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Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

Honouring of obligations and commitments by Bosnia and Herzegovina

Information note by the co-rapporteurs on their fact-finding visit to Bosnia and Herzegovina (1-4 September 2009)¹

Co-rapporteurs: Mr Mevlüt ÇAVUŞOĞLU, Turkey, European Democrat Group, and Mr Kimmo SASI, Finland, Group of the European People's Party

¹ This information note has been made public by decision of the Monitoring Committee dated 30 September 2009.

I. Foreword

1. The specific focus of our visit to Bosnia and Herzegovina from 1 to 4 September 2009 was the implementation of paragraph 8 of Resolution 1626 (2008), in which the Parliamentary Assembly called upon all political stakeholders to re-launch dialogue about the various reform proposals immediately after the October 2008 local election, in close co-operation with the European Commission for Democracy through Law (Venice Commission), with a view to drafting and adopting a new Constitution before October 2010, the date when the parliamentary elections are expected to be held.

2. During our visit, we went to Banja Luka, Mostar and Sarajevo and held meetings with the leaders of all key political parties, as well as with the members of the Presidency of Bosnia and Herzegovina, members of the Parliamentary Assembly of Bosnia and Herzegovina, the Minister of Foreign Affairs, the President of the Constitutional Court, as well as representatives of the international and diplomatic community. We are grateful to the Special Representative of the Secretary General of the Council of Europe, Ms Caroline Ravaud, for helping us to organise this visit. The programme of our visit is appended.

3. The purpose of this note is to summarise our initial findings and preliminary conclusions concerning the advancement of the constitutional reform. More detailed analysis of the implementation of Resolution 1626 (2008) will be made at a later stage, in the framework of a more comprehensive report.

II. Key developments relating to the constitutional reform since the adoption of Resolution 1626 (2008)

4. Soon after the adoption of Resolution 1626 (2008), on 8 November 2008, the leaders of the main political parties of the country, i.e. Mr Milorad Dodik (SNSD – Alliance of Independent Social Democrats), Mr Sulejman Tihic (SDA – Party of Democratic Action) and Mr Dragan Covic (HDZ BiH – Croatian Democratic Union of Bosnia and Herzegovina), met in Prud, in the municipality of Odzak, and reached an agreement in principle on issues relating to the constitutional changes, state property, population and housing census, changes to the Council of Ministers, return strategy, constitutional solution for the Brčko district and budget and fiscal issues.

5. This agreement was welcomed by the international community as an opportunity to re-launch discussions between key stakeholders about the long-standing constitutional reform. In particular, the participants in the “Prud process” declared that the discussion on the constitutional reform should focus on four main issues, namely, the bringing of the Constitution of Bosnia and Herzegovina into line with the provisions of the European Convention of Human Rights (ECHR), the competences of the state, the need to increase the functionality of state institutions and the territorial organisation of the state at the intermediate level.

6. The “Prud process” was instrumental in reaching the agreement on the adoption of the constitutional amendment concerning the status of Brčko, adopting the 2009 budget and securing the initial agreement on organising a population census. Moreover, the leaders of the key political parties of Bosnia and Herzegovina agreed that the state would be the owner of the property which was required for the functioning of the state-level institutions (including immovable and movable military property).

7. In a subsequent joint declaration, signed by the participants in the “Prud process” on 26 January 2009 in Sarajevo, further clarifications were given about the basic principles of the functioning of Bosnia and Herzegovina. In particular, the leaders of SNSD (Milorad Dodik), SDA (Sulejman Tihic) and HDZ (Dragan Covic):

- confirmed their respect of Bosnia and Herzegovina’s sovereignty and internationally recognised borders;
- declared that Bosnia and Herzegovina was a democratic, social and secular state based on the principle of the Rule of Law and separation of powers into legislative, executive and judicial branches;
- declared that Bosnia and Herzegovina was a decentralised state in which three layers of government existed; the intermediate level of government comprised four territorial units; each of the territorial units should have legislative, executive and judicial power.

