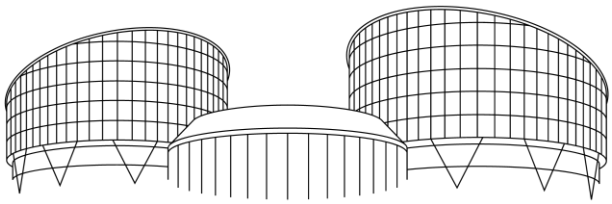

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA

(Applications nos. 27996/06 and 34836/06)

JUDGMENT

STRASBOURG

22 December 2009

In the case of Sejdić and Finci v. Bosnia and Herzegovina,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Lech Garlicki,
Khanlar Hajiyev,
Ljiljana Mijović,
Egbert Myjer,
Davíd Thór Björgvinsson,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges*,
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 3 June and 25 November 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 27996/06 and 34836/06) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two citizens of Bosnia and Herzegovina, Mr Dervo Sejdić and Mr Jakob Finci ("the applicants"), on 3 July and 18 August 2006 respectively.

2. The applicants complained of their ineligibility to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin. They relied on Articles 3, 13 and 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.

3. The applications were allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 March 2008 a Chamber of that Section decided to give notice of the applications to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the

merits of the applications at the same time as their admissibility. On 10 February 2009 the Chamber, composed of Nicolas Bratza, Lech Garlicki, Giovanni Bonello, Ljiljana Mijović, Davíd Thór Björgvinsson, Ledi Bianku and Mihai Poalelungi, judges, and Fatoş Aracı, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72). The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

4. The parties filed observations on the admissibility and merits. Third-party comments were also received from the Venice Commission, the AIRE Centre and the Open Society Justice Initiative, which had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

5. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 June 2009 (Rule 54 § 3). There appeared before the Court:

(a) *for the Government*
Ms Z. IBRAHIMOVIĆ, *Deputy Agent*,
Ms B. SKALONJIĆ *Assistant Agent*,
Mr F. TURČINOVIĆ, *Adviser*;

(b) *for the applicants*
Mr F.J. LEON DIAZ,
Ms S.P. ROSENBERG,
Mr C. BALDWIN, *Counsel*.

The Court heard addresses by Ms Ibrahimović, Mr Leon Diaz, Ms Rosenberg and Mr Baldwin. The second applicant was also present at the hearing.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Relevant background to the present case

6. The Constitution of Bosnia and Herzegovina (hereinafter referred to as "the Constitution" or "the State Constitution" when it is necessary to distinguish it from the Entity Constitutions) is an annex to the 1995 General

Framework Agreement for Peace in Bosnia and Herzegovina ("the Dayton Agreement"), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Since it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. It constitutes the unique case of a constitution which was never officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. The Constitution confirmed the continuation of the legal existence of Bosnia and Herzegovina as a State, while modifying its internal structure. In accordance with the Constitution, Bosnia and Herzegovina consists of two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Dayton Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard (Article V of Annex 2 to the Dayton Agreement). Pursuant to an arbitral award of 5 March 1999, the Brčko District has been created under the exclusive sovereignty of the State.

7. In the Preamble to the Constitution, Bosniacs, Croats and Serbs are described as "constituent peoples". At the State level, power-sharing arrangements were introduced, making it impossible to adopt decisions against the will of the representatives of any "constituent people", including a vital interest veto, an Entity veto, a bicameral system (with a House of Peoples composed of five Bosniacs and the same number of Croats from the Federation of Bosnia and Herzegovina and five Serbs from the Republika Srpska) as well as a collective Presidency of three members with a Bosniac and a Croat from the Federation of Bosnia and Herzegovina and a Serb from the Republika Srpska (for more details, see paragraphs 12 and 22 below).

B. The present case

8. The applicants were born in 1956 and 1943 respectively. They have held and still hold prominent public positions. Mr Sejdić is now the Roma Monitor of the Organisation on Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, having previously served as a member of the Roma Council of Bosnia and Herzegovina (the highest representative body of the local Roma community) and a member of the Advisory Committee for Roma (a joint body comprising representatives of the local Roma community and of the relevant ministries). Mr Finci is now serving as the Ambassador of Bosnia and Herzegovina to Switzerland, having previously held positions that included being the President of the Inter-Religious Council of Bosnia and Herzegovina and the Head of the State Civil Service Agency.

9. The applicants describe themselves to be of Roma and Jewish origin respectively. Since they do not declare affiliation with any of the "constituent peoples", they are ineligible to stand for election to the House

of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State). Mr Finci obtained official confirmation in this regard on 3 January 2007.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

A. The Dayton Agreement

10. The Dayton Agreement, initialled at the Wright-Patterson Air Force Base near Dayton (the United States of America) on 21 November 1995 and signed in Paris (France) on 14 December 1995, was the culmination of some forty-four months of intermittent negotiations under the auspices of the International Conference on the former Yugoslavia and the Contact Group. It entered into force on the latter date and contains twelve annexes.

1. Annex 4 (the Constitution of Bosnia and Herzegovina)

11. The Constitution makes a distinction between "constituent peoples" (persons who declare affiliation with Bosniacs[1], Croats and Serbs) and "others" (members of ethnic minorities and persons who do not declare affiliation with any particular group because of intermarriage, mixed parenthood, or other reasons). In the former Yugoslavia, a person's ethnic affiliation was decided solely by that person, through a system of self-classification. Thus, no objective criteria, such as knowledge of a certain language or belonging to a specific religion were required. There was also no requirement of acceptance by other members of the ethnic group in question. The Constitution contains no provisions regarding the determination of one's ethnicity: it appears that it was assumed that the traditional self-classification would suffice.

12. Only persons declaring affiliation with a "constituent people" are entitled to run for the House of Peoples (the second chamber of the State Parliament) and the Presidency (the collective Head of State). The following are the relevant provisions of the Constitution:

Article IV

"The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

1. Bosniacs were known as Muslims until the 1992-95 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*) which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

1. **House of Peoples**. 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).

(a) 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[1]. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska[2].

(b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb delegates are present.

2. **House of Representatives**. The House of Representatives shall comprise 42 members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska.

(a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement.

(b) A majority of all members elected to the House of Representatives shall comprise a quorum.

3. **Procedures**.

(a) Each chamber shall be convened in Sarajevo not more than 30 days after its selection or election.

(b) Each chamber shall by majority vote adopt 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.

(c) All legislation shall require the approval of both chambers.

(d) All decisions in both chambers shall be by majority of those present and voting. The delegates and members shall make their best efforts to see that the majority includes at least one-third of the votes of delegates or members from the territory of each Entity. If a majority vote does not include one-third of the votes of delegates or members from the territory of each Entity, the chair and deputy chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the delegates or members elected from either Entity.

(e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of,

1. Members of the House of Peoples of the Federation of Bosnia and Herzegovina are appointed by the cantonal parliaments (the Federation of Bosnia and Herzegovina consists of ten cantons). Members of the cantonal parliaments are directly elected.
2. Members of the National Assembly of the Republika Srpska are directly elected.

as appropriate, the Bosniac, Croat, or Serb delegates selected in accordance with paragraph l (a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb delegates present and voting.

(f) When a majority of the Bosniac, of the Croat, or of the Serb delegates objects to the invocation of paragraph (e), the chair of the House of Peoples shall immediately convene a joint commission comprising three delegates, one each selected by the Bosniac, by the Croat, and by the Serb delegates, to resolve the issue. If the commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.

(g) The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved.

(h) Decisions of the Parliamentary Assembly shall not take effect before publication.

(i) Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly.

(j) Delegates and members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. **Powers.** 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."

Article V

"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.

1. **Election and Term**.

(a) Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly.

(b) The term of the members of the Presidency elected in the first election shall be two years; the term of members subsequently elected shall be four years. Members shall be eligible to succeed themselves once and shall thereafter be ineligible for four years.

2. **Procedures**.

(a) The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency.

(b) The members of the Presidency shall appoint from their members a chair. For the first term of the Presidency, the chair shall be the member who received the highest number of votes. Thereafter, the method of selecting the chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV § 3.

(c) The Presidency shall endeavour to adopt all Presidency decisions (i.e. those concerning matters arising under Article V § 3 (a)-(e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two members when all efforts to reach consensus have failed.

(d) A dissenting member of the Presidency may declare a Presidency decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the member from that territory; to the Bosniac delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac member; or to the Croat delegates of that body, if the declaration was made by the Croat member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency decision shall not take effect.

3. **Powers**. The Presidency shall have responsibility for:

(a) Conducting the foreign policy of Bosnia and Herzegovina.

(b) Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation.

(c) Representing Bosnia and Herzegovina in international and European organisations and institutions and seeking membership in such organisations and institutions of which Bosnia and Herzegovina is not a member.

(d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina.

(e) Executing decisions of the Parliamentary Assembly.

(f) Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly.

(g) Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency.

(h) Coordinating as necessary with international and non-governmental organisations in Bosnia and Herzegovina.

(i) Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities."

13. The constitutional arrangements contested in the present case were not included in the Agreed Basic Principles which constituted the basic outline for what the future Dayton Agreement would contain (see paragraphs 6.1 and 6.2 of the Further Agreed Basic Principles of 26 September 1995). Reportedly, the international mediators reluctantly accepted these arrangements at a later stage because of strong demands to this effect from some of the parties to the conflict (see Nystuen[1], *Achieving Peace or Protecting Human Rights? Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement*, Martinus Nijhoff Publishers, 2005, p. 192, and O'Brien[2], *The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiation*, in Zartman and Kremenyuk (eds), *Peace versus Justice: Negotiating Forward- and Backward-Looking Outcomes*, Rowman & Littlefield Publishers, 2005, p. 105).

14. Fully aware that these arrangements were most probably conflicting with human rights, the international mediators considered it to be especially important to make the Constitution a dynamic instrument and provide for their possible phasing out. Article II § 2 of the Constitution was therefore inserted (see Nystuen, cited above, p. 100). It reads as follows:

1. Ms Nystuen participated in the Dayton negotiations and the preceding constitutional discussions as a legal adviser to the European Union Co-Chairman of the International Conference on the former Yugoslavia, Mr Bildt, who was heading the European Union delegation within the Contact Group. Thereafter, until 1997, she worked as a legal adviser to Mr Bildt in his capacity as High Representative for Bosnia and Herzegovina.

2. Mr O'Brien participated in the Dayton negotiations as a Contact Group lawyer, as well as in most major negotiations concerning the former Yugoslavia from 1994 to 2001.

"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."

While the Constitutional Court of Bosnia and Herzegovina, in decisions nos. U 5/04 of 31 March 2006 and U 13/05 of 26 May 2006, held that the European Convention on Human Rights did not have priority over the Constitution, it came to a different conclusion in decision no. AP 2678/06 of 29 September 2006. In the latter decision, it examined a discrimination complaint concerning the appellant's ineligibility to stand for election to the Presidency on the ground of his ethnic origin (a Bosniac from the Republika Srpska) and rejected it on the merits. The relevant part of the majority opinion reads as follows (the translation has been provided by the Constitutional Court):

"18. The appellants argue that their rights have been violated, taking into account the fact that Article II § 2 of the Constitution of Bosnia and Herzegovina stipulates that the rights and freedoms set forth in the European Convention and its Protocols shall apply directly in Bosnia and Herzegovina and that they shall have priority over all other law. Therefore, the appellants are of the opinion that the candidacy of Ilijaz Pilav for a member of the Presidency of Bosnia and Herzegovina was rejected exclusively based on his national/ethnic origin in which they see a violation of Article 1 of Protocol No. 12 to the European Convention which guarantees that the enjoyment of any right set forth by law shall be secured without discrimination and that no one shall be discriminated against by any public authority on any ground including the national/ethnic origin.

...

22. There is no dispute that the provision of Article V of the Constitution of Bosnia and Herzegovina, as well as the provision of Article 8 of the Election Act 2001 have a restrictive character in a way that they restrict the rights of citizens with respect to the candidacy of Bosniacs and Croats from the territory of the Republika Srpska and the Serbs from the territory of the Federation of Bosnia and Herzegovina to stand for election as members of the Presidency of Bosnia and Herzegovina. However, the purpose of those provisions is strengthening of the position of constituent peoples in order to secure that the Presidency is composed of the representatives from amongst these three constituent peoples. Taking into account the current situation in Bosnia and Herzegovina, the restriction imposed by the Constitution and Election Act 2001, which exist with respect to the appellants' rights in terms of differential treatment of the appellant's candidacy in relation to the candidacy of other candidates who are Serbs and are directly elected from the territory of the Republika Srpska, is justified at this moment, since there is a reasonable justification for such treatment. Therefore, given the current situation in Bosnia and Herzegovina and specific nature of its constitutional order as well as bearing in mind the current constitutional and law arrangements, the challenged decisions of the Court of Bosnia and Herzegovina and the Central Election Commission did not violate the appellants' rights under Article 1 of Protocol No. 12 to the European Convention and Article 25 of the International Covenant on Civil and Political Rights since the mentioned decisions are not arbitrary and are based on the law. It means that they serve a legitimate aim, that they are reasonably justified and that they do not place an excessive burden on the appellants given that the restrictions imposed on the appellants' rights are proportional to the

objectives of general community in terms of preservation of the established peace, continuation of dialogue, and consequently creation of conditions for amending the mentioned provisions of the Constitution of Bosnia and Herzegovina and Election Act 2001."

