IN THE EUROPEAN COURT OF HUMAN RIGHTS
BEFORE THE GRAND CHAMBER

Applications Nos: 27996/06 and 34836/06

CASE OF

DERVO SEJDIĆ

First Applicant

and

JAKOB FINCI

Second Applicant

-v-

BOSNIA AND HERZEGOVINA

Respondent

APPLICANTS' WRITTEN SUBMISSIONS TO THE GRAND CHAMBER

TABLE OF CONTENTS

I. SUMMARY

1. Mr. Dervo Sejdić (the 'First Applicant'), is a Bosnian citizen of Roma ethnicity and Mr. Jakob Finci (the 'Second Applicant'), is a Bosnian citizen of Jewish identity. Both are prominent figures in Bosnia-Herzegovina's ("BiH") public life.

2. The BiH Constitution makes a distinction between two categories of citizens: "constituent peoples" (Bosniaks, Croats and Serbs) and "Others" (including Jews, Roma and other minorities). The BiH Constitution and the Election Law establish that membership in the three-person elected Presidency of BiH and the House of Peoples, the upper house of the BiH Parliamentary Assembly, is strictly limited to the "constituent peoples." The Applicants are consequently prevented from standing for election to the Presidency or the House of Peoples based on their race/ethnicity, religion and association with a national minority.

3. The Applicants complain that representation in the highest public decision-making bodies being limited to members of specific groups leads to their complete exclusion from an important part of public life. It therefore infringes their rights, as citizens of BiH, to participate fully and effectively in public life in their own country. This limitation is based clear on their race, and, for the Second Applicant, also his religion. They submit that this exclusion is direct racial and religious discrimination.

4. The Applicants submit that as a result, the BiH Government (the "Respondent Government") is in breach of its obligations under Article 1 of Protocol No. 12 and Article 14 with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1, Article 13 and (in relation to the First Applicant only), Article 3.

5. The Government has previously admitted that the Applicants are prevented from standing for election to these two important political institutions but argued that the difference in treatment is justified mainly because it aims to "preserve peace" and "achieve equal representation of the three constituent peoples." The Applicants state that this difference of treatment, which is direct, based clearly on race and leads to complete exclusion from the highest elected positions in the country cannot be justified.

6. The Constitutional Court of BiH, the highest court in the country, has ruled that the issue of exclusion of the "Others" from the Presidency and House of Peoples (as contained in the Constitution and the Election Law) could not be subject to review by domestic courts.

II. FACTS

7. The First Applicant is a member of the Roma community, the Second of the Jewish community. Both are citizens in BiH and are prominent in public life. The First Applicant is now the Roma rights coordinator for the OSCE mission to BiH, having previously served as co-ordinator of the BiH Council for Roma (the highest representative body of the Roma Community in BiH) and a member of the BiH Council of Ministers' Roma Council. The Second Applicant is now serving as Bosnian Ambassador to Switzerland, having previously held positions that included being Chair of the Constitutional Commission and the Head of the Civil Service Agency.

8. The Jewish and the Roma communities have lived in BiH for centuries, under Ottoman, Austro-Hungarian and Yugoslav rule.

9. The General Framework Agreement for Peace in Bosnia and Herzegovina ("GFAP"), a peace agreement between the Republic of Bosnia and Herzegovina, the Republic of Croatia and the former Federal Republic of Yugoslavia, was initialled near Dayton, Ohio in the United States, on 21 November 1995 and signed at the Paris Peace Conference on 14 December 1995. It entered into force on the latter day. A new Constitution for BiH also entered into force as Annex IV to the GFAP.

10. The new Constitution referred to the Bosniaks, Serbs, and Croats as "constituent peoples", and everyone else as "Others". The "Others" included the Jews and the Roma, and therefore the two Applicants. Membership in both the new three-person collective Presidency, and the House of Peoples, was restricted to members of the three constituent peoples. This exclusion of the "Others" was further entrenched in law with the passing of an Election Act in 2001 which confirmed that the Presidency and the House of Peoples were restricted to members of the constituent peoples.

11. BiH became a member of the Council of Europe in 2002. It had committed itself, as noted by the Parliamentary Assembly of the Council of Europe ("PACE"), to "review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council of Europe standards, and to revise it where necessary."[1] Since then the PACE has periodically reminded BiH of its post-accession obligations regarding its electoral legislation. Thus, in its 2004 resolution on "Honouring of obligations and commitments by Bosnia and Herzegovina"[2] PACE regretted *"(...) the lack of progress in the review of the electoral legislation which should, in line with Council of Europe principles, end the constitutional discrimination of all those not belonging to one of the three constituent peoples."*

[1] Parliamentary Assembly of the Council of Europe, Opinion no. 234(2002), § 15(iv)(b).
[2] Parliamentary Assembly of the Council of Europe, Resolution 1383 (2004). Assembly debate on 23 June 2004 (20th Sitting). See http://assembly.coe.int//main.asp?link=http://assembly.coe.int/documents/adoptedtext/ta04/ERES1383.htm

12. In 2006, after regretting that the BiH Parliament failed to amend the Constitution, PACE pointed out regarding the October 2006 general elections that they *"(...) 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 the election of the members of the Presidency and for the indirect elections for the delegates for the House of Peoples to the exclusion of the so-called "Others", i.e. everybody not identifying themselves with one of the three constituent peoples."*[3] It urged BiH "*by October 2010 at the latest, to draft and adopt a new Constitution in order to: ... replace the mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against "Others"; (...)"*[4]

13. BiH ratified the European Convention on Human Rights ('ECHR'), including Protocol No. 1, on 12 July 2002, which entered into force with immediate effect. It ratified Protocol No. 12 on 29 July 2003, which came into force on 1 April 2005.

14. On 16 June 2008, BiH signed a Stabilization and Association Agreement (SAA) with the European Union and thereby committed itself to addressing the European Partnership priorities. One of the key short-term priorities for BiH in its EU partnership[5] is to "*amend electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession requirements*." Short-term priorities are expected to be accomplished within one or two years.[6]

15. Despite its commitments, no revision of the electoral legislation has taken place in BiH. On 26 April 2006, the Parliament of BiH failed, by two votes, to reach the two-thirds majority in the House of Representatives that was required to adopt a constitutional reform proposed on 18 March 2006 by six major political parties. The proposed constitutional reform included amendments to Article V and IV of the Constitution relating to the election of the Presidency and the House of Peoples.[7]

16. On 31 March 2006, the Constitutional Court delivered its decision in the case U-5/04 concerning a challenge to the restricted membership of the Presidency and House of Peoples. The application[8] had been filed by Mr. Sulejman Tihić, at the time Chair of the Presidency of BiH, who had requested that the Court review the conformity of the

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[3] Parliamentary Assembly of the Council of Europe, Resolution 1513 (2006) at paragraph 10. Assembly debate on 29 June 2006 (21th Sitting). See http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERes1513.htm.

[4] Ibid at § 20.

[5] See Principles, priorities and conditions in the European Partnership with Bosnia and Herzegovina, Council of the European Union, Doc. No: 5349/08, adopted in Brussels on 13 February 2008, at page 4.

[6] Ibid at page 1.

[7] 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, see also Venice Commission Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina; Opinion 375/2006 of 12 June 2006; Document No. CDL-AD(2006)019 at paragraph 44).

[8] See Annex 4.

provisions of Articles IV.1, IV.1 (a), IV.3 (b) and V.1 of the Constitution with the provisions of Article 14 and Article 3 of Protocol No. 1 to the ECHR.[9]

17. The Constitutional Court held 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*."[10] Consequently, 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."[11]

18. In May 2006, the Constitutional Court issued a decision on a second application from Sulejman Tihić regarding the electoral system in BiH (Case number U-13/05). This time Mr. Tihić had requested review of the consistency of Article 8.1, paragraphs 1 and 2 of the Election Law of Bosnia and Herzegovina with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the ECHR, as well as Article 2 paragraph 1 (c) and Article 5, paragraph 1 (c) of the International Convention on Elimination of All Forms of Racial Discrimination. The Constitutional Court observed that the challenged provision in the Election Law "*is fully arising out of Article V of the Constitution of BiH"* and therefore declared the application inadmissible for the same reasons as in U-5/04.[12]

19. On 3 January 2007, the Second Applicant received written confirmation from the Central Election Commission that he was ineligible to stand for election to the Presidency or the House of Peoples due to the restriction on membership of both bodies to constituent peoples. Similarly, on 10 February 2006 the First Applicant, through the BiH Council of Roma, received written confirmation from the Central Electoral Commission that the provisions of the Election Law preventing Roma from standing for elections to the Presidency or the House of Peoples could not be amended without prior amendment to the Constitution.

