REPUBLIC OF SRPSKA
PRESIDENT OF THE REPUBLIC

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His Excellency Ban Ki-Moon
Secretary General
The United Nations
1 United Nations Plaza
New York, New York, USA 10017-3515

Dear Mr. Secretary-General:

To assist the Security Council in its 12 November debate on Bosnia and Herzegovina (BiH), Republika Srpska, a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached Tenth Report to the UN Security Council.

Section I of the report (supplemented by Attachment 1) explains why the Office of the High Representative (OHR)—the main barrier to BiH's political progress and European integration—needs to close. The High Representative's claim to virtually unlimited political powers over BiH is legally untenable, and his continued presence stifles BiH's democratic development. Section II of the report describes the RS Government's efforts to strengthen the RS economy through the enactment of far-reaching economic reforms to improve its business environment and through the continuous alignment of its laws and regulations with EU standards. Next, Section III explains why the decentralized BiH structure mandated in the BiH Constitution (Annex 4 of the Dayton Accords) is essential to BiH's future and fully consistent with EU membership. Section IV examines how deep political divisions in BiH's other entity, the Federation of Bosnia and Herzegovina—as well as obstructions by Bosniak parties—are blocking progress at the BiH level. Section V of the report (supplemented by Attachment 2) demonstrates the need to reform BiH's justice institutions to meet European standards, in spite of these institutions' resistance to change. Finally, section VI explains that BiH's deeply rooted peace leaves no justification for the Security Council to continue acting under Chapter VII of the UN Charter.

I would ask that this letter, the report, and its two attachments be distributed to the Security Council's members. Should you or any Security Council member require information beyond what is provided in the report or have any questions regarding its contents, I would be pleased to provide you with it.

Yours sincerely,

Milorad Dodik

PRESIDENT OF REPUBLIKA SRPSKA

Republika Srpska's Tenth Report to the UN Security Council

November 2013

Republika Srpska's Tenth Report to the UN Security Council

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Introduction and Executive Summary

Republika Srpska (RS), a party to all of the annexes that comprise the Dayton Accords, respectfully submits this 10th Report to the UN Security Council. The report examines developments since the 9th Report and outlines the RS Government's views on some key issues facing Bosnia and Herzegovina (BiH). The RS's central goal is improving the economic condition of its citizens. To this end, the RS is pursuing the end of the High Representative's counterproductive role in BiH, the enactment of economic and judicial reforms, the advancement of EU integration, and the protection of BiH's decentralized constitutional structure.

I. The OHR's unlawful and counterproductive role must end.

The Office of the High Representative (OHR), the most important barrier to BiH's political development and its progress toward the EU, must close at last. The so-called "Bonn Powers" claimed by the High Representative are plainly contrary to the Dayton Accords and the civil and political rights of BiH citizens. Moreover, it is becoming widely recognized that the presence of a High Representative claiming such dictatorial authorities undermines the consensus-building and compromise that are essential for democratic states to function. Despite the growing recognition of the OHR's corrosive effects on BiH's political development, the current High Representative, Amb. Valentin Inzko, has continued to interfere frequently with BiH's constitutional institutions. Although many in the international community are concluding that the OHR's role in BiH should end, some continue to assert that BiH should first fulfill the so-called "5+2" objectives and conditions identified by the *ad hoc* Peace Implementation Council (PIC) in 2008. But the 5+2 formula is inherently counterproductive and unworkable because it ensures that political parties that consider the OHR an ally will block the fulfillment of the last remaining conditions for its closure.

II. The RS is pressing ahead with economic and EU-integration reforms.

In order to improve the economic situation of its citizens, the RS is continuing to implement a wide range of reforms, deepening the reform process that has dramatically improved its business environment. In July, for example, the RS enacted a sweeping set of 13 laws to remove barriers to business. The RS has also fulfilled all IMF requirements to continue receiving loans. As part of the RS's consistent commitment to the process of European integration for BiH, it is continuing the practice started in 2007, harmonizing intensely its legislation with *acquis communautaire*. The RS's efforts to improve its business environment and attract investment are paying off with major new projects that will create jobs and economic growth.

III. BiH must retain the decentralized structure of the Dayton Constitution.

Decentralized governmental structures have had great success in improving administrative efficiency, particularly in countries that, like BiH, have deep regional differences. It is BiH's decentralized structure that has enabled the RS to have, unlike the FBiH, a fully functional government and to enact far-reaching economic reforms to encourage job creation and economic growth. Another reason BiH must keep its decentralized structure is the inefficiency, dysfunction, non-transparency, irrationality, and unaccountability of BiH-level institutions.

