Written observations of the OHR Legal Department concerning the request of the applicants in Cases Nos. U 10/14 and U 12/14

I. Introduction

1. On 9 May 2014, Mr. Bakir Izetbegović, the Chair of the Presidency of Bosnia and Herzegovina, filed a request with the Constitutional Court of Bosnia and Herzegovina (hereinafter: Constitutional Court) for resolution of the dispute and review of the constitutionality of the Decision on Verification of the Accuracy and Authenticity of Data During the Registration of Permanent Residence on the Territory of Republika Srpska (Official Gazette of Republika Srpska, No. 31/14; hereinafter: the Decision on Verification). Mr. Izetbegovic also requested that the Constitutional Court adopt interim measures to suspend the application of the Decision on Verification pending a final decision of the Constitutional Court on this case. On 12 May 2014, Mr. Željko Komšić, member of the Presidency of Bosnia and Herzegovina, filed a request with the Constitutional Court for review of the constitutionality of the same Decision on Verification. Mr. Komšić also requested that the Constitutional Court adopt interim measures ordering the Government of Republika Srpska and the Ministry of Interior of Republika Srpska to suspend the implementation of the Decision on Verification pending a final decision of the Constitutional Court on this request.

2. On the 2 June 2014, the Constitutional Court invited the Department for Legal Affairs of the Office of the High Representative to provide an opinion in writing in the matter

related to cases nos. U 10/14 and U 12/14. Attached to the invitation, the Office of the High Representative received from the Constitutional Court the following documents:

a. The request for resolution of the dispute/review of the constitutionality of the Decision on Verification, including the request that the Constitutional Court adopt interim measures, submitted by Mr. Bakir Izetbegović, member of the Presidency of Bosnia and Herzegovina (case no. U 10/14).
b. The request for review of the constitutionality of the Decision on Verification, including a request that the Constitutional Court adopt interim measures, submitted by Mr. Željko Komšić, member of the Presidency of Bosnia and Herzegovina (case no. U 12/14).

3. The High Representative has an interest in the outcome of the proceedings before the Constitutional Court regarding the challenged Decision on Verification of the Government of Republika Srpska, and welcomes the opportunity offered by the Court to participate as ***amicus curiae*** to the proceedings.

II. Observations

4. At its 57th session held on 17 April 2014, the Government of Republika Srpska enacted the challenged Decision on Verification. This decision was adopted while a Draft Law on Residence in Republika Srpska had been introduced into parliamentary procedure with the intention to replace the *Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina* (Official Gazette of BiH, Nos. 32/01 and 56/08; hereinafter: the Residence Law)[1] on the territory of Republika Srpska. The Draft Law on Residence in Republika Srpska was in turn conceived as a response to the non-adoption by the Parliamentary Assembly of Bosnia and Herzegovina of amendments to the existing state-level Residence Law that were proposed by the Council of Ministers of Bosnia and Herzegovina in July 2013[2].

5. The High Representative and the international community have expressed their concerns about the situation, which touches upon the respect for decisions taken by the institutions of Bosnia and Herzegovina, but could also have an impact on the conduct of the elections, on the freedom of movement throughout Bosnia and Herzegovina as well as on other rights guaranteed under the Constitution of Bosnia and Herzegovina.

6. In a Joint Statement issued on 8 of May 2014[3], the European Union Special Representative/Delegation of the European Union, the Embassy of the United States and the Office of the High Representative expressed the following concerns:

> "The European Union Special Representative/Delegation of the European Union, the Embassy of the United States and the Office of the High Representative are very concerned about the ongoing politicization of the matter of residence in Bosnia and Herzegovina.
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> Regulation of residency is a state-level issue and requires a political and legal solution at that level. It is important that BiH amend its existing legislation and bring it closer in line with European best practices, in order to address existing gaps. At the same time, the rights of returnees to return and the freedom of movement of all citizens of BiH must be respected. Standards must be uniform across the entire territory of BiH and authorities in all parts of the country should implement existing and future legislation equally among all citizens, without any form of discrimination, in a way that builds public confidence.
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> Existing state-level legislation regulating residency must be respected until it is amended. Unilateral attempts to regulate this matter at entity level, such as the RS's recent decision on "verifying the accuracy and truthfulness of data when applying for permanent residence", go beyond

existing legislation and are not acceptable. It is equally unacceptable for other political actors to block the functioning of state institutions, such as the BiH House of Peoples, thus preventing the normal democratic interplay between various interests that would enable compromises for potential amendments of the BiH law on residence to be found.

