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

FOURTH SECTION

# CASE OF HAMIDOVIĆ v. BOSNIA AND HERZEGOVINA

*(Application no. 57792/15)*

JUDGMENT

STRASBOURG

5 December 2017

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case of Hamidović v. Bosnia and Herzegovina,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Faris Vehabović,
Egidijus Kūris,
Carlo Ranzoni,
Marko Bošnjak,
Péter Paczolay, *judges,*
and Andrea Tamietti, *Deputy Section Registrar,*
Having deliberated in private on 17 October 2017,
Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 57792/15) 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 Bosnian-Herzegovinian citizen, Mr Husmet Hamidović ("the applicant"), on 6 November 2015.

2. The applicant was represented by Mr O. Mulahalilović, a lawyer practising in Brčko. The Government of Bosnia and Herzegovina ("the Government") were represented by their Deputy Agent, Ms Z. Ibrahimović.

3. The applicant complained, in particular, under Articles 9 and 14 of the Convention that he had been punished for refusing to remove his skullcap while giving evidence before a criminal court.

4. On 24 March 2016 the complaints mentioned in paragraph 3 above were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1976 and lives in Gornja Maoča.

6. On 28 October 2011 Mr Mevlid Jašarević, a member of the local group advocating the Wahhabi/Salafi version of Islam (see, concerning this group, *Al Husin v. Bosnia and Herzegovina*, no. 3727/08, § 20, 7 February 2012), attacked the US Embassy in Sarajevo. One police officer was severely wounded in the attack. In April 2012 Mr Jašarević and two other members of that group were indicted in relation to that event. Mr Jašarević was eventually convicted of terrorism and sentenced to fifteen years' imprisonment. The other two defendants were acquitted. The relevant part of the first-instance judgment rendered in that case, depicting the religious community to which the applicant also belonged, reads as follows:

> "In his Report/Findings and Opinion and at the main trial, the expert witness Prof. Azinović clarified, from the scientific aspect, the notions of 'Wahhabism' and 'Salafism':
>
> '...
>
> *Salafi communities in Bosnia and Herzegovina, like the one in Gornja Maoča (in which the accused lived at the*

*time of the attack), are often isolated and inaccessible. The choice of remote and isolated locations to establish settlements is often informed by the belief that true believers who live in a non-believer (or secular) country need to resort to hijrah – emigration or withdrawal from the surrounding (non-believers') world, following the example set by Prophet Muhammad and his followers, who moved from Mecca to Medina in 622 to establish the first Muslim community.*

*Despite mutual differences, most of the Bosnian Salafi groups share some common traits that are not inherent to Islamic organisations (or religious sects) only. In practice, they confirm the tendencies of certain traditional religious communities to isolate from other believers and define their holy community through their disciplined opposition to both non-believers and half-hearted believers. This pattern is inherent to fundamentalist movements and sects within almost all religious traditions. Such movements as a rule have similar characteristics despite the differences in theological doctrines, size and social composition, the scope of their influence or tendency towards violence. Yet, these fundamentalist and puritan groups mostly do not encourage or approve violence, whether it is aimed against members of the same group or against the outer world.*

*According to the available sources and their own declarations, members of the community in Gornja Maoča oppose the concept of a secular State, democracy, free elections and any laws that are not based on Sharia. The positions taken by this group are, inter alia, available at a number of web sites, including www.putvjernika.com, while part of its followers live in Serbia, Croatia, Montenegro, Slovenia, Austria, Germany, Switzerland, Australia and other countries.'*

...

6.1.5.1. Punishment of accused (Article 242 of the Code of Criminal Procedure)

Having been called by the court officer to stand up when the Trial Chamber entered the courtroom at the first hearing, the accused refused to do so. Also, the accused Jašarević and Fojnica were wearing skullcaps, which the Court could correlate with clothing details indicating their religious affiliation. Pursuant to Article 256 of the Code of Criminal Procedure, all those present in the courtroom must stand up upon the call from a court officer. The President of the Trial Chamber asked the accused to explain both their refusal to stand up and the reasons for which they had entered the courtroom wearing skullcaps. The accused stated that they only respected Allah's judgment and that they did not want to take part in rituals acknowledging man-made judgment. The Court thereupon warned the accused that standing up was a statutory obligation of the accused and that under Article 242 § 2 of the Code of Criminal Procedure disruptive conduct constituted contempt of court, which the Court would sanction by removing them from the courtroom.

After the warning, the President adjourned the hearing and provided the accused with a reasonable period of time to consult their attorneys in order to change their minds.

When the Trial Chamber returned to the courtroom, the accused did not stand up, wherefore the President removed them from the courtroom. The transcript from the hearing was subsequently delivered to the accused.

At a new hearing, the accused Fojnica and Ahmetspahić again did not want to stand up after the call of the court officer, while the accused Jašarević refused to enter the courtroom. The President therefore asked the accused to respond whether it was their definite decision to act in the same way until the completion of the trial. The accused confirmed that, until the completion of the trial, they had no intention of showing any respect, by standing up, for the Court, which they did not recognise. The Court has found that to continue to bring the accused to scheduled hearings would unnecessarily expose the Court to significant expense. Therefore, the Court has decided to remove the accused from the trial until the completion of the trial, with a warning that they would be notified of any scheduled hearing, and that, prior to it, they could notify the Court if they changed their mind, in which case the Court would allow them to come to the hearing. The accused Fojnica and Ahmetspahić then changed their mind and regularly

appeared before the Court, while the accused Jašarević did so only at the following hearing. The Court delivered to the accused the audio-recordings and the transcripts from the hearings they had not attended in order to allow them to agree with their defence attorneys on the concept of their defence."

7. In the context of that trial, the Court of Bosnia and Herzegovina ("the State Court") summoned the applicant, who belonged to the same religious community, to appear as a witness on 10 September 2012. He appeared, as summoned, but refused to remove his skullcap, notwithstanding an order from the President of the trial chamber to do so. He was then expelled from the courtroom, convicted of contempt of court and sentenced to a fine of 10,000 convertible marks (BAM)[1] under Article 242 § 3 of the Code of Criminal Procedure. The relevant part of that decision reads as follows:

"The Court has examined the situation encountered in the courtroom, with utmost care. The Court is aware that the witness belongs to a religious community, organised under special rules in the village of Maoča, of which the accused are also members. In view of that, the Court has acquainted the witness with the provisions of Rule 20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina and the obligations of the parties in the judicial institutions, which ban visitors from entering these buildings in clothing that is not in accordance with the generally accepted dress codes within the professional environment of the judicial institutions. In addition, the Court has pointed out to the witness that, in public institutions, it is not acceptable to display religious affiliation through clothing or religious symbols, and that the Court is obliged to support and promote values that bring people closer, not those that bring them apart. The Court has particularly emphasised that rights of the individual are not absolute and must not jeopardise common values.

The witness's attention has especially been drawn to the fact that people of various religious beliefs, belonging to different religious groups, appear before the court and that it is necessary to have confidence in the court. Thus, the court is not the place where religious beliefs can be expressed in the way that discredits certain common rules and principles in a multicultural society. That is why the legislator obliges everyone who appears before the Court to respect the Court and its rules.

The Court finds the witness's refusal to accept the rules of Court and to show respect to the Court by accepting its warnings, to be a flagrant breach of order in the courtroom. The Court has found that this behaviour is connected to a number of other identical cases before this Court, in which the members of the same religious group behaved in the same manner, publically expressing that they did not recognise this Court. The frequency of such disrespectful behaviour and contempt of court is gaining dangerous criminogenic elements and undoubtedly presents a specific threat to society. It is not necessary to particularly substantiate how this behaviour impairs the Court's reputation and confidence in the Court. A legitimate conclusion may be that this is essentially directed against the State and basic social values. Therefore, a severe and uncompromising reaction on the part of the State, taking all existing repressive measures, is crucial against such behaviour. Retraction of the State in cases of this or other types of extremism can have serious consequences for the reputation of the judiciary and the stability of society in Bosnia and Herzegovina.

Bearing in mind the frequency, seriousness and gravity of this type of breach of order in the courtroom and its damaging consequences, the Court has decided to punish the witness by imposing a maximum fine of BAM 10,000. Such a severe penalty should be a message to all the parties in the courtroom that contempt of court is unacceptable. The Court must be respected and the level of respect for the Court is the level of respect for the State of Bosnia and Herzegovina."

8. On 11 October 2012 an appeals chamber of the same court reduced the fine to BAM 3,000 and upheld the rest of the first-instance decision. It held that the requirement to remove any and all headgear on the premises of public institutions was one of the basic requirements of life in society.

It further held that in a secular State such as Bosnia and Herzegovina, any manifestation of religion in a courtroom was forbidden. The relevant part of that decision reads:

"The Chamber observes that it is obvious and well known that skullcaps, hats and other headgear should be removed when entering any premises, and notably the premises of State and other public institutions, as there is no longer a need to wear them and removing a skullcap or a hat is an expression of respect for this institution and its function. The duty to remove headgear exists not only in this Court but also in other courts and institutions in Bosnia and Herzegovina as well as in other States. Such rules and duties apply to all persons without exception, regardless of religious, sexual, national or other affiliation.

Indeed, this is a duty of all those who visit the State Court in whatever capacity, as explained in more detail in Rule 20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina: 'Visitors must respect the dress code applicable to judicial institutions. Visitors shall not wear miniskirts, shorts, t-shirts with thin straps, open heel shoes and other garments that do not correspond to the dress code applicable to judicial institutions'.