Moreover, as the EU has made clear, BiH's decentralized constitutional structure is not a barrier to EU integration.

IV. FBiH conflicts are holding back BiH's progress.

Conflicts among the parties in the Federation of Bosnia and Herzegovina (FBiH), BiH's other entity, as well as obstructions by Bosniak parties, continue to block most political progress at the BiH level. A crisis that began with the May 2012 breakdown in the FBiH's governing coalition continues to largely paralyze the FBiH government and hamper BiH-level reforms. In an important milestone for EU integration, BiH began its first census since 1991 on 1 October. But other important measures remain blocked by the failure of FBiH parties to agree or by obstruction by Bosniak parties. There has been significant progress in talks on the establishment of a coordination mechanism for EU integration and on the implementation of the European Court of Human Rights' judgment in *Sejdić-Finci v. BiH*. The only remaining issues preventing establishment of the coordination mechanism and implementation of *Sejdić-Finci* are matters that require agreement between the FBiH's Bosniak and Croat parties. Although both houses of the BiH Parliamentary Assembly voted to approve constitutionally required changes to BiH's personal identification number law in July, the law's implementation was blocked by a parliamentary maneuver by the Bosniak caucus of the House of Peoples.

V. BiH justice system institutions are resisting the adoption of European standards.

As the RS pursues judicial reform through the EU's Structured Dialogue on Justice, BiH's judicial institutions are resisting the changes necessary to meet European standards. The Court of BiH is fighting to thwart reforms to its enabling law, including necessary amendments to a jurisdictional provision that experts have said violates European standards. Recently, the Court of BiH has even reacted with defiance to a judgment of the European Court of Human Rights. Though BiH's system for appointing judges and prosecutors violates European standards, BiH's High Judicial and Prosecutorial Council is resisting all reforms that would curtail its sweeping power. In addition, the BiH Prosecutor's Office violates European standards with its abuses of power and its failure to prosecute many of the worst war crimes against Serbs. In addition, there is a troubling lack of transparency throughout the BiH judicial system. BiH's judicial institutions should cooperate with the reforms required to meet European standards.

VI. The Security Council should end the application of Chapter VII, which has no factual or legal basis.

There is a strong international consensus that BiH does not constitute a threat to peace. The situation in BiH in no way warrants the determination required for the UN Security Council to act under Chapter VII of the UN Charter: that there exists a "threat to the peace, breach of the peace, or act of aggression." After nearly 18 years of peace and progress in BiH, there is simply no justification for the UN Security Council to continue acting under Chapter VII.

I. The OHR's unlawful and counterproductive role must end.

1. It is long past time for the OHR to close. The High Representative's claim to extraconstitutional authority over BiH is irreconcilable with his legal mandate and the human rights of BiH citizens. Moreover, the High Representative's role in BiH fuels the country's political dysfunction by undermining the culture of compromise necessary to bridge its divisions. For a more detailed exposition of these points, please see Attachment 1 to this report.

A. The High Representative's continuing claim to dictatorial powers is legally indefensible.

2. The High Representative continues to claim virtually unlimited power over BiH and its people, such as the authority to decree laws, depose elected officials, and punish individuals without any form of due process. The obvious illegality of these so-called "Bonn Powers" is clear to anyone who has read the High Representative's strictly limited mandate under Annex 10 of the Dayton Accords or is familiar with BiH citizens' civil and political rights under the BiH Constitution and international conventions. Annex 10 cannot conceivably be read to empower the High Representative to substitute himself for a legislature, elected official, or court of law.

3. The term "Bonn Powers" originates from a statement issued two years after the Dayton Accords by the PIC, an *ad-hoc* collection of countries and organizations, at a conference in Bonn, Germany. The PIC's statement did not purport to expand the authority conferred on the High Representative under the Dayton Accords, nor could it, of course—the PIC lacked the authority to rewrite a legally binding treaty. Instead, the PIC's statement accepted the High Representative's ludicrous interpretation of Annex 10 as giving him authority to make "binding decisions." According to former OHR attorney Matthew Parish, the PIC's Bonn statement "ran quite contrary to the spirit and text of Annex 10 to the [Dayton Accords], and was *legally quite indefensible*."[1]

4. Apart from their lack of a legal basis, the dictatorial authorities claimed by the High Representative are obviously incompatible with the human rights of BiH citizens, such as the right to a fair trial under the European Convention on Human Rights[2] and the right to free elections under Protocol No. 1 of the European Convention.[3] For the remainder of the OHR's tenure in BiH, the High Representative must observe the legal limits of his position.

