

**IN THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE**

***SEJDIC & FINCI v BOSNIA AND HERZEGOVINA***

**(27996/06 & 34836/06)**

**GRAND CHAMBER JUDGMENT DATED 22 DECEMBER 2009**

**SUBMISSIONS UNDER RULE 9 OF THE RULES OF THE COMMITTEE OF  
MINISTERS BY MINORITY RIGHTS GROUP INTERNATIONAL  
REQUEST FOR INITIATION OF INFRINGEMENT PROCEEDINGS**

**Summary**

This submission is communicated by Minority Rights Group International (MRG) in accordance with Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of terms of friendly settlements (Rules of the Committee).<sup>1</sup>

This is a formal request for the initiation of infringement proceedings by the Committee of Ministers (Committee) under Rule 11 of the Rules of the Committee pursuant to Article 46(4) of the European Convention on Human Rights (the Convention) in relation to the judgment of the European Court of Human Rights (the Court) in *Sejdić and Finci v. Bosnia and Herzegovina*<sup>2</sup> (the ‘Judgment’).

The Judgment represents the first time that the Court has challenged a constitutional order of a member State. The case concerns constitutionally entrenched racial discrimination in relation to the right to vote and the right to stand for election. The right to vote and stand for election—on the basis of universal and equal suffrage—is a basic principle of democratic governance and an important human right enshrined in a number of key international legal instruments. The principle of equality and non-discrimination is also a fundamental element of human rights law and a core principle of a pluralistic, democratic society. Indeed, the prohibition of racial discrimination is widely recognised to be a norm of *jus cogens*.<sup>3</sup>

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<sup>1</sup> Rules of the Committee of Ministers for the supervision of the execution and of the terms of friendly settlements adopted by the Committee of Ministers on 10 May 2006 at the 94<sup>th</sup> meeting of the Ministers’ Deputies.

<sup>2</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, Application nos. 27996/06 & 34836/06, 22 December 2009.

<sup>3</sup> Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, para 374.

The Committee has supervised the enforcement of the Judgment since March 2010, adopting three interim resolutions<sup>4</sup> urging authorities of Bosnia and Herzegovina (BiH) to take all necessary steps to remove discriminatory provisions from the Constitution and Electoral law of BiH to bring them in line with the requirements of the Convention.

Despite this supervision and declared commitments from the Government of BiH that it will take the necessary steps to implement the Judgment,<sup>5</sup> political leaders have failed to date to reach a consensus and to amend the Constitution and Electoral Law to bring them in compliance with the Convention.

As a direct result of this failure, undermining the legitimacy of BiH's elected bodies, two rounds of elections have been held since the Judgment was issued,<sup>6</sup> in direct contravention with the Convention, and under a system that is considered fundamentally discriminatory by the Court.

The Court and the Committee have noted the continuous failure of BiH authorities to execute the Judgment and highlighted the consequences of such non-implementation. They have both acknowledged that the continuing failure by the Government of BiH to amend the Constitution and Electoral Law in accordance with the judgment not only perpetuates an unacceptable political system but also undermines the credibility and the effectiveness of the Court and the Convention system.<sup>7</sup> Indeed, in two subsequent identical cases— *Zornić v. Bosnia and Herzegovina*<sup>8</sup> (*Zornić*) and *Šlaku v. Bosnia and Herzegovina*,<sup>9</sup> (*Šlaku*)—the Court emphasised that finding a violation in the cases was the direct result of the failure of the authorities to implement the Judgment.

Given the persistent failure by the BiH authorities to implement the Judgment, and despite long-term supervision by the Committee, MRG submits that invoking infringement proceedings pursuant to Article 46(4) is the next reasonable and logical procedural step that the Committee should take. The infringement proceedings were specifically introduced and ratified by State Parties to provide the Committee with strengthened measures to exert pressure on non-compliant States in cases concerning systemic violations, such as this.<sup>10</sup> The

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<sup>4</sup> Interim Resolution adopted on 2 December 2011, C/2MResDH(2C1)291; Interim Resolution adopted on 6 December 2012 CM/ResDH(212)233. Interim Resolution, adopted on 5 December 2013 CM/Res/DH(2013)259.

<sup>5</sup> For instance, political leaders and institutions undertook this commitment in the June 2012 Roadmap for BiH's EU membership application, and most recently in the declaration signed by the political leaders on 1 October 2013.

<sup>6</sup> In October 2010 and October 2014.

