



Broj: 05-50-1-2837/16
Sarajevo, 8.11.2016. godine

BOSNA I HERCEGOVINA
PARLAMENTARNA SKUPŠTINA BOSNE I HERCEGOVINE
SARAJEVO
01.11.2016

PRIMLJENO:		Redni broj	Broj priloga
Organizaciona jedinica	Klasifikaciona oznaka		
10-50-1-15	-36		16

PARLAMENTARNA SKUPŠTINA BiH

- Zastupnički dom -

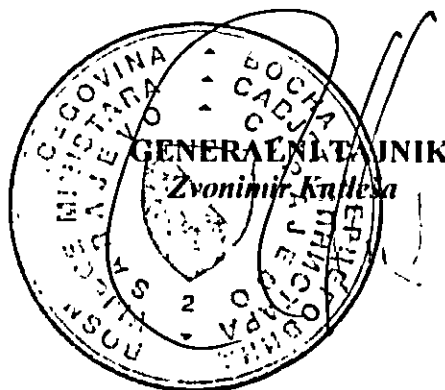
SARAJEVO

PREDMET: Odgovor na zastupničko pitanje – ponovno se dostavlja

Na vaše usmeno traženje ponovno dostavljamo Odgovor na zastupničko pitanje koje je postavio Damir Arnaut, zastupnik u Zastupničkom domu Parlamentarne skupštine Bosne i Hercegovine.

Posjećamo da je Vijeće ministara Bosne i Hercegovine, na 79. sjednici održanoj 3.11.2016. godine, utvrdilo je navedeni Odgovor, te vam isti proslijeđujemo, radi njegovog dostavljanja zastupniku.

S poštovanjem,





Bosnia and Herzegovina
COUNCIL OF MINISTERS

Broj 05-50-1-2837/16
Sarajevo, 3.11.2016. godine

Gosp. Damir Arnaut, poslanik u Predstavničkom domu Parlamentarne skupštine Bosne i Hercegovine, na osnovu člana 170. Poslovnika Predstavničkog doma Parlamentarne skupštine BiH, postavio je slijedeće poslaničko pitanje:

Molim da me obavijestite o argumentaciji koja je Bosna i Hercegovina, konkretno Ured Agenta Vijeća ministara BiH pred Evropskim sudom za ljudska prava, predložila pred tim sudom u predmetima Sejdić i Finci protiv Bosne i Hercegovine i Azra Zornić protiv Bosne i Hercegovine, odnosno da mi dostavite sve podneske koje je navedeni Ured predložio Evropskom sudu tokom postupka u tim predmetima

Na postavljeno pitanje, Vijeće ministara Bosne i Hercegovine je na 79. sjednici održanoj 3.11. 2016. godine, utvrdio slijedeći

ODGOVOR

I. Predmet *Sejdić i Finci protiv BiH*

Argumentacija koju je tužena strana iznijela pred Sudom u ovom predmetu je sumirana u točki 34. i 35. Presude u slučaju *Sejdić i Finci protiv BiH* od 22.12.2009 kako slijedi: „

1. Podnesci Vlade

34. Vlada se pozvala na slučaj *Ždanoka protiv Latvije* ([GC], br. 58278/00, ECHR 2006-IV), u kojem je Sud ponovo potvrdio da zemlje ugovornice uživaju znatnu širinu u uspostavljanju pravila unutar svog ustavnog poretka koja regulišu parlamentarne izbore i sastav parlamenta, a da se relevantni kriteriji mogu mijenjati u skladu sa istorijskim i političkim faktorima koji su svojstveni svakoj državi. Sadašnja ustavna struktura u Bosni i Hercegovini ustanovljena je mirovnim sporazumom koji je uslijedio nakon najrazornijih sukoba u novijoj istoriji Evrope. Krajnji cilj ovog sporazuma bio je uspostava mira i dijaloga između tri glavne etničke skupine – „konstitutivne narode“. Vlada je tvrdila da sporne ustavne odredbe, koje

onemogućuju licima koja se nisu deklarirala kao pripadnici nekog od „konstitutivnih naroda“ da se kandiduju na izborima za Dom naroda i Predsjedništvo treba procjenjivati naspram pomenute istorijske pozadine. Vlada je smatrala da još uvijek nije vrijeme za politički sistem koji bi bio samo odraz vladavine većine, imajući posebno u vidu istaknuti značaj mono-etničkih političkih partija i trajnu međunarodnu upravu u Bosni i Hercegovini.

35. Vlada je pozvala Sud da napravi razliku između predmetnog slučaja i slučaja *Aziz* (gore citiran): dok su turski Kiprani koji žive u oblasti Kipra pod kontrolom Vlade, spriječeni da glasaju na svim parlamentarnim izborima, državljani Bosne i Hercegovine koji pripadaju grupi „ostalih“ (kao aplikanti u predmetnom slučaju) imaju pravo kandidovanja na izborima za Predstavnički dom Bosne i Hercegovine i entitetska zakonodavna tijela. Vlada je zaključila da je razlika u tretmanu opravdana u određenim okolnostima.“

Što se tiče zahtjeva za dostavljanjem podnesaka koje je tužena strana dostavila Sudu u ovom predmetu, podsjećamo da je Ured zastupnika već ranije, u tijeku postupka pred Sudom, dostavio g. Arnautu sve podneske koji su u ovom predmetu upućeni Sudu. Naime, svi podnesci upućeni Sudu u ovom predmetu su g. Arnautu dostavljeni uz dopis¹ Ureda zastupnika od 11.05.2009. godine kojim je g. Arnaut bio pozvan da sudjeluje na javnoj raspravi u ovom predmetu u timu Bosne i Hercegovine. Gospodin Arnaut je svojim dopisom² od 16.05.2009. godine odgovorio da nije u mogućnosti prihvatiti poziv za učešće u javnoj raspravi te istakao da je njegovo ekspertno mišljenje da u gornjem predmetu ne postoje validni pravni argumenti iz oblasti ustavnog prava i međunarodnog javnog prava na strani tužene, te da su zahtjevi aplikanata u potpunosti pravno utemeljeni i opravdani.

Kako su podnesci tužene strane, a koji se traže postavljenim poslaničkim pitanjem, već ranije dostavljeni g. Arnautu, smatramo da nema potrebe da ih se ponovno dostavlja.

II. Predmet *Azra Zornić protiv BiH*

Argumentacija koju je tužena strana iznijela pred Sudom u ovom predmetu je sumirana u točkama 14. 24. i 25. Presude u slučaju *Zornić protiv BiH* od 15.07.2014. godine, kako slijedi :

1. „ Vlada je iznijela nekoliko prigovora u pogledu dopuštenosti pritužbi. Prije svega, Vlada je navela da Bosna i Hercegovina ne može biti odgovorna za sporne ustavne odredbe jer je Ustav Bosne i Hercegovine dio međunarodnog ugovora, Daytonskog sporazuma.

Nadalje, aplikantica nije aktivno uključena u politički život tužene države. Ona je sudjelovala na izborima samo jednom, i to 2002. godine, kada se bezuspješno kandidirala za Parlamentarnu skupštinu Federacije Bosne i Hercegovine. Prema tome, aplikantica ne može tvrditi da je „žrtva“

¹ Dopis Ureda zastupnika od 11.05.2009. u prilogu

² Dopis g. Arnauta od 16.05.2009. u prilogu

povreda koje navodi. Na kraju, Vlada je istakla da aplikantica nije iskoristila raspoložive domaće pravne lijekove za svoje pritužbe, a posebno, apelaciju Ustavnom sudu.

2. Vlada je navela da je postojeća ustavna struktura u Bosni i Hercegovini uspostavljena mirovnim sporazumom koji je uslijedio nakon jednog od najrazornijih sukoba u novijoj evropskoj historiji. Njegov krajnji cilj bila je uspostava mira i dijaloga između tri glavne etničke skupine – „konstitutivnih naroda“. Vlada je smatrala da sporne ustavne odredbe kojima su osobe koje se ne izjašnjavaju kao pripadnici jednog od „konstitutivnih naroda“ isključene iz mogućnosti kandidiranja za Dom naroda i Predsjedništvo, treba ocjenjivati imajući u vidu takav pozadinski kontekst. Vlada je ustvrdila da još nije sazrelo vrijeme za politički sistem koji bi jednostavno odražavao vladavinu većine, posebno imajući u vidu značaj mono-etničkih političkih partija i kontinuiteta međunarodne administracije u Bosni i Hercegovini.

3. Nadalje, Vlada tvrdi da aplikantica u predmetnom slučaju nije pripadnica bilo koje „manjine“, već je svojom voljom odlučila da se ne izjašnjava kao pripadnica niti jednog od „konstitutivnih naroda“. Ona u svako doba može promijeniti tu odluku ukoliko želi sudjelovati u političkom životu Bosne i Hercegovine.“

Na traženje dostavljamo podneske koje je tužena strana uputila Sudu u ovom predmetu kako slijedi :

- Pismo izjašnjenje Bosne i Hercegovine o dopustivosti i meritumu od 12.07.2013. g.³ ;
- Dodatno izjašnjenje Bosne i Hercegovine od 17.03.2014.g.⁴ ;
- zahtjev Bosne i Hercegovine za podnošenje slučaja Velikom vijeću Suda iz oktobra 2014. godine⁵ (Zahtjev nije prihvaćen od strane Suda, te je presuda postala konačna 15.12.2014. godine).

³ U prilogu

⁴ U prilogu

⁵ U prilogu

BOSNA I HERCEGOVINA
Ministarstvo za ljudska prava i izbjeglice
Ured zastupnika/agenta Vijeća ministara
pred Europskim sudom za ljudska prava
SARAJEVO

Broj:Ap- 2 / 08
Sarajevo, 11.5.2009. godine

Gosp. Dr. sci. Damir Arnaut

Zgrada Predsjedništva Bosne i Hercegovine
KABINET ČLANA PREDSJEDNIŠTVA BIH
gosp. Silajdžić Harisa

Predmet : Poziv za učešće na javnoj raspravi pred Europskim sudom
za ljudska prava u predmetu App no. 27996 / 06 i App no. 34836/06
Sejdić and Finci v. Bosnia and Herzegovine u svojstvu savjetnika

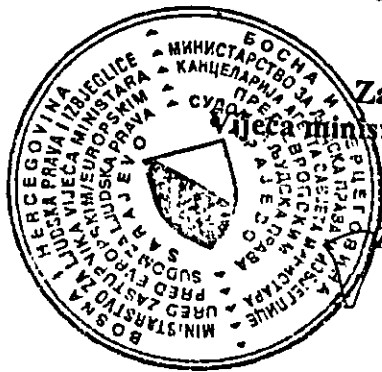
Poštovani ,

čast mi je pozvati Vas da se pridružite timu odbrane na strani tužene Bosne i Hercegovine u gornjem predmetu pred Europskim sudom za ljudska prava u svojstvu savjetnika (counsel) u javnoj raspravi koja će se održati dana 3.6.2009.g. pred Velikim vijećem Suda u Strasburgu .
Sve troškove vašeg boravka u Strasbourgu kao i avionskih karata snosiće Vlada Federacije Bosne i Hercegovine koja vas je predložila za savjetnika u timu odbrane .
U prilogu dostavljamo Vam prijevode pisama Suda , odgovore Agenta , prijevode izjašnjenja umješaka i zaključak Vijeća Ministara BiH .

