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The urgent need for a constitutional reform in Bosnia and Herzegovina

Report[1]
Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)
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Summary

The Parliamentary Assembly has followed closely the developments in Bosnia and Herzegovina since January 2010, especially in the light of the urgent need for a constitutional reform in execution of the legally binding Judgment of the European Court of Human Rights in the *Sejdic and Finci case*. It is seriously concerned that the initiatives launched by the authorities so far have not led to any concrete results.

The Assembly is fully aware of the possible implications of the holding of the October 2010 general elections on the basis of rules which are in violation of the European Convention of Human Rights and its Additional Protocols. In such a case, it will revert to the matter with a view to taking the requisite political stance.

In the meantime, the Assembly urges the authorities of Bosnia and Herzegovina to launch, without further delay, a serious institutionalised process for the preparation of a comprehensive package of constitutional amendments, in accordance with the country's post-accession commitments. It calls upon the authorities to be formed after the elections to make the implementation of the country's remaining post-accession commitments, including the constitutional reform, their political priority.

1. Reference to committee: Resolution 1115 (1997)

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A. Draft resolution

1. The Parliamentary Assembly recalls its Resolution 1701 (2010) on the functioning of democratic institutions in Bosnia and Herzegovina in which it had called the key political stakeholders to engage in meaningful and constructive dialogue about concrete proposals for constitutional amendments, with a view to adopting a comprehensive reform package, removing in particular, constitutional discrimination against the so-called "Others" as well as the members of the Constituent peoples who do not reside in the Entity where their ethnic group is largely represented, before the calling of the October 2010 general elections. It has followed closely the developments in Bosnia and Herzegovina since the adoption of that resolution, especially in the light of the need to amend the constitution before the elections in execution of the legally binding judgment of the European Court of Human Rights in the case *Sejdic and Finci v. Bosnia and Herzegovina*.

2. The Assembly is seriously concerned that the initiatives launched by the authorities so far have not led to any concrete results. Although still theoretically possible, the adoption of amendments to the constitution before the calling of the elections appears to be rather unlikely. Therefore, there is a serious risk that the October 2010 general elections once again will be held in violation of the European Convention of Human Rights and its Additional Protocols, as well as of the judgment of the Court.

3. The Assembly recalls that the revision of electoral legislation, the elimination of constitutional discrimination against the so-called "Others" and the representatives of Constituent peoples not residing in the Entity where their ethnic group is widely represented in the standing for the elections to the Presidency and to the House of Peoples, as well as the strengthening of state institutions, are key outstanding commitments of Bosnia and Herzegovina. Regrettably, the Assembly notes that, since 2006, very little progress has been achieved in the implementation of these and other commitments. This is most disappointing, the Assembly having repeatedly called on the authorities of Bosnia and Herzegovina to speed up the reforms and complete the outstanding commitments.

4. As noted in previous Assembly Resolutions, the lack of constitutional reform hampers the completion of much-needed reforms in key sectors of democratic institutions, rule of law and human rights, and slows down the country's advancement on the path to Euro-Atlantic integration. In order to end the perpetual cycle of deadlock and confrontation, the authorities of Bosnia and Herzegovina and the key political stakeholders must shoulder their political responsibilities, resolve the constitutional reform deadlock and complete the outstanding post-accession commitments as rapidly as possible.

5. The Assembly is fully aware of the possible implications of the non-implementation of the *Sejdic and Finci Judgment* before the October 2010 general elections and of the holding of these elections on the basis of rules which are in violation of the European Convention of Human Rights and its Additional Protocols. In such a case, it will revert to the matter with a view to taking the requisite political stance.

6. In the meantime, the Assembly urges the authorities of Bosnia and Herzegovina to lose no time and launch, before the general elections of October 2010, a serious institutionalised process for the preparation of a comprehensive package of constitutional amendments, in accordance with the country's post-accession commitments, while making full use of the expertise and recommendations of the European Commission for Democracy through Law (Venice Commission). This institutionalised process, based on a clear political mandate, should seek to involve a broad range of domestic legal experts, in order to make a comprehensive analysis of all existing proposals and produce a package of concrete amendments which would generate consensus among the key political stakeholders. Appropriate consultations with civil society should also be conducted in due course. This process should continue after the elections and the formation of new authorities which should make the implementation of the country's remaining post-accession commitments, including the constitutional reform, their political priority.

7. At the same time, the Assembly stresses the importance of full co-operation of Bosnia and Herzegovina with the Council of Europe and urges the authorities to appoint, as rapidly as possible, members to the Venice Commission, as well as to other Council of Europe monitoring bodies in which the country has no member yet.