It would appear from the case file that the judge in charge of this specific case first directed the witness to remove his skullcap in the courtroom, and then gave him an additional 10 minutes to think about it as well as about the consequences of rejecting that order. As the witness had nevertheless failed to remove his skullcap, showing thereby wilful disrespect for the authority of the court, the President of the Trial Chamber fined him in accordance with Article 242 § 3 of the Code of Criminal Procedure.

It results from the aforementioned that the judge in charge did not invent the duty of removing the skullcap when addressing the court, as claimed in the appeal. This is indeed a matter of a generally accepted standard of behaviour in the courtroom which applies not only to this Court but also to other courts; furthermore, it has always been applied. This duty stems from Rule 20 of the House Rules of the Judicial Institutions cited above. Therefore, the allegations of lawyer Mulahalilović made in the appeal are not only unjustified but totally inappropriate.

The allegation in the appeal that the witness was punished simply because he was a believer who was practising his religion, and that he had thereby been discriminated against, is also unsubstantiated. The duty of removing headgear and behaving decently applies without exception to anyone visiting the court premises. All persons visiting the Court, regardless of their religion, nationality, sex or other status have the same rights and obligations and are obliged, among other things, to remove their skullcaps, hats and other headgear. This was explained to the witness. Any behaviour to the contrary has always been interpreted and is still interpreted as disrespectful of the court, and the appellant is aware of that. Bosnia and Herzegovina, as mentioned in the impugned decision, is a secular State in which religion is separate from public life. The Chamber therefore holds that the premises of the Court cannot be a place for the manifestation of any religion.

It clearly follows from the aforementioned that the witness Husmet Hamidović was not deprived of his right to freedom of religion and freedom to manifest religion at his home or any other place dedicated for that purpose, but not in the courtroom. Therefore, the allegations of the lawyer, Mulahalilović, of a violation of the rights guaranteed by the Constitution and the European Convention on Human Rights, and of discrimination on religious grounds, are unsubstantiated.

Having found that the witness's punishment was justified and that his appeal was ill-founded in that part, the Appeals Chamber then examined the amount of the fine and decided that it was excessive.

As noted in the appeal, BAM 10,000 is the maximum fine for contempt of court. The maximum fine should be imposed in the most serious cases.

Turning to the relevant criteria, the nature and the seriousness of the conduct must certainly be taken into consideration. However, the appellant is wrong in claiming that his means should have also been taken into account,

as the fine for contempt of court is not a criminal sanction, but is of a disciplinary nature.

While the witness showed a high level of determination in disrespecting the court (he again failed to remove his skullcap after a pause of ten minutes given to him to reflect) and this fact definitely affected the amount of the fine, the act itself (failure to remove headgear) is not the most serious case of contempt of court which would justify the maximum fine. Since the witness did not use offensive language, there was no need to impose the maximum fine. This is notwithstanding the fact that members of the same religious group have lately shown a pattern of disrespectful behaviour. While it is true that the general prevention is one of the aims of sanctions, including disciplinary ones, disciplinary sanctions are primarily directed at individuals. Everyone should therefore be held responsible and adequately punished for his/her conduct only, and not for that of other members of any group. This follows from Article 242 § 3 of the Code of Criminal Procedure.

In the circumstances of this case, and having regard to the nature and the intensity of contempt of court committed by this witness, the appeals chamber finds that a fine in the amount of BAM 3,000 is appropriate. The appeal of the lawyer Mulahalilović is, therefore, partially accepted and the impugned decision amended."

9. As the applicant had failed to pay the fine, on 27 November 2012 the fine was converted into thirty days of imprisonment pursuant to Article 47 of the Criminal Code. That decision was upheld on 13 December 2012 and the applicant served his prison sentence immediately.

10. On 9 July 2015 the Constitutional Court of Bosnia and Herzegovina found no breach of Articles 9 and 14 of the Convention, fully accepting the reasoning of the State Court. At the same time, it found a breach of Article 6 of the Convention because of the automatic way in which fines were converted into imprisonment and ordered that Article 47 of the Criminal Code of Bosnia and Herzegovina be amended. However, it decided not to quash the decision converting the fine into imprisonment in this case, relying on the principle of legal certainty.

The relevant part of the majority decision reads as follows:

"40. The Constitutional Court notes that the present case concerns a specific situation where the universally accepted standard of conduct in a judicial institution intertwines with the right of the appellant to manifest in a courtroom, contrary to that standard, affiliation with his religious community. The appellant claims that the State Court did not have basis in the law to impose a fine for his failure to comply with a court order, as the Criminal Procedure Code does not contain a provision prescribing anything like that, which is the reason why his right to freedom of thought, conscience and religion was violated.

41. Starting from the main objection raised by the appellant, that the limitation in the case at hand was not prescribed by law, the Constitutional Court notes that the European Court (*The Sunday Times v. The United Kingdom (No. 1)*, 26 April 1979, § 49, Series A no. 30) held that two requirements flow from the expression 'prescribed by law' in Article 9 of the European Convention. 'Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' In addition, the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. The interpretation and application of such enactments depend on practice (see *Kokkinakis*, cited above).

42. Accordingly, as concerns the issue of whether the State Court, in adopting the challenged ruling, acted in accordance with the law, the Constitutional Court observes that the provision of Article 242 § 3 of the Criminal Procedure Code provides that the judge or the presiding judge may order that a party to the proceedings, who disrupts order in a courtroom or disobeys court orders, be removed from the courtroom and be fined in an amount of

up to BAM 10,000. The Constitutional Court also observes that the cited provision, on which the State Court relied, does not prescribe a list of all types of conduct which may be regarded as disruption of order in a courtroom, but rather each court, in the circumstances of a given case, decides whether some type of conduct may be considered disruptive or not, which falls within the scope of that court's margin of discretion (see the Constitutional Court decision no. AP 2486/11 of 17 July 2014, § 33). This is a universally accepted standard of conduct of the courts in Bosnia and Herzegovina, which is in accordance with the position of the European Court, referred to in the judgment *Kokkinakis* that the interpretation and application of such enactments that are couched in vague terms depend on practice.

43. The Constitutional Court notes that the State Court relied also on Rule 20 of the House Rules, providing that 'visitors must respect the dress code applicable to judicial institutions', as an internal act of the State Court and other judicial institutions. The Constitutional Court observes likewise that the mentioned provision does not specify what that dress code is. However, the State Court in the case at hand kept in mind that the universally accepted standard of conduct in a civilised society requires that upon entering the premises of a public institution one should remove one's headgear out of respect for that institution and its function. Likewise, the Constitutional Court is aware that the said House Rules were not published, but that is not a problem since the present case concerns a universally accepted and usual standard of conduct in a judicial institution in a civilised and democratic society that Bosnia and Herzegovina aspires to become. The Constitutional Court also holds that the standard in issue could and should have been known to the appellant. In addition, the Constitutional Court observes that the State Court clearly and unequivocally warned the appellant of that universally accepted standard of conduct, which is indeed mandatory for all visitors of judicial institutions, irrespective of their religion, sex, national origin or other status.

44. Moreover, the State Court clearly warned the appellant of the consequences of such conduct and, although it was not required, accorded him an additional time to reconsider his position. This is clearly in accordance with the stance taken by the European Court in relation to the notion 'prescribed by law' (*The Sunday Times*, cited above). Indeed, the State Court clearly and unequivocally informed the appellant of the applicable rules in the judicial institutions and of the consequences of disobeying the rules. Moreover, at his own request, the appellant was granted additional time to think about all this. The Constitutional Court especially emphasises the fact that the limitation in question applied only while the appellant was in the courtroom, that is, during his testimony before the State Court. The Constitutional Court holds that the State Court did not thereby place an excessive burden on the appellant, given that it simply requested that the appellant adjust his conduct to the House Rules, which applied to all visitors, and only in the courtroom. Bearing in mind all the aforementioned, the Constitutional Court holds, in the circumstances of this particular case, that the State Court, using the margin of discretion referred to in Article 242 § 3 of the Criminal Procedure Code, acted in accordance with the law, and that, contrary to the appellant's opinion, the interference, which was of a limited nature, was lawful.

45. As to the question whether the interference in the present case had a legitimate aim, the Constitutional Court notes that the State Court simply relied on a universally accepted standard of conduct in a judicial institution, which requires all the visitors of judicial institutions to respect 'the dress code applicable to judicial institutions'. That court further relied on the inadmissibility of the manifestation of religious affiliation and religious symbols in public institutions which are contrary to the usual standards of conduct, whereby the State Court took into account its obligation to support the values that bring people closer and not those that bring them apart. The Constitutional Court notes that the State Court underlined in that regard that Bosnia and Herzegovina was a secular State where religion was separated from public life and that therefore no one can manifest his/her religion or religious affiliation in a courtroom. Considering the position of the European Court that in democratic societies, in which several religions coexist (as is the case of Bosnia and Herzegovina) it may be necessary to place restrictions on the freedom of religion (*Kokkinakis*, cited above), in the context of the obligation of an independent judicial institution to support the values that bring people closer, and not those that separate them, the Constitutional Court holds that the restriction

in the present case, which was of a temporary nature, aspired to achieve legitimate aims. Finally, the Constitutional Court reiterates that Article 242 § 3 of the Criminal Procedure Code is primarily designed to allow the State Court unhindered and effective conduct of proceedings. A judge or the president of a chamber is thereby given a possibility to impose a fine for any inappropriate behaviour, which is directed at disrupting order in a courtroom or at damaging the reputation of the State Court. In the present case, the State Court considered the repeated refusal of the appellant to comply with an order of the court to be damaging to the reputation and the dignity of a judicial institution. Therefore, the Constitutional Court finds that the restriction in issue, which was of a limited nature, was in accordance with the legitimate aim of maintaining the dignity of a judicial institution for the purposes of Article 9 of the European Convention.

