Brief submitted by the High Representative concerning the request of the applicant in Case No. U 27/22

Introduction

1. My Office (OHR) received the letter signed by the Registrar of the Constitutional Court of Bosnia and Herzegovina (the Constitutional Court) of 12 October 2022 by which we were informed that the Constitutional Court considers OHR as a party to the proceedings in the case No.U-27/22 concerning the request for the review of compliance with the BiH Constitution of **Amendments to the Constitution of the Federation of Bosnia and Herzegovina** (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/ 04, 71/05, 72/05, 32/07, 88/08, 79/22 and 80/22), including my Decision No. 6/22 of 2 October 2022 and the **Law on Amendments to 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, 32/10, 18/13, 7114, 31/16 , 41/20, 38/22, 51/22 and 67/22), including my Decision No. 07/22 of 2 October 2022. I was invited to submit a response to the allegations made in the said request.

2. On 20 October, the Registrar of the Constitutional Court asked my office, as the author of the challenged acts, to provide written observations concerning the said request within the period of 15 days following the receipt of this letter.

3. The High Representative (HR) appears in this case neither in the position of a conventional party before the Court, nor

as a respondent institution in the sense of the Court's Rules, but rather submits these written observations in the posture of *amicus curiae*.

4. Following the Decision of the Constitutional Court in Case No. U 9/00 of 3 November 2000 and the theory of functional duality developed therein, the High Representatives have consistently endorsed the power of the Constitutional Court to review legal acts enacted in an exercise of their *substitution powers*. I therefore do not object to the review by the Constitutional Court of challenged provisions of Amendments CXI, CXII, CXX, CXXI and CXXVIII to the Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 79/22 and 80/22) and Articles 1, 2, 3, 4 and 5 of the Law on Amendments to the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 67/22).

5. My brief begins with background explanation (Section I). I believe it is important to understand that some of the issues relevant for the present case have been debated, in the Court and in other institutions of BiH, for a long period of time. I understand however that this background Section will be of more use for those members of the Court who did not participate in the proceedings in cases Nos. U-14/12, U-23/14 and U-4/18. I will then explain the reasons behind my decisions in order to clarify why certain matters were addressed while others were left aside (Section II). Although I see that it is important for the Court to understand the rationale behind my Decisions, these explanations are provided to the Court without prejudice to the above-mentioned theory of functional duality developed by the Court in its Decision U-09/00. Under that theory the Court can exercise review of constitutionality of the content of the legislation enacted by the High Representative but it shall not examine whether the High Representative is justified in enacting legislation in place of domestic authorities. In the third part (Section III)

I will address some of the arguments that are covered by the extensive referral submitted by the Applicant. These allegations will be addressed in turn.

Section I – Background

6. Amendments CXI, CXII, CXX, CXXI and CXXVIII to the Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 79/22 and 80/22) relate to the principles set forth by the Constitution of the Federation concerning the composition of the Federation House of Peoples and the election of its delegates and concerning the elections of the President and Vice-Presidents of the Federation. Articles 1, 2, 3, 4 and 5 of the Law on Amendments to the Election Law of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 67/22) reflect and 'operationalize' those rules.

7. The Constitution of the Federation was adopted by the Constitutional Assembly of the Federation of BiH, at its session held on June 24, 1994. It was published in the "Official Gazette of the Federation of Bosnia and Herzegovina", No. 1/94 and the provisions relevant to this appeal read as follows:

Article IV.A.6.

There shall be a House of Peoples, comprising 30 Bosniac and 30 Croat Delegates as well as Other Delegates, whose number shall be in the same ratio to 60 as the number of Cantonal legislators not identified as Bosniac or Croat is in relation to the number of legislators who are so identified.

Article IV.A.8.

The number of Delegates to be allocated to each Canton shall be proportional to the population of the Canton. Within that number, the percentage of Bosniac, Croat, and Other Delegates of a Canton shall be as close as possible to the percentage of

the Bosniac, Croat, and Other legislators in the Canton. **However, there shall be at least one Bosniac, one Croat, and one Other Delegate from each Canton that has at least one such member in its Legislature*, (emphasis added)*** and the total number of Bosniac, Croat, and Other Delegates shall be in accordance with Article 6. Bosniac, Croat, and Other Delegates from each Canton shall be elected by the respective legislators in that Canton's Legislature.

Article IV.B.1.

The President shall be the head of state.

Article IV.B.2.

In electing the President and Vice-President, a caucus of the Bosniac Delegates and a caucus of the Croat Delegates to the House of Peoples shall each nominate one person. Election as President and Vice-President shall require approval of the two nominees jointly by a majority vote in the House of Representatives, then by a majority vote in the House of Peoples, including a majority of the Bosniac Delegates and a majority of the Croat Delegates. Should either House reject the joint slate, the caucuses shall reconsider their nominations.

Article IX.7.

The published results of the 1991 census shall be used as appropriate in making any calculations requiring population data.

8. On 12 February 1998, Mr. Alija Izetbegović, at the time Chair of the Presidency of Bosnia and Herzegovina, initiated proceedings before the Constitutional Court for evaluation of the consistency of the Constitution of Republika Srpska and the Constitution of the Federation with the BiH Constitution.

9. The Constitutional Court ruled in its third partial

Decision in case no. U 5/98 of 30 June and 1 July 2000 that exclusion of one or another constituent people from the enjoyment not only of citizens' but also of peoples' rights throughout the territory of Bosnia and Herzegovina was in clear contradiction with the prohibition against discrimination contained in the BiH Constitution, which is intended to re-establish a multi-ethnic society based on equal rights of Bosniaks, Croats and Serbs as constituent peoples and of all citizens.

10. Representatives of political parties of both entities accepted the invitation of the High Representative to meet in March 2002 to negotiate under his auspices an agreement on amendments to the constitutions of the entities that could be implemented ahead of the general elections to be held the same year. The facilitation efforts undertaken by the High Representative led some of the political parties involved to conclude an Agreement on 27 March 2002 on various elements necessary to implement the third partial Decision of the Constitutional Court (the Mrakovica Agreement)[1]. Two important political parties, the SDA and the HDZ BiH, rejected the Agreement.

11. Bearing this in mind, the Agreement of March 2002 contained provisions concerning the composition of the Council of Peoples and the Federation House of Peoples and selection of its members, and concerning the composition and election of the Entities' President and Vice-Presidents, which were later incorporated in entity constitutions.

12. Considering that the House of Representatives of the Federation failed to adopt the amendments to the Constitution of the Federation to reflect the Mrakovica Agreement, on 19 April 2002 the High Representative issued the Decision No. 149/02 amending the Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of BiH, No. 16/02). Amendments XXXIII, XXXIV, XLI, XLII and LI to the

Constitution of the Federation enacted by virtue of that Decision provide:

AMENDMENT XXXIII

Composition of the House of Peoples and Selection of Members

(1) The House of Peoples of the Federation Parliament shall be composed on a parity basis so that each constituent people shall have the same number of representatives.

