings.
>
> - "Balance, or impartiality, requires the presentation of all the main points of view or interpretations of an event or an issue, regardless of whether the reporter, editor or the audience agrees with these views.
>
> "Both ingredients— accuracy and balance— are necessary for citizens to gain a full and realistic picture of the world around them. This is the fundamental purpose of journalism. Democracy, which requires the active participation of informed citizens, depends on journalists to keep citizens informed about major issues.
>
> "Omitting relevant facts and points of view from the reporting of major issues of public interest inevitably distorts the view of reality a broadcaster presents and so misleads and misinforms the public.
>
> "Propaganda— the inverse of journalism— is the deliberate distortion of reality so as to lead the public to a particular understanding of events and issues, without regard for reality. Propaganda poisons the processes of democracy and can be seen as a misuse of public resource— the frequency spectrum."

115. Section A of the Guidelines offers detailed guidance to stations with respect to the standards and requirements for fair and impartial programming, as set forth in Article 1.4 of the Broadcasting Code of Practice (see paragraph 106 above). It provides, in pertinent part, as follows:

> "1. Article 1.4 addresses the problem of a consistent bias in programming that favors one political point of view on particular issues, or one group or other special interest.

"2. Bias can be displayed in the deliberate selection and omission of facts, so as to favor one point of view. Or it can be displayed by giving disproportionate time to particular people, parties and points of view while excluding other people and other viewpoints. ...

"5. Article 1.4 prohibits the withholding or suppression of important factual information or points of view, knowledge of which would substantially affect the audience's understanding of events or issues.

Balance (or impartiality) does not necessarily require giving equal time to all points of view on an issue. But it does require giving at least an accurate and unemotional summary of facts or viewpoints that are central to the story, unpopular as they may be. Reinforcing popular understanding of an issue is not the journalists' job: if anything, a journalist should seek to challenge popular assumptions and stereotypes with new information and diverse viewpoints.

Impartiality does not necessarily require that all sides have a chance to speak in every program on every issue. On any given day, a program may focus on a narrow point of view or one side of an argument. But the spirit of balance requires that very soon thereafter—within the next few days—other points of view will be heard on the same issue.

When issues of great controversy, urgency or sensitivity are involved, however, all main points of view should be represented in each program that treats such issues. ...

In summary, presenting a balanced or impartial picture of reality, is not always an easy or popular thing to do. But it is a professional requirement of journalism. It springs from a sense of distance and fairness in the journalist that is much the same required of a judge before a court." (emphasis in original).

4. IMC and CRA Procedure for Handling Cases

116. The IMC adopted its Procedure for handling cases on 8 December 1998. The Procedure was later amended on 9 June 1999, 21 October 1999, and 29 October 2001. Following the Decision of the High Representative of 2 March 2001 (see paragraph 96 above), the amendments of 29 October 2001 were adopted "mainly in order to reflect the change of jurisdiction to also encompass both broadcasters and telecommunications operators". The only change in the amendments of 29 October 2001 relevant to this case was the substitution of CRA for IMC throughout the operative text of the Procedure; therefore, the currently applicable version of the Procedure is the one quoted and cited below.

117. The introduction to the Procedure states as follows: "While it is the role of CRA to examine cases of breaches of license conditions and Codes of Practice, CRA regards it as being of great importance to have a clear and transparent procedure for the handling of cases, which affords protection to all parties."

118. The CRA investigates cases initiated by a complaint, ex officio, or by referral from another authorised body (Article 1). Cases are registered and a case file opened. Parties are informed that a case has been opened and of all material contained in the case file. Unless otherwise decided, case files are open to the public (Article 2). Cases are examined by the relevant division or department of CRA, which may solicit additional information if necessary (Article 3).

119. Article 7 of the Procedure sets forth the possible sanctions, as follows:

"Any broadcaster or telecommunications operator who violates any provision of the CRA Codes and other rules or any license conditions, is liable to the following sanctions:

"1. A requirement to publish an apology, by a decision of the Chairman of the Enforcement Panel.

"2. The issuing of a warning, by a decision of the Chairman of the Enforcement Panel.

"3. The making of an order concerning any matter which is within the general framework of CRA by a decision of the Chairman of the Enforcement Panel. The Enforcement Panel will be consulted or the case referred to it, if the Chairman deems this necessary.

"4.*a)* *Financial Penalties for Broadcasters*
"The imposition of financial penalties, where concerning penalties up to twenty percent of the maximum penalty possible for each category of broadcaster, the Chairman of the Enforcement Panel may make the decision, whereas all other penalties will be decided by the Enforcement Panel. No penalty larger than 5,000 KM for broadcasters operating over an entire entity or in both entities, 2,500 KM for broadcasters covering fifty percent or more of an entity or 1,000 KM for any other broadcasters, may be imposed. ...

"5. The amendment or suspension of licenses, by a decision of the Chairman of the Enforcement Panel in cases of smaller amendments or other minor matters and otherwise by a decision of the Enforcement Panel.

"6. Closing down of operations, by a decision of the Enforcement Panel, but in exceptional cases, if required by the urgency and immediacy of the issue, by a decision of the Chairman of the Enforcement Panel.

"7. Terminating licenses, in all cases by a decision of the Enforcement Panel.

"Sanctions will be proportionate to the nature and gravity of the violation and will not be more severe than necessary, taking into considerations [sic] all relevant factors. Failure to comply with a previous IMC or CRA decision will result in more severe sanctions."

120. Article 10 of the Procedure, concerning decisions by the Enforcement Panel, provides as follows:

"When a decision by the Enforcement Panel is required, a meeting of the Enforcement Panel shall be called unless in exceptional circumstances.

"The documentation on the case shall be prepared and submitted by the Chairman to the members of the Enforcement Panel prior to the meeting. The documentation shall be examined by the members before meeting and additional information may, if necessary, be solicited from CRA.

"Cases shall be decided on written or received material. Oral evidence may be heard in exceptional circumstances. All parties concerned are to be given reasonable time to present and state their case and submit information or make representations."

121. Article 11 of the Procedure, concerning the appeal process, provides, in pertinent part, as follows:

"All decision on cases and refusal of licenses may be appealed to the Council.

"The appeal shall be submitted to any of the CRA offices in Sarajevo, Banja Luka and Mostar. A case may be appealed only by the parties to the case. A refusal of licence may be appealed by the applicant for a licence.

"The appeal shall be made within fourteen days of the date the parties received the decision. Information on how to make an appeal shall be included in the decision.

"After a decision is made, it will be delivered to the parties to the case in writing. The decision will simultaneously be put on the information board at the CRA offices.

"Each decision sent to the parties shall be accompanied by a receipt form. The party to the case shall sign and return the receipt form to the CRA in order to confirm the receipt. The appeal time shall be computed from the day the party signed the receipt form. ..."

122. Article 12 of the Procedure, concerning decisions by the Council on appeal, provides, in pertinent part, as follows:

"CRA shall register the appeal, which has been duly submitted to it and notify the parties that an appeal has been received.

"In case an appeal is made the decision shall not take effect until after the appeal has been decided upon, unless otherwise stated in the decision. ...

> "When an appeal is received, copies of the case file shall be forwarded to the members of the Council and a meeting of the Council shall be called by the Chairman of the Council upon notice by the Secretary of the Council. The documentation shall be examined by the members before the meeting and additional information may, if necessary, be solicited from CRA.
>
> "Cases shall be decided on written or received material. Oral evidence may be heard in exceptional circumstances. Any requests for oral hearings will be decided upon by the Chairman of the Council."

D. Laws of Bosnia and Herzegovina

1. Law on the Court of Bosnia and Herzegovina

123. The Law on the Court of Bosnia and Herzegovina (OG BiH no. 29/00 of 30 November 2000; OG FBiH no. 52/00 of 12 December 2000; OG RS no. 40/00 of 27 November 2000) became effective as of 8 December 2000. The Law provides for a competent court on the state level. Article 14 provides for administrative jurisdiction of that court, which shall be carried out by the Administrative Division, as follows:

> "1. The Court is competent to decide actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina and its bodies, Public Agencies, Public Corporations, institutions of the Brcko District and any other organisation as provided by State Law, acting in the exercise of a public function.
>
> "2. The Court shall have, in particular, jurisdiction over the following:
>
> > "a) The assessment of the legality of individual and general enforceable administrative acts adopted under State law, performed in the exercise of public functions by the authorities listed in paragraph 1 of this Article, for which judicial review is not otherwise provided by law. ..."

124. In accordance with Article 51(2), an action within the administrative jurisdiction of the Court of Bosnia and Herzegovina "must be lodged within two months from the day following the day the applicant is notified, or received the act or the decision complained of, or from the day of the publication of the regulation challenged".

2. Decision of the High Representative of 8 May 2002 on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina

125. On 8 May 2002, the High Representative issued a decision on the appointment of judges and on the establishment of the Court of Bosnia and Herzegovina (OG BiH no. 10/02 of 24 May 2002; OG FBiH no. 20/02 of 29 May 2002). In making the decision, the High Representative recalled that, according to the Declaration of the Peace Implementation Council, "the establishment of judicial institutions at the State level, which meet an established constitutional need to deal ... with administrative and electoral matters, is a precondition for the establishment of the rule of law in Bosnia and Herzegovina". He further considered the Law on the Court of Bosnia and Herzegovina (see paragraph 123 above), which was enacted "to ensure the effective exercise of the competencies of the State of Bosnia and Herzegovina and respect for human rights and the rule of law in the territory of Bosnia and Herzegovina". Accordingly, the Decision states in Article 3 that "from the date of this Decision the Court of Bosnia and Herzegovina shall be established".

126. The Decision of 8 May 2002 appoints seven judges as the Plenum of the Court and the Appellate Division of the Court of Bosnia and Herzegovina (Articles 1 and 4). They are authorised to adopt rules of procedure and to determine the organisational structure of the Court (Article 4). The Decision further specifies that "the initial primary task of the Appellate Division shall be to discharge the electoral appeals competence" (Article 5).

127. The inaugural session of the Appellate Division of the Court of Bosnia and Herzegovina was held on 6 June 2002. At that time, the High Representative, Paddy Ashdown, stated "I consider it a

priority that the Criminal Division and the Administrative Division of the Court are established by the end of this year". The Administrative Division is not presently operative.

3. Law on Telecommunications of Bosnia and Herzegovina

128. The Law on Telecommunications of Bosnia and Herzegovina, referenced in the Decision of the High Representative of 2 March 2001 (see paragraph 101 above), has not to date been adopted by the Parliamentary Assembly of Bosnia and Herzegovina.

V. COMPLAINTS

129. In its application, which was submitted to the Chamber on 1 August 2001, the applicant complains about the decision issued by the CRA Enforcement Panel on 17 May 2001 which suspended for 90 days the applicant's provisional license for broadcasting the television station RTV Sveti Georgije. The applicant also complains about the decision by the CRA Council of 7 June 2001, which confirmed the decision of 17 May 2001, and the decision of the CRA Enforcement Panel of 27 July 2001, later confirmed by the decision of the CRA Council of 30 October 2001. The applicant challenges: a) the legal grounds upon which the decisions were based; b) the application of those legal grounds to the television programme "These are the fruits of our battle" aired by RTV Sveti Georgije on 8 May 2001; c) the procedures conducted by the CRA in the applicant's case; and d) the sanctions imposed by the CRA against the applicant. The applicant further claims that the public was informed immediately about the decision on suspension even though the decision was not final because the appeal process was not yet complete. According to the applicant, this public announcement damaged its radio and television station, which derives the majority of its income from advertising.

