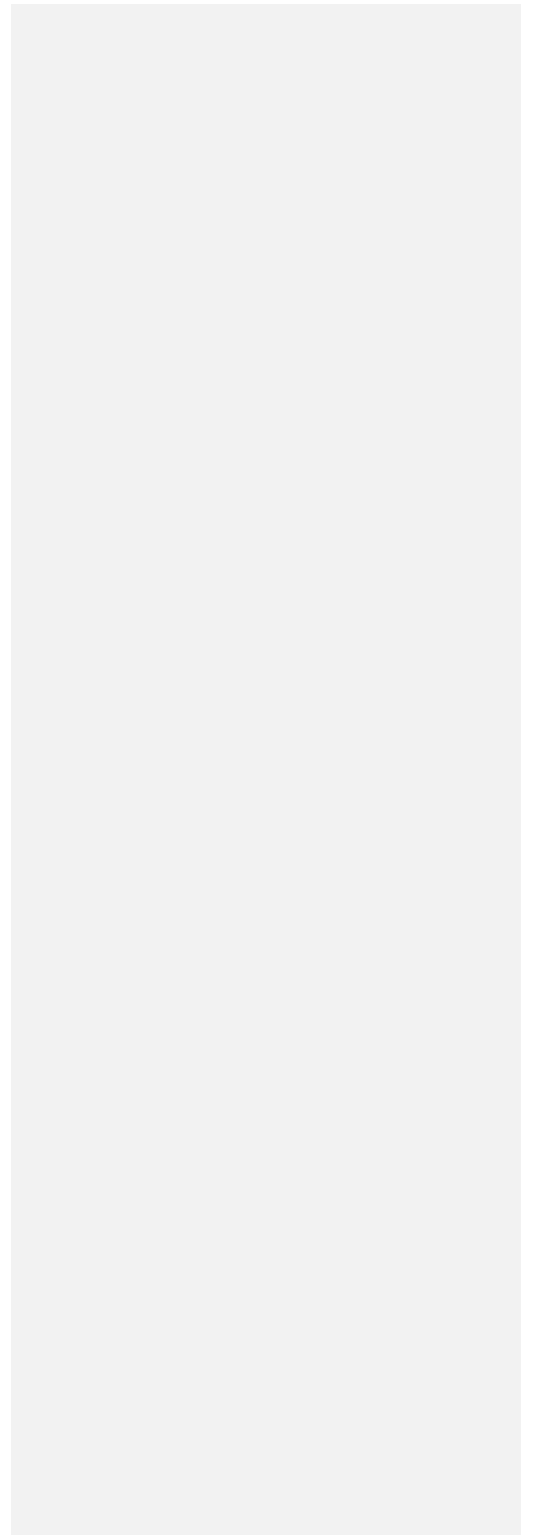


**EUROPEAN COURT OF HUMAN RIGHTS**

**APPLICATION**

*Under Article 34 of the European Convention on Human Rights  
And Rules 45 and 47 of the Rules of Court*



**I THE PARTIES**

**A- THE APPLICANT**

- 1- *Surname* FINCI *2 - First name(s)* JAKOB  
*Sex:* Male
- 3- *Nationality* Bosnian *4-Occupation* civil servant/ lawyer
- 5- *Date and place of birth*  
October 1, 1943
- 6- *Permanent address*  
Jankovica Cikma 3  
71000 Sarajevo  
Bosnia and Herzegovina
- 7- *Tel. No:* +387 33 205 695  
*Mobile:* +387 61 107 602  
*Fax:* + 387 33 212 028
- 8- *Present address (if different from 6.)*  
Same
- 9- *Name of representatives*  
1. Clive Baldwin  
2. Sheri Rosenberg
- 10- *Occupation of representatives*  
1. Solicitor of the Supreme Court of England and Wales  
2. Attorney
- 11- *Address of representative*  
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UK, E1 6LT  
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**B- THE HIGH CONTRACTING PARTY**

13. Bosnia and Herzegovina

## II STATEMENT OF THE FACTS

### SUMMARY

The Applicant, Jakob Finci, a Bosnian citizen of the Jewish identity, alleges violations by Bosnia and Herzegovina (BiH) of the European Convention on Human Rights (ECHR). The BiH Constitution and BiH Election Laws restrict his right to vote and his right to stand for election based upon his race/ethnicity, religion, and association with a national minority. The Applicant submits that as a result, BiH is in breach of its obligations under Article 1 of Protocol 12 and Article 3 of Protocol 1 to the ECHR, as well as Article 14 with Article 3 of Protocol 1, and Article 13. The Constitutional Court, the highest court in BiH, has stated that it does not have the jurisdiction to address violations of the ECHR in the relevant provisions of the Constitution and the election laws. No other avenues for domestic recourse exist.

Bosnia and Herzegovina ratified the European Convention on Human Rights, including the First Protocol on 12 July 2002, whereby both instruments entered into force with immediate effect.<sup>1</sup> It ratified Protocol 12 on 29 July 2003, which came into force on 1 April 2005.<sup>2</sup>

### FACTS

#### *Jakob Finci*

1. Mr. Jakob Finci was born in 1943. He is a Jewish citizen of Bosnia and Herzegovina and a registered voter.
2. Mr. Finci graduated from the Faculty of Law in Sarajevo and has been engaged in civic activity his entire career. He has been an active and well-regarded member of Bosnian political and cultural life for over thirty years.
3. In 1991, Mr. Finci co-founded the Jewish Cultural, Educational and Humanitarian Society "La Benevolencija", of which he remains the President. During the war, La Benevolencija was the only Bosnian humanitarian organisation working as an implementing partner for the United Nations High Commissioner for Refugees (UNHCR) and was one of most successful non-governmental organisations (NGOs), helping citizens of Bosnia-Herzegovina, regardless of ethnicity.
4. From 1996 to 2000, Mr. Finci served as a board member and later as executive director of the Open Society Fund for BiH (Soros Foundation), vice president of the Foundation for the Improvement of the Quality of Life and Sustainable Development in Sarajevo, and president of the Association of the Free Intellectuals Circle 99. In addition, he helped establish the Inter-religious Council (IRC) of BiH, and served as its first president, returning to this role again in 2003.

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<sup>1</sup> Council of Europe Treaty Office – Ratifications and Dates of Entry into Force for Convention for the Protection of Human Rights and Fundamental Freedoms, *available at*

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=12/27/2006&CL=ENG>

<sup>2</sup> Council of Europe Treaty Office – Ratifications and Dates of Entry into Force for Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *available at*

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=12/27/2006&CL=ENG>

He also served as the chair of the Association of Citizens for Truth and Reconciliation.

5. In 2001, Wolfgang Petritsch, the then High Representative of BiH, appointed Mr. Finci as the Chair of the Constitutional Commission of the Federal Parliament, and in 2002, as the first Head of the Civil Service Agency based upon "the high esteem in which Mr. Jakob Finci is held throughout BiH."<sup>3</sup> This appointment was confirmed by the BiH Council of Ministers, which extended the appointment for five years (expiring in 2007). Currently, Mr. Finci is also the President of the Jewish Community.
6. Mr. Finci is frequently interviewed by the local and international media, and has received awards for his devotion to public life from the German and French governments. For his work, Finci has been awarded the Grand Cross of the Order of Merit of the Federal Republic of Germany and the French decoration Chevalier Legion of Honour.
7. Given his background at the centre of political life in BiH and leadership of his community, Mr Finci would like to stand for public office at the highest level in his country. He submits that his qualifications and experience in public life and his leadership of his community would make him a suitable candidate for the Presidency of BiH or membership of its upper house.

#### ***Jewish Community in Bosnia-Herzegovina***

8. Prompted by the Spanish and Portuguese Inquisitions at the end of the fifteenth century, Jews fled the Iberian Peninsula in large numbers and were welcomed by Sultan Bayezid II of the Ottoman Empire.<sup>4</sup> The development of Sarajevo as a trading city first brought Jews to settle in Bosnia and the Jewish community was established in BiH in 1565.<sup>5</sup>
9. Under the Ottoman Empire, Jews were generally well-treated and were recognised under the law. Whilst strains of anti-Semitism and some restrictions based on ethnicity did exist, Jewish communities throughout the Ottoman Empire did not face systematic or long-term state sponsored discrimination, violence or exclusion from society. In 1856, Jews were granted full equality under Ottoman law.<sup>6</sup>
10. The BiH region was incorporated after World War I into what became the Kingdom of Yugoslavia. In 1940 there were approximately 14,000 Jews in BiH.<sup>7</sup> Following the invasion of Yugoslavia in April 1941 by Nazi Germany and its allies, BiH came under the control of the Independent State of Croatia (ISC), a Nazi puppet-state. Under the direction of the new Ustaše authorities, persecution

<sup>3</sup> See Annex I, OHR Decision appointing Mr. Jakob Finci to the Position of Head of Civil Service Agency, 23 May 2002.

<sup>4</sup> Carl K. Savich, *The Holocaust in Bosnia-Herzegovina, 1941-1945* (Serbianna, 18 December 2000, available at <http://www.serbianna.com/columns/savich/006.shtml>).

<sup>5</sup> NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 108 (1996).

<sup>6</sup> Harriet Freidnreich, *THE JEWS OF YUGOSLAVIA: A QUEST FOR COMMUNITY* 56-59 (Jewish Publication Society of America, 1979).

<sup>7</sup> *Id.*

and mass killings took place. After the war, the total Jewish population in Yugoslavia was approximately 4,000.<sup>8</sup>

11. In the aftermath of World War II, many Bosnian Jews returned home. A united Jewish community was re-established in 1945. The Federation of Jewish Communities emerged as the central force re-establishing the Jewish community in BiH and all of Yugoslavia.<sup>9</sup> Under Tito, Jews assumed prominent positions in government. The Jewish community lived peacefully within BiH until, like all people in BiH, it was shattered by the outbreak of the war in 1992.
12. On 8 April 1992, war broke out in BiH. By the time the war ended in 1995, over half of Bosnia's pre-war population of 4.4 million were forcibly displaced; between 100,000 and 250,000 Bosnians were killed; nearly half of the country's housing stock was damaged or destroyed; and most of its economic infrastructure was destroyed.<sup>10</sup>

#### *Creation of discrimination in political system*

13. The war ended in September 1995, with the Dayton Peace Agreement, followed by the formal signing on 14 December 1995 of the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto (together hereinafter referred to as the "DPA").<sup>11</sup> The DPA divided BiH into two entities: Republika Srpska ("RS"), and the Federation of BiH ("Federation"). The BiH Constitution is an annex to the DPA. The Constitution provides that BiH is a democratic State operating under the rule of law, with free and democratic elections.<sup>12</sup>
14. In fact, the State and Entity institutions created by the 1995 Constitution are structured to ensure representation of "constituent" peoples, rather than equal representation of citizens.<sup>13</sup> The Constitution states that the only "constituent" peoples are the three majority ethnic groups in BiH, namely, Bosniaks, Croats and Serbs. All other communities, including the Jewish community, are referred to as "Others." The Council of Europe in a 27 June 2006 report asserted: "It has often been said that the DPA ended the war but froze the conflict, that it acknowledged the forceful division of the country, by referring to the three

<sup>8</sup> Harriet Freidreich, *THE JEWS OF YUGOSLAVIA: A QUEST FOR COMMUNITY* 56-59 (Jewish Publication Society of America, 1979), at 190-191.

<sup>9</sup> *Id.*

<sup>10</sup> Elizabeth M. Cousens, *Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements Between Sovereigns and Intermediate Sovereigns*, 30 *CORNELL INT'L L.J.* 789, 792 (1997). The estimate of 250,000 killed is the most widely cited, although research published in 2005 by Mirsad Tokaca, head of the Sarajevo based Research and Documentation Center, put the number at around 100,000. For a detailed description of Jewish Community contribution to the citizens of Sarajevo during the war, see EDWARD SEROTTA, *SURVIVAL IN SARAJEVO, HOW A JEWISH COMMUNITY CAME TO THE AID OF ITS CITY* (Distributed Art Publishers, 1994).

<sup>11</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, *initialled* Dayton, Ohio, 21 November 1995, *signed* Paris, 14 December 1995, 35 *ILM* 75 (1996) [hereinafter DPA]

<sup>12</sup> BiH Constitution, Art. 1.2.

