

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 59(2)(2) and Article 61(1) and (3), of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* No. 60/05), in Plenary and composed of the following judges:

Ms. Hatidža Hadžiosmanović, President,

Mr. Tudor Pantiru, Vice-President

Mr. Miodrag Simović, Vice-President

Ms. Valerija Galić, Vice-President

Mr. David Feldman,

Mr. Mato Tadić,

Mr. Jovo Rosić,

Ms. Constance Grewe,

Ms. Seada Palavrić,

Having deliberated on the appeal of **Stranka za Bosnu i Hercegovinu** (*Party for Bosnia and Herzegovina*) and **Mr. Ilijaz Pilav** in case No. **AP-2678/06**,

At its session held on 29 September 2006 adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by **Stranka za Bosnu i Hercegovinu** (*Party for Bosnia and Herzegovina*) and **Mr. Ilijaz Pilav** against the Ruling of Court of Bosnia and Herzegovina No. IŽ-15/06 of 10 August 2006 and the Decisions of Central Election Commission No. 01-02-2-1581/06 of 1 August 2006 and No. 01-07-1-913-103-1/06 of 24 July 2006 is dismissed as ill-founded.

This Decision shall be published in the *Official Gazette of Bosnia and Herzegovina*, the *Official Gazette of the Federation of Bosnia and Herzegovina*, the *Official Gazette of the Republika Srpska* and the *Official Gazette of the Brčko District of Bosnia and Herzegovina*.

REASONING

I. Introduction

1. On 20 September 2006, **Stranka za Bosnu i Hercegovinu** (*Party for Bosnia and Herzegovina*) and **Mr. Ilijaz Pilav** (“appellants”) represented by **Mr. Džemil Sabrihafizović**, a lawyer practicing in Sarajevo, filed an appeal with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”) against the Ruling of Court of BiH, No. IŽ-15/06 of 10 August 2006, and Decisions of Central Election Commission (“CEC”) No. 01-02-2-1581/06 of 1 August 2006 and No. 01-07-1-913-103-1/06 of 24 July 2006. The appellants also filed request for an interim measure by which the Constitutional Court would order immediate inclusion of **Mr. Ilijaz Pilav** on the Party’s candidate list running for a member of the Presidency of Bosnia and Herzegovina.

II. Procedure before the Constitutional Court

2. Considering the Constitutional Court's decision in the case No. *U 13/05* and the allegations stated in the appeal that are, according to the case-file, identical to those stated by the appellants in the proceedings which resulted in the issuance of the challenged acts, the authorities which passed the challenged acts were not requested to submit their replies to the relevant appeal.

III. Facts of the Case

3. The facts of the case, as they appear from the appellants' assertions and the documents submitted to the Constitutional Court may be summarized as follows.

4. By its decision No. 01-07-1-913-103-1/06 of 24 July 2006, the Central Election Commission rejected the application for certification of the candidate Mr. Ilijaz Pilav on the Party's candidate list (code 004) for the Presidency of Bosnia and Herzegovina, as Serb member, stating that he cannot be elected from the territory of Republika Srpska as he declares himself as Bosniak. It further stated that he therefore failed to comply with the requirements of Article 8.1 paragraph 2 of the Election Law of BiH.

5. Having decided on the appellants' request for review of its decision, the Central Election Commission, by its decision No. 01-02-2-1581/06 of 1 August 2006, dismissed the joint request as ill-founded. The Commission stated in reasons of its decision that the provisions of the Election Law are in conformity with Article V of the Constitution of Bosnia and Herzegovina which provides that "the Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska". Article 8.1 paragraph 2 of the Election Law stipulates that "the member of the Presidency that shall be directly elected from the territory of RS – one Serb shall be elected by voters registered to vote in RS. A candidate who gets the highest number of votes shall be elected."

6. By its ruling No. IŽ-15/06 of 10 August 2006, the Court of BiH dismissed the appellants' appeal stating that the Central Election Commission has fully established the facts of the case and reached the accurate conclusion when it rejected the application for certification considering that it is not in compliance with the provisions of Election Law of BiH nor provisions of the Constitution of Bosnia and Herzegovina. As to the appellants' complaints relating to a violation of Article 1 of

Protocol No. 12, and taking into account the provisions of Election Law, the Court of BiH has concluded that the present case involves no discrimination on any grounds that include ethnic/national origin since the appellants have not been deprived of the rights stipulated under the law.

