

The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI(3)(a) of the Constitution of Bosnia and Herzegovina, Article 17(1)(1), Article 59(2)(2), Article 61(1), (2) and (3) and Article 63(1) and (4) of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), in Plenary and composed of the following judges:

Mr. Miodrag Simović, President

Ms. Valerija Galić, Vice-President

Ms. Constance Grewe, Vice-President

Ms. Seada Palavrić, Vice-President

Mr. Tudor Pantiru

Mr. Mato Tadić

Mr. David Feldman

Mr. Mirsad Ćeman

Having deliberated on the request of **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina**, in case no. **U 9/09**, at its session held on 26 November 2010, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The request lodged by **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** for review of the constitutionality of the provisions of Article 19.4 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) and Article 17 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04) is hereby partially granted.

It is hereby established that Article 19.4, paragraph 2 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) and Article 17, paragraph 1 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04), in part reading as follows: *Each City area shall elect three (3) City Councillors*, are not consistent with Article 25 of the International Covenant on Civil and Political Rights which makes an integral part of the Constitution of Bosnia and Herzegovina.

It is hereby established that Article 19.2 paragraphs 1 and 3 and Article 19.4 paragraphs 2 to 8 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* Nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08) and Article 17, paragraph 1 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, No. 4/04), in part reading as follows: *Each City area shall*

elect three (3) City Councillors, are not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights.

The Parliamentary Assembly of Bosnia and Herzegovina is ordered to amend the unconstitutional provisions of the Election Law of Bosnia and Herzegovina in accordance with this decision within six months following the publication of this decision in the *Official Gazette of Bosnia and Herzegovina*.

It is hereby established that Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17, paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar are not consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights.

The Council of the City of Mostar is ordered to inform the Constitutional Court of the steps it will have taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina within three months following the publication in the *Official Gazette of Bosnia and Herzegovina* of amendments made by the Parliamentary Assembly of Bosnia and Herzegovina to bring the Law on Elections of Bosnia and Herzegovina into line with the Constitution of Bosnia and Herzegovina in accordance with this Decision.

Until that time, further proceedings on the request filed by **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** for review of the constitutionality of the provisions of Article 7 paragraphs 1 and 3,

Article 15 paragraph 2, Article 17, paragraph 1 and Article 38 paragraph 1 of the Statute of the City of Mostar are adjourned.

The request filed by **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** for review of the constitutionality of the provisions of Article 19.4, paragraphs 1 and 9 and Article 19.7 of the Election of Bosnia and Herzegovina, the provision of Article VI.C. paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and the provision of Articles (*Official Gazette of the Federation of Bosnia and Herzegovina* No. 9/04) and the provisions of Article 7 paragraphs 2 and 3, Article 15 paragraph 1, Article 16, Article 17, paragraphs 2 and 3, Article 38 paragraphs 2, 3 and 4, and Articles 44 and 45 of the Statute of the City of Mostar is dismissed as ill-founded.

It is hereby established that the provisions of 19.4, paragraphs 1 and 9 and Article 19.7 of the Election of Bosnia and Herzegovina, the provision of Article VI.C. paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina, the remaining provisions of Articles 7 and 15, Article 16, the remaining provisions of Articles 17 and 38, and Articles 44 and 45 of the Statute of the City of Mostar are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25 of the International Covenant on Civil and Political Rights.

The request filed by **the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina** for review of the constitutionality of paragraph 1 of the introductory part and paragraph 2 of the Decision Enacting the Statute of the City of

Mostar issued by the High Representative is hereby rejected as inadmissible, as the Constitutional Court of Bosnia and Herzegovina is not competent to take a decision.

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 16 September 2009, the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (“the applicant”), filed the request with the Constitutional Court of Bosnia and Herzegovina (“the Constitutional Court”), for review of the constitutionality of the provisions of Article 19.1, 19.2, 19.3, 19.4, 19.5, 19.6 and 19.7 of the Election Law of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina* nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08 and 37/08; “the Election Law”), the provisions of Article VI.C. paragraphs 4 and 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 9/04; “the Constitution of FBiH”), paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative for Bosnia and Herzegovina enacting the Statute of the City of Mostar and the provisions of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar (*Official Gazette of the City of Mostar*, no. 4/04; “the Statute”).

II. Procedure before the Constitutional Court

2. Pursuant to Article 22(1) of the Rules of the Constitutional Court, on 1 December 2009, the House of Representatives and House of Peoples of the Parliamentary Assembly of BiH were requested to submit their replies to the request.

3. Pursuant to Article 15(3) of the Rules of the Constitutional Court, on 7 December 2009, the Office of the High Representative was invited to submit an expert opinion in writing with regard to the request in question.

4. On 14 December 2009, the House of Representatives submitted the reply to the request, while the House of Peoples did so on 28 December 2009.
5. On 30 December 2009, the Office of the High Representative submitted the expert observations in writing relating to the request in question.
6. Pursuant to Article 26(2) of the Rules of the Constitutional Court, the replies to the request were forwarded to the applicant on 4 January 2010.
7. At a Plenary session held on 28 and 29 May 2010, the Constitutional Court decided to hold a public hearing in the case. That hearing took place on 24 September 2010. Following the hearing, the Venice Commission (European Commission for Democracy through Law) submitted its *amicus curiae* opinion, which was communicated to the parties.

III. Request

a) Statements from the request

8. The applicant holds that the challenged provisions of the Election Law, the Constitution of FBiH and the Statute are inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 14 of the European Convention of Human Rights and Fundamental Freedoms (“the European Convention”), Article 25 of the 1966 International Covenant on Civil and Political Rights, and the 1966 and 1989 Optional Protocols thereto in conjunction with Article 3 of Protocol No. 1 of the European Convention (the applicant’s request refers to the International Covenant but this is clearly a slip) and Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which are an integral part of the Constitution of Bosnia and Herzegovina (Annex I to the Constitution of Bosnia and Herzegovina).
9. The applicant holds that paragraph 1 of the introductory part of the Decision Enacting the Statute of the City of Mostar issued by the High Representative for Bosnia and Herzegovina (“the High Representative”) is inconsistent with the provision of Article II(1) of the Constitution of Bosnia and Herzegovina, as the introduction of the principle of unequal treatment of the units of local self-government and its citizens, in comparison with other units and their citizens, is not a proper way to achieve the highest level of human rights and fundamental freedoms. In addition, the applicant considers that the imposition of the Statute of the City of Mostar is an undemocratic act

and that paragraph 2 of the High Representative's Decision, which reads: "the Statute shall be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached", is inconsistent with the provision of Article I(2) of the Constitution of Bosnia and Herzegovina.

10. Furthermore, the applicant holds that Croats are discriminated against by the provisions of Article 19.4, paragraphs 1 and 9 of the Election Law, and Article 16 of the Statute, which stipulate a lower limit and an upper limit on the number of representatives in the City Council from each constituent people. Namely, the applicant states that a minimum limit on the number of representatives in the City Council stipulated as a privilege afforded to the Serb People as the least represented people in Mostar in the specific case, as well as a maximum limit on the number of representatives stipulated as a certain limitation for the people which constitutes the majority, irrespective of the election results, have not been stipulated in any act as a privilege afforded to the Croat People, nor has it been stipulated as a limitation for the Serb and Bosniac Peoples in the cities where they constitute the majority.

11. In the view of the applicant, the provisions of Article 19.4 paragraph 2 of the Election Law, and the provisions of Article 17 paragraph 1 of the Statute, which stipulate that three councillors shall be elected from each of the six electoral constituencies of the City of Mostar, are in violation of the fundamental principle of the Election Law according to which in determining the electoral constituencies one has to observe that the electoral constituencies have equal number of voters. In this context, the applicant states that the electoral constituency of Mostar Southwest has approximately four times more voters than the electoral constituency of Mostar Southeast, and both electoral constituencies elect the same number of councillors.

12. Next, the applicant considers that, by the provisions of Article 19.2 paragraphs 1 and 3 and Article 19.4 paragraph 2 of the Election Law, and the provisions of Articles 15 and 17, paragraph 1 in conjunction with Articles 5 and 7 of the Statute, the citizens of the former Central Zone of the City of Mostar have been discriminated against compared with the citizens of the City of Mostar residing in the other six areas of the City of Mostar. Namely, the applicant states that the challenged provisions stipulate that, in the area of the City as one electoral constituency, seventeen councillors shall be elected by all the citizens of Mostar, while the remaining eighteen councillors shall be elected by the citizens from the six electoral constituencies of the City of Mostar and the citizens of the former Central Zone are prevented from electing their representatives to the City Council.

13. Also, the applicant holds that the citizens of the former Central Zone are discriminated against by the provisions of Article 38 of the Statute, which prescribe that there shall be one Committee of the City Council for each City Area comprised of the three city councillors elected from the territory of the relevant City Area. The applicant states that the Committees for the City Areas decide on distribution of revenues derived from the use of allocated construction land and on the announcement of a referendum in accordance with Article 33 of the Statute, and that the citizens of the former Central Zone can no longer take part in decision-making as they do not belong to any City Area. In addition, the applicant holds that the city councillors have been treated unequally amongst themselves based on the challenged provisions as those councillors who are elected to the city electoral constituency cannot be elected to a Committee of the City Council for specific City Areas; consequently, they cannot take part in decision-making on the aforementioned issues.

14. Furthermore, the applicant considers that the citizens of the City of Mostar have been discriminated against based on the provisions of Article 19.7 of the Election Law, Article VI.C. paragraph 7 of Amendment to the Constitution of FBiH, and Articles 44 and 45 of the Statute, which provide that only councillors elected to the Council of the City shall be elected as Mayor of the City of Mostar and that the Mayor shall be elected or removed from office by elected councillors. Namely, the applicant states that item 3 of Amendment CIV to the Constitution of FBiH and the relevant provisions of the Election Law stipulate that citizens shall directly elect municipal or city Mayors by secret ballot, and that item 2 of Amendment CI to the Constitution of FBiH stipulates that “the City of Mostar shall have the competencies of a Municipality”. Moreover, the applicant underlines that citizens directly elect municipal or city Mayors in all municipalities and in the City of Banja Luka and, therefore, it follows that the citizens of Mostar do not have the same rights as the citizens of the City of Banja Luka. Finally, the applicant states that the citizens of the former Central Zone have been particularly discriminated against by the challenged provisions as they may come to a situation that they cannot be elected for the position of Mayor, as a consequence of the manner in which the councillors to the City Council are elected.

b) Reply to the request

15. In its reply to the request, the House of Representatives states that the Constitutional-Legal Commission of the House of Representatives considered the request in question at its 87th session held on 14 December 2009. Following the deliberation, they decided with three votes in favor, three votes against and no abstentions, not to support the request of the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

16. In the reply of the House of Peoples it is stated that the Constitutional-Legal Commission of the House of Peoples considered the request in question at its 48th session held on 23 December 2009 and, following the deliberation, decided with three votes in favor, no votes against and two abstentions, without the votes of all the three constituent peoples, not to support the request of the Croat Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

(c) Opinion of the High Representative as *amicus curiae*

17. As to the challenged provisions of Article 19.1, 19.2, 19.3, 19.4 and 19.5 of the Election Law, Article VI.C. paragraph 4 of Amendment CI to the Constitution of FBiH and Articles 7, 15, 16 and 17 of the Statute, in its written observations the High Representative states that as to the allegations related to a possible violation of Article 3 of Protocol No. 1 to the 1966 International Covenant on Civil and Political Rights, it is noted that this Article regulates admissibility procedures for individual communications between the United Nations Human Rights Committee and these are not applicable to the Constitutional Court. The High Representative notes that it appears to be a mistake by the applicant whose intention may have been to refer to Article 3 of Protocol No. 1 to the European Convention and, should it be the case, the High Representative notes that the said Article is not applicable in the present case as it does not apply to elections of local Government organs, which exercise no legislative power but rather exercise regulatory power delegated by Parliament. Should the applicant still argue that Article 14 of the European Convention is applicable in conjunction with Article 3 of Protocol No. 1 to the European Convention, the High Representative states that it is worth observing that the European Court of Human Rights has made it clear that one cannot derive from the combination of these provisions the right that all votes have an equal weight. Regarding the applicant's claim under Article 25 of the International Covenant on Civil and Political Rights, the High Representative refers to the General Comment of the UN Human Rights Committee where it is stated that any restrictions on the rights in Article 25 of the International Covenant on Civil and Political Rights "should be based on objective and reasonable criteria". Namely, the High Representative notes that the principle of "one person, one vote" and the principle that all votes have an equal weight is not an absolute right and that restriction to that right can be justified based on objective and reasonable criteria. In this context, it is stated that the electoral system in place in the City of Mostar is justified taking into consideration the aims pursued by this system and the historical background of the City. It is furthermore stated that when assessing the justification in the present case, one needs to take into account the difficult history of peace implementation in Mostar and the important role that Mostar

plays in the wider context of peace implementation in the Federation of BiH and the entire State. The High Representative submits that respecting the equality of constituent peoples and creating effective power sharing mechanisms, which prevent any one people having majority control in the City Council, are the legitimate aims pursued by the challenged provisions of the Mostar Statute, the Election Law and the Constitution of the Federation of BiH. In addition, the means employed are proportionate to the aims to be achieved.

