Execution of the Sejdić and Finci v. Bosnia and Herzegovina case, the reasons behind the delay

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Tilburg, The Netherlands

2014

Abstract

This thesis examines the lack of implementation of the European Court of Human Rights case Sejdić and Finci v. Bosnia and Herzegovina. This case is significant in more ways than one, but the delay of already four years of the execution of the ruling deserves particular attention. In the case the court agreed with the applicants, stating that the electoral system of Bosnia and Herzegovina is discriminatory against national minorities that do not wish to declare affiliation with one of the three main ethnic groups called the 'constituent' peoples. This discriminatory system originates in the Bosnia and Herzegovina Constitution, which in turn was established in the Dayton Peace Agreement.

The reason behind this lack of execution of the European Court of Human Rights case is mainly the deep-rooted ethnic rivalry in Bosnia and Herzegovina. A look into the history of Bosnia and Herzegovina confirms this rivalry and illustrates that is has been there for many years, only being reinforced by the Dayton Peace Agreement. These ethnic hostilities, next to preventing execution of the European Court of Human Rights case from taking place, cause separation and segregation within all aspects of Bosnia and Herzegovina public life.

Additionally the responsibility of the international community leaves much to be desired. Even though there is no lack of supervisory mechanisms available to several members of the international community, the lack of coercive or punitive measures makes that no real pressure can be put on Bosnia and Herzegovina to execute the ruling.

List of Abbreviations

Abbreviation	**Full Name**
ECHR/Convention	European Convention of Human Rights
ECtHR	European Court of Human Rights
BiH	Bosnia and Herzegovina
CoE	Council of Europe
Constitution	Bosnia and Herzegovina Constitution
Yugoslavia	Socialist Federal Republic of Yugoslavia
RS	Republika Sprska
FBH	Federation of Bosnia and Herzegovina
AIRE Centre	Advise on Individual Rights in Europe Centre
PACE	Parliamentary Assembly of the Council of Europe
SAA	Stabilization and Association Agreement
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
EU	European Union
UN	United Nations
NATO	North Atlantic Treaty Organization

Contents

Introduction

It is easy to take the rulings that the European Court of Human Rights hands down for granted. But to do so would be unadvisable when cases such as the Sejdić and Finci v. Bosnia and Herzegovina case are taken into consideration. The cases before the ECtHR concern violations of human rights and should be followed through until the bitter end. Not only should the quality of the rulings be watched over, also the quality of the execution of those rulings. The implementation of the Sejdić and Finci v. Bosnia and Herzegovina ruling is, in this respect, a perfect case study of the many pitfalls that remain after the judgment has been delivered. As the Group of Wise Persons has said:

'The credibility of the human rights protection system depends to a great extent on execution of the courts judgments. Full execution helps to enhance the courts prestige and the effectiveness of this action and has the effect of limiting the number of applications submitted to it.'

The risk of the ECtHR rulings becoming empty shells if they do not get implemented by the respondent states confirms the relevancy of the research in this Master thesis. The execution of the Sejdić and Finci v. Bosnia and Herzegovina case is particularly lacking and therefore very suitable for examination. On first glance the case itself seems simple, with the ECtHR finding national minorities in BiH to be discriminated against because of certain discriminatory provisions within the BiH Constitution and Election Law. But nonetheless it is a landmark case for more reasons than one. Firstly it was the first case before the ECtHR where article 1 of the twelfth protocol to the European Convention on Human Rights was applied. This article guarantees the right to equal treatment as a stand-alone provision extending the right to equal treatment to all legal rights. This broadens the scope of the right to equality as found in article 14 of the ECHR, which can only be used in conjunction with other rights protected by the ECHR. Secondly it was the first case where the ECtHR found a provision of a state's constitution to be discriminatory and required its amendment. Lastly the Sejdić and Finci v. Bosnia and Herzegovina case is seen as a landmark case because of the evaluation of an international treaty, the Dayton Peace Agreement.

But despite all that, the reason why this case has been in the limelight since 2009 is the fact that Bosnia and Herzegovina has consistently failed to execute the ruling and amend the discriminatory provisions. After the ECtHR handed down its ruling all parties involved in the implementation, including the respondent state itself, agreed with the ruling, vowing to amend the discriminatory provisions as soon as possible. Four years later not much of that promise has been fulfilled.

Looking at the elapsed time of four years since the ECtHR passed its judgment many questions arise, not all relating directly to law. Even though this Master thesis should be written from a law point of view, in the case of the execution of ECtHR rulings an appeal to the interdisciplinary aspect of law is more effective. Law is not just law anymore, but it is also connected to other aspects of live. But because the ECtHR case concerns Bosnia and Herzegovina, a country troubled on many levels since its independence in 1992, precise guidelines are necessary to prevent this thesis from becoming a black hole sucking in all issues present in BiH. The central research question thus reads as follows:

'How can the issues that cause the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina case be solved?'

This question is two-dimensional. Firstly the reasons behind the lack of implementation have to become known to be able to, secondly research the possibilities available to speed up the implementation process of the ECtHR case.

To answer this central research question the chapters of this thesis will be based on a particular reasoning. By looking at the initial ECtHR case and the action taken by BiH to execute the ruling a window into the reason behind this thesis will be created. By examining Bosnia and Herzegovina's history and the current situation reasons for the lack of implementation will possibly occur. And because after more than four years BiH is still unable and/or unwilling to execute the judgment external factors that could possibly influence the implementation of the ECtHR ruling will also be looked at.
The first chapter will be a summary and analyses of the ECtHR case at hand to clarify the initial problem and show the ECtHR reasoning. The second chapter will evaluate the implementation process within Bosnia and Herzegovina. Has Bosnia and Herzegovina done all what can be expected of a respondent state? In the third chapter the history and current situation of BiH will be examined to see what is hidden under the surface that may be causing the persistent unsuccessful implementation process. Chapter four researches the measures that can be taken externally. Could a possible role of the international community speed up implementation of the Sejdić and Finci v. Bosnia and Herzegovina case through coercion or assistance?

As a conclusion to this Master thesis hopefully the reason behind the lack of implementation will become visible. Is Bosnia and Herzegovina to blame for the delay in execution or are other reasons prohibiting the implementation of the ruling?

One – An introduction into the starting point of the thesis through a summary of the Sejdić & Finci v. Bosnia and Herzegovina[1] case

As the introduction already shows, the case of Sejdić & Finci v. Bosnia and Herzegovina is groundbreaking in more ways than one. Therefore it is unbelievable that implementation of this judgment has already been delayed for over four years. Thus, even though this thesis focuses on this delay of implementation of the judgment given by the European Court of Human Rights, it is still necessary to sacrifice one entire chapter to the facts of the Sejdić & Finci v. Bosnia and Herzegovina case. The case needs to be elaborated on to create a background to all the issues that have developed since the judgment was passed. This background is needed to serve as a starting point from which this thesis ventures into the different directions marked by the different chapters. It would be impossible to endeavor on such an expedition and stay focused on the subject of implementation without a background to start from.

The European Court of Human Rights that has handled the case of Sejdić & Finci v. Bosnia and Herzegovina is a body of the Council of Europe[2]. The applicants were able to bring their case before this specialized European court because Bosnia and Herzegovina had become a member state of the Council of Europe in 2002 and consequently also signed and ratified the European Convention on Human Rights and its protocols.[3]

Mr. Sejdić and Mr. Finci, both motivated by the failed 2006 April reform package[4], initiated their case before the European Court of Human Rights separately in 2006. But because their complaints were so similar, both complaining about their ineligibility to stand for elections to the House of Peoples and the Bosnia and Herzegovina Presidency and labeling this as racial discrimination, the European Court of Human Rights combined their cases. This in a bid to improve efficiency and prevent similar cases being tried before the court, which would just produce the same results.[5]

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[1] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina

[2] The Council of Europe was founded in 1949; the headquarters are in Strasbourg, France.
The Council of Europe promotes cooperation between the countries in Europe on subjects as legal standards, the protection of human rights, democratic development, the rule of law, cultural cooperation and cultural identity and diversity. It is under the heading of promoting cooperation on the subject of human rights that the Council of Europe adopted the European Convention on Human Rights. And this convention in its turn established the supra-national court called the European Court of Human Rights, which hears complains about states that violate human rights that can be found in the ECHR.

[3] Bosnia and Herzegovina's application for membership of the Council of Europe, Opinion no. 234 (2002) – www.coe.ba

[4] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[5] Supra note 1, paragraph 1 and 2

1. Summary of the ECtHR case of Sejdić & Finci v. Bosnia and Herzegovina

The European Court of Human Rights handed down its judgment in the case at the end of 2009, on the subject, which the applicants, Mr. Dervo Sejdić and Mr. Jakob Finci, both Bosnian citizens, brought before the court in 2006. In short the applicants complained about not being eligible to stand for elections to the House of Peoples of Bosnia and Herzegovina and the Bosnia and Herzegovina Presidency, on the grounds of their origin, respectively Roma and Jewish. Their view was that this ground for their ineligibility leads to racial discrimination and they used article 14 of the ECHR, article 3 of the first protocol to the ECHR and article 1 of the twelfth protocol to reinforce their point.[6] This ineligibility can be derived from the Bosnia and Herzegovina Constitution and Election Law[7], which state that only citizens that affiliate themselves with one of the three 'constituent peoples', being ethnic Serbs, Croats and Bosniaks, are eligible to stand for election to the Presidency or the House of Peoples in Bosnia and Herzegovina. Those who refuse to declare such affiliation for whatever reason are called 'others' and are denied the right to stand for election to these bodies mentioned above.[8] It has been this way since the Constitution was put in place in 1995.[9]

1.1. Formal questions/Admissibility

The facts of the case at hand are quit elaborate and detailed. But for this thesis, which directs its focus onto the implementation of the case, not all of those details are important and some will therefore be mentioned just briefly or entirely skipped in this summary. The Grand Chamber[10] in this case could not immediately jump to the facts of the case to form a judgment. First a few, more

[6] Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
Article 3 of the first protocol provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."
Article 1 of the 12th protocol provides: 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

[7] The Constitution of Bosnia and Herzegovina: the Preamble, Articles IV and V define the eligibility of the 'constituent peoples' for the House of Peoples and the BiH Presidency.
The election Law of 2001: section 1.4 § 1 is important. This act contains the requirement to declare affiliation with a constituent people or 'others'.

[8] Supra note 1, paragraph 11, 12 and 18.

[9] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010
This also means that these provisions in the Constitution and Electoral Law not only disenfranchise minorities in Bosnia and Herzegovina, but the Serbs in the Federation of Bosnia and Herzegovina and the Bosniaks and Croats in Republika Srpska are also excluded from standing for office.

[10] Supra note 1, paragraph 3. On 10 February 2009 the chamber relinquished jurisdiction in favor of the Grand Chamber. "The ECHR in 50 questions" FAQ, question 15. http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf
The landmark status of this case is highlighted even more by the fact that the Grand Chamber of the ECtHR took over the proceedings from the Chamber of the fourth section to which the case was assigned initially. It is namely only in cases that raise a serious question that affects the interpretation of the ECHR or if there may be a risk of inconsistency with a previous ECtHR judgment, that the Grand Chamber would take over the proceedings from the initially appointed chamber and bypass the usual procedures.

formal questions needed to be answered by the court. The first question is if the applicants have exhausted all domestic remedies within their own country before appealing to the ECtHR.[11] The second and third questions together concern the admissibility of the case against Bosnia and Herzegovina. The case is admissible if the applicants that claim to be victims in the case indeed are victims, and if the government of the State in question can be held responsible for the complaint brought forward by the applicants.[12]

1.1.1. Exhausting local remedies

Putting theory into practice in the Sejdić & Finci v. Bosnia and Herzegovina case, starting with the exhaustion of domestic remedies, it can be concluded that both applicants have exhausted local remedies as far as possible in Bosnia and Herzegovina. The Grand Chamber found the requirement to be fulfilled in this case, even though the applicants had not gotten any actual decision on their case from the Bosnia and Herzegovina Constitutional Court who stated that they did not have the power to decide upon this case.[13]

1.1.2. Admissibility criteria

The two admissibility criteria can be split up in, on the one hand the admissibility of the applicants and on the other hand the responsibility of the respondent state, in this case Bosnia and Herzegovina.

1.1.2.1. Admissibility of the applicants

Firstly looking at the admissibility of the applicants, Mr. Sejdić and Mr. Finci. Could they claim to be victims who are being directly affected by the provisions in the Bosnia and Herzegovina Constitution and Election Law?

> 'Theoretically a person, non-governmental organization or group of individuals is able to claim to be a victim of a violation of a right within the European Convention of Human Rights. A person must be directly affected by the measure in question, and that is the reason why the convention does not envision the bringing of an actio popularis for the interpretation of the rights set out in the convention or permit individuals to complain about a provision of national law simply because they consider, without being directly affected, that it may violate the convention.'[14]

[11] Article 35 § 1

[12] Supra note 1, paragraph 27 – 31. Compatibility ratione personae, article 35 §3a in conjunction with article 32 ECHR.

[13] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina* – Sejdić *& Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010.
'Under the law in Bosnia and Herzegovina, only the constitutional court can consider the issue of whether national law is compatible with a state's obligation under the ECHR. But in a previous ruling the constitutional court declared that it did not have the power to hear such a case, thus leaving the applicants with no way of challenging the discriminatory election provisions in their national courts.'

[14] Supra note 1, paragraph 28

Even though the applicants had not actually run for elections to the House of Peoples or the BiH Presidency the ECtHR decided they could still claim to be victims of a violation of an ECHR right.[15] By deciding so, the Grand Chamber of the ECtHR repeated the decision from the Burden v. United Kingdom case, 'that in the absence of an individual measure of implementation, it suffices that the applicants belong to a class of people who risk being directly affected by the legislation'[16]. In the case of Mr. Sejdić and Mr. Finci they belong to the class of people that are likely to stand for election to the House of People and the Presidency because they both actively participate in Bosnian public life. The applicants have held, and still hold today, prominent public positions in Bosnia and Herzegovina. Mr. Sejdić was, at the time of this judgment the Roma monitor of the OSCE mission to Bosnia and Herzegovina and Mr. Finci used to be the ambassador for Bosnia and Herzegovina to Switzerland.[17] It would hence be assumable they would consider running for elections to the House of Peoples or the BiH Presidency.

1.1.2.2. Responsibility of the respondent state

Secondly the responsibility of the respondent state also needs to be decided on by the ECtHR. The question that needs to be answered is if the respondent state, Bosnia and Herzegovina, can be held responsible for the violation of the ECHR rights of the applicants. The ECtHR based their decision on the argument that, even though the Dayton Peace Agreement[18], to which the Bosnia and Herzegovina Constitution is an annex, is an international peace treaty; this does not mean that Bosnia and Herzegovina has no influence on this Constitution.[19]

The ECtHR bypassed the question if Bosnia and Herzegovina could be held responsible for putting the disputed constitutional provisions in place, since this took place in 1995 within a peace treaty. They did however take into consideration the fact that the power to amend the Constitution is vested with the Parliamentary Assembly of Bosnia and Herzegovina,[20] with the creation of the Brčko District[21] as an excellent example of the BiH government being able to successfully execute such an constitutional amendment.[22]

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[15] Supra note 1, paragraph 28 and 29

[16] Supra note 1, paragraph 28, ECtHR 29 April 2008, Case no. 13378/05, Burden v. the United Kingdom, paragraph 33-34 & S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

[17] Supra note 1, paragraph 19, L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010

[18] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex 4 sets out the Constitution of Bosnia and Herzegovina, Articles IV and V of which define the eligibility of the 'constituent peoples' for the House of Peoples and the Presidency.

[19] Supra note 1, paragraph 30

[20] Supra note 1, paragraph 15, Art. X elaborates on the possibility of a constitutional amendment. For such an amendment a decision by the parliamentary assembly is necessary including 2/3 majority of those present and voting in the House of Representatives.

[21] A territorial unit under the responsibility of the state, with its territory owned jointly by the two entities.

[22] Supra note 1, paragraph 15. & S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

Therefore Bosnia and Herzegovina could be to blame for maintaining the provisions in question over the years, whilst all along having the tools to change the provisions.[23] This subsequently makes the respondent state responsible if any form of discrimination is detected within those provisions.

By answering all the questions in the affirmative the court concluded that the principle complaint made by the applicants was admissible and this meant the court could then start to assess the facts of the case.

1.2 Perspective

But what seems to be a never-ending side step to get to the core of the case is not entirely over yet. Because despite the fact that the case before the European Court of Human Rights was lodged in 2006, the story that precedes this step of the applicants goes as far back as the early nineteen nineties. A brief historical perspective is thus needed to show how the past is intertwined with the present case at hand. This little history lesson however is not part of the court case itself because the ECtHR is only allowed to look at the facts that took place from 2002 onward, that being the year BiH became a member state of the CoE and also signed and ratified the ECHR.[24]

As is well known Bosnia and Herzegovina was involved in the most horrific war Europe has seen since World War Two. From 1992 until 1995 there was a war raging in Bosnia and Herzegovina, which was mainly initiated by the collapse of the Socialist Federal Republic of Yugoslavia and Bosnia and Herzegovina declaring itself independent following the lead from Croatia, Slovenia and Macedonia[25]. What was initially called a territorial conflict soon surfaced to be an ethnical conflict between the ethnical Serbs, Croats and Bosniaks living on the territory of Bosnia and Herzegovina. This ethnical conflict got highlighted even more when the crimes[26] that had taken place showed signs of ethnical cleansing and genocide, exposing thousands of Bosniak men being murdered by Serb forces.[27]

To be able to achieve peace, intervention by the international community was needed and eventually, in 1995 the General Framework Agreement for Peace in Bosnia and Herzegovina, more commonly known as the Dayton Peace Agreement[28] was signed. The three sides to the conflict, the Bosnian Serbs, Croats and Bosniaks[29] were part of the agreement, being pressured into these

[23] Supra note 1, paragraph 30
[24] The principle of ratione temporis applies.
[25] All three declared their independence in 1991
[26] Crimes against humanity; http://www.icccpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/12
[27] Established by ICTY in Prosecutor v. Krstic
[28] The Dayton Peace Agreement thanks its name to the place, Dayton in Ohio USA, where the signatory parties reached the peace agreement.
[29] The three sides from the region: the president of the Federal Republic of Yugoslavia Slobodan Milosevic, representing the Bosnian Serb interests (in the absence of Karadzic), the President of Croatia Franjo Tuđman, and the President of Bosnia and Herzegovina Alija Izetbegovic with his Foreign Minister Muhamed Sacirbey.

negotiations by the Contact Group, consisting of several influential western countries that have a significant interest in the developments of Bosnia and Herzegovina. The agreement was signed in Paris in December 1995 and it is in this agreement that the basis for the Sejdić & Finci v. Bosnia and Herzegovina case can be found.[30] Being that the drawn up Bosnia and Herzegovina Constitution was included as an annex to the agreement. [31]

Following this Constitution, Bosnia and Herzegovina was split into two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina.[32] And it is also this Constitution that contains the provisions against which the applicants have voiced their displeasure. Firstly the preamble of the Bosnia and Herzegovina Constitution describes the ethnic Bosniaks, Croats and Serbs as being the 'constituent people', creating a distinction between the 'constituent people' and the so-called 'others', which include national minorities like the ones Mr. Sejdić and Mr. Finci belong to.[33] Aside from the problems that could arise from the mere distinction in the preamble, the distinction itself is not the issue the applicants feel discriminated by. It is the fact that this distinction is used in the power-sharing mechanisms at state level that forms the core of the problem for the applicants in the case at hand.[34]

1.3. Arguments put forward by the applicants and the BiH government

1.3.1. Arguments used by the applicants

The applicants argued that this division within the Constitution and the Election Law is racially discriminating, violating article 14 ECHR in conjunction with article 3 of the first protocol to the ECHR and article 1 of Protocol no. 12 of the ECHR. In particular arguing that discrimination in relation to the right to stand for election could never be justified.[35] To prove their point they used previous ECtHR case law that had established that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'[36].