Molimo da dostavljene materijale proučite i početkom iduće sedmice dostavite Vaše primjedbe i sugestije , ukoliko ih imate u pismenoj formi . Zastupnicima će od velike pomoći biti naročito Vaše poznavanje međunarodnog prava i položaj Predsjedništva Bosne i Hercegovine u pravnom sistemu po Ustavu , zakonu i podzakonskim aktima .

Sredinom iduće sedmice zastupnici će organizovati radno konsultativni sastanak sa svom članovima tima radi dogovora o načinu zastupanja i razmjene mišljenja o nekim otvorenim pitanjima ovog slučaja . Naši kontakt telefoni i adrese su : 033 554 725 ,
e-mail : monika.mijic@mhrr.gov.ba i zikreta.ibrahimovic@mhrr.gov.ba .

Primite izraze mog visokog poštovanja i uvažavanja !



Zamjenik zastupnika/agenta
Vijeća ministara BiH pred Europskim sudom
za ljudska prava

Zikreta Ibrahimović

11.05.2009

Damir Arnaut
Musala 9
71000 Sarajevo

BOSNA I HERCEGOVINA
MINISTARSTVO ZA LJUDSKA PRAVA I IZBJEGLICE
URED ZASTUPNIKA/AGENTA VIJEĆA MINISTARA BIH
PRED EVROPSKIM/EUROPSKIM SUDOM ZA LJUDSKA PRAVA
SARAJEVO

Primljeno: 21. 05. 2009.			
Org. jed.	Klasif. oznaka	Redni broj	Broj priloga
	PP	2/08	

BOSNA I HERCEGOVINA
Ministarstvo za ljudska prava i izbjeglice
Ured zastupnika/agenta Vijeća ministara
pred Evropskim sudom za ljudska prava
SARAJEVO

n/r gosp. Zikreta Ibrahimović
Zamjenik zastupnika/agenta

16. maj 2009. godine

Predmet: Vaš broj: Ap- 2 / 08

Poštovana gosp. Ibrahimović,

U posjedu sam Vašeg pisma od 11.05.2009. godine u kom me pozivate da se pridružim timu odbrane na strani tužene Bosne i Hercegovine u predmetu App. No. 27996/06 i App no. 34836/06, Sejdić and Finci v. Bosnia and Herzegovina pred Evropskim sudom za ljudska prava u svojstvu savjetnika (counsel) u javnoj raspravi koja će se održati dana 3.6.2009. godine pred Velikim vijećem Suda u Strasburgu.

Koristim ovu priliku da Vas podsjetim da me je Vlada Federacije BiH, na svojoj 100. sjednici održanoj 29. aprila 2009. godine, imenovala za eksperta iz oblasti ustavnog prava ispred Vlade Federacije BiH u vezi sa gornjim predmetom (Odluka br. 03/05-05-478/2009-DD). Također, tokom mojih konsultacija sa predstavnicima Vlade Federacije BiH koje su prethodile mom imenovanju, usaglašeno je da će se moja uloga upravo i ograničiti na pružanje ekspertnog mišljenja iz oblasti ustavnog prava Vašem uredu ispred Vlade Federacije BiH u vezi sa tim predmetom.

Nisam, stoga, u mogućnosti prihvatiti Vaš poziv da se pridružim timu odbrane u ovom predmetu. Prije svega, odluka o mom imenovanju ne uključuje tu vrstu angazmana. Također, od jednake važnosti je činjenica da je moje ekspertno mišljenje da u gornjem

predmetu ne postoje validni pravni argumenti iz oblasti ustavnog prava i međunarodnog javnog prava na strani tužene, te da su navodi i zahtjevi aplikanata iz tih oblasti koji se odnose na meritum predmeta u potpunosti pravno utemeljeni i opravdani. Ovo moje ekspertno mišljenje je detaljno obrazloženo u prilogu ovog dopisa.

Iako bi bilo moguće napraviti validnu pravnu argumentaciju za potrebe tužene u pogledu pitanja nadležnosti Evropskog suda za ljudska prava za razmatranje ovog predmeta, konkretno u vezi sa pitanjem iskorištavanja domaćih pravnih lijekova, još jednom podsjećam da me je Vlada Federacije BiH imenovala za eksperta iz oblasti *ustavnog prava*, te nisam u prilici upuštati se u tu vrstu argumentacije.

S obzirom na gore navedene činjenice i moje ekspertno mišljenje o meritumu predmeta, nisam u mogućnosti odazvati se na Vaš poziv da se pridružim timu odbrane u tom predmetu. U skladu sa odlukom Vlade Federacije BiH i mandatom koji mi je Vlada Federacije BiH povjerila, međutim, ispred Vlade Federacije BiH u prilogu Vam dostavljam svoje ekspertno mišljenje iz oblasti ustavnog prava u vezi sa meritumom navedenog predmeta.

S obzirom da su radni jezici Evropskog suda za ljudska prava engleski i francuski, te da je Vijeće ministara BiH od Vlade Federacije BiH eksplicitno tražilo imenovanje eksperta sa visokim stepenom poznavanja engleskog ili francuskog jezika, pretpostavio sam da će Vam biti korisnije ukoliko Vam to mišljenje dostavim na engleskom jeziku. Osjećajte se slobodnim da me kontaktirate ukoliko želite da Vam isto dostavim i na bosanskom jeziku ili oko bilo kojih drugih pitanja.

S poštovanjem,



Damir Arnaut

cc: Vlada Federacije BiH, n/r g. Ismet Trumić, Sekretar Vlade
Ministarstvo za ljudska prava i izbjeglice BiH, n/r Ministar Safet Halilović

EUROPEAN COURT OF HUMAN RIGHTS
FOURTH SECTION

Applicant

Azra ZORNIĆ

versus

Respondent party

BOSNIA AND HERZEGOVINA

Application No: 3681/06

WRITTEN OBSERVATIONS OF BOSNIA AND HERZEGOVINA ON
ADMISSIBILITY AND MERITS

Sarajevo, July 2013

CONTENTS

I. INTRODUCTION.....	
II. FACTS.....	
III. RELEVANT LAW.....	
IV. OBSERVATIONS ON ADMISSIBILITY.....	
a.) Inadmissibility <i>ratione persone and ratione</i> <i>materiae</i>	
b.) Inadmissibility in respect of non-exhausting domestic legal remedies and the six-month deadline.....	
c.) Applicant is not a victim of violation of rights guaranteed by the Convention....	
V. OBSERVATIONS ON MERITS.....	
VI. CONCLUSION.....	

I. INTRODUCTION

1. The office of the Agent of the Council of Ministers before the European Court of Human Rights received for observations the application No. 3681/06 of the applicant, Mrs Azra Zornić versus Bosnia and Herzegovina on 27 March 2013. The applicant is a professor of sociology from Sarajevo born in 1957 employed with the Constitutional Court of Bosnia and Herzegovina. She complains of a violation of human rights because, despite being an active member of a prominent political party on the political scene of Bosnia and Herzegovina, namely Social-democratic Party of BiH (in short SDP), according to the Constitution of BiH and Election Law of BiH, she cannot extend her candidacy for a member of the Presidency of Bosnia and Herzegovina or a delegate in the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina only because she has not declared herself as a member of one of the three constituent peoples.

2. The applicant believes that such above stated regulations violate her human rights in respect of the right to free elections as guaranteed under Article 3 of Protocol 1 and Article 14 of the Convention and the right to non-discrimination as guaranteed by Article 1 of Protocol No. 12 to the Convention.

3. The European Court for Human Rights forwarded the application to Bosnia and Herzegovina and called on the government of Bosnia and Herzegovina to submit written observations on the statements of the application and the statement of facts summarized in the Office of the Court's Registrar and to answer the following question:

Has the applicant suffered discrimination contrary to Article 14, taken in conjunction with Article 3 of Protocol No. 1 to the Convention and/or Article 1 of Protocol No. 12 arising from the very existence of constitutional arrangements according to which only those belonging to one of the three "constituent peoples" are eligible to stand for election to the Presidency of Bosnia and Herzegovina and to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina (Sejdić and Finci v. Bosnia and Herzegovina (GC), No.2796/06 and 34836/06, ECHR 2009)?

4. Proceeding as per the request of the Court, Bosnia and Herzegovina hereby submits written observations on the instant application answering the question posed.

II. FACTS

5. The statement of facts and case description as prepared by the Office of the Court Registrar based on the allegations in the applications and enclosures thereto are not disputable for the respondent party.

6. The respondent party deems necessary to supplement the statement of facts in the instant case, as follows:

The applicant was a candidate for the House of Representatives of the Parliament of the Federation of BiH in the general elections in 2002 and won only 851 votes thus having failed to meet the required quota of votes for a delegate and representative of SDP in that legislative body or indeed any other legislative body for which she was a candidate as stated in her application. In addition, she is neither a member of any ethnic minority nor did she declare herself as one in the application itself. In the application and attachments thereto, it is not stated whether the applicant participated in the 2006 and 2010 elections as a member of her political party or independently, so it can be assumed that she did not.

7. The respondent party reminds of the fact that according to the statistics in the latest census prior to 1992 in BiH, 242.682 persons declared themselves as Yugoslavs, whilst 104.439 persons declared themselves as „Others“. Taking into account the results in percentages, 17,4 % declared themselves as Croats, 43,5% as Muslims whilst 31,2% declared themselves as Serbs. The category of „Others“ consisted of 2,4 % of the population declared and 5,5 % as Yugoslavs.

8. Prior to the filing of the application with the European Court of Human Rights, the applicant did not approach any other body of judicial branch in Bosnia and Herzegovina seeking the protection of her rights that are allegedly violated.

III RELEVANT LAW AND PRACTICE

9. At the time of the filing of the application with the European Court OF Human Rights and at the time when the alleged violation of rights occurred, the following international treaties and domestic regulations were valid and in force in the territory of Bosnia and Herzegovina:

a) Protocol No. 1. to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 3

Right to free elections

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.

b) Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1

General prohibition of discrimination

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

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

c) Constitution of Bosnia and Herzegovina –Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina

PREAMBLE

Based on respect for human dignity, liberty, and equality,

Dedicated to peace, justice, tolerance, and reconciliation,

Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

(...)

Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

Recalling the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

Article II

Human rights and fundamental freedoms

1. Human rights

Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. International standards

The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

3. Enumeration of rights

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

(...)

4. Non-Discrimination

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, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

6. Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

7. International Agreements

Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

(...)

Article IV Parliamentary Assembly

The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

1. House of Peoples

The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.

b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.

2. House of Representatives

The House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement

b) A majority of all members elected to the House of Representatives shall comprise a quorum .

(...)

Article V Presidency

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

1. Election and Term

a) Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

(...)

d) Election Law of Bosnia and Herzegovina

("Official Gazette of BiH" No. 23/01 of 19 September 2001,; amendments published in the OG BH No. 7/02 of 10 April 2002, 9/02 of 3 May 2002, 20/02 of 3 August 2002, 25/02 of 10 September 2002, 4/04 of 3 March 2004, 20/04 of 17 May 2004, 25/05 of 26 April 2005, 52/05 of 2 August 2005, 65/05 of 20 September 2005, 77/05 of 7 November 2005, 11/06 of 20 February 2006, 24/06 of 3 April 2006 and 32/07 of 30 April 2007)

This Law came into force on 27 September 2001 and the relevant provisions of this Law read, as follows:

(...)

