



Small Steps, big Effects: Optimizing the Execution of Bosnia and Herzegovina's Constitutional Court's Decisions

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Table of contents

1. Introduction	4
2. The implementation of B&H Constitutional Court's decisions - adequate and sufficient?	6
2.1. The scope and the importance of the jurisdiction of the Constitutional Court of B&H	6
2.2. The need for domestic measures ensuring the systematic execution of the Constitutional Court's decisions	7
2.3. Status of execution of the Constitutional Court's decisions in B&H: Inadequate execution and its effects	7
2.4. Execution of the domestic court's decisions as an international obligation	10
3. Measures available to ensure the execution of B&H Constitutional Court's decisions	11
3.1. Existing legal framework	11
3.2. How does the established system work in reality? The role of different institutions in the (non)enforcement process	13
3.2.1. Passive role of the Prosecutorial Office of B&H	13
3.2.2. A proactive approach of the Constitutional Court of B&H?	14
3.2.3. Role of the authorities obliged to enforce the decisions of the Constitutional Court of B&H and offered excuses for non-execution	15
4. What is being done on the improvement of execution?	17
5. A set of steps to optimize the execution of B&H's Constitutional Court's decisions	18
6. Conclusion	23
Appendices	25
Bibliography	28

„Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms.“

Article II.1. of the Constitution of B&H

„Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.“

Article II.6. of the Constitution of B&H

„ The Constitutional Court considers that the highest level of internationally recognized human rights and basic freedoms cannot be achieved If the rulings of the Constitutional Court of B&H, as their ultimate protector, are not enforced. “

Ruling on failure to enforce No. U 35/00



Executive Summary

The Constitutional Court of Bosnia and Herzegovina, being the highest judicial institution in the state and supervising all branches and all levels of government, plays an important role of the guardian of the constitutional order and constitutionally guaranteed rights and fundamental freedoms. However, for this role to be fulfilled it is not only sufficient to have quality constitutional decisions; those decisions need also to be properly and timely enforced.

In the period from January 1st 2003 to December 31st 2010, in the framework of its appellate jurisdiction, the Constitutional Court has adopted 778 decisions establishing a violation of the B&H Constitution, which is mainly also a human rights violation. Out of these 778 decisions, 56 or 7 % have been officially qualified as non-executed. However, these statistics are far less optimistic in reality. On the one hand, this percentage becomes higher considering the fact that a significant part of the mentioned 778 decisions establishes a human rights violation without requiring further execution action of a responsible authority in a set time-frame, exempting them in that way from the execution assessment. On the other hand, it seems that some of the other decisions, requiring execution assessment, even if not enforced or not fully enforced, have not (yet) been qualified by the Court as such, which again raises the number of de facto non-enforced decisions.

Out of 56 analyzed non-enforced decisions, the biggest part (43 %) refers to decisions containing orders to ordinary courts to accelerate pending judicial proceedings because of an established violation of an appellant's right to a trial within a reasonable time. 32 % concern non-executed orders directed towards different levels of government instructed to pay compensation for non-pecuniary damages awarded to victims of lengthy time proceedings. Nine per cent of the non-enforced decisions relate to proceedings initiated by relatives of the persons went missing during the war, since the different levels of government have failed to establish institutions foreseen by the previously adopted Law on Missing Persons or have also failed to conduct investigations and provide family members with relevant information on the fate and whereabouts of missing persons. Some of the decisions, de facto or de jure not enforced, seem to be problematic due to the difficulties in terms of the understanding on the required manner of their execution.

The reasons given for this kind of passivity are of different nature - financial, organizational or political. However, it is the inadequacies in the existing enforcement mechanisms that are at the heart of the issue, since they alone, if effective, are able to minimize the space for appearance of objective reasons as well as unjustifiable non-enforcement excuses. Delayed or lacking action upon some of the Constitutional Court's decisions being taken as a structural problem require thus strategic steps in response, which if implemented will significantly reduce flawed reactions to these decisions.

This study departs from an analysis of the given framework of enforcement mechanisms, their functioning in practice, and of on the ground encountered difficulties in enforcing decisions. Based on these insights, the study explores suitable mechanisms supporting enforcement, and identifies a series of feasible and reasonable technical steps which, if adopted, would contribute to the overcoming of this specific issue and make in the long term as many responsible stakeholders as possible abide by these decisions. In this way, these small steps are expected to generate big effects: allow for the improvement of the rule of law, better functioning of the

domestic judicial control within the system of Checks and Balances, and improvement of the accountability of domestic stakeholders. Finally, since the decisions mostly concern citizens' human rights protection, a positive influence on the general implementation of relevant human rights standards in B&H and diminishing of the need for individuals to seek help from international human rights protection institutions is also expected.

1. Introduction

A significant number of the important decisions of the Constitutional Court of Bosnia and Herzegovina (CCBH) are not being adequately enforced by the institutions which ought to do so, without the responsible actors from these institutions bearing any consequences whatsoever. On the one hand, this is a direct consequence of the still undeveloped rule of law culture and the lack of accountability of local stakeholders¹. On the other hand, under the described conditions, existing enforcement mechanisms of these decisions also demonstrate inadequacies not favoring the situation.

One important aspect of accountability arrangements is its horizontal dimension - the institutional oversight and system of checks and balances within a state. In this context, judicial review of the executive and legislative branches of government, as well as of the lower judicial instances, is an important oversight function. Constitutional Justice, thereby, has a special additional role. Throughout its binding jurisprudence, it is protecting certain fundamental constitutional and internationally recognized values, such as human rights, rule of law and democracy, with which every single domestic act and action has to be reconciled. Therefore, based on these values, the Constitutional Court is issuing directives and creating a framework for action of the whole judicial and political system in the country. For Bosnia and Herzegovina (B&H), a new democratic state and a society in transition still being in search of its own identity and international standards and guidelines to follow, this task is even more important. But the sole adoption of judicial decisions is not sufficient for the realization of these functions, especially not in a country with strong accountability deficits. In order for the oversight and value protection function to take effect, decisions of the Constitutional Court have to be consequently enforced. The enforcement of this specific kind of decisions is a complex matter everywhere. It seems, however, to be an issue especially in new democracies facing an array of practical and political challenges, where courts still need to strengthen their authority upon other institutions. This is why properly functioning enforcement mechanisms are of such importance.

The problem at stake here is the inadequacy in enforcement of the decisions of the Constitutional Court of B&H. The quantitative analysis shows that a big share of these decisions is being implemented, but in qualitative analysis it is obvious that there are still a significant number of important decisions, and groups of decisions which are being either not adequately implemented, or not implemented at all by different levels of government, parliaments and ordinary courts². This clearly indicates the insufficiencies of the existing enforcement mechanisms and the need for the introduction of additional, appropriate ones. In case adequate enforcement mechanisms were implemented, they would reduce the existing open space for unaccountability of officials in different institutions responsible for the execution of Constitutional Court decisions. Mechanisms that ensure the effective implementation of court decisions by exacting compliance from the responsible authorities are a crucial precondition for the respect of the rule of law and the proper functioning of the judicial system, which on their side form a firm

¹ Voluntary compliance by public authorities with the constitutional judgments demand namely „political conditions of a sufficiently established democratic state and of the political culture of constitutionalism“, as the spanish constitutional law professor of Garcia Roca denotes it (See Venice Commission (VC), (CDL-JU (99) 28)).

² See also Ademović&Steiner, 2010, p. 867.



framework for responsible behavior of local actors and thereby overall prosperity of the country. The effective execution of court' decisions is an integral part of the fundamental right to fair trial within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR). Just as the civil society and political representatives are currently widely discussing the elimination of constitutional discrimination of certain categories of B&H citizens, the problem with the non-enforcement of domestic judgments, as an issue repeatedly brought before the European Court of Human Rights (ECtHR) and other international bodies, should be given the same attention as it will probably, in case of lack of efforts on the improvement of the situation, cause in the future analogous problems in the area of B&H's international obligations.

This study therefore focuses on re-thinking of the existing and proposing possible new mechanisms which could, if improved and/or introduced, provide for a proper and consequent implementation of the decisions of the highest judicial instance of B&H- its Constitutional Court. It is the combined introduction of several small steps supporting the implementation of the discussed decisions which, in the long term, can lead to the strengthening of the rule of law and accountability of local stakeholders, and eliminate detrimental effects on the country and its citizens' fundamental rights.

The study, being prospective, primarily focuses on the Constitutional Court of B&H, but it also takes into account the decisions of the Human Rights Chamber (HRCh) and the Human Rights Commission within the CCBH (HRCCom), which have ceased to exist.

Departing from the premise that concrete enforcement difficulties vary depending on the nature of different Court's orders, different groups of inadequately enforced decisions have been identified throughout the research for the purpose of exploring the most appropriate enforcement mechanisms which could redress the respective obstacles.

The study gives thereby priority to the analysis of appellate decisions of the Constitutional Court not requiring general legislative activities, and it does not treat the review of constitutionality of laws. With due care of the respect of the principle of separation of powers, the decision enforcement by the introduction of new legislation and the harmonization of the existing one with the Constitution depends mainly on the possibility to reach parliamentary majorities; it is a matter of political will. This is why this question deserves to be treated with special attention in another analysis.

The paper begins by examining the actual status of enforcement of the mentioned decisions, before analyzing the existing enforcement mechanisms and their functioning in practice, and ends in the presentation of the measures which, if implemented, could improve the execution of the Constitutional Court's decisions and therefore have a positive impact on the rule of law, human rights protection, the functioning of judicial system and the accountability in B&H in general.

2. The implementation of B&H Constitutional Court's decisions - adequate and sufficient?

2.1. The scope and the importance of the jurisdiction of the Constitutional Court of B&H

The Constitution of B&H, which was adopted as part of the Dayton Peace Agreement in 1995, established the CCBH whose primary function is to uphold the constitution. Bosnia and Herzegovina has incorporated impressive elements of the international human rights law and standards into its legal system, and the case-law of the CCBH has until now been of crucial importance in the process of implementing these elements by bringing domestic law and practice in line with fundamental constitutional values, democratic principles and human rights protection standards. Despite occurrences of disapproval of Courts' decisions by bodies whose acts are being qualified as unconstitutional and sometimes even from a broader public, it has so far been shown that "detailed, thorough and quality reasoning offered in its decisions enhance the reputation of the CCBH with the public at large, irrespective of the affected party's attacks towards the CCBH and its disagreement with the decision" (Galić, 2011). However, in order to play and keep playing this important role to the full extent, there is a need for improvement of the implementation of the decisions that form this case-law. The decisions of the Constitutional Court not only need to be *respected*, but also *executed* without exception and without delay.

