



Alternative Report Submitted to the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD)

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**Submitted by the
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Introduction

1. This shadow report is respectfully submitted to the attention of the Committee on the Elimination of all Forms of Racial Discrimination (CERD) upon its examination Bosnia and Herzegovina's (BiH) sixth periodic reports due on February 22 and 23, 2006.
2. We welcome the Bosnian Government's Sixth Periodic Report and commend the progress that has been made in implementing its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).
3. The General Framework Agreement for Peace in BiH and its Annexes, signed in Paris on 14 December 1995¹ put an end to the war in BiH. The Dayton Peace Agreement DPA enshrines the parties' agreement that BiH would remain one country divided into two entities: Republika Srpska ("RS") comprising 49% of the territory and the Federation of BiH ("Federation") comprising 51%. Unlike any other peace treaty in history, the BiH Constitution is an annex to the DPA. The Constitution provides that BiH is a democratic State operating under the rule of law, with free and democratic elections and provides for a highly decentralized State.² At the same time, the State and Entity institutions are structured not to represent citizens directly but to ensure representation of "constituent" peoples.³ In BiH the "constituent"

¹ General Framework Agreement for Peace in Bosnia and Herzegovina, *initialed* Dayton, Ohio, 21 November 1995, *signed* Paris, 14 December 1995, 35 ILM 75 (1996) [hereinafter "DPA"].

² DPA, Annex 4, Art. 1. 2.

³ DPA Preamble reads: "Bosniacs, Croats and Serbs as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows." 'Others' is the term used in the BiH Constitution and laws to describe all those not

peoples are comprised of three ethnic groups in BiH – namely – Bosniacs, Croats and Serbs.

4. While the DPA had the inevitable merit of stopping the war, it has come to be understood by many as a transitional arrangement. In fact, on 22 November 2005, after months of negotiation, the leaders of the major political parties, representatives essentially from the Croat, Serb and Bosniac political groups in BiH signed a joint statement announcing the commitment to reform the BiH Constitution by March 2006. The declaration stated: “To achieve Euro-Atlantic integration, we will need to strengthen state institutions ...and to protect the human rights of all citizens of Bosnia and Herzegovina, regardless of ethnicity...We have decided to embark upon a process of constitutional reform that will enhance the authorities of the state government and streamline parliament and the office of the presidency.”⁴
5. Conspicuously missing from these negotiations were representatives from minority communities.⁵ Given the need to secure the collective rights of the three main ethnic groups in BiH after the war, which ostensibly was fought on ethnic grounds, the rights of “others” have often been overlooked in the implementation of human rights and collective rights in almost areas of life. And in spite of progress, as outlined in BiH’s periodic report, severe problems of racism and discrimination persist in the country, often as a result of nationalist policies pursued by ethnically based political parties.⁶
6. Safeguarding human rights is of key importance in the DPA. It functions not only as a constitutional requirement but also as a prerequisite of, and an instrument for, long-standing peace in the country.⁷ In fact, in Annex VII of the DPA the signatory parties recognise that observation of human rights and protection of refugees and displaced persons are vital to achieving a lasting peace.⁸

included in the constituent peoples. These groups are classified as national minorities, and children of mixed marriages or citizens who do not wish to identify with one nation.

⁴ The declaration was signed by BiH Presidency member Sulejman Tihic, Dragan Cavic, Barisa Colak, Mladen Ivanic, Safet Halilovic, Zlatko Lagumdzija, Milorad Dodik, and Mate Bandur. See, Antonio Prlenda, Southeast European Times, May 12, 05 available at http://www.setimes.com/cocoon/setimes/xhtml/en_GE/features/setimes/features/2002/12/0, NYT, November 22, 2005, found at <http://www.nytimes.com/aponline/national/AP-US-Bosnia.html?emc=etal@pagewanted=..>

⁵ Only the representatives of the parties that are currently in the Parliament were included in this process. Though this makes it representative of the Constituent Peoples, it does not satisfactorily include the representation of “Others”.

⁶ European Commission against Racism and Intolerance, Report on Bosnia and Herzegovina, Adopted on 25 June 2005, p. 6. available at www.coe.int/ecri.

⁷ Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina, adopted by the Venice Commission at its 39th Plenary Meeting, *on file with the author*.

⁸ DPA, *supra* note 1, Annex 7, Art. II provides: The Parties shall ensure that refugees and displaced persons are permitted to return in safety without risk of harassment, intimidation, persecution or discrimination particularly on account of their ethnic origin, religious belief, or political opinion.

7. The Constitution declares that BiH and both Entities shall ensure “the highest level of internationally recognized human rights.”⁹ Article II.4 of the Constitution contains very strong language on non-discrimination and grants constitutional rank to other international human rights agreements listed in Annex 1 to the Constitution. ICERD is an integral part of Annex I to the Constitution of BiH, along with fourteen additional human rights agreements to be applied in BiH¹⁰, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) including Protocol No. 12, the International Covenant on Civil and Political Rights (“ICCPR”) and the Optional Protocols thereto, and the Framework Convention for the Protection of National Minorities (“FCNM”). Moreover, Article II.2 of the Constitution gives priority to the ECHR and Protocols over all other law and directly incorporates it into the legal system of BiH.¹¹

8. In light of the ongoing negotiations over constitutional reform and the scheduled Bosnian elections in October 2006 this report will focus on discrimination in regard to the right of public participation. In particular, this report will focus on the incompatibility of the BiH Constitution and the Election Law of BiH with Article 5(c) of ICERD. It is argued that the Constitution and Election Law do not provide for equal treatment of all citizens in the exercise of their right to vote and to stand for election.

9. Violations highlighted in this report must also be read in conjunction with Article 1(1), which establishes the grounds for discrimination under the Convention, and Article 2(1)(c) which sets out government obligations to ‘amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.’