B. The OHR undermines democratic consensus-building.

5. The OHR's presence in BiH undermines the spirit of compromise that is essential to progress in any democracy—and particularly a multinational state like BiH. The presence of a High Representative who claims autocratic powers encourages parties to adopt maximalist positions in hopes of enlisting his help, whether through formal decrees, pressure, or other forms of interference. Instead of doing the hard work of negotiation and compromise, some parties—

[1] Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007, p. 14 (emphasis added).

[2] European Convention on Human Rights, art. 6.

[3] Protocol, European Convention on Human Rights, art. 3.

particularly the Bosniak parties—often appeal to the High Representative to dictate a "solution." The International Crisis Group wrote in a November 2009 report that one of the two main Bosniak parties considers the OHR its "main negotiating leverage."[4]

6. The Crisis Group called for OHR's closure,[5] explaining:

> The OHR has become more a part of Bosnia's political disputes than a facilitator of solutions, and the High Representative's executive (Bonn) powers are no longer effective. The OHR is now a non-democratic dispute resolution mechanism, and that dispute resolution role should now pass to Bosnia's domestic institutions with the temporary and non-executive assistance of the EUSR.[6]

7. The PIC Steering Board has shown increasing concern that some political actors in BiH expect the OHR intervene to solve their disputes. But such dependence is inevitable for as long as the OHR claims "Bonn Powers." In March 2013, the Bosniak SDP party demanded that the OHR impose a "solution" in the FBiH's current political crisis. The PIC Steering Board wisely rejected this demand, saying, "Authorities must stop expecting the International Community to do their job for them and instead explain how they intend to move forward . . . ."[7] But the OHR's long history of imposing "solutions," combined with OHR's continued claim that it possesses "Bonn Powers," ensures that this expectation of foreign intervention will continue to undermine the culture of compromise that is so essential to BiH's future.

8. Amb. Inzko has tried to disclaim any responsibility for BiH's dysfunction, ignoring the perverse effect the OHR's actions—and very presence—have on BiH's political development. The FBiH—and BiH as a whole—continue to suffer through a political crisis triggered by a decree he issued in 2011. In that year, the Bosniak SDP party, acting in flagrant violation of the FBiH Constitution, formed a new FBiH Government that marginalized the Croats. In a March 2011 decision, the Central Election Commission (CEC) rightly declared the new government's formation unlawful and annulled it. Amb. Inzko, however, quickly overruled the CEC's decision, effectively imposing the new, illegally-formed government on the FBiH. This action is widely considered—both inside and outside BiH—to have been unlawful and politically disastrous. This solution, as the President of the International Crisis Group wrote, "undermined state bodies and the rule of law."[8] It left the FBiH with a poisoned politics from which it has yet to recover. The governing coalition Amb. Inzko imposed on the FBiH in 2011 collapsed little more than a year later, and stalemate has prevailed ever since, stalling progress in the FBiH as well as at the BiH level.

C. The High Representative continues to interfere with BiH's constitutional

[4] International Crisis Group, *Bosnia's Dual Crisis*, 12 Nov. 2009, pp. 5-6.

[5] *Id*. at p. 16.

[6] *Id*. at p. 1.

[7] Statement by the Ambassadors of the Steering Board of the Peace Implementation Council, 26 March 2013.

[8] Letter from Louise Arbour, President and CEO of International Crisis Group, to PIC Steering Board Ambassadors, 2 May 2011.

governance

9. Despite the growing understanding of the High Representative's harmful effect on BiH's political development, Amb. Inzko has continued, in recent months, to interfere with BiH's constitutional processes.

10. In June, for example, Amb. Inzko injected himself deeply into a dispute in the BiH Parliamentary Assembly over the Law on Personal Identification Number (PIN) of Citizens, even threatening to decree his own "solution." After protestors angry at the failure to pass a law blockaded the Parliamentary Assembly building, confining hundreds of people there against their will, Amb. Inzko promised the blockaders that he would call a meeting of the PIC Steering Board Ambassadors.[9] He threatened to decree a "solution," but the PIC Ambassadors wisely rejected this idea. It was only after it became clear that the PIC would not allow the High Representative to intervene that both houses of the Parliamentary Assembly voted to approve the necessary law. When the Bosniak SDA party used a procedural maneuver to block—or at least delay—the PIN law's implementation, Amb. Inzko was uncharacteristically silent.

