

# **Brief submitted by the High Representative concerning the request of the applicant in Case No. U 4/18**

## **I. Introduction**

1. On 10 January 2018 the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court) received the request of Ms. Borjana Krišto, who was, at that time, Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, for the review of constitutionality of Article IV.A.2.8. Paragraph (3) of the Constitution of the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH", nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 & 88/08) (hereinafter: Constitution of the Federation)
2. On 28 March 2018, the Constitutional Court invited the High Representative, as the authority that enacted the "challenged provisions", to intervene in an *amicus curiae* capacity.
3. This Brief is submitted pursuant to that invitation and with a view to assisting the Constitutional Court. It contains some elements that were already included in the brief that the OHR Department for Legal Affairs provided in the proceedings concerning the Case No. U 23/14, which covered an issue related to the one arising under the present case.
4. The challenged provision, Article IV.A.2.8. Paragraph (3) of the Constitution of the Federation, was enacted by virtue of Amendment XXXIV to the Constitution of the Federation that formed integral part of the Decision of the High Representative No. 149/02 of 19 April 2002 (Decision No. 149/02 amending the Constitution of the Federation of Bosnia and Herzegovina, "Official Gazette of the Federation of BiH" no. 16/02). That amendment was never adopted by the Parliament of the Federation. As a result, the Constitutional Court will be reviewing a decision by which the High Representative substituted for the Parliament of the Federation of Bosnia and Herzegovina.
5. The Constitutional Court will possibly deliberate on this point when considering its admissibility proceedings. It is worth underlining that, following the Decision of the Constitutional Court in Case No. U 9/00 of 3 November 2000, the High Representative has consistently endorsed the power of the Court to review an exercise of his substitution powers. The High Representative therefore does not object to the review by the Constitutional Court of challenged provision of Article IV.A.2.8. Paragraph (3) of the Constitution of the Federation enacted by virtue of Amendment XXXIV to the Constitution of the Federation.
6. This information explains the rationale behind the challenged provision and argues that this provision is part of the machinery for the implementation of provisions central to the Dayton Peace Agreement. The challenged provision creates conditions that allow for the return of refugees and displaced persons to their homes of origin and thereby helps to re-establish the multi-ethnic society that had existed prior to the war without "any territorial separation that would bear ethnic inclination."<sup>[1]</sup>

## **II. Factual Background**

7. The request submitted to the Constitutional Court relates to one of the principles set forth by the Constitution of the Federation concerning the composition and selection of the delegates of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina (hereinafter: the Federation House of Peoples). In particular, it contends that the requirement that "*[i]n 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*" is contrary to the Article I(2) of the Constitution of Bosnia and Herzegovina (hereinafter: the BiH Constitution), Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and

Fundamental Freedoms (hereinafter: the ECHR) and Article II/4 of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights (1966) and the Optional Protocols (1966 and 1989).

8. This first section of this information focuses on the factual background and explains the evolution of the provisions of the Constitution of the Federation related to the Federation House of Peoples.
9. 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 provided the following concerning the composition of the Federation House of Peoples and the selection of its delegates:

#### **Article IV.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.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 IX.7.**

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

10. 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 an evaluation of the consistency of the Constitution of Republika Srpska and the Constitution of the Federation with the BiH Constitution.
11. The four partial Decisions of the Constitutional Court in case no. U 5/98<sup>[2]</sup> were related to a number of provisions of the Constitutions of the Entities of Bosnia and Herzegovina, some of which were found to be in contravention of the BiH Constitution. In particular, the Constitutional Court ruled in its third partial Decision in case no. U 5/98 of 30 June and 1 July 2000 (Official Gazette of Bosnia and Herzegovina, No. 23/00 of 14 September 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 the equal rights of Bosniaks, Croats and Serbs as constituent peoples and of all citizens.
12. Representatives of political parties of the Federation of Bosnia and Herzegovina (hereinafter: the Federation of BiH) and of Republika Srpska 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<sup>[3]</sup>.

