



Doc. 12816

9 January 2012

The functioning of democratic institutions in Bosnia and Herzegovina

Report¹

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

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Summary

The Monitoring Committee deeply regrets that, more than 15 months after the October 2010 general elections in Bosnia-Herzegovina, there is still no government at state level. The constant bargaining about the ethnic distribution of posts in the Council of Ministers does nothing to improve the image of the country. The democratic will of the voters must be respected and the committee therefore calls upon the key political stakeholders to shoulder their responsibilities, stop obstructionism and work constructively at the level of state institutions.

The Monitoring Committee also urges the Parliamentary Assembly of Bosnia and Herzegovina to adopt constitutional amendments without further delay and reiterates that the *Sejdić and Finci* judgment of 22 December 2009 is legally binding and must be enforced. It warns that, if the necessary amendments are not adopted in good time before the next elections in 2014, the continued membership of Bosnia-Herzegovina in the Council of Europe may be at stake.

The Monitoring Committee also stresses the importance of full co-operation by Bosnia and Herzegovina with the Council of Europe and of active participation by its representatives in the Council's various bodies. In this regard, the committee called on the Presidency of Bosnia and Herzegovina to take the necessary measures to nominate candidates for key positions in the Venice Commission, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), the European Commission against Racism and Intolerance (ECRI), the bodies of the Framework Convention of National Minorities and others. In some cases, nominations have been outstanding ever since the country joined the Council of Europe. By 10 February 2012, the Presidency also needs to send a list of candidates for the seat of judge at the European Court of Human Rights.

The Monitoring Committee invites the Parliamentary Assembly to consider, if no progress is made on the issues mentioned in this draft resolution before 15 March 2012, all necessary steps to be taken during the April 2012 part-session, which marks the 10th anniversary of Bosnia and Herzegovina's accession to the Council of Europe.

¹ Reference to committee: Resolution 1115 (1997).

A. Draft resolution²

1. The Parliamentary Assembly recalls its Resolution 1701 (2010) on the functioning of democratic institutions in Bosnia and Herzegovina, in which it called on the key political stakeholders to engage, before the October 2010 parliamentary elections, in a constructive dialogue about concrete proposals for constitutional amendments, with a view to adopting a comprehensive package addressing, in particular, the constitutional discriminations found by the European Court of Human Rights in its judgment of 22 December 2009 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, with regard to the right of the so-called “others” to stand for election to the Presidency and the House of Peoples.
2. The Assembly also recalls its Resolution 1725 (2010) on the urgent need for constitutional reform in Bosnia and Herzegovina, in which it expressed its serious concern about the non-adoption, prior to the 2010 elections, of the necessary amendments to the Constitution and the election law. These elections, albeit globally free and fair, were thus held on the basis of a constitutional and legal framework which is in violation of the European Convention on Human Rights (ETS No. 5) and its Protocols.
3. The Assembly strongly regrets that no credible efforts were undertaken by the authorities to set up, before the elections, a serious institutionalised process for the preparation of a comprehensive package of constitutional amendments, in consultation with civil society and a broad range of legal experts, to be adopted as a matter of priority as soon as possible after the elections. The mixed working group for the implementation of the *Sejdić and Finci* judgment, composed of three ministers and nine parliamentarians, was paralysed by absenteeism. By the end of its work in June 2010, it had not reached a consensus on the mandate and composition of the body to be set up after the elections.
4. The Assembly regrets that a whole year was lost and that the new Joint Interim Committee of the Parliamentary Assembly of Bosnia and Herzegovina was set up only in October 2011. Its task was to prepare constitutional amendments by 30 November and amendments to the election law by 31 December 2011. On 1 December, the Joint Interim Committee officially announced the failure of its work. The Assembly regrets that, once again, it was not possible to reach even a minimum consensus and to submit constitutional amendment proposals to parliament.
5. The Assembly reiterates that the *Sejdić and Finci* judgment is legally binding and must be implemented. If the necessary amendments are not adopted in good time before the next elections in 2014, the Assembly warns that the continued membership of Bosnia and Herzegovina in the Council of Europe may be at stake.
6. The Assembly therefore:
 - 6.1. urges the Parliamentary Assembly of Bosnia and Herzegovina to continue its work and adopt constitutional amendments without further delay. It reiterates that the execution of the *Sejdić and Finci* judgment is a first step in the comprehensive constitutional reform that is needed in order to move away from the institutional straightjacket created by the Dayton Constitution, towards a modern, euro-compatible and functional democracy in which every citizen, regardless of his or her ethnic affiliation, enjoys the same rights and freedoms. The Assembly considers, in particular, that the restrictive quorum rules, the excessive use of entity voting (a double qualified majority used for all decision-making in parliament) and the vague definition of the so-called “vital national interest” – instead of preventing outvoting by any of the ethnic groups through dialogue and search for compromise – have been systematically abused and now hamper all decision-making processes;
 - 6.2. reiterates that a blue-print for constitutional reform was provided by the European Commission for Democracy through Law (Venice Commission) already in 2005 and calls on the authorities of Bosnia and Herzegovina to take into account its recommendations;
 - 6.3. recalls that constitutional reform is indispensable for the functioning of the state but that it also necessary to carry out constitutional reform at entity level and therefore calls on both Republika Srpska and the Federation to finalise as a matter of urgency the adoption of amendments to their constitutions, in line with the recommendations made by the Venice Commission, notably with regard to the abolition of the death penalty in Republika Srpska and the deletion of the constitutional provisions on the Federation ombudsman.

² Draft resolution adopted unanimously by the committee on 15 December 2011.