20. On 26 March 2009 the BiH Parliamentary Assembly successfully amended the BiH Constitution for the first time, in accordance with the amendment procedure under Article X of the Constitution. The amendment itself concerned the question of the Brcko District's access to the BiH Constitutional Court, but showed that the Constitution can be amended by the Parliamentary Assembly.[13]

[9] BiH Constitutional Court Decision, Case No. U-5/04 decision of 31 March 2006, § 14.
[10] Ibid. at § 15.
[11] Ibid. at § 16.
[12] See Annex 7, BiH Constitutional Court Decision, Case No. U-13/05 decision of 26 May 2006, § 10.
[13] See OHR press release "Brčko District added to the BiH Constitution", 26 March 2009 at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=43268. See also Steering Board of the Peace Implementation Council communiqué at http://www.ohr.int/pic/default.asp?content_id=43264.

III. DOMESTIC LAW

1. Membership and Election of the Presidency of Bosnia and Herzegovina

21. Article V of the BiH Constitution states that:

> 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.

22. Article 8.1, Paragraphs 1 and 2 of the Election Act 2001 of Bosnia and Herzegovina 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.[14]

2. Membership and Election of the House of Peoples

23. Article IV of the BiH Constitution states:

> **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.

3. Protection of Convention rights in domestic law

24. Article II.4 of the Constitution states:

> 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

[14] See Annex 3, Election Law of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, 23/01.

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.

25. Article II.2 of the Constitution states:

> 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].

26. 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.
>
> Recognised national minorities under Article 3 include Jews and Roma.[15]

4. Amendment of the Constitution

27. Article X of the Constitution states:

> ***Amendment***
> 1. Amendment Procedure. This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.
>
> 2. Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

IV. COMPLAINTS

28. Both Applicants complain that they have suffered violations of the following Articles of the ECHR and it Protocols, due to the exclusion of Others from the Presidency and House of Peoples: Article 1 of Protocol No. 12; Article 14 with Article 3 of Protocol No. 1; Article 3 of Protocol No. 1 and (the First Applicant only) Article 3. They also complain of a violation of Article 13 in the lack of any effective remedy within BiH.

[15] 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.

V. THE LAW

1. Admissibility

i. Exhaustion of domestic remedies

29. The Applicants are victims, being personally and directly affected by the relevant provisions of the BiH Constitution and BiH Election Law by virtue of the fact that the Respondent Government denies them, on the grounds of their ethnicity and their association with a national minority and, in the case of the Second Applicant, on the grounds of religion, the right to stand for election for the Presidency and the House of Peoples, in particular as they are prominent figures in the BiH public life.

30. The Applicants submit that there are no available, sufficient and effective domestic remedies to redress their complaints as the interferences with their rights under the ECHR emanate from clear, unequivocal and unambiguous provisions contained in the Constitution of BiH which are not capable of challenge before the courts in BiH. It is well established in the jurisprudence of the Court that there is no need to exhaust remedies that are inadequate or ineffective.[16] The Applicants further submit that the burden falls on the Respondent Government to satisfy the Court that there was a particular domestic remedy available, which could have been invoked by the Applicants and which was capable of providing redress, and offered a reasonable prospect of success.

31. The Constitutional Court in its rulings on cases U/5/04 on 31 March 2006, and on U/13/05 of 26 May 2006, addressed complaints about the discriminatory provisions on membership of the Presidency and House of Peoples. Its first ruling stated that the contested provisions of the Constitution cannot be challenged domestically on the basis of the ECHR, any other international standard or any domestic prohibition on discrimination. Its second ruling clarified that it could not examine the alleged discrimination in the Election Law as that "*(...) is fully arising out of Article V of the Constitution of BiH, for which reason the Court has no competence to take a decision as, in fact, it would be reviewing the consistency of a constitutional provision with the provisions of international documents on human rights (...).*"

32. The decisions of the BiH Constitutional Court are binding on all courts in BiH. The Applicants submit that these rulings confirmed that they have no effective remedy available in BiH capable of addressing their discriminatory exclusion from the Presidency and House of Peoples.[17]

33. A claim before the BiH State Court would not be capable of remedying directly the situation complained of because the State's Court's jurisdiction in electoral appeals is limited to finding violations of the Election Law and any regulations issued by the Electoral Commission. The jurisdiction of the BiH State Court in electoral appeals as

[16] *Aksoy v. Turkey,* no. 21987/93, 18 December 1996, §§ 51-52; *Adkivar and Others v. Turkey*, no. 21893/93, 16 September 1996, §§ 65-67, *Baysayeva v. Russia*, no. 74237/01, 5 April 2007, § 104.

[17] The 26 January 2007 BiH Constitutional Court decision, AP-2678/06, confirms that there is no effective remedy.

provided for in Chapter IX of the BiH law on administrative disputes is limited to hearing "*violations of the Election Law and the regulations issued by the Election Commission*"; it would not be able to rule on the discriminatory nature of the contested provisions of the Election Law which derive from the Constitution.[18]

34. The case of Ilijaz Pilav[19] concerning a separate provision of the law on elections to the Presidency confirms that both the Central Election Commission and the BiH State Court will not challenge provisions concerning election to the BiH Presidency that are set out in the Constitution or Election Law. Mr. Pilav complained that he was discriminated against as a Bosniak in the Republika Srpska, but both the Commission and the Court declined his candidacy to the BiH Presidency ruling simply that in excluding him the provisions of both the Constitution and the Election Law were applied correctly.[20] This case is further illustration that a domestic challenge to Article V of the Constitution and Article 8 of the Election Law on the ground that these provisions violate the Convention would stand no prospect of success.[21]

35. The Applicants have noted with interest the ruling of this Court on admissibility in the recent case of *Tănase and Chirtoacă v. Moldova,* which concerned restrictions on standing for election. In particular the Court, in response to the Government's argument in that case that the Applicants should have first submitted themselves for election even though the law was clear, considered that: "*…[a]ccepting the Government's suggestion and deferring the adoption of a judgement until after the elections would render the Convention protection illusory and theoretical. . . .*"[22]

ii. The six months rule

36. The Applicants' initial letters to this Court were received on 12 July and on 18 August 2006, respectively, both within any possible six-month period following the Constitutional Court rulings.

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[18] See Law on Administrative Disputes of Bosnia and Herzegovina, "Official Gazette of Bosnia and Herzegovina", 19/02, 88/07 Article 76 as amended.

[19] See Cases Iž-15/06 of the State Court dated 10 August 2006 and AP-2678/06 of the Constitutional Court of 26 January 2007 (both attached to the Government's observations). On 26 January 2007 Mr. Ilijaz Pilav, a BiH citizen of Bosniak ethnicity, complained that Article V of the Constitution and Article 8.1 of the Election Law both providing that a member of the Presidency elected from the territory of the Republika Srpska must be of Serb ethnicity, were discriminatory against non-Serbs in the Republika Srpska. Mr. Pilav's candidacy was declined both by the Central Election Commission and the BiH State Court on the basis that both provisions of the Constitution and the Election Law were applied correctly. The State Court stated that: "*the nomination of the candidate (...) Mr. Ilijaz Pilav of Bosniak ethnicity, should not be verified as a nomination for the member of the BiH Presidency from the territory of Republika Srpska, since that would be contrary to provisions of Election Law of BiH, but also contrary to provisions of the Constitution of BiH*." Decision number Iž-15/06 of the State Court dated 10 August 2006, last paragraph.

[20] Decision number Iž-15/06 of the State Court dated 10 August 2006, last paragraph.

[21] *Estrikh v. Latvia*, no. 73819/01, 18 January 2007, § 98, "[W]here a consistent case-law shows that such safeguards fail or are deficient, it would be contrary to the very principle of the Convention and would lead to excessive formalism under Article 35 § 1 to demand of the applicant that he exhaust the inadequate safeguards."; see also *D.H. and Others v The Czech Republic,* No. 57325/00, 13 November 2000, §§ 121-122; *Keegan v. Ireland*, no. 1969/90, 26 March 1994, § 39.

[22] No. 8/08, 18 November 2008, § 71 (This case has been referred to the Grand Chamber.)

37. In any event, the Applicants submit that the violations of their rights amount to continuing violations, which have still not ended, and therefore the six month period has not yet begun to run.

VI. RESPONSES TO THE GRAND CHAMBER QUESTIONS

38. The First and Second Applicants' cases were relinquished to the Grand Chamber on 6 January 2009. In preparation for the Grand Chamber hearing, the Court has requested the Applicants to submit joint written submissions setting out an exhaustive outline of the Applicants' position and specifically addressing the six questions set out below. In responding to the Grand Chamber questions the Applicants underline that they continue to support the arguments set out in the First Applicant's Application and Reply to the Government's Observations, and the Second Applicant's Application and Reply to the Government's Observations. The exception to this is that the Applicants withdraw their previous argument that the restrictions on standing for the Presidency amount to a violation of Article 14 and of Article 3 of Protocol No. 1. To comply with the request in the letter from the Court of 17 March 2009, the Applicants have not made cross-references.