8. The Assembly calls upon all international partners and, in particular the European Union, to fully support the proposed institutionalised process for the preparation of constitutional amendments, in order to speed up the country's advancement on the road to Euro-Atlantic Integration. It stresses the importance of Council of Europe's participation in the EU Western Balkans Summit to be held on 2 June 2010, with a view to ensuring appropriate synergies with key regional and international partners.

9. The Assembly resolves to closely follow the process of constitutional reform in Bosnia and Herzegovina and invites its Monitoring Committee to examine regularly the progress achieved by the authorities at its forthcoming meetings, in order to propose to the Assembly any further action to be taken as required by the situation.

B. Draft recommendation

1. The Parliamentary Assembly refers to its Resolution …(2010) on the urgent need for a constitutional reform in Bosnia and Herzegovina, and recommends that the Committee of Ministers:

1.1. takes this resolution into account in its own periodic reporting procedure conducted by the Group of Rapporteurs on Democracy (GR-DEM);

1.2. provides full political support to the institutionalised process for the preparation of constitutional amendments, which the authorities are asked to launch without further delay. This process should bring together domestic legal experts and aim at analysing the various existing proposals of amendments and elaborating a comprehensive package of constitutional amendments necessary to complete Bosnia and Herzegovina's outstanding commitments;

1.3. develops a targeted co-operation programme, with the involvement of the European Commission for Democracy through Law (Venice Commission) and in co-operation with the key international partners, so as to provide key European expertise and expert advice to the domestic legal experts, whenever necessary;

1.4. ensures that the Council of Europe is represented at the appropriate level at the EU Western Balkans Summit to be held on 2 June 2010.

C. Explanatory memorandum by Mr Sasi and Ms Woldseth, co-rapporteurs

1. Foreword

1. At its meeting of 17 March 2010, the Monitoring Committee held an exchange of views with the members of the parliamentary delegation of Bosnia and Herzegovina on the follow-up to Assembly Resolution 1701 (2010) on the functioning of democratic institutions in Bosnia and Herzegovina, in the light of the conclusions of the visit to Bosnia and Herzegovina by the President of the Parliamentary Assembly, held on 1-3 March 2010. The main focus of the discussion was the implementation, before the parliamentary elections to be held in October 2010, of a constitutional reform required by the Judgment of the European Court of Human Rights in the case *Sejdic and Finci v. Bosnia and Herzegovina*.

2. Following the exchange of views, the Committee "instructed the co-rapporteurs to make a fact-finding visit to the country before the Assembly April 2010 part-session and, depending on the findings of the co-rapporteurs, asked the Chairman of the Committee to propose to the Bureau, on behalf of the Committee, the holding of an urgent debate on the functioning of democratic institutions in Bosnia and Herzegovina during the April 2010 part-session of the Assembly".[2]

3. On the basis of this decision, we travelled to Bosnia and Herzegovina on 12-13 April 2010 and held meetings with the members of the Collegiums of both Chambers of the Parliamentary Assembly of Bosnia and Herzegovina, the leaders of all parliamentary groups, as well as the representatives of the international community. We are grateful to the Parliamentary Assembly of Bosnia and Herzegovina and to the Special Representative of the Secretary General of the Council of Europe in Sarajevo for their valuable assistance in the organisation of these meetings.

4. In the light of the conclusions of our visit, we addressed a letter to the Chair of the Monitoring Committee, Mr Dick Marty, recommending that he should request the holding of an urgent debate on "the urgent need for a constitutional reform in Bosnia and Herzegovina" during the Assembly April 2010 part-session. On 26 April 2010, following a recommendation by the Bureau, the Assembly decided to hold an urgent debate on this subject and referred the matter to the Monitoring Committee. According to the Committee's usual practice, we were appointed co-rapporteurs *ex-officio* on this subject.

5. The present report is three-fold: firstly, it briefly recalls Bosnia and Herzegovina's post-accession commitments relating to the constitutional reform; secondly, it summarises the key developments with respect to the constitutional reform which have occurred since the adoption of Assembly Resolution 1701(2010); thirdly, it highlights the implications of the non-implementation of a constitutional reform before the elections and the possible consequences thereof at the level of the Assembly, as well as within the wider framework of the Council of Europe. In the concluding part of this report, we will make some recommendations to the authorities of Bosnia and Herzegovina with respect to this matter.

2. Brief recapitulation of Bosnia and Herzegovina's post accession commitments relating to the constitutional reform

6. Bosnia and Herzegovina joined the Council of Europe in 2002. Upon accession, the authorities voluntarily took upon them a number of commitments, in addition to the general statutory obligations resulting from membership in the Organisation. The specific commitments are established on the basis of Assembly Opinion 234 (2002).

7. As regards state institutions and the electoral reform, in Opinion 234 (2002), the Assembly noted that: "the state institutions should be strengthened at the expense of the institutions at Entity level, if need be by a revision of the constitution" (paragraph 4).