18. As to the challenged provisions of Article 38 of the Statute, the High Representative considers that neither the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina, nor the international instruments enumerated in the request of the applicant, guarantee “the right of citizens to be elected and/or to take part in decision-making in the Committees of the City Council”.

19. With regard to the challenged provisions of Article 19.7 of the Election Law, Article VI.C. paragraph 7 of Amendment CI to the Constitution of FBiH and Articles 44 and 45 of the Statute, the High Representative holds that neither the Constitution of Bosnia and Herzegovina and the Constitution of the Federation of Bosnia and Herzegovina, nor the international instruments enumerated in the request of the applicant require a uniform system of elections/removal of the Mayors of cities/municipalities throughout Bosnia and Herzegovina. It is further stated that authorities in Bosnia and Herzegovina enjoy a wide margin of appreciation in establishing either direct or indirect system of election and/or in removal of the Mayor of Cities or Municipalities. Next, it is stated that the Constitution of FBiH foresees both direct and indirect election and removals/recalls of Heads of Municipalities/Cities in Bosnia and Herzegovina. Finally, it is stated that Mayor of Sarajevo, Mayor of East Sarajevo and the Mayor of the Brcko District of BiH are indirectly elected or removed as is the case in the City of Mostar.

(d) Opinion of the Venice Commission as *amicus curiae*

20. The Venice Commission stated that Articles 19.4 and 19.6 of the Election Law of BiH, which regulate the election of the City Council of Mostar, deviate from the principle of equal weight of each vote by establishing a minimum and a maximum threshold of representation of the three constituent peoples and of the Others. The Venice Commission stated that these provisions aim to guarantee the representation of all constituent peoples and the group of Others, and to prevent the dominance of the Council by one constituent people or the group Others. In this regard, the Venice Commission stated that according to the principles of the case-law of the European

Court of Human Rights and of the UN Human Rights Committee, decisive in the assessment of the provisions in question is whether the restrictions on the principle of equal weight can be regarded as reasonable and based on objective criteria. The Venice Commission emphasized that in its opinion on the Election Law of BiH in 2001, the Venice Commission recalled that “the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible and that in such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability. The Venice Commission pointed out that although the situation in Bosnia and Herzegovina has evolved in a positive sense, there are still circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups and that it therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups”.

21. Also, the Venice Commission referred to the Decision of the Constitutional Court No. *U 4/05* on the electoral system of the City of Sarajevo, wherein the Constitutional Court stated that that “it is necessary for all three constituent peoples to be “given minimum guarantees for the participation on the city council irrespective of the election results since that is the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina”. Furthermore, the Venice Commission referred to the third partial decision of the Constitutional Court in Case No. *U 5/98* wherein the Constitutional Court stated that “a consistent application of the democratic principle – one elector one vote, in the existing political circumstances in Bosnia and Herzegovina, is running a risk of creating mono-ethnic authority elected in the areas in which one of the constituent peoples is in majority”. Bearing in mind the aforementioned, the Venice Commission stated that given the general circumstances of BiH and specific circumstance in Mostar, guaranteeing the representation in elected bodies of all constituent peoples and the group of Others as well as preventing any of the groups from dominating such bodies remain legitimate aims, although the development should move towards a system giving more weight to electoral results. In this regard, the Venice Commission pointed out that that similar solutions have been adopted in respect of Sarajevo (as appears from the decision of the Constitutional Court No. *U 4/05*), as well as other European cities with similar contexts of multi-ethnic or multi-lingual composition. Belgium in particular is a case in point. In the opinion of the Venice Commission, the deviations from the principle of equal weight of each vote are proportionate to the legitimate aim pursued and, thus, meet the criteria of reasonableness and objectivity, required by Protocol 12 as well as by Article 25 of the ICCPR and the General Comment of the UN Human Rights Committee. The same may be

said for the provisions on the organisation and the composition of the Committees of the City Council, which follow the same criteria.

22. As to the former Central Zone, the Venice Commission stated that the people residing in the Central Zone, unlike residents of Mostar who live in any of the six City Areas, only vote for the seventeen councillors elected in a city-wide electoral constituency, and not also for the other eighteen councillors elected at the level of the city-area electoral constituencies. This means that the electoral rights of the residents in the Central Zone are lesser than those of the other inhabitants of Mostar. The ground for this different treatment is a purely geographical one: their actual place of residence within the city. In this regard, the Venice Commission has not been informed of any special reasons pertaining today which may still justify this situation. In the absence of reasonable and objective justifications, this difference in treatment appears as discriminatory, in breach of Protocol 12 to the ECHR. The Venice Commission also stated that the City Council has direct substantial powers in respect of the Central Zone in the fields (the distribution of revenues derived from Land Allocation Compensation within the former Central Zone), which are, in the six City Areas, within the competence of the City Council Committees. The Venice Commission considers that the residents of the Central Zone are therefore deprived, in a discriminatory manner which appears to be lacking any special and objective justification, of their right to regulate and manage autonomously and in their own interest the share of public affairs, and that, therefore, Protocol 12 to the European Convention has been violated.

23. As to the election of mayor, the Venice Commission stated that neither the Constitution of BiH nor the international instruments invoked by the applicants address the election of the Mayor, but allow for both direct and indirect election. The Venice Commission stated that the choice of indirect elections is aimed at obtaining ethnic pacification, which is more difficult to achieve in the context of direct elections and that this aim appears to be legitimate, and the essence of the voting right in question is preserved. In the view of the Venice Commission, therefore, the choice of different treatment appears reasonably and objectively justified when it comes to the election of mayor.

IV. Public hearing

24. Pursuant to Article 46 of the Rules of the Constitutional Court, at its plenary session held on 28 and 29 May 2010, the Constitutional Court decided to hold a public hearing to examine the request in question. The Constitutional Court has, in accordance with Article 47(3) of the Rules of

the Constitutional Court, at the plenary session held on 9 July 2010 decided to invite the following parties to attend the public hearing: applicant's representative, representatives of the both houses of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Council of Europe, representative of the European Union, representative of the OSCE, representative of the OHR, representative of the Venice Commission, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović.

25. The Constitutional Court held the public hearing on 24 September 2010 which was attended by the following parties: the applicant's representative, representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Office of the Secretariat of the Council of Europe in BiH, representative of the Head of the Mission of the OSCE in BiH, representative of the OHR, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović. In deliberation on the request in question, the following parties took part: the applicant's representative, representatives of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, representative of the Bosniac Caucus to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, president of the Council of the City of Mostar, Mayor of the City of Mostar, representative of the Central Election Commission of Bosnia and Herzegovina and election system experts Prof. Dr Zoran Tomić and Dr Suad Arnautović.

V. Relevant Law

26. **Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 23/01), as relevant, reads:

Article 12.7

The Mayor may either be elected by an indirect election by the Municipal Council/Assembly or by a direct election by the registered voters in that municipality. If the Entity laws stipulate that there shall be a direct election of the Mayor then the election shall be

conducted in accordance with paragraph two of this article. If the Entity laws stipulate that the election of the Mayor shall be elected indirectly by the Municipal Council/Assembly then the election shall be conducted in accordance with paragraph 3 of this article. If the Entity laws do not stipulate how the Mayor shall be elected then the Mayor shall be elected by an indirect election as established in paragraph 3 of this Law.

If the Mayor is directly elected then the Election Commission of Bosnia and Herzegovina shall determine the form of the ballot.

If the Mayor is indirectly elected then he or she shall be elected by a majority vote of the total number of members of the Municipal Council/Assembly. Each member of the Municipal Council/Assembly may nominate a candidate for the position of the. In the event a candidate does not receive a majority vote of the total number of members, a second election shall be conducted. If no candidate receives a majority of votes of the total number of members, a third election shall be conducted. The member that receives the most votes in the third election shall be elected. In the event that there is a tie, the youngest of the tied candidates shall be elected Mayor.

In the event that the indirectly elected Mayor resigns, dies or is removed by the Municipal Council/Assembly, the Municipal Council/Assembly shall elect a new Mayor in accordance with paragraph 3 of this article.

27. **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 20/02)

Article 18

The current Chapters 12, 13, 14, 15, 16, 17 and 18 shall become Chapters 13, 14, 15, 16, 17, 18 and 19.

28. **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, No. 4/04), in the relevant part, reads:

Article 2

A new Chapter 19 will be introduced in the Election Law of Bosnia and Herzegovina (OG BiH, 23/01, 7/02, 9/02, 20/02 and 25/02): after Chapter 18, “District of Brčko”, a Chapter entitled “The City of Mostar” will be added and read as follows:

Article 19.1

This law shall govern the elections of the councillors to the Council of the City of Mostar (hereinafter: “the City Council”). The principles outlined in this Chapter will apply to elections in the City of Mostar, notwithstanding Chapter 13 of this Law.

Article 19.2

The City Council shall be composed of 35 members. The councillors in the City Council shall be elected in a city-wide electoral constituency and city area electoral constituencies, in the manner set forth in Article 19.4 hereof.

‘A city-wide electoral constituency’ shall for the purpose of the preceding paragraph cover the entire territory of the City, as defined in Article 5 of the Statute of the City of Mostar.

For the purpose of paragraph 1 of this Article, “city areas electoral constituencies” shall be the former city municipalities, as defined by Article 7 and 15 of the Statute of the City of Mostar.

Article 19.3

The City of Mostar shall have one Election Commission established in accordance with the provisions of this Law pertaining to Municipal Election Commissions.

Article 19.4

Seventeen (17) councillors shall be elected from a city-wide electoral constituency. A minimum of four (4) councillors of each constituent people and one (1) councillor from the group of “Others” shall be elected from the city-wide electoral constituency.

Three (3) councillors shall be elected from each of the six city area electoral constituencies.

The city area electoral constituency I shall consist of the former City-Municipality Mostar North.

The city area electoral constituency 2 shall consist of the former City-Municipality Mostar Stari Grad.

The city area electoral constituency 3 shall consist of the former City-Municipality Mostar Southeast.

The city area electoral constituency 4 shall consist of the former City-Municipality Mostar South.

The city area electoral constituency 5 shall consist of the former City-Municipality Mostar Southwest.

The city area electoral constituency 6 shall consist of the former City-Municipality Mostar West.

Each constituent people or the group of "Others" shall not have more than fifteen (15) representatives in the City Council.

Article 19.5

The mandates to be filled from the city-wide electoral constituency shall first be allocated under the formula set forth in Article 9.6, paragraph 1 of this Law. If the allocation of mandates from the city-wide electoral constituency does not allow minimum representation of any of the constituent peoples and/or of the group of "Others", as provided for under Article 19.4, paragraph 1 of this Law, the following method shall apply:

1. The last mandate(s) to be allocated from the city-wide electoral constituency required to fill the quotas of any of the constituent peoples and/or the group of "Others" shall be allocated to the candidate(s) from the relevant constituent people(s) and/or group of "Others" having received the highest number of votes on the list of the political party, the list of independent candidates or the coalition's list to which the mandate was allocated under Article 9.6, paragraph 1 of this Law. If the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, item 2 of this Article will apply.

2. If the political party, list of independent candidates or coalition to which the mandate(s) was allocated under Article 9.6, paragraph 1 of this Law does not have enough

such eligible candidate(s) on its city-wide electoral list or if the mandate would, under Article 9.6 of this Law, be allocated to an independent candidate, the mandate shall be transferred either:

- *to the political party(ies), list(s) of independent candidates or coalition(s) having such candidates left on its list; or*
- *to (an) independent candidate(s) from the relevant constituent people or from the group of “Others”, which/whoever ha(s)(ve) the next highest quotient as defined in Article 9.6 of this Law.*

3. *If no candidate from the relevant constituent people(s) or the group of “Others” can be found in accordance with items 1 and 2 of this Article, the mandate(s) shall be transferred to either:*

- *the political party, list of independent candidates or coalition’s list having such candidate(s) left on a list for any city area constituency after the seats filled from the area constituencies have been allocated in accordance with Article 19.6 of this Law; or*
- *the independent candidate(s) from the relevant constituent people or from the group of “Others” running for any city area constituency, which/whoever ha(s)(ve) received the highest quotient as defined in Article 9.6 of this Law.*

Article 9.6, paragraph 2 shall not apply when allocating mandate(s) under this Article.

