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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

OPINION

ON

**CERTAIN QUESTIONS RELATING TO THE FUNCTIONING OF THE
CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**

**Adopted by the Venice Commission
at its 138th Plenary Session
(Venice, 15-16 March 2024)**

on the basis of comments by

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I. Introduction

1. By letter of 19 January 2024, the President of the Constitutional Court of Bosnia and Herzegovina requested an opinion of the Venice Commission on eight questions relating to the functioning of the Constitutional Court.

2. Ms Jana Baricová, Mr Paolo Carozza, Mr Christoph Grabenwarter, Ms Hanna Suchocka and Mr Kaarlo Tuori acted as rapporteurs for this Opinion.

3. On 21 February 2024, Mr Carozza, Ms Suchocka and Mr Tuori, together with Ms Tania van Dijk and Mr Domenico Vallario from the Secretariat, held online meetings with the Constitutional Court of Bosnia and Herzegovina, the Office of the High Representative and representatives of the European Union delegation in Bosnia and Herzegovina and DG-NEAR, as well as with several academics. The Venice Commission regrets that the rapporteurs did not have the opportunity to meet online with members of the National Assembly of Republika Srpska and the House of Representatives of the Federation of Bosnia and Herzegovina to discuss these issues in greater depth. The Commission is grateful to the Council of Europe Office in Sarajevo for the excellent organisation of the online meetings.

4. This Opinion was prepared in reliance on an English translation of the current Rules of the Constitutional Court, which may not accurately reflect the original version on all points.

5. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 21 February 2024. Following its examination at the joint meeting of the Sub-Commissions on Rule of Law and Constitutional Justice (Venice, 14 March 2024), the Opinion was adopted by the Venice Commission at its 138th Plenary Session (Venice, 15-16 December 2024).

II. Background

6. The Constitution of Bosnia and Herzegovina provides that “*The Constitutional Court of Bosnia and Herzegovina shall have nine members*” (Article VI(1) of the Constitution). Out of those nine members, six members are selected by the legislatures of the country’s two entities: four by the House of Representatives of the Federation of Bosnia and Herzegovina (FBiH) and two by the Assembly of Republika Srpska (RS) (Article VI(1)(a) of Constitution). The remaining three members are selected by the President of the European Court of Human Rights (ECtHR) after consultation with the Presidency of Bosnia and Herzegovina (Article VI(1)(a) of Constitution). It is furthermore provided that judges of the Constitutional Court “*shall serve until the age of 70, unless they resign or are removed for cause by consensus of the other judges*” (Article VI(1)(d) of the Constitution).

7. It is noted that Bosnia and Herzegovina does not have a law on the Constitutional Court, while the Constitution itself also does not provide for the institution of organic laws. Other than providing that “*(...) the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights*” (Article VI(1)(d) of the Constitution), the Constitution does not expressly confer power upon the Parliamentary Assembly to further regulate the organisation, powers of and procedure before the Constitutional Court. Instead, the Constitution provides that “*The Court shall adopt its own rules of court by a majority of all members*” (Article VI(2)(b) of the Constitution).¹

¹ According to these Rules, the Court has Plenary sessions, comprising all judges of the Court (Article 9 of the Rules), Grand Chamber sessions comprising only domestic judges (Article 10 of the Rules) and Chamber sessions, comprising the President of the Court and two Vice-Presidents from among domestic judges, which decides by unanimity on interim measures and administrative measures (Article 12 of the Rules). Decisions in the Plenary and Grand Chamber sessions require a majority of all the judges (Article 9 and 10 of the Rules).

8. Following the retirement (in August 2022) of a judge selected by the House of Representatives of FBiH, and respectively the retirement (in November 2022) and resignation (as of January 2024) of the two judges selected by the National Assembly of RS, and the failure of the House of Representatives of FBiH and the National Assembly of RS to fill these vacancies, the Constitutional Court currently has only six serving judges: three domestic judges appointed by the FBiH and three international judges appointed by the President of the ECtHR. These remaining three domestic judges are set to retire respectively in November 2024, December 2025 and October 2026 upon reaching the age of 70.

9. The reasons behind the failure of the legislatures of the FBiH and RS to fulfil their constitutional obligations to select judges to the Constitutional Court are of a political nature. Since the retirement of the judge appointed by the FBiH in August 2022, the authorities of the FBiH have failed to reach political agreement on a new appointment. As regards RS, actions taken so far demonstrate intentional obstruction of the Constitutional Court.² Following the refusal in the first half of 2023 to fill the vacancy left by the retirement of one judge appointed by RS and pressure placed on the one remaining judge appointed by RS to leave his post³, the Constitutional Court changed its Rules on 19 June 2023, allowing it to make decisions even if a judge appointed by RS (or three judges elected by the FBiH) would not be present.⁴ Thereafter, on 27 June 2023, following an emergency procedure, the RS National Assembly adopted a law on the non-application of decisions of the Constitutional Court of Bosnia and Herzegovina on the territory of RS (and on the non-publication of decisions of the High Representative).⁵ On 1 July 2023, the High Representative invalidated this Law.⁶

10. The failure of the authorities of the FBiH and RS to fill the vacancies has seriously hampered the functioning of the Constitutional Court. The Grand Chamber (comprising the six domestic judges and hearing cases falling under the “appellate jurisdiction”) is no longer functional, which has considerable consequences for the efficiency of the Court. During the on-line meetings, the Venice Commission rapporteurs were informed that, as of 21 February 2024, there were 7,902 pending cases before the Constitutional Court. This renders access to constitutional justice excessively lengthy, and risks violating Article 6 of the European Convention on Human Rights (ECHR) when this applies⁷, while also jeopardising the effectiveness and credibility of the judicial