8. We welcomed this joint statement as it confirmed the legitimacy of state institutions and contained useful indications on the directions of the future constitutional reform. It indeed provided a good basis for discussing further detailed arrangements of the future organisation of the state.

9. However, almost immediately after the end of the meeting, the three participants in the “Prud process” gave different interpretations of the exact meaning of the basic principles contained in the joint statement.

10. Whereas the SDA President, Mr Sulejman Tihic, spoke about the need to transform the intermediate level of government into four multiethnic economic regions, the SNSD leader and Prime Minister of Republika Srpska, Mr Milorad Dodik, declared that no changes to the constitution should affect the Republika Srpska which should remain one of the four territorial units of the State; the HDZ leader, Mr Dragan Covi, said, for his part, that one of the four territorial units should be a new Croat-dominated entity.

11. Following these contradictory statements, there was little room for continuing negotiations between the key stakeholders. The subsequent meeting, held on 21 February, was very short and ended with the Prime Minister of Republika Srpska (RS), Mr Milorad Dodik, walking out of it and conditioning further talks with the agreement that the RS has the right to hold a referendum on its status after a three-year waiting period. Since this meeting, no new developments in the “Prud process” have occurred.

12. While we believe that the “Prud process” was a good initiative aiming at bringing together the key stakeholders and working out co-ordinated and mutually agreeable solutions with respect to the constitutional reform, we regret that this process was not supported by other stakeholders. In fact, one of the parties of the current coalition in the Parliamentary Assembly of Bosnia and Herzegovina, the Party for BiH (SBiH) of Mr Haris Silajdzic, Bosnian member of the BiH Presidency, rejected the agreement. As a result, the three political parties which signed the agreement, from the very beginning, did not have the majority in the Parliamentary Assembly to implement the agreement. It is obvious that other stakeholders should be brought into the process and a wider discussion on the constitutional reform should start.

III. Different approaches to the constitutional reform

13. In the absence of any developments within the framework of the “Prud process”, it appears that the constitutional reform process has, yet again, reached a stalemate. It transpired from our discussions with all key political parties of Bosnia and Herzegovina that all stakeholders agree on the need to change the Constitution. The exact nature of the changes and their extent is, however, a subject of considerable disagreement.

14. One of the key issues which the future constitutional reform will have to address is the compatibility of the BiH Constitution with the ECHR. In fact, already in 2005, the Venice Commission raised concerns as to the compliance of the BiH Constitution with the Convention standards², especially, with regard to the norms governing the election of the members of the Presidency of Bosnia and Herzegovina and the Entity delegates to the House of Peoples of the Parliamentary Assembly of BiH. The BiH Constitution provides that 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 (Article 5). 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) (Article 4). It thus excludes the representatives of “Others” from standing for the election to the Presidency and to the House of Peoples. Furthermore, it applies strictly the ethnic principle to the election, which in practice means that only a Serb can be elected on behalf of the Republika Srpska and only Bosniacs and Croats can be elected on behalf of the Federation of Bosnia and Herzegovina.

15. This situation gave rise to a law-suit by two representatives of “Others” which was eventually brought before the European Court of Human Rights (Applications No 27996/06 and 34836/06 by Dervo Sejdic and Jakob Finci against Bosnia and Herzegovina, lodged respectively on 3 July and 18 August 2006). On 22 October 2008, the Venice Commission made public its *amicus curiae* in these cases³, clearly stating that the exclusion of the “Others” from the elections to the House of Peoples and to the Presidency is incompatible with the Article 1 of Protocol 12 to the ECHR. Moreover, according to the *amicus curiae*, the exclusion of the “Others” from the elections to the House of Peoples is also incompatible with Article 14 in conjunction with Article 3 of Protocol No. 1 to the ECHR. On 3 June 2009, the Grand Chamber of the European Court of Human Rights (ECtHR) considered these two cases and a judgment is expected to be delivered before end of 2009.

² Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the high representative. CDL-AD(2005)004 of 11 March 2005.

³ Amicus Curiae Brief of the Venice Commission in the cases of Sejdic and Finci against Bosnia and Herzegovina. CDL-AD(2008)027 of 22 October 2008.

16. It is now obvious that, should ECtHR decide these two cases in favour of the applicants, Bosnia and Herzegovina will be found in violation of the Convention. This means that, apart from individual measures in favour of the applicants, the State of Bosnia and Herzegovina will have to take general measures, including the adoption of amendments to the Constitution, in order to comply with the decision of the Court. In this respect, two approaches appear to emerge with respect to the scope of future constitutional reform:

17. The first approach consists of adopting a series of specific amendments which would eliminate the incompatibilities between the Constitution and the ECHR, without going into a more thorough revision of the constitutional framework. The Prime Minister of Republika Srpska, Mr Milorad Dodik, and the Speaker of the National Assembly of the Republika Srpska, Mr Igor Radojicic, clearly spoke in favour of this approach and stated that the constitutional revision should focus on adopting these changes as quickly as possible. Other constitutional amendments, in their opinion, are either unnecessary or should be developed at a later stage.

18. Although nobody argues against the need to bring the BiH Constitution into line with the ECHR, some stakeholders do not agree to limit the constitutional reform only to human rights-related issues. The leaders of SDA, SBiH and SDP argue in favour of a more comprehensive constitutional reform which, in addition to the specific ECHR amendments, should include a profound revision of the country's constitutional framework and institutions. This second approach consists in developing the necessary amendments to the Constitution on the basis of the so-called 2006 "April package" which was rejected by the Parliamentary Assembly of BiH by just two votes. The new amendments should address the incompatibilities between the Constitution and the ECHR, reform the BiH state institutions in order to make them stronger and more functional, as well as contain a number of measures with a view to facilitating and streamlining the adoption of legislation which is necessary for the accession of the country to NATO and the EU.

19. While not contradicting each other, these two approaches are, in practice, incompatible, as the positions and political strategies of their supporters pursue completely opposite objectives.

20. Obviously, the amendments envisaged according to the first approach are not going to change the existing BiH institutions. We were told that they are likely to have a very limited effect in practice. In fact, even if the ethnic limitations are removed from the Constitution, statistically, the member of the Presidency elected from the RS is most likely to be a Serb and the two members elected from the Federation of Bosnia and Herzegovina are most likely to be Bosniacs. Should this happen, not only the existing situation would not be changed (i.e. the members of the Presidency and the members of the House of Peoples would continue to be elected along ethnic lines), but the changes to the Constitution may potentially put the Croat Constituent People in a weaker position at state level as, statistically, the chances of electing a Croat representative to the Presidency would be low. Such a situation would be against the spirit of the Dayton agreement.

21. That said, a comprehensive revision of the Constitution envisaged by the second approach is not likely to be supported in the Republika Srpska, as the current leadership of the RS appears to oppose any further strengthening of state institutions and, in some instances, is publicly challenging the already established distribution of competences between the State and the Entities, as exemplified by the adoption by the RS National Assembly, on 14 May 2009, of the Conclusions and "Information on the Effects of the transfer of constitutional responsibilities from RS to the Institutions of BiH"⁴.

IV. Preliminary conclusions

22. Given that there is very little time left to reconcile the positions of all stakeholders and work out a meaningful set of amendments to the Constitution, which could be agreeable to all parties, we are afraid that the prospects of adopting a new constitution for Bosnia and Herzegovina before the next parliamentary elections, expected to be held in Autumn 2010, look rather gloomy. The positions of various stakeholders are extremely polarised and an agreement on a comprehensive package of constitutional amendments is almost impossible to reach. Constitution-making is a serious exercise which requires building a broad consensus about the key features of the reform. It should not be abused of to satisfy immediate goals relating to the electoral campaign.

