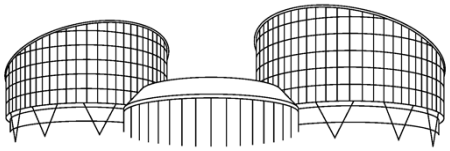

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF PILAV v. BOSNIA AND HERZEGOVINA

(Application no. 41939/07)

JUDGMENT

STRASBOURG

9 June 2016

FINAL

09/09/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Pilav v. Bosnia and Herzegovina,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Ganna Yudkivska, *President,*
Nona Tsotsoria,
Erik Møse,
André Potocki,
Síofra O'Leary,
Carlo Ranzoni,
Mārtiņš Mits, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 17 May 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 41939/07) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a citizen of Bosnia and Herzegovina, Mr Ilijaz Pilav ("the applicant"), on 24 September 2007.

2. The applicant was represented by Mr Dž. Sabrihafizović, a lawyer practicing in Sarajevo, and by Mr D. Arnaut, who was granted leave to represent the applicant under Rule 36 § 4 (a) of the Rules of Court. The Government of Bosnia and Herzegovina ("the Government") were represented by their Agent, Ms M. Mijić.

3. The applicant took issue, in particular, with the legal impossibility for him either to stand for election to the Presidency of Bosnia and Herzegovina or to vote for a member of his own community to this office. He relied on Article 1 of Protocol No. 12 to the Convention.

4. On 2 September 2013 the complaint concerning Article 1 of Protocol No. 12 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The judge elected in respect of Bosnia and Herzegovina, Mr Faris Vehabović, was unable to sit in the case (Rule 28 of the Rules of Court). Accordingly, the President of the Section decided to appoint Ms Nona Tsotsoria, the judge elected in respect of Georgia, to sit in his place (Rule 29 of the Rules of Court).

6. A joint submission was received by Minority Rights Group International, Human Rights Watch and Benjamin N. Cardozo School of

Law, which had been granted leave to intervene as third parties (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1964 and lives in Srebrenica, a town in the Republika Srpska (one of the two constituent Entities of Bosnia and Herzegovina[1]).

8. The applicant declares himself as Bosniac[2] (one of the country's "constituent peoples"). He actively participates in the social and political life of the country. The applicant is a member of the Party for Bosnia and Herzegovina (*Stranka za BiH;* "the BH Party") and a founding member of the Srebrenica Intellectuals' Club (*Klub Intelektualaca Srebrenice*).

9. He has held several elected and appointed political positions in the Republika Srpska. At the time of lodging his application to the Court, the applicant was a member of the National Assembly of the Republika Srpska.

10. In 2006, as a candidate of the BH Party, the applicant submitted his candidacy for the 2006 elections to the Presidency of Bosnia and Herzegovina.

11. On 24 July 2006 the Central Election Commission of Bosnia and Herzegovina ("*Centralna izborna Komisija Bosne i Hercegovine*"; "the CEC") rejected his candidacy. It explained that the applicant could not be elected to the Presidency from the territory of the Republika Srpska considering that he declared affiliation with Bosniacs. Pursuant to Article V of the Constitution and Article 8.1 § 2 of the Election Act 2001 the presidential candidate from that Entity must be a Serb.

12. On 1 August 2006 the CEC rejected the applicant's request for the reconsideration of that decision.

13. On 10 August 2006 the Court of Bosnia and Herzegovina rejected the applicant's further appeal. It held that the applicant's candidacy was in contravention of the Constitution and the Election Act 2001.

14. On 20 September 2006 the BH Party and the applicant lodged a constitutional appeal relying on Article 1 of Protocol No. 12 to the Convention. On 29 September 2006 the Constitutional Court of Bosnia and Herzegovina held that there had been no violation of that provision

[1] Bosnia and Herzegovina consists of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and Brčko District.