² The authorities of RS condition the appointment of judges from RS to the Constitutional Court on the passing of a law on the Constitutional Court of Bosnia and Herzegovina. This law would reportedly terminate the mandate of international judges and provide for three judges from each of the constituent nations (three judges from RS and six from the FBiH) to sit on the Court, with decisions of the Court only being valid if there is at least one representative of each of constituent peoples being part of the decision-making process). In this context, the Venice Commission recalls that it has already determined that “a rule requiring that decisions of the BiH Constitutional Court would be valid only if at least one judge from each constituent people supported the decision would run counter to European standards” (Venice Commission, [CDL-AD\(2005\)039](#), Opinion on proposed voting rules for the Constitutional Court of Bosnia and Herzegovina), para. 24.

³ In a [statement](#) of 16 June 2023, the Venice Commission urged the National Assembly of RS to withdraw its call for the resignation of one of the judges appointed by RS, describing it as contrary to the guarantee of the independence of the Court.

⁴ Constitutional Court of Bosnia and Herzegovina, [Decision](#) on amendments to the Rules of the Constitutional Court of Bosnia and Herzegovina (19 June 2023).

⁵ The adoption of this Law was severely criticised by the international community. See *inter alia* the [statement](#) of the Secretary General of the Council of Europe on this, and the [reaction](#) of the UN Special Rapporteur on the independence of judges and lawyers.

⁶ [Decision](#) Preventing the Entry into Force of the Law on Non-application of Decisions of the Constitutional Court of Bosnia and Herzegovina (1 July 2023).

⁷ For the applicability of Article 6, para. 1, ECHR to individual proceedings before the Constitutional Court of Bosnia and Herzegovina, see for example: ECtHR, [Pinkas and others v. Bosnia and Herzegovina](#), no. 8701/21, 4 October 2021, paras. 36-39.

system.⁸ Under the ECHR, States are bound to undertake promptly the necessary legislative, organisational or other measures to avoid excessively lengthy judicial proceedings.⁹

11. Against this background and in recognition of the fact that, if no further actions are undertaken, already in 2025, the Constitutional Court will no longer be quorate (on the quorum see below section III(A)), the President of the Constitutional Court requested an opinion of the Venice Commission on eight questions related to the functioning of the Constitutional Court. In replying to these questions, the Venice Commission recognises that the root cause of the current crisis is essentially of a political nature. Respect for the fundamental democratic principle of separation of powers requires that no branch of power, whether at state or entity level, should be permitted, by way of deliberate inaction or mere incapability to act, to block the functioning of another branch of power and hold constitutional institutions hostage to political demands. Ensuring the functioning of the Constitutional Court is a fundamental constitutional interest and a vital presupposition for the implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina. It is through this prism that the Venice Commission will address the technical aspects of this crisis.

III. Questions of the Constitutional Court

12. This Opinion focuses on the questions posed by the President of the Constitutional Court in her letter of 19 January 2024, namely:

- (1) In a situation in which the political authorities deliberately block the election of new judges to the Constitutional Court of BiH in order to render the Constitutional Court unable to function, what measures could be taken to ensure that the Constitutional Court can continue to function?;
- (2) Would the appointment of *ad hoc* judges be permissible in this constitutional emergency situation?;
- (3) Who could make this appointment [of *ad hoc* judges] in the constitutional system of BiH?;
- (4) In the event of appointment of *ad hoc* judges, would the work of the Constitutional Court continue to be in accordance with the Constitution of BiH and legitimate?;
- (5) Would it be in violation of Article VI(1)(c) of the Constitution of BiH for the current national judges, who under the cited article can serve until the age of 70, to remain in office until the appropriate authorities fulfil their constitutional obligations and appoint the new judges?;
- (6) If the term of the current judges is extended, would the work of the Constitutional Court continue to be in accordance with the Constitution of BiH and legitimate? Would it be in line with the Constitution of BiH if the Constitutional Court were to stipulate such a possibility in its Rules that are adopted pursuant to Article VI(2)(b) of the Constitution of BiH?;
- (7) Briefly, could and [if so,] how [would] similar practices at the European level (e.g. the European Court of Human Rights) be used at the national level in order to overcome the political blocking of the work of the Constitutional Court of BiH?;

⁸ ECtHR, [Scordino v. Italy \(No 1\) \[GC\]](#), no. 36813/97, 29 March 2006, para. 224.

⁹ ECtHR, [Bieniński v. Poland](#), no. 48762/19, 21 July 2022, para. 44.

- (8) In view of the previous opinions of the Venice Commission on similar issues in other member states of the Council of Europe and pointing to a need for the existence of anti-blocking and anti-deadlock mechanisms in the event of impossibility of reaching a political compromise (see, among others, [CDL-AD\(2016\)001](#), Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland), what unblocking mechanisms could be applied in BiH?

IV. Analysis

13. The questions posed by the President of the Constitutional Court are interrelated. For reasons of practicality, after replying to question 1, which focuses to a large extent on the measures the Constitutional Court can itself take to ensure that it can continue to function, questions 2-4 on *ad hoc* judges will be taken together, as will questions 5 and 6 on the extension of the term in office of current judges, and questions 7 and 8 on the use of similar practices at the European level and anti-deadlock mechanisms.