8. At the same time, in accordance with Opinion 234 (2002), the authorities of Bosnia and Herzegovina committed themselves 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" (paragraph 15.iv.b).

2. Synopsis of the meeting of the Monitoring Committee held on 17 March 2010 (synopsis No. 2010/002)

9. In its subsequent resolutions, the Assembly has on several occasions called upon the authorities of Bosnia and Herzegovina to implement a constitutional reform, in order to achieve two key objectives:

– firstly, the constitutional reform should focus on reviewing the electoral arrangements in order to "*end the constitutional discrimination of all those not belonging to one of the three constituent peoples*" (Assembly Resolution 1383 (2004), paragraph 3.);

– secondly, the Assembly has been stressing that the functioning of state institutions has to be improved in order to "*create a modern and functional state*" (Assembly Resolution 1383 (2004), paragraph 8.).

10. After the failure, in April 2006, by just two votes, of the so-called "April package" of constitutional amendments, the Assembly held an urgent debate and adopted Resolution 1513 (2006), addressing a number of concrete recommendations to the authorities. The key Assembly demands focused on adopting a new constitution, by October 2010 at the latest, in order to:

– "replace mechanisms of ethnic representation by representation based on the civic principle, notably by ending the constitutional discrimination against 'Others'" (paragraph 20.1.);

– "find efficient and rational decision-making procedures that are not sacrificed to the principle of involving representatives of each constituent people in any decision" (paragraph 20.2.); and

– "review the territorial organisation of the state and its division into entities, cantons and municipalities and the repartition of competences between the state and the lower levels with a view to increasing efficiency and sustainability" (paragraph 20.3.).

11. In debating a general monitoring report on the honouring of obligations and commitments by Bosnia and Herzegovina in September 2008, in Resolution 1626 (2008), the Assembly recalled its previous demands and called upon the domestic 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" (paragraph 8.).*

12. Due to the failure to implement a constitutional reform by end of 2009, during its January 2010 part-session, the Assembly held a debate on the functioning of democratic institutions in Bosnia and Herzegovina and adopted Resolution 1701(2010), expressing "*serious concern over the lack of progress on the constitutional reform front*" (paragraph 5.).

13. The Assembly further took note of the Judgment of the European Court of Human Rights in the case *Sejdic and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/05 and 34836/06), and noted that a constitutional reform had to be urgently implemented within a couple months, in order to hold the October 2010 elections in accordance with the modified constitution, complying with the European Convention of Human Rights standards. Therefore, the Assembly urged all domestic political stakeholders to "*fully engage in a meaningful and constructive dialogue about concrete proposals for amendments to the Constitution, in line with the 2005 recommendations of the Venice Commission, with a view to adopting a reform package in time for the 2010 parliamentary elections which should be organised in accordance with the revised Constitution*" (paragraph 9).

3. Key developments with respect to the constitutional reform which have occurred since the adoption of Assembly Resolution 1701 (2010)

3.1. At domestic level

3.1.1. Adoption of the Action Plan for the implementation of the Judgment in the Sejdic and Finci case

14. On 11 February 2010, the Council of Ministers of Bosnia and Herzegovina instructed the Ministry of Justice to draft an Action Plan for the implementation of the Judgment to be prepared in co-ordination with the Ministry of Human and Minority Rights, as well as the Ministry of Civil Affairs. The Action Plan was examined by the Council of Ministers on 4 March and subsequently endorsed by the Parliamentary Assembly of Bosnia and Herzegovina. The Action Plan provided for the establishment of a thirteen-member Working Group, bringing together the members of the Council of Ministers and the representatives of the parliamentary groups and peoples' caucuses in the Parliamentary Assembly of Bosnia and Herzegovina. According to the Action Plan, the Working Group was to prepare amendments to the Constitution by 29 March 2010. The amendments were to be considered and approved by the Council of Ministers by 1 April 2010. Subsequently, the same Working Group was to prepare amendments to the Election Code, by 15 April 2010.

15. The Action Plan was forwarded to the Council of Europe Committee of Ministers which has started the process of supervision over the execution of the Judgment in the *Sejdic and Finci v. Bosnia and Herzegovina* case.