[2] Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

(decision no. AP 2678/06). The relevant part of the majority opinion reads as follows (the translation has been provided by the Constitutional Court):

> "...Therefore, the provision of Article 8 of the Election Law of Bosnia and Herzegovina, including Article V of the Constitution of Bosnia and Herzegovina, should be viewed in the light of the discretionary right of the State to impose certain restrictions when it comes to the exercise of individual rights. The said restrictions are justified by the specific nature of the internal order of Bosnia and Herzegovina that was agreed upon by Dayton Agreement and whose ultimate goal was the establishment of peace and dialogue between the opposing parties given that the said provision was intentionally incorporated into the Constitution so that the members of the Presidency come from amongst Bosniaks, Croats and Serbs.
>
> There is no dispute that the provision of Article V of the Constitution of Bosnia and Herzegovina, as well as the provision of Article 8 of the Election Act 2001, have a restrictive character in that they restrict the rights of citizens, namely the candidacy of Bosniacs and Croats from the territory of the Republika Srpska and the Serbs from the territory of the Federation of Bosnia and Herzegovina to stand for election as members of the Presidency of Bosnia and Herzegovina.
>
> However, the purpose of those provisions is to strengthen the position of the constituent peoples in order to ensure that the Presidency is composed of the representatives from these three constituent peoples. Taking into account the current situation in Bosnia and Herzegovina, the restriction imposed ... is justified at this moment since there is a reasonable justification for such reasoning.
>
> Therefore, given the current situation in Bosnia and Herzegovina and specific nature of its constitutional order as well as the current constitutional and statutory arrangements, the challenged decisions of the Court of Bosnia and Herzegovina and the Central Election Commission did not violate the appellants' rights under Article 1 of Protocol No. 12 to the European Convention and Article 25 of the International Covenant on Civil and Political Rights since the above-mentioned decisions are not arbitrary and are based on law. It means that they serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights are proportionate to the objectives of the general community in terms of preservation of the established peace, continuation of dialogue, and consequently the creation of conditions for amending the above-mentioned provisions of the Constitution of Bosnia and Herzegovina and Election Act 2001."

The relevant part of the concurring opinion of Judge Feldman reads as follows:

> "I agree that the special circumstances in which the Dayton Agreement was drafted and the needs of the time are capable of providing a rational and objective justification for treatment which would otherwise be discriminatory...Like Judge Grewe in her separate dissenting opinions....I regard the justification as being temporary rather than permanent, but I respectfully differ from Judge Grewe in thinking that the time has not yet arrived when the State will have completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina.
>
> However, I have another reason for joining the majority of the Constitutional Court in this case. Until the time (if it ever arrives) when Article V of the Constitution of Bosnia and Herzegovina is amended to remove the differential treatment of potential

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

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

The relevant part of the dissenting opinion of Judge Grewe, joined by Judge Palavrić, reads as follows:

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

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

precised by the Constitutional Court in case U 5/98 (Official Gazette of BiH, No. 36/00), stressing the equality of all constituent peoples in both entities and excluding in consequence the minority status of any constituent people in any entity.

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

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

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

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

15. On 5 July 2010 the applicant again submitted his candidacy to the CEC. On 29 July 2010 it was rejected for the same reasons as before.

II. RELEVANT DOMESTIC LAW

16. The relevant domestic law was outlined in *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, ECHR 2009).

Notably, the Constitution of Bosnia and Herzegovina makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs, Croats[3] and Serbs[4]) and "others" (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood or other reasons).

17. Only persons declaring affiliation with a "constituent people" are entitled to run for the House of Peoples (the second chamber of the State parliament) and the Presidency (the collective Head of State). The following are the relevant provisions of the Constitution:

Article V

"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.

...

2. **Procedures.**

...

(c) The Presidency shall endeavour to adopt all Presidency decisions (i.e. those concerning matters arising under Article V § 3 (a)-(e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two members when all efforts to reach consensus have failed.

(d) A dissenting member of the Presidency may declare a Presidency decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the member from that territory; to the Bosniac delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac member; or to the Croat delegates of that body, if the declaration was made by the Croat member. If the declaration is confirmed by a two-thirds vote of those persons

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[3] The Croats are an ethnic group whose members may be natives of Croatia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Croat" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Croatian", which normally refers to nationals of Croatia.