A. Possible measures to be taken (Question 1)

14. When it comes to measures that could be taken to ensure that the Constitutional Court can continue to function, the Venice Commission notes that the provisions of the Constitution regulating the Constitutional Court are very concise. Article VI briefly regulates the powers and jurisdiction of the Court (paragraph 3), its composition (paragraph 1) and minimal aspects of its procedure (paragraph 2), leaving it up to the Court to regulate remaining issues in its Rules, which require a majority of all members to be adopted (and, by analogy, to be amended). There are thus a few measures that can be adopted by the Court itself this way.

15. The most obvious measure is to move most powers of the Grand Chamber (comprising domestic judges only and currently not functional) to the Plenary. The Venice Commission is aware of the logistical constraints and financial implications of this solution, in that international judges do not sit full-time on the Court and all documents pertaining to pending cases would need to be translated. It nevertheless considers that there is further room for manoeuvre in having more decisions taken by the Plenary (especially given the relative financial independence of the Court and the tools available nowadays for high-quality automated translations). From the on-line meetings, the Venice Commission understands that the Constitutional Court has already increased the frequency of its Plenary sessions from once every two months to once every month, which is a good start.

16. Furthermore, questions have been raised about the interpretation of the constitutional provision on the (attendance) quorum. Most European legal systems with a specialised constitutional court have attendance quorums (which often exceed the simple majority of judges of the court).¹⁰ In most cases, the legal provisions are clear on this, either stipulating the exact number of judges making up the attendance quorum or allowing this to be deduced from the context. In Bosnia and Herzegovina, Article VI(2)(a) of the Constitution provides that a “*majority of all members of the Court shall constitute a quorum*”. The stipulation “*all members of the Court*” has been interpreted by the Constitutional Court as meaning all nine members of the Court (whether or not all nine seats are in fact occupied or vacant), rather than all those who have been appointed at any given moment (e.g. currently six members). As the Venice Commission has previously made clear, it is not within its mandate to provide interpretations of national constitutional norms: This is for the Constitutional Court itself to do. The Venice Commission can

¹⁰ See for a comparative overview of attendance quorums: Venice Commission, [CDL-AD\(2016\)001](#), Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, para. 69-71.

only offer its advisory opinion, based on a comparative analysis. With this caveat in mind and while noting the ambiguity of the provision in question¹¹, the Venice Commission supports the interpretation that the Constitutional Court has given to the quorum requirement. It is in line with previous Venice Commission Opinions in similar cases,¹² and similar constitutional provisions (with corresponding interpretations) exist in other countries.¹³

17. Regarding the majority needed for taking decisions, the Venice Commission notes that the Constitution is silent on this. Its stipulation on the quorum for attendance in Article VI(2)(a) only requires that a majority of all members be *present* for the Court to adopt its decisions. Moreover, Article VI(2)(b) provides only that the Rules of Court shall be adopted by a majority of all members. Provisions on the majority needed for taking decisions are outlined in the Rules. Article 42, paragraph 4 of the Rules of the Court prescribes “*A decision of the Constitutional Court sitting as a Plenary Court or as a Grand Chamber shall be taken by the majority of votes of the total of nine judges of the Constitutional Court*”.¹⁴ In view of the Venice Commission, such a strict requirement, which introduces a qualified majority in case of any formation other than the full nine, would not be necessary. In this context, it also considers that the smaller the composition of the Constitutional Court, the more difficult it will be for an applicant to obtain a decision on the merits of the case.¹⁵ Provided that there is an attendance quorum for taking decisions, in case of prolonged political inaction in appointing judges, the Rules could justifiably prescribe that decisions (other than those amending the Rules of Court) are adopted by a simple majority of those appointed to the Court or those present in the Plenary or Grand Chamber.¹⁶ The Venice Commission is aware that changing the Rules of the Court in this respect will nevertheless provide limited respite, as in the absence of the judges appointed by RS, there will be no attendance quorum in the Grand Chamber in its current formation.

18. During the on-line meetings the participants requested the Commission also to look into experiences of the ECtHR as regards single-judge formations (for admissibility decisions) or three-judge committees (for admissibility decisions or decisions on applications which *prima facie* concern well-established case-law). The Venice Commission recalls that the competencies of single-judge formations and three-judge committees are prescribed by the Convention

¹¹ The Venice Commission notes that in other provisions of the Constitution which refer to a quorum, there is no such ambiguity. Article IV (2) (b) of the Constitution in respect of the Parliamentary Assembly makes it explicit that it refers to elected members only, by providing “*A majority of all members elected to the House of Representatives shall comprise a quorum*”. By contrast, Article IV (1) (c) of the Constitution makes this numerically explicit: “*Nine members of the House of Peoples shall comprise a quorum (...)*”.

¹² Venice Commission, [CDL-AD\(2022\)019](#), Republic of Moldova - Opinion on the draft law on amending some normative acts (Judiciary), paras. 48-49.

¹³ A similar interpretation was followed in the case of the Constitutional Court of Montenegro, which according to Article 151 of the Constitution decides by majority vote of all judges and became paralysed when the departure of four of its seven members (and the lack of election of judges to the Constitutional Court) left it with only three members. See Venice Commission, [CDL-AD\(2022\)053](#), Montenegro – Urgent Opinion on the Law on Amendments to the Law on President, para. 17 and further. Similarly, as regards the Constitutional Court of Albania, the Constitution prescribes that the Constitutional Court makes its final decision by the majority of all its members (Article 133, paragraph 2). For nearly two years, until November 2019, the Court only had one member out of nine. As of November 2019, it had four members, but it remained to a large extent non-operational because it requires a quorum of six members to sit in plenary. See: [CDL-AD\(2020\)10](#), Albania – Opinion on the appointment of judges to the Constitutional Court, para. 66.