7. The Assembly deeply regrets that, more than a year after the general elections held at all levels except municipal on 3 October 2010, no government has yet been formed. The constant, increasingly bitter and fruitless bargaining about the ethnic distribution of posts in the Council of Ministers does nothing to improve the image of the country.

8. The Assembly considers that the democratic will of the voters must be respected. With only four seats in the House of Representatives, out of 42, the Assembly believes that the two main Croat parties (HDZ and HDZ 1990) are not in a position to claim one third of the nine ministerial positions, including the chairmanship. It regrets the failure of the House of Representatives, in July 2011, to confirm the nomination of a non-political ethnic Croat candidate for the position of chairman of the Council of Ministers and calls on the 14 delegates from Republika Srpska to use their entity voting rights sparingly in the future and not to abuse them for short-term political gains.

9. Democratically elected institutions, such as the Parliamentary Assembly and the tripartite Presidency, should not be under instructions of political party leaders, but should work according to the four-year mandate they received from the voters. The Assembly therefore urges the Presidency to nominate a new candidate for the post of chairman of the Council of Ministers without further delay.

10. The Assembly also stresses the importance of the full co-operation of Bosnia and Herzegovina with the Council Europe. This requires the active presence of Bosnia and Herzegovina representatives in the various bodies and institutions of the Organisation. Regrettably, for almost 10 years now, the Presidency has been unable to nominate candidates for key positions in the Venice Commission, in the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), in the European Commission against Racism and Intolerance (ECRI), in the bodies of the Framework Convention on National Minorities and others. The Presidency also needs to send a list of candidates, by 10 February 2012, for the seat of judge at the European Court of Human Rights, since the current judge resigned well before the end of her term. The Parliamentary Assembly of Bosnia and Herzegovina also urgently needs to elect the chairperson of the country's delegation to the Parliamentary Assembly of the Council of Europe.

11. The Assembly also strongly regrets the long delay in the constitution of the two houses of the Parliamentary Assembly of Bosnia and Herzegovina: the House of Representatives only started to function towards end of May 2011, and the House of Peoples at the beginning of June 2011. This has significantly delayed the adoption of legislation, such as the law on census and the law on state aid, that are required by Bosnia and Herzegovina's European Partnership Agreement with the European Union.

12. The Assembly urges the authorities of Bosnia and Herzegovina to adopt as soon as possible amendments to the election law in order to create mechanisms to sanction the unconstitutional behaviour of some cantonal assemblies, which blocked the constitution of the State House of Peoples by not sending within the required deadlines their delegates to the Federation House of Peoples, which in turn sends delegates to House of Peoples at state level.

13. The April 2012 part-session marks the tenth anniversary of Bosnia and Herzegovina's accession to the Council of Europe. The current situation hampers the completion of much needed reforms in key sectors, such as democratic institutions, the rule of law and human rights, and slows down the country's advancement on the path to European integration. The Assembly notes that, since 2006, very little progress has been achieved in the implementation of key outstanding commitments of Bosnia and Herzegovina to the Council of Europe.

14. In order to end the perpetual cycle of deadlock and confrontation, the Assembly once again calls on the authorities of Bosnia and Herzegovina and the key political stakeholders to shoulder their responsibilities, stop obstructionism and work constructively at the level of state institutions.

15. The Assembly resolves to closely follow the situation in Bosnia and Herzegovina and to take stock of the progress achieved in the implementation of this and previous resolutions. If no progress is made on the issues mentioned in this resolution before 15 March 2012, the Assembly will consider any further action that might be required at its April 2012 part-session, on the occasion of the tenth anniversary of the accession of Bosnia and Herzegovina to the Council of Europe.

B. Explanatory memorandum by Mr Mignon and Ms Woldseth, co-rapporteurs**Contents**

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1. Introduction

1. On becoming a member of the Council of Europe on 24 April 2002, Bosnia and Herzegovina (hereafter “BiH”) accepted to honour the obligations placed on all member states under Article 3 of the Organisation’s Statute, together with a number of specific undertakings set out in Opinion 234 (2002) on Bosnia and Herzegovina’s application for membership of the Council of Europe. With a view to ensuring compliance with these commitments, the Parliamentary Assembly decided, pursuant to Resolution 1115 (1997), to closely monitor the situation in Bosnia and Herzegovina as from its accession.

2. The first monitoring report was presented to the Assembly in June 2004 and led to the adoption of Resolution 1383 (2004) and Recommendation 1664 (2004) on 23 June 2004. Following the failure of the constitutional reform in April 2006, the Assembly also decided in June 2006 to hold a debate under urgent procedure on the constitutional reform in Bosnia and Herzegovina and adopted Resolution 1513 (2006). The second full monitoring report was debated in September 2008 and led to the adoption of Resolution 1626 (2008).

3. On 22 December 2009, the European Court of Human Rights delivered its judgment in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, in which it found a violation of Protocol No. 12 (general prohibition of discrimination) to the European Convention on Human Rights (ETS No. 5, hereafter “the Convention”) and a violation of Article 3 of Protocol No. 1 in conjunction with Article 14 of the Convention (right to free elections and prohibition of discrimination in relation to other Convention-protected rights). Both Mr Finci (a Jew) and Mr Sejdić (a Roma) belong to the constitutional category of “Others” and as such cannot stand for election to the Presidency of the country or be elected to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina.

4. According to the Constitution (Annex 4 of the Dayton Peace Accords), the tripartite Presidency of the State is directly elected every four years: one member must be a Serb elected from the territory of Republika Srpska (RS), one of the two entities, and the other two must be respectively a Croat and a Bosniak (Muslim) elected from the territory of the Federation of Bosnia and Herzegovina, the other entity, composed of 10 cantons. Again, according to the Constitution, the House of Peoples must be composed of five Serbs (appointed by the Republika Srpska National Assembly) and by five Croats and five Bosniaks appointed by the House of Peoples of the Federation. This system excludes everybody who does not declare him or herself as belonging to a “constituent people”, either because they are members of the 17 recognised minorities or because they do not wish to declare themselves, from participating in the political life of the country.

