

Submission by the Council of Europe Commissioner for Human Rights

under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of the friendly settlements

in the cases of

Sejdić and Finci v. Bosnia and Herzegovina

(application number 27996/06, judgment of 22 December 2009)

Zornić v. Bosnia and Herzegovina

(application number 3681/06, judgment of 15 July 2014)

Šlaku v. Bosnia and Herzegovina

(application number 56666/12, judgment of 26 May 2016)

Pilav v. Bosnia and Herzegovina

(application number 41939/07, judgment of 9 June 2016)

Pudarić v. Bosnia and Herzegovina

(application number 55799/18, judgment of 8 December 2020)

Introduction

1. This submission by the Council of Europe Commissioner for Human Rights (hereinafter: “the Commissioner”) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.4 of the Rules of the Committee of Ministers,¹ in the context of the supervision of the execution of the judgments of the European Court of Human Rights (hereinafter: ‘the Court’) in the *Sejdić and Finci* group of cases. This group of judgments relates to discrimination against the applicants on account of their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina due to their lack of affiliation with a constituent people (i.e. Bosniaks, Croats or Serbs), or due to their failure to meet a combination of the requirements of ethnic origin and place of residence in violation of Article 1 of Protocol No. 12. to the European Convention on Human Rights (hereinafter: ‘the Convention’). The cases (apart from *Pilav* and *Pudarić*) also concern violations of the right to free elections and discrimination against the applicants on account of their ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina, due to their lack of affiliation with a constituent people (a violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1).
2. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the Convention; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.²
3. The present submission aims to assist the Committee of Ministers in its examination of the execution of the above five cases. It is based on the work of the Commissioner and her predecessors on issues related to addressing the legacy of the war in Bosnia and Herzegovina and its long-lasting impact on inter-ethnic relations and social cohesion, including institutionalised ethnic discrimination.
4. Section I of this submission contains an overview of the Commissioner’s work on the issues raised in this group of judgments. Section II provides the Commissioner’s observations on the importance of fully removing ethnic discrimination from the Constitution and the electoral legislation of Bosnia and Herzegovina. Section III contains some additional observations about the situation in Bosnia and Herzegovina that the Commissioner considers relevant to discussions about the execution of these judgments. These sections are followed by the Commissioner’s conclusions.

I. Overview of the Commissioner’s work

5. Successive Commissioners have addressed issues concerning ethnic discrimination in the Constitution of Bosnia and Herzegovina and the electoral legislation since 2008. In the February 2008 report following his visit to Bosnia and Herzegovina in June 2007, former Commissioner Thomas Hammarberg referred to the important contribution of the Venice Commission to discussions on the future constitutional arrangements for Bosnia and Herzegovina, including as regards the provisions on the composition and election of the Presidency and the House of Peoples. He concurred with the assessment of the Venice Commission about the need for further constitutional reforms in the long-term with a view to “changing the emphasis from the equality of three constituent peoples to a state based on the equality of citizens”, and with an approach “which would enable the elimination of discrimination currently institutionalised”. The former Commissioner also shared the view of the Venice Commission that “if the interests of individuals were conceived as being based mainly on ethnicity, this impedes the development of a wider sense of nationhood”.³

¹ [Rules of the Committee of Ministers](#) for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 and [amended on 18 January 2017](#)).

² [Resolution \(99\)50](#) on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

³ [Report](#) by Thomas Hammarberg, Commissioner for Human rights, on his visit to Bosnia and Herzegovina, 20 February 2008.