We call upon the authorities in BiH at all relevant levels to find a state-level solution to the issue of residence, to rescind regulations of the same at other levels of governance and thus end the unnecessary politicization of this important matter."

7. In the 45th Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations[4], it was provided *inter alia* that

"5. (…) Unilateral actions taken by Republika Srpska towards adopting an entity-level residence law and the adoption by the Republika Srpska government of a decree on residence verification, despite the fact that this matter is exclusively regulated at the state level, could represent attempts to reverse measures undertaken to implement core provisions of the GFAP, including those related to freedom of movement."

(…)

"25. In response to the ongoing failure of the BiH House of Peoples to adopt changes to the BiH Law on Temporary and Permanent Residence, which would provide for more thorough verification of residence applications, Republika Srpska has taken unilateral steps to legislate residence issues at entity level. On 6 March the RS Government passed an entity Law on Residence under urgent procedure, which was moved into regular procedure in the RS National Assembly on 8

April and passed in the first reading. If adopted, the law will represent another step by an entity to legislate on a matter already regulated by state law. A subsequent decision by the RS government on 17 April on residence checks also raised concerns, given the state competency in this area and evoked fears by Bosniaks that the regulations would be applied in a discriminatory manner. Previous examples of the RS legislating on matters already regulated by state law include the RS Law on Courts, RS separate regulation on the single identification number, and the Law on the Television of Republika Srpska (RTRS). Under the Constitution, the entities are bound to comply with decisions of the institutions of BiH."

8. Mindful of the case-law of the Constitutional Court, as developed in case nos. U 14/04 of 29 October 2004, U 2/11 of 27 May 2011 and U 25/13 of 23 January 2014, concerning the obligations of the Entities (and subdivisions thereof) to comply with the obligations imposed on them through the laws passed by the institutions of Bosnia and Herzegovina under Article III (3) (b) of the Constitution of Bosnia and Herzegovina and Article I(2) of the Constitution of Bosnia and Herzegovina, the written observations below seek to follow the reasoning of the Court in said Decisions of the Court and are divided in two sections:

a. Observations concerning the violation of Article III (3)(b) in conjunction with Article I (2) of the Constitution of Bosnia and Herzegovina, and
b. Observations on the constitutional responsibilities of Bosnia and Herzegovina to adopt the state-level Residence Law.

II.1. Violation of Article III (3)(b) in conjunction with Article I (2) of the of the Constitution of Bosnia and Herzegovina

9. *The challenged Decision of the RS Government raises issues*

of compliance with the state-level Residence Law and therefore of compliance with Article III (3)(b), in conjunction with Article I (2) of the Constitution of BiH, for the following reasons:

a. Regulation of matters covered by the challenged Decision on Verification of the Government of Republika Srpska is vested in the Ministry of Civil Affairs of Bosnia and Herzegovina under Article 32 of the Residence Law;
b. The Decision on Verification of the Government of Republika Srpska fails to include specific safeguards as foreseen in Chapter IV of the Residence Law applying to returnees.
c. The fact that the adoption of the Decision on Verification of the RS Government came as a result of the failure to reach the necessary majority in the BIH Parliamentary Assembly to pass the Proposed Law on Changes and Amendments to the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina and the way the representatives of the political parties based in Republika Srpska have positioned themselves vis-à-vis such amendments[5] indicate that even these parties acknowledge that the competence to regulate matters of residence is vested in the Parliamentary Assembly of Bosnia and Herzegovina.