130. The applicant alleges that the following human rights have been violated: freedom of thought, conscience and religion (Article 9 of the Convention), freedom of expression (Article 10 of the Convention), right to access to courts (Article 6 of the Convention), right to an effective remedy (Article 13 of the Convention), and prohibition of abuse of rights (Article 17 of the Convention).

VI. SUBMISSIONS OF THE PARTIES

A. The respondent Party

131. On 19 November 2001, the respondent Party submitted its observations on the admissibility and merits of the application. The respondent Party explains the establishment and functioning of the IMC and the CRA pursuant to the Decisions of the High Representative of 11 June 1998 and 2 March 2001, respectively (see paragraphs 93–102 above). According to the respondent Party, the Broadcasting Code of Practice and other rules, regulations and guidelines adopted by the IMC and the CRA "have legal precedence over all laws in the media field in [Bosnia and Herzegovina]"; moreover, they have the "force of law". Pursuant to Article 6.2 of the Decision of the High Representative of 2 March 2001, "all acts, codes, rules, guidelines and decisions previously made by the IMC … remain in force" unless amended or replaced by the CRA. The respondent Party submits that "it is the position of the CRA that its legal status is that of an independent administrative state-level agency, with a mandate to execute its duties and responsibilities on the territory of Bosnia and Herzegovina".

132. In its submission of 19 November 2001, the respondent Party also describes in detail the decision-making process of and the potential sanctions available to the CRA (see paragraphs 28, 116–122 above). With respect to the appeal process within the CRA, the respondent Party explains that the Enforcement Panel "gives full consideration to all aspects, factual and legal, of the case". The Council acts as the appellate body of the CRA, but it "does not re-open a discussion on the merits of the case, which had already been decided upon" by the Enforcement Panel. "In every appeal, the Council should only decide whether the Procedure for Handling Cases had been violated, whether a material error had occurred, or whether a station is offering entirely new evidence."

133. With respect to the allegations in the application, the respondent Party notes that at the time the application was submitted, the appeal process before the CRA Council of the decision of the CRA Enforcement Panel of 27 July 2001 (which revoked the applicant's provisional broadcasting license), was still pending. Therefore, the respondent Party submits that "neither the [Enforcement Panel] decision of 27 July 2001, nor the subsequent Council decision of 30 October should be discussed by the Chamber" because the applicant had failed to exhaust available remedies in those respects at the time the application was submitted. The respondent Party also challenges the factual accuracy of the applicant's representations concerning the programme "These are the fruits of our battle" broadcast on 8 May 2001. In response to the applicant's complaint that the CRA improperly and prematurely announced its decision of 17 May 2001 (which suspended the applicant's provisional broadcasting license), the respondent Party explains that the CRA informed the public about the decision in accordance with its procedures and in no way implied that the decision was final and binding.

134. With respect to the substantive provisions of the Convention raised in the application, the respondent Party denies that any violations of the Convention have occurred. Noting the CRA's Procedure for Handling Cases and the failure of the applicant to object to a violation of its procedural rights in its appeals before the CRA Council, the respondent Party maintains there has been no violation of Article 6 of the Convention. The fact of the appellate process before the CRA Council and the opportunity to present an application to the Chamber further confirm that there has been no violation of Article 13 of the Convention. Concerning any possible violation of Article 1 of Protocol No. 1, the respondent Party argues that "a broadcasting license is a license to use a frequency, it does not in itself constitute property in any way". None the less, if the Chamber considers the broadcasting license to be related to economic interests, then "the CRA has issued its decisions precisely in line with paragraph 2 of this Article, which provides for the State to control the use of property in accordance with the general interest."

135. Concerning the allegation of a violation of the applicant's right to freedom of expression, the respondent Party points to the permissible conditions and restrictions on the exercise of that right allowed by paragraph 2 of Article 10 of the Convention. "Regulation in itself means establishment and maintenance of order in the field of communication ... However, it does not mean that regulation is to be understood in terms of censorship." The respondent Party submits that "the broadcast in question present[ed] one of the most blatant violations of principles of objectivity and impartiality, it denigrated religious beliefs of others and at a given time, it has presented a clear threat of causing violence and disorder. It also carried a clear and immediate risk of inciting ethnic or religious hatred among the communities of Bosnia and Herzegovina." In addition, the respondent Party calls particular attention to Article 20 of the International Covenant on Civil and Political Rights and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (see paragraphs 91-92 above). The respondent Party argues that "the CRA has clearly been acting in accordance with all of the aforementioned principles laid down in the international human rights law to which Bosnia and Herzegovina is a party". The CRA, with respect to both the substance of its decisions and its procedures, "has acted within the scope of its mandate" and "the limits set by the applicable rules", "in order to prevent additional harm to [the] public which could have been caused by the programme broadcast by RTV Sveti Georgije". Thus, according to the respondent Party, there can be no violation of the applicant's right to freedom of expression.

136. When asked at the public hearing to justify the challenged decision of the CRA on the basis of Article 10(2) of the Convention, Ms. Rokša of the CRA responded, as follows:

> "The CRA believes that the continual use of the language of hatred and intolerance by RTV Sveti Georgije could cause damage to the peace implementation process in Bosnia and Herzegovina, and at the same time it is a direct threat to it. More precisely, from the legal point of view, it falls within the scope of Article 10 for the purposes of the interests of security and protection of health and morals, and this is what we claim as our basis. I also must mention that the actual decision on suspension was a result of repeated violations by this station. ... The decision on suspension of the Enforcement Panel had to be issued after establishing the violations caused by the programme broadcast on 8 May 2001, which occurred only one day after the incidents in Banja Luka, of which we are all aware, and which

could be considered as a serious threat, particularly taking into account all the circumstances."

137. At the public hearing, Mr. Finci, a member of the CRA Enforcement Panel, also offered his opinion on the programme of 8 May 2001: "I consider that the broadcast had a negative effect on multi-ethnic relations, reconciliation, and mutual life in Bosnia and Herzegovina". He added, "the whole broadcast supports in a certain way the [violent] events of 7 May [2001]", which prevented the groundbreaking ceremony for the laying of the cornerstone, which was "legally scheduled and which in a certain way also implemented a decision of this esteemed Chamber".

138. In its prehearing submission of 21 February 2002, the respondent Party confirms that "the IMC has sent all the acts, Codes, rules and regulations, together with the High Representative['s] Decision from 11 June 1998, to all broadcasters. Subsequently, any amendments to the Codes, *etc*., have been sent to stations and made public." In addition, RTV "Sveti Georgije has agreed to abide by the IMC/CRA Codes and Regulations, while being issued a Provisional License". Therefore, the respondent Party concludes that "international norms for accessibility of documents of regulatory agencies" have been fully met and even exceeded. The respondent Party further calls attention to the case law of the European Court of Human Rights where the Court has said that, "it is acceptable that rules are accessible with the help of professional knowledge and/or professional advisors".

139. With respect to the CRA appellate process, the respondent Party emphasises the importance of the function of the Council "as it provides broadcasters with recourse to a separate, independent body and thus guarantees that the rule of law is respected". Moreover, "the role of the Council acting on appeal is similar to the one of an appellate court". The respondent Party particularly explains that "precisely due to the lack of [a] Supreme Judicial body in [Bosnia and Herzegovina], the IMC/CRA Council has been entrusted with the appellate function, which it performs in a completely fair, unbiased, public and non-discriminatory way". At the public hearing the respondent Party acknowledged that it is not possible to institute regular court proceedings against decisions of the CRA since no Court of Bosnia and Herzegovina presently exists.

140. With respect to the "fair and public hearing" requirement of Article 6 of the Convention, the respondent Party argues that "this does not always mean that the whole procedure as such is to be public". It notes that all the decisions of the CRA (the Enforcement Panel, Director General, and Council) are made available to the public. Through these decisions, the CRA has established case law and precedent which "contribute[s] to the clarification of standards by which broadcasters can measure their programming and which can help broadcasters interpret the Code".

141. In the public hearing before the Chamber on 7 March 2002, the respondent Party confirmed that it maintains on the whole all the allegations contained in all its submissions to the Chamber.

B. The applicant

142. In its submission of 26 December 2001, the applicant replied to the observations submitted by the respondent Party and the OHR as *amicus curiae* on 19 November 2001. The applicant agrees that the "CRA is an institution of Bosnia and Herzegovina, as an independent body with the status of a legal person". However, the applicant challenges the legality of the activity of the CRA. It argues that the CRA "must act in accordance with laws and decisions taken by" the Council of Ministers and the Parliamentary Assembly of Bosnia and Herzegovina. The only "regulation contained in the legislation of Bosnia and Herzegovina which is applied by the CRA is the Law on Telecommunications", but the provisions applied by the CRA against the applicant in this case are not contained in that Law. The applicant concludes, "during the time when the dispute has occurred, the CRA has had no legal regime of the existing problem". The applicant appears to contend that since the draft Law on Telecommunications, which would fully regulate the status of the CRA, has not yet been adopted by the Parliamentary Assembly of Bosnia and Herzegovina, the CRA cannot be presently functioning in accordance with the law. At the public hearing, the applicant further argued that "in the period of 2 March 2001 through 30 October 2001, there were actually no rules in existence on the basis of which such measures could be ordered as those that form the subject matter of this dispute".

143. The applicant further claims in its written submission that during the time at issue, the Council did not work in the "prescribed composition", which "raises the issue of the regularity of the contested decisions". Furthermore, since the CRA has not produced minutes documenting the work of the Enforcement Panel and Council, the applicant concludes that that work must be "suspect". With respect to its Article 6 claim, the applicant points out that the procedures of the CRA do not actually have two instances to decide upon an appeal, presumably because both bodies are contained within the same institution. The applicant states that its application "essentially involves the issue of the functioning of institutions working on the basis of joint bodies of Bosnia and Herzegovina". At the public hearing, the applicant noted that the *amicus curiae* had stated that there are no limitations on appeals before the CRA Council; however, the applicant claims this statement contradicts documents sent to it.

144. The applicant submits it has pursued all avenues for appeal of the challenged decisions and has "no other legal remedy available".

145. The applicant describes its programme of 8 May 2001 as "only a reaction to the mentioned event, expressed through opinions of viewers that have not been censored". It further highlights that "nothing has happened as a result of the programme in question"; thus, for the CRA to have based its decisions on presumptions of what could have happened is "not serious". The applicant seeks to include in its application before the Chamber a challenge to the decision of the CRA rejecting its application for a long-term license. The applicant alleges that there is a "direct correlation" between that decision and the decisions raised in its initial application concerning the suspension and revocation of its provisional broadcasting license.

146. At the public hearing, the applicant made a clear distinction when speaking about the programme of 8 May 2001 between the statements uttered by the studio guest and callers and the statements uttered by the anchor or other representatives of RTV Sveti Georgije. The applicant argued, "no one in the region where we broadcast our programme or anyone else who professionally assesses the work of the editorial board can claim that RTV Sveti Georgije uses the language of hatred and fuels ethnic tensions. That simply is not true." Consequently, the applicant feels that it has been the victim of partiality by the CRA.

147. In the public hearing before the Chamber on 7 March 2002, the applicant confirmed that it maintains on the whole all the allegations contained in its application and other submissions.

C. The Office of the High Representative as *amicus curiae*

148. In response to an invitation from the Chamber, on 19 November 2001, the OHR as *amicus curiae* offered its comments on the status of the CRA, in particular "whether Bosnia and Herzegovina may be responsible for its actions". The OHR noted the intention of the Peace Implementation Council to combine the competencies of the IMC and TRA "so as to develop thereby a State-level regulatory mechanism for telecommunications and the media". It further highlighted Articles 4 and 5 of the Decision of the High Representative of 2 March 2001, which refer to the CRA as "an independent body with the status of a legal person in Bosnia and Herzegovina" and as "a state-level agency", respectively (see paragraph 101 above). Thus, the OHR concludes, "it is therefore clear that the CRA is to be regarded as a state institution of Bosnia and Herzegovina".