The applicants further claimed that, should the ECtHR believe that such treatment could actually be justified; the objectivity and reasonability of this justification should be held to a high standard. This is especially true in the case of racial discrimination, which the ECtHR stated is 'particularly

[30] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision* – Sejdić *and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011.
[31] Supra note 1, paragraph 11 – 15, the BiH Constitution is the fourth annex to the DPA.
[32] Supra note 1, paragraph 6
[33] Supra note 1, paragraph 11
[34] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010
[35] Supra note 1, paragraph 32
[36] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010 & Timishev v. Russia, No. 55762/00 and 55974/00, 58.

offensive', particularly in relation to political participation and representation since 'democracy is without a doubt a fundamental feature of the European public order'.[37] In the eyes of the applicants the ECtHR would have to consider if these discriminatory measures could be justified by assessing whether the aim of the discrimination is legitimate and proportionate. Their view is that both legitimacy and proportionality are lacking, meaning that the difference in treatment cannot be justified and thus amounts to direct discrimination. The applicants also asked the court to interpret the length of time during which Bosnia and Herzegovina could have amended the provisions in the Constitution and Election Law, from 1995 until 2009, but did not, as an aggravating factor in their judgment[38].

In general the 'applicants found that in the preoccupation with ensuring that Bosnia and Herzegovina's government is proportionally balanced along ethnic lines, the rights of national minorities, including those of Jews and Roma, had been seriously ignored', and that this has led to the infringement of their right to fully and effectively participate in Bosnia and Herzegovina public life[39].

1.3.2. Arguments put forward by the BiH government

To counter these arguments put forward by the applicants, the Bosnia and Herzegovina government used two main arguments.

Firstly the government argued that the election rules were not discriminatory, denying that the Constitution effectively banded the applicants from participating in the democratic process, since they were eligible to register to vote and also to stand for election to the House of Representatives. The government added that even if the ECtHR would find the provisions in the Constitution and Election Law to be discriminatory, that there were objective and legitimate justifications for the limitations on the democratic right of the applicants, these justifications being the protection of peace and achieving equal representation of all three constituent peoples in a few legislative bodies.[40]

In their second argument the government of Bosnia and Herzegovina used the fact that the current election rules were implemented under international law and established as part of the DPA, which is an international treaty, to their benefit. They claimed that because of this they did not have the

[37] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010

[38] Supra note 1, paragraph 32, BiH had agreed to amend their electoral system already in 2002, when they became a member of the CoE and they did so again in 2008 when they signed the SAA with the EU.

[39] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010

The third parties, The Venice Commission, The AIRE and the Open Society Justice Initiative, which also submitted their views on the issues within this case, share the opinion of the applicants; Supra note 1, paragraph 21, 22, 36 and 37

[40] Supra note 1, paragraph 34 and 35

power or the authority to amend the election rules to remove the offending provisions, nor could they bear the responsibility for any breach of the ECHR in this international treaty, the DPA.[41]

Additionally the government used the ECtHR case of Zdanoka v. Latvia[42] to substantiate their position further. In that case the ECtHR states that 'contracting parties enjoy considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each state'[43]. Transferring this to the current case, one must keep in mind that the Bosnia and Herzegovina Constitution was put in place to establish peace and dialogue between the three main ethnic groups. The BiH government sees the fact that they keep these provisions in use, as their right to enjoy the 'considerable latitude' they are given following the Zdanoka v. Latvia case.

The government finds, supported by these arguments, that the difference in treatment between the 'constituent people' and 'others' is justified, adding that BiH is still not ready for a change in the political system that would mean a reflection of the majority rule.[44]

1.4. Assessment by the Grand Chamber of the European Court of Human Rights

To be able to hand out their judgment the Grand Chamber of the ECtHR needs to assess the arguments put forward by, on the one hand the applicants and on the other hand the Bosnia and Herzegovina government. To be able to do so the ECtHR makes a distinction between the House of Peoples and the Bosnia and Herzegovina Presidency. Firstly, using this distinction, the ECtHR looks to see if the rules concerning the elections for the House of Peoples of Bosnia and Herzegovina are in compliance with article 14 of the Convention in conjunction with article 3 of the first protocol to the Convention.

The ECtHR states that 'Discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. 'No objective and reasonable justification' means that the distinction in, for example this current case, does not pursue a 'legitimate aim' or there is no 'reasonable relationship of proportionality between means employed and the aim sought to be realized'. The scope of a contracting party's margin of appreciation in this sphere will vary accordingly to the circumstances, the subject matter and the background.'[45]

[41] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010
[42] ECtHR, Zdanoka v. Latvia, no. 58278/00, ECHR 2006-IV.
[43] Supra note 1, paragraph 34
[44] Supra note 1, paragraph 34
[45] Supra note 1, paragraph 42

In situations like the case at hand, where the differential treatment is based on race and ethnicity[46], the objective and reasonable justification needs to be interpreted as strict as possible. The court finds that in a contemporary democratic society built upon principles of pluralism and respect for different cultures there is no place for that kind of discrimination, consequently there can be no justification for it.[47]

In the present case the Grand Chamber of the ECtHR did however have to acknowledge that the rules that exclude 'others' from the elections to the House of Peoples pursued at least one aim broadly compatible with the general objectives of the Convention, which is the restoration of peace. At the time when the BiH Constitution was designed there was a very fragile cease-fire, and the goal was to end a brutal conflict. But, because the ECtHR is only competent to examine ratione temporis, meaning the period after the ratification of the convention, in this case 2002 and onwards, they have to disregard that initial pursued aim of the BiH Constitution as much as possible. And although some significant positive developments do emerge since 2002 in Bosnia and Herzegovina[48], the ECtHR agrees with the BiH government that these developments do not immediately mean that the power-sharing mechanism peculiar to Bosnia and Herzegovina can be amended as well. The view of the court is however that there are other more suited options that Bosnia and Herzegovina needs to look into, instead of maintaining the current situation.

It is interesting to see that the Grand Chamber agrees with the applicant's claim that it should weigh extra heavy that Bosnia and Herzegovina has had from 1995 until 2009 to amend the provisions, but neglected to do so. This is especially true says the ECtHR in 2002 and 2008 when Bosnia and Herzegovina agreed to amend their electoral system voluntarily but eventually failed to do so.[49]

Taking the above into account the Grand Chamber of the ECtHR eventually concludes that the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification and has therefore infringed article 14 in conjunction with article 3 of protocol no. 1.[50]

Secondly the court takes a closer look at the Presidency of Bosnia and Herzegovina and the applicant's claim that the election procedure for the Presidency is not in compliance with article 1 of

[46] Ethnicity and race are related concepts in this case. Race is a biological classification of humans into subspecies on the basis of morphological features, like for example skin color. Ethnicity revolves around social groups that are marked by common nationality, religious faith, shared language or cultural and traditional origins and backgrounds. Discrimination on account of ethnicity is a form of racial discrimination.

[47] Supra note 1, paragraph 44

[48] Bosnia and Herzegovina has made steps in the right direction by for example joining the NATO's Partnership for Peace in 2006 and signing and ratifying a Stabilization and Association Agreement (SAA) with the European Union in 2008.

[49] In 2002 and 2008 the BiH government agreed voluntarily to amend their electoral system. Supra note 1, paragraph 54.

[50] Supra note 1, paragraph 50

protocol no. 12 of the Convention. This relatively new article from the twelfth protocol to the ECHR that was adopted in 2005 and entered into force in BiH in that same year, introduces a general prohibition of discrimination. But with the article never being considered before 2009 by the ECtHR, and no clarification on its intent and content was given before the Sejdić and Finci case against BiH, the Grand Chamber reasoned that the meaning of the article was intended to be identical to that of article 14 of the ECHR[51], so they used that, already settled interpretation on discrimination.

And in short the ECtHR found Bosnia and Herzegovina to be in breach of Protocol no. 12 of the European Convention on Human Rights, which provides for the right to equal treatment and non-discrimination, in failing to allow its citizens who are not 'constituent peoples' to stand for election to the Presidency. The Court also found a violation of article 14 of the ECHR, which provides for freedom of discrimination, taken in conjunction with article 3 of protocol no. 1, which protects free elections to the legislature, as a result of the ineligibility of 'others', including national minorities, to stand for election to the House of Peoples.[52]

The Grand Chamber agreed with Mr. Sejdić and Mr. Finci on their claims concerning unjustified differential treatment in Constitutional provisions and the Election Law[53], which meant that they were awarded just satisfaction[54] and that BiH was urged to amend its Constitution and the Election Law, to be in line with the European Convention of Human Rights, before the next general elections in 2010. To correctly implement and comply with this ECtHR ruling, BiH needed to amend its law in such a way that national minorities not belonging to one of the three 'constituent' peoples would enjoy the same rights as this 'constituent' majority on the subject of elections for the House of Peoples and the BiH Presidency. If and how this implementation of the judgment has taken place in BiH are fair follow up questions that arise and to which the next part of this thesis is dedicated.

[51] This is one of the reasons why this case has been marked a landmark case.
[52] Supra note 1, paragraph 56
[53] The court found the other complaints of the applicants ill founded. They namely also claimed a breach of article 13 ECHR, which provides the right to an effective remedy before national authority. And Mr. Sejdić, by himself also claimed a violation of article 3 ECHR, which prohibits degrading treatment. But these claims were not shared by the ECtHR and thus rejected - Supra note 1, paragraph 57 - 60
[54] Article 41 ECHR

Two – Action taken in Bosnia and Herzegovina after the 2009 ruling of the ECtHR in the Sejdić and Finci v. Bosnia and Herzegovina case

Due to the fact that, at the time of writing this thesis, in 2014, still no solution has been found within Bosnia and Herzegovina to comply with the judgment passed by the ECtHR already in December of 2009, this issue has earned itself an entire chapter. To be precise, a chapter that will focus especially on what has been undertaken in BiH since 2009 to achieve compliance with the ECtHR ruling.

But before the situation surrounding the implementation of the Sejdić & Finci v. Bosnia and Herzegovina case can be handled it is first necessary to find out what was actually expected of Bosnia and Herzegovina after the delivery of the judgment by the ECtHR. What is the general practice surrounding the implementation of ECtHR judgments by states party to the ECHR? It is only with that knowledge acquired that the implementation process in BiH can be looked at and the question if Bosnia and Herzegovina took the right steps towards implementation can be answered.

What might be exceptional for an introduction is that in this chapter the core of the conclusion can already be given from the start. Because, unfortunately due to unsuccessful attempts within Bosnia and Herzegovina, implementation of the Sejdić & Finci v. Bosnia and Herzegovina judgment still has not taken place. This in turn means that this chapter, which examines the path to implementation, indirectly is a summary of failed implementation attempts.

1. What was expected of Bosnia and Herzegovina after the judgment was delivered, and what kind of action would have satisfied that expectation?

It is of course hard if not impossible to pinpoint one particular manner in which ECtHR judgments need to be implemented by a particular state. No case before the ECtHR is the same and that means that the execution of a judgment within a state has to be made-to-measure. This of course does not mean that no overarching conclusions can be made about the process and manner of implementation of ECtHR judgments.

For example, it can be found within the ECHR itself in article 6, which provides for a fair trial, that the execution of a judgment given by any court must be considered as an essential part of the trial,[55] because it is not only important for the applicants and the state in a certain case that the delivered judgment is executed correctly, it is also one of the keys to improving the European Human Rights System[56].

[55] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[56] Supra note 55

For the ECtHR judgments to be effective they have been classified as final[57] and binding on the parties, which also makes the obligation to execute a judgment binding on a state and all the state authorities.[58] This obligation has immediate consequences on the day on which the judgment is delivered, which is highlighted even more by the direct effect the judgment has within the domestic courts of the state in question, to make sure applicants as well as other individuals are not denied their rights any longer.[59]

1.1. How to implement an ECtHR judgment

The obligation to execute the ECtHR judgments can be compared to the more informal obligation found in general international law. In general international law the execution of judgments is based on good faith, with the thought that spontaneous execution of judgments of international courts should be the result of recognition of a court's jurisdiction,[60] and that compliance in international law can be seen as a 'conscience' or 'compelling morality' of States.[61] In the specific case of the ECtHR this informal obligation that can be found in international law has developed into a set of rules and obligations that appeals less to a state's morality or conscience and has become more of a formal obligation. This obligation to execute a judgment of the ECtHR arises out of the responsibility assumed by a state, which has failed to fulfill its primary responsibility under the first article of the ECHR, which is, to secure for everyone within its jurisdiction the rights enclosed in the ECHR.[62]

As formal as this obligation to execute has become, on important aspect of the obligation has stayed relatively informal over the years. The obligation to execute is namely merely an obligation to produce a specific result. A combination of article 53 of the Convention, the fact that the ECtHR leaves the manner in which the specific result is to be achieved up to the state[63] and is even unwilling to indicate what kind of measures would satisfy the obligation to execute a ruling, proves the hollowness of the obligation. This reserved attitude of the ECtHR is a direct consequence of the subsidiary nature of the ECHR in relation to the domestic system of a State and also of the division of tasks between the ECtHR and the Committee of Ministers,[64] which is the supervisory organ of the CoE. The theory behind this behavior of the ECtHR is that the court does not find itself to be in the position to make any assessments about possible necessary measures because that would

[57] Article 52 ECHR
[58] Supra note 55 and ECtHR 16 July 1971, Case no. 2614/65, Ringeisen v. Austria
[59] Supra note 55 & ECtHR 29 November 1991, Case no. 12849/87, Vermeire v. Belgium - the domestic court must apply the requirements of the ECtHR judgment directly and hold that domestic law is not applicable pending amendment of the legislation
[60] Supra note 55
[61] W.M. Reisman, *The enforcement of International Judgments*, 1969
[62] Supra note 55
[63] Supra note 55 and ECtHR 29 April 1988 & Case no. 10328/83, Belilos v. Switzerland, paragraph 78 & ECtHR 29 July 2004, Case no. 36813/97, Scordino v. Italy, paragraph 233
[64] Supra note 55

presuppose a rather detailed knowledge of every member-state's legal system and that is simply not the case.[65]

This described latitude does however not mean that states have an unlimited freedom to choose the means of execution, the ECtHR has stated in the Papamichalopoulos and others v. Greece case that the state is 'in principle free' to choose the means.[66] This case is a first sign of the slowly changing attitude of the ECtHR towards giving more guidelines on how to execute their judgments. Because the lack of directions given by the ECtHR to states has been receiving a growing amount of criticism for not being conducive to swift and accurate execution of delivered judgments this development has been welcomed with open arms.[67] To continue this trend the ECtHR needs to make sure the judgments they hand down are precise and complete so that states are able to execute them correctly.

1.1.1 The assumption of responsibility and the implementation obligations

In addition to precise and complete judgments delivered by the ECtHR, the states are also helped by the three existing levels within the obligation to execute the judgment recognized by the court in the Scozzari and Glunta v. Italy case. The so-called assumption of responsibility requires three obligations: the obligation to put an end to the violation, the obligation to make reparation, and the obligation to avoid similar violations.[68]

One further specification of the obligations a state can use when implementing an ECtHR judgment is the division of three categories of obligations. These are just satisfaction, individual measures and general measures.[69] The obligation to satisfy the, by the ECtHR awarded just satisfaction to the applicants is required to be fulfilled within three months after the delivery of the judgment.[70] This aspect of the execution of the Sejdić and Finci v. Bosnia and Herzegovina has not caused any problems with the BiH government paying the owed amount to the applicants Mr. Sejdić and Mr. Finci within the three-month time limit.[71] This aspect of the ruling can thus be dismissed as 'complied with', thus not needing to be mentioned anymore within this thesis. The other two, individual and general measures are not as clear-cut as just satisfaction, because these measures differ per case. Individual measures concern the applicants and are supposed to restore or satisfy the rights as found in the ECHR. The general measures concern the prevention of repetition of similar cases regarding

[65] Supra note 55
[66] Supra note 55 & ECtHR 24 June 1993, Case no. 14556/89, Papamichalopoulos and others v. Greece, paragraph 34
[67] Supra note 55
[68] Supra note 55 and ECtHR 13 July 2000 & Case no. 39221/98 and 41963/98, Scozzari and Giunta v. Italy
[69] Supra note 55
[70] R.C.A. White & C. Ovey, *The European Convention on Human Rights*, fifth edition 2010 Oxford
[71] http://www.slobodnaevropa.org/content/manjine_izbori_ljudska_prava_finci_sejdic_sud_za_ljudska_prava/2124085.html. 2010 CoM (CoE) communication from Human Rights Watch on the Sejdić and Finci v. Bosnia and Herzegovina case; Payment made by the government of BiH in February 2010

the violation of the ECHR. These general measures can be possible changes in the domestic case law or the more radical adaptation of a regulation or law.[72]

Usually these measures are implemented relatively quickly by states. But although it does occur that states adopt the necessary measures before the case has come before the CoM or even before the ECtHR itself,[73] mostly a first supervisory check-up by the CoM, that takes place six months after the judgment has been passed, is necessary to shift the states into gear. When implementation is delayed beyond this timeframe technical problems rather than political resistance in the state itself are the main cause of this.[74]

2. Did Bosnia and Herzegovina take the right steps towards correct execution of the ECtHR judgment?

Looking at the Sejdić and Finci v. Bosnia and Herzegovina case it is not only important the case is implemented correctly to end the discrimination in the electoral system of BiH but also since correct execution could assist in breaking down ethnic divisions in Bosnia and Herzegovina by boosting political participation and representation and promoting social cohesion.[75] The challenge lies in the fact that Bosnia and Herzegovina is expected to figure out what the best way of implementation is because the ECtHR does not specify their rulings to that extent.