II.2. Constitutional Responsibilities of the State of Bosnia and Herzegovina in Residence Matters

10. The Parliamentary Assembly of Bosnia and Herzegovina adopted the Residence Law in the exercise of its constitutional responsibilities related to *Article I (4), Article II [Article II (2) – Article 2, Protocol 4 to the European Convention on Human Rights and Fundamental Freedoms, Article II (3)(m), Article II(5)], Article III (5)(a), Article IV (4)(a) and Item 7 of Annex 1 to the Constitution of Bosnia and Herzegovina [Art. 12 of the International Covenant on Civil and Political Rights]. The enactment of the Law*

responded to the necessity to ensure a uniform approach to foster freedom of movement, including freedom to choose one's place of residence equally across the territory of Bosnia and Herzegovina and to ensure that the procedure of registration of residence is not used by relevant authorities to undermine the rights of refugees and displaced persons guaranteed under the Constitution of Bosnia and Herzegovina and Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina.

11. *When the possibility for the State to legislate in the field of residence was first examined, the Office of the High Representative issued a legal opinion*[6]*, which reads in its relevant parts:*

> Article II.2 of the BiH Constitution states that the rights and freedoms as set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (hereinafter "European Convention") shall apply *directly in Bosnia and Herzegovina* and shall have *priority over all other law*. Article II.3 (m) enumerates the right to liberty of movement and residence as one such right. Moreover, this article has to be read in conjunction with Article I.4 of the BiH Constitution according to which there shall be, among others, freedom of movement of persons throughout BiH without any impediment.
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> The concept of liberty of movement and residence are certainly inter-linked: without the existence of freedom of movement, the liberty of residence cannot exist and vice versa. For instance the 1966 International Covenant on Civil and Political Rights connects these two subjects, by stating in one and the same Article that "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence" (Article 12). Consequently any regulation on residence has to ensure and respect the full freedom of movement.

The above mentioned articles in the BiH Constitution put a direct obligation on both the State and the Entities to ensure freedom of movement and residence and not to impede the same. However, this obligation has several dimensions: one part of it concerns legislative powers whereas another part concerns implementation of the legislation.

Liberty of movement and residence, as stated in article II.3 (m) of the Constitution, is hardly sufficient in ensuring that such liberty exists on the ground and thus has to be guaranteed, among others, through subsequent legislation dealing with the matter. The wording in Article II.2, according to which the freedoms as set out in the European Convention shall *have priority over all other law in BiH* indicates that such legislation has to be enacted at a level which ensures the priority of this right. Moreover, the freedom of movement, in accordance with article I.4 of the Constitution, has to be guaranteed not only within the respective Entities but also across the inter-Entity boundary line. For obvious reasons an Entity cannot, through its legislation, ensure freedom of movement and liberty of residence to citizens when crossing the inter-Entity boundary line to the other Entity. Such legislation could only ensure freedom of movement within that particular Entity which does not fulfill the purpose of Article I.4 and II.3 (m) of the BiH Constitution establishing such freedom *throughout the country*. This is in contrast to many other rights and freedoms set out in the European Convention, which can be ensured through Entity legislation in accordance with the Constitution. Consequently, the freedom of movement and residence being not only of concern to a separate Entity but to the whole territory of BiH can only be regulated at the state level in order to ensure the full freedom of movement and liberty of residence as laid down in the Constitution.

The Entities on the other hand are obliged to comply with

such legislation and if necessary remove any obstacles existing on the ground to freedom of movement and liberty of residence. This brings the second point of concern, namely the implementation of the legislation. Clearly, despite the legislative competence falling within the exclusive responsibility of the state, the implementation of the same can only be carried out at the local level by the competent organs in the Entities. The responsibility for the implementation would thus remain with the Entities under the supervision of the State.