[4] The Serbs are an ethnic group whose members may be natives of Serbia or of other former component republics of the SFRY including Bosnia and Herzegovina. The expression "Serb" is normally used (both as a noun and as an adjective) to refer to members of the ethnic group, regardless of their nationality; it is not to be confused with "Serbian", which normally refers to nationals of Serbia.

within ten days of the referral, the challenged Presidency decision shall not take effect.

...

3. Powers. The Presidency shall have responsibility for:

(a) Conducting the foreign policy of Bosnia and Herzegovina.

(b) Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

(c) Representing Bosnia and Herzegovina in international and European organisations and institutions and seeking membership in such organisations and institutions of which Bosnia and Herzegovina is not a member.

(d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

(e) Executing decisions of the Parliamentary Assembly.

(f) Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

(g) Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

(h) Coordinating as necessary with international and non-governmental organisations in Bosnia and Herzegovina.

(i) Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities."

18. The relevant provision of the Election Act 2001 (*Izborni zakon*, Official Gazette of Bosnia and Herzegovina nos. 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06 and 32/07), which entered into force on 27 September 2001, reads as follows:

Article 8.1 (§§ 1-2)

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

The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of the Republika Srpska – one Serb, shall be elected by voters recorded in the Central Voters Register to vote in the Republika Srpska. Candidate who gets the highest number of votes shall be elected."

III. RELEVANT INTERNATIONAL DOCUMENTS

19. In becoming a member of the Council of Europe in 2002, Bosnia and Herzegovina undertook to "review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary" (see Opinion 234 (2002) of the Parliamentary Assembly of the Council of Europe of 22 January 2002, paragraph 15(iv)(b)). Thereafter, the Parliamentary Assembly of the Council of Europe has periodically reminded Bosnia and Herzegovina of this post-accession obligation and urged it to adopt a new constitution.

20. The Venice Commission, the Council of Europe's advisory body on constitutional matters, adopted a number of Opinions in this connection.

The Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (document CDL-AD(2005)004 of 11 March 2005) reads, in the relevant part, as follows:

> "1. On 23 June 2004 the Parliamentary Assembly of the Council of Europe adopted Resolution 1384 on 'Strengthening of democratic institutions in Bosnia and Herzegovina'. Paragraph 13 of the Resolution asks the Venice Commission to examine several constitutional issues in Bosnia and Herzegovina.
>
> ...
>
> ***2. Composition and Election of the Presidency***
>
> 67. Under the terms of Article V of the Constitution,
>
> *"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."*
>
> This means in particular that:
>
> • to be elected member of the Presidency a citizen has to belong to one of the constituent peoples;
>
> • the choice of the voters is limited to Bosniac and Croat candidates in the FBiH and Serb candidates in the RS; and
>
> • Bosniacs and Croats can be elected only from the territory of the FBiH and not from the RS, Serbs only from the RS and not from the FBiH.
>
> 68. In a federal State special arrangements ensuring an appropriate representation of the Entities within the federal institutions are unobjectionable. In principle, in a multi-ethnic State such as Bosnia it appears also legitimate to ensure that a State organ reflects the multi-ethnic character of society. The problem is however the way in which the territorial and the ethnic principle are combined.
>
> ...
>
> 69. If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume

that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests... It cannot be maintained that only Serbs are able and willing to defend the interests of the RS and only Croats and Bosniacs the interests of the Federation. The identity of interests in this ethnically-dominated manner impedes the development of a wider sense of nationhood.

70. Furthermore, members of the three constituent peoples can be elected to the Presidency but they may be prevented from standing as candidates in the Entity in which they reside if they live as Serbs in the Federation or as Bosniacs or Croats in the RS.

...

71. With respect to the ECHR it has to be taken into account that Art. 14 ECHR provides that "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."* A violation of this article can therefore only be assumed if the discrimination concerns a right guaranteed by the Convention. However, the ECHR does not guarantee the right to elect a President or be elected President. Article 3 of the (first) Protocol to the ECHR guarantees only the right to elect the legislature.

72. However, it has also to be taken into account that BiH has ratified Protocol No. 12 to the ECHR, which guarantees the enjoyment of any right set forth by law without discrimination. This Protocol will enter into force soon, on 1 April 2005, and the prohibition of discrimination will thereby be extended to cover the right to elect a President or stand for election as President.

...