¹⁴ In addition, Article 9, paragraph 2 of the Rules provides that “*The Constitutional Court shall take decisions sitting in the plenary session, by a majority of votes of all the judges of the Constitutional Court (...)*”. Similarly, Article 10, paragraph 3 of the Rules provides that “*The Grand Chamber shall take decisions, by a majority of votes of all the judges of the Constitutional Court (a minimum of five judges) (...)*”.

¹⁵ While in this respect Article 42, paragraph 5 of the Rules (which prescribes that, in the event that there are less than the total of nine judges taking part in the decision-making of the Court and a majority of five votes cannot be reached, the case can be adjourned and if at that later point in time the same situation occurs again, the vote of the President will count for two) may allow for some respite, with an ever smaller number of judges at the Court, it will be increasingly difficult to reach any decision, even if this paragraph would be applied.

¹⁶ This would be in line with the reasoning behind the point made in the report of the Venice Commission, [CDL-STD\(1997\)020](#), The Composition of Constitutional Courts (p. 22), that “*In case of prolonged inaction by this authority [i.e. the appointing authority], the quorum required to take decisions could be lowered*”.

(respectively Article 27 and 28 ECHR) and not in the ECtHR's Rules of Court. Given the explicit stipulation on the attendance quorum in Article VI(2)(a) of the Constitution of Bosnia and Herzegovina and in the absence of any further openings provided in the Constitution for decisions to be taken by formations of fewer judges than the prescribed quorum, the Venice Commission would not recommend for the Constitutional Court to establish single-judge formations for admissibility decisions or three-judge panels for well-established case-law.¹⁷

B. *Ad hoc* judges (questions 2-4)

19. A second issue to be examined is the appointment of *ad hoc* judges. At the European level, Rule 29 of the Rules of the ECtHR envisages the appointment of *ad hoc* judges, in the absence of a judge of a contracting party, even if the ECHR does not explicitly foresee such a possibility.¹⁸ In these cases, the President of the Chamber appoints an *ad hoc* judge from a list of up to five persons submitted in advance by the contracting party. If the contracting party has not supplied such a list of persons or the President of the Chamber finds that less than three persons on this list satisfy the conditions, the President of the Chamber can appoint another elected judge to sit as an *ad hoc* judge.¹⁹ This latter option would however not provide a solution for the Constitutional Court of Bosnia and Herzegovina given the overall shortage of appointed judges.

20. It is noted that few Venice Commission member states provide for the possibility of appointing *ad hoc* judges to constitutional courts: in Austria, the Constitutional Court benefits from a system of substitute judges in order to safeguard the proper functioning of the Court, a possibility that is explicitly provided for by the Constitution (Article 147); in Chile, the appointment of two substitute judges is provided by law; and in Liechtenstein, a system of alternate judges has been established by law.²⁰ Given the limited number of examples, the Venice Commission cannot say that there is a common European or other standard on the appointment of *ad hoc* judges to constitutional courts.

21. Notwithstanding the absence of a common European standard, the serious situation in which the Constitutional Court of Bosnia and Herzegovina now finds itself would warrant the

¹⁷ The Venice Commission is aware that the Constitutional Court of Bosnia and Herzegovina has a three-judge chamber (Article 12 of the Rules). This Chamber however only decides on interim measures and administrative issues, in as far as these are not dealt with by the Plenary or Grand Chamber.

¹⁸ Rule 29 of the [Rules of the Court](#) (ECtHR) *inter alia* provides "1. (a) *If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall appoint an ad hoc judge, who is eligible to take part in the consideration of the case in accordance with Rule 28, from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as ad hoc judges for a renewable period of four years and as satisfying the conditions set out in paragraph 1 (c) of this Rule. (...)*"

¹⁹ Rule 29, paragraph 2 of the Rules of the Court. This was for example done in recent ECtHR cases involving the Russian Federation (e.g. ECtHR, [Ukraine and the Netherlands v. Russia \(dec.\) \[GC\]](#), nos. 8019/16, 43800/14 and 28525/20, 30 November 2022, paras. 37-40; [Kutayev v. Russia](#), no. 17912/15, 24 January 2023, paras. 7-9, and [Svetova and Others v. Russia](#), no. 54714/17, 24 January 2023, paras. 10-12, but also for example in a recent case involving Poland ([Waleśa v. Poland](#), no. 50849/21, 23 November 2023).

²⁰ The Constitutional Court of Austria has in total six substitute members, who are summoned to attend if a member of the Constitutional Court is prevented from attending (Article 6, paragraph 2 of the Federal Law of Austria on the Constitutional Court). The Constitutional Court of Chile has two substitute judges appointed by the President of the Republic, who may replace judges in the Plenary or chamber session if the respective quorums required to hold a session have not been reached (Article 18 of the Constitutional Organic Law on the Constitutional Court). The Constitutional Court of Liechtenstein has five judges and five alternate judges, with the latter being able to substitute the judges (Article 1 and 9 of the Constitutional Court Act of Liechtenstein). Other examples of equivalent institutions include the Supreme Court of Canada (where judges of the Federal Court of Appeal, the Federal Court or Tax Court of Canada can be requested by the Chief Justice to substitute for an absent Supreme Court judge, pursuant to Article 30 of the Supreme Court Act), the Supreme Court of Costa Rica (which provides for the appointment by the Legislative Assembly of no less than twenty-five alternate judges, pursuant to Article 164 of the Constitution) and the Supreme Court of the Netherlands (which envisages up to 20 judges in extraordinary service, who can be called upon to serve as a judge by the President of the Court, pursuant to Section 72 of the Judicial Organisation Act).