11. Amb. Inzko is also interfering with resolution of the longstanding controversy over state and defense property. Despite a March 2012 agreement by BiH's main parties to resolve these issues together, Amb. Inzko is taking the side of Bosniak parties who backed away from the March 2012 agreement to demand enactment of a law on military property alone.

12. Amb. Inzko has become a major political ally of Judge Meddžida Kreso, the highly outspoken President of the Court of BiH. Judge Kreso, who has long been a controversial figure because of the Court of BiH's performance and her media comments, brought further criticism in July when her court issued a press release reacting defiantly to a judgment of the European Court of Human Rights. A week after BiH's High Judicial and Prosecutorial Council issued a statement admonishing Judge Kreso and the BiH Chief Prosecutor over their media comments,[10] Amb. Inzko met with Judge Kreso and issued a press release criticizing her detractors.

13. Amb. Inzko dedicated a June speech in Dublin to seeking support for more heavy-handed OHR interference in BiH's constitutional governance.[11] Though his words were vague, his message was clear. For example, Amb. Inzko called for "[c]onfronting more directly political parties and actors" who, in his view, "undermine reforms and . . . promote division." That means taking action against democratic parties and leaders with whom he disagrees. Amb. Inzko also urged "[p]reventing a roll-back of previous actions by reaffirming the role of the OHR and EUFOR in maintaining the progress achieved in the post-Dayton period." That means telling BiH, under the threat of force, that its constitutional bodies may not reconsider laws that were imposed by High Representatives. Amazingly, Amb. Inzko urged a reconsideration of "our policy of the last seven years,"[12] suggesting a return to something like the era that ended seven

[9] Office of the High Representative, *Elected Officials of BiH Must Live up to Their Responsibilities*, 11 June 2013.

[10] Statement of the HJPC BiH, posted at www.hjpc.ba, 26 Sept. 2013 (emphasis added).

[11] Valentin Inzko, *Rethinking the International Community's Approach*, Address to EU parliamentarians in Dublin, Ireland, 25 June 2013 ("Dublin Speech").

[12] Dublin Speech.

years ago. That was the era when High Representative Paddy Ashdown ruled BiH like an absolute monarch, decreeing hundreds of statutes and other edicts, deposing freely elected officials who displeased him, and imposing extrajudicial punishments on whomever he chose. Amb. Inzko's renewed threats to intervene directly in BiH's governance only exacerbate the detrimental effect the OHR has on BiH's politics. The international community should reject Amb. Inzko's extralegal threats against BiH's democratic institutions and acknowledge the OHR's leading role in creating BiH's political dysfunction. For BiH to move forward, the High Representative's claim to autocratic powers needs to end once and for all.

II. The RS is pressing ahead with economic and EU-integration reforms.

14. Since the its last report to the Security Council in May, the RS has continued to move forward on reforms to improve its economy and bring the RS closer to Europe. Continuing past efforts to strengthen the RS economy, the RS enacted a broad slate of reforms making it easier to do business. It also continued to enact legislation improving RS laws' alignment with EU standards. The RS's business-friendly reforms are helping to attract investments that create jobs and brighten the RS's economic prospects.

A. Economic reforms

15. In recent months, the RS has continued to take important steps to improve its business climate. In July 2013, for instance, the RS National Assembly approved a sweeping set of 13 laws to remove barriers to business.[13] The set of newly implemented reforms includes enactment of the new Law on Business Registration and improvements to other laws, such as the Law on Foreign Investment, the Law on Companies, the Law on Commerce, the Law on Administrative Fees, the Law on Court Fees, and the Law on Tax Procedure.[14]

16. Through this set of laws, court and administrative fees required for opening a business were abolished and notary fees and procedures were decreased, at both the local and the entity level. A one-stop shop business registration system will begin operating on 1 December 2013. This reform, besides its advantages for the business community, has a goal of creation a single and integrated register of businesses in Republika Srpska. That way, all key institutions of the system will have a better insight into the work of existing businesses as a basis for analysis and new reform activities. The International Monetary Fund has given its full support to the RS's business registration reforms.[15] The European Commission's 2013 Progress Report for BiH observed that in the RS, "an ambitious reform—embracing amendments to 20 legal acts in the entity—introducing a one-stop-shop business registration system has been launched targeting significant reduction of registration time (from 23 to 3 days), number of required procedures (from 11 to 5) and business start-up costs (from €500-750 to €200)."