Article 4.10 §§ 1-3

An independent candidate shall submit his or her application for candidacy no later than one hundred and thirty five (135) days prior to the election and it shall contain: the name and surname, address, national identification number, date and signature of the independent candidate.

The Central Election Commission of Bosnia and Herzegovina shall certify the application of an independent candidate for participation in the elections if the application meets the requirements as established by this law not later than within 15 days following the date the application is received

If the Central Election Commission of Bosnia and Herzegovina rejects the application, the applicant shall have the right to request the Central Election Commission of Bosnia and Herzegovina to reconsider the decision within two (2) days from the date of receipt of the decision. The Central Election Commission of Bosnia and Herzegovina shall make a decision within three (3) days from the date of receipt of the request.

Article 4.17

A political party, coalition, independent candidate or list of independent candidates shall enclose all the necessary documentation and information as established by this law with each application in order to certify its participation in the elections.

Article 4.19 §§ 5-7

"The candidates list shall contain: the name, surname of every candidate on the list, their personal identification number (JMBG number), permanent residence address, declared affiliation with a particular constituent people or group of "Others", valid ID card number and place of issue, signature of the president of the political party or presidents of the political parties in the coalition. The statement of each of the candidates on the list validating the acceptance of candidacy shall be along with the proposed lists. This statement must be certified in the way described by law.

The declaration of affiliation with the particular constituent people or the group of "Others" referred to in the above Paragraph shall be used as the grounds for the exercise of rights to hold an elected or appointed office for which the statement of ethnic affiliation with the particular constituent people or the group of "Others" is a condition in the election cycle for which the candidates list has been submitted.

A candidate shall be entitled not to declare his or her ethnic affiliation with a particular constituent people of the group of "Others" on the candidacy list. However, any such failure to declare the personal affiliation shall be considered as a waiver of the right to an elected or appointed office for which the declaration of affiliation with the particular constituent people of the group of "Others" is a condition.

Protection of the electoral right shall be secured by the election commissions, Election Council for Objections and Complaints and the Appellate Division of the Court of BiH.

(...)

Article 6.12

The Appellate Division of the Court of Bosnia and Herzegovina shall be competent to hear appeals against decisions of the Central Election Commission of Bosnia and Herzegovina or the Election Council for Objections and Complaints. An appeal shall be submitted to the Appellate Division of the Court of Bosnia and Herzegovina no later than five (5) days after a decision of the Central Election Commission of Bosnia and Herzegovina or the Electoral Council for Objections and Complaints is received.

(...)

e) Law on Protection of Rights of National Minorities from 2003 (published in OG BiH br. 12/03 of 6 May 2003; amendments published in OG BiH No. 76/05 of 31 October 2005)

This Law came into force on 14 May 2003 and contain the following provisions:

Article 2 §§ 2

The Council of Europe's Framework Convention for Protection of National Minorities shall directly apply and be an integral part of the legal system in BiH and the entities within BiH.

Article 3

"A national minority, in terms of this Law, shall be a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics.

BiH shall protect the status and equality of members of national minorities as follows: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Turks, Ukrainians and other who meet requirements referred to in Paragraph 1 of this Article."

f) Rules of the Constitutional Court of Bosnia and Herzegovina

1.

2. Participants to the proceedings

Article 15

1. The participants to the proceedings shall be, as follows:

a. the initiators of proceedings referred to in Article VI.3 (a) of the Constitution and the enactors of the acts which are the subject of dispute;

b. the parties to the proceedings that ended in a judgment/decision challenged and the court or body that rendered the challenged judgment/decision (Article VI.3 (b) of the Constitution);

c. the Chair of the House of Peoples, in the event of a dispute arising under Article IV.3 (f) of the Constitution;

d. the court that referred the issue to the Constitutional Court, and the enactor of the law on whose validity the court's decision depends (Article VI.3 (c) of the Constitution).

2. The Constitutional Court may, in each particular case, designate other participants in respect of whom the principle of adversarial procedure shall be applied.

3. The Constitutional Court, Judge Rapporteur or Registrar may request other bodies and organizations to submit expert opinions in writing or other information relevant to the decision of the Constitutional Court in each individual case. Written expert opinions or information shall not be taken into account after the expiration of the time-limit specified by the Constitutional Court in a particular request.

IV OBSERVATIONS ON ADMISSIBILITY

10. With respect to the question asked by the Court, the respondent party will first make its observations on the admissibility of the application. The question is:

Has the applicant suffered discrimination, contrary to Article 14 taken in conjunction with Article 3 of Protocol No. 1 and/or Article 1 of Protocol 12, arising from the very existence of the constitutional arrangements according to which only those belonging to one of the three "constituent peoples" are eligible to stand for election to the Presidency of Bosnia and Herzegovina and the House of Peoples of Bosnia and Herzegovina (Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009)?

11. The respondent party took the position that the background of this application is corresponding with the foregoing *Sejdić and Finci* case in the part referring to the solutions on position of the constituent peoples as provided in the Constitution, however, the respondent party maintains that the concept of citizens with electoral right who do not fit in the category of constituent peoples is different from the application lodged, which is why the respondent party challenges the admissibility of the application on several grounds.

12. Further on, the respondent party will present arguments that challenge the admissibility of the application, *inter alia* on the ground of "*ratione personae*," which it allegedly failed to do in the *Sejdić and Finci* case.

a) Inadmissibility *ratione persone* and *ratione materiae*

13. The Constitution of Bosnia and Herzegovina does not exist as a constitutional text in any of the languages of the peoples of Bosnia and Herzegovina, and it was not adopted in a democratic procedure, but represents a part of a peace process among the warring parties, the Republic of Bosnia and Herzegovina, Republic of Croatia, and the Federal Republic of Yugoslavia (succeeded by Montenegro and Serbia), under the auspices of the West European countries, the Russian Federation, and the United States of America, who are also the guarantors of the General Framework Peace Agreement for Bosnia and Herzegovina (hereinafter the DPA).

Thus, as part of a peace process, without the participation of the citizens of Bosnia and Herzegovina and its constitutional and legislative bodies, a document in English, that would in the future function as the Constitution of Bosnia and Herzegovina, was adopted in the Wright Patterson Air Base near Dayton Ohio, USA.

14. The Government signatories of the Convention are responsible only for the documents they adopted themselves and that were in application only after the signing of the Convention, and which violate the human rights of persons under its jurisdiction. The state of Bosnia and Herzegovina clearly did not adopt Annex IV, which is in application as the Constitution of Bosnia and Herzegovina within the peace arrangement defined by the General Framework Agreement for Peace in Bosnia and Herzegovina of 15 December 1995. According to this peace agreement under the auspices of the international community, made by the three former republics of SFRY, the Republic of Bosnia and Herzegovina continued its existence as Bosnia and Herzegovina, having its internal structure arranged by Annex IV of the peace agreement. True, Article X of Annex IV in the capacity of the Constitution of Bosnia and Herzegovina allows for the constituent peoples and citizens and others in Bosnia and Herzegovina to make amendments to the Constitution or adopt a completely new one in a certain period of time. Time, manner, and circumstances under which such changes may happen were naturally not defined, just as adoption of a constitution is usually not part of a peace agreement as an international document.

15. Thus, the burden of adopting a new Constitution that should "correct" the initial obvious violation of international legal norms concerning the non-constituent peoples was transferred to the post-Dayton Bosnia and Herzegovina. The term "constituent", freely interpreted, might mean "constitutional or constituting", unlike those people who are not determined by that category. In the *Sejdić and Finci* case, the Strasbourg Court specifically confirmed these facts:

"The constitutional arrangements contested in the present case were not included in the Agreed Basic Principles which constituted the basic outline for what the future Dayton Peace Agreement would contain (see paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of 26 September 1995). Reportedly, the international mediators reluctantly accepted these arrangements at a later stage because of strong demands to this effect from some of the parties to the conflict..."

16. Once again, the respondent party, just like in the *Sejdić and Finci* case, points out that it would be contrary to the rules of the Convention for a state to be held accountable for a document that violates human rights that it did not adopt. Particularly in the case of a Constitution, a state cannot be held accountable for a document which, although performing the role of the Constitution, was not adopted in a democratic way and by the will of its citizens in the fashion common among the Signatories of the Convention. In addition, a state would in that case be accountable for the consequences of the document's application throughout the entire period since its adoption, while its amendments depend exactly on the constituent peoples, whose rights not only are not violated, but are preserved and protected, so it is hard to expect any changes in that respect, although they are formally enabled by Article X of the Constitution.

17. In any case, amendments enabled by Article X of the Constitution that might lead both to its partial or complete replacement with a new document are a matter of free political will of

citizens who decided about it, which certainly includes the timeframe and the scope of amendments, which are all characteristics of a democratic constitution adopted by the free will of the citizens. Bosnia and Herzegovina, as a member state of the Council of Europe, even though it has the obligation to amend the Constitution within one year after acceding to the Council of Europe, might be accountable for potential violation of right that follows from its own democratic Constitution only after its adoption. That is why the applicant's claims with respect to Bosnia and Herzegovina must be rejected as *per ratione persone*.

18. In their applications to the Court, applicants can generally complain about the violation of only those rights guaranteed to them by the national Constitution and laws. In several cases, the Court emphasized "that it has no authority to 'create' the right that has not already been made part of the national legislation". The applicant claims that she was denied the right to free elections in a discriminatory manner, because she refused to declare her affiliation with one of the constituent peoples. The applicant did not claim to be affiliated with any of the minorities pursuant to the Law on Protection of Minorities' Rights of BiH, unlike the applicants in the *Sejdić and Finci* case. The respondent party sees no reason why the applicant cannot declare herself as being affiliated with one of the constituent peoples in case she wants to run for office in the legislative authority and thus meet the requirements of the national Constitution and laws.

19. The respondent party maintains that in reference to the above, the applicant chose of her own free will not to subject herself to the Election Law that stems from the Constitution, which is why she would not be in a position to claim that her right to free elections was violated and her application needs to be rejected *ratione materiae* in view of the fact that she lodged her application to the Court with respect to the Constitution and the laws that do not affect her personally, nor infringe on her guaranteed civic rights and obligations under the Constitution and laws of the respondent party.

b) Inadmissibility as regards non-exhaustion of local remedies and time-limit of six-months

20. The applicant did not address the domestic judicial authorities as regards the alleged violations of her right, not even by filing an application with the Constitutional Court of BiH as the last-instance court that can render a decision on claims as regards violation of human rights guaranteed by the Convention and in case when it is not possible to institute such proceedings before regular courts, that is, when there is no legal remedy for a specific situation. True, applicants are under obligation to use only those remedies that are effective and purposeful in eliminating the violation.

21. The respondent party first notes that the applicant provides no explanation other than an arbitrary claim that "she had no court or other institution to turn to against the violation of her right to vote and be elected". The applicant does not invoke any reasons or circumstances that prevented her from using the legal tools such as an application with the Constitutional Court, that is, why such one application would stand no chance of succeeding. She simply refers to Article 15 of the Rules of the Constitutional Court of Bosnia and Herzegovina, which pertains to specifying who can be a party to the proceedings before the Constitutional Court of Bosnia and Herzegovina. The respondent party sees in the regulation that the applicant invokes no obstacle that would hinder the right to a remedy, that is, would hinder an application with the

Constitutional Court as regards violation of rights. On the contrary, this provision of the Rules of the Constitutional Court is the very evidence that contradicts the claim "that the applicant had no court to turn to", because by itself it enables all natural and legal persons to complain about violations of rights encompassed by the relevant provisions of the Constitution of BiH without any restrictions (see Relevant law).