<sup>13</sup> The BiH Constitution Preamble reads: "Bosniaks, Croats and Serbs as Constituent Peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows." 'Others' is the term used in the BiH Constitution and laws to describe all those not included in the Constituent Peoples. These groups are classified as national minorities, and children of mixed marriages or citizens who do not wish to identify with one nation.

constituent people, and that the institutions it provides for are totally unsuited to the development of a functioning democracy based on the rule of law.”<sup>14</sup>

15. As a point of clarification, whilst the term ‘Bosnian’ applies to all citizens of Bosnia (including Jews), the term ‘Bosniak’ (identified as one of the Constituent Peoples) denotes a specific people, generally of traditional adherence to Islam. It is not a generic term for those living in Bosnia.
16. The 1995 Constitution fundamentally changed the previous position for the Jewish community, by introducing new constitutional structures into BiH society that discriminated on grounds of ethnic origin or nationality.<sup>15</sup> Such formal discrimination against the Jewish community had not existed before 1995.
17. Most notable of all, no member of the Jewish community has been able to be considered for election to/membership of either the collective Presidency of BiH or the House of Peoples, the upper house of the BiH Parliament. Both of these are restricted to members of the three constituent peoples, with no provision for any membership of members of the “Others” group.
18. The current principles of ethnic division enshrined within the Constitution and Election Laws of BiH have been the subject of scrutiny for some time.<sup>16</sup> In March 2005, the European Commission for Democracy Through Law (the Venice Commission) adopted, at the request of the Parliamentary Assembly of the Council of Europe, its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative. In unequivocal language, the Commission asserted that the present Constitution of BiH does not establish a functional state. The Commission concluded that constitutional reform within BiH is unavoidable.<sup>17</sup>

#### *Political attempts to end discrimination*

19. On 22 November 2005, after months of negotiation, the leaders of the major political parties, representatives essentially from the Croat, Serb and Bosniak political groups in BiH signed a joint statement announcing the commitment to reform the BiH Constitution by March 2006. The declaration stated: “To achieve Euro-Atlantic integration, we will need to strengthen state institutions ...and to protect the human rights of all citizens of Bosnia and Herzegovina, regardless of

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<sup>14</sup> Council of Europe Report: *Constitutional Reform in Bosnia and Herzegovina*, Doc. 10982, 27 June 2006, § II.5, [hereinafter Council of Europe Report] available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc10982.htm>

<sup>15</sup> Joseph Marko, *Bosnia and Herzegovina, Multi-Ethnic or Multinational?* Societies in Conflict: The Contribution of Law and Democracy to Conflict Resolution, Science and Technique of Democracy No. 29, Council of Europe (2000); Julie Mertus, *Prospects For National Minorities Under the Dayton Accords - - Lessons From History: The Inter-War Minorities Schemes and the “Yugoslav Nations”*, 23 BROOKLYN J. INT’L L. 793 (1998) (noting that a “nationality key” system was not new to post-Dayton BiH where a proportional representation scheme existed in the former Yugoslavia and BiH).

<sup>16</sup> Council of Europe Report, *supra* note 14.

<sup>17</sup> Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD (2005) 004, 62nd plen. sess., 11-12 March 2005, [hereinafter Venice Commission Opinion 2005], available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf)

ethnicity.”<sup>18</sup> Conspicuously missing from these negotiations were representatives from minority communities, including Mr Finci.<sup>19</sup>

20. On 26 April 2006, approximately five months before the general elections in October, the House of Representatives attempted to enact a series of Constitutional amendments, including proposals to partially reform certain discriminatory Constitutional provisions. However, the House of Representatives was unable to achieve the required two-thirds majority necessary to adopt the proposed package of constitutional amendments. This failure of action drew immediate expressions of disappointment from a multitude of actors. The former Prime Minister and current leader of the Social Democrat political party, Zlatko Lagumdžija, reiterated his assertion that the current method of electing the presidency was in violation of basic human rights because of its severe restrictions on eligibility and accordingly needs to be reformed.<sup>20</sup>
21. In a 27 June 2006 Session, the Parliamentary Assembly of the Council of Europe specifically commented on the failed 26 April 2006 BiH House of Representatives vote. “This means that the forthcoming elections on 1 October 2006 will be held in violation of Council of Europe commitments, in particular Protocol No. 12 to the European Convention on Human Rights on the prohibition of discrimination, because again only Serbs, Bosniaks and Croats will be able to stand for election...”<sup>21</sup>
22. It should be noted that the package of Constitutional amendments that were considered did not address the discriminatory practices affecting the Applicant. Representation and participation in the House of Peoples and the Presidency would have remained limited to Constituent Peoples even if the amendments had passed.<sup>22</sup>

#### *Legal attempts to challenge discrimination*

23. As stated above Mr Finci would like to present himself as candidate for the highest office in his country. However, the failed political attempts to change the constitution and dismissal by the Constitutional Court of two cases challenging the discriminatory provisions meant it was impossible for him to do so.<sup>23</sup> Finci, as a member of the Jewish community, and therefore not one of the Constituent Peoples, was not able to stand for election to the Presidency in the October 2006 elections or try to become a member of the House of Peoples.

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<sup>18</sup> The declaration was signed by BiH Presidency member Sulejman Tihić, Dragan Čović, Barisa Čolak, Mladen Ivanic, Safet Halilović, Zlatko Lagumdžija, Milorad Dodik, and Mate Bandur. See, Antonio Prlenda, Southeast European Times, May 12, 2005, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GE/features/setimes.features/2002/12/0](http://www.setimes.com/cocoon/setimes/xhtml/en_GE/features/setimes.features/2002/12/0), NYT, November 22, 2005, found at <http://www.nytimes.com/aponline/national/AP-US-Bosnia.html>

<sup>19</sup> Only the representatives of the parties that are currently in the Parliament were included in this process. The Constituent Peoples therefore were represented at these talks; representatives of “others” were not.

<sup>20</sup> Transitions Online, April 27, 2006 available at <http://www.tol.cz/look/TOL/article.tpl?IdLanguage=1&IdPublication=4&NrIssue=164&NrSection=1&NrArticle=16847>

<sup>21</sup> Council of Europe Report, *supra* note 14.

<sup>22</sup> An in depth analysis of the amendments and the process by which they were considered is available at <http://www.usip.org/pubs/specialreports/sr175.html>

24. The violations Mr Finci is complaining about are continuing violations. He was prevented from standing for the Presidency and House of Peoples, and for being able to vote for candidates from his community, both before and after the Convention entered into force for BiH in 2002 (and Protocol 12 entered into force in 2005). Mr Finci continues to be prevented from standing from office and from being able to choose candidates from his own community to this date. It should also be noted that although the many Council of Europe states were involved in the Dayton Peace Agreement, it is Bosnia and Herzegovina that is responsible for its electoral law today and Mr Finci falls within their jurisdiction. An analogous situation is that of *Aziz v Cyprus*. There the challenge was also to an electoral law deriving from the 1960 Constitution of Cyprus, which had been guaranteed by Greece, Turkey and the United Kingdom. However the Court rejected complaints against the latter three states as being of "a political nature and have no bearing ... on the refusal of the authorities to register [the Applicant] in the electoral lists." [Partial Decision on Admissibility, 23 April 2002]
25. Mr. Finci submits that despite his qualifications, observable commitment to public service, and desire to run for public office, he is barred by BiH Constitutional provisions and Election Laws, from both standing for election to the office of the tripartite presidency, and from the possibility of becoming a member of the House of Peoples, the upper house of the BiH parliament.
26. Mr Finci also submits that the election laws in BiH restrict his right, as a citizen and voter of BiH, in a free choice of candidates for the Presidency and in being represented in the upper house of his parliament by excluding any possibility of candidates who are not from the Constituent Peoples. Most particularly, Mr Finci submits that the laws in BiH totally exclude his right to be represented by any member of his own Jewish community in the highest legislative bodies in the BiH political system.
27. Mr Finci submits that these violations of his right to present himself for office, and his right as a voter are continuing violations of the European Convention on Human Rights. The decisions of the BiH Constitutional Court in 2006 confirmed that no remedy was available in BiH law against the discrimination.

## **DOMESTIC LAW**

### *Membership and Election of the Presidency of Bosnia and Herzegovina*

28. Article V of the BiH Constitution provides:

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

29. Article 8.1, Paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina adopted by the Parliamentary sessions in August 2001 reads as follows:

The members of the Presidency of Bosnia and Herzegovina directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniak and one



Croat - shall be elected by voters registered to vote for the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation may vote for either the Bosniak or Croat Member of the Presidency, but not for both. The Bosniak and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected.

The member of the Presidency of Bosnia and Herzegovina that shall be directly elected from the territory of Republika Srpska (RS) - one Serb shall be elected by voters registered to vote in the RS. The candidate who gets the highest number of votes shall be elected.<sup>24</sup>

#### *Membership and Election of the House of Peoples*

30. Article IV of the BiH Constitution provides:

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

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

#### *Protection of Convention rights in domestic law*

31. Article II.4 of the Constitution provides:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

32. Article II.2 of the Constitution provides:

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

33. Article 19 of the BiH Law on Protection of Rights of Members of National Minorities 2003 states:

Persons belonging to a national minority as defined in Article 3 of this Law, shall have the right to be represented in the bodies of public authorities and other civil services at all levels, proportionally to their share in the population of BiH, in accordance with the last census.

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<sup>24</sup> See Annex 3, Election Law of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, 23/01.

Recognised national minorities under Article 3 include Jews.<sup>25</sup>

#### *International Standards Incorporated into the Constitution*

34. In Bosnian law, constitutional rank is granted to international human rights agreements listed in Annex 1 to the Constitution. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is an integral part of Annex I to the Constitution of BiH, along with fourteen additional human rights agreements to be applied in BiH,<sup>26</sup> such as the Convention on the Elimination of Racial Discrimination ("ICERD"), the International Covenant on Civil and Political Rights ("ICCPR"), and the Framework Convention for the Protection of National Minorities ("FCNM"). Moreover, Article II.2 of the Constitution gives priority to the ECHR and Protocols over all other law and directly incorporates it into the legal system of BiH.<sup>27</sup>

35. Special consideration must be accorded to the principle enshrined in Article 3(1) of the Framework Convention for the Protection of National Minorities which stipulates that:

Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.

### **III STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND RELEVANT ARGUMENTS**

36. The Applicant alleges that the following Articles of the Convention have been violated: Article 1 of Protocol 12; Article 14 with Article 3 of Protocol 1; Article 3 of Protocol 1 itself; Article 13.

#### **The Applicant has suffered Discrimination under Article 1 of Protocol 12**

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion,

<sup>25</sup> Article 3 of the Law on Protection of Rights of Members of National Minorities 2003 recognizes Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks and Ukrainians as 'minorities' in BiH.

<sup>26</sup> DPA Annex 4 – BiH Constitution, Annex I: Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto, Convention Relating to the Status of Refugees and the 1966 Protocol thereto, Convention on the Nationality of Married Women, Convention on the Reduction of Statelessness, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, European Charter for Regional or Minority Languages, Framework Convention for the Protection of National Minorities.

<sup>27</sup> DPA Annex 4 - BiH Constitution, Art.II.2: "International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

political or other opinion, national or social origin, association with a national minority, property, birth or other status.  
No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

37. The codification of Protocol 12 reflects the Council of Europe's and the member states' commitment to a cornerstone principle of a pluralistic, democratic society. Protocol 12 reflects the general principle of equality and non-discrimination, as fundamental elements of international human rights law.<sup>28</sup> The right to non-discrimination has intrinsic value as a fundamental human right and constitutive value as being integral to ensuring lasting peace and justice. As emphasised in the Preamble to the Universal Declaration on Human Rights "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The Preamble goes on to state that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ...".
38. In response to the widespread consensus for the need of equal and inalienable rights of all members of the human family, the constitutions of all Council of Europe member states today contain bans on discrimination on the grounds of race and/or ethnic origin. This Court expressly noted that Article 1 of Protocol 12 reflects the essential nature of the principles of equality and non-discrimination as part of international human rights law found in the ICCPR.<sup>29</sup>
39. The explanatory note to Protocol 12 states that the meaning of discrimination under it is intended to be identical to that developed by the Court under Article 14. Protocol 12 differs from Article 14 of the Convention in that its scope of protection is much wider, prohibiting discrimination in any right "set forth by law".<sup>30</sup>
40. By creating an independent right, which is not parasitic on other Convention rights, Protocol 12 is an important addition to the Convention's commitment to non-discrimination. This case fits squarely within the parameters of the object and purpose of Protocol 12, which seeks to "promote the equality of all

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<sup>28</sup> The Preamble to Protocol 12 refers to "the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law". See also Article 1, para. 4, of the International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD], Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women [hereinafter CEDAW], Article 4, para. 3, of the Framework Convention for the Protection of National Minorities [hereinafter FCNM], and Article 7 of the Universal Declaration of Human Rights [hereinafter UDHR]. The general prohibition against race discrimination may be *jus cogens*, a peremptory norm of international law. See, e.g., the Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), p. 298.