<sup>7</sup> See Decision of Ministers Deputies 1170<sup>th</sup> (regular) meeting dates 7 May CM/Del/Dec(2013)1170 Decision of Ministers Deputies 1172<sup>th</sup> meeting dates 4-6 June CM/Del/Dec(2013)1172. See also *Zornić and Šlaku*, *Infra notes 8 and 9*.

<sup>8</sup> *Zornić v. Bosnia and Herzegovina*, Application no. 381/06, 15 July 2014.

<sup>9</sup> *Šlaku v. Bosnia and Herzegovina*, Application no. 56666/12, 26 May 2016.

<sup>10</sup> The infringement proceedings were specifically introduced by Protocol 14.

proceedings were also established explicitly in order to prevent repetitive applications and to preserve the credibility and effectiveness of the Court and the Convention system.

MRG further submits that the grounds of Article 46(4) of the Convention are met in *Sejdić and Finčić v Bosnia and Herzegovina (Sejdić and Finčić)*. Protocol 14 and the Rules of the Committee require that infringement proceedings should be brought only in exceptional circumstances. The Judgment meets this pre-condition of exceptionality due to not only the systemic and continuing nature of the human rights violations but also the gravity and nature of these violations (as set out above).

The objective of invoking the infringement proceedings mechanism under Article 46(4) in this case is to provide every citizen of BiH with the right to stand for election to high offices, including the Presidency and the upper house of the Parliament, without discrimination based on ethnicity.

On the grounds set out above, MRG requests that the Committee of Ministers initiate infringement proceedings in accordance with Article 46(4) in relation to the Judgment.

In order to do so, MRG further requests the Committee, in accordance with Article 46(4):

1. to serve formal notice on BiH by means of an interim resolution
2. thereafter adopt a decision referring to the Court the question whether BiH has failed to fulfil its obligation under Article 46(1) of the Convention.

## **Introduction**

1. This is a formal request for the initiation of infringement proceedings by the Committee of Ministers under Rule 11 of the Rules of the Committee of Ministers, pursuant to Article 46(4) of the European Convention on Human Rights in relation to the judgment of the European Court of Human Rights in *Sejdić and Finčić v. Bosnia and Herzegovina*.
2. MRG communicates this request as a non-governmental organisation under Rule 9(2) of the Rules of the Committee of Ministers, regarding the execution of judgments under Article 46(2).
3. MRG is a non-governmental organisation based in London working to secure the rights of ethnic, religious and linguistic minorities, and indigenous peoples worldwide. For over 40 years, MRG has developed extensive experience in the fields of minority rights, anti-discrimination and human rights law. MRG represented Mr. Jakob Finčić in the case before the Court.

4. The request is submitted pursuant to the firmer measures afforded to the Committee by Article 46, as amended by Protocol 14, introduced specifically to address situations of persistent non-implementation of the Court's judgments in cases of violations of a systemic nature.
5. Despite the supervision undertaken by the Committee in relation to the case of *Sejdić and Finci* and the explicit concern expressed by the Court about the consequences of non-implementation in subsequent identical cases, in more than 6 years since the initial judgment there have been no credible efforts made by the Government of BiH to remove discriminatory provisions from its Constitution and Electoral Law to execute the Judgment.
6. *Sejdić and Finci* is one of the few cases which was referred by the Court direct to its upper chamber, the Grand Chamber, as opposed to considering it first in the main Chamber. This decision is indicative of the exceptionality of the case in the view of the Court.
7. In its Judgment, the Court ruled that the exclusion of citizens not belonging to the three 'Constituent Peoples' from being elected to the Presidency violated Protocol 12, which provides for equal treatment without discrimination. The Court also ruled that their exclusion from the House of Peoples violated Article 14, taken in conjunction with Article 3 of Protocol 1, which prohibit discrimination with regard to the right to free election.
8. The Court affirmed that exclusion from political representation solely based on ethnicity should have no role in a contemporary democratic society. The Court stated that "racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction"<sup>11</sup> The Court further stated 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."<sup>12</sup>
9. In the case of *Zornić*, the Court, ruling in favour of a citizen of BiH who refused to declare affiliation to any particular ethnic group, reaffirmed that granting special political rights to particular ethnic groups "to the exclusion of minorities or citizens" has no role in a contemporary democratic society, reiterated that the Constitution of BiH violates fundamental human rights and called for the "speediest and most effective resolution of the situation."<sup>13</sup>

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<sup>11</sup> *Sejdić and Finci*, §42.

<sup>12</sup> *Ibid.*, §44.

<sup>13</sup> *Zornić* §40.

