

# **Opinion in writing made by the OHR Legal Department concerning the request of the applicants in Case No. U-9/09**

## **I. Introduction**

1. On 16 September 2009 the Constitutional Court of Bosnia and Herzegovina received an application of the Caucus of Croat people in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina for review of constitutionality of Articles 19.1, 19.2, 19.3, 19.4, 19.5, 19.6, and 19.7 of the Election Law of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina", nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08) and paragraphs 4) and 7) of Article VI.C of the Amendments to the Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of Bosnia and Herzegovina", no. 9/04) and Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar ("Official Gazette of the City of Mostar", no. 4/04).

2. The request, in its relevant part, could be summarized as follows:

Firstly, the provisions of Articles 19.1, 19.2, 19.3, 19.4, 19.5, and 19.6 of the Election Law of Bosnia and Herzegovina, paragraph 4 of Article VI.C adopted by Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and Articles 7, 15, 16, and 17 of the Statute of the City of Mostar, which all regulate the method of electing the councilors to the City Council of the City of Mostar, are not in conformity with Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 25 of the 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols and Article 3 of the Protocol 1 to the 1966 International Covenant on Civil and Political Rights, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, all of which form an integral part of the Constitution of Bosnia and Herzegovina (Annex I to the Constitution of Bosnia and Herzegovina).

Secondly, Article 38 of the Statute of the City of Mostar discriminates against the citizens of the former "Central Zone" of the City of Mostar. In addition, the provisions of Article 38 of the Statute of the City of Mostar places the City Councilors in an unequal position and thereby are not in conformity with the Constitution of Bosnia and Herzegovina and the above mentioned international instruments.

Thirdly, the provisions of Article 19.7 of the Election Law of Bosnia and Herzegovina, paragraph 7) of Article VI, C adopted by Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and Articles 44 and 45 of the Statute of the City of Mostar which all specify that only Councilors elected to the City Council may be elected as Mayor are discriminatory for the citizens of the City of Mostar and not in conformity with the Constitution of Bosnia and Herzegovina and the above mentioned international instruments insofar as the citizens of the City of Mostar are not "equal before law" to other citizens in Bosnia and Herzegovina who can directly elect their Mayors.

3. The applicants therefore request from the Constitutional Court to determine that articles 19.1, 19.2, 19.3, 19.4, 19.5, 19.6, and 19.7 of the Election Law of Bosnia and Herzegovina ("Official Gazette of Bosnia and Herzegovina" nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08), paragraphs 4) and 7) of Article VI.C enacted by Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of Bosnia and Herzegovina", no. 09/2004), articles 7, 15, 16, 17, 38, 44, and 45 of the Statute of the City of Mostar ("Official Gazette of the City of Mostar", no. 4/2004) are not in conformity with Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the 1966 International Covenant on Civil and Political Rights, and Article 3 of Protocol 1 to the of the 1966 International Covenant on Civil and Political Rights<sup>[1]</sup> and provisions of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina as well as to order the Parliamentary Assembly of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina, the City Council of the City of Mostar to harmonize the contested provisions with the Constitution of Bosnia and Herzegovina and to report to the Constitutional Court on the measures taken within a six month deadline following the day of publication of the Decision of the Constitutional Court in the "Official Gazette of Bosnia and Herzegovina."

4. On the 1<sup>st</sup> of December 2009, the Constitutional Court invited the Department for Legal Affairs of the Office of

the High Representative and the European Union Special Representative for Bosnia and Herzegovina to submit its expert opinion in writing with regard to the allegations contained in the request.

5. The Office of the High Representative has prepared this Amicus Curiae submission with the purpose of assisting the Constitutional Court. The applicants' allegations and specific requests are addressed in turn.

## **II. Facts**

6. The provisions of the Election Law of Bosnia and Herzegovina (hereinafter: the Election Law), the Constitution of the Federation of Bosnia and Herzegovina (hereinafter: the FBiH Constitution) and the Statute of the City of Mostar (hereinafter: the Statute), which are all contested by the applicants, were enacted by the High Representative's decisions of 28 January 2004.[2]

7. The abovementioned decisions of 28 January 2004 were enacted following the completion of the work of the Commission for Reforming the City of Mostar, established by the High Representative's Decision No. 160/03 of 17 September 2003. The Commission, composed of the Chairman, representatives of political parties represented in the Mostar City Council and experts, completed its work on 15 December 2003. In the "Recommendations of the Commission –Report of the Chairman" of 15 December 2003, the Chairman of the Commission informed the High Representative and relevant authorities in Bosnia and Herzegovina about results of the work of the Commission including the agreed solutions, proposals and recommendations with respect to the reorganization of the City of Mostar[3].

