OPEN SOCIETY JUSTICE INITIATIVE

VIA FACSIMILE

August 15, 2008

T.L. Early, Section Registrar
Office of the Registry
European Court of Human Rights
Council of Europe
F-67075 Strasbourg CEDEX
France
+33 388 41 27 30

RE: **Application nos. 27996/06 and 34836/06**
Sejdíc and Finci v. Bosnia and Herzegovina

Dear Mr. Early,

The Open Society Justice Initiative hereby submits its written submission in the above-referenced case, in accordance with the June 13, 2008 letter granting us leave to do so. A paper copy has been send via DHL.

Please do not hesitate to contact us at + 1 (212) 548-0157 with any questions or concerns.

Sincerely,

Robert O. Varenik
Acting Executive Director

Enclosure:/

The Open Society Justice Initiative is a joint initiative of Open Society Institute, New York and Open Society Institute, Budapest.
400 West 59th Street, New York, New York 10019, USA ▮ Tel: 1 (212) 548-0600 ▮ Fax: 1 (212) 548-4662
Oktober 6.u. 12, H-1051 Budapest, Hungary ▮ Tel: (+36-1) 327-3100 ▮ Fax: (+36-1) 327-3103
No. 32/Plot 1266, Amazon Street, Off Alvan Ikoku Way, Maitama, P.O. Box 11363, Garki GPO, Abuja, Nigeria ▮ Tel: (+234-9) 413-3771 ▮ Fax: (+234-9) 413-3772
1120 19th Street, N.W., 8th Floor, Washington, DC 20036 ▮ Tel: 1 (202) 721-5600 ▮ Fax: 1 (202) 530-0128
5th/4th Floor Cambridge House, 100 Cambridge Grove, Hammersmith, London W6 0LE, United Kingdom ▮ Tel: (+44) 207 031-0200 ▮ Fax: (+44) 207 031-0201

www.justiceinitiative.org

Third Party Observations

European Court of Human Rights

Fourth Section

in the cases of

Dervo SEJDIĆ and Jakob FINCI

against

Bosnia and Herzegovina

Applications nos. 27996/06 and 34836/06

15 August 2008

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JUSTICE INITIATIVE

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I. Introduction

1. This third party submission concerns the cases of Sejdić and Finci v. Bosnia and Herzegovina pursuant to Article 36(2) of the European Convention of Human Rights ("the Convention") and Rule 44 of the Rules of the Court European Court of Human Rights ("the Court").

   The Court has summarized the factual background of the cases as follows:

   > "The applicants, Mr Dervo Sejdić and Mr Jakob Finci, are citizens of Bosnia and Herzegovina who live in Sarajevo. [...]Mr Dervo Sejdić is a Rom and Mr Jakob Finci a Jew. They held in the past and still hold prominent public positions. On 3 January 2007 Mr Jakob Finci obtained a written confirmation by the Central Election Commission that he was ineligible to stand for election to the Presidency and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina because of his Jewish origin."

   The Applicants' complaints before this Court are that:

   > "[b]ecause, despite possessing experience comparable to the highest elected officials, they are prevented by the Constitution of Bosnia and Herzegovina, and the corresponding provisions of the Election Act 2001, from being candidates for the Presidency and the House of Peoples of the Parliamentary Assembly solely on the ground of their ethnic origin. They invoke Articles 3, 13 and 14 of the Convention, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 to the Convention."

2. The constitution of Bosnia and Herzegovina, adopted as part of the Dayton Peace Accords in 1995, provides that Serbs, Croats and Bosniaks are the 'Constituent Peoples' of the country. Election to the House of Peoples of the Parliamentary Assembly, the Chair and Vice-chair of the Houses of the Parliamentary Assembly and the Presidency of Bosnia and Herzegovina is limited only to the members of these three groups. Members of all other ethnic groups, such as Roma, Jews, and other national minorities, together with those who do not declare affiliation with any ethnic group, are known as 'the Others' and totally excluded from these public offices.