appointment of *ad hoc* judges, in order to safeguard the proper functioning of the Court, in a similar way as is foreseen in the Rules of Court of the ECtHR (whereby it should be noted that this possibility is also not envisaged by the Convention itself, but only in the Rules of Court). However, by analogy to the selection of *ad hoc* judges for the ECtHR, as well as the appointment of substitute and alternate judges in respectively Austria and Liechtenstein, in the view of the Venice Commission, in order for the work of the Constitutional Court to continue to be in accordance with the Constitution of Bosnia and Herzegovina and be legitimate (question 4 above) the selection of *ad hoc* judges would have to be done by the same authorities foreseen in the Constitution (question 3 above), namely the House of Representatives of the FBiH and the National Assembly of RS. A selection carried out by bodies different than those foreseen in the Constitution would be difficult to reconcile with judicial independence and would be to the detriment of the legitimacy of the Court. As the Constitution is silent on the actual method of selection and appointment of Constitutional Court judges by the legislatures of the two entities, it could certainly be envisaged that a list of *ad hoc* or reserve judges is established to be made use of in future in case the judge appointed by the respective entity is absent and/or the appointment process takes longer than foreseen. This would however not offer a solution to the current crisis and, while it may be an option for future appointments by the FBiH, given the current obstruction by RS of the work of the Constitutional Court, it may be unlikely to ever be a realistic option or needed in respect of judges to be appointed by RS.

C. Extending the terms in office (questions 5-6)

22. Allowing constitutional judges to remain in office until the appointment of a successor (questions 5 and 6), as an exception to constitutional provisions on the term of office of constitutional judges, is a relatively common practice in Europe, permitting constitutional courts to continue to function when appointments of new judges are blocked. At the level of the ECtHR, Protocol No. 15 abolished the age limit of 70 years for judges of the ECtHR,²¹ but Article 23 ECHR continues to provide that “*The judges shall hold office until replaced. They shall however continue to deal with such cases as they already have under consideration*”. Similarly, the Constitutions of Albania (Article 125), Slovenia (Article 165) and Slovakia (Article 134) explicitly provide that constitutional judges continue exercising their mandates until their successor takes oath. The Constitution of Croatia (Article 126) contains a similar provision but limits the prolongation to six months. The Constitutions of Lithuania, Portugal and Spain all stipulate that the mandate of constitutional judges is nine years but are silent regarding prolongation of these mandates. It is instead the respective Laws on the Constitutional Court that stipulate that constitutional judges continue exercising their mandates until their successor takes oath.²² Similarly, the Constitution of Montenegro provides that the mandate of a judge is 12 years, with the Law on the Constitutional Court (Article 15) stipulating that a constitutional judge can continue exercising his/her mandate if there is no immediate successor for a maximum period of a year, upon decision by Parliament.²³ In Georgia, the Constitution (Article 60) and the Organic Law on the Constitutional Court (Article 18) provide that the term of office of a judge of the Constitutional Court is ten years. However, by decision of the Constitutional Court an exception is made, if – upon expiry of a constitutional judge’s term in office – the relevant body does not appoint a new member within the time limits established by law and the Court would no longer be quorate. In such a case, the acting judge’s term of office is to be extended.²⁴ The Constitutions of Germany and Latvia do not regulate the length of the mandate of constitutional judges, with this being instead stipulated in their respective laws, which also provide that constitutional judges continue

²¹ Instead, Article 21 ECHR now introduces an age limit of 65 years at the date by which the list of three candidates has been requested by the Parliamentary Assembly.

²² Respectively, Article 4 of the Law on the Constitutional Court of Lithuania, Article 17 of the Organic Law on the Constitutional Court of Spain and Article 21 of the Law on the Constitutional Court of Portugal.

²³ It should be noted that in spite of this provision the Constitutional Court still became paralysed.

²⁴ Judgment of the Plenum of the Constitutional Court of Georgia of 29 December 2016, N3/5/768,769,790, 792.

exercising their mandates until their successor takes oath.²⁵ By contrast, the Constitutions of Italy (Article 135 of the Constitution)²⁶ and Romania (Article 142 of the Constitution) clearly state that the mandate of constitutional judges cannot be prolonged, with the legal systems of Austria (Article 147 of the Constitution), Bulgaria (Article 147 of the Constitution)²⁷, the Czech Republic (Article 7, Act on the Constitutional Court), Hungary (Section 15, Act on the Constitutional Court)²⁸ and Serbia (Article 13, Law on the Constitutional Court) not or no longer allowing for a prolongation of the mandate of constitutional court judges.