10. Recommendations in relation to the incompatibility of the BiH Constitution and the Election Law of BiH are outlined in the conclusion of this shadow report. These recommendations build on those of the Framework Convention for the Protection of National Minorities’ Advisory Committee, adopted on 27 May 2004, which are incorporated as Annex I of the present document.

⁹ DPA, *supra* note 1, Annex 4, art. II. 1.

¹⁰ DPA Annex I: Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto, Convention Relating to the Status of Refugees and the 1966 Protocol thereto, Convention on the Nationality of Married Women, Convention on the Reduction of Statelessness, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto, Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, European Charter for Regional or Minority Languages, Framework Convention for the Protection of National Minorities.

¹¹ DPA, *supra* note 1, Annex 4, art.II.2.

Facts related to Participation in Elections

Access to the Presidency

11. Article V of the Constitution of BiH and Article 8.1 Paragraphs 1 and 2 of the Election Law of BiH do not guarantee the right to vote and to stand for election on the basis of universal and equal suffrage in the sense of Article 5(c) of ICERD, since they do not ensure equal treatment for all citizens of BiH in the exercise of their voting rights and right to stand for election.

12. Article V of the BiH Constitution reads as follows:

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

13. Article 8.1, Paragraphs 1 and 2 of the Election Law 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 [sic] 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 Bosniac or Croat Member of the Presidency, but not for both. The Bosniak [sic] 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. Candidate who gets the highest number of votes shall be elected.

14. The above quoted provisions reserve access to the tripartite presidency for persons belonging to the “constituent peoples”, namely Bosniac, Serb or Croat ethnicities. Thus, persons falling outside of - or not identifying themselves with - the stated ethnic groups are legally barred from holding a position in the tripartite presidency.

15. Moreover, Serbs residing in the Federation and Bosniacs or Croats residing in the RS are not eligible to the tripartite Presidency of BiH.¹² Thus, the right to participate in elections is inextricably linked to ethnicity, which in turn is linked to territory.

16. Finally, citizens voting rights in both Entities are restricted on the basis of ethnicity in that an individual may only vote for candidates of specified ethnicities.

¹² This situation will further be referred to in this report as limitations on Constituent Peoples living outside of their designated territorial areas. These individuals form a minority in the respective Entities in which they now live and will also be referred to herein as ‘minority returnees.’

Access to the House of Peoples

16. Article IV.1 of the Constitution of BiH does not guarantee the right to vote and to stand for election on the basis of universal and equal suffrage in the sense of Article 5(c) of ICERD, since it does not ensure equal treatment for all citizens of BiH in the exercise of their voting rights and right to stand for election.
17. With regard to the House of Peoples, Article IV.1 of the Constitution of BiH reads as follows:
- The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).
18. According to this provision, only the members of the three Constituent Peoples in BiH, meaning the Bosniacs, the Croats, and the Serbs, may be appointed as delegates to the House of Peoples of the Parliamentary Assembly of BiH. No citizens of BiH from among the group of 'Others' or individuals not identifying themselves with the three groups (i.e. a citizens not belonging to one of the three Constituent Peoples) may be elected to the House of Peoples. This results in discrimination with regard to their access to these public offices – discrimination on the grounds of ethnicity, race and/or religion.
19. Moreover, Serbs residing in the Federation and Bosniacs or Croats residing in the RS are not eligible to the House of Peoples of BiH. Thus, the right to participate in elections is inextricably linked to ethnicity, which in turn is linked to territory.
20. Article IV.1.(a) of the Constitution of BiH, for its part, provides that:
- The designated Croat and Bosniac delegates from the Federation shall be selected, respectively, by the Croat and Bosniac 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.
21. According to this provision, members of the Federation House of Peoples who are not Bosniac or Croat, are not only prevented from being elected to the House of Peoples of BiH, but also by virtue of their of ethnicity, have less power than a Bosniac or Croat parliamentarian, because non-constituent peoples may not vote for delegates to the BiH House of Peoples.
22. Moreover, 'Others' in BiH are excluded from access to election as Chair or Deputy Chair of the House of Representatives and the House of Peoples of the Parliamentary Assembly of BiH.¹³

¹³ DPA, *supra* note 1, Annex 4, art. IV. 3(b) "Each chamber shall by majority vote adopts its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected."

23. Two applications concerning the above referenced discriminatory Election Laws and Constitutional provisions have been submitted before the Constitutional Court of BiH by Sulejman Tihic, Chairman of the Presidency of BiH. The first case U-5/04 has been declared inadmissible by the Constitutional Court.¹⁴

The Contours of Non-Discrimination

24. Art. 5 (c) of CERD provides in relevant part:

States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in Government as well as in the conduct of public affairs at any level and to have equal access to public service.

25. The CERD Committee has observed that Article 5, apart from requiring that the exercise of human rights be free from racial discrimination,¹⁵ does not itself create civil, political, economic, social or cultural rights. It assumes the existence of such rights. Rather, when the law provides certain rights, CERD obliges States to prohibit and eliminate racial discrimination in the enjoyment of such rights. The BiH Constitution, in fact, provides for a plethora of human rights protections, including the right to equal public participation, and guarantees that all rights provided for in Article II (3) of the Constitution as well as all instruments listed in Annex I to the Constitution shall be secured without discrimination. At the same time, the BiH Constitution denies the right to political participation on racial grounds¹⁶ to minority groups, Serbs living in the Federation, Croats and Bosniacs living in the RS, and all of those not identifying as Serb, Croat or Bosniac.

¹⁴ BiH Constitutional Court Case No. U-5/04 submitted 27 April 2004 and Case No. 01-142/05, submitted 5 September 2005 (not yet registered with the Court). In Case No. U-5/04 the applicant asked the Court to review the compatibility of Articles IV.1, IV.1(a), IV(3)(b) and V.1 of the BiH Constitution with Article 14 of the ECHR and Article 3 of Protocol No. 1 to the ECHR. The Constitutional Court has decided “that it is not competent to review the conformity of the Constitution of Bosnia and Herzegovina with the ECHR. The wording of the decision shall be verified at the next plenary session to be held on 31 March 2006.” See, Press Releases – Constitutional Court of BH, Friday, January 27, 2006 available at <http://www.ccbh.ba/?lang=en&page=board/releases/98>. It is interesting to note that Sulejman Tihic, was a member of the RS assembly, but later had to change residence and move to the Federation to be elected to the presidency.