The Constitutional Court has the following responsibilities:

As part of the *appellate proceedings*, which form the largest share of its workload, pursuant to Article VI.3(b) of the Constitution of B&H³ and the Article 64 of the Rules of the Constitutional Court, in response to an appealation, a constitutional complaint filed by an individual against legal acts of the three branches of government possibly violating their constitutional rights, the Constitutional Court may quash the challenged decision and refer the case back to the competent authority for renewed expedited proceeding, resulting in a new decision in which the legal position of the Court has to be observed. The Court can, however, also conclude its proceedings by taking a decision on the merits of the case, and referring it to the competent authority which by enforcing this decision has to secure the appellant's constitutional rights that have been violated.

Another important proceeding before the Court is the control of the constitutionality of norms, which can be undertaken under Article VI.3 (a) as an *abstract review of their compatibility* with the Constitution, initiated by authorized parties⁴, whereby the Court has, under Article 63 of the Rules, the possibility to quash the challenged general act or some of its provisions partially or entirely⁵. The Court is given the same option in the framework of the „concrete“ or „incidental“ review of the compatibility of a law on whose validity depends a decision of an ordinary court in B&H, in case the ordinary court referred the issue to the CCBH under Article VI.3 (c) of the Constitution⁶.

Other areas of the Constitutional Court's jurisdiction are the „unblocking“ of the work of the House of Peoples of the Parliamentary Assembly of B&H concerning an issue of destructiveness to the vital national interest, pursuant to Article IV3 (f) of the Constitution; exclusive jurisdiction, under Article VI.3 (a) of the Constitution, over any dispute that arises under the Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities,

³ Appendix A contains the complete text of this Article.

⁴ A member of the Presidency, the Chair of the Council of Ministers, the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, one-fourth of the members of either chamber of the Parliamentary Assembly, or one-fourth of either chamber of a legislature of an Entity.

⁵ It may only exceptionally grant a time-limit up to 6 months for the harmonization of unconstitutional provisions, with the possibility to determine in case of failure of implementation that these provisions cease to be in force after the set deadline (Article 63 par. 5). The introduction of this possibility as an exception, rather than a rule, is a direct consequence of earlier passive approach of parliaments in executing decisions by way of adoption of new provisions (Ademović & Steiner, 2010, p. 859).

⁶ The Court is thereby authorized to examine its compatibility with the Constitution, the ECHR or with the laws of B&H, as well as to pronounce itself concerning the existence or the scope of a general rule of public international law pertinent to the court's decision.



or between institutions of Bosnia and Herzegovina⁷, as well as the recently used power, given under Article VI.1 (c) of the Constitution and Article 101 of the Rules, to remove judges for cause by consensus of all the other judges.

Throughout the first post-war years and the last decade by exercising the wide above-described competencies, this Court has proven its capability to fulfill the crucial task it was entrusted with, and it has thus been a cornerstone institution in the democratization and state-building process in Bosnia and Herzegovina.⁸

2.2. The need for domestic measures ensuring the systematic execution of the Constitutional Court's decisions

In order for the Court to maintain this important role and to stay effective in protecting its basic objectives, the different decisions taken in the frame of the presented procedures have to be adequately and timely executed.

First of all, this means that they have to be respected and enforced *in a systematic and consistent manner*, without exceptions. This usually proves to be problematic in a country undergoing a double transition process - transition to a truly democratic state/society, and transition to a sustainable, peaceful post-conflict society. Taking into consideration the lack of an established, long-lasting democratic society and rule of law culture, it is not surprising that government representatives and representatives of other institutions, if not forced to do so, can be inclined to disrespect decisions due to the fact that they are perceived as unacceptable for different reasons. These can be financial reasons, organizational issues, reasons of political opportunity, the unwillingness to accept and launch different reform processes, but also reasons motivated by the still present profound divisions amongst Bosnian citizens and the wish of certain political actors to continue using those as a tool in order to maintain power and avoid sanctions⁹.

Secondly, the decisions of the Constitutional Court need to be enforced by *local* actors without the need for external intervention by international community representatives, as it has been the case numerous times before¹⁰. This is particularly important taking into account the exit-strategy of the international community and the hereto related need for local ownership. Nowadays with representatives of international community avoiding to use their power to impose decisions and push for reforms, it is of extreme importance for the country to build up and rely on its own effective tools. Without properly functioning domestic mechanisms, constitutional decisions which are, for whatever reasons, unacceptable for certain institutions, government branches or local stakeholders, could end up unenforced without the responsible actors bearing any consequences. This is exactly what happened so far in different cases of non-executed decisions.

2.3. Status of execution of the Constitutional Court's decisions in B&H: Inadequate execution and its effects

According to the internal statistics of Ademović & Steiner (2010), since 2001, the Court has adopted 22 decisions in the framework of its abstract and concrete norm control function, finding violations in 12 cases. In six cases the Court determined a certain period for the harmo-

⁷ Parties authorized to refer the dispute are the same as for the abstract review procedure. See footnote 4.

⁸ Together with the former HRCh, and later the HRCOM, this judicial instance has played an important role in crucial areas such as human rights protection and protection against discrimination, state organization, refugee return and dealing with the past. Acting independently and professionally, these bodies have been giving directives and a general framework for the political actions of stakeholders and have made possible many essential reform processes in cited and other areas (Ademović & Steiner, 2010). As emphasized by Nedim Ademović, chief of the Cabinet of the president of the CCBH (2007), its case law serves as an important basis for the further development of the procedural, material and institutional human rights protection.

⁹ In this context, the disrespect of these decisions could potentially be used as a powerful tool for questioning the authority of the Constitutional Court. As a judicial instance at the state level, in a weak state as B&H is, this Court is still searching for a balance between different levels of government in its complex state organization, and has an important integration and legal harmonization role. It is setting standards which have to be respected in every part of the country, and at any government level.

¹⁰ Despite the fact that they formally don't have a role in the implementation process, their contribution in this regard was often crucial. This is especially true for the decisions of the HRCh, but also the Constitutional Court (See Ademović & Steiner, 2010). The famous „Constituent Peoples“ decision from 2000, requiring the two Entities to amend their Constitutions in order to harmonize their text with the Constitution of B&H and to ensure the full equality of the country's three “constituent peoples” throughout its territory is significant in this regard. The proper implementation of this decision had meant profound reforms of state structures in the two entities of B&H, a reason why it was just under strong international pressure and mediation efforts that the local actors reached a compromise and signed in 2002 an agreement on the issue at stake. On the active role played by the Office of the High Representative in B&H in the implementation process of a HRCh decision ordering investigations related to a person went missing during the war, see also the *Joint partly dissenting opinion of judges Bratza and Vehabović* attached to the ECtHR's judgment *Palić v. B&H* (2011).

nization of unconstitutional provisions, and 50 % of these six decisions have been implemented in the moment of publication of the data. According to information provided by the Constitutional Court of Bosnia and Herzegovina to the Commissioner for Human Rights of the Council of Europe in January 2011, around 100 decisions of the CCBH and the HRCh have not been enforced since 2003 (Commissioner, 2011).

¹¹ Information obtained, upon request, from the Constitutional Court of B&H.

¹² More information about the adoption of these rulings on page 12. The 56 adopted rulings (6 in 2005, 13 in 2006, 3 in 2007, 3 in 2008, 19 in 2009, 8 in 2010, 4 in 2011) are available at the Court's website: <http://www.ccbh.ba/eng/odluke/>.

¹³ In 2008 - 18, in 2009 - 26 and in 2010 - 44 decisions.

¹⁴ The Court just finds that a right has been violated (mainly Article 6 and rarely Article 5 of the ECHR), or quashes in addition to that a higher court's judgment, while declaring a lower ordinary court's judgment to remain effective.

¹⁵ For an example, see the text below and p. 15. Other *de facto* non-implemented decisions are, for ex., decisions on war damages.

¹⁶ Some reports even estimate that 20% of the decisions of the CCBH are not implemented (Human Rights Council, 2009; Vehabović, F. *et al.*, 2008; U.S. Department of State, 2011).

¹⁷ See, *inter alia*, CCBH, No. AP-1182/05, judgment of 12 April 2006, and Ruling on failure to enforce it of 23 May 2007.

¹⁸ 15 decisions on the missing persons had been adopted until the end of 2004 under the jurisdiction of the HRCh (Džumhur, 2009). The first such decision taken by the CCBH dates back to May 27, 2005; AP-129/04.

¹⁹ According to TRIAL (2010), the main reason for this postponement was the wish of various actors to manipulate with numbers of missing persons from their own ethnic group, which would be made impossible if there were a central database. The second reason is the failure of the governments to get to an agreement on the method of financing and management of the Fund.

When it comes to individual constitutional complaints - the appeals, in the period from January 1st 2003 to December 31st 2010 the Constitutional Court has adopted 778 decisions establishing violation of the B&H Constitution¹¹. Out of these, 56 decisions (7,2 %) have been qualified as not executed in its so-called rulings on failure to enforce¹².

These statistics, however, should be taken with caution. On the one side, it does not mean that the decisions remained unexecuted after the adoption of the respective ruling. But on the other side, it clearly means that they had not been executed in a timely manner, following clear instructions of the Court. Furthermore, a certain part¹³ out of these 778 decisions, while establishing a violation does not require any positive action for its execution¹⁴, or is forwarded to competent authorities who are to ensure the appellants rights in accordance to the respective decisions without setting a deadline for execution, which makes unnecessary the need for assessment of their timely execution by the CCBH. Taking this in account, together with the fact that there are *de facto* non-implemented decisions, for which no rulings on failure to enforce have so far been adopted¹⁵, this percentage is much higher.¹⁶

Having in mind the importance of the CCBH as the judicial instance being on top of the country's judicial system, and its important role in safeguarding basic constitutional values, this practice has a negative impact on the rule of law and on the oversight role of the Court over all three branches of government, and thus on the accountability of the actors responsible for the enforcement of the decisions.