76. This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the rules on the Presidency to make them compatible with international standards while maintaining the political balance in the country.

77. A multi-ethnic composition can be ensured in a non-discriminatory way, for example by providing that not more than one member of the Presidency may belong to the same people or the Others and combining this with an electoral system ensuring representation of both Entities. Or, as suggested above, as a more radical solution which would be preferable in the view of the Commission, the collective Presidency could be abolished and replaced by an indirectly elected President with very limited powers."

The Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina (CDL-AD(2006)004 of 20 March 2006), in the relevant part, provides:

"1. By letter dated 2 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to provide an Opinion on three different proposals for the election of the Presidency of this country. This request was made in the framework of negotiations on constitutional reform between the main political parties in Bosnia and Herzegovina. The issue of the election of the Presidency remains to be resolved in order to reach agreement on a comprehensive reform package.

...

Comments on Proposal I

8. Proposal I would consist of maintaining the present rules on the election and composition of the Presidency, with one Bosniac and one Croat elected from the territory of the Federation and one Serb elected from the territory of Republika Srpska. In its [Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] the Commission raised serious concerns as to the compatibility with Protocol No. 12 to the European Convention of Human Rights of such a rule, which formally excludes Others as well as Bosniacs and Croats from Republika Srpska and Serbs from the Federation from being elected to the Presidency. Maintaining this rule as it stands should therefore be excluded and Proposal I be rejected.

...

Comments on Proposal II

9. Proposal II, which is not drafted as text to be included in the Constitution but as a summary of possible constitutional content, maintains the system of directly electing two members of the Presidency from the Federation and one from Republika Srpska, however without mentioning any ethnic criteria for the candidates. The de jure discrimination pointed out in the Venice Commission Opinion would therefore be removed and adoption of this proposal would constitute a step forward. The Proposal also includes a rotation of the President of the Presidency every 16 months. Within the logic of a collective Presidency, this appears as a rational solution.

...

12. As a further drawback, *de facto* Bosniacs and Croats from the Republika Srpska and Serbs from the Federation would also continue to have no realistic possibility to elect a candidate of their preference.

13. Furthermore, the election of the Head of State would continue to take place on an Entity basis while it would be desirable to move it to the State level as part of the overall approach of strengthening the State.

...

18. Moreover, in an indirect election it is easier to devise mechanisms ensuring the desired pluri-ethnic composition of the Presidency. It offers more possibilities for inter-ethnic cooperation and compromise while direct elections for *de facto* separate ethnic slots provide an incentive to vote for the person considered as the strongest advocate of the respective constituent people and not for the candidate best suited to defend the interests of the country as a whole."

21. For a more detailed analysis of the relevant international documents see *Sejdić and Finci* (cited above, §§ 19-25).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

22. The applicant complained that a constitutional ban preventing him to stand for election to the Presidency on the grounds of his ethnic origin amounted to racial discrimination. He also submitted that he was prevented to vote for a member of his own ethnic community to that office.

The applicant relied on Article 1 of Protocol No. 12 to the Convention which reads as follows:

> "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."

A. Admissibility

1. The Government's objections as to admissibility

23. The Government submitted that Bosnia and Herzegovina could not be held responsible for the contested constitutional provisions because its Constitution was part of an international treaty, the Dayton Agreement.

The Government further argued that the applicant could not claim to be a "victim" of the alleged violation. Unlike the applicants in *Sejdić and Finci*, the present applicant, as a Bosniac, was not treated differently compared to members of other "constituent peoples". The territorial restriction in question applied to Serbs and Croats as well: Bosniac and Croat members of the Presidency were elected by voters in the Federation of Bosnia and Herzegovina, and a Serb member was elected by voters in the Republika Srpska. If he moved to the Federation of Bosnia and Herzegovina the applicant would enjoy his right to vote and to stand for election without restriction.

24. The applicant disputed these arguments. In particular, as regards the first objection, the applicant invited the Court to follow its ruling on this point in *Sejdić and Finci.* As regards the second objection, the applicant submitted that the Government's arguments addressed the merits of the case.