46. Finally, as to the question whether the decision was necessary in a democratic society in order to achieve one of the legitimate aims under Article 9 of the European Convention, the Constitutional Court reiterates that, according to the settled case-law of the European Court, the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference, but this margin is subject to European supervision, embracing both the law and the decisions applying it, even those given by independent courts (*Dahlab*, cited above). Furthermore, under the well-established case-law of the European Court, the Court is called upon to establish whether the measures undertaken at the national level were justified in principle – that is, whether the reasons given by the national authorities to justify them were 'relevant and sufficient' and whether the measures were proportionate to the legitimate aim pursued (*The Sunday Times*, cited above, § 50[2]).

47. The Constitutional Court notes that the appellant was fined for contempt of court; that is, for his failure to respect an order of the State Court to remove his skullcap in the courtroom. The Constitutional Court further notes that the first-instance decision imposed a fine in the amount of BAM 10,000, but that the second-instance decision reduced the fine to BAM 3,000. The Appeals Chamber held that the fine set in the first-instance decision was excessive, and taking into consideration all the circumstances of the case, it concluded that a fine in the amount of BAM 3,000 was appropriate. The Constitutional Court observes that the State Court acted in this case in accordance with its margin of discretion, accorded by Article 242 of the Criminal Procedure Code enabling the courts to fine participants in proceedings who refuse to obey court orders, with a view to conducting proceedings efficiently and maintaining the authority and dignity of courts. The Constitutional Court took into account the fact that due to his failure to pay the fine, the appellant's fine was converted to a prison sentence pursuant to Article 47 of the Criminal Code. However, the Constitutional Court will examine that factor in the following paragraphs of this decision concerning the right to a fair trial. Therefore, in view of the above and the circumstances of this particular case, the Constitutional Court holds that the impugned restriction did not constitute an excessive burden for the appellant, that the measure undertaken by the State Court pursued legitimate aims within the meaning of Article 9 of the European Convention, and that there was a reasonable relationship of proportionality between the restriction and the legitimate aim pursued.

48. Accordingly, the Constitutional Court concludes that the impugned decision did not breach the appellant's right to manifest his religion under Article II § 3 (g) of the Constitution of Bosnia and Herzegovina and Article 9 of the European Convention."

11. Two out of eight judges of the Constitutional Court appended dissenting opinions. They disagreed with the majority as concerns Articles 9 and 14 of the Convention. Notably, given that the applicant had appeared as summoned and had stood up while addressing the court, they considered that his conduct had not been disrespectful. They further maintained that, unlike public officials, private citizens, such as the applicant, did not owe a duty of neutrality. Therefore, the applicant's punishment for refusing to remove a religious symbol in a courtroom constituted, in their opinion, disproportionate interference with his right to freedom of religion.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. As concerns the wearing of religious symbols

12. According to the most recent census, taken in 2013, Muslims make up almost 51% of the population of Bosnia and Herzegovina and Christians almost 46% (approximately two thirds of Christians are Orthodox and one third is Catholic).

13. The Constitution of Bosnia and Herzegovina guarantees “the highest level of internationally recognised human rights and fundamental freedoms”, including the freedom of religion (see Article II of the Constitution). Whilst the principle of secularism is not expressly stated in the Constitution, it transpires from the 2004 Freedom of Religion Act[3] as well as the case-law of the Constitutional Court of Bosnia and Herzegovina (see, notably, decisions nos. AP 286/06, 29 September 2007, § 28, and AP 377/16, 20 April 2016, § 35) that Bosnia and Herzegovina is a secular State.

The relevant provisions of the 2004 Freedom of Religion Act read as follows:

**Section 1(1)**

“In accordance with the heritage and traditional values of tolerance and coexistence of multi-confessional Bosnia and Herzegovina, and with the aim of promoting mutual understanding and respect for the right to freedom of conscience and religion, this Act establishes a legal framework within which all churches and religious communities in Bosnia and Herzegovina shall act and be equal in rights and obligations, without any discrimination.”

**Section 11(1)**

“Churches and religious communities shall be self-administering in accordance with their own laws and doctrines. This shall have no civil-law effect, shall not be enforced by the public authorities and shall not be applicable to non-members.”

**Section 14**

“Churches and religious communities are separate from the State, which means that:

(1) The State may not accord the status of State religion or State church or religious community to any church or religious community;

(2) The State shall not have the right to interfere in the internal organisation and the affairs of churches and religious communities;

(3) Subject to clause (4) below, no church, religious community or religious official may obtain any special privileges from the State; churches and religious communities may not participate formally in any political institutions;

(4) The State may confer, on an equal basis, material support to churches and religious communities for heritage conservation as well as health-care, educational, charitable and social services provided by churches and religious communities, on condition that those services be provided without discrimination on any grounds, and notably on the grounds of religion or belief;

(5) Churches and religious communities may take part in upbringing, education and humanitarian, social and health-care assistance, in accordance with family law;

(6) The public authorities shall not interfere in the election, appointment or removal of religious officials and the internal structure of churches and religious communities;

(7) Freedom to manifest religion or belief may be subject only to such limitations as are prescribed by law and

(7) Freedom to manifest religion or belief may be subject only to such limitations as are prescribed by law and necessary in the interests of public safety, for the protection of health or morals, or for the protection of the rights and freedoms of others in accordance with international standards. Churches and religious communities shall have the right to appeal against any such decision. The appellate body shall seek an opinion of the Ministry of Human Rights and Refugees of BiH in this connection."

14. In 2015 the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("the HJPC") made an analysis of the legal framework related to the wearing of religious symbols in judicial institutions[4]. As stated in that analysis, judges, prosecutors and court officers in Bosnia and Herzegovina are forbidden to wear such symbols in the course of their duties. The HJPC relied on a number of domestic provisions, notably section 13 of the Courts Act 2005 of the Federation of Bosnia and Herzegovina[5] and section 14 of the Courts Act 2012 of the Republika Srpska[6]. While that prohibition does not apply to other persons, such as parties and witnesses, they may be ordered to remove a religious symbol in a courtroom if it is considered justified by the judge in a given case, taking into consideration the right to freedom of religion and equal access to justice, the organisation of the proceedings and the need to maintain the authority of the judiciary. On 21 October 2015 the HJPC sent a circular to all courts and prosecutors in the country reminding them of those rules. The circular, notably as regards the wearing of religious symbols by judicial officials, was condemned by the Islamic Community of Bosnia and Herzegovina, the House of Representatives of the Federation of Bosnia and Herzegovina, two Cantonal Assemblies, the Agency for Gender Equality, the Women's Network (an informal group working on women's rights) and by others. The HJPC at that point requested all courts and prosecutors in the country to inform it whether they had come across any cases of judges, prosecutors or court officers wearing religious symbols in the course of their duties. It would appear from the replies that one judge and approximately ten court officers were wearing headscarves. On 10 February 2016 the HJPC reasserted its position that judges, prosecutors and court officers were forbidden to wear religious symbols at work. It reminded all court presidents and chief prosecutors of their duty to enforce that rule.

### B. As concerns examination of witnesses and contempt of court

15. The relevant part of Article 81 of the Code of Criminal Procedure of Bosnia and Herzegovina[7] reads:

"(4) Witnesses shall be notified in the summons ... of the consequences of failing to appear.

(5) Should a witness fail to appear and to justify his absence, the court may impose upon him a fine of up to BAM 5,000 or issue a warrant to arrest the witness and bring him before the court."

16. The relevant part of Article 86 § 6 of the Code reads:

"Given the age and the physical and mental condition of a witness, or for other justified reasons, he or she may be examined using technical means for transferring image and sound in such a manner as to permit the parties and the defence attorney to ask questions although not in the same room as the witness. ..."

17. The relevant part of Article 242 § 3 of the Code provides:

"Should ... a witness ... cause a disturbance in the courtroom or fail to comply with an order of ... the presiding judge, ... the presiding judge shall warn him or her. If the warning is unsuccessful ... the presiding judge may order that the person be expelled from the courtroom and be fined in an amount of up to BAM 10,000..."

18. Article 256 of the Code provides:

"(1) When the judges enter or exit the courtroom, all those present shall stand up upon the call from the court officer.

(2) The parties and other participants in the proceedings shall stand up when addressing the Court unless there are justified reasons for not doing so."

19. Rule 20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina[8] provides that on the premises of judicial institutions at State level, including the State Court, everyone must respect the "dress code applicable to judicial institutions". The Rules were issued by the President of the State Court, the Chief Prosecutor and the President of the HJPC in June 2009. They were not published in the Official Gazette, but they are displayed in the building of the State Court, where they are easily visible to all visitors.

### C. As concerns conversion of fines into imprisonment

20. Article 47 of the Criminal Code of Bosnia and Herzegovina[9] reads as follows:

"(1) Fines shall not be collected by force.

(2) If a fine is not paid within the period determined in the judgment, the court shall, without delay, convert the fine into imprisonment.