22. The respondent party further believes that, even though the applicant not only fails to provide reason for non-exhaustion of domestic remedies, but refers to a regulation that proves the contrary, it needs to present its position as regards efficiency, purposefulness and availability of addressing the Constitutional Court of BiH with regard to the specific claims presented by the applicant.

23. In its practice to date, the Constitutional Court of Bosnia and Herzegovina rendered several decisions as regards election law and discrimination pertaining to that right. Although authorised applicants *in abstracto*, as well as the applicant belonging to one of the constituent peoples were not successful with their human rights violation claims as regards free elections and non-discrimination, this does not mean that the remedy is ineffective or inaccessible.

24. To wit, no court jurisprudence has been established with respect to the rights of "others" as regards the violation of right to free elections and non-discrimination. Therefore, the applicant cannot state that her application would be doomed to fail. The respondent party reiterates that the Constitutional Court had opportunities to present its position only on complaints by members of one constituent people whose right to election was restricted in terms of their ethnicity in the territory of one of the entities, in the case no. AP 2678/06 from 29 September 2006.

25. In two cases (No. U-5/04 and U-13/05) that pertained to the abstract control of harmony of the very constitutional provisions and of the Election Law as the direct implementation of the constitutional arrangements, with the European Convention on Human Rights, the Constitutional Court of BiH declared lack of jurisdiction because of the controversy related to the Constitutional Court's jurisdiction to examine the compatibility between the Constitution of BiH and the Convention, that is, the controversial issue of hierarchy between those two documents.

26. Unlike these two cases, in the third case (No. AP-2678/06), in which it acted within its appellate jurisdiction, the Constitutional Court examined the merits of the case to assess whether the denial of the appellants' right, in the specific case the right of Bosniaks from the territory of Republika Srpska to stand for elections to the Presidency of BiH, constitutes discrimination, which, pursuant to the convention law, may exist in case there is different treatment of persons in similar situation without an objective and reasonable justification.

27. Unlike in the foregoing case, the respondent party so far had no opportunity to examine the complaints as regards the denial of right to free elections and along with it and /or the separate issue of discrimination prohibited pursuant to Article 14 of the Convention and Article 1 of the Protocol No. 1 relative to the Convention, on the basis of complaints lodged by citizens who refuse to declare their ethnicity.

28. In that respect, the respondent party points to the obscurity and controversy accompanying the group of citizens called "others" under the Constitution of Bosnia and

Herzegovina, requesting the issue to be discussed at the national level before such a case ends up before the European Court of Human Rights. While the applicants Mr. Finčević and Mr. Sejdinović in clear terms declared their affiliation with an ethnic, that is, religious group that makes them different from the constituent peoples, the group of "others" remained undefined, that is, defined as a group of those who "do not want to declare themselves", that is, as a negative choice that may often prove to be insufficient and insecure.

29. This group, which for various reasons refuses to declare its affiliation with either one of the minorities or one of the constituent peoples, is not covered by the Law on Protection of the National Minorities' Rights, which is in full compliance with the Covenant on Civil and Political Rights, as Article 3 of the Law refers to the members of that group. On the other hand, existence of self-determination as the sole prerequisite for being affiliated with a specific ethnic, linguistic, religious or other group is part of the right to freedom of thought, belief and manifestation guaranteed by Article 9 of the Convention.

30. Further on, differentiating a group according to the international law in any UN or Council of Europe member state is a matter of objective criteria on one side (same language, religion, race, skin colour etc.). Also, freedom to declare affiliation with a specific group is guaranteed by the UN Covenant on Civil and Political Rights, as well as the European Convention on Human Rights and Fundamental Freedoms in practice enables defining members of the group whose rights need to be protected, and who are different from the majority around them by some objective and unchanging criteria on which the members of the group have no impact (race, skin colour, language, ethnic background, etc.).

31. The same assumptions represent the ground for international conventions against all forms of discrimination to which minority groups are potentially exposed, and which ultimately require an estimate of the number of individuals to which the potential discrimination relates or might relate for the sake of their legal protection. When it comes to the group of "others", who refuse to identify themselves in Bosnia and Herzegovina, it practically consists of various groups, including those who, by applying objective criteria, would belong to the constituent peoples, which is why they do not fall under the Law on Protection of Minorities' Rights.

32. The group called "others", pursuant to the Preamble of the Constitution of BiH, exists as a broad concept that comprises both citizens of undefined ethnic background, as well as ethnic minorities, using the following statement: *"as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows..."*

33. In the narrow sense of the concept, the group of "others", according to the practice in BiH too, remained undefined in terms of ethnic background equally with respect to the constituent peoples and with respect to the minorities. According to the above-cited formulation from the Constitution, it would be hard to claim that the constituent peoples, just like the others, are not at the same time citizens, although integral Bosnian-Herzegovinian nation does not exist, as is the case in some other states, where people of one ethnic background represent majority, while other ethnic, linguistic or religious groups are categorised as minorities. Since the term "others" is mostly used for nationals who did not declare themselves as being affiliated with one of the three peoples that constitute majority, or with a chosen minority, as is the case with the

applicant, it follows from that that being part of this group does not depend on a single objective criteria, but on subjective criteria subject to changes on daily basis, and in some cases, on the need to fill posts in civil service or politics.

34. Since the applicant's case involves a very serious type of complaint against discrimination in election law, which touches upon the very essence of the Constitutional order, the respondent party considers that it should be given the opportunity to take its own position as regards the alleged rendering the right to free elections impossible for the group of "others" in the narrower sense.

35. Finally, the respondent party believes that the applicant had and has available efficient and purposeful tool in the form of application to the Constitutional Court of Bosnia and Herzegovina, which has by its own Rules established its jurisdiction to also decide on issues of the right of an individual that stems from the very Constitution of BiH. The respondent party notes that in case of Mr. Pilav case, which the applicant herself attached to her application as evidence, in which the Court decided on the merits of the right to election of a person affiliated with a constituent people, it is evident that the national courts argue a situation that has a legal remedy available, from the appeal to the Election Commission, to the Court of BiH, to the Constitutional Court of Bosnia and Herzegovina. Also, having regard for the passage of time between the decision on that application and the recently rendered judgement in the *Sejdić and Finci* case, handed down by the Grand Chamber, there is a strong possibility that the Constitutional Court takes some other appropriate positions on the issue of others. Since the applicant did not address the Constitutional Court of BiH, timeliness of the application for the purposes of admissibility under the six-month deadline rule cannot be examined.

36. With regard to the above, we wish to outline that an application to the European Court of Human Rights from this point of view is premature, because local available and efficient remedies were not exhausted, which is why the respondent party maintains that the application is inadmissible.

c) Applicant did not suffer violation of rights as guaranteed by the Convention

37. The applicant complains that as a member of "others" she suffers discrimination in Bosnia and Herzegovina in the election process in comparison to the constituent peoples and that there is no effective remedy to that violation. However, the applicant stood for elections to the House of Representatives of the Federation of Bosnia and Herzegovina only once, in 2002, and failed.

38. In view of the high positions to which her candidacy was allegedly prevented, combined with the fact that the applicant is virtually unknown in the political and public life, her success in the election process to high positions of authority is very questionable, regardless of her affiliation with the constituent peoples or others, while the applicants in the *Sejdić and Finci* case are well-known and prominent members of minority communities.

39. As it appears, the applicant could at any time change her opinion and declare her affiliation with a constituent people, and her restrictions in the election process are a matter of personal choice rather than of objective criteria. The fact which the applicant herself outlines indicates that her passive and active voting right has not been violated, nor is there

discrimination to which they point “*in concreto*”, which is why the respondent party considers that the applicant cannot claim to be the victim of a violation contrary to Article 3 of Protocol 1 to the Convention, and/or Article 14 of the Convention and Article 1 of Protocol No. 12 as objectively she is not affected by the provisions of the Constitution of BiH and the Elections Law of BiH.

IV – OBSERVATIONS ON THE MERITS

40. The respondent party provides observations on the merits while simultaneously answering the following question asked by the Court:

Has the applicant suffered discrimination, contrary to Article 14 taken in conjunction with Article 3 of Protocol No. 1 and/or Article 1 of Protocol 12, arising from the very existence of the constitutional arrangements according to which only those belonging to one of the three “constituent peoples” are eligible to stand for election to the Presidency of Bosnia and Herzegovina and the House of Peoples of Bosnia and Herzegovina (Sejdić and Finci v. Bosnia and Herzegovina [GC], nos. 27996/06 and 34836/06, ECHR 2009)?

41. First of all, the respondent party notes that the applicant did not at all run for office of a delegate in the Parliamentary Assembly of BiH at the general elections in 2002, or for the member of the Presidency of BiH. Further on, the applicant was not elected or become a member of the Parliament of the Federation of Bosnia and Herzegovina primarily because she did not win enough votes at the general elections, and thus did not have the opportunity to vote on the election of members of the House of Peoples of the BiH Parliamentary Assembly or to be in a position to be elected to that body. Her declaration with regard to ethnic background actually might be relevant only in the case she became a delegate in the Parliament of the Federation. To wit, delegates in the House of Peoples of the BiH Parliamentary Assembly are being elected indirectly from among the delegates in the Parliament of the Federation of Bosnia and Herzegovina, and she therefore could not vote for the delegates to the House of Peoples of the BiH Parliamentary Assembly, nor could she be a candidate, primarily because she did not win enough votes.

42. In her application, the applicant makes arbitrary assessment of the flaws made by representatives of the international community and the national authorities with regard to her personal view of the way of implementation of guaranteed human rights under the Constitution and the Convention in the national legal system. The assessment partly consists of slighting the entire legal system of Bosnia and Herzegovina, since, in the applicant’s view, all persons who do not support the constitutional reforms, on which the applicant has her own views, should have started being “gotten even with and sanctioned”.

43. The respondent party considers that the parties before the Court must avoid using terminology that belittles or insults, which is contravention of the fundamental principles of the Convention as an international legal act. The Convention in itself primarily promotes peaceful solutions through democratic dialogue, and does not support sanctioning and punishment as a way to implement in practice guaranteed rights and freedoms from the Convention, even if it involves those groups and individuals who to some extent resist the rule of law and the

democratic principles of the Convention. As a matter of fact, the Convention is based on evaluation and understanding of processes in a society, and on stimulation of those processes that will promote democratic values by voluntary acceptance of the rule of law principle, which implicitly means absence of imposing "democracy" through sanctions, even when it involves the principles of human rights protection.

44. The respondent party considers that the applicant has not suffered discrimination as regards those Articles of the Convention cited in the question posed by the Court. The comparative case-law that the Court, as well as the respondent party used in the *Sejdić and Finci* case, such as: *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987, para. 53, *A series no. 113*), *Gitonas et al v. Greece* and *Ždanokav v. Latvia*, pertains to the discrimination of persons whose language or ethnic background was different from that of the majority in the respondent parties.