Question 1:

To what extent is the fact that the Constitution of Bosnia and Herzegovina was adopted by an international agreement (namely, Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina) relevant to the present case? What are the respective powers of Bosnia and Herzegovina and the High Representative (set up under Annex 10 to that Agreement) as regards constitutional amendments?

39. The Applicants submit that the Constitution of BiH is a national Constitution. Although it is contained in an international treaty, it acquired domestic Constitutional status as a result of its ratification by the BiH Parliamentary Assembly. The manner of its initial adoption does not therefore affect the Applicants' complaints in this case, nor does it affect the jurisdiction of BiH to remedy them.

40. The Constitution contained in Annex 4 entered into force with the signature of the GFAP on 14 December 1995 by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. The Annexes to the GFAP are an integral part of the GFAP and thus also can be considered as international treaties, as previously recognised by the Court.[23]

41. The Applicants submit that the intention of the signatories of the GFAP, as reflected in their subsequent practice, was that the Constitution of BiH was to be exclusively implemented by BiH. The parties to GFAP "*[w]elcomed and endorsed the arrangements that have been made concerning the Constitution of BiH, as set forth in Annex 4*" and undertook to "*respect and promote fulfilment of the commitments made*

[23] See Admissibility Decision in *Jeličić v Bosnia and Herzegovina,* no. 41183/02, 15 November 2005, page 28.

therein"[24] rather than assuming any of the specific or substantive obligations contained in its provisions. Since the conclusion of the GFAP on 14 December 1995, neither the Republic of Croatia nor the Federal Republic of Yugoslavia (or its successor states) have played any executive role in the implementation of the Constitution.[25]

42. On the other hand, the Republic of Bosnia and Herzegovina and the two Entities (the Federation of Bosnia and Herzegovina and the Republika Srpska), made unilateral declarations undertaking to abide by the terms of the Constitution "*[a]s a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina (...)*" (i.e. the Constitution of the Republic of Bosnia and Herzegovina of 1974)[26] and intended to preserve and continue Bosnia and Herzegovina's "*[l]egal existence under international law as a state, (...) with its present internationally recognized borders (...)*".[27] In this regard, on 12 December 1995, the BiH Parliamentary Assembly at a joint session ratified the Constitution as contained in Annex 4 through the adoption of the "Constitutional Law on Amendments and Additions to the Constitution".[28] Through this act BiH incorporated the Constitution of Annex 4 into its domestic legal system.

43. The parties to the GFAP agreed that their consent was not required to amend the BiH Constitution. This is shown by the amendment procedure established in Article X of the Constitution which provides for amendments to the Constitution by a "decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives."

44. The validity of the amendment procedure established under Article X of the Constitution has not been disputed by the Respondent Government or by the other parties to the GFAP. The 2006 attempt to amend the Constitution and the recent March 2009 successful amendment of the BiH Constitution by the BiH Parliamentary Assembly establish that the amendment procedures can be utilised by the Respondent.

45. Therefore the Constitution itself, as is made clear in Article X, can be amended by a decision of the Parliamentary Assembly alone, making the responsibility for remedying the discrimination complained of by the Applicants fall clearly within the jurisdiction of BiH. Neither an amendment to the GFAP, nor the approval of the High Representative is necessary to amend the discriminatory provisions contained in the Constitution.

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[24] GFAP Article V.

[25] See Article 31(3)(b) of the Vienna Convention on the Law of Treaties regarding interpretation of treaties and subsequent practice in their application.

[26] Article XII of the Constitution states that "[t]his Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina."

[27] Constitution, Art. I(1).

[28] See "Constitutional Law on Amendments and Additions to the Constitution", *Official Gazette of RBiH*, 20 December 1995, at 540. Note that the Assembly elected in 1990 had the mandate to continue its functions until the peace agreement on Bosnia and Herzegovina was reached and implemented: see Constitutional Law of 30 March 1994, Art. 4, Official Gazette of RBiH, 6 Apr. 1994, at 127.

46. The GFAP does not provide any role for the High Representative in initiating or adopting amendments to the Constitution of BiH. The High Representative was established by international treaty to promote, facilitate and monitor the civilian implementation of the peace settlement. His responsibilities do not include amending any part of the peace agreement, including Annex 4. Under Annex 10 to the Peace Agreement, the High Representative is mandated to "facilitate the Parties' own efforts" in implementing the GFAP (Article I); monitor the implementation of the peace settlement by the parties and promote the parties full compliance with all civilian aspects of the peace settlement (Article II § 1).

47. The Court has previously dealt with electoral systems partly derived from international agreements on at least two occasions. In *Aziz v Cyprus*,[29] the electoral system enshrined in the Constitution was initially derived, in part, from an international agreement.[30] Nonetheless, the Court held, that regardless of the international arrangements, and taking into account the Government's argument that the "whole political situation could have been described as delicate,"[31] direct discrimination on ethnic grounds in respect of electoral rights was a violation of Article 3 of Protocol No. 1 and Article 14 by Cyprus.

48. The Applicants therefore submit that the fact that the Constitution of BiH entered into force by the signing of an international agreement has little actual impact on the issue today. The exclusionary provisions of the electoral system derive from both the Constitution and the Electoral Law, both of which can be amended by the Parliamentary Assembly. In becoming a party to the Convention seven years after the peace agreement, BiH voluntarily accepted responsibility to bring its laws, including its Constitution, into line with the requirements of the Convention. BiH has failed to do so. Therefore the fact that the BiH Constitution derived from an international agreement does not affect the responsibility of the Respondent Government under Article 1 of the Convention to secure the rights and freedoms to everyone within their jurisdiction. It is the Bosnian state that is responsible for its Constitution and could amend this to remove the discrimination without the need for amending the GFAP or the involvement of the High Representative.

[29] *Aziz v. Cyprus*, no. 69969/01, 22 June 2004.

[30] The Cypriot Constitution originally derived from the Zurich and London agreements between the United Kingdom, Greece, Turkey and Cypriot representatives in 1959. Mr. Aziz initially brought his complaint against the other three countries as well, as parties to the separate 1960 Treaty of Guarantee, but his complaints against the three other states were held inadmissible. However, Cyprus was held responsible by this Court for its own Constitution and electoral law. See *Aziz,* § 26. Cyprus remedied the violation.

[31] *Aziz*, § 22.

Question 2

Does the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina constitute a "legislature" within the meaning of Article 3 of Protocol No 1 to the Convention?

49. The Applicants submit that taking into account the constitutional structure of BiH and with due regard to its particular competences and powers within that framework, the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina constitutes a "legislature" within the meaning of Article 3 of Protocol No. 1 to the Convention. In their amicus curiae brief to the Court, the Venice Commission of the Council of Europe stated that the election of the members of the House of Peoples can be considered to be covered by Article 3 of Protocol No. 1, as "[t]he House of Peoples indeed forms part of the Parliamentary Assembly, which is the main legislative body in Bosnia-Herzegovina, and has significant and extended powers over the legislative process in B-H."[32]

50. This is indeed the case. Article IV of the BiH Constitution creates a bicameral system in which the Parliamentary Assembly, which is the legislative body in BiH, is composed of two houses: the House of Representatives and a House of Peoples.[33] Article IV(4) of the BiH Constitution creates direct legislative powers for the Parliamentary Assembly.[34] The powers are given to the Assembly as a whole, treating both Houses as equal. Therefore the House of Peoples has significant and extended powers over the legislative process as legislation to be adopted needs the approval of both Chambers (Article IV(3)(c) of the Constitution). The House of Peoples has the authority to adopt legislation, it enjoys wide powers to control the passage of legislation and has an absolute power to veto legislation initiated by the lower chamber.

51. In fact, the House of Peoples can be described as having a more important role in legislation, at least in its power of veto. It is in the House of Peoples that the constituent peoples can exercise their vital interest veto (Article IV paragraph 3(e) of the Constitution) whereby a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniak, Croat, or Serb people by a majority of, as appropriate, the Bosniak, Croat, or Serb Delegates of the House of Peoples. These powers are increased by the fact that the BiH Constitution does not define the content of 'vital national interest', so it can be and has been used widely.

[32] See Venice Commission, Opinion no. 483/2008, CDL-AD(2008)027, of 22 October 2008 at paragraph 20.

[33] Members of the House of Peoples are chosen through indirect elections. The Croat and Bosniak Delegates from the Federation are selected, respectively, by the Croat and Bosniak Delegates to the House of Peoples of the Federation and delegates from the Republika Srpska are selected by the National Assembly of the Republika Srpska.

[34] 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."