13. The said Agreement embodied the broadest possible agreement throughout the Federation of BiH and Republika Srpska to protect the equal rights of Bosniacs, Croats and Serbs as constituent peoples, and of the Others, and all citizens of Bosnia and Herzegovina in both Entities. Although this Agreement was signed by a vast majority of the political parties participating in the negotiations, two important political parties, the SDA and the HDZ BiH, rejected the Agreement.
14. Bearing this in mind, the Agreement of 27 March 2002 contained the following provisions concerning the composition of the Council of Peoples and the Federation House of Peoples and selection of its members:

**Article 3. Composition of the Council of Peoples and the House of Peoples and selection of members**

The Council of Peoples and the House of Peoples shall be composed on a parity basis so that each constituent people shall have the same number of representatives.

A minimum number of 8 and a maximum number of 17 members shall come from a single constituent people. The Others shall be represented by a number not exceeding one half of the representatives of a single constituent people in the CoP and HoP respectively.

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

15. Article 1.14. of the Election Law (Official Gazette of BiH, Nos. 23/01 and 7/02) requires the Election Commission of Bosnia and Herzegovina to notify all competent authorities of the date of an election at least one hundred and seventy (170) days prior to the election. As a result, the Peace Implementation Council Steering Board met on 27 March 2002 and concluded, *inter alia*, that the amendments to the Entity constitutions must be fully in line with the agreement reached by the political parties on 27 March 2002 and requested the Entity parliaments to adopt the amendments by the first week of April 2002.<sup>[4]</sup>
16. On 18 April 2002, the Federation House of Peoples adopted amendments to the Constitution of the Federation consistent with the four partial Decisions of the Constitutional Court in case No. U 5/98 and respecting the provisions of the 27 March 2002 Agreement. However, the House of Representatives of the Federation of BiH failed, on the same day, to adopt the same.
17. 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 XXVII – LIV to the Constitution of the Federation formed an integral part of that Decision. The text of the amendments was based on the text of amendments adopted by the Federation House of Peoples. Amendments XXXIII, XXXIV 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.

*This Amendment shall amend Article IV.A.2.6 of the Constitution of the Federation of BiH.*

**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.
- (5) No delegate of the House of Representatives or councilor of the Municipal Council may serve as a member of the House of Peoples.

*This Amendment shall replace Article IV.A.2.8 of the Constitution of the Federation of BiH.*

### **AMENDMENT LI**

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

*This Amendment shall replace Article IX.7 of the Constitution of the Federation of BiH.*

18. The Law on Amendments to the Election Law adopted by the Parliamentary Assembly of BiH in July 2002 (Official Gazette of Bosnia and Herzegovina, No. 20/02) introduced provisions regulating the selection of delegates to the Federation House of Peoples with the aim to implement the provisions of the Constitution of the Federation as set forth in Amendment XXXIII and XXXIV to the Constitution of the Federation. The Constitutional Court has decided in its recent Decision adopted in the case No. U 23/14 of 1 December 2016, that Article 10.12, paragraph 2 of the Election Law reading *each constituent people shall be allocated one seat in every canton* and Article 20.16 A, paragraph (2), items a-j of the Election Law of BiH which allocate seats to Cantons and constituent peoples, are in contravention of the principles established in the Constitution of the Federation as they introduce an absolute determinant rather than a conditional one. The following section will therefore focus on the principles established by the Constitution of the Federation with a particular emphasis on the provision challenged in the applicant's request.

## **III. Arguments**

### **III.1. Rationale of the Challenged Provision**

19. As mentioned earlier, the matter raised in the request relates to one of the principles set forth by the Constitution of the Federation concerning the composition of the Federation House of Peoples and the method of selection of its members. These matters do not constitute "principles applicable to the elections at all levels of power in Bosnia and Herzegovina" nor "pertain to elections of members and delegates of the Parliamentary Assembly or Presidency of BiH". As such, pursuant to the case law of the Constitutional Court<sup>[5]</sup>, they do not fall within the exclusive responsibilities of Bosnia and Herzegovina but are rather responsibilities falling within the organisational autonomy of the Federation of BiH.<sup>[6]</sup>
20. As a result, it is important to emphasize that it belongs to the Constitution of the Federation to determine the composition of the Federation Parliament and set the principles applying to the selection of its members whereas the Election Law must reflect and 'operationalize' those rules contained therein.

