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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 Sarajevo and Travnik (6 – 9 July 2014)

Co-rapporteurs: Mr Egidijus Vareikis, Lithuania, Group of the European People's Party and Sir Roger Gale, United Kingdom, European Democrat Group

I. Introduction

1. We visited Bosnia and Herzegovina (BiH) from 6 to 9 July 2014. This was our first visit to the country this year as co-rapporteurs in the framework of the monitoring procedure.
2. The last debate on the functioning of democratic institutions in Bosnia and Herzegovina took place in October 2013 and led to the adoption of Recommendation 2025(2013). There has been no full report on the honouring of obligations and commitments since 2008. Instead the Assembly has focused since 2010 on the urgent need to adopt constitutional changes: it has held 2 debates in 2010 and one in 2012 mainly on this subject. No other country has been so frequently debated in the Assembly.
3. During our visit, we met with a number of high officials from various state level institutions including the Minister of Human Rights and Refugees, the Chair of the Constitutional legal Committee of the House of Representatives, the Central Election Commission, the President of the Constitutional Court, and the Regulatory Agency for Communications. We had a frank and constructive discussion with some of our colleagues from the BiH parliamentary delegation to the PACE
4. We also met the High Representative, the UN Resident coordinator and the EU Delegation in BiH. Unfortunately, we did not manage to set up any meetings with the tri-partite Presidency, the Minister of Foreign Affairs and the collegium of both houses of parliament. We regret this, especially since this was Sir Roger Gale's first visit to the country

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5. We would like to thank the parliamentary delegation of Bosnia and Herzegovina and its secretariat for their help in organising the visit and express our profound gratitude to the Council of Europe Office in Sarajevo, who organised most of our meetings, in particular our meeting with the international Community, NGOs and our trip to Travnik.

II. Main events since adoption of Recommendation 2025 (2013)

6. In October 2013, one of the largest mass graves believed to contain upwards to 1 000 bodies was discovered in Tomasica, near Prijedor, in Republika Srpska. Around 400 people have already been identified by forensic and DNA tests pioneered by the International Commission for Missing Persons (ICMP), and around 250 were buried on 20 July 2014. The bodies are exceptionally well preserved: many were found with their hands tied behind their backs and a gunshot through their heads. The ICTY will have to decide whether it will use this evidence in the ongoing trials in The Hague.

7. In early February 2014, mass protests and violent riots -including burning of official buildings- broke out in the northern town of Tuzla, and quickly spread to other cities in Bosnia and Herzegovina, mainly located in the federation, including Sarajevo. These protests mark the largest outbreak of public anger over high unemployment, botched privatisations and corrupt government. Many called these protests the "Bosnian spring", but by April they ran out of steam. However, 4 cantonal governments in the federation resigned, and citizens organised themselves in public "plenums" to present their demands. The cost of the destruction of public property in all the cities across the country has been estimated to be around 25.5 million Euros, according to the website of Klix.ba.

8. In mid-February 2014, talks facilitated by EU Commissioner Füle between the 6 main political leaders in the framework of the High level dialogue on the European Union Accession Process (HLAP), conducted since June 2012,¹ finally collapsed. These talks were supposed to foster a consensus on the implementation of the 2009 Sejdic and Finci ECHR judgment, a pre-condition for the entry into force of the 2008 Stabilisation and Association Agreement, and on the creation of a coordination mechanism that would allow BiH to speak with one voice in its relations with the EU. Commissioner Füle, who had personally invested a lot of time and effort in this endeavour, was deeply disappointed.

9. In May 2014, Serbia, and Bosnia and Herzegovina, suffered the worst floods in over a century. Most of north-western Bosnia was flooded, 24 people died, 90 000 people were temporarily displaced, over 43 000 houses were flooded and 1 952 houses destroyed through landslides. The floods also displaced many mines from the conflict, making the mine clearing efforts far more dangerous².

10. According to the UNDP the floods are estimated to have caused the equivalent of nearly 15% of GDP in damages and losses. The total damage is estimated at around 2 billion Euros. This represents 4 years of State budget.

11. A donor conference took place in Brussels on 16 July: 1.8 billion Euros were pledged, but most of it will be (favourable) loans. The UN Resident coordinator told us that most of the grants would not be managed by the authorities but directly by the beneficiaries.