6. In the report following his second visit to the country, published in March 2011, the former Commissioner remained concerned that the provisions of the Constitution and the electoral legislation were unchanged, despite their discriminatory character as established by the Court's 2009 judgment in *Sejdić and Finci*. The report noted that the general elections in October 2010 were held under the discriminatory provisions of the Constitution and the Election Law. He called on the authorities to end the longstanding discrimination against members of national minorities by bringing the Constitution and the electoral legislation fully in line with the Court's judgment.⁴
7. In 2017, former Commissioner Nils Muižnieks raised his concerns about the stagnation and regression in many aspects of human rights protection and the rule of law in Bosnia and Herzegovina. Noting that reform of the Constitution and the electoral legislation was long overdue, he called on the authorities to implement the relevant Court judgments. The report also noted that divisions along ethnic lines had been exacerbated by aggressive nationalist rhetoric and hate speech widely used in the public sphere, as well as by increased inter-ethnic tensions in the region. The former Commissioner was also concerned about denial of genocide and the glorification of war criminals, stressing how this seriously undermined reconciliation efforts in the country. Finally, he was concerned that generations of children in Bosnia and Herzegovina had been deprived of inclusive education due to the authorities' failure to abolish the system of 'two schools under one roof' and mono-ethnic schools. He called on the country's political leadership to act in a principled and determined manner towards rebuilding a tolerant and inclusive society without discrimination on any ground.⁵
8. Since the beginning of her mandate in April 2018, the Commissioner has repeatedly raised her concerns about risks posed by deeply entrenched ethnic divisions and ethnic discrimination in Bosnia and Herzegovina. She has tackled these issues during her missions to Bosnia and Herzegovina, in exchanges with representatives of the authorities and with other international actors, as well as in meetings with civil society organisations and with civilian war victims. In her op-ed published in December 2020 on the occasion of the 25th anniversary of the Dayton Peace Agreement, the Commissioner noted that Bosnia and Herzegovina remained mired in serious structural and functional problems and that its constitution provides for "a complex and expensive administrative and political system, one that is clogged up by excessive protection of ethnic interests and mechanisms that have enabled nationalist politicians to veto important decisions that could help the country to move forward".⁶ In November 2021, the Commissioner stressed the urgency of de-escalating tensions in Bosnia and Herzegovina and underlined four urgent steps to be taken, including the implementation of this group of judgments and ending hate speech, genocide denial and the glorification of war criminals.⁷ In her [address](#) at the Solemn Hearing of the European Court of Human Rights on 24 June 2022 the Commissioner evoked how "non-execution of judgments sometimes affects not only individual applicants, [...], but also the broader democratic fabric of a society", referring specifically to the non-execution of this group of judgments.

II. The Commissioner's observations on the importance of fully removing ethnic discrimination from the Constitution and the electoral legislation

9. The Commissioner considers it a matter of great concern that, fourteen years after the Grand Chamber delivered its first judgment in this group of cases, the discriminatory provisions remain in the Constitution and the electoral legislation. These provisions continue to prevent many citizens of Bosnia and Herzegovina from the enjoyment, on an equal footing, of their fundamental democratic rights.⁸ Those who do not belong to one of the constituent

⁴ [Report](#) by Thomas Hammarberg, Commissioner for Human Rights, on his visit to Bosnia and Herzegovina, 29 March 2011.

⁵ [Report](#) by Nils Muižnieks, Commissioner for Human Rights, on his visit to Bosnia and Herzegovina, 16 June 2017.

⁶ Commissioner for Human Rights, [Opinion](#): The Dayton Accords could only do so much, 14 December 2020.

⁷ [Op-ed: De-escalate Bosnia and Herzegovina - before it is too late - Commissioner for Human Rights \(coe.int\)](#).

⁸ According to the 2013 population census in Bosnia and Herzegovina, which registered the total population of 3,531,159, 3,44% of the population (about 130 000 persons) declared themselves as "Others" or refused to declare their ethnic affiliation.

peoples – defined in the Constitution as Others – have been denied the right to stand for election to the Presidency and the House of Peoples of Bosnia and Herzegovina for the past 28 years. This includes national minorities who have lived in Bosnia and Herzegovina for centuries.