3. What did Bosnia and Herzegovina have to do after the judgment was delivered?

Two similar questions with most likely different answers, what did BiH have to do and what did BiH actually do to execute the judgment correctly, both need separate attention. To find out what action is needed to make sure the Bosnia and Herzegovina electoral system is in line with the ECHR, the question needs to be answered how the result, of all citizens in BiH being allowed full participation in the electoral process, is best achieved.[76] To combat the, by the ECtHR uncovered, discrimination within the electoral system of BiH and to prevent further similar violations of rights of BiH citizens belonging to ethnic minorities, active measures needed to be taken by the BiH government before the 2010 general elections.[77] The method most effective in stopping the violation would be the

[72] Supra note 55

[73] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011 & ECtHR 25 February 1997, Case no. 22107/93, Findlay v. The United Kingdom

[74] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

[75] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina* – Sejdić *& Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010

[76] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

[77] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010 & C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

general measure of a rule change. In this specific case a rule change would involve the amendment of the discriminatory provisions found in the BiH Constitution[78] and Election Law.

On first glance the adding of the mere words 'and others are also eligible to stand for elections' to these provisions makes it in theory possible for the national minorities in BiH to stand for elections to the House of Peoples and Presidency of Bosnia and Herzegovina.[79] In addition to this quite simple way of complying with the ECtHR's judgment the state is always free to take further, more far-reaching steps to eliminate any discrimination within those provisions. In the case of Bosnia and Herzegovina for example one might think of steps towards proposals for a Constitutional reform as put forward by the Venice Commission of the CoE.[80] In theory both of these directions would satisfy the ruling of the ECtHR.

4. What action was eventually taken in Bosnia and Herzegovina?

Despite what seems to be a simple case, which would have a simple solution, the road to execution of the ruling of the ECtHR has not been a smooth one. Following a timeline from December 2009 until the beginning of 2014 is the easiest way to paint a picture of the steps taken by the BiH government to try and comply with the ECtHR ruling.

4.1. 2009

Starting at the end of 2009 when the ECtHR delivered the judgment, it is worth mentioning that there have even been initiatives by several parties, including the BiH government itself, to amend the discriminatory provision before the judgment was passed. Unfortunately these so-called Butmir and Prud processes[81] did not produce any successful proposals, but it does however show at least some kind of willingness of BiH to comply with the handed down judgment.

4.2. 2010

In 2010 it became urgent for Bosnia and Herzegovina to be swift with the implementation of the ECtHR judgment. In October 2010 general elections would take place, and BiH had to make sure that the amendments to the relevant provisions were already completed before these elections took place, to prevent the country's institutions once again being formed in violation with the ECHR.[82] Being aware of this, the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina concluded in February of that same year that it was up to the Council of Ministers of

[78] Supra note 55: "Amendments of the constitution have proved necessary, as the ECHR has clearly stated: the Convention makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member states' jurisdiction from scrutiny under the Convention." & ECtHR 30 January 1998, Case no. 19392/92, United Communist party of Turkey and others v. Turkey

[79] Supra note 28 & ECtHR, 22 December 2009, Case no. 27996/06 & 34836/06, Sejdić and Finci v. Bosnia and Herzegovina

[80] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

[81] Parliamentary Assembly CoE (PACE), Doc. 12112, *Report: The Functioning of Democratic Institutions in Bosnia and Herzegovina*, 11 January 2010

[82] Parliamentary Assembly CoE (PACE) Resolution no. 1701(2010), *Functioning of Democratic Institutions in Bosnia and Herzegovina.*

Bosnia and Herzegovina in collaboration with the Parliamentary Assembly of Bosnia and Herzegovina to take action with the aim to implement the judgment handed down in the Sejdić & Finci v. Bosnia and Herzegovina case. The action taken eventually took the shape of an Action Plan for the enforcement of the judgment with a Working Group set up to implement the Action Plan in time for the upcoming elections.[83]

2010 is also the first year the set deadlines[84] for the harmonization of the BiH Constitution and Election Law with the judgment of the ECtHR were set and not met by Bosnia and Herzegovina. In May of 2010 supervision by the Committee of Ministers of the CoE took place for the first time, but still no changes had occurred and the execution of the judgment was no closer. The CoM was of the opinion that this did not bode well for the upcoming general elections, which turned out to be true. Mr. Sejdić himself experienced this failure to execute the judgment first hand when he asked the Central Election Commission of Bosnia and Herzegovina if he could stand for election for the BiH Presidency in 2010. Sadly his request was denied, exhibiting no change since the judgment was passed in 2009.[85] Despite the Working Group for the Implementation of the Action Plan having up to eight meetings in 2010, no consensus on the amendment of the discriminatory provisions was reached.

4.3. 2011

As in the previous year, in 2011 another supervisory session of the CoM of the CoE passed without any change to the situation of Bosnia and Herzegovina's discriminatory election laws. In addition an update to the CoE about the progress of the Action Plan revealed the existence of six amendment proposals, all brought forward by different political parties, a development which is in no way conducive for the execution of the judgment delivered by the ECtHR.[86] In this same year the Council of Ministers of Bosnia and Herzegovina set up a new working group by the name of 'Interim Joint Commission'. But just as their predecessor, the Working Group, this new commission achieved no success in 2011, meaning that another set deadline, December 2011, was passed by without being met.[87] This failure to execute the judgment in 2011 does not need to be seen as a surprise when one

[83] DH – DD(2010)108E, Case of Sejdić and Finci against Bosnia and Herzegovina (application no. 27996/06) – Communication from the delegation of Bosnia and Herzegovina, 26 February 2010 https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2116000&SecMode=1&DocId=1545522&Usage=2

[84] 1 April for the Constitution and 15 April for the Election Law.

[85] www.klix.ba 19-01-2012

[86] DH – DD(2011)403, Updated information on the Action plan/action report, 27 May 2011 https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2116003&SecMode=1&DocId=1745176&Usage=2

[87] Committee of Ministers, Supervision of the execution of judgments and decisions of the European Court of Human Rights, Annual report 2011 http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf

might consider that the forming of the national government took up to over a year after the general elections in 2010.[88]

4.4. 2012

Eventually all these previous failed attempts led the execution of the judgment into its third year. At the beginning of 2012 it became known that Mr. Sejdić had made the leap to the ECtHR once again, but this time asking for 250.000 KM[89]. He understood that, being denied his right to stand for election to the BiH Presidency in the 2010 general elections, almost a year after the initial judgment was passed by the ECtHR, meant change of the electoral system was not in the foreseeable future and thus asked for 250.000 in this new application. This amount being the equivalent of what a member of the BiH Presidency would make in a four-year term.[90]

In 2012, as in the previous years, a deadline was established for Bosnia and Herzegovina that had to be met with at least a proposal on which the different political parties had reached consensus. In July a proposal created by two of the most prominent political parties in BiH appeared to be just in time for the set deadline of 31 August[91]. But what initially was presented as a widely supported proposal was soon revealed to be the opposite. The proposal got its biggest hit when Mr. Komšić, at the time a member of the BiH Presidency and also a member of one of the two political parties that initiated the proposal spoke out against it. Mr. Sejdić also voiced his disapproval of the proposal and it became clear he was not alone in this disapproval when a round table was organized by more than twenty NGO's from the region who were all concerned about the proposal as it was set up by the two parties.[92] After all the disapproval that was voiced leading up to the deadline in August, this proposal was not adopted and another deadline slipped by.

Later that year the six members of the Interim Joint Commission announced that, despite the lack of concrete plans for the implementation of the judgment, they had been able to agree on the same general ideas about how the plans should look like.[93] But this just seemed to be a smokescreen put up to hide the fact that still not a single step towards execution of the ECtHR ruling had been taken since December 2009.

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[88] Eventually formed in February 2012

[89] The Bosnia and Herzegovina Convertible Mark, BiH currency. (Sign: KM, code: BAM) 250.000 KM is equal to approximately 127.824 Euro

[90] www.klix.ba 19-01-2012

[91] www.klix.ba 16-07-2012; That proposal: SDA/HDZ

The Presidency will stay three chaired but will fulfill a more ceremonial function, with the Council of Ministers taking over their powers. The presidents would then be chosen by the Parliament from a preselected group, but a group that would have no ethnic criteria.

The House of Peoples would get 24 members instead of 15, with 7 from each ethnic group and 3 from the category of "others". A new aspect would be the mixed electoral composition; from the FBH 6 Croats and 6 Bosniaks, 2 Serbs and 2 "others" and from RS 5 Serbs, 1 Croat, 1 Bosniak and 1 "other".

[92] www.klix.ba 19-07-2012

[93] www.klix.ba 20-11-2012

4.5. 2013

What might have seemed unbelievable in 2009 when the ECtHR delivered their ruling, that it would take over 3 years to implement the judgment, had become reality. The execution of the Sejdić and Finci v. Bosnia and Herzegovina case entered its fourth year. 2013 was the year in which BiH needed to come up with a solution for the execution of the ECtHR case if it wanted to make sure the 2014 general elections are in compliance with the ECHR. Possible consequences of those elections taking place without any change to the electoral system of BiH would be catastrophic for BiH's future.

That there was more pressure on BiH to implement the ECtHR case in 2013 is noticeable in the significant increase of news coverage on the issue. When the judgment was delivered in December of 2009 the BiH media provided intense news coverage on the developments surrounding the Sejdić and Finci v. Bosnia and Herzegovina judgment, but later on the media reduced the intensity of their coverage and with that society's interest was lost. This newly re-discovered interest of the BiH media in 2013 needs to be welcomed as a positive development because such a spotlight increases pressure on the persons responsible for the execution of the ruling.

The last couple of months have been the most active months since 2009, with the negotiations on ways to implement the ruling picking up pace. With the first of October 2013 being the set date for the BiH government to meet EU delegates in Brussels to discuss BiH's EU roadmap to accession, political parties took it upon themselves to start negotiations to create a plan to be presented in Brussels on the first of October.[94] At the end of September such a plan seemed to be created by a coalition of two political parties. But with history repeating itself a lack of support from other political parties for this plan meant BiH had to arrive in Brussels without any concrete plans for the execution of the ECtHR ruling. [95]

Despite the political parties from BiH arriving empty handed in Brussels, a general framework for possible execution of the ECtHR judgment was created with the help of the EU delegates. To refine and fill in the blanks of this framework, which only contained the agreement that the BiH Presidency would be chosen through direct elections, the seven political parties[96] from BiH were given 10 days by the EU. On the tenth day anticipation on the result of these negotiations was high, but eventually turned out to be an anticlimax, stacking another failure on top of previous ones.[97] Mr. Finci spoke out at the time, not being surprised of another failed attempt stating, 'if the solution has not been found in the last 45 months, it will certainly not be found in ten days'.[98]

[94] www.klix.ba
[95] www.klix.ba
[96] Seven parties: SNSD, SDS, SDP BiH, HDZ BiH, HDZ 1990, SBB and SDA
[97] www.klix.ba
[98] www.klix.ba

The negotiating parties presented the new round of negotiations that started on October 30th and continued throughout November to be very fruitful but the light at the end of the tunnel seemed closer then it in fact was, with further negotiations in December of 2013 and January 2014 producing no result. Thus as optimistic as one might want to become at times, some reservations are needed. In the case of the execution of the Sejdić and Finci v. Bosnia and Herzegovina case, with uncountable failed attempts, the saying 'seeing is believing' applies to its fullest.

As sad as all the failed attempts over the past four years may sound, those attempts do not depict the entire depressing story. The fact is that direct effect, which BiH judges should have practiced immediately after deliverance of the ECtHR case, has not been practiced. After the ECtHR delivered their judgment, Mr. Sejdić took this ruling to the Constitutional Court of BiH to enforce his rights. Instead of agreeing with him and the ECtHR judgment, the BiH Constitutional Court declared itself incompetent to decide on the matter and added that any other court in BiH would also be. This was later confirmed in a similar case before the Constitutional Court of BiH brought by three other applicants in the same position as Mr. Sejdić.[99] In a sense, the fact that, next to, still not having executed the ECtHR case, direct effect is not being applied in BiH should be seen as an extra weight on the immensity of the situation that has arisen after the ECtHR passed its judgment.

5. Conclusion

All the above unfortunately means that more than four years have passed and still no implementation of the ECtHR judgment in the Sejdić & Finci v. Bosnia and Herzegovina case has taken place.

Execution of the judgment may be very close because of the pressure that the elections that are just around the corner have put on BiH, but at the same time there is no guarantee that it will not take another four years. For that not to happen, politicians from Bosnia and Herzegovina need to keep in mind that a proposal for the execution of the ECtHR ruling needs to be presented to the BiH Parliamentary Assembly no later than March 2014 to be able to execute the proposal in time for the elections.

Even though a part of the conclusion of this chapter was already known before the chapter was even written that does not mean that it is clear why Bosnia and Herzegovina has not been able to implement the ECtHR judgment. Summing up the huge amount of attempts, the advantage of having the Venice Commission opinions, the fact that changing these discriminatory provisions should be BiH's first priority above all else and the fact that the case concerns a seemingly simple case of obvious discrimination it is surprising no headway has been made with the implementation of the

[99] Constitutional Court BiH, 29 june 2010 and 21 july 2010, nr. AP-1945/10 and nr. AP 2149/10 - M. Fafulic, N. Jusic, S. Besic

ECtHR ruling within four years. In theory execution of the judgment should have taken place a long time ago, which makes the next question that needs to be answered why the theory does not line up with the practice in BiH. The next chapter will discuss the issues that arise in practice that cannot be foreseen in theory.

Three - What is causing the delay of the execution of the Sejdić and Finci v. Bosnia and Herzegovina case in BiH?

The lack of implementation of the ECtHR case of Sejdić and Finci v. Bosnia and Herzegovina, which as shown in the previous chapter has dragged on for over four years, raises questions concerning the reasons behind this lack of implementation.
On the one hand Bosnia and Herzegovina has shown willingness to amend their electoral system in the past, by committing to change in two separate instances, once in 2002 and once in 2008[100], and in the present, proven by the many initiatives since 2009. But on the other hand these commitments and initiatives have not led to the expected amendment of the BiH election rules to prevent further discrimination of the national minorities in Bosnia and Herzegovina.

Could it be, as is being argued by the Bosnia and Herzegovina Government in the Sejdić & Finci v. Bosnia and Herzegovina case, that the BiH Constitution simply cannot be amended, because it is part of the international treaty known as the DPA, and because of that they do not have the authority or the powers to amend it? BiH argued that because the rules were implemented under international law the government was unable to amend them to remove the offending provisions.[101] Or were the ECtHR judges right to dismiss this argument and are there maybe other reasons behind the obvious lack of implementation? Factors such as the historical ethnical differences that still sound through in BiH society today should possibly also be taken into account. Because what could possibly be the reason behind the fact that the amendment of such an obvious design flaw of the Bosnia and Herzegovina Constitution has still not taken place.

A possible first clue to what the reason behind the lack of action and execution is could be found in the press coverage on the issue. Dissecting the opinions on the issue as put forward by several political parties in BiH, which can be divided along ethnic lines, a clash of views on how to implement the judgment in BiH law can be discovered. It would however be to easy to state that the lack of compliance with the judgment that has not changed in almost four years is merely due to a difference of opinion between political parties in BiH. The question this thesis is trying to answer concerns the reason behind the lack of implementation, and as the elapsed time proves, a look underneath the covers is needed to achieve a full understanding of the issues surrounding the Sejdić & Finci v. Bosnia and Herzegovina case. This specifies the question that needs to be answered to 'what is causing the politicians to have a difference of opinion about such an important judgment?'

[100] In 2002 BiH committed to amending its election rules at its accession to the CoE and in 2008 the same commitment was made when the first EU Agreement was signed.
[101] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina

To answer this question and at the same time not get lost in the ravel of Bosnia and Herzegovina's many issues, the starting point of the search for answers is best based in history. With the BiH civil war and the collapse of the Former Republic of Yugoslavia in the not so distant past, a look into history reveals early and continuing signs of a region tormented by ethnic hostilities, which were eventually calmed down by the DPA. The same DPA, that contains the BiH Constitution that is at the heart of the issue in the Sejdić and Finci judgment. A possible link between the 1992-1995 civil war, particularly the DPA, and todays troubles in Bosnia and Herzegovina concerning the execution of the Sejdić and Finci v. Bosnia and Herzegovina judgment is thus not un-imaginary. Hinting at a possible link is the fact that many, including the political parties in the BiH Government[102], view the DPA to be the key problem in this case. To research this possible link questions such as: 'what is visible of the DPA today in BiH' and 'could it be the DPA that is causing the stalling of implementation' need to be answered.

Next to the historic background of Bosnia and Herzegovina and the DPA other possible factors should also be taken into account. BiH is a country struggling on several fronts, such as economics, corruption, employment and crime, being both post-war and post-communism consequences[103], and these issues should not be ignored when searching for reasons behind the lack of implementation.

Could it be just a coincidence that these difficulties surrounding the implementation of such an obvious case of discrimination explicitly arise in a country with such a rare governmental structure that was created by an international peace treaty almost twenty years ago?

1. History of the region

Even before the region was known as Bosnia and Herzegovina and even before BiH was part of Yugoslavia, problems caused by ethnic differences could be detected. The region known today as Bosnia and Herzegovina has had far more bloodshed then just the war in the 1990's that could be attributed to the difficulties between ethnic groups, and the ethnic differences, as they do today, have also put previous political systems under strain.

Even going as far back as the period after the First World War the ethnic hostilities become clear. At that time, in 1918 to be exact, the Kingdom of Serbia, Croatia and Slovenia came into existence. And an early example of the ethnic groups within this kingdom not getting along became visible in 1921, when a new Constitution was adopted by the Serb majority, calling the kingdom a nation state[104],

[102] www.klix.ba

[103] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.

[104] Nation state: a political unit consisting of an autonomous state inhabited predominantly by a people sharing a common culture, history, and language, the American Heritage Dictionary of the English Language.

with which the Croats and Slovenes did not agree. In 1928 a name change of the kingdom introduced the name, as it was known until the 1990's, kingdom of Yugoslavia.[105]

A step forward brings the Balkan region to the period just after the Second World War. The time of the Kingdom of Yugoslavia had ended and the monarchy had been replaced by a federation led by the League of Communists of Yugoslavia[106] headed by Josip Broz Tito[107]. This all took place in 1946, with a new federal Constitution being adopted establishing Yugoslavia as a federation made up of six constituent republics.[108] Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia were the republics and there were two additional autonomous territories within Serbia, namely Kosovo and Vojvodina.

This communist system seemed to do wonders for the once so troubled Balkan region, but certain changes to the structure did take place in 1974 upon the discontent of Slovenia and Croatia about the perceived Serb domination of the federal government. These changes made the system look more like a confederation by increasing the competences of the republics and creating an eight-member presidency (the six republics in combination with the two autonomous territories) that in turn selected on prime minister. The changes were put in place to avoid any possible conflict between the republics, and indirectly between the ethnic groups. But despite these modifications, it was still the same communist party and leader that dominated the country since the 1940's. The in theory confederate state was in practice highly centralized and mainly held together by the country's paramount leader, Josip Broz Tito, at least until 1980,[109] because with the death of Tito in 1980 the demise of Yugoslavia was set in. The federal and con-federal system, that, until then had been successful in suppressing any tension between ethnic groups, started to show the first signs of disintegration. Before Tito died it was a combination of his knowledge that, looking at the history of the region, factors such as ethnicity and religion were (too) sensitive and should best be avoided and one of the trademarks of communism, in which subjects such as ethnicity and religion were considered taboo that kept the country together.