8. The Constitutional Court of the Federation of Bosnia and Herzegovina has previously reviewed the conformity of certain provisions of the Interim Statute for the City of Mostar as well as certain provisions of the existing Statute of the City of Mostar in its cases No. U-11/98 (Official Gazette of the Federation of BiH No. 34/98) and No. U-31/06 of 21 March 2007 (Official Gazette of the Federation of BiH No. 31/07). The High Representative has forwarded written observations to the Constitutional Court of the Federation of BiH on 23 February 2007 in order to assist the Court in its examination of Case No. U-31/06.

9. Part of the Judgment in Case No. U-31/06 of the Constitutional Court of the Federation of BiH examined whether Article 44, Paragraph 1 and 3 of the Statute of the City of Mostar was consistent with Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, which added *inter alia*, a new Article VI.C paragraph 7 to the said Constitution. On that occasion, a discrepancy was identified between the official English version of the text of the Decision of the High Representative Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina signed by the High Representative on 28 January 2004, and the translated version published in the Official Gazette of the Federation of Bosnia and Herzegovina No. 9/04 of 16 February 2004. Insofar as the Amendments enacted by the said Decision of the High Representative had not yet been adopted by the Parliament of the Federation of Bosnia and Herzegovina, on the 9th of May 2007, the High Representative issued Decision Correcting the Translation of the Official Decision of the High Representative Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina.

**III. As to the allegation that Articles 19.1, 19.2, 19.3, 19.4, 19.5, and 19.6 of the Election Law of Bosnia and Herzegovina, paragraph 4 of Article VI.C adopted by Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, and Article 7, 15, 16, and 17 of the Statute of the City of Mostar, which all regulate the method of electing the councilors to the City Council of the City of Mostar, are not in conformity with Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 25 of the 1966 International Covenant on Civil and Political Rights and its 1966 and 1989 Optional Protocols and Article 3 of the Protocol 1 to the 1966 International Covenant on Civil and Political Rights, and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.**

10. As to the first allegation regarding a possible violation of Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the ECHR, we note that Article 14 is not free standing and is limited to cases falling within the "ambit" of another Article of the Convention[4]. The applicants have not argued in their submission that any other provision of the ECHR might have been violated.

11. As to the allegation concerning a possible violation of Article 3 of the first Protocol to the 1966 International Covenant on Civil and Political Rights, it is noted that this article regulates admissibility procedures for individual

communications before the United Nations Human Rights Committee. These are not applicable to the Constitutional Court. As noted above<sup>[5]</sup>, it appears to be a mistake by the applicants whose intention may have been to refer to Article 3 of the Protocol 1 to the ECHR. Should it be the case, we note that Article 3 of Protocol 1 to the ECHR is not applicable in the present case as it does not apply to election of local Government organs which exercise no legislative power but rather exercise regulatory power delegated by Parliament.<sup>[6]</sup>

The Constitution of the Federation of Bosnia and Herzegovina explicitly defines the City of Mostar as a “*territorial unit of administration and local self-government and provides that the City of Mostar shall have the competencies of a Municipality, unless otherwise provided by law*” (Article VI.C. paragraphs 1 and 2). Under the Constitution of the Federation of BiH, the Law on Principles of Local Self-Government in the Federation of BiH (“Official Gazette of Federation of BiH” No. 49/06 and 51/09) and the Law on Local Self-Government of the Herzegovina-Neretva Canton (“Official Gazette of Herzegovina-Neretva Canton” No. 4/00), the City Council of the City of Mostar does not constitute a legislative body inasmuch as it is only authorized by the above mentioned acts to pass its Statute, decisions and individual legal acts but not to pass legislative acts.

12. Should the Applicants still argue that article 14 is applicable in conjunction with Article 3 of protocol 1 (which it is our opinion that it cannot be so as Article 3 of Protocol 1 is not applicable in this case), it is worth observing that the European Court has made it clear that one cannot derive from the combination of these provisions the right that all votes have an equal weight.<sup>[7]</sup> As such, the argument drawn from those provisions by the applicant would not be supported by the jurisprudence of the ECtHR.