Article 19.6

The mandates filled from the city areas electoral constituencies are thereafter allocated under the formula set forth in Article 9.6 of this Law. Mandates shall be allocated individually, starting with the highest placed candidate in each city area constituency, and proceeding in similar fashion to fill each available seat from each city area constituency. The sequence of filling the mandate allotted to each city area constituency, for each of the three successive steps, shall be determined by the drawing of lots. The drawing of lots shall be organized by the Election Commission of Bosnia and Herzegovina.

If the allocation of a mandate from the city areas electoral constituency would lead to the representation of a constituent people and/or the group of Others beyond the quota provided for under Article 19.4, paragraph 4 of this Law, the following method shall apply:

1. The mandate shall be re-allocated to the candidate who does not belong to the said constituent people and/or to the group of “Others” having received the highest number of votes on the list of the political party, the list of independent candidates or coalition’s list to which the mandate was allocated under Article 9.6, paragraph 1 of this Law. If the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, item 2 of this Article will apply.

2. If there is no such candidate or if the mandate would, under the formula set for the in Article 9.6, paragraph 1 of this Law, be allotted to an independent candidate, the mandate shall be transferred, in the same city area constituency, either:

- to the party, list of independent candidates or coalition’s list having a candidate who does not belong to the said constituent people and/or to the group of “Others” left on its list; or*
- to the independent candidate(s) who does not belong to the said constituent people and/or to the group of “Others”, which/whoever has the next highest quotient as defined in Article 9.6 of this Law.*

3. If no such candidate can be found in accordance with items 1 and 2 of this Article, the mandate(s) shall be transferred to either:

- the political party, list of independent candidates or coalition’s list having such candidate(s) left on a list for any other city area constituency after the seats filled from that city area constituencies have been allocated in accordance with Article 19.6 of this Law; or*
- the independent candidate(s) from the relevant constituent people or from the group of “Others” running for any city area constituency, which/whoever ha(s)(ve) received the highest quotient as defined in Article 9.6 of this Law.*

Article 19.7

Notwithstanding Article 13.7 of this Law, the Mayor of the City of Mostar will be indirectly elected in accordance with the Constitution of the Federation of Bosnia and Herzegovina

29. **Law on Amendments to the Election Law of Bosnia and Herzegovina** (*Official Gazette of Bosnia and Herzegovina*, no. 33/08)

Article 57

Article 13.7 is amended to read as follows:

- (1) The Municipal Mayor or City Mayor shall each be elected in accordance with this Law, the constitutions, the entity legislation, and Municipal or City statutes respectively.*
- (2) If the Municipal Mayor or City Mayor are elected directly, the Municipal Mayor or City Mayor shall each be elected by the voters registered in the Central Voter Register of the particular Polling Station in accordance with this Law, the entity legislation, Municipal or City statutes respectively.*
- (3) In the event that the term of office for an elected Municipal Mayor or City Mayor referred to in paragraph (2) of this Article has terminated as provided by Article 1.10 of this Law or if he/she has been recalled, the Municipal mayor or City Mayor shall each be elected in accordance with this Law, the entity legislation, Municipal or City statutes respectively.*

29. **Election Law of Bosnia and Herzegovina** (*Official Gazette of Federation of Bosnia and Herzegovina*, no. 33/08)

Article 57

Article 13.7 shall amend and read:

- 1) The Municipal Mayor or City Mayor shall each be elected in accordance with this Law, the constitutions, the entity legislation, and Municipal or City statutes respectively.*

2) If the Municipal Mayor or City Mayor are elected directly, the Municipal Mayor or City Mayor shall each be elected by the voters registered in the Central Voter Register of the particular Polling Station in accordance with this Law, the entity legislation, Municipal or City statutes respectively.

3) In the event that the term of office for an elected Municipal Mayor or City Mayor referred to in paragraph (2) of this Article has terminated as provided by Article 1.10 of this Law or if he/she has been recalled, the Municipal mayor or City Mayor shall each be elected in accordance with this Law, the entity legislation, Municipal or City statutes respectively

30. Amendments to the Constitution of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina, no. 13/97):

Amendment XVI

In the Constitution of the Federation of Bosnia and Herzegovina, after Chapter „VI MUNICIPAL AUTHORITIES“, a new chapter shall be added to reads as follows:

VI. A. CITY AUTHORITIES

(1) For the areas of two or more municipalities which are territorially linked by the everyday needs of citizens, a city shall be formed as a local government and self-government unit, in accordance with Federal legislation.

(2) The city shall be responsible for: a) finances and tax policy, in accordance with Federal and Cantonal legislation; b) joint infrastructure; c) urban planning; d) public transport; e) other responsibilities assigned to the city by the canton or municipalities.

(3) The city shall have a statute which must be in accordance with this Constitution, Cantonal Constitution and Cantonal legislation

(4) The city shall have a city council consisting of an equal number of councilors from each municipality, and the number of councilors, election procedure and duration of mandate shall be specified in the Statute. The City council may not have less than 15 or more than 30 councilors.

(5) *The City council shall: a) prepare and by a two-thirds majority vote approve the city statute; b) elect the Mayor; c) approve the city budget; d) enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the statute.*

(6) *The Mayor shall be responsible for: a) appointing and removing city officials, b) executing and enforcing city policy and city regulations, c) ensuring the cooperation of city officials with the Ombudsmen, d) reporting on the implementation of city policy to the city council and the public.*

(7) *The city shall secure revenues by taxation, borrowing and other means, in accordance with law.*

31. **Amendments to the Constitution of the Federation of Bosnia and Herzegovina**
(Official Gazette of the Federation of Bosnia and Herzegovina, no. 9/04), in the relevant part, reads:

Amendment CI

A new Article VI.C shall be added and read as follows:

VI. C. Organisation of Mostar

4) *The City Areas shall be electoral constituencies. The composition of the City Council and the modalities of election shall be regulated respectively by the Statute and the Election Law of Bosnia and Herzegovina in a manner that may derogate from the requirements prescribed in Article VI.A of this Constitution.*

7) *Only Councillors elected to the Council of the City may be elected as Mayor of the City of Mostar. The Mayor is elected and removed from office by a majority of two-thirds of elected councillors, in accordance with the Statute of the City of Mostar.*

32. **Decision correcting the translation of the official Decision of the High Representative enacting amendments to the Constitution of the Federation of Bosnia and Herzegovina**
(Official Gazette of the Federation of Bosnia and Herzegovina, no. 32/07)

Article 1

In Article VI.C, Paragraph 7 of the Constitution of the Federation of Bosnia and Herzegovina, the first sentence which reads as follows: “Svaki građanin Bosne i Hercegovine koji ispunjava uslove za glasanje u Gradu Mostaru može biti izabran za gradonačelnika Grada Mostara”, shall be replaced by the following sentence: “Samo vijećnici izabrani u Gradsko vijeće mogu biti birani za gradonačelnika Grada Mostara”.

Article 2

For the avoidance of any doubt, it is hereby specifically declared and provided that, the corrected provision referred to in Article 1 of this Decision is deemed to have been in force as of 15 March 2004.

In the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement and by Article II:1(d) of the same Annex which requires the High Representative to facilitate the resolution of any difficulties arising in connection with civilian implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina;

[...]

Noting and bearing in mind all the matters aforesaid, the High Representative hereby issues the following

DECISION

Enacting the Statute of the City of Mostar

The Statute of the City of Mostar set out hereunder forms an integral part of this Decision and shall enter into force on March 15, 2004.

The Statute shall be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached.

[...]

33. **Statute of the City of Mostar** (*Official Gazette of the City of Mostar, no. 4/04*), in the relevant part, reads:

In accordance with the Constitution of the Federation of Bosnia and Herzegovina and the Constitution of the Herzegovina-Neretva Canton, the City Council of the City of Mostar adopts the following Statute:

Article 5

Territory of the City

The territory of the City encompasses a single, undivided area according to the state of the area delineated by the cadastre lines of the skirting areas on 1st January 1991 as modified by the General Framework Agreement for Peace in Bosnia and Herzegovina signed on 14th December 1995.

Article 7

City Areas

- 1. In the City, six (6) City areas shall be formed and shall correspond to the former City-Municipalities.*
- 2. Branch offices of the City Administration shall be established in the City areas for the sole purpose of delivering the maximum range of services to the citizens within their own neighborhoods.*
- 3. The City areas of the City are electoral constituencies according to Article 15 of this Statute.*

Article 15

Elections for the City Council

- 1. The Councillors in the City Council shall be elected in electoral constituencies.*
- 2. The electoral constituencies in the City shall be the area of the City and six City areas, as defined in Articles 5 and 7 of this Statute and in the map annexed to the Interim*

Statute published in the Official Gazette of the City of Mostar of 20 February 1996 (O.G. City of Mostar, no. 1, 20 February 1996), which forms an integral part of this Statute.

Article 16

Representation in City Council

A minimum of four (4) representatives of each Constituent People and one (1) of the Others shall be represented in the City Council.

No Constituent People shall have more than fifteen (15) Councillors.

Article 17

Allocation of Seats

- 1. Each City area shall elect three (3) City Councillors. The remaining seventeen (17) Councillors shall be elected in the area of the City as one electoral constituency (hereinafter: the City-wide list).*
- 2. At least four (4) candidates of each Constituent People and one (1) candidate of the Others from the City-wide list shall be elected to the City Council.*
- 3. Allocation of seats in the City Council shall be conducted in accordance with the Election Law of Bosnia and Herzegovina.*

Article 28

Competencies of the City Council

The City Council is the highest body of the City and shall be responsible for all matters falling within its competencies in accordance with the Constitutions and the law.

Article 38

Committees for City Areas

- 1. There shall be one Committee of the City Council for each City Area (Komisija Gradskog Vijeca za Gradska Podrucja). Each Committee of the City Council for City Areas (hereinafter: "Committees for City Areas") shall be comprised of the three City Councillors*

elected from the territory of the relevant City Area pursuant to Article 17, paragraph 1 of this Statute.

2. The Committees for City Areas shall have the following responsibilities:

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

3. Decisions of the Committees for City Areas shall be adopted by simple majority.

4. Article 37, paragraphs 3 through 5 of this Statute will apply to the Committees for City Areas. Issues not regulated by this Statute shall be prescribed by the Rules of Procedure of the City Council in accordance with the general principles set forth in this Statute.

Article 44

Election of the Mayor

1. Only Councillors elected to the City Council may be elected as Mayor.

2. The election of the Mayor shall be carried out at the first session of the City Council after the Elections.

3. Every City Councillor shall be entitled to nominate candidates from amongst elected Councillors.

4. Before the elections, the nominees shall declare in writing that they accept their candidacy.

5. A majority of two-thirds of the elected City Councillors shall be required to elect a Mayor. If none of the candidates receives the necessary votes in the first round, a second round will take place between the two candidates who obtained the largest number of votes in the first round. If, due to a tie between candidates in the first round, it is impossible to determine which two candidates received the highest number of votes, a separate round will be organized between these candidates in order to select the candidate(s) who will qualify

for the second round. If none of the remaining two candidates receives a two-third majority in the second round, a third round shall take place. In the third round, a simple majority of the elected City Councillors shall be required to elect a Mayor from the remaining two candidates. If the remaining two candidates obtain the same number of votes in the third round, the younger one of the two shall be elected as Mayor.

6. *Immediately after the elections, the elected nominee shall declare whether he/she accepts his/her election. If he/she does not accept it, the elections shall be repeated in accordance with the procedure prescribed in this Article.*

Article 45

Removal from Office

1. *The Mayor may be removed from office before the end of his/her mandate by a City Council decision.*

2. *The motion shall require the support of more than half of the elected City Councillors.*

3. *The decision on the removal of the Mayor shall be passed at a special session of the City Council. A two-third majority of the elected City Councillors is required.*

VI. Admissibility

34. The Law Amending the Election Law of Bosnia and Herzegovina was enacted by the Decision of the High Representative for Bosnia and Herzegovina and it was determined that the Decision would enter into force on 1 March 2004 and required no further procedural steps to effect its enactment. Moreover, the Amendments to the FBiH Constitution and the Statute of the City of Mostar were enacted by the Decisions of the High Representative whereby it was determined that they would enter into force on 15 March 2004 and be in force on an interim basis until adopted by the City Council of the City of Mostar in due form, without amendments and with no conditions attached.

Admissibility as to the Decision of the High Representative enacting the Statute of the City of Mostar

35. The applicant is of the opinion that paragraph 1 of the introductory part of the High Representative's Decision enacting the Statute of the City of Mostar is not consistent with Article II(1) of the Constitution of Bosnia and Herzegovina and that paragraph 2 of the Decision in question is not consistent with Article I(2) of the Constitution of Bosnia and Herzegovina.