It appeared that the death of Tito launched the nationalist parties in the constituent republics to start promoting ethnic nationalism. Politicians in Croatia and Serbia used ethnic nationalism as a way

[105] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[106] The communist party that established a one party rule in the Socialist Federal Republic of Yugoslavia after the Second World War

[107] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[108] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[109] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

to become popular within their respective republics. Because of this the nationalist tendencies gained momentum in the 1980's and Tito's famous words were put to the test. Tito used the following statement 'Take care of your brotherhood and unity as if it is the iris of your eye'[110] to underline that the feeling of unity as Yugoslav citizens was the most important thing, even if Yugoslavia was a federation, and that for fear of conflicts nationalism within republics should be blocked to protect the Yugoslav unity. Tito was proven right in his fear that, as soon as nationalist tendencies in the republics would take over from the Yugoslav unity, Yugoslavia would have no chance of survival.[111]

2. Civil war

At the end of the 1980's, when nationalism within the republics reached its high, different viewpoints emerged. The Serb republic tried to dominate the federal institutions and reconstruct Yugoslavia under their dominance.[112] This path taken by Serbia initiated the pursuit of independence in Croatia and Slovenia, with the eventual and inescapable death spiral of Yugoslavia being set in on the twenty-fifth of June 1991 when Croatia and Slovenia declared their independence and Bosnia and Herzegovina following in their footsteps in March 1992.

Serbia still dreaming of a united Yugoslavia under their dominance tried to prevent the path to independence forcibly in all three republics. Compared to Bosnia and Herzegovina and Croatia, Slovenia got lucky in that respect with just a 10-day battle with the JNA[113]. Croatia, although it did eventually have a war that lasted from 1991 until 1995, had quit localized battles, with most of the country never seeing battle[114]. BiH on the other hand, proved to be in the least favorite position compared to Croatia and Slovenia. Bosnia and Herzegovina drew the shortest straw, because having ethnic Croats, Serbs and Bosniaks on its territory meant three different interests. These three ethnic groups all wanting other things resulted, as mentioned earlier, in the most horrific war Europe has seen since the Second World War. It became obvious that peaceful transition of Bosnia and Herzegovina into independence was impossible. But a war that started out because of Bosnia and

[110] Translated loosely from the saying 'Bratstvo i jedinstvo treba paziti kao zlica u oku'

[111] *An excellent example of this Yugoslav unity at its finest can be recognized in the person of Emerik Blum, a Jewish businessman and politician,[111] who was not only the founder and director of Energo-invest, Balkans largest conglomeration and mayor in ministry for electricity in both the BiH Republic and the Yugoslav federal government but he was, al be it for only two years, the mayor of Sarajevo and he was even a member of the organizational committee for 1984 winter Olympics. His successful career, even after being held at a concentration camp in the Second World War shows that coming from a minority within Yugoslavia did not mean that one could not be successful in public life.* - 7 august 1911 – 24 June 1984 - boek biography ''Monographia Emerik Blum" Emerik Blum – Sahinpasic 2002 & The Morning Record http://news.google.com/newspapers?nid=2512&dat=19700922&id=YP1HAAAAIBAJ&sjid=wf8MAAAAIBAJ&pg=860,2665033

[112] They tried to achieve this by forcibly abolishing the autonomy of both Kosovo and Vojvodina and replacing the Montenegro leader with one that would adhere to their wishes. This meant they gained predominance in the Yugoslavia decision taking process.

[113] Yugoslav Army fighting for the Serb republic

[114] The sea side for example

Herzegovina's declaration of independence, with the Serb and Croat nationalist parties proclaiming their own mini states within BiH, respectively the Serb Republic of Bosnia and Herzegovina and Herceg Bosna, with the support of their constituent republics, eventually turned into a Serb policy of ethnic cleansing with the killing of thousands of Bosniak and Croat men. [115]

Eventually in the autumn of 1995 the war was brought to a halt when NATO military activity, newly vigorous US diplomatic efforts and above all a coordinated Bosnian and Croat offensive to reverse Serb gains all aligned with the aim of achieving peace[116]. And in the form of a treaty, it was eventually the so called Dayton Peace Agreement[117] that put an end to the 1992 – 1995 war and brought peace to Bosnia and Herzegovina[118].

3. Dayton Peace Agreement

Commonly known as the Dayton Peace Agreement and abbreviated as DPA, the actual name of this international peace treaty is the General Framework Agreement for Peace in Bosnia and Herzegovina. This agreement was the key to the establishment of peace in Bosnia and Herzegovina after years of armed conflict.

3.1. Factuality's about the DPA

The DPA is a peace agreement brokered by the United States[119], between the respective presidents of Bosnia and Herzegovina, Croatia and Serbia[120] and signed on December 14th 1995. The agreement might seem to be an instant success that can be accredited to the United States, but in the years leading up to the agreement it were the European Union and the United Nations who lead the, unfortunately unsuccessful, peace negotiations.[121] The negotiations were eventually taken over by the so-called Contact Group, which was composed of representatives of the United States, Russia, United Kingdom, France and Germany. The Contact Group continued to build upon what was already achieved and agreed in the earlier negotiations[122], as for example the plan that Bosnia and Herzegovina would continue its legal existence within its present borders, but two entities would be

[115] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005
[116] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013
[117] The DPA got lost. The original document on file in Sarajevo got lost in 2008, but luckily France had a certified copy, which they sent to Sarajevo.
[118] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[119] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011
[120] Presidents of the "Yugoslav" republics, respectively Izetbegovic, Tudman, and Milosevic
[121] Lord Owen and Stollenberg and Bildt for the EU.
[122] The basic principles of the peace plans already developed by the earlier International Conference of the Former Yugoslavia

created to house the different parties.[123] But admittedly it were finally the efforts of United States assistant secretary of state Richard Holbrooke and his team of negotiators that, with the use of shuttle diplomacy[124], initiated the peace conference at the Wright Patterson Air Force Base in Dayton, Ohio[125] in November of 1995. This is where the final peace agreement was negotiated and adopted, to be signed in Paris one month later.[126]

The goal of the DPA was to end the armed conflict in BiH between the Bosnian Serbs, Croats and Bosniaks by finding an acceptable compromise between the three belligerent parties in order to end the war[127]. The Agreement aimed at securing peace in Bosnia and Herzegovina and stability in the region by setting up a representative government structure for Bosnia and Herzegovina and ensuring implementation of the peace agreement by international organizations. To do so the DPA consisted of twelve annexes[128] on several subjects. But looking for a direct link between the DPA and consequences for the implementation of the Sejdić and Finci case only a few of the annexes are interesting. Firstly it is the second annex that contains the agreement on inter-entity boundary lines en related issues. Secondly and obviously the fourth annex, which is the Bosnia and Herzegovina Constitution. This Constitution constructed Bosnia and Herzegovina as a highly decentralized state with only a few powers left to the central institutions and the remainder left to the two entities. It also designed all the principal governmental organs to have an equal number of Bosnian, Serb and Croat members, to prevent one interest to prevail.[129] Thirdly annex six houses the agreement on Human Rights, which provides for a Commission on Human Rights. Ironically it is in the same DPA as in which this agreement on Human Rights was included, the provisions that discriminate against national minorities can be found.

[123] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005 - Republika Srpska and Federation of BiH

[124] Shuttle diplomacy: It is actually not a real treaty in the traditional sense. It did not consist of face-to-face meetings among the parties. Because of their widely differing views they were held apart, with US negotiators moving from party to party. & The DPA entered into force on signature, so no ratification was needed.

[125] This spot was chosen because of the possibility of complete radio silence, to prevent the parties from being influenced by outside information

[126] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition & K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[127] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

[128] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

[129] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

3.2. General consequences of the DPA

Unfortunately these facts about the DPA do not give any insight into the implications or consequences for BiH, and especially for the national minorities, that followed from the DPA after it was signed in December 1995.

Obviously the main implication that can be deduced from the DPA is the fact that discriminatory provisions in the Bosnia and Herzegovina Constitution in combination with the BiH Election Law provide that only members of the three 'constituent' peoples are eligible to stand for election to either the BiH Presidency or the House of Peoples of the Parliamentary Assembly with the consequence that those who are not 'constituent' people, called 'others', are denied the right to stand for elections to those two bodies.[130] This may have been the initial motive to examine the DPA better, but that does not mean other implications connected to the DPA do not play a role in the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina ECtHR ruling. Errors that were made at the setting up of Bosnia and Herzegovina as it is known today, block implementation of the judgment from taking place which in its turn means the discrimination of ethnic and religious minorities in BiH remains in place.

The first of these issues is the fact that the BiH Constitution was drawn up at the time the DPA peace treaty was being negotiated and it was later signed by the three parties involved, being the representatives from the Republics of Croatia, BiH and Serbia. The People of Bosnia and Herzegovina did not adopt their own Constitution by a referendum or an elected parliament, which means in fact, it is a Constitution without democratic legitimacy, not being the outcome of consensus among the people of BiH but instead it is a document not voluntarily agreed upon by an existing state with de facto control over its territory. What makes matters even worse is that the original language of the Constitution was English instead of the BiH native language.[131]

This approach may have been needed and democratic legitimacy had to give way to the obvious priority of ending bloodshed en securing peace in BiH.[132] But that was almost twenty years ago and claiming that the same situation applies today would be madness. Instead Bosnia and Herzegovina should, because the situation has changed, use their ability to amend the Constitution to, step-by-step, ad democratic legitimacy to the BiH Constitution. And despite the BiH Government claiming they are not eligible to amend the Constitution, which is one of the other issues connected to the

[130] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010.
[131] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005
[132] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

DPA, they seem to have forgotten the amendment procedure for it given in the Constitution itself which they actually already used successfully once before in 2009 to create the Brcko District.

'As regards amendments to the Constitution, article X provides as follows:

1. *Amendment procedure. This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.*
2. *Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.'*[133]

4. BiH governmental structure established by the BiH Constitution

The issues that are causing the lack of implementation of the Sejdić and Finci judgment are being fueled by the current governmental structure of BiH. This structure shows the inefficiency of the BiH Constitution in practice and it explains how ethnicity, that has been the dividing factor in all areas of the Sejdić and Finci case, can also play a role in the inhibiting of the implementation of the same case.

This matter is also connected to the DPA, because even though the DPA was successful in the effective termination of military confrontation, the aim of defusing ethnic hostilities has shown not to be as successful. The reason why the implementation of the post conflict state building process remained unsatisfactory and why the BiH Constitution is wrapped in so much controversy can be reduced from the parties to the conflict wanting to convert their wartime power into political authority[134]. This meant much of the negotiations in 1995 were based on ethnicity and led to lack of consent of the parties concerned. That is the reason compromises such as between discrimination of national minorities in BiH and the satisfaction of the three 'constituent' peoples were made at the time and issues that surfaced during the war were never properly handled.[135]

[133] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina, paragraph 15 And this has been put into practice successfully on the 26. Of March 2009. The Parliamentary Assembly on that date successfully amended the Constitution for the first time, in accordance with the above procedure. The amendment at issue concerned the status of the Brcko District.

[134] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

[135] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

The political structure established by the DPA has led to a complex institutional architecture which provides for governments on state, entity and district levels[136], a structure that remains inefficient and is even today subject to different interpretations by the different parties.[137]

To reveal why the Bosnia and Herzegovina political structure is a problem enabler instead of a problem solver a closer look into the BiH central governmental structure is necessary. The DPA had made a federal state out of BiH, establishing a power sharing arrangement, which can be found in article 3 of the BiH Constitution, by creating two separate entities, the Repulika Srpska and the Federation of Bosnia and Herzegovina, within the borders of BiH but with their own individual governments. Above these entities sits a central government on state level with a tripartite rotating Presidency and a central bicameral Parliamentary Assembly, consisting of the House of Representatives and the House of Peoples. The most distinctive feature of this political system of BiH is that the three largest ethnic groups, the 'constituent' peoples, need to be equally represented in the state's institutions.[138] This means that next to the division into two entities, also, and maybe above all, a division into three ethnicities plays a role in the Bosnia and Herzegovina governmental structure.

4.1. Ethnic division caused by the BiH governmental structure

The ethnic division is clearly visible within the Parliamentary Assembly of Bosnia and Herzegovina. The House of Representatives has its 42 members elected by proportional representation along entity lines, with one third of the members needing to be from the Republika Srpska and two thirds from the Federation of Bosnia and Herzegovina.[139] In the House of Peoples on the other hand, membership requires affiliation with one of the three 'constituent' peoples, meaning that the 15 delegates within the House of Peoples need to be distributed equally among the three 'constituent' peoples, with each 5 seats. This means, with all legislation requiring the approval of both chambers of the parliamentary assembly[140], not only the two chambers need to agree, but also two entities and the three largest ethnic groups within it.

But to make matters even more complicated and blurred, the House of Peoples has also been dubbed the Veto Chamber because of the right the majority of any of the three 'constituent' peoples have to declare any proposed decision of the parliamentary assembly to be destructive of the vital

[136] B. Divjak & M. Pugh, *The Political Economy of Corruption in Bosnia and Herzegovina*, International Peacekeeping, Vol. 15, No. 3, June 2008, pp. 373-386: FBiH was divided into 10 cantons, each with its own parliament and ministries (with some 160 ministers altogether), and the country as a whole was further divided into 142 opstinas or municipalities. The number of public officials in senior and middle administrative management in the country is estimated at around 50,000, and there are 14 police forces.
European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document

[137] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document

[138] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

[139] BiH Constitution in combination with the Election Law of 2001

[140] Art. IV (3c)

interest of their 'constituent people'.[141] This does not only make that the House of People will have to decide on any proposal put forward concerning the implementation of the Sejdić and Finci case and thus their own faith, but they will also be able to veto it.

As is the Parliamentary Assembly, the Presidency of BiH is also set up in a way, which guarantees equal representation of the three 'constituent' peoples. The three members of the Presidency, each belonging to one of the three 'constituent' peoples are elected directly for a term of four years, with, to convey an image of leadership, a rotating chairmanship, which does not bring any additional powers or rights. This means decisions still need to be made by consensus, and only when consensus cannot be reached, two of the three can decide, which in turn enables the third to challenge the decision as is possible in the House of Peoples, when the vital interest of his or hers 'constituent' peoples is at stake.[142] An aggravating factor in all this is the fact that only citizens of the RS can vote for Serb member of the Presidency and only FBH residents can vote for Bosniak and Croat seats. This unhelpfully connects entity residency to ethnic identity, which reinforces the notion among voters that they should only vote for their own 'kind'.[143]

These constitutional arrangements, with the three 'constituent' peoples functioning like a thread through the entire governmental structure, need to be seen as a complex set of checks and balances between these three ethnic groups to ensure none of the three 'constituent' peoples can dominate the government and override the interests of the other groups.[144] But unfortunately this preoccupation with ensuring that BiH's Government is proportionally balanced along ethnic lines, led to the rights of the so called 'others' or minorities being seriously ignored, preventing them to participate and be represented in the political and democratic process.[145]

In practice this means that the decision making process in both the Presidency and the parliamentary assembly is quite complicated and time consuming, causing BiH to not be able to develop further, with the different ethnic groups still facing each other instead of playing for the same team.

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[141] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010.

[142] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

[143] National Democratic Institute for international affairs, *Bosnia and Herzegovina Democracy Assessment Report*, 2009 & J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

[144] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

[145] L. Claridge, Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina, Minority rights group international, January 2010 & S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

Because the three main ethnic groups still face each other, agreeance on the implementation of the Sejdić and Finci ruling seems far away, with none of the 'constituent' peoples wishing to diminish any of their own power, acquired through hard bargaining at the DPA negotiations, in favor of the national minorities in BiH.

The BiH Constitution aimed at integrating the different ethnic groups into one harmonious country by ensuring fair representation of these groups in Bosnia and Herzegovina public life. But instead, the set up that emerged from the BiH Constitution, a combination of restrained competences of the central government of BiH[146] and the division into two entities resulted in the opposite, with territorial separation and even segregation of the three main ethnic groups in Bosnia and Herzegovina.

5. Consequences of all the above that affect implementation

As revealed already in the second chapter the reason for the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina case seems to be the fact that two possible paths have emerged via which the ruling could be executed. However this does not mean that the question with which this endeavor started, 'what prevents implementation of the ECtHR case', has been answered just yet. It is the search for what lies beneath the difference of opinion on which path should be taken, that connects all the above, BiH's history, the DPA, BiH's Constitution and its governmental structure, with issues that currently plague BiH and delay the implementation of the ECtHR case.

The history of both Yugoslavia and BiH has revealed that the struggles that haunt Bosnia and Herzegovina today are not new to the region and seem to resurface in whatever era. The desire of any of the ethnic groups to dominate the kingdom, nation-state or federation is always lurking. Being that the issues between the ethnic groups have already put previous political systems under strain the same seems to be happening again in BiH. And the fact that the implementation of the Sejdić and Finci judgment still has not taken place, after almost four years, only proves it stirred up the already existing issues in BiH.

The mere fact that the BiH government is spread over three levels across three ethnicities and two entities means that in practice the decision making process in the Presidency and Parliamentary Assembly is problematic and time consuming. This is not being improved by the already large

[146] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013
Competences of the state: listed exhaustively: foreign policy, foreign trade policy, customs policy, monetary policy, finances of the institutions and for the international obligations of BiH, immigration, refugee and asylum policy and regulation, international and inter-entity criminal law enforcement, including relations with Interpol, common and international communications facilities, inter entity transportation and air traffic control. All powers not expressly assigned to the state in the annexes to the DPA rest with the entities.

governmental administration of BiH growing each year[147]. But the issue of time-consuming decision taking, although it certainly affects the lack of implementation, is only partially responsible for the almost four year delay.

Additionally, and more importantly, the current political structure in BiH only reinforces the ethnic separation and stimulates segregation, thereby reinforcing the ethnic character of the entities. It has excessively strained the process of implementation by causing the difference of opinion that is used and abused as the reason behind the lack of implementation. This ethnic fragmentation has led to the entities becoming in fact mini states[148], with their own legislative, executive and judicial organs. Within the entities, but also on central state level, membership to a particular ethnic group has become of greater importance than the actual BiH citizenship. Where citizenship is supposed to constitute an important condition for full and effective participation, in Bosnia and Herzegovina the composition of public institutions is based on ethnic and religious criteria instead.[149] This means that the entities, acting as if they were sovereign states, have created a division in the central government by representing different interests instead of working together. Consequently it seems this two entity-three ethnicity division set up by the DPA that was created with the aim of solving issues caused by the war has only caused more issues instead of solving any. This ethnic territorialism that in the first place causes underrepresentation of minorities has also led to a paralyzed decision making process.[150]

Examples of this division are divers. One of the more alarming ones is that the educational system in Bosnia and Herzegovina is not unified and differs not only by entity but also by ethnicity, with the schools in the RS focusing[151] on the Serb majority and the schools in the FBH being divided into schools for Croat pupils and schools for Bosniak pupils.[152] Another, even more visible example is easily seen when crossing entity lines, or even the unofficial ethnic boundary lines. Between the two entities two different alphabets are used, Latin and Cyrillic, and this is immediately noticeable on road signs and adverts. Also instantly visible in FBH where two of the three main ethnic groups are represented, is the segregation of some areas in the 'Herzegovina' region that are predominantly Croat, where the Croatian flag is more prominent then the BiH flag.[153] The most specific example of

[147] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document

[148] The Dayton Constitution set up an ongoing political struggle between central and entity control over Bosnia's economic and political life.