45. Paragraph 37 of the *Sejdić and Finci* judgement outlines the criticism of the third parties, such as Aire Centre and the Open Society Initiative, which indicates that the applicants who declared themselves to be affiliated with the Roma and Jewish minorities suffered discrimination on the basis of their ethnic background as objective characteristics of their personalities on which they had no impact whatsoever. Also, international conventions, such as: International Convention on the Elimination of all Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights, cited in the judgement as international law, ban discrimination of minorities on the basis of their congenital traits on any ground.

46. According to paragraph 48 of the *Sejdić and Finci* judgement, within the political powers relations in the Bosnian-Herzegovinian society and the context in which Annex IV emerged, the Court did not find the rights of the three constituent peoples presented through the constitutional solution enabling the arrangement of mutual equality in the decision-making process concerning laws and in the bodies of authority to be in contravention of the Convention. The Presidency of BiH, which also performs a part of the administrative authorities functions, according to the same concept is also reserved for members of the constituent peoples

47. However, the position of those citizens who did not declare their ethnic affiliation makes an undefined group with a variety of goals when it comes to their participation in the respondent party, unlike those citizens who declared themselves to be affiliated with minorities. It also seems that ethnically unaffiliated citizens can at any point of time "change opinion" as regards their self-determination, which might put them among the constituent peoples, since they are only defined by the denial of constituent peoples affiliation, and without an ambition to be one of the minorities. This is particularly pronounced in case they want to stand for election to those positions of authority that are reserved for constituent peoples by the Constitution and the law.

48. Pursuant to the Election Law and the Constitution, "others" in the narrow sense are excluded from one part of the election process, just like the members of minorities, but we cannot talk about complete elimination from the election process on the basis of ethnic background, as is the case in the *Aziz v. Cyprus* case, because they are ethnically unaffiliated individuals.

49. The applicant has both active and passive voting right, although the respondent party does not deny that the right is partly restricted. The voting right of the applicant and others who find

themselves in the same legal position is restricted for the sake of the legitimate goal, which is equal representation of all the three constituent peoples in a smaller number of legislative institutions (House of Peoples of the BiH Parliamentary Assembly). The restriction is a result of historical circumstances and the related constitutional changes. At the same time, this restriction is not of lasting nature since failure to define affiliation in the context of the Bosnian-Herzegovinian society is subject to changes.

50. As regards the above, the respondent party notes that the case-law from the *Sejdić and Finci* case, which the Court invokes by asking the question "*Has the applicant suffered discrimination, contrary to Article 14 taken in conjunction with Article 3 of Protocol No. 1 and/or Article 1 of Protocol 12, arising from the very existence of the constitutional arrangements ...*" is not applicable in this case, and thus responds that the applicant has not suffered discrimination.

51. To wit, the respondent party maintains that, having regard for the lack of definition, applicant's legal position in the election system does not at all allow for the differential treatment test in the same situation, which represents the essence of Article 14 of the Convention and Article 1 of Protocol 1 to the Convention. The situation in which the applicants, Mr. Sejdić and Mr. Finci found themselves in is a fully defined position of minority in comparison to the constitutional peoples and others as a majority. Their rights are also guaranteed by the state-level law on minority rights (see Relevant Law). It is also clear that the applicants in this case were treated differently because of the religious and ethnic affiliation that is different than that of the majority of other citizens of Bosnia and Herzegovina, and those are the traits acquired by birth and they cannot change them nor have impact on them.

52. Facts from the *Aziz v. Greece* case, cited in the *Sejdić and Finci* judgement also do not correspond to the facts of the present case. That case involves an applicant who is not even on the voting roll as a result of the solution provided by the election law because he is a Turk on the "Greek" part of the island, while the applicant in the present case obviously had the possibility to vote and be elected.

53. The respondent party did not deny any of the applicant's guaranteed rights, or prevented the applicant to use her voting right, even though the constituent peoples have special right and are, in the broad sense, also citizens, as provided in the Preamble of the Constitution of BiH, just like other citizens which the applicant is "allegedly" affiliated with. The right to free elections without discrimination on ethnic grounds under the law and Constitution has been given to the applicant and all other citizens, since they can stand for election and vote for election of members of all other bodies, as well as the House of Representatives of the Parliamentary Assembly of BiH and the Entities.

54. The respondent party reiterates that according to the jurisprudence of the Strasbourg Court, member states have certain freedom in limiting the rights of individuals to vote and be elected, but those requirements do not "*restrict these rights to the extent that would jeopardise their essence and deprive them of their effectiveness; that these requirements were introduced in order to satisfy a legitimate goal aspired to; that the applied means are not disproportional.*"

55. The Constitution of Bosnia and Herzegovina, which allegedly violates the applicant's rights, was adopted not by the national authorities, but by the international community as Annex IV of

the Peace Agreement, and even though it contains certain contradictions between the proclaimed freedoms and their implementation in practice, it guarantees an election system as a compromise that will, *inter alia*, satisfy the need to represent persons who do not want to declare their ethnic affiliation. The respondent party also invoke its right on margin of appreciation (see *Ždanoka v. Latvia*).

56. In the present case, there is reasonable justification for restriction of the voting right with respect to the citizens who are ethnically undefined by their own free will, along with the fact that different treatment serves a legitimate goal, such as the preservation of peace and opening a dialogue by enabling all the three constituent peoples to decide on important issues in legislative and other authorities. As regards the above, the respondent party considers that the applicant has suffered no discrimination in violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 to the Convention.

57. Constitutional solutions for the election process in relation to the applicant's treatment as member of others, although less beneficial in comparison to the constituent peoples, have reasonable justification and do not result in violation of right to non-discrimination under the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 12 Addition to the Convention. Less beneficial treatment is justified in case of internal arrangement set up by a peace agreement (see admissibility). Such internal arrangement, which occurred as a result of historical circumstances, is in any case of temporary nature, just like the peace agreement as a document. In any case, the desired changes and agreement on constitutional changes that the applicant refers to are not possible without the participation of the constituent peoples, and that category, as constitutional, was introduced by the Dayton solutions, without the consultation with the citizens of this country, including "others".

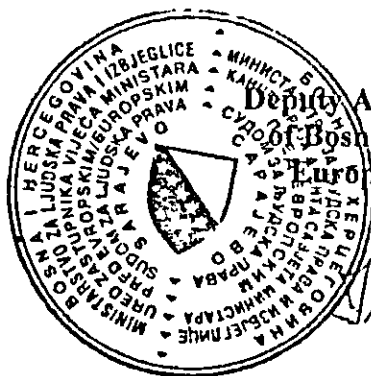
58. Applicants in the *Sejdić and Finci v. BiH* case invoked and attached a range of opinions by competent international bodies in charge of monitoring the observation of rights guaranteed by the Convention, its Protocols, and other international conventions, which in their reports, examined the constitutional situation with respect to the Election Law in BiH. Certainly the most relevant among them are the opinion of the Venice Commission, which presented its opinion of the election system of Bosnia and Herzegovina several times. What is specific, and what the respondent party particularly emphasizes is that even with numerous criticism of the whole Constitution, particularly election law, this Commission, in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the powers of the High Representative, adopted at the 62nd Plenary Session held on 11 and 12 March 2005, states the following:

"Par. 104: Further constitutional reforms, changing the emphasis from a state based on equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the medium and long term. If the interests of individuals are conceived as being based mainly on ethnicity, this impedes the development of a wider sense of nationhood. In this context, the people of BiH will also have to decide whether they want to replace their present Constitution negotiated as part of a peace treaty by an entirely new Constitution which would enjoy full democratic legitimacy as the fruit of a democratic constituent process in BiH."

59. Finally, the respondent party points out that the constitutional and legislative solutions in Bosnia and Herzegovina are the result of its historical emerging as an independent state, and that in that regard there has been no violation of the right the applicant invoked. As regards that, the respondent party proposes to the Court to accept the following:

CONCLUSIONS

1. The present application is inadmissible *ratione persone* and *ratione materiae*, and also because local remedies were not exhausted as stipulated by Article 35(1) of the Convention, and because of the failure to meet the related time limit of six-months.
2. The applicant has no status of a victim of human rights violation, which is why her application is rejected as inadmissible.
3. The application is ill-founded because there is no violation of Article 13 and 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 to the Convention and/or Article 1 of Protocol No. 12 to the Convention.



Deputy Agent of the Council of Ministers
of Bosnia and Herzegovina before the
European Court of Human Rights

Zikreta Ibrahimović

EUROPEAN COURT OF HUMAN RIGHTS
FOURTH SECTION

Applicant:

Azra Zornić

v.

The respondent party:

BOSNIA AND HERZEGOVINA

Application number: 3681/06

ADDITIONAL OBSERVATIONS BY BOSNIA AND HERZEGOVINA

Sarajevo, 17 March 2014

CONTENTS

I.	INTRODUCTION.....
II.	ADDITIONAL OBSERVATIONS.....
III.	CONCLUSION.....

I. INTRODUCTION

1. European Court of Human Rights (hereinafter “the Court”) communicated on 24 February 2014 to the respondent party Bosnia and Herzegovina Written Observations by the applicant in response to the Observations by the respondent party of July 2013.

2. In their letter, the Court invited the respondent party to send to the Court by 17 March 2014 at the latest any additional observations should it wish to do so. Pursuant to the Court’s invitation, the respondent party hereby provides its further observations.

II ADDITIONAL OBSERVATIONS

3. The respondent party firstly points out that it maintains its earlier positions as presented in its written observations of July 2013 where the admissibility of the present application was challenged, as well as its merits.

4. In response to the applicant’s comments regarding the admissibility of the application in terms of *ratione personae* criterion, in relation to which the applicant notes that Mr Alija Izetbegović, Mr Haris Silajdžić and other representatives of Bosnia and Herzegovina were present when the Dayton Peace Agreement was signed, the respondent party notes that the presence of the officials of the Republic of Bosnia and Herzegovina in Dayton, USA, or the fact that Mr Izetbegović, in his capacity of the President of the Republic of BiH, put his signature on the Dayton Peace Agreement (DPA) does not change the fact that the Constitution of BiH, as one of the DPA annexes, was not adopted in parliamentary procedure.

Furthermore, the respondent party maintains the position that the DPA is a peace arrangement reached under the auspices of the international community by three sovereign states, republics of the former SFRY. Respondent party recalls that the Court itself, in its *Sejdić and Finci v. Bosnia and Herzegovina* [GC] Judgment no. 27999/06 and 34836/06, §§ 30, as well as in some other judgments rendered against BiH, found that the Constitution of BiH is an annex to the Dayton Peace Agreement, in itself an international treaty (see *Jeličić v. Bosnia and Herzegovina* (dec), no. 41183/02, ECHR 2005). In addition, this international agreement has not become part of the domestic legal system by ratification, as it was not ratified by the Parliament of the Republic of Bosnia and Herzegovina which since then exists under the name of Bosnia and Herzegovina and with a changed internal structure, pursuant to the Constitution of BiH and the contents of the DPA as the constitution in a broader sense.

5. As a corollary, despite the indisputable value that the DPA bears in terms of introduction of the rule of law principle and human rights in the country where those rights were massively breached, the Constitution of BiH as its integral part was obviously adopted with no procedures to ensure its democratic legitimacy, which is why the responsibility of the respondent party with respect to the legal consequences that this act produced and that allegedly affect the applicant, is disputable. In that regard, the

respondent party notes that High Contracting Parties to the Convention are responsible only for acts they adopted themselves and applied after their acceding to the Convention. Therefore, as in the *Sejdić and Finci v. Bosnia and Herzegovina* case, the respondent party indicates in relation to the present application, as well, that holding a state responsible for an act that violates human rights, but which that state did not adopt itself, in a democratic manner and by the will of its citizens, as customary in the Convention signatory states, would be contrary to the Convention.