Thereby, only a group of 13 specific decisions have an effect on a total number of over 1183 complainants. In this most well known series of unenforced decisions from the period of 2005-2008¹⁷, the CCBH found that the appellants, relatives of persons having disappeared during the war, are victims of a violation of their rights not to be subjected to torture, inhuman or degrading treatment and to respect for private and family life, as guaranteed by Articles 3 and 8 of the ECHR. The Court ordered the B&H Council of Ministers, the governments of the two Entities, and of the Brčko District to enforce the B&H Law on Missing Persons ("*Official Gazette of B&H*", No. 50/04) by providing the operational functioning of the institutions established by this law; the Institute for Missing Persons, the Fund providing financial aid for these families, and the Central Registry of Missing Persons of B&H, which they had been obliged to do back in 2004 following the adoption of the Law. It also ordered the relevant authorities to give the relatives information on their loved ones. Although the time limit for acting indicated by the Court was „urgently“ , „without further delay“, and no longer than six months - the deadline for informing the Court on the measures taken, nearly seven years have gone by from the adoption of the first decision of such kind¹⁸ without any of them being fully enforced. The bound authorities have initiated investigative proceedings or provided information to one part of the appellants. The Institute has been established after a long struggle and many obstructions of various kinds, and the central database has been recently promoted, but the families, having lost faith in the domestic legal system, still have to wait for the introduction of the fund, while nobody is taking any consequences for this passivity (CIN, 2010)¹⁹.

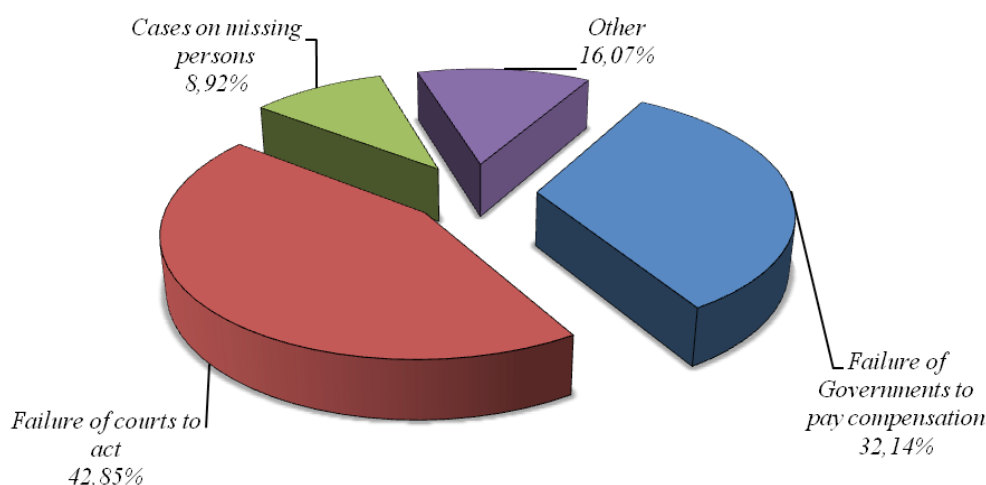


Figure 2.1
Rulings on failure to enforce
2005-2010; Main enforcement
problems identified

As it is clearly visible from Figure 1, out of all 56 decisions so far reported by the Constitutional Court as non-executed or partially executed, 9 % are related to these missing persons cases. This percentage is in reality probably even higher as it includes just five decisions regarding which the CCBH has adopted the ruling in which it held that the respective decisions had just been partially executed. Therefore, it does not include the other eight decisions adopted in this matter.²⁰

²⁰ See page 15.

Another 32 % of decisions are those concerning the failures of different governments to pay for non-pecuniary damages compensation to victims of human rights violations, mainly victims of excessive length of proceedings before ordinary courts.

Most constitutional complaints are directed against court decisions. Astonishingly, 43 % of the decisions reported as non-executed were initially addressed to the ordinary courts, which consequently have not undertaken the ordered measures in the set time frame and even beyond it. Most often, these rulings refer to ordinary courts which are openly ignoring the Constitutional Court's orders to expedite pending proceedings in cases where the CCBH had established a violation of the right to a trial within a reasonable time.* Beside some cases where a further delay in proceedings can be objectively justifiable, this is unacceptable as the established human rights violation continues in this way and the ordinary courts itself call into question the authority of the Constitutional Court, which is on the top of the judicial hierarchy they are part of.

* See, for example, the Ruling No. AP 1245/06.

It seldom happens that a lower court disrespects the legal reasoning of a CCBH's judgment²¹. Generally speaking, the authority and quality of case-law of the Constitutional Court result in a change of case-law of ordinary and supreme courts of both Entities of B&H, being aware that one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.

²¹ An example of this negative practice - Ruling No. AP 1/05.

All the other described non-enforcement cases result in a continuation of the legal situation already declared unconstitutional, whereby the citizens affected by the non-execution of court judgments are in fact becoming the victims of a prolonged violation of human rights - the right to fair trial.

2.4. Execution of the domestic court's decisions as an international obligation

The respect for human rights, democratic principles and the rule of law is not just a matter of domestic affairs, but an international obligation of Bosnia and Herzegovina; primarily under the European Convention on Human Rights, the International Covenant on Civil and Political Rights and under the Stabilization and Association Agreement. This has clearly been emphasized in various judgments and monitoring reports on B&H presented by important international bodies, which puts an even stronger pressure on the country to pay due attention to this problem, especially having in mind its aspirations toward Euro-Atlantic Integrations.

In a continuous lack of response from actors responsible for the execution of the decisions by redressing the established human rights violation and in the lack of an effective domestic remedy, many of the affected citizens are bringing their claims before international bodies in the hope of finally achieving justice²².

A growing number of judgments of the ECtHR reveal a systemic problem of non-execution or delayed execution of B&H's judicial bodies' decisions. In some of the most well known cases against B&H²³ the Court held that the fact of non-enforcement of the decisions, respectively of the HRCh and the HRCom within the CCBH resulted in a violation of the Article 6 of the ECHR securing the right to fair trial to everyone. The Court recalls that this right "would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."²⁴ The Court finds most often also a violation of the Article 1 of the Protocol No. 1 of the ECHR securing the right to property. In addition to this, the Court usually grants compensation for pecuniary and non-pecuniary damages to the applicants, and interests payable in case of the delay in paying, and under certain conditions it also orders the reimbursement of costs of legal representation of the applicant. It is estimated that until now B&H has had to pay the victims around 3 million KM or 1,5 million EUR on the basis of the decisions adopted by the ECtHR (T.C., 2011).²⁵ However, this sum does not include the costs of the State for its defense before the Court.

This makes it obvious that, besides the detrimental effect on the rule of law and the respect of human rights of the citizens of B&H, the proceeding is too expensive for the State to allow itself bringing it repeatedly to that stage. The non-execution is regarded as a structural problem²⁶, which means that an established human rights violation is affecting not only the applicant, but also a larger number of other persons in B&H, which is likely to result in numerous other applications before the Court, representing a potential threat to the future effectiveness of the Convention machinery. According to Monika Mijić, the Representative of the Government of B&H before the Court (Stanojlović, 2010), around 1300 cases are pending before the ECtHR, the majority of them being related to the right to fair trial, the non-execution of judgments, missing persons, return of property, expulsion of foreigners and similar. Having this in mind, one can easily conclude that it is of crucial importance to concentrate on preventive action, i.e. considering measures which could, if implemented, minimize the number of cases of non-enforcement and thus avoid further human rights violations of Bosnian citizens, and, in the end, further financial complications for the state of B&H.

Another institution within the Council of Europe having identified the existence of a systemic problem is the Commissioner for Human Rights of the Council of Europe (2007), who has noted with concern that "... the decisions of the Constitutional Court are (...) often not implemented

²² Concerning „missing persons cases“, for instance, it is the Advocacy Center Trial (ACT), which provides family members with free legal aid, bringing their cases before the ECtHR and the United Nations Human Rights Committee. For more information, see their website <http://www.trial-ch.org/index.php?id=827&L=5>.

²³ See the case of *Jeličić v. B&H* (2006), *Karanović v. B&H* (2007), *Millisavljević v. B&H* (2009), *Čolić and Others v. B&H* (2009), *Kudić v. B&H* (2008) and *Šekerović and Pašalić v. B&H* (2011). All the decisions are available in the HUDOC database of the European Court's case-law at its website <http://www.echr.coe.int/echr>.

²⁴ ECtHR, *Jeličić v. B&H*, §38: "It would be inconceivable that Article 6§1 should describe in detail the procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions." This would, according to the Court "...indeed be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6".

²⁵ In the mentioned cases, the Court granted the applicants compensation ranging from EUR 1,500 to 4,000 per applicant in respect of non-pecuniary damage sustained, as well as the payment of additional damages - for instance EUR 163,460 pecuniary damage for a disputed flat in the first case, and up to EUR 427,088 in the last case cited.

²⁶ In seven (out of a total of 16 judgments) delivered against B&H, the ECtHR has found a human rights violation because of non-execution of domestic judgments. See in this regard also: Commissioner (2011).



by the relevant bodies and authorities, which is of serious concern as it undermines the rule of law and respect for the Constitutional Court. Furthermore, there is no mechanism in place currently that could remedy the situation. The non-execution of final court decisions needs to be addressed.”²⁷

An international body acting beyond a regional level worth mentioning is the United Nations Committee against Torture, which in its recent Concluding Observations (2010), expressed “serious concerns that a significant number of judgments made by the Constitutional Court are not implemented even several years following their adoption”, emphasizing that “most of non-implemented Constitutional Court’s decisions are related to cases of human rights violations, mainly the cases of missing persons”. Furthermore it pointed out that “it is necessary to fully implement the Constitutional Court’s judgments without further delay, in particular with regard to cases on enforced disappearances, and prosecute failure to comply with such judgments.” The UN Working Group on Enforced or Involuntary Disappearances came after a visit to Bosnia and Herzegovina to the same conclusion in its Report (2011)²⁸.

It is not just organizations primarily focused on human rights protection that have expressed their concerns about a lack of adequate enforcement of B&H’s domestic constitutional decisions. In its last Progress Report on Bosnia & Herzegovina (2010), the European Commission, too, pointed out that the Entities have not yet made their constitutional texts compliant with the 2006 decision of the CCBH founding that the entity coats of arms, flags and anthems are not in line with the state-level Constitution, and that there were several cases of non-enforcement of decisions of the CCBH leading in the end to cases being lodged before the ECtHR.²⁹

All this can be avoided only by adequate and efficient enforcement mechanisms of the domestic legal order, improving the general respect of the rule of law and the authority of the Constitutional Court and allowing the constitutional judicial review to truly challenge the power of other branches, as well as lower judicial bodies and to bring their activities in conformity with the Constitution and incorporated international human rights standards.