5. In January 2010, the Assembly adopted Resolution 1701 (2010) on the functioning of democratic institutions in Bosnia and Herzegovina, urging the authorities to make the necessary constitutional and legislative amendments to the election law in order to abide by the *Sejdić and Finci* judgment before the next general elections scheduled for 3 October 2010. The Assembly also suggested holding a multilateral conference with key local and international holders (notably the countries represented on the Peace Implementation Council, the European Union, the Council of Europe and the neighbouring countries) to discuss ways of overcoming the institutional and political deadlock in Bosnia and Herzegovina.

6. Neither the Constitution nor the election law were amended in due time before the elections.³ In Resolution 1725 (2010) on the urgent need for a constitutional reform, the Assembly therefore expressed its disappointment that the next elections were likely to be held on the basis of rules which were in violation of the Convention and its Protocols and called on the authorities not to waste the remaining time before the elections and to launch immediately a serious institutionalised process for preparing a comprehensive package of constitutional amendments right after the elections. This was not done either, since the members of the mixed Sejdić and Finčić working group (3 ministers and 9 MPs) could not agree on the mandate and composition of this constitutional reform commission and, in particular, whether it should be set up by a law or by a decision of parliament. Thus, on 26 August 2010, the Council of Ministers had to take note of the working group's failure and agreed to its proposal to resume work only after the elections.

7. Elections were held at all levels, except municipal, on 3 October 2010. At state level, voters had to elect the three-member Presidency of the state and the 42 members of the House of Representatives. Voters in the Republika Srpska elected the President of the Republika Srpska (and two vice-presidents) and the 83 members of the National Assembly of Republika Srpska. Voters in the Federation of Bosnia and Herzegovina elected the 98 members of the House of Representatives of the Federation.⁴ Finally, voters in the Federation also had to elect the members of the 10 cantonal assemblies.

8. These elections were observed as usual by an ad hoc committee of the Bureau of the Assembly, which formed part of the international observation mission and which also included election observers from the NATO and OSCE parliamentary assemblies and the OSCE/ODIHR.

9. The international election observation mission concluded that the general elections in Bosnia and Herzegovina on 3 October 2010 "represented further progress and, except for legal restrictions of voting rights, were generally conducted in line with OSCE and Council of Europe commitments". However, Mr Tiny Kox, Head of the Assembly delegation, added that "the elections were once again conducted with ethnicity and residence-based limitations to active and passive suffrage rights imposed by the Dayton Accords. As such, the existent legal framework continues to violate the European Convention on Human Rights".

10. As in 2006, it was widely expected that negotiations for government formation would take around three to four months, maximum six months. Instead, to date, there is no government at state level, more than one year after the elections. Extremely concerned about this situation and the resulting institutional paralysis, we carried out a fact-finding visit to Bosnia and Herzegovina from 20 to 23 September 2011, visiting, *inter alia*, leaders of the main political parties in Sarajevo and Mostar, in order to get a better understanding of the reasons behind this continued deadlock.

11. At its meeting during the October 2011 part-session of the Assembly, when we orally reported on the situation in BiH, expressing our grave concerns, the Monitoring Committee decided to ask the Bureau of the Assembly to include on the agenda for the January 2012 part-session a debate on the "Functioning of democratic institutions in Bosnia and Herzegovina".

12. Bosnia and Herzegovina, as we all know, is a very complex state, with an extremely high degree of decentralisation and very weak central institutions. It consists of two entities: Republika Srpska (covering 49% of the territory) and the Federation of Bosnia and Herzegovina, which is divided into 10 cantons by virtue of the 1994 Washington agreement. There is also the autonomous Brčko District whose status is the result of international arbitration (the 1999 Brčko Final Arbitration Award).

13. Given this complex structure, when dealing with any issue, one has to deal with five presidents, 13 prime ministers, around 180 ministers at the state, entity and cantonal level, and with 14 elected parliaments or assemblies (including Brčko, but excluding the municipal level). There is a very serious lack of co-ordination and co-operation, even of communication, between the various levels of government and the decision-making process is hampered by a high number of complex mechanisms designed to prevent outvoting by any of the three "constituent" peoples: the Bosniaks, Serbs and Croats. State laws do not apply automatically throughout the country, legislation in many areas is not harmonised and can vastly differ, and there is no mechanism at the disposal of the state to force sub-state levels to comply with laws or policy decisions.

³ In order for the changes to apply for the 2010 elections, both the Constitution and the election law would have to have been amended before 5 May 2010 when the Central Election Commission announced that elections would take place on 3 October.

⁴ In the Federation, the President (and two vice-presidents) are indirectly elected by the Federation House of representatives.

14. Although Bosnia and Herzegovina has been back-sliding in its reform process approximately since 2006, despite some positive news such as the signing of a Stabilisation and Association Agreement (SAA) with the European Union in June 2008 and an invitation by NATO in April 2010 to a Membership Action Plan, the current impasse represents the most serious crisis for the country since the end of the war in 1995. The fundamental question at the root of this crisis is whether power should be shared between representatives of constituent peoples or between representatives *from* constituent peoples, and whether it should be shared on a proportional basis⁵ or on the basis of total equality between the three constituent peoples.

15. There is no magic recipe to end this crisis. As the Assembly has pointed out many times, a solution requires trust, a common vision of the future of the country and the political will of all the local political stakeholders. All these seem to be in short supply at the moment. We will try to explain why below.