[149] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[150] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[151] Teachings of history, religion etc.

[152] Press statement of the OSCE, 30 October 2012 & OSCE shows initiative to get rid of the segregation in schools; http://www.oscebih.org/Default.aspx?id=3&lang=EN

[153] South of the city Mostar

such widespread partition between ethnicities can be found in Mostar. The city seems to be split in two, with the Croats on the west side and Bosniaks on the east side, with different postal services, phone providers, two universities and even supermarkets on the west side selling products from Croatia, while supermarkets on the east side sell products from BiH.[154]

5.1. The difference of opinion

For the past few years, since the judgment was delivered, Bosnia and Herzegovina has faced and still faces today, two major Constitutional reform issues. The discriminatory electoral system, as is displayed in the Sejdić & Finci v. Bosnia and Herzegovina case, on the one hand and a wider state structure reform on the other.[155] Along these lines two viewpoints on the execution of the Sejdić and Finci v. Bosnia and Herzegovina case have emerged. These two viewpoints on how to implement the case have been voiced in the Parliamentary Assembly of Bosnia and Herzegovina and in the Joint Interim Commission set up to rush the implementation of the case,[156] and they are anything but random political beliefs of random political parties. In fact, unsurprisingly they are based on the ongoing ethnic rivalry with the political parties predominantly from the FBH representing one interest and the political parties from the RS representing the other.

5.1.1. The viewpoint that dominates the RS entity

The political parties from the RS, together with ethnic Croats from the FBH, have all voiced a similar specific opinion that they believe minimum action, by amending the discriminatory provisions in the Constitution and the Election Law would be the appropriate way to satisfy the Sejdić and Finci ruling.

They propose to only adjust the provisions in the Constitution and the Election Law and to allocate or add a number of seats in the House of Peoples per entity to declared non-members of the three 'constituent' peoples[157], which would prevent minorities from no longer being able to stand for election to the House of Peoples and the Presidency. In practice this could be achieved by only adding the words 'and others' to the discriminatory provisions.

This approach can be found to be entirely in line with wishes the ethnic Serbs in BiH, which make out most of the RS, and the ethnic Croats had at the time of the DPA negotiations in 1995. The ethnic Serbs and Croats wanted Bosnia and Herzegovina to be constructed existing of strong, largely independent entities and a weak central government with only limited competences.[158] This almost

[154] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[155] Supra note 28

[156] CoE Committee of Ministers, Communication from Bosnia and Herzegovina concerning the case of Sejdić and Finci against Bosnia and Herzegovina (application no. 27996/06) , DH-DD(2011)403E, 27 May 2011

[157] CoE Committee of Ministers, Communication from Bosnia and Herzegovina concerning the case of Sejdić and Finci against Bosnia and Herzegovina (application no. 27996/06) , DH-DD(2011)403E, 27 May 2011

[158] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005 & J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

twenty-year-old wish and this current opinion of the political parties from both the ethnic Serbs and Croats on how to implement the Sejdić and Finci v. Bosnia and Herzegovina ruling align when the current situation in BiH is analyzed. The direction in which Bosnia and Herzegovina has been going the recent years seems to lead to the situation desired by the ethnic Serbs and Croats in 1995. The entities have become more independent and the central government keeps struggling to unite their interests. Because the wish of these two ethnicities seems to be getting fulfilled it is obvious they are against any change that could reverse BiH's current direction. Any change to the governmental structure of BiH or its electoral system needs to be kept to a minimum, which explains the stance the political parties that represent the ethnic Serbs and Croats have taken regarding the implementation of the Sejdi and Finci judgment. Their view on how implementation should take place, will thus only result in a plan designed to give the least amount of support to Bosnia and Herzegovina's instability. But that does not have to mean such a proposal would not satisfy the obligations BiH, as the respondent state in the case, has towards the CoM and the ECtHR. Even though article 46(1) of the ECHR only states that the respondent state undertakes to abide by the final judgment given by the court which means states are in principal free to choose the manner in which they 'abide by' the final judgment, there do exist precise obligations they need to comply with. Next to taking measures to put an end to the violations, the respondent state, BiH, also needs to erase the consequences of the violation for the applicants and take measures to prevent new, similar violations from taking place.[159] Therefore, if the plans proposed by the political parties from the RS and by the ethnic Croats comply with these obligations it does not matter if these changes to the electoral system are minimal. An additional clue that minimal implementation would suffice in the eyes of the judges of the case itself is the fact that, in the case itself, they stated that BiH would not be ready for any big changes to its electoral system that could affect the power sharing mechanism.[160]

5.1.2. The viewpoint that dominates the FBH entity

The FBH on the other hand wishes to amend the entire electoral and governmental structure of BiH, because they view an entire overhaul of the system as the only approach possible that could eliminate the discrimination. The political parties from the FBH are of the opinion that the minimum change proposed by the ethnic Serb and Croat parties would not end the discrimination of minorities, because the current power sharing structure of BiH in practice provides no realistic chance for the minorities to be elected to either the House of Peoples or the Presidency.[161] With for example the House of Peoples still only protecting the vital interests of the 'constituent' peoples,

[159] Communication from Human Rights Watch in the case of Sejdić and Finci against Bosnia and Herzegovina – COE CoM – 09/06/2010
[160] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010
[161] Communication from Human Rights Watch in the case of Sejdić and Finci against Bosnia and Herzegovina – COE CoM – 09/06/2010

adding seats for the 'others' would only be for show. This wish of the political parties from the FBH for an entire constitutional reform is less altruistic then it seems. As is the case with the ethnic Serbs and Croats, the viewpoint of the FBH on how implementation of the Sejdić and Finci ruling should take place, supports the wish the ethnic Bosniaks had in the 1995 DPA negotiations. The wish Bosniaks voiced in 1995 was for BiH to be established as a state with a strong central government, being led by the ethnic Bosniaks, keeping the entities weak by awarding most competences to the central government.[162] As Bosnia and Herzegovina has been heading in the opposite direction for several years, with only a few competences left to the central government, FBH needs to push for an entire overhaul of the governmental system to be able to reverse BiH's path.

5.2. Evaluation of the different viewpoints

Simply stated, the three parties to the conflict that wanted to convert their wartime power into political authority at the DPA negotiations[163] still wish to do so today. The reason why they still cherish the same desires as almost twenty years ago comes from the fact that, despite the DPA seeming to be an agreement between the parties of the conflict, in reality this was not the case. The ethnic Bosniaks might have been represented by the right person, Alija Izetbegovic, the President of the BiH republic, but he lacked the power that was needed to pursue the desired goals of the Bosniak people. The ethnic Serbs and Croats in Bosnia and Herzegovina were represented by the presidents of two other republics of former Yugoslavia, namely Croatia and Serbia. And it were those presidents that agreed on the compromise that eventually turned into the DPA, without considering the wishes or representing the interests of the real parties to the conflict, the ethnic Serbs and Croats. Even though they had the knowledge that these parties did not agree with the agreements being made in Dayton, Ohio, they went ahead with it nonetheless. This meant the ethnic groups in Bosnia and Herzegovina were left with an international peace agreement they themselves did not support. This left none of the parties to the conflict, the three largest ethnic groups in BiH, content with the outcome of the negotiations.

Adding a magnifying glass onto these trials and tribulations in the present reveals a few clear indicators of the divided interest in BiH. A clear display of the weak central government was the 2010

[162] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[163] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition: The lesson learned is: when negotiating parties represent narrow interests, international mediators should press broader interests, including democratic governance and constitution's capacity to evolve beyond the immediate purpose of the negotiating parties.

general elections in BiH. These elections showed that ethnic tension and mistrust still prevail in BiH[164] with 16 months of political stalemate only resulting in a coalition in February of 2012[165].
The eventual coalition existing of six political parties[166] has up to date been unable to execute the judgment. These six political parties that can be divided into parties from the RS and the FBH, all representing a specific ethnic group, have, because they are unable to merge their viewpoints on the implementation of the Sejdić and Finci case given away their true identity. At first glance the political parties seem to have it all. 'Organizational structure, membership, statutes, they are proficient in the mechanics of contesting elections, have institutional integrity and staying power if not full credibility among the BiH citizens.'[167] However at the core of virtually all of these political parties lies the same ethno-only approach with all politics being based on ethnic-nationalist appeals[168], resulting in only one interest being represented, that of their respective ethnic group. Choices and discussions are not based on ideology coherent policy-oriented platforms[169] because ethnic issues keep other issues from being tackled. Examples that bring together this ethnic rivalry with the current situation in BiH, such as the RS leader Milorad Dodik openly floating the idea of secession of the RS, FBH ethnic Croats pushing for more autonomy within the FBH and Bosniak representatives calling for a more centralized state and the dissolution of the RS which they regard to be an undeserved reward for Serbian-orchestrated genocide[170], can be found in many areas and in large amounts.

A huge factor that adds to the persistency of the ethnic groups in the case of the implementation of the Sejdić and Finci judgment is the fact that actually both of the viewpoints held by the ethnic groups are correct. The proposed plan of the RS to achieve implementation with minimum action is seen as the short term solution that would satisfy the execution of the ruling, but the FBH plan to go for an overall reform is the actual remedy BiH needs to make it a healthy democracy. It is even stated by the president of PACE (Parliamentary Assembly of the CoE) that BiH needs a wide constitutional reform, but a first step needs to be made with the amendment of the discriminatory provisions.[171] This proves the FBH is not delusional for pushing for an entire overhaul of the governmental system to improve and further BiH's post-war state building. But because the created deadlock and the importance of the Sejdić and Finci v. Bosnia and Herzegovina ruling, the change proposed by the RS,

[164] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011
[165] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[166] SDA, HDZ 1990, HDZ BiH, SDS, Stranka za BiH and SNSD
[167] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[168] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[169] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[170] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009
[171] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision – Sejdić and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011

the mere amendment of the provisions to comply with the judgment can create a stepping stone towards the overall required change.

As a final concluding remark on the role of the DPA in the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina case it can be stated that, although the DPA did not create the ethnic rivalry between the three largest ethnic groups in BiH, the DPA did create an environment in which these hostilities were magnified and could thrive. The DPA is responsible for predominantly focusing on the short-term solution of ending the war, without overlooking the consequences on the long term for Bosnia and Herzegovina. Power-sharing mechanisms that were instated to prevent one ethnic group dominating the other two 'gave each warring side, Bosniaks, Serbs and Croats, substantial power in protecting the interests of their respective communities'[172]. But that proved to be a feeding ground for politicians that use the ethnic rivalry as their claim to fame, which caused, and still causes, further separation of the entities and ethnicities.

6. Other issues that could affect the lack of implementation of the ECtHR case against BiH

Without any knowledge acquired from this thesis, it was already obvious that Bosnia and Herzegovina is a troubled country. Next to the ethnic factor that has immersed itself in every aspect and on every level of BiH society other problems BiH struggles with also affect decision taking in the central government and touch upon all other aspects in BiH. It is therefore possible and highly probable that other issues Bosnia and Herzegovina has to deal with contribute to the lack of execution of the Sejdić and Finci v. Bosnia and Herzegovina ruling.

Ethno-nationalism might have the firmest grip on Bosnia and Herzegovina's public and private sector, but a close second one is corruption. Actually these two issues that plague BiH can often been found together.

Corruption can be defined as 'abuse of public power for private benefit'[173] and it is of course unlikely that this abuse of power for private benefit is the reason why implementation of the Sejdić and Finci v. Bosnia and Herzegovina ruling has been delayed but the fact that corruption is still widespread across the country does ring alarm bells. Examples of vote buying by political parties at the last national elections in 2010, with at least 15% of the population being approached and offered money to vote for a certain candidate[174] and allegations against both Bosniak representative Bakir

[172] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[173] IMF definition; J. Bake, S. Runkel & R. *Scheid, Socio-Economic Aspects of Peacebuilding - Corruption, Informal Labour and Brain Drain in Bosnia and Herzegovina*, CCS working paper no. 8, Philipps-university Marburg, November 2008
[174] UNODC, *Corruption in Bosnia and Herzegovina – Bribery as experienced by the population*, 2011

Izetbegovic and Serb representative Milorad Dodik of embezzlement[175] prove that corruption has affected all spheres of live and even the rule of law.[176] Although cases of high-level government officials participating in corruption rarely get investigated and prosecuted, mere allegations have already affected the trust of the BiH citizens in the state institutions,[177] with citizens of Bosnia and Herzegovina ranking corruption as the fourth most important problem facing their country, after unemployment, the performance of the government and poverty or low standard of living.[178] And with the fact that the political parties from the FBH and the RS are named as one of the most corrupt organizations in BiH[179] it becomes clear why efforts to reduce corruption have failed. They have little incentive to combat corruption and replace the institutions in which the foundation of their power lies with ones that reduce their influence and strengthen the central government.[180] Implementing such changes that would reduce corruption affects their ability to maintain their control.[181] Almost every public office being allocated according to ethnic quota has led to them being corrupt. This system, set up by the DPA is tailor made for those who wish to stoke ethnic rivalry for political advancement,[182] with most political parties and leaders doing so. Because of the tripartite allocation of powers accountability that should be felt by these parties and leaders has decreased and has the rule of party prevailing over the rule of law.[183] The consequence of an amendment of the BiH Constitution to comply with the Sejdić and Finci ruling would most certainly mean a decrease in power for the three main ethnic groups, which is probably at the back of their minds when negotiating these amendments.

There is of course no prove that corruption, mainly the desire of the politicians in power to gain and regain power and their will to do anything to achieve it, has anything to do with the delayed implementation of the Sejdić and Finci case, but the amount of corruption in BiH is definitely something to be considered when looking at the issue at hand and certainly when looking for a solution to speed the implementation up.

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[175] B. Divjak & M. Pugh, *The Political Economy of Corruption in Bosnia and Herzegovina*, International Peacekeeping, Vol. 15, No. 3, June 2008, pp. 373-386

[176] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document

[177] UNODC, *Corruption in Bosnia and Herzegovina – Bribery as experienced by the population*, 2011

[178] UNODC, *Corruption in Bosnia and Herzegovina – Bribery as experienced by the population*, 2011

[179] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[180] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[181] J. Bake, S. Runkel & R. *Scheid, Socio-Economic Aspects of Peacebuilding - Corruption, Informal Labour and Brain Drain in Bosnia and Herzegovina*, CCS working paper no. 8, Philipps-university Marburg, November 2008

[182] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[183] J. Bake, S. Runkel & R. *Scheid, Socio-Economic Aspects of Peacebuilding - Corruption, Informal Labour and Brain Drain in Bosnia and Herzegovina*, CCS working paper no. 8, Philipps-university Marburg, November 2008

Besides corruption the fast majority of other issues that BiH has to deal with on a daily basis affect the implementation by taking away from its importance. It is understandable that the high unemployment rate and the failing economy get more attention by politicians and also media. The average unemployment rate in 2011 reaching 27,6% and further rising in 2012 with the youth unemployment rate even hitting 63%,[184] it comes as no surprise economic growth has stalled and over 25% of BIH citizens live in poverty.[185] A contributing factor to this is that economic power in BiH is fragmented along entity and ethnic lines.[186] These problems affect almost everyone in BiH society and therefore overtake any other issues that need to be dealt with. Examples of issues like these occur far too frequently[187], and take attention away from the execution of the Sejdić and Finci ruling, causing the priority with which that case should be implemented to decline.

Despite becoming clear that the lack of implementation of the Sejdić and Finci judgment is not attributable to discrimination of minorities but to ethnic rivalry, discrimination cannot be shoved under the rug as if it does not matter. Unfortunately discrimination does occur on a large scale in Bosnia and Herzegovina. Even though BiH has ratified all major Human Rights conventions and anti-discrimination laws are in place[188] systematic patterns of grievous instances of discrimination by individuals and organizations in key areas of law, policy and practice keep occurring.[189] Especially women, Roma and the LGBT community are being discriminated against on a daily basis. Women for example are greatly underrepresented in BiH government with for example not one woman in the BiH Council of Ministers and only two of the fifteen delegates for the House of Peoples being women. Sadly discrimination of Roma is more accepted in BiH society and because of that, Roma are often treated as second-class citizens. This makes the Roma, next to being the largest minority in BiH, also the most vulnerable minority in BiH society.[190] They continue to be the most socially, economically and politically marginalized group in the country,[191] with for example the Roma children having difficulty getting into normal schools.[192] The same goes for the discrimination of the LGBT community

[184] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[185] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009
[186] B. Divjak & M. Pugh, *The Political Economy of Corruption in Bosnia and Herzegovina*, International Peacekeeping, Vol. 15, No. 3, June 2008, pp. 373-386
[187] Another one of these issues that has BiH in its grip currently is the case of the different curriculums provided by schools in the RS and FBH.
[188] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[189] OSCE fact sheet 'national minorities in BiH'
[190] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[191] OSCE fact sheet 'National minorities in BiH'
[192] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

in BiH. They suffer widespread discrimination, even by the media and politicians[193] and are often victims of hate crimes[194]

7. Conclusion

Notwithstanding the fact that there are of course issues such as corruption that have delayed the implementation of the Sejdić and Finci ruling, the main contributing factors to the delay must be said to be the ethnic rivalry magnified after the DPA governmental structure was put in place in combination with mistakes that were made at the outset when the DPA was being negotiated. All parties involved have acknowledged that the provisions that prohibit BiH minorities from being elected to the House of Peoples and the BiH Presidency are discriminatory[195] but all these parties have also been unable to agree on a plan of action to execute the judgment. Proving that discrimination of minorities is not the delaying factor and that politicians still cling to ethnicity as the dividing factor in decision taking.

The DPA had the sincere aim of achieving peace and providing BiH's population with the opportunity to rebuild their lives by creating a state that would bring the peoples of Bosnia and Herzegovina together, within a social and political framework that would enable the country to take its rightful place in Europe.[196] And it goes without saying that part of this ambitious aim has been achieved, with Bosnia and Herzegovina not being war ridden anymore since 1995. The second, long-term part of the DPA goal however, has not been achieved. The structure set up by the DPA for post war Bosnia and Herzegovina was bold enough to achieve a compromise between the three parties to end the bloodshed, but unfortunately not bold enough to efficiently and successfully rebuild Bosnia and Herzegovina. The structure has kept the ethnical differences and hostilities alive, only strengthening the ethnical conflict between the three so-called 'constituent' peoples. Sadly it is this deep-rooted issue that has, for over four years, prevented the ECtHR case of Sejdić and Finci v. Bosnia and Herzegovina from being executed. Looking at the progresses over the years and the impasse that has developed on the issue since the ruling was passed in 2009; national minorities will remain deprived from the full use of their rights if BiH politicians do not come to an agreement.