(3) The fine shall be converted into imprisonment in such a way that ... each BAM 100 is converted into one day of imprisonment, provided that the term of imprisonment does not exceed the punishment prescribed for that particular offence.

(4) If the convicted person has only paid a portion of the fine, the remaining amount shall be proportionally converted into imprisonment and if he then pays the remaining amount, the execution of the prison sentence shall cease."

## III. COMPARATIVE LAW

21. The Court conducted a comparative study of the legislation of thirty-eight Contracting States (Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, the former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom). The wearing of religious symbols in the courtroom by private citizens is not regulated, as such, by the laws of any of those States covered. Consequently, none of them prohibits wearing such symbols on the sole ground that they are religious. Nevertheless, it should be noted that a minority of Contracting States apply a more or less loosely defined dress code to private citizens in court premises, and in four States it means uncovering one's head while in the courtroom (Belgium, Italy, Portugal and Slovakia). It would appear that this rule has never been applied to religious symbols in Italy, Portugal and Slovakia. As concerns Belgium, a recent study by the Human Rights Centre of Ghent University shows that only around 30% of the Belgian judges have ever made use of this provision. Of this minority of judges, around 80% explained that they had only used this provision with regard to non-religious headgear, like baseball caps[10].

22. Special rules may apply to face-covering clothing (such as burqa and niqab). For example, in the case *R v. D (R)* ([2013] Eq LR 1034), a British judge ruled as follows:

"(1) The defendant must comply with all directions given by the Court to enable her to be properly identified at any stage of the proceedings.

(2) The defendant is free to wear the niqab during trial, except while giving evidence.

(3) The defendant may not give evidence wearing the niqab.

(4) The defendant may give evidence from behind a screen shielding her from public view, but not from the view of the judge, the jury, and counsel; or by mean of a live TV link.

(5) Photographs and filming are never permitted in court. But in this case, I also order that no drawing, sketch or other image of any kind of the defendant while her face is uncovered be made in court, or disseminated, or published outside court."

## IV. OTHER RELEVANT MATERIALS

23. The Islamic Community in Bosnia and Herzegovina was established in 1882 during the Austrian-Hungarian rule over Bosnia and Herzegovina. After the creation of the Kingdom of Serbs, Croats and Slovenes, the seat of the Islamic Community was moved from Sarajevo to Belgrade. The Islamic Community in Bosnia and Herzegovina broke away from Belgrade in 1993, shortly after Bosnia and Herzegovina had become independent. The Islamic Community in Bosnia and Herzegovina and its head, the Grand Mufti of Bosnia and Herzegovina, are the highest religious authorities for about four million Muslims in the world. The Islamic Community in Bosnia and Herzegovina has jurisdiction throughout Bosnia and Herzegovina, as well as in Croatia, Slovenia and Bosniac religious communities and mosques around the world. The Islamic Community in Montenegro is not formally under the jurisdiction of the Islamic Community in Bosnia and Herzegovina, but it recognises the Grand Mufti of Bosnia and Herzegovina as the highest moral authority of Muslims in the region. In Serbia, however, there is a dispute as to whether the Islamic Community in Bosnia and Herzegovina or the Islamic Community in Serbia has jurisdiction over the country.

24. The position of the Islamic Community in Bosnia and Herzegovina on wearing the hijab/headscarf and the skullcap is outlined in a letter sent to Mr Osman Mulahalilović, the applicant's lawyer, on 19 September 2016[11]:

"The Islamic Community through its highest representative and legislative body, the Mufti Council, took an official position regarding the wearing of a hijab (headscarf) in Islamic teaching. The position was expressed in the fatwa that established the following:

'The hijab, the headscarf worn by Muslim women, is a religious duty and clothing practice of Muslim women stipulated by the basic sources of Islam, the Koran and Sunnah as well as the consensus of all Muslims. ...'

As concerns the wearing of the skullcap, this represents a centuries-old tradition of Muslims in Bosnia and Herzegovina and elsewhere. The wearing of the skullcap does not represent a strong religious duty, but it has such strong traditional roots that it is considered as a religious duty by many. Until recent discussions about the wearing of the skullcap caused by decisions of judicial institutions in Bosnia and Herzegovina, we were not aware that the wearing of the skullcap had been prohibited in earlier regimes. It has always been respected as part of the traditional identity of each person since wearing the skullcap in public was a sign of civility."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

25. The applicant complained that his punishment for wearing a skullcap in a courtroom was contrary to Article 9, which reads as follows:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

### A. Preliminary remark

26. It should be noted at the outset that the present case is not about the wearing of religious symbols and clothing at the workplace (in this regard, see *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001−V; *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006−II; *Eweida and Others v. the United Kingdom*, nos. 48420/10 and 3 others, ECHR 2013; and *Ebrahimian v. France*, no. 64846/11, ECHR 2015). Indeed, it concerns a witness in a criminal trial, which is a completely different issue. The public debate about the wearing of religious symbols and clothing by judicial officials, now taking place in Bosnia and Herzegovina (see paragraph 14 above), as well as the applicant's submissions in that regard, are therefore irrelevant to the present case.

### B. Admissibility

27. The Government did not raise any admissibility objections. As this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds, it must be declared admissible.

### C. Merits

#### *1. The parties' submissions*

28. The applicant argued that it was his religious duty to wear a skullcap, since the Prophet Muhammad had also worn one. In his case, the ban on wearing the skullcap had therefore amounted to a "limitation" on the manifestation of his religion. In his view, that limitation had not been lawful, as no statutory provision expressly prohibited the wearing of the skullcap in the courtroom. The House Rules on which the domestic decisions had relied (see paragraph 19 above) could not introduce into the legal system bans that had not been prescribed in statute. Moreover, the sanction imposed on him was disproportionate. According to the applicant, the State Court wished to send a message to religious people that they were not welcome at that court and that they would be imprisoned if and when they entered its premises.

29. The Government were in agreement with the applicant that the ban on wearing the skullcap in the courtroom had amounted to a "limitation" on the manifestation of his religion. They relied in this connection on the case-law of the Constitutional Court of Bosnia and Herzegovina and General Comment No. 22 on the right to freedom of thought, conscience and religion adopted by the UN Human Rights Committee on 27 September 1993, according to which "The observance and practice of religion or belief may include ... the wearing of distinctive clothing or

headcoverings" (document no. CCPR/C/21/Rev.1/Add.4, § 4). That said, the Government argued that the limitation was lawful. The House Rules on which the domestic decisions had relied should be read in conjunction with Article 242 § 3 of the Code of Criminal Procedure affording trial judges wide discretion with regard to questions of court decorum (see paragraph 17 above). As regards the aim of the limitation, the Government maintained that the trial judge had simply enforced a generally accepted rule of civility and decent behaviour that skullcaps were not permitted in the courtroom in Bosnia and Herzegovina. Moreover, the trial judge had acted to protect the principle of secularism, which was of vital importance in multicultural societies, such as that of Bosnia and Herzegovina. Considering also that the impugned measure had been taken in the context of a sensitive and complex case regarding a terrorist attack against the Embassy of the United States, the Government claimed that the limitation in question had been proportionate.

*2. The Court's assessment*

**(a) Whether there has been a "limitation" within the meaning of Article 9 § 2**

30. The parties agreed that the punishment imposed on the applicant for wearing a skullcap in a courtroom constituted a limitation on the manifestation of his religion. This is in line with the official position of the Islamic Community in Bosnia and Herzegovina, according to which the wearing of the skullcap does not represent a strong religious duty, but it has such strong traditional roots that it is considered by many as a religious duty (see the last paragraph of the letter of 19 September 2016 cited in paragraph 24 above). This is also in line with the ruling of the Constitutional Court (see paragraph 10 above).

31. Such a limitation will not be compatible with Article 9 § 2 unless it is "prescribed by law", pursues one or more of the legitimate aims set out in that paragraph and is "necessary in a democratic society" to achieve the aim or aims concerned.

**(b) Whether the measure was "prescribed by law"**

32. The Court reiterates that the expression "prescribed by law" in the second paragraph of Article 9 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see *İzzettin Doğan and Others v. Turkey* [GC], no. 62649/10, § 99, ECHR 2016).

33. In the present case, the parties' opinions differed as to whether the impugned measure was "prescribed by law". As pointed out by the applicant, no statutory provision expressly prohibited the wearing of the skullcap in the courtroom (see also the position of the HJPC in this regard in paragraph 14 above). However, the applicant was not punished pursuant to any such general ban, but on the basis of an inherent power of the trial judge to regulate the conduct of proceedings in the State Court so as to ensure that no abuse of the court occurred and that the proceedings were fair to all parties, a provision that is inevitably couched in terms which are vague (see Article 242 § 3 of the Code of Criminal Procedure in paragraph 17 above). The Constitutional Court examined in depth this issue and concluded that the interference was lawful, taking into consideration specially the fact that the President of the trial chamber informed the applicant of the applicable rule and of the consequences of disobeying it (see paragraph 10 above). The Court has no strong reasons to depart from the finding of the Constitutional Court. It, therefore, considers that there was a basis in law for restricting the wearing of the skullcap in the courtroom.

**(c) Whether there was a legitimate aim**

34. The Court has already held that the enumeration of the exceptions to the individual's

34. The Court has already held that the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive (see *S.A.S. v. France* [GC], no. 43835/11, § 113, ECHR 2014, and the authorities cited therein). For it to be compatible with the Convention, a limitation on this freedom must therefore pursue an aim that can be linked to one of those listed in this provision.