(2) The House of Peoples shall be composed of 58 delegates; 17 delegates from among each of the constituent peoples and 7 delegates from among the Others.

(3) Others have the right to participate equally in the majority voting procedure.

AMENDMENT XXXIV

(1) Delegates to the House of Peoples shall be elected by the Cantonal Assemblies from among their representatives in proportion to the ethnic structure of the population.

(2) The number of delegates to the House of Peoples to be elected in each Canton shall be proportional to the population of the Canton, given that the number, structure and manner of election of delegates shall be regulated by law.

(3) In the House of Peoples there shall be at least one Bosniac, one Croat, one Serb from each Canton which has at least one such delegate in its legislative body.

(4) Bosniac delegates, Croat delegates and Serb delegates from each Canton shall be elected by their respective representatives, in accordance with the election results in the legislative body of the Canton, and the election of delegates from among the Others shall be regulated by law.

AMENDMENT XLI

The President of the Federation shall have two Vice-Presidents who shall come from different constituent peoples. They shall be elected in accordance with this Constitution.

AMENDMENT XLII

(1) In electing the President and two Vice-presidents of the Federation, at least one third of the delegates of the respective Bosniac, Croat or Serb caucuses in the House of Peoples may nominate the President and two Vice-presidents of the Federation.

(2) The election for the President and two Vice-presidents of the Federation shall require the joint approval of the list of three nominees, by a majority vote in the House of Representatives, and then by a majority vote in the House of Peoples, including the majority of each constituent people's caucus.

(3) If no list of the nominees receives the required majority in both Houses the procedure shall be repeated.

(4) If one of the Houses rejects the joint nominees' list in the repeated procedure as well, it shall be considered that the nominated persons have been elected by approval of the list in only one house.

AMENDMENT LI

Published results of the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented.

13. The Constitutional Court conducted several proceedings falling under its jurisdiction arising out of Article VI (3)(a) of the Constitution of Bosnia and Herzegovina concerning the review of constitutionality of these provisions governing the composition and election of the members of the Federation House of Peoples and the President and Vice-

Presidents of the Federation and the corresponding provisions in the Election Law of Bosnia and Herzegovina. Some of those proceedings resulted in the adoption of final and binding decisions of the Constitutional Court, such as decisions of the Constitutional Court in cases Nos. U 14/12 of 26 March 2015 and U 23/14 of 1 December 2016. The Constitutional Court decided to terminate proceedings in Case No. U 4/18 following the withdrawal of the request by the applicant. In all the proceedings concerning all the mentioned cases, following the invitation by the Constitutional Court, the High Representative and/or the Office of the High Representative assisted the Constitutional Court by providing written observations in the amicus curiae capacity[2].

14. The Decisions of the Constitutional Court as well as the *Sejdić and Finci*judgment of the European Court of Human Rights (ECtHR) and other relevant judgements in the *Sejdić and Finci* group of cases (*Šlaku, Zornić, Pilav and Pudarić;* hereinafter: Sejdić-Finci group of cases) remain unimplemented, a situation that has led to the polarization of the political scene. No political party has been ready to compromise on Constitutional/Electoral Reform in BiH. Parties rather used the means at their disposal in order to reach a solution in their favor, including by incapacitating or blocking the institutions in the Federation of BiH.

15. It is deplorable that relevant authorities of BiH took no measures to implement the rulings in the Sejdić-Finci group of cases which clearly require adoption of amendments to the Constitution of BiH and the Election Law of BiH. I will explain in the other Sections of this brief how this failure also affected the formation of authorities in the Federation and the implementation of Decision in case No. U-14/12.

16. The failure of BiH authorities also extends to the implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina of 1 December 2016 in Case No. U 23/14 (Ljubić case). According to this ruling, the provision of Sub-

chapter B, Article 10.12 (2) which states that each of the constituent peoples shall be allocated one seat in every canton and the provisions of Chapter 20 – Transitional and Final Provisions, and of Article 20.16A (2) items a-j of the Election Law of BiH are not in conformity with Article I(2) of the Constitution of BiH. The Court held that the BiH Parliamentary Assembly must harmonise those provisions with the Constitution of BiH no later than six months from the day of delivery of its decision.

17. Failure to implement the decision of the Court in the Ljubić Case resulted in the decision of the Constitutional Court on non-compliance by which disputed provisions of the Election Law were repealed. Such failure led to a situation where the legal framework regulating the election of delegates to the House of Peoples of the Federation as set forth in the Constitution of the Federation and the Election Law of BiH was inconsistent.

18. A request made by Ms. Krišto for review of compliance with the BiH Constitution of the so-called 1-1-1 rule in the Constitution of the Federation in Case No. U 4/18 was withdrawn by the applicant, which deprived the Court of the opportunity to clarify some of the ambiguities relevant for interpretation and implementation of the Ljubić judgment.

19. The absence of harmonization of the legal framework by the relevant authorities obliged the BiH Central Election Commission (CEC) to act in December 2018, adopting an instruction regulating the process of election of the delegates to the House of Peoples, which seeks to address blatant inconsistencies between the Election Law of BiH and the Constitution of the Federation.

20. While the CEC instruction recognized the direct applicability of the Federation Constitution vis-à-vis the need for representation of all constituent peoples in each canton, when possible, several political actors believed it

ignored another provision of the Federation Constitution related to the applicability of the 1991 census. Request for review of constitutionality of this provision was rejected by the Constitutional Court as inadmissible.

21. Political parties have opposing views not only on how to reform the institutions of this country but also on the existing constitutional arrangements in BiH. These views have resulted in differing interpretations of European Court of Human Rights judgements and BiH Constitutional Court decisions. The efforts to reform several aspects of the electoral rules through amendments to the BiH Election Law and limited constitutional changes have unfortunately failed to yield results.

22. I have supported long-standing efforts of the European Union and the United States of America to facilitate an agreement on electoral reform that would comply with the decisions of the ECtHR and of the Constitutional Court as well as the deficiencies related to the integrity of the electoral process that were identified by international institutions, including the OSCE Office for Democratic Institutions and Human Rights or the Venice Commission of the Council of Europe.

23. In order for these amendments to be adopted, the country's political leaders need to reach an agreement on their scope and content. A negotiations process among political parties on electoral reform, facilitated by the European Union and the United States, had ended in late March without results. It is impossible to foresee when such an agreement will be reached and implemented and what would be the scope of an agreed solutions. It has been the consistent view of the Steering Board of the Peace Implementation Council and successive High Representatives, including the present office-holder, that the Constitution of Bosnia and Herzegovina should be changed only pursuant to the procedures prescribed in the Constitution of Bosnia and Herzegovina and that the mandate of the High

Representative is to uphold the implementation of the Constitution of BiH as set forth in Annex 4 to the GFAP and not to amend it. Otherwise, the High Representative would overstep the limits of his mandate and act *ultra vires*.