2. The Court's assessment

(a) Compatibility *ratione personae*

25. In *Sejdić and Finci*, cited above, the Court held that, leaving aside the question whether the respondent State could be held responsible for putting in place the contested constitutional provisions, it could nevertheless be held responsible for maintaining them (loc.cit., § 30; see also *Zorni v. Bosnia and Herzegovina*, no. 3681/06, § 16, 15 July 2014). The Court therefore rejects the Government's objection under this head.

(b) Victim status

26. The Court agrees with the applicant that the Government's second objection, concerning his victim status, goes to the heart of the issue whether the applicant has been discriminated against in violation of Article 1 of Protocol No. 12. It would thus be more appropriately examined at the merits stage. The Court therefore joins the question of the applicant's victim status to the merits of the case.

3. Conclusion

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

28. The applicant submitted that, in principle, in a multi-ethnic state such as Bosnia and Herzegovina it could be considered legitimate to ensure that a State body reflects the multi-ethnic character of the society. The problem was however the way in which the territorial and ethnic principles were combined. The applicant was faced with two options: to move to the Federation of Bosnia and Herzegovina thereby giving up the possibility to serve his community in the Republika Srpska, or to accept a status of second-class citizen in the Republika Srpska.

29. The applicant further submitted that the complete exclusion of all Bosniacs living in the Republika Srpska from the opportunity to stand for election for the Presidency constituted a complete impairment of the "very essence" of the right to do so as the very essence of that right was inclusion. As a result of limiting the candidate pool on an election roll in a multi-ethnic territorial unit to members of a certain ethnic group or groups, the right in question was deprived of its effectiveness as no member of any other ethnic group residing in that unit would ever be in a position to

exercise that right. The Government's argument that the applicant could move to the Federation led directly to further exclusion. The freedom of movement that the Government invoked as a way of obtaining the right to vote and stand for election to the Presidency would thus become an almost compulsory measure. All non-Serb residents of the Republika Srpska would in effect be told that they had to move if they wanted to exercise that right.

30. In the applicant's view, the Government's argument that he had not been completely excluded from the political process since he could participate in local, entity and State elections (for the House of Representatives of the State parliament), completely ignored the *Sejdić and Finci* judgment. The applicant maintained that there was no difference between him and the applicants in that case with respect to exercising those other political rights, as the exclusion in his case was also based on his ethnic origin. He had been treated differently in comparison with Serbs living in the Republika Srpska. Moreover, the Presidency had an important power toward the entities. Namely, each member of the Presidency had a veto right whenever there was a violation of a vital interest of the Entity from which he or she was elected. The applicant argued that it could not be maintained that only Serbs were able and willing to defend the interests of the Republika Srpska and only Croats and Bosniacs those of the Federation.

2. The Government's submissions

31. The Government referred to the case of *Ždanoka v. Latvia* ([GC], no. 58278/00, ECHR 2006-IV), in which the Court had reaffirmed that the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State. The current constitutional structure in Bosnia and Herzegovina was established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups, the "constituent peoples".

32. The Government submitted that the applicant had not been entirely deprived of his right to vote and stand for elections and invited the Court to distinguish this case from *Sejdić and Finci*. The applicant's rights, while restricted, were not restricted to the extent of impairing their very essence. The impugned measures, while restrictive, were not discriminatory because they had an objective and reasonable justification: they served a legitimate aim - namely the establishment and preservation of peace in Bosnia and Herzegovina – and were reasonably proportionate to that aim.

33. Furthermore, the applicant had not suffered discrimination because the contested constitutional provisions applied equally to all the "constituent

peoples". The difference in treatment between the applicant and the Serbs from the Republika Srpska was justified in the particular circumstances by the need to preserve peace and to facilitate a dialogue between different ethnic groups. The applicant could vote for a Serb member of the Presidency.

34. The Government further submitted that the right to liberty of movement and residence was guaranteed under the Constitution of Bosnia and Herzegovina. Therefore, the applicant could change his residence at any time. This precondition for the right to stand for election to the Presidency did not place an excessive burden on the applicant. Moreover, the applicant could participate in politics of the Republika Srpska. He was a member of its National Assembly and as such had the possibility to protect the interest of his ethnic community.