3. Measures available to ensure the execution of B&H Constitutional Court’s decisions

3.1. Existing legal framework

Currently, it is the Constitutional Court, the Prosecutorial Office and the State Court of B&H who are involved in the process of monitoring and reacting to non-enforcement of the decisions at stake³⁰.

Unlike the enforcement mechanism of Constitutional Court’s decisions at the entity level and some neighboring countries, where the Prime Minister³¹ or the Government³² ensure their execution, the Council of Ministers of B&H has no legal responsibility to push for the implementation of the decisions of the CCBH. These decisions are also not being executed in the framework of regular well-developed enforcement procedures known for the decisions of ordinary courts. The Constitutional Court does not have its execution division, because this is not usual for, and is in contrary to the nature of constitutional justice; and the police, banks and other relevant institutions cannot help with the enforcement of its decisions (Bičakčić, 2007)³³.

²⁷ See also (Commissioner, 2011, par. 175). For a similar conclusion see OSCE (n.d.).

²⁸ See also UN Human Rights Committee (2006), par. 14 and 25, and Human Rights Council (2009) par. 28.

²⁹ The United States of America have also pointed out the existence of this problem in the new Report on B&H of the U.S. Department of State (2011).

³⁰ Like already mentioned, until recently the international community vested in the Office of the High Representative together with the OSCE was also actively involved in the implementation of the decisions of highest judicial bodies.

³¹ Like in the Federation of BiH.

³² Like in the Republika Srpska or Croatia.

³³ Another situation exists, for example, in the United States, where the constitutional review is carried out by the ordinary judiciary, and where the decisions can thus be executed through law-enforcement (VC,CDL-JU(2008)029). So are the USA a rare exception known even for the execution of judgments by force if needed, like it was the case concerning the suppression of racial segregation in education (VC, 2001).

It has to be emphasized that the sole force of the judgments of the Constitutional Court, being final, binding and enforceable, as it is foreseen by Article VI. 4 of the Constitution and Article 74§1 of the Rules of the Constitutional Court, is to be treated as an execution measure (*N. Ademović, personal interview, December 7, 2010*). As opposed to the execution of ordinary court decisions in civil matters where execution is not automatic because it is up to the parties to decide whether to request the execution of a court decision in their favor or not, the decisions of the Constitutional Court are directly enforceable without the need for any positive action on behalf of the appellants³⁴.

³⁴ See also Ademović & Steiner (2010).

³⁵ See Appendix B for the relevant Rules' text.

³⁶ The general binding effect of these decisions on all physical and legal persons and bodies determine the important place that the CCBH and its decisions take in the entire state and the society of B&H and places its decisions at least in the same rank as laws adopted by parliaments. As being an integral part of the legal system, they share thus also „the fate of the rest of the legal system as regards its being observed or its reception being denied by the state institutions obliged to receive it“ (Bross, VC, 2009).

³⁷ A similar possibility is previewed by the Article 35 of the Germany's Federal Constitutional Court Act. For a comparative description of other countries see VC, *CDL-INF (2001) 9*.

³⁸ On such type of role of the German Constitutional Court see also Bross, VC, 2010.

³⁹ This is also the reason why other countries' constitutional courts are being careful about the introduction or use of this opportunity.

Following this line of thinking, the Rules of the Constitutional Court³⁵ further detail the execution of the decisions; they foresee that the judgments of the CCBH are to be published in the official gazettes of the state and the two entities (Article 73), that every physical and legal person shall be obliged to *respect* the decisions, and that all bodies shall be obliged to *enforce* the decisions of the CCBH within their competencies established by the Constitution and the Law.³⁶

Another positive feature of the competence of the CCBH is that it is in its decisions allowed to state the *manner* and the *time-limit* for the enforcement which is not the case for many other countries³⁷. This is a comprehensible consequence of the direct enforceability of its decisions, which in the end places an important responsibility on the Constitutional Court itself, as it may in this way, depending on the specific case and type of proceeding in question, issue, *ex officio*, all concrete orders necessary for the execution of its decision³⁸. The CCBH often uses this legal possibility trying, however, not to misuse it in order to avoid impediments of the principle of separation of powers³⁹. The fact that the Court appoints concrete authorities which have to execute its decisions by paying certain sums of money or taking various necessary measures to ensure the respect of human rights of the appellants, has so far surely had a big impact on the generally speaking positive trend of constitutional justice execution in this young post-war democracy. Even if inclined to unaccountability, local actors do find themselves in a rather uneasy situation as their respective institutions are most of the time very concretely and directly addressed by a judgment, setting also a concrete time-limit for their action. This gives the Court important space for ensuring that its decisions are complied with.

However, when it comes to the core execution of these decisions, the CCBH only supervises their execution, but does not implement them. According to its own Rules the body obliged to enforce the decision of the Court shall, within the time-limit set forth by the Court in its decision, be obliged to submit information about the required measures taken to enforce it. In the event of a failure to enforce a decision, or a delay in enforcement, or in the sole event of failure to give information to the Constitutional Court about the measures taken, it adopts rulings on failure to enforce, having thereby also the possibility to determine the manner of enforcement of the decision.

The Constitutional Court publishes these rulings in the Official Gazette of B&H and forwards them to the Prosecutorial Office of B&H, which is then supposed to treat them as a criminal complaint and consequently to order investigations and undertake other steps necessary for the criminal sanctioning of such behavior. It may forward the ruling also to another body competent to enforce the decision, as designated by the Court.

The given legal framework, more precisely the Article 239 of the Criminal Code of Bosnia and Herzegovina, adopted in 2003, actually provides for criminal liability for the failure to enforce



the binding and final decisions of the CCBH, as well as of the Court of B&H or the ECtHR.⁴⁰ Any official who either refuses to enforce, prevents or frustrates the enforcement of such decision in some other way, shall, according to the Law, be punished by imprisonment for a term between six months and five years.

3.2. How does the established system work in reality?

The role of different institutions in the (non)enforcement process

It would appear that all the described mechanisms combined and implemented together would provide a solid basis for ensuring the execution of the constitutional decisions⁴¹. However, the question of their effectiveness, when implemented in practice in B&H is visible from the above described status of their execution. Their inadequacy and insufficiency seem evident from the sole fact that this topic is being repeatedly addressed in various national and international discussions and reports.

3.2.1. Passive role of the Prosecutorial Office of B&H

The practice has shown that the Prosecutorial Office has not had an active approach to prosecuting actors allegedly responsible for this criminal offence.

Until now there has been only one case where the Prosecutorial Office raised an indictment, which in the end resulted in a conviction by the Court of Bosnia and Herzegovina for not honoring a decision of the Constitutional Court. However, it has to be emphasized that this proceeding was initiated by the appellant himself, whose goal had been to protect his property based on a constitutional decision delivered in his favor whose enforcement has been obstructed by two officials of the Republic of Srpska Office for Geodetic, Property and Legal Issues⁴². The two individuals in question were conditionally convicted, one to ten months and the other to six months in jail, one of them being later acquitted of the charges.

According to some statistics of June 2009⁴³, an investigation has begun in 60 cases, but 21 have been dropped because the Office found no evidence of criminality. In 25 other cases, prosecutors are still determining whether there is a legal basis for an investigation (CIN, 2009). When it comes to the "missing persons" cases, the Prosecutorial Office of B&H claims to have initiated several investigations, but none of them have resulted in an indictment so far.

There are different opinions about the root causes of this inactivity. One of the explanations for the passive kind of behavior of the Prosecutorial Office is "the lack of efficient judiciary which would not back down because of its fear of prosecuting the holders of highest political and public functions in Bosnia and Herzegovina". (Bičakčić, 2007) On the other side, the Spokesperson of the Prosecutorial Office argues that it is difficult to individualize criminal responsibility for non-enforcement, which is in substance very different to political responsibility. Another argument is that the investigations require too much time and human resources⁴⁴, and that some decisions are confusing, not precise enough. In this context, it is being repeated that the Constitutional Court itself should take a pro-active approach in helping out the Office by offering additional explanations and discussions on the respective decisions (CIN, 2009). But then again, concerning for example the unenforced decisions on missing persons, Mr. Faris

⁴⁰ Bosnia is thereby one of the rare countries providing for criminal sanctioning as a mean for pressure to execute the decisions of its Constitutional Court. Other known examples are Azerbaijan (see VC, 2009 Guliyev), or Slovakia, where prosecutors can also initiate criminal proceedings pursuant to their ordinary powers on grounds of non-execution of domestic decisions.

⁴¹ In many other democratic countries with better political and societal conditions, even without these mechanisms the execution of the discussed decisions doesn't pose significant problems, due to the sole fact of the authority of the respective Court and the general respect for the rule of law.

⁴² For more information, see CIN (2009), the decisions of the CCBH No. U-47/01 from November 2, 2001 and AP-2281/05 from July 6, 2007, as well as the decisions of the Court of B&H KŽK-03/05 from October 13, 2005 and KŽK-3/07 from November 6, 2007, available upon request to the Court of BiH.

⁴³ According to the Prosecutor's Office of BiH, from 2002 to 2008, 85 decisions of the CCBH have not been enforced within the deadline set by the Court (CIN, 2009).

⁴⁴ It would seem that only five prosecutors are working on the Constitutional Court's cases, and each of them has an average of about 350 cases to handle (CIN, 2009).

Vehabović, judge of the Constitutional Court of the Federation of B&H, underlines that “the Court clearly stated whose rights were violated, which institutions were responsible and what steps the authorities should take”. “Prosecutors, however, have yet to act.” (CIN, 2009). The Spokesperson of the Prosecutorial Office claims that there are some cases, mainly individual cases on missing persons, where the individuals presumably hiding information on disappearance have been identified. He adds, however, that there would probably be a higher number of investigations if concrete persons not executing the CCBH’s decisions were indicated, facilitating thereby their criminal processing (Alić, 2010).