16. We note that all political parties represented in the Parliamentary Assembly of Bosnia and Herzegovina participated in the Working Group. All have tabled proposals of amendments. However, in essence, the different proposals were significantly diverging from one another. In particular, the Party for Democratic Action (SDA) had tabled the so-called "Butmir I" amendments from 19 October 2009 as its proposal of a comprehensive package of constitutional amendments, aimed at executing the *Sejdic and Finci Judgment* as well as strengthening the functionality of state institutions. HDZ Bosnia and Herzegovina tabled another set of amendments for a comprehensive reform, also inspired by the Butmir proposals, but with an alternative mechanism for the election of the Presidency (which came down to an indirect election of a President and two Vice-Presidents from among the members of the House of Representatives, with a nomination of candidates by the House of Peoples, as well as a modified and extended composition of the House of Peoples. The Alliance of Independent Social-Democrats (SNSD) argued that an indirect election of the members of the Presidency from among the members of the House of Representatives would not be acceptable and tabled a much less ambitious proposal which aimed only at eliminating discrimination against the so-called "Others" and representatives of the constituent peoples not residing in the entity where their nation is largely represented in the election to the Presidency and to the House of Peoples. The Serb Democratic Party (SDS) also proposed a set of "minimal" amendments, aimed only at eliminating discrimination against the so-called "Others" and representatives of the constituent peoples not residing in the entity where their nation is largely represented in the election to the Presidency and to the House of Peoples. The HDZ 1990 submitted a memorandum indicating the main lines along which constitutional amendments should be drafted (in particular, indirect election of the members of the Presidency, constitutional endorsement of powers transferred from the Entities to the State, changes to the methods of decision-making in the House of Peoples, notably, with respect to the protection of vital national interests, the strengthening of the Parliamentary Assembly and of the Council of Ministers, as well as the introduction of an EU integration clause).

17. The Party for Bosnia and Herzegovina (SBiH) launched its own initiative even before the establishment of the Working Group. SBiH's proposal aimed at introducing a new (fourth one) member of the Presidency to be elected on behalf of the "Others"; in addition, 3 more delegates nominated by the group of "Others" would be added to the House of Peoples. Subsequently, this proposal was rejected by the Committee on legal and constitutional affairs of the Parliamentary Assembly of Bosnia and Herzegovina and is no longer discussed.

18. While the adoption of the Action Plan and the establishment of the Working Group were a promising development in the beginning, we believe that the key stakeholders did not make a serious attempt to negotiate a proposal which could generate consensus within the Working Group. In fact, the Working Group held only three meetings and the political parties participating in it tabled proposals which, in some cases, were diametrically opposed (e.g. direct v. indirect election of the members of the Presidency). We would have hoped to see more intense consultations between the members, as well as some drafting work on concrete amendments. We, therefore, consider that the establishment of the Working Group was in fact a missed opportunity.

19. According to the Electoral Code of Bosnia and Herzegovina, elections are held in the first week of October of the election year. The elections have to be called six months before the election day. In this context, the deadline for the adoption of amendments to the Constitution (and subsequently, harmonisation of the Electoral Code with the new constitutional arrangements) is the last week of May 2010.

20. Consequently, given the fact that the Working Group has failed to agree on any amendments and that the positions of the key stakeholders appear to be extremely polarised, not leaving the slightest space for consensus, it appears that the chances of seeing the adoption of amendments to the Constitution before the calling of the general elections are almost inexistent. It is very likely that, in October 2010, Bosnia and Herzegovina will hold another general election in violation of the standards of the European Convention of Human Rights and its Additional Protocols, as well as of the Court's binding Judgment in the *Sejdic and Finci case*.

3.1.2. Proposals to postpone the date of the elections or reduce the period between the calling and the holding of general elections

21. Recently, some stakeholders have voiced proposals aimed at changing the Electoral Code in order to either postpone the elections (by a couple of months), or reduce the mandatory deadline to be established between the calling of the elections and the election day.[3] We are not convinced that this is a good initiative.

22. Firstly, according to European standards, member states should avoid changing electoral legislation 6 months before the election day, in order to avoid undermining the credibility and the stability of the electoral system.[4]Secondly, reducing the period between the calling of the elections and the election day may create a lot of technical problems for the electoral administration, because of the need to perform a number of mandatory activities in order to ensure the smooth organisation of the elections. Thirdly and finally, we do not believe that additional time could help generate amendments to the Constitution and to the electoral framework, because, as we said earlier, the key stakeholders do not appear to be willing to engage in meaningful negotiations before the elections.

23. At any rate, changing the deadlines for calling and/or holding general elections would require the adoption of amendments to the Electoral Code. This would require a vote in both Chambers of Parliament which would necessitate, yet again, political will and broad consensus between key stakeholders, as the adoption of a law in Parliament requires entity voting[5]in both Chambers and may be subjected to a vital-national interest procedure[6]in the House of Peoples.