36. As to the power of the High Representative to enact laws and the competence of the Constitutional Court to take decisions on conformity of such laws with the Constitution of Bosnia and Herzegovina, the Constitutional Court has already expressed its opinion stating that the powers of the High Representative arise from Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the relevant resolutions of the UN Security Council and the Bonn Declaration and that neither the powers nor the exercise of those powers are subject to review by the Constitutional Court. However, whenever the High Representative intervenes into the legal system of Bosnia and Herzegovina as a substitute for domestic authorities he acts as an authority of Bosnia and Herzegovina and the laws enacted by him are domestic laws by their nature and must be considered the laws of Bosnia and Herzegovina whose conformity with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court (see, the Constitutional Court, Decision no. *U 9/00* of 3 November 2000, published in the *Official Gazette of Bosnia and Herzegovina*, no. 1/01, Decision no. *U 16/00* of 2 February 2001, published in the *Official Gazette of Bosnia and Herzegovina*, no. 13/01 and Decision no. *U 25/00* of 23 March 2001, published in the *Official Gazette of Bosnia and Herzegovina*, no. 17/01).

37. It follows from the aforementioned that the Constitutional Court is not competent to review the constitutionality of paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative enacting the Statute of the City of Mostar since this issue concerns the authorities of the High Representative arising from Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina that are not subject to review by the Constitutional Court as it is stated in the preceding paragraph of the decision.

38. Bearing in mind Article 17(1)(1) of the Rules of the Constitutional Court according to which a request shall be rejected as inadmissible if it is established that the Constitutional Court is not competent to take a decision, the Constitutional Court decided as set out in the enacting clause of the decision insofar as this part of the request is concerned.

Admissibility as to the challenged provisions of the BiH Election Law, the FBiH Constitution and the Statute of the City of Mostar

39. On the other hand, the Constitutional Court notes that the High Representative intervened into the legal system of Bosnia and Herzegovina and enacted the challenged provisions of the BiH Election Law, the FBiH Constitution and the Statute of the City of Mostar substituting for the Parliamentary Assembly of Bosnia and Herzegovina, the Parliament of the Federation of Bosnia and Herzegovina and the City Council of the City of Mostar. In view of the aforementioned paragraphs, these acts are considered the domestic acts whose conformity with the Constitution of Bosnia and Herzegovina is subject to review by the Constitutional Court.

40. As to the challenged provisions of the FBiH Constitution, the Constitutional Court notes that according to Article VI(3)(a)(2) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall have exclusive jurisdiction to decide whether any provision of an Entity's constitution or law is consistent with this Constitution. Furthermore, the Constitutional Court notes that although Article VI(3)(a) of the Constitution of Bosnia and Herzegovina does not provide for an explicit jurisdiction of the Constitutional Court to review constitutionality of laws or provisions of laws of Bosnia and Herzegovina, a substantive notion of authorities defined under the Constitution of Bosnia and Herzegovina contains within itself the *authority* of the Constitutional Court to conduct such a review of constitutionality, in particular as a body which upholds the Constitution of Bosnia and Herzegovina. The opinion of the Constitutional Court given in its case-law with regards to such cases clearly indicates that the Constitutional Court is competent to review the constitutionality of laws or certain provisions of laws of Bosnia and Herzegovina (see the decision of the Constitutional Court No. *U I/99* of 14 August 1999, *Official Gazette of Bosnia and Herzegovina*, no.16/99).

41. Further, as to the challenged provisions of the Statute, the Constitutional Court has already elaborated on the issue of its competences under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina in its case-law with regards to a similar situation when the subject of review was the Statute of the City of Sarajevo and concluded that: “as an institution which upholds the Constitution, the Constitutional Court is competent to review the constitutionality of all acts regardless of their adopters if the issue raised is under one of the Constitutional Court’s competences set out in Article VI(3) of the Constitution of Bosnia and Herzegovina. In line with the arguments concerning human rights, the Constitutional Court holds that it must, whenever this is feasible, interpret its jurisdiction in such way as to allow the broadest possibility of removing the consequences of violation of human rights. In the case at hand, the request for a review of constitutionality relates to issues under, respectively, the Constitution of Bosnia and Herzegovina and International Agreements that guarantee protection and exercise of human rights and

constitutional principles such as the principle of constituent peoples and the right to non-discrimination”, (see, the Constitutional Court, Decision on Admissibility and Merits no. *U 4/05* of 22 April 2005, paragraphs 14 through 17, published in the *Official Gazette of Bosnia and Herzegovina*, no. 32/05). Being guided by the principles from the mentioned decision, the Constitutional Court considers that in the instant case it is competent to review the constitutionality of the Statute since this matter concerns the request for review of constitutionality relating to the issues under the Constitution of Bosnia and Herzegovina and international agreements on protection of human rights, *i.e.* on protection of human rights and right to non-discrimination.

42. Furthermore, the request for review of constitutionality was submitted by the Croat Caucus in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina whereby the requirement under Article VI(3)(a) of the Constitution of Bosnia and Herzegovina has been satisfied according to which a request may be submitted by at least one fourth of the members/delegates from any of the Houses of the Parliamentary Assembly.

43. Having regard to Article VI(3)(a) of the Constitution of Bosnia and Herzegovina and Article 17(1) of the Constitutional Court’s Rules, the Constitutional Court established that this part of the request is admissible for it was submitted by an authorized person and there is no single formal reason under Article 17(1) of the Rules of the Constitutional Court that would render the request inadmissible.

VII. Merits

Discrimination in relation to elections to the City Council contrary to Article 14 of the European Convention taken together with Article 3 of Protocol No. 1 to the European Convention

44. Article 14 of the European Convention, as relevant, reads:

The enjoyment of the rights and freedoms set forth in this Convention 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.

45. Article 3 of the Protocol No. 1 to the European Convention reads:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

46. Article 14 of the European Convention applies where a person or group has been treated differently from others on a prohibited ground in relation to another right under the European Convention and its Protocols, and the difference does not have an objective and rational justification. To engage Article 14, a rule, act or omission must therefore fall within the ambit of one of the substantive rights under the European Convention. In the instant case, the applicant submits that challenged provisions fall within the ambit of Article 3 of Protocol No. 1 to the European Convention (the applicant invoked provision of Article 3 of the International Covenant, which is an obvious omission).

47. The obligation imposed on the state by Article 3 of Protocol No. 1 to the European Convention produces both active and passive rights in the population: the active right to vote in elections, and the passive right to offer one's self for election. However, these rights relate only to the 'choice of the legislature'. The European Court of Human Rights has consistently held that the Article applies only in respect of elections to bodies which exercise a significantly legislative function. Whether a particular body exercises sufficient legislative power to be regarded as a legislature for this purpose is a question of judgment to be answered in the light of the role of the body and its contribution to democratic law-making in the context of the constitution as a whole: see for example *Mathieu-Mohin and Clerfayt vs. Belgium*, judgment of 2 March 1987, Series A, No. 113; *Matthews v. United Kingdom*, judgment of 18 February 1999, Reports 1999-I [GC]; *Santoro vs. Italy*, judgment of 1 July 2004, Reports 2004-VI. While a regional council may have sufficient legislative power to qualify (see *Santoro vs. Italy*, above), a local council typically does not: see for example *Gorizdra vs. Moldova* Application No. 53180/99, admissibility decision of 2 July 2002; *Cherepkov vs. Russia* Application No. 51501/99, admissibility decision of 25 January 2000, Reports 2000-I; *Salleras Llinares vs. Spain* Application No. 52226/99, admissibility decision of 12 October 2000, Reports 2000-XI.

48. Provision of Article 28 of the Statute of the City of Mostar provides that the City Council is the highest body of the City and responsible for all issues under its jurisdiction pursuant to constitution and the laws. Amendments to the Constitution of the Federation of Bosnia and Herzegovina (*Official Gazette of the Federation of Bosnia and Herzegovina* no. 13/97) provide that *the City council shall: a) prepare and by a two-thirds majority vote approve the city statute; b)*

elect the Mayor; c) approve the city budget; d) enact regulations on the exercise of transferred authorities and carry out other responsibilities specified in the statute.

49. Considering the very limited extent of legislative power exercised by the Council, the Constitutional Court considers that the Council is mainly an administrative rather than legislative body. Accordingly, elections to the Council do not fall within the ambit of the obligation of Bosnia and Herzegovina under Article 3 of Protocol No. 1 to the European Convention to hold elections which will secure ‘the free expression of the opinion of the people in the choice of the legislature.’ That being so, no issue arises as to the application of Article 14 of the European Convention in conjunction with Article 3 of Protocol No. 1 to the European Convention. This part of the applicant’s request is therefore dismissed as ill-founded.

Discrimination in relation to elections to the City Council in breach of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant on Civil and Political Rights

50. The applicant alleges that the provisions of Article 19.1, 19.2, 19.3, 19.4, 19.5, 19.6 and 19.7 of the Election Law of Bosnia and Herzegovina, the provisions of Article VI.C paragraph 7 of Amendment CI to the Constitution of the Federation of Bosnia and Herzegovina and the provisions of Articles 7, 15, 16, 17, 38, 44 and 45 of the Statute of the City of Mostar are not consistent with 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) (Annex I to the Constitution of Bosnia and Herzegovina).

51. **Article II(4) of the Constitution of Bosnia and Herzegovina**, as relevant, reads:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina 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.

52. **Annex I to the Constitution of Bosnia and Herzegovina – Additional Human Rights Agreement to be applied in Bosnia and Herzegovina**

7. International Covenant on Civil and Political Rights (1966) and Optional Protocols (1966 and 1989)

53. **Article 25 of the International Covenant on Civil and Political Rights** (1966) provides:

Article 25

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

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(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;

54. The Constitutional Court shall first examine the request within the context of the right to non-discrimination under Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights, before considering the allegation of a violation of Article 25.b) taken alone.

55. The Constitutional Court recalls that Article II(4) of the Constitution of Bosnia and Herzegovina provides that the enjoyment of rights and freedoms envisaged under the international agreements listed in Annex I to the Constitution of Bosnia and Herzegovina is granted to all persons without discrimination on any ground. Annex I item 7 to the Constitution of Bosnia and Herzegovina sets out a list of Additional Human Rights Agreements to be applied in Bosnia and Herzegovina which includes, inter alia, the International Covenant on Civil and Political Rights (1966). The Constitutional Court recalls the case-law of the European Court of Human Rights according to which discrimination exists if a person or group of persons in an analogous situation are differently treated and there is no objective or reasonable justification for such differential treatment (see, the European Court of Human Rights, *Belgian Linguistic Case*, the judgment of 23 July 1968, Series A, no. 6). The European Court of Human Rights has applied this approach to questions of discrimination in relation to political participation in Bosnia and Herzegovina under both Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention: see *Sejdić and Finci vs. Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, judgment of 22 December 2009 [Grand Chamber]. The Constitutional Court considers that this approach is equally appropriate in relation to the application of Article II(4) of the Constitution of Bosnia and Herzegovina in combination with Article 25 of the International Covenant. In accordance with that approach, for a difference in treatment to be objectively and

reasonably justified two conditions must be fulfilled - the principle of differential treatment may be applied for the purpose of achieving a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

56. Article 25 of the International Covenant on Civil and Political Rights guarantees the right of every citizen to take part in the conduct of public affairs, to vote and be elected and the right of access to public services. Unlike Article 3 of Protocol No. 1 to the European Convention, the rights to vote and to be elected under Article 25 of the International Covenant are not restricted to elections to legislatures, but apply generally to those bodies membership of which depends wholly or partly on election. The International Covenant requires the signatory states to enact laws and take other necessary measures in order for the citizens to be given an effective possibility to enjoy the rights guaranteed under this international agreement. The UN Human Rights Committee stated, in its Comment on Article 25.b) of the International Covenant on Civil and Political Rights (adopted at its 57th session of 12 July 1996), as follows: “Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria (...) and the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable.” In the further part of the Comment, the UN Human Rights Committee points to the possible reasonable restrictions on active and passive electoral right, such as setting a minimum age limit for the right to vote, as well as to unacceptable restrictions such as literacy, educational and property requirements, membership of a political party, etc. There are also the conditions under which states should organize elections without any pressure, force or other forms of coercion on electors. The UN Human Rights Committee specifically noted that the International Covenant on Civil and Political Rights does not impose any particular electoral system, but any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors. In the Comment it is emphasized that: “the principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely”.