Hereby, it needs to be emphasized that this kind of indication cannot be expected from the Constitutional Court as this is clearly out of scope of its competences. It is rather the prosecuting body which, according to criminal law, has to establish the facts of the respective case reported based on the available documentation, including the one the CCBH disposes of. It must be borne in mind that the primary and sole function of every constitutional court, including the B&H one, is constitutional adjudication and upholding of the Constitution. The investigative actions are referred exclusively to prosecution bodies.

3.2.2. A proactive approach of the Constitutional Court of B&H?

As above described, the CCBH monitors the implementation of its decisions on a regular basis and adopts rulings establishing that a certain authority or authorities have not executed its decision (majority of cases), have not fully executed, or have frustrated the execution of its decision (only several cases; for example AP-214/03). It adopts these rulings in plenary session (all members of the Court, including international judges), which clearly indicates the importance of this proceeding. The Court emphasizes every time in these rulings that its decisions are final and binding and that all bodies are obliged to enforce them. Consequently, it forwards them to the Prosecutorial Office of B&H.

⁴⁵ For example, in Ruling No. AP-53/03, where an urgent delivery of a new judgment was ordered by the Court, and a six-month term was set for informing the Court, the Court considered the six months also as the time-limit for the execution of the decision.

⁴⁶ For the payment of compensation for non-pecuniary damage sustained, the Court envisages for instance a term of 3 months for the execution, as well as for informing the Court, considering it to be sufficiently long to make the decision timely enforceable.

⁴⁷ See, for example, the Ruling No. AP-602/04.

⁴⁸ See Conclusion No. 214/03 from the 9th May 2006.

The analysis of the 56 so far adopted rulings leads to the conclusion that the Court has taken an active role in exercising this function, which can only be welcomed. The Court considers the time-limit set in the decision for informing the Court on the measures taken with the goal of executing the ruling as the final time-limit for the sole execution⁴⁵. While determining this deadline, the Court takes into account the nature of the ordered obligation and the reasonable amount of time needed for its execution⁴⁶.

In the majority of cases, the authorities do regularly inform the Court on the measures taken or not taken. In certain cases, however, the enforcing authority indicated in the decision does not fulfill this duty. In this situation, although not obliged to do so by its internal rules, the Constitutional Court usually sends, at the expiration of the set term and sometimes even before it, a letter to the respective authority asking for information and leaving additional 7 or 10 days for the response. This seems to be a very useful initiative of the Court, as in many cases the authorities respond to this additional demand. Even if the body informs the Court in due time on certain measures taken, the Court usually writes to the body again, asking about further measures taken and the actual state of execution⁴⁷. In one case⁴⁸, the CCBH granted additional 30 days for the execution of its decision upon the ordinary court’s request, due to the complexity of the case.



In September 2007 the CCBH has issued a release reiterating its findings from the decisions concerning missing persons, expressing its concern on the failure to enforce these decisions even following the adoption of a ruling on non-execution and calling again the responsible authorities to fulfill their judicially established obligations⁴⁹. This practice can only be welcomed, indicating the active approach the Constitutional Court has taken in this matter, again notwithstanding the lack of obligation to do so.

In certain cases, the Court also uses its right to determine the manner of execution in its ruling. This was the case with one of the rare decisions addressed at an ordinary court which was disrespecting the reasoning of the CCBH, whose decision the CCBH consequently quashed. The Constitutional Court, thereby, reminded the ordinary court in question that the binding and enforceable nature of its decision does not refer only to the wording of the judgment, but also to the legal reasoning, underlining thus its authority as well as the authority of its decisions⁵⁰.

It has to be emphasized that it is always possible for the Constitutional Court not to adopt a ruling on non-execution or partial execution even if the decision has not been enforced. This can happen if the Court finds that a decision is objectively and thus justifiably not enforceable.

As already mentioned, in the cases on missing persons, a ruling on non-enforcement has been adopted concerning five cases, while in the other eight cases the decisions adopted in this matter have not been qualified as non-executed, notwithstanding the lack of their implementation for the same reasons as the first group (Trial, 2010)⁵¹. While for example it could possibly happen to be objectively impossible to provide to the relatives the required information on some missing persons, it seems difficult to argue that the passive attitude of the responsible governments towards their obligation to establish the legally foreseen institutions can be justified. In the concrete missing persons cases, the systematic adoption of rulings with regard to failure to establish the described institutions would not change anything regarding the proceedings before the Prosecutorial Office, as there are always the same facts and the same responsible authorities that should have been investigated. However, the situation changes when it comes to the obligation set forth by the decision to investigate specific cases of disappearances. If the set conditions are met, it would be desirable to adopt rulings on failure to enforce, as it can happen that concrete individuals differing from case to case are hiding data on certain missing persons, and they could accordingly be prosecuted.⁵²

3.2.3. Role of the authorities obliged to enforce the decisions of the Constitutional Court of B&H and offered excuses for non-execution

The authorities obliged to enforce the decisions of the CCBH give different reasons for the failure to execute and the Court examines, in every single case, if these reasons are of such nature to justify the non-enforcement of the decision. If the Court finds that these reasons exist for a specific decision, it denotes the decision in a periodically adopted internal information note as justifiably non-enforced, without adopting a ruling on their non-enforcement at that moment. The Court, however, follows up the execution of these decisions in its next information note, since it happens sometimes that the decisions are executed in the meantime. If the Court establishes that the previously mentioned reasons ceased to exist, it adopts rulings on failure to enforce.

⁴⁹ Available at: <http://www.ustavisud.ba/bos/press/index.php?pid=2327&sta=3&pkat=125&kat=123>.

⁵⁰ See the Ruling No. AP 214/03 and No. AP 854/04.

⁵¹ According Trial (Position Paper, 2011), appellants in these cases have not even obtained an answer on the status of execution of these decisions, which leads in the end to an unjustifiable different treatment of appellants.

⁵² For the sake of confidence in the judicial system and the possible undertaking of further steps in the pursuit of justice, it is furthermore of crucial importance for the victims of human rights violations to ensure a systematic adoption of Rulings on failure to enforce, or at least to let them know that the decision in their favor had been qualified as justifiably unexecuted, if that is so.

⁵³ For instance, for a decision adopted in March 2005, where the time-limit for enforcement had expired in August 2005, the Ruling on non-enforcement was adopted in April 2006.

The enforcing authorities are thereby placed in a rather comfortable position, having in mind that the Court is trying to be realistic when setting the time-limit for execution and that it normally issues rulings a certain amount of time after the expiration of the set deadline, leaving thereby to the respective authorities enough time to execute the decisions even with some delay and avoiding the adoption of the ruling with its possible negative consequences.⁵³

⁵⁴ This is a clear structural problem in B&H, leading to a vast majority of the appellations arriving to the Court and being repeatedly addressed in its decisions.

Amongst the causes for non-enforcement stated in the information notes sent to the Court two are repetitively brought forward by ordinary courts and different levels of government, leading to a repeated adoption of rulings on non-enforcement, and are therefore worth analyzing. They are related to the problem of length of proceedings, which, as already mentioned is a part of the right to a fair trial⁵⁴. If the Constitutional Court finds a violation of this right on this ground, it mostly orders the court in question to expedite proceedings and bring the case to an end without further delay and awards sometimes at the same time compensation for non-pecuniary damages caused to the applicant by excessive length of proceedings.

⁵⁵ Some of them send to the Constitutional Court even a statement of the responsible judge and a table indicating the number of cases and of employees.

The main justification of the ordinary courts concerning their inactivity in executing the CCBH's decisions is the overburdening of the court⁵⁵, or loss of time because of the sick leave of the responsible judge. The CCBH, however, does not accept excuses for further prolonging of the proceedings. In response to these allegations it mostly emphasizes that the appellation was granted precisely because of failure to bring to an end a proceeding in a reasonable time which required special urgency in the further proceeding.

⁵⁶ The compensation is paid from the budget of the government financing the court of general jurisdiction found to be responsible for the violation - as mentioned, mainly a consequence of excessive length of proceedings.

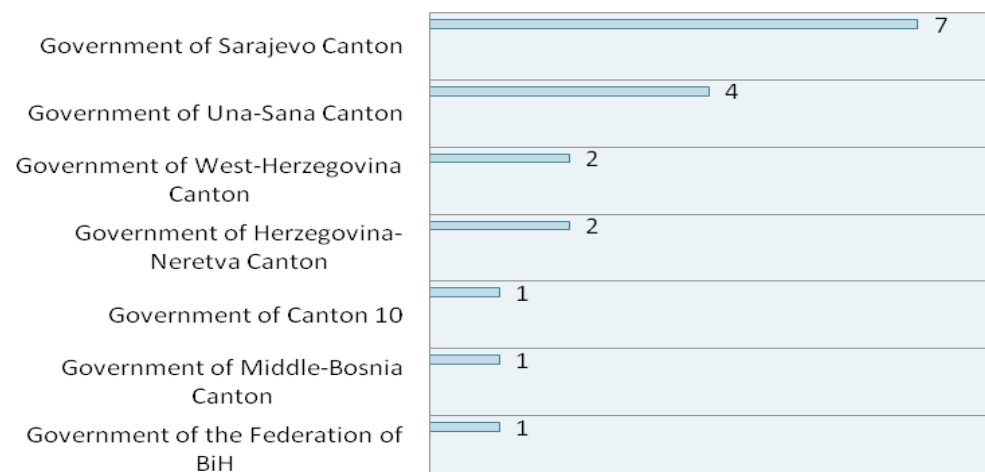
The other group of cases, revealing an underlying structural problem, and not an isolated coincidental event, concerns the repeated problem occurring with different levels of government ordered to pay damages to the victims of human rights violation⁵⁶, but not doing it by explaining that they do not have necessary financial means at their disposal for the execution of the decision within the current budget, and sometimes also indicating that they would execute the payment after the adoption of a new budget or rebalance of the existent one.**

** For an example, see Ruling No. AP 2310/06.

⁵⁷ The Government of the Federation BiH itself is thereby more to be regarded as an exception.

It is worth noticing (see Figure 3.1) that the Rulings on failure to enforce a decision by paying compensation are referring exclusively to the Cantons of the Federation of B&H⁵⁷, the Entity known for its complicated structural organization and thereto related financial problems. It seems that the Republic of Srpska promptly fulfills its obligations to pay the ordered sums, which could be explained by the fact of having one single budget and being thus better organized in contrary to the Cantons lacking coherence in acting.