<sup>29</sup> *Opinion of the European Court of Human Rights on Draft Protocol 12 to the European Convention on Human Rights*, CDDH (2000) 001, 1 February 2000, [hereinafter ECtHR Opinion on Draft Protocol 12] para. 2. Article 26 of the ICCPR provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

<sup>30</sup> *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report*, (ETS No. 177), [hereinafter "Explanatory Report to Protocol 12"] para. 21, available at <http://conventions.coe.int/treaty/en/Reports/Html/177.htm>

persons<sup>31</sup> and “address clear inequalities of treatment.”<sup>32</sup> Because the direct discrimination excluding the Applicant from the right fully to participate in the voting and election process is *the fundamental aspect* of this case the importance of the equality dimension of this case must not be overlooked.<sup>33</sup>

#### *The Rights “Set Forth By Law”*

41. The Protocol requires that all rights “set forth by law” be secured without discrimination. The meaning of rights “set forth by law” includes “the enjoyment of any right specifically granted to an individual under national law.”<sup>34</sup>
42. The Applicant states that he has suffered and continues to suffer discrimination with respect to the following rights set forth by law in BiH:
  - i. The right to stand for and be a member of the Presidency;
  - ii. The right to stand for and be a member of the House of Peoples;
  - iii. The right to vote for and be represented in the collective Presidency;
  - iv. The right to be represented in the House of Peoples;

These rights set forth above are provided for by law in BiH. These rights are found in Articles II.4 and IV-V of the Constitution, Article 8.1 of the Election Law, ICERD, ICCPR, and the FCNM. Protocol 12 applies to these rights.<sup>35</sup>

#### *Meaning of Discrimination*

43. The Explanatory Note provides that the definition of discrimination under Protocol 12 is identical to that under Article 14. In its Opinion on draft Protocol 12 to the ECHR, this Court noted that under its consistently interpreted case-law, “a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised’.”<sup>36</sup>
44. This Court has also cited the definition of racial discrimination adopted by the United Nations’ International Convention on the Elimination of All Forms of Racial

<sup>31</sup> Article 12 Protocol 1 Preamble. According to the principles of interpretation used by the Court, a treaty must be interpreted in context and in the light of its object and purpose, and to determine the object and purpose, the Court must take into the account the text as a whole, the preamble, and any agreement related to the treaty. This means that assistance should be derived from Article 14 of the ECHR as it is clearly a related instrument. See, Vienna Convention on the Law of Treaties of 23 May 1969, Article 3; *Goldar v. UK* (1975) 1 EHRR 524, § 30.

<sup>32</sup> *Aziz v. Cyprus* (No. 69949/01), Judgment of 22 June 2004, §35 (the Court will consider Article 14 claims “if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.”)

<sup>33</sup> Protocol 12 allows the Court to recognize that the equality right at issue in this case, though part of the right to vote and to stand for election, is also of a different nature to that substantive right.

<sup>34</sup> Explanatory Report to Protocol 12, *supra* note 30, para. 22. In BiH, the 15 International Human Rights Agreements listed in annex to the DPA Constitution are automatically incorporated into Bosnian law.

<sup>35</sup> See *supra* paras 28-34.

<sup>36</sup> See ECtHR Opinion on Draft Protocol 12, *supra* note 29, para. 5. See also *Abdulaziz, Cabales and Balkandali v. The United Kingdom* (Nos. 9214/80; 9473/81; 9474/81) [hereinafter *Abdulaziz v UK*], Judgment of 28 May 1985, § 72.

Discrimination (ICERD) in its jurisprudence.<sup>37</sup> The relevant part of Article 1 of ICERD states:

In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

#### *Grounds of discrimination*

45. In considering the different types of discrimination, the Court has noted that "[d]iscrimination on account of one's actual or perceived ethnicity is a form of racial discrimination."<sup>38</sup> In *Timishev v. Russia* the Court observed that ethnicity and race are related and overlapping concepts. The Court further clarified that whereas "race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."<sup>39</sup>

46. The Applicant submits that he has been discriminated against in violation of his right under Protocol 12 on the basis of his Jewish religion and ethnicity.<sup>40</sup> The Applicant further submits that he has been discriminated against on the basis of his association with a national minority. Jews are one of thirteen legally recognised minorities in Bosnia.<sup>41</sup>

#### *Difference in Treatment*

47. In order to determine whether the Applicant has been discriminated against, the Court must first determine whether the Applicant has been and continues to be treated differently from others in the same or relevantly similar situation. The jurisprudence of the Court makes clear that, for the purposes of Article 14 (which will serve as the general framework for Protocol 12), a difference of treatment is

<sup>37</sup> *Timishev v. Russia* (Nos. 55762/00 and 55974/00), Judgment of 13 December 2005, §35; see also, citation to the ECRI General Policy Recommendation no. 7 on national legislation to combat racism. It defines "racial discrimination as: ... (b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective or reasonable justification..." *Id.* § 34.

<sup>38</sup> *Timishev v. Russia*, *supra* note 37, § 56.

<sup>39</sup> *Id.* § 55.

<sup>40</sup> In BiH, ethnicity and religion have largely merged with respect to the construction of ethnic identity. The Serb people are largely identified as the Orthodox religion, Croats as Catholic, and Bosniaks as Muslim. Jews are recognised as a "national minority" and therefore, in BiH, being Jewish is a religious, national/ethnic and minority identity.

<sup>41</sup> Law on the Rights of National Minorities, Official Gazette of Bosnia and Herzegovina, 12/03. Article 3 states: A national minority, in terms of this Law, shall be a part of the population-citizens of BiH that does not belong to any of three constituent peoples and it shall include people of the same or similar ethnic origin, same or similar tradition, customs, religion, language, culture, and spirituality and close or related history and other characteristics. BiH shall protect the status and equality of members of national minorities as follows: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romas, Romanians, Russians, Rusins, Slovaks, Slovenians, Turks, Ukrainians and other who meet requirements referred to in Paragraph 1 of this Article.

discriminatory if it has no reasonable or objective justification, that is if it does not pursue a legitimate aim or there is no reasonable relationship or proportionality between the means employed and the aim sought to be realised.<sup>42</sup>

48. The BiH Constitution and BiH Election Laws limit the Applicant's right to vote and to stand for election based solely upon his status as a Jewish citizen of BiH. Mr. Finci is completely excluded from the right to stand for election for, and be a member of the tripartite Presidency and/or for a position in the House of Peoples. He is therefore being treated differently (and to his detriment) from members of the Serb, Bosniak or Croat communities who can be elected to the highest offices of state. There are no apparent or arguable differences between Bosniak, Croat or Serb individuals and Jewish individuals in relation to their qualifications for these public offices.
49. He has similarly limited voting and representation rights, as he may only vote for Serbs, Croats, and Bosniaks. Unlike members of the "Constituent Peoples," Jewish citizens like the Applicant are excluded by the BiH laws from any opportunity to vote for and be represented by members of their own community in the highest offices of state. The Constitutional and legislative structure of BiH has the effect of creating two classes of citizens: the Constituent Peoples who may represent other citizens, and those "Others" who may not. In the leadership of their country, the "Others" may only watch, not participate.
50. The Applicant, despite possessing experience comparable to the highest elected officials in BiH, is prevented from the political opportunities they enjoy solely on the basis of his membership in the Jewish community. He has suffered a difference in treatment on the basis of religious and ethnic/racial identity, as well as his association with a national minority.

#### *Objective and Reasonable Justification*

51. The respondent party has a very heavy burden when seeking to establish objective and reasonable justifications for this type of differential treatment, given both the basis of it (direct racial discrimination); and the areas to which it applies (political participation and representation in the highest level of the state).
52. Because the discrimination that the Applicant has and continues to endure is on the basis of his race/ethnicity, religion, and association with a national minority, the Applicant has been the victim of "racial discrimination" as defined by this Court.<sup>43</sup> This Court has held that "[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."<sup>44</sup>

<sup>42</sup> See e.g., *Belgian Linguistic Case* (Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), Judgment of 23 July 1968, § 10 (setting forth Article 14 standard) and finding discrimination in the enjoyment of the right to education, in violation of the European Convention, where French-speaking children residing in a Flemish area of Belgium were denied access to French-speaking schools outside that area and were compelled to attend local Dutch-speaking schools.

<sup>43</sup> See *supra* § 37-40 of the present application.

<sup>44</sup> See *Nachova and Others v. Bulgaria* (Nos. 43577/98 and 43579/98), Judgment of 26 February 2004, § 145; *Timishev v. Russia*, *supra* note 37, § 56; *supra* § 37-40.

53. Moreover, this Court has established that “a special importance should be attached to discrimination based on race and that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances constitute a special affront to human dignity.”<sup>45</sup> Badges of differentiation such as race, colour, descent and national and ethnic origin all belong to the general category of “race.” Moreover, this Court has found that differential treatment based upon association with a national minority relates to racial discrimination.<sup>46</sup>

54. Furthermore, the discrimination at issue nullifies a right that has been deemed by this Court to be of “prime importance.” This Court has held that the principle of equality of treatment of all citizens in the exercise of their right to vote and to stand for election is fundamental because it “enshrines a characteristic principle of democracy.”<sup>47</sup>

*There can be no Legitimate Aim to justify such difference in treatment*

55. The Applicant submits that the respondent Party cannot show that the discrimination suffered by the Applicant is justified by any legitimate aim.

56. In analysing claims under Article 14, the Court has generally granted the respondent states a “margin of appreciation” with regard to the aim sought to be achieved through the discriminatory practice.<sup>48</sup> “The scope of this margin will vary according to the circumstances, the subject-matter, and its background.”<sup>49</sup>

57. In the context of discrimination on the basis of sex, the Court has found that “very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of sex as compatible with the Convention.”<sup>50</sup> Such a requirement for very weighty reasons to justify discriminatory treatment is equally, if not more, applicable in relation to racial discrimination since it is “a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance ... [authorities] must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.”<sup>51</sup>

<sup>45</sup> *Cyprus v. Turkey* (No. 25781/94), Judgment of 10 May 2001, § 306 (Finding a violation of Article 3 of the Convention where Greek Cypriot relatives of people disappeared following a military intervention were subjected to inhuman and degrading treatment based on their ethnic origin, race, and religion.); *East African Asians v. the United Kingdom* (Nos. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 and 4527/70-4530/70) Report of 14 December 1973 [hereinafter *East African Asians v UK* Commission Report], D.R. 78 A/B/5, §207 (Where citizens of the UK who were residents of Africa and were of Asian descent seeking to settle in the UK and were either denied admission or permission to remain in the UK permanently. In the cited provision, the Commission found a violation of Article 14 in conjunction with Article 3 of the Convention).

<sup>46</sup> Article 1 of ICERD, ECRI General Policy Recommendation 7 cited in *Timishev v. Russia*, *supra* note 37, § 55.

<sup>47</sup> *Mathieu-Mohin and Clerfayt v. Belgium* (No. 9267/81), Judgment of 2 March 1987, § 47.

<sup>48</sup> See e.g., *Chassagnou and Others v. France* (Nos. 25088/94, 28331/95 and 28443/95), Judgment of 29 April 1999, § 91.

<sup>49</sup> *Abdulaziz v UK*, *supra* note 36, § 78.

<sup>50</sup> *Willis v. The United Kingdom* (No. 36042/97), Judgment of 11 June 2002, § 39.

<sup>51</sup> *Timishev v. Russia*, *supra* note 37, § 56.