12. The floods also showed an unprecedented level of solidarity across the ethnic divide, and the international community massively came to the rescue and provided humanitarian and technical aid.

13. But it is clear that the floods will have a drastic impact on the economic situation in a country which was already fragile: following Croatia's accession to the EU in July last year, BiH can only export to EU markets agricultural products such honey, raw leather and fish. All other products, including dairy products, do not fulfil EU sanitary regulations.

14. This tragedy is also a major setback in the implementation of the strategy for providing housing to refugees and IDPs and closing down the remaining collective centres.

¹ On 27 June 2012, the parties had signed a roadmap in Brussels undertaking to put constitutional amendments into parliamentary procedure by August 2012 and to adopt by November 2012. On 1 October 2013, the parties signed up to 7 principles on which a solution to the stalemate would be based, again to no avail.

² 17% of the territory is still infested with mines, and mine accidents claim around 30 lives per year.

III. The upcoming elections in October 2014

15. Elections will be held on 12 October 2014 at four different levels: for the tri-partite State Presidency, for the state-level House of Representatives (42 MPs) for the 2 Entities House of Representatives (83 seats in the RS National Assembly, and 98 seats in the federation House of Representatives) and for the 10 cantonal Assemblies in the federation. In addition, Republika Srpska will be holding direct elections for its President³. Parliamentary Assembly member, Mladen Ivanic, will again be running for the Serb seat on the Presidency of BiH.

16. The Central Election Commission (CEC) was confident it could manage all the process properly. It had worried that elections could not be organised in a number of constituencies in the Republika Srpska, because of the non-implementation of a ruling by the Constitutional Court relating to the name of certain electoral units in the RS, but the State parliament adopted the relevant changes to the election law more or less at the last minute. Another positive change is the introduction of a 40% quota for women. Despite attempts at introducing closed lists, the next election will still be held on the basis of open lists.

17. The CEC noted that the 2014 elections will see the highest number of candidates since 2002: 65 political parties, 24 independent candidates and 24 coalitions will compete. The CEC has invested a lot of efforts in training local election commissions and adopting by-laws, for example for printing 4 differently coloured ballots to ease the counting, but it regretted that transparent ballot boxes have not been introduced.

18. There will also be early local elections in Srebrenik and Laktasi (the home town of Milorad Dodik, current RS President) because the mayor has resigned.

19. At the time of writing, it is unlikely that amendments to the electoral law, brokered by the High Representative, will be adopted, making local elections in Mostar impossible (see Recommendation 2025 (2013)). We recall that local elections, scheduled throughout the country in 2012, did not take place in Mostar, the unofficial capital of the federation.

20. We also met with the Regulatory Commission for Communications (RAK in Bosnian- Croatian - Serbian), which looks into violations of media election rules as per mandate of the CEC. No significant problems have been revealed over the past ten years.

21. The major problem of the RAK is threats to its independence: the mandate of the previous head of RAK expired in 2007, and in 2009, the mandate of the RAK board expired as well, without the State level parliament conducting the necessary appointment procedures.

22. The stalemate only ended late 2012, after new amendments to the appointment procedure were adopted. In December 2013, a new Board was appointed (all of its 7 members are men), and one name was sent to the Council of Ministers for the post of Director General of the RAK.

23. Needless to say, the election campaign will focus mainly on bread and butter issues, on promised reconstruction and on compensation for the damages and losses incurred because of the floods. Our colleagues from the BiH PACE delegation told us that implementation of the Sejdic and Finci judgment was definitely not a priority in the current situation, but that it would of course be again on the agenda after the elections. They thought constitutional amendments would most probably be adopted within 6 months after the election.

24. The pre-election campaign was described by many of our international interlocutors as again full of divisive rhetoric aiming at raising fear in the population. The political climate in general is reportedly the worst in decades: there is no political will, no willingness to compromise and no sense of accountability. The High Representative told us that it simply cannot go on like this. He also said he could no longer make use of his Bonn powers because of lack of support of certain countries, notably the Russian Federation, within the Peace Implementation Council.

25. We would like to hope that it will not, as it did in 2010, take a further 14 months to form an administration. Bosnia and Herzegovina is supposed to take over the rotating chairmanship of the Council of Europe in May 2015. It would be highly undesirable for the chairmanship of the Council of Europe to be taken over by a State with an interim caretaker government.