15. As regards amendments to the Constitution, its Article X provides as follows:

"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."

On 26 March 2009 the Parliamentary Assembly successfully amended the Constitution for the first time, in accordance with the above procedure. The amendment at issue concerned the status of the Brčko District.

2. Annex 10 (the Agreement on Civilian Implementation)

16. The Agreement on Civilian Implementation outlines the mandate of the High Representative – the international administrator for Bosnia and Herzegovina, established with the authorisation of the United Nations Security Council by an informal group of States actively involved in the peace process (called the Peace Implementation Council) as an enforcement measure under Chapter VII of the United Nations Charter (see United Nations Security Council Resolution 1031 of 15 December 1995).

17. It is well known that the High Representative's powers are extensive (see *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 and others, 16 October 2007). On numerous occasions, he has imposed ordinary legislation and has amended the Entity Constitutions (the Entity Constitutions, as opposed to the State Constitution, are not part of the Dayton Agreement). Whether the High Representative's powers also cover the State Constitution is, however, less clear. The Dayton Agreement is silent on this matter, but an episode concerning a typing error in the State Constitution would suggest a negative answer. Several months after the entry into force of the Dayton Agreement, some of the international lawyers who had been present during the Dayton negotiations realised that a reference in Article V § 2 (c) was wrong (the reference to Article III § 1 (a)-(e) was meant to have been a reference to Article V § 3 (a)-(e)). In November 1996 the High Representative, Mr Bildt, wrote a letter to the Secretary of State of the United States of America, Mr Christopher, and proposed to correct the error by invoking Annex 10 to the Dayton Agreement. Mr Christopher considered that Mr Bildt's authority under Annex 10 did not extend to the State Constitution (see the text of their correspondence in Nystuen, cited above, pp. 80-81). Shortly thereafter, the

error was corrected without any formal decision: the High Representative simply informed the Presidency of Bosnia and Herzegovina and published a corrected version of the State Constitution. What is relevant to the present case is that the official position of High Representatives has ever since been that the State Constitution is beyond their reach. The speech by Lord Ashdown, in his capacity as High Representative, to the Venice Commission confirms this (see the Report from the 60th Plenary Session of the Venice Commission, CDL-PV(2004)003 of 3 November 2004, p. 18). The relevant part of his speech reads as follows:

> "If Bosnia and Herzegovina wishes to join the [European Union] and NATO it will need a fully functioning State and nothing less. Bosnia and Herzegovina political leaders are already beginning to realise that they face a choice: to maintain the current constitution and pay the economic, social and political consequences, or make the constitutional changes required to make Bosnia and Herzegovina a stable, functional and prosperous country within the European Union.
>
> I do not believe that the people of Bosnia and Herzegovina will accept that their constitution should be a barrier to their security and prosperity.
>
> However, we cannot remove that barrier for them.
>
> It has consistently been the view of [the] Peace Implementation Council and successive High Representatives, including me, that, provided the Parties observe Dayton – and there remains a question mark on this in respect of Republika Srpska's compliance with The Hague, then the Constitution of Bosnia and Herzegovina should be changed only by the prescribed procedures by the Parliamentary Assembly of Bosnia and Herzegovina and not by the International Community. In other words, that, provided Dayton is observed, the powers of the High Representative begin and end with the Dayton texts, and that any alteration to the Constitution enshrined therein is a matter for the people of Bosnia and Herzegovina and their elected representatives to consider."

B. The Election Act 2001

18. The Election Act 2001 (published in Official Gazette of Bosnia and Herzegovina no. 23/01 of 19 September 2001, amendments published in Official Gazette nos. 7/02 of 10 April 2002, 9/02 of 3 May 2002, 20/02 of 3 August 2002, 25/02 of 10 September 2002, 4/04 of 3 March 2004, 20/04 of 17 May 2004, 25/05 of 26 April 2005, 52/05 of 2 August 2005, 65/05 of 20 September 2005, 77/05 of 7 November 2005, 11/06 of 20 February 2006, 24/06 of 3 April 2006, 32/07 of 30 April 2007, 33/08 of 22 April 2008 and 37/08 of 7 May 2008) entered into force on 27 September 2001. The relevant provisions of this Act provide:

Section 1.4(1)

"Each citizen of Bosnia and Herzegovina who has attained eighteen (18) years of age shall have the right to vote and to be elected pursuant to this law."

Section 4.8

"In order to be certified for the elections, an independent candidate must present to the Central Election Commission his or her application for participation in the elections, which is to contain at least:

1. one thousand five hundred (1,500) signatures of registered voters for elections for members of the Presidency of Bosnia and Herzegovina; ..."

Section 4.19(5-7)

"The list of candidates shall contain the name and surname of every candidate on the list, their personal identification number (JMBG number), permanent residence address, declared affiliation with a particular 'constituent people' or the group of 'others', valid ID card number and place of issue, as well as a signature of the president of the political party or presidents of the political parties in the coalition. Each candidate's declaration of acceptance of candidacy, a statement confirming the absence of impediments referred to in section 1.10(1)(4) of this Act and a statement indicating his or her property situation referred to in section 15.7 of this Act shall be attached to the list. The declaration and statements must be duly certified.

The declaration of affiliation with a particular 'constituent people' or the group of 'others' referred to in the paragraph [immediately] above shall be used for purposes of the exercise of the right to hold an elected or appointed position for which such declaration is required in the election cycle for which the list has been submitted.

A candidate shall be entitled not to declare his or her affiliation to a 'constituent people' or the group of 'others'. However, any such failure to declare affiliation shall be considered as a waiver of the right to hold an elected or appointed position for which such declaration is required."

Section 8.1

"The members of the Presidency of Bosnia and Herzegovina who are directly elected from the territory of the Federation of Bosnia and Herzegovina – one Bosniac and one Croat, shall be elected by voters registered to vote in the Federation of Bosnia and Herzegovina. A voter registered to vote in the Federation of Bosnia and Herzegovina may vote for either the Bosniac or Croat member of the Presidency, but not for both. The Bosniac and Croat member who receives the highest number of votes among candidates from the same constituent people shall be elected.

The member of the Presidency of Bosnia and Herzegovina who is directly elected from the territory of the Republika Srpska – a Serb – shall be elected by voters registered to vote in the Republika Srpska. The candidate who receives the highest number of votes shall be elected.

The mandate for the members of the Presidency of Bosnia and Herzegovina shall be four (4) years."

Section 9.12a

"Croat and Bosniac delegates from the Federation of Bosnia and Herzegovina to the House of Peoples of Bosnia and Herzegovina shall be elected by the Croat and Bosniac caucus, as appropriate, in the House of Peoples of the Federation of Bosnia and Herzegovina.

Croat and Bosniac delegates to the House of Peoples of the Federation of Bosnia and Herzegovina shall elect delegates from their respective constituent people.

Serb delegates and delegates of the 'others' to the House of Peoples of the Federation of Bosnia and Herzegovina shall not participate in the process of electing Bosniac and Croat delegates for the House of Peoples of Bosnia and Herzegovina from the Federation of Bosnia and Herzegovina.

Delegates from the Republika Srpska (five Serbs) to the House of Peoples of Bosnia and Herzegovina shall be elected by the National Assembly of the Republika Srpska.

Bosniac and Croat delegates and delegates of the 'others' to the National Assembly of the Republika Srpska shall participate in the process of electing delegates from the Republika Srpska to the House of Peoples of Bosnia and Herzegovina."

Section 9.12c

"Bosniac or Croat delegates to the House of Peoples of Bosnia and Herzegovina shall be elected in such a way that each political entity participating in the Bosniac or Croat caucus or each delegate from the Bosniac or the Croat caucus in the House of Peoples of the Federation of Bosnia and Herzegovina, shall have the right to nominate one or more candidates to the list for the election of Bosniac or Croat delegates to the House of Peoples of Bosnia and Herzegovina.

Each list may include more candidates than the number of delegates to be elected to the House of Peoples of Bosnia and Herzegovina."

Section 9.12e

"Election of delegates from the Republika Srpska to the House of Peoples of Bosnia and Herzegovina shall be conducted in such a way that each political party or each delegate to the National Assembly of the Republika Srpska shall have the right to nominate one or more candidates to the list for the election of Serb delegates to the House of Peoples of Bosnia and Herzegovina.

Each list may include more candidates than the number of delegates to be elected to the House of Peoples of Bosnia and Herzegovina."

C. The United Nations

19. The International Convention on the Elimination of All Forms of Racial Discrimination, adopted under the auspices of the United Nations on 21 December 1965, entered into force in respect of Bosnia and Herzegovina on 16 July 1993. The relevant part of its Article 1 provides:

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

The relevant parts of Article 5 of the Convention read as follows:

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

The Concluding Observations on Bosnia and Herzegovina of the Committee on the Elimination of Racial Discrimination, the body of independent experts set up to monitor the implementation of this treaty, read, in the relevant part, as follows (document CERD/C/BIH/CO/6 of 11 April 2006, paragraph 11):

> "The Committee is deeply concerned that under Articles IV and V of the State Constitution, only persons belonging to a group considered by law to be one of Bosnia and Herzegovina's 'constituent peoples' (Bosniaks, Croats, and Serbs), which group also constitutes the dominant majority within the Entity in which the person resides (e.g. Bosniaks and Croats within the Federation of Bosnia and Herzegovina, and Serbs within the Republika Srpska), can be elected to the House of Peoples and to the tripartite Presidency of Bosnia and Herzegovina. The existing legal structure therefore excludes from the House of Peoples and the Presidency all persons who are referred to as 'Others', that is persons belonging to national minorities or ethnic groups other than Bosniaks, Croats, or Serbs. Although the tripartite structure of the State Party's principal political institutions may have been justified, or even initially necessary to establish peace following the armed conflict within the territory of the State Party, the Committee notes that legal distinctions that favour and grant special privileges and preferences to certain ethnic groups are not compatible with Articles 1 and 5 (c) of the Convention. The Committee further notes that this is especially true when the

exigency for which the special privileges and preferences were undertaken has abated. (Articles 1 (4) and 5 (c)).

The Committee urges the State Party to proceed with amending the relevant provisions of the State Constitution and the Election Law, with a view to ensuring the equal enjoyment of the right to vote and to stand for election by all citizens irrespective of ethnicity."

20. The International Covenant on Civil and Political Rights, adopted under the auspices of the United Nations on 16 December 1966, entered into force in respect of Bosnia and Herzegovina on 6 March 1992. The following are its relevant provisions:

Article 2 § 1

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 25

"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

Article 26

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Concluding Observations on Bosnia and Herzegovina of the United Nations Human Rights Committee, the body of independent experts set up to monitor the implementation of this treaty, read, in the relevant part, as follows (document CCPR/C/BIH/CO/1 of 22 November 2006, paragraph 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. (Articles 2, 25 and 26).

The State Party should reopen talks on the constitutional reform in a transparent process and on a wide participatory basis, including all stakeholders, with a view to adopting an electoral system that guarantees equal enjoyment of the rights under Article 25 of the Covenant to all citizens irrespective of ethnicity."

D. The Council of Europe

21. In becoming a member of the Council of Europe in 2002, Bosnia and Herzegovina undertook 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" (see Opinion 234(2002) of the Parliamentary Assembly of the Council of Europe of 22 January 2002, paragraph 15(iv)(b)). Thereafter, the Parliamentary Assembly of the Council of Europe has periodically reminded Bosnia and Herzegovina of this post-accession obligation and urged it to adopt a new constitution before October 2010 with a view to replacing "the mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against 'Others'" (see Resolution 1383 (2004) of 23 June 2004, paragraph 3; Resolution 1513 (2006) of 29 June 2006, paragraph 20; and Resolution 1626 (2008) of 30 September 2008, paragraph 8).

22. The Venice Commission, the Council of Europe's advisory body on constitutional matters, adopted a number of Opinions in this connection.

The Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative (document CDL-AD(2005)004 of 11 March 2005) reads, in the relevant part, as follows:

"1. On 23 June 2004 the Parliamentary Assembly of the Council of Europe adopted Resolution 1384 on 'Strengthening of democratic institutions in Bosnia and Herzegovina'. Paragraph 13 of the Resolution asks the Venice Commission to examine several constitutional issues in Bosnia and Herzegovina.

...

29. Bosnia and Herzegovina is a country in transition facing severe economic problems and desiring to take part in European integration. The country will only be able to cope with the numerous challenges resulting from this situation if there is a strong and effective government. The constitutional rules on the functioning of the State organs are however not designed to produce strong government but to prevent the majority from taking decisions adversely affecting other groups. It is understandable that in a post-conflict situation there was (and is) insufficient trust between ethnic groups to allow government on the basis of the majoritarian principle alone. In such a situation specific safeguards have to be found which ensure that all major groups, in Bosnia and Herzegovina the constituent peoples, can accept the

constitutional rules and feel protected by them. As a consequence the Bosnia and Herzegovina Constitution ensures the protection of the interests of the constituent peoples not only through territorial arrangements reflecting their interests but also through the composition of the State organs and the rules on their functioning. In such a situation, a balance has indeed to be struck between the need to protect the interests of all constituent peoples on the one hand and the need for effective government on the other. However, in the Bosnia and Herzegovina Constitution, there are many provisions ensuring the protection of the interests of the constituent peoples, *inter alia*: the vital interest veto in the Parliamentary Assembly, the two-chamber system and the collective Presidency on an ethnic basis. The combined effect of these provisions makes effective government extremely difficult, if not impossible. Hitherto the system has more or less functioned due to the paramount role of the High Representative. This role is however not sustainable.

The vital interest veto

30. The most important mechanism ensuring that no decisions are taken against the interest of any constituent people is the vital interest veto. If the majority of the Bosniac, Croat or Serb delegates in the House of Peoples declare that a proposed decision of the Parliamentary Assembly is destructive to a vital interest of their people, the majority of Bosniac, Serb and Croat delegates have to vote for the decision for it to be adopted. The majority of delegates from another people may object to the invocation of the clause. In this case a conciliation procedure is foreseen and ultimately a decision is taken by the Constitutional Court as to the procedural regularity of the invocation. It is noteworthy that the Constitution does not define the notion of vital interest veto, contrary to the Entity Constitutions which provide a (excessively broad) definition.

31. It is obvious, and was confirmed by many interlocutors, that this procedure entails a serious risk of blocking decision-making. Others argued that this risk should not be overestimated since the procedure has rarely been used and the Constitutional Court in a decision of 25 June 2004 started to interpret the notion [see decision U-8/04 on the vital interest veto against the Framework Law on Higher Education]. The decision indeed indicates that the Court does not consider that the vital interest is a purely subjective notion within the discretion of each member of parliament and which would not be subject to review by the Court. On the contrary, the Court examined the arguments put forward to justify the use of the vital interest veto, upheld one argument and rejected another.

32. The Commission is nevertheless of the opinion that a precise and strict definition of vital interest in the Constitution is necessary. The main problem with veto powers is not their use but their preventive effect. Since all politicians involved are fully conscious of the existence of the possibility of a veto, an issue with respect to which a veto can be expected will not even be put to the vote. Due to the existence of the veto, a delegation taking a particularly intransigent position and refusing to compromise is in a strong position. It is true that further case-law from the Constitutional Court may provide a definition of the vital interest and reduce the risks inherent in the mechanism. This may however take a long time and it also seems inappropriate to leave such a task with major political implications to the Court alone without providing it with guidance in the text of the Constitution.

33. Under present conditions within Bosnia and Herzegovina, it seems unrealistic to ask for a complete abolition of the vital interest veto. The Commission nevertheless

considers that it would be important and urgent to provide a clear definition of the vital interest in the text of the Constitution. This definition will have to be agreed by the representatives of the three constituent peoples but should not correspond to the present definition in the Entity Constitutions which allows practically anything being defined as vital interest. It should not be excessively broad but focus on rights of particular importance to the respective peoples, mainly in areas such as language, education and culture.

Entity veto

34. In addition to the vital interest veto, Article IV § 3 (d) of the Constitution provides for a veto by two-thirds of the delegation from either Entity. This veto, which in practice seems potentially relevant only for the Republika Srpska, appears redundant having regard to the existence of the vital interest veto.

Bicameral system

35. Article IV of the Constitution provides for a bicameral system with a House of Representatives and a House of Peoples both having the same powers. Bicameral systems are typical for federal States and it is therefore not surprising that the Bosnia and Herzegovina Constitution opts for two chambers. However, the usual purpose of the second chamber in federal States is to ensure a stronger representation of the smaller entities. One chamber is composed on the basis of population figures while in the other either all entities have the same number of seats (Switzerland, USA) or at least smaller entities are overrepresented (Germany). In Bosnia and Herzegovina this is quite different: in both chambers two-thirds of the members come from the Federation of Bosnia and Herzegovina, the difference being that in the House of Peoples only the Bosniacs and Croats from the Federation and the Serbs from the Republika Srpska are represented. The House of Peoples is therefore not a reflection of the federal character of the State but an additional mechanism favouring the interests of the constituent peoples. The main function of the House of Peoples under the Constitution is indeed as the chamber where the vital interest veto is exercised.

36. The drawback of this arrangement is that the House of Representatives becomes the chamber where legislative work is done and necessary compromises are made in order to achieve a majority. The role of the House of Peoples is only negative as a veto chamber, where members see as their task to exclusively defend the interests of their people without having a stake in the success of the legislative process. It would therefore seem preferable to move the exercise of the vital interest veto to the House of Representatives and abolish the House of Peoples. This would streamline procedures and facilitate the adoption of legislation without endangering the legitimate interests of any people. It would also solve the problem of the discriminatory composition of the House of Peoples.

The collective Presidency

37. Article V of the Constitution provides for a collective Presidency with one Bosniac, one Serb and one Croat member and a rotating chair. The Presidency endeavours to take its decisions by consensus (Article V § 2 (c)). In case of a decision by a majority, a vital interest veto can be exercised by the member in the minority.

38. A collective Presidency is a highly unusual arrangement. As regards the representational functions of Head of State, these are more easily carried out by one

person. At the top of the executive there is already one collegiate body, the Council of Ministers, and adding a second collegiate body does not seem conducive to effective decision-making. This creates a risk of duplication of decision-making processes and it becomes difficult to distinguish the powers of the Council of Ministers and of the Presidency. Moreover, the Presidency will either not have the required technical knowledge available within ministries or need substantial staff, creating an additional layer of bureaucracy.

39. A collective Presidency therefore does not appear functional or efficient. Within the context of Bosnia and Herzegovina, its existence seems again motivated by the need to ensure participation by representatives from all constituent peoples in all important decisions. A single President with important powers seems indeed difficult to envisage for Bosnia and Herzegovina.

40. The best solution therefore would be to concentrate executive power within the Council of Ministers as a collegiate body in which all constituent peoples are represented. Then a single President as Head of State should be acceptable. Having regard to the multi-ethnic character of the country, an indirect election of the President by the Parliamentary Assembly with a majority ensuring that the President enjoys wide confidence within all peoples would seem preferable to direct elections. Rules on rotation providing that a newly elected President may not belong to the same constituent people as his predecessor may be added.

...

74. In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives. The inclusion of such rules in the text of the Constitution [of Bosnia and Herzegovina] at that time therefore does not deserve criticism, even though they run counter to the general thrust of the Constitution aiming at preventing discrimination.

75. This justification has to be considered, however, in the light of developments in Bosnia and Herzegovina since the entry into force of the Constitution. Bosnia and Herzegovina has become a member of the Council of Europe and the country has therefore to be assessed according to the yardstick of common European standards. It has now ratified the [European Convention on Human Rights] and Protocol No. 12 [thereto]. As set forth above, the situation in Bosnia and Herzegovina has evolved in a positive sense but there remain circumstances requiring a political system that is not a simple reflection of majority rule but which guarantees a distribution of power and positions among ethnic groups. It therefore remains legitimate to try to design electoral rules ensuring appropriate representation for various groups.

76. This can, however, be achieved without entering into conflict with international standards. It is not the system of consensual democracy as such which raises problems but the mixing of territorial and ethnic criteria and the apparent exclusion from certain political rights of those who appear particularly vulnerable. It seems possible to redesign the rules on the Presidency to make them compatible with international standards while maintaining the political balance in the country.

77. A multi-ethnic composition can be ensured in a non-discriminatory way, for example by providing that not more than one member of the Presidency may belong to the same people or the Others and combining this with an electoral system ensuring representation of both Entities. Or, as suggested above, as a more radical solution which would be preferable in the view of the Commission, the collective Presidency could be abolished and replaced by an indirectly elected President with very limited powers.

...

80. The House of Peoples is a chamber with full legislative powers. Article 3 of Protocol No. 1 to the [European Convention on Human Rights] is thereby applicable and any discrimination on ethnic grounds is thereby prohibited by Article 14 of the [Convention]. As to a possible justification, the same considerations as with respect to the Presidency apply. While it is a legitimate aim to try to ensure an ethnic balance within Parliament in the interest of peace and stability, this can justify ethnic discrimination only if there are no other means to achieve this goal and if the rights of minorities are adequately respected. For the House of Peoples it would for example be possible to fix a maximum number of seats to be occupied by representatives from each constituent people. Or, as argued above, a more radical solution which would have the preference of the Commission, could be chosen and the House of Peoples simply be abolished and the vital national interest mechanism be exercised within the House of Representatives."

The Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina (CDL-AD(2006)004 of 20 March 2006), in the relevant part, provides:

"1. By letter dated 2 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to provide an Opinion on three different proposals for the election of the Presidency of this country. This request was made in the framework of negotiations on constitutional reform between the main political parties in Bosnia and Herzegovina. The issue of the election of the Presidency remains to be resolved in order to reach agreement on a comprehensive reform package.

...

Comments on Proposal I

8. Proposal I would consist of maintaining the present rules on the election and composition of the Presidency, with one Bosniac and one Croat elected from the territory of the Federation and one Serb elected from the territory of Republika Srpska. In its [Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] the Commission raised serious concerns as to the compatibility with Protocol No. 12 to the European Convention of Human Rights of such a rule, which formally excludes Others as well as Bosniacs and Croats from Republika Srpska and Serbs from the Federation from being elected to the Presidency. Maintaining this rule as it stands should therefore be excluded and Proposal I be rejected.

Comments on Proposal II

9. Proposal II, which is not drafted as text to be included in the Constitution but as a summary of possible constitutional content, maintains the system of directly electing two members of the Presidency from the Federation and one from Republika Srpska, however without mentioning any ethnic criteria for the candidates. The *de jure* discrimination pointed out in the Venice Commission Opinion would therefore be removed and adoption of this proposal would constitute a step forward. The Proposal also includes a rotation of the President of the Presidency every 16 months. Within the logic of a collective Presidency, this appears as a rational solution.

10. By contrast, the Proposal lacks clarity as to the pluri-ethnic composition of the Presidency. The collective Presidency was introduced, and supposedly will now be maintained, in order to ensure that no single State organ is dominated by a representative of a single constituent people. As it stands, under the proposal it would be possible to, for example, elect two Bosniacs from the Federation to the Presidency. Legally, this drawback could be remedied in the framework of the Proposal by providing that not more than one member of the Presidency may belong at the same time to the same constituent people or the group of Others. It is the understanding of the Commission that the intention is indeed to include such a provision in the Constitution in case this proposal is adopted.

11. However, the problem would result of having to possibly exclude from the Presidency candidates who have received a higher number of votes. In the Federation it is quite possible that two Bosniacs would attain the highest number of votes. In this case, a candidate who obtained more votes would have to be barred from the Presidency in favour of a candidate who obtained fewer votes. These issues should be regulated clearly at the level of the Constitution and not be left to ordinary law.

12. As a further drawback, *de facto* Bosniacs and Croats from the Republika Srpska and Serbs from the Federation would also continue to have no realistic possibility to elect a candidate of their preference.

13. Furthermore, the election of the Head of State would continue to take place on an Entity basis while it would be desirable to move it to the State level as part of the overall approach of strengthening the State.

14. As a minor issue, the proposal would also allow members of the Presidency to hold a leadership position in a political party. This does not seem in line with the overall aim of constitutional reform of transforming the Presidency from an executive body into a (collective) Head of State.

15. To sum up, Proposal II is a clear improvement with respect to the present constitutional situation. However, it has a number of drawbacks, including the risk that candidates with less votes than others are elected and it does not contribute to the overall aims of the constitutional reform of moving power to the Council of Ministers and strengthening the State level.