58. The DPA to which the Constitution is annexed, provides for a complex power sharing structure, arranged through a strong emphasis on ethnic belonging linked to territorial belonging, and was largely designed to cater to the needs of the “constituent peoples.” This arrangement was considered necessary by some to stop the war and consolidate the peace.
59. It is submitted that laws which encourage and perpetuate a focus on ethnic differences at the expense of democracy and the fundamental principles of non-discrimination are not likely to secure a lasting consolidated peace and do not therefore constitute a legitimate aim.
60. In light of the “special importance” attached to racial discrimination,<sup>52</sup> and given that it is a “particularly invidious kind of discrimination,”<sup>53</sup> the Applicant submits that even in 1995 (when the BiH Constitution was adopted as part of the DPA) and notwithstanding the need to secure a peace agreement, there could have been no legitimate aim which justified excluding completely the Jewish community (and other minorities) from representation and the consequent creation of their second-class status.
61. Even if it could be argued that there was a legitimate aim for such discriminatory treatment at the time of the adoption of the Constitution (which is not accepted by the Applicant), the situation in BiH today is such that there can be no legitimate aim which would justify the ongoing discrimination in the political system. The only other member state of the Council of Europe where whole elements of the population formally excluded from being represented or standing in the legislature solely on the basis of their race is Cyprus, where the Court has already found a violation of the Convention in *Aziz v Cyprus*.
62. The lack of any legitimate aim for the discriminatory treatment faced by those from the Jewish community (and other minorities) in the electoral system is also apparent from the arbitrary nature of such treatment. The total exclusion of the Jewish community and others minorities only applies to the highest levels of state (the Presidency and the upper house of Parliament) and a few other bodies (e.g. the Presidency of the Federation). Any justification for such discriminatory treatment would therefore have to explain why such exclusion was considered necessary in relation to the bodies at the highest levels but not others. No such explanation is apparent but rather such exclusion at the highest level simply serves to further entrench a second-class status for the so-called “Others” as opposed to the “Constituent Peoples”.
63. The official creation of second-class status for the Jewish (and other) community within Bosnia is fundamentally incompatible with the object and purpose of Protocol 12 and there can therefore be no legitimate aim that would justify such discrimination in the political system.
64. Many organisations and human rights bodies have emphatically stressed the need for BiH to replace its system of discriminatory ethnic representation. The

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<sup>52</sup> *Cyprus v. Turkey* (No. 25781/94), Judgment of 10 May 2001, § 306, and *East African Asians v UK* Commission Report, *supra* note 45, § 207.

<sup>53</sup> *Timishev v. Russia*, *supra* note 37, § 56.



Applicant directs the attention of the Court to the following reports and resolutions for consideration:

- Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Bosnia and Herzegovina, 27 May 2004<sup>54</sup>
- European Parliamentary Assembly, Resolution 1513 (2006): Constitutional reform in Bosnia and Herzegovina<sup>55</sup>
- UN Committee on the Elimination of Racial Discrimination, Concluding Observations of the Sixty-Eighth Session, 20 February – 10 March 2006<sup>56</sup>
- UN Human Rights Committee, Concluding observations of the Eighty-Eighth session, 16 October to 3 November 2007.<sup>57</sup>
- Venice Commission report – CDL-AD(2005)004<sup>58</sup>
- European Commission against Racism and Intolerance: Report on Bosnia and Herzegovina, 25 June 2004<sup>59</sup>

65. The above authorities reflect an emerging consensus that the current structure for political representation in BiH can no longer be justified by the post-war environment (if it ever could be). Therefore the racial discrimination imposed by the respondent state on the Applicant has no legitimate aim and is not justified. Moreover, "no difference of treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary society built on the principles of pluralism and respect for different cultures."<sup>60</sup>

<sup>54</sup> "There will be a growing need in the future to move from this emphasis on ethnic belonging and group rights towards a more inclusive approach focusing on individual human rights..." – Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Bosnia and Herzegovina*, ACFC/INF/OP/I/(2005)003, 27 May 2004, para. 13.

<sup>55</sup> Urging BiH to "replace the mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against 'Others'" European Parliamentary Assembly, Resolution 1513, 29 June 2006, 21st sitting, §§ 20-20.1.

<sup>56</sup> Noting that the ethnic-based rights structure "may have been necessary, on an interim basis, to secure peace in the aftermath of the armed conflict. However ... the Constitution's current assignment of important rights based expressly on ethnicity may impede the full implementation of the Convention [on the Elimination of Racial Discrimination]." CERD Concluding Observations, CERD/C/BIH/CO/6, 68th sess., 11 April 2006, § 4.

<sup>57</sup> The UN Human Rights Committee, highlighted the following in paragraph 8 of its Concluding Observations: 8. The Committee is concerned that after the rejection of the relevant constitutional amendment on 26 April 2006, the State Constitution and Election Law continue to exclude "Others," i.e. persons not belonging to one of the State party's "constituent peoples" (Bosniaks, Croats and Serbs), from being elected to the House of Peoples and to the tripartite Presidency of Bosnia and Herzegovina. (arts. 2, 25 and 26) The State party should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis, including all stakeholders, with a view to adopting an electoral system that guarantees equal enjoyment of the rights under article 25 of the Covenant to all citizens irrespective of ethnicity.

<sup>58</sup> Admitting the necessity for distribution of posts at the time of the Dayton Agreement, but noting, "[t]his justification has to be considered, however, in the light of developments in BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards." Venice Commission Opinion 2005, *supra* note 17, paras. 74-75

<sup>59</sup> "While it recognises that these constitutional arrangements [referring to provisions in the Constitution that reserve certain public positions for persons belong to specific ethnic groups] derive from the GFAP...ECRI considers that the ethnically discriminatory nature of these arrangements will have to be addressed." European Commission against Racism and Intolerance, Report on Bosnia and Herzegovina, CRI (2005) 2, 25 June 2004, para. 8, *available at* [http://www.coe.int/t/e/human\\_rights/ecri/1-ecri/2-country-by-country\\_approach/bosnia\\_and\\_herzegovina/](http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/bosnia_and_herzegovina/)

<sup>60</sup> *Timishev v. Russia*, *supra* note 37, §58.

*No Reasonable Relationship of Proportionality between the Means employed and the Aim Sought to be Realised*

66. Without prejudice to the foregoing arguments as to the absence of legitimate aim, the means used (disenfranchisement of swaths of the BiH population) are disproportionate to that aim. The maintenance of these discriminatory provisions violates Article 1 of Protocol 12.<sup>61</sup>
67. Whatever the situation in 1995, the situation today cannot justify blatant racial discrimination at the heart of the political system. In support, the Applicant refers to the comments and reports referenced above.
68. The Venice Commission Report<sup>62</sup> found that any aim of the present Constitutional structure can be achieved through other means which are in conformity with the European and International law standards. It concluded that:

[T]here remain [in BiH] circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. ... This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the rules on the Presidency to make them compatible with international standards whilst maintaining the political balance in the country.<sup>63</sup>

69. As the Venice Commission Report makes clear, the present Constitutional structure is not the only way to achieve a guaranteed distribution of power in BiH. Since there are other, non-discriminatory means available to the respondent state, the means are disproportionate.
70. In conclusion, the Applicant has shown that he is being treated differently from other Bosnians similarly situated solely on the basis of his Jewish identity. The Court has previously espoused a stringent view of discriminatory treatment on the basis of race and should regard any legitimate aims offered by the respondent state with a very narrow "margin of appreciation." The respondent state has no legitimate aim or justification for discriminating against the Applicant. Even if the respondent state claims the constitutional structure was necessary at the end of the war; that is clearly not the case now. Even if there is a present need for political balance in BiH, there are other ways to achieve it; therefore the respondent state's means are not proportionate.

**Breach of Article 14 of the Convention together with Article 3 of Protocol 1 to the Convention**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour,

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<sup>61</sup> *supra* § 48-50.

<sup>62</sup> Venice Commission Opinion 2005, *supra* note 17.

<sup>63</sup> *Id.* paras. 75-76.

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

71. Because Article 14 is coextensive with Protocol 12, the Applicant will not repeat the same arguments. The following, however, should be highlighted with respect to the Court's jurisprudence under Article 14 as it pertains to the case at bar.
72. In the case of *Aziz v Cyprus*, the Court considered that the complaint under Article 14 of the Convention was not a mere restatement of the Applicant's complaint under Article 3 of Protocol No. 1. The Court noted that the Applicant was a Cypriot national, resident in the government-controlled area of Cyprus. The Court further observed that the difference in treatment in the case in question resulted from the very fact that the Applicant was a *Turkish* Cypriot. It emanated from the constitutional provisions regulating the voting rights between members of the Greek-Cypriot and Turkish-Cypriot communities that had become impossible to implement in practice.<sup>64</sup>
73. Although the Court took note of the Government's arguments, it considered that the party "could not justify this difference on reasonable and objective grounds, particularly in the light of the fact that Turkish Cypriots in the Applicant's situation are prevented from voting at any parliamentary election".<sup>65</sup> The Court stated that whilst member states enjoyed considerable latitude in establishing rules within their constitutional order governing parliamentary elections and the composition of their parliaments; the relevant criteria might vary according to the historical and political factors peculiar to each State. However, those rules should not be such as to exclude certain people or groups of people from participating in the political life of the country and, in particular, in the choice of the legislature. Thus, the Court concluded that there was a clear inequality of treatment in the enjoyment of the right in question, which had to be considered a fundamental aspect of the case. Accordingly a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 was found.<sup>66</sup>
74. The Applicant's situation is analogous in many ways to the situation in the case of *Aziz v Cyprus*. His exclusion from any right to stand for the Presidency or the House of Peoples, and the limitation on his right to vote for or be represented by a member of his own community for these bodies, are due to laws that exclude his entire community from participating fully in the political life of the country. There is a clear inequality of treatment between the Applicant, as a member of the Jewish community, and persons of similar qualifications who are member of the Constituent Peoples. The inequality of treatment is a fundamental aspect of this case.
75. The areas of discrimination against the Applicant fall within Article 3 of Protocol 1, being a restriction on his right to stand for elected office, and on his right to vote.

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<sup>64</sup> *Aziz v. Cyprus*, *supra* note 32, § 36.

<sup>65</sup> *Id.* § 37.

<sup>66</sup> *Id.* § 38.

76. The Applicant submits for the reasons set out above under Protocol 12 that these restrictions amount to a difference in treatment on the basis of religion, race/ethnicity and association with a national minority, which have no objective and reasonable justification. They amount therefore to discrimination and a violation of Article 14 of the Convention with Article 3 of Protocol 1.

### **Violation of Article 3 of Protocol 1**

Article 3 of Protocol 1 states as follows:

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

77. Article 3 of Protocol 1 differs from other Convention rights since it is phrased in terms of the *obligation* of the High Contracting Party to hold elections which express the opinion of the people. Moreover, there are no limitations set out within Article 3 of Protocol 1 on the rights. As understood by this Court, this phrasing emphasises the importance to this commitment and highlights that this is an area where High Contracting Parties are required to take positive measures to ensure access to this right rather than merely refraining from interfering with this right.<sup>67</sup> Over the years, Article 3 of Protocol 1 has evolved from the idea of an "institutional right to the holding of free elections, [...] to the concept of "universal suffrage" and then as consequence to the concept of subjective rights to participation - the "right to vote" and the "right to stand for election."<sup>68</sup>

78. The right to vote is not a privilege. It is a well-established principle of international law that universal suffrage and fair and free elections are the cornerstone of democracy based upon the consent of the people.<sup>69</sup> In this respect, this Court has held that the principle of equality of treatment of all citizens in the exercise of their right to vote and to stand for election is of "prime importance" in the Convention system since it "enshrines a characteristic principle of democracy."<sup>70</sup>

79. There are numerous ways of organising and running electoral systems and no one particular way is demanded by this Article. Of course, there is a wealth of differences, *inter alia*, in historical development, cultural diversity, political and philosophical assumptions, and levels of political evolution between each Contracting High Party. Nonetheless, whilst this Court has determined that as a consequence of such diversity, States have a wide margin of appreciation with respect to the application of this Article, this margin is not unlimited. The Court must satisfy itself that that any conditions imposed in respect of this Article, do not limit the right to vote or to stand for election to such an extent that they impair

<sup>67</sup> *Hirst v. The United Kingdom* (No 74025/01) [hereinafter *Hirst v UK*], Judgment of 30 March 2004, § 57 citing *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 47 § 50.