21. Article IV.2.6 and IV.2.8 of the Constitution of the Federation regulate the composition and election to the Federation House of Peoples and establish five principles in that respect:
- a. Members of the Federation House of Peoples are elected by the Cantonal Assemblies from among their members;
  - b. The Federation House of Peoples is composed on a parity basis so that each constituent people has 17 delegates and the Others have 7 delegates;
  - c. The number of delegates to be elected by a canton is proportional to its population;
  - d. The delegates elected by each constituent people in a canton reflects the ethnic structure in that canton;
  - e. At least one representative of each constituent people is elected from each canton having such representatives in its legislative body.

Since the application of these provisions involve calculations requiring demographic data, Article IX.7 of the Constitution of the Federation requires that the published results of the 1991 census are used for all calculations requiring demographic data, until Annex 7 is fully implemented.

22. Every one of these requirements has its own rationale and, applied together, they reflect the fact that the Constitution of the Federation established an upper house, the Federation House of Peoples, that blends representation of constituent peoples (and representation of Others) and territorial representation of cantons. Whereas the representation of constituent peoples is made on an equal representation basis, the representation of cantons is proportionate to their respective population.
23. In the present case, the applicant submits that the application of the requirement under which at least one representative of each constituent people be elected from each canton whenever there is such a representative in the Cantonal Assembly leads to a violation of the other requirements which amounts to a violation of the Constitution of BiH and, in particular, Article I(2) thereof.
24. As mentioned above, the requirement that each canton elects at least one representative of each constituent people whenever there is such a representative in the Cantonal Assembly was part of the Washington Agreement concerning the Constitution of the Federation from March 1994<sup>[7]</sup>. Whereas the Entity Constitutions were amended to ensure that all constituent peoples enjoy the same representation in the upper house in accordance with the Decision of the Constitutional Court in the case No. U 5/98 (Constituent Peoples Decision), the broad features of the system of elections of delegates of the Federation House of Peoples were kept untouched. As a result, the only substantive changes made to the composition of the Federation House of Peoples and the election of its members concerns the establishment of a Serb caucus with the same composition as the Bosniac and Croat caucuses and the reduction of a number of delegates in the caucuses of constituent peoples from 30 to 17.
25. The principles concerning representation of constituent peoples and cantons within the upper house of the Federation Parliament reflect the political considerations prevailing when they were adopted. The constitutional principle that the applicant challenged seeks to promote the representation of all constituent peoples even from cantons where they constitute a numeric minority.
26. To that end, the accent was put on giving all cantons where representatives of constituent peoples are elected a chance to elect at least one of those representatives to the Federation House of Peoples. This was a way to highlight the constitutional principle of collective equality of constituent peoples throughout the territory of BiH often put forward by the Constitutional Court of BiH (see Constitutional Court, Third Partial Decision, No. U 5/98 of 1 July 2000) and to re-establish the multi-ethnic society that had existed prior to the war by ensuring that all caucuses in the Federation House of Peoples would have appropriate representation from as many cantons as possible.
27. This was emphasised by Mr. Krešimir Zubak, the first President of the Federation who was a

signatory to the Washington Agreement and was part of the discussions that led to the Sarajevo-Mrakovica Agreement, who stated, in a recent statement to media, that:

*"[i]t should be known that in the process of election of the delegates to the House of Peoples, the methods of positive discrimination and proportionality are combined. In our case, that is applied by the constitutional provision according to which at least one delegate is elected from each constituent people from each canton, if elected in the cantonal assembly, and that meets the principles of positive discrimination and proportionality. Why positive discrimination? Precisely to enable those constituting the minority in certain areas, that is in cantons in our case, to also participate in the adoption of important decisions. (...) The role of the House of Peoples of the Parliament of the FBiH is to give opportunity to the members of less represented peoples, who do not have a dominant position in the House of Representatives, to influence decision-making. The essence is to enable the members of the constituent peoples in cantons where they are minority to take part in making of important state decisions, laws above all".[8]*