13. Regarding the applicant’s claims under Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR), we observe that the UN Human Rights Committee noted in its General Comment on art. 25 ICCPR:

“The principle of one person, one vote, must apply, and within the framework of each State’s electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.” (Para.21)

14. The General Comment further explains that any restrictions on the rights in article 25 of the ICCPR ‘should be based on objective and reasonable criteria’.

15. In applying those principles in the case of *Matyus v. Slovakia* (No.923/2000), the Human Rights Committee, “(...) **in the absence of any reference by the State party to factors that might explain the differences in the number of inhabitants or registered voters per elected representative in different parts of Roňaava** (...)” [emphasis added], found a violation of Article 25 of ICCPR, because of highly un-equal seat-residents ratios, with seats representing from 200 to 1,400 residents.

16. It follows that the principle of ‘one person, one vote’ and the principle that all votes have an equal weight is not an absolute right and that restriction to that right can be justified based on objective and reasonable criteria.

17. It is argued that the electoral system in place in the City of Mostar is justified taking into consideration the aims pursued by this system and the historical background of the City. Indeed when assessing the justification in this case, one needs to take into account the difficult history of peace implementation in Mostar and the important role that Mostar plays in the wider context of peace implementation in the Federation and in the entire State. As the European Court for Human Rights stated in the *Matieu-Mohin* case concerning Belgium: “The aim is to defuse the language disputes in the country by establishing more stable and decentralized organizational structures.” (...) In any consideration of the electoral system in issue, its general context must not be forgotten.”<sup>[8]</sup>

18. It is submitted that respecting the equality of constituent peoples is one of the legitimate aims pursued by the Mostar Statute and other provisions disputed by the Applicants. Creating effective power sharing mechanisms, which prevent any one people having majority control in the City Council, as stated in the Mostar Commission Report and the Decision of the High Representative, is one other legitimate aim.

19. The Constitutional Court of Bosnia and Herzegovina had in the past to deal with similar situations and is well aware of the arguments regarding the legitimate aims pursued in this case. It has held that these were objective and reasonable criteria. In the Decision No. U 4/05 of 22 April 2005, the Constitutional Court recalled that since the creation of the modern statehood of Bosnia and Herzegovina, the principle of multi-ethnicity (Bosniacs, Serbs and

Croats) has been one of the most important elements that found its place in the Constitution as the supreme legal act of a State.

20. The Constitutional Court took the view in its Third Partial Decision No. 5/98 (Decision of 1 July 2000, para 60; published in the Official Gazette of Bosnia and Herzegovina No. 23/00) that: “... *the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits (...) any domination in governmental structures (...)*”. Additionally, the Decision of the Constitutional Court No. U 5/98 clearly stated that “... *it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination...*” (ibid, para 73).

21. In deciding a challenge against the system of elections in the City of Sarajevo, it held that it was necessary for all three constituent peoples to be “given minimum guarantees for the participation on the city council irrespective of the election results since that is the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina.” [emphasis added].[9]

22. In this regard it is worth noting that Constitutional Court jurisprudence has consistently stated that the effective participation of the constituent peoples in State authorities constitutes an inherent element of the vital interest of the constituent peoples[10]. In this regard the Constitutional Court has held that it is obvious that a consistent application of the democratic principle – one elector one vote, in the existing political circumstances in Bosnia and Herzegovina, is running a risk of creating mono-ethnic authority elected in the areas in which one of the constituent peoples is in majority. (...)

23. In its recent Judgment in *Sejdić and Finci v. Bosnia and Herzegovina*[11], the Grand Chamber of the European Court on Human Rights (“the European Court”) recalled that “(...) there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule”.

24. As a result, it is argued that the means employed to create these power sharing mechanisms are clearly not disproportionate to the aims to be achieved. Respect of the principle of proportionality should take into account all its aspects and in particular the instrumentality of the measure, e. its ability to reach the pursued aim of respecting the equality of constituent peoples by creating effective power sharing mechanisms, which prevent any one people having majority control of the City Council.

25. With regard to the provision of Article II (4) of the Constitution of Bosnia and Herzegovina referred to by the applicant, which prohibits discrimination in relation to both the enjoyment of the rights and freedoms safeguarded by the European Convention and the rights protected under the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina, we note that the case-law of the Constitutional Court of Bosnia and Herzegovina has relied on the European Court’s jurisprudence.