<sup>68</sup> *Zdanoka v. Latvia* (No. 58278/00), Judgment of 16 March 2006, § 102.

<sup>69</sup> See Venice Commission, *Opinion on the Electoral Law of Bosnia and Herzegovina*, CDL-INF (2001) 21, 48th plen. mtg., 19-20 October 2001, para. 9, "There can nevertheless be no doubt that the combined result of these provisions [the international treaties and conventions annexed to the BiH Constitution] is that all citizens, irrespective of ethnicity, must have an equal right to vote in and stand as candidates for elections.", available at [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)021-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)021-e.asp)

<sup>70</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 47 §50.

"the very essence of the rights protected."<sup>71</sup> Moreover, any such condition must be imposed in pursuit of a legitimate aim, and the means employed must not be disproportionate to the aims.

80. It is submitted that in considering whether disenfranchising individuals based solely upon their ethnic origin, race, religion or association with a minority group constitutes a violation of Article 3 of Protocol 1, this Court should take into account that this type of disenfranchisement violates a number of other international legal norms, including the following:

- The International Covenant on Civil and Political Rights (ICCPR), Article 25<sup>72</sup>
- The Universal Declaration of Human Rights (UDHR), Article 21<sup>73</sup>
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5(c)<sup>74</sup>
- The Framework Convention for the Protection of National Minorities (FCNM)<sup>75</sup>
- UN Declaration on the Rights of Persons Belonging to National or Ethnic Minorities<sup>76</sup>

*The House of Peoples and the collective Presidency are "legislatures"*

81. The Court has made clear that whether a body is a "legislature" for the purposes of this Article depends on the constitutional structure of the state and particular competences and powers of the body in question.<sup>77</sup> The Applicant submits that

<sup>71</sup> *Zdanoka v. Latvia*, *supra* note 68, § 104.

<sup>72</sup> Article 25 of the ICCPR provides: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country."

<sup>73</sup> Article 21 of the UDHR provides: "(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

<sup>74</sup> Article 5(c) of ICERD provides: "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service."

<sup>75</sup> Amongst the provisions of the FCNM, Article 4.2 provides: "The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."

<sup>76</sup> Article 2.1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic Minorities states that: "Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life." Article 4.1 states: "1. States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law." Article 3.1 provides: "1. Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination."

<sup>77</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 47, § 53; *Federacion Nacionalista Canaria v Spain*, Declaration of 7 June 2001, § 1 of "The Law" Section; *Matthews v. the United Kingdom* (No. 24833/94), Judgment of 18 February 1999, § 40

both the House of Peoples and the collective Presidency are legislatures. The House of Peoples, being the upper house of parliament, is clearly a legislature. Article IV.4 of the BiH Constitution provides for direct legislative powers for the Parliament.<sup>78</sup>

82. In *Boskoski v. The Former Yugoslav Republic of Macedonia*, the Court found that the word “legislature” could be extended to the Presidency when the executive had the authority to “initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities.”<sup>79</sup>
83. Uniquely in the Council of Europe, BiH has a collective Presidency, which in itself gives the Presidency much more of the aspects of a legislature than if it were a single individual. The BiH Constitution establishes that the BiH presidency is to “execute decisions of the Parliamentary Assembly.”<sup>80</sup> The presidency has the power, among other things to veto the legislative decisions of the BiH Parliament,<sup>81</sup> creating a legislative type power within the Presidency. The Presidency has the final authority in determining the passage of government legislation through its veto power.
84. The office of the Presidency has the authority to initiate and adopt “its own rules of procedure.”<sup>82</sup> The ability to initiate and adopt the Presidential rules of procedure may permit the Presidency to expand the powers of veto or limit the obligation to execute the decisions of the Parliament as required by Article V.3 (e). Having unbridled power to initiate and adopt rules, without any censure ability by any co-existent branch of government, allows the Presidency procedural authority to legislate.
85. The veto power held by the members of the Presidency allowing for a censure of the Parliament and the unquestioned authority to set rules of procedure allowing for the ability to choose which laws enacted by Parliament the Presidency will execute, give the Members of the Presidency legislative functions. The Applicant submits that these functions should extend the Court’s view of Article 3 of Protocol 1’s use of the word “legislature” to the office of the collective Presidency of BiH.

*The Applicant is prevented for standing for election to the House of Peoples and the Presidency of BiH.*

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<sup>78</sup> Article IV.4 of the BiH Constitution states: “The Parliamentary Assembly shall have responsibility for: (a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution. (b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina. (c) Approving a budget for the institutions of Bosnia and Herzegovina. (d) Deciding whether to consent to the ratification of treaties. (e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.”

<sup>79</sup> *Boskoski v. The Former Yugoslav Republic of Macedonia* (No. 11676/04), Judgment of 2 September 2004, § 7.

<sup>80</sup> BiH Constitution, Article V.3(e).

<sup>81</sup> BiH Constitution, Article V.2(d). See also, Venice Commission, *Opinion on the Electoral Law of Bosnia and Herzegovina*, *supra* note 66.

<sup>82</sup> BiH Constitution, Article V.2(a).

86. The right to stand for election is protected by Article 3 of Protocol 1. The Applicant's right to stand for election to both the collective Presidency and the House of Peoples is completely excluded under any circumstances under BiH law.

*The Applicant has severe restrictions on his right to vote for the collective Presidency and his right to be represented in the Presidency and in the House of Peoples*

87. With respect to the Applicant's right to vote, Mr. Finci is a Jewish Bosnian living in the Federation. As set forth above, current domestic law requires the Applicant to vote solely for Croat or Bosniak candidates for the Presidency based upon his geographical residence. He is precluded from voting for candidates of any other ethnicity or race, including his own, and is effectively forced to vote along prescribed ethnic lines when exercising his voting rights.

88. The laws also make it clear that under no circumstances will any member of the Applicant's community be able to become members of the Presidency or House of Peoples.

*There can be no justification for such severe limitations*

89. Limitations have been placed upon the Applicant's rights to stand for election and to vote; limitations which are a *prima facie* curtailment of the principle of universal and equal suffrage. In order for these limitations not to violate Article 3 of Protocol 1 they must 1) not impair the very essence of the rights protected, depriving them of their effectiveness 2) serve a legitimate aim, and 3) be proportional in response to the desired aim, that is it they must be narrowly tailored and not be arbitrary.<sup>83</sup>

90. Total exclusion of the Applicant from any opportunity to stand for election to the two bodies is a complete impairment of the 'very essence' of his right under this Article, since the 'very essence' is *inclusion*. Inclusion is at the heart of the right to universal suffrage and universal suffrage bespeaks the essence of the rights protected. "[I]n the twenty-first century, the presumption in a democratic State must be in favour of inclusion."<sup>84</sup> That is to say, the "essence" of the right is the free expression of the people in the choice of the legislature. It is not a matter of who the people ultimately elect, but rather that the political system itself provides a pool of possible candidates in a manner that is free of discrimination. This Court has made clear that the will of the people can only be heard through inclusive, universal suffrage.<sup>85</sup>

91. The total restriction of the Applicant's right to vote for and be represented by a member of his community in the highest political offices in the country is also a major interference in his right as a voter. This, effectively, means that his own community has second-class status in the political life of his country.

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<sup>83</sup> *Zdanoka v. Latvia*, *supra* note 68, § 104.

<sup>84</sup> *Hirst v UK*, *supra* note 67, § 59.

<sup>85</sup> *Zdanoka v. Latvia*, *supra* note 68, § 115(c).

### *Legitimate Aim*

92. The Dayton Peace Accord, to which the Constitution is annexed, provides for a complex power sharing structure, largely designed to cater to the needs of the Constituent Peoples. This aim appears to be to ensure power-sharing between the three Constituent Peoples. In fact, these same concerns gave rise to a "veto right" granted to State Parliamentary representatives of the Constituent Peoples, and protects any group from being outvoted in case a decision is 'destructive of a vital interest of the Bosniac, Croat, or Serb People.'<sup>86</sup> What constitutes a vital interest is specifically undefined, providing for discretion on the part of the representatives of the Constituent Peoples that further serves to consolidate power in the hands of three main ethnic groups to the detriment of all other groups in BiH.
93. The overall emphasis of ethnic belonging in the executive and legislative branches of BiH was designed to ensure a permanent grand coalition of the Constituent Peoples. This structure creates incentives for the three Constituent Peoples to govern in a manner beneficial to, and exclusively for, their ethnic constituencies and detrimental to the needs of the citizens outside of these three groups.<sup>87</sup>
94. A political system that gives priority to three groups at the expense of others fundamentally ignores the basic principles of numerous international conventions and treaties, that all citizens are treated equally with respect to their right to effectively participate in the political process. In these respects it is submitted that any aim that leads to this is not legitimate.
95. As already mentioned, whatever the situation at the end of the war, the situation today is very different and such severe restrictions on citizens' rights must need strong justification.<sup>88</sup> The Court has stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned. In this respect, the Venice Commission pronounced:

The justification [for the distribution of posts in the State organs between Constituent Peoples] has to be considered, however, in the light of developments of BiH since the entry into force of the Constitution. BiH has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the ECHR and its Protocol No. 12. ...[t]here remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups.<sup>89</sup>

<sup>86</sup> BiH Constitution, Art. 3 (e), see also BiH Constitutional Court Case No. U-8/04, interpreting the 'vital interests' clause.

<sup>87</sup> Experts have suggested that the functioning of the collective Bosnian Presidency since 1996 suggests that the Presidency members have been generally operating as leaders of their particular constituent people, mostly because they did not moderate their platform to garner minority support. See, Florian Bieber, *Regulating Elections in Post-War Bosnia: Success and Failure of Electoral Engineering in Divided Societies*, Open Society Institute.

<sup>88</sup> *Kajtas et al v. BiH*, Human Rights Chamber Case, Case No. Ch/98/1309 et al, Decision on Admissibility and Merits, 7 September 2001, § 160 (recognising that a proportional representation scheme among the Constituent Peoples may have been legitimate to consolidate the BiH polity but no longer remains legitimate.), available at <http://www.user.gwdg.de/~ujvr/hrch/1000-1999/1309admmmer.htm>

<sup>89</sup> Venice Commission Opinion 2005, *supra* note 17, para. 75.



*The Restrictions Imposed on the Applicant are Arbitrary and Not Proportionate to the Aim Pursued*

96. Even if the aims are still legitimate, the means employed are arbitrary and grossly disproportionate. A blanket disenfranchisement of a large swath of the Bosnian population is not proportionate to any aim of achieving peace and stability. Exclusion of any groups of the general population from voting and election rights must be reconcilable with the underlying purpose of Article 3 of Protocol No. 1, which is to guarantee universal suffrage. Undermining the principle of universal suffrage undermines "the democratic validity of the legislature thus elected and the laws which it promulgates."<sup>90</sup>
97. In each case where the court found a valid restriction on universal suffrage, the restriction was very narrowly tailored to meet a legitimate aim. For example, the Court has found that the imposition of a minimum age may be envisaged with a view toward ensuring the maturity of the electorate, or that eligibility may be tied to criteria such as residence to identify those with sufficiently close and relevant links to the country concerned, or that very limited conditions may be imposed in order to mediate language disputes or to ensure the inclusion of differing political persuasions.<sup>91</sup>
98. In the current case, a blanket restriction disenfranchises all individuals who do not identify as Bosniak, Serb or Croat. This includes members of all minority communities in BiH, including the Jewish community, individuals from mixed marriages who perhaps are from - but do not identify with - the Constituent Peoples ethnic classifications, or individuals who simply wish to identify themselves as Bosnians (in the former 'Yugoslav' sense of the term). In *Hirst v. United Kingdom*, the Grand Chamber held that "a general, automatic and indiscriminate restriction on a vitally important Convention right (Article 3 of Protocol 1) must be seen as falling outside any acceptable margin of appreciation."<sup>92</sup> In *Hirst*, the Court found that legislation which imposed a blanket restriction on all convicted prisoners was not narrowly tailored enough to be proportionate to the government's stated aim. The broad impact of curtailing over seventy thousand persons' right to vote, irrespective of the nature or gravity of their offence, was disproportionate to the United Kingdom's aim.
99. The Court has never found that restrictions in voting and election rights based upon immutable traits such as ethnicity to be a proportionate response to what might otherwise be a legitimate consideration. Unlike the aforementioned cases where the court found reasonable 'conditions' on voting and election rights, the Applicant can do nothing to overcome the restrictions that prevent him from standing for office. The restrictions are based on his being born a Jew. He cannot learn a language, resign an office, or establish residency in order to overcome

<sup>90</sup> *Hirst v UK*, *supra* note 67, § 62.