23. The examples of Lithuania, Montenegro, Portugal and Spain (as well as, in a different manner, Georgia) demonstrate that constitutional provisions which stipulate the length of the mandate of constitutional judges but are silent on mandate prolongation do not necessarily preclude the adoption of infra-constitutional provisions allowing for judicial mandate prolongation, if the Constitution itself is silent about such a possibility. Indeed, in several previous Opinions, the Venice Commission has explicitly recommended regulating by law (and not through constitutional amendments) that a judge remains in office until his or her successor takes office.²⁹

24. The situation in Bosnia and Herzegovina is different from the aforementioned examples in that there is no Law on the Constitutional Court.³⁰ The Constitutions of almost all European countries with a constitutional court expressly confer on the legislature the power to further regulate the organisation, powers of and procedures before the Constitutional Court. This is not the case for Bosnia and Herzegovina, where the Constitution seemingly leaves it to the Constitutional Court itself to do so, thereby signifying its special place in the institutional set-up of Bosnia and Herzegovina with distinct guarantees for its independence from other state and entity

²⁵ Respectively Article 4 of the Law on the Federal Constitutional Court of Germany and Article 11 of the Constitutional Court Law of Latvia.

²⁶ In Italy, prior to the 1967 reform "*prorogatio*" was allowed under the Constitutional Court's Rules of Procedure. Constitutional Law no. 2/1967 shortened the mandate of constitutional judges to nine years and added a new paragraph to Article 135 of the Constitution, which still reads "*At the end of their term, the constitutional judge shall cease from office and may no longer exercise the functions thereof*".

²⁷ Article 147 of the Constitution of Bulgaria states that constitutional judges are appointed for a non-renewable nine-year term. The Law on the Constitutional Court used to contain a second paragraph to its Article 5 which provided that members of the Constitutional Court continued in office until their successors took office. The Constitutional Court declared this provision unconstitutional (with quite a few dissenting opinions) in its judgment no. 1 of 7 March 2006.

²⁸ Article 24 of the Constitution of Hungary provides that the mandate of constitutional judges is twelve years. Section 15, paragraph 1(a) of the Act on the Constitutional Court used to allow for mandate prolongation, but the provision was repealed by the Parliament in 2013.

²⁹ See Venice Commission, [CDL-AD\(2006\)016](#), Ukraine - Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, para. 21; See also a discussion of this in [CDL-AD\(2008\)030](#), Montenegro - Opinion on the Draft Law on the Constitutional Court of Montenegro, para. 85, providing explicitly "*Other issues can be resolved on the basis of ordinary law these are in particular (...): At least the case of old-age retirement judges should remain in office until their successor takes up office*". Other examples include [CDL-AD\(2014\)033](#), Montenegro - Opinion on the Draft Law on the Constitutional Court, para. 56; [CDL-AD\(2014\)017](#), Tajikistan - Opinion on the Draft Constitutional Law on the Constitutional Court, para. 68; [CDL-AD\(2012\)009](#), Hungary, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 15. By contrast, however, [CDL-AD\(2016\)017](#), Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, outlines *inter alia* that "*a strict limitation of the term of the judges should be only introduced together with a constitutional amendment providing that the outgoing judge continues in office until the new judge enter into office (...)*" and [CDL-AD\(2011\)050cor](#), Serbia - Opinion on draft amendments and additions to the law on the Constitutional Court of Serbia, paras. 17 and 54, which indicates that the extension of the term of office of a judge "*may require an amendment of Article 174.1 of the Constitution*". In this context, see also: [CDL-AD\(2022\)019](#), *op. cit.*, para. 46, which outlines regarding members of the Superior Council of Magistracy, that in some situations, "*a short-term technical prolongation of the mandate of a constitutional body may be inevitable, but [...] it should not become a rule*"; with further reference to [CDL-AD\(2021\)012](#), Montenegro – Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, para. 50.

³⁰ It is worth noting that the Constitution does not explicitly entrust the Parliamentary Assembly with adopting such a law and only stipulates that "*(...) the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights*" (Article IV(1)(d) of the Constitution).

institutions. Indeed, the Rules of the Constitutional Court cover a wide array of issues normally covered by a Law on the Constitutional Court. As such, the Rules of the Constitutional Court in Bosnia and Herzegovina are of a specific constitutional nature, occupying a high place in the hierarchy of legal norms, as noted also by the Court.³¹ While it is obvious that the Rules are not an organic law in the formal sense, they can be regarded as an organic regulation fulfilling the role of a *sui generis* law. In line with earlier Venice Commission Opinions, that a law on the Constitutional Court can (and in some cases, should) extend the term of office of a constitutional judge until a successor takes up office, the Venice Commission takes the view that in the case of Bosnia and Herzegovina, in the absence of other pertinent legislation, this can exceptionally be regulated by the Rules of the Court.

25. In this context, the Venice Commission also considers that the Constitution provides that judges serve until the age of 70 *and* expects the Court to continue functioning by having these judges immediately replaced by new judges. In a situation like the present one, where the basic functioning of a crucial constitutional body is at stake, the question can be raised which of these two principles is of greater importance. Too strict an interpretation of the clause "*judges (...) shall serve until age 70*" would lead to the strange conclusion that the drafters of the Constitution would prefer a complete paralysis of an essential constitutional organ to temporary prolongation of the term in office of legitimately appointed judges. Given that this prolongation can at any point be cut short by the legislatures of the entities themselves, simply by selecting new judges, as they are constitutionally obliged, the Venice Commission considers that a literal interpretation must yield to the overarching constitutional principle of a functioning Constitutional Court, safeguarding the fundamental right of access to a court.

26. The drawback of providing in the Rules that a judge continues in office until a successor takes up his/her position is that this only provides for a limited solution to the current crisis, given that it only applies to future vacancies, is limited to judges appointed by the FBiH (given that there are no judges appointed by RS who could continue their term in office) and can only provide temporary respite (in the understanding that judges will not continue indefinitely and may at any moment resign themselves). It will provide little incentive to overcome the inertia and obstruction on the side of the appointing authorities in the FBiH and RS. Allowing a paralysis of the Constitutional Court could however be seen as a reward for this inertia and obstruction.