IV. Appeal

a) Allegations stated in the appeal

7. The appellants stated that the candidacy of Mr. Ilijaz Pilav for a member of Presidency of BiH was rejected exclusively based on ethnic/national origin. They find this to constitute a violation of Article 1 of Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention“) which guarantees that the enjoyment of any right set forth by law shall be secured without discrimination on any grounds that include national origin. The appellants state that pursuant to Article II(2) of the Constitution of BiH the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina and that they shall have priority over all other law as well as that non-discrimination includes the right to run for a member of Presidency of Bosnia and Herzegovina from Republika Srpska. Hence, in the appellants’ opinion, the European Convention and its Protocols have not entered into force on the basis of the Constitution of Bosnia and Herzegovina but, by the application of Article II(2) and since its beginning, these have been an integral part of the Constitution and, at least, equivalent to all other provisions of the Constitution, including Article V of the Constitution. The appellants find that the challenged decision are “incompatible with equal right to stand for election and to be elected under Article 25 of the International Covenant on Civil and Political Rights or with equality under the law, which is guaranteed to the minority group member by Article 4 of the General Convention for Protection of National Minorities being that the minority group member, in this case Bosniak from Republika Srpska, is formally excluded from one public office such as the Presidency of Bosnia and Herzegovina. Appellants request that the Constitutional Court of Bosnia and Herzegovina quash the decisions of Central Election Commission by which Mr. Ilijaz Pilav’s candidacy for a member of Presidency of Bosnia and Herzegovina was rejected, as well as the ruling of the Court of BiH, and that the Constitutional Court order immediate inclusion of Mr. Ilijaz Pilav on the election list for the aforementioned office.

V. Relevant law

8. Constitution of Bosnia and Herzegovina

Article V

Presidency

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

9. Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 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 and 24/06).

Article 8.1

The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina - one Bosniak and one Croat shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either the Bosniak or Croat Member of the Presidency, but not for both. The Bosniak and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected.

The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of RS - one Serb shall be elected by voters registered to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected.

(...)

VI. Admissibility

10. According to Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

11. According to Article 16 paragraph 1 of the Rules of the Constitutional Court, the Constitutional Court may examine an appeal only if all effective legal remedies, available under the law against the judgment or decision challenged by the appeal, have been exhausted and if it is filed within a time limit of 60 days from the date on which the appellant received the decision on the last legal remedy that he/she used.

12. In the present case, the subject matter of the appeal is the ruling of the Court of BiH No. IŽ-15/06 of 10 August 2006, against which there are no other effective remedies available under the law. Furthermore, the challenged ruling was rendered on 14 August 2006 and the appeal was filed on 20 September 2006, that is, within the 60 days time-limit as provided for under Article 16(1) of the Rules of the Constitutional Court. In conclusion, the appeal also meets the requirements under Article 16(2) and (4) of the Rules of the Constitutional Court as neither being manifestly (*prima facie*) ill-founded nor inadmissible for any formal reasons.

13. In view of the provisions of Article VI(3)(b) of the Constitution of Bosnia and Herzegovina, Article 16(1), (2) and (4) of the Rules of the Constitutional Court, the Constitutional Court established that the admissibility requirements have been met in the relevant appeal.

VII. Merits

14. The appellants challenge the aforementioned decisions claiming a violation of their right not to be discriminated against under Article 1 of Protocol No. 12 to the European Convention, their right to stand for election and to be elected, as provided for by Article 25 of the International Covenant on Civil and Political Rights, and their right of equality before the law and of equal protection of the law, which is guaranteed to the minority group member by Article 4 of the General Convention for Protection of National Minorities.

15. Article 1 of Protocol No. 12 to the European Convention reads:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

Article 25 of the International Covenant on Civil and Political Rights reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(...)

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(...)

16. The Constitutional Court observes that the Court of BiH and CEC have conducted the proceedings and applied the valid substantive legal regulations and rejected the application for certification of the candidate Mr. Ilijaz Pilav on the Party's candidate list (code 004) for Presidency of Bosnia and Herzegovina, as Serb member, and presented detailed reasons for their decisions.