26. In this regard we note that according to the case law of the European Court, an act or regulation is to be deemed discriminatory if it makes a distinction between individuals or groups who are in a similar situation, and if this distinction lacks reasonable and objective justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.

27. It is argued that in the present case the challenged legislation pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized. Thus, in evaluating the Election Law of BiH, the Venice Commission made the following observations about the context in which election systems developed in BiH:

[T]he distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in BiH possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives.[12]

[T]he circumstances requiring a political system that is not a simple reflection of majority rule but guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

28. The specific history and context of the development of the Statute of the City of Mostar are also highly relevant for any legal review of elections to the City Council. The following history is excerpted from the report of the "Commission for Reforming the City of Mostar," 15 December 2003 [emphasis added].

*The Commission's work is the culmination of a process that began in March 1994 with the signing of the Washington Agreement. The framework for the BiH Federation was signed on 1 March 1994, and the Agreement on the Constitution of the Federation of BiH was signed on 18 March 1994. As a part of these founding documents, it was agreed that the Mostar City Municipality would be governed by an EU Administration for up to two years, to facilitate the post-war transition, coordinate reconstruction in the destroyed city and initiate the basic development of essential structures in the City in the critical early years.*

*A Memorandum of Understanding (MOU) was signed in Geneva on 6 April, emphasising commitment to the development of a unified, multiethnic city, return, freedom of movement and the temporary establishment of the EU Administration in Mostar (EUAM).*

*The Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina was signed in Dayton, Ohio on 10 November 1995. Twenty months after the Washington Agreement, this sought to strengthen the political, economic and social integration of the Federation within the larger framework for peace in the country. In addition to calling for full implementation of the EUAM MOU, this document reaffirmed agreement on a set of principles for the Interim Statute for the City of Mostar, including support for the unity of the city under an interim structural agreement.*

*By signing the Rome Agreement on 18 February 1996 the parties agreed to support the process of unifying the City of Mostar, and to adopt the EU's plan for reform and reconstruction. The issues addressed in the Agreement included a commitment to return, the development of a unified police force and the delimitation of the Central Zone. The Interim Statute was adopted on 7 February 1996, and viewed as an important transitional stage in the development of Mostar; as an interim, and therefore temporary, arrangement to ensure the basic administration of the City and government services while a permanent legal structure was negotiated, drafted and adopted.*

*Six municipal districts, or "City-Municipalities," were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). The Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration.*

*The EU Administration worked to implement the Interim Statute and to prepare the ground for further normalisation of the city. This was a challenging goal, as there were few local authorities or politicians interested in promoting real reform or progress on behalf of the citizens of Mostar. Elections were organized by the EUAM and held on 30 June 1996, yet the elected officials failed to address the problems facing Mostar as a whole, focusing on the narrow interests of their parties and "their" peoples whom they claimed to represent.*

*These early agreements were temporary arrangements made under imperfect circumstances, and they proved to be inadequate in many ways. However, they enabled the first small steps for rebuilding the war-shattered area. The six City-Municipalities created by the interim arrangement were not developed according to historical districts or democratic legal procedure, but simply reflected the purely undemocratic demarcation lines established through war. As administrative units based solely on the demographic of the "dominant peoples" within, these units serve not the citizens of Mostar, but specific national groups. These initial steps provided a provisional structure for interim solutions.*

*The EU Administration ended its mission in July 1996, and was followed by a follow-on mission led by the Special Envoy, before transferring responsibilities on 6 January 1997 to the Office of the High Representative and a broad set of international agencies involved in the peace implementation and development process.*

*The Interim Statute provided an interim solution and framework for Mostar's gradual recovery from war and the consequences of economic destruction and transition. Before its adoption, there was no established rule of law, and no legislation that might support its terms and intentions. It provided for the provision of a minimal level of services, and for the slow reconstruction of community and social life. It neither guaranteed nor precluded the development of a city established along more standard guidelines. However, it provided*

preliminary opportunities for gradual cooperation among the war-torn communities, and was an initial part of the normalisation process.