3. This submission argues that this exclusion from political participation and representation based on race and /or ethnic identity violates Article 14 of the Convention,[1] in conjunction with Article 3 of Protocol No. 1 of the Convention.[2] It also claims that the system of political representation set out in the Bosnian constitution violates the general prohibition of discrimination on grounds of race and/or ethnicity provided for as an independent right under Article 1 of Protocol No. 12 to the Convention.[3]

4. We argue that in a democratic state, governed by the rule of law with respect for fundamental rights, effective equality as regards political participation and representation should be guaranteed among

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[1] Article 14 – Prohibition of discrimination:
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[2] Protocol 1, Article 3 – Right to free elections:
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.

[3] Protocol 12, Article 1 – General prohibition of discrimination:
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.

citizens of the same State Party to the Convention. In other words, all citizens should have materially the same opportunities to stand for public office and to vote for representatives of their choice, fully participating in the political process.

5. A core element of citizenship of a State is that its holders enjoy substantively the same political rights and duties: equal opportunities for political participation and representation are key constitutive elements of citizenship. Distinctions between the political rights of groups of citizens may be made in order to guarantee representation and participation, but absolute bars on participation may be (temporarily) made only on the basis of incompetence/incapacity (e.g., mental incapacity, minors, those under legal guardianship and those who fail to meet minimum eligibility criteria, such as residence) or felony disenfranchisement (e.g., certain classes of convicted criminals).[4] Ethnicity is a presumptively invalid criterion upon which to restrict political participation and representation; to do so undermines the legal meaning of citizenship itself, as well as the principle that human beings possess human rights free of adverse discriminatory racial and ethnic distinctions.[5]

6. Arrangements to ensure political representation of specific groups are permitted when they advance substantive equality. However, this brief argues that when such arrangements require the exclusion of other groups on the basis of race or ethnicity, the distinct classes of citizenship thereby created are by definition discriminatory.

II. Effective Political Participation and Representation Is a Constitutive Element of Citizenship

Scope of Exercise of Citizenship Rights

7. Crucial to the modern principles of citizenship and human rights is that, among citizens of the same state, substantively equal rights apply, without disabilities on the basis of ethnic or religious group membership. One of the key rights that citizens enjoy is political participation and representation, including the right to stand for election for public office. This is a long established principle, of which it has been written:

> "To be a citizen...was to be part of a political community...The essential feature of citizenship...was that the citizen, and only the citizen, was entitled by law to take a part in the government of his community."[6]

8. U. Preuss, professor of law and politics at the Berlin Free University, has articulated the constituent elements of citizenship in both the legal and political context as follows:

> ...(2) Citizenship denotes a legal status according to which the relevant individuals are both empowered and protected by equal rights. This is the legal dimension of citizenship. Its polemical meaning is directed against privileges, status hierarchies and the dominance of local customs as the expression of domination of local lords.

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[4] Cf. ECtHR [GC], *Hirst v the United Kingdom (No. 2),* App. No. 74025/01, 6 October 2005, §§ 56-62.

[5] See the Universal Declaration of Human Rights, Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. and Article 21: : "(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

[6] Dagger, Richard 'Metropolis, Memory, and Citizenship', in Engin F. Isin (ed.) Democracy, Citizenship, and the Global City, Routledge (2000), pp. 25-47.

(3) Citizenship embodies the right (the duty, the virtue) of active participation in the political process...This is the political dimension of citizenship."[7]

9. Political participation is one of the rights and responsibilities that maintains the legal bond between the citizen and the state. In most jurisdictions, the rights to vote, to be elected and to stand for office are what most clearly distinguish a citizen from a non-citizen.[8] Restrictions on these rights, particularly on the suspect grounds of race and ethnicity, are not only discriminatory, but undermine the meaning of citizenship itself.

10. Aside from being an important and universally understood right linked with citizenship, political participation is particularly important for ethnic/national minorities; it is essential to overcoming the marginalization of these groups and bringing them into the mainstream. It is through the political process that minority groups may counter the view of autochthonous majority populations that they do not really "belong" to the national community.