149. In its prehearing submission of 4 March 2002, the OHR as *amicus curiae* offers an extensive response to the Chamber's question concerning the applicability of Article 6 of the Convention to proceedings before the CRA Enforcement Panel and Council. The OHR argues that "the present case does not concern a 'right'" within the meaning of Article 6. Pursuant to the Decision of the High Representative of 2 March 2001, the CRA, "as a domestic regulatory agency on the state level" is responsible for the regulatory regime of broadcasting and telecommunications. The OHR points out that "it is important to note that broadcasting makes use of a scare natural resource, the radio frequency spectrum, which is the fundamental reason for permitting regulation of the use thereof". As a result, licensing of broadcasting operations is unique from other kinds of licensing: it is not sufficient that a broadcaster fulfil all criteria to qualify for a license as the natural resource, *i.e.*, a place in the frequency spectrum, must also be available. Accordingly, "there is no *right* to obtain a broadcasting license". The OHR also suggests that if this notion is considered from the opposite

perspective, then "a right to a broadcasting license would make impossible the creation of a viable, well-functioning, and competitive market media" and "would also by necessity mean that Bosnia and Herzegovina would violate its international obligations ... within the areas of electronic media and telecommunications". In addition, "the provisional character of the license must be borne in mind". All broadcasters were fully aware that their provisional broadcasting licenses were temporary, subject to conditions at all times, and also subject to an application for a long-term license.

150. The OHR notes that the "CRA as a state body, by virtue of Annex II to the Constitution, is under an obligation to comply with certain international conventions", in particular Article 20 of the International Covenant on Civil and Political Rights and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (see paragraphs 91-92 above). Noting the factual context of the dispute at issue in this case, "the Office of the High Representative therefore believes that the need to regulate any use of the ether for racist or other illegal objectives must be considered an important aspect of a purported right to a broadcasting license".

151. The OHR further questions whether, if such a "right" to a broadcasting license exists, it can be considered a "civil right" within the meaning of Article 6 of the Convention. The OHR elaborates as follows:

> "[A]ny right to a provisional broadcasting license must be considered as primarily characterised by the various international obligations incumbent upon Bosnia and Herzegovina, and therefore upon the broadcaster in question, as a result of the Constitution and of international agreements to which Bosnia and Herzegovina is a party. Thus, regardless of the administrative character of the CRA or of the rules issued or enforced by the CRA, such a right must be considered to have a non-civil character.
>
> "The objective of the proceedings by which the provisional license was revoked was to enforce the regulatory scheme created by the regulator according to the 11 June 1998 and the 2 March 2001 Decisions. Hence, the revocation proceedings aimed at securing compliance with internationally accepted principles and rules that all domestic broadcasters have agreed to follow by virtue of their broadcasting licenses."

152. Moreover, the OHR argues that even if Article 6 of the Convention is applicable to proceedings before the CRA, then the requirements of that provision have been met. As the CRA has been established based on decisions by the OHR, which have the force of law in Bosnia and Herzegovina, the requirement that the tribunal be "established by law" is satisfied. In addition, given that the members of the Enforcement Panel and Council are appointed by the High Representative, protected from removal by the executive, have significant involvement of international members, and apply recusal procedures where any question of impartiality arises, "both organs have a public appearance of independence and impartiality". With respect to the appellate process within the CRA, the OHR notes that, while the Enforcement Panel and Council are part of the same body, there is no overlap in their respective memberships. Also, the Decision of the High Representative of 2 March 2001 "does not restrict in any manner the extent, nature, content, form or scope of any appeal to the Council". Thus, "the Office of the High Representative is of the opinion that the Council is in no way bound by the previous instance decision and that it consequently is independent in discharging its functions as appellate instance." Moreover, since neither the Decision of the High Representative nor the Procedure for Handling Cases prevents public hearings before the Enforcement Panel or the Council, the OHR has no reason to believe that the hearings are "not open to the public". Lastly, the OHR calls attention to case law of the European Court of Human Rights in which the Court has found that an applicant may waive his right to a public hearing. Given that RTV Sveti Georgije participated in the hearing of 7 May 2001 and was invited to participate but failed to appear at the hearing of 27 July 2001, this fact "must be understood as an unequivocal waiver of his right to a public hearing".

153. At the public hearing, one of the members of the Chamber asked why the High Representative had not imposed "a full state telecommunications regulatory system". In response, Ms. La Croix of the OHR responded, "it was decided that in the effort toward partnership and ownership of the process, that the law should be adopted instead of imposed." She elaborated that the draft Law on

Telecommunications was submitted to the Parliamentary Assembly of Bosnia and Herzegovina in May 2001, and it has not yet been adopted.

VII. OPINION OF THE CHAMBER

A. Admissibility

154. Before considering the merits of this application, the Chamber must decide whether to accept it, taking into account the admissibility criteria set forth in Article VIII(2) of the Agreement.

1. Exhaustion of domestic remedies

155. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept and in what priority to address them. In so doing, the Chamber shall take into account the following criteria: (a) Whether effective remedies exist, and the applicant has demonstrated that they have been exhausted".

156. The respondent Party objects in part to the admissibility of the application because, with respect to the decision of the Enforcement Panel of 27 July 2001 and the subsequent decision of the Council of 30 October 2001, which revoked RTV Sveti Georgije's provisional broadcasting license, the applicant had not exhausted its available remedies before the CRA at the time it submitted its application to the Chamber. The respondent Party admits, however, that since no Court of Bosnia and Herzegovina existed during the relevant time period, it has not been possible for the applicant to challenge the decisions of the CRA before any functioning domestic court. The Law on the Court of Bosnia and Herzegovina provides for a competent court at the State level which shall have administrative jurisdiction over actions taken against final administrative acts or silence of the administration of the institutions of Bosnia and Herzegovina (see paragraph 123 above). The Decision of the High Representative of 8 May 2002 determines that "the Court of Bosnia and Herzegovina shall be established" (see paragraph 125 above). However, during the relevant time period, no such Court of Bosnia and Herzegovina was functioning which could have acted upon an appeal against a final decision by the CRA, and now the deadline for filing such an appeal appears to have expired.

157. The Chamber notes that it transmitted the application to the respondent Party on 19 September 2001, prior to the issuance of the decision of the Council of 30 October 2001, which reviewed the decision of the Enforcement Panel of 27 July 2001. None the less, at the time the respondent Party submitted its observations on the admissibility and merits of the application on 19 November 2001 and at the time of the public hearing on 7 March 2002, all proceedings before the CRA with respect to the revocation of RTV Sveti Georgije's provisional broadcasting license were complete and the decisions were final and binding.

158. Considering that the applicant has exhausted all available avenues for appeal before the CRA and considering that no Court of Bosnia and Herzegovina was functioning during the relevant time period and now the deadline for filing such an appeal appears to have expired, the Chamber decides that the applicant has, within the meaning of Article VIII(2)(a) of the Agreement, exhausted effective remedies.

2. Admissible *ratione personae*

159. In accordance with Article VIII(2)(c) of the Agreement, "the Chamber shall also dismiss any application which it considers incompatible with this Agreement".

160. The OHR as *amicus curiae* has persuasively explained in its submissions that the CRA is an agency of Bosnia and Herzegovina on the state level competent for regulating telecommunications and the media. Articles 4 and 5 of the Decision of the High Representative of 2 March 2001, which refer to the CRA as "an independent body with the status of a legal person in Bosnia and Herzegovina" and as "a state-level agency", respectively (see paragraph 101 above), confirm this position. Moreover, the respondent Party submits that the CRA is "an independent administrative

state-level agency, with a mandate to execute its duties and responsibilities on the territory of Bosnia and Herzegovina". The applicant further agrees that the "CRA is an institution of Bosnia and Herzegovina". Thus, there is no dispute on the status of the CRA.

161. Therefore, the Chamber accepts that the CRA is an agency of Bosnia and Herzegovina and that Bosnia and Herzegovina is thereby responsible for its actions.

3. Admissible *ratione materiae*

162. As stated above, Article VIII(2)(c) of the Agreement provides that the Chamber shall dismiss any application which it considers incompatible with the Agreement.

163. The OHR as *amicus curiae*, in particular, has argued that Article 6 of the Convention is not applicable to proceedings before the CRA because those proceedings do not relate to the determination of "civil rights and obligations" as required by Article 6. The Chamber considers that in the context of this case, this issue is a question that requires a thorough analysis of the relevant facts and applicable law. It cannot be said as a preliminary matter that the claim under Article 6 is incompatible *ratione materiae* with the Agreement. The Chamber will address the arguments of the OHR in its discussion on the merits of the claim under Article 6 (see paragraphs 203–208 below). Accordingly, the Chamber decides that the application is compatible with the Agreement.

164. As no other grounds for declaring the application inadmissible have been raised or appear from the application, the Chamber declares the application admissible in whole.

B. Merits

165. Under Article XI of the Agreement, the Chamber must next address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement. Under Article 1 of the Agreement, the parties are obliged to "secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms," including the rights and freedoms provided for in the Convention and the other international agreements listed in the Appendix to the Agreement.

1. Freedom of expression (Article 10 of the Convention)

166. With respect to freedom of expression, the applicant has alleged violations of his rights protected by Articles 9, 10, and 17 of the Convention.

167. Article 9 of the Convention, concerning freedom of thought, conscience and religion, states as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

168. Article 10 of the Convention, concerning freedom of expression, states as follows:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

> reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

169. Article 17 of the Convention, concerning the prohibition of abuse of rights, states as follows:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

170. As "one of the essential foundations of a democratic society", freedom of expression enjoys special protection under the Convention (Eur. Court HR, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, page 23, paragraph 31). The right protected by Article 10 (freedom of expression) overlaps with some other rights protected by the Convention, including the right protected by Article 9 (freedom of thought, conscience and religion). However, in the context of the right to hold and express opinions, Article 10 is "virtually indistinguishable" from Article 9 (Keir Starmer, *European Human Rights Law* § 24.3 (2002)). In addition, although some anti-democratic expression may be subject to a direct attack under Article 17 of the Convention, the European Court of Human Rights in Strasbourg (the "Court") "has not relied on Article 17 to justify interference with an expression interest". Rather, the Court has required that the legitimacy of the interference with such expression must be justified under paragraph 2 of Article 10 (D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* at pages 373-374 (1995)).

171. As the Court has interpreted and applied Article 10, it protects every form of expression, even reviled expression. In a frequently quoted passage, the Court has stated:

> "Freedom of expression constitutes one of the essential foundations of such a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (Eur. Court HR, *Handyside v. United Kingdom*, judgment of 7 December 1976, Series A no. 24, page 23, paragraph 49).

172. The Court has confirmed that "both broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in" paragraph 1 of Article 10 (Eur. Court HR, *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, page 22, paragraph 55). With respect to the third sentence of paragraph 1 of Article 10, which permits States to require licensing of broadcasting enterprises, the Court has explained the purpose of this sentence, as follows:

> "to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole" (*id.* at page 24, paragraph 61).

> "Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. ... The compatibility of such interferences with the Convention must nevertheless be assessed in light of the other requirements of paragraph 2" (Eur. Court HR, *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A no. 276, page 14, paragraph 32).