[193] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[194] OSCE fact sheet 'hate crimes'
[195] Exceptions that prove the rule: politicians like Mazalica of SNSD, who proclaimed there is no discrimination because Sejdić and Finci can just declare affiliation with one of the three peoples, and they will then have the same rights as the others. (www.klix.ba)
[196] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

Four - What is the role of the international community in the implementation of the Sejdić and Finci v. Bosnia and Herzegovina case?

The previous chapters revealed the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina and the reasons behind this lack of implementation. The third chapter shows that BiH politicians use the implementation of the case at hand as a means to an end, with the execution of the ECtHR ruling never being a priority for the ethnic political elites. Despite this the second chapter has shown that there were attempts undertaken to achieve compliance with the ECtHR ruling but neither the initial Working Group nor the Interim Commission for the Implementation, both set up by the Council of Ministers of Bosnia and Herzegovina, have yielded any success[197]. Unfortunately, with the situation in BiH as it is today and as is described in the previous chapter, change of the current deadlock is not in the foreseeable future. With the execution of the Sejdić and Finci judgment already taking up to four years, it is becoming more urgent than ever before to accelerate the execution process. The BiH 2014 general elections are namely approaching and there is a legitimate risk of the election results not being accepted by the international community if they are based on discriminatory provisions and not in line with the ECHR.[198] It is obvious that all stops need to be pulled out to prevent this from happening, but how and by whom? From inside BiH the fastest way to implement the ECtHR ruling would be for the parties involved to let go of their wartime ideals and ethnic rivalry. But without help from the outside it is unlikely this would happen in time for the 2014 BiH elections. A look across the borders of BiH on the other hand has a greater chance of success. With the international community still involved on many levels of BiH society since the 1990's war, possible involvement in the execution of the Sejdić and Finci v. Bosnia and Herzegovina case should not be too complicated.

Before looking into all the different levels within the international community that could possibly affect or even speed up the implementation of the ECtHR case firstly BiH's place between states that are willing to comply but are unable to do so because of various reasons and states that are unwilling to comply because they do not agree with the judgment needs to be set out. At first sight, the situation that has developed surrounding the Sejdić & Finci v. Bosnia and Herzegovina case seems to be the situation in which the state, in this case BiH, is willing to comply, but unable to do so because of some reasons. After all, all parties involved agreed with the passed judgment, declaring the provisions in question to be discriminatory, with the BiH Council of Ministers even setting up an Interim Commission to implement the case. But despite their self-proclaimed best efforts, the unique

[197] E. Hodzic & N. Stojanovic, *New/Old Constitutional Engineering 2011*, Sarajevo 2011, Analitika Center for Social Research
[198] www.klix.ba

governmental structure and the DPA prevent the judgment from being implemented. The previous chapter however has created a more nuanced image of the situation in BiH. It shows a hint of unwillingness to execute the judgment among the negotiating parties. All the parties involved have a hidden agenda, and are only willing to agree on an initiative for implementation if it is in line with their own agenda. The difference between willingness and unwillingness to execute an ECtHR judgment needs to be made because it determines the approach that needs to be taken by the international community. If a state shows willingness to implement a judgment, assistance, instead of force is often enough to speed up the implementation. But if a state is unwilling to execute the judgment forcible action is needed to convince the state to implement the ruling. In the case of Bosnia and Herzegovina both approaches could advance the execution of the Sejdić & Finci v. Bosnia and Herzegovina judgment. However whatever path is chose, it is clear that international action to prevent political deterioration in BiH is needed.[199]

Walking through the international organizations and categories most involved in BiH is the easiest way to create an image of the possibilities the international community has to address the lack of implementation. The following organizations and categories are not randomly chosen but have the closest link to BiH and are thus in the best position to get involved in the speeding up of the execution of the ECtHR judgment: the Office of the High Representative in BiH, the Organization for Security and Cooperation in Europe, the Council of Europe, the European Union, the United Nations, the North Atlantic Treaty Organization, Non-Governmental Organizations and individual countries. Hinting into the direction that involvement of these different organizations on different levels could be successful is the fact that the reason behind the problems surrounding the implementation of the case are based on political difficulties, which is one of the less common reasons for a delay in implementation. And such difficulties are best combated by, in addition to political pressure, intervention of a variety of players, as in the case of Cyprus v. turkey[200] case where EU intervention was encouraged.[201]

1. The Office of the High Representative

The first organization to be looked at is the Office of the High Representative in Bosnia and Herzegovina. This is the organization that is inextricably linked to the infamous DPA and thus a perfect starting point. In the tenth annex of the DPA the OHR was established as an interim international administration to assist Bosnia and Herzegovina's transition into a peaceful

[199] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[200] European Court of Human Rights, Cyprus v. Turkey, 10 May 2001
[201] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008. & R.C.A. White & C. Ovey, *The European Convention on Human Rights*, fifth edition 2010 Oxford – chapter 3

democracy.[202] This international institution became responsible for the civilian implementation of the DPA and the ultimate authority regarding interpretation of it.[203] The main function of the OHR became the supervision of cooperation and coordination in the state building process by national organs[204].

Even though it may be the United Nations Security Council that appoints the High Representative that does not make the OHR a UN organ.[205] Instead, the OHR is supported and overseen by the PIC, the Peace Implementation Council,[206] which provides political guidance to the OHR[207]. Additionally the PIC also extended OHR's powers in the 1997 Bonn Conference, when it became clear that cooperation between national bodies was not moving along smoothly, by condoning extensive legislative and executive action.[208] These so called Bonn powers that made OHR the most authoritative body within Bosnia and Herzegovina were the OHR's ability to remove civil servants and public officials from office and to impose legislation if that would further the implementation of the DPA and the reform in BiH.[209]

This might all seem perfect for the case at hand, where forcible action is obviously needed to speed up the implementation of the Sejdić & Finci v. Bosnia and Herzegovina case. But despite its extended powers the OHR might not be the organization best fit or even willing to get involved in the execution of the ECtHR judgment. Firstly the OHR itself has stated that they consider amending the BiH Constitution outside the scope of their powers,[210] which limits any possibilities for the OHR to impose legislation for the execution of the ECtHR ruling. Secondly the combination of the fact that the OHR has no democratic legitimacy[211] from inside BiH and its diminishing credibility in BiH because

[202] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010 & J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition

[203] L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010 & S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

[204] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[205] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010 & S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013: The security Council merely endorsed the mandate of the OHR as laid down in the DPA annex 10.

[206] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[207] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

[208] K. Oellers-Frahm, *restructuring Bosnia-Herzegovina: A Model with Pit-Falls*, Max Planck Yearbook of United Nations Law vol. 9 2005

[209] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013 & S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

[210] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010; even though the BiH Constitution is an annex to the DPA

[211] S. Bardutzky, *Case note – The Strasbourg Court on the Dayton Constitution*, European Constitutional Law Review 2010

of the lack of success[212] has led to criticism which points to the closing down of the OHR. And this closing down may in fact not be as far away as expected. The OHR itself has started to reduce its role in BiH already since 2007, becoming more and more reluctant to use the invasive Bonn powers and in 2011 even lifting almost all bans it imposed over the years on officials to hold office.[213] This trend has been accelerated by the PIC, which is eager to move away from direct supervision due to political exhaustion and increasing disagreements within the PIC of the direction in which BiH should develop.[214] These developments are not in the favor of speeding up the implementation of the Sejdić & Finci v. Bosnia and Herzegovina case, but objectively the closing down of the OHR could encourage BiH political leaders to take responsibility for their own country because if BiH wishes to join the NATO and the EU it needs to be a fully sovereign state.[215]

It is unfortunate that the OHR, because of its plans to interfere less in BiH, is not willing to take action that could speed up the execution of the ECtHR ruling. But a further look into other international organizations might reveal some institutions that are better suited and willing to assist or pressure BiH into implementation of the ECtHR case.

2. The Organization for Security and Cooperation in Europe

The Organization for Security and Cooperation in Europe is another organization that operates directly in BiH, and next to the EU and the CoE it is the most prominent European intergovernmental organization with a human rights brief.[216] Despite only having politically, and not legally binding decision making powers[217] that does not mean the OSCE does not carry any weight in the speeding up of the implementation of the Sejdić and Finci v. Bosnia and Herzegovina case. Next to providing crisis management and trying to prevent impending conflict the OSCE also monitors and reports on human rights issues.[218] In addition the OSCE is, because of its presence in BiH since the end of the war and their assistance on subjects such as border security, arms control, democratization, human

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[212] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

[213] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

[214] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

PIC agreed to close OHR after 5 objectives have been met. These include:

1. A decision on ownership of state property
2. A decision on defense property
3. Implementing the Brcko final award (made it a self governing unit)
4. Ensuring fiscal sustainability
5. Entrenching the rule of law.

The PIC and OHR demand specific action and legislation from central and entity government to meet these objectives.
2 additional conditions: the signing of the SAA with the EU and a positive assessment of the situation in BiH by the PIC.

[215] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

[216] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010

[217] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010

[218] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010

rights and most importantly elections, an organization with a deep knowledge of BiH public life and the current situation. It was the OSCE that set up and monitored the first elections after the war in Bosnia and Herzegovina[219], and the OSCE has been involved in every election since. They even brought the issue of the discriminatory provisions in the BiH Constitution and Election Law up in 2006, already giving their opinion on amendments needed.[220] The OSCE may not have the tools available to pressure BiH politicians into executing the ECtHR ruling as there role in BiH is one of mere assistance. The OSCE however does need to be considered as an expert consultant on the issue of the amendment of the electoral system in BiH, by other organizations when looking for a solution.

3. The Council of Europe

The most obvious international organization to contemplate when looking for ways to speed up implementation of the Sejdić & Finci v. Bosnia and Herzegovina case is of course the Council of Europe. The European Court of Human Rights, where the ruling was handed down, is an institution of the CoE and was established to ensure compliance with the European Convention on Human Rights. But even before the ECtHR passed its ruling on the case in 2009 the CoE had already made the amendment of the electoral system to comply with the ECHR an obligation for BiH much earlier. The story starts in 2002, when Bosnia and Herzegovina became a CoE member state and undertook the obligation to review its electoral legislation in light of CoE standards and to revise it were necessary, within one year after the accession. But besides the Parliamentary Assembly of the CoE periodically reminding BiH of this post accession obligation no action to stimulate compliance on the subject was taken up to the ECtHR ruling in 2009. After this binding and final ruling of the ECtHR, it is article 46, paragraph 2, of the ECHR that transfers the supervision of the execution of the judgment onto the executive organ of the CoE, the Committee of Ministers.[221] This division of powers between the ECtHR and the CoM is not without reason, its namely fundamental to the European system to prevent the ECtHR from getting involved in politics. This means that since the judgment was delivered, BiH needs to answer to the CoM about the execution of the Sejdić & Finci v. Bosnia and Herzegovina case. But that does not make the CoM the only organ of the CoE that is involved in the execution of the Sejdić & Finci v. Bosnia and Herzegovina case. The ECtHR and PACE also have, due to their increased involvement in the execution process of rulings, means at their disposal to intervene in the implementation of an ECtHR ruling.

[219] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition
[220] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina
[221] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

3.1 The Committee of Ministers

In short the CoM is the executive and formal policy making body of the CoE, consisting of the ministers of foreign affairs of the CoE member states,[222] and is, among other things, responsible for the supervision of the execution of ECtHR rulings by member states.

As mentioned earlier Bosnia and Herzegovina needs to answer to the CoM about the execution of the ECtHR judgment. But that does not mean that the CoM itself does not have any obligations concerning the execution process. The CoM has its own supervisory obligations and powers that it needs to start exercising after the judgment has been passed.

With the general elections in 2010 coming up, immediate action was taken by the CoM, which asked the BiH authorities to submit an official report in January 2010 on measures that they intended to take in order to address the discriminatory provisions that the ECtHR had found. When the CoM discussed these intended measures in March of 2010 the CoM was positive about the path BiH had embarked on to implement the judgment.

Prove that the CoM kept its eye on BiH and the execution of the Sejdić & Finci v. Bosnia and Herzegovina ruling in 2010 was the declaration that was adopted in May of 2010 in which the CoM reflected on its expectations for BiH to make the constitutional reform required for compliance with the judgment a top priority within BiH and to make use of the provided international assistance to do so.[223]

As 2010 progressed it became apparent that if the deadline of the October elections was to be met more assertive involvement by the CoE was needed. It was thus welcomed that in May 2010 Caroline Ravaud, who was Special Representative of the Secretary General in Bosnia-Herzegovina for the CoE at the time, noted that the CoE would provide assistance in the form of technical support in the creation of an expert body to work on amending the BiH Constitution.[224] The expert body was created and shaped as an Interim Joint Commission. But despite these efforts the 2010 general elections passed with no changes to the electoral system of BiH. The CoM kept consistently reminding BiH of its obligations and demanding the judgment be implemented as soon as possible, but deadline after deadline passed without any change to the electoral system.

The CoM eventually decided to enact coercive methods, adopting three interim resolutions on the situation BiH, in 2011, 2012 and 2013. The CoM has done so to provide information on the state of progress of the execution of the ECtHR ruling in BiH and to express concern about the encountered delays,[225] with the tone of the interim resolutions developing from encouraging in 2011 to more

[222] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[223] E. Hodzic & N. Stojanovic, *New/Old Constitutional Engineering 2011*, Sarajevo 2011, Analitika Center for Social Research
[224] E. Hodzic & N. Stojanovic, *New/Old Constitutional Engineering 2011*, Sarajevo 2011, Analitika Center for Social Research
[225] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

coercive in 2013.[226] Unfortunately the shortcomings of such interim resolutions are that they take a long time to draft and adopt and need to be publicized through the press to put more pressure on the state.[227]

All the initial principal steps, as the CoM inviting BiH in its special human rights meeting after the ECtHR judgment to inform them about the intended action plan for the implementation and the follow up meetings every six months, have been taken. With the latest on of these meetings[228] taking place in September of 2013 in which the CoM urged BiH to deploy all their efforts to reach a consensus on the issue at the third round of EU high level dialogue on the Accession Process that was planned on the first of October.[229] In the meantime that deadline has also passed without agreement.

Because these taken measures have proven insufficient the question arises if the CoM has other measures or methods at their disposal to make up for the lost time?

Firstly a measure that is certainly desirable in the case of Bosnia and Herzegovina is the adoption of interim measures. Such measures are needed when the implementation of the ECtHR judgment and the adoption of general measures take a long time to complete. In BiH especially, such measures, that would prevent the breach of the ECHR found by the ECtHR to continue after the delivery of the ruling, are needed because of the lack of direct effect in the national courts. Unfortunately the adoption of such measures would still remain in the hands of BiH authorities that have not been able to achieve any success in the adoption of general measures for the implementation of the Sejdić & Finci v. Bosnia and Herzegovina case.[230]

Secondly, next to the already used coercive measure of 'interim resolutions' there is one other coercive measure or so called 'unequal' power available to the CoM. These coercive methods have been created for states that delay the taking of measures to implement an ECtHR case. This most excessive method open to any CoE institution can be found in article 8 and article 3 of the Statute of

[226] Interim Resolution CM/ResDH(2011)291 & Interim Resolution CM/ResDH(2012)233 & Interim Resolution CM/ResDH(2013)259

E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008 - there are three types of interim resolutions; with the first type only acknowledging the failure to take measures by the state as a simple public official finding of non-execution, the second type gives the CoM the opportunity to note certain progress and to encourage the state further. The CoM can comment directly on possible means of compliance with the judgment. This is the most common type of resolution. The third type is used only exceptionally and is designed to threaten a state with more serious measures.

[227] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

[228] 1179th meeting

[229] See 4. The European Union

[230] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

the CoE. These articles open up the possibility for the expulsion of a state from the CoE if that state repeatedly refuses to execute a judgment, which in turn constitutes a 'serious violation of the principle of the rule of law and the enjoyment of human rights and fundamental freedoms'.[231]
But the CoM has never used this measure and it would be for the best if it would stay that way. Namely, if a state is expelled, the execution of the ECtHR case at hand may never take place and it is thus better for the CoM to keep in control, how severely lacking the state's action may be. Besides, the mere threat of the use of this measure can already have the desired effect, because it is in any state's interest to stay a CoE member state. Despite a lot of talk in the media about the possibility of BiH being expelled from the CoE after the 2014 general elections, the CoM has made no such threat yet[232].

It is unfortunate that there exists no measure that sits in between the coercive measure of the 'interim resolution' and the excessive measure of expulsion from the CoE. The case of Bosnia and Herzegovina has proven that such an in between measure is desperately desired.

So despite the supervision by the CoM going according to plan, it has shown not to be enough to move BiH into action, because even though the CoE institution charged with the supervision of the execution of ECtHR judgments did its duties after the ruling was delivered, the CoM should have picked up on the alarming signals such as the fact that BiH courts were and still are not applying the case directly, which should have triggered even more intrusive action by the CoM.[233]

3.2 The European Court of Human Rights

The next institution of the CoE that is worth mentioning is the ECtHR itself. In theory the ECtHR has no powers when it comes to the supervision of the execution of their judgments. To protect the division of powers this is left to the CoM. But over the years the ECtHR has gradually assumed a more prominent role in the execution of its judgments and is slowly becoming a major player in the execution process.[234]
Originally the supervisory methods used by the ECtHR are above all preventive in nature, but the ECtHR has started to clarify the scope of its judgments better and more often as well. By providing more specific details on the meaning of its judgment states now have a better understanding of what

[231] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[232] EU parliamentarians have asked for BiH to be suspended from CoE in winter of 2013, because of lack of implementation.
[233] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008. - This so-called direct effect in the domestic courts is designed to ensure that individuals cannot be denied their rights while awaiting implementation of the ECtHR case.
[234] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

is expected of them.[235] This development within the ECtHR follows the, albeit at a very early stage, 1950 Foster Plan. This Foster Plan envisioned the, at the time yet to be established, European Court of Human Rights to be able to prescribe remedies or require states to impose criminal and administrative measures against persons responsible for violating, annulling, suspending or amending the impugned decision. For the case at hand this type of action by the ECtHR would have possibly been the way to prevent the delay in execution of the judgment, but at the time, in 1950, the plan was too ambitious.[236] In general this direction the ECtHR is moving into is applauded but it does not come close to the actual Foster Plan and for the specific case at hand of the implementation of the Sejdić and Finci judgment it has not been enough to cause swift implementation. Not because the ruling was not clear enough, in fact, the ruling was very clear. In the ruling the ECtHR made use of the proposals and opinions of the Venice Commission on the matter, its advisory body on constitutional matters.[237] These opinions and proposals were set up really precise, exactly stating which paths should and should not be taken by Bosnia and Herzegovina to reform its electoral system. BiH can therefore not claim a lack of guidance or unclear judgment as the reason for the delayed execution of the ruling.

A possible downside of this development is the fact that the margin of appreciation that the states have in deciding how to implement an ECtHR ruling has become smaller. The principle that the ECtHR does not prescribe the means of compliance is thus, to an increasing extent, maintained mainly for form.