¹⁵ Throughout this report, “racial discrimination” shall mean: any distinction, exclusion, restriction or preference based on race colour descent, or national or ethnic origin which has the purpose or effect or nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” CERD, Article 1.1 Race will be defined accordingly.

¹⁶ Throughout this report, “race” includes, race, colour, descent, or national or ethnic origin. CERD, Article 1.

26. When a State imposes a restriction on any of the rights enumerated in Article 5, it must ensure that such restriction has neither a purpose nor effect, which is incompatible with Article 1 of ICERD. In other words, such restriction based on race, colour, descent, national or ethnic origin, may not (in purpose or effect) impair the exercise of guaranteed human rights protections.¹⁷ This is confirmed by the obligation of States parties under article 2.1(c) to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.¹⁸
27. The CERD Committee has observed that a differentiation of treatment constitutes discrimination if the criteria for such differentiation, judged against the objectives and the purposes of the Convention, are not legitimate.¹⁹ The jurisprudence of CERD establishes that any differential treatment must be based upon reasonable and objective criteria.²⁰
28. The right to vote and stand for election - on the basis of universal and equal suffrage - is a core democratic principle as illustrated by the enshrinement of such rights in human rights law and minority rights law.²¹ In this regard, the European Court on Human Rights in Case *Mathieu Mohin and Clerfayt vs. Belgium* of 1987 stated that the principle of equality of treatment of all citizens in the exercise of their right to vote and to stand for election is indeed of “prime importance” in the Convention system, since it enshrines a characteristic principle of democracy”.²²
29. The Constitutional provisions and Election Laws that make it impossible for a substantial number of citizens who either do not come from among the three constituent peoples, or are of Serb ethnicity living in the Federation, or of Bosniac/Croat ethnicity living in the RS, to be elected to the Tripartite Presidency and the House of Peoples of the Parliamentary Assembly provides for differential treatment.
30. According to the CERD Committee’s jurisprudence, the question then becomes whether this differential treatment is reasonable and objective. The DPA to which the Constitution is annexed, provides for a complex power sharing structure, arranged through a strong

¹⁷ General Recommendation No. 20: *Non-discriminatory implementation of rights and freedoms*, U.N. CERD, Hum. Rts. Comm., 48th Sess, U.N. Doc. CERD A/45/18 (1996).

¹⁸ General Recommendation No. 14: *Definition of discrimination*, U.N. CERD, Hum. Rts. Comm., 42nd Sess., U.N. Doc. CERD A/48/18 (1993).

¹⁹ *Id.*

²⁰ *Sefic v. Denmark*, Case. No. 32/2003, Opinion of 10 March 2005 (finding that the language requirement provided by the Fairs Insurance A/S regarding the issuance of an insurance policy were reasonable and objective). See also, HRC Case No. 182/1984, *F.H. Zwaan-De Vries V. The Netherlands*, 9 April 1987, para. 13 (stating that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26).

²¹ In this regard, see ICERD Article 5(c), Article 3 of Protocol No. 1 to the European Convention, Article 1 of the UNDM, Article 15 of the Framework Convention on the Protection of National Minorities, and also contrary to a host of provisions within the OSCE Lund Recommendations on Public Participation.

²² Art 3 of Protocol 1 to the ECHR.

emphasis on ethnic belonging linked to territorial belonging, largely designed to cater to the needs of the constituent peoples, was considered necessary to end the war and to consolidate a democracy. In fact, these same motivations also gave rise to a “veto right” granted to State Parliamentary representatives of the constituent peoples, and protects any group from being outvoted in case a decision is ‘destructive of a vital interest of the Bosniac, Croat, or Serb people.’²³ The overall emphasis of ethnic belonging in the executive and legislative branches of BiH ensures a permanent grand coalition of the Constituent Peoples.²⁴

31. The BiH structure creates incentives for the three constituent peoples to govern in a manner beneficial to their ethnic constituencies and detrimental to the needs of citizens outside these three groups. Thus, it is difficult to argue that the means to achieve this aim – which have deeply entrenched discrimination in the political system, and alienated a sizeable proportion of citizens in BiH – were either reasonable or objective.
32. Regardless of whether the Committee finds that the discriminatory measures were reasonable at the time they were implemented,²⁵ BiH is now ten years from the end of the war and moving beyond the needs of the post-conflict rehabilitation phase of its development. It can no longer justify the political disenfranchisement of significant portions of the population on racial grounds.²⁶
33. Moreover, the lack of any objective or reasonable justification for restrictions imposed on “constituent peoples” of mixed ethnicity who refuse to choose one identity over another constitutes another most apparent form of discrimination contrary to Articles 1 and 5(c) of CERD, thereby weakening any argument for the legitimacy of the means used to achieve the aim of equitable power-sharing. The same can be said of the denial of access to effective participation experienced by those

²³ DPA Annex 4, art. 3 (e), *see also*, BiH Constitutional Court Case No. U-8/04, interpreting the “vital interests” clause.

²⁴ FLORIAN BIEBER, *POST-WAR BOSNIA, ETHNICITY, INEQUALITY AND PUBLIC SECTOR GOVERNANCE* 56 (Palgrave- Macmillan) (2006).

²⁵ *Cite Kajtaz et. al v. BiH*, Human Rights Chamber, Case Nos. CH/98/1309 *et. al*, Decision on Admissibility and Merits, 7 September 2001, par.160 (recognizing that equal representation of the constituent peoples in the State Ministries, which creates differential treatment may have been legitimate in BiH since it had been deemed necessary for the cohesion of BiH immediately after the war).