24. The elections of delegates to the Federation House of Peoples pursuant to the 2018 CEC instruction ensure that the upper chambers of the Federation and BiH Parliaments were able to function but did not bring the dispute concerning electoral reform to an end. This situation exposed serious problems concerning the functionality of the Federation institutions as the process of election of executive authorities in the Federation has been blocked, leaving the government elected in 2014 in charge in a caretaker function. This also affected the timely replacement of judges in the Constitutional Court of the Federation and also affected the ability of Vital Interest Panel to decide on cases, giving political parties more instruments to block proposed legislation.

25. Bearing in mind the prominent role that elections play for the future of Bosnia and Herzegovina and the prominent place that elections hold under the GFAP, I enacted amendments to the Election Law of Bosnia and Herzegovina on 27 July, with an exclusive focus on the integrity of the elections, to bring it more in line with international standards and good democratic practices, leaving more time to political parties to come up with an agreement on how to address other reforms required. Although some political parties and citizens group constructively participated to this dialogue, the Applicant and his political party chose not to contribute to that process.

26. In view of the failure of this dialogue process and given the high risk that the formation of institutions after the elections would once again be blocked, I decided to use my mandate to resolve a situation which I see as a difficulty arising in connection with civilian implementation and jeopardizes citizen participation in political processes and

poses a serious threat to the implementation of the election results and the proper functioning of the Federation and possibly the State authorities. The Decision Enacting Amendments to the Constitution of the Federation of Bosnia and Herzegovina and a Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina, both enacted on the 2 October and announced after the closure of the polls, contain a set of measures that allow the rapid establishment and functioning of legislative, executive, and judicial bodies after the elections.[3]

Section 2 – Rationale Behind the Enactment of Challenged Provisions

27. It should be emphasized that the objectives underlying the enacted Decisions are most relevant and crucial in the present proceedings. These objectives were limited to meet the most urgent necessities, without preempting the overdue reform of the electoral system, in particular to implement the Judgments of the ECtHR in the Sejdić-Finci group of cases, which cannot and should not be achieved through use of the High Representative's powers. Instead, the enacted Amendments to the Federation Constitution and the Election Law purport to avoid another institutional paralysis by enabling post-election establishment of the institutions in the Federation and by ensuring that this process is inclusive and cannot be blocked or slowed down by any political actor. Accordingly, the challenged acts have no bearing on direct elections, but only affect the upcoming formation of indirectly elected bodies.

28. Elections are a crucial element of democratic governance. If election results are not reflected in the institutional setting, the entire democratic structure and all legitimacy of government is placed at risk. Having this in mind, a repetition of a situation where elections are held but never given proper effect would have had severe and even disastrous consequences. It would have stifled the ability of the country

to advance the reform agenda needed for EU integration and more specifically the discussion on candidate status that have entered in a crucial phase following the July decision to grant candidate status to Ukraine and Moldova. It would also have fomented widespread scepticism towards the elections and distrust in democracy as a whole.

29. It was the unwillingness or inability of the relevant political actors to compromise on electoral reform and government formation for so long which pushed the High Representative finally to intervene with a legislative crisis management which does not pretend to pre-empt the necessary implementation of the judgments of the ECtHR and the decisions of the Constitutional Court. The High Representative should not fully displace the elected organs to which the constitutional framework assigns the competence and responsibility for amending the basic law of the Federation and BiH.

30. All this explains why the recent constitutional and legislative amendments enacted by the High Representative cannot pre-empt all the reforms necessary to respond to issues identified by the ECtHR and the Constitutional Court.

31. Željko Komšić, Member of the Presidency of BiH (hereinafter: the Applicant) has submitted a number of arguments about the need to respect those judicial decisions and to realise a more representative system in BiH. Whilst some of these arguments may not be devoid of merit, the specific nature of BiH as a federal and multi-national country must be recognised, as must be the precarious balance between the different constituent groups and other segments of the electorate which to some extent bars full proportional representation as established in other democratic countries. This requires compromises on the classical representative model, adjustment to which need to be considered by domestic actors. Facilitation by the international community, including the High Representative, will be forthcoming.

32. Therefore, it would have been inappropriate for the High Representative to settle all pending issues of proper representation by his decisions rather than respecting the responsibility of the elected authorities and political parties of BiH. The High Representative's role under GFAP covers the mandate to interpret and monitor the basic framework as well as to contribute to resolve difficulties arising in the implementation of the civilian aspects of the GFAP. But this mandate neither includes the responsibility nor the power to change the terms of the very legal regime in which his mandate is anchored.

33. This explains why the electoral Decisions enacted by the High Representative have been designed to address one problem – and one problem only – i.e. the post-election establishment of indirectly elected bodies and their functionality.

34. Election and constitutional reform remain a responsibility of the institutions of BiH and discussions on that subject will need to be resumed as new authorities emerge following these elections. A compromise between local stakeholders on these matters is essential and the international community can only facilitate those efforts and will require discussions on some of the issues that the Applicant has raised in its referral.

35. The preamble of my Decisions enacting the challenged provisions makes all this abundantly clear, highlighting the fact that these amendments are aimed at overcoming the current deadlock in the institutions of the Federation of BiH in order for Bosnia and Herzegovina to engage meaningfully in reforms needed for the country to advance its integration into European Union and noting the Political Agreement on principles for ensuring a functional BiH that advances on the European path reached in the presence of the President of the European Council, Mr. Charles Michel on 12 June 2022. This is even more important following the conditional recommendation of the European Commission to grant BiH candidate status on 12

October 2022.

36. The same preamble makes it clear that discussion on implementation of essential ECtHR and Constitutional Court decisions is overdue. I have called for these discussions to resume as soon as possible, highlighting that further reform of the Constitution of the Federation will be necessary and that the rules governing the composition, election, role and functions of the House of Peoples, including the role of caucuses of three constituent peoples, will need to be examined in the shortest possible time frame with a particular emphasis on the rights of Others.

37. Following the 2018 General Elections, certain political parties have demonstrated their ability to abuse the current constitutional framework to hold formation of key authorities and their functioning hostage to achieving their political goals. This has created an unseen precedent in the post-Dayton history where election results have not been implemented since the last elections, where the outgoing Federation executive elected after 2014 elections is still in place at the time of writing of this brief. Functioning of key Federation authorities that are responsible to work and perform in the interests of all citizens, all three constituent peoples and members of the group of Others alike have been blocked by endless political bickering, ultimatums, zero-sum politics and inability of political establishment to accept that mandate which citizens entrusted to them in 2018 elections implies responsibility to deliver back to the citizens.

38. My mandate includes an obligation to facilitate the resolution of difficulties arising in connection with civilian implementation. As a result, I could not stay idle and watch this situation perpetuate for another four years. I submit that when doing so, I acted to find a balance between restoring confidence in the democratic process in the Federation and the necessity to leave space for reforms agreed by the relevant institutions in the future. The Decision

enacting the challenged provisions are part of a package which is designed at making the Federation institutions functional without prejudging future discussions on constitutional and electoral reform.