Proposal III

16. Proposal III differs more markedly from the present constitutional situation by introducing a complicated procedure of indirect elections for the Presidency. As set forth above, the main preference of the Commission is for the indirect election of a

single President with reduced powers. But also in the case of a collective Presidency, the Commission maintains its preference for indirect elections.

17. The reason is, first of all, that one of the main aims of the constitutional reform would be to reduce the powers of the Presidency and to concentrate executive power in the Council of Ministers. This change will be more difficult to bring about if the Presidency does have the legitimacy of a direct popular vote.

18. Moreover, in an indirect election it is easier to devise mechanisms ensuring the desired pluri-ethnic composition of the Presidency. It offers more possibilities for inter-ethnic cooperation and compromise while direct elections for *de facto* separate ethnic slots provide an incentive to vote for the person considered as the strongest advocate of the respective constituent people and not for the candidate best suited to defend the interests of the country as a whole.

19. Finally, the Proposal moves the election to the State Parliament. It is indeed desirable and in line with the overall aim of strengthening the State to have the election of the Head of State at this level.

20. From the point of view of the overall approach, Proposal III therefore seems preferable. There are nevertheless some drawbacks.

21. First of all, the proposal seems complicated with too many steps and possibilities for stalemate. Nominations can be put forward by members of the House of Representatives or the House of Peoples, the selection of the candidates takes place by the three separate ethnic caucuses in the House of Peoples and thereafter the slate of candidates has to be confirmed both by the three caucuses in the House of Peoples and by the House of Representatives.

22. Within the parameters of the proposal, it would seem preferable to have a simpler procedure with more focus on the House of Representatives as the body having direct democratic legitimacy derived from the people as a whole. The possibility to nominate candidates should be reserved to members of the House of Representatives, selection among these candidates could take place in the three separate ethnic caucuses of the House of Peoples to ensure that the interests of all three constituent peoples are respected and the slate of candidates would have to be confirmed by the majority of the composition of the House of Representatives, ensuring that all three members have legitimacy as representatives of the people of Bosnia and Herzegovina as a whole.

23. In addition, it should be clarified how the positions of the President and Vice-Presidents are to be distributed. As it stands, Proposal III leaves this important decision implicitly to backroom dealing between the three ethnic caucuses since a slate identifying President and Vice-Presidents has to be submitted to the House of Representatives, while no indication is provided on how this choice has to be made. This seems the worst possible solution and likely to lead to stalemate. The rotation envisaged by Proposal II seems more feasible.

24. There are also other aspects of Proposal III which are not in accordance with the preferences of the Venice Commission. In its above-mentioned Opinion, the Commission argued in favour of abolishing the House of Peoples. Giving it a strong role in the selection of the Presidency cannot therefore be considered a positive step. The role of ethnic caucuses makes the election of candidates not belonging to a

constituent people extremely unlikely. This is however not peculiar to this Proposal but reflects the political situation. The proposal at least ensures that the representatives of the Others in the House of Representatives will take part in the vote and that Serbs from the Federation and Bosniacs and Croats from Republika Srpska are no longer disadvantaged since their representatives in the State Parliament will be able to vote for the candidates of their choice.

25. Even in the framework of a collective Presidency, solutions for indirect elections could be devised, which would appear preferable. For example, within the House of Representatives, slates of three candidates not coming from the same constituent people or the group of Others could be nominated and the vote could take place between such slates. This would nevertheless be a different proposal and not an amendment to Proposal III.

26. To sum up, Proposal III is also a clear improvement with respect to the present situation. If it were to be adjusted as suggested in paragraphs 22 and 23, it would appear suitable as a solution (although not an ideal one) for the first stage of constitutional reform.

Conclusions

27. In conclusion, the Commission strongly welcomes that the political parties in Bosnia and Herzegovina have found the courage to try adopting a comprehensive constitutional reform before the forthcoming elections in October 2006. It acknowledges that a reform adopted at this stage can have an interim character only, as a step towards the comprehensive reform the country clearly needs.

28. With respect to the three proposals submitted to the Commission, adoption of the first proposal could only be regarded as a failure of constitutional reform on this issue and should be excluded. By contrast, both Proposal II and Proposal III deserve, subject to some additions and amendments, to be considered at the present stage as important steps forward, but by no means as ideal solutions.

29. Between Proposal II and Proposal III, the Commission would – though not without hesitation – give preference to Proposal III, subject to some adjustments as indicated above. An indirect election in line with the aim of the constitutional reform of reducing the powers of the Presidency makes it easier to ensure a balanced composition of the Presidency and thereby corresponds better to the *raison d'être* of this – unusual – institution. The Proposal also moves the election to the State level, in accordance with the overall aim to strengthen the State of Bosnia and Herzegovina. However, sight should not be lost of the ultimate aim of constitutional reform in this area: having in future a single President elected in a manner ensuring that he or she enjoys trust beyond the ethnic group to which he or she belongs."

The relevant part of the Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina (CDL-AD(2006)019 of 12 June 2006) provides as follows:

"1. By letter dated 21 March 2006 the Chairman of the Presidency of Bosnia and Herzegovina, Mr Sulejman Tihić, asked the Venice Commission to give an Opinion on the text of the agreement on the modalities of the first phase of constitutional reform reached by the leaders of political parties in Bosnia and Herzegovina on 18 March 2006. Since the constitutional reform has to be adopted urgently in order to

make it possible to take it into account at the parliamentary elections scheduled for October 2006, he expressed the wish to receive the Opinion of the Venice Commission 'shortly'.

...

Amendment II to Article IV of the Constitution on the Parliamentary Assembly

...

22. The main aim of the Amendment is to move from a bicameralism with two equal chambers to a new system where the House of Peoples ... would have only limited powers with a focus on the vital national interests veto. The new structure of the Article, systematically putting the House of Representatives ... first, reflects this aim. The reform would be a step in the direction of the Venice Commission recommendation to abolish the [House of Peoples] and to streamline decision-making within the State institutions.

...

24. Sub-section (d) would increase the number of members of the [House of Peoples] from 15 to 21. The justification of the increase in the membership of this House is less apparent since its powers are greatly reduced. Nevertheless, this is an issue entirely within the discretion of the national authorities. If they feel that this increase is required to ensure that the House adequately represents the political spectrum, this step seems justifiable.

25. More problematic is the circumstance that membership in this House remains limited under sub-section (d) to people belonging to one of the three constituent peoples. In its Opinion [on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] the Venice Commission noted that the previous composition of this House along similar lines seemed to contradict Article 14 of the [European Convention on Human Rights] in conjunction with Article 3 of [Protocol No. 1].

26. Following the reform the House of Peoples would however no longer be a full legislative chamber but a body dealing mainly with the vital national interests veto. It seems therefore questionable whether Article 3 of [Protocol No. 1] and thereby Article 14 of the [Convention] would still be applicable. The problem of the compatibility of this provision with Protocol No. 12 [to the Convention] remains however. In the absence of any case-law on this Protocol, it can be interpreted only with prudence. ...

27. In the present case the legitimate aim could be seen in the main role of the House as a body in which the vital national interests veto is exercised. The [Bosnia and Herzegovina] Constitution reserves the right to exercise this veto to the three constituent peoples and does not give it to the Others. From that perspective it would not seem required to include 'Others' in the composition of this House. The other responsibilities of the House, to participate in the election of the Presidency and to approve constitutional amendments – though not beyond criticism –, do not lead to a different result. They show that the function of the [House of Peoples] is to be a corrective mechanism, ensuring that the application of the democratic principle reflected in the composition of the [House of Representatives] does not disturb the

balance among the three constituent peoples. The need for such a mechanism seems still to be felt in [Bosnia and Herzegovina]. In that case it seems possible to regard this need as a legitimate aim justifying an unequal treatment of Others in respect to representation in the [House of Peoples].

...

Amendment III to Article V of the Constitution on the Presidency

43. The main aim of the Amendments is to strengthen the powers of the Council of Ministers and increase its efficiency and reduce the role of the Presidency. This is entirely in line with the Opinion [on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative] of the Venice Commission. In addition, the Commission would have preferred having a single President instead of a collective Presidency. This does however not seem politically possible at the moment. Nevertheless Amendment III takes a first step in this direction.

...

46. The Venice Commission adopted an Opinion on the three alternative proposals for electing the Presidency at its last session (CDL-AD(2006)004). It would serve no purpose to re-open this discussion at the present moment. The absence of a dead-lock breaking mechanism if the [House of Representatives] refuses to confirm the proposal of the [House of Peoples] is however a concern.

..."

23. The European Commission against Racism and Intolerance (ECRI) is the Council of Europe's independent human rights monitoring body specialised in combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance. In its General Policy Recommendation No. 7, adopted on 13 December 2002, ECRI defines racism as "the belief that a ground such as race[1], colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons".

E. The OSCE

24. In a report concerning the general elections held in 2006, the OSCE Office for Democratic Institutions and Human Rights, the lead agency in Europe in election observation, held as follows:

"The 1 October general elections in Bosnia and Herzegovina were the first elections since the 1995 Dayton Agreement to be fully administered by the Bosnia and

1. Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the legislation. (Footnote to ECRI Recommendation cited above.)

> Herzegovina authorities. The manner in which these elections were conducted was generally in line with international standards for democratic elections, although further efforts are needed, particularly with regard to the vote count. Therefore, overall, the elections represented further progress in the consolidation of democracy and the rule of law. However, it was regrettable that, due to constitutional ethnicity-based limitations to the right to stand for office, the elections were again in violation of Protocol No. 12 to the European Convention on Human Rights (ECHR) and of the commitments made to the Council of Europe, as well as Article 7.3 of the OSCE 1990 Copenhagen Document."

F. The European Union

25. In 2008 Bosnia and Herzegovina signed and ratified a Stabilisation and Association Agreement with the European Union and thereby committed itself to addressing the European Partnership priorities. One of the key priorities for Bosnia and Herzegovina, expected to be accomplished within one to two years, 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 commitments" (see Annex to Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, Official Journal of the European Union L 080 (19 March 2008)).

On 14 October 2009 the European Commission adopted its annual strategy document explaining its policy on enlargement. On the same date the 2009 progress reports were published, in which the Commission services monitor and assess the achievements of each of the candidate countries and potential candidates (such as Bosnia and Herzegovina) over the last year.

THE LAW

I. THE APPLICANTS' PRINCIPAL COMPLAINTS

26. The applicants took issue with their ineligibility to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin, which, in their view, amounted to racial discrimination. They relied on Article 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12.

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured 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."

Article 3 of Protocol No. 1 provides:

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

Article 1 of Protocol No. 12 to the Convention provides:

"1. The enjoyment of any right set forth by law shall be secured 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.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

27. Although the respondent State did not raise any objection as to the Court's competence *ratione personae*, this issue calls for consideration *ex officio* by the Court.

1. Whether the applicants may claim to be "victims"

28. It is reiterated that in order to be able to lodge a petition by virtue of Article 34 of the Convention, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. It is, however, open to applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted (see *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33-34, ECHR 2008, and the authorities cited therein).

29. In the present case, given the applicants' active participation in public life, it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency. The applicants may therefore claim to be victims of the alleged discrimination. The fact that the present case raises the question of the compatibility of the national

Constitution with the Convention is irrelevant in this regard (see, by analogy, *Rekvényi v. Hungary* [GC], no. 25390/94, ECHR 1999-III).

2. Whether the respondent State may be held responsible

30. The Court notes that the Constitution of Bosnia and Herzegovina is an annex to the Dayton Agreement, itself an international treaty (see *Jeličić v. Bosnia and Herzegovina* (dec.), no. 41183/02, ECHR 2005-XII). The power to amend it was, however, vested in the Parliamentary Assembly of Bosnia and Herzegovina, which is clearly a domestic body (see paragraph 15 above). In addition, the practice set out in paragraph 17 above confirms that the powers of the international administrator for Bosnia and Herzegovina (the High Representative) do not extend to the State Constitution. In those circumstances, leaving aside the question whether the respondent State could be held responsible for putting in place the contested constitutional provisions (see paragraph 13 above), the Court considers that it could nevertheless be held responsible for maintaining them.

3. Conclusion

31. The Court declares the applicants' principal complaints admissible.

B. Merits

1. The applicants' submissions

32. Despite being citizens of Bosnia and Herzegovina, the applicants are denied by the Constitution any right to stand for election to the House of Peoples and the Presidency on the grounds of their race/ethnicity (ethnic discrimination has been held by the Court to be a form of racial discrimination in *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII). The applicants submitted that difference in treatment based expressly on race or ethnicity was not capable of justification and amounted to direct discrimination. In this regard, they referred to the Court's case-law (notably, *Timishev*, cited above, § 58, and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 176, ECHR 2007-IV) and to European Union legislation (such as Council Directive 2000/43/EC of 29 June 2000 – the "Race Directive" – implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, which in Article 2 explicitly included under its definition of indirect discrimination the possibility of objectively justifying the treatment, but made no such justification possible under its definition of direct discrimination). They further submitted that this impossibility of justification was particularly important in a case concerning the right to stand for election (they referred to *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V).