28. As such, the principle stems from "necessary, reasonable or proportionate steps to develop a power-sharing structure or a multi-ethnic community" throughout the Federation of BiH.[9]
29. The link between the right to return and the need to ensure that constituent peoples and others are represented in government structures at all levels was also central to the discussion that led to the adoption of amendments to the Constitution of the Federation. In its Third Partial Decision, No. U 5/98 of 1 July 2000, the Court emphasized the importance of the concomitant application of, *inter alia*, the last line of the Preamble of the Constitution and the positive obligations of the entities which follow from Articles II.3 (m) and II.5 of the Constitution of BiH[10] and concluded 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."
30. The Steering Board of the Peace Implementation Council also stressed this link, in its Communiqué of its meeting held on 6-7 May 2002, emphasised that both the Mrakovica-Sarajevo Agreement and the subsequent amendments to the entity constitutions highlight the obligation of the entity authorities to make every possible effort towards the full implementation of Annex 7 of the GFAP, which is crucial to the overall process of reconciliation in Bosnia and Herzegovina.
31. The rule has sometimes been used by some in ignorance of its rationale and for the sole purpose of gaining political representation, a situation which the Court had addressed in its past decisions[11]. Although this is a practice that should be regulated through election regulations, an abuse of the constitutional rule does not undermine its existence nor impair the intention behind those provisions, in this present case the intention to implement certain crucial provisions of the Peace Agreement.

### **III.2. An Overarching Rationale in the Constitution of the Federation**

32. The challenged provision is not the only provision that seeks, through the establishment of power-sharing structures, to re-establish multi-ethnicity throughout the Federation of BiH. It is also not the only provision that ensures that constituent peoples, which are marginally represented in cantonal assemblies, are given rights that enable them to have an influence on the decision-making process to further the equality between constituent peoples.
33. It is the same intention, to give constituent peoples the possibility to defend their national interests wherever they are represented in political authorities, that later led to the adoption of Amendment LXXIX to the Constitution of the Federation related to Article V.7 of the Constitution of the Federation under which a caucus of constituent people is constituted when **at least one** delegate from a constituent people is elected to a cantonal assembly. This rule enables constituent people that constitute a minority in a particular canton to have their "vital national

interest” protected in that canton even if there is only one of their representatives elected in the assembly. A determination that such a delegate does not have legal standing to represent the constituent people they belong to in the Federation House of Peoples would also affect his/her ability to protect the national interest of that constituent people at cantonal level.

34. In the same way, the intention to over-represent constituent peoples that constitute numerical minority led to the re-enactment of Article IX.7 of the Federation Constitution which ensures that the results of 1991 census are appropriately used for all calculations requiring demographic data. I emphasise however that what was an open-ended requirement under the agreed constitutional principles of the Washington Agreement was qualified in 2002 to ensure that these data would only be used “until Annex 7 is fully implemented”. In that respect, the rule that is now in the Constitution of the Federation is of a transitional nature and explicitly linked to the right to return whereas the challenged provision goes, as mentioned above, further by seeking to ensure equality of constituent peoples throughout the FBiH on a permanent basis.
35. Without going into the merits of Article IX.7., which is not part of the provisions challenged by the applicant, I note that the fulfilment of Annex VII to the GFAP and the relinquishment of the use of 1991 census demographic data would contribute to redistributing the mandates for the Federation House of Peoples between the Cantons, ensuring increased representation of constituent peoples in the Cantons where they currently live as opposed to those where they lived before the war. As such, it would go towards addressing some of the concerns expressed by the applicant.
36. I further note that sixteen years after the adoption of the challenged provision, no step has been taken to declare Annex VII completed. To the contrary, the Parliamentary Assembly of BiH adopted a Strategy of Bosnia and Herzegovina for the Implementation of Annex VII to the GFAP, which envisages projects related to the return of refugees and displaced persons. We note that some of these projects had a five-year duration and are due to be completed by 2020.
37. It remains however to be seen whether the provision of IX,7 still serves its purpose and act as an incentive for refugees and displaced persons to return to their pre-war homes. We are not aware that this provision or an amendment thereto has ever been discussed in the Parliament of the Federation.

