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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 memorandum is submitted by Minority Rights Group International (MRG) in advance of the second periodic review of Bosnia and Herzegovina 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 Bosnia and Herzegovina (BiH) in relation to the implementation of relevant accepted recommendations, in particular those that relate to removing discriminatory provisions from the Constitution, ensuring effective implementation of the its domestic anti-discrimination law, and protecting the rights of minority returnee communities. This memorandum 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

Recommendations accepted: 98, 99, 100, 101, 102

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.¹ Until the Constitution and the electoral law are amended to comply with the judgment of the European Court of Human Rights (ECtHR) in the *Sejdić 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. Despite declared commitments from the Bosnian government that it will take the necessary steps to implement the judgment², and repeated calls of the Council of Europe³ and the European Union⁴ to take such steps, to date Bosnia's political leaders have failed to reach a consensus and to amend the Constitution and election law to bring them in compliance with the judgment.

¹ According to the Constitution and electoral law of BiH, only members of the 'Constituent Peoples' (i.e. ethnic Serbs, Croats, and Bosniak Muslims) are eligible to stand for election to the three-member Presidency and the House of Peoples. Non-constituent Bosnians, including national minorities—defined in the Constitution as 'others'—are banned from standing for election to these bodies.

² 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.

³ See for example decisions of Ministers Deputies at the 1164th, 1170th, 1172th, 1179th 1186th meeting (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).

⁴ See for example Joint statement by High Representative/Vice President Catherine Ashton and Commissioner for Enlargement Štefan Füle at <http://www.europa.ba/News.aspx?newsid=5781&lang=EN>; Statement of Commissioner for Enlargement Štefan Füle http://ec.europa.eu/commission_2010-2014/fule/headlines/news/2013/04/20130411_2_en.htm; Council conclusions on Bosnia and Herzegovina, adopted on 21 October 2013, European Parliament resolution of 23 May 2013 on the 2012 Progress Report on Bosnia and Herzegovina (P7_TA(2013)0225).

4. If the necessary amendments are not adopted in time for the next elections a second set of national elections will take place in BiH in contravention of the European Convention on Human Rights, under a system that is considered fundamentally discriminatory by the ECtHR. This would not only undermine the legitimacy of the ECtHR but also perpetuate an unacceptable political system and put into question the legitimacy of Bosnia's future elected bodies.
5. Furthermore, the lack of meaningful minority representation in the political consultation process regarding the implementation of the judgment is of great concern. The *ad hoc* Joint Parliamentary Commission ("Commission") tasked with preparing amendments to implement the judgment consists of delegates from political parties, representing only Constituent Peoples. Although representatives from the Council of National Minorities of BiH can attend the Commission's sessions and present their proposals, they lack any role in decision-making of the Commission. They cannot ensure that their proposals will be considered, and they have no power to block the acceptance of proposals that are detrimental to their interests. In March 2012 the Commission temporarily suspended its activities until a multi-party political agreement is reached on the implementation of the judgment.
6. It seems that since the suspension of the activities of the Commission, there has been no participation of, or consultation with, minority communities affected by the proposed amendments in any of the high-level political consultations, which have involved only the main political parties representing the Constituent Peoples. Such exclusion of minorities from the implementation process will very likely lead to proposals that do not reflect the concerns of minorities and may result in amendments that do not remedy the violations outlined by the Court.
7. The lack of meaningful minority participation in the work of the Commission and complete lack of minority representation during the subsequent political consultations on the implementation of the judgment are not only a further manifestation of the problem of discrimination and exclusion from access to political decision-making addressed in the Court's judgment but also contrary to international and regional standards of minority rights protection.⁵

⁵ 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)⁵ 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."