Therefore, the focus of the analysis in freedom of expression cases, including cases involving broadcasting licenses, falls upon the justification for the interference with the expression under

paragraph 2 of Article 10. The Chamber will apply this same approach and consider the applicant's freedom of expression claims under paragraph 2 of Article 10 of the Convention.

173. Paragraph 2 of Article 10, as quoted above, requires that any interference with the right to freedom of expression must be "prescribed by law", pursue a legitimate aim as itemised in that paragraph, and be "necessary in a democratic society" in the interest of the legitimate aim (Eur. Court HR, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, page 17, paragraph 43).

a. Prescribed by law

174. When considering whether the interference with expression is "prescribed by law", the Court considers whether the governing instruments have some basis in the national law and satisfy the concepts of accessibility and foreseeability. To be foreseeable, the governing instruments must "be formulated with sufficient precision to enable the individual to regulate his conduct" (Eur. Court HR, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, page 21, paragraph 45). In the present case, the applicant has argued that the applicable rules and regulations of the IMC and CRA lack the force of law. The Chamber will also consider whether those rules and regulations comply with the other requirements of being "prescribed by law" within the meaning of paragraph 2 of Article 10 of the Convention.

1. Basis in the national law

175. The Chamber recalls that the Court has found that rules adopted by non-parliamentary bodies with independent rule-making power and competence may be considered as a "law" within the meaning of paragraph 2 of Article 10 (Eur. Court HR, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, pages 21-22, paragraph 46).

176. With respect to the legal validity of the codes, rules, regulations, and guidelines of the IMC and CRA, the Chamber recalls that the IMC and CRA were established by the Decisions of the High Representative of 11 June 1998 and 2 March 2001, respectively (see paragraphs 93, 96 above), pursuant to his authority under Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina. In those Decisions, the High Representative expressly authorised the IMC and CRA to establish a regulatory regime for broadcasting and the media, including appropriate codes of practice (see, *e.g.*, paragraphs 2 and 5 of Decision of 11 June 1998; Articles 1.1, 6.1, and 6.2 of Decision of 2 March 2001). Article 6.1 of the Decision of 2 March 2001 transfers all "responsibilities and obligations" of the IMC to the CRA. In addition, Article 6.2 of the same Decision states that "all acts, codes, rules, guidelines and decisions made by the IMC and the TRA shall remain in force unless replaced or amended by decisions made by the CRA". Article 4 of the Decision of 2 March 2001 provides that the CRA "shall carry out its duties pursuant to the principles of telecommunications policy as enumerated in Article 3 of the Law on Telecommunications and the Telecommunications Sector Policy of Bosnia and Herzegovina". Admittedly, the draft Law on Telecommunications has not yet been adopted by the Parliamentary Assembly of Bosnia and Herzegovina, and the structure created by the High Representative was intended to be transitional until that draft law is adopted (see paragraphs 24, 101 above). However, nowhere in the Decisions of the High Representative are the activities of the IMC and CRA restricted to those enumerated in laws passed by the Parliamentary Assembly of Bosnia and Herzegovina. To the contrary, the authorised activities of the IMC and CRA are itemised in the Decisions of the High Representative, which have the force of law in Bosnia and Herzegovina.

177. Given these legal provisions, there is no question that the IMC and CRA have acted in accordance with the law in adopting the Broadcasting Code of Practice and the other Guidelines and Procedure at issue in this case. Since these governing instruments were validly adopted by the IMC and CRA, they can be considered part of the national regulatory regime of broadcasting and communications in Bosnia and Herzegovina. Provided they otherwise satisfy the requirements of the Convention, they may be considered to set forth the prescribed "law" in the present case.

2. Accessibility

178. In order to be "prescribed by law", the Court has explained that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case" (Eur. Court HR, *Sunday Times v. United Kingdom*, judgment of 26 April 1979, Series A no. 30, page 31, paragraph 49). It is not decisive for the requirement of accessibility whether the governing instruments that prescribe the interference on expression have been published in the official gazettes of the country. The Court has found that unpublished instruments may, depending on the circumstances of the case, satisfy the requirement of accessibility (Eur. Court HR, *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, page 26, paragraph 68).

179. The Chamber notes that the IMC/CRA Code of Practice, rules, regulations, and guidelines (see paragraphs 103–122 above) were not published in any Official Gazette in Bosnia and Herzegovina. None the less, according to the respondent Party and the CRA, they were given to the applicant, like all broadcasters, at the time it was granted its provisional broadcasting license. Thereafter, the CRA claims it promptly transmitted any amendments to these codes, rules, regulations, and guidelines to the applicant and all other broadcasters. The Chamber recalls that the applicant has not denied receiving copies of such codes, rules, regulations, and guidelines, and in fact, in its letter of 14 May 2001 to the CRA, RTV Sveti Georgije confirmed that it was aware of the applicable rules and regulations (see paragraph 73 above). Moreover, in Article 3 of the Terms and Conditions of its provisional broadcasting license, the applicant agreed to be "subject to IMC rules, regulations, orders and codes of practice". Under these circumstances, the Chamber finds that the IMC and CRA codes, rules, regulations, and guidelines were sufficiently accessible to the applicant.

3. Foreseeability

180. In *Sunday Times v. United Kingdom*, the Court examined the requirement of foreseeability with respect to whether an interference with expression was "prescribed by law" (Eur. Court HR, judgment of 26 April 1979, Series A no. 30). It explained as follows:

> "[A] norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice" (*id.* at page 31, paragraph 49).

"In assessing whether the criterion of foreseeability is satisfied, account may also be taken of instructions or administrative practices which do not have the status of substantive law, in so far as those concerned are made sufficiently aware of their contents" (Eur. Court HR, *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116, page 23, paragraph 51).

181. In the context of the present case, taking into consideration the specific language of the Broadcasting Code of Practice as well as the Guidelines on Reporting Provocative Statements, the Guidelines on Accuracy and Balance, and the Procedure for Handling Cases (see paragraphs 103–122 above), the Chamber finds that the Broadcasting Code of Practice is sufficiently precise to enable RTV Sveti Georgije to regulate its conduct. With respect to the direct relationship between the substantive provisions and the possible consequences of a violation of those provisions, the Chamber notes that Article 7 of the Procedure for Handling Cases states only that "sanctions will be proportionate to the nature and gravity of the violation" (see paragraph 119 above). None the less, in its three-year history, the IMC and CRA have established a body of case law, which interprets the substantive provisions in individual cases and imposes specific sanctions. That case law is available to RTV Sveti Georgije and to the public, and it enhances the foreseeability of the prescribed law.

182. The Chamber further recalls that on two previous occasions, the IMC established that RTV Sveti Georgije had violated the same provisions of the Broadcasting Code of Practice. On both prior occasions, the IMC subjected RTV Sveti Georgije to the maximum financial penalty (see paragraphs

36–40 above). Therefore, RTV Sveti Georgije was individually familiar with the manner in which the IMC and CRA applied its rules and regulations and the severity of sanction which could result from another similar violation. At the public hearing, the owner of RTV Sveti Georgije even admitted that the format of the 8 May 2001 programme was "risky" and that the subject matter of the programme was "very dangerous" (see paragraph 70 above). As a result, in this case, the Chamber finds that the applicable law was formulated with sufficient precision to enable RTV Sveti Georgije to regulate its conduct and to foresee reasonably the consequences of its actions. Thus, the applicable law was "foreseeable" within the meaning of paragraph 2 of Article 10 of the Convention.

183. Since the codes, rules, regulations, and guidelines of the IMC and CRA have been validly adopted by an authorised and competent state institution and they satisfy the requirements of accessibility and foreseeability in this case, the Chamber considers the provisions contained within those governing instruments to be "prescribed by law" within the meaning of paragraph 2 of Article 10 of the Convention.

b. Legitimate aim

184. In the decision of 17 May 2001, the CRA found that the programme of 8 May 2001 broadcast by RTV Sveti Georgije "caused a considerable risk of public harm", "denigrate[d] the religious beliefs of others", and provided "a tendentious, partially incorrect and one-sided view of an important event in [Bosnia and Herzegovina]" (see paragraph 74 above). In its submissions before the Chamber the respondent Party further argued that the programme "carried a clear and immediate risk of inciting ethnic or religious hatred among the communities of Bosnia and Herzegovina" (see paragraph 135 above). At the public hearing, the CRA elaborated that the programme of 8 May 2001 "carr[ied] the language of hate speech", was "damaging to the peace implementation process in Bosnia and Herzegovina", and directly threatened "the interests of security and protection of health and morals". Mr. Finci, a member of the CRA Enforcement Panel, stated: "I consider that the broadcast had a negative effect on multi-ethnic relations, reconciliation, and mutual life in Bosnia and Herzegovina". He added, "the whole broadcast supports in a certain way the [violent] events of 7 May [2001]", which prevented the groundbreaking ceremony for the laying of the cornerstone, which was "legally scheduled and which in a certain way also implemented a decision of this esteemed Chamber". Thus, the respondent Party identifies as its legitimate aims for the interference with expression the restrictions identified in paragraph 2 of Article 10 that are designed to protect the public interest and individual rights; namely, "the interests of national security, … public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of … rights of others…".

1. Public safety and the prevention of disorder or crime

185. The Chamber observes that the violent events of 7 May 2001 in Banja Luka occurred eight years to the day after the Ferhadija mosque was destroyed by an explosive device in the middle of the night during a time period when all 15 mosques situated in Banja Luka were similarly destroyed and while armed conflict was occurring elsewhere in Bosnia and Herzegovina. Plans to reconstruct the Ferhadija mosque have met with obstruction at every stage, and Bosnian Serb officials in Banja Luka have, in the past, expressed their opposition to reconstruction of the mosque (see paragraphs 42-44 above). None the less, the Islamic and international communities have persisted, and finally, the groundbreaking ceremony for laying the cornerstone was scheduled for 7 May 2001. However, as explained above, this ceremony was prevented by the extensive, violent, public protests, which resulted in property damage, many injuries, and one death (see paragraph 45 above). Against this backdrop, a mere one day later, RTV Sveti Georgije broadcast a live television programme in which it allowed members of the public to express their viewpoints unfettered. Although thankfully no additional violence occurred as a result of this television programme, taking the historical facts into consideration, along with the prevailing circumstances in the country, the Chamber accepts that the interference in dispute was legitimately aimed at protecting the public safety and preventing further disorder or crime.

2. Protection of the rights of others

186. The Chamber recalls that in the Human Rights Agreement, Bosnia and Herzegovina has agreed to "secure to all persons within their jurisdiction the highest level of internationally recognised

human rights and fundamental freedoms". The Constitution of Bosnia and Herzegovina sets forth certain human rights agreements which are to be applied in Bosnia and Herzegovina, including the International Covenant on Civil and Political Rights of 1966 and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (see paragraphs 91-92 above). These human rights instruments require that Bosnia and Herzegovina condemn and prohibit by law any advocacy of racial or religious hatred that may incite discrimination, hostility, or violence. Articles 1.1 (concerning general standards of civility and respect for ethnic, cultural and religious diversity) and 1.3 (concerning religious belief and practice) of the IMC/CRA Broadcasting Code of Practice appear to comport with these obligations. As such, it is logical to conclude that the interference with RTV Sveti Georgije's provisional broadcasting license based upon breaches of those provisions was legitimately aimed at protecting the rights of others to be free from advocacy of discrimination based upon their national, ethnic, or religious origin or beliefs (*see also* Eur. Court HR; *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A).

c. Necessary in a democratic society

187. In deciding whether an interference with expression is "necessary in a democratic society", the European Court of Human Rights "will look at the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued" (Eur. Court HR, *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, page 23, paragraph 31). The Court must be satisfied that the national authorities applied standards in conformity with the principles of Article 10 and appropriately assessed the relevant facts (*id.* at page 24, paragraph 31). However, "it is primarily for the national authorities, notably the courts, to interpret and apply national law" (Eur. Court HR, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A no. 295-A, page 17, paragraph 45). The adjective "necessary" in paragraph 2 of Article 10 "implies the existence of a 'pressing social need'" (Eur. Court HR, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, page 25, paragraph 39). Moreover, in assessing the existence and extent of the necessity for an interference with expression, States enjoy "a certain margin of appreciation". This "margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances" (*id.* at page 19, paragraph 50). Consequently, in reviewing the decisions of the national authorities, the Court takes account of the factual background of the case before it, the specific circumstances, and any particular problems linked to that factual background (*see* Eur. Court HR, *Incal v. Turkey*, judgment of 9 June 1998, Reports of Judgments and Decisions 1998, paragraph 58).