35. The applicant took the view that the interference with the exercise of his freedom to manifest his religion did not correspond to any of the aims listed in Article 9 § 2. The Government maintained, for their part, that the impugned measure pursued two legitimate aims: to protect the rights and freedoms of others; and to maintain the authority and impartiality of the judiciary. The Court notes that the second paragraph of Article 9 does not refer expressly to the second of those aims. As regards the first of the aims invoked – to ensure the protection of the rights and freedoms of others – the Government referred to the principle of secularism and the need to promote tolerance in the post-conflict society. The Court has already held that secularism is a belief protected by Article 9 of the Convention (see *Lautsi and Others v. Italy* [GC], no. 30814/06, § 58, ECHR 2011) and that an aim to uphold secular and democratic values can be linked to the legitimate aim of the "protection of the rights and freedoms of others" within the meaning of Article 9 § 2 (see *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 99, ECHR 2005−XI, and *Ahmet Arslan and Others v. Turkey*, no. 41135/98, § 43, 23 February 2010). There is no reason to decide otherwise in the present case.

**(d) Whether the measure was "necessary in a democratic society"**

*(i) General principles*

36. The general principles concerning Article 9 were recently restated in *S.A.S. v. France*, cited above, §§ 124-31:

"124. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion (see, among other authorities, *Kokkinakis v. Greece*, 25 May 1993, § 31, Series A no. 260-A; *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 34, ECHR 1999-I; and *Leyla Şahin*, cited above, § 104).

125. While religious freedom is primarily a matter of individual conscience, it also implies freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which the manifestation of one's religion or beliefs may take, namely worship, teaching, practice and observance (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 73, ECHR 2000-VII, and *Leyla Şahin*, cited above, § 105).

Article 9 does not, however, protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs (see, for example, *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission's report of 12 October 1978, DR 19, p. 5; *Kalaç v. Turkey*, 1 July 1997, § 27, *Reports of Judgments and Decisions* 1997−IV; and *Leyla Şahin*, cited above, §§ 105 and 121).

126. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected (see *Kokkinakis*, cited above, § 33). This follows

both from paragraph 2 of Article 9 and from the State's positive obligations under Article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined therein (see *Leyla Şahin*, cited above, § 106).

127. The Court has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. As indicated previously, it also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed (see *Manoussakis and Others v. Greece*, 26 September 1996, § 47, *Reports* 1996-IV; *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 78, ECHR 2000−XI; and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 91, ECHR 2003−II), and that this duty requires the State to ensure mutual tolerance between opposing groups (see, among other authorities, *Leyla Şahin*, cited above, § 107). Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *Serif v. Greece*, no. 38178/97, § 53, ECHR 1999−IX; see also *Leyla Şahin*, cited above, § 107).

128. Pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (see, *mutatis mutandis*, *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 63, Series A no. 44, and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 112, ECHR 1999-III). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (see, *mutatis mutandis*, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45, *Reports* 1998-I, and *Refah Partisi (the Welfare Party) and Others*, cited above, § 99). Where these 'rights and freedoms of others' are themselves among those guaranteed by the Convention or the Protocols thereto, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society' (see *Chassagnou and Others*, cited above, § 113; see also *Leyla Şahin*, cited above, § 108).

129. It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight (see, for example, *Maurice v. France* [GC], no. 11810/03, § 117, ECHR 2005−IX). This is the case, in particular, where questions concerning the relationship between State and religions are at stake (see, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek*, cited above, § 84, and *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; see also *Leyla Şahin*, cited above, § 109). As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary'. That being said, in delimiting the extent of the margin of appreciation in a given case, the Court must also have regard to what is at stake therein (see, among other authorities, *Manoussakis and Others*, cited above, § 44, and *Leyla Şahin*, cited above, § 110). It may also, if appropriate, have regard to any consensus and common values emerging from the practices of the States Parties to the Convention (see, for example, *Bayatyan v. Armenia* [GC], no. 23459/03, § 122, ECHR 2011).

130. In the judgment in *Leyla Şahin* (cited above), the Court pointed out that this would notably be the case when it

came to regulating the wearing of religious symbols in educational institutions, especially in view of the diversity of the approaches taken by national authorities on the issue. Referring to the judgment in *Otto-Preminger-Institut v. Austria* (20 September 1994, § 50, Series A no. 295-A) and the decision in *Dahlab v. Switzerland* ((dec.), no. 42393/98, ECHR 2001-V), it added that it was thus not possible to discern throughout Europe a uniform conception of the significance of religion in society and that the meaning or impact of the public expression of a religious belief would differ according to time and context. It observed that the rules in this sphere would consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. It concluded from this that the choice of the extent and form of such rules must inevitably be left up to a point to the State concerned, as it would depend on the specific domestic context (see *Leyla Şahin*, cited above, § 109).

131. This margin of appreciation, however, goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate (see among other authorities, *Manoussakis and Others*, cited above, § 44, and *Leyla Şahin*, cited above, § 110)."

*(ii) Application of those principles to the present case*

37. The Court notes that the applicant had no choice but to appear before the court: in accordance with the Code of Criminal Procedure of Bosnia and Herzegovina, a witness who fails to appear risks being fined or arrested (see paragraph 15 above). It is further observed that the applicant stood up when addressing the court, as required under domestic law (see paragraph 18 above). The presiding judge informed the applicant that he was equally required to remove his skullcap, pursuant to the House Rules (see paragraph 19 above). He explained that the wearing of the skullcap was contrary to the dress code applicable to judicial institutions and that no religious symbols or clothing were permitted in the court. The applicant was then accorded some additional time for reflection, but he eventually refused to remove his skullcap, claiming that it was his religious duty to wear a skullcap at all times. The presiding judge fined him for contempt of court. The applicant failed to pay, so the fine was converted into thirty days of imprisonment (see paragraph 9 above).

38. It is important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is the case, in particular, where questions concerning the relationship between State and religions are at stake, as rules in this sphere vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order. As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is "necessary". This margin of appreciation, however, goes hand in hand with a European supervision embracing both the law and the decisions applying it. The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate. In this respect, the Court may, if appropriate, have regard to any consensus and common values emerging from the practices of the States Parties to the Convention (see, among other authorities, *S.A.S. v. France*, cited above, §§ 129-31).

39. The Court is aware that the presiding judge had a difficult task of maintaining order and ensuring the integrity of the trial in a case in which a number of participants belonged to a religious

group opposing the concept of a secular State and recognising only God's law and court (see paragraph 6 above). The Court has also taken note of the overall context at the time of the trial. Nonetheless, the Court considers that the measure taken at national level was not justified for the following reasons.

40. As mentioned above (see paragraph 26 above), the present case must be distinguished from cases concerning the wearing of religious symbols and clothing at the workplace, notably by public officials who may be put under a duty of discretion, neutrality and impartiality, including a duty not to wear such symbols and clothing while exercising official authority (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001, concerning the dismissal of a judge because she had, among other things, proselytised and prayed during court hearings; *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V, concerning the prohibition for a primary-school teacher to wear a headscarf while teaching; *Kurtulmuş v. Turkey* (dec.), no. 65500/01, ECHR 2006−II, concerning the prohibition for a university professor to wear a headscarf while teaching; *Eweida and Others*, cited above, § 105, concerning the dismissal of a registrar of births, deaths and marriages as a result of her refusal to conduct same-sex partnerships; and *Ebrahimian v. France*, no. 64846/11, ECHR 2015, concerning the prohibition for a social worker in the psychiatric department of a public hospital to wear a headscarf at work). In democratic societies, private citizens, such as the applicant, are normally not under such a duty.

41. It is true that Article 9 of the Convention does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs (see *S.A.S. v. France*, cited above, § 125, and the authorities cited therein; see also, *mutatis mutandis*, *Enver Aydemir v. Turkey*, no. 26012/11, §§ 68-84, 7 June 2016, in which the Court held that the applicant's refusal, because of his idealistic and political views linked to the Koran and Sharia, to perform military service for the secular Republic of Turkey was not such as to entail the applicability of Article 9). Indeed, there may be cases when it is justified to order a witness to remove a religious symbol (see paragraph 22 above). However, the Court would emphasise that the authorities must not neglect the specific features of different religions. Freedom to manifest one's religion is a fundamental right: not only because a healthy democratic society needs to tolerate and sustain pluralism and diversity, but also because of the importance to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others (see *Eweida and Others*, cited above, § 94). The Court sees no reason to doubt that the applicant's act was inspired by his sincere religious belief that he must wear a skullcap at all times, without any hidden agenda to make a mockery of the trial, incite others to reject secular and democratic values or cause a disturbance (see, in this regard, *Eweida and Others*, cited above, § 81). Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail. The role of the authorities is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see *S.A.S. v. France*, cited above, § 127-28).

42. Unlike some other members of his religious group (see paragraph 6 above), the applicant appeared before the court as summoned and stood up when requested, thereby clearly submitting to the laws and courts of the country. There is no indication that the applicant was not willing to testify or that he had a disrespectful attitude. In these circumstances, his punishment for contempt of court on the sole ground of his refusal to remove his skullcap was not necessary in a democratic society.

43. The Court concludes that in the present case the domestic authorities exceeded the wide margin of appreciation afforded to them (see paragraph 38 above). There has therefore been a

violation of Article 9 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

44. The applicant submitted that he had been discriminated against in the enjoyment of his freedom to manifest his religion. He relied on Article 14 of the Convention taken together with Article 9 of the Convention.