Another procedure gaining popularity within the ECtHR is the Pilot Case Procedure[238], being used for the most complex and serious cases the ECtHR is faced with. It is a useful method to compel states to adopt effective domestic remedies, which otherwise only the CoM is able to do trough their supervisory role. In a pilot case procedure the court expresses an opinion on a draft law or more directly helps a state determine the measures to be adopted to prevent a further rash of cases. While such action by the ECtHR used to be an exception it is slowly becoming systematic policy. But caution is advised because of three reasons, firstly this procedure is not enshrined in the ECHR, secondly it might upset the carefully crafted balance between the ECtHR and the CoM, letting the ECtHR venture

[235] R.C.A. White & C. Ovey, *The European Convention on Human Rights*, fifth edition 2010 Oxford

[236] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

[237] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008. Venice Commission: European Commission for Democracy through Law

[238] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008 - Freeze examination of similar cases pending adoption domestic means of redress, to review the action taken. The policy is being applied more widely even when there are no large-scale problems that might generate a rash of cases.

onto political terrain and lastly the risk of nullifying the 'states to be free to chose the means of execution'.[239]

So despite this pilot case procedure being again a great way to speed up the specific execution of the Sejdić and Finci ruling, the downsides need to be taken into consideration. And even though the procedure seems useable for the case at hand, the fact the ECtHR has not yet taken up action to start such a procedure in the Sejdić and Finci v. Bosnia and Herzegovina case makes any success only speculation.

It is of course great to see the ECtHR is taking more initiative in the execution side of its judgments, but for the case at hand, Sejdić & Finci v. Bosnia and Herzegovina, this has not been used yet or not shown effective enough to speed up implementation of the case.

A great addition to the quit disappointing measures available to the ECtHR and also the CoM could be the 14th protocol to the ECHR. This protocol is innovative in that it gives the CoM two new supervisory remedies to use before the ECtHR. It creates an interesting dynamic between the CoM and the ECtHR, forcing them to work together instead of alongside each other. The CoM can use these two new remedies in the event interpretation problems arise about the scope of the judgment or if a state fails to execute. This first issue of interpretation, as has been showcased earlier, is not the reason for the lack of execution of the ECtHR case in BiH and thus referral to the ECtHR for further clarification of its ruling is not necessary. The second issue of a state that fails to execute however is the exact position BiH finds itself in. Now with protocol 14 in place the CoM can take up infringement proceedings against the state at hand, in this case BiH, and send the state to face the ECtHR for failure to execute the judgment. Article 46 that makes such infringement proceedings possible entered into force in 2010 and it contains the following:

Article 46(1) ' if the Committee of Ministers considers that a high contracting party refuses to abide by a final judgment in a case which its party, it may, after serving formal notice on that party, and by decision adopted by majority vote of 2/3 of the representatives in the Committee of Ministers, refer to the court the question whether that party has failed to fulfill its obligation under paragraph 1.'

Paragraph 5 adds: 'if the court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of measures to be taken. If the court finds no violation of

[239] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.' [240]

Resembling the procedure in the EU with the same name, the procedure is entirely in the hands of a political body. In the case of the CoE this body is the CoM, which, as the supervisory body for the ECtHR is best placed to determine whether there is a continuous infringement. If it seems such continuous infringement is taking place, the decision to take action will be taken by the CoM in the form of a reasoned interim resolution and must be preceded, at least six months beforehand, by a notice to comply, served on the noncompliant state. Eventual action asked for by the CoM of the ECtHR consists of deciding whether the state has taken the measures required by the judgment that found the violation, and it is not the intention to reopen the entire case.[241]

The benefit of this new infringement procedure is the preventive effect it bares and it seems to be the middle course between the weak measure interim resolution and the excessive measure of expulsion from the CoE. But until the CoM decides to start up such infringement proceedings against BiH for the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina case the conclusion must be that with the measures it has enacted the ECtHR together with the CoM is not in the position to speed up or coerce BiH to execute the Sejdić and Finci ruling.

3.3 Parliamentary Assembly of the Council of Europe

Next to the Committee of Ministers and the European Court of Human Rights there remains one organ that has a possible chance of pushing BiH to execute the ECtHR ruling, the Parliamentary Assembly of the Council of Europe. The PACE has gradually become more involved in the supervision of the execution of the ECtHR judgments, playing a supporting role to the CoM.[242]

The PACE consists of 318 members elected on a proportional basis by and from the national parliaments of the CoE member states.[243] This explains why the growing interest of the PACE in the execution of the ECtHR judgments is welcomed with open arms, being based on the principle that only national delegations have the competence to call their governments to account within their own national parliamentary assembly in an objective matter, for action taken on a judgment.

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[240] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[241] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[242] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[243] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010

The growing involvement and interest of the PACE in supervision of ECtHR rulings can be deduced from the fact that the PACE instructed its Committee on Legal Affairs and Human Rights to report about any problems that arise on the subject of compliance with ECtHR judgments, and when having knowledge of such problems the members of PACE have shown not to hesitate to use written questions to acquire an explanation from the CoM on the failure to execute the ECtHR ruling, with the CoM being required to provide a written answer to these questions.[244] Another example is the fact that the PACE decided to adopt recommendations to the CoM, and through it to the relevant states, concerning the execution of certain judgments if it noted abnormal delays. Mainly as a hint to the CoM to hold an urgent debate on the issue and to be more forthcoming with the use of their ability to pressure such a state, not shying away from article 8 proceedings.[245] The fact that, of the four annual PACE meetings, at least one of these meetings includes the subject of execution of ECtHR judgments on the agenda also hints at the PACE wanting to be involved more on the issue. Additionally, to be kept completely in the loop on the execution of judgments the CoM's Rapporteur Group on Human Rights agreed on formal consultations with the PACE Committee on Legal Affairs and Human Rights.[246]

Going a step further the PACE even envisions itself getting involved in cases where states prove especially reluctant to implement the ECtHR ruling, asking the Minister of Justice of the state concerned to give an explanation in person before the PACE members.[247] The significance of PACE involvement lies in the ability of members of national parliaments to put subsequent pressure on the national legislature and executive to adopt the necessary measures and also in their power to make formal recommendations to the national authorities in charge of policy making. It needs to be emphasized that the PACE can call upon national delegations to monitor execution and to take all necessary steps to ensure their speedy and effective execution.

Adding additional significance is the public nature of the criticism handed out by the PACE, seeking to make its members more accountable for their own governments.[248]

In the case of implementation of the Sejdić and Finci ECtHR ruling in Bosnia and Herzegovina however, as yet another disappointment of many, the BiH government has yet to appoint a chair to

[244] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[245] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights,* 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[246] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights,* 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[247] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights,* 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[248] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

the PACE. This means many of the effects of increased PACE involvement in the supervision of the execution of ECtHR judgments are lost in the specific case of the execution of the Sejdić & Finci v. Bosnia and Herzegovina case.[249]

Despite this disadvantage for the PACE, they involved themselves in the execution of the Sejdić and Finci v. Bosnia and Herzegovina case already in 2010, reminding BiH the discriminatory provisions needed to be amended before the 2010 general elections by adopting resolution 1725 and expressing serious concern about the lack of results on the subject. Despite this minimal involvement of PACE, it is still welcomed because it is better than no involvement at all.

As an overall deduction it can be said that the PACE, which pressures the CoM to be more determined in its supervision, has, in combination with their view that states should undertake more to ensure swift implementation of ECtHR rulings revealed they believe stronger/harsher action is needed to make states comply with ECtHR rulings.[250] This outlook on the future of the execution of judgments is needed when taking execution of the Sejdić and Finci ruling as an example which in turn shows that, what can be done and has been done is not enough.

3.4 Concluding remarks on the Council of Europe

Despite three CoE institutions being able to get involved in the supervision of the execution of the Sejdić and Finci v. Bosnia and Herzegovina case, only one measure, the expulsion from the CoE by the CoM, has a punitive effect, with the other available measures serving as masked warnings and reminders for BiH. With the expulsion from the CoE seen as a last resort, which the CoM is reluctant to enact, one must be on guard and take the words of the Group of Wise Persons into consideration. They stated, 'the credibility of human rights protection system depends to a great extent on execution of the courts judgments.'[251] So in fear of the ECtHR losing its function and its decisions remaining inoperative[252], with the case at hand concerning BiH being a great example of this possibility, the CoE needs to remain in motion concerning the development of the supervision of the ECtHR rulings.

The current situation with the combination of on the one hand the fact that ECHR membership is up to the free will of the states and on the other hand the lack of effective coercive measures for the execution of the ECtHR judgments has left the CoE weak. Because in the end, looking at the case at hand and the supervision of the execution of judgments process as it stand today, there is, very little

[249] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document
[250] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[251] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.
[252] E. Abdelgawad, *The execution of judgments of the European Court of Human Rights*, 2nd edition Human Rights Files No. 19, Council of Europe Publishing, Strasbourg 2008.

the CoE can do with a state persistently in violation, short of expelling it from the CoE, but that being a counterproductive measure.[253]

This means the question still remains if any other international organization could have a more fulfilling role concerning the execution of the Sejdić and Finci v. Bosnia and Herzegovina judgment.

4. The European Union

One of these other international players that could possible speed up implementation of the Sejdić and Finci v. Bosnia and Herzegovina case is the European Union. Even though the EU started as an economic/trade partnership, developments over the past decades made the EU begin to require respect for human rights as a condition for EU membership.[254] But even before EU membership played a role in BiH the EU was already involved in Bosnia and Herzegovina. In 1995 already, the EU was involved in the DPA negotiations and thus had a, albeit small, hand in the establishment of the discriminatory constitutional provisions.[255]

Eventually it took until 1999 for EU membership to be used as a leveraging ground by the EU and the rest of the international community. After the Kosovo war that ended in 1999, all the countries in the Balkan region were offered an opening into possible EU and NATO membership; on the condition they develop certain institutions to help facilitate their eventual integration into these organizations. It was assumed that the appeal of EU as well as NATO membership would prevail over other political dynamics in BiH. But this allure was not enough of an incentive to convince BiH's ethnic elites to change the institutions that had given them their power.[256]

I took until 2006, when the 2006 April Reform Package[257] was initiated by the international community, for the EU to become involved in the constitutional reform process of Bosnia and Herzegovina. The fact that this proposed plan failed made the EU threaten to put a stop to the EU membership proceedings with BiH until such a constitutional reform had taken place, which would rid the BiH Constitution of its flaws.

But the EU eventually decided, despite these threats made in 2006 to proceed with the Stabilization and Association Agreement, which can be seen as the precursor of the actual EU membership, with this SAA eventually being signed in 2008 despite not all preconditions being met.[258] By signing and ratifying this SAA BiH committed itself to address the European Partnership Priorities. One of these

[253] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[254] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[255] J.C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, chapter 12 - Framing the State in Times of Transition
[256] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009
[257] The international communities first major efforts to persuade BiH's elites to reform the constitution set up by the DPA and to rid it of its flaws.
[258] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

priorities was to, within a year or two, amend the electoral legislation regarding members of the BiH Presidency and the HoP delegates to ensure full compliance with the ECHR, ridding it of any discriminatory provisions. Meaning BiH had to indirectly comply with the earlier made CoE post-accession commitments.

Despite the less then successful road BiH has taken since 2008 concerning EU accession, the EU kept involved and even increased its involvement over the past few years and since the 2009 ECtHR ruling. In 2011 for example the EU decoupled their own EU Special Representative, Peter Sorenson,[259] from the OHR, thereby reinforcing their role in Bosnia and Herzegovina. This representative has taken the lead in supporting the country on its path towards EU integration.[260] And the EUSR has since; in combination with varying EU delegations, become instrumental in communicating the EU priorities to citizens and in implementing the objectives of the EU agenda in key areas.[261]

Unfortunately, this involvement has led to no avail concerning EU membership for Bosnia and Herzegovina. The reason being that BiH has not complied with the European Partnership Priorities from the SAA including the constitutional reform required, to amend the discriminatory provisions as recognized in the Sejdić and Finci v. Bosnia and Herzegovina case. The consequence of this non-compliance by BiH is that, even though the SAA has been ratified by all EU member states it has not yet entered into force because the European Council has blocked the entrance into force until the set conditions are met.[262]

Unexpectedly the EU has shown further persistence in assisting BiH towards EU accession in the last few years. The High-level dialogue on the Accession Process (HLDAP) was launched in Brussels in June of 2012 together with the representatives of the authorities and the political parties of BiH.[263]

The purpose of the HLDAP is to start the process of explaining what EU accession requires both in political and technical terms. The need for effective coordination mechanism between levels of government for the transportation, implementation and enforcement of EU laws remains a matter of priority.[264] The HLDAP can be seen as a helping hand, through which on 31 august of 2012, the EU and BiH agreed on a roadmap for EU integration and the entry into force of the SAA. The execution of the Sejdić and Finci v. Bosnia and Herzegovina ECtHR case, which is almost equal to the initial

[259] Abbreviated: EUSR & also head of the EU delegation in BiH
[260] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013
[261] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document
[262] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document
[263] European Commission, *Bosnia and Herzegovina 2012 Progress Report*, Commission Staff Working Document
[264] European Commission, *Bosnia and Herzegovina 2012 & 2013 Progress Report*, Commission Staff Working Document

constitutional reform required in 2008 has become a breaking point within the HLDAP and roadmap, as the EU sees it as the top priority for the possibility to continue on the road to EU accession.

Under the flag of the HLDAP numerous attempts have been undertaken by the EU[265] to get the BiH political leaders negotiating and agreeing on the execution of the Sejdić and Finci case, but all have ended in failure.[266] The most current and fairly major consequence of this consistent failure of the BiH political leaders to agree on a proposal for the execution of the Sejdić and Finci v. Bosnia and Herzegovina ruling has been set in motion on the ninth of December 2013. Since the latest efforts of the EU to speed up the execution of the ECtHR case, with the last negotiations between the EU delegates and BiH politicians taking place in November and December of 2013[267] an ultimatum set up by the EU has been hanging above the heads of the BiH political leaders. The ultimatum consists of the simple construction that if BiH political leaders did not put forward a proposal for the execution of the Sejdić and Finci ECtHR case before December 9 2013, financial aid coming from the Instrument for Pre-Accession assistance[268], under which BiH gets financial assistance from the EU, will be reduced by at least 45 million euro's.[269] The current state of affairs is that, as this date has passed without a proposal being put forward, the EU has started the process of re-allocating the funds, 45 million euro, to Kosovo instead of Bosnia and Herzegovina.[270]

As unbelievable as it may seem, but the threat of cutting back on financial aid from the EU, which can be perceived as a financial sanction, has not pressured BiH politicians into letting go of their ideals for the good of Bosnia and Herzegovina. Because of this selfishness of the political leaders one interesting means of persuasion remains open to the EU. Since 2011 the European Council is namely in the position to impose bans on traveling to the EU member states and to freeze assets when confronted with intransigence by BiH leaders. Persons that threaten Bosnia and Herzegovina's sovereignty, territorial integrity and the security situation in BiH or undermine the DPA could become subject to such sanctions.[271] Although not yet used by the EU it would be interesting to see if

[265] The single EU representation (EUSR) and EU delegation continue to facilitate political dialogue and to apply a broad and balanced set of instruments to maximize the incentives provided by the EU.
European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document
[266] European Commission, *Bosnia and Herzegovina 2012 & 2013 Progress Report*, Commission Staff Working Document, www.klix.ba
[267] 18 November 2013 negotiations started up again, with EU experts coming to Sarajevo to discuss possible proposals for the solution
[268] IPA
[269] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document
[270] www.klix.ba
[271] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

such individual pressure on political leaders could have the desired effect of a swift execution of the ECtHR ruling.

In general above-described EU involvement in the execution of the Sejdić and Finci v. Bosnia and Herzegovina case needs to be welcomed with open arms. The EU has stayed active within BiH over the years even increasing the pressure on BiH politicians. The main reason behind this is the fact that EU accession remains the most significant diplomatic lever available to the international community,[272] as it is one of the few or only interests BiH political leaders share.
The fact that the EU has linked compliance with human rights standards as a prerequisite for EU membership is a good thing. For that is the reason it is possible for the EU to make the progress of the BiH EU accession process dependent on the execution of the ECtHR case of Sejdić and Finci. But as the EU has identified BiH as the Balkan state lagging most in the EU integration process,[273] and the amendment of the discriminatory provisions in the BiH Constitution already pending since 2008 all the efforts of the EU have proven futile. Luckily the EU is still willing to stay involved in the process of assisting BiH with the steps that need to be taken towards EU membership.

5. United Nations

This chapter would not be completed without mentioning the United Nations. BiH is namely a UN member since 1992 and the UN has been involved in Bosnia and Herzegovina since then, even during the war that lasted until 1995.[274] More recent UN involvement in BiH can still be found in the fact that the OHR is appointed by the UN and that in recent years the UN has not refrained from frequently bringing up the lack of implementation of the ECtHR ruling, and labeling it as worrying.
The first article of the UN Charter, which states that 'Promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion' is one of the principal purposes of the United Nations emphasizes that the UN most certainly has the mandate to get involved in the execution of the Sejdić and Finci v. Bosnia and Herzegovina case.

The UN being quit the comprehensive organization there are several organs and levels on which the supervision of the execution of the ECtHR case can take place. Firstly the fact that BiH is member to the International Convention on the Elimination of All forms of Racial discrimination since 1993 makes it possible for the corresponding Committee on the Elimination of Racial Discrimination (CERD) to voice their discontent about the discriminatory electoral system BiH. On several occasions

[272] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009
[273] C. Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision* – Sejdić *and Finci v. Bosnia and Herzegovina*, Human Rights Brief 2011.
[274] BiH is a member of the UN since 22 may 1992 and UN involvement in the war was military intervention/support.

the CERD has voiced its concern about the fact that only 'constituent' people can stand for election to the BiH Presidency and the HoP, which is not compatible with articles within the Convention.[275] Secondly the same applies for the International Covenant on Civil and Political Rights and its Human Rights Committee, to which BiH is a member since 1992. The Human Rights Committee has spoken out against the current electoral system in BiH and urged the countries political leaders to reopen talks on constitutional reform, after the 2006 April Package failed.[276] These opinions put forward by these Committee's prove the awareness of the UN about the current situation concerning the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina ruling.
Thirdly this awareness can also be detected in the UN Periodic Review[277]. These universal periodic reviews are held by the Human Rights Council and are a form of peer review between UN member states. The Human rights situation within a state is then measured against the UN charter, the UDHR and other UN human rights treaties.[278] The review of BiH took place in March 2010. On the subject of implementation of the Sejdić and Finci case it was stressed that the law should be amended, with the BiH delegation at the time of this review vowing to take measures in accordance with the ECtHR judgment before the 2010 elections. Today it is obvious they failed to do so, and with BiH being up for review again in 2014[279] it will be interesting to see what conclusions will flow from the next UPR.