2. Results of the 2010 elections

16. In all, the general elections were contested by 32 political parties, 10 coalitions and 7 independent candidates. With the exception of the Social democratic Party (SDP) which officially claims to be multi-ethnic, the other major parties remain essentially ethnic parties. For the Serbs, the main parties are the SNSD (Alliance of Independent Social Democrats), the SDS (Serbian Democratic Party) and the PDP (Party for Democratic Progress). On the Croat side, the main parties are the HDZ (Croatian Democratic Union of Bosnia and Herzegovina) and the HDZ 1990 (Croatian Democratic Union 1990⁶). For the Bosniaks, the main parties are the SDA (Party for Democratic Action), the SBiH (Party for BiH) and the newly created SBB (Party for a better future of BiH).

17. A total of 8 242 candidates were included in 562 separate lists standing for the general elections, including 4 259 Bosniaks, 1 926 Serbs, 1 713 Croats and 299 "Others". Forty-four candidates did not declare their national identity. A total of 3 126 599 electors were registered on the electoral lists.⁷ On election day, the turnout was 56.28%, which is an increase of some 3% over 2006.

2.1. Election of the tripartite state presidency

18. Voters registered in Republika Srpska, whether Serb, or Croat or Bosniak, could only vote for the Serb member of the Presidency. Incumbent Nebojsa Radmanovic, from the SNSD, was re-elected with 295 629 votes, namely 48.92%. This was a close race because Mladen Ivanic, a former Minister of Foreign Affairs and the leader of the PDP, a party in opposition in Republika Srpska, received 285 951 votes, namely 47.31%.

19. Voters in the Federation, again independently of their own ethnic affiliation, could only vote either for the Croat member of the Presidency or for the Bosniak one. For the Bosniak seat, the winner was Bakir Izetbegovic who received 162 831 votes, namely 34.86%. Again, the race was close because Fahrudin Radoncic, a media tycoon and the leader of the newly created SBB, received 142 387 votes (30.79%). Incumbent Haris Silajdzic from the SBiH, was relegated to third place with barely 25.10% of the votes. The most popular politician in the Federation,⁸ and the best elected throughout the country, is undoubtedly the Croat member of the Presidency, Zeljko Komsic, from the SDP. He was re-elected for a second term with 337 065 votes, namely 60.61%. The candidates from the biggest Croat parties, Borjana Kristo of the HDZ and Martin Raguz of HDZ 1990, only received 19.74% and 10.84 % of the votes respectively.

20. Given the relatively small size of the Croat ethnic community in BiH (they were around 760 000, namely 17% of the population according to the pre-war 1991 census, and, according to Cardinal Puljic, the number today is approximately 400 000 people), it is clear that a vast number of Bosniaks, instead of voting for their ethnic Bosniak candidates, voted instead for Mr Komsic. As in 2006, we see this as a positive sign that politics in BiH can move away from the ethnic divide.

⁵ Article IX (3) of the BiH Constitution provides that "Officials appointed to positions in the institutions of BiH shall be generally representative of the peoples of BiH".

⁶ The HDZ 1990 is originally a splinter party of the HDZ and was set up just before the 2006 elections. This time, however, they decided to join forces.

⁷ For the first time, 1 065 electors were registered in embassies and consular services abroad in order to vote in the elections. Moreover, 36 649 voters were registered for televoting by mail, which was subject to having completed the requisite form by 19 July 2010. As in previous elections, displaced persons were able to vote either in their current municipality of residence or in their pre-1991 constituencies. Of the 113 642 displaced persons in the country, 22 473 opted for voting in their pre-1991 constituencies.

⁸ In Republika Srpska, the most popular politician is Milorad Dodik from SNSD. The outgoing RS Prime Minister won the presidential race in RS with 319 618 votes, namely 50.52%.

21. The mainstream Croat parties, HDZ and HDZ 1990, however, consider that Mr Komsic is not a “real” Croat because he was elected with Muslim votes. They do not question his ethnicity *per se*,⁹ but deny him the right to represent the Croat people in the Presidency. For them, there is a major difference between being a representative *of* the Croat people, elected by Croats, and being a representative *from* the Croat people, elected with votes cast by others than Croats.

22. We completely disagree with this view. We think that it has no constitutional and legal basis whatsoever and that it shows complete disrespect for the democratically expressed will of the people. What is even more surprising is that both the HDZ and the HDZ 1990 do not use the same line of argument with regard to the ethnic Croats in Republika Srpska, where ethnic Croats such as RS Vice-President Emil Vlajki, for example, was elected with Serb votes.

2.2. Elections to the various parliaments, at state and entity levels

2.2.1. At state level

23. The BiH Constitution provides that the House of Representatives of BiH is composed of 42 delegates, of which 28 are elected from the territory of the Federation and 14 from the territory of Republika Srpska. This time the biggest election winner for the 28 MPs to be elected to the House of Representatives from the territory of the Federation was Zlatko Lagumzija’s SDP. This multi-ethnic party, which has been in opposition since 2002, won 26.07% of the votes and now has eight MPs in the House of Representatives. The main Bosniak parties, Suleyman Tihic’s SDA, Fahrudin Radoncic’s SBB and Haris Silajdzic’s SBiH won seven, four and two seats respectively. The main Croat parties, HDZ and HDZ 1990 won three and one seat respectively. The rest of the seats are spread between smaller Croat parties: the HSP (Croatian Party of Rights) and the NSRzB (People Party for Betterment through Work) got one seat each. One seat went to a small mainly Bosniak party, the DNZ.

24. Following the elections, the SDP, the SDA, and two small Croat parties (HSP and NSRzB) agreed to go into a coalition based on a commonly agreed platform for government. Together, they now command 17 seats out of 42. This is of course not a majority, but the platformists, as they are called, will probably, at least on issues of major importance, be able to count also on the four votes of the SBB and the two votes of the SBiH, which both decided to stay in opposition.