The Interim Statute was envisioned "as the floor and not the ceiling," and as a starting point for on-going serious discussions aimed at increasing the abilities and efficiency of the central administration of Mostar. Unfortunately, the reforms of the Interim Statute aimed at increasing the effectiveness and efficiency of the central authorities through the empowerment of the City Council and the development of the Central Zone did not occur. The following summarizes the most blatant inefficiencies and problems plaguing the administration of Mostar today, and over the past several years:

- The Central Zone was never achieved according to the plans of the Interim Statute.
- Power and authority were usurped from the City Council and the supporting City Administration by the administrations in the six City-Municipalities.
- The City remained divided, with rampant parallelism and a complete lack of cooperation between the Mayor and Deputy Mayor (who by law represent different national groups).
- City finances remained divided through the existence of two separate treasuries in the City, as well as additional budgets in each of the six City-Municipalities.
- Redundancy was rampant, with duplicative administrative structures at the level of each of the six City-Municipalities as well as the essentially impotent City Administration. This resulted in seven separate bureaucratic structures and expenses for services such as transportation, housing, education, health care, infrastructure, property affairs and cadastre and numerous other services.
- There was a constant and conscious lack of coordination between the six City-Municipalities and the City in spite of the fact that such coordination was a requirement of the Interim Statute.

The level of waste and duplication in this dysfunctional system has been and continues to be significant, with approximately 550 employees working on these issues at the City-Municipality level, and 124 employees working at the (virtually powerless) City level. The impact of such expensive administrative overhead on businesses in terms of investment and job creation is also clear. At a public forum with Mostar's business leaders, a clear concern was that all money paid in taxes is spent simply on the administration of government – not on regional development initiatives that could improve Mostar's economic future.

Finally, the dysfunctionality of Mostar is affecting democracy and progress in less visible ways as well. The disconnect between politicians and the citizenry is growing, as there is a perception that politicians are only interested in securing their own interests, not doing the will of the people. The triumph to date of cronyism and corruption in government has tarnished the notion of public service, replacing this concept with one of personal gain through public means. Citizens' electoral choices are not based upon serious consideration of the issues, platforms and qualifications of candidates, but on the ongoing manipulation of voters through the politics of fear. Unfortunately for the citizen taxpayers of Mostar, serious reform and problem-solving has not been forthcoming from the authorities and political parties. The spirit and intent of the Interim Statute was frozen and neglected, and the intended goals of the City – centralized competencies, effective administration and basic functionality – were never achieved.

Since 1994, the International Community at various levels has consistently urged authorities to work together to develop a more efficient Mostar, and local officials committed themselves to such change, in word if not in deed. At the Federation Forum held on 3 February 1997, the relevant authorities committed themselves to ensuring freedom of movement throughout Mostar, and agreed on the constitution of the six City-Municipalities by 14 February. Additional commitments aimed at the normalisation of Mostar were made at the Federation Forum on 20 August 1997. The Peace Implementation Council (PIC) has supported the progressive development of Mostar throughout this process. Specific attention to the situation in Mostar has been a feature of many of the PIC discussions, as early as meetings in Florence on 13 June 1996, and in London on 5 December 1996. At the PIC meeting in Bonn in December 1997, the Council again noted its concern that "serious problems of local administration, notably in Mostar, continue to exist," and urged authorities to "ensure that the City of Mostar and its unified City Administration is operational in all aspects, in accordance with the City Statute. This includes dissolution of the union of the three City-Municipalities in West

Mostar.” In Madrid in 1998 the PIC called on the Herzegovina-Neretva Canton to establish an integrated judiciary, including the City of Mostar, and stated that the future establishment of the capital of the Federation in Mostar depends on fulfilment of several conditions, including the establishment of a “truly unified city administration [that] exists under one leadership with one budget, and operating effectively.” In July 2000, the PIC Steering Board noted with great interest the encouraging attempts by responsible politicians in Mostar to find pragmatic forms of cooperation across the ethnic divide which aim at establishing normal life in the city and its eventual unification. In this context, the continued financial contribution of the European Union was welcomed, as was the Mostar Document signed between representatives of the European Union and of the city of Mostar and its six City-Municipalities. The Board took note of the announcement by the City authorities that they would begin working on the final status of Mostar.