²⁶ See, Advisory Committee on the Framework Convention For the Protection of National Minorities, Opinion on Bosnia and Herzegovina, 27 May 2004, para. 13. In the Tihic application to the BiH Constitutional Court U-5/04 of 26 April 2004, the complainant alleges that (A4 paper) page 4 that: “After harmonizing the provisions of the entity level constitutions with the Decision of the Constitutional Court of Bosnia and Herzegovina in the constituent peoples case U 5/98 III, the Bosniacs, the Croats, and the Serbs are made constituent in both of the entities. Accordingly, they have the right to vote and be elected to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, and among these are also the Serbs from the Federation and the Bosniacs and the Croats from the Republika Srpska.”

“constituent people” who do not reside in their prescribed geographic area.

34. In this regard the Venice Commission has pointed out that ‘If the members of the Presidency elected from an Entity represent all citizens residing in this Entity and not a specific people, it is difficult to justify that they must identify themselves as belonging to a specific people. Such a rule seems to assume that only members of a particular ethnicity can be regarded as fully loyal citizens of the Entity capable of defending its interests.’²⁷
35. The present shadow report argues that the legitimacy of the aims for ensuring equitable power-sharing between constituent peoples can no longer be justified as a full decade of transition now draws to a close, and need for special measures warrant careful review. This is particularly so, given the inherently discriminatory nature of these provisions, and their infringement on the basic principles of democratic governance. The current Constitutional Court challenge on the discrimination in access to the Presidency and the House of Peoples, which has been brought forward by Sulejman Tihic (himself Member of the Presidency) is a testament to the need – and possibility – for the consolidation of new democratic spaces in BiH.²⁸
36. How the introduction of more efficient participation in BiH should be introduced is subject to debate. In its interpretation of Article 5(c), the CERD Committee should nonetheless take note of the fact that the European Court’s reading of Protocol No.1’s Article 3 does not create any obligation to introduce a specific political system, such as proportional representation or majority voting with one or two ballots. Nor does it require that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. On the contrary, the Court concludes that, having in mind a wide margin of appreciation of the country and the level of political evolution of an individual country, the Commission and the Court may only evaluate whether the conditions prescribed by the country concerned impair **“the very essence of the rights protected”**.²⁹
37. What is clear is that deprivation of a number of citizens of BiH to present themselves as candidates for the positions in the legislative and executive branches of government constitutes impairment of the essence of the protected rights, under CERD, the ECHR, and the instruments referred to in paragraph 26 of this report. Further, BiH has also notably disregarded the provisions set out in the CERD

²⁷ The Venice Commission. Opinion on the Electoral Law of Bosnia and Herzegovina. 2001, par. 17.

²⁸ *Supra* par. 23.

²⁹ *See*, A BRIEF GUIDE THROUGH THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 123 (Council of Europe Press) (1998).

Committee's General Recommendation No. 27 relating to the Discrimination against Roma.³⁰

Discrimination: Purpose or Effect

38. Recalling the wording of Article 1 of the Convention, it is clear that the term '**racial discrimination**' shall mean:

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

39. While the government may argue that there is no intention to discriminate, the discrimination deeply embedded in the legal framework of BiH, through the elimination of the opportunity of large segments of the population to be part of the Presidency and House of Peoples of BiH, clearly impedes these groups from fully taking part in the political process. In *L.R. v. Slovakia*, the CERD Committee makes clear that "article 1 expressly extends beyond measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular circumstances of the petitions, as by definition indirect discrimination can only be demonstrated circumstantially."³¹

40. In this regard BiH's Sixth Periodic Report may be somewhat misleading concerning the 'particular circumstances' surrounding the right to political participation. Paragraph twenty-nine the BiH Report states the following: "The Election Law of Bosnia and Herzegovina (Official Gazette of BiH number 23.01) provides for every citizen of Bosnia and Herzegovina who is of age 18 a voting right, i.e. to vote and to be elected in accordance with this Law."³² Arguably, BiH may maintain that it is acting in accordance with its Election Law, which does not intend to discriminate.

41. But, as will be explained further below, the BiH Constitutional Court in the Constituent Peoples decision requires, at a minimum, that all three constituent groups and 'others' are to be treated equally across the whole of BiH.³³ Disenfranchising national minorities and minority returnees, meaning, Serbs living in the Federation and Bosniac and Croats living in the RS, does not represent equal treatment of all

³⁰ General Recommendation No. 27: *Relating to the Discrimination against Roma*, U.N.CERD, Hum. Rts. Comm., 57th Sess., U.N. DOC A/55/18, annex V (2000). See in particular section 6, which sets out Measures concerning participation in public life.

³¹ *L.R. v. Slovakia*, Case No. 31/2003, opinion of 10 March 2005, para. 10.4.

³² BiH State Report, para. 29.

³³ Constituent Peoples' Decision of the Constitutional Court of BiH, U-5/98.

people across the whole of BiH.³⁴ The highest court of the land in BiH has recognized that the contested laws are discriminatory on their face.