17. In this context, the Constitutional Court notes that the challenged decisions of the Court of BiH and CEC were passed based on the provision of Article 8.1 paragraph 2 of the Election Law, which stipulates that the member of the Presidency of Bosnia and Herzegovina, that shall be directly elected from the territory of RS - one Serb, shall be elected by voters registered to vote in the Republika Srpska. In its Decision No. *U 13/05* of 26 May 2006, the Constitutional Court states that the aforementioned provision embodies, in fact, a slightly expanded version of Article V of the Constitution of Bosnia and Herzegovina, which stipulates that the Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska. Consequently, the Court of BiH and CEC have applied the appropriate regulations.

18. Given that the appellants argue that their rights have been violated taking into account the fact that Article II(2) of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina and that they shall have priority over all other law. Therefore, the appellants are of the opinion that the candidacy of Ilijaz Pilav for a member of the Presidency of BiH was rejected exclusively based on his national/ethnic origin in which they see a violation of Article 1 of Protocol No. 12 to the European Convention which guarantees that the enjoyment of any right set forth by

law shall be secured without discrimination and that no one shall be discriminated against by any public authority on any ground including the national/ethnic origin.

19. The Constitutional Court recalls that according to the case-law of the European Court of Human Rights a differential treatment does not constitute *a priori* discrimination, but one can say that there is discrimination only in cases when differential treatment is lacking objective or reasonable justification. In these terms the Constitutional Court notes that Article 25 of the International Covenant on Civil and Political Rights guarantees that every citizen shall have the right and the opportunity, without any of the distinctions and without unreasonable restrictions: to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. Accordingly, the mentioned Article recognizes that the restrictions may exist but that they must be justified.

20. In connection with the aforesaid, the Constitutional Court recalls that the European Court of Human Rights concluded, as regards Article 3 of the Protocol No. 1 to the European Convention, that the rights in question are not absolute and that in their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded and that they have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether those requirements *have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.* (see the European Court, *Mathieu-Mohin and Clerfayt vs. Belgium*, judgment of 2 March 1987, paragraph 52). The Court of Human Rights presented almost identical position in case *Gitonas and Others vs. Greece* (judgment of 1 July 1997). In case *Ždanoka vs. Latvia* (decision of 16 March 2006, petition no. 58278/00), the Court of Human Rights also concluded that the Contracting States must be given a margin of appreciation in this sphere and that there are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe and that it is for each Contracting State to mold it into its own democratic vision (see paragraph 103), in other words that the electoral legislation must be assessed in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (see paragraph 115.c.). As regards the right to stand as a candidate for election, i.e. the so-called “passive” aspect of the rights to stand

for election, in that decision the Court of Human Rights took a position that the competence of the court has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate (see paragraph 115.e).

21. The Constitutional Court holds that the said conclusions of the European Court of Human Rights may be analogously applied to the appellants' case although, from the aspect of Article 3 of the Protocol no. 1, they are related to the legislative authorities. Therefore, the provision of Article 8 of the Election Law of Bosnia and Herzegovina, including Article V of the Constitution of Bosnia and Herzegovina, should be viewed in the light of discretionary right of the State to impose certain restrictions when it comes to the exercise of individual rights. The said restrictions are justified by the specific nature of internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties given that the said provision was intentionally incorporated into the Constitution so that the members of the Presidency come from amongst Bosniaks, Croats and Serbs.

22. There is no dispute that the provision of Article V of the Constitution of Bosnia and Herzegovina, as well as the provision of Article 8 of the Election Law have a restrictive character in a way that they restrict the rights of citizens with respect to the candidacy of Bosniaks and Croats from the territory of Republika Srpska and the Serbs from the territory of the Federation of Bosnia and Herzegovina to stand for election as members of the Presidency of Bosnia and Herzegovina. However, the purpose of those provisions is strengthening of the position of constituent peoples in order to secure that the Presidency is composed of the representatives from amongst these three constituent peoples. Taking into account the current situation in Bosnia and Herzegovina, the restriction imposed by the Constitution and Election Law, which exist with respect to the appellants' rights in terms of differential treatment of the appellant's candidacy in relation to the candidacy of other candidates who are the Serbs and are directly elected from the territory of the Republika Srpska, is justified at this moment since there is a reasonable justification for such treatment. Therefore, given the current situation in BiH and specific nature of its constitutional order as well as bearing in mind the current constitutional and law arrangements, the challenged decisions of the Court of BiH and CEC did not violate the appellants' rights under Article 1 of the Protocol no. 12 to the European Convention and Article 25 of the International Covenant on Civil and Political Rights since the mentioned decisions are not arbitrary and are based on the law. It means that they serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights

are proportional to the objectives of general community in terms of preservation of the established peace, continuation of dialogue, and consequently creation of conditions for amending the mentioned provisions of the Constitution of Bosnia and Herzegovina and Election Law.

23. The appellants also consider that their right to the equality before law, which is guaranteed to the minorities under Article 4 of the Framework Convention for the Protection of National Minorities, was also violated by the challenged decisions because the minorities, in this instant case the Bosniaks from the Republika Srpska are formally excluded from a public office such as the Presidency of Bosnia and Herzegovina. The Constitutional Court recalls that according to Annex I to the Constitution of Bosnia and Herzegovina, the Framework Convention for the Protection of National Minorities is applied in Bosnia and Herzegovina. However, the Constitutional Court concludes that the Bosniaks from the Republika Srpska do not have a minority status, and therefore, the invocation of violation of rights under the Framework Convention for the Protection of National Minorities is not justified in the appellant's case.

24. Given the nature of the instant case, in other words the fact that the appeal related proceedings concerns the electoral rights, the Constitutional Court decided to have the appeal be dealt under the summary proceedings as referred to in Article 24 of the Rules of the Constitutional Court. However, the Constitutional Court notes that the challenged decision was delivered to the appellants on 14 August 2006 and that the appeal was filed on 20 September 2006, which means that the appellants filed the appeal after the expiration of the period of more than one month from the date when the decision of the Court of BiH had been delivered to them, i.e. few days prior to the general election in BiH. In connection with that, the Constitutional Court holds that in a situation where the electoral rights are the issue the appellants should demonstrate a higher level of promptness and inventiveness and file the appeal as soon as possible so that the decisions of the Constitutional Court, given the relatively tight deadlines prescribed by the enforceable provisions of the Election Law, are adopted in timely manner, i.e. in order to avoid the entire electoral process be brought in question.

VIII. Conclusion

25. There is no violation of the appellants' rights guaranteed by the European Convention, its Protocols, and Additional Human Rights Agreements which are, according to Article II(2) and Annex I of the Constitution of Bosnia and Herzegovina, applied in Bosnia and Herzegovina as long as the challenged decisions have been passed based on the legal provisions prescribing certain

restrictions with respect to the exercise of individual rights given the fact that there is an objective and reasonable justification for differential treatment.

26. Pursuant to Article 61(1) and (3) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

27. Considering the Constitutional Court's decision in the present case, it is not necessary to separately consider the appellants' request for interim measure.

28. Pursuant to Article VI(4) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Hatidža Hadžiosmanović
President
Constitutional Court of Bosnia and Herzegovina

Attachment:

- Separate Concurring Opinion of Judge David Feldman
- Separate Dissenting Opinion of Judges Constance Grewe and Seada Palavrić

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**Case No. AP-2678/06, appeal of Stranka za Bosnu i Hercegovinu (Party for Bosnia and Herzegovina) and Mr Ilijaz Pilav****Separate concurring opinion of Judge Feldman**