10. Despite four interim resolutions and multiple decisions adopted by the Committee of Ministers in the framework of the supervision of the execution of these judgments, and intensive engagement of the international community, there has been no progress to date. The international community, in particular the European Union, with the assistance of the Venice Commission, has facilitated many rounds of discussions among political leaders in Bosnia and Herzegovina on the content and scope of the necessary constitutional reform, most recently in the period leading up to the general elections in 2022. The Commissioner notes with deep regret that despite these efforts, the last elections were the fourth general elections held on the basis of discriminatory provisions in the Constitution and the electoral legislation since the adoption of the judgment in *Sejdić and Finci* .
11. The Commissioner understands, from the [communication](#) of the authorities of Bosnia and Herzegovina to the Committee of Ministers of 13 February 2023, that the members of the newly-formed political coalition at the state level have signed a document entitled “*Guidelines, principles and goals in the executive and legislative power at the level of BiH for the period 2022-2026*”. According to the authorities, this document comprises six parts, including one on “electoral legislation and democratisation of electoral process”, and the parties’ commitment to “urgent implementation, and at least within six months of the establishment of government at all levels, of limited changes to the Constitution of Bosnia and Herzegovina and the adoption of the amendments to the Election Law in accordance with the decision of the Constitutional Court and the judgments of the European Court of Human Rights.” The authorities’ communication also notes that “the burdensome past and the complexity of the multi-ethnic society in Bosnia and Herzegovina require a careful approach and time to reach compromised solutions.”
12. While the Commissioner is cognisant of the complexity of the issues at stake and the legacy of the past, she underlines that reform of the Constitution is long overdue, given that 28 years have passed since the signing of the Dayton Peace Agreement. The Court made this clear already in 2016, in its judgment in *Zornić v. Bosnia and Herzegovina*, in which it noted that “more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions”. As further noted by the Court in this judgment, “in view of the need to ensure effective political democracy the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent peoples to the exclusion of minorities or citizens of Bosnia and Herzegovina.”
13. In the Commissioner’s view, time has always been of the essence in the execution of these judgments, and the negative impact of the delay on social cohesion and inter-ethnic relations has been significant. The deeply embedded ‘ethnic keys’ in the country’s constitutional system, at state and entity levels, have amplified divisions along ethnic lines over the years, which has adversely impacted on the human rights situation in the country, as confirmed by reports of the Commissioner’s predecessors and the Council of Europe monitoring bodies, such as ECRI and the Advisory Committee on the Framework Convention for the Protection of National Minorities. The Venice Commission warned of these risks already in 2006. In its opinion about the constitutional reform from that year, the Venice Commission noted that the notions of “constituent peoples” and of “Others” leads to a stratification of society which, instead of appeasing ethnic tensions, exacerbates them, given that part of the civic prerogatives depends on whether or not one belongs to a constituent people. The Commissioner shares the view of the Venice Commission expressed in this opinion that those who have decided to “opt out” of one of the constituent peoples appear to have replaced their “ethnic identity” with an “identity through citizenship” and that “this attitude should be encouraged, inter alia through the enhancement of the position of the “Others” at the constitutional level.”⁹

⁹ Venice Commission, Amicus Curiae Brief in the cases of *Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06) pending before The European Court of Human Rights, para. 36.

14. The Commissioner considers it positive that the implementation of these judgments is one of the commitments of the newly-formed coalition in Bosnia and Herzegovina; however, reference to the implementation of “*limited* changes to the Constitution”¹⁰ raises her concern. While there is, at present, no clarity as to what this entails, the Commissioner underlines the importance of ensuring that any constitutional or legislative changes that the authorities undertake fully comply with these Court judgments and that they lead to the full elimination of ethnic discrimination from both the Constitution and the electoral legislation. The Commissioner thus considers it important that in its latest decision on the execution of these judgments from March 2023, the Committee of Ministers strongly urged the political leaders and all relevant authorities to take all actions required to ensure the adoption of the constitutional and legislative amendments aimed at eliminating discrimination based on ethnic affiliation in elections for the Presidency and the House of Peoples of Bosnia and Herzegovina, and that it continues to do so.
15. In the same vein, the Commissioner is concerned about calls for so-called “legitimate representation of constituent peoples” in discussions about reform of the Constitution and the electoral legislation. This concept has been upheld by the Constitutional Court of Bosnia and Herzegovina in respect of the House of Peoples of the Federation of Bosnia.¹¹ The Commissioner understands this concept to imply the inclusion of additional mechanisms in the Constitution and the electoral legislation, which would ensure the election of candidates from constituent peoples in the Presidency and in the House of Peoples of Bosnia and Herzegovina who are considered as “legitimate” representatives of their ethnic group. For the Commissioner, this would mean granting special rights for constituent peoples, to the exclusion of minorities or citizens of Bosnia and Herzegovina who do not affiliate with any of the constituent peoples, and which could contravene the Court’s findings in these judgments.¹² Even if this only means preserving the existing situation, this implies that being just a citizen is considered to be of a lower status, as opposed to being a member of one constituent people, which would be contrary to the principle of non-discrimination.