42. Moreover, paragraph eleven of the BiH state report, provides: “As for the rights of minorities, these have been given possibility to get involved in all fields of public life. The Election Law of BiH has granted them right to vote and be elected representatives of the national minority under condition the members of the minority make more than 3% of population on the territory of the electoral unit.” While this may be somewhat accurate at the Entity level due to recent reforms, it does not reflect the reality as concerns State level Election Law.
43. Implementing the Constitutional Court’s Constituent Peoples decision, which determined that the entity constitutions discriminated against one or two of the constituent peoples as well as other citizens, the Federation of BiH parliament, and the presidency now include individuals of Serb ethnicity, while in the RS a new Council of Peoples was established to ensure the rights of Croats, Bosniacs and ‘others’ in the legislature. And Croats and Bosniacs are now also included in the presidency of the RS. These amendments highlight the fact that BiH recognized its obligations flowing from the Constituent Peoples decisions to provide for equal representation across the whole of the country, but only went so far in pursuing its obligations.
44. Minorities are not ‘given the possibility to get involved in all fields of public life.’ The BiH Constitution and Election Laws concerning the Presidency and the BiH House of Peoples do not provide for equal representation of minorities and minority returnees, and therefore violates BiH’s national anti-discrimination law as interpreted by the BiH Constitutional Court as well as its obligations under ICERD. BiH should be asked to explain further its statements in paragraphs 11 and 29 so as to clarify the particular circumstances existing in BiH.
45. Irrespective of whether the contested laws are intended to discriminate, or are discriminatory on their face, the negative effects of the laws are manifold. The current power sharing arrangements in BiH have created powerful incentives for members of the presidency and the legislature to represent the interests of their own ethnic group. The main cleavage cutting across BiH is ethnicity, as opposed to regional identity because of the ethnic/territorial link (e.g., only Serbs may be elected from the RS and only Bosniacs or Croats from the Federation of BiH). Therefore, the Presidency members and BiH legislature in the House of Peoples represent primarily the interests of their respective ethnic constituency and secondarily their entity and ‘others’ within it.³⁵

³⁴ *Supra* para. 14.

³⁵ The Bosnian Presidency since 1996 suggests that the Presidency members have been generally regarded leaders of their ethnic group, mostly because they did not moderate their platform to garner minority support. Bieber, POST-WAR BOSNIA, *supra* note 51.

46. This political arrangement directly thwarts the principle and practise of refugee return also enshrined in the DPA,³⁶ discouraging individuals from returning to the Entity in which they now form a minority (minority returns) and perpetuates entrenched discrimination in all areas of life, against minority returnees, national minorities, other minority groups, and individuals unable or unwilling to identify with the “constituent people” categories.³⁷
47. In the absence of a population census since 1991, the current number of inhabitants and their distribution according to ethnic groups remains unclear. Nevertheless, population estimates suggest the number of minority returnees in each Entity is very low. In the case of the RS, approximately 17% of the population is of non-Serb ethnicity whereas in the Federation 8.7% of the population are of Serb ethnicity.³⁸ Obstacles to minority returns include return-related violence, where the criminal justice system fails to follow up adequately on such crimes, social and economic factors such as realizing rights to education, health, social security and pensions, and above all the right to work. These broad deprivations of minority returnees’ rights are inextricably linked with the lack of political representation of the non-dominant group into the political system.
48. Effectively, Serbs from the Federation and Bosniacs and Croats from the RS have no representation of their own in the Presidency or the BiH Parliament. This not only raises issues about discriminatory treatment in the right to vote and be elected, but it also has the effect of thwarting the principle of refugee return.
49. Further, non constituent peoples have even less of an opportunity to have their concerns heard and rights protected. To illustrate concretely, as recounted for the European Roma Rights Center: “When a Bosniak decided to return to Republika Srpska he can always count on the [pro-Bosniak] SDA to cry foul in the event that for some reason he is not treated well in his place of return. If, on the other hand, a Romani person is denied access to healthcare, prevented from repossessing property or prevented from sending his children to school, no one says anything. And this is just considered normal.”³⁹

³⁶ See DPA, *supra* note 1, Annex 7.

³⁷ See eg., European Commission against Racism and Intolerance, Report on Bosnia and Herzegovina, adopted 25 June 2004; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on BiH, 27 May 2004; IDP Project Report, *Bosnia and Herzegovina: state-building key to overcome ethnic division and solve displacement issue*, 25 March 2005 available at www.idproject.org; Amnesty International Report, *Bosnia and Herzegovina: Behind closed gates: ethnic discrimination in employment*, January 2006. See also Section V of the Warsaw Guidelines to Assist National Minority Participation in the Electoral Process (2001).

³⁸ Bieber, POST-WAR BOSNIA, *supra* note 32.

³⁹ European Roma Rights Center interview with Mr. Dervo Sejdic, December 28, 2002, Sarajevo. In *The Non-Constituents: Rights Deprivation of Roma in Post-Genocide Bosnia and Herzegovina*, Country Reports Series No. 13, February 2004, pp. 59-60.

50. At a minimum, the penumbra effects of the contested provisions create a situation of indirect discrimination that maintains second – class citizenship for large swaths of the BiH population and cuts against the hopes of rebuilding an integrated, peaceful democracy in BiH that respects and accommodates the rights of all its citizens.

Promotion and Protection of Minorities: Key Concepts

51. Discrimination against individuals who are not members of the “constituent peoples” or do not identify as such, or who are from mixed marriages, through the elimination of the opportunity to be a part of the executive or legislative branches of the BiH government, embedded in the legal framework of BiH, denies such individuals their political rights in the sense of CERD 5(c). Such deprivation, particularly in BiH which runs on ethnicity based politics, leads to further deprivation of guaranteed civil, political, social and economic rights. Since minorities bear the brunt of the discrimination legally enshrined in the Constitution and Election Law of BiH, and its residual effects impact them so heavily, it is of interest to revisit two key concepts relating to minority rights under international law.

52. Denying members of minority groups the right to vote and stand for election conflicts with BiH’s national Law on the Protection of Rights of National Minorities⁴⁰, and with regional and international agreements, including, The Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“UNDM”), The International Covenant on Civil and Political Rights (“ICCPR”), The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (“Copenhagen Document”), and the Framework Convention for the Protection of National Minorities (“FCNM”).