Importance of Non-Discrimination in the Exercise of Political Rights

11. There is no European case-law that directly addresses the current case, since statutory exclusion from the political process on grounds of ethnicity has occurred nowhere in present-day Europe but Bosnia. However, in response to the ethnic conflicts in Europe in the 1990s, the OSCE's highly-regarded former High Commissioner for National Minorities, Max van der Stoel, conducted years of intensive work on the problems of minority groups. One of his initiatives culminated in the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life ("Lund Recommendations"). The principles of the Lund Recommendations highlight the importance of political participation for national/ethnic minorities.[9]

Section I, Article 1 of the Lund Recommendations states:

"1) Effective participation of national minorities in public life is an essential component of a peaceful and democratic society.... These Recommendations aim to facilitate the inclusion of minorities within the state and enable minorities to maintain their own identity and characteristics, thereby promoting the good governance and integrity of the State [quoted in the application].

...

7) Experience in Europe and elsewhere demonstrates the importance of the electoral process for facilitating the participation of minorities in the political sphere. States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and stand for office without discrimination."

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[7] The ambiguous meaning of citizenship, Ulrich K. Preuss, Professor of Law and Politics, Free University Berlin, Paper presented at the University of Chicago Law School to the Center for Comparative Constitutionalism.

[8] See *mutatis mutandis* Article 5 of the ICERD, Article 5 which provides that:

"[S]tates 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:[...][P]olitical 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."

CERD's General Recommendation 20 declared that the right to vote and the right "to stand for election" are the rights of all citizens. In General Recommendation 29, the CERD asserted that states must take measures to ensure that members of "descent-based communities" have the right to "participate in elections, to vote and stand for election on the basis of equal and universal suffrage, and to have due representation in Government and legislative bodies."

[9] The Lund Recommendations on the Effective Participation of National Minorities in Public Life. Commissioned by the OSCE High Commissioner on National Minorities, 1 September 1999, *available at* http://www.osce.org/documents/henm/1999/09/2698_en.pdf.

12. Four of the Lund Recommendations were elaborated in 2001 as the "OSCE Guidelines to Assist National Minority Participation in The Electoral Process." These Guidelines make clear that conditional political participation arrangements must not restrict the rights of minority groups on grounds of race or ethnicity because such arrangements threaten minority group participation:

> "The following are examples of how eligibility requirements, in general, may discriminate against persons belonging to national minorities:
> • citizenship is often the fundamental requirement for eligibility…if ethnicity is a requirement for citizenship it may discriminate against persons who belong to national minorities that do not share that ethnic origin;
> […]
> The right to stand for office
> • The right to stand for public office should be constitutionally guaranteed. Restrictions on the right should be carefully scrutinized in order to ensure that persons belonging to national minorities are not barred from office or standing for office. While language regulations may be established for the proceedings of public institutions, including parliamentary institutions, the exclusion on linguistic grounds of anyone to stand for office is in violation of Article 25 of the ICCPR and, more simply, interferes with the freedom of the electorate to choose their representatives."[10]

13. The emphasis placed on political participation in the Lund Recommendations and the subsequent OSCE Guidelines clearly indicates that political participation is a critical aspect of citizenship itself. Citizens who are not permitted to take an active part in the political process become second-class citizens—in effect, they are only residents on the state's territory, citizens in name only, since the citizenship they possess is missing a critical functional element. Barring a person from active political participation and representation erodes the bond between that person and the State of which he or she is a citizen.

14. In addition to being a key constitutive element of citizenship, political participation is an essential means by which citizens assert and protect their human rights by expressing their interests and seeking remedies for their problems through the ballot box. Racial, ethnic or religiously-defined prohibitions on exercising political rights, failing a compelling objective justification, violate the fundamental right to be free from discrimination and heighten the vulnerability of minority groups to human rights violations.

III. Article 14 of the Convention in Conjunction with, Article 3 of Protocol No. 1, and Protocol 12 to the Convention both Prohibit Ethnic Discrimination in the Exercise of Political Rights

15. The key question in the present cases is how the principle of non-discrimination between citizens in the exercise of the political rights is expressed in the ECHR framework, in particular in view of Protocol 12 to the Convention.