8. Moreover, it should be noted that local laws and constitutions that extend similar special privileges provided in the national Constitution to the Constituent Peoples in the governments and public institutions at national, entity and cantonal levels must also be amended and brought in line with the judgment. Based on a preliminary study, in addition to the state Constitution, at least 20 laws and regulations would also need to be amended in accordance with the *Sejdić and Finci* judgment.⁶

III. Ensuring effective implementation of the anti-discrimination law

Recommendation accepted: 45

Recommendations partially accepted: 32 as well as 9, 10, 11, 18

9. The adoption of the comprehensive anti-discrimination law (ADL) in July 2009 represents an important step toward the protection of minorities from discrimination in BiH; however, it is concerning that to date only very limited measures have been taken to ensure its effective and proper implementation. While discrimination faced by members of minority communities is widespread in BiH, minorities have brought very few cases under the law.⁷
10. The weak implementation of the ADL is partly due to the general lack of understanding among the judiciary, relevant administrative authorities, the public and minority communities of the law's provisions, including the concept of both direct and indirect discrimination, the rule of shifting the burden of proof, as well as the lack of adequate protection from victimisation.
11. NGOs working with minority communities and engaging in litigation of discrimination cases note the difficulty of identifying suitable cases as the general public, including members of minority communities, do not properly understand the concept of discrimination and thus interpret any human rights violation as an instance of discrimination. Moreover, when discrimination occurs, since victims are often unaware of the judicial and quasi-judicial remedies available to them, they take no action to redress the violation.
12. Furthermore, the lack of proper protection from victimisation of participants in the proceedings is of a great concern. There have been several instances when victims of discrimination were subjected to harassment or disciplinary proceedings for making a complaint or an allegation of ethnic discrimination, and relevant bodies failed to take

⁶ 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.

⁷ For instance, in 2012, the Department for the Elimination of All Forms of Racism of the Ombudsman of BiH received only 30 complaints relating to ethnic discrimination and 3 complaints based on membership to a national minority. (The Institution of Human Rights Ombudsman of Bosnia and Herzegovina, *Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2012*, p. 13.)

proper action against the perpetrators.⁸ Therefore, victims of discrimination are often reluctant to take their cases to court or other competent authority due to fear of victimisation.

13. Effective implementation of ADL is further hindered by the legal community's unfamiliarity with the law. The ADL is still not part of the law school curriculum in BiH, and legal professionals have not been trained adequately on the provisions of the ADL and their application. Lawyers and NGOs providing legal aid for victims of discrimination as well as organisations monitoring cases of discrimination note that the judicial community is still not sufficiently familiar with the provisions of the anti-discrimination law to apply them confidently; therefore, they frequently apply provisions of other laws in discrimination cases. Most of the judges still do not understand the concept of discrimination properly and are therefore unable to identify instances of discrimination. In addition, they often disregard the specific provisions of the ADL that were introduced to help victims to bring claims in discrimination cases.⁹
14. Moreover, "the central institution competent for the protection against discrimination,"¹⁰ the Institution of Human Rights Ombudsman of Bosnia and Herzegovina (Ombudsman of BiH), continues to be significantly challenged by lack of funding, capacity issues, and non-implementation of its recommendations. Due to lack of funds and resulting understaffing of the office¹¹, the citizens' accessibility to the Ombudsmen of BiH is rather limited and the office is unable to properly carry out its mandate. In particular, it lacks funds for statistical data gathering, raising public awareness about the provisions of the ADL and the role of the office in challenging discrimination, monitoring of discrimination cases in court and administrative proceedings, and carrying out proper investigations into allegations of discrimination.¹²

⁸ See, for example, the cases cited in Analitika, *The Ombudsman in System of Protection against Discrimination in Be&H: Situational Analysis and Characteristic Problems* (Sarajevo, January 2013), p. 33.

⁹ For example, the analysis of court practice in BiH indicates that judges often misinterpret or fail to understand completely the rule of shifting the burden of proof in civil proceedings. In discrimination cases, once the complainant establishes facts from which it can be concluded that discrimination could have been one of the reasons for their less favorable treatment, the burden of proof shifts to the defendant to prove that discrimination did not form any part of their treatment of the complainant. However, in civil discrimination cases judges still often apply the general rule of burden of proof set out in the Code of Civil Procedure instead of those of the ADL, requiring the complainants to prove that discrimination occurred. See, for example, the cases cited in Analitika, *Judicial Protection from Discrimination in Bosnia and Herzegovina: Analysis of Laws and Practice Based on Initial Cases in the Field: Policy Brief* (Sarajevo, April 2013), p. 7.