### **III.3. Nature of the Federation House of Peoples**

38. As explained above, five constitutional requirements govern the composition and election of delegates to the Federation House of Peoples. These requirements are of equal rank and must be interpreted as a consistent whole and applied together. The strict application of only one of those principles, or providing precedence to one over the others, would lead to a breach of other principles or would render them ineffective. To give an obvious example, the strict application of the requirement that the representation of cantons in the Federation House of Peoples be proportional to their population and of the requirement that the delegates selected by each canton represent constituent peoples proportionally would inevitably require a departure from the principle of equal representation of constituent peoples in the Federation House of Peoples. Therefore, it is not only the principle that at least one representative of each constituent people be elected from each canton whenever there is such a representative in the Cantonal Assembly that distorts the strict proportionality but also the need to ensure parity between constituent peoples which populations vary greatly. In other words, it is clear that the principle “minimum one representative per constituent people and canton if possible” leads to over-representation of constituent peoples in some cantons to the detriment of others. In the same way, the principle of parity between constituent peoples also leads to a distortion in the representation in a way that ensures that, in the election of delegates to the Federation House of Peoples, a Croat delegate’s vote has more weight than a Bosniak vote and less weight than a

Serb vote.

39. However, the five constitutional principles included in Article IV.2.6 and 8 of the Constitution of the Federation illustrate the clear intention of the drafters not to disturb the principle of organisation of the Federation of BiH and of its authorities based on both territorial and ethnic considerations. This hybrid nature manifests itself in the composition of the Federation House of Peoples and the election of its members by the fact that the representation of each canton must be proportional to its population. When distributing mandates to cantons and constituent peoples, the mandates are first distributed to cantons and, afterwards, to constituent peoples in each canton respecting the principle of minimum representation of constituent peoples. The representation of cantons is also achieved through the principle under which Cantonal Assemblies elect delegates from amongst their members.
40. This mixture of ethnic and territorial elements is also reflected in other provisions of the Federation Constitution. By way of illustration, Article V.1.3. of the Constitution of the Federation enables cantons to establish Councils of Cantons in order to coordinate activities on matters of common interest to their communities and to advise **their representatives in the House of Peoples**. This clearly illustrates the link between the members of the House of Peoples and the Canton from which they are elected and goes against an interpretation that the House of Peoples' exclusive aim is to represent constituent peoples.
41. This issue was abundantly discussed in the negotiations that led to the "Mrakovica Agreement" during which a number of political parties were advocating for absolute symmetry between the institutions in the Federation and Republika Srpska. It was the need to ensure representation of the cantons and the need to maintain them as a key element of the power-sharing arrangement agreed under the Washington Agreement, that led to different solutions being adopted for the Federation and the Republika Srpska. The creation of a Council of Peoples with a mandate limited to questions of Vital National Interest reflects the fact that territorial representation was not seen as an issue in the centralised structure of Republika Srpska as it was in the Federation. As a result, recognising that the Federation House of Peoples has no other purpose than representing constituent peoples would lead to the conclusion that its mandate should be substantially limited or that cantons should no longer play a role in electing delegates to the Federation House of Peoples.
42. To conclude this section, it is important to stress that the principle of ethnic and territorial representation have never been seen as conflicting principles insofar as the representation of Cantons in the authorities of the Federation were seen as a complementary way to ensure protection of constituent peoples, in particular those which constitute a numeric minority Federation-wide.