16. The Court has shown itself sensitive to the dangers of majoritarian impulses causing violations of minority political rights. The Court's position was summed up in the *Gorzelik* case:

> "[A]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be

[10] OSCE Guidelines to Assist National Minority Participation in The Electoral Process, Warsaw, January 2001, available at http://www.osce.org/documents/hcnm/2001/01/240_en.pdf .

achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position." [11]

17. The Court has established that although the right to stand for election is important under the Convention, it is not absolute. However, any limitation must not curtail the right so as to undermine its very essence and deprive it of effectiveness. Consequently, the restrictions imposed should be in pursuit of a legitimate aim and the means employed must not be disproportionate.[12]

18. To our knowledge no regional or international court or monitoring body has ever held, either in core holdings or *obiter dicta*, that total exclusion based on race or ethnicity could ever be acceptable under international law. Although the issue of total exclusion from the right to stand for election and assume highest public office on racial or ethnic grounds has not been before this Court in this form, the standard established by this Court under Article 14 of the Convention is one of a particularly rigorous scrutiny of racial and ethnic distinctions affecting the exercise of rights under the Convention, and, under Protocol 12, in relation to any right guaranteed under national law.

19. In the *Aziz* case, the closest on point to the present cases, the Court considered an arrangement which effectively barred an ethnic minority group from voting in their place of residence. Specifically, the Court considered an arrangement in which members of the Turkish-Cypriot community living in the Cypriot government-controlled part of Cyprus were excluded from the Greek-Cypriot electoral list, and thus could not vote in parliamentary elections as provisions for a separate, Turkish-Cypriot list had not been implemented. The Court concluded that this gap in the opportunity for political participation between Turkish and Greek Cypriots could not be justified on reasonable and objective grounds.[13] Applying the abovementioned strict standard, the Court emphasized that the differential treatment based upon the Applicant's belonging to the Turkish-Cypriot minority was impermissible. The Court did not pronounce whether separate lists for the two ethnic communities would have been acceptable, but the *de facto* exclusion of voters of Turkish ethnic origin is analogous to the exclusion of non-"Constituent Peoples" in the cases at hand.

20. The Court's case-law on racial and ethnic discrimination reflects very strong, clear principles. The Court has found that ethnic discrimination is "a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction." and that "[i]n any event, 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."[14] Thus, while it remains possible that distinctions on grounds of ethnicity are permissible in order to achieve equality and fairly distribute political power among citizens, absolute exclusions on the grounds of ethnicity are presumptively invalid.

IV. The Bosnian Restriction on Political Participation of Non-Constituent Groups Is not Proportionate and Necessary and thus Fails the Justification Test under the Convention

Principles and Criteria

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[11] ECtHR, *Gorzelik v Poland*, App. No. 44158/98, 17 February 2004, §§ 90 and 92.
[12] See most recently, ECtHR, *Sarukhanyan v. Armenia*, App. No. 38978/03, 27 May 2008, § 38.
[13] ECtHR, *Aziz v. Cyprus*, App. no. 69949/01, 26 April 2004.
[14] ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, §§ 56 and 58.

22. While the Court has rejected distinctions on racial/ethnic grounds, its jurisprudence affirms that some measures involving differential treatment can be justified and fall within the scope of justified exceptions under European human rights law. The case at hand does not fall within this scope, however.

23. The general criteria allowing for differential treatment under Article 14 and Protocol 12 of the Convention dictate that such treatment must be in pursuit of a "legitimate aim," and that there must be a "reasonable proportionality between the means employed and the aim sought to be realised."[15] States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations may justify differential treatment, bearing in mind the country-specific context.[16]

24. Protocol 12 of the Convention is intended to follow the jurisprudential line established by the Court under Article 14 of the Convention, using the same definition of discrimination and applying the same criteria for exceptions to the principle of equal treatment.[17]

Legitimate Aim

25. The 1995 Dayton Peace Accords reflect the interest in maintaining a balance between the different major ethnic groups following the atrocities of the war preceding Dayton. The context of the Accords and the situation in Bosnia at the time of signing will not be recounted here, but we acknowledge that stopping the civil war in Bosnia and enshrining a balance of power between the main warring ethnic groups are legitimate aims.