3.2. At international level

3.2.1. Efforts by Council of Europe institutions

24. On 2-4 March 2010, at their 1078th DH (Human Rights) Meeting, the Council of Europe Ministers' Deputies examined the implementation of the *Sejdic and Finci Judgment* by the authorities of Bosnia and Herzegovina. In the decision adopted, the Ministers' Deputies recalled Bosnia and Herzegovina's commitments to review within one year the electoral legislation in the light of the standards of the Convention, with the assistance of the Venice Commission, and to revise it where necessary; recalled that the Committee of Ministers and the Parliamentary Assembly have repeatedly asked the authorities of Bosnia and Herzegovina to bring the Constitution into line with the requirements of the European Convention of Human Rights and ensure that the so-called "Others" were given an effective opportunity to stand for election to the Presidency and to the House of Peoples; as well as strongly encouraged the authorities of Bosnia and Herzegovina to enhance their efforts with a view to eliminating the existing discrimination against the so-called "Others", while taking into consideration the opinions of the Venice Commission in elaborating the measures to be taken. The Ministers' Deputies also decided to resume consideration of this case at their 1086th meeting (DH), in June 2010.[7]

25. At the same time, it is worth mentioning that, at their 1081st meeting, held on 31 March 2010, the Ministers' Deputies decided to put the topic of "the strategic role and responsibility of the Council of Europe: Bosnia and Herzegovina" on the agenda of the 120th Ministerial Session (to be held on 11 May 2010), as a current political topic.[8] We welcome this initiative which goes in the direction of the Assembly recommendations contained in Recommendation 1894 (2010) on the functioning of democratic institutions in Bosnia and Herzegovina.[9]

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3. See for example the proposal of Mr Suad Arnautovic, member of the Central Election Commission. RTRS, 14 March 2010.
4. As a rule, the Venice Commission recommends that no changes to electoral law should be within 12 months preceding the election day. However, in some cases, the adoption of amendments to the electoral framework during the election year was deemed acceptable by the Venice Commission, on the condition that these amendments represented an improvement of the existing system and provided that they were adopted with a large consensus of all political forces (e.g. changes to the Electoral Code of Moldova adopted before the early parliamentary elections of July 2009).
5. According to Article IV-3-d) of the Constitution of Bosnia and Herzegovina, when adopting decisions, the members and delegates of both Chambers of Parliament "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".
6. According to Article IV-3-e) of the Constitution of Bosnia and Herzegovina, "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 [in the House of Peoples]. 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."
7. See CM/Del/Dec(2010)1078, 8 March 2010.
8. CM/Del/Dec(2010)1081, 6 April 2010.

26. On 1-3 March 2010, the President of the Parliamentary Assembly paid an official visit to Bosnia and Herzegovina and met all key political stakeholders with a view to facilitating dialogue on and the adoption of amendments to the Constitution, in order to hold the October 2010 general elections in accordance with the standards of the European Convention of Human Rights and its Additional Protocols. In his meetings, the President of the Assembly stated that "Bosnia and Herzegovina urgently needs wide constitutional changes, but that – as an immediate first step, before the October elections – at least the provisions excluding some citizens from standing for the Presidency and the House of Peoples should be changed", adding that "the country urgently needs to move forward, with functioning institutions to address the ordinary concerns of citizens".

27. Following the visit by the President, the Monitoring Committee of the Assembly held, on 17 March 2010, an exchange of views with the members of Bosnia and Herzegovina's delegation to the Assembly and instructed the co-rapporteurs to pay a fact-finding visit to the country in order to examine the progress in the constitutional reform. During this visit, which took place on 12-13 April, we met the leaders of all political groups in both Chambers of the Parliamentary Assembly, as well as the members of the Collegiums of both Chambers.

28. In our meetings, we stressed that the implementation of the Sejdic and Finci Judgment before the elections was an absolute necessity. We argued that the adoption of the necessary "minimal" amendments to the Constitution before the election could open the way for the implementation of a comprehensive reform after the elections, in order to fulfil the country's post-accession commitment to improve the functionality of State institutions.

29. In our meetings with the leaders of parliamentary groups, we examined the various proposals of amendments tabled within the framework of the Working Group (see paragraph 16 above). From our discussions, we gained the impression that the key political stakeholders were not ready to engage in a meaningful negotiation about constitutional amendments before the elections. At the same time, we noted that all of them expressed willingness to resume work on a constitutional reform immediately after the October 2010 general elections.

30. Overall, we came to the conclusion that political will to implement a constitutional reform before the elections is lacking. This is most disappointing, as this is not the first time that we are facing this situation in Bosnia and Herzegovina. It is high time that the key political stakeholders shoulder their political responsibilities. Human rights, European integration and prosperity are not given for free; those who strive to achieve these objectives have to work hard to translate aspirations into concrete actions.

3.2.2. Initiatives by key international partners

31. On 22 January 2010, the European Commissioner for Enlargement sent a letter to the Chairman of the Council of Ministers of Bosnia and Herzegovina, Mr Nikola Spiric, requesting information about the actions the authorities were taking in order to implement the Judgment of the Court. This is especially important as the abolition of constitutional discrimination against the so-called "Others" is a condition for the implementation of the Stabilisation and Association Agreement (SAA).