1. This case concerns an appeal by the appellants against a Ruling of the Court of Bosnia and Herzegovina and two Decisions of the Central Election Commission rejecting the claim of the second appellant to be allowed to be placed on the first appellant's list of candidates for election as the member of the Presidency of Bosnia and Herzegovina from the territory of the Republika Srpska. The second appellant's candidacy was rejected on the ground that Article V of the Constitution of Bosnia and Herzegovina and Article 8.1, paragraph 2 of the Election Law both provide that the member of the Presidency elected from the territory of the Republika Srpska must be a Serb. The second appellant is a Bosniak. The appellants complain that the effect is to discriminate unlawfully against non-Serbs in the Republika Srpska.
2. In its Decision in this case, the Constitutional Court dismisses the appeal as ill-founded on the ground that the treatment of the second appellant, while less favourable in this respect than the treatment of Serbs who wish to be candidates for election to the Presidency from the territory of the Republika Srpska, has a rational and objective justification, and so does not violate the right to be free of discrimination under the Constitution of Bosnia and Herzegovina and Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The less favourable treatment is justified because of 'the specific nature of the internal order of Bosnia and Herzegovina that was agreed upon by the Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties...' (paragraph 21 of the Decision).
3. I agree that the special circumstances in which the Dayton Agreement was drafted and the needs of the time are capable of providing a rational and objective justification for treatment which would otherwise be discriminatory: see my separate concurring opinion in Case No. U-13/05 of 26 May 2006. Like Judge Grewe in her separate dissenting opinions in this case and in Case No. U-13/05, I regard the justification as being temporary rather than permanent, but I respectfully differ from Judge Grewe in thinking that the time has not yet arrived when the State will have completed its transition away from the special needs which

dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.

4. However, I have another reason for joining the majority of the Constitutional Court in this case. Until the time (if it ever arrives) when Article V of the Constitution of Bosnia and Herzegovina is amended to remove the differential treatment of potential candidates for the Presidency, it seems to me that Article V leaves the drafters of the Election Law, the Central Election Commission and the courts no choice. It is not constitutionally permissible for a Law or the interpretation or implementation of a Law to be directly incompatible with the express and unambiguous requirements of Article V of the Constitution. Had the appellants succeeded in their appeal, it would have left Article V of the Constitution with no effect whatever. It would have been otiose, reduced to empty words. In my view, the Constitutional Court, required by Article VI of the Constitution to ‘uphold this Constitution’, cannot properly make a decision which makes an important part of the Constitution wholly ineffective. I accept that there different parts of the Constitution appear to have conflicting values and objectives, but constitutions are never entirely coherent. They are always shaped by, and are a compromise between, conflicting values and objectives. The task of the Constitutional Court under Article VI is to give effect to the Constitution, with all its inconsistencies, and make it as effective as possible in all the circumstances.

5. For this reason, I would have dismissed this appeal as ill-founded even had I disagreed with the conclusion of the majority of the Constitutional Court that there is an objective and rational justification for the difference of treatment. Whether justified or not, the difference is required by Article V of the Constitution of Bosnia and Herzegovina. An international tribunal such as the European Court of Human Rights might perhaps decide that the constitutional arrangements for electing members of the Presidency violate rights under the European Convention (and nothing I write here should be taken to lend support to that suggestion under present conditions). Such a tribunal has no duty to uphold the Constitution. The Constitutional Court has an express constitutional obligation to uphold the Constitution, and in my opinion has no power to set aside parts of it, or make them ineffective, by relying on rights arising in an international instrument in preference to the express and unambiguous terms of the Constitution itself.

Judge
David Feldman
Constitutional Court of Bosnia and Herzegovina

3rd February 2007

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Case No. AP-2678/06, appeal of Stranka za Bosnu i Hercegovinu (Party for Bosnia and Herzegovina) and Mr Ilijaz Pilav

**Separate dissenting opinion of
Judge Constance Grewe**

I agree with the majority of the Constitutional Court on the admissibility of the appeal (§§ 10 – 13) and on the choice to deal with the appeal under the summary proceedings (§24 of the decision) since it was filed only few days prior to the general election in BiH. I also agree that a differential treatment constitutes a discrimination only when this treatment is lacking objective or reasonable justification, that regarding Article 3 of the Protocol No. 1 to the European Convention the right to vote and to be elected is not absolute, the standards in this matter being less stringent than those applied under Articles 8-11 of the Convention and that particularly the political evolution of the country has to be taken in account (§ 19).

But I respectfully differ from the conclusion that there is no violation of the appellant's rights guaranteed by the European Convention, its Protocols and Additional Human Rights Agreements because of an "objective and reasonable justification for differential treatment".

