The Concurring Opinion of Judge Dr. Škrk

1. I have voted in this case in favor of both paragraphs of the disposition and also fully agree with the reasoning of the Constitutional Court. However, in the course of the discussion, those judges who have voted against the majority opinion raised certain questions that, in my opinion, deserve an additional explanation which would not exceed the subject of the opinion and the substance of the Court's review.

2. The first question refers to the argument that the Constitutional Court did not apply the same criteria of review as in Rm-1/97 (the review of Subsections 7b and 7c of Art. 45 and Appendix XIII of the Europe Agreement, in conjunction with Art. 64.2 of ESP, with the Constitution). It allegedly failed to review, following the principle of linking issues pursuant to Art. 30 of ZUstS, the conformity of Art. 54 of the Agreement between the Republic of Slovenia and the Republic of Croatia on Border Traffic and Cooperation (hereinafter the Agreement) with the Constitution. The review of that article was not suggested. It is true that, in case Rm-1/97, the Constitutional Court had very precisely discussed all the legal aspects in connection with its jurisdiction of the preventive review of the constitutionality of treaties, including the doctrine of applying, also in such proceedings, the linking-issues principle pursuant to ZUstS if the statutory conditions are fulfilled.

However, in case Rm-1/97, which until the Agreement at issue had been the only case of the preventive review of treaties in the Constitutional Court's practice, the Court adopted a doctrine which was not implemented in practice. In Paragraph 22 of the reasoning of Rm-1/97, the Court inter alia wrote: "In the proceedings for the review of the constitutionality of a law or regulation, the Constitutional Court reviews the conformity of those provisions of the law or regulation which are claimed to be non-conforming by a petitioner according to Art. 24 of ZUstS, or a proposer according to Art. 23 of ZUstS. In this connection, the Constitutional Court may not ex officio extend its review of constitutionality to provisions which are not challenged, unless it is allowed to do so by the provision of Article 30 of ZUstS.

This empowers the Constitutional Court to also review the constitutionality and legality of other provisions of this or some other law, regulation or general act issued for the exercising of public authority, whose constitutionality or legality have not been challenged, if such provisions are mutually connected or if this is absolutely necessary to resolve the case. In the case of issuing an opinion, no reasons exist for taking another position.[1] The Constitutional Court reviews only those treaty provisions which are claimed by the proposer to be controversial, and reviews other provisions only if the conditions specified in Art. 30, in conjunction with Art. 49, of ZUstS, are fulfilled." In Rm-1/97, the Constitutional Court had remained within the framework of the review as suggested by the proposers. The Constitutional Court acted similarly in the case at issue, and reviewed also the challenged Art. 1 of the Agreement with Art. 2 of the Constitution, since the latter provision had also been mentioned by the proposers, which also follows from Paragraph 17 of the reasoning.

3. Otherwise I opine that Art. 54 of the Agreement, in Chapter VIII, entitled "The Authorities to Implement the Agreement," which deals with the establishment of the Permanent Mixed Commission and its tasks, does not have such legal character so as to be directly connected with the basic question, i.e. whether Art. 1 of the Agreement (the determination of border areas) is in conformity with TUL, and whether this prejudices the border with Croatia. Art. 54 of the Agreement reads as follows: "

1. With the intention to develop the border traffic and the correct application of this Agreement, a Permanent Mixed Commission is to be established. The Commission consists of the delegations of the contracting Parties. Each delegation may have up to six members, and each member may have their own deputy.

2. The manner of work of the Permanent Mixed Commission is determined by its rules of procedure. The Permanent Mixed Commission will adopt the rules of procedure at its first session.

3. The Permanent Mixed Commission is to consider all questions connected with the interpretation and application of this Agreement.

4. The Permanent Mixed Commission also has the right to approve the issuance of a border permit and agricultural entry permit to persons who do not fulfill the conditions determined in this Agreement.

5. Resolutions of the Permanent Mixed Commission are adopted by the consent of both delegations.

6. Resolutions of the Permanent Mixed Commission take effect when approved by the Governments of the contracting Parties. This does not apply to the resolutions which contain proposals to amend or supplement the Agreement.

7. The Permanent Mixed Commission meets in a regular session once a year, alternating between the contracting Parties.

Furthermore, at the request of one contracting Party, extraordinary sessions may also be called. The contracting Parties agree on the place and time of the session.

8. The presidents of the delegations may by consent propose to the competent authorities that they meet and discuss specific questions as regards the application of this Agreement. The provision of Para. 5 of this article applies mutatis mutandis also to the resolutions of such a session.

9. The competent authorities are to inform the Permanent Mixed Commission of the questions discussed and the results reached.

10. To adjust the interests in certain areas encompassed by this Agreement, the Permanent Mixed Commission may establish specialized working bodies composed of members of each contracting Party. Such working bodies suggest to the Commission the adoption of resolutions in the areas for which they have been established.