6. Pursuant to the foregoing, the respondent party Bosnia and Herzegovina cannot be held responsible for alleged violations of the applicant's rights in relation to the manner of election of the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH prescribed in the Constitution of BiH. For this reason the respondent party believes that the applicant's complaints against Bosnia and Herzegovina must be rejected as inadmissible *ratione personae*.

7. In addition, the applicant argues that despite the fact that more than twenty years have passed since the adoption of the Constitution of BiH, domestic authorities have still taken no specific actions to improve the existing constitutional arrangements. This contention by the applicant is incorrect. It is generally known that the domestic authorities, with the assistance of the international community, have been for years putting effort in finding adequate solutions, and particularly after the *Sejdić and Finci v. Bosnia and Herzegovina* Judgment. The fact that despite these efforts a unanimous position regarding the proposed constitutional amendments has still not been reached, additionally confirms that the issue of amendments to the Constitution of BiH is a complex one, dependant on a constellation of mutual relations between the constituent peoples and the group of others.

8. Any change to the existing constitutional arrangements, no matter how justified its objective may be, can easily upset the hard-to-reach balance of the interethnic relations which has been struck on an interim basis by the very adoption of the Constitution of BiH under the auspices of the international community. Amending the Constitution of BiH is an extremely sensitive and complex issue, which primarily depends on the possibility to reach a political consensus, which again is a long-term process whose maturity for constitutional amendments cannot be precisely forecasted.

9. Still, even if the political consensus were reached within BiH, the question arises as to whether the domestic authorities alone could change the existing Constitution of BiH which is actually a part of a peace arrangement, whose guarantors, in addition to the international community, are also the other two signatory states, Serbia and Croatia, regardless of the fact that Annex IV to the DPA allows for that possibility.

10. Pursuant to all of the foregoing, the respondent party maintains its position that the present application is inadmissible *ratione personae*.

11. Moreover, the applicant argues that persons who do not declare their affiliation with one of the three constituent peoples are not considered as citizens of BiH and that they belong to no one. As the respondent party noted in its earlier observations, the applicant enjoys all human and political rights as do other citizens of BiH. The truth is, however, that should the applicant wish to stand as a candidate for the Presidency of BiH

or for the House of Peoples of the Parliamentary Assembly, she would be required to declare her affiliation with one of the three constituent peoples who live in BiH. In that regard, the respondent party argues that the applicant is by no means prevented from declaring her affiliation with one of the three constituent peoples residing in BiH, while that would not be a disproportionate or excessive burden for her, in case the applicant indeed wished to stand as a candidate for legislative bodies at the level of BiH.

12. As the applicant chose to be a member of the group of “Others” of her own free will, she consequently chose to be excluded from the possibility to stand as a candidate pursuant to the Election Law and the existing Constitutional provisions. Respondent party recalls that member states are allowed to introduce certain restrictions, in particular concerning the so called passive electoral right which, in its essence, is more of a political nature, unlike the active electoral right. The applicant always has the option to declare her affiliation with one of the three constituent peoples by a simple expression of her will, and thus the respondent party maintains its position that the present application is inadmissible *ratione materiae*.

13. In any event, the respondent party underlines that the applicant has an active electoral right as well as all other rights that other citizens of BiH have. Respondent party does not contend that the applicant’s passive electoral right is not “*in abstracto*” limited by the fact that she does not declare her affiliation with one of the three constituent peoples. However, in the initial stage, when individuals and parties apply for participation in elections, they are required to submit a certain number of signatures of their supporters, which is actually a kind of permitted electoral census. As the respondent party already noted, the applicant did not take part in the last elections; moreover, when she did participate as a candidate, she did not win the necessary number of votes. Considering that political parties and individuals who have undergone the application stage are required to submit their lists of candidates with their personal details, including their ethnic affiliation information, the respondent party reiterates the issue of admissibility of the application of a person who did not even submit the application to utilize her passive electoral right, nor has such application been accepted. The respondent party therefore maintains its earlier position that the applicant is not a victim of violation of the right invoked in the present application.

14. In her additional observations, the applicant alleged that the reason why she did not appeal to the Constitutional Court of BiH was primarily because she had not exhausted remedies before the lower instance domestic courts, due to which her appeal would have been rejected as inadmissible by the Constitutional Court. In that respect, the respondent party points out that Article 16 of the Rules of the Constitutional Court of BiH provides that the Constitutional Court may examine an appeal even when there is no decision of a competent court if the appeal indicates a grave violation of the rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina or by the international documents applied in Bosnia and Herzegovina¹, which renders this allegation of the applicant completely ill-founded.

¹ http://www.ccbh.ba/public/down/pravila_bos.pdf

15. Moreover, relying on the decision that the Constitutional Court of BiH rendered in the case of Ilijaz Pilav, AP 2678/06 of 29 September 2006, the applicant claims that the appeal to the Constitutional Court of BiH is not an efficient domestic legal remedy in respect of the complaints invoked in her application to the Court. In that regard, the respondent party firstly notes that Mr Pilav's complaints differ from the complaints of the applicant, that is, their factual basis in the two cases is not the same. In addition, the respondent party argues that the mere fact that an applicant ultimately lost does not render the domestic system ineffective (see paragraph 67 of Judgment in *Đokić v. BiH*).

16. Respondent party submits that the applicant thus precluded the examination of the merits of the case by the Constitutional Court of BiH so as for this court to establish whether the violation of the rights alleged in this specific case had occurred, and in case of violation, to order measures to put right the alleged violations (see, *inter alia* the Court's decisions in *Selmouni v. France* [GC], no. 25803/94, ECHR 1999-V, § 74, and in *Scordino v. Italy (no.1)* [GC], § 140), which was certain, in particular considering that the Constitutional Court of BiH has unequivocally demonstrated by its case law that it adheres to the jurisprudence of the European Court. The respondent party therefore stands by its argument that the applicant failed to exhaust all domestic legal remedy available, which renders her application inadmissible under Article 13 and Article 35, paragraph 1, of the Convention (see Judgment in *Handyside v. UK* of 7 December 1976).

17. As regards the applicant's contention that the provisions of the Constitution of BiH and the Election Law of BiH, pertaining to the election of members of the Presidency of BiH and the House of Peoples of BiH, are discriminatory in the sense of the requirement for the citizens to declare their affiliation with constituent peoples, the respondent party reiterates that the Court found in numerous cases that the electoral right is not an absolute right, and that legal systems of the majority of member states of the Council of Europe contain certain limitations to this right.

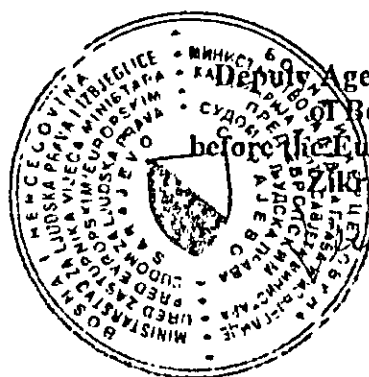
18. Specifically, the Court's jurisprudence that the contracting states have a wide margin of appreciation in limiting individual electoral rights, provided that these limitations do not impair the very essence of these rights and deprive them of their effectiveness, as well as that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt v. Belgium*, no. 9767/81, Judgment of the Court of 2 March 1987, § 52, *Gitonas et al. v. Greece*, no.18747/91; 19376/62; 19379/92 of 1 July 1997, §§ 37- 40, *Ždanoka v. Latvia* [GC], no. 58278/00, Judgment of the Court of 16 March 2002 et al., §§ 103 and 104, *Matthews v. United Kingdom*, no. 24833/94, Judgment of 18 February 1999, § 63).

19. Therefore, the respondent party is of the opinion that, in its ruling on this case, the Court should not lose sight of the fact that the existing constitutional arrangements and the provisions of the Election Law of BiH that are based on them, resulted from the Dayton Peace Agreement, and that the existing constitutional provisions themselves are a guarantee for this Agreement and the hard-to-reach peace in BiH. Finally, the respondent party does not claim that the existing solutions are ideal when it comes to electoral rights, but must reiterate that despite certain deficiencies, neither the domestic authorities nor the international community have succeeded in finding adequate solutions. Respondent party therefore submits that in the present case the Court should recognise a wide margin of

appreciation in the sphere of electoral rights (*see Rasmussen v. Denmark*, no. 8777/79, the Court's Judgment of 28 November 1984, § 40).

III CONCLUSION

20. Pursuant to all of the foregoing, the respondent party maintains its observations of July 2013 in their entirety and submits that the Court, in case it decides to declare the present application admissible, should find that the applicant was not discriminated against in the present case, specifically that no violation of Article 1 of Protocol no. 12 to the Convention occurred.



Deputy Agent of the Council of Ministers
of Bosnia and Herzegovina
before the European Court of Human Rights
Zikreta Ibrahimović

Zikreta Ibrahimović

To: THE EUROPEAN COURT OF HUMAN RIGHTS

**REQUEST OF BOSNIA AND HERZEGOVINA
FOR REFERRAL OF THE CASE TO THE GRAND CHAMBER**

Case: ZORNIĆ v. BOSNIA AND HERZEGOVINA

Application No. 3681/06

Sarajevo, October 2014

CONTENTS

I INTRODUCTION

II REASONS FOR THE REQUEST FOR REFERRAL TO THE GRAND CHAMBER

- 1. Departure from the Court's established case law in assessing admissibility of the application in respect of the victim status. In this case of vital importance which concerns the core of the constitutional and legal order and political system of the Member State, the applicant is not a victim and the application is an *actio popularis* by its nature.**
- 2. Violation of the key principles underlying the Convention system, the subsidiarity principle and the principle of margin of appreciation, in applying Article 46 of the Convention in the Chamber's judgment.**

III CONCLUSION

I INTRODUCTION

1. The present case originated from the application filed by Ms Azra Zornić, which in its essence is an *actio popularis* and where the applicant expressed her personal discontent and, according to her, the discontent of numerous other citizens, by the constitutional provisions that discriminate against citizens who do not wish to be categorized as members of the three constituent ethnic groups when it comes to elections. In her application, the applicant generally complained about the Constitution of BiH for dividing the citizens into Serbs, Croats and Bosniaks. The applicant relied on Article 3 of Protocol 1 to the Convention taken alone and in conjunction with Article 14 of the Convention.

2. On 24 June 2014, pursuant to the application of an *actio popularis* character, the European Court of Human Rights Chamber delivered a Judgment in the *Zornić v. Bosnia and Herzegovina* case, app. no. 3681/06, finding a violation of the applicant's rights under Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1, as regards the applicant's ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina, as well as a violation of the applicant's rights under Article 1 of Protocol No. 12 of the Convention, as regards the applicant's ineligibility to stand for election to the Presidency of Bosnia and Herzegovina.