Figure 3.1
Governments not executing the CCBH's decisions by paying compensation sums





Here again, the Constitutional Court does not accept the stated financial reasons as being of such nature to justify the non-enforcement of its final and binding decision, as it also repeatedly finds in its decisions regarding the non-execution of judgments delivered by other courts and in accordance with the well-established ECHR case-law⁵⁸.

As the Court clearly explained it in its Rulings in the cases AP-1103/06 and U-35/00, par. 6:

“The Constitutional Court cannot accept the reasoning of Sarajevo Canton according to which the funds necessary for enforcement of the Constitutional Court’s decision are not available. Actually, every competent (public) legal entity is obligated to organize itself so as to comply with its legally binding obligations within the given time limits, including those referred to in decisions of the Constitutional Court. This is an explicit obligation of the competent authorities, which is required in order to comply with this element of the constitutional principle of the rule of law, as provided for in Article I(2) of the Constitution of Bosnia and Herzegovina.”

Finally, a third group of non-enforced decisions has to be taken in consideration; Monika Mijić (personal communication, December 28, 2010) indicates that there are cases where uncertainty surrounding an allegedly imprecise wording of the decision, or the existence of questions of negative conflicts of competence between different levels of governing, or other reasons might create difficulties in executing such decisions, even if authorities do not contradict the Court’s decisions. For instance, in the Ruling AP 602/04 the Municipal Court of Široki Brijeg requested from the CCBH an interpretation of its decision for the sake of executing it, whereas the Court didn’t answer the request, finding only that the decision at stake had not been enforced. It must be borne in mind that this kind of excuse for non-execution could in some cases also be motivated by the desire to manipulate with time; in some particular cases even a clarification by the CCBH does not change anything, because of the lack of the political will, financial or other underlying reasons for non-execution⁵⁹. But if there appear really cases of non-enforcement because of problems of interpretation this is to be considered as a specific group of enforcement problems which are to be adequately tackled.

4. What is being done on the improvement of execution?

From the data on the status of (non)execution of the decisions of the Constitutional Court so far presented, it is obvious that Bosnia and Herzegovina needs to think about preventive steps directed towards optimizing the execution of these decisions, in order to avoid further possible detrimental effects of failure to enforce these decisions.

In order to deal with the issue at stake, two round table sessions with the representatives of both the Constitutional Court and the Prosecutorial Office of B&H, as well as relevant government representatives, have been organized so far. The recommendations were formulated and distributed to the relevant authorities⁶⁰. This action is welcomed, as the cooperation of different state organs is crucial to the proper functioning of judicial decisions enforcement.

Besides the above-cited examples of international reports of the United Nations bodies, regional organizations like the European Union, the Council of Europe and the OSCE, and cited judgments of the ECHR, this issue has so far been treated in domestic reports (TRIAL, 2010; Human Rights Ombudsman of BiH, 2010; Vehabović et al., 2008), the media (CIN, 2009; Alić, 2010), legal articles (Bičakčić, 2007), as well as studies of constitution (Ademović& Steiner,

⁵⁸ “The complexity of the domestic enforcement procedure or of the state budgetary system cannot relieve the state of its obligation to guarantee to everyone the right to have a binding judicial decision enforced within a reasonable time [...] Nor is it open to a state authority to cite the lack of funds or other resources as an excuse for not honoring a judgment debt.” (Hammerberg, 2010; see also i.a. ECtHR. *Burdov v. Russia* (No2), 15 January 2009, §70).

⁵⁹ For instance, in the judgment *Šekerović v. B&H* (ECtHR, 2011, §14,30), one can see this demonstrated. The CCBH held on 13 October 2010 in its ruling on failure to enforce the HR Commission’s decision *CH/00/6413 and others* that in order to enforce its judgment adopted in favour of i.a. Mr Šekerović, it was not sufficient to pay him the difference between his current pension and what he would have received as a pension from the FBiH Fund and to continue paying such difference in the future, but that he should instead be transferred to the FBiH Fund pension. Despite this clarification this obligation had remained unfulfilled.

⁶⁰ On the round table session on „The obligation of government bodies to execute decisions of the Constitutional Court of B&H, decisions of the Human Rights Chamber of B&H and final judgments of domestic courts“, organized by the Council of Europe (CoE) and the Office of the Government Agent before the European Court of Human Rights in June 2009, see http://www.mhrr.gov.ba/ured_zastupnika/novosti/?id=659.

2010) or transitional justice in B&H (UNDP B&H, 2009). Still, different arguments and criticisms of the existing law and practice stay dispersed in fragmented sources. The wider public, except for the affected appellants, is not sufficiently informed and aware of this problem, which results in the lack of awareness that urgent measures need to be taken to redress it.

Bosnia needs a systematic approach to solving the problem, with a set of concrete measures that need to be undertaken in order to minimize, if not possible to eliminate cases of non-enforcement. This can be done by the identification of actual groups of decisions that stay unenforced, an analysis of the concrete obstacles in their execution and by finding adequate solutions, which if implemented would significantly reduce the number of unexecuted decisions. In this way the other incidental cases staying not enforced would stick out, get more attention from the public and be thereby under stronger pressure for implementation.

Since the existing enforcement mechanism, although well developed comparing to other states, proves to be insufficiently effective as such because of some political, financial and transitional circumstances in the state, the introduction of any other measure supportive of this mechanism has to undergo a test of expected effectiveness and efficiency beforehand. In addition to that, under the current political conditions prevailing in B&H, showing reticence to any mayor reform processes, it is important to consider measures which would not require outstanding and time-consuming changes, but rather small steps which, taken all together, are intended to bring positive results in terms of improving the enforcement of the discussed decisions.

5. A set of steps to optimize the execution of B&H's Constitutional Court's decisions

If the status of enforcement remains as it is, B&H runs the risk of seeing more and more of its decisions which are on different accounts unacceptable for local stakeholders staying non-enforced. The difficult and unstable political process the state is going through does not favor accountable practice, the respect for state-level institutions, additional financial burdens nor the rule of law. Having in mind the decisive role the international community used to play in the implementation of crucial and problematic decisions, and the fact of their changed, passive attitude, this can become a problem which could potentially lead to a worsening of the described detrimental effects of non-enforcement and to repeated failings of exams before important international bodies.

It is, hence, of crucial importance to explore a legal and regulatory framework which will ensure enforcement of the decisions of the Constitutional Court of B&H. In the case of structural problems, it is necessary to adopt a systematic domestic approach to the optimization of execution of domestic decisions, involving all actors and decision-makers concerned (Committee of Ministers of the CoE, 2010). The supporting enforcement measures can be referred to different parties having a role in the enforcement process, respectively the Prosecutorial Office of B&H, the CCBH itself, and the authorities being mostly addressed by the decisions of the Court.

Strengthening the resources and capacity development of the Prosecutorial Office of B&H?

Taking into account that this is a new not well known crime prescribed by law, the main problem of prosecutors seems to be the lack of understanding how to individualize responsibility



for non-enforcement, how to act in response to non-enforcement which often takes place in collective and political bodies, or how to act in response to a decision made by a judge in his right of personal conviction of judges, but contrary to the reasoning of the Court. In order to overcome this problem, prosecutors and other personnel need to be educated, trained by legal experts from other legal systems being familiar with this sort of criminal liability. In addition to that, the Prosecutorial Office should be better equipped and have more personnel, in order to be in the position to react in a promptly manner to non-enforcement (N. Ademović, personal interview, December 7, 2010; Conclusions of round table discussions, June 2009). Prosecution on these grounds should also stay assigned to a few prosecutors, which could allow for facilitated internal monitoring on the necessary steps taken.

Although this could potentially have positive impact on the implementation of the decisions as a result of the fear of consequences of non-enforcement, it is still a long and costly process⁶¹. It also must not be forgotten that this mechanism has just a sanctioning function, once the decision has not been enforced. It can still be considered an enforcement mechanism, because the threat of criminal liability can be used as a strong pressure tool for making responsible actors abide by judgment orders. But it is not a supervision mechanism providing for the monitoring of decision enforcement by a certain authority, allowing it to react on time in a preventive manner: to identify actors responsible for the enforcement and to urge for their accountable action. The existing mechanism could in fact, if implemented, have an important role and any efforts directed towards its strengthening are to be highly welcomed. But still, this is not a mechanism of control of decision enforcement like the special execution divisions existing in municipal courts are, or the assignment of this task to the heads of government, which is the case at entity level and in some other countries⁶².

Making the Council of Ministers of B&H responsible for ensuring the enforcement ?

Following this logic, it has often been put forward in public discussions a comparison of the state-level with the entity-level constitutions, which assign this task to the entity prime minister/government, recommending the same solution for the Constitutional Court of B&H (UNDP, 2009)⁶³. First of all it has to be emphasized that the responsibility of the entity governments is just of a secondary nature - they have a rather coordinating function and are not directly responsible for the implementation of the decision. Still, this could indeed have a positive impact on the enforcement of *some* of the decisions, under the coordination and pressure of the heads of government. In the current socio-political environment of B&H, however, there is also no guarantee that the implementation of all of the decisions at stake will be politically, financially, or for whatsoever other reason acceptable to the government which is supposed to ensure it. In this regard, the decision on "missing persons" being binding *inter alia* on the Council of Ministers of B&H is a significant example. Accountability deficits are present amongst all parts of the Executive, even the highest ones, and primarily other branches of power are suitable to act as their check and balance. A possible influence this authority could have on the legislative bodies or the ordinary courts not executing the constitutional decisions seems also problematic, as this could impede the principle of separation of powers.

This is one of the important reasons why the appointment of authorities responsible for enforcement of its decisions and the monitoring function is reserved to the Constitutional Court itself. But, on the other hand, as the ECtHR observes, this special procedure may lead to no more than an acknowledgment of the impugned state of affairs in the form of a declaration:

⁶¹ Besides that, even if equipped with the needed knowledge and resources, it is still an open question if there would be sufficient courage within the Office to prosecute, if needed, higher ranking politicians. This depends on the general context the Office is operating in.

⁶² A good example on an international level is the strong mechanism of the Committee of Ministers of the CoE, supervising the execution of the judgments of the ECtHR.