26. The critical issue before the Court is not the legitimacy of the aims of the Dayton Accords, but whether the measures to achieve that aim are pertinent, proportionate and necessary.

The Government Bears the Burden of Proof to Demonstrate that the Exclusionary Measures Are Proportionate and Necessary in Present-Day Circumstances

27. The Court has held that in order to pass the proportionality test under Article 14 of the Convention, measures involving differential treatment on the basis of ethnicity must be capable of effectively achieving the relevant legitimate aims, i.e. they must address a pressing social need, and be both pertinent and effective in achieving those aims.[18] Where the same result could be achieved through a

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[15] ECtHR [GC], *D.H. and Others v the Czech Republic*, App. No. 57325/00, § 196.

[16] Cf. *Aziz v Turkey, supra*, § 34 and see discussion on margin of appreciation below in §§ 39-43.

[17] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177, Explanatory Report:

> "18. [T]he notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the judgment in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom*: "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'" (judgment of 28 May 1985, Series A, No. 94, paragraph 72). The meaning of the term "discrimination" in Article 1 is intended to be identical to that in Article 14 of the Convention. The wording of the French text of Article 1 ("sans discrimination aucune") differs slightly from that of Article 14 ("sans distinction aucune"). No difference of meaning is intended; on the contrary, this is a terminological adaptation intended to better reflect the concept of discrimination within the meaning of Article 14 by bringing the French text into line with the English (see, on this precise point, the Court's judgment of 23 July 1968 in the *Belgian Linguistic case*, Series A, No. 6, paragraph 10).

[18] See, *mutatis mutandis*, ECtHR, *Abdulaziz and Others v United Kingdom, supra*, § 81.

measure that does not rely on a racial or ethnic differentiation, the ethnic distinction is considered unnecessary and therefore discriminatory.[19]

28. This Court has held that where distinctions are made on the basis of race or ethnicity, the notion of objective and reasonable justification must be interpreted strictly. Once the applicant has shown a difference in treatment based on ethnicity, the burden shifts to the Government, which must prove that it is justified.[20]

29. A crucial element in evaluating whether the exclusion in question is "justified" is the time elapsed since the events which ostensibly necessitated them. In Section II above we have set out the importance of effective political participation, in particular the right of citizens to stand for public office. We submit that any restriction on this right must be considered in the present context to assess whether the current situation justifies its infringement.

30. Thus, regardless of whether the exclusion of minority groups from standing for federal public office and the House of Peoples was at the time of the Dayton Peace Accords a legitimate and proportionate measure, such an exclusion must now be evaluated in the light of the significantly changed circumstances and time elapsed since the end of hostilities and the institution of the Bosnian Constitution under Dayton.

31. The proposition that differential treatment of minority racial or ethnic groups must be judged in light of current circumstances rather than past ones rests on the fact that such distinctions are inherently suspect and should be scrutinized carefully. The Court has acknowledged on many occasions that it should not rely on past pronouncements, but examine ethnic-based distinctions in the light of evolving conditions and circumstances.[21] No less an authority than the former High Representative for Bosnia and Herzegovina, Paddy Ashdown, made precisely this point when reflecting on his powers to 'remove'[22] hard-line officials from the domestic political process:

> "The international community felt strongly that... it would intolerable to preside over a post war environment in which...hard-line officials could sabotage the provisions of the Dayton Agreement with impunity, or cripple various governments and parliamentary assemblies, or hobble the legislative process...
> But is all this still justifiable in 2004? And is it compatible with the ECHR and other relevant conventions?
> Removals certainly amount to depriving individuals of certain of their rights that are listed under the ECHR and its additional protocols (such as the right to stand for election, right to an effective judicial remedy). Such deprivations are usually accepted on an exceptional and temporary basis in order to achieve a legitimate goal.[...]
> I am clear that removal decisions cannot and must not apply in perpetuity. The removal decisions specifically acknowledge the temporary nature of the ban they impose on individuals."[23]

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[19] See, e.g., ECtHR, *Inze v Austria*, App. No. 8695/79, 29 October 1987, § 44, in which the European Court found that proposed legislative amendments "show that the aim of the legislation in question could also have been achieved by applying criteria other than that based on [birth in or out of wedlock]".