52. The Applicants note that in its previous submissions the Respondent Government did not contest that the House of Peoples falls within the scope (and therefore ambit) of the term "legislature" for the purposes of Article 3 of Protocol No. 1 but rather argued that the fact that the applicants have access to the House of Representatives should be sufficient to comply with the meaning of Article 3 of Protocol No. 1.[35]

53. In *Mathieu-Mohin and Clerfayt v. Belgium*[36] the Court suggested that Article 3 of Protocol No. 1 applies to the election of one of the chambers of a legislature with two or more chambers. The main issue in that case concerned membership of the Flemish Council, a constituent part of the legislature in Belgium. The travaux preparatoires establish that the intention of the drafters was to ensure that governments were not bound by an obligation to hold open elections to both houses of the legislature, since in some States the upper chamber was, either in whole or in part, not elective but hereditary (as was the case in the United Kingdom) or appointed (as in Belgium).[37] It follows that BiH has no obligation under Article 3 of Protocol No. 1 to hold elections to the upper house of its legislature. However, it does not automatically follow that once a State has decided to hold elections to its second chamber that such elections can be conducted in total disregard of the requirements of Article 3 of Protocol No. 1, for example by the elections not being by secret ballot or by arbitrarily restricting who can stand for election. Accordingly, once BiH decided to hold indirect elections to the House of Peoples, (through election from the Entity parliaments) it cannot exclude individuals from the right to stand for the House of People based upon race.[38] This is especially relevant considering the nature of the legislature in BiH.

54. Bicameral systems are typical for federal states where the usual purpose of the second chamber is to ensure a stronger representation of smaller territorial entities. In BiH, however this distinction does not apply. The House of Peoples is a mechanism to represent the interests of the dominant ethnic groups, i.e. the constituent peoples. As such it is a very powerful upper house and plays a critical role in the legislative process, and should therefore be considered as a legislature. The House of Representatives has a territorial representation component (so-called "Entity voting") and for any decision to be adopted it will require a majority including one-third of the votes of Delegates from the territory of each Entity.

Question 3

What is the relationship between and the respective roles of, Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention? In particular, is the latter provision applicable only to those discrimination issues not covered by the former provision? Is there any differences between the rights provided for by Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention respectively

[35] See Government's Observations of 4 July 2008.
[36] *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113.
[37] Travaux Preparatoires vol. III, pp. 50.
[38] Indeed, the Court stated in *Mohin*, "...the phrase 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' implies essentially (…) the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election." Supra note 36 § 52.

and, in light of the answer to that question, may a parallel be drawn with the Court's lex specialis/lex generalis approach?

55. The Applicants believe the discrimination they suffer with regard to membership to the House of Peoples amounts to a violation of both Articles whereas the discrimination suffered with regards to membership to the Presidency amounts to a violation of Article 1 of Protocol 12.

56. This case is the first concerning Protocol No. 12 to reach the Grand Chamber. The Applicants argue that violations of both Article 1 of Protocol No. 12 and of Article 14 have taken place with regard to their prohibition on standing for election to the House of Peoples. Given the identity in substance between the two Articles, the only difference being one of scope, for the reasons set out below, the Applicants submit that the Court should consider the violations of Protocol No. 12 first. Should the Court find such a violation the Applicants suggest that it will not be necessary to consider whether there was a violation of Article 14.

57. There is no jurisprudence yet on Protocol No. 12. Given that, the Applicants suggest that the Court should be guided in particular by the Explanatory Report to the Protocol and the Court's own Opinion on the draft of the Protocol.[39]

i. The relationship between Article 14 and Article 1 of Protocol No. 12

58. Protocol No. 12 was adopted by member States of the Council of Europe to address the limitations of Article 14. Protocol No. 12 raises the right to non-discrimination to an autonomous, substantive right.[40] As established in the Explanatory Report to Protocol No. 12, in a State, like BiH, that has ratified Protocol No. 12, there will be overlap between Article 1 of Protocol No. 12 and Article 14.[41]

59. The Explanatory Report is clear that Protocol No. 12, as an autonomous, substantive right, is not limited to cases not covered by Article 14.[42] The Applicants submit, that the Court's approach to the relationship between the Articles, in terms of securing the rights to equality and non-discrimination, should be guided by the Court's general principle that protection of the Convention rights should be 'practical and effective' and that "any exercise in interpreting the Convention must be geared to securing the universal and effective recognition and observation of the guarantees enumerated, unless it is to turn into a betrayal of the spirit and letter of its momentous preamble."[43] The relationship between the two Articles should be viewed in light of the fact that

[39] *Protocol No. 12 to the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS No. 177, Council of Europe Explanatory Report, ["Explanatory Report"]; *Opinion of the European Court of Human Rights on draft Protocol No. 12 to the European Convention on Human Rights*,§ 5, 6 December 1999

[40] As stated in the Explanatory Report to the Protocol, it was adopted to provide an independent prohibition of discrimination, akin to Article 26 of the International Covenant of Civil and Political Rights or Article 7 of the Universal Declaration of Human Rights. Ibid at § 1.

[41] Ibid at §§ 32-33.

[42] Ibid at § 33.

[43] *Anguelova v. Bulgaria*, no. 383671/97, 13 June 2002, (Judge Bonello's dissent in respect of the Court's failure to address Article 14 in relation to Articles 2 and 3) § 9 of dissent.

Protocol No. 12 is intended to reinforce the Convention's protection against discrimination, and therefore the Court should be guided by its assessment of which (or both) provisions best and most efficiently gives effect to the right to non-discrimination and equality.

iii. No difference in substance of rights between the two Articles

60. This Court's advisory opinion and the Explanatory Report have made it clear that the definition of discrimination that this Court has developed under Article 14 should apply identically to Protocol No. 12.[44] Paragraph 18 of the Explanatory Report states that the definition of discrimination under Protocol No. 12 is intended to be identical to that under Article 14 summarising this as "*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.*"[45] Therefore the substance of the definition of discrimination and the analytical framework to be applied to a set of facts shall be the same under Protocol No. 12 as under Article 14.

iv. No Parallel to Lex Specialis

61. In light of the answer to the Court's question that there is no difference in substance between the two Articles, it follows that the Court's approach to *lex specialis* does not parallel the relationship between Article 14 and Article 1 of Protocol 12 and should therefore not be a basis for the Court's approach to this issue.

62. The Court has applied the technique of "the special has priority over the general" where the Court finds that a particular Article's safeguards are stricter than another related Article, and then deems the more stringent requirements *lex specialis*. In particular the Court has sometimes established that there is a more specific guarantee (*specialis*) that either provides more stringent safeguards, thereby absorbing the general norm[46] or that use of the '*specialis*' rule may create a more equitable result.[47] This has been established by the Court in a number of cases, for example, dealing with claims brought under Article 6 and Article 13.[48] In these cases the *lex specialis* rule is applied because it better ensures the protection of rights and is judicially efficient, since examining the general before the specific would require ensuring that the specific does not either create an exception to the general rule or qualify the general rule. [49]

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[44] *Opinion of the European Court of Human Rights on draft Protocol No. 12 to the European Convention on Human Rights*, § 5, 6 December 1999; *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*: *Explanatory Report,* § 18.

[45] *Abdulaziz, Cabales and Balkandali v United Kingdom*, nos. 9214/80, 9474/81, 28 May 1985, § 72.

[46] *Khadayeva and Others v. Russia*, no. 5351/04, 12 March 2009, § 180.

[47] *Kiselev v. Russia*, no. 75469/01, 29 January 2009 (Judge Kalaydieva's dissenting opinion). For a general discussion of the *lex specialis* approach see Martti Koskenniemi, *Fragmentation of International Law: The Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained' Regimes* § 2, http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf

[48] *Dauti v. Albania*, no. 19206/05, 3 February 2009, §§ 58, 59 (citing *Meneshev v. Russia*, no. 59261/100, 2006, § 105).

[49] See e.g., *Mazurek v. France,* no. 34406/97, 1 February 2000 (partly dissenting opinion of Judges Loucaides and Tulkens); *Maaouia v. France*, no. 39652/98, 5 October 2000 (concurring opinion of Judges Costa, joined by Judges Hedigan and Pantiru § 2).

63. The Applicants submit that the rationales for the Court's application of *lex specialis* do not lend themselves to the relationship between Article 14 and Article 1 of Protocol No. 12 because the substance of the rights protected under those Articles are the same. The difference is only as to scope, or the protected activity. Therefore the requirements of one or the other cannot be said to be more strict or specific. Neither one creates exceptions or qualifies the other. Given the rationale for applying *lex specialis*, a difference in scope alone would not give rise to the application of *lex specialis.* Therefore, this method of treaty interpretation has little relevance.

64. Rather, the Applicants submit that the relationship between the two Articles should be viewed in light of the fact that Protocol No. 12 is intended to reinforce the Convention's protection against discrimination, and therefore the Court should be guided by its assessment of which (or both) provisions best and most efficiently gives effect to the right to non-discrimination and equality, taking into consideration that protection of the Convention rights should be 'practical and effective.'

iv. Approach in this case

65. Two main reasons why Article 1 of Protocol No. 12 should be the first Article to be considered.

66. Firstly, the Applicants believe in this case it will be judicially efficient. The first test under Protocol No. 12 is whether the right to stand for election to the House of Peoples is a right "set forth by law". For Article 14, the first step is the 'ambit' test which can lead to legalistic demarcations disputes.