#### III.4. Minimum Representation in Upper Chambers

43. As highlighted by the Venice Commission in its brief for the Constitutional Court of BiH on the mode of election of delegates to the House of Peoples of the Federation,

*"it is not inherently undemocratic to have a second chamber that is not proportionally representative of the population. In particular, bicameralism is often practised in federal states to equally represent the sub-national authorities at a national level; where this is the purpose of the second chamber, it is entirely appropriate that the members are selected by those sub-national authorities. A corollary of representing a sub-national authority in this manner is the, seemingly, disproportionate representation of the different populations. IDEA International comments that where a second chamber exists to represent sub-national authorities, there tends to be an assumption this will generally involve disproportionate representation of the population: "190. The structures of these vary widely, but in general the most common use of second chambers is in federal systems to represent the constituent units of the federation. For example, the states in the USA and Australia, the Länder in Germany and the provinces in South Africa are all separately represented in an upper house. Typically, this involves a weighting in favour of the smaller states or*



*provinces, as there tends to be an assumption of equality of representation between them (...)"*.

44. The challenged provision does exactly that, in a manner that reflects the hybrid nature of the House and its ethnic and territorial dimensions. In practice, it provides a certain amount of representation to the less populated cantons and ensures that all constituent peoples are represented whenever this can be achieved in conformity with the requirement that members of the Federation House of Peoples are members of the Cantonal Assembly.
45. The Venice Commission, in its Amicus Curiae submitted to the Constitutional Court in the Case No U 23/14 and in particular to paragraph 46 to 57 thereof, elaborates on this point.

### **III.5. Observations Concerning Certain Aspects of the Decision of the Court in Case No. U 23/14 of 1 December 2016**

46. In the part of the Decision of the Court in Case No. U 23/14 related to the presentation of the arguments of the applicant, the applicant himself argued that Election Law of BiH *must be in compliance with the Constitution of Bosnia and Herzegovina and also in accordance with the Entity Constitutions because of the complex organisation of Bosnia and Herzegovina (see Para 9.)*.
47. It is important to note that the Constitutional Court in its Decision of 1 December 2016 partially granted the request of the applicant, underlining that

*"(...) Article 8 paragraph 3, the Constitution of the Federation provides for the obligation of filling the delegates' seats in all cantons by at least one member from each constituent people under the condition that the members of that constituent people are present in the respective legislative body, which means that the Constitution of the Federation does not "require" that the House of Peoples is filled by members from the canton which has no members of certain constituent peoples within the respective legislative body of that canton. The Constitutional Court notes that the aforementioned means that it is about a conditional option and not about absolute determinant.(...)"*.<sup>[12]</sup>

48. As such, the issue raised by the said Decision seems to be more a question of lack of conformity between certain provisions of the Election Law of BiH and the provision challenged in the present case, a lack of conformity that raises an issue under Article I(2) of the BiH Constitution. Taking into account above, it appears that the conclusions of the Court in its Decision of 1 December 2016 concerning the disputed provisions of the Election Law of BiH cannot be applied *mutatis mutandis* to the challenged provision of the Constitution of the Federation, that the Court in its Decision of 1 December 2016 (as well as the applicant in the said case) has not disputed or brought into question the constitutionality of challenged provision of the Constitution of the Federation, but rather emphasized that the challenged provision of the Constitution of the Federation pursues conditional option rather than absolute determinant envisaged in the disputed provisions of the Election Law of BiH.

### **IV. Concluding remarks**

49. Section II outlines for the Court the relevant circumstances that led to the adoption of the system in place for the selection of delegates to the Federation House of Peoples. These circumstances show that the provisions included in the Constitution of the Federation served – and continue to serve – a legitimate aim, in particular in its attempt at incorporating concepts that led the Court to decide in the Constituent Peoples Case while retaining those that led to the signing of the Washington Agreement.
50. It is clear that the challenged provision was part of a machinery for the implementation of certain important parts of the peace settlement: these included the establishment of conditions that make the return of refugees and displaced persons possible and the re-establishment of a truly multi-ethnic society throughout Bosnia and Herzegovina. As such, the challenged

provision constituted, to use the words of the Court, “reasonable or proportionate steps to develop a power-sharing structure or a multi-ethnic community” as well as a measure aimed at ensuring simultaneous application and effectiveness of a number of provisions of the Constitution such as the last line of the Preamble of the Constitution and the positive obligations of the entities which follow from Articles II.3 (m) and II.5 of the Constitution of BiH.