188. The Court has expressed on numerous occasions the pre-eminent role of the press in a democratic society governed by the rule of law. It has explained as follows:

> "[T]he safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep various bounds set, *inter alia*, in the interest of 'the protection of the reputation and rights of others', it is nevertheless incumbent on it to impart information and ideas on political questions of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'" (*Jersild* at page 23, paragraph 31).

The Court has further observed that freedom of the press "gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society" (Eur. Court HR, *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, page 23, paragraph 43).

189. In *Jersild v. Denmark*, the applicant was a journalist assigned to a serious television programme dealing with a wide range of social and political issues. While preparing a documentary about the Greenjackets, a group of young people who held racist attitudes, the applicant invited three representatives of the group along with a social worker employed at a local youth centre for a television interview. During the interview, the three Greenjackets made abusive and derogatory comments about immigrants and ethnic groups in Denmark. Thereafter, the applicant included a few edited minutes of the interview in a broadcast of his regular television programme. As a result of

statements by the three Greenjackets, the applicant was convicted for the criminal offence of aiding and abetting the dissemination of racist remarks. The applicant argued that his conviction violated his right to freedom of expression under Article 10 of the Convention. The Court considered whether the interference was "necessary in a democratic society" for "the protection of the reputation or rights of others", and subsequently found that it was not (Eur. Court HR, judgment of 23 September 1994, Series A no. 298, page 26, paragraph 37).

190. The Court noted "the vital importance of combating racial discrimination in all its forms and manifestations" and the "general importance" of that issue as illustrated by the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Thus, the Court explained that the object and purpose of the UN Convention carry "great weight in determining whether the applicant's conviction, which – as the Government have stressed – was based on a provision enacted in order to ensure Denmark's compliance with the UN Convention, was 'necessary' within the meaning of Article 10 § 2" (*Jersild* at page 22, paragraph 30). It was significant to the Court that the objectionable statements were not uttered by the applicant, but rather, he assisted in their dissemination by broadcasting them on his television news programme. The Court also noted the immediate and powerful effect of the audio-visual media and the intended audience (*id.* at pages 23 and 25, paragraphs 31 and 34). "[A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas" (*id.* at page 24, paragraph 31). The Court took into consideration the specific comments of the applicant during the programme that sought to place the offensive statements of the Greenjackets in context. As a result, the Court concluded that the programme, taken as a whole, did not objectively have as its purpose "the propagation of racist views and ideas"; to the contrary, it sought to expose, analyse and explain a matter of great public concern (*id.* at page 24, paragraph 33).

191. Turning to the facts of this case, the Chamber takes particular note of the prevailing circumstances in Bosnia and Herzegovina and its status as a country seeking to promote the peace implementation process. The television programme at issue was broadcast by RTV Sveti Georgije only one day after extensive violent protests in the city centre of Banja Luka. In the context of preventing the groundbreaking ceremony for laying the cornerstone to reconstruct the former Ferhadija mosque, these protests can be seen as an attack against the efforts of peaceful reconciliation and a manifestation of intolerance of the religious beliefs of others. None the less, merely one day later, RTV Sveti Georgije voluntarily chose to broadcast a live television programme in which it invited residents of Banja Luka to call in and comment, without restriction, on the events of the previous day and the reactions of politicians to these events. RTV Sveti Georgije also invited as its studio guest a person of Serb origin who participated in the protests. By the nature of this programme format, RTV Sveti Georgije had no control over the viewpoints of the callers who offered their comments live on the air during the programme of 8 May 2001. However, RTV Sveti Georgije was in theory capable of representing various viewpoints through other studio guests or through its programme anchor. The anchor of the call-in programme did not himself make any inappropriate comments, but neither did he attempt to contradict, restrict, or reprimand callers for any comments that objectively could be considered offensive or insulting to viewers who were members of the Islamic, Bosniak, and international communities. As a result, the programme, which lasted for 75 minutes, exclusively disseminated the viewpoints of persons who strongly and passionately supported the violent protests of 7 May 2001.

192. RTV Sveti Georgije has stated repeatedly that its purpose in broadcasting the programme of 8 May 2001 was to open a dialogue on the causes and consequences of the violent events of the previous day. The Chamber accepts that this purpose has journalistic value, particularly since the events in question are a matter of great public concern. None the less, the specific timing and structure of this programme seem to detract from its stated purpose. A dialogue necessarily involves the expression of various viewpoints on a particular issue, and it is most effective when the participants are able to distance themselves somewhat from their emotions. Additionally, the broadcast of 8 May 2001 was RTV Sveti Georgije's third occasion of broadcasting programmes found to violate Articles 1.1 and 1.3 of the Broadcasting Code of Practice for carrying a clear and immediate risk of inciting ethnic or religious hatred or causing public harm and misrepresenting the belief and practice of religious groups (see paragraphs 36, 38, 74 above). Taking into consideration that the owner of RTV Sveti Georgije admitted that a live, unedited, uncensored, call-in television programme

is a "risky" format and that the station took few, if any, precautions to actively distance itself from the ugly statements made during the programme (see paragraphs 46, 70-71 above), the Chamber finds that the programme, taken as a whole, objectively could be seen as promoting incitement to violence and as propagating religious and ethnic intolerance.

193. In order to maintain its compliance with international human rights instruments applied in the country (see paragraphs 91-92 above), Bosnia and Herzegovina must provide a mechanism and legal regime to sanction improper attacks on the religious beliefs and practices of its citizens and the promotion of racial hatred and discrimination in any form. In this respect, the Chamber recalls that the CRA is the national body charged with regulating broadcasting and the media on behalf of Bosnia and Herzegovina, and it appears to take its duties seriously. The Chamber is satisfied that in reaching its decision of 17 May 2001, the CRA considered the relevant facts and adequately applied the governing law. Moreover, in determining that RTV Sveti Georgije had committed a breach of the applicable law that warranted sanctions, the CRA acted within the margin of appreciation.

194. Upon finding that RTV Sveti Georgije had breached the Broadcasting Code of Practice and the Terms and Conditions of its provisional broadcasting license, the CRA was authorised and obliged to sanction RTV Sveti Georgije (see paragraphs 94, 100, 107, 119 above). In its decision of 17 May 2001, the CRA imposed the sanction of a 90-day suspension of the provisional broadcasting license. This decision was based upon the fact that on two previous occasions, RTV Sveti Georgije had committed similar grave and multiple violations of the Broadcasting Code of Practice and the Terms and Conditions of its provisional broadcasting license. In those two previous decisions of 4 February 1999 and 13 May 1999, the CRA imposed a fine upon RTV Sveti Georgije in the maximum amount of 1000 KM (see paragraphs 37, 39 above). Moreover, in each of those previous decisions, RTV Sveti Georgije was expressly warned that, "any further violation of a similar nature will entail a more severe sanction". The Terms and Conditions of RTV Sveti Georgije's license also provide that "breaches of the Broadcasting Code of Practice or other terms of a broadcast[ing] license, unless otherwise resolved, will lead to appropriate and proportionate sanctions", of which "suspension of license" is listed directly after "imposition of financial penalties" (see paragraph 35 above). Under these circumstances, the CRA's decision of 17 May 2001 to suspend RTV Sveti Georgije's provisional broadcasting license for 90 days was a "proportionate" means to pursue the stated legitimate aims. Since the subsequent revocation of RTV Sveti Georgije's provisional broadcasting license resulted from its failure to comply with the decision of 17 May 2001 after that decision became final and binding, it too can be considered a "proportionate" means.

195. The Chamber therefore concludes that the suspension and later revocation of RTV Sveti Georgije's provisional broadcasting license by the CRA was proportionate to the legitimate aims of protecting the rights of others, protecting the public safety, and preventing disorder or crime. That being so, the interference with expression was "necessary in a democratic society".

d. Conclusion as to freedom of expression

196. As explained above, the Chamber has determined that the interference with the applicant's freedom of expression was "prescribed by law", pursued a legitimate aim, and was "necessary in a democratic society", within the meaning of paragraph 2 of Article 10 of the Convention. Accordingly, the Chamber concludes that the respondent Party has not violated the applicant's rights guaranteed under Article 10 of the Convention.

2. Peaceful enjoyment of possessions (Article 1 of Protocol No. 1 to the Convention)

197. The applicant alleges that the respondent Party has violated its right to peaceful enjoyment of possessions. The respondent Party contends that a provisional broadcasting license is a use right rather than a property right and, in addition, that the CRA has complied with Article 1 of Protocol No. 1 to control the use of property in accordance with the general interest.

198. Article 1 of Protocol No. 1 to the Convention states as follows:

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

199. Article 1 of Protocol No. 1 comprises three distinct rules. The first rule, which is of a general nature, enshrines the principle of peaceful enjoyment of property. It is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to the condition that the deprivation must be in the public interest and subject to conditions provided for by law and by the general principles of international law. It appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. It is contained in the second paragraph (see, *e.g.*, case no. CH/96/29, *Islamic Community*, decision on admissibility and merits of 11 June 1999, paragraph 190, Decisions January-July 1999).

200. Assuming that the Chamber were to find that the applicant's provisional broadcasting license constituted a "possession" or "property" for the purposes of Article 1 of Protocol No. 1, the Chamber would then consider whether the interference, deprivation, or controlled use of that possession or property complied with the requirements of the Convention. For the reasons explained above with respect to paragraph 2 of Article 10 of the Convention, the Chamber concludes that the respondent Party has not violated the rights of the applicant protected by Article 1 of Protocol No. 1 because the CRA's suspension and later revocation of the applicant's provisional broadcasting license were "subject to the conditions provided by law" and "in the public interest". In the alternative, the CRA was acting to enforce laws "necessary to control the use of property" for the "general interest". In reaching this conclusion, it is not necessary for the Chamber to decide whether the applicant's provisional broadcasting license constitutes a protected "possession" or "property", within the meaning of Article 1 of Protocol No. 1; therefore, the Chamber expressly leaves this question open.

3. Right to access to courts (Article 6 of the Convention)

201. The applicant alleges that its right protected by Article 6 of the Convention has been violated. It appears to argue that in the proceedings before the CRA, which form the subject of this application, RTV Sveti Georgije was not granted a fair hearing by an impartial tribunal established by law. The applicant points out certain indications of procedural irregularities and further challenges the legality of the appellate process within the CRA. The CRA maintains that it has in all ways fully complied with the requirements of Article 6 of the Convention. The OHR as *amicus curiae* argues that in the context of this case, there is no "right" to a provisional broadcasting license, and if there is, it cannot be characterised as a "civil right". None the less, if the Chamber decides that Article 6 does apply to

proceedings before the CRA, then the OHR concurs that those procedures have in all ways fully complied with the requirements of Article 6 of the Convention.

