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MINORITY RIGHTS GROUP INTERNATIONAL

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Minority Rights Group International (MRG) is an international non-governmental organisation working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. MRG works with over 150 organisations in nearly 50 countries. MRG has consultative status with the United Nations Economic and Social Council, observer status with the African Commission on Human and Peoples' Rights, and is a civil society organisation registered with the Organization of American States.



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I. Executive Summary

1. This submission is made by Minority Rights Group International (MRG) in advance of the third periodic review of Bosnia and Herzegovina (BiH) at the Human Rights Council. It addresses two crucial areas of minority rights: participation in political life and protection from discrimination. It summarises MRG's observations on the progress and shortcomings of BiH in relation to the implementation of relevant accepted recommendations, in particular those that relate to removing discriminatory provisions from the Constitution and complying with the European Court of Human Rights (ECtHR) 2009 judgment in the *Sejdic and Finci* case. This submission also includes MRG's recommendations on how the Working Group should encourage the government of BiH to address these issues.

II. Removing discriminatory provisions from the Constitution and the electoral law and ensuring the effective participation of minorities in political life

Recommendations accepted: 107.119, 107.120, 107.121, 107.122, 107.123, 107.124, 107.125, 107.126, 107.127, 107.128, & 107.129

2. The political marginalisation of non-constituent citizens entrenched in the Constitution of BiH leaves minority groups with limited decision-making power in the government. Until the Constitution and the electoral law are amended to comply with the ECtHR's judgment in the *Sejdic and Finci* case, minorities will continue to be excluded from representation in the tripartite Presidency and the House of Peoples of the Parliamentary Assembly (HoP).
3. By way of background, BiH's Constitution provides for an electoral system based on a strict division into Bosniak, Croats and Serbs, who are defined as the nation's "Constituent Peoples". This system excludes all other citizens (defined in the Constitution as "Others"), including Jews, Roma and other national minorities who have lived in BiH for centuries, from standing for election to either the three-member presidency or the HoP. In 2009, in its judgment in the *Sejdić and Finci* case, the ECtHR concluded BiH had violated Protocol 12 and Article 14 in conjunction with Article 3 of Protocol 1 of the European Convention on Human Rights. Accordingly, BiH had to amend its Constitution and electoral laws to bring them into compliance with the Convention.
4. It has now been more than 9 years since the ECtHR issued its judgment in the *Sejdic and Finci* case and even though BiH has taken some steps towards implementing the judgement this is still far from being meaningful. Indeed, Bosnia established a working group and an *ad hoc* Joint Commission of both Houses of Parliament in 2010 and 2011 respectively, each tasked with drafting proposed amendments to bring the Constitution

and electoral law in line with the ECtHR's judgment, however, MRG is concerned neither achieved any tangible results.

5. The Court acknowledged the continuous failure of Bosnian authorities to execute the *Sejdic and Finci* judgment and the consequences of such non-implementation in the *Zornic v. Bosnia and Herzegovina* case. The case concerns a Bosnian citizen who refuses to declare affiliation to any particular ethnic group and is therefore prevented from being elected to the Presidency or the House of Peoples. The Court found that BiH had again breached the Convention and noted that the violation was a direct result of the authorities' failure to execute the *Sejdic and Finci* judgment. The Court further added that non-implementation "not only is 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."ⁱ
6. Accordingly, in September 2015, BiH's Council of Ministers adopted an Action Plan for implementation of the *Sejdic and Finci* and *Zornic* judgments. The Action Plan contemplated the creation of a Task Force charged with "drafting amendments to the Constitution and electoral legislation, and prescribed measures, activities, bodies responsible for each activity and timeframes for the execution of the judgments."ⁱⁱ However, due to the lack of political will, two caucuses of the HoP failed to appoint any representatives to the Task Force. This impasse has effectively stalled the process to date. It appears evident from BiH's most recent submission to the Council of Europe that the government is no closer to drafting the constitutional and legislative amendments necessary to implement the judgments.ⁱⁱⁱ
7. Importantly, the lack of meaningful minority representation in the political consultation process vis-à-vis the implementation of the *Sejdic and Finci* and *Zornic* judgments continues to be of great concern. In particular, BiH authorities have not indicated to what extent the Task Force process will incorporate meaningful consultation of minority communities (if any). Such participation is necessary to ensure that changes arising from implementation of the judgment do not have a detrimental impact on their participation through, for example, changes to electoral district boundaries. The absence of any provisions that ensure meaningful minority participation in the implementation process is a further manifestation of the problem of discrimination and exclusion from access to political decision-making addressed in the Court's judgments; it is also contrary to international and regional standards of minority rights protection.^{iv}
8. Despite declared commitments from the Bosnian government that it will take the necessary steps to implement the judgments^v—including by accepting the above-referenced recommendations during the second cycle of the Universal Periodic Review in 2014—and repeated calls by the Council of Europe^{vi} and the European Union^{vii} to take such steps, to date, Bosnia's political leaders have failed to reach a consensus and amend the Constitution and election law to bring them in compliance with the judgment.