II REASONS FOR THE REQUEST

3. Respondent party believes that the Chamber should have exercised particular caution in examining the present case which concerns the core of the constitutional and legal order of a country and the essence of an international peace agreement (equal distribution of power among the three constituent ethnic groups) which put an end to a years-long, bloody and devastating war. The respondent party submits that the Chamber in the present case, without any particular consideration and with no explanation, groundlessly found that the applicant was a victim and that her application, essentially an *actio popularis*, was admissible. Pursuant to such an inadmissible application, the Chamber delivered its Judgment applying Article 46 of the Convention in the manner which violates the fundamental principles underlying the Convention, such as subsidiarity and the margin of appreciation, whose importance was particularly highlighted and reaffirmed by the agreement of all member states of the Council of Europe in the 2012 Brighton Declaration. The respondent party submits that the violation of these principles which, in accordance with the Brighton Declaration, through Protocol 15 have been included in the preamble to the Convention itself is an issue of general concern for all States Parties. This is particularly so because these principles have been violated in a case of vital importance, which concerns the core of a State's constitutional and legal order and its political system.

4. Should this Judgment, rendered on inadmissible application of an *actio popularis* character become final, the core of the constitutional and legal order, as well as political system of any State Party could be exposed to this kind of cursory and unsubstantiated assessment by the Chamber, and the obvious exceeding of the Court's jurisdiction which goes so far as to assess, from the distant Strasbourg, when and what kind of political system should be introduced in a State Member of the Council of Europe. Therefore, the respondent party reasonably believes that, should this Judgment become final, it could have far-reaching repercussions on the entire human rights safeguarding mechanism under the Convention.

5. Moreover, should this Judgment, in this exceptionally serious and important case become final, it will in itself pose a threat to the future effectiveness of the Convention mechanism. Specifically, following this Judgment, any citizen of Bosnia and Herzegovina who, for whatever reason, does not declare affiliation to one of the constituent ethnic groups, and who is generally dissatisfied with the Constitution of BiH, regardless of whether or not he/she is affected by the contested constitutional provisions at all, regardless of whether or not he/she has any serious intention of engaging in politics, regardless of whether or not he/she participates in the public or political life, will be treated before the Court as a victim of violation of rights protected under the Convention and its Protocols. The Chamber's superficial and unsubstantiated assessment of the existence of victim status opens an avenue for numerous other similar applications, essentially constituting an *actio popularis*.

6. In addition, considering that affiliation with any of the constituent people requires only the person's own determination and statement of affiliation (there are no objective statutory requirements for affiliation with any of the constituent peoples, see paragraph 11 of the Grand Chamber's Judgment in the *Sejdić and Finci* case of 22 December 2009), any citizen who declares his/her affiliation with a constituent people, may at any time refuse to declare such affiliation and, for example, decide to declare his/her affiliation to the group of "Others". According to the Chamber's assessment regarding the existence of victim status, any such person who decides not to declare his/her affiliation with a constituent people any more, for whatever reason (which may also include a political interest, or economic interest in respect of just satisfaction) may argue before the Court that he/she is a victim, as the constitutional provisions at issue prevent him/her from standing for elections to the House of Peoples or to the Presidency of BiH, regardless of whether or not such a person has a genuine intention to stand for elections, or regardless of whether or not it is arguably coherent that such a person would indeed consider running for elections. Accordingly, such case law of the Court, with no specific criteria on the victim status in respect of violations of Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12, could quite clearly be limitlessly abused in similar cases, and lead to a large number of similar applications and judgments.

7. Respondent party first indicates the ill-founded conclusions of the Chamber in respect of:

a) *The assessment that the applicant is a victim as regards the alleged violation of her rights under Article 3 of Protocol No. 1 to the Convention taken alone and in conjunction with Article 14 of the Convention, and under Article 1 of Protocol No. 12 to the Convention*

8. According to the Court's established case law, the applicant needs to prove that he/she has a legitimate interest to act as a party, given that an action in public interest is inadmissible; specifically, an individual who raises an issue on behalf of all those potentially aggrieved, cannot be a party. If the applicant is not personally affected by any of the measures he complains of, the Court shall reject such an application as an *actio popularis* (see *X v. Austria*, app.no. 7045/75, Decision of 10 December 1976).

9. In *Očić v. Croatia*, app.no. 46306/99, Decision of 25 November 1999, the Court thoroughly analysed the nature of an individual application under Article 34 of the Convention, examining it both from the aspect of an *actio popularis* and from the aspect of its submission *in abstracto*. In this case the Court held that "...Article 34 requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 34 may not be used to found an action in the nature of an *actio popularis*; nor may it form the basis of a claim made *in abstracto* that a law contravenes the Convention.... In the present case the legislation complained of had never been enforced against the applicant - his claim was in the nature of an *actio popularis* by means of which he sought a review *in abstracto* of the contested legislation in the light of the Convention. The Court observes that there is no sufficiently direct connection between the applicant as such and the injury he maintains he suffered as a result of the alleged breach of the Convention. In this connection, the Court recalls that a person who is unable to demonstrate that he or she is personally affected by the application of the law which he or she criticises cannot claim to be the victim of a violation of the Convention ... For these reasons the applicant cannot be considered the victim of a violation of the rights set out in the Convention."

10. The respondent party argued in this case that the applicant was not a victim because she did not participate in any way in the public or political life of Bosnia and Herzegovina, and therefore, she could not claim that she was personally affected by the contested provisions of the Constitution of BiH. Moreover, the applicant did not include in her application a single sentence about her participation and engagement in the public or political life in Bosnia and Herzegovina, or about having held any public and prominent office, or about her intention to stand for election either to the House of Peoples of the Parliamentary Assembly of BiH, or to the Presidency of BiH. The applicant is an employee of the Constitutional Court of BiH, entirely anonymous in the country's public life.

11. Although the applicant failed to mention this in her application, the respondent party obtained information that only once, in 2002, the applicant stood as a candidate of the Social Democratic Party in election to the House of Representatives of the Parliament of the Federation of BiH. For the reason of her total anonymity and insufficient voter support, and not because of her ethnic affiliation, which is not an impediment to stand for election to the House of Representatives of the Federation of BiH, the applicant won only 851 votes, thus failing to meet the quota required for election to the House of Representatives of the Federation of BiH. In any event, one failed attempt of a completely anonymous person in election for the House of Representatives of the Federation of BiH, which took place 12 years ago, cannot be considered as an active participation in the country's political life.

12. Specifically, in paragraph 6 of the present Judgment, the Chamber stated: "She actively participates in the political life of the country. Among other things, in 2002 she stood as a candidate of the Social Democratic Party of Bosnia and Herzegovina for election to the parliament of one of the Entities." This statement of her active participation in the political life of the country is totally untrue! There are no "other things". The applicant, an employee of the Constitutional Court of BiH, does not participate in any way in the public or political life of the country and it cannot be regarded entirely coherent that the applicant would consider running for election to the Presidency of BiH or to the House of Peoples.

13. In her application, the applicant expressed her arbitrary and general dissatisfaction concerning the Constitution of BiH which recognizes the categories of constituent peoples and others. The applicant argues that the present Constitution of BiH, and its application in the realm of elections, does not enable the free expression of will in elections for legislative branch to citizens who, like herself, do not wish to be categorized under one of the three ethnic groups or even vote for such representatives. In her application, the applicant argues that the term "Others" as referred to in the Constitution of BiH, should be changed into "Citizens of Bosnia and Herzegovina". She goes on to say: "How can we talk about respect for human rights in Bosnia and Herzegovina, when it's fundamental document, the Constitution (Annex IV of the Peace Agreement) divides the citizens of this country into Serbs, Croats and Bosniaks." Accordingly, the applicant expresses her general discontent in respect of the Constitution of BiH and the existing political system which recognises the categories of constituent peoples and "others"; the foregoing leads to a clear conclusion that this complaint is politically motivated with no intention on the part of the applicant to personally stand for election to the Presidency of BiH or to the House of Peoples.

14. In response to the written observations submitted by the respondent party, the applicant clearly states that the discriminatory role of the Constitution of BiH in the lives of the citizens of Bosnia and Herzegovina is exactly the subject matter of her complaint, as the Constitution prevents the citizens from being constituent people in their own country. Further, the applicant states that she does not understand why the citizens of the European countries and all over the world are called after the name of the country they live in, while only in Bosnia and Herzegovina, not even in the Constitution are there Bosnians and Herzegovinians, but only Croats, Serbs and Bosniaks, and Others. It is absolutely clear that the purpose of her application is the expression of her general discontent with the Constitution of BiH and the fact that the categories of constituent peoples and others exist in it.

15. For the very fact that in her submissions to the Court, the applicant herself made it clear what the purpose of her complaint was, specifically, general allegation that the Constitution of BiH is discriminatory in the lives of the citizens of Bosnia and Herzegovina, as well as for the fact that the applicant failed to demonstrate by a single sentence her intention to stand for elections to the House of Peoples or the Presidency of BiH, the respondent party reasonably argues that the application is an *actio popularis*, submitted in the name of the purported "common interest" of the citizens of Bosnia and Herzegovina, and that the applicant is not a victim in the present case. The applicant failed to show, let alone support by evidence, that she is personally affected by the application of the contested provisions of the Constitution of BiH. At issue here is a classical *actio popularis* whereby the applicant seeks the Court to review *in*

abstracto the Constitution of BiH in the light of the Convention. The applicant in the present case is not a member of a class of people who risk being directly affected by the constitutional provisions (see *Burden v. United Kingdom* [GC] no.13378/07 of 29 August 2008, §§ 33-34).

16. The Court rejected in the present case the respondent party's objections in respect of the victim status with no particular explanation, only invoking in § 17 of the Judgment, the conclusion made in the *Sejdić and Finci v. Bosnia and Herzegovina* Judgment [GC] no. 27999/06 and 34836/06, § 29). Paragraph 17 of the Judgment at issue reads: "As regards the second objection, in *Sejdić and Finci* the Court examined the applicants' victim status and concluded that, given their active participation in public life, they might claim to be victims of the alleged discrimination (*ibid.*, § 29). The Court sees no reason to depart from this conclusion in the present case and therefore rejects the Government's second preliminary objection."

17. Unlike the applicants in *Sejdić and Finci* who held and still hold prominent offices in the public life, as detailed in § 8 of the Grand Chamber's Judgment in the *Sejdić and Finci* case, the present applicant is a person completely unknown to the public, a lawyer in the Constitutional Court of BiH. Therefore, no analogy can be found between the applicant Zornić and the applicants in *Sejdić and Finci*. Unlike Mr Finci and Mr Sejdić, the applicant has never held any public office through which she could affirm herself as a well-known or a reputable person in the political life of Bosnia and Herzegovina, based on which the same conclusion could be drawn as that concerning the applicants in the *Sejdić and Finci*, that is, that it would be entirely coherent that the applicant would consider running for the House of Peoples or the Presidency of BiH. We reiterate that in her application the applicant did not even state her intention or wish to personally run for the House of Peoples or the Presidency of BiH. Also, the fact that the applicant failed to invoke Article 1 of Protocol 12, additionally confirms that the applicant did not express any intention to run for Presidency of BiH.

18. In addition, the respondent party deems it important to indicate the following essential difference between the applicant in the present case and the applicants in the *Sejdić and Finci* case. The applicants in the *Sejdić and Finci* are by their origin members of Roma and Jewish national minority, respectively, and therefore fall under the category of "others" while the applicant in the present case simply does not wish to declare her affiliation with a constituent people, with which she is actually affiliated by her origin.