Most recently, on 26 September 2003, the PIC Steering Board issued a communiqué, noting that it “supports the aim of a unified City in accordance with European standards, which promotes the rights of all people and will not allow dominance of one part of the population of Mostar. The Steering Board considers the solution of the Mostar question as essential for the sustainable and peaceful development of BiH.” The International Community’s support for reform has been public and clear, and the Mostar authorities have continually professed their agreement. However, they failed to meet their stated obligations. Numerous agreements and MOUs were developed and signed by the appropriate authorities in cooperation with the International Community, and the continued reiteration of the goals for the City of Mostar has remained the same since 1994. However, action has failed to keep pace with rhetoric. The time that has passed has allowed for discussion and debate, development of general and specific implementation and reform plans and general infrastructure and systemic development. But it has also increased the financial desperation of the city and its people, stalled business development and fostered continued division. Throughout this challenging, gradual and often obstructed process, the citizens of Mostar have demonstrated their desire and hope for a normal life by consistently returning to their pre-wars homes, to re-build their lives and their beloved communities. This trend has been particularly evident since 2001. It is critical to note that as progress has been made in harmonising legislation across governmental levels, in ensuring the protection of human rights, in supporting a representative police force and in reducing elements of crime and corruption throughout BiH, more and more people have been able to make the decision to return. The changing environment created space for people to make this important choice.

While it is clear that there is still work to be done to ensure full implementation of Annex VII, any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of Others, through protection of vital national interests. This imperative drove the work of the Commission.

Following months of discussion, the High Representative supported the idea of assisting in the establishment of a multiethnic, cross-party commission that would include representatives from all of the levels of government that may be called on to make changes to their legislation or constitutions. This Mostar City-based commission, nominated by the Mostar Mayor and Deputy Mayor and appointed by the City Council on 15 April, met 15 times from April through July to discuss needed reform. During the process, the OHR and OSCE served as the secretariat of the commission, leaving the commission members fully responsible for the negotiations. The work of the commission in the spring of 2003 was guided by a set of principles outlined in a letter from the High Representative on 15 April, and presented in the Executive Summary of this report.

All of the stakeholders involved agreed that the current situation in Mostar is untenable. While this first commission was able to agree on many issues of structure and process, it failed to develop a comprehensive and final recommendation for Mostar’s reform. However, it did identify many of the relevant issues, participated in open and lively debate concerning the essence of the principles and uncovered many of the difficult issues that would have to be addressed for reform to be successful.

The Commission for Reforming the City of Mostar was established by the High Representative on 17 September 2003. The decision establishing this Commission was the culmination of the process that has been ongoing since 1994. While there had been hope that a reform process would be initiated and implemented over the past years, a comprehensive solution had not been presented. Although progress had been made in return, economic development and government accountability and transparency in many parts of the country, it became clear that Mostar continued to suffer from a dysfunctional and duplicative system that failed to serve its citizens.

29. It was in this context that the High Representative enacted the Mostar Statute on 28 January 2004. In that decision, the High Representative took specific note of the following:

**Noting** that the Steering Board, at its meeting held at Political Directors' level on 26 September 2003, considered the resolution of the Mostar question as crucial to the sustainable and peaceful development of Bosnia and Herzegovina;

**Bearing in mind** the special status given to Mostar under the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, signed on 10 November 1995, and in the Annex thereto which establishes principles for the Interim Statute for the City of Mostar;

**Further bearing in mind** that the political authorities at the "City" and the "City-Municipality" levels have hitherto failed to unify the City of Mostar under the said Interim Statute, and have, rather, used the City-Municipalities to create parallel institutions and divide the City;

**Mindful** of the need to consolidate the administrative, functional and legal unity of the City of Mostar in a manner that promotes efficiency in the delivery of services, guarantees the fundamental rights of all citizens, ensures the collective rights of the constituent peoples and prevents dominance by one segment of the population of Mostar;

**Acknowledging** the work of the Commission for Reforming the City of Mostar established by the High Representative on 17 September 2003 (hereinafter: "the Commission");

**Welcoming** the efforts undertaken by the political parties involved in the said Commission which culminated in concrete proposed solutions to various key issues relating to the reorganization of the City of Mostar;

**Convinced** that said proposed solutions provide a sound basis for the establishment of the aforementioned guarantees and safeguards, and, further contain carefully negotiated power-sharing provisions aimed at enabling the citizens of Mostar to build a foundation for a progressive future predicated upon, inter alia, protection of national vital interests;

**Encouraged** that said proposed solutions emerged from the broadest possible consensus with respect to the reorganization of the City of Mostar;

**Regretting** that the parties involved in the Commission failed to reach a consensus on two outstanding issues and convinced that the resolution of said issues would significantly improve applied standards of governance in the City while maintaining an electoral architecture reflective of the sui generis circumstances in Mostar arising from profoundly conflicting interests among its constituent peoples.