10. Recently, in the case of *Šlaku* concerning a citizen of BiH belonging to the Albanian ethnic minority who was prevented from running as a candidate for the Presidency and the House of Peoples, the Court reiterated that more than eighteen years after the end of the tragic conflict, there could no longer be any reason for the maintenance of the contested constitutional provisions.<sup>14</sup> “
11. In both the *Zornić* and *Šlaku* cases the Court found that they were identical to *Sejdić and Finci* and indicated that, under Article 46 of the Convention, the finding of a violation in the cases was the direct result of the failure of the authorities of the respondent State to introduce measures to ensure compliance with the Judgment.
12. The Court also acknowledged in both judgments the consequences of non-implementation of the Judgment:  
“The failure of the respondent State to introduce constitutional and legislative proposals to put an end to the current incompatibility of the Constitution and the electoral law with Article 14, Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 is not only an aggravating factor as regards the State’s responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery”.<sup>15</sup>

### **Power to bring Infringement Proceedings**

13. When a State fails to implement a judgment of the Court in a timely manner, the Committee can undertake more frequent examinations of the case and increase communications between the Committee Chair and the respondent state.<sup>16</sup> Indeed, in cases of longer delays of implementation, the Committee can adopt public interim resolutions to exert pressure on the non-compliant State.<sup>17</sup> Moreover, where there is a persistent or flagrant failure, ultimately, the Committee can sanction the non-compliant State by suspending or expelling the state in question under Articles 3 and 8 of the Council of Europe’s Statute.
14. Indeed, the Committee of Ministers has been explicitly urged to take firmer measures to exert pressure on States that persistently or flagrantly fail to comply with the Court’s judgments by the Parliamentary Assembly (PACE),<sup>18</sup> the Secretary General of the Council of Europe,<sup>19</sup> State Parties themselves in the Brighton Declaration.<sup>20</sup>

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<sup>14</sup> *Šlaku* §40.

<sup>15</sup> *Zornić* §40; *Šlaku* §37.

<sup>16</sup> From Judgment to Justice: Implementing International and Regional Human Rights Decisions, Open Society Foundations, pp 48.

<sup>17</sup> Rule 16 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of terms of friendly settlements.

<sup>18</sup> PACE Recommendation 1955 (2011) Implementation of judgments of the European Court of Human Rights

<sup>19</sup> Speech by Thorbjorn Jagland. Secretary General of the Council of Europe at the Brighton Conference, April 2012.

<sup>20</sup> High Level Conference on the Future of the European Court of Human Rights: The Brighton Declaration, paras. 27 and 29.

15. To provide the Committee with an effective alternative to the extreme sanction of suspension or expulsion of a member State, in particular in relation to the persistent failure to implement judgments concerning systemic violations, Protocol 14 was introduced, specifically in order to preserve the credibility and the effectiveness of the Court and Convention system.

16. Accordingly, Protocol 14, which entered into force on 1 June 2010, gave the Committee of Ministers the power to initiate infringement proceedings pursuant to Article 46(4) of the Convention. Article 46(4) provides:

“If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.”

17. As the Explanatory Report to Protocol 14 sets out, the infringement procedure was introduced specifically to address situations where a High Contracting Party failed persistently to implement the Court’s judgments:

“Rapid and full execution of the Court’s judgments is vital. It is even more important in cases concerning structural problems, so as to ensure that the Court is not swamped with repetitive applications. For this reason, ever since the Rome ministerial conference of 3 and 4 November 2000 (Resolution I), it has been considered essential to strengthen the means given in this context to the Committee of Ministers. The Parties to the Convention have a collective duty to preserve the Court’s authority – and thus the Convention system’s credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court’s final judgment in a case to which it is party.”<sup>21</sup>

18. Both PACE and the President of the Court explicitly urged the Committee recently to make use of a new “infringement procedure”, introduced in 2010, which allows the Court to rule on whether a State has breached its obligation to abide by the Convention in its recommendations.