⁶³ Similarly, in Austria, the enforcement of judgments is (with the exception of judgments relating to pecuniary claims against the Federation, the Länder or local authorities, executed by ordinary courts) incumbent on the Federal President, who shall upon request of the Constitutional Court give instructions to the Federal or Länder authorities appointed at his discretion for the purpose of enforcement (VC, 2009, Wagner). For other examples, like Albania or Switzerland, see Venice Commission, CDL-INF(2001)9, page 19. Latvia has also introduced the duty of the Ministry of Justice, as the most appropriate institution, to coordinate a prompt and adequate implementation of decisions of the Constitutional Court (VC, CDL-JU(2008)028).

⁶⁴ ECtHR, *Karanovic v. B&H*, §19, 2007.

⁶⁵ *Ibid.*

⁶⁶ The right to an effective legal remedy is guaranteed by the Article 13 of the ECHR. According to the case-law of the ECtHR (see *Klass and Others v. Germany*, 1978, § 64), this means that an individual who has an arguable claim to be the victim of a violation of the rights set forth in the Convention should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. The ECtHR has highlighted in *Mirazović v. B&H* (2006), that „a domestic remedy for the non-enforcement of judgments is effective within the meaning of Article 35§1 of the Convention if it can be used either to prevent the alleged violation or its continuation, or to provide adequate redress for any violation that had already occurred...”. The ECtHR found, for example, in the case *Kačićothers v. Croatia*, 2008, that the constitutional complaint was not an effective legal remedy if the ordinary courts do not respect the time-limits set by the Constitutional Court for the adoption of judgments and the complainant did not receive sufficient damages for lengthy proceedings.

⁶⁷ Besides saving costs to the State of B&H, this would also be beneficial to the ECHR and the CoE who are repeatedly inviting the State Parties to support the subsidiary role of the European Court by ensuring that effective domestic remedies exist (See the Izmir Declaration, 2011).

⁶⁸ The obligation to pay non-pecuniary damages per diem and interests in case of enforcement delay was being regularly preventively included in the very wording of the decisions of the former HRCh and HRCom. The abandoning of this practice must thus be compensated by the introduction of an appropriate ex post remedy.

⁶⁹ In B&H, this more general approach could, besides providing a remedy for non-execution of the CCBH's decisions to citizens, have the additional advantage of disburdening the Court from the appellations directed towards protection from lengthy proceedings, which form by far the biggest share of its caseload creating a permanent backlog. It would in this case, however, be of crucial importance to educate the ordinary courts judges and to give them concrete directives as to the criteria established by the CCB&H's and the ECtHR's case-law when reviewing the justifiability of the protection claims. It would, in the interest of avoiding further human rights protection delays, also be important to assign to this kind of cases an urgent character, obliging the judges to give them priority over other ordinary/compensation cases, and to make the decisions executable in a limited time-frame.

“The special chambers have no power to examine whether the impugned non-enforcement amounted to a separate breach of the Convention or to award damages in this connection.”⁶⁴. In the cited case, the Court has thus found that the Government of B&H has “failed to establish that an appeal to the Constitutional Court is sufficiently ‘effective’ so as to be capable of providing the applicant with redress for his/her complaint”⁶⁵.

Introducing an effective legal remedy for non-execution of constitutional decisions at the disposal of claimants

Starting from this premise, the introduction of an effective legal remedy⁶⁶ for non-execution of CCBH's decisions, which would in the same time diminish the huge number of such cases being brought before the ECtHR on grounds of violation of Article 6 of the ECHR, is also to be considered (Conclusions from round table discussions, 2009)⁶⁷.

First of all, this could be done by the introduction of a new law or legislative provision previewing an obligation for the authorities in charge of enforcing the respective decisions to pay for pecuniary and non-pecuniary damages as well as interests in case of delay with execution, with a possibility for affected citizens to file a lawsuit within ordinary courts in this respect (N. Ademović, personal interview, December 7, 2010)⁶⁸. The Constitutional Court could also foresee in its ruling on failure to enforce a remedy for non-enforcement, such as (additional) monetary compensation (Conclusions from round table discussions, 2009). The positive impact of both alternatives could be a preventive effect since the authorities in question would probably want to avoid further negative financial consequences, which could thus accelerate the enforcement process.

For the affected citizens, the first solution would thereby have the advantage of giving them the possibility to get redress before ordinary courts in regular enforcement procedures, while the disadvantage would be an additional period of time spent waiting for a new decision to be adopted.

A comparative analysis of the neighboring countries of B&H and other countries with problems of execution of judgments and lengthy proceedings as well as of the European Court's case-law related thereto shows that an ideal option seems to be the introduction of a more general possibility for protection of the right to a trial within a reasonable time, encompassing a remedy on grounds of non-execution of judgments⁶⁹. This possibility is provided by way of introduction of a special Law on the protection of the right to fair trial within reasonable time like it has been done in Slovenia and Montenegro, the adoption of a special provision on this kind of protection in the Law on Courts like it is the case in Croatia and FYRM, or a Compensation Act like the one adopted in 2010 in Russia. All of them provide a possibility for the affected citizens to turn to an ordinary court (usually the court directly above the one acting in the case or the supreme court) requesting the acceleration of pending proceedings and/or to award any damages sustained to be paid by the responsible authority on the grounds of already occurred violations of the right to a fair trial⁷⁰.

⁷⁰ In *Scordino v. Italy*, 2006, §186, the ECtHR underlined that “...some States, such as Austria, Croatia, Spain, Poland and Slovakia, have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation.” For detailed information on these mechanisms, see Gorjanc-Prelevic, 2009.



The remedy for non-execution could thereby provide redress not only to the applicants affected by the two main groups of problems identified and explored in this study - the passivity of ordinary courts and governments in lengthy proceedings cases, but also by all the other non-executed decisions, including the missing persons cases.

Foreseeing an obligation to pay adequate default interest in case of delay in payment

An additional measure which could ensure the avoidance of the multiplication of judgments and additional time needed to process claims for damages can be to preview in the constitutional decisions an obligation to pay default interests per day in case the state authorities fail to pay the ordered sums after the expiry of the set dead-line. This was the case regarding the decisions of the European Court and Commission in Strasbourg, where payments ordered in judgments were often late, and where the Court and the Committee of Ministers redressed this problem by introducing from 1996 the practice of including in the very text of the decision an order to pay default interest after expiry of the usual 3-month payment dead-line. As a consequence, the execution of the decisions considerably improved⁷¹. This possibility was also extensively used by the former HRCh and HRCCom⁷².

Introducing the possibility of the CCBH to give authoritative interpretations of its decisions.

The decisions of the Constitutional Court have to be precise and clear in order to avoid misunderstandings on the required manner of its execution, as well as in order to minimize space for excuses for non-enforcement. This task has so far been achieved by the Court, which, respecting the separation of powers, renders decisions that are being enforceable without realistic space for confusion. However, in the case of the objective emergence of some uncertainties about the orders of the Court and the way they have to be implemented despite the previously mentioned fact, such as doubts concerning the orders on the legal remedies (Conclusions from round table discussions, 2009), the conflict of competencies in execution, or similar, the Court shall be given and use the possibility to provide a detailed and authoritative interpretation of its judgments (N. Ademović, personal interview, December 7, 2010) in its rulings on non-enforcement⁷³ or in a special ruling adopted for this purpose⁷⁴. This could eliminate any doubts appearing in the enforcement process, and provided there is will or necessary conditions to execute it, avoid further proceedings on the account of violation of the right to fair trial because of non-execution. Interpretation could be provided following the introduction of a new rule in the Rules of the Constitutional Court, foreseeing the possibility of request for clarification of the terms and the scope of judgments, or using the existing competence under Article 74§ 6 to determine the manner of enforcement of the decision in its rulings.

However, a possible danger of misuse of the possibility to request interpretation, as a method of gaining time and further delaying the enforcement, has to be borne in mind. The Court should thus retain the possibility to refuse this request, in case it estimates that the order in the respective decision was clear enough and immediately enforceable without difficulties. This procedure should also be applied to justifiable, isolated cases. In this way, together with a remedy providing for the payment of damages and interests delayed execution, space for manipulation by the authorities bound to enforce the decision should be effectively reduced. In addition to that, in case of a continued ignorance of a constitutional decision even after a given interpretation, the criminal prosecution of responsible officials would be significantly facilitated. The responsible authorities would also not have any objectively justified reasons to put forward in case of possible proceedings eventually initiated before the ECtHR⁷⁵.

⁷¹ For more information, see Sundberg, VC, 1999.

⁷² See, for example, the decision CH/98/375, 06 April 2005.

⁷³ An important example in this regard is the case *Milislavjević v. B&H* (ECtHR, 2009, §10-14), where the HRCCom gave a response to a request of the Federation of B&H to interpret a HRCh's order to allocate to the applicant an apartment, by explaining that in accordance with the decision that applicant should have been given ownership of an apartment and not a tenancy.

⁷⁴ Similarly, the CoE organs also clearly identified the problem of lack of clarity of some ECtHR's decision as detrimental to its prompt and proper execution. The Protocol No. 14 to the ECHR has in response introduced the Article 46, § 3 providing for a possibility to the CoE Committee of Ministers to refer the matter to the ECtHR for a ruling on the question of interpretation in cases of „problems of interpretation“.

⁷⁵ In this regard, see European Court's judgment *Šekerović v. B&H* (ECtHR, 2011, §§ 14, 30 and 40).

Coming back to the **authorities bound to enforce the decisions** and their excuses for not enforcing judgments of the CCBH, two solutions to the two main structural groups of enforcement problems seem appropriate.

Establishing a special Fund in the government budgets for the need of rapid and proper execution of CCBH’s decisions:

As regards the recurring situation of excessively lengthy execution of compensation orders by excuse of not having foreseen sufficient financial means, this reveals a structural budgetary problem which is also known in other countries, and which is mainly a consequence of discrepancy between the budgetary planning and the constantly occurring new government’s payment obligations, as well as of the lack of proper mechanisms which could promptly ensure additional funding (CoE Committee of Ministers, 2007). Payments resulting from final constitutional decisions, however, are to be regarded as mandatory expenses, which are to be timely paid despite current budgetary constraints. Having in mind that the compensation is usually awarded to citizens after a violation of their right to a trial within a reasonable time is established, it is even more unacceptable to make these citizens wait additionally for payments of the therefore awarded just satisfaction⁷⁶.