**Bearing in mind** that the Steering Board of the Peace Implementation Council, at its meeting held in Brussels on 11 December 2003, 'committed itself to give its full support to the implementation of a solution to the issue of Mostar based on a single coherent city administration with effective guaranteed power-sharing mechanisms which prevent any one people having majority control of the City Council and to act to ensure that implementation of the plan in the coming months has the necessary political and economic support' [emphasis added];

30. In reviewing limitations placed on voting rights, the test is whether:

1. The limitations curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness;
2. They are imposed in pursuit of a legitimate aim; and
3. The means employed are not disproportionate.[13]

31. We believe that the system of election of the councilors of the City Council of Mostar passes this test. No qualified citizen of Mostar is denied the right to vote or to stand for election. In fact, the Applicants have not alleged a complete denial of the right to vote or be elected. They merely assert that voters in different parts of the city cast votes that carry different weight in city council elections and that they have different opportunities to stand for election. However, there is no absolute requirement in human rights law that all votes carry equal weight.[14]



**IV. As to the allegation that Article 38 of the Statute of the City of Mostar is discriminating against the citizens of the former “Central Zone” of the City of Mostar and that the provisions of Article 38 of the Statute of the City of Mostar place the City Councilors in an unequal position and are thereby not in conformity with the Constitution of Bosnia and Herzegovina and the above mentioned international instruments.**

32. The establishment, composition, modalities of election, decision-making and responsibilities Committees of the City Council for City Areas as provided by the Statute of the City of Mostar must be considered as complementing the establishment of six City Areas for the City of Mostar. We have seen that these City Areas correspond to the six City-Municipalities of the City of Mostar that were established by the Interim Statute pursuant to the Annex to the Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina *that was signed in Dayton on 10 November 1995 which reaffirmed agreement on a set of principles for the Interim Statute for the City of Mostar, including support for the unity of the city under an interim structural agreement. The Interim Statute was adopted on 7 February 1996. Six “City-Municipalities,” were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). The Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration.*

33. As implied by its name, the Interim Statute was meant to be in force on a provisional basis. This is why the enactment of a new legislation in January 2004 regulating the City of Mostar was also responding to the need to consolidate the administrative, functional and legal unity of the City of Mostar in a manner that promotes efficiency in the delivery of services.

34. Under Article 7 of the Statute of the City of Mostar, six City Areas are envisaged as branch offices of the City Administration for the sole purpose of delivering the maximum range of services to the citizens within their own neighborhoods as well as electoral constituencies (Article 7 of the Statute of the City of Mostar, Article VI.C. Paragraph 3) and 4) of the Constitution of the Federation of Bosnia and Herzegovina).

35. We note that the rationale for the establishment of the branch offices was to bring the services closer to the citizens in order for them not to suffer from the unification of the city. As such, this question is primarily a matter of local self-governance which falls beyond the scope of this legal brief.

36. The Office of the High Representative also believes that the establishment, composition, modalities of election, decision-making and responsibilities of the Committees of the City Council for City Areas, as provided by Article 38 of the Statute of the City of Mostar, are part of the internal organisation of the City Council of the City of Mostar. The discretion of the City Council to define special voting procedures for the adoption of certain decisions is recognised under Article VI.C, paragraph 5 of the Constitution of the Federation of Bosnia and Herzegovina.

These Committees are not distinct from the City Council but are created as working bodies of the Council to enable the Council to better carry out its function.

The City Councilors elected from the territory of relevant City Area represent, promote and protect the interests of the citizens of the six City Areas of the City of Mostar in two types of specific decisions which directly affect the six City Areas:

- Deciding on the distribution of revenues derived from allocated construction land, in accordance with Article 56 of the Statute of the City of Mostar;
- Participating in the decision on announcement of a referendum, in accordance with Article 33, paragraph 3 of the Statute of the City of Mostar.

37. We note that the membership to the Committees of the City Council for the City Areas are directly linked to the election of Councilors to the City Council from the City Areas. As such, said membership does not result from a separate election. The possible restriction on rights under Article 25 of the 1966 International Covenant on Civil and Political Rights, Article 3 of Protocol 1 to the of the 1966 International Covenant on Civil and Political Rights and provisions of the International Convention on the Elimination of All Forms of Racial Discrimination referred to in Annex I to the Constitution of Bosnia and Herzegovina as claimed by the Applicants in their request has already been examined in the previous section of this brief.