<sup>91</sup> *Hilbe v. Liechtenstein*, (No. 31981/96), Decision of December 1999; *Melnichenko v. Ukraine* (No. 17701/02), Judgment of 19 October 2004, § 56; *Mathieu-Mohin and Clerfayt v. Belgium*, *supra* note 47 (requiring an oath of office in a specified language); *Gitonas and Others v. Greece* (Nos. 68/1996/687/877-879, 17/1997/801/1004 and 23/1997/807/1010.), Judgment of 23 June 1997, § 39, (restricting public servants from standing as candidates for specific elected offices.); *Py v. France* (66289/01), Judgment of 11 January 2005, § 48, (restricting participation rights based upon the length of residency)

<sup>92</sup> *Hirst v UK*, *supra* note 67, § 82.

the BiH institutional barriers that prevent him from engaging in full political participation. His legal exclusion from office ignores the Applicant's fluency in the Bosnian language, his previous and extensive political and social experiences, and his community's ties to BiH, which can be traced back well over 350 years. The political restrictions based upon Mr. Finci's ethnicity are analogous to illegal political restrictions based upon gender. In both cases, an individual is born to a particular status, which will not pass in time; rather, one's gender or ethnicity constitutes an immutable and permanent dimension of self. Restrictions based upon gender would infringe on an individual's right to vote or stand for election.<sup>93</sup>

100. Finally, the measures lack proportionality because the effects are arbitrary and do not serve the stated aim.<sup>94</sup> As stated above, the negative consequences of the restrictions to political participation are manifold. Among other implications, this political arrangement directly thwarts the principle and practice of refugee return enshrined in the DPA,<sup>95</sup> discouraging individuals from returning to the Entity in which they now form a minority and perpetuates entrenched discrimination in all areas of life, against minority returnees, national minorities, other minority groups, and individuals unable or unwilling to identify with the "Constituent People" categories.<sup>96</sup>

101. Citizens who are not members of the Constituent Peoples, like the Applicant, have less of an opportunity to have their concerns heard and rights protected. The political system classifies them as "Others" which automatically means they are treated as second-class. To illustrate concretely: "When a Bosniak decided to return to Republika Srpska he can always count on the [pro-Bosniak] SDA to cry foul in the event that for some reason he is not treated well in his place of return. If, on the other hand, a Romani person is denied access to healthcare, prevented from repossessing property or prevented from sending his children to school, no one says anything. And this is just considered normal."<sup>97</sup> The rights of "Others" have often been overlooked in the implementation of human rights and collective rights in almost all areas of life, further exacerbating the severe problems of

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<sup>93</sup> See Venice Commission, *Report on the Abolition of Restriction on the Right to Vote in General Elections*, European Commission For Democracy Through Law, CDL-AD(2005)011, 4 April 2005, § 76, available at [http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)011-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)011-e.pdf)

<sup>94</sup> *Hirst v UK*, *supra* note 67, § 76.

<sup>95</sup> See DPA Annex 7, Agreement on Refugees and Displaced Persons, Article 1.3 states: "The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons. To demonstrate their commitment to securing full respect for the human rights and fundamental freedoms of all persons within their jurisdiction and creating without delay conditions suitable for return of refugees and displaced persons, the Parties shall take immediately the following confidence building measures: (a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect."

<sup>96</sup> See e.g., ECRI, *Report on Bosnia and Herzegovina 2004*, *supra* note 59; Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Bosnia and Herzegovina 2004*, *supra* note 54; Global IDP Project Report, *Bosnia and Herzegovina: state-building key to overcome ethnic division and solve displacement issue*, 25 March 2005, available at <http://www.reliefweb.int/library/documents/2005/globalidp-yug-24mar.pdf>; Amnesty International, *Bosnia and Herzegovina: Behind closed gates: ethnic discrimination in employment*, EUR 63/001/2006, 26 January 2006. See also OSCE, *Guidelines to Assist National Minority Participation in the Electoral Process*, January 2001, Section V, available at [http://www.osce.org/documents/hcnm/2001/01/240\\_en.pdf](http://www.osce.org/documents/hcnm/2001/01/240_en.pdf).

<sup>97</sup> European Roma Rights Center interview with Mr. Dervo Sejdic, December 28, 2002, Sarajevo. In *The Non-Constituents: Rights Deprivation of Roma in Post-Genocide Bosnia and Herzegovina*, Country Reports Series No. 13, February 2004, pp. 59-60.

persistent racism and discrimination within the country, often as a result of nationalist policies pursued by ethnically based political parties.<sup>98</sup>

102. The far-reaching effects of the discriminatory laws create a situation that maintains second-class citizenship for large swaths of the BiH population and cuts against the hopes of rebuilding an integrated, peaceful democracy in BiH that respects and accommodates the rights of all its citizens. Indeed, even for those "Constituent Peoples" who are not disadvantaged by their place of residence or their mixed ethnicity, it is clear that their right to effective participation is sharply limited by the manner in which the current system 'ethnifies' politics, rendering the candidate of their own ethnicity as the only viable choice.

#### **Participation Under International Law**

103. Under international law, the right of everyone to participate in the conduct of public affairs is outlined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR).<sup>99</sup> The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDM) elaborates on ICCPR Article 25 by stating that 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life' (Article 2(2)) and the right to 'participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live' (Article 2(3)).<sup>100</sup> Expert commentary on the UNDM has interpreted participation in public life as including '*rights related to election and to be elected, the holding of public office and other political and administrative domains*'.<sup>101</sup>

104. The Council of Europe's Framework Convention for the Protection of National Minorities also explicitly requires states to 'create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in the public affairs, in particular those [matters] affecting them'.<sup>102</sup>

105. The OSCE Lund Recommendations on the Effective Participation of National Minorities in Public Life set further standards on participation of

<sup>98</sup> ECRI, *Report on Bosnia and Herzegovina* 2004, *supra* note 59, para. 6

<sup>99</sup> 'Every citizen shall have the right and the opportunity ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives'. Public affairs in the meaning of this Article have been interpreted as 'a broad concept, which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers'. HRC General Comment 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, Art 25 (1996), UN doc. CCPR/C/21/Rec.1/Add.7, para 5. While Article 25 appears broader than that of the ECHR, it must be noted that the ECHR provides (Art. 53) that "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

<sup>100</sup> UNDM, Articles 2.2 and 2.3.

<sup>101</sup> A. Eide, Final Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2001/2, 2001. The Working Group on Minorities decided at its tenth session to 'endorse the commentary ... as the commentary of the Working Group on Minorities as a whole, to reissue it as such and to give it the widest possible distribution'. E/CN.4/Sub.2/2004/29.

<sup>102</sup> FCNM, Art. 15. The FCNM entered into force in BiH on 1 June 2000.

minorities in public life.<sup>103</sup> The Recommendation's General Principles provides in relevant part that:

Effective Participation of national minorities in public life is an essential component of a peaceful and democratic society. Experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish specific arrangements for national minorities. These Recommendations aim to facilitate the inclusion of minorities within the state and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the State.<sup>104</sup>

106. The key in all of the aforementioned normative standards is *effective* participation, and that non-discrimination provisions be strictly applied in order to overcome barriers to the realisation of this right on the grounds of race, ethnicity or any other ground listed within ECHR Article 14 and its counterparts such as Article 1 of ICERD.

107. The rights outlined in Article 2(2) of the UNDM are essential for minorities to promote their interests within the larger society. Principles of non-discrimination in the ICERD are clear that if the majority or dominant communities can participate, then minorities must also be able to effectively participate.<sup>105</sup> Whilst ICERD Article 1(2) places certain restrictions in relation to non citizens in matters of elections, it is important to underscore that in the present case, members of the Jewish Community in BiH is restricted in its participation in political life regardless of their citizenship.

108. In light of 'formal or *de facto* exclusion from participation in the political processes of the State [being] contrary to the democratic principles that the Council of Europe espouses',<sup>106</sup> there can be no objective or reasonable justification for restricting the full participation of all citizens of BiH, regardless of their identity.

#### **Violation of Article 13 – there is no effective remedy in BiH for the alleged violations**

Article 13 states as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

<sup>103</sup> The Lund Recommendations on the Effective Participation of National Minorities in Public Life. Commissioned by the OSCE High Commissioner on National Minorities, 1 September 1999, available at [http://www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf). For a review of the Recommendations and further analysis, see the OSCE, *Guidelines to Assist National Minority Participation in the Electoral Process*, *supra* note 96

<sup>104</sup> The Lund Recommendations, *supra* note 103, Section I, General Principles, para. 1.

<sup>105</sup> ICERD Article 1(1) stipulates that: "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

<sup>106</sup> Pamphlet no. 7 of UN Guide 'Minority Rights Under the European Convention of Human Rights', p. 4, available at <http://www.ohchr.org/english/about/publications/docs/minorpam7.doc>.

109. The Court has held that Article 13 must be interpreted as guaranteeing an effective remedy before a national authority for everyone who claims that their rights and freedoms under the Convention have been violated.<sup>107</sup> The remedy afforded by Article 13 of the European Convention must be effective in practice as well as in law.<sup>108</sup> Article 13 has been said to give “direct expression to the States’ obligation to protect human rights first and foremost within their own legal system.”<sup>109</sup>

110. The Applicant alleges that the BiH Constitution, and the BiH Election Laws which mirror the wording of the Constitution, restrict his right to vote and to stand for election in a discriminatory way based upon his race/ethnicity, religion, and association with a national minority and that the domestic regime affords no effective remedy to him in respect of what amounts to a direct violation of the ECHR.

111. The European Convention on Human Rights is, according to the BiH Constitution, supposed to apply directly in BiH, and have priority over all other law.<sup>110</sup> However, the Applicant, as an individual is not entitled under the BiH legal system to apply directly to the Constitutional Court for review of the constitutionality of a law or its compatibility with the ECHR and, in any event, the Constitutional Court has, on two separate occasions, stated that it has no competence to decide whether any Constitutional provisions (or laws under them) conform with the ECHR.<sup>111</sup>

112. The Constitutional Court of BiH is the only court that can review the compatibility of laws with the European Convention on Human Rights. Article VI(3)(a) of the Constitution emphasizes that:

The Constitutional Court shall have *exclusive jurisdiction* to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to (...) whether any provision of an Entity's constitution or law is consistent with this Constitution.<sup>112</sup>

113. Under BiH law, only a lower court can make a reference to the Constitutional Court to decide upon whether a law is compatible with the Constitution or with the ECHR.<sup>113</sup>

<sup>107</sup> *Klass and others v. Germany* (No. 5029/71), Judgment of 6 September 1978, § 64.

<sup>108</sup> *Aksoy v. Turkey* (No. 21987/93), Judgment of 18 December 1996, § 95.

<sup>109</sup> *Kudla v Poland* (No. 30210/96), 26 October 2000, § 152.

<sup>110</sup> See Article II(2) of the Dayton Constitution (Annex 4) which states: “International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

<sup>111</sup> See domestic legal advice note from Dr. Zoran Pajic (under section on jurisdiction) in Annex 9.

<sup>112</sup> Article VI(3)(a) BiH Constitution. Emphasis added

<sup>113</sup> Article VI(3)(c) BiH Constitution provides that: The Constitutional Court shall have jurisdiction over issues referred by *any court in Bosnia and Herzegovina* concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision. [Emphasis added.]