51. The challenged provision, in addition to promoting the return of refugees by ensuring representation of their constituent people in the legislative structure of the Federation, was intended to ensure that the Federation would give representation to minority constituent peoples whenever one of their representative is elected to a cantonal assembly. As such, the provision was a tool to promote equality of peoples and give them the possibility to get representation from all cantons where they live. The challenged provision was not meant to be transitional in the same way as Article IX,7.
52. I note that, at the time of the negotiations and enactment of the amendments to the Constitution of the Federation, no one could envision that Annex VII would not be completed over twenty years after the signing of the Dayton Peace Accords. We have seen that the completion of Annex VII is linked to a reorganization of the structures of the Federation which will alleviate the issue raised in the request of the applicant. This reorganization was not meant to only include the composition of the FBiH House of Peoples but also the Government of the Federation and its main administrative structures.
53. Over-representation in upper chambers of parliament is not uncommon and is practiced in most Federal countries. The challenged provision means to simultaneously ensure over-representation of constituent peoples where they constitute a numerical minority and minimum representation of cantons in the FBiH House of Peoples. As such, the provision reflects, like many others, the power-sharing structures that include ethnic and territorial elements that prevail in the Federation and Bosnia and Herzegovina as a whole. Again, it is crucial to recall that the departure from strict proportionality and equal voting rights in the upper chamber was aiming to give effect to other aspects of the principle of equality: in that respect, the challenged provision has a function similar to the provision that provide for parity between constituent peoples in the Federation House of Peoples.
54. As a result, we believe that the mechanism provided by the challenged provision meets the test set forth by the European Court on Human Rights which stated 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’, and that there is room for “mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities”[13].

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#### Notes:

[1] Constitutional Court, Third Partial Decision, Case No. U 5/98 of 1 July 2000, Paragraph 73.

[2] Constitutional Court Decision of 28, 29 and 30 January 2000 (Official Gazette of Bosnia and Herzegovina, No 11/00 of 17 April 2000), of 18 and 19 February 2000 (Official Gazette of Bosnia and Herzegovina, No. 17/00 of 30 June 2000), of 30 June and 1 July 2000 (Official Gazette of Bosnia and Herzegovina, No. 23/00 of 14 September 2000) and of 18 and 19 August 2000 (Official Gazette of Bosnia and Herzegovina, No. 36/00 of 31 December 2000).

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

[4] Communiqué of the Steering Board of the Peace Implementation Council of 27 March 2002 available at: <https://www.ohr.int/?p=52101>

[5] Decisions in Case No U 4/11 of 27 May 2011 and U 4/12 of 26 May 2012.

[6] See also Opinion of the Venice Commission n°862/2016 of 17 October 2016: "The present situation could be considered to be a specific one, which allows for the interpretation of State law in conformity with the Entities' law to the extent that it results from a delegation by the Entities. Such delegation should not in itself be interpreted as allowing the State to go against an Entity's constitution and organisational autonomy."

[7] Article IV.8 of the Constitution of the Federation quoted in paragraph 10 above.

[8]

<https://www.faktor.ba/vijest/zubak-za-faktor-neprihvatljivo-je-uskratiti-nekom-pravo-da-bude-biran-u-dom-naroda-288863>

[9] See paragraph 77 of the Decision of the Constitutional Court in Case No. U 9/09 of 26 November 2010.

[10] See paragraphs 72-74.

[11] See decisions of the Court in cases Nos. AP 66/15 of 10 February 2015 and AP 369/15 of 24 April 2015.

[12] See Paragraph 43 of the Decision on Admissibility and Merits No. U 23/14 of 1 December 2016.

[13] See also Constitutional Court Decision No. U 9/09. In Decision No. U 14/12, the Court stated that "[t]he 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."