202. Paragraph 1 of Article 6 of the Convention states as follows:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

a. Determination of a civil right

203. When it has considered whether a particular case concerns a "civil right" for the purposes of Article 6 of the Convention, the Court has set forth certain well-established governing principles. Firstly, the phrase "civil rights and obligations" in paragraph 1 of Article 6 "covers all proceedings the result of which is decisive for private rights and obligations" (Eur. Court HR, *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, page 39, paragraph 94). Accordingly, "a tenuous connection or remote consequences" are not sufficient for Article 6; there must be a direct relationship between the proceedings and the right at issue (Eur. Court HR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, page 21, paragraph 47). Secondly, "the dispute must be genuine and of a serious nature," and it may relate to the existence, scope, or exercise of the right at issue (Eur. Court HR, *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, page 17, paragraph 37). Thirdly, the concept of "civil rights and obligations" is determined by only the character of the right at issue (Eur. Court HR, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, page 30, paragraph 90). "Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned" (*id.* at page 30, paragraph 89).

204. The Court has taken a case by case approach to the determination of "civil rights" within the meaning of paragraph 1 of Article 6 of the Convention. In each of the following four cases mentioned below, which are analogous to the present case, the Court has held that the rights at issue were "civil rights"; thus, paragraph 1 of Article 6 was applicable to the challenged proceedings. The rights to continue to operate a private medical clinic and to continue to practice the medical profession were considered "civil rights" (Eur. Court HR, *König v. Germany*, judgment of 28 June 1978, Series A no. 27, page 32, paragraph 95). It was significant in the *König* case that the rights at issue involved "a commercial activity carried on with a view to profit"; the fact that the rights were subject to administrative authorisation and supervision by the authorities to protect the public interest, *i.e.*, public health, did not detract from the private character of the rights at issue (*id.* at pages 31-32, paragraphs 92-94). The refusal of a licence to operate a petrol station also gave rise to "civil rights" (Eur. Court HR, *Benthem v. Netherlands*, judgment of 23 October 1985, Series A no. 97, page 16, paragraph 36). In *Benthem*, the Court noted that the right to the license claimed by the applicant was a necessary condition for the exercise of his desired business activities, and as such, "it was closely associated with the right to use one's possessions in conformity with the law's requirements". Since there were "direct links between the grant of the license and the entirety of the applicant's commercial activities", the Court concluded that the right at stake was "civil" (*id.*).

205. The Court has found the revocation of a license to operate a taxi and interurban traffic business to involve "civil rights" (Eur. Court HR, *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, page 16, paragraph 38). The Court noted that the license obtained conferred a "right" upon the applicant, even though the license was subject to certain prescribed conditions and the possibility of revocation by the authorities competent to supervise public transportation services (*id.* at page 15, paragraph 34). "The maintenance of the licence to which the applicant claimed to be entitled was one of the conditions for the exercise of his business activities." Those business activities were commercial, carried out in order to earn profits, and based upon a contractual relationship between the licence-holder and his customers (*id.* at page 16, paragraph 37). Lastly, the

revocation of a license to sell alcohol gave rise to "civil rights", even though the license was subject to conditions and supervision by competent administrative authorities (Eur. Court HR, *Tre Traktörer AB v. Sweden*, judgment of 7 July 1989, Series A no. 159, page 19, paragraph 44). The Court noted that under the applicable domestic law, the applicant could argue it was entitled to continue to operate its business under the license unless it violated the conditions (*id.* at page 18, paragraph 40). The license had allowed the applicant to sell alcoholic beverages, a private commercial activity with the object to earning profits, and the withdrawal of the license had adversely affected the goodwill of the remainder of its restaurant business (*id.* at page 19, paragraph 43).

206. The Chamber considers that the proceedings conducted by the CRA which led to the suspension and later revocation of RTV Sveti Georgije's provisional broadcasting license were determinative and decisive for the exercise of RTV Sveti Georgije's continued broadcasting activities. The dispute between RTV veti Georgije and the CRA over RTV Sveti Georgije's compliance with the terms and conditions of its license was further, in the view of the Chamber, genuine and of a serious nature.

207. With respect to the character of the right involved in the proceedings before the CRA, the Chamber observes that in the present case the applicant's desired business activity, to operate a radio and television broadcasting station, is a commercial activity that is carried out for the purpose of gaining profits. It is also a business activity that has, at all times relevant to this case, required the applicant to possess a valid broadcasting license issued by the IMC or CRA. Although the applicant's broadcasting license was expressly "provisional", *i.e.*, temporary in duration, without it the applicant could not conduct his broadcasting business at all. Certainly, the applicant's provisional broadcasting license was subject to conditions and to supervision by the IMC or CRA, as the administrative authority charged with regulating broadcasting and the media according to the public interest. None the less, as in the cases cited above, the conditional and temporal nature of the broadcasting licence is not determinative in this case, nor is the fact that the IMC or CRA discharged public functions in supervising the activities authorised by the broadcasting license. The Chamber considers that there were direct links between the grant of the provisional broadcasting license and RTV Sveti Georgije's private commercial activities. Upon obtaining that broadcasting license, it was also closely associated with RTV Sveti Georgije's right to use its possessions, *e.g.*, its broadcasting equipment, in conformity with the requirements of the law.

208. Therefore, in accordance with the case law of the European Court of Human Rights discussed above, the Chamber concludes that the challenged proceedings before the CRA involved the determination of the applicant's "civil rights and obligations", within the meaning of paragraph 1 of Article 6 of the Convention. As such, Article 6 is applicable to those proceedings, and the Chamber must next consider whether those proceedings afforded the applicant the required protections.

b. Tribunal established by law

209. Paragraph 1 of Article 6 of the Convention requires "an independent and impartial tribunal established by law" to make the determination of civil rights and obligations. The applicant has challenged the legality of the activities by the CRA because the Parliamentary Assembly of Bosnia and Herzegovina has not yet adopted the draft Law on Telecommunications, which would authorise and regulate the CRA.

210. As explained above, the IMC and CRA have been acting under the authority of the Decisions of the High Representative of 11 June 1998 and 2 March 2001, respectively. These decisions, which have the force of law in Bosnia and Herzegovina, expressly "establish" the IMC (Paragraph 1 of the Decision of 11 June 1998) and then combine it with the TRA to form the CRA, "produc[ing] a single communications regulator having jurisdiction over both broadcasting and telecommunications" (Article 1.1 of the Decision of 2 March 2001). The Decisions further describe in detail the structure of the agency (Paragraphs 7-8 of the Decision of 11 June 1998; Article 2 of the Decision of 2 March 2001). It follows that the IMC and CRA have been properly "established by law".

c. Independent and impartial tribunal

211. The Chamber notes that in many countries of the world, administrative bodies are composed of two or more levels or instances that decide upon initial disputes and appeals. However, after the parties participate in decision-making before the administrative body, they usually have the right to file an appeal to a classical court against the final decision of the administrative body. The Law on the Court of Bosnia and Herzegovina provides that the Court of Bosnia and Herzegovina "is competent to decide actions taken against final administrative acts or silence of administration of the institutions of Bosnia and Herzegovina" (see paragraph 123 above). Therefore, providing the Court of Bosnia and Herzegovina had been operative (which it was not during the relevant time period in the present case), after proceedings before the Enforcement Panel and the Council, a broadcaster would have been entitled to file an appeal against a final administrative decision of the CRA to that Court. However, as there was no operative Court of Bosnia and Herzegovina during the relevant time period, the CRA must on its own fulfil the requirements of Article 6 of the Convention in order for the proceedings in RTV Sveti Georgije's case to be in compliance with Article 6 of the Convention.

212. Although the CRA is clearly not a court in the classical meaning of the word, the European Court of Human Rights has explained that a non-judicial body may be a "tribunal" within the meaning of paragraph 1 of Article 6, provided it fulfils the requisite characteristics of a "tribunal" described by the Court.

> "According to the Court's case-law, a 'tribunal' is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of further requirements— independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure— several of which appear in the text of Article 6 § 1 itself" (Eur. Court HR, *Belilos v. Switzerland*, judgment of 29 April 1988, Series A no. 132, page 29, paragraph 64) (citations omitted).

213. With respect to independence, the European Court of Human Rights has elaborated as follows:

> "In determining whether a body can be considered to be 'independent' — notably of the executive and of the parties to the case —, the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" (Eur. Court HR, *Campbell and Fell v. United Kingdom*, judgment of 28 June 1984, Series A no. 80, pages 39-40, paragraph 78) (citations omitted).

214. The Decision of 2 March 2001 at Article 4 states that "the CRA shall be an independent body with the status of a legal person in Bosnia and Herzegovina". Furthermore, the applicant has conceded that the "CRA is an institution of Bosnia and Herzegovina, as an independent body with the status of a legal person" (see paragraph 142 above). Certainly, both bodies of the CRA — *i.e.*, the Enforcement Panel and the Council — are separate and independent from the executive branch of the Government of Bosnia and Herzegovina. However, after a complaint is initiated against an individual broadcaster by the relevant department or division of the CRA, the Enforcement Panel decides upon that complaint. The Enforcement Panel implements the governing laws and determines appropriate sanctions for any violations of the licensing conditions or the laws (Article 2.4 of the Decision of 2 March 2001).

215. When the proceedings before an adjudicatory body fail in some respect to comply fully with the requirements of paragraph 1 of Article 6, the European Court of Human Rights has found that such defects may be cured if those proceedings are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1" (Eur. Court HR, *Bryan v. United Kingdom*, judgment of 22 November 1995, Series A no. 335, page 16, paragraph 40; *see also Zumtobel v. Austria*, judgment of 21 September 1993, Series A no. 268, page 13, paragraphs 29-30). In the present case, an appeal against a decision of the Enforcement Panel may be filed with the Council. However, according to the submissions of the CRA, the Council "does not re-open a

discussion on the merit[s] of the case". The Council only determines whether proper procedures were followed, whether an error of law occurred, or whether entirely new evidence has been presented (see paragraph 28 above). The Chamber recalls that the OHR as *amicus curiae* has argued that the Decision of the High Representative of 2 March 2001 "does not restrict in any manner the extent, nature, content, form or scope of any appeal to the Council" (see paragraph 152 above). However, the Chamber finds this argument unpersuasive in light of the explicit statements of the CRA in its submissions to the Chamber and in its publicly distributed materials, that the Council does not conduct a full appellate review (see paragraphs 28, 132 above). Therefore, the appeal to the Council could not cure any possible procedural defects in the proceedings before the Enforcement Panel because the Council lacked the power required by paragraph 1 of Article 6.

216. According to the European Court of Human Rights, "[t]he existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge on a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect" (Eur. Court HR, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, page 21, paragraph 47). In any event, "[t]he personal impartiality of members of a body covered by Article 6 is to be presumed until there is proof to the contrary" (*Campbell* at page 41, paragraph 84). There are no allegations or evidence in the present case that individual members of the Enforcement Panel or Council of the CRA have acted with any personal bias.

217. Under the objective test, the question is whether "there are ascertainable facts which may raise doubts as to [a judge's] impartiality. In this respect even appearances may be of a certain importance" (*Hauschildt* at page 21, paragraph 48). The Chamber recalls that the European Court of Human Rights has recognised that the appearance of proper functions and organisation are important for an "independent and impartial tribunal" because the lack of such appearance "may undermine the confidence which must be inspired by the courts in a democratic society" (Eur. Court HR, *Belilos v. Switzerland*, judgment of 29 April 1988, Series A no. 132, page 30, paragraph 67).