39. These future discussions will need to balance the aspirations of those who, like the Applicant, want an electoral system that is more representative of the citizens and those who want appropriate representation of constituent peoples. The Decisions that I enacted and are challenged by the Applicant have strived to be less intrusive and to respect the system put in place under the existing Constitution. As explained in the next section, these considerations are relevant to most of the arguments contained in the request, be it about the election of the President and Vice-President of the Federation or about the appointment of delegates to the House of Peoples of the Federation.

40. As explained in the next section, I have given due consideration to Constitutional Court decisions in cases U 23/14 and U 14/12 and the conclusions of the Court contained therein. However, implementing the relevant ECtHR judgment was not an objective pursued by the Decisions subject to request in this case and could not have been, bearing in mind the limitations of my mandate.

Section 3 – Consequences for judicial review

41. The function and objective of certain provisions of the recently enacted Decisions of the High Representative as crisis management and their objective as transitional responses to institutional malfunctioning calls for particular sensitive parameters of constitutional review.

42. Mutatis mutandis, some of these provisions[4] serve a function similar to interim rulings of a constitutional or international court which are confined to stabilize a normative regime, institutional functionality, to preserve

rights or to prevent an unconstitutional situation from further deteriorating. This transitional function allows a court to maintain such measures, as long as a full implementation of the normative (constitutional or international) standards is still pending.

43. Modern constitutionalism recognizes the figure of a legal regime which albeit not fully in conformity with constitutional standards, at least is "closer to the constitution" than the previous, now displaced or amended legal situation. Thus, the German Constitutional Court held that in light of the limited powers of the German State as to a territorial question, a legal arrangement which is closer to the Basic Law than the previous situation should be upheld.[5] In this context, the Court rejected insistence on a perfect implementation of constitutional standards as excessive "legal rigorism" which would rather entrench a constitutionally highly undesirable situation than an imperfect improvement, only because perfect harmony with constitutional principles cannot be reached for the time being. [6]

Section 4 – Arguments

44. It would be impossible to address all the arguments raised in the extensive referral submitted by the Applicant. I will therefore focus on a few points, which I believe are central to the case pending before the Court:

I. The House of Peoples and principles of Democracy

45. In his challenge, the Applicant refers to the fact that the "Houses of Peoples are the main obstacle to the realization of the democratic will of the people (…) and considers that the role of the House of Peoples has been increased by the acts that are subject to the present proceedings, creating "a situation in which only ethnically based and ethnically organized political parties possess a controlling package of seats in the House of Peoples".

46. It should be recalled that the objective behind the amendments of 2 October is to remove the possibility for a party controlling one caucus of constituent people to prevent the formation of authorities, a possibility that has impaired the ability of the Federation institutions to function appropriately over the last years. Besides, the role and composition of second chambers have been subject to many studies which show that different principles of representation might be applied to reflect the diversity of a state[7]. We also recall the extensive analysis that the Venice Commission devoted to the issue of applicability of international electoral standards to the election of members of upper chambers[8] in which it concluded that "although this distortion of proportionality in the electoral system [e. in the election of delegates to the Federation House of Peoples] might not be consistent with principles of European electoral heritage **if the election was for a directly elected part of the legislature** [emphasis added], it can be justified that the concept of equal voting should not apply to the special parts of the BiH legislature, which are designed to ensure representation of constituent peoples and others".

47. In its Judgment in the Sejdić and Finci case, the European Court of Human Rights underlined that:

> "(…) the travaux préparatoires demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers. Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system (see Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, § 53, Series A no. 113). At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament's chambers to be filled through *direct elections. (…)"**[9]***

48. In fact, the European Court of Human Rights through its jurisprudence clarified that states have a wide margin of appreciation in this area[10] and that there are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision[11].

49. The Court will be aware of the fact that, even though the number of delegates in the House of Peoples of the Federation has been increased, it is inaccurate to state the role of that House was increased. By way of illustration, Amendment CXVI to the Constitution of the Federation removes the possibility to invoke vital national interest on all issues or Amendment CXVIII to the Constitution of the Federation streamlines the procedure to invoke and decide on vital national interest issues, including by deleting the possibility for a proposed act to be blocked without proper review by the Vital Interest Panel established in the Constitutional Court of the Federation.

50. It must be recognized that the House of Peoples of the Federation cumulates functions in a way that sometimes hampers its legislative efficiency and that this should be subject to discussions between local stakeholders. Again, this was articulated in the Preamble of the Decision of the High Representative in order to stress the limited scope of his intervention:

"Noting in this respect the hybrid nature of the House of Peoples which combines ethnic and territorial elements and emphasizing that the various functions exercised by the House of Peoples as a legislative chamber which also exercises functions related to the protection of vital interests of constituent peoples and important appointment functions is seriously affecting the ability of the House and the Federation Legislature as a whole to function efficiently and

to exercise its constitutional responsibilities".

51. I consider the extension of the number of delegates in the Federation House of Peoples as an appropriate and balanced response to the Decision of the Constitutional Court in case U-23/14. The Office of the High Representative has taken the opportunity to comment on the system of allocations of seats to cantons and constituent peoples in the past, reminding that the composition of the House must reflect a number of principles inherent in the constitutional system of the Federation of BiH which calls for a difficult balance: election of delegates by the cantonal assemblies from among their ranks, parity between constituent peoples and representation of the group of Others, proportionality in the distribution of seats between cantons and constituent peoples; and minimum representation of constituent peoples[12] in all cantons whenever it is possible. These principles constitute a mixture of proportionality and "positive discrimination".[13]

52. Without going into the controversial issue of whether Decision U 23/14 can be considered as properly implemented after the Court passed its Ruling on Enforcement on 6 June 2016, an issue that has been used by many political leaders to shape the political discourse, I note that said Decision of the Court includes, in its explanatory part, reference to the principle of proportionality in the allocation of constituent peoples' seats between cantons. In particular, the Court noted that:

"[t]he consequence of the principle of proportionality is that certain canton give more and other canton give less of the delegates to the House of Peoples and that is in accordance with the national structure of the respective canton. It follows that the established principle of proportionality is in the service of as complete representation of each of the constituent peoples in the Federation as it is possible [paragraph 43]"

and that:

“[a]s a result [of the implementation of the Decision of the Court N°5/98], the number of delegates was reduced and Serb delegates were included in the House of Peoples (…). Whether a greater number of delegates would enable better, i.e. more credible representation of constituent peoples and Others is an issue falling within the scope of competence of certain legislative authorities who enjoy a “wide margin of appreciation”, and thus, is not an issue of constitutionality so that it does not fall within the scope of jurisdiction of the Constitutional Court.”

53. The extension of the number of delegates in each constituent peoples’ caucus and of the group of Others follows that logic of “more credible representation” and aims at increasing proportionality in the representation of cantons and constituent peoples by increasing the number of seats that are distributed to cantons and constituent peoples in proportion to their population. By doing, it increases the chances of smaller parties or group of parties to accede to representation. It does so without affecting in any way the safeguards given to all constituent peoples and the group of Others in all cantons.