38. As a result, we believe that neither the Constitution of Bosnia and Herzegovina and the Constitution of the

Federation of Bosnia and Herzegovina nor the international instruments enumerated in the request of the Applicants guarantee “the right of citizens to be elected and/or to take part in the decision-making in the Committees of the City Councils”.

**V. As to the allegation of the applicants that provisions of Article 19.7 of the Election Law of Bosnia and Herzegovina, paragraph 7) of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and Articles 44 and 45 of the Statute of the City of Mostar are not in conformity with the Constitution of Bosnia and Herzegovina and the above mentioned international instruments insofar as the citizens of the City of Mostar are not “equal before law” and are discriminated against as other citizens in Bosnia and Herzegovina can directly elect their Mayors.**

39. OHR believes that neither the Constitution of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina nor the international instruments enumerated in the request of the applicants require a uniform system of elections/removals of the Mayors of Cities/Municipalities throughout Bosnia and Herzegovina.

40. Authorities in Bosnia and Herzegovina enjoy a wide margin of appreciation in establishing either direct or indirect system of election and/or removal of the Mayor of Cities and Municipalities. The Constitution of Bosnia and Herzegovina and the international instruments enumerated in the request of the applicants do not regulate matters related to elections and removals of Heads of units of local self-government. The Constitution of the Federation of Bosnia and Herzegovina and the Election Law of Bosnia and Herzegovina foresees both direct and indirect elections and removals/recalls of Heads of Municipalities/Cities in Bosnia and Herzegovina.

41. By way of illustration, Mayor of Sarajevo, Mayor of East Sarajevo and the Mayor of the Brčko District are indirectly elected and removed by the City Councillors/Brčko District Assembly Councillors as is the case in the City of Mostar.

As the integral part of the Observations we attach a copy of the “Recommendations of the Commission – Report of the Chairman” of the Commission for Reforming the City of Mostar, dated 15 December 2003.

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#### **Notes:**

[1] As noted below, the quotation of Article 3 of Protocol 1 in the applicants’ request could actually refer to the European Convention on Human Rights rather than to the 1966 International Covenant on Civil and Political Rights.

[2] Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina” No.4/04)[2], Decision Enacting the amendments to the Constitution of the Federation of Bosnia and Herzegovina (“Official Gazette of the Federation of Bosnia and Herzegovina” No. 9/04) and Decision Enacting the Statute of the City of Mostar (“Official Gazette of the Herzegovina-Neretva Canton” No.1/04 and “Official Gazette of the City of Mostar” No. 4/04).

[3] “Recommendations of the Commission –Report of the Chairman” of the Commission for Reforming the City of Mostar, dated 15 December 2003 in English and local language version can be found at:

[https://www.ohr.int/archive/report-mostar/pdf/Reforming%20Mostar-Report%20\(EN\).pdf](https://www.ohr.int/archive/report-mostar/pdf/Reforming%20Mostar-Report%20(EN).pdf)

[https://www.ohr.int/archive/report-mostar/pdf/Reforming%20Mostra-Report%20\(BO\).pdf](https://www.ohr.int/archive/report-mostar/pdf/Reforming%20Mostra-Report%20(BO).pdf)

[4] See, e.g., *Botta v. Italy*, Judgment of 24 Feb. 1998, para. 39

[5] See footnote 1.

[6] See Comm. 5155/71, *X v. United Kingdom* decision of 12 July 1976, DR 6, p. 13 at pp. 13-14; see also *Standly E. Booth-Clibborn and others v. United Kingdom*, decision of 5 July 1985, DR 43, p. 236 at p. 248.

[7] *Liberal Party v. United Kingdom*, 18 December 1980.

[8] *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A, at paragraph 57.

[9] Decision of the Constitutional Court of BiH in Case No. U 4/05.

[10] see Third Partial Decision of the Constitutional Court, *No.U-5/98* of 1 July 2000

[11] Judgment of 22 December 2009, applications nos. 27996/06 and 34836/06, at paragraph 48.

[12] Opinion on the Electoral Law of Bosnia and Herzegovina, CDL-INF(2001), at paragraph 23.

[13] *Mathieu-Mohin v. Belgium*, *supra*.

[14] *Liberal Party v. United Kingdom*, 18 December 1980.