67. Secondly, while Article 14 attaches to cases falling within the "ambit" of another Article of the Convention, it is not uncommon for Court to find it unnecessary to address Article 14 when it has found a violation of the substantive right.[50] Moreover, the 'justification' or 'balancing' test performed by the Court, even when hearing the Article 14 claim, will be made in light of the requirements of the substantive article, which could diminish the focus on the precise justification required for the discriminatory treatment. The result is that the discrimination aspect of a claim may be lessened under Article 14. Under Protocol No. 12 the same risk that the discrimination claim will be subsumed does not exist since, under that provision, the right to non-discrimination *is* the substantive right protected.

68. In sum, the Applicants submit that a finding of a violation of Article 1 of Protocol No. 12, by addressing discrimination as a substantive right, will also ensure that the general measures required of the state will be focused on addressing the discrimination. It will therefore often lead to a more effective remedy than Article 14.

[50] See e.g., *Isaak v. Turkey,* no. 44597/98, 24 June 2008, § 131. But see *Chassagnou and Others v. France*, nos. 25088/94, 28331/95 and 28443/95, 29 April 1999; *Cyprus v. Turkey,* no. 25781/94, 10 May 2001, § 3 (Judge Costa's dissenting opinion).

Therefore, although there will be a violation of both Articles, it is appropriate to consider Article 1 of Protocol No. 12 first.

Question 4

As regards constitutional provisions according to which only those belonging to one of the three constituent peoples are eligible to stand for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, are they contrary to Article 14 read in conjunction with Article 3 of Protocol No. 1 to the Convention and/or Article 1 of Protocol No. 12 to the Convention?

69. The Constitution of BiH and the Electoral Law make it clear that membership of the House of Peoples, the upper chamber of the Parliamentary Assembly, is limited to members of the constituent peoples. The Applicants submit that this amounts to a difference in treatment causing them a detriment on the grounds of their race/ethnicity, membership of a national minority and (for the Second Applicant) religion. They submit that such direct racially-based difference in treatment can have no objective and reasonable justification. Even if the possibility of a justification is accepted, they submit that the Respondent Government has not and will not be able to discharge its heavy burden to justify this difference in treatment, given that the difference in treatment is based on race and has led to the Applicants' complete exclusion from the highest institutions of the state.

70. As set out in the answer to Question 3, the Applicants believe that Protocol No. 12 and Article 14 are overlapping and both apply in this case, using the same test for discrimination. They suggest the Court considers Protocol No. 12 first.

71. The Applicants submit that the prohibition on standing for elections concerns a "right set forth by law", that because of their ethnicity and race they have been treated differently from constituent peoples, and that such difference in treatment on racial grounds is not capable of justification. Alternatively, should the Court consider that direct difference in treatment on racial grounds can be open to justification, the Applicants submit that the difference of treatment has no objective and reasonable justification because: (i) it does not pursue a legitimate aim; and (ii) there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[51]

72. Finally, the Applicants submit that is for the Respondent to show that the difference in treatment can be justified[52] and that the Respondent Government has failed to provide the Court with a justification for the evident difference in treatment.

i. Right Set forth by Law

[51] Using the test set out in *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v Belgium* Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, §10.
[52] *Timishev v Russia*, nos. 55762/00 and 55974/00, 13 December 2005, § 57.

73. The right to stand for and be a member of the House of Peoples of the BiH Parliamentary Assembly is a right set forth in Article IV of the BiH Constitution and Section 9.12 of the Election Act 2001. Article 19 of the BiH Law on Protection of Rights of Members of National Minorities also provides for the right of persons belonging to a national minority to be represented in all 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. The Respondent Government also claimed in its Observations that the "right to free elections without discrimination on ethnical grounds is *mainly* secured under the Law and Constitution"[53] [emphasis added]. Protocol No. 12 requires that this right, as set forth by law, is to be secured without discrimination on any ground, including the grounds of race, religion or association with a national minority.

74. The Applicants further state that the Convention rights at issue in this case, as set out in the treaties in Annex 1 to the Constitution, are also "set forth by law" in BiH by being incorporated into domestic law by virtue of Article II.4 of the Constitution.[54] The Explanatory Note to Protocol No. 12 acknowledges that the word "law" may also cover international law.[55]

75. The Applicants submit that the duty to *secure* rights under Article 1 of Protocol No. 12 equally includes a positive obligation on the state to ensure equal rights and to remedy lacunae in protection, at least in the public sphere.[56] The Respondent appeared to be suggesting in its Observations that Protocol No. 12 would not apply as the Applicants did not have the right in BiH law to stand for the Presidency or House of Peoples. It would lead to a result contradictory to the object and purpose of Protocol No.12 if Article 1 of the Protocol was interpreted to mean that when a law is directly discriminatory, e.g., an applicant is excluded from protection of a right because of a domestic law directly denying him that right, Protocol No 12 would not apply (i.e. the right would be treated as not being "set forth by law"). The Applicants submit that the logical consequence of such a reading of Protocol 12 would mean that the worst type of discrimination – direct, clear discrimination entrenched in domestic laws – would not be prohibited under Protocol No.12, and all that states would need to do to avoid violations of Protocol No.12 would be to enshrine discriminatory practices in domestic law.[57]

[53] Government's Observations, § 26.
[54] See BiH Constitutional Court cases, AP/ 379/07 § 17, AP 813/06 § 17; AP 95/06 § 11 and CH/02/10720 § 53. As a result, the constitutional provisions that are at issue in this case are in direct contradiction with other Bosnian law.
[55] See Explanatory Report § 28.
[56] See Explanatory Report § 26.
[57] *Stec and Others v. The United Kingdom*, nos. 65731/01 and 65900/01, 6 July 2005, § 55. *Stec* held that once a State decides to provide a benefit under the law, it must do so in a manner which is compatible with Article 14.

ii. Difference in treatment based on race, religion and membership of a national minority

76. Although both Applicants are citizens of BiH, the BiH Constitution and the BiH Election Laws deny them any right to stand for election in respect to the House of Peoples solely upon their status as being Roma and Jewish. As such, the Applicants are being treated differently on grounds of their race (ethnic discrimination has been held by the Court to be a form of racial discrimination)[58] and their association with a national minority[59], as well as, in the case of the Second Applicant, on the grounds of religion, when they are compared to the fellow citizens who are members of the constituent peoples.

77. The Respondent Government in its Observations did not contest that the Applicants were subject to a difference in treatment under the provisions of the Constitution and the Election Law based on their ethnicity, religion (for the Second Applicant) and their being a member of a national minority.[60] Indeed the Respondent's Observations conceded that the Applicants "as members of national minorities" have been excluded from part of the electoral process.[61] The issue which therefore appears to be in contention between the parties is whether there is objective and reasonable justification for the difference in treatment.

iii. No justification possible for difference in treatment based decisively on race or ethnicity

78. The Applicants submit that the case-law of this Court shows that difference in treatment based directly on race or ethnicity is not capable of justification and amounts to direct discrimination. As previously established by the Court:

> "... no difference in 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 democratic society built on the principles of pluralism and respect for different cultures" (*Timishev v Russia)*[62].
>
> This was reaffirmed in the Grand Chamber judgement in *D.H. and others v Czech Republic.*[63]

79. The Court has also stated in respect of religious discrimination that:

> "[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable" (*Hoffmann v Austria*)[64].

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[58] *Timishev v Russia* supra note 52 § 56.
[59] Romas and Jews are recognised national minorities under Article 3 of the Law on Protection of Rights of Members of National Minorities 2003.
[60] Government's Observations, §§ 25 and 31.
[61] Government's Observations, § 25.
[62] *Timishev v. Russia,* nos. 55762/00 and 55974/00, 13 December 2005, § 58.
[63] D.H. and others v. Czech Republic, no. 57325/00, 13 November 2000, § 176.
[64] *Hoffman v. Austria*, no. 12875/87, 23 June 1993, § 36.

80. The Applicants submit that this impossibility of justification should be particularly important in this case concerning the right to stand for election. The Court has explicitly stated that the rules governing the composition of a parliament:

> "… should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States" (*Aziz v Cyprus*).[65]

81. Thus the Court held that constitutional provisions effectively barring an ethnic minority group, Turkish Cypriots living within the Cypriot government-controlled part of Cyprus, from voting in their place of residence resulted in a clear inequality of treatment in the enjoyment of the right in question, which had to be considered as a fundamental aspect of the case. Therefore, the Court found a violation of Article 14 in conjunction with Article 3 of Protocol No. 1.

82. Under the Community Law of the European Union, Council Directive 2000/43/EC (the "Race Directive") implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, explicitly in Article 2, includes under its definition of indirect discrimination the possibility of objectively justifying the treatment, but the Directive makes no such justification possible under its definition of direct discrimination.