114. The Constitutional Court also has appellate jurisdiction over “issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.”<sup>114</sup> However, lower courts lack jurisdiction to address this issue as well. The lower courts have jurisdiction over criminal matters, some administrative matters and complaints concerning violations of the electoral code (but not the legality of the code itself).<sup>115</sup>

*The Applicant has no standing to refer a case to the Constitutional Court for consideration of violations of the ECHR*

115. With regard to the standing of individuals, disputes to the Constitutional Court of BiH may only be referred by a member of the Presidency (as did Mr. Tihic in his capacity as Chairman of the Presidency), by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.<sup>116</sup>

116. Mr. Finci does not fall within any of these extremely restrictive categories. For this as well as the other aforementioned reasons, Mr. Finci is thus prevented from seeking relief at the Constitutional Court level, a Court that, in any event, has declared itself without jurisdiction to address the complaint at hand.<sup>117</sup>

117. The European Court of Human Rights has previously held that where a person has no standing to apply directly to the Constitutional Court to review the constitutionality of a law, such a remedy is not one whose exhaustion is required for the purposes of Article 35 of the ECHR since such a remedy cannot be considered to offer any real prospect of success and hence is not effective.<sup>118</sup> The Applicant submits that such reasoning applies equally in relation to Article 13 and that, since he has no standing under the law of BiH to apply direct to the Constitutional Court for a review of the constitutionality of the discriminatory provisions under the Constitution or of the Election Law, his right to an effective remedy has been violated.

*The Constitutional Court has stated it does not have jurisdiction to address this specific violation*

118. Two complaints concerning the precise issue of whether the BiH Constitution and BiH Election Laws constitute a breach under the European

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<sup>116</sup> See BiH Constitution, Article VI(3)(a). The Constitutional Court also has appellate jurisdiction over “issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.” *Id.* at VI.3(b). However, lower courts lack jurisdiction to address this issue as well. The state courts have jurisdiction over criminal matters, administrative matters (but limited to those adopted under state law), and complaints concerning violations of the electoral code (but not the legality of the code itself). See The High Representative’s Decision on Law Establishing the State Court of Bosnia and Herzegovina (2000).

<sup>118</sup> See, for example, *Immobiliare Saffi v Italy* (No 22774/93) Judgment of 28 July 1999 § 42, together with *Spadea and Scalabrino v Italy* (No 12868/87) Judgment of 28 September 1995 § 24.

Convention have been submitted to the Constitutional Court, the highest Court in BiH, which declared it does not have jurisdiction to address this issue.<sup>119</sup>

119. On 27 April 2004, Mr. Sulejman Tihic, Chairman of the Presidency of BiH, submitted an application concerning discriminatory Election Laws and Constitutional provisions to the Constitutional Court of BiH.<sup>120</sup> Specifically, the Applicant asked the Court to review the compatibility of Articles IV and V of the BiH Constitution with Article 14 of the ECHR and Article 3 of Protocol 1 to the ECHR.

120. In its decision of 31 March 2006, the Constitutional Court held that it lacked the jurisdiction to review the conformity of a provision of the Constitution of BiH with the ECHR.<sup>121</sup> The Court reasoned that the Constitutional Court shall only consider those cases arising from disputes between “the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina,” as required by Article VI.3 (a) of the Constitution of BiH.<sup>122</sup> The Constitutional Court found that it does not have jurisdiction to review the conformity of part of the BiH Constitution with the ECHR.

121. The Constitutional Court held that it must “hold on to the text” of the BiH Constitution and further noted that “the rights under the European Convention cannot have a superior status in relation to the Constitution of BiH in view of the fact that the European Convention, an international document, entered into force on the basis of the Constitution of BiH and thereby the constitutional authorities derive from the Constitution of BiH and not from the European Convention.”<sup>123</sup> On these bases, the Court concluded that the issue of whether Constitutional provisions fail to conform with the European Convention “falls out of the scope of its competence.”<sup>124</sup>

122. Mr. Sulejman Tihic filed a second Constitutional Court case, No. U 13/05, on 5 September 2005. In this case, the Applicant asked the Constitutional Court to assess the compatibility of Article 8.1 paragraphs 1 and 2 of the Election Law of BiH with Article 1 of Protocol 12 and Article 3 of Protocol 1 of the ECHR and Articles 2.1(c) and 5.1(c) of the International Convention on the Elimination of Racial Discrimination (ICERD).<sup>125</sup>

123. In its decision of 26 May 2006, the Constitutional Court declared the second case inadmissible. The Court reasoned that “although the subject matter of the case at hand is not a review of conformity of the provisions of the Constitution of Bosnia and Herzegovina but of the Election Law, it cannot be ignored that the challenged provision of the Election Law, *de facto*, derive fully

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<sup>119</sup> See Annex 5. BiH Constitutional Court Decision, Case No. U-5/04 decision of 31 March 2006, and Annex 7 Constitutional Court Decision, Case No. U-13/05 decision of 26 May 2006.

<sup>120</sup> See Annex 4.

<sup>121</sup> BiH Constitutional Court Decision, Case No. U-5/04 decision of 31 March 2006, para. 14.

<sup>122</sup> *Ibid.* at para. 14.

<sup>123</sup> *Ibid.* at para. 15.

<sup>124</sup> *Ibid.* at para. 16.

<sup>125</sup> Protocol 12 came into effect on 1 April 2005.

from the provisions of Article V of the Constitution of BiH, which remove any doubts as to its constitutionality.”<sup>126</sup>

124. Decisions of the Constitutional Court in BiH are **final and binding**, pursuant to Article VI.4 of the Constitution of BiH and are not subject to any further appeal.<sup>127</sup> The Applicant therefore submits that, as a consequence, there are no effective domestic remedies available to him to have his complaint about the discriminatory electoral system even considered, let alone remedied.

125. It is therefore apparent from the case law of the Constitutional Court that, even if the Applicant had standing to apply to it to review the constitutionality of the discriminatory Constitutional provisions and the Election Law and their compatibility with the ECHR (which is not the case), the Constitutional Court has made it clear that it considers that it has no competence to pronounce itself on such an issue. The Applicant is consequently left without any effective remedy under the law of BiH despite the fact that his case is clearly with merit. Such a lack of effective remedy is in direct violation of Article 13.

126. In view of the final and binding nature of Constitutional Court decisions on the issue of “Others” within the electoral system, which render recourse to any other body within Bosnia and Herzegovina’s jurisdiction futile, there are no effective remedies available to the present Applicant that would offer a prospect of success; and would be capable of redressing the complaint.<sup>128</sup>

127. The above provisions make it clear that the Constitutional Court is supreme over any other judicial body in BiH. They also render the lack of scope for administrative bodies such as the Electoral Commission as an effective remedy decisively clear for “Others” seeking access to the Presidency or the House of Peoples. The Electoral Commission’s mandate can only strictly apply the wording of Article 8.1 of the Election Law in conformity with Article V of the Constitution of BiH. The existing Tihic decisions at the Constitutional Court level means the Electoral Commission are bound to apply the discriminatory provisions of the electoral law and cannot redress the Applicant’s complaint.<sup>129</sup>

128. In sum, therefore, the Applicant has no judicial mechanism by which the essence of his complaint, the discrimination in the membership of the Presidency and House of Peoples of BiH, can even be considered. He has no effective remedy.

<sup>126</sup> See Annex 7, BiH Constitutional Court Decision, Case No. U-13/05 decision of 26 May 2006, para. 10.

<sup>127</sup> See Article VI-4 of the Dayton Constitution: “ Decisions of the Constitutional Court shall be final and binding”.

<sup>128</sup> The principles relating to availability, effectiveness and sufficiency of remedies is developed in the subsequent section dealing with Article 35(1) of the Charter. These arguments link to the futility of the Constitutional Court’s appellate jurisdiction in this particular case (as per Article VI(3)(b) in light of its already existing jurisprudence set by the Tihic decisions, which mirror the exact complaints brought forward by Mr. Finci.

<sup>129</sup> See *Stogmuller v. Austria* (No. 1602/62), Decision of 10 November 1969, § 11. See also *Akdivar and Others v. Turkey* (No. 21893/93), Judgment of 16 September 1996, § 65 (requiring that the remedy be effective *vis-à-vis* the alleged breach); *Aksoy v. Turkey*, *supra* note 108, § 51 (same).

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#### IV STATEMENT RELATIVE TO ARTICLE 35 (1) OF THE CONVENTION

129. The Applicant alleges discrimination with respect to his right to vote and stand for election arising from the Constitution and Election Laws of BiH. These are continuing violations of his rights.

##### Exhaustion of Domestic Remedies

130. Article 35(1) provides that this Court may only deal with a matter after all domestic remedies have been exhausted according to the general recognised rules of international law and where the matter was brought before the Court within a period of six months from the date of the final decision.<sup>130</sup> In its case law on the requirement of exhaustion of domestic remedies, this Court has established that the requirement only applies to those domestic remedies that are available, sufficient and effective.

131. A remedy is only effective if it offers a prospect of success;<sup>131</sup> and it is sufficient if it is capable of redressing the complaint.<sup>132</sup> A remedy that is not available, effective and sufficient need not be exhausted. A “remedy” is not “available” where the avenue is incapable of redressing the Applicant’s complaints.<sup>133</sup> In *Stogmuller v. Austria*, this Court held that “[i]nternational law only imposes the use of the remedies which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints.”<sup>134</sup>

##### Absence of sufficient remedies

132. It is submitted that there are no outstanding remedies available to the Applicant that are sufficient in that they would be capable of redressing his complaint. Indeed, the Applicant has already approached the Electoral Commission of BiH on the question of his eligibility to run for the Presidency of BiH or as a member of the House of Peoples of the Parliamentary Assembly of BiH given his membership of the Jewish community. The Electoral Commission responded in the following manner:

In respect of your request [...] we would like to stress the following: Provisions of the Election Law of BiH (“Official Gazette of BiH”, No. 23/01, 7/02, 9/02, 20/02, 25/02/4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06 and 24/06) are determining election of the members of the Presidency of BiH and delegates of the House of Peoples of the Parliamentary Assembly of BiH and are in accordance with

<sup>130</sup> Formerly Article 26.

<sup>131</sup> See e.g. Application No. 299/57, Yearbook 2, pp. 192-193 (inter-State); Application No. 434/58, Yearbook 2, p. 374; Application No. 788/60, Yearbook 4, p. 168 (inter-State); Application No. 712/60, Yearbook 4, p. 400; Communications 210/1986 and 225/1987, HRC 1989 report, p. 228; Communication No. 220/1987, HRC 1990 report, vol. II, p. 122; Communication No. 222/1987, HRC 1990 report, vol. II, p. 130; Communication No. 306/1988, HRC 1990 report, vol. II pp. 182-183. See also *Akdivar and Others v. Turkey*, *supra* note 128, § 65; *Aksoy v. Turkey*, *supra* note 108, § 51.

<sup>132</sup> Appl. 11660/85, X v Portugal, D&R 59 (1983), p.85.

<sup>133</sup> See *Stogmuller v. Austria* (No. 1602/62), Decision of 10 November 1969, § 11. See also *Akdivar and Others v. Turkey*, *supra* note 128, § 65 (requiring that the remedy be effective *vis-à-vis* the alleged breach); *Aksoy v. Turkey*, *supra* note 105, § 51 (same). <sup>133</sup> Appl. 11660/85, X v Portugal, D&R 59 (1983), p.85.

<sup>134</sup> *Id.*

provisions of the Constitution of BiH. Both mentioned legal acts are determining, in the same manner, the structure of the Presidency of BiH, specifying that it composed of one Bosniak and one Croat, that are elected directly each from the territory of the Federation, and one Serb that is elected directly from the territory of Srpska Republic and structure of the House of Peoples of the Parliamentary Assembly of BiH which consists of five Croats and five Bosniaks from the Federation and five Serbs from Srpska Republic.<sup>135</sup>

133. Furthermore, the Electoral Commission reviews administrative issues only and has no power to review the law itself. Since the Constitution and Election laws govern the actions of the Electoral Commission and indeed, all other administrative bodies in BiH, the Electoral Commission cannot provide any meaningful or substantive remedy to the Applicant.