³ In the federation, the President is indirectly elected by the federation parliament.

IV. Constitutional reform

26. In Recommendation 2025(2013), the Assembly stated that it would not tolerate yet another election in blatant violation of the 2009 *Sejdic and Finci* judgment and asked the Committee of Ministers to urge the authorities and political leaders to amend the constitution and electoral legislation without delay.

27. The domestic deadline for making constitutional changes and amending the electoral legislation in due time before the October 2014 elections expired end of April 2014 and no changes were made by that date. It is perfectly clear now that the next elections will be held under a constitutional and legal framework that violates one of the fundamental rights of every citizen: the right to stand for election and not be discriminated against.

28. Even if constitutional amendments were to be adopted tomorrow, the violation of the ECHR will thus last for another 4 years, until the next elections in 2018.

29. In Recommendation 2025(2013), the Assembly regretted that the three constitutional amendments submitted to parliament in August 2012, though mutually exclusive, had not yet even been submitted to a vote.

30. When we asked the Chair of the Constitutional legal Committee to explain why the existing constitutional amendments put into parliamentary procedure in August 2012 were still not voted on, we were informed that the speaker of the House of Peoples refused to put them on the agenda and there was no way that he could be forced to do so. We were also informed that the negotiations facilitated by Commissioner Füle failed because Croat parties insisted on a specific Croat election unit, which the Bosniak parties refused, as this would de facto create a third Entity. It was hoped, however, that a solution would be found after the elections.

31. We also met with the Prosecutor General who has opened a criminal investigation against persons unknown for failing to implement the *Sejdic and Finci* judgment. It is a criminal offence under Bosnian law not to implement judgments of the Constitutional Court⁴ or an international Court. The investigations are underway, but it was of course not possible to indict the parliament as such for failure to act.

V. The next steps

32. As co-rapporteurs for Bosnia-Herzegovina, we are now faced with the difficult task of proposing a course of action to the Assembly. We have to face the reality: no constitutional amendments were adopted in time for the 2014 elections. So what should flow from that? The fact that this judgment will have to be implemented will not go away.

33. It is clear that while the Dayton Agreement was a “quick fix” designed to bring a halt to hostilities it has, in the longer term, generated other intractable problems. It would assist in the resolution of some of these if the current and any future High Representative were to be enabled to continue to exercise their “Bonn powers” until a long-term solution is achieved. The Council of Europe must address this as a matter of urgency and must further seek to hold recalcitrant members of the Peace Implementation Council to account.

34. After our visit, in a judgment delivered on 15 July 2014 in the case of Amra Zornic (relevant extracts to be found in Appendix 2), the Court held that: “more than 18 years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. **In view of the need to ensure effective political democracy, the Court considers that the time has come to introduce a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina**”.

35. This judgment will become final only on 15 October, but we believe it’s unlikely that an appeal to the Grand Chamber will be allowed, since this case is a follow-up case of the Grand Chamber judgment in *Sejdic and Finci*.

⁴ The President of the Constitutional Court confirmed that over 80 of its judgments had not been implemented.

36. One could argue that the Court is overstepping its remit by indicating to a sovereign country what kind of political system it should adopt. But the principle of one man one vote is one of the foundations of our democratic societies and, as such, needs to be maintained.

37. We believe the authorities of Bosnia and Herzegovina should make good use of the window of opportunity they have until May 2015, when they take over the chairmanship of the Council of Europe, to make the necessary constitutional changes: as one of our interlocutors put it: it can be done in 5 minutes if there is the political will to do it. We propose that Bosnia and Herzegovina should be discussed again during the first part-session of the Assembly in January 2015 to consider further action.

APPENDIX 1

Programme of the fact-finding visit to Sarajevo and Travnik (6-9 July 2014)

Mr Egidijus Vareikis, Lithuania, Group of the European People's Party
Sir Roger Gale, United Kingdom, European Democrat Group

Sunday, 6 July 2014

19:00-20:00 Briefing with **Ms. Mary Ann Hennessey**, Head of the CoE office in Sarajevo

Monday, 7 July 2014

09:00-10:15 Meeting with **Constitutional Legal Commissions** of both houses of the BiH Parliamentary Assembly