83. The BiH electoral laws exclude the Applicants from standing for election resulting in a clear inequality of treatment between the Applicants and Bosniak, Croat and Serb individuals. The difference of treatment is entirely based on race/ethnicity and religion. Accordingly, the difference in treatment between the Applicants, being of Roma and Jewish ethnicity, from that of members of the constituent peoples, in their right to stand for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, is not capable of objective justification and therefore constitutes discrimination.

iv. The Government cannot meet the very high level of justification that would be required

84. The Applicants believe that no justification of the difference in treatment is possible in this case. However, even if the Court does accept that a justification may be possible, the Applicants submit that the Respondent Government would still a bear a very heavy burden when seeking to establish an objective and reasonable justification. This is given both the basis of the complaint (direct racial and ethnic discrimination) and the areas to which it applies (political participation and representation at the highest level of state). The Government's burden of proof is especially high in relation to racial discrimination, which is a "particularly invidious kind of discrimination."[66] Direct and explicit racial discrimination, as in the present case, is considered amongst the most

[65] *Aziz v. Cyprus*, no. 69949/01, 22 June 2004, § 28.
[66] *Chapman v UK,* no. 27238/95*,* 18 January 2001*,* §176 (citing *Nachova and Others v. Bulgaria* [Grand Chamber], nos.. 43577/98, 43579/98, 6 July 2005, §145; *Timishev v. Russia*, § 56.

egregious types of discrimination, the prohibition of which is widely accepted as customary international law and even *jus cogens*.[67]

85. The Respondent's burden of justification is further heightened in relation to fundamental rights such as electoral rights. The Court has observed on several occasions that "*democracy is without doubt a fundamental feature of the European public order*"[68] and that the Convention was designed to maintain and promote the ideals and values of a democratic society[69]. This said, as the Court has repeatedly observed, there can be no democracy without pluralism.[70] States are the ultimate guarantors of the principle of pluralism under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.[71] The Applicants submit that such free expression of opinion is impossible with the exclusion of important parts of BiH's society from standing for elections. The Respondent Government's justifications in the present case must therefore be subject to detailed scrutiny and "very weighty reasons are required."[72]

86. The Applicants submit that the Respondent Government cannot show that the difference in treatment is justified in this case. They will examine the Respondent's purported legitimate aims as provided for in its Observations in turn, and whether the exclusion of the Others could ever be a proportionate response.

v. The Respondent's purported Legitimate Aims

87. The Constitutional Court of BiH, in its partial decision III in Case 5/98 on the status of constituent peoples[73] stated the following in this regard:

"*(...) it is a generally recognized principle to be derived from the list of international instruments in Annex I to the Constitution of BiH that a government must represent the whole people belonging to the territory without distinction of any kind thereby prohibiting -- in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of*

[67] See e.g. International Court of Justice Namibia Case 1971, § 17; Dissenting Opinion of Judge Tanaka in the South West Africa Cases (Second Phase), ICJ Reports (1966), § 298; Advisory Opinion 18/2003 of the Inter-American Court of Human Rights, declaring non-discrimination a principle of *jus cogens,* because the entire legal structure of public order rests on it; Christopher McCrudden*, International and European Norms Regarding National Legal Remedies for Racial Inequality* 251, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM (Ed. Sandra Fredman 2001).

[68] See the *Loizidou v. Turkey* judgement of 23 March 1995 (preliminary objections), Series A no. 310, § 75 and *Communist Party of Turkey and Others v. Turkey*, nos. 133/1996/752/951, 30 January 1998, § 75.

[69] See the *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23, § 53.

[70] *Freedom and Democracy Party v. Turkey*, no. 23885/94, 8 December 1999, §§ 39 & 41.

[71] See *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276, § 38.

[72] *East African Asians v. United Kingdom*, App. No. 4403.70, 15 December 1973, § 207, *Cyprus v. Turkey*, (1976) 4 EHRR 482 § 503, *D.H. and Others,* supra note 21, §§ 176 and 196; *Timishev*, supra note 52, §58. See generally LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, p. 481, (Eds. Harris, O'Boyle and Warbick 1995), Oddny Mjoll Arnardottir, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, p. 147 (2003); Jeroen Schokkenbroek: *The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation*, 19 Human Rights Law Journal p. 22; Stephen Livingstone, *Article 14 and the Prevention of Discrimination in the European Convention on Human Rights*, 1 EUR. HUM. RTS. L.J. p. 29, argue that race is generally an internationally "suspect" classification calling for higher scrutiny.

[73] Constitutional Court of Bosnia and Herzegovina, "Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina", Case No. U 5/98-III, Third Partial Decision, 1 July 2000.

BiH through Annex I -- a more or less complete blockage of its effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-national state, democratic decision-making would be transformed into ethnic domination of one ore even more groups if, for instance, absolute and/or unlimited veto-power would be granted to them thereby enabling a numerical minority represented in governmental institutions to enforce its will on the majority forever."

88. It is difficult to discern from the Government's Observations precisely what are the legitimate aims being put forward to justify the difference in treatment and exclusion from the highest offices. Some purported aims of the constitutional provisions are set out at paragraphs 25, 29 and 31 of the Respondent Government's Observations:

"to achieve an equal representation of all three constituent peoples in a few legislative bodies;"
"the preservation of the peace;"
"opening of dialogues;"
"making [a] platform for amendments of the Constitution and Electoral Law" as it is a "situation where a social system is established by a Peace agreement after a devastating war."[74]

89. As to the first of these purported aims, the Applicants would have agreed with an argument that achieving fair representation is a possible legitimate aim of an electoral system. However, the Government was not claiming fair representation as an aim: its aim was only the equal representation of the three constituent peoples, with no mention of the "Other" communities. Indeed the equal representation of the constituent peoples is achieved precisely by excluding the "Other" communities without any explanation of why this is necessary to ensure such equal representation. The Applicants submit that this cannot be a legitimate aim as it is inherently discriminatory, giving the constituent peoples a superior status within the BiH polity.

90. The Applicants fail to understand what the Government meant by "opening of dialogues" or "making a platform for amendments" as being legitimate aims to justify the exclusion of the "Others". Discriminatory laws cannot be justified on the basis that the fact that they are in violation of human rights standards will result in discussions to amend them to remove their discriminatory element. The Applicants submit that neither of these purported justifications is legitimate.

91. As to the aim of preserving peace, the Applicants contend that it is difficult to comprehend how the promotion of democratic values with full and equal participation of all citizens in public life could represent a threat to the preservation of peace as argued by the Government. The Applicants contend that, on the contrary, the constitutionally guaranteed ethnic domination by the Constituent Peoples and the ongoing racial discrimination cannot promote peace and reconciliation but rather, as pointed out by the General Assembly of the United Nations in the preamble to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination,

[74] Government's Observations, §§ 25, 29 and 31.

" (…) all forms of racial discrimination and, still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, besides constituting a violation of fundamental human rights, tend to jeopardize friendly relations among peoples, co-operation between nations and international peace and security (…) "[75]

92. The Applicants' position is supported in the preamble of Annex 4 to the Dayton Peace Accords (containing the BiH Constitution) where the signatories showed themselves "*Convinced* that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society." Annex VII to the Dayton Peace Accords further stresses " (…) the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace, (…) " [Emphasis added.]

93. The final purported legitimate aim was simply that the discrimination was put in place by the Constitution in a peace agreement. The mere fact that discriminatory arrangements are established by a peace agreement cannot, as the Government would appear to contend, be a legitimate aim to justify such discrimination. In this regard the Applicants refer the Court to their answer to the Court's first question.

94. In becoming a party to the Convention some years after the peace agreement, the Government voluntarily accepted responsibility to bring its laws, including its Constitution, into line with the requirements of the Convention. This commitment was reiterated on 16 June 2008, with the signing of the Stabilization and Association Agreement (SAA) with the European Union.

95. BiH has full authority to amend its Constitution without amending the GFAP. This issue is dealt with also in the Applicants' response to Question 1.

vi. If there is a legitimate aim, total exclusion on the basis of race cannot be a proportionate response

96. Even had the Respondent Government been able to establish that the differential treatment of the Applicants with respect to their standing for election to the House of Peoples pursued a legitimate aim at the time of the introduction of the present applications, a point which is not accepted, the Applicants submit that the differential treatment is not proportionate to any such aim.[76] The relevant provisions of the BiH Constitution and BiH Election Law result in a blanket exclusion on the rights of "Others", including Jews and Roma, to stand for election. This would require a very high justification to show it was a proportionate means of achieving a legitimate aim.

97. The Respondent Government failed to put forward any arguments in its Observations as to how the total exclusion of the Applicants from any opportunity to stand for election to the House of Peoples of the Parliamentary Assembly is proportionate to the purported legitimate aims set out at paragraph 88 supra. Accordingly, it has failed to

[75] United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963.
[76] Second Applicant's Application, §§ 96-102.

discharge the burden of proof upon it to show that the differential treatment is justified.