32. In this context, the Steering Board of the Peace Implementation Council (PIC SB) noted in its Communiqué of 25 February 2010 that "a delay in addressing the recent verdict of the European Court of Human Rights would mean that the forthcoming elections would take place under the conditions which are incompatible with the European Convention of Human Rights and may therefore impact on the SAA." At the same time, the PIC SB "welcomed initial steps undertaken by BiH authorities to amend the Constitution, called upon them to complete this process in time for the next elections, and stressed that further constitutional changes would improve BiH's political functionality and facilitate BiH's EU aspirations".

33. In parallel with these initiatives, the Spanish Chairmanship of the European Union and the United States have invested themselves in trying to bring about consensus between the key political stakeholders about the constitutional reform. The Spanish Minister of Foreign Affairs, Mr Miguel Angel Moratinos, and the United States Under Secretary of State, Mr Jim Steinberg, went to Bosnia and Herzegovina on 6-7 April to hold meetings with key political stakeholders, in an attempt to push forward the constitutional reform and

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9. In particular, in paragraph 2.3. of this Recommendation, the Assembly recommended that the Committee of Ministers should "consider launching a wide discussion, with the participation of key domestic and international stakeholders, including the members of the Peace Implementation Council and, in particular, European Union institutions and Bosnia and Herzegovina's neighbours, about the challenges Bosnia and Herzegovina currently has to face on the road to Euro-Atlantic integration and the means to overcome them".

strengthen Bosnia and Herzegovina's leaders' commitment in their journey towards joining Euro-Atlantic structures. It appears that, during this visit, a proposal for a declaration by key political stakeholders about their commitment to pursue constitutional reform after the elections was discussed. However, there are no indications whether this proposal would be given any follow-up. Moreover, Mr Moratinos announced that the Spanish Chairmanship of the European Union would be organising a conference on the Western Balkans in June 2010. This conference should, inter alia, establish the path that Bosnian leaders will set for the country, following the general elections in October 2010.

4. Non-implementation of a constitutional reform before the October 2010 general elections and possible implications thereof at the level of the Assembly and other Council of Europe bodies

4.1. Supervision of the execution of the Sejdic and Finci Judgment by the Committee of Ministers of the Council of Europe

34. Under Article 46 of the European Convention of Human Rights, the High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment shall be transmitted to the Committee of Ministers of the Council of Europe, which shall supervise its execution.

35. According to the Rules of Procedure of the Committee of Ministers, a case cannot be adjourned for more than 6 months and will remain on the Committee of Ministers' agenda as long as the Committee of Ministers is not satisfied with the full execution of the judgment. The Committee of Ministers may also decide to keep a case under review on a more regular basis, i.e. more than twice a year. On 3 March 2010, the Committee of Ministers thus decided to resume examination of the *Sejdic and Finci case* already at its June meeting.[10]

36. The execution of the judgment may require a) payment of the compensation and costs awarded, b) individual measures (reopening of criminal proceedings in case of unfair trial or restitution of property for example) and c) general measures to avoid a repetition of the same sort of violation in the future. As noted in our report on the functioning of democratic institutions in Bosnia and Herzegovina (see doc. 12112 and addendum), the general measures for the execution of this judgment require amendments to the constitutional provisions governing the elections to the Presidency and to the House of Peoples, as well as the revision of the corresponding provisions of the Electoral code.

37. If the Committee of Ministers is not satisfied with the progress made towards execution, it can issue public statements or adopt Interim Resolutions.[11]

38. We have to note that, even if it has taken years, on occasions, all judgments of the Court in the last 50 years have always been executed.

39. Of course, in this report we cannot take a position for the Committee of Ministers. We will continue to follow closely developments on this front.

4.2. Possible implications of the non-execution of the Sejdic and Finci judgment for the Assembly

4.2.1. Observation of the October 2010 general elections

40. According to its usual practice, the Assembly would normally observe the general elections to be held in October 2010, subject to receipt of an invitation from the authorities.

41. In the last election observation report, the Assembly noted that "the manner in which the 1 October 2006 general elections in Bosnia and Herzegovina were conducted was generally in line with Council of Europe standards. However, as a result of constitutional ethnicity-based limitations to the right to stand for office, these elections were again in violation of Protocol 12 to the European Convention of Human Rights and Council of Europe commitments".[12]

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10. See paragraph 24 above.

11. The ultimate sanction is exclusion from the Council of Europe according to Article 8 of the Statute of the Council of Europe which provides "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine".

42. As was seen earlier, in its Resolutions on the honouring of obligations and commitments by, and the functioning of democratic institutions in, Bosnia and Herzegovina, the Assembly has on two occasions called upon the authorities to remedy this problem and remove constitutional discrimination against the so-called "Others" before the October 2010 general elections.