3. The third parties' intervention

35. The third-party interveners submitted that it was a fundamental pillar of international law that individuals should be able to express freely their opinions and participate in the governance of the countries in which they live through a non-discriminatory electoral system. Relying in particular on Articles 25 and 2(1) of the International Covenant on Civil and Political Rights ("ICCPR") and Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), they submitted that there could be no justification for the ethnic-based restriction on the right to stand for elections. This must apply to all such restrictions, even where limited to a specific geographical area within the country.

36. Furthermore, the ability to freely exercise one's right to vote is a pillar of the modern concept of citizenship in a democratic society. The importance of this right in conjunction with the prohibition of discrimination on the basis of ethnic background was recognised not only by the Convention but by a myriad of other international agreements and treaties, including, *inter alia*, the Universal Declaration of Human Rights, the ICCPR, the ICERD and the Charter of Fundamental Rights of the European Union. It was a well-established principle of international law that universal suffrage and fair and free elections were the cornerstone of democracy based upon the consent of the people.

37. Article 15 of the Framework Convention for the Protection of National Minorities recognised that the effective participation of individual members of national minorities in various areas of public life was essential to ensure social cohesion and the development of a truly democratic society. A voting structure with inequalities based on ethnic background was contrary to the need to protect the rights of ethnic groups, which was paramount. Without the freedom to vote for members of one's own ethnicity, voters were effectively forced to vote only according to prescribed ethnic lines. While there could be good reasons to structure a government

taking into consideration representation of various ethnicities, voting laws that incentivised members of ethnic groups to move from their communities in order to vote treated their votes as worth less than those of other groups.

4. The Court's assessment

38. The Court has already found in *Sejdić and Finci* that Article 1 of Protocol No. 12 is applicable to elections to the Presidency of Bosnia and Herzegovina (ibid., § 54).

39. Discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among many authorities, *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (ibid., § 82).

40. The Court further reiterates that the same term "discrimination" from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court sees no reason to depart from the settled interpretation of "discrimination", as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12 (see *Sejdić and Finci*, cited above, § 55; *Ramaer and Van Willigen v. the Netherlands* (dec.), no. 34880/12, 23 October 2012, §§ 88 – 91; and *Zornić*, cited above, § 27).

41. The Court observes that in accordance with the Constitution of Bosnia and Herzegovina only persons declaring affiliation with a "constituent people" are entitled to stand for election to the Presidency, which consists of three members: one Bosniac and one Croat, each directly elected from the Federation of Bosnia and Herzegovina, and one Serb directly elected from the Republika Srpska. The applicant, a Bosniac living in the Republika Srpska is as a result excluded.

42. A similar constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 1 of Protocol No. 12 in *Sejdić and Finci*, which concerned the inability of the applicants, of Roma and Jewish origin respectively, to stand for election to the Presidency (cited above, § 56). In *Zornić*, which concerned an applicant who did not declare affiliation with any of the "constituent people" but declared herself as a citizen of Bosnia and Herzegovina, the Court reached the same conclusion as regards her inability to stand for election to the Presidency (cited above, §§ 36-37 and § 43).

43. The present applicant, unlike the applicants in the judgments cited above, belongs to one of the "constituent people". The Government argued that, that being the case, the applicant has not been entirely deprived of his right to vote and stand for election to the Presidency, and invited the Court to distinguish this case from *Sejdić and Finci*. The Court observes that the applicant, as one of the "constituent people", has a constitutional right to participate in elections to the Presidency. However, in order effectively to exercise this right he is required to leave his home and move to the Federation of Bosnia and Herzegovina. Therefore, while, unlike the applicants in *Sejdić and Finci*, the present applicant is theoretically eligible to stand for election to the Presidency, in reality, as long as he lives in the Republika Srpska he cannot use this right.

44. The Court recalls that, in relation to cases concerning Article 3 of Protocol No. 1, it has found that a residence requirement was not disproportionate or irreconcilable with the underlying purposes of the right to free elections (see, for example, *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999 VI, and *Ali Erel and Mustafa Damdelen v. Cyprus* (dec.), no. 39973/07, 14 December 2010). These cases illustrate that enjoyment of the right to vote and to stand for election may depend on the nature and degree of the links that existed between the individual applicant and the legislature of the particular country. Relevant considerations include (1) the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country's day-to-day problems; (2) the impracticality and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living elsewhere so as to secure the free expression of opinion; (3) the influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes; and (4) the correlation between one's right to vote in parliamentary elections and being directly affected by the acts of the political bodies so elected (see *Melnychenko v. Ukraine*, no. 17707/02, §§ 56-57, ECHR 2004-X).