33. Even on the assumption that a justification was possible, the applicants maintained that the respondent Government would still bear a very heavy burden when seeking to establish an objective and reasonable justification, given both the basis of the complaint (direct racial and ethnic discrimination) and the areas to which it applied (political participation and representation at the highest level of State). Furthermore, the length of time during which the exclusion had continued increased even more the burden on the respondent Government to justify it (they referred to a decision of the United Nations Human Rights Committee of 8 April 1981 in the case of *Silva and Others v. Uruguay*, § 8.4). The applicants concluded that the respondent Government had failed to demonstrate that the difference in treatment was justified in the instant case.

2. The Government's submissions

34. The Government referred to the case of *Ždanoka v. Latvia* ([GC], no. 58278/00, ECHR 2006-IV), in which the Court had reaffirmed that the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State. The current constitutional structure in Bosnia and Herzegovina was established by a peace agreement following one of the most destructive conflicts in recent European history. Its ultimate goal was the establishment of peace and dialogue between the three main ethnic groups – the "constituent peoples". The Government maintained that the contested constitutional provisions, excluding persons who did not declare affiliation with a "constituent people" from the House of Peoples and the Presidency, should be assessed against this background. They claimed that the time was still not ripe for a political system which would be a simple reflection of majority rule, given, in particular, the prominence of mono-ethnic political parties and the continued international administration of Bosnia and Herzegovina.

35. The Government invited the Court to distinguish the present case from the case of *Aziz* (cited above): while Turkish Cypriots living in the Government-controlled area of Cyprus were prevented from voting at any parliamentary election, citizens of Bosnia and Herzegovina belonging to the group of "others" (such as the applicants in the present case) were entitled to stand as candidates for election to the House of Representatives of Bosnia and Herzegovina and the Entities' legislatures. They concluded that the difference in treatment was justified in the particular circumstances.

3. The third parties' submissions

36. The Venice Commission, in its submissions of 22 October 2008, took the view that the constitutional provisions contested in the present case

breached the prohibition of discrimination. These submissions were along the lines of the Opinions cited in paragraph 22 above.

37. The AIRE Centre and the Open Society Justice Initiative, in their submissions of 15 August 2008, argued likewise. Based on an analysis of the Contracting Parties' legal systems, the AIRE Centre concluded that a European consensus had emerged that it was appropriate to withdraw an individual's right to stand for office only as a result of his or her conduct, as opposed to innate or inalienable characteristics. The Open Society Justice Initiative underlined that political participation represented one of the rights and responsibilities that maintained the legal bond between a citizen and a State. In most jurisdictions, the rights to vote, to be elected and to stand for office were what most clearly distinguished a citizen from an alien. Restrictions on these rights, particularly on the suspect grounds of race and ethnicity, were, therefore, not only discriminatory, but undermined the meaning of citizenship itself. Aside from being an important right linked with citizenship, political participation was particularly important for ethnic minorities and essential to overcoming their marginalization and bringing them into the mainstream. This was particularly true following an ethnic conflict, where legally entrenched distinctions based on ethnicity could exacerbate tensions, rather than fostering the constructive and sustainable relations between all ethnicities that were essential to a viable multiethnic State.

4. The Court's assessment

(a) As regards the House of Peoples of Bosnia and Herzegovina

38. The applicants relied on Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, Article 3 of Protocol No. 1 taken alone and Article 1 of Protocol No. 12. The Court considers that this complaint should first be examined under the first-mentioned provisions.

(i) The applicability of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

39. It is noted that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall "within the ambit" of one or more of the latter (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94; *Petrovic v. Austria*, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II; and *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR

2003-VIII). The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols require each State to guarantee. It applies also to those additional rights falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see *Case* "*relating to certain aspects of the laws on the use of languages in education in Belgium*" *v. Belgium (merits)*, 23 July 1968, § 9, Series A no. 6; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 40, ECHR 2005-X; and *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008).

40. The Court must decide, therefore, whether elections to the House of Peoples of Bosnia and Herzegovina fall within the "ambit" or "scope" of Article 3 of Protocol No. 1. In this connection, it is reiterated that this provision applies only to elections of a "legislature", or at least of one of its chambers if it has two or more. However, the word "legislature" has to be interpreted in the light of each State's constitutional structure (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 40, ECHR 1999-I) and, in particular, its constitutional traditions and the scope of the legislative powers of the chamber in question. Furthermore, the *travaux préparatoires* demonstrate (vol. VIII, pp. 46, 50 and 52) that the Contracting Parties took into account the particular position of certain parliaments which included non-elective chambers. Thus, Article 3 of Protocol No. 1 was carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 53, Series A no. 113). At the same time, however, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament's chambers to be filled through direct elections.

41. As regards the House of Peoples of Bosnia and Herzegovina, the Court notes that its composition is the result of indirect elections, its members being appointed by the Entities' legislatures. In addition, the Court observes that the extent of the legislative powers enjoyed by it is a decisive factor here. The House of Peoples indeed enjoys wide powers to control the passage of legislation: Article IV § 3 (c) of the Constitution specifically provides that no legislation can be adopted without the approval of both chambers. Furthermore, the House of Peoples, together with the House of Representatives, decides upon the sources and amounts of revenues for the operations of the State institutions and international obligations of Bosnia and Herzegovina and approves a budget of the State institutions (see Article IV § 4 (b)-(c) of the Constitution). Lastly, its consent is necessary before a treaty can be ratified (see Articles IV § 4 (d) and V § 3 (d) of the Constitution). Elections to the House of Peoples, therefore, fall within the scope of Article 3 of Protocol No. 1.

Accordingly, Article 14 taken in conjunction with Article 3 of Protocol No. 1 is applicable.

(ii) Compliance with Article 14 taken in conjunction with Article 3 of Protocol No. 1

42. The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among many authorities, *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (ibid., § 82).

43. Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination (see the definition adopted by the International Convention on the Elimination of All Forms of Racial Discrimination in paragraph 19 above and that adopted by the European Commission against Racism and Intolerance in paragraph 23 above). Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII, and *Timishev*, cited above, § 56).

44. In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *D.H. and Others*, cited above, § 196). The Court has also held that 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 (ibid., § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable

justification, give rise to a breach of that Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, cited above, § 10; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *D.H. and Others*, cited above, § 175).

45. Turning to the present case, the Court observes that in order to be eligible to stand for election to the House of Peoples of Bosnia and Herzegovina, one has to declare affiliation with a "constituent people". The applicants, who describe themselves to be of Roma and Jewish origin respectively and who do not wish to declare affiliation with a "constituent people", are, as a result, excluded (see paragraph 11 above). The Court notes that this exclusion rule pursued at least one aim which is broadly compatible with the general objectives of the Convention, as reflected in the Preamble to the Convention, namely the restoration of peace. When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society.

46. It is nevertheless the case that the Court is only competent *ratione temporis* to examine the period after the ratification of the Convention and Protocol No. 1 thereto by Bosnia and Herzegovina. The Court does not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system in any event does not satisfy the requirement of proportionality.

47. To begin with, the Court observes significant positive developments in Bosnia and Herzegovina since the Dayton Agreement. It is true that progress might not always have been consistent and challenges remain (see, for example, the latest progress report on Bosnia and Herzegovina as a potential candidate for European Union membership prepared by the European Commission and published on 14 October 2009, SEC(2009)1338). It is nevertheless the case that in 2005 the former parties to the conflict surrendered their control over the armed forces and transformed them into a small, professional force; in 2006 Bosnia and Herzegovina joined NATO's Partnership for Peace; in 2008 it signed and ratified a Stabilisation and Association Agreement with the European Union; in March 2009 it successfully amended the State Constitution for the first time; and it has recently been elected a member of the United Nations Security Council for a two-year term beginning on 1 January 2010. Furthermore, whereas the maintenance of an international administration as

an enforcement measure under Chapter VII of the United Nations Charter implies that the situation in the region still constitutes a "threat to international peace and security", it appears that preparations for the closure of that administration are under way (see a joint report by Mr Javier Solana, the European Union's High Representative for Common Foreign and Security Policy, and Mr Olli Rehn, European Union Commissioner for Enlargement, on "EU's Policy in Bosnia and Herzegovina: The Way Ahead" of 10 November 2008, and a report by the International Crisis Group on "Bosnia's Incomplete Transition: Between Dayton and Europe" of 9 March 2009).

48. In addition, while the Court agrees with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time may still not be ripe for a political system which would be a simple reflection of majority rule, the Opinions of the Venice Commission (see paragraph 22 above) clearly demonstrate that there exist mechanisms of power-sharing which do not automatically lead to the total exclusion of representatives of the other communities. In this connection, it is noted that the possibility of alternative means achieving the same end is an important factor in this sphere (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009).

49. Lastly, by becoming a member of the Council of Europe in 2002 and by ratifying the Convention and the Protocols thereto without reservations, the respondent State has voluntarily agreed to meet the relevant standards. It has specifically undertaken 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" (see paragraph 21 above). Likewise, by ratifying a Stabilisation and Association Agreement with the European Union in 2008, the respondent State committed itself to "amend[ing] 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 commitments" within one to two years (see paragraph 25 above).

50. Thus, the Court concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1.

(iii) The complaints under Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12

51. Having regard to its finding in the preceding paragraph, the Court considers that it is not necessary to examine separately whether there has

also been a violation of Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12 as regards the House of Peoples.

(b) As regards the Presidency of Bosnia and Herzegovina

52. The applicants relied on Article 1 of Protocol No. 12 only.

(i) The applicability of Article 1 of Protocol No. 12

53. The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination.

54. The applicants contested constitutional provisions rendering them ineligible to stand for election to the Presidency of Bosnia and Herzegovina. Therefore, whether or not elections to the Presidency fall within the scope of Article 3 of Protocol No. 1 (see *Boškoski v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 11676/04, ECHR 2004-VI), this complaint concerns a "right set forth by law" (see sections 1.4 and 4.19 of the Election Act 2001 – see paragraph 18 above) which makes Article 1 of Protocol No. 12 applicable. This has not been contested before the Court.

(ii) Compliance with Article 1 of Protocol No. 12

55. The notion of discrimination has been interpreted consistently in the Court's jurisprudence concerning Article 14 of the Convention. In particular, this jurisprudence has made it clear that "discrimination" means treating differently, without an objective and reasonable justification, persons in similar situations (see paragraphs 42-44 above and the authorities cited therein). The authors used the same term, "discrimination", in Article 1 of Protocol No. 12. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraph 18 of the Explanatory Report to Protocol No. 12). The Court does not therefore see any reason to depart from the settled interpretation of "discrimination", noted above, in applying the same term under Article 1 of Protocol No. 12 (as regards the case-law of the United Nations Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights, a provision similar – although not identical – to Article 1 of Protocol No. 12 to the Convention, see Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, N.P. Engel Publishers, 2005, pp. 597-634).

56. The lack of a declaration of affiliation by the present applicants with a "constituent people" also rendered them ineligible to stand for election to the Presidency. An identical constitutional precondition has already been found to amount to a discriminatory difference in treatment in breach of Article 14 as regards the House of Peoples (see paragraph 50 above) and,

moreover, the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol No. 12 are to be interpreted in the same manner (see paragraph 55 above). It follows that the constitutional provisions which render the applicants ineligible for election to the Presidency must also be considered discriminatory and a breach of Article 1 of Protocol No. 12, the Court not considering that there is any pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency of Bosnia and Herzegovina.

Accordingly, and for the detailed reasons outlined in paragraphs 47-49 above in the context of Article 14, the Court finds that the impugned precondition for eligibility for election to the Presidency constitutes a violation of Article 1 of Protocol No. 12.

II. THE APPLICANTS' REMAINING COMPLAINTS

A. Article 3 of the Convention

57. The first applicant submitted that his ineligibility to stand for election to the House of Peoples and the Presidency on the ground of his Roma origin effectively reduced him and other members of the Roma community as well as other members of national minorities in Bosnia and Herzegovina to the status of second-class citizens. This, in his view, amounted to a special affront to his human dignity in breach of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

58. The Court has held in previous cases that racial discrimination could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 (see *East African Asians v. the United Kingdom*, nos. 4403/70 and others, Commission's report of 14 December 1973, p. 62, § 208, Decisions and Reports 78-A, and *Cyprus v. Turkey* [GC], no. 25781/94, § 310, ECHR 2001-IV). In the present case, however, the Court observes that the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicant and that it was not designed to, and did not, humiliate or debase but was intended solely to achieve the aim referred to in paragraph 45 above.