19. Specifically, in its Resolution 2017 (2015), PACE referred to the implementation of judgments of the Court, and strongly urged the Committee “to use all available means to effectively fulfil its tasks related to the supervision of the implementation of judgment ... and to take firmer measures in case of dilatory and/or continuous non-

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<sup>21</sup> Explanatory Report to Protocol 14, para 98.

compliance with Court judgments, including those foreseen in Article 46, paragraphs 3, 4 and 5, of the European Convention on Human Rights.”<sup>22</sup>

20. In addition, on 30 September 2015, Dean Spielmann, the President of the Court, addressed PACE as part of the debate before Resolution 2017 (2015) was adopted, similarly urged the Committee to use the infringement procedure and expressed his regret that the Committee has not yet used the mechanism to exert pressure on non-compliant member States.<sup>23</sup>

## **Failure of BiH authorities to remove discriminatory provisions from the Constitution and Electoral Law and supervision by the Committee of Ministers to date**

### ***Prior to the Judgment***

21. By ratifying the Convention and the Protocols in 2002, the Government of BiH voluntarily agreed to meet the relevant human rights standards. In the same year, BiH undertook to “review within one year, with the assistance of the European Commission for Democracy through Law (Venice Commission), the electoral legislation in the light of Council for Europe standards, and to revise it where necessary”.
22. In 2005, BiH's political leaders signed a joint statement announcing reform of the Constitution by March 2006. The declaration stated: “To achieve Euro-Atlantic integration, we will need to strengthen state institutions...and to protect the human rights of all citizens of Bosnia and Herzegovina, regardless of ethnicity...we have decided to embark upon a process of constitutional reform that will enhance the authorities of the state government and streamline Parliament and the office of the Presidency.”<sup>24</sup>
23. Likewise, by ratifying a Stabilisation and Association Agreement with the European Union in 2008, BiH committed itself to “amend[ing] electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance on Human Rights and the Council of Europe post-accession commitments” within one to two years.<sup>25</sup>

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<sup>22</sup>PACE Recommendation 2075 (2015) Implementation of judgments of the European Court of Human Rights

<sup>23</sup> See also <http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5803&lang=2&cat=8>

<sup>24</sup> See, Antonio Prlenda, Southeast European Times, 12 May, 2005 available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GE/features/setimes.features/2002/12/0](http://www.setimes.com/cocoon/setimes/xhtml/en_GE/features/setimes.features/2002/12/0)

<sup>25</sup> Judgment paragraphs 25, 49. Annex to Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, Official Journal of the European Union L 080 (19 March 2008).

24. Therefore, when the Court issued its Judgment on 22 December 2009, BiH was already in breach by six years of its original undertaking as a result of its Council of Europe membership to review and revise its Constitution and Electoral Law.

### *Developments since the Judgment*

25. Pursuant to Article 46(2), the Judgment is currently under the supervision of the Committee, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance.

26. Immediately following the Judgment, in January 2010, the Committee underlined “the importance to align the Constitution and the electoral legislation of Bosnia and Herzegovina with the European Convention on Human Rights as soon as possible”<sup>26</sup> and during its March 2010 meeting it encouraged BiH authorities to enhance their efforts to execute the Judgment.<sup>27</sup>

27. On 4 March 2010, BiH authorities adopted an action plan for the execution of the Judgment, establishing a Working Group to implement the action plan. The Working Group had its first meeting on 15 March 2010 and was tasked with drafting amendments to the Constitution by 29 March 2010, but reached no agreement by the deadline. On 22 April 2010, it was instructed to produce a new action plan.

28. On 11 May 2010, referring to PACE resolution 1725 related to the urgent need for Constitutional reform to implement the Judgment before the October 2010 elections, the Committee issued a declaration emphasising the necessity to make the implementation of the Judgment a priority.<sup>28</sup>

29. At its June 2010 meeting, the Committee expressed concerns about the lack of political consensus in relation to the content of Constitutional and legislative changes necessary to execute the Judgment and noted that the authorities had already missed the deadlines contained in the action plan submitted by the State.<sup>29</sup>

30. Despite close supervision by the Committee, the Working Group failed to reach an agreement on the modalities for execution of the Judgment, and the general elections on 3 October 2010 were held in continuing violation of the Convention and contravention of the Judgment. The Working Group was instructed to continue its activities after general elections.

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<sup>26</sup> Decision of Ministers Deputies 1075<sup>th</sup> meeting dated 20 January 2010, CM/Del/Dec(2010)1075.

<sup>27</sup> Decision of Ministers Deputies 1078<sup>th</sup> meeting dates 4 March 2010 CM/Del/Dec(2010)1078.

<sup>28</sup> PACE Resolution 1725 adopted on 11 May 2010 CM(2010) 59.

<sup>29</sup> Decision of Ministers Deputies 1086<sup>th</sup> meeting dates 3 June 2010 CM/Del/Dec(2010)1086.