53. It should be noted that the European Community issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union requiring conformity with the Copenhagen Document as a precondition for the recognition of new states. Under Article 35 of the Document, member states have undertaken to respect the rights of members of national minorities to ‘effective participation in

⁴⁰“Persons belonging to 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, proportional to their share in the population of BiH, in accordance with the last census.” Law on Protection of Rights of Members of National Minorities, Official Gazette of BiH 12/03, para. 19. National Minorities are defined under Article 5 of the Law as: “A national minority, in the sense of this Law, is a part of the population of BiH that does not belong to one of three constituent peoples of BiH, and it consists of the people of the same or similar ethnic origin, same or similar tradition, customs, religion, culture, and spirituality and close or related history or other features. BiH shall protect situation and equality of members of national minorities Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Romani, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, and Ukrainians.

public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.⁴¹

54. Despite the Preamble of the BiH Constitution, which states that the document was “inspired”, *inter-alia*, by the UNDM, as well as additional human rights instruments found in Annex I to the Constitution, the status of minority rights in BiH remains below the established norms in each of the aforementioned documents, including the “precondition” Copenhagen Document.

Two Central Concepts in the Promotion and Protection of Minority Rights: Effective Political Participation and Self-Identification

55. The importance of securing minority rights and the breadth of current international protections of these rights is provided for in The Lund Recommendations on the Effective Participation of National Minorities in Public Life as commissioned by the OSCE High Commissioner on National Minorities (“Lund Recommendations”). The Recommendations are founded upon fundamental principles and rules of international law, such as respect for human dignity, equal rights, and non-discrimination, as these rules and principles affect the ability of national minorities to participate in public life and to integrate themselves into the elected bodies that shape the governing social, cultural and economic programs of society.⁴²

56. Section I, Paragraph 1 of the Recommendation’s General Principles provides in relevant part:

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

57. Section I, Paragraph 4 of the Recommendation’s General Principles provide in relevant part:

Individuals identify themselves in numerous ways in addition to their identity as members of a national minority. The decision as to whether an individual is a member of a minority, the majority, or neither rests *with that individual and shall not be imposed upon her or him. Moreover, no person shall suffer any disadvantage as a result of such a choice or refusal to choose* [emphasis added].

⁴¹ Yash Ghai, *Public Participation and Minorities*, Minority Rights Group Report, p. 7, July 2003.

⁴² The Lund Recommendations on the Effective Participation of National Minorities in Public Life. Commissioned by the OSCE High Commissioner on National Minorities, 1 September 1999. Available at http://www.osce.org/documents/hcnm/199/09/2698_en.pdf. For a review of the Recommendations and further analysis, see the Guidelines to National Minority Participation in the Electoral Process. Available at http://www.osce.org/documents/hcnm/2001/01/240_en.pdf.

The Right of Effective Political Participation

58. The FCNM requires states to 'create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in the public affairs, in particular those affecting them.'⁴³
59. The UNDM⁴⁴ and the ICCPR⁴⁵ place positive obligations on states to protect the 'identity' of minorities and to encourage 'conditions for the promotion of that identity.' Recognizing that the right of political participation is the cornerstone for implementing the protection of minority identities, the UNDM, which elaborates on ICCPR Article 25, states that 'persons belonging to minorities have the right to participate effectively in cultural religions, social, economic and public life'⁴⁶ and the right to 'participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live.'⁴⁷
60. These UNDM and ICCPR make explicit that to safeguard the identity of minority populations, these populations need first to be able to effectively participate in the political national bodies that affect a group's overall identity, namely cultural, religious, social and economic interactions within society. Ultimately, expanding the foundation of the right to political participation on the basis of universal and equal suffrage will ensure that such rights, which already freely flow to majority populations, will ensure a lasting and stable democracy.
61. The rights outlined above are essential for minorities to promote their interests in the larger society. Principles of non-discrimination in CERD are clear that if the majority or dominant communities can participate, than minority communities must also be able effectively to participate. In the present case, while each of the Constituent Peoples may form a 'minority community' in the respective Entities, it is imperative that the rights of the constituent peoples not be protected to the detriment of the even more vulnerable national minorities in BiH in the name of minority or collective rights.

The Right to Self-Identification

62. Minorities are defined both by objective and subjective criteria. Objective criteria generally include characteristics such as ethnicity, language, or religion. These objective criteria must nonetheless be met with the fulfilment of subjective criteria, which includes the right of the individual members collectively to preserve and develop their distinct

⁴³ FCNM, art. 15. The FCNM entered into force in BiH on 1 June 2000.

⁴⁴ UNDM art. 1

⁴⁵ ICCPR art 27.6.2

⁴⁶ UNDM Article 2(2)

⁴⁷ UNDM Article 2(3)

ethnic identity.⁴⁸ The CERD Committee, elaborating on Art. 1, paras. 1 & 4, has stated that such identification shall be based upon self-identification by the individual, if no justification exists to the contrary.⁴⁹ In this context, as explained above, a legitimate justification for requiring an individual to identify himself as a national minority, which results in discrimination under Arts. 1 and 5 (c) of CERD cannot be considered legitimate

63. The Copenhagen Document specifies that ‘to belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice.’⁵⁰ Article 3(1) of the FCNM provides that “Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.” Finally, Article 3(2) of the UNDM also prohibits any disadvantage resulting “for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration.” Importance to the principle of self-identification is also accorded in the Warsaw Guidelines to Assist Minority Participation in the Electoral Process (2001).⁵¹

64. In BiH a citizen who asserts his membership in a national minority experiences political disenfranchisement precisely because minority populations within BiH are not afforded the same participatory rights as those citizens of BiH who are designated as “constituent peoples.” Further, the Constitution and Election Law also pose serious disadvantage to those among the “constituent peoples” who are of mixed parentage and unwilling to declare themselves as solely Serb, Croat or Bosniac. Given the high percentage of intermarriage between these groups, it is inevitable that a significant number of individuals within BiH are thus forced to choose between publicly negating part of their identity or otherwise accepting the consequent political exclusion.⁵² The former is a violation of key principle relating to minority rights, whilst the latter is a clear case of racial discrimination.

65. Some say that a member of a national minority or a person of mixed ethnicity can gain access to public office reserved for the Constituent Peoples simply by declaring himself as a Bosniac, Serb or Croat. Such assertion, however, directly contravenes Article 3(1) of the FCNM

⁴⁸ To be clear, elements of both objective and subjective criteria must be met in order legitimately to identify a minority.