57. In the first part of the request the applicant submits that the people of Mostar suffer discrimination as compared with the other inhabitants of Bosnia and Herzegovina in relation to their respective rights to participate in free elections to City Councils (or equivalent institutions). This

discrimination is said to result from the provisions of Article 19.4, paragraphs 1 and 9 of the Election Law, and Article 16 of the Statute, which stipulate that a minimum of 4 and a maximum of 15 representatives from each constituent people shall be in the City Council. In order to understand the significance of this, we have to compare the positions of particular constituent peoples relative to each other in Mostar with their relative positions with respect to similar elections in other major municipalities in Bosnia and Herzegovina. The applicant argues that the minimum limit on the number of representatives in the City Council constitutes a privilege afforded to the Serb People, as the least represented people in Mostar in the specific case, whilst the maximum limit on the number of representatives for any one constituent people (or Others) constitutes an artificial limitation on the extent to which free elections can give rise to a majority of Croat representatives in such elections. By contrast, in other municipalities of comparable importance, such as Sarajevo and Banja Luka, where the Croat people forms a minority of the population, the applicant says that the law does not set an equivalent minimum level or representation for the Croat people, or other minority peoples, nor is the maximum representation of the constituent people which forms a majority of the population restricted (notwithstanding the results of the elections) in such a way as to privilege the Croat People (or other peoples forming a minority in the population), in the cities where the Bosniac or Serb people constitutes a majority. For example, the applicant pointed out that the privilege which is granted to the Serb and Bosniac Peoples to be represented by at least four councillors in the City Council, regardless of the number of voters and election results, is not granted to the Croat People in other areas of Bosnia and Herzegovina, such as Banja Luka, where they constitute a minority.

58. In deciding whether the Croat People has suffered differential treatment as compared with the Serb and Bosniac Peoples, it is necessary to identify the appropriate comparators. In other words, whether there has been differential treatment depends on establishing which persons or groups are in relevantly analogous positions, so that treating them differently would require justification. In the instant case, the applicant complains that members of the Croat People in Mostar are treated differently from, and less favorably than, members of the Serb people in constituencies where the Serb people form a majority in the population such as Banja Luka, and areas such as Sarajevo where the Bosniac people form a majority. There are two possible bases for comparison. The first is the position of the Croat People in Mostar as compared with the positions of the Bosniac and Serb Peoples and Others in Mostar. On the face of the challenged provisions, Croats, Serbs and Bosniacs are in exactly the same position in elections to the City Council, and

Others are less favorably treated but still receive some possible relief against the possibility of election results offering them little or no representation.

59. This does not appear at first sight to be a matter of which the Croat (or Serb or Bosniac) People could complain. However, treating similarly people or groups who are not in a relevantly analogous position may sometimes engage the right to be free of discrimination: like cases should be treated alike, but relevantly different cases should be treated differently. If the Croat people were able to show that they would be significantly under-represented in the Council relative to other constituent peoples and Others bearing in mind their respective numbers in the population of Mostar, the artificial limitation on the numbers of representatives would at least call for justification under Article II.4 of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant. However, no up-to-date and reliable statistics are available as to the make-up of the population of Mostar; the most recent are to be found in the results of the census from 1991. At the public hearing, the representative of the Central Election Commission, Mr. Branko Petrić, in response to a question from the Court, confirmed that electoral records exist from which it would be possible to compile statistics concerning the current distribution of members of the Constituent Peoples in the various constituencies of Mostar. However, as yet no such statistics have been compiled. That being so, the Constitutional Court is not in a position to say on this basis that the challenged provisions engage rights under Article II(4) of the Constitution of Bosnia and Herzegovina.

60. The alternative basis for deciding whether there has been differential treatment is to compare the position of the constituent peoples in Mostar with their respective positions in elections to City Councils and similar institutions in other parts of Bosnia and Herzegovina. The issue then becomes whether the special treatment given to voters who are not members of the Croat People in the Mostar area is different from the treatment of voters who are not members of the majority People in Banja Luka or Sarajevo, so that the Croat People in the Mostar area are treated less favorably in terms of their right to vote and their right to participate in public affairs than the Serb People in Banja Luka or the Bosniac People in Sarajevo, because the possible proportion of elected representatives who may be members of the Croat People in the Mostar area is lower than the equivalent proportion of elected representatives for Sarajevo and Banja Luka who may be members of the Bosniac and Serb Peoples respectively.

61. The Constitutional Court notes that, in relation to the City Council of Sarajevo, the Statute of the City of Sarajevo, Article 22, paragraph 3 provides: ‘Bosniacs, Croats and Serbs, as

constituent peoples are each guaranteed a minimum of 20 per cent of seats in the City Council, and Others at least two seats, regardless of the election results.’ As a result, the Bosniac majority cannot have less than 20 per cent of the seats, or more than 60 per cent of the seats less 2. The Statute of the City of Banja Luka, Article 33 paragraph 2 provides: ‘one councillor’s seat in the City of Banja Luka Assembly shall be guaranteed to the members of all national minorities.’ This means that the Serb majority in Banja Luka could potentially hold no seat at all, or could hold one seat less than 100 per cent of the seats, on the City Assembly of Banja Luka.

62. If one compares that with the position of electoral position of Croats in respect of Mostar City Council, one finds that, under Article 19.4 of the Law on Amendments to the Election Law of Bosnia and Herzegovina, there are to be 35 councillors for the City of Mostar. Of these, 17 are elected from a city-wide constituency. Of these, at least four are elected from each of the three constituent peoples, and at least one is elected from Others. The minimum number of these seats which could be held by Croats is therefore four, and the maximum number is eight. Eighteen further councillors are to be elected (three from each of six constituencies consisting of areas of the city). The Law does not require any particular number of these to be from the constituent peoples or Others, but the ninth paragraph of Article 19.4 specifies that each of the constituent peoples and Others may have no more than 15 representatives. It follows that the Croat people may have any number of representatives on the Council from four (11.43 per cent of the representatives) to 15 (42.86 per cent of the representatives), even if Croat candidates receive far more than 42.86 per cent of the votes cast.

63. It is clear that the greatest possible proportion of Croat representatives in the City of Mostar Council is significantly lower than that of Bosniac representatives in the City Council of Sarajevo, and far less than the maximum possible proportion of Serb representatives in the City Assembly of Banja Luka. The Constitutional Court holds that this differential treatment is potentially inconsistent with Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant. The Constitutional Court must therefore decide whether the differences are objectively and rationally justified.

64. In this regard, the Constitutional Court considers it necessary to emphasize that the challenged provisions are incorporated into the Statute of the City of Mostar and Election Law as a result of years-long efforts of both the domestic and international authorities trying to find the most favorable solution for the organization of the City of Mostar, a matter which presented special difficulties in the context of the need to reconstruct the city and facilitate its restoration to a

multiethnic community after the war. In connection with this issue, the Constitutional Court recalls that by the Washington Agreement from March 1994, the Framework Agreement for the Federation signed on 1 March 1994 and the Agreement on the Constitution of Federation signed on 18 March 1994, it was agreed that the Mostar City Municipality shall be governed by the Administrator of the European Union for up to two years in order to facilitate the post-war transition, coordinate reconstruction in the destroyed city and initiate the basic development of essential structures in the City in the critical early years. A Memorandum of Understanding, signed in Geneva on 6 April 1994, emphasized the commitment to the development of a unified, multiethnic city, return, freedom of movement and the temporary establishment of the EU Administration. The Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina of 10 November 1995 reaffirmed the agreement on a set of principles for the Interim Statute for the City of Mostar, including support for the unity of the city under an interim structural agreement. Finally, the Interim Statute was adopted on 7 February 1996 as an interim arrangement to ensure the basic administration of the City and government services while a permanent legal structure was negotiated, drafted and adopted. It follows from the aforementioned that the City of Mostar, due to its specific character, had a special status when compared with other cities in Bosnia and Herzegovina. The special problems concerning the reconstruction of the city provided objective and reasonable grounds for making its organization different from those in other cities of Bosnia and Herzegovina.

65. Establishing a satisfactory arrangement turned out to be a long-term project. The Steering Board of the Peace Implementation Council, at its session held in Brussels on 11 December 2003, assumed responsibility for offering full support to the implementation of a solution to the issue of Mostar based on a single, coherent city administration with effective, guaranteed power-sharing mechanisms which prevent any one people having majority control of the City Council. In addition, the Commission for Reforming the City of Mostar (“the Commission”), which was established by the Decision of the High Representative No. 160/03 of 17 September 2003, stated, in its Report of 15 December 2003 that in the course of drafting a new Statute of Mostar it was guided by a set of principles as guidelines for its work, outlined by the High Representative in his *amicus curiae* opinion in the instant case. The guidelines were, *inter alia*, that the composition of the City Administration should reflect the last (1991) census and that the unified council and electoral system should provide for: representation of all constituent peoples and Others; and representation from all parts of Mostar. To explain the reasons for the arrangements adopted for Mostar, the *amicus curiae* opinion of the High Representative quotes the Venice Commission writing in 2001 to

support the proposition that power-sharing between the constituent peoples is an essential part of the Dayton settlement making peace possible in Bosnia and Herzegovina, however problematic it may be for the law of discrimination. The High Representative also quotes from the report of the Commission, which referred to the difficulties experienced in reforming the city authorities of Mostar to increase their effectiveness and efficiency and to put in place a genuinely democratic political system in place of one based on the self-interest of politicians and the politics of fear. The Commission insisted in its report that ‘any reform of Mostar must be based not on population numbers, but on commitment to the protection of human rights, and of the rights of the Constituent Peoples and the group of Others, through protection of vital national interests.’ The Report presented data concerning the 1991 demographic structure of the pre-war municipality of Mostar - 43,856 Bosniacs (34.6%); 43,037 Croats (34%); 23,864 Serbs (18.8 %); 12,768 Yugoslavs (11.1%) and 3,121 Others (2.5%). The provisions of Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute reflect the last census of the City of Mostar and ensure that there is representation of all constituent peoples and that none of the peoples has an absolute majority on the City Council.

66. If one accepts the premises on which the Report was based, particularly that it was appropriate in 2003 to base the election of a Council on the balance between the constituent peoples and Others at the time of the 1991 census and that the organization of Mostar should therefore be based on power-sharing without representatives of any one constituent people having an absolute majority in the City Council, the upper and lower limits on representation in the City Council of Mostar stipulated by Article 19.4 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute produce a result which is objectively and reasonably justifiable. However, this prompts two further questions: first, whether it was rational in 2003 to base the organization of Mostar on a 1991 census and ignore any changes in the population which might have occurred as a result of the war of 1992-1995 and the subsequent exercise by refugees and displaced persons of their right to return to their homes of origin; secondly, whether it remains rationally justifiable to maintain in 2010 special arrangements which engage Article II(4) of the Constitution of Bosnia and Herzegovina, more than 14 years after the end of the war.

67. In relation to the rationality of using census figures from 1991 as the basis for the organization of Mostar in 2003, the Constitutional Court has already noted that these were the most recent figures available. The Constitutional Court therefore considers that, in the circumstances existing in 2003, using 1991 population figures was less than ideal, but was a reasonable course

bearing in mind the difficulty of establishing more up-to-date figures and the importance of encouraging refugees and displaced persons to return to their former homes in Mostar to create a multiethnic community in a unified city.

68. The Constitutional Court must next consider whether it remains justifiable in 2010 to maintain electoral systems for City Councils which treat members of different peoples differently relative to each other according to the municipality in which the election is taking place. This is a far more difficult issue. A further seven years have passed; the population figures are now 19 years old, and there seems to have been no official attempt to establish a more accurate picture of the population pattern in Mostar today. There is a risk that the effectiveness of Article II(4) of the Constitution of Bosnia and Herzegovina will be undermined in relation to discrimination between constituent peoples *inter se* and between each constituent people and Others unless authorities throughout Bosnia and Herzegovina take steps to establish reliable statistics for the current structure of the population of Bosnia and Herzegovina and its Entities, the Brčko District, cantons, cities and municipalities.

69. The Constitutional Court recalls that the European Court of Human Rights in *Sejdić and Finci vs. Bosnia and Herzegovina*, mentioned above, paragraph 41, decided by a majority that too much time had passed since the end of the war for the special needs of Bosnia and Herzegovina to continue to justify, at the end of 2009, discriminatory provisions in the Constitution of Bosnia and Herzegovina concerning representation of Others in the House of Peoples of the Legislative Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina. While accepting 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', the European Court observed that 'there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is recalled that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor vs. Switzerland*, no. 13444/04, § 94, 30 April 2009).' (See paragraph 48 of the judgment in *Sejdić and Finci*, above.) Furthermore, the Court regarded it as important that, in 2002, Bosnia and Herzegovina had acceded to the European Convention without reservations and thus had committed itself to meeting the standards of the Convention (paragraph 49).