9. BiH's failure to implement any of the necessary amendments has resulted in three national elections taking place in contravention of the European Convention on Human Rights, under a system that is considered fundamentally discriminatory by the ECtHR. This state of affairs not only perpetuates an unacceptable discriminatory political system, it also taints the legitimacy of Bosnia's elected bodies.
10. Furthermore, the special privileges the national Constitution affords to the Constituent Peoples are mirrored in the local laws and constitutions of the governments and public institutions at all levels, which must also be amended and brought in line with the ECtHR's judgments. Based on a preliminary study, in addition to BiH's Constitution, at least 20 laws and regulations would also need to be amended in accordance with the *Sejdic and Finci* (and now, also, *Zornic*) judgments.^{viii}

III. RECOMMENDATIONS

MRG asks the Working Group to make the following recommendations to Bosnia and Herzegovina:

11. Adopt without further delay measures necessary to implement the *Sejdic and Finci* and *Zornic* judgments of the ECtHR.
12. Ensure that minority groups in BiH have the opportunity for effective participation in the consultation process aiming to find solutions to implement the ECtHR's judgments and to carry out necessary legal reforms to remove ethnic discrimination in political participation.
13. Amend all constitutions, laws and regulations to end ethnic discrimination in political participation against national minorities.

ⁱ *Zornic v Bosnia and Herzegovina*, European Court of Human Rights, Application No. 3681/06, Judgment, 15 July 2014.

ⁱⁱ Communication from Bosnia and Herzegovina concerning the *Sejdic and Finci* group of cases against Bosnia and Herzegovina (Application No. 27996/06), DH-DD(2016)1154, 20 October 2018.

ⁱⁱⁱ Communication from Bosnia and Herzegovina concerning the case of *Sejdic and Finci v. Bosnia and Herzegovina* (Application No. 27996/06), DH-DD(2017)380, 31 March 2017.

^{iv} The right of everyone to participate in the conduct of public affairs is outlined in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities elaborates on ICCPR Article 25 by stating that 'persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life' (Article 2(2)) and the right to 'participate effectively in decisions on the national, and where appropriate, regional level concerning the minority to which they belong or the regions in which they live' (Article 2(3)).

Furthermore, Article 15 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM)^{iv} explicitly requires states "to create the conditions necessary for the effective participation of persons belonging to national cultural, social and economic life and in the public affairs, in particular those [matters] that affect them."

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- ^v For instance, political leaders and institutions undertook this commitment in the June 2012 Roadmap for BiH's EU membership application, and most recently in the declaration signed by the political leaders on 1 October 2013. See Joint Conclusions from the High Level Dialogue on the Accession Process with Bosnia and Herzegovina and the Road Map for BiH's EU membership application, European Commission, MEMO/12/503, Memo, 27 June 2012; BiH: Agreement on how to come to solution on pressing issues, European Commission, MEMO/13/840, Memo, 1 October 2013.
- ^{vi} See, e.g., decisions of Ministers Deputies at the 1164th, 1170th, 1172th, 1179th, 1186th, 1193rd, 1214th, 1273rd, 1288th meetings (CM/Del/Dec(2013)1164/6; CM/Del/Dec(2013)1170; CM/Del/OJ/DH(2013)1172/6; CM/Del/OJ/DH(2013)1179/4; CM/Del/OJ/DH(2013)1186/6; CM/Del/Dec(2017)1288/H46-6). See also Committee of Ministers, Interim Resolutions CM/ResDH(2011)291, CM/ResSH(2012)233, and CM/ResDH(2013)259.
- ^{vii} See, e.g., Statement by Commissioner Štefan Füle on political consultations on implementation of the Sejdić-Finci judgment, European Commission, MEMO/13/328, Memo, 11 April 2013, http://ec.europa.eu/commission_2010-2014/fule/headlines/news/2013/04/20130411_2_en.htm; Council conclusions on Bosnia and Herzegovina, Council of the European Union, 21 October 2013; 2012 progress report on Bosnia and Herzegovina – European Parliament resolution of 23 May 2013 on the 2012 Progress Report on Bosnia and Herzegovina, The European Parliament, P7_TA(2013)0225, 23 May 2013 paras 15-17; Statement of Secretary General Jagland available at Council of Europe, *Bosnia and Herzegovina: all citizens should have the right to stand for elections*, 13 October 2014, https://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EYIBJNjXtA5U/content/bosnia-and-herzegovina-all-citizens-should-have-the-right-to-stand-for-elections?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp_p_id%3D101_INSTANCE_EYIBJNjXtA5U%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1; Statement of the PACE pre-electoral delegation available at Parliamentary Assembly, *Bosnia and Herzegovina: statement by the PACE pre-electoral delegation*, 19 September 2014, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5210&lang=2&cat=3>; Statement of the PACE pre-electoral delegation available at Parliamentary Assembly, *Elections in Bosnia and Herzegovina: statement by the pre-electoral delegation*, 22 September 2018, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7204>.
- ^{viii} Nedim Kulenovic et al., “Presuda Sejdic i Finci protiv Bosne i Hercegovine: Konkretno posljedice – prvi pregled” [The Decision in Sejdic and Finci v. Bosnia and Herzegovina: Concrete Consequences – Initial Overview], 1-2 Sveske za javno pravo (2010) 18.