[20] see, among other authorities, ECtHR [GC], *Chassagnou and Others v France*, App. Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999 ,§§ 91-92; and *Timishev v Russia, supra*, § 57.

[21] See, e.g. ECtHR, *Mazurek v France*, App. no. 34406/97, 1 February 2000§ 49: "The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions."

[22] The removal / disenfranchisement of public officials and politicians has come to be seen as an immediate and effective sanction in the absence of efficient courts and against the backdrop of an inadequate system of parliamentary or popular political accountability. Source: Speech by the High Representative, Paddy Ashdown, to the Venice Commission, 8 October 2004, available at www.ohr.int, p. 5.

[23] Ibid, p. 7.

32. The High Representative's power to exclude individuals is of a far more limited nature than the absolute exclusion of 'the Others' from the political process that is challenged in the instant cases. If the indefinite nature of powers to 'remove' individuals from political participation is problematic, it is even less justifiable in a provision that affects entire groups defined by ethnicity.

33. In addition to considering whether the exclusion challenged here is presently justified, we must look at the present-day effects of the exclusion of 'the Others' from active political participation and representation at the federal level. The existing system effectively refuses to acknowledge smaller minority groups (such as the Roma or Jews) and those Bosnians who are multi-ethnic or reject any ethnic identity. This affects the right to stand for election most obviously but it produces other effects on these minorities in Bosnian society, notwithstanding that they are its legal citizens. As Minority Rights Group (MRG) points out in its comparative electoral systems report, "[t]he preoccupation with three segments has produced bleak prospects for longer-term integration and democratic consolidation."[24]

34. The MRG report explains that the electoral system introduced in Bosnia through the Dayton Accords has separated and segmented Bosnian society, ultimately making ethnic identity and political-physical separation the preeiminent political issues in Bosnia. The system does not permit the evolution of moderate multi-ethnic parties which might sow the seeds of a return to shared nationhood in the Balkans.[25]

35. In judging the proportionality and justifiability of this arrangement, it must be noted that if candidates from specific groups may never stand for election campaign discourse, political party platforms and in all likelihood government policies will consistently underrepresent certain minority interests and policy proposals. Measures to protect minority interests are likely to be overlooked, because the candidates whose natural constituencies and personal experiences would make them advocates for such issues have been barred from elected office.

36. It is particularly striking that notwithstanding Bosnia's recent history, ethnic minority groups are excluded from the political participation that would permit them to overcome past marginalization and to protect their rights through the political process. In light of these consequences, a scheme of absolute exclusion of specific ethnic groups is simply not tenable in the long-term: it not only harms the affected groups but undermines national unity. Where differences between ethnic groups are enshrined in law, social divisions are likely to deepen and political stability, far from being bolstered, will be seriously undermined.

37. The analysis of Nedim Ademović, Senior Legal Advisor at the Constitutional Court of Bosnia and Herzegovina, is particularly telling:

> "In some states with problems concerning group rights, the constitution creators often provide for a so-called "quota system" according to which the right of the group to equal participation is guaranteed in certain government bodies... The right of the group to participation in government (the "quota system") is permissible only if it can be proven that it is the only "means" of protecting a certain constitutionally and legally significant aspect of group identity (in accordance with the principles of public interest and proportionality). Otherwise, the citizen is being discriminated against...."[26]

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[24] Minority Rights Group, 'Electoral Systems and the Protection and Participation of Minorities' report, 2006, p. 24.
[25] Ibid, p. 23.
[26] " Constitutive Peoples and Constitutional amendments: A Visa for the Past" by N. Ademović, available at http://www.pulsdemokratije.net/index.php?a=pdf&l=en&id=389