17. Another reform to improve the RS's economic situation will be a new labor law, which

[13] *Approved set of laws for removal of barriers to business in Republic of Srpska*, Business Friendly Certificate South East Europe, 30 July 2013.

[14] *Id*.

[15] *Prime Minister Cvijanovic met with the IMF Delegation*, Government of the Republic of Srpska, 17 May 2013.

the RS Minister of Finance recently said he expects the RS will enact by the end of this year.[16]

18. On 29 August 2013, two RS Government ministries, the RS Chamber of Commerce, the RS Association of Local Authorities, and the Banja Luka Development Agency EDA signed an agreement establishing the Business Friendly Network of Republika Srpska, part of a regional project of certification of municipalities with positive business environments.[17] The certification project evaluates whether, and to what extent, a municipality has met standards for a favorable business environment, and issues recommendations for improvement. In the pilot stage of project, the RS city of Prijedor has already received a business-friendly certification, and the RS's largest city, Banja Luka, is expected to earn such a certification by the end of the year.[18]

19. The RS has continued to improve its economic prospects by moving forward with privatization. According to a July 2013 report by the EU Commission, the "privatization process is relatively well advanced in Republika Srpska," and "state-owned capital of 35 companies will be offered for sale by the RS government in the course of 2013." The RS Government and other partners recently sold the company Energoinvest – Rasklopna oprema a.d for 7.6 million KM.[19]

20. In a July 2013 report, the EU Commission also praised the RS's 2012 pension system reform, noting that it "is paying off."[20] According to the EU Commission report:

> The new Pension Law in Republika Srpska, aimed at the improvement of the long-term sustainability of the public finances of the Entity, is estimated to have generated savings worth KM 25 million since its entry into force in January 2012. The law introduced a credit system, which is expected to stimulate longer working careers, established penalties for early retirement, and increased retirement age. This way, apart from the direct budget effects, the pension system reform in Republika Srpska is projected to have a positive impact on the labour market as well.[21]

21. Activities toward foreign investors were intensified. Several business forums were organized at which significant interest for investment to Republika Srpska was shown. A Republika Srpska – Azerbaijan business forum took place on 18 February. The commercial delegation of Azerbaijan was led by Minister of Economic Development Mr. Shain Mustafayev, who was accompanied by Deputy Minister of Foreign Affairs Mr. Khalaf Khalafov and Ambassador Eldar Hasanov. About 20 Azerbaijani companies interested in commercial cooperation with Republika Srpska were present. Final negotiations over concrete investments in

[16] До краја године нови закон о раду, SRNA, 22 Sept. 2013.

[17] *The Business Friendly Network of the Republic of Srpska established*, Business Friendly Certificate South East Europe, 29 Aug. 2013.

[18] *Eight cities and municipalities received the regional Business Friendly Certificate*, Business Friendly Certificate South East Europe, 14 June 2013.

[19] Цвијановићева задовољна продајом, SRNA, 2 Sept. 2013.

[20] EC Assessment, p. 27.

[21] *Id*.

Republika Srpska are ongoing now. Highest-level talks with investors took place during visits to Greece and Austria and at a business forum in London. For the second time, Republika Srpska introduced itself with its investment offer at the large investment fair in Munich, EXPO REAL 2013.

22. The delegation of the Government of Republika Srpska, led by Prime Minister Željka Cvijanović, visited the United States. During this visit, considerable attention was paid to talks with potential investors. Several important business forums will be prepared in the next month.

23. The efforts to make the processes in Republika Srpska transparent are being made. For this purpose, the Government of Republika Srpska, in cooperation with IFC/WB signed all investment incentives it awards and published them on its website www.investsrpska.net.

24. Other processes with a goal of increase of commercial investment inflow are also taking place. The program of post-investment support to existing investors implemented by the Government of Republika Srpska, and strengthening the cooperation aimed at protection of existing and attracting new investments with the local communities.

B. Alignment of laws with EU standards

25. The RS has long led the way for BiH in harmonizing its laws with the EU's *acquis communautaire*. According to European Commission reports, the RS has significantly outpaced the FBiH in achieving the reforms required by the SAA and Interim Agreement. Under the decentralized structure established by the BiH Constitution, the vast majority of requirements related to harmonization of laws with the EU's *acquis* must be implemented at the entity level. The RS Government has subjected more than 1,300 laws, bylaws, and general acts to this procedure since 2007, and the RS continues steadily to more closely align RS law with EU standards.