31. At its December 2010 meeting, the Committee expressed deep regret that the October elections were held under a system that the Court found fundamentally discriminatory and “deplored that no political consensus has been reached on the content of the constitutional and legislative amendments necessary to execute the judgment.”<sup>30</sup>
32. The Committee again reiterated its concerns about the lack of political consensus related to the modalities for the execution of the Judgment in its decisions adopted during its March 2011<sup>31</sup> and June 2011 meetings.<sup>32</sup>
33. On 31 October 2011, the BiH Parliament established an *ad hoc* Joint Commission of both Houses tasked with drafting proposed constitutional amendments to address the violations found by the Court. It was required to submit proposed constitutional amendments by 30 November 2011 and proposed election law amendments by 31 December 2011.
34. On 2 December 2011, the Committee adopted Interim Resolution C/2MResDH(2C1)291 concerning the execution of the Judgment, noting that despite the adoption of two action plans to implement the Judgment, the necessary measures were not taken to execute the Judgment within the deadlines set therein. It also reiterated its call on the authorities and political leaders of BiH to make necessary amendment to the Constitution and the Electoral Law to execute the Judgment “without any further delay.”<sup>33</sup>
35. At its March 2012 meeting, the Committee similarly expressed its “concerns about the lack of progress implementing the Judgment”.<sup>34</sup> During its meeting in June 2012, it expressed its regret that “no tangible process had been achieved in the execution” of the Judgment and once again called on the BiH authorities to execute the Judgment “without any further delay”.<sup>35</sup> In July 2012 the case was examined at the Committee’s regular meeting, at which the Committee reiterated the same call on the government and set the deadline for compliance with the Judgment for 31 August 2012.<sup>36</sup>
36. On 27 June 2012, at a European Commission meeting, BiH’s political leaders agreed to a Roadmap for its EU membership application which declared they would “ensure a political agreement on the *Sejdić and Finčić* ruling and to amend the Constitution by November”.<sup>37</sup>

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<sup>30</sup> Decision of Ministers Deputies 1100<sup>th</sup> meeting date 2 December 2010 CM/Del/Dec(2010)1100.

<sup>31</sup> Decision of Ministers Deputies 1108<sup>th</sup> meeting dates 8-10 March 2011 CM/Del/Dec(2011)1108.

<sup>32</sup> Decision of Deputies 1115<sup>th</sup> meeting dates 7-8 June 2010 CM/Del/Dec(2010)1115.

<sup>33</sup> Interim Resolution adopted on 2 December 2011, C/2MResDH(2C1)291.

<sup>34</sup> Decision of Ministers Deputies 1136<sup>th</sup> meeting dates 6-8 March 2012 CM/Del/Dec(2012)1136.

<sup>35</sup> Decision of Ministers Deputies 1144<sup>th</sup> meeting dates 4-6 June 2012 CM/Del/Dec(2012)1144.

<sup>36</sup> Decision of Ministers Deputies 1147<sup>th</sup> meeting dates 4-6 July 2012 CM/Del/Dec(2012)1147.

<sup>37</sup> Joint Conclusions from the High Level Dialogue on the Accession Process with Bosnia and Hercegovina and the Road Map for BiH’s EU membership application, European Commission, 27 June 2012.

37. On 4 September 2012, BiH provided an updated action plan to the Committee, which confirmed that the Joint Interim Commission of both Houses of the Parliamentary Assembly of BiH for the implementation of the Judgment had not reached the consensus needed to propose the Constitutional amendments. At its September 2012 meeting, the Committee noted with regret that BiH authorities missed the 31 August deadline, and extended the deadline to 30 November 2012.<sup>38</sup>
38. However, BiH political leaders again failed to reach a consensus on draft amendments by the new deadline. As a result, the Committee adopted a second Interim Resolution at its December 2012 meeting “noting with profound disappointment” that once again the authorities of BiH had failed to take necessary measures to implement the judgment and strongly urged the authorities to execute the Judgment “without further delay”.<sup>39</sup>
39. At its March 2013 meeting the Committee deplored that “despite the repeated calls of the Community, in particular its two interim resolutions adopted so far (CM/ResDH(2011)291 and CM/ResDH(2012)233, and of the international community to that effect” the authorities still had failed to execute the Judgment, and strongly encouraged BiH authorities to “take without any further delay all the necessary steps for the full execution of the Judgment.”<sup>40</sup>
40. At its May 2013 regular meeting, the Committee acknowledged the consequences of lack of implementation, and noted that the failure to implement the Judgment “would not only amount to a manifest breach of obligations under Article 46, paragraph 1, of the Convention but would also seriously undermine the legitimacy and the credibility of the country’s future elected bodies.”<sup>41</sup> It reiterated the same concerns at its June 2013 meeting and decided to invite the responsible Minister of BiH for an exchange of views on the implementation of the Judgment.<sup>42</sup>
41. At its September 2013 meeting, the Committee once again expressed its “deep concern” about the lack of political consensus related to the modalities for the execution of the Judgment and requested the authorities of BiH to “deploy all their efforts to reach a consensus at the third round of the High-Level Dialogue on the Accession Process with the European Union of 1 October 2013.”<sup>43</sup>
42. On 1 October 2013, at the third round of the High-Level Dialogue on the Accession Process with the European Commission, the leaders of BiH’s main political parties agreed to take forward the implementation of the Judgment and signed a seven-