45. The Government contested that argument.

46. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

47. Since the applicant's complaint relating to Article 14 amounts to a repetition of his complaint under Article 9 and having regard to the finding relating to Article 9 (in paragraph 43 above), it is not necessary to examine whether, in this case, there has also been a violation of Article 14 (see, for example, *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 134, ECHR 2001-XII).

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

48. 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

49. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

50. The Government considered the claim to be excessive.

51. The Court accepts that the applicant suffered distress as a result of the violation found, justifying an award in respect of non-pecuniary damage. Making its assessment on an equitable basis, as required by the Convention, the Court awards the applicant EUR 4,500 under this head, plus any tax that may be chargeable.

### B. Costs and expenses

52. The applicant also claimed EUR 1,000 for the costs and expenses incurred before the Court.

53. The Government considered the claim to be unsubstantiated.

54. 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. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. Since no such documents have been submitted in the present case, the Court rejects this claim (see, for example, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 158, ECHR 2014).

### C. Default interest

55. 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

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 9 of the Convention;

3. *Holds*, by six votes to one, that there is no need to examine the case also from the standpoint of Article 14 of the Convention;

4. *Holds*, by six votes to one,
(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 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(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;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Deputy Registrar

Ganna Yudkivska
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) Concurring opinion of Judge De Gaetano;
(b) Concurring opinion of Judge Bošnjak;
(c) Dissenting opinion of Judge Ranzoni.

G.Y.
A.N.T.

# CONCURRING OPINION OF JUDGE DE GAETANO

1. This is a case which has everything to do with freedom of religious expression and very little, if anything, to do with contempt of court or keeping order in the courtroom. Unfortunately, at domestic level everything was conflated.

2. The applicant appears to have been caught in the slipstream of the decision taken under Article 242 of the Code of Criminal Procedure in respect of Mr Jašarević and the other two defendants (see paragraph 6 of the judgment). It is difficult to conceive how the applicant's behaviour, in merely keeping his skullcap on as a manifestation of his deeply held religious belief, can be regarded as being either disrespectful towards the court or as engendering disorder or a lack of decorum in the courtroom. If the applicant had been a Catholic bishop, would he have been prevented from appearing in court wearing the pectoral cross? Or if he had been an Orthodox bishop, would he have been compelled to remove the black headdress? And what if he had been a Sikh? In the last-mentioned case, the removal of the headgear would have been a rather complicated, and possibly time-consuming, affair.

3. While I agree that in this case there was a violation of Article 9 of the Convention and that there is no need to examine the case under Article 14, the Court's analysis should have stopped at the examination of whether the measure in question was "prescribed by law". At the time of the incident in 2012 the High Judicial and Prosecutorial Council of Bosnia and Herzegovina had not yet expressed the position referred to in paragraph 14 of the judgment. Article 242 § 3 of the Code of Criminal Procedure was never intended to authorise a presiding judge to impart *any order whatsoever* – that would be sheer arbitrariness – but only such orders as were or might be necessary for the proper maintenance of order in the courtroom and for the proper expedition of business. Likewise, Rule 20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina (see paragraph 19) was entirely vague. While a certain sobriety and propriety in one's dress can be read into the expression "dress code applicable to judicial institutions", that expression could not reasonably have been foreseen at the time as referring to such things as the applicant's skullcap. I am particularly disturbed at the way paragraph 33 of the judgment is worded. The applicant was, in my view, punished on the basis of a general and vague provision of law, a vagueness which no amount of circumlocution by the Constitutional Court could effectively veil. Moreover, a trial judge's inherent power to regulate the proceedings does not extend to provoking unnecessarily a situation of conflict, particularly where a fundamental human right – in this case, that of freedom of religious expression – is concerned.

4. I likewise fail to see how the reference in paragraph 35 of the judgment to *Lautsi and Others v. Italy* ([GC], no. 30814/06, § 58, ECHR 2011 (extracts)) can be said to be relevant. The issue in the instant case is not one of "philosophical convictions", as was the case in *Lautsi and Others.* Only in exceptional cases, such as when the principle of secularism is embedded in the constitution of a country or where there is a long historical tradition of secularism, can secularism be said to fall, in principle, within the ambit of the expression "for the protection of the rights and freedoms of others" for the purposes of the second paragraph of Article 9. The separation of church and State is no more an excuse for an aggressive form of *laïcité* than it is for promoting secularism at the expense of freedom of religion. As Judge Bonello put it in his concurring opinion in *Lautsi and Others*: "Freedom of religion, and freedom from religion, in substance, consist in the rights to profess freely any religion of the individual's choice, the right to freely change one's religion, the right not to embrace any religion at all, and the right to manifest one's religion by means of belief, worship, teaching and observance. Here the Convention catalogue grinds to a halt, well short of the promotion of any State secularism" (see paragraph 2.6 of the opinion).

halt, well short of the promotion of any State secularism" (see paragraph 2.6 of the opinion).

## CONCURRING OPINION OF JUDGE BOSNJAK

1. In the present case, I voted with the majority in finding that there had been a violation of Article 9 of the Convention. I believe that the key arguments for this position can be found in paragraph 42 of the judgment. However, these arguments are valid for the situation where no provision regulated, let alone prohibited, the wearing of religious symbols in a courtroom at the time the applicant was fined for his failure to remove the skullcap. Had such a provision existed, my assessment would possibly have been different.

2. It is not disputed between the parties that the fining of the applicant amounted to an interference with his right under Article 9 of the Convention. I can agree with the majority that the sanction imposed on the applicant was prescribed by law. According to Article 242 (3) of the Code of Criminal Procedure of Bosnia and Herzegovina, a witness may be fined, *inter alia*, if he or she fails to comply with an order by the presiding judge, provided that a warning has previously been given. It is undisputed in the present case that the presiding judge ordered the applicant to remove the skullcap, warned him about the possibility to being fined if he failed to comply and only then resorted to the sanction. At the point that the applicant was fined, it was fully foreseeable that this would happen.

3. Nevertheless, the requirement of lawfulness may not be read in isolation from the condition that the interference be necessary in a democratic society. I strongly agree with the restatement of the principles regarding freedom of religion as outlined in paragraph 38 of the judgment. The margin of appreciation enjoyed by High Contracting Parties in these matters should be considered wide, but needs to be exercised by those national authorities which have democratic legitimacy to act as policy-makers. The manifestation of religious beliefs in official institutions and public places in a given State is generally a sensitive issue, calling for a general policy. Standard-setting and rule-making cannot be left solely to individual holders of power in a particular imminent situation. For example, I doubt that a teacher should be the one to decide whether religious symbols are allowed in “his or her” classroom. The same goes for a nurse in “his or her” hospital wing, a judge in “his or her” courtroom or a lifeguard on “his or her” beach. A different standpoint would open the door wide to arbitrariness, which in turn would be incompatible with a democratic society that is characterised by tolerance.

4. In previous landmark cases decided by this Court in which the respondent State’s wide margin of appreciation was accepted and no violation was found (see for example *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014 (extracts), or *Leyla Sahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI), there existed a general rule at the national level prohibiting certain religious symbols in public places. The present case clearly differs from the above-mentioned ones in that no such provision existed. Instead, it was the presiding judge who “enacted” a rule that the religious symbol worn by the applicant should be prohibited. For the reasons set out in the previous paragraph, this fact affects the assessment of whether this prohibition and the subsequent fine were necessary in a democratic society.

5. The above position is not intended to exclude the possibility that – in the absence of a general rule – a judge or authority in a similar position could and should react when a symbol which is in itself religious is displayed in a manner that undermines order, prevents the smooth functioning of a court or other body or endangers any of the values the authority is competent to protect, or is used for that purpose. However, this does not appear to have been the case in the applicant’s situation. The presiding judge’s decision referred to the behaviour of other participants who belonged to the same religious sub-group as the applicant, behaviour which could indeed be

described as undermining the authority of the court. But that behaviour, namely the refusal to stand up or to enter the courtroom and verbal expressions of disrespect for the court, differed considerably from that of the applicant. One cannot avoid the impression that the judge's decision was motivated more by those other overt signs of disrespect than by the applicant's own behaviour. In a democratic society, however, responsibility for infractions of a penal nature can only be individual.

6. While it is true that the applicant disobeyed the order to remove the skullcap, this disobedience can be considered similar to conduct motivated by conscientious objection and cannot in itself be considered as a sign of contempt of court. On the other hand, the presiding judge failed to explain whether and, if so, in what way in this particular situation, the wearing of a skullcap would undermine order in the courtroom, impede the proper conduct of the proceedings or imminently endanger any value he was called upon to protect. Instead, in his written decision the presiding judge expressly considered it unnecessary to substantiate exactly how the applicant's behaviour would, in his view, impair the court's reputation and confidence in it. Hence, in the absence of any general provision prohibiting the wearing of religious symbols in a courtroom and in the absence of any valid reason given by the presiding judge for the prohibition in the applicant's case, there has been a violation of Article 9 of the Convention.

## DISSENTING OPINION OF JUDGE RANZONI

1. I respectfully disagree with the majority that there has been a violation of Article 9 of the Convention (point 2 of the operative part).