26. In its newly published 2013 Progress Report for BiH, the European Commission wrote, "The Government of Republika Srpska has remained engaged in approximation of draft legislation with the *acquis*. Its administrative capacity to monitor EU-related legislation remains satisfactory."[22] The Progress Report further noted:

> In Republika Srpska, the National Assembly's EU Integration Committee has cooperated closely with the government in assessing the level of compliance of proposed legislation with the *acquis*. The Assembly has developed a strategic plan for administrative services covering the period 2013-2017 and started with its implementation, with the aim of improving the quality of its work and cooperation with other institutions.[23]

27. Since the RS's last report to the Security Council in May, the RS National Assembly has enacted legislation implementing many solutions provided by the European Union's *acquis,*

[22] European Commission, Bosnia and Herzegovina 2013 Progress Report, 16 Oct. 2012, p. 9.

[23] *Id*. at p. 8.

including: the Criminal Code, the Civil Procedure Code, the Law on the Banking Agency, the Law on Foreign Investment, the Company Law, the Trade Law, the Law on Development of Small and Medium Enterprises, the Law on Energy Efficiency, the Law on Takeover of Joint Stock Companies, the Law on Animal by-products, the Law on Agency for Intermediary, IT, and Financial Services, the Law on Electronic Signature, the Law on Banks, the Law on Tourism, the Hospitality Law, the Law on Crafts and Entrepreneurial Activities, the Law on Court Fees, the Law on Classification of Activities, the Law on Special Modalities of Payment of the Tax Debt, and the Law on Registration of Businesses.

28. The RS has consistently expressed its willingness to provide any necessary assistance to the BiH level and the FBiH in the process of fulfilling EU-related obligations.

C. Implementation of IMF requirements to permit continuation of assistance to BiH

29. The RS has continued to fulfill all of its commitments to the IMF, doing its part to ensure that BiH is able to benefit from IMF loans. In a September meeting, IMF representatives noted that the RS had met all of the conditions that it had undertaken in its supplementary letter of intent.[24] The IMF has also praised the RS's execution of its budget in the first six months of 2013.[25]

D. Economic development

30. The RS Government's efforts to improve the RS's business environment and attract foreign investment have been bearing fruit.

31. Energy is a central component of the RS's economic future, and major projects to harness the RS's energy potential, create new jobs, and bring economic growth are moving forward rapidly.

32. For example, Comsar Energy Company, a Russian firm, recently began work on a major new power plant project that will be a long-term boon to the RS's economy. In September, RS Prime Minister Željka Cvijanović said that preparatory work for the construction of Bloc 3 of the Ugljevik Thermal Power Plant has begun and that Comsar has already invested 50 million euros.[26] The total cost of the project is estimated at €750 million.

33. In addition, Comsar plans to invest 200 million euros in the Mršovo hydroelectric power station.[27] In September, Comsar announced that the construction of the dam at the Mršovo hydroelectric plant would start in the summer of 2014.[28]

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[24] *SRNA Review of News (III)*, SRNA, 4 Sept. 2013.

[25] *Rooden: Economic recovery in Srpska and BiH*, SRNA, 6 Sept. 2013.

[26] *Preparatory work on the construction of Bloc 3 has started*, SRNA, 10 Sept. 2013.

[27] *Id*.

[28] *Construction of dam for Hydroelectric Power Station Mrsovo in Republika Srpska to begin in 2014*, ENERGETIKA.NET, 16 Sept. 2013.

34. Also in September, Prime Minister Cvijanović stated that the RS Government signed a framework agreement with China Power Engineering Consulting Group Corporation (CPECC) regarding a strategic partnership on infrastructure projects in the RS.[29] The framework agreement provides the basis for CPECC to technically prepare and standardize projects in the RS in order to enable Chinese investment.[30] The projects will later have the support of the Chinese Development Bank.[31]

35. In June, RS President Milorad Dodik and Alexander Medvedev of Gazprom signed a roadmap for the implementation of energy projects in the RS as part of the South Stream gas pipeline project.[32] South Stream's route through the RS has been approved, and construction is expected to begin in mid-2014.[33] The project envisages not just pipelines but also gas power plants. On 27 September, the RS Government adopted legislation governing the regulatory framework for land expropriations necessary for the implementation of this project.[34]

36. On 30 May, the company Jadran-naftagas drilled oil exploration wells under a concession agreement with the RS.[35] Jadran-naftagas's project for oil and gas prospecting and exploitation in Republika Srpska has a total value of €172 million.[36]