98. The Venice Commission stated in this regard that:

" *(…) The long time that has elapsed since the elaboration of the Dayton Peace Treaty proves that the solution found in 1995 does not really help to overcome the problems in Bosnia-Herzegovina. It is not proportionate to nullify rights guaranteed in the Convention in order to preserve a constitutional structure that has not helped to acquire the desired results within a period of about 13 years (…)"*[77]

99. Additionally, with regard to any consideration of the proportionality of the measures under challenge, due consideration must also be given to the fact that the Venice Commission and other authoritative bodies have made clear that the present constitutional structure is not the only means of achieving a guaranteed distribution of power in BiH.[78] Other non-discriminatory avenues are available to the Respondent. It is not, of course, the role of the Court to propose suitable electoral alternatives, simply to determine if the issues in the Application amount to a violation of the Convention. However the fact that viable alternative political structures have been proposed or implemented show that the current system is not necessary. Thus for instance, at the level of the Entities (the Federation of Bosnia and Herzegovina and the Republika Srpska), both constituent peoples and "Others" are represented in the respective second chambers. The Venice Commission has described this as a "striking contrast" with the state Presidency and House of Peoples.[79] It is therefore apparent that it is possible to establish a mechanism of power-sharing which does not automatically necessitate the exclusion of "Others" from the right to stand for election.

100. The attempt to reform the relevant constitutional provisions in March 2006 equally shows that an alternative mechanism for power sharing is possible which does not involve outright exclusion of certain groups on ethnic grounds.[80] The Court has previously found that the fact that legislative amendments were being made to remove discriminatory laws showed that other non-discriminatory means could be used to achieve the stated aims and that therefore the relationship of proportionality was not met in maintaining the discriminatory laws.[81]

101. The Respondent Government has conceded that the discriminatory provisions must be eradicated, but has asserted that BiH is still not ready to address the discrimination. It has stated that the exclusion of the Others is "temporary" and that it is "aware of the necessity of gradual changing [sic] in accordance with the development of social relations."[82] The Applicant submits that direct racial discrimination cannot be justified

[77] Venice Commission, Amicus Curiae Brief CDL-AD(2008)027 §33.
[78] Venice Commission, 2005 CDL-AD(2005)004.
[79] Venice Commission, Amicus Curiae Brief (2008), §37.
[80] Although the final version of these proposed changes would not have removed the discrimination against the Others in the House of peoples, earlier proposals would have done.
[81] *Inze v. Austria*, no. 8695/79, 28 October 1987, § 41 (proposed legislative amendments to laws which discriminated against children born outside marriage showed that other non-discriminatory means could be used to achieve the stated aims).
[82] Government's Observations, § 31.

even for a temporary period. The fundamental principle of non-discrimination constitutes a *jus cogens* norm of international law that should be implemented immediately, not be a mere aspiration or subject only to gradual acceptance.[83] It is striking that the Government's observations, although talking about the "transition to a civil society" in paragraph 29, did not give any indication as to when it would be time for the removal of the discriminatory political system, nor who would decide that this time had arrived.

102. In summary, a total exclusion of a significant portion of the Bosnian population is not proportionate to any aim of achieving peace. The Respondent Government has failed to put forward any explanation as to how the exclusion of the Applicants is proportionate to any such aim and has therefore failed to discharge the burden upon it to justify the uncontested difference in treatment. Further, 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. The effects of the blanket restriction are arbitrary and do not serve any stated aim.

103. On every occasion in recent years when the Bosnian political structure has been considered by an international human rights or other monitoring body, the international body has emphatically stressed the need for BiH to replace its system of discriminatory ethnic representation. The Applicants direct 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[84]
-European Parliamentary Assembly, Resolution 1513 (2006): Constitutional reform in Bosnia and Herzegovina[85]
-UN Committee on the Elimination of Racial Discrimination, Concluding Observations of the Sixty-Eighth Session, 20 February – 10 March 2006[86]
-UN Human Rights Committee, Concluding observations of the Eighty-Eighth session, 16 October to 3 November 2007. [87]

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[83] See, for example, General Comment no. 3 of the UN Committee on Economic, Social and Cultural Rights § 1: "various obligations which are of *immediate* effect … One of these … is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination' ...". [Emphasis added].

[84] "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.

[85] 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.

[86] "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.

[87] 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

-Venice Commission report – CDL-AD(2005)004[88]
-European Commission against Racism and Intolerance: Report on Bosnia and Herzegovina, 25 June 2004[89]

104. In a 29 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 as candidates for election. . . ."[90]

vii. Violation of Article 14 read in conjunction with Article 3 of Protocol No 1

Within the Ambit

105. The Applicants rely on the response to Question 2 above [49-54], as establishing that the facts of the present case are within the ambit of Article 3 Protocol No 1, as the House of Peoples forms a key part of the legislature. Therefore, Article 14 is applicable and requires that this right is secured without discrimination.

Discriminatory treatment

106. As the meaning of the term "discrimination" in Article 1 of Protocol No 12 is "intended to be identical to that in Article 14 of the Convention",[91] it follows that the difference in treatment of the Applicants in their right to stand for election to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina is equally not capable of justification under Article 14 for the reasons set out above under Protocol No. 12.

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electoral system that guarantees equal enjoyment of the rights under article 25 of the Covenant to all citizens irrespective of ethnicity.

[88] 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 78, paras. 75

[89] "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/

[90] Council of Europe Resolution 1513, supra note 3.

[91] Explanatory Report, § 18.

Question 5:

As regards constitutional provisions according to which only those belonging to one of the three constituent peoples are eligible to stand for election to the Presidency of Bosnia and Herzegovina, are they contrary to Article 1 of Protocol No 12 to the Convention (see, by analogy, Aziz v Cyprus, no. 69949/01, ECHR 2004-V; Timishev v Russia, nos. 55762/00 and 55974/00, §58, ECHR 2005-XII; and D.H. and Others v the Czech Republic [GC], no. 57325/00, § 176, ECHR 2007-)?

i. Rights set forth by law

107. In respect of the Presidency of Bosnia and Herzegovina, the right to stand for and be a member of the Presidency is set forth in Article V of the Constitution and Article 8.1, paragraphs 1 and 2 of the Election Law. The Applicants also state that the Convention rights at issue in this case, as set out in the treaties in Annex 1 to the Constitution, are also "set forth by law" by being incorporated into domestic law by virtue of Article II.4 of the Constitution.[92]

ii. Justification of differential treatment on grounds of ethnicity, religion and being associated with a national minority

108. As set out above in the response to Question 4 at paragraphs 84 – 87, as consistently interpreted in the case law of the Court on Article 14, once an Applicant has shown a difference in treatment, the onus is on the Respondent Government to show that differential treatment was justified, in that it pursued legitimate aims and that there is a reasonable relationship of proportionality between the means employed and the aims sought to be realized.[93]

109. As submitted in paragraphs 77 and 101 above, there does not appear to be any issue between the parties that there is a difference in treatment of the Applicants in respect both of their right to stand for election to the House of Peoples and also to the collective Presidency of Bosnia and Herzegovina on grounds of ethnicity, association with a national minority and, in the case of the Second Applicant, religion.[94] The issue between the parties is limited to whether such acknowledged difference in treatment has any objective and reasonable justification.

110. The Applicants repeat the submissions under Question 4. Firstly, such difference in treatment with an exclusionary affect on entire racial groups cannot be justified. Alternatively even it can, the Respondent Government has not met the burden on it to show that such difference in treatment was objective and reasonable, in that it was necessary and proportionate to meet a legitimate aim. Finally, the Applicants submit that any justification for exclusion from the Presidency, the highest office of state, and

[92] See BiH Constitutional Court cases, AP/ 379/07 § 17, AP 813/06 § 17; AP 95/06 § 11 and CH/02/10720 § 53. As a result, the constitutional provisions that are at issue in this case are in direct contradiction with other Bosnian law.

[93] *D.H. and Others,* supra note 21, at §§ 177, 189; *Timishev v Russia*, supra note 52 § 57; *Chassagnou and Others v. France,* supra note 50 at §§ 91-92.

[94] Government's Observations §§ 25-26.

that which represents the entire country, should require an even higher level of justification than that with reference to the House of Peoples.

Question 6

In particular, as regards questions 4 and 5 above, was any difference in treatment justified at the time of the introduction of the present application (in 2006)?

111. In responding to the above question, the Applicants invite the Court to also consider events and developments in Bosnia and Herzegovina that have taken place since their applications were lodged, that is, since 2006. This was the approach of the Grand Chamber in the case of *Yumak and Sadak v. Turkey,* where it took into account an election that had taken place after the application was submitted[95].

112. For the reasons set out above in response to Question 4, the Applicants believe the direct explicit racial and religious discrimination causing complete exclusion of Jews, Roma and other groups from the highest offices of state, cannot be justified at any time, including in 1995.