- Mr Sefik Dzaferovic
- Mr Zijah Hasic

10:30-11:30 Meeting with the members of the **BiH PACE delegation**

- Mr Senad Šepić (SDA)
- Mr Boško Tomić (SNSD)
- Mr Mladen Ivanić (PDP)
- Ms Ismeta Dervoz (SBB)

11:45-12:45 Meeting with UN Resident Co-ordinator: **Mr Yuri Afanasiev**

13:00-15:00 Working lunch with Kurt Bassuener (Democratisation Policy Council) and Srecko Latal, Political analyst, formerly with International Crisis Group

15:00-15:45 Meeting with **State Prosecutor of BiH**: Mr Goran Salihović

16:00-16:45 Meeting with the representatives of **Regulatory Agency for Communications**

- Ms Amela Odošić – Head of PR Department
- Ms Helena Mandić – Director of Broadcasting

17:00-18:00 Meeting with NGOs: **CCI, Zasto ne (Istinomjer), SoC and K-143**

20:00 Dinner hosted by PACE with ambassadors of UK, US, Belgium and Netherlands

- Mr Kenneth Zurcher – US Embassy
- Ms Jo Lomas – UK Embassy
- Ms Ellen van Reesch- Embassy of Netherlands
- Mr Jean-Pierre Biebuyck – Belgium Embassy

Tuesday, 8 July 2014

08:30-09:15 Meeting with **Mr Valentin INZKO**, High Representative in BiH

09:30-10:15 Meeting with the Minister for Human Rights and Refugees: **Mr Damir Ljubic**

10:30 Departure for Travnik

15:30-16:15 Meeting with the Mayor of Travnik municipality

18:30 Return to Sarajevo

Wednesday, 9 July 2014

09:00-09:45 Meeting with the **Central Election Commission**

10:00-10:45 Meeting with the **President of the Constitutional Court**: Ms Valerija Galic

11:00-11:45 Meeting with the **Head of the EU Political Office**: Mr Thomas Busch

13:00 Meeting with the **BiH Ombudsman**

15:00 Meeting with the **Resident Representative of the IMF**: Mr Ruben Atoyán

APPENDIX 2

Judgment in the case of Zornic v. Bosnia-Herzegovina

38. The Court finds it appropriate to consider the present case under Article 46 of the Convention, which provides, in so far as relevant:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution...”

39. The Court recalls that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the right of the applicant which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicant’s position, notably by solving the problems that have led to the Court’s findings [...]

40. The Court further recalls its finding in *Sejdić and Finci* that constitutional provisions which rendered the applicants ineligible to stand for elections to the House of Peoples and to the Presidency of Bosnia and Herzegovina amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12. It emphasises that the finding of a violation in the present case was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the judgment in *Sejdić and Finci*. The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State’s responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193, and *Greens and M.T.*, cited above, § 111).

41. Pursuant to Article 46 § 2, *Sejdić and Finci* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It has always considered that a number of amendments to the Constitution of Bosnia and Herzegovina and its electoral legislation should be adopted for the execution of this judgment. The Committee of Ministers adopted three interim resolutions urging the authorities of Bosnia and Herzegovina to take all the necessary steps for the full execution of that judgment by adopting necessary measures aimed at eliminating discrimination against those who are not affiliated with a constituent people in standing for election to the House of Peoples and the Presidency of Bosnia and Herzegovina and to bring its constitution and electoral legislation in conformity with the Convention requirements without any further delay (see paragraph 12 above; see also Resolutions nos. 1701(2010), 1725(2010) and 1855(2012) and Recommendation no. 2025(2013) of the Parliamentary Assembly of the Council of Europe). In its third resolution in particular the Committee of Ministers called upon the respondent State “to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the ‘constituent peoples’” (see paragraph 12 above).

42. In light of the lengthy delay which has already occurred, the Court, like the Committee of Ministers, is anxious to encourage the speediest and most effective resolution of the situation in a manner which complies with the Convention’s guarantees (compare, *Greens and M.T.*, cited above, § 112).

43. In *Sejdić and Finci* the Court observed that when the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground and that the provisions were designed to end a brutal conflict marked by genocide and “ethnic cleansing” (see *ibid.*, § 45). The nature of the conflict was such that the approval of the “constituent peoples” was necessary to ensure peace (*ibid.*). However, now, more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions. The Court expects that democratic arrangements will be made without further delay. In view of the need to ensure effective political democracy, the Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.