43. If no amendments to the Constitution are adopted before the deadline for calling the elections (first week of May 2010, according to Bosnia and Herzegovina's Electoral Code), the 2010 general election will be held, yet again, in violation of the European Convention of Human Rights and its Additional Protocols as well as of the Judgment of the European Court of Human Rights in the *Sejdic and Finci case*. The Assembly would be obliged to reiterate its assessment and recommendations from November 2006.

4.2.2. Credentials of the members of Bosnia and Herzegovina's delegation to the Assembly to be appointed after the October 2010 general elections

44. According to the Assembly Rules of Procedure, Bosnia and Herzegovina will have to appoint a new delegation to the Assembly at the opening of the January 2011 part-session of the Assembly, or at any other moment within six months of the October 2010 general elections. The new delegation will include the members of the House of Representatives as well as Delegates to the House of Peoples, elected on the basis of the results of the October 2010 general elections.

45. While the members of the House of Representatives are elected on the basis of free, equal and universal suffrage, according to the proportional system, the Delegates to the House of People are elected on the basis of an indirect procedure. According to Article IV, § 1 of the Constitution of Bosnia and Herzegovina, the House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including 5 Croats and 5 Bosniacs) and one third from the Republika Srpska (5 Serbs). The Delegates from the Federation are elected by the House of Peoples of the Federation while the Delegates from Republika Srpska are elected by the RS National Assembly.

46. It follows from the Judgment in the *Sejdic and Finci case* that, if the current constitutional provisions are not changed, the subsequent election of the Delegates to the House of Peoples will be done in accordance with rules that violate Article 14 (prohibition of discrimination in the enjoyment of rights protected by the Convention and additional protocols), taken in conjunction with Article 3 (right to free elections) of Protocol 1 to the European Convention of Human Rights. Therefore, the democratic legitimacy of the members of Bosnia and Herzegovina's delegation to the Assembly could be put in question.

4.2.3. Failure to implement a constitutional reform for Bosnia and Herzegovina's commitments and obligations to the Council of Europe

47. As was seen above as well as in the Assembly's earlier reports, the strengthening of State institutions (including, the implementation of a constitutional reform) and the elimination of the constitutional discrimination against the so-called "Others" in the procedure of election to the Presidency and to the House of Peoples constitute key outstanding post-accession commitments of Bosnia and Herzegovina.

48. While in the first four years of membership in the Council of Europe, the Bosnian authorities and the key political stakeholders made some efforts to fulfil these commitments (which culminated in the preparation of the so-called "April package" of constitutional amendments), since 2006 there has been no or only very limited progress on this front.[13]

49. In this context, it could be argued that there would be grounds to say that the non-implementation of a constitutional reform and the holding of the October 2010 elections in accordance with the existing discriminatory constitutional provisions could be seen as representing a "serious violation of the basic principles of the Council of Europe" as well as a "persistent failure to honour [the country's] obligations and commitments". In accordance with the Rules of Procedure of the Assembly, these could give rise to the non-ratification of the credentials of a national delegation to the Assembly or the ratification of credentials together with depriving or suspending the exercise of some of the rights of participation or representation of members of the delegation concerned in the activities of the Assembly and of its bodies (Rule 8 of the Rules of Procedure).

12. See Doc. 11101, 22 November 2006
13. See our report on the functioning of democratic institutions in Bosnia and Herzegovina, Doc. 12112 and addendum

50. As a last resort measure, the continued persistent failure of a country to honour obligations and commitments may give rise to the adoption by the Assembly of a Recommendation to the Committee of Ministers requesting the latter to take appropriate action in accordance with Article 7 and 8 of the Statute of the Council of Europe[14] (paragraph 12 of Resolution 1115 (1997) on the setting up of an Assembly Committee on the honouring of obligations and commitments by member states of the Council of Europe).

5. Concluding remarks and recommendations

51. As was seen above, it transpires from our discussions that the chances for a last minute political agreement on the constitutional reform and the execution of the *Sejdic and Finci Judgment*, before the October 2010 general elections, appear to be extremely slim. If the October 2010 elections are held in violation of the European Convention of Human Rights and its Additional Protocols, as well as of the Court's Judgment, the question of the democratic legitimacy of the members of the Presidency and Delegates to the House of Peoples will arise. In this situation, the Assembly must stress, once more, that Bosnia and Herzegovina is not implementing its key outstanding post-accession commitments as well as subsequent Resolutions of the Assembly relating to the honouring of obligations and commitments and the functioning of democratic institutions. Moreover, within the framework of the possible observation of the October 2010 general elections, it would have to examine this issue again and might decide to take any measures as may be required by the situation.