54. The criticism of the use of the Ste Lagüe (a.k.a Webster) formula to allocate mandates is also unfounded. Applied in this context, the Ste Lagüe formula is usually seen as favoring smaller contenders (in this case cantons)[14]. As a result, the use of that formula comes in support of the minimum representation rule (the so-called 1/1/1 rule) and operates in favour of the representation of constituent peoples in cantons where they are in numerical minority.

55. The Applicant seems critical of the fact that the amendments of the electoral system bring greater proportionality, arguing that “it would be more logical that the majority of these representatives (i.e. delegates) are

elected from areas where they occupy a relative ‘minority’ position”. This argument not only challenges the views that the Court expressed in U 23/14. It also contradicts the Applicant own statement that the House of Peoples is “the main obstacle to the realization of the democratic will of the people expressed through majority decision-making”.

56. All these considerations lead to the conclusion that the extension of the number of delegates, by addressing issues that the Court expressed in its Decision U 23/14, lifts the uncertainty that existed in respect to the implementation of that Decision. As I have underlined in some of my public interventions, that this particular amendment implements the ruling in the so-called Ljubić case in the proper context, i.e. in the Federation House of Peoples. By doing so, it could facilitate discussions on the implementation of the Sejdić-Finci group of cases that must take place within the framework of EU integration.

57. Finally, I note that the representation of Others has been brought up to eleven seats. For the reasons explained in Section 2 of this brief, this measure is only a first step of a necessary reform agenda. However, my views on the need to comprehensively examine the representation and role of the delegates from the group of Others have been plainly expressed in the preamble of the decision which states:

“Persuaded that further reform of the Constitution of the Federation will be necessary and that the rules governing the composition, election, role and functions of the House of Peoples, including the role of caucuses of three constituent peoples, will need to be examined in the shortest possible time frame **with a particular emphasis on the rights of Others**”.

58. With this in mind, I must emphasize that the situation here is essentially different from the one addressed by the ECtHR in the Sejdić-Finci case where the ECtHR, whilst leaving

a wide margin of appreciation in relation to the election of the members of the upper chamber, rejected the total disenfranchisement of certain persons, especially in light of the fact that such exclusion was not required to effect a politically acceptable settlement. This problem does not exist in the current case, even less so after the group of Others is now able to achieve representation from any canton. Previously, only seven seats were assigned to the caucus of the Others in the House of Peoples of the Federation, which made impossible for Others from all ten cantons to be represented in the House.

II. The Choice of the Census

59. In its Ruling on Non-Enforcement of 6 July 2017, the Court repealed the transitional provisions of Article 20.16A, (2), items a-j of the Election Law of Bosnia and Herzegovina. These provisions implemented Article IX.7 of the Federation Constitution which determined that *"Published results of the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented*." Said repeal brought to an end the transitional regime and triggered the applicability of Article 10.12 of the Law which reads as follows:

"The number of delegates from each constituent people and group of Others to be elected to the House of Peoples from the legislature of each canton shall be proportionate to the population of the canton ***as reflected in the last census*** [emphasis added]. The Election Commission will determine, after each new census, the number of delegates elected from each constituent people and from the group of Others that will be elected from each canton legislature."

60. This has placed the Constitution of the Federation at variance with the Election Law of BiH and obliged the Central Election Commission of Bosnia and Herzegovina to adopt an instruction regulating the process of election of the

delegates to the House of Peoples by the BiH Central Election Commission in December 2018. This instruction seeks to reconcile those texts by giving application to Article 10.12 of the Election Law of BiH.

61. Amendment CXXVIII to the Constitution of the Federation of Bosnia and Herzegovina as enacted by virtue of the High Representative's Decision of 2 October introduced a new paragraph (2) in Article IX.7 which provides that *published results of the latest census in Bosnia and Herzegovina shall be used for the calculations requiring demographic data made for the election of delegates to the House of Peoples*. The entry into force of this Amendment removes the above-mentioned inconsistencies between provision of the Election Law [Article 10.12, Paragraph (1)] with Article IX.7. of the Constitution of the Federation.

62. In taking this step, I also took into account a number of considerations:

i. The need for continuity. As mentioned earlier, the 2013 census was applied in the last election;

ii. The positions of the Constitutional Court of BiH provided in many of its past decisions.[15] I would in particular recall Decision in case No. U-9/09 where the Court held:

"In relation to the rationality of using census figures from 1991 as the basis for the organization of Mostar in 2003, the Constitutional Court has already noted that these were the most recent figures available. The Constitutional Court therefore considers that, in the circumstances existing in 2003, using 1991 population figures was less than ideal, but was a reasonable course bearing in mind the difficulty of establishing more up-to-date figures and the importance of encouraging refugees and displaced persons to return to their former homes in Mostar to create a multi-ethnic community in a unified city."

iii. Deciding on the applicability of the latest census for calculation needed to establish representation of constituent peoples and cantons does not in any way prejudge or pre-empt completion of return efforts undertaken under Annex VII to the GFAP. Again, this was made clear in the Preamble to the Decision of the High Representative No. 6/22 which is challenged by the Applicant:

"Emphasizing that Annex VII to the General Framework Agreement for Peace in Bosnia and Herzegovina has not been declared implemented and that particular protection should be granted to the members of constituent peoples that are living in areas where they constitute a numerical minority".

63. I note that the minimum representation rule (so-called 1-1-1 rule) which existed in the Constitution of the Federation since its adoption and that I amended on the 2 October 2022 to include the group of Others also reflects the continued importance of the return of refugees by giving representation in the legislative structure of the Federation to constituent peoples that represent a numerical minority in the canton where they live. This positive discrimination instrument gives all peoples the possibility to have representation from all cantons where they live. Whereas the use of the pre-war census was clearly meant to be transitional and was placed in the transitional provisions of the Constitution of the Federation, the minimum representation rule is included in the core part of the Federation Constitution.

64. I do not share the Applicant's criticism of the use of data from two different censuses for a transitional period. This should rather be considered as evidence that the Federation of Bosnia and Herzegovina is gradually moving away from its past to look more into its future, opening itself for broader reforms. Exclusive use of 30-years old data could indeed prove problematic in a country that aspires to become a member of the European Union.

65. Finally, I would like to draw attention of the Constitutional Court to Article VI.3 as amended by Amendment CIV to the Constitution of the Federation, which according to information available to my Office has been applied by certain authorities in the Federation of BiH by using demographic data published in the 2013 census, thereby derogating the application of Article IX.7. of the Constitution of the Federation.

III. Discrimination in the Election of the President and Vice-Presidents of the Federation

66. The applicant argues that the challenged provisions enacted by the Decisions of 2 October concerning the composition and election of the President and Vice-Presidents of the Federation completely ignored the Decision of the Constitutional Court in in Case No. U 14/12 of 26 March 2015 (Komšić Case) as well as the requirements from the judgments of the ECtHR in the Sejdić-Finci, Zornić and Šlaku group of cases and introduced an additional source of ethnic divisions and a reinforced systemic discrimination.