25. The seats allocated to the 14 delegates elected from the territory of Republika Srpska are as follows: 8 for Milorad Dodik’s SNSD, 4 for Mladen Botic’s SDS, 1 for the Mladen Ivanic’s PDP and 1 for the DNS (Democratic People’s League). For the first time, all 14 MPs from Republika Srpska are ethnic Serbs. SNSD and SDS have decided to go into coalition at state level, but the SDS remains in opposition at the entity level in Republika Srpska.

26. The newly elected MPs met in an inaugural session on 30 November 2010, but only to take the oath. Due to the ongoing negotiations on government formation, there was no agreement either on who should become Speaker and Vice-Speakers of the House. Finally, thanks to an initiative by the president of the SDS, the House elected a Speaker (from SDP) and two Vice-Speakers (from SNSD and HDZ 1990) on 20 May 2011 and started working.¹⁰ However, since all legislation also needs to be adopted by the House of Peoples, which was not constituted until 4 June 2011, in effect there was no legislative work carried out at all for eight months after the elections

27. The House of Peoples of Bosnia and Herzegovina comprises 15 delegates, two thirds of which must be coming, according to the Constitution, from the Federation (5 Croats and 5 Bosniaks) and one third from Republika Srpska (five Serbs). It is the Republika Srpska National Assembly which appoints its five delegates to the House of Peoples: this was done already in January 2011. For the Federation delegates, matters were unacceptably delayed because the 10 delegates had to be appointed by the House of Peoples of the Federation.

28. The House of Peoples of the Federation has 58 delegates (17 Bosniaks, 17 Serbs, 17 Croats and 7 “Others”) who are appointed by the 10 cantonal assemblies. According to the Federation’s Constitution (Article 10), the cantonal assemblies should have sent their delegates to the Federation House of Peoples no later than 20 days after the elections. This constitutional deadline was ignored by a number of cantons

⁹ Although some say he is not a Croat because he lives in Sarajevo, is not a practising Roman Catholic, is married to a Bosniak and received the Order of the Golden Lily for defending Sarajevo during the war.

¹⁰ In total, one year after the elections, only 10 laws amending existing legislation were adopted.

with a Croat majority¹¹ until 30 May 2011. The House of Peoples was thus inaugurated only on 4 June 2011. We strongly urge the BiH authorities to adopt as soon as possible the required legislation in order to avoid this kind of unconstitutional delay in the future.

2.2.2. At entity level

29. In Republika Srpska, although Milorad Dodik's SNSD lost 4 seats compared with 2006, the SNSD remains the strongest party¹² in the RS National Assembly with 37 seats out of 83. In coalition with the Socialist Party and the DNS, the SNSD thus has a comfortable majority of 47 seats. In these circumstances, government formation was not a problem: the RS government which consists of 16 ministers was approved already on 29 December 2010, and Prime Minister Aleksandar Dzombic took office on 1 February 2011, following a 31 January ruling of the Vital National Interest (VNI) Panel of the RS Constitutional Court that his appointment did not violate Bosniaks' vital national interest.¹³

30. Things were much more complicated in the Federation. The Federation House of Representatives has 98 seats: 28 were won by the SDP, 23 by the SDA, and 5 by the NSRzB. The Platform parties thus command 56 seats and have a clear majority. The HDZ gained 12 seats and the HDZ 1990, 5 seats.¹⁴ According to the election law,¹⁵ however, the government could not be formed until the composition of House of Peoples of the Federation was completed, i.e. until all 10 cantonal assemblies had sent their delegates (see supra paragraph 28).

31. In order to keep a strong bargaining chip for the negotiations over government formation at state level, three cantons with a Croat HDZ/HDZ1990 majority did not send their delegates to the Federation House of Peoples. On 17 March 2011, the Platform parties, who had a majority of 33 cantonal delegates in the House of Peoples, convened a session, took the oath and elected the President¹⁶ and Vice-Presidents of the Federation and the Speaker and Vice-Speakers of the House of Peoples.

32. The House of Peoples then immediately proceeded with the appointment of a government, which was confirmed by the House of Representatives. The Federation Government comprises 16 ministers, with Nermin Nikšić (SDP) as Prime Minister, and Jerko Ivankovic-Lijanovic (NSRzB) and Desnica Radivojevic (SDA) as Deputy Prime Ministers. The two HDZ parties are not holding any ministerial post.

33. On 24 March, these two decisions were annulled by the Central Election Commission¹⁷ and on 28 March, the High Representative, Valentin Inzko, suspended them until further notice. This suspension has not been lifted to date.

34. The High Representative was very much criticised for interfering in the Federation government formation process. But a solution had to be found urgently: on 26 January, the High Representative had to issue a decision on temporary financing for the period January-March, expiring 31 March, without which salaries, pensions and allowances could no longer be paid by the Federation authorities to budget beneficiaries. A budget for 2011 was adopted by the new Government on 26 March.

35. The HDZ and HDZ 1990, with the support of Dodik's SNSD, consider the formation of the House of Peoples and the subsequent formation of the Government in the Federation to be unconstitutional, illegal and illegitimate. Previous HDZ ministers refused to vacate their offices, the former HDZ President of the

¹¹ The Central Election Commission confirmed to us that there was no legal avenue to sanction this delay. The CEC has no competence to impose fines or other sanctions.

¹² The SDS (Serb opposition) got 18 seats, PDP (Serb opposition) got 7, the Democratic Party (Serb opposition) got 2, the Democratic People's League or DNS received 6, the Socialist Party 4, the SDP 3, the SDA 2, the National democratic Party 2, the Serb Radical party 1. There is 1 independent MP.