38. Thus, the rule derivable from case-law and practical guidelines from European bodies[27] is that, with respect to political arrangements based on ethnic identities, various forms of consociational and proportionate representation schemes may permissibly distinguish among citizens in order to advance or expand political participation of minority groups, but not exclude such groups. Political structures can accommodate the needs of minorities without detracting from the overall balance sought between the majority groups at power. The key is that such arrangements never *totally exclude* groups from political participation. The best models reserve seats or otherwise guarantee the participation of minority groups, the exact opposite of the Bosnian system, which entirely excludes minority groups.[28]

39. We submit that in making its determinations, the Court should look to whether alternatives were fully considered that would have accommodated some form of active political participation of 'the Others', i.e. the non-"Constituent Peoples", in the Bosnian context. There are myriad possibilities that can achieve the aim of balance of power, short of the steps actually taken. The complete, unconditional exclusion of (ethnic/national/religious) minorities is therefore unnecessary and ultimately not proportionate in order to meet the aims envisaged.

Limited Margin of Appreciation - Bosnia Holds an Isolated Position in Europe

40. A final element in assessing the exclusions enshrined in the Dayton Accords is the "margin of appreciation" left to the state—the state's discretion to decide whether certain interference with basic protected rights is justified with regard to its specific socio-political context. The margin of appreciation is not unlimited and is subject to the ultimate judgment of the Court. The Court assesses any margin of appreciation claimed against a common standard – a European consensus among State Parties to the Convention – which would indicate whether a certain measure or policy falls within the margin or appreciation or not.[29]

41. With regard to the assessment of the State's margin of appreciation in relation to permissible differential treatment on protected grounds, the Court has indicated in the *Rasmussen* case that it will

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[27] See discussion above, §§ 16-28.

[28] A good example can be found in South Africa in which "electoral systems promoted cooperation between communities and encouraged multi-ethnic parties". MRG notes in its Electoral Systems Report:
"Recent attempts to re-establish democracy in post-conflict situations highlight a number of electoral systems that have aided minority inclusion and multi-ethnic accommodation in a variety of contexts. South Africa's first three democratic elections (1994, 1999 and 2004) were all conducted under List PR, with half the National Assembly (200 members) being chosen from nine provincial lists and the other half being elected from a single national list.... The PR [proportional representation] system, as an integral part of other power-sharing mechanisms in the new Constitution, was crucial to creating the atmosphere of inclusiveness and reconciliation that precipitated the decline of the worst political violence..."
Closer to home and obviously within the relevant background, in Croatia the Constitutional Law on National Minorities guarantees the representation of eight minority members in the Parliament. There are many other examples where participation of minorities has been accommodated in a fair a reasonable manner even in post-conflict situations. Conversely, negative experiences can be shown in the case of Lebanon where it is provided that that the President be a Maronite Christian, the Prime Minister a Sunni Muslim, and the Speaker of Parliament a Shi'a Muslim. In 1989 the Ta'if agreement codified the confessional system according to which seats in parliament are divided on a confessional basis. This hinders minorities (such as the Druze) from participating in Lebanese politics in a meaningful way. Arguably, the confessional system has also contributed to continuous political instability.

[29] *Cf.* The Court's President, Jean-Paul Costa, at the International Conference "Protection of the democratic values in administration of justice" Baku, 2 May 2008: [...] This margin of appreciation is a logical consequence of the place of democracy in the Convention scheme. The international judge owes a degree of deference to decisions taken by national democratic institutions in full compliance with the rule of law, [and although that deference will never exclude the international review completely, it will call for some measure of judicial self-restraint at international level. But just as democracy furnishes the *raison d'être* and the justification for the margin of appreciation, it also establishes its limits. In other words as we approach the core operation of democracy, such as the right to vote and the right to form political parties or again the right to participate in free political debate, so the margin of appreciation contracts almost to vanishing point.