This is something that can be ensured by adequate planning and by reconstructing the budgetary systems of different levels of government in B&H, especially those of the entities, in order to make them able to respond to a human rights violation in a prompt manner (Conclusions from round table discussions, June 2009). According to Ademović (personal interview, December 7, 2010) the best solution would be to establish specific and separate Funds⁷⁷ for the two Entities, the Brčko District and the State of B&H in order to cope with budgetary shortcomings and, thereby, to ensure avoidance of unnecessary delays in execution of decisions. The Federal Fund could for example provide a possibility for the lower administrative units - Cantons and Municipalities - to withdraw money from this fund in order to properly and promptly enforce the decisions, with an obligation of possible reimbursement of the relevant sums and perhaps default interests. As the analysis of non-enforced decisions has shown that it is primary the canton-level that has a problem with promptly paying compensation of non-pecuniary damages, the stated would be particularly pertinent for the Federation of B&H. It would simply take away the space for unnecessary delays in executing a court decision and in return strengthen the due respect for the obligation of unexceptional proper and timely execution of constitutional orders.

An analysis of the constitutional decisions of the years 2008, 2009 and 2010 that had established human rights violation and have ordered compensation to be paid to the victims, show that the average sum yearly ordered in the Federation, including the Federal and all the Cantonal governments, has reached 59.350 KM⁷⁸. This average amount could be a reference point in determining the annual budget of the Fund to be established, but should also be kept adaptable to new yearly predictions of expected occurring costs. This option has the advantage of requiring minimal expenses while resulting in important benefits on the enforcement of the mentioned decisions.⁷⁹

Foreseeing the priority of proceedings in execution of the state Constitutional Court’s order before ordinary courts and adequate performance evaluation in this regard

As regards the ordinary courts not executing the CCBH’s decisions ordering them to urgently and without further delay expedite proceedings, it has to be emphasized that these are ex-

⁷⁶ As noted by the Venice Commission (2006), "...in order to be effective, a compensatory remedy must be accompanied by an adequate budgetary provision so that effect can be given to decisions of the court awarding compensation within six months... from the date when they become enforceable" (par. 162).

⁷⁷ Another alternative could also be the introduction of "special reserve budgetary lines". See the recommendations of the CoE Committee of Ministers Round table, 2007.

⁷⁸ In 2008 - 34.000 KM, in 2009- 69.162 KM, in 2010 - 80.740 KM. For a detailed analysis see the table from Appendix D.

⁷⁹ This governance-directed approach supports in fact the repeatedly presented thesis that Bosnia must, in order to be able to follow the rule of law, first become a more functional state (See for ex. Ademović, in CIN, 2009).



clusively first and second instance courts. Starting from the above described premise that the courts cannot justify their failure to speed up and put to an end proceedings following an explicit order of the Constitutional Court by the overburdening of its respective institution by a large number of pending cases, the courts shall be obliged to give priority to proceedings and execution of these orders over all other pending cases. This obligation should be foreseen in the rules of internal procedure of ordinary courts or in the Procedure Codes, which do already foresee special urgent proceedings, for example for labor law disputes. A special responsibility should be placed on the presidents of ordinary courts to ensure that the judges of the respective courts whose work they are managing are acting urgently in these cases. Additionally, the performance of individual judges and courts in these matters should be adequately assessed by the presidents of courts/ the High Judicial and Prosecutorial Office of BiH (HJPC), as part of their annual performance evaluation.

6. Conclusion

It is a well known fact that the execution of judgments is an instrument of exceptional significance for the effectiveness of the entire legal order of a country. Generally speaking, one can conclude that the Constitutional Court of B&H, despite being a relatively young institution and despite difficult socio-political conditions under which it is performing its duty, has succeeded in building up its authority through its well-reasoned judgments with strong argumentation. However, the statistics make it obvious that certain of these decisions are not being implemented in a prompt and proper manner despite their undisputed quality, in particular because of aforementioned complex socio-political and economic circumstances.

This state of affairs is especially favored by the lack of a set of efficient mechanisms for the execution of these decisions, which leaves the responsible authorities open space for passive behavior in following judicial orders. So are certain governments bound to pay compensation to victims of excessively lengthy proceedings delaying the payments with the excuse of not having sufficient financial means envisaged in their budgets. Ordinary courts ordered to speed-up and to conclude pending lengthy proceedings are not acting upon the orders with the explanation of being overburdened with other cases or similar excuses. In some cases the responsible authorities do complain of a lack of clarity of the decision, which can occur for example for the reason of the complex government structure in B&H, leading to negative conflicts of competence. This negative practice makes it clear that urgent steps need to be taken to address the identified insufficiencies and prevent their further detrimental effects.

Setting aside the question of their justifiability, the aforementioned repeatedly offered explanations for not executing Constitutional Court's decisions have to be primarily considered while exploring the most appropriate means for the improvement of their implementation. Taking also into account the current socio-political context in B&H, where large, lengthy and costly reforms would seem difficult to handle, an imperative seems to remain realistic in the choice of feasible means which are to prevent non-execution or delayed execution and to provide a possibility of redress for the case a decision stays non-executed despite all the undertaken efforts.

As part of an effective enforcement strategy, a combined pressure of small, but effective steps arises as an ideal action to be taken - "procedural rules framed sufficiently precise so as to avoid leaving the opening for non-execution" (VC, 2001).

Small Steps, Big Effects:

Preventive means

- *Providing in the Constitutional Court's decisions the obligation to pay adequate default interest in case of delay in payment*
- *Establishing a special Fund in the government budget of the Federation of B&H providing the Federal and the Cantonal Governments with necessary financial means for the need of prompt execution of CCBH's decisions.*
- *Foreseeing an obligation of ordinary courts to give priority to proceedings in execution of state Constitutional Court's orders and adequate evaluation of judges' and courts' performance in this regard.*
- *The CCBH should, in case of enforcement difficulties, and upon request, give authoritative interpretation of its decisions*

Remedies

- *Introducing an effective legal remedy for non-execution at the disposal of affected citizens*

Based on the analysis of the main problems identified the proposed recommendations show the possibility of taking a set of small steps, as a part of a systematic approach to achieving the goal of optimizing the Constitutional Court's decisions enforcement. These steps, taken all together, could provide for a minimization of the number of unimplemented decisions and an adequate redress for affected citizens, while their introduction would have the advantage of not being costly and not requiring huge reform processes local actors are currently not inclined to.

It must in the end once again be underlined that the compliance with the decisions of the CCBH depends not only on legal but also on political and sociological factors, whereby the general economic conditions, the state of democratic development, and the overall respect for the rule of law are of crucial importance and unfortunately often out of scope of some concrete "magic stick" enforcement mechanism. But it is the introduction of combined small technical steps which offers a possibility of minimizing space for abuse and thus in the long term positive influence in turn on these very factors.

A prompt and qualitative implementation of the decisions of the CCBH is essential to the protection of human rights, it favors good governance and enhances respect of the rule of law, fosters the authority of the Court and the proper functioning of the country's legal system, positively influences the accountability of local stakeholders and last, but not least, it saves B&H from unnecessary additional costs which can occur because of non-enforcement. These are big effects for the proposed small steps. And they are definitely worth working on.



APPENDICES

Legal Framework Governing the Execution of Decisions of the Constitutional Court of B&H

Appendix A: Relevant Text of the Constitution of Bosnia and Herzegovina

Article VI: Constitutional Court

1. Composition

The Constitutional Court of Bosnia and Herzegovina shall have nine members.

- a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency.
- b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.
- c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges.
- d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. Procedures

- a) A majority of all members of the Court shall constitute a quorum.
- b) The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. Jurisdiction

The Constitutional Court shall uphold this Constitution.

- a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:
 - Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.
 - Whether any provision of an Entity's constitution or law is consistent with this Constitution.

Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

- b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.
- c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

4. Decisions

Decisions of the Constitutional Court shall be final and binding.

Appendix B:

Relevant Text of the Rules of the Constitutional Court of B&H

Enforcement of Decisions

Article 74

1. The decisions of the Constitutional Court shall be final and binding. Every physical and legal person shall be obligated to respect them.
2. All bodies shall be obligated to enforce the decisions of the Constitutional Court within their competences established by the Constitution and law.
3. Every person who has a legal interest may seek enforcement of a decision of the Constitutional Court.
4. The Constitutional Court may specify in its decision the manner of and time-limit for the enforcement of the decision of the Constitutional Court.
5. Within the time-limit referred to in paragraph 4 of this Article, the body obligated to enforce the decision of the Constitutional Court shall be obligated to submit information about the measures taken to enforce the decision of the Constitutional Court, as required by the decision.
6. In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court.

Article 75

Enforcement of final or legally binding individual acts which have been enacted in accordance with the provisions that ceased to be in force pursuant to Article 63 of these Rules can neither be ordered nor carried out. The enforcement shall be discontinued in the event it has commenced.

Article 76

1. If it is established that the consequences of the application of provisions which were declared incompatible cannot be remedied by altering an individual act, the Constitutional



Court may, at the request of an interested party, decide to remedy the consequences by ordering restitutio in integrum, compensation of damage or in any other way.

2. In a decision granting an appeal, the Constitutional Court may exceptionally award compensation for non-pecuniary damages on the appellant's request.

Appendix C:

Relevant text of the Criminal Code of B&H

Failure to Enforce Decisions of the Constitutional Court of Bosnia and Herzegovina, Court of Bosnia and Herzegovina and Human Rights Chamber

Article 239

An official of the State, the Entities or the Brčko District who refuses to enforce a final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights, or who prevents the enforcement of any such decision, or who frustrates the enforcement of any such decision in some other way, shall be punished by imprisonment for a term between six months and five years.

Appendix D:

Compensation orders (for non-pecuniary damages) to different governments in BiH from 2008-2010 (in KM)

	2008	2009	2010
Brčko Distrikt	0	2000	0
Republika Srpska	37900	20900	53575
Federation of BiH	900	7950	9100
Council of Ministers of BiH	150	0	0

	2008	2009	2010
Una-Sana Canton	6750	24250	33340
Sarajevo Canton	6850	15587,5	14550
Herzegovina-Neretva Canton	16200	8550	2700
Tuzla Canton	0	5100	8600
Zenica-Doboj Canton	0	2250	7050
Posavina Canton	0	3600	3300
West-Herzegovina Canton	0	1500	2100
Middle-Bosnia Canton	900	0	0
Canton 10	0	375	0

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