¹³ The Bosniak caucus in the RS Council of Peoples had invoked VNI because the RS Constitution stipulates that any of the three constituent peoples or Others cannot hold more than two positions each among the six highest positions in the RS. The RS Council of Peoples (28 members: 8 Serbs, 8 Croats, 8 Bosniaks and 4 "Others") is elected by the RS National Assembly.

¹⁴ The SBB got 13 seats, the SBiH, 9 and 3 seats went one each to the A-SDA (a splinter party of the SDA), the DNZ and the SNSD.

¹⁵ Under the Election Law of Bosnia and Herzegovina, the Cantonal Legislatures were obliged to elect delegates to the House of Peoples of the Federation of Bosnia and Herzegovina "as soon as a cantonal assembly convenes after the elections for the Cantonal Assemblies, and no later than one month after validation of the results".

¹⁶ HSP's Živko Budimir was appointed FBiH President, while the Vice-Presidents are Mirsad Kebo (SDA) and Svetozar Pudarić (SDP).

¹⁷ No appeal against these decisions of the CEC was lodged with the State Court. Instead the HDZ lodged two appeals with the Constitutional Court of the Federation complaining about the unconstitutional "coup" perpetrated by the Platform parties.

Federation, Borjana Kristo, who withdrew her constitutional appeal after the suspension order of the High Representative, put her mandate at his disposal. Because they consider themselves as the only legitimate representatives of the Croats in Bosnia and Herzegovina, both HDZ and HDZ 1990 feel sidelined and excluded. They are now forcefully calling for the creation of a third entity and have revived the Croat National Council, a body grouping all cantons with a Croat majority.

36. With just four elected MPs (out of 42) in the state level House of Representatives and with 17 MPs (out of 98) in the Federation House of Representatives, we believe the two HDZs simply need to accept the election results. In a democratic state, the voters' will has to be respected. Both HDZ and the HDZ 1990 have a majority in a number of cantons and should concentrate on working there over the next four years. Given their election results, they cannot claim an acquired right to a reserved number of ministerial posts, either at state or Federation level. There is nothing wrong with being in opposition for a while. As politicians, we have all experienced this.

3. The ongoing stalemate with regard to Government formation at state level

37. The Council of Ministers of Bosnia and Herzegovina comprises nine ministers and a chairman. The Constitution of Bosnia and Herzegovina provides that no more than two thirds of all ministers may be appointed from the territory of the Federation and that the chairman may appoint deputy ministers who shall not be of the same constituent people as their ministers. In total, there are thus 19 positions to be shared. There is an unwritten gentlemen's agreement that the position of chairman should rotate between the constituent peoples. The current chairman, Nikola Spiric, is a Serb, the previous one, Adnan Tersic, was a Bosniak. The Chairman to be appointed for the 2010-2014 term should thus be a Croat.

38. The Presidency forwards to the House of Representatives, no later than 15 days after its inaugural session, its proposal for the position of Chairman of the Council of Ministers. If the House of Representatives confirms the nomination, the Chairman then appoints ministers and deputy ministers, who again need to be confirmed by the House of Representatives. If the candidate proposed by the Presidency fails to be confirmed by the House of Representatives, the Presidency should come up with a new nomination within eight days.

39. Given its election results, the SDP originally claimed the position of chairman of the Council of Ministers, preferably for the SDP President¹⁸ himself. This was strongly opposed by the two HDZ parties and by the Serb parties, because of the above-mentioned informal rotation rule. As the biggest Croat parties, the two HDZs consider the post to be theirs by right. They also claim two other ministerial posts.

40. The SDP, as a multi-ethnic party, then proposed a non-partisan Croat professor from Mostar, Slavo Kukic. The HDZ proposed Borjana Kristo, former Federation President and the NSRzB, another of the Platform parties, proposed Mladen Ivankovic-Lijanovic. On 14 June 2011, the Presidency examined these candidatures and decided to send the nomination of Slavo Kukic to the House of Representatives for confirmation. However, on 29 June, Mr Kukic's nomination, although it obtained a majority of 22 votes, was not confirmed, because the majority needed to include one third of positive votes from Republika Srpska, and it did not. According to the BiH Constitution, in the second round of voting, it was required that votes from the 14 Republika Srpska Delegates should not include two thirds or more of votes against the nomination. On 14 July, the nomination of Mr Kukic was thus finally rejected, as more than two thirds of RS Delegates voted against.

41. According to the law on the Council of Ministers, the Presidency should have forwarded another nomination to the House of Representatives within the next eight days. It did not, but instead wrote a letter to the main political parties requesting them to nominate a candidate who would have the support of at least 22 delegates in the House of Representatives. To date, this has not happened.

42. The six main party leaders (SDP, SDA, HDZ, HDZ 1990, SNSD and SDS) have held a number of meetings since then but no agreement is in sight: Republika Srpska claims four ministries, including the Foreign Affairs one¹⁹, the two HDZs insist on having the chairmanship, and two other ministries, the SDP still wants at least the Foreign Affairs Ministry. There are battles also with regard to the distribution of the positions of deputy minister: the platform parties at some point agreed on the attribution of posts to the HDZs, including the chairmanship, but requested that at least one deputy minister be appointed from the

¹⁸ Zlatko Lagumdžija, the President of the SDP, is a Bosniak.

¹⁹ This is quite a surprising demand: the current Foreign Affairs Minister is a Jew, that is to say from the category of "Others". The RS apparently considers him to be a Bosniak, because he was nominated to this post in 2006 by Haris Silajdzic of the SBiH. The Foreign Affairs Minister in the 2002-2006 mandate was a Serb, Mladen Ivanic.