23. At the same time, we expect the key stakeholders to launch, without delay, a meaningful dialogue about the changes to be made to the Constitution, in order to make Bosnia and Herzegovina a normal European state, capable of handling effectively the challenges arising from the process of European integration. We invite the key stakeholders to use extensively the expertise of the Venice Commission, in

⁴ These Conclusions and Information were subsequently nullified by the High Representative on 20 June 2009, on the ground that they were in contradiction with the Dayton Agreement.

order to find practical and functional solutions to the problems which the country has to face, including in the field of implementation of the standards of the European Convention of Human Rights in the domestic constitutional and legislative framework.

24. We suggest that the Monitoring Committee should remain seized of the situation in Bosnia and Herzegovina and examine, at its meeting in December 2009, any further progress relating to the constitutional reform and its prospects, as well as to other aspects of the implementation of Resolution 1626 (2008). Depending on the developments, we shall propose to the Committee any further measures to be taken, as the situation requires, including a possible debate on the functioning of democratic institutions in Bosnia and Herzegovina at the January 2010 part-session of the Assembly.

APPENDIX

Programme of the fact-finding visit to Bosnia and Herzegovina (1-4 September 2009)

Mr Mevlüt ÇAVUŞOĞLU, member of Parliament
Mr Kimmo SASI, member of Parliament
Mr Artemy KARPENKO, co-secretary of the Monitoring Committee

Tuesday 1 September 2009

Briefing with Ms Caroline RAVAUD, Special representative of the Secretary General
of the Council of Europe in Bosnia and Herzegovina

Wednesday 2 September 2009

09:00-10:00 Meeting with representatives of the National Assembly of RS
Mr Igor RADOJIČIĆ, Speaker

10:00-11:00 Meeting with representatives of RS Government
Mr Milorad DODIK, Prime Minister

11:30-12:30 Meeting with representatives of the majority and opposition
- Mr Mladen IVANIĆ, PDP President
- Mr Dragan ČAVIĆ, DP President

12:30-17:00 Journey from Banja Luka to Mostar

17:00-18:00 Meeting with representatives of Mostar City Assembly
Mr Danijel VIDOVIĆ, President

18:00-19:00 Meeting with representative of HDZ
Mr Dragan ČOVIĆ, President

19:30-20:30 Meeting with representatives of HDZ 1990
Mr Božo LJUBIĆ, President

Thursday 3 September 2009

10:00-10:45 Meeting with representatives of BiH Constitutional Court

11:00-12:00 Meeting with representatives of SDP
Mr Zlatko LAGUMDŽIJA, President

12:00-13:00 Meeting with representatives of Ministry of Foreign Affairs
Mr Sven ALKALAJ, Minister

13:00-14:45 Working lunch with Mr Raffi GREGORIAN, PDHR and Brčko supervisor

15:00-16:00 Meeting with representatives of SDA
Mr Sulejman TIHIĆ, President

16:00-17:00 Meeting with representatives of Nasa Stranka
- Mr Bojan BAJIĆ, President
- Mr Danis TANOVIĆ, Vice-president

20:00 Working dinner with representatives of international organisations and ambassadors

Friday 4 September 2009

09:00-10:00 Meeting with the BiH Presidency
- Mr Željko KOMŠIĆ
- Mr Haris SILAJDŽIĆ
- Mr Nebojša RADMANOVIĆ

- 10:30-12:00 Meeting with the Collegiums of HR and HP BIH PA
- Mr Beriz BELKIĆ, HoR, Speaker
 - Mr Ilija FILIPOVIĆ, HoP Speaker
 - Mr Milorad ŽIVKOVIĆ, HoR deputy Speaker
 - Mr Sulejman TIHIĆ, HoP , deputy Speaker
 - Mr Niko LOZANČIĆ, HoR, deputy Speaker
 - Mr Mladen IVANIĆ, HoP, deputy Speaker