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<sup>38</sup> Decision of Ministers Deputies 1150<sup>th</sup> meeting dates 24-26 September 2012 CM/Del/Dec(2012)1150.

<sup>39</sup> Interim Resolution adopted on 6 December 2012 CM/ResDH(212)233.

<sup>40</sup> Decision of Ministers Deputies 1164<sup>th</sup> meeting dates 5-7 March CM/Del/Dec(2013)1164.

<sup>41</sup> Decision of Ministers Deputies 1170<sup>th</sup> (regular )meeting dates 7 May CM/Del/Dec(2013)1170.

<sup>42</sup> Decision of Ministers Deputies 1172<sup>th</sup> meeting dates 4-6 June CM/Del/Dec(2013)1172.

<sup>43</sup> Decision of Ministers Deputies 1179<sup>th</sup> meeting dates 24-26 September CM/Del/Dec(2013)1179.

principle declaration, which includes *inter alia* the provision that the Presidency should consist of three directly elected members, two from the Federation of Bosnia and Herzegovina (FBiH) according to the model to be agreed and one from Republika Srpska (RS).

43. BiH's political leaders also agreed that they would reach a consensus “by 10 October, on electoral modalities that will meet the legitimate concerns of the Constituent Peoples and ‘Others’, while meeting international standards ... [and that] the method of election of the two Presidency Members from FBiH through constitutional amendments, should, in addition to the Strasbourg Court ruling, prevent imposing the outcome of election results on any Constituent Peoples or ‘Others’.”<sup>44</sup>
44. However, the meeting on 10 October 2013 ended without an agreement and, as a result, the European Commission initiated a procedure for suspending EU funds in areas of transport, support to business or the construction of institutions (i.e. reducing the initially foreseen Instrument for Pre-Accession Accession grant funds for the 2013 programme by 54%).<sup>45</sup> The European Commission continued facilitating efforts to ensure BiH's political leaders reached an agreement on implementation of the Judgment, and subsequent meetings were held in Brussels, Sarajevo, Budapest and Prague.
45. At the Prague meeting on 1-2 December 2013, BiH's leaders “tentatively agreed on the composition and method of the selection of delegates for the House of Peoples” but still could not reach an agreement on all elements for the election of the members of the Presidency.<sup>46</sup>
46. At its December 2013 meeting the Committee adopted its third Interim Resolution expressing its “gravest concern that, despite the repeated assurances” authorities of BiH failed to take necessary measures to execute the Judgment and firmly called upon all authorities and political leaders of BiH “to ensure that the constitutional and legislative framework is immediately brought in line with the Convention requirements so that the elections in October 2014 are held without any discrimination against those citizens who are not affiliated with any of the constituent peoples.”<sup>47</sup>
47. At its March 2014 meeting, the Committee similarly reiterated “its grave concern that, as a result of the absence of agreement between the political leaders of BiH, there is a clear and growing risk that the constitutional and legislative context in which the elections will take place will not be in compliance with the European Convention's

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<sup>44</sup> See [http://europa.eu/rapid/press-release MEMO-13-840\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-840_en.htm)

<sup>45</sup> See [http://europa.eu/rapid/press-release MEMO-13-874\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-874_en.htm)

<sup>46</sup> See [http://ec.europa.eu/commission\\_2010-2014/fule/headlines/news/2013/12/20131203\\_en.htm](http://ec.europa.eu/commission_2010-2014/fule/headlines/news/2013/12/20131203_en.htm)

<sup>47</sup> Interim Resolution, adopted on 5 December 2013 CM/Res/DH(2013)259.

requirements” and strongly urged BiH authorities “to execute the judgment as soon as possible.”<sup>48</sup>