⁴⁹ General Recommendation 8: *Identification with a particular racial or ethnic group*, U.N. CERD, Hum. Rts. Comm., 38th Sess., U.N. Doc. CERD A/45/18 (1990).

⁵⁰ Copenhagen Document, para. 32.

⁵¹ See Section V of the Warsaw Guidelines.

⁵² Florian Bieber, *POST-WAR BOSNIA*, *supra* note 23 at 16. Noting that rates of intermarriage has been increasing since the 1960’s.

which guarantees that no disadvantage shall come from choosing to be identified as a national minority.⁵³

66. Securing minority rights as established by current international standards offers the greatest prospects for stability, equality, and for building respect amongst all ethnic groups. Long-overdue reforms to the signalled discriminatory provisions of the Constitution and Election Law will benefit the country as a whole and facilitate a degree of universal equality that is in line with the rights provided for in the BiH Constitution and the BiH Law on The Protection of Members of National Minorities.

Analysis of the BiH State Report Submitted to CERD

67. The BiH State Report submitted to the CERD committee on 20 May 2005 depicts a current state of political affairs in BiH that does not accurately capture both the presence of discriminatory electoral laws and Constitutional provisions and their resulting disenfranchisement in BiH. In light of numerous apparent discrepancies within the official State Report and the aforementioned international agreements, we respectfully ask that the committee give proper consideration to the following examples:

68. Paragraph 11 of the State Report to CERD states: “As for the rights of minorities, these have been given possibility to get involved in all fields of public life. The Election Law of BiH has granted them right to vote and be elected representatives of the national minority[...].” It is difficult to reconcile this statement with Article V of the Constitution and Article 8.1 Paragraphs 1 and 2 of the Election Law which do not guarantee the right to vote and stand for election on the basis of universal and equal suffrage, as so required under Article 5(c) of ICERD. Under both the Constitution and Election Law the ability to exercise the right to vote and to stand for election is limited to three constituency peoples who represent majority ethnic populations within BiH.

69. Paragraph 19 of the State Report reads: “The Constitution also directly forbids discrimination as the paragraph 4 of the same Article [Article II] reads ‘The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in the Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, *association with a national minority* [emphasis added] property, birth or other status.” It is difficult to reconcile this statement with the Article V and Article 8.1 Paragraphs 1 and 2 limitations on political participation as imposed upon national minorities in BiH, as they run counter to the

⁵³ See, *The Non-Constituents: Rights Deprivation of Roma in Post-Genocide Bosnia and Herzegovina*, *supra* note 38 at 58.

rights secured under the aforementioned international agreements listed in Annex I of the Constitution.

70. Paragraph 29 of the State Report reads: “The Election Law of Bosnia and Herzegovina provides for every citizen of Bosnia and Herzegovina who is of age 18 a voting right, i.e., to vote and to be elected in accordance with provisions of this law.” This statement is in direct opposition to the limitations faced by national minorities and others in both voting and or standing for political office as noted in both the BiH Constitution and Election Law. Furthermore, Paragraph 29 of the State Report conflicts with the aforementioned Article 19 of BiH’s Law on Protection of Rights of Members of National Minorities.⁵⁴
71. Paragraph 20 of the State Report again informs the Committee that BiH has ratified the European Convention. Furthermore, Paragraph 20 quotes from Article 14 of the Convention, which speaks to the universality of the rights and freedoms provided for by the Convention in that they may not be withheld on the basis of any ground such as national minority status. As stated previously, it is again difficult to reconcile this statement with the direct limitations on political participation as imposed upon national minorities in BiH.
72. Paragraph 23 of the State Report maintains that “Article II/4 of the Constitution of Bosnia and Herzegovina bans discrimination on any grounds such as, among others, the association with the national minority, by which it means the existence of groups defined as the national minorities.” In conjunction with this enunciated right for national minorities to freely associate and thus self-identify as a minority without discrimination, Paragraph 46 of the State Report holds that “Members of all minority communities in Bosnia and Herzegovina have had a legal possibility and right in the 1991 census to freely express themselves if and what minority they belong to.”⁵⁵
73. Despite explicit acceptance of the FCNM--and thus the rights on self-identification as provided for within the Convention—in the BiH Constitution, it is difficult to maintain that paragraph 23 and 46 of the State Report are in harmony with this and other international agreements. A citizen of BiH who asserts his membership in a national minority experiences the direct disadvantage of political disenfranchisement precisely because minority populations within BiH are not afforded the same public participatory rights as those citizens of BiH who are designated as a constituent people. While “individual choice” may exist, the consequent free dimension of such a choice does not.

⁵⁴ *Supra* paras. 39-44.

⁵⁵ In this respect, it should be noted that the 1991 census was conducted during a time of extreme ethnic tension and many national minorities, including Roma, were reluctant to declare their ethnicity. *See, The Non-Constituents*, *supra* note 38 at 19.

A State May Not Rely on National Law to Avoid Obligations

74. Finally, with regard to the general incompatibility of the BiH Constitution and the BiH Election Law with Articles 1 and 5(c) of ICERD, the Committee should firmly remind the state party that it is a well-established principle of international law that:

A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law.⁵⁶

75. This principle was first recognized by the Permanent Court of International Justice and since then, it has been upheld by international jurisprudence.⁵⁷ The rule clearly establishes that a State may not rely on domestic law to avoid its international obligations. The principle was codified by the International Law Commission in its 1949 Draft Declaration on the Rights and Duties of States.⁵⁸

Article 13 provides:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it *may not invoke provisions in its constitution or its law as an excuse for failure to perform this duty.*⁵⁹

76. The rule has been given further expression in articles 26 and 27 of the Vienna Convention on the Law of Treaties,⁶⁰ which stipulate that:

⁵⁶ I. Brownlie, *Principles of Public International Law*, 5th edition, Oxford University Press, Oxford, 1998, p. 34.