The majority refers to decision in case *U 13/05* in which I already gave a dissenting opinion. In fact as well as in decision in case *U 13/05* I consider the exclusion of the candidate Mr. Ilijaz Pilav on the Party's candidate list for the Presidency of Bosnia and Herzegovina inconsistent with Article 1 of Protocol No. 12 and with Article 25 of the International Covenant on Civil and Political Rights which guarantees equal right to stand for election and to be elected without unreasonable restrictions. Contrary to the statements of the majority (§ 22), it seems to me that the current situation in Bosnia and Herzegovina does not justify at this moment the differential treatment of the appellant's candidacy in relation to the candidacy of other candidates who are the Serbs and are directly elected from the territory of the Republika Srpska nor serves the differential treatment a legitimate aim, such as preservation of peace, continuation of dialogue or creation of conditions for amending the provisions of the Constitution of BiH and Election Law. Although I think like judge Feldman in his separate concurring opinion under this decision that the State of BiH has not yet completed its transition, that it is still in a special situation requiring specific measures, I however consider that the Dayton Agreement architecture is evolving and has to adapt to the different stages of evolution in BiH. The constitutional specificity of BiH consists of the multi-ethnic character of

State and public institutions. The multi-ethnicity established by the Dayton Agreement has been precised by the Constitutional Court in case U 5/98 (Official Gazette of BiH, No. 36/00), stressing the equality of all constituent peoples in both entities and excluding in consequence the minority status of any constituent people in any entity.

The coherence of this decision implies a multi-ethnic composition of the Presidency **without** territorial interference since the three constituent peoples are precisely equal in the whole State territory of BiH (see my dissenting opinion in U 13/05 and in AP 35/03). It is the particular combination of ethnic and territorial structures which leads to unjustified discriminations since the territorial interference in presidential elections result to an ethnic separation materialized by the exclusion of the right to stand for election for all Serbs living in the Federation and for all Croats and Bosniacs living in Republika Srpska. This combination is inconsistent with the Dayton Agreement's goal of a multi-ethnic State and with the principle of equality of constituent peoples in both entities which only justifies that the Serbs living in Federation and that the Bosniacs and the Croats living in Republika Srpska do not benefit of the status of a minority.

Therefore the only legitimate aim appropriated to the current situation in BiH consists of excluding the territorial criterion in presidential elections. Only such a solution could be a reasonable justification of differential treatment and would be consistent with the requirements of Article 1 of Protocol No. 12 that any right set forth by law shall be secured without discrimination on any ground and of Article 25 of the International Covenant on Civil and Political Rights. In other terms, the differential treatment challenged by the appeal is not justified in an objective or in a proportionate manner.

I also differ from the opinion expressed by judge Feldman in his point 4. Indeed, the European Convention and its Additional Protocols have at least the same rank as the Constitution of BiH. The Constitutional Court stated that the Constitution of Bosnia and Herzegovina was adopted as the Annex 4 to the Peace Agreement. It follows that there cannot be a conflict and possibility of dispute between that Agreement and the Constitution of BiH which form a legal unity. This implies that the Constitutional Court grants the same importance to the Peace Agreement and its annexes and thus that in case of conflict of norms, the case may only be resolved through a method of systematic interpretation. Furthermore the provisions of Articles II.2, II.3 and X.2 of Constitution place the compliance with the human rights and the European Convention among the basic pillars of the

constitutional order in Bosnia and Herzegovina which have priority over any other law and cannot be restricted even by a constitutional revision.

The Constitutional Court in its role of upholding the Constitution has to take account of all these elements as well as of legal evolutions in order to guarantee concrete and effective rights. Therefore Article V.1 has to be read in light of Articles II and X of the Constitution and of Article 1 of Protocol No. 12. The Constitutional Court cannot, of course, replace or modify the present Constitution but it can request the Parliament to harmonize the text with the requirements of BiH's international obligations.

Judge
Constance Grewe
Constitutional Court of Bosnia and Herzegovina

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Case No. AP-2678/06, appeal of Stranka za Bosnu i Hercegovinu (Party for Bosnia and Herzegovina) and Mr Ilijaz Pilav

**Separate dissenting opinion of
Judge Seada Palavrić**

Having regard to Article 41, paragraph 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* no. 60/05), I am hereby joining the Separate Dissenting Opinion of Judge Constance Grewe to decision in case no. AP 2678/06 of 29 September 2006.

Judge
Seada Palavric
Constitutional Court of Bosnia and Herzegovina