This complaint is therefore manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4.

B. Article 13 of the Convention

59. The applicants complained under Article 13 of the Convention that they had not had an effective domestic remedy for their discrimination complaints. Article 13 provides:

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

60. The Court reiterates that Article 13 does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 135, ECHR 2009). Since the present case concerns the content of constitutional provisions, as opposed to an individual measure of implementation, the complaint is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected under Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

62. The applicants made no claim in respect of pecuniary damage. In respect of non-pecuniary damage, the first applicant claimed 20,000 euros (EUR) and the second applicant EUR 12,000. The Government maintained that the claims were unjustified.

63. The Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicants.

B. Costs and expenses

64. The first applicant was represented *pro bono* and he only claimed EUR 1,000 for his counsel's appearance at the hearing before the Court on 3 June 2009. The second applicant claimed EUR 33,321 for the entire case. This included 270 hours worked by his two counsel and another member of the legal team, Ms Cynthia Morel of the Minority Rights Group International, at EUR 82.45 per hour in preparing the application,

observations and just satisfaction claim before the Chamber and Grand Chamber, together with disbursements such as an expert report by Mr Zoran Pajić of Expert Consultancy International Ltd, meetings of the legal team with the applicant in New York and Sarajevo, and the costs of the hearing before the Grand Chamber. The applicant explained that involvement of a third lawyer, Ms Cynthia Morel, had been necessary given the range and complexity of issues to be addressed.

65. The Government maintained that the above claims were unnecessarily incurred and excessive. In particular, they contested the need for the second applicant to use foreign-based lawyers, whose fees were incomparably higher than those of local lawyers, and whose appointment had had the effect of inflating the expenses for travel and communication.

66. The Court disagrees with the Government that applicants must choose locally-based lawyers to represent them before the Court, notwithstanding the fact that such lawyers may be able to offer a service of the same quality as foreign-based lawyers (as evidenced in the present case). Accordingly, the disparity between the amounts claimed in the present case is not sufficient in itself to render the higher of them unnecessary or unreasonable. That being said, the Court considers the amount claimed by the second applicant to be excessive and awards the second applicant EUR 20,000 under this head. The first applicant's costs and expenses should be met in full.

C. Default interest

67. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Decides* unanimously to join the applications;

2. *Declares* by a majority the applicants' principal complaints as regards their ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina admissible;

3. *Declares* unanimously the applicants' principal complaints as regards their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina admissible;

4. *Declares* unanimously the remainder of the applications inadmissible;

5. *Holds* by fourteen votes to three that there has been a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards the applicants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;

6. *Holds* unanimously that there is no need to examine the same complaint under Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12;

7. *Holds* by sixteen votes to one that there has been a violation of Article 1 of Protocol No. 12 as regards the applicants' ineligibility to stand for election to the Presidency of Bosnia and Herzegovina;

8. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

9. *Holds*
   (a) by sixteen votes to one that the respondent State is to pay the first applicant, within three months, EUR 1,000 (one thousand euros) in respect of costs and expenses, to be converted into convertible marks at the rate applicable at the date of settlement, plus any tax that may be chargeable to the first applicant;
   (b) by fifteen votes to two that the respondent State is to pay the second applicant, within three months, EUR 20,000 (twenty thousand euros) in respect of costs and expenses, to be converted into convertible marks at the rate applicable at the date of settlement, plus any tax that may be chargeable to the second applicant;
   (c) unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses* unanimously the remainder of the second applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 December 2009.

Vincent Berger
Jurisconsult

Jean-Paul Costa
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

– the partly concurring and partly dissenting opinion of Judge Mijović, joined by Judge Hajiyev;

– the dissenting opinion of Judge Bonello.

J.-P.C.
V.B.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE MIJOVIĆ, JOINED BY JUDGE HAJIYEV

I. General remarks

In the *Sejdić and Finci v. Bosnia and Herzegovina* judgment, the Grand Chamber has found a violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 as regards that State's constitutional arrangements in respect of the House of Peoples, and a violation of Article 1 of Protocol No. 12 with regard to the constitutional arrangements on the State Presidency of Bosnia and Herzegovina.

Although I had a few reservations concerning the Grand Chamber's reasoning on the latter point, I had no difficulties in sharing the majority's view that the constitutional arrangements concerning the State Presidency structure amount to a violation of the prohibition of discrimination. On the other hand, and to my regret, my opinion on the former point differs significantly from the conclusion reached by the majority.

Since this is the very first case related to the general prohibition of discrimination as enshrined in Article 1 of Protocol No. 12, and a case that tackles the essence of the internal State structure of Bosnia and Herzegovina, there have been huge expectations on the part of the public. In addition, the fact that this is the very first case of its kind in the Court's case-law, in the sense that it might result in serious constitutional turmoil and rearrangements in one of the Council of Europe member States, has contributed to those expectations.

The specific characteristics not only of the creation of Bosnia and Herzegovina, but also of its accession to the Council of Europe, have further increased the importance of this case. It might be said that all of the weak features of Bosnia and Herzegovina's statehood, visible but ignored at the moment of its accession to the Council of Europe, have shown themselves to their full extent in this case.

My general remarks are firstly related to the fact that, as Judge Bonello has correctly pointed out in his dissenting opinion, the Grand Chamber has failed to analyse both the historical background and the circumstances in which the Bosnia and Herzegovina Constitution was imposed. I believe that, in so doing, the Court has set aside its previous case-law, in which it examines all the relevant factors that are important in making a final evaluation. I consider those circumstances to be particularly important in this case, because it is precisely those circumstances that led to the current State structure of Bosnia and Herzegovina.

II. Factual background

The first thing I wondered in this case was whether Bosnia and Herzegovina was totally aware of the possible consequences of ratifying all Convention Protocols when it did so.

Specifically, Bosnia and Herzegovina is one of the seventeen Council of Europe member States which have ratified Protocol No. 12. Given that thirty other member States decided not to do so, this illustrates different approaches towards Protocol No. 12 and the issues covered by it.

The two applications before us deal with the very heart of the post-war organisational structure of the State, put in place by the 1995 Constitution of Bosnia and Herzegovina, which was, from a technical point of view, a part or, more accurately, an annex to an international peace settlement – the Dayton Agreement. Once the masters of war had decided to become masters of peace, after long and difficult negotiations between political representatives of the Bosniacs, Croats and Serbs under the supervision of the international community, they created a State that was of an unprecedented shape, one that was previously totally unknown in international and constitutional law.

The Dayton Agreement constituted Bosnia and Herzegovina, comprising of two entities, while the Preamble to the Constitution reads that only Bosniacs, Serbs and Croats are constituent peoples. The other ethnic groups, which did not take sides in the conflict, were simply set aside. Their legal position, an extremely sensitive issue, was left for some calmer and politically less sensitive time.

In accordance with the Dayton Agreement constitutional arrangements, persons belonging to national (ethnic) minorities cannot be candidates for the State Presidency and the House of Peoples of the State Parliament, although these two State institutions are not the only bodies where the balance of power between three constituent peoples was designated by this settlement (see, for example, the structure of the Constitutional Court, which consists of two Bosniacs, two Croats, two Serbs and three foreign judges).

In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement, making peace in Bosnia and Herzegovina possible. In such a context, denying legitimacy to norms that may be problematic from the point of view of non-discrimination but were necessary to achieve peace and stability and to avoid further loss of human lives would be very difficult.

That is the key aspect of the sensitive nature of these applications, because the changes in the composition of specific political institutions requested by the applicants would actually require changes in the existing balance of power, which could rekindle the serious tensions that are still present in Bosnia and Herzegovina.

Aware of the necessity for constitutional reform, in 2006 the international community pushed the leading politicians of Bosnia and Herzegovina to enter into negotiations with a view to adopting an electoral system that would guarantee equal enjoyment of political rights to all citizens, irrespective of ethnicity, but these proved completely unsuccessful. Talks have now been reopened, which means that, in dealing with the instant cases, the Court is entering a highly sensitive area, one that concerns an issue that has already received tremendous public attention.

The applicants in these two cases are a Rom and a Jew. They complained that, despite possessing experience comparable to that of the highest elected officials, they were prevented by the Constitution of Bosnia and Herzegovina and the Election Act 2001 from standing as candidates for the Presidency and the House of Peoples of the Parliamentary Assembly, solely on the ground of their ethnic origin, which, in their opinion, amounted to discrimination.

III. State structure of Bosnia and Herzegovina

As noted above, the Constitution of Bosnia and Herzegovina was the result of long and difficult negotiations between representatives of the Bosniacs, Croats and Serbs, under the supervision of the international community. Its complex power-sharing arrangements concern mainly the Bosniacs, Croats and Serbs, as direct parties to the 1992-95 war, and so the main political institutions were designed to achieve a balance of power between the three constituent peoples. Other ethnic groups were not taken into consideration at that time, since they had not taken sides in the conflict. After the war these minority groups became part of all power-sharing arrangements at the Entity levels. This has not been the case at the State level, however, and that is the reason for the applicants' complaints.

Power-sharing arrangements at the State level, particularly those concerning the structure of the House of Peoples and the State Presidency, provide that only those who declare affiliation with one of the three main ethnic groups are entitled to hold a position in these two State organs. It must be added that, in the context of Bosnia and Herzegovina, ethnic affiliation is not to be taken as a legal category, since it depends exclusively on one's self-classification, which represents *stricto sensu* a subjective criterion. It actually means that everyone has a right to declare (or not) his or her affiliation with one ethnic group. It is not obligatory to do so. There is neither a legal obligation to declare one's ethnic affiliation, nor objective parameters for establishing such affiliation.

Affiliation becomes an important issue only if an individual wishes to become involved in politics. A declaration of ethnic affiliation is thus not an objective and legal category, but a subjective and political one.

IV. Violation of Article 1 of Protocol No. 12

Although I had a few reservations concerning the Grand Chamber's reasoning with regard to the violation of Article 1 of Protocol No. 12, I had no difficulties in sharing the majority's view that Bosnia and Herzegovina's constitutional arrangements concerning the State Presidency structure represent a violation of the general prohibition of discrimination.

My dissension regarding this part of the Grand Chamber's judgment arises from my expectations that the Court would use this case, as the very first of its kind, to lay down specific first principles, standards or tests that might be considered universal and applicable to future cases concerning general discrimination. Those expectations obviously turned out to be unrealistic, since the Court has merely reiterated the very same reasoning and justification as those applied in finding a violation of Article 14 with regard to the complaint concerning the constitutional arrangements on the House of Peoples.

In addition, the Court treated this complaint as being of less importance, thus creating the impression that Article 1 of Protocol No. 12 was applied only because it was not possible to apply Article 3 of Protocol No. 1. The relevant reasoning on Article 1 of Protocol No. 12 was set out in only two paragraphs, in which the Court came to the conclusion that there was no "pertinent distinction to be drawn ... between the House of Peoples and the Presidency of Bosnia and Herzegovina" with regard to discriminatory constitutional arrangements. In contrast, I believe that there were a few distinctive elements that should have been discussed.

The tripartite structure of the Bosnia and Herzegovina State Presidency is, like many other State institutions in that country, a result of the political compromise achieved by the peace accord. Its structure was intended to establish a mechanism of balance and to prevent the supremacy of any one people in the decision-making process. In my opinion, the key question that required an answer in this case was whether that tripartite structure was ever justified, and whether it continues to be justified. From the perspective of the case-law on Article 1 of Protocol No. 12, it would have been not only interesting but also very useful had the Court decided to give its view on this point. Instead, it merely reiterated the arguments concerning the tests applied in the Article 14 part of the judgment, an approach that I find disappointing.

Hypothetically speaking, were it not occurring in a State built on atrocities, massacres and bloodshed, I would be of the opinion that, even taken alone, the obligation on an individual to declare his or her affiliation with an ethnic group in order to stand as a candidate for a public position is unacceptable and sufficient to find a violation of the prohibition of discrimination based on ethnic affiliation.

Turning back to the State Presidency structure, if Bosnia and Herzegovina were a stable and self-sustainable State, the ineligibility of minorities, but also the ineligibility of all those who are unable or unwilling to declare their ethnic affiliation in order to stand as candidates for public positions would be the essence of discrimination. However, since Bosnia and Herzegovina was created as result of pressure from the international community and, fourteen years later, still does not function as an independent and sovereign State, it cannot be said that it represents a State that is sufficiently stable to withstand the above approach.