12. We contend that the State of Bosnia and Herzegovina is competent for this matter and that the Parliamentary Assembly of Bosnia and Herzegovina adopted the Residence Law in the exercise of such constitutional responsibilities. Permanent and temporary residence of citizens of Bosnia and Herzegovina is regulated at the state level and the responsibility for enactment of rulebooks, instructions and guidance, including those included in the disputed decision of the RS Government, is vested by the state Residence Law with the Ministry of Civil Affairs of Bosnia and Herzegovina (Article 32), while a role in the implementation of certain provisions is given to the competent entity bodies.

13. The decision of the Government of Republika Srpska, by establishing conditions for registration of permanent residence of citizens which apply exclusively in one part of the country, namely the territory of the Republika Srpska, raises issues of compliance with the principle of freedom of movement of persons and the right to liberty of movement and residence guaranteed under Article I (4) and Article *II (3)(m) of the Constitution of Bosnia and Herzegovina* as explained in the above-mentioned legal opinion and raises issues of compliance with provisions of the Constitution of *Bosnia and Herzegovina* guaranteeing the right of return of refugees and displaced persons under Article II (5).

a) Concerns in respect to freedom of movement:

The freedom of movement of all persons in Bosnia and Herzegovina to pursue opportunities anywhere in Bosnia and Herzegovina should be an essential element of citizenship of Bosnia and Herzegovina. The Decision on Verification creates in this regard new barriers to mobility across the whole territory of Bosnia and Herzegovina whereas the state-level laws aim at eliminating or reducing barriers to free movement, and to encouraging actual use of common free-movement rights.

b) Effects on returnees, IDPs and refugees:

According to UNHCR official figures, there are still 84.500 internally displaced personsand 27,419 refugees wanting to return to their pre-war municipalities.[7] Presumably the bulk of new requests for re-registration of permanent residence in the Republika Srpska is likely to be initiated by these vulnerable groups.

The state Law on Residence reflects the legal obligation stemming from Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina and Article II (5) of the Constitution of BiH and contains an entire chapter, namely Chapter IV, regulating the so-called facilitated re-registration of returnees. This chapter is aimed at removing obstacles to the return of refugees and displaced persons and the implementation of Annex 7 to the GFAP, one of the most important goals of resolving the conflict in Bosnia and Herzegovina.

The Decision on Verification of the Republika Srpska Government ignores these provisions of the state Law on Residence and fails to include specific conditions for the facilitated re-registration of permanent residence of refugees and displaced persons as foreseen in the state Law on Residence. By doing so, the Decision on Verification could have prejudicial effects on refugees and displaced persons seeking to return to their pre-war municipalities in

the Republika Srpska in particular.[8]

14. Consequently, we argue that Bosnia and Herzegovina has competence to regulate the field of residence based, *inter alia*, upon the constitutional provisions on freedom of movement and on the right to liberty of movement and freedom to choose one's residence, which have to be equally applicable and ensured throughout the country. As a result, the fulfillment of those constitutional obligations can only take place through a State law. The *challenged* Decision of the RS Government undermines the uniformity of the state regulatory framework and, by providing additional and stricter conditions for registration of permanent residence of citizens which are applicable only in the territory of the Republika Srpska, limits the freedom of movement of persons as well as the right to liberty of movement and residence guaranteed under the Constitution and as implemented by the state Law on Residence. In addition, *the* failure to include specific conditions for the facilitated re-registration of permanent residence of returnees as foreseen in the state Law on Residence most likely would have prejudicial effects on returnees in particular.

II.3. Concluding Observations

15. *By enacting the Decision on Verification, the Government of Republika Srpska is trying to occupy a field of competence already occupied by the relevant institutions of Bosnia and Herzegovina.*

16. *By doing so,* the RS Government's Decision on Verification violates Article III(3)(b) in conjunction with *Article I(2)* of the Constitution of BiH, *Article I (4), Article II (2) [Article 2, Protocol 4 to the ECHR], Article II(3)(m), Article II(5), Article IV(4)(a) and Item 7 of Annex 1 to the Constitution of Bosnia and Herzegovina [Art. 12 of the ICCPR].*