2. The present case can be summarised as follows. During the trial of a member of a local Wahhabi/Salafi group for having attacked the US Embassy in Sarajevo, the applicant, a member of the same religious community, was summoned to testify as a witness. He appeared before the court. However, in disregard of an order by the President of the trial chamber, he refused to remove his skullcap and was therefore convicted of contempt of court and sentenced to a fine of 10,000 convertible marks (BAM). This fine was later reduced by the appeals chamber of the same court to BAM 3,000. Eventually, as the applicant had failed to pay the fine, it was converted into thirty days of imprisonment.

3. I agree with the majority that the punishment imposed on the applicant for wearing a skullcap in a courtroom constituted a limitation on the manifestation of his religion, and that this limitation was prescribed by law and pursued the legitimate aim of the "protection of the rights and freedoms of others" (see paragraphs 30-35 of the judgment). I am likewise in agreement with the general principles concerning the necessity of the measure (see paragraph 36). Where I differ from the majority's reasoning is the application of these principles to the present case.

4. One may agree or disagree with the assessment made by the national courts and with the content of their decisions. However, considering we are not a further national court or a fourth-instance body, the Court may only substitute its view for that of the national courts if this is justified, in particular when the member State has clearly overstepped its margin of appreciation.

5. As a national judge, I would possibly not have intervened but might have tolerated a witness testifying while wearing a skullcap. However, that is only an assumption because, despite many years of being a judge in the national courts, I was never confronted with a similar situation. Be that as it may, as judges of an international court we have to look at such a case from a different position and with a different perspective. We have to accept the limits by which we are bound, in particular when assessing a complaint under Article 9 of the Convention.

### I. General principles

**I. General principles**

*i. Subsidiarity of the Convention system and margin of appreciation in Article 9 cases*

6. The assessment of the necessity of an interference with Article 9 rights is closely linked with the subsidiarity of the Convention system. The primary responsibility for the protection of the Convention rights lies with the Contracting States, in particular the national courts. In this respect, the Strasbourg Court has to show a certain restraint when examining whether decisions taken by national courts are compatible with the State's obligations under the Convention, in particular when reviewing decisions in the area of religion. The domestic situation is likely to reflect historical, cultural, political and religious sensitivities, and an international court is not well placed to resolve such disputes.

7. In the recent judgment in *S.A.S. v. France* ([GC], no. 43835/17, ECHR 2014) the Grand Chamber emphasised this fundamentally subsidiary role of the Convention mechanism in cases where the relationship between State and religions is at stake. It stated, *inter alia* (§ 129):

> "The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. ... As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary'."

8. Similarly, in *Leyla Şahin v. Turkey* ([GC], no. 44774/98, § 109, ECHR 2005-XI; see also *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, § 88, ECHR 2017) the Court, with reference to the margin of appreciation, noted:

> "It is not possible to discern throughout Europe a uniform conception of the significance of religion in society ..., and the meaning or impact of the public expression of a religious belief will differ according to time and context ... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order ... Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context."

9. As far as the notion of secularism is concerned, the Court in *Leyla Şahin* (cited above, § 114) considered it to be

> "consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention."

*ii. Margin of appreciation when balancing different rights and interests*

10. In cases where an exercise of striking a fair balance between two conflicting Convention rights was undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts (see *Couderc and Hachette Filipacchi Associés* [GC], no. 40454/07, §§ 90-92, ECHR 2015, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 104-07, ECHR 2012).

11. A similar approach needs to be taken in cases like the present one. When the State is afforded a wide margin of appreciation and the national courts made an assessment based on the

afforded a wide margin of appreciation and the national courts made an assessment based on the specific national context, taking into account the Court's case-law as well as the relevant principles and criteria, the Court would likewise require strong reasons to substitute its own view for that of the domestic courts.

12. Such an approach would be in accordance with the Court's case-law. For example, in *Kearns v. France* (no. 35991/04, § 74, 10 January 2008) the Court stated that "the Contracting States will usually enjoy a wide margin of appreciation if the public authorities are required to strike a balance between competing private and public interests or Convention rights". The same applies where a fair balance has to be struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161; *Öcalan v. Turkey* [GC], no. 46221/99, § 88, ECHR 2005−IV; and *Bayatyan v. Armenia* [GC], no. 23459/03, § 124, ECHR 2011).

13. Furthermore, in the very recent judgment in *Ndidi v. the United Kingdom* (no. 41215/14, § 76, 14 September 2017, not yet final) the Court, in an Article 8 case, held as follows:

> "The requirement for 'European supervision' does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so."

14. In this respect, the Court's task is to determine whether the reasons relied on by the national authorities to justify the measures interfering with the applicant's rights are "relevant and sufficient" for the purposes of the Convention right at stake (see, *mutatis mutandis*, *Murphy v. Ireland*, no. 44179/98, § 68, ECHR 2003-IX (extracts)). In other words, the Court should not, primarily, examine the applicant's situation and the facts of the case as such, but rather it should review the assessment made by the national courts. If this assessment was carried out by independent and impartial domestic courts on the basis of the Court's principles, taking due account of the particular circumstances of the case and the competing interests, and if the national courts' decision, as a comprehensible result of this assessment, remained within the margin of appreciation afforded to member States under the respective Convention right, then their decision must be accepted by our Court. This is all the more true when the margin of appreciation, as in the present case, is wide. Otherwise, as I have already said on other occasions, we are just paying lip service to this principle.

15. Therefore, in all such cases, and consequently also in Article 9 cases, the Court would require sufficient, if not strong, reasons to substitute its own view for that of the domestic courts. However, such reasons are lacking in the present case, or at least they are not set out in the judgment.

## II. Application of the general principles to the present case

### *i. National courts remained within the margin of appreciation*

16. The majority's assessment of the circumstances of the case at hand is limited to paragraphs 41 and 42, the first of which contains, for a large part, only general statements not specifically linked to the particular facts of the present case. That, in my opinion, is not sufficient for holding

linked to the particular facts of the present case. That, in my opinion, is not sufficient for holding that the State overstepped its wide margin of appreciation.

17. In particular, the judgment does not deal at all with the national courts' arguments as put forward in their different decisions. Let us have a look at the domestic courts' reasoning (paragraphs 7-11 of the judgment) and examine whether these arguments are comprehensible and tenable and within the margin of appreciation.

18. The trial court referred to the provisions of Rule 20 of the House Rules of the Judicial Institutions of Bosnia and Herzegovina and the obligations of the parties in judicial proceedings, which the applicant was acquainted with. It stated that the court was not a place where religious beliefs could be expressed in a way that discredited certain common rules in a multicultural society. The court also connected the case with a number of other identical cases before it, in which people had behaved in the same manner, publicly indicating that they did not recognise the court. It emphasised the frequency of such disrespectful behaviour and contempt of court and concluded that it might essentially be directed against the State and basic social values.

19. The appeals chamber of the court pointed out that the duty to remove headgear in courts was well known and applicable to all persons, regardless of their religious, sexual, national or other affiliation. It confirmed that this was a generally accepted standard of behaviour in courtrooms, and held that, in the secular State of Bosnia and Herzegovina, court premises could not be a place for the manifestation of religion.

20. The Constitutional Court, finding no breach of Articles 9 and 14 of the Convention, fully endorsed the reasoning of the lower courts. In doing so, it made an assessment in conformity with the Court's methodology, examining the limitation of the applicant's freedom of religion, the lawfulness and the legitimate aim of this limitation, its necessity and the proportionality of the sanction imposed. It noted, *inter alia*, that the case concerned a specific situation and an accepted standard of conduct, which the applicant had been aware of; that the restriction in question had been limited, and the trial court had not placed an excessive burden on the applicant; that judicial institutions, owing to the separation of religion from public life in the secular State of Bosnia and Herzegovina, had an obligation to support the values that brought people closer, and not those which separated them, and that the temporary restriction in this case had aspired to achieve this aim; and that the repeated refusal of the applicant to comply with a court order was damaging to the reputation of a judicial institution. Eventually, the Constitutional Court confirmed the substantial reduction of the fine imposed.

21. The domestic courts' extensive reasoning is at least acceptable, taking into account the specific situation in Bosnia and Herzegovina as described in the decisions. Of course, the principles of secularism and pluralism could entail a different approach, but this very much depends on the particular situation in each member State. The approach taken in Bosnia and Herzegovina does not seem unreasonable. Furthermore, it concurs with our case-law in so far as Article 9 of the Convention does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one's religion or beliefs. In democratic societies, in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups (see *S.A.S. v. France*, cited above, §§ 125 and 126; see also *Leyla Şahin*, cited above, §§ 105 and 121; and *Osmanoğlu and Kocabaş*, cited above, § 83).

22. That is exactly what the respondent State did in view of its quite particular situation. Does our Court have the necessary knowledge and competence to call into question the State's choice in regulating this specific and sensitive issue? Is it our role to dictate, from a distance and with hindsight, which policies a State has to pursue in the context of a difficult national situation? Should we not accept, as far as possible, the domestic decision when it results from a reasoned

balancing of concurring rights and interests? The Court has held on many occasions that national authorities have direct democratic legitimation and are in principle better placed than an international court to evaluate local needs and conditions (see *S.A.S. v. France*, cited above, § 129). However, although often reiterated, this statement is unfortunately not always followed where it would be justified, as in the present case.