In the fourth place the Office of the UN High Commissioner for Human Rights deserves to be mentioned. This UN High Commissioner is responsible for promoting and protecting effective enjoyment by all, of all human rights. In this role the High Commissioner should and could play an active role in removing current obstacles to the full realization of all human rights and in preventing the continuation of human rights violations, as has been the case in Bosnia and Herzegovina for at least the past four years.[280]

Lastly the UN Security Council[281] need not be skipped. The SC has a direct link into BiH through the OHR. As mentioned earlier the High Representative of the OHR is appointed by the SC and so, despite the fact that the OHR is not a UN organ, it has the duty to report back to the SC on the realization of the peace process in BiH. The most recent report done by the current High Representative Valentin

[275] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina & L. Claridge, *Briefing – Discrimination & Political participation in Bosnia and Herzegovina – Sejdić & Finci v. Bosnia and Herzegovina*, Minority rights group international, January 2010
[276] ECtHR 22 December 2009, Case no. 27996/06 and 34836/06, Sejdić and Finci v. Bosnia and Herzegovina
[277] UPR
[278] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[279] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[280] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[281] Abbreviated: SC

Inzko took place on the twelfth of November 2013.[282] He reported on the general standstill on many issues within BiH because of the inability of politicians to reach agreement, but was optimistic in his review Inzko stating that there is still time to achieve a lot before the general elections in 2014. On the specific subject of the execution of the Sejdić and Finci ECtHR ruling he acknowledged that the failure to implement the ruling has blocked Bosnia and Herzegovina's path towards the EU and NATO. In his opinion the implementation of the ECtHR case should be seen as a test of responsibility to adhere to human rights, adding that nothing is deemed impossible, because if Serbia and Kosovo were able to solve a 600-year issue, BiH leaders must be able to agree on a proposal for the execution of the Sejdić and Finci ruling.[283]

Unfortunately for the case at hand, although the UN can involve itself in the execution of the Sejdić and Finci case on several levels, this involvement has not led to the desired amendments to the law in BiH. With for example the opinions put forward by the treaty bodies, not being legally binding, but only being a form of soft law that can provide guidance to authorities on the general obligations of state[284]. So for the time being the UN needs to be put in the same category as the OHR and the OSCE, being a party that can claim involvement but is less eager or unwilling to do so in the manner in which the EU or the CoE have done.

6. Non-Governmental Organizations

As it is commonly known, Non-Governmental Organizations in theory do not have any tools at their disposal to exercise pressure onto a state. In practice however NGO's have been able to pressure states into taking certain action. Until today however no NGO has been able to exercise such pressure onto BiH politicians to reach an agreement on the execution of the Sejdić and Finci ruling. Mostly because NGO's that have originated from within BiH are underdevelopment from the standpoint of entering into the political debate and exercising power as issue advocates, government watchdogs and generally helping to set the agenda for political debate.[285] Within Bosnia and Herzegovina NGO's are not taken seriously or seen as equal partners in any political debate.

Luckily the international and larger NGO's have a somewhat louder voice within the international community. Human Rights Watch[286] for example has urged the CoM of the CoE to adopt an interim

[282] www.klix.ba
[283] www.klix.ba
[284] D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law*, Oxford University Press 2010
[285] National Democratic Institute for international affairs, Bosnia and Herzegovina Democracy Assessment Report 2009.
[286] HRW

resolution calling upon BiH to rapidly adopt necessary measures, taking a report supplied by HRW itself and the Venice proposals into account.[287]

It might be best not to expect any major progress on the implementation of the ECtHR ruling to come from NGO involvement, but with the case as a standstill today any NGO involvement should be considered a welcome bonus to other highly desired action from the EU or CoE.

7. North Atlantic Treaty Organization

Not worth mentioning excessively in this thesis, but certainly a usable incentive for BiH could be the possibility of NATO membership. In 1999 the countries from the Balkan region were not only seduced with possible EU membership, but also with possible NATO membership. In November 2006 Bosnia and Herzegovina took its first steps towards NATO membership by joining the Partnership for Peace (PFP), which provides BiH with assistance in improving its armed forces and making them interoperable with NATO. This PFP was followed by BiH being permitted to become part of the Membership Action for NATO aspirants in 2010.[288]

Despite the NATO not being involved in the execution of the ECtHR ruling because its interests lay on entirely different levels of BiH development one might consider if the allure of NATO membership could be used as a lever to pressure BiH politicians into reaching an agreement on the execution of the ECtHR ruling, as is being done with EU membership.

8. Individual countries

Next to involvement of the international organizations on the subject of the execution of the Sejdić and Finci judgment, involvement and pressure from individual countries need not be marginalized in its effects. But the question remains if there can be found countries that are willing to interfere and intervene in BiH.

8.1. Neighboring countries; Serbia and Croatia

Not only the geographical proximity of Serbia and Croatia to BiH but also their close involvement with their respective ethnic groups within BiH makes them perfect candidates for possible pressure or assistance on the matter of the implementation of the ECtHR ruling. In addition this kind of cooperation is also applauded by the EU, which sees regional cooperation and good neighborly relations as an essential part of BiH's process of moving towards EU membership.[289] And because the Serbs and Croats in BiH look to Belgrade and Zagreb for support and the EU currently has more

[287] 2010 CoM (CoE) communication from HRW on the Sejdić and Finci v. Bosnia and Herzegovina case.
[288] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013, By NATO foreign ministers
[289] European Commission, *Bosnia and Herzegovina 2013 Progress Report*, Commission Staff Working Document

leverage over Serbian and Croatian leaders than it does over ethnic elites in BiH,[290] it would not be out of place for the EU to, through these neighboring countries pressure their respective ethnic counterparts in BiH to reach an agreement on the execution of the Sejdić and Finci judgment.

8.2. United States of America

The USA being one of the major players within whatever situation or organization, any involvement of theirs in the execution of the ECtHR ruling is applauded, but must not be taken for granted. Because although, over the years, the USA has consistently reminded[291] BiH of its obligation to amend the discriminatory provisions the role of the USA in BiH is declining since the failure of the 2006 April Package.[292] So despite the High Representative Valentin Inzko being in Washington in November of 2013 to report to the Assistant Secretary of State for European and Eurasian Affairs Mrs. Nuland on the current situation in BiH,[293] interest in the USA is dwindling, mainly because more pressing issues have arisen, both national and international.[294]

9. Conclusion

A variety of organizations and their efforts to speed up the execution of the Sejdić and Finci v. Bosnia and Herzegovina ruling have been analyzed in this chapter. And the most obvious conclusion is that none of their undertakings have shown successful, not even in the slightest way. There is no lack of monitoring mechanisms on all levels, within the CoE, the EU and even the UN, but merely monitoring the process within BiH will not get the execution of the ECtHR case any closer to completion. This is emphasized by the result of the many failed attempts undertaken, putting the international community is in its weakest position since the war ended in 1995.[295]

But the lack of proper instruments available is not the only reason the international community has been unsuccessful in speeding up the execution of the Sejdić and Finci ruling. The inconsistency of the international organizations has not delivered the desired pressure onto the political leaders of Bosnia and Herzegovina. BiH can be compared to a child with the EU and the CoE as inconsistent parents. They use harsh language to voice their demands but rarely follow through, eventually giving BiH its reward without getting anything in return. Because of this treatment BiH is not given the

[290] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

[291] Human Rights Watch: example in June 2011: joint opinion by US secretary of State Hillary Clinton and UK foreign affairs minister William Hague; expressed disappointment at the protracted institutional gridlock in BiH that was preventing needed reforms, including ending ethnic discrimination in politics. During visit to BiH that same month, US assistant Secretary of state P.H. Gordon noted the country had made little progress since 2006 and called BiH politicians to reform and stop stoking ethnic tension

[292] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013

[293] www.klix.ba

[294] S. Woehrel, *CRS Report for Congress - Bosnia and Herzegovina: Current Issues and U.S. Policy,* Congressional Research Service, 24 January 2013 – examples: oversees wars and economic crisis

[295] P.C. McMahon & J. Western, *The Death of Dayton; How to stop Bosnia from falling apart*, Foreign Affairs volume 88 no. 5, September/October 2009

incentive to change its behavior. But something that might give BiH politicians the incentive to take the implementation of the ECtHR more seriously is the fact that the EU has, because BiH political leaders did not reach an agreement on the execution on the ninth of December, cut into the financial aid for BiH reducing it by 45 million Euros. The soft approach has proven ineffective so this punitive follow through by the EU is celebrated.

There might still be some paths the international community could venture into to assist and pressure BiH into implementation of the Sejdić and Finci v. Bosnia and Herzegovina case. With the general elections coming up in 2014 it is expected the international community will increase the pressure on BiH politicians to amend the discriminatory provisions before the elections take place. But looking at the intensity of international involvement since 2009, the past does not bode well for the possible implementation after the 2014 general elections. In 2009 and 2010, right after the ECtHR delivered the judgment, the criticism and threats coming from the international community were much stronger and louder. Once the Working Group that the BiH Parliamentary Assembly set up, had failed to implement the Sejdić and Finci ruling and the 2010 general elections were scheduled without any amendments made to the BiH electoral system the statements that were being issued by the international community no longer contained strong language.[296] Currently, with the 2014 general elections just around the corner the initiatives of the international community have picked up again and have increased the amount of action within BiH. It however remains unknown what the international community will do if execution of the ECtHR does not take place in time for the elections in 2014. It will be interesting to see what position BiH will put itself in if the ECtHR case is not implemented in time for the 2014 general elections. Because what might be the consequences for BiH if the results of the elections remain based on discriminatory provision, BiH loses its credibility as a democratic country or the international community decides not to acknowledge the outcome.

[296] E. Hodzic & N. Stojanovic, *New/Old Constitutional Engineering 2011*, Sarajevo 2011, Analitika Center for Social Research

Five – Conclusion

The central research question as presented in the introduction:
'How can the issues that cause the lack of implementation of the Sejdić and Finci v. Bosnia and Herzegovina case be solved?'

The preceding chapters have by tackling the issue from different viewpoints, exposed several issues, both within Bosnia and Herzegovina as with the intervention by the international community. Because the research question is two dimensional, it is best to analyze the acquired knowledge through these two dimensions. Firstly the conclusions concerning the reasons behind the lack of implementation and secondly the conclusions on the possibilities to finally implement the ECtHR ruling.

Implementation of the Sejdić and Finci v. Bosnia and Herzegovina case within Bosnia and Herzegovina
Quite early it already became obvious that the content of the Sejdić and Finci v. Bosnia and Herzegovina case itself was not the reason behind the delay of the execution of the case. The facts of the case are very simple and clear making the ruling passed by the ECtHR not unexpected and easy to comprehend. Considering the subject of the Sejdić and Finci case is discrimination of national minorities it also needs to be mentioned that discrimination has nothing to do with the lack of implementation of the ECtHR case. Despite being able to tick the case itself and discrimination of from the list of possible reasons for the lack of execution of the ECtHR case, Bosnia and Herzegovina is a troubled country and many issues still remain possible culprits. To prevent the creation of a black hole of all the issues disturbing the development of Bosnia and Herzegovina, the history of BiH is the best starting point. Luckily the history does reveal a lot. It exposes ethnic rivalry between the three main ethnic groups in Bosnia and Herzegovina and the role of the Dayton Peace Agreement in the situation at hand. The DPA constructed Bosnia and Herzegovina, as it is known today and unfortunately reinforced the historical ethnic rivalry in the region. So not only did the DPA put the discriminatory provisions in place it also maintains the situation in which these provisions are not being amended. Because the ethnic rivalry has been kept in place for over twenty years the interests of these ethnic groups in Bosnia and Herzegovina diverged into different directions. The ethnic Croats and Serbs wish to execute the ECtHR ruling with minimum action, and the mere amendment of the discriminatory provisions. The ethnic Bosniaks on the other hand want BiH to undergo a complete Constitutional reform, the execution of the ECtHR ruling being part of it.

This difference of opinion causes the decision making process in the BiH Government to be difficult and time consuming, not adding onto the growth of political stability. Political parties in BiH remain based on ethnicity instead of political beliefs and the four year time lapse is prove that ethnic interests prevail over the rights of minorities.
This proves that Bosnia and Herzegovina is both unable and unwilling to execute the Sejdić and Finci v. Bosnia and Herzegovina ruling.

In addition, the people of Bosnia and Herzegovina show little interest in the case of Sejdić and Finci, decreasing the pressure on BiH politicians to take action. The people are more concerned with other issues such as unemployment and corruption, because they directly affect them.

All the above should have made clear that the implementation of the ECtHR judgment is not the real problem but a mere manifestation of the many issues BiH is plagued with that are connected to ethnicity. This is also why the reasons for the delay in execution have nothing to do with the ECtHR case or discrimination itself.

The possibilities within BiH to finally execute the Sejdić and Finci v. Bosnia and Herzegovina ruling are thus mostly focused on politics instead of the actual discriminatory provisions.
With the 2014 general elections coming up, BiH politicians know they have to find a solution for the lack of execution of the ECtHR case for two reasons. Firstly, a democratic society as Bosnia and Herzegovina cannot justify holding elections that are based on discriminatory provisions and secondly there is the risk of the election results not being recognized by the international community because of those discriminatory provisions.

The fact that the two viewpoints on the execution of the ruling, that divide the ethnic groups in Bosnia and Herzegovina, both satisfy the requirements for the execution of the case is more of a disadvantage then an advantage. The two proposals both being possible proves both the parties and all three of the ethnic groups have solid arguments for pursuing one of the two viewpoints. However, objectively on must note that the option put forward by the ethnic Serbs and Croats would be easiest and fastest to execute. There is no denying that the extensive approach favored by the ethnic Bosniaks is necessary in the long-term. But the urgency of the implementation of the ECtHR requires at least some action, which is always better then no action at all. The option favored by the ethnic Serbs and Croats is best in theory, but practice has shown that it is unlikely the three main ethnic groups will agree.

To circumvent all the issues that delay the implementation of the ECtHR case only one approach seems possible. The execution of the Sejdić and Finci v. Bosnia and Herzegovina case needs to be moved away from the political playing field and returned to the place where it originated, with the lawmakers. Only then the ethnic aspect that has connected itself to the case can be detached.

The role of the international community

Is the situation in BiH the only reason execution of the ECtHR ruling has not taken place or are there reasons behind the lack of implementation that can be allocated to the international community? And does this international community offer any solutions to end the delay of the implementation? Analyzing the previous chapters the role of the international community offers its own conclusions, which, again, are best, approached through the two dimensions of the central research question.

Could the responsibility of the international community, or rather the lack of it, be seen as a possible reason for the lack of implementation of the ECtHR ruling. How realistic was it of the ECHR to expect that this Constitutional intervention, which had already been postponed several times since the DPA, most prominently in 2002 and 2008 when BiH failed to meet the conditions set by the CoE and the EU, could be undertaken within several months after the issuance of the judgment. The fact that amendments to the discriminatory provisions had not taken place since 1995, when they were put in place, should have alarmed the European Court of Human Rights. It should have made them reconsider, as this thesis does, the reasons behind this consistent failure to amend the provisions.
Obviously the CoE and the ECtHR thought it was realistic to ask BiH to amend the discriminatory provisions, probably thinking this was just a formal amendment. It is unclear if the ECtHR forgot or purposely ignored the underlying issues in Bosnia and Herzegovina, they did however hide behind the principle of ratione temporis to avoid possible responsibility for an unreasonably burdensome ruling.
It is of course true that most of the responsibility for the execution of the ECtHR case lies with BiH, but as has been acknowledged several times by members of the international community, the deteriorating situation in BiH has marked 2013 as the worst year since the end of the war in 1995. This deterioration should have moved the international community into action, not only sticking to monitoring and assistance but also using coercive methods.

The responsibility that the international community bears comes from the fact that they have certain options at their disposal that could possibly speed up the lacking execution of the ECtHR case in Bosnia and Herzegovina. There is no lack of supervisory measures open to the international community but only a few compelling or coercive measures are in place.

Initially it may have seemed that for BiH, a struggling state, the threat of financial sanctions would be enough to coerce the politicians into agreeing on a proposal for the execution of the ruling. But this theory was proven wrong in December of 2013 when the threat of and eventual cut in the financial aid from the EU did not have the desired effect. Because the financial sanction proved insufficient there now remain three other options open to the international community that could possibly speed up the implementation of the Sejdić and Finci v. Bosnia and Herzegovina case. The allure of EU membership, the expulsion from the Council of Europe by the CoM and the possibility the EU has to sanction BiH politicians that persistently counteract the efforts towards EU membership.

Despite EU membership being regarded, as the biggest asset the international community has to coerce Bosnia and Herzegovina into adherence concerning the ECtHR ruling, over the years that membership has lost its allure. The economic crisis has made EU membership less attractive, making pubic opinion in BiH on the European Union very negative.

Expulsion from the CoE might be the most punitive measure available to the international community but that does not mean the CoM of the CoE is eager to utilize it. Although the CoM has threatened with the use of the measure of expulsion several times before, it has never been used. The reason being that the CoM is aware that expulsion would have a counterproductive effect on the human rights situation of the expelled state, with no incentive to comply with the ECHR remaining. One must however consider the effect the mere threat of the use of the measure can have on a state. The CoM has not yet voiced such a threat towards Bosnia and Herzegovina, but it should definitely consider doing so.

Lastly the measure at the disposal of the EU, to sanction individual politicians if they block the road to EU accession needs to be looked at. Such individual sanctions could be successful in Bosnia and Herzegovina because the lack of implementation is based on political difficulties. A politician might be willing to let go of ethnic rivalry if he, individually, could be affected and sanctioned for not doing so.

The upcoming 2014 general elections in BiH can be a great way for the international community to use these measures to finally pressure Bosnia and Herzegovina into implementing the ECtHR judgment. As within BiH, the international community is aware of the significance of the upcoming elections and execution of the Sejdić and Finci v. Bosnia and Herzegovina case. The CoM warned BiH that a failure to execute the ECtHR ruling in time for the elections could potentially undermine het legitimacy and credibility of the countries future elected bodies.

Concluding remarks

The most general remark that can be made is in itself a warning to the ECtHR and other courts. If cases of severely lacking implementation such as in the Sejdić and Finci v. Bosnia and Herzegovina

case are not taken seriously the rulings of the court run the risk of becoming empty shells. The existence of the ECtHR is threatened when more cases of non-compliance surface, with the ECtHR running the risk of being seen as an advisory organ instead of a court. To prevent this from happening the ECtHR and the international community in general need to provide more guidance to a struggling state. There need to be better mechanisms available for both states that are unwilling and states that are unable to execute an ECtHR ruling. The development over the last few years, of the ECtHR providing clearer and more elaborate rulings is a step in the right direction. But in the interest of human rights and the existence of the ECtHR, both supervisory and coercive mechanisms need to be put in place.

But eventually, despite allocating quite a lot of responsibly to the international community, there is just so much that can be expected from the international community. BiH remains responsible for its own actions and ultimately will have to take responsibility for the execution of the Sejdić and Finci v. Bosnia and Herzegovina ruling, or accept the consequences of not doing so, and becoming isolated from the rest of Europe.

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