37. On 21 May, RS President Milorad Dodik and EFT Group Chairman Vuk Hamovic laid a cornerstone marking the official start of construction of a 300 megawatt thermal power plant in Doboj. There to help them mark the event were the ambassadors of the UK and China, representatives of energy companies from BiH and abroad, and local officials.[37] The power plant, which is expected to begin generating electricity in early 2016, is valued at an estimated €550 million.[38] Its construction is expected to employ 800 workers from BiH.[39] In addition, the power plant project is expected to provide permanent employment for about 1000 people, including in the nearby mine.[40]

38. The RS Government's efforts to develop the RS's textile industry are also showing success. A textile factory recently opened that plans to hire 2,500 workers by 2014, and the

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[29] *Government of Republika Srpska signs protocol with China's CPECC*, ENERGETIKA.NET, 12 Sept. 2013.

[30] *Id*.

[31] *Id*.

[32] *Gazprom, Republika Srpska Sign Roadmap on South Stream*, LNG WORLD NEWS, 17 June 2013.

[33] *South Stream's route through Republika Srpska approved*, ENERGETIKA.NET, 14 June 2013.

[34] *Government of Republika Srpska drafting South Stream regulatory framework*, ENERGETIKA.NET, 27 Sept. 2013.

[35] *Oil prospecting in Republika Srpska continues with the first well*, ENERGETIKA.NET, 30 May 2013.

[36] *Id.*

[37] *EFT Group lays cornerstone for TPP Stanari*, ENERGETIKA.NET, 21 May 2013.

[38] *In Republika Srpska, foundation stone for Thermal Power Plant Stanari to be laid on 8 May*, ENERGETIKA.NET, 7 March 2013.

[39] *Id.*

[40] *Id.*

factory has buyers for its products for the next five years.[41] Three additional factories will also open soon.

III. The Dayton Constitution mandates a highly decentralized structure for BiH. This structure is essential for BiH stability and efficient governance.

39. Decentralization is beneficial to administrative efficiency, and it has been used successfully in widely varied countries around the world. Institutions can usually deliver services to citizens most efficiently when they are at the levels closest to the citizens they serve. Decentralization also supports stability in states like BiH where democracy must be accompanied by safeguards for constituencies with strongly diverse views on political and economic policies.

40. There are many examples of successful decentralized states including Spain, Belgium, Italy, Switzerland, and Canada, among many others. Switzerland, for example, is widely admired for the effectiveness of its government institutions. It protects the interests of its diverse language and dialect groups in part by vesting broad autonomy in 26 cantons. The autonomy of Swiss cantons includes their right to conclude international treaties. More and more governments in Europe have emphasized that it is decentralization, not centralization, that leads to an increase of efficiency.

A. Decentralization has enabled the RS to enact an ambitious program of reform.

41. As detailed in Section II, above, the RS has, in recent years, pursued a strong program of reform to improve its economic competitiveness. The RS could not make the reforms that it has made—and continues to make—without BiH's decentralized structure. The FBiH, in contrast to the RS, has, by and large, failed to enact economic reforms, pursue privatization or impose fiscal restraint.

B. Centralized BiH institutions have not been effective in improving services to citizens, yet these institutions continue to demand increases in personnel and funding.

1. BiH-level institutions consume an exorbitant portion of tax revenues and support from abroad.

42. BiH was established in the Dayton Accords as a highly decentralized state. Other than the 10 competencies specifically designated to BiH institutions under article 3(1) of the Constitution, all governance in BiH fell to the responsibility of the entities. Even after numerous competencies have been transferred—some voluntarily, most by force or intimidation—to BiH institutions, the principal responsibility for governing in BiH still rests with the entities.

43. It is worrying, therefore, to see that BiH institutions have extremely high expenditures, despite having dramatically less in terms of responsibilities and functions compared to the entities. BiH's 2013 budget is 1.74 billion convertible marks (KM), almost as high as the RS's

[41] *BiH textile businesses raise hopes for economic recovery*, SETIMES.COM, 4 June 2013.

2013 budget of 1.94 billion KM.

44. Even as the RS Government made painful cuts to its own spending, BiH institutions saw their budgets increased. For example, between 2012 and 2013, the High Judicial and Prosecutorial Council's operating budget jumped 14%; its capital expenditures budget increased 71%. The entities should not be forced to shoulder the burden of austerity measures even as the budgets of opaque and inefficient BiH institutions are preserved or even increased.