¹⁰ The Law on the Prohibition of Discrimination in BiH, *Official Gazette of BiH 59/09*, Article 7.

¹¹ Due to the lack of proper funding, the staffing of the Ombudsman's office remained very limited, with only 3 staff members working for the Department for the Elimination of All Forms of Racism, and one full-time consultant working for the Department for Protection of the Rights of National, Religious and Other Minorities.

¹² The Institution of Human Rights Ombudsman of Bosnia and Herzegovina, *Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2011*, pp. 24-27; *Annual Report on Occurrences of Discrimination in Bosnia and Herzegovina for 2012*, p. 25.

IV. Protecting the rights of minority returnee communities¹³

Recommendation accepted: 46

Recommendations partially accepted: 117, 118, 119 as well as 47, 116

15. It should be noted that the Constitution of BiH not only discriminates against “Others” as the ECtHR ruled in the *Sejdić and Finci case* but also disenfranchises minority returnee communities, i.e. Serbs living in the Federation of BiH (Federation) and Bosniaks and Croats living in the Republika Srpska (RS). According to the current system, unlike Croats and Bosniaks residing in the Federation, their counterparts residing in RS have no right to be elected to the tripartite Presidency and the HoP; the situation of Serbs living in the Federation is identical.¹⁴
16. Effectively, these minority returnee communities have no representation of their own in the Presidency or the HoP. This not only raises issues about discriminatory treatment in the right to vote and be elected, but it also has the effect of thwarting the principle of refugee return. If minority returnees are not able to effectively vote upon their return to their rightful homes because of voting inequalities based on ethnicity and location, they will be discouraged from returning home, where they would be second-class citizens.
17. The limited political representation of minority returnee communities perpetuates entrenched discrimination against them in all areas of life and is inextricably linked with broad deprivations their rights. Minority returnee communities visited by MRG in 2013 and 2014 claimed that their needs receive little attention in comparison to other communities. They noted that lack of proper infrastructure and access to basic services are long-standing problems for them while other ethnic communities in the same area do not face the same issues. Many minority returnee communities lack access to running water, proper roads, public lightning and sewage-system, and some of them live in segregated settlements far from accessible schools, work opportunities, health and other emergency services. Due to high levels of discrimination they often face difficulties in realizing their rights to education, health, social security and pensions, and above all their right to work.
18. Furthermore, integrated education remains a concern for most minority returnee communities. Some attend segregated schools—either mono-ethnic schools or ethnically segregated schools under the ‘two-schools under one roof system’—significantly hindering their integration. On the other hand, those who attend unified schools often find that they cannot learn their own minority language or be taught based on a *curriculum* that also promotes the knowledge of their culture, history and religion.

¹³ The term minority returnees here refers to ‘Constituent Peoples’ who find themselves in the situation of being *de facto* minorities in the autonomous entities or cantons in which they live and where they face significant challenges as returnee communities.

¹⁴ Another case on this particular problem is pending before the European Court of Human Rights (*Pilav vs. BiH*, Application no. 41939/07).

V. RECOMMENDATIONS

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

19. Adopt without delay measures necessary to implement the *Sejdić and Finci* judgment of the European Court of Human Rights.
20. Amend all constitutions, laws and regulations to end ethnic discrimination in political participation against both national minorities and minority returnee communities.
21. Ensure that minority groups in BiH have the opportunity for effective participation in the consultation process aiming to find solutions to implement the judgment of the ECtHR and to carry out necessary legal reforms to remove ethnic discrimination in political participation.
22. Ensure appropriate financial resources and staff capacity building to enable the Ombudsman of BiH to fulfill its mandate;
23. Promote effective implementation of the ADL by educating the public and the legal community about discrimination, urging relevant authorities to provide adequate protection against victimization and to create further mechanisms to exert pressure on violators to comply with recommendations issued by the office of the Ombudsman;
24. Ensure sustainable return of minority returnees by removing discriminatory provisions from the Constitution limiting their right to political participation and by reinforcing the promotion of their human rights and protection from ethnic discrimination;
25. End ethnic segregation in schools and promote integrated education that respects the principles of multiculturalism and intercultural education and international minority rights standards.