On the other hand, if nothing is done in order to improve the current situation, there is no chance that progress will occur. The elimination of mistrust among ethnicities is, in my opinion, a process that must be developed very carefully, step by step. If the time has come for a change in the post-conflict State structure (and here I emphasise again that the Court has not embarked on any such evaluation), I hope that a change in the composition of the State Presidency could be the first step. The State Presidency is an institution that represents the State as a whole[1], while the House of Peoples has an important and sensitive role in the protection of "vital national interests".

V. Violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

Regrettably, I cannot share the majority's opinion as regards Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1 for the following reasons.

First of all, the issue of the *applicability of Article 3 of Protocol No. 1* is very questionable. Article 3 of Protocol No. 1 protects the right to free elections, although there is no definite and commonly accepted answer to the question whether this covers both direct and indirect elections[2]. Relying on its case-law, however, the Court states that Article 3 of Protocol No. 1 was "carefully drafted so as to avoid terms which could be interpreted as an absolute obligation to hold elections for both chambers in each and every bicameral system" (see paragraph 40 of the judgment). At the same time, as the Grand Chamber points out, it is clear that Article 3 of Protocol No. 1 applies to any of a parliament's chambers to be filled through direct elections. Direct or indirect, it should be clarified that in Bosnia and Herzegovina, no elections are envisaged for the members of the House of Peoples. They are appointed by the Entity Parliaments, which means that the complaints before the Court are of a purely theoretical nature, since

1. See the powers of the State Presidency in the Constitution, Article V § 3.
2. In this judgment, the standpoint that it applies to both direct and indirect elections has been explained only by the *travaux préparatoires* for Protocol No. 1; see paragraph 40 of the judgment.

there have been no previous elections nor is there an obligation on the Entity Parliaments to appoint any particular candidate. The composition of the House of Peoples is not the result of an electoral process. The members of the House of Peoples are to be designated/selected by a majority in the Republika Srpska National Assembly or a majority in the Clubs of Bosniacs and Croats in the Parliament of the Federation of Bosnia and Herzegovina[1]. Given that the original version of the Constitution was written in English, even a linguistic approach confirms that we are not in the presence of elections, but of appointments. In particular, Article IV of the Constitution reads that House of Peoples "shall comprise 15 *delegates*", and that "the designated delegates shall be *selected*" by the respective Entity Parliaments[2].

The concept of the right to free elections in Bosnia and Herzegovina simply does not include *per se* the right to stand for election to the House of Peoples, since members of this House are, as noted, not elected, but designated/selected by the Entity Parliaments.

The elections would still be indirect if the lists of candidates were announced during an electoral campaign or at any other moment before their appointment (and as such were transparent to the public), or if there were any criteria they had to fulfil in order to be appointed. However, their names do not appear on electoral ballots or lists. A fact that has been totally ignored by the Court is that neither the Constitution of Bosnia and Herzegovina nor the Election Act 2001 set out the criteria that candidates must fulfil in order to stand for election to the House of Peoples. There is not a single domestic provision that prescribes the structure, political party or even political option from which candidates are to be picked[3]. It is thus theoretically possible that any individual, including those who are not even engaged in public life, could be selected. Accordingly, the procedure for designating members of the House of Peoples does not depend on their political party membership; there are no formal ties between these delegates and voters and the candidates' names are unknown to the general public, voters included, before they are nominated by members of the Entity Parliaments. What is formally needed is only their declaration of ethnic affiliation, which is of no legal relevance for anything other than their membership of the House of Peoples. Strictly speaking, it is clear that the applicants cannot be "elected", not because of their ethnicity, but because of the absence of provisions which allow for the election of delegates in general, since the members of this House are exclusively appointed.

1. See Article IV of the Constitution of Bosnia and Herzegovina.
2. This is about the distinction between the notions of "election" and "selection": linguistically, while "election" implies an unlimited choice, "selection" implies a preferable/limited one.
3. There is only one exception, which stipulates that members of the cantonal houses of peoples are to be appointed from among the members of cantonal parliaments.

Equally, a complaint might be lodged by individuals belonging to one of the three constituent peoples, claiming that there are no free elections to the House of Peoples for them either, since the only way for somebody to become a member of this House is through appointment by an Entity Parliament. Accordingly, there is no general right for anyone to stand for election to the House of Peoples and there are no elections of this kind. Consequently, if this procedure is to be established as discriminatory, could the same discrimination criteria be applied to those parliamentary systems that prescribe that second chamber seats are hereditary (as in the British House of Lords) or conditioned by public function (as in the German *Bundesrat*)? I am of the opinion that an affirmative answer in respect of such systems would be as inappropriate as it is in respect of Bosnia and Herzegovina.

The fact that the only formal condition to be fulfilled by delegates to the House of Peoples concerns one's ethnic affiliation shows that the House of Peoples was designed to secure ethnic balance in the legislature. It is a well-established fact that mechanisms of this kind made peace in Bosnia and Herzegovina possible, and it is obvious that even fourteen years later there is still no common and mutual approach towards possible constitutional rearrangements in that State[1].

My second point of disagreement with the Grand Chamber's decision on admissibility is related to the legal nature of the House of Peoples. The Grand Chamber's understanding is that it is the second chamber of the Bosnia and Herzegovina Parliamentary Assembly, a point on which I disagree.

Generally speaking, an upper house is usually distinct from the lower house in one (or more) of the following respects: it has less power than the lower house, including that of expressing a reservation on certain decisions of the lower house; it has limited powers, such as those concerning certain constitutional amendments that may require its approval; it is an advisory or "revising" chamber, so that its powers of direct action are often reduced in some way; it represents administrative or federal units; if elected, its members often sit for longer terms than those of the lower house (if composed of peers or nobles, members hold their seats for life) and if elected, they are elected in sections for staggered terms, rather than all at once.

As regards their institutional structure, there is a great variety in the way the members of an upper chamber are assembled. They can be elected directly or indirectly, appointed, selected through hereditary means, or a certain mixture of all these systems can be applied. As noted above, the

1. As noted above, talks began in 2006 on constitutional reform (the "April Package"), but these were unsuccessful. Talks have now been reopened (the "Butmir Package"), but it appears that the politicians are sticking to their previous positions.

German *Bundesrat* is quite unique in that its members are members of the cabinets of the German *Länder* who are merely delegated and can be recalled at any time, as is the British House of Lords, where the seats are partly hereditary.

As shown above, the upper chamber is, as a rule, designed to represent administrative or federal units, which is not the case in Bosnia and Herzegovina, since the House of Peoples represents not only the entities of Bosnia and Herzegovina, but also ethnicities (that is, constituent peoples). Both chambers of the Parliamentary Assembly are equal and they form two parts, which cannot function independently. Each and every draft text has to be discussed and adopted by both houses, while the special role of the House of Peoples is to protect "vital national interests".

With regard to the applicability of Article 3 of Protocol No. 1, the Grand Chamber found the extent of the legislative powers enjoyed by the House of Peoples to be decisive[1] while, in my opinion, it is quite the opposite. Specifically, both houses have the same powers[2], since all legislation "shall require the approval of both chambers"[3]. This in fact confirms that they have equal standing, although ethnic representation in the House of Peoples is of some relevance only when it comes to the vital interests of the constituent peoples: "[a] proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb delegates selected in accordance with paragraph l (a) ... Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb delegates present and voting"[4].

Constitutional provisions related to those powers that are not divided between the House of Representatives and the House of Peoples (see footnote 2 on this page) illustrate that the Parliamentary Assembly of Bosnia and Herzegovina has a unique structure that does not allow any categorisation according to commonly accepted academic models. Additionally, Article X of the Constitution provides that the Constitution

1. See paragraph 41 of the judgment.
2. Article IV § 4 of the Constitution of Bosnia and Herzegovina:
"Powers. 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."
3. See the Constitution of Bosnia and Herzegovina, Article IV § 3 (c).
4. Ibid., Article IV § 3 (e).

"may be amended by a decision of the Parliamentary Assembly", which is to be interpreted as stating that both houses are to decide on any such question.

An implied conclusion in this judgment, namely that the applicants in this case, who are of Roma and Jewish origin, are prevented from participating in the legislature of Bosnia and Herzegovina because they are not eligible to stand for election to the House of Peoples, would be wrong, since both Houses have the same powers and the applicants have the entirely plausible option of becoming members of the House of Representatives, where candidature is independent of ethnicity[1].

The House of Peoples is a veto chamber where members perceive their exclusive task as being that of defending the interests of their peoples, and that is exactly what makes it a *sui generis* mechanism. Fourteen years after the Dayton Agreement, does Bosnia and Herzegovina still need this mechanism? That is another question that should be addressed as a justification for a finding on the merits only if Article 3 of Protocol No. 1 is applicable.

To sum up, my opinion is that Article 3 of Protocol No. 1 is not applicable in this case because the right of any individual to stand for election to the House of Peoples *per se* simply does not exist in domestic law; the House of Peoples is a non-elective organ, having neither the typical characteristics nor the powers of a second chamber, and its structure places it outside the ambit of Article 3 of Protocol No. 1.

As regards *the merits of this complaint*, the main question is whether the current differential treatment is discriminatory. The definition that has been developed in the Court's case-law on Article 14 is that 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.

The majority's conclusion that the relevant constitutional provisions were not intended to establish ethnic domination, as argued by the applicants, but indeed to stop a brutal conflict and to secure effective equality between the warring parties, i.e. constituent peoples, is correct, as is the majority's conclusion that the impact of these provisions is different treatment on ethnic grounds. However, was this arrangement justified, and if yes, are the relevant grounds still present and significant? The Grand Chamber preferred to leave this question half-answered, while I thought that a detailed answer to this question would have been the most important

1. The Constitution of Bosnia and Herzegovina provides (Article IV § 2) that "the House of Representatives shall comprise 42 Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska" and "Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly".

response. Differential treatment of individuals belonging to "Others" was an issue left to be dealt with once the situation in Bosnia and Herzegovina was less sensitive, and from that perspective the Court has accepted that it was initially justified.

However, what is the situation now, fourteen years after the Dayton Agreement? Returning to the facts that initially justified the impugned arrangements and so far as losses are concerned, at least 100,000 inhabitants of Bosnia and Herzegovina disappeared or were killed during the war. Almost 1.3 million people from the pre-war population (28%) became refugees living outside Bosnia and Herzegovina. In the absence of war and allowing for the usual death, birth and migration rates, at the end of 1995 Bosnia and Herzegovina would have had 4.5 million inhabitants, while in reality there were only 2.9 million people in the country at the end of 1995. It has been fourteen years since the armed conflict ended, but is there real and significant progress as argued by the Grand Chamber?

The latest Amnesty International report on Bosnia and Herzegovina states that "13 years after the war ended an estimated 13,000 people still remained missing. The use of nationalist rhetoric increased in [Bosnia and Herzegovina] and the country continued to be deeply divided along ethnic lines"[1].

According to the Ministry of Human Rights and Refugees of Bosnia and Herzegovina, more than 1.2 million people have not yet returned to their pre-war homes. Those that have returned are often faced with inadequate access to housing and employment. About 2,700 families still live in so-called collective housing establishments. Some of the returnees have not been able to repossess their property, either because it was destroyed or because there is no willingness on the part of the authorities to let them reintegrate[2]. Nor does the political situation appear better. The State has been run by political parties bearing nationalist flags and using nationalist rhetoric. Many war-crimes suspects are still free, although there is a process of transferring war-crimes cases from the International Criminal Court for the former Yugoslavia to domestic courts. Judicial and prosecutorial authorities are still supervised and instructed by international judges and prosecutors. All these facts were sufficient reasons for the United Nations, the European Union and the Peace Implementation Council to extend (in November 2009) the mandate of the High Representative. There are other signs that the international community sees no significant progress in Bosnia and Herzegovina (for example, international military forces are still present, as is the European Union Police Mission). On official websites, many States warn their citizens not to travel to Bosnia and Herzegovina on safety grounds. The 2006 elections showed that most voters still preferred

1. See http://www.amnesty.org/en/region/bosnia-herzegovina/report-2009.
2. See http://www.mhrr.gov.ba/izbjeglice/?id=6.

nationalist rule because they felt safe being led by "their own people". Children in schools are separated[1], and cities that had a mixed population before the war are still divided. On becoming a member of the Council of Europe, Bosnia and Herzegovina undertook, among other commitments, 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". The fact that, in spite of this commitment undertaken on its accession to the Council of Europe, Bosnia and Herzegovina has not yet honoured it shows that there is no consensus among leading political parties.