67. In Paragraph 67 of the said Decision, the Court:

"recalls that the distribution of positions in the state bodies among the constituent peoples was the central element of the Dayton Agreement in order to secure peace in BiH. In that context it is hard to deny the legitimacy of norms that may be problematic from the point of view of non-discrimination, but which were necessary in order to secure peace and stability and to avoid further loss of human lives. The challenged provisions of the Entities' Constitutions and the Election Law on the distribution of the offices of the President and Vice-Presidents of the Entities among the constituent peoples, although built into the Entities' Constitutions in the process of the implementation of the Third Partial Decision no. U 5/98 serve the same goal. In that respect, the Constitutional Court observes that the legitimacy

of the goal, which was reflected in securing the peace, was not called into question by the European Court in the light of the European Convention (see, Sejdić and Finci, paragraph 46).”

And, in Paragraph 71:

“[t]he Constitutional Court recalls that, in accordance with Article I(2) of the Constitution of BiH, Bosnia and Herzegovina is defined as a democratic state operating under the rule of law and with free and democratic elections. In accordance with Article II(1) of the Constitution of BiH, Bosnia and Herzegovina and both Entities will ensure the highest level of internationally recognized human rights and fundamental freedoms. Besides, in accordance with Article II(4) of the Constitution of BiH, rights and freedoms provided for in Article II or in the international agreements listed in Annex I to this Constitution will be secured to all persons in Bosnia and Herzegovina without discrimination on any ground. (…) The legitimate goal which is reflected in the preservation of peace for a country after the war represents the permanent value which the society as a whole must be dedicated to, which significance cannot be diminished by the lapse of time and the progress made in the democratic development. **In that respect the Constitutional Court cannot accept that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples, as regulated by the challenged provisions, and which serves the legitimate goal of the preservation of peace, can be abandoned and replaced by a political system reflecting the rule of majority** [emphasis added](…)”.

In paragraph 72 the Court emphasized that:

“(…) the exclusion of the possibility for the members of “Others” who are, as well as the constituent peoples, citizens of BiH who are guaranteed by law the right to stand for election without discrimination and restrictions in running

for office of the President and Vice-Presidents of the Entities, no longer represents the only way to achieve the legitimate goal, (…) establish the differential treatment of "Others" which is based on ethnic affiliation and result in the discrimination in contravention of Article II(4) of the Constitution of BiH and Article 1 of Protocol No. 12 to the European Convention."

68. In Paragraph 74 the Court concluded that:

"it is impossible to foresee the scope of those changes [to the Constitution of the Federation of BiH and the Election Law of BiH] in this moment. The Constitutional Court will not quash the aforementioned provisions of the Constitutions of the Entities and the Election Law, it will not order the Parliamentary Assembly of BiH, National Assembly and Parliaments of the Federation to harmonize the aforementioned provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the European Court in the quoted cases."

69. I note in that respect that the Constitutional Court exercised the necessary restraint by not striking down the aforementioned provisions of the Constitutions of the Entities and the Election Law and by not ordering the Parliamentary Assembly of BiH, National Assembly and Parliament of the Federation to harmonize these provisions until the adoption, in the national legal system, of constitutional and legislative measures removing the current inconsistency of the Constitution of Bosnia and Herzegovina and Election Law with the European Convention, which was found by the ECtHR in the Sejdić and Finci and Zornić cases.

70. I am well aware of the conclusions of the Court in case U 14/12 which closely follow the conclusions of the ECtHR in the Sejdić-Finci case. As mentioned earlier, High Representative's

intervention pursued an objective quite limited in scope. Taking sweeping remedial measures in this particular instance, having in mind the position of the Court in the above-mentioned Paragraph 74, could have had a negative influence on broader reforms necessary to bring BiH and its entities in compliance with ECtHR judgments in the Sejdić-Finci group of case.

71. I have recalled in the Preamble of the Decision Amending the Constitution of the Federation of Bosnia and Herzegovina of 2 October the importance of implementing the pending ECtHR and Constitutional Court decisions as soon as possible and emphasized that

"(…) the Decision of the BiH Constitutional Court in case no. U 14/12 of 26 March 2015 is yet to be implemented but that its implementation is linked to the prior adoption of constitutional and legislative measures in the implementation of the European Court of Human Rights Judgments taken in the Sejdic and Finci, Zornic and other relevant cases and that the requirement under Article IV.B.1. Paragraph (2) of the Constitution of the Federation remains problematic and shall need to be adjusted, along with the provisions of Article IV.B.2. provided hereinafter".

72. Accordingly, my Decision does not alter Article IV.B.1, Paragraph (2) (amended by the Amendment XLI) to the Constitution of the Federation which determine the composition of the President and Vice-Presidents of the Federation. The challenged provisions which relate to the part of my decisions of 2 October 2022 regulating [nomination and] election of the President and Vice-Presidents of the Federation of BiH must be consistent with Article IV.B.1, Paragraph (2) as amended by the Amendment XLI to the Constitution of the Federation. Challenged provisions of the Election Law of BiH as amended by virtue of my decision of 2 October 2022 implement and operationalize said provisions of the Constitution of the Federation regulating the composition and the election of the

President and Vice-Presidents of the Federation.

73. In this respect, I refer to paragraphs 41 through 43 of this brief and submit that although the amendments to the Constitution of the Federation and the Election Law of BiH do not, for valid reasons, address the deficiencies identified in case No. U-14/12, they are addressing another fundamental deficiency in the system which, by allowing parties to prevent the formation of executive authorities, affect the essential democratic rights of citizens.

74. Under the High Representative's mandate to uphold the GFAP, I fully share the position of the Court expressed in the Case No. U 14/12 that the preservation of peace for a country after the war represents the permanent value which the society as a whole must be dedicated to, which significance cannot be diminished by the lapse of time and the progress made in the democratic development. I also share position of the Court that at this point in time the existing power-sharing system, which is reflected in the distribution of the public offices among the constituent peoples and which serves the legitimate goal of the preservation of peace, cannot be abandoned altogether and replaced by a political system reflecting the rule of majority in terms of full unmitigated proportional representation. Of course, the current exclusion of representatives of the group of Others from the positions of President and Vice-President of the Federation remains on the agenda of necessary constitutional reforms. This issue should be addressed along with the implementation of Sejdić-Finci group of cases within the shortest possible timeline.

IV. Stability of election law and legal certainty

75. In the last four months, I have used the powers vested in me under Annex 10 of the GFAP to ensure that the 2022 general elections can take place and can lead to a situation where elections can be perceived as free and fair. I have been bearing in mind the prominent role that elections play under

the GFAP.

76. My first intervention concerned the financing of the elections. Short of it, it would not have been possible to prepare for and conduct the general elections on 2 October. Despite their legal obligation to do so, the responsible authorities had not secured the funds needed for the conduct of the general elections.

77. On 27 July, I enacted amendments to the Election Law of Bosnia and Herzegovina to bring it more in line with international standards and good practices. My intervention was guided by the need to prevent election fraud and improve election transparency. It relied extensively on a legislative proposal which was prepared during the talks on electoral reform with the assistance of OSCE ODIHR and the Venice Commission and was pending before the Parliamentary Assembly of BiH. I thereby gave the CEC of BiH the means to sanction violations of the rules of conduct in the election campaign without touching in any way on the electoral system of BiH.