52. The aim of the Assembly's monitoring procedure is to support democratic changes and help the Council of Europe member states fulfill their commitments and obligations. Sanctions are not an instrument in this process, as long as there is room for positive action. Therefore, in the spirit of support and constructive co-operation, we would like to suggest that the authorities of Bosnia and Herzegovina should, without any delay and, by all means, before the October 2010 elections, launch an institutionalised process of preparation of constitutional amendments, in accordance with the country's remaining post-accession commitments and the Judgment of the Court in the *Sejdic and Finci case*.

53. This process should be carried out at two levels: firstly, the authorities (both, Council of Ministers and Parliamentary Assembly) should provide a political basis and mandate for the development of various options of a broad constitutional reform, in accordance with the recommendations of the Venice Commission; secondly, an expert task force, bringing together key domestic legal experts, should be set up in order to prepare the justification for the reform, analyse various existing proposals, and come up with a set of concrete amendments which could generate consensus among the key political stakeholders. This process should continue after the elections and the formation of new authorities which should make the implementation of the country's remaining post-accession commitments, including the constitutional reform, their political priority.

54. The Assembly should follow this process very closely and take its results into account in the monitoring of Bosnia and Herzegovina's obligation and post-accession commitments. It should examine the progress made on this front at one of its future part-sessions, for example, in April or June 2011.

55. At the same time, it should call upon the Committee of Ministers to provide full support to this process and, where appropriate, develop, in co-operation with the domestic authorities, a specific co-operation programme in order to provide, when necessary, the domestic experts involved in the preparation of amendment proposals with targeted advice and European expertise.

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

Reference to committee: Resolution 1115 (1997)

Draft resolution adopted unanimously by the committee on 27 April 2010

Members of the committee: Mr Dick **Marty** (Chairperson), Mrs Josette Durrieu (1st Vice-Chairperson), Mr Pedro **Agramunt Font de Mora** (2nd Vice-Chairperson), Mrs Karin S. Woldseth (3rd Vice-Chairperson), Mr Aydin **Abbasov**, Mr Francis Agius, Mr Miloš **Aligrudić**, Mrs Meritxell Batet Lamaña, Mr Ryszard Bender, Mr József **Berényi**, Mrs Anne **Brasseur**, Mr Patrick **Breen**, Ms Lise Christoffersen, Mr Boriss **Cilevičs**, Mr Georges Colombier, Mr Telmo Correia, Mr Joseph **Debono Grech**, Mr Juris Dobelis, Mr Mátyás Eörsi, Mrs Mirjana Ferić-Vac, Mr Axel Fischer, Mrs Pernille **Frahm**, Mr György **Frunda**, Mr Giuseppe Galati, Mr Jean-Charles **Gardetto**, Mr Andreas **Gross**, Mr Michael Hagberg, Mr Michael Hancock, Mr Davit **Harutyunyan**, Mrs Olha **Herasym'yuk**, Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel **Hunault**, Mrs

14. For the text of Article 7 and 8 of the Statute of the Council of Europe, see footnote 10 above.

Sinikka **Hurskainen**, Mr Kastriot Islami, Mr Mladen **Ivanić**, Mr Zmago Jelinčič Plemeniti, Mr Michael Aastrup **Jensen**, Mr Miloš Jevtić, Mr Tomáš **Jirsa**, Mrs Corien W.A. Jonker, Mr Guiorgui **Kandelaki**, Mr Haluk Koç, Ms Katerina Konečná, Mr Jaakko **Laakso**, Mr Terry **Leyden**, Mr Göran Lindblad, Mrs Kerstin **Lundgren**, Mr Pietro **Marcenaro**, Mr Bernard Marquet, Mr Frano Matušić, Mr Miloš **Melčák**, Mrs Nursuna Memecan, Mr Jean-Claude Mignon, Mr João Bosco Mota Amaral, Mr Adrian **Năstase**, Mrs Elsa **Papadimitriou**, Mr Dimitrios Papadimoulis, Ms Vassiliki Papandreou, Mr Alexander **Pochinok**, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos Pourgourides, Mr John Prescott, Mrs Mailis Reps, Mr Andrea Rigoni, Mr Ilir **Rusmali**, Mr Armen **Rustamyan**, Mr Indrek Saar, Mr Kimmo **Sasi**, Mr Samad **Seyidov**, Mr Leonid **Slutsky**, Mr Yanaki **Stoilov**, Mr Christoph **Strässer**, Mr Björn von Sydow, Mrs Chiora **Taktakishvili**, Mr Zhivko Todorov, Mr Øyvind Vaksdal, Mr Egidijus **Vareikis**, Mr José Vera Jardim, Mr Piotr Wach, Mr Robert Walter, Mr David **Wilshire**, Mrs Renate Wohlwend, Mrs Gisela **Wurm**, Mr Andrej Zernovski.

N.B.: The names of the members who took part in the meeting are printed **in bold**

Secretariat of the committee: Mrs Nachilo, Mr Klein, Ms Trévisan, Mr Karpenko