11. Each contracting Party covers the expenses of the members of the Commission whom it has appointed, including the expenses of the experts it engages. Other expenses in connection with the activities of the Commission are proportionally covered by both contracting Parties unless otherwise agreed upon." 4. This article has a complete procedural and institutional character. For this reason, I do not see any direct connection with the basic purpose of the review. In Rm-1/97, the principle was established, which has also been adopted in the present decision, that preventive constitutional review is intended to prevent the State from assuming an unconstitutional international obligation at the moment of the ratification of a treaty. In my opinion, such a test with respect to Art. 54 of the Agreement cannot be carried out in view of its procedural and institutional character (the establishment of the Permanent Mixed Commission and its tasks) and its corresponding substance. What is unconstitutional in the case of this Agreement at the moment of its ratification, if the National Assembly ratifies it? Merely the suspicion that in implementing the Agreement the competent State authorities will not always act completely in agreement with their mandate pursuant to the Constitution and statute and, thereby, perhaps prejudice the future State border, in my view, exceeds the framework of constitutional review. In reviewing the challenged Art. 1 of the Agreement, the Constitutional Court reviewed, in Paragraph 26 of the reasoning of the Opinion, also the "safeguard" in Art. 59, which provides that "the Agreement provisions in no manner prejudice the determination and marking of the State border between the contracting Parties". The Constitutional Court ascribed to this safeguarding clause the meaning of lex specialis regarding the Agreement as a whole, and inter alia wrote that "it is legally relevant also for the subsequent practice of the contracting Parties in the framework of the Authorities to Implement the Agreement (Arts. 54 and 55)". 5. In accordance with Art. 54 of the Agreement, the Permanent Mixed Commission is based on one of the previous models of border agreements, most probably on the Udine Agreement on the Border Traffic of Persons on Land and the Sea. In addition to the Udine Agreement, let me mention also the 1975 Osim Agreement on the Fostering of Econimic Cooperation, and the Commission for Water Economy Questions. Mixed commissions are also a well-established model for implementing border agreements with the Republic of Austria. The most established ones were determined in the 1954 and 1955 Agreements on the

Drava and Mura Rivers. With the Republic of Hungary a mixed commission was established to oversee the implementation of the 1993 Minorities' Agreement.[2] The Diplomatic Commission for the border in the framework of the 1993 Agreement with Croatia on the Determination and Marking of the State Border is based on the model of a mixed commission. The powers and manner of work of practically all mixed commissions are grounded on the same pattern as in the case of the Permanent Mixed Commission according to this Agreement. They are permanent bodies, which are periodically in session and responsible for the implementation of the (border) Agreement, decides by consent, and whose resolutions are recorded in (joint) records that are co- signed by the co-presidents (usually the heads of the delegation of each contracting side). Such mixed commissions also adopt their own rules of procedure, or such is already envisaged in the agreement on border cooperation. Often, but not always, the records of the mixed commissions are subject to subsequent approval by the Government, as in the case of this Agreement.

The meaning of such approval is not to contract new obligations but to introduce additional supervision by the Governments of the activities of this Permanent Mixed Commission, or the subsequent approval of its resolutions on a higher level of domestic law.

Comparatively and historically speaking, in my opinion, the tasks and the envisaged activities of the Permanent Mixed Commission cannot be seen as violating Arts. 2 and 3 of the Constitution.

6. Moreover, I opine that the records of mixed commissions, in this case the resolutions of the Permanent Mixed Commission, cannot be ascribed the character of treaties unless the records provide otherwise or this follows from the determinable intention of both contracting Parties. Pursuant to DKPMP, the mere signing of the records, without a note that the signature entails the assumption of obligations, does not suffice for the assumption of contracted obligations (Art. 12, the Consent to Become a Contracting Party by Signing). In the first sentence of Art. 54.6 it is stated that the resolutions of the Permanent Mixed Commission take effect when approved by the Governments of the contracting Parties. I opine that this case concerns internal approval and not external confirmation having ratification effects (Art. 14 of DKPMP, the Consent to Become a Contracting Party by Ratification, Acceptance or Approval). In the second sentence of Paragraph 6, it is furthermore stated that such approval of the Government does not apply to resolutions which contain proposals to amend or supplement the Agreement. For their adoption a different procedure is needed, in my opinion the same as needed for entering into the basic agreement, i.e. ratification by the National Assembly.

7. With regard to the abovesaid in this concurring opinion, I do not see anything unconstitutional concerning the possible violation of Art. 3 of the Constitution, regarding the authority vested in the Government as regards the implementation of the Agreement. In accordance with Art. 65.1 of the Foreign Affairs Act (hereinafter ZZZ), the Government is authorized to implement treaties and, pursuant to Art. 63.3 of ZZZ in conjunction with Art. 153.2 of the Constitution, to reach implementing agreements which do not impose new obligations on Slovenia. Or, stated differently, given Art. 3.2 of the Constitution (the principle of the separation of powers), in the area of international relations with other States, the authority vested in the Government is also binding on the Constitutional Court.

8. Regarding the question of what belongs to the subject of review or consistency with TUL, the Constitutional Court acted in conformity with the Constitution, since it did not exceed the subject and framework of the Agreement. If it had acted otherwise (certain judges were in favor of such position) it would have interferred with the negotiating position of the State concerning the future course of the State border with Croatia on land and the sea. Such interference, in my opinion, exceeds the subject of preventive constitutional review. The body entrusted with preparing for and carrying out negotiations is the Government, and only the National Assembly is empowered to either accept or refuse the results of such negotiations (Art. 57 of ZZZ). The matter thus concerns the relation between executive and legislative power, and if the Constitutional Court interfered with such it would violate the principle of the separation of powers (Art. 3.2 of the Constitution).

Dr. Mirjam Škrk

Opombi:

[1] Rm-1/97, n. 20. The same position is taken in Spanish constitutional case law. See Luis Lopez Guerra, Alvaro Rodriguez Bereijo: Raport de la delegation Espagnole, Protection constitutionnelle et protection internationale des Droits de l'Homme: Concurrence ou complementarite, 9th Conference of European Constitutional Courts, Paris, May 1993, pp. 272-275. In the case of the request for the review of constitutionality of the Maastricht Treaty, the French President also had to supplement his request by specifying more precisely the Treaty provisions to which his request referred.
See L.Favoreu and L.Philip: Les grandes decisions du Conseil constitutionnel, 7eme edition, Sirey, Paris, 1993, p. 799.

[2] This is not a territorial treaty although both minorities live along the border.