27. In conclusion, considering the overarching constitutional principle of a functioning Constitutional Court, the Venice Commission finds that allowing acting judges to continue their mandate beyond the age of 70 until a successor is appointed would not run counter to Article VI(1)c of the Constitution of Bosnia and Herzegovina (question 5) and that, in case the term of the current judges is indeed extended, the work of the Constitutional Court would continue to be in accordance with the Constitution and therefore legitimate (question 6). Given the status of the Rules of the Constitutional Court in the hierarchy of norms, such a possibility can be and would need to be stipulated in the Rules (question 6).

³¹ In case [U-7/13](#) of 27 September 2013, the Court reasoned "*Having regard to the aforesaid, the Constitutional Court holds that the Rules of the Constitutional Court which are provided for by the Constitution of Bosnia and Herzegovina as an act the issuance of which is in the exclusive competence of the Constitutional Court, have a specific constitutional nature which is the result of need and intention to fully preserve and protect the autonomy and independence of the Constitutional Court. Having regard to such constitutional nature of this act, and the fact that that act has its source directly in the Constitution of Bosnia and Herzegovina, the Constitutional Court holds that the rules of court could be considered a sui generis law in terms of Article VI(3)(a) of the Constitution of Bosnia and Herzegovina*" (para. 11). See also case [U-11/21](#) of 2 December 2021, paras. 12-13.

D. Anti-deadlock mechanisms (questions 7-8)

28. As for the use in Bosnia and Herzegovina of practices similar as to those used at the European level (e.g. ECtHR) (question 7), the Venice Commission refers to its above replies to the use of *ad hoc* judges, single judge formations and three-judge committees. It is not aware of any other practices that could be used by analogy in Bosnia and Herzegovina.

29. Regarding potential anti-deadlock mechanisms that could be applied in Bosnia and Herzegovina (question 8), the Venice Commission refers to its replies to questions 1 and 5-6 as measures the Court itself can take. When it comes to measures outside the remit of the Court, the Venice Commission reiterates that the causes of the current crisis are of a political nature, for which legal measures can provide only limited solutions. In various Opinions,³² the Venice Commission has recommended providing for an anti-deadlock mechanism, by lowering the qualified majority requirements for the election or appointment of judges to the Constitutional Court in the event of a blockage occurring at first attempt(s),³³ sharing the power to appoint / elect constitutional court judges between different state powers,³⁴ devolving powers of either the initial selection or the appointment/election of constitutional judges from the original constitutional body to other bodies in case of continued inaction or failure to nominate or appoint constitutional judges³⁵ or, if an assembly fails to choose within a certain period of time between candidates on a list, the first ranked could be considered as appointed.³⁶ Such anti-deadlock mechanisms would ideally have to be provided for in the Constitution, as they deviate from the main rules on appointments.

30. In Bosnia and Herzegovina, as already outlined above, the problem does not lie with the requirement of a qualified majority. In fact, the selection of constitutional judges by the entities' assemblies only requires a simple majority. When it comes to devolving powers of nomination, at the level of FBiH, legislation could indeed envisage the nomination of candidates to the House of Representatives to be taken over by a different (neutral) body than the Commission for Selection and Appointments in case of continued inaction of this Commission over a specified period of time. At the level of the RS, given the manifest refusal of the authorities to appoint judges to the Constitutional Court this will not provide any solution in fact. Measures such as sharing the power to appoint or elect constitutional court judges between different state and entity powers or transferring the power to select judges of the Constitutional Court from the entity legislatures to other bodies, in case they do not appoint judges within a certain period of time, would certainly be warranted but would require constitutional amendments. The majority needed

³² See Venice Commission, [CDL-PI\(2023\)018](#), Compilation of Venice Commission Opinions and Reports relating to Qualified Majorities and Anti-Deadlock Mechanisms, page 5 and further.

³³ For example, Venice Commission, [CDL-AD\(2015\)024](#), Opinion on the draft institutional law on the Constitutional Court of Tunisia, para. 21; [CDL-AD\(2014\)033](#), *op. cit.*, paras. 13-14. Such a measure was also introduced in Slovakia, with the constitutional amendments of December 2020, whereby Article 85 (para. 5) of the Constitution now provides that if a three fifths majority is not reached in the Parliament in the first two rounds of votes, the subsequent vote to elect a candidate for judge of the Constitutional Court requires an absolute majority.

³⁴ For example, Venice Commission, [CDL-AD\(2016\)001](#), *op. cit.*, para. 141.

³⁵ For example, pursuant to Article 7a of the Law on the Federal Constitutional Court of Germany, in case of inaction by the Selection Committee of the *Bundestag*, the Federal Constitutional Court is to be requested to propose candidates. See also on the nomination of candidates by neutral bodies, Venice Commission, [CDL-AD\(2015\)037](#), First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 162; [CDL-AD\(2015\)024](#), *op. cit.*, para. 21.

³⁶ For example, Article 125, para. 2 of the Constitution of Albania provides for the following anti-deadlock mechanism for appointments of constitutional court judges by its Assembly: "*The Assembly shall elect the Constitutional Court judges by no less than three-fifth majority of its members. If the Assembly fails to elect the judge within 30 days of the submission of the list of candidates by the Justice Appointment Council, the first ranked candidate in the list shall be deemed appointed.*" In a similar vein, in Slovakia, following the constitutional amendments of December 2020, which were prompted by the crisis of the Constitutional Court in 2019, Article 134 (para. 2) of the Constitution now provides for a time-limit for Parliament to select the necessary number of candidates, allowing the President of the Republic to appoint judges from an incomplete pool of candidates in case of delay.

for such constitutional amendments is currently unlikely to be found and would in any case not provide an immediate solution to the present crisis.