78. This is where my intervention in respect to direct elections ended. As I have mentioned above, the democratic nature of elections is questionable if they cannot be implemented as parties abuse the structural weaknesses of the legal framework in place and abuse the formation of indirectly elected bodies as a leverage to achieve their political goals. Stagnation of the Federation resulted in one of the major difficulties arising in connection with the implementation of the civilian aspects of the GFAP and I decided to step in to ensure that the Federation would not face another four year-period of stagnation. Of course, I would have preferred not to have to intervene at his stage.

79. The Applicant argues that the timing of my Decisions disrupts the principle of stability of electoral legislation. I published my decisions after the closure of the polling stations and before the announcement of the first preliminary

election results. I did so in order to prevent any influence of the Decision on the mind and the electoral preferences of the voters and not to disturb the election campaign of political actors. I also acted before the first results were known because I wanted to avoid any speculation that I reacted to a new political distribution.

80. The underlying principles of European electoral systems can only be guaranteed if certain general conditions are fulfilled. Stability of electoral law represents one of such general conditions for implementing the principles underlying European electoral heritage (*universal, equal, free, secret and direct suffrage and* elections must be held *periodically*)[16] that is meant to ensure that rules of electoral law have at least the rank of a statute and 2. fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, are not open to amendment less than one year before an election, or are written in the constitution or at a level higher than ordinary law.[17] In practice, the principle is limited in scope:

> I. The Code of Good Practice in Electoral Matters highlights that stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. It covers stability of some of the more specific rules of electoral law, especially those covering the electoral system per se, the composition of electoral commissions and the drawing of constituency boundaries.
>
> II. Insofar as [some of the] principles underlying European electoral heritage do not apply to the presidency elections and the indirectly elected upper chambers[18], this by extension also impacts the applicability of general conditions, such as the stability of the electoral law for implementing the principles underlying European electoral heritage, to the presidency elections and the indirectly elected upper chambers.

81. I submit that my Decisions do not interfere with issues that are subject to the principle of stability of the law. They do not affect the counting of the votes. They do not interfere with the fundamental elements of electoral law – like the composition of election commissions, the electoral system and the drawing of constituency boundaries.

82. My intervention does not relate to direct elections. It aims at making elections and appointments to indirectly elected bodies possible by removing the procedural obstacles that would have made this unlikely. I note in that respect that all the judicial decisions mentioned in the request relate to changes that were made to the regulations applicable to direct elections.

83. The Applicant further argues that the High Representative's Decisions, by violating this principle of stability, made the election process meaningless, misleading and deceiving the voters and political parties.

84. The changes related to the composition/elections to the Federation House of Peoples rely on the existing system in place before these Decisions and represent minimum interventions to make this system functional. The new rules do not change the method of indirect elections in the cantonal assemblies nor the method of allocation of seats that was provided for in the election law. They do not take away from any canton representation in any caucus of constituent people. They merely ensure that more delegates will be elected by certain Cantonal Assemblies from each constituent people and from the group of Others.

85. The rules in the Constitution of the Federation and in the Election Law of BiH distinguish between elections for Cantonal Legislatures and elections for the Federation House of Peoples. The ethnic declaration of the candidates annexed to the candidacy lists certified for the elections to the cantonal legislatures is not mentioned on the printed ballots

and is therefore not formally known to the voters. When the voters cast their vote, they are doing so with a view to have their candidate elected to the cantonal assembly. It is only when the elections to the cantonal assemblies are certified that caucuses of constituent peoples are formed on the basis of those declarations and that parties establish their lists to compete in the vote that takes place in each caucus of each assembly. When casting their votes for a candidate for a cantonal assembly, the voter is unaware of the way the caucus will be composed, how parties will seek alliances or how other members of the constituent people caucus will vote. In fact, the candidates that fare best in the direct vote could very well be set aside by a political party and not be candidates for election to the House of Peoples of the Federation. It is difficult to see how my Decision could have confused the voters as to the predictability of these elections.

86. The same argument can be made for the change of rules regulating the nomination and election of the President and Vice-President of the Federation. Besides the fact that it is generally accepted that deciding on the manner of election of the President is a matter for the Constitution of an individual state and is not subject to the same guarantees as election to the legislature[19], I submit that my Decisions amending the rules regulating those elections are not, as claimed by the Applicant, changing the manner of election of the President and Vice-Presidents as to deprive their election of democratic legitimacy.

87. I would like to emphasize that the amendments concerning the nomination of candidates for the position of the President and Vice-Presidents introduce specific deadlines for the nomination and election applying a “degressive majority” for the nomination of candidates for those positions with the aim to facilitate expedient nomination and election of the candidates to the three positions. If the number of delegates of one caucus necessary to nominate a candidate for one of the

positions of President and Vice-Presidents has increased in the first 30 days following the certification of the elections to the House of Peoples, the number of delegates needed to nominate decreases with time in a way that makes the nomination of candidates inevitable.

88. Some voices have argued that these changes benefit one specific party. This criticism is unfounded and ignores the objectives of degressive majority: The degressive majority is meant to ensure:

1. that the process of nomination cannot be stalled in one caucus and

2. that parties conclude alliance with other parties in order to access to the executive positions and form a government that would have the majority to govern and enjoy a relative stability.

In that respect, it promotes a crucial element of democratic competition, i.e. the formation of alliances while ensuring that if a party or group of parties decides to frustrate the formation of executive authorities, these executive authorities can be formed without him or them.

89. Some have also argued that my Decisions shift the balance of power from the Federation House of Representative to the Federation House of Peoples. I note in that respect that the House of Representative continues to have precedence over the House of Peoples in the election of the President and Vice-President. Whereas the number of delegates necessary to nominate a candidate has been increased, at least in a certain timeframe, the requirement to have a majority in each caucus to elect the list for the President and Vice-Presidents has been abandoned. I must also emphasize that the method of election of the government remains unaffected by the Decisions and that Article IV.B.5 of the Federation Constitution provide for the election of the Government by sole House of

Representatives of the Federation. As a result, no Government can be elected that does not receive a majority of votes in the House of Representative of the Federation.

90. For all those reasons, I submit that the amendments subject to the Applicant's request do not interfere with the principle of stability of the election law nor with the predictability of the election system. Rather, a situation where elections would remain dead letter and not translate in the formation of indirectly elected bodies would have directly eroded the *confidence in the elections* together with the principle of *legitimate expectations* and/or *legal certainty*. The Decisions to amend the Federation Constitution and the Election Law of BiH in a remedial way respond to this risk, striking a fair balance between the legitimate interests of the voters and various sector of the electorate on one hand and the need to promote good governance on the other.