Croat platform parties. This was refused. The SDA suggested taking into account not only the 19 positions in the Council of Ministers, but more globally the 63 to 70 positions in all state institutions and to distribute them according to the ethnic repartition key provided by the 1991 census. This was rejected as well, because the HDZs were claiming complete equality, namely a third of all posts. In order to show some flexibility, the RS accepted at some point that one of the ministers appointed from the territory of the RS could be either a Bosniak or a Croat.²⁰ It would be too long to detail here all the various proposals made. We consider that this kind of political bargaining needs to stop and we call on all political stakeholders to finally agree on a government that is professional and competent, independently of the ethnic affiliation of its members. Unfortunately, this seems to be wishful thinking for the time being.

4. Consequences of the absence of a state-level government

43. We heard on a number of occasions during our visit that the situation as regards government formation was no worse than in Belgium, a member state of the European Union. But Belgium is not Bosnia and Herzegovina and an agreement on government formation was finally reached in Brussels on 1 December. The political establishment in BiH should understand that the constant bargaining over posts and the ethnic petty quarrelling about almost everything is not conducive to further European integration.

44. We also do not agree with statements to the effect that Bosnia and Herzegovina is a special country, with an institutional straightjacket imposed on it by foreigners in Dayton after a long and bloody war, and that it therefore deserves special treatment. In our view, the Dayton straightjacket has been considerably tightened by the local politicians themselves since the war, for example through the abuse of the double qualified majority, called entity voting. This majority applies to everything in parliamentary procedure: setting the agenda, taking note of annual reports, tabling motions or elections, such as the chairman of the Council of Ministers. Nor has any attempt has been made to limit the use of the vital national interest to specific issues that indeed affect the vital national interest of the three main ethnic groups. Common institutions at state level are constantly contested, criticised or systematically weakened, particularly by Republika Srpska. As a state, Bosnia and Herzegovina functions with a budget of only around 500 million euros²¹ per year, and 22 000 employees.

45. Acting Chairman Nikola Spiric has been quoted as saying he did not understand the international community's hysteria with regard to government formation. In his view, the Council of Ministers is not a real government anyway, ministers are political appointees, and decisions are made elsewhere. There is, for example, no guarantee that a draft law adopted by the Council of Ministers will also be voted by both houses of parliament.

46. We would agree with Mr Spiric that the Council of Ministers is not a real government in the meaning we usually give to it and we would welcome its strengthening, as recommended by the European Commission for Democracy through Law (Venice Commission) already in 2005. In the current institutional set-up however, the absence of a functioning government has made itself felt already: Parliament rejected the Presidency's budget proposal for 2011 on 14 July 2011, again by means of the entity voting. Republika Srpska wants the state budget to be reduced and its delegates therefore voted against. The country has been functioning on temporary financing since January 2011 and can only pay the salaries of its employees and service its debts. The Fiscal Council has still not agreed on the global fiscal balance and policies for the period 2011-2013. Without this global fiscal framework, the International Monetary Fund (IMF) will be unable to disburse the second tranche of its standby agreement of 1.2 billion euros and the European Union's macro-financial assistance of around 100 million euros. BiH almost lost 96 million euros of already agreed 2011 IPA (Instrument for Pre-Accession Assistance) funds in September, because the RS suddenly opposed 8 million euros worth of funds to be spent on strengthening or creating state-level institutions, such as a state register of companies.²²

47. Given the political stalemate, foreign direct investment was only 65 million KM²³ (around 32.5 million euros) in the first half of 2011, down almost 20% compared with the first half of 2010. Unemployment continues to be shockingly high, at 43% of the workforce. On 16 May 2011, Moody's lowered the country's credit rating outlook from stable to negative. This will lead to the downgrading of BiH's current credit rating of B2.

²⁰ The current Minister of Security is a Bosniak from Srebrenica, which is located in the RS.

²¹ By way of comparison, the budget of the city of Paris (2.2 million inhabitants) is 7 754 billion euros for 2011 and the city employs 49 000 people.

²² The European Union finally gave in and accepted that these funds be re-allocated to refugee return and de-mining, following a personal deal struck by Mr Lagumdzija and Mr Dodik while we were in Sarajevo.

²³ In Montenegro, for example, a country with 700 000 inhabitants, foreign direct investment amounted to 300 million euros in the first half of 2011.

48. For over a year now, the performance, both at state and entity level, of government and parliaments has been poor: the best performing parliament, the RS National Assembly, adopted only 36 laws out of a planned 68. At state level, the parliamentary assembly has adopted only 10 laws, amending existing legislation. This is due to the fact that the caretaker Council of Ministers, although it met regularly, did not forward bills to parliamentary procedure.

49. No progress has been made in addressing the European partnership priorities such as the adoption of a law on state aid, a law on census and the necessary adoption of amendments to the Constitution and election law to abide by the *Sejdić and Finci* judgment. The Stabilisation and Association Agreement, albeit having been ratified by all 27 European Union member states, has not been put into force by the European Council, because Bosnia and Herzegovina would have to be immediately suspended as it is in violation of the Agreement, notably on the three points mentioned above.

50. Most international partners of Bosnia and Herzegovina are running short of patience, all the more so because there would appear to be no way out of the current situation. Either one of the quarrelling factions relents and realises that its maximalist demands and constant obstruction to finding a solution risk making it completely irrelevant in the future, or all of them come to a compromise, where everybody needs to give and lose something. It should be noted in this regard that snap elections are not possible under the current constitutional and legal set-up.