113. Alternatively, if the possibility of justification for such exclusion is accepted, the Applicants submit that the length of time during which the exclusion continues will increase the burden on the Respondent Government to justify it, especially when the Respondent has admitted, as in this case, that the exclusion is intended to be temporary. In this regard the Applicants refer to the Human Rights Committee findings in the case of *Silva v Uruguay* to show that the length of period of exclusion from political rights will increase the likelihood of a violation.[96] In that case the applicants had been deprived of their right to stand for election (and to vote) for a period of 15 years, but Uruguay had purported to declare a state of emergency and derogate from the Covenant. Nevertheless the Committee did "*(...) not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. (...)*"

114. Furthermore in 2006 there was a serious attempt to reform the BiH Constitution, which involved possible changes to the balance between the groups, and some of the earlier forms of the proposals would have ended the discrimination entirely. This shows that many in BiH believed that the discrimination, even if it had once been justified, could no longer be justified and that reform was possible.

115. Most importantly, by 2006, the Respondent Government had freely chosen to join the Council of Europe and ratify both the ECHR (ratified and entered into force in 2002) and Protocol No. 12 (ratified in 2003, entered into force in 2005). It ratified both

[95] *Yumak and Sadak v. Turkey*, no. 10226/03, 8 July 2008 at § 73 [GC].
[96] *Jorge Landinelli Silva v. Uruguay*, Communication No. R.8/34, Views of Human Rights Committee, 8 April 1981, § 8.2.

without reservation and indeed made a commitment that it would revise its electoral legislation to meet Council of Europe standards within one year of accession to the Council.[97] At no time since becoming party to the ECHR has BiH declared a state of emergency or attempted to derogate from any provision of the Convention under Article 15. Even if they had attempted to derogate, the Applicants would submit that blatant, direct discriminatory measures, even under an emergency, would still not be justifiable.[98]

VII. SUMMARY OF APPLICANTS' ADDITIONAL ARGUMENTS

116. In addition to the above, the Applicants have raised a number of additional violations of the ECHR which are summarised below for the Court's reference.

1. Article 3 of Protocol No. 1

117. The Applicants submit that, for the reasons set out at paragraphs 39-54 above, the House of Peoples is a legislature.

118. The Applicants' rights to stand for election to the House of Peoples are removed by virtue of their race/ethnicity, religion and association with a minority, which amounts to a total exclusion of the very essence of their rights under this Article which, as stated at paragraphs 39-48, 69-106 cannot be justified in any circumstances. It is to be recalled that violations of this Article have been repeatedly found when whole groups of individuals have been prevented from exercising their participatory rights. The Court has held that "a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside of any margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1" (*Hirst v. the United Kingdom (no. 2)* [GC][99]). More recently, in *Adamsons v Latvia*[100], a blanket exclusion of a whole group of former 'officers' of the KGB from standing for election without a case by case assessment, was deemed unacceptable. The Applicants submit that the BiH Constitutional provisions restricting their right to stand for election are precisely such a general automatic and indiscriminate restriction.

119. Moreover, a political system that gives priority to three groups at the expense of others ignores the principles of equal treatment and cannot therefore be seen to pursue a legitimate aim. Further, the restrictions imposed on the Applicants are arbitrary and not proportionate to the aims pursued. Total exclusion from any opportunity to stand for election constitutes a complete impairment of the 'very essence' of the Applicants' rights under Article 3 of Protocol No 1, since the 'very essence' is *inclusion*. As the Court has clearly stated, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run

[97] See PACE Opinion No. 234 (2002) which sets out this commitment.
[98] See *A and Others v United Kingdom,* no.3455/05*,* 19 February 2009, § 190.
[99] *Hirst v. The United Kingdom (no.2),* no. 74025/01, 6 October 2005, § 85.
[100] *Adamsons v. Latvia*, no. 3669/03, 24 June 2008, § 125.

counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst v. the United Kingdom (no. 2)* [GC][101] and *Ždanoka v. Latvia* [GC][102]). As a result, the provisions of the BiH Constitution and Election Laws contravene Article 3 of Protocol No 1 ECHR.

2. Article 13

120. The complaints of the Applicants concern very serious issues, their exclusion from even the possibility of standing for the highest offices of state, due to direct, racially-based discrimination. This had been put into force by the BiH Constitution and the Election Law.

121. Two challenges to the discriminatory provisions have been made, by Sulejman Tihic in Cases U-5/04 and U-13/05. However in its two rulings the Constitutional Court of BiH refused to address the discrimination and instead stated that it lacked jurisdiction to consider the compatibility of neither the Articles IV and V of the Constitution, nor, in the second case the Electoral Law, with the ECHR, despite the Convention having nominally a superior status to all other law in the BiH Constitution. The binding nature of this ruling meant, with respect to the Applicants, that they could not challenge the discriminatory provisions in any court in BiH. Given that the Court refused to rule on the substance of the challenge to the law, this means that the Applicants have not been able to, nor do they have any possibility of, challenging the substance of the discrimination they suffer within any Bosnian legal or other institution. Therefore they do not have any effective remedy within BiH, and therefore have suffered a violation of Article 13.

3. Article 3

122. The First Applicant submits that the BiH Constitution and Election Laws, in restricting his right to vote and his right to stand for election based on his race/ethnicity, religion and association with a national minority, constitutes degrading treatment in violation of Article 3 ECHR. In preventing him from fully participating in the political affairs of his country, he and others member of the Roma community as well as other members of national minorities in BiH are effectively reduced to the status of second class citizens, amounting to a special affront to his human dignity in breach of Article 3.

[101] *Hirst v. The United Kingdom (no.2),* no. 74025/01, 6 October 2005, § 62.
[102] *Ždanoka v.. Latvia*, no. 58278/00, 16 March 2006, § 104.

VIII. APPLICANTS' CLAIMS FOR JUST SATISFACTION PURSUANT TO ARTICLE 41

1. Non-pecuniary damages

123. The restriction on the Applicants' right to stand for election purely on ethnic grounds constitute a special affront to their human dignity, not least because, as this Court has previously stated, racial discrimination constitutes a particularly invidious kind of discrimination (*Timishev v Russia*). The Applicants submit that they have sustained non-pecuniary damage, including psychological and emotional harm, and seek compensation for the frustration and humiliation that they have suffered as a result of such discrimination and for which the finding of a violation of the Convention does not constitute sufficient redress.

124. The Court has previously recognised that a violation of an individual's right to stand for election will cause that individual to suffer non-pecuniary damage and has accordingly made awards in that respect (see, *inter alia, Zdanoka v Latvia*[103], *Adamsons v Latvia*[104] and *Melnychenko v Ukraine*[105]). It should be noted that, in the cited cases, the Court found violations of Article 3 of Protocol No 1 ECHR alone and still made awards for non-pecuniary damages; the Court has yet to consider a claim under Protocol No. 12. The Applicants submit that the Court should apply this approach to the instant case, which concerns not only a violation of the right to stand for election but also a more fundamental and serious violation, that is, direct discrimination on the basis of race/ethnicity, religion and association with a national minority. Therefore, it is submitted that this award should, at a very minimum, respect the amounts awarded in the above cited cases.

125. Accordingly, the First Applicant requests to be awarded 20,000 Euros for non-pecuniary damages. The Second Applicant submits that 12,000 Euros represents an equitable amount of compensation for such non-pecuniary damage.

2. Costs and expenses

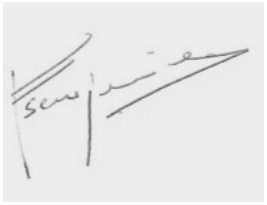
126. The First Applicant's Legal Representative worked pro-bono on all proceedings. Mr. Sejdić claims 1000 Euros in respect of legal costs and expenses incurred in relation to the oral hearing before the Grand Chamber; this includes travel expenses for the Applicant's legal representative and subsistence allowances in connection with the Grand Chamber hearing on 3 June 2009 (see Annex 16).

127. The Second Applicant claims 33,321.59 Euros in respect of legal costs and expenses incurred during the pursuit of this case before the European Court of Human Rights, full details and evidence of which are set out in Annex 17. The claim includes prospective legal, travel and accommodation costs in relation to attendance and legal representation at the Grand Chamber hearing on 3 June 2009.

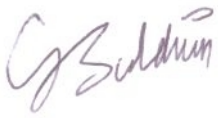
[103] *Zdanoka v. Latvia*, no. 58278/00, 17 June 2004.
[104] *Adamsons v. Latvia,* no. 3669/03, 24 June 2008.
[105] *Melnychenko v. Ukraine,* no. 17707/02, 19 October 2004.

128. The Applicants request the Court to award default interest based on the marginal lending rate of the European Central Bank, to which three percentage points should be added.

FRANCISCO JAVIER LEON DIAZ
FOR THE FIRST APPLICANT



CLIVE BALDWIN
SHERI ROSENBERG
FOR THE SECOND APPLICANT



28 APRIL 2009