218. In the present case, the Council serves as the "appellate body for CRA decisions", including decisions made by the Enforcement Panel (Article 2.3 of the Decision of 2 March 2001). However, the Council also guides the CRA on "strategic issues of policy implementation". Moreover, the Council adopts the governing codes, rules, regulations, and guidelines in the field of broadcasting and telecommunications (Article 2.3 of the Decision of 2 March 2001). Both the Council and the Enforcement Panel are organs of one legal entity — the CRA. In this manner, the CRA, as one agency, and particularly the Council, may be seen to make the laws, interpret the laws, and enforce the laws in the field of broadcasting and telecommunications. Without the possibility of any appeal against a final decision of the CRA to an independent external tribunal with full jurisdiction, this structure lacks the appearance of independence and impartiality required for a "tribunal", within the meaning of paragraph 1 of Article 6.

219. For these reasons, the Chamber concludes that the CRA, as a singular administrative body, fails the test of appearing to be an "independent and impartial tribunal" within the meaning of paragraph 1 of Article 6 of the Convention. If there had been a court with proper procedural guarantees and full jurisdiction functioning during the relevant time period in Bosnia and Herzegovina that could have decided upon an appeal filed against the challenged final administrative decisions of the CRA, then the Chamber would be satisfied that the CRA, as an administrative body, has acted within the scope of its competence and its proceedings have been entirely proper and fair.

d. Public hearing

220. According to the provisions of paragraph 1 of Article 6, parties to civil disputes are, in the absence of an express or tacit waiver of their rights, "entitled to have the proceedings conducted in public", unless one of the exceptions contained in the second sentence of paragraph 1 applies to the particular circumstances of the case. (Eur. Court HR, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, page 25, paragraph 59). "[T]he holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6"

(Eur. Court HR, *Diennet v. France*, judgment of 26 September 1995, Series A no. 325-A, page 14, paragraph 33).

> "This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention" (*id.* at pages 14-15, paragraph 33).

221. Although in certain circumstances a departure may be justified, "[n]evertheless, the principle of publicity must be fully respected at least in one instance dealing with the merits of a case" (Eur. Court HR, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, page 33, paragraphs 136-137). However, this does not mean that every civil dispute must have a public hearing; it means there must be at least one opportunity for a public hearing, unless the exceptions in the second sentence of paragraph 1 of Article 6 are applicable. Accordingly, the Court has confirmed that tribunals, which expressly provide in their rules for the possibility of a public hearing upon the request of one of the parties or the tribunal, satisfy the public hearing requirement of Article 6, even when most proceedings take place without a public hearing (see Eur. Court HR, *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A no. 263, page 20, paragraph 58). This is particularly so when the subject matter of the dispute is highly technical (*id.*).

222. In this case, the Chamber recalls that neither the Procedure for Handling Cases, nor any other rules, regulations, procedures, or guidelines of the IMC and CRA provide for any opportunity for a public hearing. Articles 10 and 12 of the Procedure for Handling Cases, concerning decisions by the Enforcement Panel and Council, respectively, state that "[c]ases shall be decided on written or received material. Oral evidence may be heard in exceptional circumstances" (see paragraphs 120, 122 above). The OHR as *amicus curiae* has argued that since no IMC or CRA rule prevents public hearings, there is no reason to believe that the hearings before the CRA are "not open to the public" (see paragraph 152 above). Neither the respondent Party nor the *amicus curiae* have argued that the exceptions to the publicity requirement contained in the second sentence of paragraph 1 of Article 6 apply to the challenged proceedings before the CRA, and the Chamber also does not consider the exceptions applicable in the present case.

223. According to the record before the Chamber, RTV Sveti Georgije requested an oral hearing before the Council in its appeal of the decision of the Enforcement Panel of 17 May 2001. The Council granted that request, and Mr. Boris Martinovic verbally presented the appeal to the Council (see paragraphs 76-77 above). RTV Sveti Georgije also requested an oral hearing before the Enforcement Panel with respect to the proceedings concerning a possible violation of the suspension order of 17 May 2001. This request was not granted because "there were no special circumstances which warranted the granting of such request"; thereafter, the Enforcement Panel issued its decision of 27 July 2001 in a *per capsulam* procedure (see paragraphs 81, 83 above). In its appeal against the decision of 27 July 2001, RTV Sveti Georgije once again requested an oral hearing before the Council. The Council granted the request, but the representative of RTV Sveti Georgije inexplicably failed to appear at the oral hearing (see paragraph 85 above). Considering these facts, there is no dispute that the CRA provided RTV Sveti Georgije with an opportunity to request an oral hearing at each stage in its proceedings, although it did not grant all those requests. However, there is no evidence before the Chamber that any of these oral proceedings were or could have been open and accessible to the public.

224. Certainly the opportunity for an oral hearing is one aspect of the requirement of a "public hearing", but absent access to the public, an oral hearing lacks the element of publicity, which is essential to the judicial guarantees provided by paragraph 1 of Article 6. The Chamber finds the lack of a prohibition of a public hearing in the published rules and procedures of the CRA unpersuasive. Therefore, the Chamber concludes that the mere opportunity for a private oral hearing before the CRA does not satisfy the requirement of a "public hearing", within the meaning of paragraph 1 of Article 6 of the Convention. As the Chamber has already commented, if the Court of Bosnia and Herzegovina had been functioning during the relevant time period and had provided a public hearing and proper

procedural guarantees, then the Chamber would be satisfied that the administrative proceedings before the CRA had been proper and fair.

225. Since the Chamber has found that the CRA is not an "independent and impartial tribunal" and that the CRA does not provide a "public hearing", it is not necessary for the Chamber to consider further the other requirements set forth in paragraph 1 of Article 6 of the Convention.

e. Conclusion as to Article 6 of the Convention

226. The Chamber concludes that the challenged proceedings before the CRA involved the determination of the applicant's "civil rights and obligations"; therefore, Article 6 of the Convention is applicable to those proceedings. The Chamber further concludes that the CRA is "established by law"; however, the CRA is not an "independent and impartial tribunal", and it does not provide a "public hearing", within the meaning of paragraph 1 of Article 6. Accordingly, the respondent Party has violated the rights of the applicant protected by Article 6 of the Convention.

4. Right to an effective remedy (Article 13 of the Convention)

227. The applicant has alleged that the respondent Party violated its rights protected by Article 13 of the Convention. Article 13 of the Convention states as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

228. Taking into consideration its conclusion that the respondent Party has violated the applicant's rights protected by Article 6 of the Convention, the Chamber decides that it is not necessary separately to examine the application under Article 13 of the Convention. The reason for this is that the requirements of Article 13 are less strict than, and in the context of this case are absorbed by, the requirements of paragraph 1 of Article 6 of the Convention.

VIII. REMEDIES

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

230. The applicant has requested compensation for pecuniary damages in the amount of 1,124 Convertible Marks (*Konvertibilnih Maraka*, "KM") per day, commencing on 17 June 2001, and non-pecuniary damages in an unspecified amount.

231. The Chamber has found no violation of the applicant's right to freedom of expression as protected by Article 10 of the Convention, but it has found a violation of the applicant's right protected by Article 6 of the Convention. In particular, the Chamber has found that the respondent Party violated Article 6 of the Convention because the disputed proceedings before the CRA concerning the applicant's provisional broadcasting license were not decided by "an independent and impartial tribunal" and the applicant had no opportunity for a "public hearing". The Chamber further observes that if there had been a fully functioning Court of Bosnia and Herzegovina during the relevant time period with broad jurisdiction to deal with all questions of fact and law and with all appropriate procedural guarantees to which the applicant could appeal the final administrative decisions by the CRA, then there would be no violation of Article 6 in this case.

232. The Chamber also notes that the disputed proceedings in this case concern the CRA's suspension and later revocation of the applicant's provisional broadcasting license. However, on 12 October 2001, the CRA issued a decision denying RTV Sveti Georgije's application for a long-term broadcasting license, which would have rendered the provisional broadcasting license out of force had it still been valid at that time. The CRA issued the decision of 12 October 2001 in accordance

with the Merit-Based Competitive Process for the Awarding of Long-Term Broadcasting Licenses. In that decision, the CRA did not take into consideration the applicant's prior failures to comply with the Broadcasting Code of Practice because RTV Sveti Georgije had failed to meet the minimum requirements for programme quality, financial information and viability, and technical operations. The decision of 12 October 2001 was confirmed by the decision of the CRA Council of 7 December 2001 (see paragraphs 88-90 above).

233. In light of these facts and the finding of no violation of Article 10 of the Convention, the Chamber does not find it appropriate to award the applicant compensation for pecuniary damages. Nor, in the circumstances, will the Chamber award the applicant compensation for non-pecuniary damages. In the context of this case, the Chamber's decision finding a violation of the applicant's rights protected by paragraph 1 of Article 6 of the Convention constitutes sufficient satisfaction.

IX. CONCLUSIONS

234. For the above reasons, the Chamber decides,

1. unanimously, that the application is admissible against Bosnia and Herzegovina in its entirety;

2. by 10 votes to 4, that Bosnia and Herzegovina did not violate Article 10 of the Convention;

3. by 10 votes to 4, that Bosnia and Herzegovina did not violate Article 1 of Protocol No. 1 to the Convention;

4. by 12 votes to 2, that the failure to provide the applicant with a public hearing by an independent and impartial tribunal for the determination of its civil rights and obligations violated the applicant's rights protected by paragraph 1 of Article 6 of the Convention, Bosnia and Herzegovina thereby being in breach of Article I of the Human Rights Agreement;

5. unanimously, that it is not necessary separately to examine the application under Article 13 of the Convention; and

6. by 8 votes to 6, that the decision finding a violation of the applicant's rights protected by paragraph 1 of Article 6 of the Convention constitutes sufficient satisfaction.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Concurring opinion of Mr. Andrew Grotrian
Annex II Concurring opinion of Mme. Michèle Picard, joined by Mr. Andrew Grotrian
Annex III Partly dissenting opinion of Mr. Manfred Nowak, joined by Mr. Dietrich Rauschning
Annex IV Dissenting opinion of Mr. Miodrag Pajić
Annex V Dissenting opinion of Mr. Vitomir Popović

ANNEX I

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mr. Andrew Grotrian.

CONCURRING OPINION OF MR. ANDREW GROTRIAN

1. I agree with the opinion of the Chamber that the challenged proceedings before the CRA involved the determination of the applicant's "civil rights and obligations" within the meaning of Article 6 paragraph 1 of the Convention, and that Article 6 was therefore applicable to those proceedings (see paragraph 208 above). However in view of the importance of the matter I would like to add some further thoughts to the Chamber's reasoning.

2. The provisional licence held by the applicant gave it the right, albeit temporarily, to carry on its business as a television broadcaster, subject to the conditions of the licence and the applicable law. The CRA proceedings, which concerned the possible withdrawal or suspension of that right for alleged breaches of the relevant conditions and rules, involved the "determination" of a dispute or "*contestation*" over the right for the purposes of Article 6 since the matters at issue were of a kind which "inherently lend themselves to judicial decision" (Eur. Court HR, *Van Marle and Others v. Netherlands*, judgment of 26 June 1986, Series A no. 101, page 12, paragraph 35). Furthermore, at least in today's conditions where the existence of public broadcasting monopolies has become exceptional and probably illegitimate under Article 10 of the Convention (see Eur. Court HR, *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A no. 276), and private commercial broadcasting is a common feature of society, the conduct of a private broadcasting business can be regarded as analogous to other forms of private commercial activity carried on subject to licence. The right to conduct such a business can therefore be regarded as being of a private law nature and therefore "civil" in character for the reasons given in paragraph 207 above.