V. Conclusion

31. The President of the Constitutional Court has asked the Venice Commission for its opinion on the measures that could be taken in a situation in which the authorities deliberately block the election of judges to the Constitutional Court, as well as the appointment of *ad hoc* judges, prolongation of the mandate of current judges and anti-deadlock mechanisms.

32. The Venice Commission is gravely concerned by the fact that the Constitutional Court of Bosnia and Herzegovina can currently not function at its full capacity. This has led to an accumulation of more than 7,000 pending cases, which renders access to constitutional justice excessively lengthy, jeopardising the effectiveness and credibility of the judicial system. The Constitutional Court could soon become paralysed, due to the incapacity, to date, of the authorities of the Federation of Bosnia and Herzegovina in appointing judges to the Constitutional Court and the refusal of the authorities of Republika Srpska to do so. As the Venice Commission has emphasised in parallel contexts,³⁷ crippling the effectiveness of a constitutional court undermines all three basic principles of the Council of Europe: democracy – because of an absence of a central part of checks and balances; human rights – because access to the Constitutional Court could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Court, which is a central part of the judiciary in Bosnia and Herzegovina, would become ineffective. It is undeniable that the failure of the authorities to fulfil their constitutional obligations to keep the Constitutional Court of Bosnia and Herzegovina functioning violates the Constitution.

33. In replying to the eight questions posed by the Constitutional Court of Bosnia and Herzegovina, the Venice Commission recognises that the current critical situation in which the Constitutional Court finds itself is of a political nature. It is a situation that would be easy to solve if the willingness on the side of political actors would be there. Without this willingness, any legal solution requiring broad political support is destined to fail, even if the Venice Commission also recognises that the provisions on the Constitutional Court contained in the Constitution would benefit from being amended.

34. Without wishing to pre-empt solutions the Constitutional Court itself may find in the current crisis, in the view of the Venice Commission, in response to the first question posed by the Court, the Constitutional Court could with full legitimacy amend its Rules in order to 1) temporarily transfer all cases normally to be decided by the Grand Chamber to the Plenary, whilst increasing the frequency of Plenary sessions and 2) lower the majority of votes required to adopt decisions, in full respect of the attendance quorum stipulated by the Constitution.

35. In response to the second, third and fourth question on the possible appointment of *ad hoc* judges, the Venice Commission finds that, even if the situation in which the Constitutional Court of Bosnia and Herzegovina finds itself would warrant the appointment of *ad hoc* judges (question 2), in order for the work of the Constitutional Court to continue to be carried out in accordance with the Constitution of Bosnia and Herzegovina and be legitimate (question 4) the selection of *ad hoc* judges would have to be done by the same authorities as foreseen in the Constitution (question 3), namely the House of Representatives of the Federation of Bosnia and Herzegovina and the National Assembly of Republika Srpska.

³⁷ See Venice Commission, [CDL-AD\(2016\)001](#), *op. cit.*, para. 138.

36. Furthermore, in response to the fifth and sixth question, considering the overarching constitutional principle of a functioning Constitutional Court, the Venice Commission finds that allowing acting judges to continue their mandate beyond the age of 70 until a successor is appointed would not run counter to Article VI(1)c of the Constitution of Bosnia and Herzegovina (question 5) and that, in case the term of the current judges is indeed extended, the work of the Constitutional Court would continue to be in accordance with the Constitution and therefore legitimate (question 6). Given the status of the Rules of the Constitutional Court in the hierarchy of norms, such a possibility can be and would need to be stipulated in the Rules (question 6).

37. As for the use in Bosnia and Herzegovina of practices similar to those at the European level (e.g. ECtHR) (question 7), the Venice Commission is not aware of any other practices that could be used by analogy for the situation in Bosnia and Herzegovina. Regarding potential anti-deadlock mechanisms that could be applied (question 8), the Venice Commission considers that various anti-deadlock mechanisms would be a useful complement to the current system but would require constitutional amendments. At the level of the entities, it could be envisaged in the Federation of Bosnia and Herzegovina to introduce an anti-deadlock mechanism to nominate candidates directly to the House of Representatives, in case of continued inaction of the Commission for Selection and Appointments over a specified period of time, but in order for the selection process itself to be taken away from the House of Representatives constitutional amendments would again be needed. Similarly, constitutional amendments would also be needed for the selection process to be carried out by any other body than the National Assembly of Republika Srpska in case of continued refusal to appoint constitutional judges.

38. The Venice Commission recognises that the above solutions are limited in scope and will not remedy the situation in a truly satisfactory manner. A viable, lasting solution can only be found with the *bona fide* engagement of all relevant political stakeholders, in particular the authorities of the two entities. The Venice Commission stresses once again that the mandate and powers of institutions of the state of Bosnia and Herzegovina must be respected in order to allow them to fulfil their legitimate institutional objectives. It therefore urges the authorities of the Federation of Bosnia and Herzegovina and Republika Srpska to be guided by the principle of loyal cooperation between state and entity organs and fulfil their constitutional obligations, appointing judges to the Constitutional Court without further delay.

39. The Venice Commission remains at the disposal of the authorities of Bosnia and Herzegovina and its Constitutional Court for further assistance in this matter.