45. Unlike the applicants in *Ali Erel and Mustafa Damdelen* and *Hilbe*, cited above, who did not have permanent residence in Cyprus and Liechtenstein, respectively, and therefore did not satisfy the residence requirement, the present applicant lives in Bosnia and Herzegovina. In that connection, the Court observes that the Presidency of Bosnia and Herzegovina is a political body of the State and not of the Entities. Its policy and decisions affect all citizens of Bosnia and Herzegovina, whether they live in the Federation, the Republika Srpska or Brčko District. Therefore, although the applicant is involved in political life in the Republika Srpska (see paragraph 9 above), he is also clearly concerned with the political activity of the collective Head of State.

46. While it is true that the residence requirement in question applies to all the "constituent peoples" equally, as rightly argued by the Government, the Court notes that the applicant complains that he was treated differently than Serbs living in the Republika Srpska. The Government submitted that this difference in treatment was justified by the need to maintain peace and to facilitate a dialogue between different ethnic groups. The Court recalls that the same justification had already been examined in *Sejdić and Finci,* where it was noted that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (ibid., § 45). The Court held in particular (ibid. § 48):

> " ...while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009)."

47. Moreover, in *Zornić* (cited above, § 43) the Court noted:

> "In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing" (see ibid., § 45). The nature of the conflict was such that the approval of the "constituent peoples" was necessary to ensure peace (ibid.). 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."

48. The present applicant, although he belongs to one of the "constituent peoples", is excluded from election to the Presidency as a result of the impugned residence requirement. Notwithstanding the differences with *Sejdić and Finci*, the Court considers that this exclusion is based on a combination of ethnic origin and place of residence, both serving grounds of distinction falling within the scope of Article 1 of Protocol No. 12 (see, *mutatis mutandis*, *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 70 and 71, ECHR 2010), and as such amounts to a discriminatory treatment in breach of Article 1 of Protocol No. 12.

49. Accordingly, the Court rejects the Government's objection as regards the applicant's victim status (see paragraph 26 above), and finds that

there has been a violation of Article 1 of Protocol No. 12 as regards the present applicant's ineligibility to stand for election to the Presidency.

50. In view of this conclusion, the Court considers that it is not necessary to examine separately whether there has also been a violation of Article 1 of Protocol No. 12 as regards the applicant's complaint that he was unable to vote for a member of his own ethnic community to that office.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

52. The applicant claimed 185,581 euros (EUR) in respect of pecuniary damage, which was based on the salary of a member of the Presidency which he would have received had he been elected to that post in 2006 and 2010. He also sought EUR 20,000 in respect of non-pecuniary damage.

53. The Government maintained that the claims were unjustified.

54. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. With regard to non-pecuniary damage, the Court considers, in the light of all the circumstances of the case, that the finding of a violation constitutes sufficient just satisfaction in the circumstances of the present case (see *Sejdić and Finci*, cited above, § 63).

B. Costs and expenses

55. The applicant also claimed EUR 6,607 for the costs and expenses incurred before the domestic courts and before the Court.

56. The Government maintained that the above claims were unnecessarily incurred and excessive.

57. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the requested sum of EUR 6,607 covering costs under all heads, plus any tax that may be chargeable to the applicant on that amount.

C. Default interest

58. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objection regarding the applicant's lack of victim status and *rejects* it after considering the merits;

2. *Declares* the application admissible;

3. *Holds* that there has been a violation of Article 1 of Protocol No. 12 to the Convention;

4. *Holds* that there is no need to examine separately the applicant's complaint under Article 1 of Protocol No. 12 concerning his inability to vote for a member of his own ethnic community to the Presidency;

5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;

6. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,607 (six thousand six hundred and seven euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Ganna Yudkivska
President