*ii. The underlying principle of European consensus*

23. After having noted in paragraph 38 of the judgment that the State should, in principle, be afforded a wide margin of appreciation, subsequently this margin disappeared without any explanation and without any proper balancing exercise being carried out. How was it possible for the majority to conclude, in paragraph 43, that the domestic authorities had exceeded their wide margin of appreciation without giving clear reasons for restricting this margin? Did they possibly take into account a "European consensus" which, according to the Court's case-law (see *S.A.S. v. France*, cited above, § 129, and *Osmanoğlu and Kocabaş*, cited above, § 89), may delimit the extent of the margin of appreciation? Although this concept was referred to in paragraph 38 of the judgment, subsequently the "consensus" argument was not explicitly used in order to restrict the wide margin of appreciation. Were the majority, in this respect, nevertheless influenced by the comparative study of the legislation of 38 out of the 47 Contracting States (see paragraph 21 of the judgment), which revealed that the wearing of religious symbols in the courtroom by private citizens is not, as such, regulated by the laws of any of the States covered, with only a limited number of States defining the dress code? If not, why else was this study mentioned at all in the judgment if it had no bearing on it?

24. Whether or not the majority drew any inference from an alleged European consensus, I would like to take the opportunity to share some reflections on the concept of "consensus".

25. Such a consensus must be established in applying a correct methodology. In this connection, I would observe that the comparative survey in the present case did not encompass all States, but at least a sample representative of all major geopolitical blocs. However, a closer look reveals that the research report was confined to the narrow question whether national law prohibits or otherwise regulates the wearing of religious symbols in the courtroom by private individuals.

26. It is not surprising that most member States have not regulated, *as such*, in national laws the wearing of religious symbols in courtrooms by private individuals. The courts are often afforded a fairly wide discretion as concerns order and behaviour in courtrooms and the applicable dress codes. This seems to be the case also in Bosnia and Herzegovina. The issue is not normally regulated by law but rather by "house rules" or "guidelines" which are of a more general nature. Nevertheless, according to the research report, in at least four member States there are regulations expressly ordering all persons present in courtrooms to uncover their heads; it is likely that this includes all kinds of (skull)caps.

27. A related problem is the basis for comparison, as the aspects in issue are not always socially significant or subject to legislative debate in all States. The fact that most member States have not deemed it necessary to legislate in a specific area cannot be taken as an indicator for a European consensus. Unresponsiveness to non-existent problems in some member States therefore cannot have any evidentiary value. The consensus doctrine measures attitudes and legal solutions adopted in respect of similar sociopolitical dilemmas and not the absence of such legal solutions (see Carmen Draghici, "The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?", in *Public Law*, 2017, pp. 18-19).

28. This was also the approach taken, for example, in *S.A.S. v. France* (cited above, § 156), where the Court noted that there was no European consensus against a ban on the wearing of the

full-face veil in public. It added that “in all likelihood, the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of member States, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places”. In the recent Grand Chamber judgment in *Bărbulescu v. Romania* (no. 61496/08, § 118, ECHR 2017) the Court confirmed that the lack of explicit regulation by member States did not constitute a European consensus on the issue.

29. Be that as it may, even a certain “consensus” would not be binding on the Court. Furthermore, the State would still keep a margin of appreciation and it would still be open to it to show that the measure chosen was necessary for the achievement of the aim pursued. A consensus would admittedly restrict the State’s margin of appreciation, but it would not reduce it to zero.

*iii. The missing elements of the proportionality analysis*

30. In this regard, I would point out that the majority’s judgment, apart from not dealing at all with the national courts’ arguments, failed to take into account several important elements when examining the necessity of the State’s interference and determining the actual extent of the State’s margin of appreciation. A scrupulous proportionality analysis should have included, in particular, the following aspects.

31. The intensity of the interference: the restriction on the wearing of a skullcap was very limited, first of all in nature. There was no general ban on wearing such headgear or other religious symbols in all public spaces. Rather, the restriction related to a particular and limited context where the secular nature of the State and the neutrality of the courts were at stake, and where the State could have a comprehensible interest in controlling the appearance of people entering State premises. In this respect, I would reiterate that Article 9 does not protect every act motivated or inspired by a religion or belief and does not always guarantee the right to behave in the public sphere in a manner which is dictated by one’s religion or beliefs (see paragraph 21 above). Freedom to manifest one’s religion or beliefs pursuant to Article 9 of the Convention cannot be interpreted as giving *carte blanche*.

32. The concrete restriction imposed on the applicant was, secondly, limited in place and time as it was applied only for the period during which he stayed within the court premises or, more specifically, within the courtroom where he had to give his witness statement.

33. The importance of secularism in Bosnia and Herzegovina: the majority’s judgment completely failed to address this issue, although the Government as well as the domestic courts explicitly relied on this aspect. The Constitutional Court of Bosnia and Herzegovina noted, confirming the State Court’s reasoning, that “Bosnia and Herzegovina was a secular State where religion was separated from public life and that therefore no one can manifest his/her religion or religious affiliation in a courtroom”. It also stressed “the obligation of an independent judicial institution to support the values that bring people closer, and not those that separate them” (see paragraph 10 of the majority’s judgment and, with respect to the State Court’s decisions, paragraphs 7 and 8). The Government referred to another decision of the Constitutional Court in which it had held “that the separation, as a substantive principle in the relations between the state and its entities towards religious communities, was necessary for the achievement of freedom of religion in a pluralist society of Bosnia and Herzegovina” (Ap 286/06 – see the Government’s observations, § 46). The majority’s judgment is limited to simply stating that Bosnia and Herzegovina is a secular State (see, in the domestic law part, paragraph 13; and, when accepting secularism as part of a legitimate aim, paragraph 35). However, in the necessity analysis it

refrained from assessing this aspect, as well as the specific and complex situation of and within Bosnia and Herzegovina.

34. The quality of the decision-making body: what is meant here is the fact that the domestic decisions were taken not by administrative bodies, but rather by judicial bodies, and at three judicial levels. The final decision at national level was taken by the highest national judicial body, namely the Constitutional Court, which took into account the relevant principles from the Court's case-law (see paragraph 20 above).

35. The quality of the proceedings: the applicant, before being fined, was informed of the duty to remove the skullcap and the possible consequences of his refusal. He was even accorded additional time to reconsider his position. Furthermore, the applicant could effectively participate in the subsequent proceedings, and the decisions delivered by the different courts were comprehensively reasoned.

36. Finally, in trying to "substantiate" their reasoning, the majority, in paragraphs 41 and 42 of their judgment, used some arguments which, to my mind, do not form part of the necessity assessment. For example, whether "the applicant's act was inspired by his sincere religious belief that he must wear a skullcap at all times", which by the way was not contested, belongs to the assessment of the applicability of Article 9 and the admissibility of the complaint or to the question of "interference" (see *Ebrahimian v. France*, no. 64846/11, § 47, ECHR 2015), but cannot be used again as an argument when examining the issue of necessity. Likewise, the lack of a "disrespectful attitude" on the part of the applicant, in my understanding, does not constitute a valid argument in the analysis of his freedom of religion or the limitation thereof.

## III. Conclusion

37. The national courts, which were afforded a wide margin of appreciation, made a careful and comprehensible assessment based on the particular circumstances of the present case and the specific national context, and took into account the relevant principles according to the Court's case-law. They struck a fair balance between the requirements of the protection of the applicant's freedom of religion and the legitimate aim of protecting the rights and freedoms of others. I fail to see sufficient, let alone strong reasons to hold that the State's wide margin of appreciation was extensively restricted or that the State overstepped its remaining margin of appreciation, and to substitute the Court's assessment or the judges' personal view for that of the domestic courts. The majority's judgment simply lacks such reasons as well as a nuanced approach, limiting itself to general statements and to a sort of "pick and choose" of preferred elements of the Court's case-law. Therefore, I have voted against the finding of a violation of Article 9 of the Convention.

38. Eventually, the majority, having regard to the finding relating to Article 9, held that it was not necessary to examine the complaint under Article 14. Although, in principle, I agree with this analysis, I had to vote to the contrary because a finding of no violation of Article 9 would oblige the Court to examine this part of the application. However, in the context of this dissenting opinion and because of the lack of an assessment of this issue by the Chamber, I refrain from further elaborating on this aspect.

39. Consequently, I have likewise voted against point 4 of the operative part (damage and costs).

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[1]1. The convertible mark uses the same fixed exchange rate to the euro that the German mark has (1 euro = 1.95583 convertible marks).

[2]. The relevant paragraph is 62, rather than 50.

[3]. *Zakon o slobodi vjere i pravnom položaju crkava i vjerskih zajednica u BiH*, Official Gazette of Bosnia and Herzegovina no. 5/04.

[4]. *Nošenje vjerskih obilježja u pravosudnim institucijama*; the analysis is available at the website of the HJPC.

[5]. *Zakon o sudovima u Federaciji Bosne i Hercegovine*, Official Gazette of the Federation of Bosnia and Herzegovina nos. 38/05, 22/06, 63/10, 72/10, 7/13 and 52/14.

[6]. *Zakon o sudovima Republike Srpske*, Official Gazette of the Republika Srpska nos. 37/12 and 44/15.

[7]. *Zakon o krivičnom postupku BiH*, Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13.

[8]. *Kućni red i obaveze korisnika kompleksa pravosudnih institucija Bosne i Hercegovine*.

[9]. *Krivični zakon BiH*, Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15 and 40/15.

[10]. A case introduced by a civil party in criminal proceedings who had been denied access to a Brussels courtroom after refusing to remove her Islamic headscarf is currently pending before the Court (*Lachiri v. Belgium*, no. 3413/09, communicated on 9 October 2015).

[11]. The applicant submitted a copy of the letter, and a translation of the letter in English, to the Court on 22 September 2016.