70. Constitutional Court reminds that in the judgment of the European Court of Human Rights in the case *Sejdić and Finci*, paragraph 44 reads as follows: "In this context, where a difference in

treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *D.H. and Others*, cited above, § 196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (ibid., § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct “factual inequalities” between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article (*Case “relating to certain aspects of the laws on the use of languages in education in Belgium”*, cited above, § 10; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *D.H. and Others*, cited above, § 175)“. In addition, the Constitutional Court also reminds that in paragraph 48 of the same judgment it is stated that: „In addition, while the Court agrees with the Government 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, the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is recalled that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor v. Switzerland*, no. 13444/04, § 94, 30 April 2009)“. This might seem to indicate that, as a matter of European human rights law, there is now no justification under Article II(4) of the Constitution of Bosnia and Herzegovina for maintaining the challenged provisions. However, for two reasons the Constitutional Court does not consider itself bound to adopt that approach in the present case. First, the judgment of the European Court, like all judgments concerning justification for potentially discriminatory treatment or rules, focused on the particular facts and issues before it. The case of *Sejdić and Finci* concerned arrangements which entirely excluded candidates other than members of the three constituent peoples from offering themselves for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina. By contrast, the provisions challenged in the instant case specifically protect the right of Others to be represented in the City Council of Mostar. Secondly, whilst the European Court is the final authority on the interpretation and application of the European Convention, the Constitutional Court is the final authority on the interpretation and application of the Constitution of Bosnia and Herzegovina, including Article II(4). Whilst the general principles applicable to questions of discrimination are the same under Article II(4) as under the European Convention (as

noted in paragraph 41, above), it is for the Constitutional Court to decide whether in each case there is an objective and reasonable justification for the purposes of Article II(4), and for that purpose the Constitutional Court must have regard to its own knowledge and understanding of the situation within Bosnia and Herzegovina. Being far closer to and more familiar with the social and political conditions of life in Bosnia and Herzegovina today than is the European Court, the Constitutional Court is better placed than the European Court to assess the justification for treatment or rules which, if not justifiable, would amount to unconstitutional discrimination. In this connection, the Constitutional Court notes that the Venice Commission (the European Commission for Democracy through Law) in its submission as *amicus curiae* in the present case, accepted that the special position of Mostar might provide an objective and rational justification for its unique electoral arrangements, whilst submitting that the Constitutional Court when assessing possible justifications should take account of any changes in the situation which have occurred over the last fifteen years. The Constitutional Court agrees that this is the appropriate way to approach the issue.

71. That being so, the Constitutional Court considers that the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the basis established in 2003. Applying a test of proportionality, the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe. The measures serve a legitimate aim in that they put in place a power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. They are rationally related to that legitimate aim. They may result in the City Council being constituted in a way that does not accurately reflect the expression of views of the electorate in elections, and that is a significant disadvantage in terms of the democratic legitimacy of the system. On the other hand, the practical impact of the differences between the ability of Croats in Mostar and of members of other constituent peoples and Others in Sarajevo, Banja Luka and other cities in Bosnia and Herzegovina seems to the Constitutional Court to be likely to be relatively small, at least in comparison with the importance of the legitimate aim for the measures and the risk to all inhabitants of Mostar if the attempt to establish an effective system of representative democracy in Mostar fails. At any rate, on the very sparse information currently available it is not possible to say that the impact is likely to be disproportionate to the importance of the aim.

72. The Constitutional Court therefore concludes that the challenged provisions of Article 19.4, paragraphs 1 and 9 of the Election Law and Article 16 of the Statute do not discriminate against the Croat People in the exercise of their rights under Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

Alleged violation of the right to elections on the basis of universal and equal suffrage under Article 25.b) of the International Covenant on Civil and Political Rights taken alone in relation to elections to the City Council of Mostar

73. The Constitutional Court must next consider the applicant's assertion that the challenged provisions violate Article 25 of the International Covenant on its own. The applicant argues, in this regard, that the challenged provisions violate the right to elections on the basis of universal and equal suffrage, because Article 19.4 of the Election Law and Article 17 of the Statute of the City of Mostar establish constituencies with significantly different numbers of voters, resulting in the value of individual votes being significantly different. This is said to violate the principle of equal suffrage under Article 25.b) of the International Covenant on Civil and Political Rights.

74. The first question is whether Article 25.b) of the International Covenant on Civil and Political Rights taken alone can be applied by the Constitutional Court when evaluating the constitutionality of a legal norm under Article VI(3)(a) of the Constitution. In that regard, the Constitutional Court indicates that the International Covenant on Civil and Political Rights makes an integral part of the Constitution of Bosnia and Herzegovina. Considering that, the Constitutional Court has competence to decide in this case whether the challenged provisions are in compliance with Article 25.b) of the International Covenant on Civil and Political Rights .

75. The Constitutional Court observes that the requirement of equal suffrage cannot require exact equality in the weight, or effect, of each elector's vote. That would be an unattainable ideal. The essence of the requirement is that each voter should have the same number of votes and that each vote should have roughly the same value, although exact equality of effect may be unachievable under some systems of voting even if the number of electors in each constituency was to be equal; for example, votes may in practice have different weights under some forms of proportional representation, and votes cast for the same party may have different effect in different constituencies in systems using simple majority (or 'first past the post) elections. Exact equality in the number of voters in each constituency is also unattainable in practice. Numerous difficulties

affect the drawing of constituency boundaries. Some of these are geographical; others are administrative. All that can be achieved is that there should not be excessive inequalities in the size of electorates and weight attributed to individual votes in different constituencies. This was recognized by the drafters of the International Covenant (see Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993), p. 448). It has also been accepted by the European Court of Human Rights when interpreting the words ‘equal suffrage’ in Article 3 of Protocol No. 1 to the European Convention (see *Matthieu-Mohin vs. Belgium* Series A, No. 113, judgment of 2 March 1987, paragraph 54). The European Court admits implied limitations to the right, and asks itself whether there has been arbitrariness or disproportionality and whether the limitation has interfered with the free expression of the electorate, making the assessment in the light of political conditions in the state in question (see generally *Ždanoka vs. Latvia* Application No. 58278/00, Reports 2006-IV [GC]; *Adamsons vs. Latvia* Application No. 3669/03, judgment of 24 June 2008 at paragraph 111; and *Yumak and Sadak vs. Turkey* Application No. 10226/03, judgment of 8 July 2008 [Grand Chamber] at paragraph 109).

76. It follows from the Central Election Commission’s Decision on Determination and Announcement of Voters recorded in the Central Voter Register in the Basic Electoral Constituencies for the 2008 Local Elections (*Official Gazette of BiH*, no. 74/08) that the number of voters in the constituency of Urban Area 1 (the former City Municipality of Mostar South-West) is 8866, the number of voters in the constituency of Urban Area 2 (the former City Municipality of Stari Grad) is 18 977, in the constituency of Urban Area 3 (the former City Municipality of Mostar South-East) is 6869, in the constituency of Urban Area 4 (the former City Municipality of Mostar South) is 6989, in the constituency of Urban Area 5 (the former City Municipality of Mostar South-West) is 29 522 and in the constituency of Urban Area 6 (the former City Municipality of Mostar West) is 17 406. The Constitutional Court observes that the numbers of voters in constituencies in urban areas of Mostar (according to the applicant, whose figures have not been challenged) vary from 29,522 in Mostar South-West to 6,869 voters in Mostar South-East. This is a significant variation: the higher figure is 400 per cent of the lower figure. Yet each constituency elects three members of the Council, so the value of a vote in Mostar South-East is four times the value of a vote in Mostar South-West. It appears from Article 7 of the Statute of the City of Mostar that the boundaries of the constituencies were simply borrowed from the boundaries of the previous municipalities within Mostar, which became city areas (Article 7.1) which, in turn, became electoral constituencies for elections to the City Councils. As Article 17.1 then assigns three representatives to each constituency, historical boundaries become a cause of significant inequality. The

Constitutional Court considers that this inequality requires justification if it is not to be unconstitutional.

77. The reasons for the arrangements adopted for Mostar have been noted in paragraphs 58 and 59, above. As stated in paragraph 65 above, the Constitutional Court considers that the need to deal with post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, continues to represent a legitimate aim which might justify departing from the normal, democratic principle that, so far as possible, each elector's vote should have similar weight. However, the Constitutional Court is not satisfied that the differences between the weights attaching to votes of electors in different constituencies are proportionate, in the sense of being objectively and rationally related, to the legitimate aim of developing a multiethnic, power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. The scale of the differences, noted in paragraph 76 above, results directly from two decisions: first, to base the constituency boundaries directly on the boundaries of the former city areas; secondly, to allocate the same number of councilors to each of those constituencies. It seems to the Constitutional Court that both those decisions flowed from a desire for administrative simplicity rather than being necessary, reasonable or proportionate steps to develop a power-sharing structure or a multiethnic community in Mostar. The Constitutional Court therefore holds that a variation on this scale cannot be justified as being necessary or proportionate to any legitimate aim. In addition, the Constitutional Court establishes that the provisions of Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute in the part that reads: *Each City area shall elect three (3) City Councillors* are inconsistent with Article 25 of the International Covenant on Civil and Political Rights. It would not be appropriate for the Constitutional Court to quash the relevant legislation with immediate effect, as this would leave the affected constituencies entirely disenfranchised until the legislature passes new legislation to redefine constituency boundaries. The Constitutional Court therefore allows a period of six months following the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* for the appropriate authorities to harmonize the relevant provisions with the Constitution of Bosnia and Herzegovina, in accordance with this decision.

78. The applicant also claimed that Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute are in violation of a fundamental principle of the Election Law according to which, in determining the electoral constituencies, one has to observe that the electoral constituencies have equal number of voters, as well a basic principle "one person, one vote", which

is inherent in all majority democracies. However, in view of its conclusion in relation to inconsistency with Article 25.b) of the International Covenant on Civil and Political Rights, the Constitutional Court does not consider it necessary to decide whether there is such a fundamental principle in the Election Law or whether, if there were to be such a principle, a provision inconsistent with it could be said to give rise to violate the Constitution of Bosnia and Herzegovina.

Alleged violation of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights in respect of citizens in the former Central Zone of Mostar

79. Next, the applicant considers that by the provisions of Article 19.2 paragraphs 1 and 3, Article 19.4 paragraphs 2 to 8 of the Election Law and the provisions of Articles 15 and 17 paragraph 1 in conjunction with Articles 5 and 7 of the Statute the citizens of the former Central Zone are discriminated against in the enjoyment of their right under Article 25.b) of the International Covenant on Civil and Political Rights as they do not have the same rights as citizens of city areas when electing the councillors to the City Council. Also, the applicant considers that the citizens of the former Central Zone are discriminated against by the provisions of Article 38 of the Statute, as are the councillors to be elected to the city electoral constituency, because they have no possibility to be elected to the Committees for City Areas.

80. The Constitutional Court notes that the provisions of Article 19.2 of the Election Law and provisions of Article 15 in conjunction with Articles 5 and 7 of the Statute provide that the councillors in the City Council shall be elected in a city-wide electoral constituency and city area electoral constituencies that match the former city municipalities. In view of the aforesaid, the Constitutional Court recalls that six municipal areas or “city municipalities” were established through the adoption of the Interim Statute: Mostar South, Mostar South-West, Mostar West and Mostar South-East, Mostar North and Stari Grad (Old Town). Further, the Constitutional Court reminds that according to the Interim Statute, the Central Zone in the middle of the traditional commercial and tourist centre of the city was to be administered directly by a City-wide administration. Accordingly, it follows that the Central Zone did not constitute a “city municipality” according to the Interim Statute nor does it constitute a “city area” according to the new Statute.

81. As a result of this, the residents of the Central Zone of Mostar are entitled to vote only for the 17 councillors who represent the city-wide constituency. Unlike residents of the six City Municipalities, they do not have the opportunity to vote also for three councillors to represent their

area of the city on the City Council. In consequence of the manner in which committees of the Council are constituted, the Central Zone is the only area of the city which is not represented on committees.

82. The Constitutional Court considers that this arrangement fails to secure ‘equal suffrage’ for the voters of Mostar, and is incompatible with Article 25.b) of the International Covenant. Most voters in Mostar can vote for two classes of councilors. Voters in the Central Zone can vote for only one class. This evident inequality cannot be justified, bearing in mind that, as the Constitutional Court has noted earlier, the reason for adopting the arrangement was mainly administrative convenience rather than as a rational way of pursuing the legitimate aim of adapting the electoral system to take account of historical difficulties afflicting the Constituent Peoples in Mostar. It follows that the arrangements also violate the guarantee of protection against discrimination under Article II.4 of the Constitution of Bosnia and Herzegovina. This violation adversely affects a significant number of people: the International Contact Group Europe Report No. 150, Annex A, indicated that in 2002 there were 1008 residents in the Central Zone, whilst the representative of the Central Election Commission, in his presentation at the public hearing in the present case, suggested that today the number is in the region of 2000.

83. The Constitutional Court therefore established a violation of Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25 of the International Covenant, to order the Parliamentary Assembly of Bosnia and Herzegovina within six months of the publication of this decision in the *Official Gazette of Bosnia and Herzegovina* to amend relevant provisions of the Election Law of Bosnia and Herzegovina to remove the discrimination.