48. Despite intensive facilitation efforts of the European Commission in 2013 and 2014 to resolve remaining blockages, the Judgment was not implemented before the next elections, and on 12 October 2014, BiH held a second set of general elections in violation of the Convention in defiance of Judgment of the Court.
49. At its December 2014 meeting, the Committee “noted with profound concern and disappointment” that the October 2014 elections took place “under the same regulatory framework which the European Court found to be discriminatory” and encouraged authorities to “intensify their efforts to reach consensus” on the modalities for executing then Judgment.<sup>49</sup>
50. As part of the reform deal with the European Union, in 2015 BiH political leaders signed a written declaration agreeing they would “direct special attention to the implementation of the ruling of the European Court for Human Rights in the case of *Sejdić and Finci vs. Bosnia and Herzegovina*.” These written commitments were agreed by the Presidency on 29 January 2015, signed by 14 parties of the Parliament and endorsed by the Parliamentary Assembly on 23 February 2015.<sup>50</sup>
51. At its June 2015 meeting, the Committee encouraged the political leaders of BiH “to ensure that this written commitment leads to concrete results, invited them again to intensify their efforts to rapidly reach a consensus on the content of the constitutional and legislative amendments” necessary to execute the Judgment.<sup>51</sup>
52. On 8 September 2015, the BiH authorities adopted a new action plan on implementation of the Judgment and agreed that a new working group would be established, tasked with drafting proposed constitutional amendments to address the violations found by the Court in the Judgment.
53. However, this development has yielded no concrete results to date. Indeed, no credible effort has been made in the past 9 months to ensure that this working group has been formally established<sup>52</sup> and has commenced its work on the draft amendments. This is concerning not least because the previous working group established in 2010 for the same purpose also brought about no concrete outcome.

### **Pre-condition of exceptional circumstances**

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<sup>48</sup> Decision of Ministers Deputies 1193<sup>rd</sup> meeting dates 4-6 March CM/Del/Dec(2014)1193.

<sup>49</sup> Decision of Ministers Deputies 1214<sup>th</sup> meeting dates 2-4 December CM/Del/Dec(2014)1214.

<sup>50</sup> [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/dsee/dv/0507\\_11/0507\\_11en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dsee/dv/0507_11/0507_11en.pdf)

<sup>51</sup> Decision of Ministers Deputies 1230<sup>th</sup> meeting dates 3-5 June CM/Del/Dec(2015)1230.

<sup>52</sup> Based on information received from authorities of BiH, as of 3 June 2016 the Working Group is still not fully formed. Email communication with Ministry of Human Rights and Refugees, 3 June 2016.

54. The Explanatory Report and the Rules of the Committee require that the Committee should bring infringement proceedings only in exceptional circumstances. The case of *Sejdić and Finci* meets this pre-condition of exceptionality due to both the systemic and continuing nature of these violations and also the gravity and nature of the violations found by the Court.
55. The gravity of the violations and exceptionality of the case was explicitly recognised by the Court itself when, under Article 30 of the Convention and Rule 72 of the Court of Rules of Procedure, the Chamber relinquished its jurisdiction in favour of the Grand Chamber.<sup>53</sup>
56. Further, the Judgment represents the first time in the Court's history that the constitutional order of a member State has been challenged. The case concerns constitutionally entrenched racial discrimination in relation to the right to vote and the right to stand for election.
57. The rights to vote and stand for election- on the basis of universal and equal suffrage- are basic principles of democratic governance and important human rights enshrined in a number of key international legal instruments. The principle of equality and non-discrimination is also a fundamental element of human rights law and a core principle of a pluralistic, democratic society. Indeed, the prohibition of racial discrimination is widely recognised to be a norm of *jus cogens*.<sup>54</sup>
58. The Court reaffirmed that discrimination in the Judgment and, "in view of its perilous consequences, "requires from the authorities special vigilance and a vigorous reaction"<sup>55</sup> The Court further stated 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."<sup>56</sup>
59. The continuing failure of the BiH authorities to amend the Constitution in accordance with the Judgment has far-reaching consequences. In addition to undermining the legitimacy of the Convention system, it means that persons who do not identify themselves as belonging to the 'Constituent Peoples', including national minorities, continue to be legally barred from running for the Presidency, the House of Peoples

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<sup>53</sup> Article 30 of the Convention states: "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects."

<sup>54</sup> Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, para 374.

<sup>55</sup> *Sejdić and Finci*, §42.

<sup>56</sup> *Ibid.*, §44.

and other high offices, as well as excluded from certain public institutions, based solely on their ethnicity.