Section 5 – Concluding Remarks

91. This rather long brief shall assist the Court in evaluating the circumstances that led to the difficult Decisions taken on October 2. These Decisions were never meant to restructure the constitutional regime in BiH, address the delicate but crucial question of representation of the group of Others and citizens or even pre-empt the elected political bodies in sharing the country's future. They rather purport to ensure that the Federation of BiH and BiH as a whole have, rather earlier than later, functioning institutions with the necessary legitimacy to decide on BiH future in a period that will certainly bring a number of challenges, but that could also move BiH much closer towards Europe and European integration.

92. In reforming the constitutional structures in BiH, these institutions will need to ensure citizens' participation in the decision-making, a possibility that I have introduced in the Constitution of the Federation.

93. The enacted Decisions which are now under the Court's scrutiny are fully in line with my previous interventions in attempting to move away from the deadlock the Federation of BiH has been in for years. In terms of minimal constitutional surgery, this recent intervention also sought to make the elections effective. It has started to produce effect with the recent appointment of judges to the Constitutional Court of the Federation and to its Vital Interest Panel, an institution that had been unable to work for more than three years. Contrary to the arguments submitted by Applicant and others in favour of the *status quo ante*, stability of an electoral regime, properly understood, cannot signify stalemate, institutional blockade and dysfunctionality and, in the end, defeat the voters' confidence in democratic processes.

94. The Court and the High Representative, within the different mandates, have been working towards the same objective. Like the Court, the High Representative can authoritatively interpret the text that established his mandate, but cannot alter it. It would have been simpler to implement all Court decisions, rulings of the Constitutional Court as well as judgments of the ECtHR, with a single sweeping decision. However, such a massive intervention would have been legally an act overstepping the mandate under GFAP and politically inappropriate. What is needed at this stage are institutions that can fulfil their constitutional functions and start discussing institutional challenges in a spirit of compromise.

95. The Applicant's views reflect his own vision for the future of BiH. As the Court has said so many times, these must be confronted with the reality of the situation in BiH and its sui generis constitutional system.

96. Many voices will continue to claim that I could have done more or that I should have done less. With due restraint, I have taken the necessary steps to ensure that the current institutional system is not held hostage by political parties.

97. Many of the arguments contained in the request of the Applicant are inconsistent and contradict each other. Many of these misguided arguments flow from a lack of understanding of the extent of my Decisions and of its content. I wish to stress once more that none of the provisions challenged by the Applicant affect direct elections or changed in any way the method of filling the positions in indirectly elected bodies. Nor do they shift responsibilities from one constitutional organ to another.

98. I therefore ask the Court to reject the request of the Applicant fully. A decision that would stay the application of the challenged provisions would have far-reaching damaging effects, including on the ability of BiH to meet the challenges that will enable the newly formed authorities to advance on its path towards the European integration.

99. For the same reason the application for interim measure must be rejected. A decision granting such a measure would neither be in the interest of the parties nor in the interest of the proceedings. Granting interim measures would indeed perpetuate a situation where the election results cannot be properly implemented, the very situation that my Decisions seek to avoid.

Notes:

[1] Sarajevo/Mrakovica Agreement of 27 March 2002 is annexed to this submission.

[2] These briefs include elaborations concerning the provisions of the Constitution of the Federation of Bosnia and Herzegovina and the Election Law of Bosnia and Herzegovina that were in force prior to being partially amended through enacted Amendments to the Constitution of the Federation of

Bosnia and Herzegovina and the Law on Amendments to the Election Law of Bosnia and Herzegovina that are challenged in the present case pending before the Constitutional Court and are available at https://www.ohr.int/cat/amicus-briefs/

[3] https://www.ohr.int/measures-to-improve-federation-functionality/

[4] In particular Amendment CXX which is subject to the current proceedings.

[5] German Constitutional Court, BVerfGE 4, 157 para. 38 (1955).

[6] German Constitutional Court, *ibid.*: "Die rechtliche Feststellung einer Verfassungswidrigkeit wird grundsätzlich dadurch ausgeschlossen, daß der durch den Vertrag geschaffene Zustand "näher beim Grundgesetz steht" als der vorher bestehende. Wollte man nur eine dem Grundgesetz voll entsprechende vertragliche Regelung als verfassungsmäßig gelten lassen, so hieße das, einen verfassungsrechtlichen Rigorismus vertreten, der sich in den Satz verdichten ließe: Das Schlechte darf dem Besseren nicht weichen, weil das Beste (oder von diesem Standpunkt aus: das allein Gute) nicht erreichbar ist. Das kann vom Grundgesetz nicht gewollt sein." (Legal establishment of an unconstitutionality is being, in principle, excluded by the fact that the condition created by the contract "is closer to the Constitution" than the previously existing one (condition). If one would want to accept as constitutional only those contractual arrangement which fully conform to the Constitution, that would mean to hold a view of constitutional rigidity which could be summarized in the following sentence: The Bad must not yield to the Better, because the Best (or from this standpoint: the Only Good) is not achievable. This cannot be the intention of the Constitution.)

[7] See for instance, Institute for Democracy and Electoral Assistance, Bicameralism, 2017

[8] European Commission for Democracy through Law, Amicus Curiae Brief for the Constitutional Court of Bosnia and Herzegovina on the Mode of Election of Delegates to the House of Peoples of the Parliament of the Federation of BiH, Opinion 862/2016 if 17 October 2016.

[9] Paragraph 40.

[10] For instance Mathieu-Mohin and Clerfayt v. Belgium, 2 March 1987, § 52, Series A no. 113; Matthews v. the United Kingdom [GC], no. 24833/94, § 63, ECHR 1999-I; Labita v. Italy [GC], no. 26772/95, § 201, ECHR 2000-IV;

[11] Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 61, ECHR 2005-IX

[12] This requirement now applies, by virtue of Amendment CXII enacted by the High Representative, to the Group of Others.

[13] See Information Submitted by the Office of the High Representative in case N°U 23/14, paragraph 19.

[14] See for instance “The Politics of Electoral Systems”, Ed. Michael Gallagher and Paul Mitchell, Oxford University Press.

[15] Decision in Case No. U 9/09 of 26 November 2010 (paragraphs 67 and 68)

Decision in Case No. U 23/14 of 1 December 2016 (Paragraph 55)

Decision in Case No. U 3/17 of 6 July 2017 (paragraphs 47-51)

Decision in Case No. U 3/19 of 28 March 2019 (paragraphs 26-28)

Decision in Case No U 14/22 of 26 May 2022 (paragraphs 43 and 44)

[16] European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters and Explanatory Report, CDL-AD(2002)023rev2-cor, paragraph 2 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e: *"These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the "European electoral heritage". This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, and the second the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met."*

[17] European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters, *ibid.*, p.10

[18] European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters, *ibid.*, paragraph 56: *Direct election of one of the chambers of the national parliament by the people is one aspect of Europe's shared constitutional heritage. Subject to such special rules as are applicable to the second chamber, where there is one, other legislative bodies, like the Parliaments of Federate States, should be directly elected, in accordance with Article 3 of the Additional Protocol to the European Convention on Human Rights (…) On the other hand, even though the President of the Republic is often directly elected, this is a matter for the Constitution of the individual state*.

[19] European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters, ibid. at paragraph 56.