*Absence of available and effective remedies: Constitutional Court has refused to address the issue*

134. As has been mentioned above in relation to Article 13, this Court has previously held that where a person has no standing to apply directly to the Constitutional Court to review the constitutionality of a law, such a remedy is not effective, as it affords no realistic prospect of success. Thus in the case of *Immobiliare Saffi v Italy*, it was held that:

As to the second limb of the objection – the constitutionality issue – the Court observes that in the Italian legal system an individual is not entitled to apply directly to the Constitutional Court for review of a law's constitutionality. Only a court trying the merits of a case has the right to make a reference to the Constitutional Court, either of its own motion or at the request of a party. Accordingly, such an application cannot be a remedy whose exhaustion is required under Article 35 of the Convention (see the Spadea and Scalabrino judgment cited above, p. 23, § 24).<sup>136</sup>

135. This Court has similarly held that a remedy is not effective if the established case law of the domestic courts makes it clear that the Applicant's arguments would have no realistic prospect of success:

As regards points (2) and (3) the Court recalls that the only remedies required to be exhausted are remedies which are effective and capable of redressing the alleged violation.<sup>137</sup> It considers that the Applicant would have had no prospect of success in making these claims before the courts having regard to the case-law of the Supreme Court which denies to a natural father any constitutional right to take part in the adoption process (see paragraph 21 above).<sup>138</sup>

136. It is submitted that, in line with the above case law, the Applicant has exhausted all effective domestic remedies. As in the case of *Immobiliare Saffi*, the Applicant has no standing to apply directly to the Constitutional Court of BiH to challenge the constitutionality of either the constitutional provisions or the

<sup>135</sup> See Annex 8 for the English translation, accompanied by the original document.

<sup>136</sup> *Immobiliare Saffi v Italy* No 12868/87 § 42.

<sup>137</sup> See, amongst many authorities, the *Open Door and Dublin Well Woman v. Ireland* judgment of 29 October 1992, Series A no. 246, p.23, § 48.

<sup>138</sup> *Keegan v Ireland* (No 16969/90) Judgment 26 March 1994 § 39.

election laws under consideration here nor their compatibility with the ECHR.<sup>139</sup> Equally, as in the case of *Keegan v Ireland*, it is apparent from the earlier decisions of the Constitutional Court of BiH in the two cases brought by Tihic that, even if the Applicant were able to bring a case directly before the Constitutional Court, he would not have any realistic prospect of success as the Constitutional Court has declared itself to have no competence to review the constitutionality of the provisions of the BiH constitution under consideration here.

137. Thus, on the same basis as the arguments outlined in relation to Article 13, relief was sought and denied with regard to both the Constitutional provisions and the Election Laws at the national level.

138. Decisions of the Constitutional Court in BiH are **final and binding**, pursuant to Article VI.4 of the Constitution of BiH. Neither Mr Finci, nor anyone else, may appeal these decisions.

139. Because the Constitutional Court has determined that it lacks jurisdiction to review the discriminatory provisions of both the BiH Constitution and the BiH Election Laws, the Applicant has no actual or effective domestic remedy against these constitutionally enshrined provisions of law. Indeed, the Applicant submits that the facts of this case result in a further violation of Article 13 of the ECHR.

#### *Six-month time limit*

140. The Applicant submits that the violations of his rights set out above amount to continuing violations of his rights.

141. Without prejudice to the above argument, the Applicant further submits that the decisions of the BiH Constitutional Court of 31 March and 26 May 2006 confirmed that he had no effective remedy at the national level as the Constitutional Court will not address the issues, in a decision binding on all courts in BiH.

142. The Applicant's initial letter to this Court was introduced on 18 August 2006, within the six-month period following the date on which BiH's highest domestic court held that it had no jurisdiction to address the issues that the Applicant now brings before this Court.

#### *Mr. Finci's Status as a Victim*

143. Article 34 of the European Convention provides, "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High

Contracting Parties undertake not to hinder in any way the effective exercise of this right."<sup>140</sup>

144. The word, "victim," denotes a person "directly affected by the act or omission which is in issue, the existence of a violation conceivable even in the absence of prejudice..."<sup>141</sup>
145. Mr. Finci is a victim of violations of Articles 13 and 14 of the ECHR and Article 1 of Protocol 12 and Article 3 of Protocol 1. BiH is a High Contracting Party.
146. Whilst this Court has refused to examine in *abstracto*<sup>142</sup> the compatibility of a domestic law with the European Convention, the Court may review the merit of those applications filed by individual victims who demonstrate the incompatibility of domestic law with the European Convention. Mr. Finci has been personally and directly affected by the Convention violations at issue.
147. This Court has recognised that the maintenance in force of domestic laws that violate individual rights under the European Convention constitutes a breach.<sup>143</sup> Therefore, the state of the law itself constitutes a violation when the Applicant can show that the risk of a direct violation is possible and would personally affect the Applicant.
148. The Applicant constitutes a "victim" under Article 34 of the European Convention due to his membership in a clearly identifiable group, which is particularly affected by the impugned provisions of BiH's Constitution and Election Laws.<sup>144</sup>
149. Under the discriminatory provisions of the BiH Constitution and Election laws, no discretionary exception is permitted to this direct discrimination based on ethnicity/race, religion, and affiliation with a national minority. The challenged provisions do not allow consideration of the individual merits of citizens who do not affiliate themselves with the Serb, Croat, and Bosniak ethnic groups, such as the Applicant, a member of Jewish identity with a long and distinguished record in politics at local and national levels.<sup>145</sup>

<sup>140</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Article 34.

<sup>141</sup> *Eckle v. Germany* (No. 8130/78), Judgment of 15 July 1982(1892), § 66. See also *Groppera Radio Ag And Others V. Switzerland* (No. 10890/84), Judgment of 28 March 1990, § 47.

<sup>142</sup> In *abstracto* has been referred as a term that describes a cause of action where there is no actual victim. (*X v. Austria* (No. 7045/75), Decision of 10 December 1976, 7 DR 87) Such causes of action attempt to render a theoretical interpretation of the law. In *X v. Austria*, this Court determined that it is "competent to examine the compatibility of domestic legislation... [in regards] to its application in a concrete case." (p.88).

<sup>143</sup> *Dudgeon v. The United Kingdom* (No. 7525/76), Judgment of 22 October 1981.

<sup>144</sup> Prejudice is relevant only to assessing the extent of damage suffered under Article 41. See *De Jong, Baljet and Van Den Brink v. Netherlands* (Nos. 8805/79, 8806/79 and 9242/81) Judgment of 22 May 1984. Thus, the level of prejudice or amount of damage to Mr. Finci is not at issue for the purpose of determining whether he is a victim under Article 34. Rather, Mr. Finci's status as a victim depends solely upon whether he is a person directly affected by the discriminatory provision of the BiH Constitution and Election laws.

<sup>145</sup> See *Norris v Ireland* (No. 10581/83), Judgment of 26 October 1988(1991) 13 E.H.R.R 186; *Modinos Vv. Cyprus* (No. 15070/89), Judgment of 22 April 1993; *Bruggemann and Scheuten v Federal Republic of Germany* (1977)3 E.H.R.R. 244.

*Victim status as voter in BiH belonging to the Jewish community*

150. The Applicant submits broadly, that he is a victim in two different ways. First, as a citizen and voter of BiH from the Jewish community, he is restricted in his choice of candidate for the Presidency and representation in the upper house of Parliament, in the complete exclusion of any possibility of any member of his community being a member of either institution. He submits his status as victim on this issue, as a Jewish citizen of BiH, is clear and ongoing.

*Victim status as someone prevented from presenting himself for election/membership of Presidency or House of Peoples*

151. Second, that the Applicant is himself barred under any circumstances from putting himself forward for either institution, despite his record of public service.

152. Decisions of the Court have made clear that an Applicant is not required to take action in violation of a domestic statute that is inconsistent with obligations under the European Convention to be heard by this Court.<sup>146</sup> Article 34 allows applications if the law itself violates Applicants' rights under the Convention where there is a personal risk of direct violation.

153. In *Dudgeon v. United Kingdom*,<sup>147</sup> the ECHR admitted and decided a case concerning the validity of domestic criminal legislation in the United Kingdom. The citizen was found to be a victim under Article 34, even in the absence of a domestic conviction under the criminal statute. The legislation criminalised homosexual activities, and though the Applicant had not been convicted of any crime related to this legislation, the Court held his claim admissible. The Court "unanimously concluded that the legislation complained of interferes with the Applicant's right to respect for his private life guaranteed by Art. 8 para. 1 [of the Convention]."<sup>148</sup> The Court based its determination on the premise that "the maintenance in force of the impugned legislation constitutes a continuing interference with the Applicant's right[s]...."<sup>149</sup> In sum, the state of the law itself was a violation because Mr. Dudgeon was able to show potential risk of a direct and personal violation of his individual rights under the Convention.<sup>150</sup>

154. This Court has also recognised that two non-pregnant female applicants had victim status under Article 34 when they challenged an Irish court order preventing dissemination of information to pregnant women in abortion facilities outside Ireland.<sup>151</sup> Reasoning that the two applicants were of childbearing age

<sup>146</sup> See *Open Door and Dublin Well Woman v. Ireland* (Nos. 14234/88 and 14253/88), Judgment of 29 October 1992, § 44; and *Johnston and others v. Ireland* (No. 9697/82), Judgment of 18 December 1986, § 42.

<sup>147</sup> *Id.*

<sup>148</sup> *Dudgeon v. The United Kingdom*, *supra* note 143, § 40.

<sup>149</sup> *Id.* § 41.

<sup>150</sup> See also *Norris v. Ireland* (No. 10581/83), Judgment of 26 October 1988.

<sup>151</sup> *Open Door Counselling Ltd and Dublin Well Woman v Ireland* (Nos. 14234/88 and 14235/88), Decision of 15 May 1990.

who could potentially be adversely affected by the restrictive order, the Court determined that they were victims.

155. Because the discriminatory provisions of the BiH Constitution and Election Laws violate Mr. Finci's individual rights guaranteed by the European Convention, the maintenance in force of those domestic laws constitute a breach. Because Mr. Finci is directly and personally affected by those discriminatory provisions, the state of the law itself is a violation.

156. Further, unlike the applicants in the above-mentioned cases, Mr. Finci is already adversely affected by the discriminatory provisions. Mr. Finci is already precluded from running for the offices at issue. Thus, he is a victim under Article 34.

157. As established, despite the Applicant's qualifications, observable commitment to public service, and desire to run for public office, he is barred by BiH Constitution and Election Laws from running for the office. He is directly and personally affected by the law at issue, and as such, is a victim for the purposes of Article 35.

## **V STATEMENT OF THE OBJECT OF THE APPLICATION AND PROVISIONAL CLAIMS FOR JUST SATISFACTION**

1. A declaration that his rights under Protocol 12, Article 3 of Protocol 1, Article 14 with Article 3 of Protocol 1 and Article 13 have been violated.
2. The costs of this application.

## **VI STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS**

No complaint has been submitted on behalf of the Applicant to any other international procedure or investigation concerning facts that give rise to this application.

## **VII LIST OF DOCUMENTS**

- Annex 1: Office of the High Representative, Decision appointing Mr. Jakob Finci to the position of first Head of the Civil Service Agency, Thursday, May 23, 2002.
- Annex 2: Mr. Finci's CV
- Annex 3: Election Laws of Bosnia and Herzegovina.

- Annex 4: Application to the BiH Constitutional Court in Case No. U-5/04
- Annex 5: BiH Constitutional Court Decision, Case No. U-5/04 decision of 31 March 2006.
- Annex 6: Application to the BiH Constitutional Court in Case No. U-13/05 .
- Annex 7: BiH Constitutional Court Decision, Case No. U-13/05 decision of 26 May 2006.
- Annex 8: Election Commission finding (original text and English translation)
- Annex 9: Domestic expert legal advice on domestic remedies by Dr. Zoran Pajic.
- Annex 10: Explanatory Report to Protocol 12.
- Annex 11: Venice Commission, Opinion on the Electoral Law of Bosnia and Herzegovina, 24 October 2001.
- Annex 12: Venice Commission, Opinion of the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, 11 March 2005.
- Annex 13: Council of Europe, Parliamentary Assembly, Report on Constitutional Reform in Bosnia and Herzegovina, Doc. 10982 27 June 2006.
- Annex 14: Concluding observations of the Committee on the Elimination of Racial Discrimination concerning Bosnia and Herzegovina, CERD/C/BIH/CO/...March 2006.
- Annex 15: European Commission against Racism and Intolerance (ECRI) Report on Bosnia and Herzegovina, Adopted on 25 June 2004.

#### **VIII - DECLARATION AND SIGNATURE**

*I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.*

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*Jakob Finci*