III. Additional observations about the situation in Bosnia and Herzegovina

16. The longstanding non-execution of these judgments is a reminder that the legacy of the violent past still lingers in Bosnia and Herzegovina 30 years after the war, and is impeding social cohesion, reconciliation, and progress. As she has done in her above-mentioned statement from December 2020, the Commissioner wishes to once more draw attention to the negative impact on human rights of an ingrained vision of politics that for decades has been capitalising on lingering ethnic resentment to maintain power and a discriminatory status quo, without even a minimal effort or any political will to ensure equality and prosperity for all living in Bosnia and Herzegovina, regardless of their ethnic or any other affiliation.
17. The Commissioner considers that the non-execution of these judgments is the expression of a persisting approach which does not place human rights at its centre, and which also manifests itself in rising ethnic tensions and polarisation, as well as lingering divisions along ethnic lines in education.
18. In this sense, the Commissioner shares concerns expressed by other international human rights actors, including those of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr Fabian Salvioli. In the report on his visit to Bosnia and Herzegovina from July 2022, the Special Rapporteur noted that “in recent years, relentless political bargaining by political elites and the exacerbation of nationalist agendas for political purposes has led to a virtual standstill in governance. This, combined with an exponential rise in anti-ethnic minority rhetoric and the glorification of convicted war criminals, has led to

¹⁰ Emphasis added.

¹¹ See, Constitutional Court of Bosnia and Herzegovina, U/23/14, Dr Božo Ljubić, [Decision on Merits](#), 1 December 2016. See also the decisions of the High Representative of Bosnia and Herzegovina Enacting [the Law on Amendments to the Election Law of Bosnia and Herzegovina](#) and [Amendments to the Constitution of the Federation of Bosnia and Herzegovina](#), which were adopted on 2 October 2022 with a view to implementing this Constitutional Court decision.

¹² See, the Court’s [judgment](#) in *Zornić v. Bosnia and Herzegovina*, para. 43.

worrying levels of polarization and tangible risks to peace sustainability, which require an immediate national and international response.”¹³

IV. Conclusions

19. In 2002, Bosnia and Herzegovina became a member of the Council of Europe and committed itself to respecting the judgments of the European Court of Human Rights. It ratified the ECHR and its Protocols without reservations, agreeing to meet the relevant requirements. In particular it agreed to 'review within one year, with the assistance of the Venice Commission, the electoral legislation in the light of Council of Europe standards, and to revise it where necessary'. Ensuring equality and non-discrimination of citizens, notably by implementing the *Sejdić-Finci* group of cases is also one of the 14 key priorities for the opening by the European Union of accession negotiations with Bosnia and Herzegovina.¹⁴
20. More than fourteen years have passed since the adoption by the Grand Chamber of the judgment in *Sejdić and Finci*, the first judgment of the five cases against Bosnia and Herzegovina concerning discriminatory provisions in the Constitution and the electoral legislation before the European Court of Human Rights. The Commissioner regrets that the authorities have not yet executed these judgments despite four interim resolutions and multiple decisions of the Committee of Ministers, as well as intensive engagement by the international community, with the help of the Venice Commission. As a result, many citizens of Bosnia and Herzegovina continue to be discriminated against on account of their ineligibility to stand for election to the Presidency of Bosnia and Herzegovina or the House of Peoples of Bosnia and Herzegovina.
21. In the Commissioner's view, the failure of the authorities to execute these judgments has contributed to the further deterioration of the situation in Bosnia and Herzegovina and has amplified ethnic divisions. Increased threats to peace and stability, the rise of hate speech, glorification of war criminals and unsanctioned genocide denial, as well as longstanding divisions in education along ethnic lines, are just some of the negative consequences of the preservation of a system based on ethnic discrimination. It is imperative that the authorities place focus on building a state based on the equality of citizens, rather than on further embedding ethnic discrimination in the Constitution and the electoral legislation.

¹³ [Report](#) of the Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence on his visit to Bosnia and Herzegovina, July 2022, paragraph 15.

¹⁴ European Commission, Communication from the Commission to the European Parliament and the Council, Commission [Opinion](#) on Bosnia and Herzegovina's application for membership of the European Union, 29 May 2019.