84. When that has been done, it may be necessary (depending on the content of the amendments to the Election Law which the Parliamentary Assembly will have adopted) for the City Council of Mostar to amend some or all of Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17 paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar to bring the Statute into line with the Law on Elections as amended. At present, they produce a result which is incompatible with the Constitution of Bosnia and Herzegovina for the same reasons as those given above in relation to the Election Law, Article 19.2 paragraphs 1 and 3.

85. However, at present it is impossible to foresee whether any such amendments to the Statute of the City of Mostar will be needed or, if needed, what form they should take. The Constitutional Court therefore adjourns this aspect of the request *sine die*, but orders the Council of the City of

Mostar to inform the Constitutional Court, within three months of the publication in the *Official Gazette of Bosnia and Herzegovina* of the Parliamentary Assembly's amendments to the Law on Elections of Bosnia and Herzegovina, of the steps it has taken to make the Statute of the City of Mostar consistent with the Constitution of Bosnia and Herzegovina. The Constitutional Court will then decide whether it is necessary to restore this case for further consideration. Therefore, the Constitutional Court has at present partially resolved the applicant's request in this part.

Alleged discrimination against citizens in the City of Mostar in respect of the election of a mayor

86. Next, the applicant submits that the citizens of the City of Mostar have been discriminated against in relation to the method of electing their mayor. The applicant draws attention to the provisions of Article 19.7 of the Election Law, Article VI.C paragraph 7 of Amendment CI to the Constitution of FBiH, and Articles 44 and 45 of the Statute of the City of Mostar, which together provide that the mayor is to be elected from among the councillors by a vote of two-thirds of the councillors. The applicant compares this with the position of citizens of the City of Banja Luka, who elect and dismiss their mayor directly. In connection with this matter, the Constitutional Court keeps in mind the provisions of Article 13.7 paragraph 1 of the Election Law which provide that the Municipal Mayor or City Mayor shall be elected in accordance with this Law, the Constitutions, the Entity laws, and Municipal or City statutes. Paragraph 2 of the mentioned article provide that if the Municipal/City Mayor is to be elected directly he/she will be elected by the voters registered in the Central Voter Register of the particular Polling Station in accordance with the Entity laws, Municipal or City Statutes. That is to say that the relevant provisions of the Election Law have defined two ways in which the mayor may be elected – *indirectly* by the citizens and *directly* through the representatives within the city councils – and the choice between these methods is to be finally determined by the Entity Constitutions, Entity Laws and the Statutes of Cities. In view of the aforesaid, the Constitutional Court notes that by the provisions of Article VI.A paragraph 4 of Amendment XVI to the FBiH Constitution it is stipulated that the City Council shall elect the Mayor. On the other hand, Article 100 of the Constitution of the Republika Srpska provides that the territorial organisation shall be regulated by the Law. Provisions of the Article 42 paragraph 1 and Article 60 of the Law on Local Self-government (*Official Gazette of RS*, nos. 101/04, 42/05 and 118/05) provide that the head of municipality/mayor shall be elected by citizens in direct general elections.

87. The method of electing a city mayor falls within the scope of Article 25.b) of the International Covenant. However, that Article does not require or rule out any specific method of selecting a mayor. It is not uncommon for different methods to be in use in the same state depending on the circumstances prevailing in particular cities. For example, in England and Wales the law permits either direct election by voters of the city or indirect election by elected councillors; some mayors are directly elected, although most are indirectly elected. In the view of the Constitutional Court, the issue in each case under Article 25.b) is whether the choice of method is arbitrary, bearing in mind that Article 25.a) recognizes that people may take part in public affairs either directly or indirectly through freely elected representatives. As, in the case of the City of Mostar, the Constitutional Court is satisfied that councillors are freely elected, the principles of democracy which underpin Article 25 as a whole permit the selection of a mayor by the councillors rather than directly by the electors.

88. The difference between methods of electing mayors in Mostar as compared with Banja Luka does, however, give rise differential enjoyment of the right to take part in elections which may engage Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant. The questions to be answered are: (a) whether the task of electing a mayor is analogous in different cities; and (b) if it is, whether the different treatment is objectively and reasonably justified.

89. The Constitutional Court considers that the task of electing a mayor for different cities is analogous, since the role of mayor is broadly similar in each city. Turning therefore to the question as to whether it is justifiable to use different methods, the Constitutional Court notes the Constitution of the Federation of Bosnia and Herzegovina, to which Mostar is subject, regulates the matter differently from the Constitution of the Republika Srpska, which governs the matter in Banja Luka. Those differences are not incompatible with the relevant provisions of the Election Law of Bosnia and Herzegovina. Bearing in mind that the Constitution of Bosnia and Herzegovina provides for a significant degree of self-government in each of the Entities, the Constitutional Court considers that a simple difference of this sort is not unjustifiable for the purpose of Article II(4) of the Constitution of Bosnia and Herzegovina unless the choice of one or other method of electing a mayor can be regarded as unreasonable or can be shown to be part of a plan to deprive the people of a particular Entity or city of the essence of their right to participate in public affairs through a democratic political process. Considering the lack of any such evidence, the limited role of mayors in policy-making for the City Council, and the fact that, internationally, both direct and elect

methods of electing mayors are regularly found, there is nothing in the instant case which would indicate that the choice of indirect election for the mayor of the City of Mostar amounts to unjustified discrimination when compared with the citizens of the City of Banja Luka. It follows that the citizens of the City of Mostar do not suffer discrimination in the enjoyment of their right under Article 25.b) of the International Covenant contrary to Article II(4) of the Constitution of Bosnia and Herzegovina.

90. Having regard to the aforesaid, the Constitutional Court concludes that the provisions of Articles 19.4, paragraphs 1 and 9 and 19.7 of the Election Law, the provisions of Article VI.C paragraph 7 of Amendment CI to the FBiH Constitution and provisions of Articles 7, 15, 16, 17, paragraph 1 insofar as the remaining part is concerned, paragraphs 2 and 3 and Articles 38 paragraphs 2, 3 and 4, 44 and 45 of the Statute of the City of Mostar are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25.b) of the International Covenant on Civil and Political Rights.

Other allegations in the applicant's request

91. The Constitutional Court finds it unnecessary to examine the challenged provisions of Articles 19.1, 19.2, paragraph 2, 19.5 and 19.6 of the Election Law and provisions of Article VI.C paragraph 4 of Amendment CI to the FBiH Constitution, as those allegations in the applicant's request lack specificity and reasoned arguments, and the request does not state which constitutional provisions or rights under the international instrument are alleged to be violated in this context.

VIII. Conclusion

92. The Constitutional Court concludes that the provisions of Article 19.5 paragraphs 1 and 9 of the Election Law and Article 16 of the Statute, which stipulate a lower limit and an upper limit on the number of representatives from each constituent people within the City Council, do not discriminate against the Croat People in the enjoyment of their rights under Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

93. On the other hand, the Constitutional Court grants the applicant's requests in respect of (a) the allegation that Article 19.2 paragraphs 1 and 3, and Article 19.4 paragraph 1, as a result of which there are widely varying numbers of electors in constituencies based on former city areas in Mostar, violate Article 25.b) of the International Covenant on Civil and Political Rights, and (b) the

allegation that Article 19.2, paragraph 1 and Article 19.4, paragraphs 2 to 8 making it impossible for voters in the Central Zone of Mostar to vote for councillors to represent that Zone, in addition to councillors to represent the city-wide constituency, violate Article II(4) of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights.

94. The Constitutional Court decides that Article 7 paragraphs 1 and 3, Article 15 paragraph 2, Article 17 paragraph 1, and Article 38 paragraph 1 of the Statute of the City of Mostar, which make it impossible for voters in the Central Zone of Mostar to vote for councillors to represent that Zone, in addition to councillors to represent the city-wide constituency, violate Article II.4 of the Constitution of Bosnia and Herzegovina taken together with Article 25.b) of the International Covenant on Civil and Political Rights. The Constitutional Court adjourns further proceedings on this part of the request *sine die* pending the amendment of the Law on Elections of Bosnia and Herzegovina in accordance with this decision. The Constitutional Court orders the Council of the City of Mostar, within three months following the publication of an amended version of the Law on Elections, to inform the Constitutional Court of the steps the Council will have taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina.

95. Finally, the Constitutional Court considers that the provisions of Article 19.7 of the Election Law, Article VI.C paragraph 7 of the Amendment to the FBiH Constitution and Articles 44 and 45 of the Statute, according to which the citizens of the City of Mostar elect their mayor in a manner which is different from the one in which the citizens of the City of Banja Luka elect their mayor, are consistent with the rights of the citizens of the City of Mostar safeguarded under Article 25.b) of the International Covenant on Civil and Political Rights, and do not discriminate against the citizens of the City of Mostar in the enjoyment of that right contrary to Article II(4) of the Constitution of Bosnia and Herzegovina.

96. The Constitutional Court found it unnecessary to decide whether Article 19.4 paragraph 2 of the Election Law and Article 17 paragraph 1 of the Statute are in violation of a fundamental principle of the Election Law, or to examine the challenged provisions of Articles 19.1, 19.2, paragraph 2, 19.3, 19.5 and 19.6 of the Election Law and provisions of Article VI.C paragraph 4 of Amendment CI to the F BiH Constitution by reference to the unsupported allegations of the applicant referring to the International Convention on Elimination of All Forms of Racial Discrimination.

97. Having regard to Article 17(1)(1), Article 61(1),(2) and (3) and Article 63(1) and (4) of the Constitutional Court's Rules, the Constitutional Court decided as set out in the enacting clause.

98. Within meaning of Article 41 of the Rules of the Constitutional Court, Separate Partially Dissenting Opinions of the Vice-President Valerija Galić and Judges Mato Tadić and Mirsad Ćeman shall make an annex to this Decision.

99. According to Article VI(5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Prof Dr Miodrag Simović
President
Constitutional Court of Bosnia and Herzegovina

SEPARATE PARTIALLY DISSENTING OPINION OF THE VICE-PRESIDENT GALIC

Pursuant to Article 41 of the Rules of the Constitutional Court of BiH (“Official Gazette of BiH”, Nos. 60/05, 64/08 and 51/09), I hereby give my separate opinion partially dissenting from the decision of the majority of judges in the relevant case and the reasons are the following:

I ADMISSIBILITY

As to the challenged provisions of the Election Law of BiH, the Constitution of F BiH and the Statute of the City of Mostar, I agreed with the opinion of the majority of judges that in this part the request is admissible.

As to the admissibility relating to paragraph 1 of the introductory part and paragraph 2 of the Decision of the High Representative for BiH promulgating the Statute of the City of Mostar, while having great reservations, I agreed that in the mentioned part the request is not admissible due to the lack of jurisdiction of the Constitutional Court to decide this matter and it was solely for the reason that the Constitutional Court had taken a different view in several earlier decisions of the Constitutional Court of BiH, wherein it is stated that the powers of the High Representative for BiH and the exercise of those powers are not subject to the control by the Constitutional Court.

II MERITS

My substantial disagreement with the opinion of the majority of judges is related to a part of the Decision whereby it is established that the provisions of 19.4, paragraphs 1 and of the Election of Bosnia and Herzegovina and Article 16 of the Statute of the City of Mostar, **in a part where it is prescribed that “none of the constituent peoples on the City Council of Mostar may have more than fifteen (15) councillors”**, are consistent with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights.

The reasons why I disagree with the opinion of the majority of judges are as follows:

1. Taking the approach of the Constitutional Court as a starting point (paragraphs 55 and 56 of the Decision) which relates to the review of the challenged provisions from the aspect of their inconsistency with Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights and invoking the approach which the European Court of Human Rights applied to the issues of discrimination in connection with co-participation in the political life of Bosnia and Herzegovina in relation to Article 14 of the European Convention and Article 1 of Protocol No. 12 to the European Convention (see, *Sejdić and Finci vs. Bosnia and Herzegovina*, Applications No. 27996/06 and No. 34836/06, the judgment of 22 December 2009 (Grand Chamber), with reference to the criteria established through the practice of the Strasbourg authorities and General Comments of the UN Human Rights Committee as regards the right to vote which is guaranteed under Article 25. b) of the International Covenant on Civil and Political Rights, I excepted that the Constitutional Court would consistently follow that approach while reviewing the constitutionality of the challenged provisions.

However, as regards the reasoning for the Decision (paragraphs from 57 through 62) I am of the opinion that the Constitutional Court has insufficiently presented the test of comparison and insufficiently determined the relevant criteria for comparison which are inherent in the test of equality in order to answer the question whether the allegations of the applicant are well-founded that there is a differential treatment in the instant case.