⁵⁷ Permanent Court of International Justice (PCIJ): *The S. S. Wimbledon* (1923), PCIJ, Ser. A, no. 1, p. 29; *Mavrommatis*, Ser. no. 5; *German Interests in Polish Upper Silesia* (1926), Ser. A, no. 7, p. 19; *Chorzów Factory* (Merits); (1928), Ser. A, no. 17, pp. 33-34; *Jurisdiction of the Courts of Danzig* (1928), Ser. B, no. 15, pp. 26-27; Advisory Opinion in the *Greco-Bulgarian Communities* case (1930) Ser. B, no. 17, p. 32; *Free Zones of Upper Savoy and the District of Gex* (1932) Ser. A, no. 24, p. 12 and Ser. A/B, no. 46, p. 167, *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, (1932) Ser. A/B, no. 44, p. 24. International Court of Justice (ICJ): *Fisheries case*, ICJ Reports (1951), p. 132; *Nottebohm*, ICJ Reports (1955), p. 20-21. Arbitral Tribunals: *Montijo*, Moore, *Arbitration*, p. 1850; Commission d'arbitrage pour la Commission d'arbitrage pour la Yougoslavie, avis no. 1, 29 November 1991, R.G.D.I.P. 1992, p. 264. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Blaskic*, IT-95-14-1, para. 7. *Alabama Claims arbitration* (1872), Moore, *Arbitrations*, i. 653.

⁵⁸ G.A. Res. 375 (IV), G.A.O.R., 4th session, Resolutions, p. 66 (1949), available at <http://www.un.org/law/ilc/texts/decfra.htm> D.J. Harris, *Cases and materials on International Law*, Sweet and Maxwell, 5th edition, p. 71. See also *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig territory*, *supra*, p. 24; *Montijo*, *supra*, p. 1850.

⁵⁹ Emphasis added

⁶⁰ *Vienna Convention on the Law of Treaties*, adopted on 22 May 1969, in force 27 January 1980, available at <http://www.un.org/law/ilc/texts/treaties.htm>. The VCLT codified the customary international law relating to treaties (see the *Programme of Work adopted in 1949* by the International Law Commission, available at <http://www.un.org/law/ilc/progfra.htm> were the Law of Treaties was among the fourteen topics selected for *codification*).

Every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*);
and
[a] party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.⁶¹

77. More recently, the principle has been included in Article 32 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, elaborated and adopted by the International Law Commission (the "ILC Articles").⁶²

78. Finally, one cannot underestimate the status of non-discrimination as a peremptory norm of international law. In this regard, the obligation to respect and protect this right is non-derogable, with immediate effect.

Concluding Remarks

79. While achieving political stability is reasonable, it is difficult to conceive how the disenfranchisement resulting from the rigid political structures cited throughout this report would not in fact be the source of new tensions. Indeed, even for those "constituent peoples" who are not disadvantaged by their place of residence or their mixed ethnicity, it is clear that their right to effective participation is sharply limited by the manner in which the current system 'ethnicizes' politics, rendering the candidate of their own ethnicity as the only viable choice.

80. A system which encourages and perpetuates a focus on ethnic differences at the expense of democracy and the fundamental principles of non-discrimination is unlikely to secure a consolidated peace. A system that does so in the name of minority or collective rights clearly ignores the basic principles that CERD affords, distorting its main purpose which is to ensure that all citizens are treated equally with respect to all provided rights and in particular their right effectively to participate in the political process.

Recommendations

81. The present report urges the Committee, with respect to the discrimination faced by the Roma, Jews and other minority groups forming part of the "others", the Committee should encourage

⁶¹ Article 27 admits the limited exception of article 46 VCLT relating to the procedure of ratification. The fact that this is the only exception expressly provided would indicate that once a treaty is ratified, the rule knows of no further exception.

⁶² Draft articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV.E.1, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm .

amendments to all legal provisions barring their effective participation in the BiH House of Peoples and the tripartite Presidency.⁶³

82. The present report urges the Committee to interpret Article 5(c) of CERD in light of the discrimination that arise from limitations posed on “constituent peoples” of one ethnicity living in the designated territorial area of another, which ultimately undermines their ability to effectively access or participate in the political process.
83. The present report urges the Committee to encourage the State government to fully implement the Constitutional Court Constituent Peoples decision so as to provide equality to all citizens of BiH across the entirety of the country.
84. The present report also notes with concern the need for the adoption and implementation of special measures that would afford greater access to effective participation within the wider political sphere of the country.⁶⁴ With regard to the Roma in particular, the present report urges CERD to draw on the provisions within General Recommendation XXVII.⁶⁵
85. The present report urges the Committee to encourage the BiH government to facilitate public debate over the State Constitutional Amendments to ensure thorough involvement of all groups composing the society of BiH, in order to ensure that the constitutional arrangements allow for participation of all in public life and do not discriminate on any prohibited grounds.
86. The present report urges the Committee to recommend that the authorities of BiH make the declaration under Article 14 of CERD, recognizing the competence of the Committee to receive and consider communications from individuals and groups of individuals alleging violations by the State of any of the rights set out in the Convention.

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⁶³ As stated under the previous heading, it is nonetheless important to be mindful of the fact that it is not only minorities falling under the category of “Others” that are denied the right to effectively participate, but also the host of individuals born of mixed marriages who are forced to choose one Constituent People identity over another (or otherwise lose their right to participate).

⁶⁴ *Adequate Consultation*

The key principle in all of the aforementioned provisions is that of *effective* participation. States must ensure that any measures they take or mechanisms they establish are not tokenistic. It is not sufficient for one member of a minority to rubberstamp a decision taken by the state. The measures should include opportunities for *adequate and meaningful consultation* before decisions are made and the state must take into consideration the outcomes of the consultation process when making decisions.

⁶⁵ Particular attention should be drawn to Section 6 of the General Recommendation.