3. The Office of the High Representative pointed out in its *amicus curiae* submission, that the licensing of broadcasting activities differs from the licensing of other activities in that it involves the allocation of a scarce natural resource, the radio frequency spectrum, and that there was no "right" to a licence even if all legal criteria were fulfilled. These submissions may have validity in relation to the allocation of licences. However it does not necessarily follow from the Chamber's decision that Article 6 would apply to other functions of the CRA, such as the allocation of licences. The right at issue in the present case was the right conferred by the licence. Different considerations may arise in the allocation procedure, which involves, amongst other things, an assessment of the qualifications of competing applications for a limited number of licences (see paragraph 27 above). I would therefore reserve my opinion on whether, and if so how, Article 6 may apply to other functions of the CRA.

(signed)
Andrew Grotrian

ANNEX II

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the concurring opinion of Mme. Michèle Picard, joined by Mr. Andrew Grotrian.

CONCURRING OPINION OF MME. MICHÈLE PICARD, JOINED BY MR. ANDREW GROTRIAN

1. I agree with the majority of the members that there has been a violation of Article 6 of the European Convention on Human Rights in regard to the issue of the independence and impartiality of the CRA. However I think that the reasoning of the majority is not very clear. From the subjective test, there is no doubt that the CRA is independent from the executive power and that its organs acted impartially towards the applicant, as the applicant recognizes itself. But from the objective test, there is a structural defect in the CRA that was not totally explained in our decision. The decision starts to examine whether the Enforcement Panel is independent and then examines whether the Council is impartial. In my opinion, it is the whole system that lacks the appearance of independence and impartiality. The CRA is an "independent administrative body" which makes the laws, interprets the laws, applies the laws, and finally decides on the conformity of its own decisions with the laws. This confusion of powers in the same organ is sufficient to cast doubt on the impartiality of the whole institution.

2. Moreover, even if we take into account the fact that the members of the Enforcement Panel are different from the members of the Council, I notice that there is no separation at all in the administrative structure of the CRA. For example, the IMC decision of 30 August 1999 issuing the provisional broadcasting license to RTV Sveti Georgije is signed by the same person as the decisions of the IMC Enforcement Panel of 4 February 1999 and of 13 May 1999 fining RTV Sveti Georgije, as the decision of the IMC Council of 9 June 1999 on appeal or as the decision of the IMC Director General of 6 October 1999. Although this person does not have any decision-making power, this functional situation, that is, the lack of separation in the administrative structure of the IMC/CRA, would be enough to give the whole institution an appearance of partiality.

(signed)
Michèle Picard

(signed)
Andrew Grotrian

ANNEX III

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Manfred Nowak, joined by Mr. Dietrich Rauschning.

PARTLY DISSENTING OPINION OF MR. MANFRED NOWAK, JOINED BY MR. DIETRICH RAUSCHNING

1. I disagree with the majority that the respondent Party has violated the rights of the applicant protected by Article 6 of the Convention.

2. Firstly, I doubt whether the broadcasting licensing system established by the OHR for Bosnia and Herzegovina determines civil rights and obligations in the sense of Article 6. I agree with the legal opinion expressed by the OHR as *amicus curiae* that "licensing of broadcasting operations is unique from other kinds of licensing" (see paragraph 149 above). Article 10(1) of the Convention explicitly authorises States to require the licensing of broadcasting, television or cinema enterprises, which is a traditional public law function. As such, it needs to be distinguished from the license to run a medical clinic and other licenses which the European Court of Human Rights, in highly disputed inductive case law, has accepted as falling under the concept of civil rights. When the OHR established this regime for broadcasting licenses, it followed a two-step approach. In the first step, all broadcasters operating at that time in Bosnia and Herzegovina were granted a provisional temporary license subject to certain conditions, such as compliance with the Broadcasting Code of Practice. All broadcasters were fully aware that any advocacy of national, racial or religious hatred was prohibited by the CRA Guidelines and might lead to sanctions, including the revocation of the provisional license. In the second step, those broadcasters that complied in practice with the Broadcasting Code of Practice, the CRA Guidelines and other legal requirements, such as programme quality, financial viability and technical operations, are eligible for a long-term broadcasting license. As the frequency spectrum is a limited natural resource, only a limited number of broadcasters will qualify for a long-term license. Since no broadcaster can assert a civil right to a long-term license, the provisional license also does not grant any civil right. Consequently, Article 6 is not applicable in the proceedings regarding the granting or the revocation of both provisional and long-term broadcasting licenses.

3. Secondly, I disagree with the reasoning of the majority that the CRA does not qualify as an independent and impartial tribunal as required by Article 6 (if this provision was deemed to be applicable). The fact that the members of the respective bodies of the CRA, the Enforcement Panel and the Council, were appointed by the OHR and consist of well-known and professional international and Bosnian media experts who are independent from the executive branch of the Government of Bosnia and Herzegovina, as the Chamber explicitly recognises, is the best guarantee, under the present political circumstances prevailing in the country, for an independent and impartial broadcasting licensing regime. During the proceedings, no one argued that any of the individual members of the Enforcement Panel or Council acted partially or were subjected to any inappropriate outside pressure or appeared not to be independent.

4. In its argument against the appearance of independence and impartiality of the CRA, the majority highlights that "both the Council and Enforcement Panel are organs of one legal entity — the CRA". If this argument were valid, even the Human Rights Chamber itself, since it allows for appeals against Panel decisions to be decided by the Plenary Chamber, and considering that both Panels and the Plenary Chamber are part of the same singular legal entity, could not be considered an independent and impartial tribunal. Since it is not unusual in many countries that two instances in administrative or judicial proceedings are part of the same legal entity, this cannot be a decisive criterion in this case. Moreover, the majority combines the separate functions of the Council and the Enforcement Panel and concludes that the structure of the CRA "lacks the appearance of independence and impartiality" because "the CRA, as one agency, … may be seen to make the laws, interpret the laws, and enforce the laws in the field of broadcasting and telecommunications" (see paragraph 218 above). In *H v. Belgium*, the European Court of Human Rights specifically rejected such an argument (Eur. Court HR, judgment of 30 November 1987, Series A no. 127-B, pages 34-35, paragraph 50). In that case, it was argued that a disciplinary body for *advocats* could not be a

"tribunal" because it "perform[ed] many functions— administrative, regulatory, adjudicative, advisory and disciplinary". The Court explained that "this kind of plurality of powers cannot in itself preclude an institution from being a 'tribunal'" (*id.*). In the present case, the majority should rather have looked into the criteria developed by the European Court of Human Rights for assessing the independence of an administrative authority in order for it to qualify as a "tribunal" in the sense of Article 6 of the Convention, such as the duration of the members' terms of office, the organisational relationship with the executive branch, and the existence of guarantees against outside pressures. As has been stated above, there is no indication that the CRA bodies would not fulfil these criteria.

5. For these reasons I respectfully dissent.

(signed)
Manfred Nowak

(signed)
Dietrich Rauschning

ANNEX IV

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Miodrag Pajić.

DISSENTING OPINION OF MR. MIODRAG PAJIĆ

1. I disagree with the opinion of the majority that there has been no violation of Article 10 of the European Convention on Human Rights in this case. Namely, my impression at the public hearing was that the programme, taken as a whole, could not objectively "be seen as promoting incitement to violence and as propagating religious and ethnic intolerance" (see paragraph 192 above). On the contrary, I am of the opinion that the programme sought to present, analyse, and explain issues and dilemmas of great interest and concern to the public. The programme was broadcast on 8 May 2001, its purpose being to discuss the protests, that is, the events of 7 May 2001. It could not have any impact on provoking riots in Banja Luka, which was governed by peace and order at that time. The frequencies of this broadcaster cover the region of Banja Luka and not all of multi-ethnic Bosnia and Herzegovina; thus, the programme in dispute technically could not have influenced the dissemination of ethnic or religious hatred among the communities of Bosnia and Herzegovina. I agree that freedom of expression constitutes "one of the essential foundations of a democratic society" and "one of the basic conditions for its progress and for the development of every man" (see paragraphs 170-171 above). I am also of the opinion that the principles of different viewpoints and tolerance are unavoidable in the process of achieving that aim. Therefore, in the present case, the revocation of the provisional license by the CRA was proportionate neither to the pursuit of the legitimate aim of protecting the rights of others nor to the purpose of protecting the public safety.

2. The Chamber has left open the issue of whether the provisional broadcasting license constitutes a protected "possession", but it has none the less concluded that there is no violation of Article 1 of Protocol No. 1 (see paragraph 200 above). I consider that there is a direct link between the allocation of the provisional broadcasting license and the private commercial activity of the applicant. The broadcasting license is a condition for use of property (*e.g.*, equipment) of "ORDO" - RTV "Sveti Georgije". Accordingly, the provisional license constitutes a "possession" protected by Article 1 of Protocol No. 1 to the Convention. In the present case, the deprivation of this right was adverse to the requirements of the Convention.

3. I disagree that the sole finding of a violation of the right protected by paragraph 1 of Article 6 of the Convention constitutes sufficient satisfaction to the applicant. There must be an effective legal remedy in practice available to the applicant for the protection of its rights. Such a remedy could have been presented by the possibility of an appeal to the Court of Bosnia and Herzegovina, established by the Decision of the High Representative of 8 May 2002. Accordingly, I cannot agree that the sole finding of a violation of human rights guaranteed by Article 6 of the European Convention is sufficient satisfaction, and, with due respect, I dissent.

(signed)
Miodrag Pajić

ANNEX V

According to Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Vitomir Popović.

DISSENTING OPINION OF MR. VITOMIR POPOVIĆ

1. I disagree with the opinion of the majority in this case that there was no violation of Article 10 of the European Convention on Human Rights. A thoughtful analysis of the video recording of the programme may lead to the conclusion that the programme did not aim to "promot[e] incitement to violence" and to "propagat[e] religious and ethnic intolerance" (see paragraph 192 above), but rather to inform the public about the events of 7 May 2001 in an utterly objective manner. Similar programmes were broadcast on other television stations, by means of reporting on the above event. Also, the representative of the CRA indicated at the public hearing that she could not state specifically how this broadcaster could have protected itself from the provocative statements by viewers of the live call-in programme. When asked what she would have done if she had been the programme anchor, she responded that the "official position of the CRA is that it cannot be involved"; broadcasters only must follow the published rules and guidelines of the CRA.

2. The legal procedure does not usually provide for the possibility that the same body, *e.g.,* the CRA in the present case, firstly issues a decision suspending or revoking a broadcasting license, and then, in the same composition, decides upon the appeal lodged against that decision. Instead, an "independent and impartial tribunal", as prescribed by Article 6 of the European Convention, should be provided at some stage in the legal proceedings.

3. For precisely these reasons, the Chamber should have issued a decision finding a violation of Article 10 of the European Convention, and moreover, should have earlier issued an order for provisional measures to render out of force the CRA's suspension and later revocation of the applicant's provisional broadcasting license. In other words, the Chamber should have enabled the applicant to continue with its work both before the completion of the proceedings and afterwards.

4. The violation committed by the CRA against the applicant caused it great damage; thus, the sole finding of a violation of paragraph 1 of Article 6 cannot be proportionate to the violation. Therefore, there is a manifest disproportion between the established violation and the ordered remedy.

5. As regards the remainder of the decision, I join the minority of my colleges who have voted against the finding of no violation of Article 10 of the European Convention and who have expressed their dissenting opinions in relation to this decision.

(signed)
Vitomir Popović