19. In § 31 of the Judgment in the case of *Zornić v. BiH*, as regards the argument of the respondent party that the applicant could at any time choose to affiliate with one of the constituent peoples, the Court observed among others: "...There may be different reasons for not declaring affiliation with any particular group, such as for example intermarriage or mixed parenthood or simply that the applicant wished to declare herself as a citizen of Bosnia and Herzegovina. While it is not clear what the present applicant's reasons are, the Court considers them in any case irrelevant. The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification." In relation to this, the respondent party notes that the applicants Sejdić and Finci, for objective reasons, that is, for their respective affiliation with Jewish and Roma national minority could not declare their affiliation with a constituent people. Unlike in the case of the applicants Sejdić and Finci, no similar objective impediment exists in the case of the present applicant to declare her affiliation

with a constituent people, notably if she indeed has a serious intention to run for the Presidency of BiH or the House of Peoples of the Parliamentary Assembly of BiH. However, it is quite clear from the application in this case that the applicant has no such intention, but uses the application, which in its nature is an *actio popularis*, to express her general discontent with the Constitution of BiH which recognizes the categories of the constituent peoples and "Others".

20. The position of the Chamber, as worded in § 31 of the present Judgment, in the sentence: "The applicant should not be prevented from standing for elections for the House of Peoples on account of her personal self-classification" in fact means that everyone, including members of the constituent peoples of Bosnia and Herzegovina, would be ineligible to stand for election to the Presidency of BiH or the House of Peoples, should they decide, on their own and of their own will, not to declare their affiliation with a constituent people, and that based on such a free decision of theirs, which they may change at any time, they can claim before the Court to be victims, no matter whether they indeed intend to engage in politics and run for elections. Such an extensive, unrestricted by any criteria interpretation of the victim concept, poses a threat to the existing mechanism of human rights protection as established under the Convention.

21. It has been simply neglected in this Judgment that the Convention system does not provide human rights protection *in abstracto*, merely because individuals or groups consider that a particular legal provision is in conflict with a provision of the Convention. In its case law the Court has admitted certain cases of individuals or groups claiming to be affected or that they are highly likely to be affected by certain acts or practice of state authorities and thus suffer violation of some of the guaranteed rights. However, even in such cases, the victim concept was not interpreted so broadly as to include any individual who could conceivably be affected by a measure or an act of the state, without any objective criteria, facts or evidence which would make such a possibility likely. Individuals must show that the measures complained of have been applied to their detriment (see for example, *Leigh and others v. The United Kingdom*, app.no.10039/82, Decision of 11 May 1984).

22. The victim status is a condition *sine qua non* for admissibility of an application before the European Court. As the present applicant failed to show that she is a victim, the respondent party submits that by declaring her application as admissible, not only has the Court expanded its position regarding the victim concept, but also made a significant departure from its established case law. This position taken by the Court is not only to the detriment of the respondent party but also raises the issue of the interpretation of the "victim" concept in all future cases. The question arises as to how will the Court in its future cases define the circle of persons entitled to file an application, in particular when it comes to cases that open extremely sensitive issues from the realm of constitutional law in the context of compliance with the Convention.

b) Violation of the key principles underlying the Convention system, the subsidiarity principle and the principle of margin of appreciation, in applying Article 46 of the Convention in the Chamber's Judgment.

23. Respondent party firstly notes that the present case, for the very reason that it concerns the core of the country's constitutional and legal system and that it originates from the application that is an *actio popularis* in its essence, is absolutely unsuitable for the application of Article 46 of the Convention, as has been done in the present Judgment. There is currently just one more similar case pending before the Court against Bosnia and Herzegovina, originating from an application submitted by Samir Šlaku, an Albanian by ethnicity, who also complains about the existence of the contested constitutional provisions that make him ineligible to run in election to the Presidency of BiH or the House of Peoples. Accordingly, it is not arguable that, because the *Sejdić and Finci* Judgment has not been executed to date future effectiveness of the Convention mechanism is jeopardized, especially if taken into account that only a minor number of persons can have the status of a victim in similar cases and claim to be affected by the contested constitutional provisions.

24. In the present case, the Chamber decided to consider the case in terms of Article 46 of the Convention and thus the Judgment at issue in § 43, among others, states: "However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina."

25. The respondent party holds that the position of the Chamber, as expressed in § 43 of the Judgment, exceeds the jurisdiction of the Court, directly breaches the principles of subsidiarity and margin of appreciation, encroaching directly upon the sovereignty of a State Party to the Convention. In this Judgment, the Chamber fully assumed the role and competencies of the national authorities, concluding that eighteen years after the end of the war, there could no longer be any reason for the maintenance of the contested constitutional provisions, and stating that they consider that the time has come for a political system which will not grant special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina. This conclusion is in contravention of the very essence of the Dayton Peace Agreement which is exactly about granting special rights to constituent peoples, as a condition for the achievement and preservation of peace and stability in Bosnia and Herzegovina.

26. In this respect, the respondent party deems it important to reiterate that the current constitutional order of BiH was established by the Dayton Peace Agreement reached after one of the most destructive conflicts in the recent history of Europe. The nature of this conflict necessitated a compromise solution among the three constituent peoples, which was achieved by the drafting of the so-called Dayton Constitution. Provisions of the constitutional and electoral system of Bosnia and Herzegovina are justified and proportionate to the objective pursued, namely the establishment and preservation of peace in the country, through equal participation in power of the three constituent peoples. Also, in the *Sejdić and Finci v. Bosnia and Herzegovina* the Court held that there was no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and

Herzegovina and that the time might still not be ripe for a political system which would be a simple reflection of majority rule (see § 48 of the Judgment).

27. Amendments to the Constitution of BiH, as part of an international peace agreement, is inseparably linked to the post-war development of Bosnia and Herzegovina and the creation of a favourable political and social ambience and mutual trust between former warring parties. That said, the respondent party notes that historical circumstances under which the existing constitutional provisions were created must be taken into account, and particularly the fact that the division of offices in the state bodies between the constituent peoples is a central element of the Dayton Peace Agreement, whereby the four-year armed conflict was finally ended and replaced by peace. The existing solutions regarding the composition and the manner of election of members of the Presidency of BiH and delegates to the House of Peoples of the Parliamentary Assembly of BiH constitute a guarantee of equal representation in power for the three formerly warring parties, and presently the three constituent peoples. Any change of the existing constitutional arrangements, no matter how justified its objective may be, could disturb the hard-to-establish balance in power sharing between the three constituent peoples living in BiH, which indicates that an extremely sensitive and complex issue is at stake. Therefore, despite the efforts of the national authorities supported by the international community, no common position has been reached on the proposed constitutional amendments and modifications to the tripartite structure, envisaged as the guarantor preventing the predominance of any constituent people in BiH in the decision-making process.

28. Amendments to the contested provisions of the Constitution of BiH are inevitably conditioned by the development of the political and social relations, creation and maintenance of trust among the peoples of Bosnia and Herzegovina and reaching a political consensus, which constitutes a normal process in any country Member State of the Council of Europe. This natural process cannot be substituted by the application of Article 46 of the Convention in the manner as done in the Judgment at issue.

29. Respondent party recalls that despite the fact that the subsidiarity principle is firmly incorporated into the Convention supervisory system and the Convention case law as developed by the European Court, the third High Level Conference on the Future of the European Court of Human Rights held in April 2012 in Brighton, United Kingdom, concluded that for the purpose of transparency and accessibility, a reference on the subsidiarity principle, as developed in the Court's case law should be included in the Preamble to the Convention. The Brighton Declaration (2012) highlighted that the Convention system is subsidiary to the protection of human rights at the national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The principle of subsidiarity must be applied so that the States Parties may choose how to fulfil their obligations under the Convention (§§ 11 and 29b of the Declaration).

30. In addition, the Brighton Declaration repeatedly states that "the jurisprudence of the Court makes clear that the State Parties enjoy margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and

freedoms engaged". The margin of appreciation goes hand in hand with supervision under the Convention system, and the Court must "have due regard" to it (§ 11 of the Declaration) that is, it must give great prominence to this doctrine and apply it consistently in its judgments (§12a of the Declaration). The Brighton conference concluded that, for the purpose of transparency and accessibility, a reference on the subsidiarity principle, as developed in the Court's case law should be included in the Preamble to the Convention.

31. The position of the Chamber, as expressed in § 43 of the Judgment at issue, directly encroaches into the sovereignty of the country and is in direct contradiction to the Brighton Declaration which gives special attention and importance to the principles of subsidiarity and margin of appreciation. Pursuant to the Brighton Declaration, through Protocol 15, these two principles are included in the very Preamble to the Convention, which clearly demonstrates the significance of these two principles in the Convention's supervisory system. Should this Judgment by the Chamber become final, any State Party to the Convention will potentially be exposed to this kind of blatant breach of the subsidiarity and margin of appreciation principles and encroachment into the sovereignty of the state, in very sensitive and complex cases that concern the core of the constitutional and legal order and political system of States Parties to the Convention.

III CONCLUSION

32. In accordance with all of the foregoing, the respondent party submits that this case includes important issues that concern the interpretation and application of the Convention and its Protocols, as well as a serious issue of general interest, and therefore, this case merits review by the Grand Chamber of the Court.

33. Accordingly, the respondent party requests that a panel of five judges of the Grand Chamber admit this request and adopt a decision to refer this case to the Grand Chamber for their review.



Agent of the Council of Ministers of Bosnia and Herzegovina
Before the European Court of Human Rights

Monika Mijić



Broj: 01-07-3-825/16
Sarajevo, 04.10.2016.godine
(DG)

05 10 2016

BOSNA I HERCEGOVINA
MINISTARSTVO ZA LJUDSKA PRAVA I IZBJEGLICE
URED ZASTUPNIKA VIJEĆA MINISTARA
SARAJEVO
Ulica Džemala Bijedića 39/II

11-R-11/16 - 720/16

PREDMET: Obavijest

Veza: Vaš dopis broj: 11-R-11/16-710/16 od 3.10.2016.godine

U svezi Vašeg dopisa, gornje oznake i datuma, a kojim od Ureda za zakonodavstvo Vijeća ministara Bosne i Hercegovine tražite davanje mišljenja na prijedlog odgovora na zastupničko pitanje zastupnika gđin-a Damira Arnauta upućenog Uredu zastupnika Vijeća ministara Bosne i Hercegovine pred Europskim sudom za ljudska prava, želimo vas obavijestiti da Ured za zakonodavstvo nije u obvezi da daje mišljenja na odgovore na zastupnička pitanja iz nadležnosti drugih institucija.

Naime, suglasno poslovnim odredbama oba doma Parlamentarne skupštine Bosne i Hercegovine i Poslovnika o radu Vijeća ministara Bosne i Hercegovine, zastupnik gđin Damir Arnaut, putem Generalnog tajništva Vijeća ministara Bosne i Hercegovine, zatražio je odgovor na navedeno pitanje od Ureda zastupnika Vijeća ministara Bosne i Hercegovine.

S tim u svezi, potrebno je da sačinite prijedlog odgovora u potrebitom broju primjeraka suglasno vašoj nadležnosti, te isti dostavite Generalnom tajništvu Vijeća ministara Bosne i Hercegovine radi uvrštavanja i razmatranja na sjednici Vijeća ministara Bosne i Hercegovine.

S štovanjem,

Dostaviti:
-naslovu
-a/a.