2. The Constitutional Court focused its review on the issue of possible proportion of the representation in the City Council of Mostar, i.e. on the representation of councillors from the Croat people in relation to a possible proportion of representation of other constituent peoples (Bosniac and Serb peoples) in other units of local government and self-government wherein those peoples constitute majority, in which case the criterion for comparison was a possible proportion of representation of the Bosniac representatives in the City Council of the City of Sarajevo and the Serb representatives in the Assembly of the City of Banja Luka. The Constitutional Court establishes (paragraph 63 of the reasoning of the Decision) that the greatest possible proportion of Croat representatives in the City of Mostar Council is significantly lower than that of Bosniac representatives in the City Council of Sarajevo, and far less than the maximum possible proportion of Serb representatives in the City Assembly of Banja Luka. The Constitutional Court considers that there is a possibility for this differential treatment to be in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25. b) of the International Covenant on Civil and Political Rights. I do agree with the conclusion of the majority of judges and, in my opinion, there is no dispute as to the existence of obvious inequality in treatment of the representation of the Croat councillors when compared with the Bosniac and Serb representatives and not only in the City Council of the City of Sarajevo and Assembly of the City of Banja Luka but also in other units of local government and self-government in Bosnia and Herzegovina since there is a number of other comparative indicators that confirm the aforesaid.

The issue of differential treatment as regards the representation of Croat representatives in the units of local government and self-government may be a fundamental aspect of this case. However, I consider that the Constitutional Court failed to examine another important aspect of this case, which was only marginally mentioned in paragraph 57 of the reasons for the Decision. That issue is related to differential treatment of all three constituent peoples, which means not only the Croat people, when it comes to the representation in the City of Mostar Council (given the provision on upper limit of representation in the City of Mostar Council) in comparison with the representation of all three constituent peoples in the councils or assemblies of other units of local government and self-government in Bosnia and Herzegovina. I am of the opinion that free will of voters becomes limited by determining the upper limit, in other words a deviation is made in respect of the principle of equal weight of each vote being guaranteed under Article 25(b) of the International Covenant on Civil and Political Rights, which, in my opinion, cannot be regarded as reasonable and based on the objective criteria and that the Constitutional Court should have dealt with this aspect as well.

3. I particularly disagree with the opinion of the majority of judges presented in the reasons for the Decision (paragraphs 64 through 72) which is reflecting the position that the existing differential treatment is not discriminatory for the City of Mostar in the sense that there is the objective and rational justification for the existence of such treatment and that by this treatment a legitimate aim is achieved and that there is a justified proportionality between the means employed and the aim sought to be achieved.

Basically, this conclusion of the majority of judges is based on the Report of the Commission for Reforming the City of Mostar of 15 December 2003. The majority of judges consider that the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the

basis established in 2003 and that the difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe.

I am particularly disappointed with a part of the reasons (paragraph 70 of the Decision) where the issue is raised as to the applicability of the positions of the European Court of Human Rights to the decisions of the Constitutional Court of Bosnia and Herzegovina. This is true all the more so if one takes into account that the predominant part of the case-law of the Constitutional Court is based on the principles and standards established through the case-law of the European Court of Human Rights.

Regretfully, the Constitutional Court does not consider as relevant the position of the European Court of Human Rights in the case of *Sejdić and Finci* in respect of which the Court observes significant positive developments in Bosnia and Herzegovina since the signing of the Dayton Peace Agreement and this opinion is based on the reports of the relevant European and other international representatives and organizations for Bosnia and Herzegovina, and the position of the Constitutional Court is based on the assessment of the Commission for Reforming the City of Mostar presented in the Report of December 2003. I am of the opinion that this report is not sufficient basis for adopting a conclusion that fifteen years after the signing of the Dayton Peace Agreement and seven years after the imposing of the Statute of the City of Mostar the situation in Mostar is still of such nature that there is a justified reason for the organization of the City of Mostar to remain in the form as established by the imposed acts from 2003. In my opinion such conclusion failed to reflect the reality and developmental processes that have taken place in the City of Mostar since the time the challenged acts were imposed. In order to draw a proper conclusion, the Constitutional Court should have conducted a thorough analyses and intensive examination in the light of the current circumstance, but regretfully the Constitutional Court failed to do so.

The historical context and post-war developments in the City of Mostar might have been the justification for certain limitation of the electoral rights in the City of Mostar Council at the time of the imposition of the challenged acts and there still might be a justified reason for setting a minimum of guarantees for the representation in the City of Mostar Council for all three constituent peoples and Others regardless of the election results. However, with due respect for the opinion of the majority of judges, I do not see any argument in the given reasons which would convince me that the provisions on the upper limit of representation of the constituent peoples in the City of Mostar Council are still justified. I consider that those provisions significantly derogate from the democratic principles guaranteed under the relevant international documents which are applied in Bosnia and Herzegovina on the basis of the Constitution of Bosnia and Herzegovina and that the mentioned provisions are in contravention of Article II(4) of the Constitution of Bosnia and Herzegovina in conjunction with Article 25(b) of the International Covenant on Civil and Political Rights.

4. Furthermore, I am of the opinion that this kind of decision of the Constitutional Court is inconsistent with the decision of the majority of judges in part in which the Court established that there are the violations of other challenged provisions of the Election Law of BiH and the Statute of the City of Mostar. Although I agreed with the decision of the majority of judges, I consider that the decision of the Constitutional Court will be hardly enforceable in part in which the Court established that there are violations of other challenged provisions and, in reality, this decision will have no practical significance because of the fact that the provisions of the Election Law of BiH and the provisions of the Statute of the City of Mostar providing for the upper limit of representation of the constituent peoples in the City of Mostar Council remained in force.

SEPARATE PARTIALLY DISSENTING OPINION OF JUDGE TADIC

1. With regards to the Decision on Admissibility and Merits in case no. U 9/09, I agree with the majority opinion.
2. My disagreement relates to the part of the decision dismissing the request to declare as unconstitutional the provisions of Article 19.4 paragraph 9 of the Election Law and Article 16 paragraph 2 of the Statute of the City of Mostar, in conjunction with Article 25 of the International Covenant on Civil and Political Rights. The challenged provisions provide for the maximum quota so that each constituent people shall not have more than 15 representatives in the City Council.
3. I consider that the majority opinion on this part of our decision does not meet the standards required by the Constitution of BiH with regards to the prohibition of all forms of discrimination, it is not compatible with Article 25 of the International Covenant on Civil and Political Rights and it is unconvincing and partially contradictory to other views taken in this Decision and some other decisions of the Constitutional Court.
4. The Constitutional Court admits that such solutions (obligatory minimum and maximum quota) are not provided for by the Election Law insofar as other towns and municipalities of BiH are concerned, nor are they provided for by the Statute of the Town of Mostar. The Constitutional Court gives the main justification for this in paragraphs 64, 65 and 66 of its Decision, where it points to the post-war developments and pacification in Mostar in the period from 1994 to 2003. I could accept that the major part of these views were justified at the relevant time, but I cannot accept at all that the Constitutional Court expresses the same arguments in 2010 and refers to the Commission's Report relating to the guidelines with regards to the City of Mostar (dated 15 December 2003), which was established by a decision of the High Representative, in order to justify its view in 2010. In my opinion, the Constitutional Court did not give any relevant reasoning in support of this view.
5. In developing the highest standards of the rule of law in its practice and application of democratic principles and elimination all forms of discrimination, as a rule the Constitutional Court refers to the decisions of the European Court of Human Rights, but it does not do it in this specific case but it is having a debate with the European Court of Human Rights by sending a clear message that it does not agree with the decision of the European Court of Human Rights in the *Sejdić and Finci vs. Bosnia and Herzegovina* case (see paragraph 70 of our Decisions).
6. By providing justification for keeping these solutions, the Constitutional Court, in paragraph 71 of our Decision, notes as follows: "the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable." I am not aware of the basis for the majority to draw the conclusion that even today, seven years after the Commission's report, "difficulties (...) have been

and remain particularly intractable”, since we did not present any evidence, nor did the participants to the proceedings submit any relevant and reasoned facts in support of such allegations. This is the reason why I consider as arbitrary that conclusion of the Constitutional Court.

7. Taking into account the aforesaid, in my opinion, there has been a violation of Article II(4) of the Constitution of BiH, in conjunction with Article 25 of the International Covenant on Civil and Political Rights with regards to the upper limit and *today* such provisions in the Election Law and Statute have no justification, nor do they pursue the legitimate aim, which is the reason why I did not support this part of the Decision.

SEPARATE PARTIALLY DISSENTING OPINION OF JUDGE CEMAN

Pursuant to Article 41, paragraph 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (*Official Gazette of Bosnia and Herzegovina*, Nos. 60/05, 64/08 and 51/09), I hereby give my separate opinion partially dissenting from the Decision on Merits of 26 November 2010 in Case No. 2010.

First of all, I would like to emphasize that **I agree with** the decision and reasons expressed in paragraphs 8, 9 and 10 of the operative part of the Decision (be mindful of the order of these paragraphs as they are not marked with numbers).

As to the dismissing part of the decision in paragraphs 8 and 9 of the operative part, the Constitutional Court has given, *inter alia*, the following reasons in paragraph 71 of the reasoning: “(...) the post-war social and political conditions affecting Bosnia and Herzegovina, and the City of Mostar in particular, remain such that it remains reasonable to approach the political organization of the City of Mostar on the basis established in 2003. Applying a test of proportionality, the Constitutional Court concludes that the challenged measures give rise to differences of treatment of constituent peoples between cities, but that difficulties faced in Mostar, as identified by the Commission in its report of December 2003, have been and remain particularly intractable and severe. The measures serve a legitimate aim in that they put in place a power-sharing structure which it is reasonable to hope will gradually improve the quality of the political process in the city. They are rationally related to that legitimate aim. They may result in the City Council being constituted in a way that does not accurately reflect the expression of views of the electorate in elections, and that is a significant disadvantage in terms of the democratic legitimacy of the system. On the other hand, the practical impact of the differences between the ability of Croats in Mostar and of members of other constituent peoples and Others in Sarajevo, Banja Luka and other cities in Bosnia and Herzegovina seems to the Constitutional Court to be likely to be relatively small, at least in comparison with the importance of the legitimate aim for the measures and the risk to all inhabitants of Mostar if the attempt to establish an effective system of representative democracy in Mostar fails. At any rate, on the very sparse information currently available it is not possible to say that the impact is likely to be disproportionate to the importance of the aim.”

Unlike the majority opinion, **I consider for the same aforementioned reasons that “the political organization of the City of Mostar”** should not be changed yet. There has been a basis for the Constitutional Court to establish that the challenged provisions of the Election Law of BiH and the Statute of the City of Mostar, referred to in paragraphs 1 through 5 of the operative part of the Decision (be mindful of the order of these paragraphs as they are not marked with numbers), are not incompatible, i.e. are compatible with the relevant provisions of the Constitution of BiH in conjunction with relevant provisions of the International Covenant on Civil and Political Rights. **In particular**, although it would be reasonable and obligatory to rectify the applicable legislation, including those at the local level (perhaps even in the manner alleged by the applicant of the request for review of constitutionality), after the change for the good and after objective indicators have

confirmed it, I do not see any realistic changes which would impose any modification of the challenged provisions of Law and Statute in question for their alleged incompatibility with the Constitution and International Covenant on Civil and Political Rights. In giving a reason why it does not consider that it is obliged to take the identical view in this case as that which the European Court took in the *Sejdić and Finci* case, the Constitutional Court, in paragraph 70 of the Decision, has concluded as follows: „ (...) the Constitutional Court must have regard to its own knowledge and understanding of the situation within Bosnia and Herzegovina. Being far closer to and more familiar with the social and political conditions of life in Bosnia and Herzegovina today than is the European Court, the Constitutional Court is better placed than the European Court to assess the justification for treatment or rules which, if not justifiable, would amount to unconstitutional discrimination.”

In my opinion, such approach is a creative approach expressed by the majority of the Constitutional Court, which I support as well, in identifying particular conditions and circumstances in the City of Mostar (at an earlier point and at the time of making the decision) and interpreting the constitutional text and international documents in the field of human rights forming its integral part. In my opinion, such approach simultaneously corresponds to the practice of the European Court of Human Rights and “the social and political conditions of life in Bosnia and Herzegovina” which should be taken into account in making a decision in this case.

Although “social and political conditions of life in Bosnia and Herzegovina” and in the City of Mostar are not primary as such or are not at all a “legal category”, they objectively (given the methodology of understanding and interpreting the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms) represent the basis for understanding the real capacity and scope of the provisions of the Constitution of BiH and international agreement to which the applicant has referred.

Thus, even if the Court had decided to dismiss the parts of the request in paragraphs 1-5, I do not believe that one could say that in this moment the effect would be disproportional to the importance of the aim incorporated in the package of regulations at the State, Entity and local level regulating the organization of the City of Mostar.