60. In addition, the Constitutional Court of BiH has declared the provisions of entity constitutions and the Electoral Law requiring the President and the Vice-Presidents of the entities to come from the ranks of 'Constituent Peoples' discriminatory, unconstitutional, and incompatible with Article 1 of Protocol No. 12 of the Convention.<sup>57</sup> However, the Constitutional Court noted that its hands are tied in terms of its ability to quash the contested provisions until Constitutional and legislative reforms are undertaken in accordance with the Court's judgment in the cases of *Sejdić and Finci* and *Zornić*. Therefore, instead of quashing the aforementioned provisions, it linked the removal of these discriminatory provisions from the entity constitutions to the implementation of the *Sejdić and Finci* and *Zornić* judgments.
61. Moreover, the discrimination against non-Constituent Peoples entrenched in the Constitution trickles down not only to local constitutions but also to national public institutions. Therefore, as an indirect consequence of non-implementation of the Judgment, a whole range of state institutions continue to provide special rights to the 'Constituent Peoples' to the exclusion of 'Others'. For instance, 'Others' - including national minorities - cannot be represented in the Institution of Ombudsman for Human Rights of BiH, where main positions are implicitly reserved for the 'Constituent Peoples'.<sup>58</sup> Currently there are three Ombudspersons, one Bosniak, one Croat and one Serb. There is no hierarchy or division of duties among them; and they make all decisions by consensus.
62. Both the Venice Commission and the UN Committee of Elimination of Racial Discrimination (CERD) have expressed concerns about this problem of "pluralism and discrimination" in the national human rights institution of BiH. CERD noted that this "may hamper the Institution's mandate to protect against discrimination of national minorities,"<sup>59</sup> and the Venice Commission stated that this often leads to 'denial of justice [that] tarnishes the prestige of the Institution, as well as the public confidence in its ability to address ... issues impartially.'<sup>60</sup>

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<sup>57</sup> Judgment of Constitutional Court of BiH in Case no. U14/12 issued on 26 May 2015.

<sup>58</sup> The current Law on the Ombudsman for Human Rights of BiH (*Official Gazette of BiH, 19/02, 35/04, and 32/06*) stipulates that that the Ombudsmen are "appointed from the ranks of the three Constituent Peoples" but that this "does not rule out the possibility of appointing persons from the ranks of Others". Although the law does not automatically exclude non-constituent citizens, it also says that that the institution is to be composed of three Ombudsmen, so if they need to be selected from the three 'Constituent Peoples', it is unclear as to how someone from the category of 'Others' might secure a role as Ombudsman.

<sup>59</sup> CERD Concluding observations on the ninth and eleventh periodic reports of BiH, CERD/C/BIH/CO/11, (15 May 2015).

<sup>60</sup> Venice Commission, Opinion No. 810/2015, Opinion on the draft law on the ombudsman for human rights, CDL-AD (2015)034 (26 October 2015), para. 38. It should be noted that some efforts have been made to make changes to the Law on the Ombudsman for Human Rights of BiH in order to *inter alia* address the issue of its composition. These included drafting amendment proposals and a consultation with the Venice Commission in

63. MRG submits, therefore, that the grounds of Article 46(4) of the Convention are met in the case of *Sejdić and Finci*.

### **Request for initiation of Infringement Proceedings**

64. In the light of the lack of any tangible progress towards implementing the Judgment, MRG requests the Committee of Ministers to initiate infringement proceedings, pursuant to Article 46(4) of the Convention, in relation to BiH's refusal to comply with the Court's final judgment in *Sejdić and Finci v Bosnia and Herzegovina*.

65. MRG submits that invoking Article 46(4) is the next logical procedural step for the Committee to take as BiH authorities have persistently failed to implement the Judgment despite long-term supervision. The infringement procedure was specifically introduced by Protocol 14 and ratified by State Parties to provide the Committee with strengthened measures to exert pressure on a non-compliant State, in particular in relation to cases concerning systematic violations, and explicitly in order to prevent repetitive applications and to preserve the credibility and effectiveness of the Court and the Convention system.

66. In order to comply with this request, MRG further requests the Committee of Ministers, in accordance with Article 46(4) and Rule 11 (2) and 11(3) of the Rules of the Committee, to:

- i. serve formal notice to Bosnia and Herzegovina of the Committee's intention to bring proceedings by means of an interim resolution (by a majority vote of two-thirds of the representatives entitled to sit on the Committee, and giving six months' notice before the lodging of proceedings);
- ii. and, thereafter adopt an interim resolution (by a majority vote of two-thirds of the representatives entitled to sit on the Committee) referring to the Court the question whether Bosnia and Herzegovina has failed to fulfil its obligation under Article 46(1) of the Convention.

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relation to some of these draft proposals. These developments, however, have not yet resulted in any concrete amendments to the law up to this date.