5. Implementation of the *Sejdić and Finci* judgment

51. Needless to say, the current political stalemate has also impacted on the constitutional reform. The Joint Interim Committee of both houses of parliament was finally set up in early October 2011, namely one full year without any work being done on constitutional reform since the elections. It was given excessively short deadlines: 30 November to propose constitutional amendments and 31 December for amendments to the election law. The committee held 10 meetings, listening, *inter alia*, also to representatives of civil society and minorities but, on 1 December, it was officially announced that no consensus could be reached for constitutional amendments.

52. The reason no consensus could be reached would appear to be that views on both the scope and content of the amendments differ widely and cannot be reconciled. Republika Srpska will only accept a *minima* amendments and only those necessary to abide by the judgment. For election to the Presidency, Republika Srpska wishes to maintain its system of direct election of the Serb member, whereas the Croat parties want indirect elections by parliament for the Croat and Bosniak member, in order to be sure that their candidate is elected. Failing this, they call for a third entity so that Croats would have their own electoral constituency. No agreement was found on how to guarantee the right of "Others" to stand for the Presidency. On the other hand, a consensus seems to have emerged with regard to the Council of Peoples: a number of "Others" would be added. How this would function in practice is not clear, but the entity constitutions foresee a similar solution.

53. We are perfectly aware that, in such a difficult political climate, with an evident lack of trust and with repeated strident calls for secession of one part of the country, even politicians with the best intentions will have a hard time fulfilling the country's essential international obligations. But the options available are scarce: either Bosnia and Herzegovina abides by the judgment of the European Court of Human Rights or it will ultimately have to leave the Council of Europe. Respect for the European Convention on Human Rights is the primary condition for membership in the Council of Europe and it would be unthinkable to have the next elections, in 2014, conducted under the same discriminatory regime.

54. Mr Thorbjørn Jagland, Secretary General of the Council Europe, recently stated the following: "Some people say that Dayton is a delicate power-sharing agreement which is the guarantor of peace in BiH. They say that this consociational federalism is a carefully balanced construction which cannot bear too much tinkering. What does the 'Dayton Peace' require? It requires ethnic accommodation in order to avoid any one group or 'constituent people' being able to dominate the State level institutions. It requires Entity accommodation in order to avoid any one Entity to be able to dominate State level institutions or policies. These guarantees are completely compatible with the requirements of the *Sejdić and Finci* judgement. The judgment was a precedent for the enforcement of Protocol No. 12 and its general prohibition of discrimination, it was a vindication for two persistent gentlemen, and it may just save democracy also for Bosniaks, Serbs and Croats in Bosnia and Herzegovina. Why? Because, it requires the Constitution to recognise the primacy of the individual citizen as the holder of rights and as the source of the sovereign power 'of the people'. This does not negate, deny or diminish the meaningfulness of the ethnic community to which that citizen may be a member. It does, however, mean that the existence of ethnic communities, even

those of 'constitutive' importance, may neither limit the participation of non-members, nor limit an individual member's right to multiple identities. The implementation of this judgement is an invitation to BiH to be a country which is more than just the sum of its parts."²⁴

55. Just like Mr Jagland, we believe that the implementation of the *Sejdić and Finci* ruling is just the first step forward towards a truly European state which values both the individual citizen and the specificities of the ethnic communities.

56. For our part, we cannot understand why a single President of the country would be anathema to all three main ethnic groups, while some even propose to add a fourth one to remove the discrimination of "Others". A tripartite member Presidency, furthermore rotating every eight months, is unheard of in the European Union member states. It damages the country's reputation and prevents it from playing a role in international fora: Bosnia and Herzegovina is the only country in the region (with Serbia) not to recognise Kosovo.²⁵ BiH, one of the United Nations Security Council's non-permanent members, will also have to abstain in the United Nations Security Council or vote against the Palestinian bid for full membership because of a lack of consensus between the three Presidency members.

57. We believe that the Dayton Constitution will ultimately need to be completely rewritten. With hindsight, it was probably a mistake to append a constitution to a peace treaty. The Dayton straightjacket has been abused in the last 16 years to a point where obstruction and stagnation have become the norm and not the exception. Republika Srpska's repeated calls for a peaceful separation or secession are a bluff that needs to be called. Both entities' Constitutions also need to be revised (the RS Constitution still provides for the death penalty, for example, and the Federation Constitution still mentions an entity ombudsman institution that no longer exists).

6. Conclusions

58. We would like to warn that the current crisis risks having serious consequences not only for Bosnia and Herzegovina itself, but also with regard to its membership in international organisations. Let us recall that 2012 will mark 10 years of Bosnia and Herzegovina's membership in the Council of Europe.

59. On 24 April 2002, Bosnia and Herzegovina's Council of Europe membership began full of hopes for a more secure life of democracy, human rights and rule of law for the citizens of BiH and brought with it the promise of further European integration towards the European Union and NATO. We regret to say that, as a member state of the Council of Europe, despite some progress, Bosnia and Herzegovina has not lived up to the Organisation's expectations and has not sufficiently used its membership to learn from the experiences and best practices of other members. Due to the ongoing disagreement over the ethnic distribution of posts, including in international organisations, the Presidency still has to appoint or nominate candidates for fundamental positions in the Council of Europe, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Venice Commission, European Commission against Racism and Intolerance (ECRI), in the bodies of the Framework Convention for the protection of national minorities and others. The judge (a Serb) sitting on the European Court on behalf of BiH also resigned recently, well before the end of her term (May 2013). The BiH Delegation to the Assembly, which was finally appointed, at least partly, in time for the Assembly's June 2011 part-session, has still not elected its chairperson.

60. We therefore call on the Presidency to finally take the necessary steps to make the nominations to Council of Europe bodies and we will make other recommendations to the authorities in the appended draft resolution.

²⁴ Editorial by the Secretary General in the *Nezavisne Novine* newspaper, 19-21 November 2011, p. 10.

²⁵ Throughout this text, all reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.