In the light of the above, can one be absolutely certain of the lack of justification for these constitutional arrangements today? On the other hand, if they are still justified, do such arrangements pursue a legitimate aim? As the Venice Commission has correctly pointed out, "the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible. In such a context it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives". Peace has been achieved, but the stability factor remains questionable. It may be that, as pointed out by Judge Feldman of the Bosnia and Herzegovina Constitutional Court in his concurring opinion, "... [I regard] the justification as being temporary rather than permanent, ... but the time has not yet arrived when the State will have completed its transition away from the special needs which dictated the unusual architecture of the State under the Dayton Agreement and the Constitution of Bosnia and Herzegovina"[2]. In *Ždanoka v. Latvia*[3], the Court found that "it is not surprising that a newly established democratic legislature should need time for reflection in a period of political turmoil to enable it to consider what measures were required to sustain its achievements". In the same judgment[4], the Court further stated that the domestic authorities should be left "sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions, including the national parliament, and to answer the question whether the impugned measure is still needed ..." Are the special constitutional arrangements in Bosnia and Herzegovina still deemed necessary and can the current situation still be justified, despite the passing

1. See Council of Europe Monitoring Report, 2008, SG/Inf(2008)2.
2. See http://www.ustavnisud.ba/eng/odluke/povuci_pdf.php?pid=67930 for the concurring opinion of Judge Feldman to the decision of the Constitutional Court of Bosnia and Herzegovina, AP-2678/06.
3. See *Ždanoka v. Latvia* [GC], no. 58278/00, § 131, ECHR 2006-IV.
4. Ibid., § 134.

of time? Is it up to the European Court of Human Rights to determine when the time for change has arrived? I would hesitate to give a firm and definite answer to these questions. "Identity through citizenship" would be a desirable change, but ethnic distinction, in the Court's case-law, is considered unnecessary and therefore discriminatory where the same result (legitimate aim) could be achieved through a measure that does not rely on a racial or ethnic differentiation, or on the application of criteria other than those based on birth[11]. However, what other method would maintain the ethnic balance and build the confidence that is so needed in Bosnia and Herzegovina? The Court has not answered this question either; it concludes only that "the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore breached Article 14 taken in conjunction with Article 3 of Protocol No. 1" (see paragraph 50 of the judgment).

Accordingly, the test of proportionality between the means employed and the aim sought to be realised in this case has not been tried at all. I see this as a missed opportunity to provide more decisive and convincing arguments or at least a ground for comparison with other member States. The law of most, if not all, member States of the Council of Europe provides for certain distinctions based on nationality with regard to certain rights and the Court's case-law allows a certain margin of appreciation to national authorities in assessing whether and to what extent differences justify a different treatment in law[22]. Additionally, the scope of the margin of appreciation in the Court's case-law varies "according to the circumstances", as pointed out in *Rasmussen v. Denmark*[33]. As the Court has found, "[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision"[44]. For the sake of the Court's case-law, it would have been very interesting to see how far the Court would have interpreted the margin of appreciation left to the State in this case.

VI. Costs and expenses

Finally, I disagree with the majority's decision to award the second applicant 20,000 euros (EUR) in respect of costs and expenses, while the first applicant was awarded only EUR 1,000. This discrepancy was

1. See *Inze v. Austria*, 28 October 1987, § 44, Series A no. 126.
2. See *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, Series A no. 113, and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, ECHR 2008.
3. See *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87.
4. See *Hirst v. the United Kingdom* (*no. 2*) [GC], no. 74025/01, § 61, ECHR 2005-IX.

explained by the fact that the second applicant's team of representatives included three international members and/or experts and that they held meetings in New York and Sarajevo, while the first applicant was represented *pro bono* and claimed only EUR 1,000 for his counsel's appearance at the hearing before the Court[1]. Since the submissions of both applicants were of comparable quality, I find it simply unfair to award them drastically different amounts.

1. See paragraph 64 of the judgment.

DISSENTING OPINION OF JUDGE BONELLO

On principle and in the abstract, I cannot but share the reasoning of the majority as to the significance of non-discrimination in securing the enjoyment of electoral rights. I voted, with major reservations, to find the two applications admissible. But I also voted, with fewer hesitations, against finding a violation of the Convention. These two cases may appear to be the simplest the Court has had to deal with to date, but they may well be, concurrently, among the more insidious. There is nothing so obvious as finding damnable those provisions which, in a constitutional set-up, prevent Roma and Jews from standing for election. So far, an open and shut violation, hardly worth wasting time on.

Behind this invitation to get on with more challenging business, however, lurk issues which have disturbed me deeply and to which, I confess, I heard no satisfactory answers from the Court. Certainly, persuasive answers exist, were the Court to shove history out of its front door. I believe the present judgment does precisely that: it has divorced Bosnia and Herzegovina from the realities of its own recent past.

After the extravagantly violent events of 1992 which witnessed horrific blood baths, ethnic massacre and vendettas without frontiers, the international community intervened: firstly in an attempt to achieve a truce between Bosniacs, Serbs and Croats, and later a more permanent settlement – the Dayton Peace Accords of 1995. These were hammered out in protracted and persistent negotiations which aimed at creating institutional bodies based almost exclusively on systems of checks and balances between the three belligerent ethnicities. It was ultimately a most precarious equilibrium that was laboriously reached, resulting in a fragile tripartite symmetry born from mistrust and nourished on suspicion.

Only the action of that filigree construction extinguished the inferno that had been Bosnia and Herzegovina. It may not be perfect architecture, but it was the only one that induced the contenders to substitute dialogue for dynamite. It was based on a distribution of powers, tinkered to its finest details, regulating how the three ethnicities were to exercise power-sharing in the various representative organs of the State. The Dayton Agreement dosed with a chemist's fastidiousness the exact ethnic proportions of the peace recipe.

Now this Court has taken it upon itself to disrupt all that. Strasbourg has told both the former belligerents and the peace-devising do-gooders that they got it all wrong. They had better start all over again. The Dayton formula was inept, the Strasbourg non-formula henceforth takes its place. Back to the drawing board.

The questions I ask myself are closely linked with both the admissibility and the merits of the two applications: does it fall within this Court's remit to behave as the uninvited guest in peacekeeping multilateral exercises and

treaties that have already been signed, ratified and executed? I would be the first to want the Court not to be too small for its ideals. I would be the last to want the Court to be too big for its boots.

A second question follows: the Court has almost unlimited powers when it comes to granting remedies to established violations of Convention-acknowledged human rights – and that surely is as it should be. But do these almost unlimited powers include that of undoing an international treaty, all the more so if that treaty was engineered by States and international bodies, *some of which are neither signatories to the Convention nor defendants before the Court in this case*? More specifically, does the Court have jurisdiction, by way of granting relief, to subvert the sovereign action of the European Union and of the United States of America, who together fathered the Dayton Peace Accords, of which the Bosnia and Herzegovina Constitution – impugned before the Court – is a mere annex? I do not offer facile answers to these questions, but believe them to be cogent enough for the Court to have tackled them preliminarily and in some depth. It did not.

Again, one cannot possibly disagree with the almost platitudinous Preamble to the Convention that human rights "are the foundation of peace in the world". Sure they are. But what of exceptionally perverse situations in which the enforcement of human rights could be the trigger for war rather than the conveyor of peace? Are the rights of the two applicants to stand for election so absolute and compelling as to nullify the peace, security and public order established for the entire population – including themselves? Is the Court aware of its responsibility in reopening the Dayton process, in order to bring it into line with its judgment? And will it face up to the enormities of failure, should the new Strasbourg dawn fail to turn up for its appointment?

The whole structure of the Convention is based on a primordial sovereignty of human rights, but, saving the very core rights (to which that of standing for election certainly does not belong), always subject to their exercise in conformity with the rights of others and with the overriding social good. I cannot see the Convention wanting the applicants to stand for election come hell or high water. Election candidates, even with Armageddon as the price.

I would be the first to bellow how invaluable the values of equality and non-discrimination are – but then national peace and reconciliation are at least equally so. The Court has canonised the former and discounted the latter. With all due respect to the Court, the judgment seems to me an exercise in star-struck mirage-building which neglects to factor in the rivers of blood that fertilised the Dayton Constitution. It prefers to embrace its own sanitised state of denial, rather than open its door to the messy world outside. Perhaps that explains why, in the recital of the facts, the judgment declined to refer even summarily to the tragedies which preceded Dayton and which ended exclusively on account of Dayton. The Court, deliberately

or otherwise, has excluded from its vision not the peel, but the core of Balkan history. The Court felt compelled to disgrace the Dayton Constitution, but has not felt compelled to put something equally peace salving in its place.

I also question the Court's finding that the situation in Bosnia and Herzegovina has now changed and that the previous delicate tripartite equilibrium need no longer prevail. That may well be so, and I just hope it is. In my view, however, a judicial institution so remote from the focus of dissention can hardly be the best judge of this. In traumatic revolutionary events, it is not for the Court to establish, by a process of divination, when the transitional period is over, or when a state of national emergency is past and everything is now business as usual. I doubt that the Court is better placed than the national authorities to assess the point in time when previous fractures consolidate, when historical resentments quell and when generational discords harmonise. I find that claims such as these, arguably based on self-delusory wishful thinking, show little or no respect for the inexhaustible resources of rancour. The Court does ill to shut its mind to histories in which hate validates culture.

The Court has ordered the respondent State to put the Dayton Peace Accords in the liquidiser and to start looking for something else. I, for my part, doubt that any State should be placed under any legal or ethical obligation to sabotage the very system that saved its democratic existence. It is situations such as these that make judicial self-restraint look more like a strength than a flaw.

The Court has repeatedly accepted that the enjoyment of the majority of basic human rights – not least, the right to stand for election – is subject to intrinsic restrictions and extrinsic curtailment. It can be abridged for objective and reasonable considerations. The exercise of fundamental rights can suffer limitations for the purposes of security and public order and in keeping with the general interest of the community. It can shrink as a consequence of exceptional historical realities, such as terrorism and organised crime or in the aftermath of national emergencies.

Strasbourg has, over the years, approved quite effortlessly the restriction of electoral rights (to vote in or stand for elections) based on the widest imaginable spectrum of justifications: from absence of language proficiency[1] to being in detention[2] or having previously been convicted of a serious crime[3]; from a lack of "four years' continuous residence"[4] to

1. *Clerfayt and Others v. Belgium*, no. 27120/95, Commission decision of 8 September 1997, Decisions and Reports (DR) 90, p. 35.
2. *Holland v. Ireland*, no. 24827/94, Commission decision of 14 April 1998, DR 93-A, p. 15.
3. *H. v. the Netherlands*, no. 9914/82, Commission decision of 4 July 1983, DR 33, p. 242.
4. *Polacco and Garofalo v. Italy*, no. 23450/94, Commission decision of 15 September 1997, DR 90-A, p. 5.

nationality and citizenship requirements[1]; from being a member of parliament in another State[2] to having double nationality[3]; from age requirements[4] to being under 40 years old in senate elections[5]; from posing a threat to the stability of the democratic order[6] to taking the oath of office in a particular language[7]; from being a public officer[8] to being a local civil servant[9]; and from the requirement that would-be candidates cannot stand for election unless endorsed by a certain number of voters' signatures[10] to the condition of taking an oath of allegiance to the monarch[11].

All these circumstances have been considered sufficiently compelling by Strasbourg to justify the withdrawal of the right to vote or to stand for election. But a clear and present danger of destabilising the national equilibrium has not. The Court has not found a hazard of civil war, the avoidance of carnage or the safeguard of territorial cohesion to have sufficient social value to justify some limitation on the rights of the two applicants.

I do not identify with this. I cannot endorse a Court that sows ideals and harvests massacre.

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1. *Luksch v. Italy*, no. 27614/95, Commission decision of 21 May 1997, DR 89-B, p. 76.
2. *M. v. the United Kingdom*, no. 19316/83, Commission decision of 7 March 1984, DR 37, p. 129.
3. *Ganchev v. Bulgaria*, no. 28858/95, Commission decision of 21 November 1966, DR 87-A, p. 130.
4. *W., X., Y. and Z. v. Belgium*, nos. 6745/74 and 6746/74, Commission decision of 30 May 1975, Yearbook 18, p. 236.
5. Ibid.
6. *Ždanoka v. Latvia* [GC], no. 58278/00, ECHR 2006-IV.
7. *Fryske Nasjonale Partij and Others v. the Netherlands*, no. 11100/84, Commission decision of 12 December 1985, DR 45, p. 240.
8. *Gitonas and Others v. Greece*, 1 July 1997, § 40, *Reports of Judgments and Decisions* 1997-IV.
9. *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 75, *Reports* 1998-VI.
10. *Asensio Serqueda v. Spain*, no. 23151/94, Commission decision of 9 May 1994, DR 77-B, p. 122.
11. *McGuinness v. the United Kingdom* (dec.), no. 39511/98, ECHR 1999-V.