17. *If the* Decision on Verification is not put out of force,

Article I (2) and Article III (3)(b) of the Constitution of BiH would become ineffective. *Insofar as the Decision of the RS Government was issued as a result of the lack of sufficient support for the amendments to the Residence Law covering the same issue within the Parliamentary Assembly of BiH, accepting that said Decision remains in force alongside the state Residence Law would amount to recognizing the possibility for an entity to substitute for the institutions of BiH when the representatives elected from that entity within the institutions of BiH cannot make their views prevail. As such, it would constitute a substitute to the need to seek compromise between entities and constituent peoples (along with Others) on matters that need to be regulated at State level.*

III. Observations Regarding Requests for Interim Measures

18. Should the Constitutional Court not decide on merits of the present case at its next session, we contend that the Court should consider issuing interim measures at that session suspending the implementation of the Decision on Verification pending the final decision of the Constitutional Court on the merits of this case for the following reasons:

a. As mentioned above, this case raises very serious issues related to the constitutionality of the challenged Decision, including compliance with a number of provisions of the Constitution of BiH regulating the division of constitutional responsibilities between the state and its entities.
b. The implementation of the challenged Decision may lead to irreparable harmful consequences for a number of persons, in particular refugees and displaced persons who as a result of the war in Bosnia and Herzegovina are not in possession of their property in the Republika Srpska and/or live abroad, and who might face administrative obstacles in trying to register their residence in Republika Srpska.

c. The implementation of the Decision that is being challenged in front of the Constitutional Court could make the process of registration of residency on the territory of Republika Srpska more cumbersome. Implementation of the challenged Decision seriously disrupts the current State-wide system of registration of residence, and could bring into question compliance with Article I (2) of the Constitution of Bosnia and Herzegovina – principle of legal certainty.
d. Implementation of the challenged Decision may also have a negative impact on the organization and conduct of the electoral process for the 2014 General Elections, having in mind that residence is the main element for registration of citizens of Bosnia and Herzegovina who have the right to vote. The Election Law of Bosnia and Herzegovina specifically defines the meaning of permanent residence in order to precisely determine the categories of voters.

Notes:

[1] Draft Law on Residence in Republika Srpska– see Article 46 of the Draft Law – available at : http://www.narodnaskupstinars.net/upload/documents/cirilica/materijali/Materijali_za_34_sjednicu.zip

[2] Proposed Law on Changes and Amendments to the Law on Permanent and Temporary Residence of Citizens of Bosnia and Herzegovina available at: https://www.parlament.ba/sadrzaj/zakonodavstvo/u_proceduri/default.aspx?id=41313&langTag=bs-BA&pril=b

See also Reasoning to the Draft Law on Residence in Republika Srpska available at : http://www.narodnaskupstinars.net/upload/documents/cirilica/materijali/Materijali_za_34_sjednicu.zip

[3] https://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=48526

[4] https://www.ohr.int/other-doc/hr-reports/default.asp?content_id=48532

[5] The proposal of the Minister for Civil Affairs, Mr. Novic, was adopted unanimously by the Council of Ministers at its session held on 17 July 2013. See http://www.vijeceministara.gov.ba/saopstenja/sjednice/saopstenja_sa_sjednica/default.aspx?id=15418&langTag=en-US

[6] Constitutional Basis for the BiH Law on ID Cards and Residence, LO 2000/08

[7] see: http://www.unhcr.org/pages/49e48d766.html,

[8] *Hugh Jordan v. the United Kingdom* (App. no. 24746/94) Judgment of 4 May 2001, para 154, *D.H. and Others v. the Czech Republic* (App. no. 57325/00) Judgment (GC) of 13 November 2007, para 175, *Opuz v. Turkey* (App. no. 33401/02) Judgment of 9 June 2009, para 183. Or else, *Sampanis et autres c. Grèce* (Req. No. 32526/05) Arrêt 5 juin 2008., para 68, *Oršuš and Others v. Croatia* (App. no. 15766/03), Judgment (GC) of 16 March 2010, para 150, *Horváth and Kiss v. Hungary* (App. no. 11146/11) Judgment of 29 January 2013, para 105.