45. Further exacerbating these problems and fostering tension within BiH is the allocation of foreign aid and assistance. Most foreign attention is directed toward BiH institutions, which have the least impact on the day to day lives of BiH citizens. According to the 24 January 2013 U.S. Congressional Research Service Report, *Bosnia and Herzegovina: Current Issues and U.S. Policy*, the United States has provided BiH with $2 billion since the country's independence. Significantly, the report clarifies that "U.S. aid has focused on strengthening state-level institutions in Bosnia."[42] So although the BiH Constitution seats the primary responsibility of governance in the hands of the entities, foreign aid programs have sought to strengthen the institutions with which the people of BiH have the least interaction.

2. BiH Armed forces account for a considerable amount of the BiH budget but are unnecessary at their current level.

46. The BiH Armed Forces cost the citizens of BiH more money than any other institution at either the BiH or entity levels. As much as a quarter of the entire BiH budget has been dedicated to the Armed Forces. In 2010, the Ministry of Defense spent 324,758,367 KM—by far the most of any BiH institution, and nearly four times the next most expensive BiH institution, the Indirect Taxation Authority. The RS Government, in its effort to identify areas of the budget that can be freed up to provide services that impact the day-to-day lives of the citizens asks a question that states all over the world are asking: why?

47. According to a study by the Stockholm International Peace Research Institute published in 2013, the majority of European states, particularly those facing economic hardship, have instituted significant defense spending cuts in order to address their overall economic situation. The study reports that "Since 2008, two thirds of countries in Europe have cut military spending, although the rates of cuts have varied considerably. Some of the largest cuts have been in Central Europe, where the generally weaker economies have been unable to sustain such large budget deficits. Eighteen European countries have seen real-terms falls of more than 10% in military spending since 2008, of which 13 are from Central Europe. Eight of these have made cuts of greater than 20%, with all but one from Central Europe. The largest fall has been in Latvia, by 51%. Elsewhere in Europe, the largest reductions have generally been in countries facing acute debt crises: Greece (26%), Spain (18%), Italy (16%), and Ireland (11%), as well as Belgium (12%)."[43]

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[42] Stephen Woehrel, *Bosnia and Herzegovina: Current Issues and U.S. Policy*, Congressional Research Service Report 24 Jan. 2013, p. 9.

[43] Stockholm International Peace Research Institute, Recent Trends in Military Expenditure (2013), *available at* www.sipri.org/research/araments/milex/resultoutput/trends.

C. BiH's decentralized structure is fully compatible with EU membership

48. The RS Government strongly supports BiH's integration into the EU, and it will work with determination toward BiH's accession to the EU while, at the same time, preserving the decentralized constitutional governance established in the Dayton Accords. BiH's decentralized constitutional structure is fully consistent with membership in the EU. EU officials have frequently made clear that this structure is not a barrier to EU membership.

49. In December 2012, for example, European Commissioner for Enlargement Štefan Füle said, "The decentralized structure of BiH is not an obstacle to the process of EU accession." Another top EU official said in 2011, "BiH must be in a position to adopt, implement and enforce the laws and rules of the EU. *It is up to Bosnia and Herzegovina to decide on the concept which will lead to this result*."[44]

50. In a January 2012 interview, the Head of the EU Delegation to BiH, Special Representative Sørensen said:

> I should underline that the EU recognizes that Bosnia and Herzegovina has a specific constitutional order. We support this, and please remember that there are also different types of internal structure within many of the existing Member States.[45]

51. No EU member or candidate state has ever been required to change its constitutional structure from a decentralized federal system to a centralized one in order to qualify for EU accession. Nor is BiH required to do so, as EU officials have made clear.

52. BiH's decentralized system is also consistent with BiH's future obligations as an EU member. The compatibility of decentralized structures with EU membership is demonstrated each day by current EU members, such as Germany, Spain, Belgium, and Italy.

IV. FBiH conflicts are holding back BiH's progress

53. Since the RS's previous Report to the UN Security Council in May, BiH has made political progress in some areas, but too often advances have been stymied by continued conflicts within the FBiH and by Bosniak parties' obstruction at the BiH level.

A. The FBiH remains paralyzed

54. Political divisions in the FBiH, especially between the Bosniak parties, have continued to freeze political progress there. Since a breakdown in the FBiH's governing coalition in May 2012, the FBiH has been unable to reshuffle its government. This has left the FBiH Government in a sustained state of near paralysis. According to the European Commission's 2013 Progress Report on BiH, published on 16 October, the failure of the reshuffling "has resulted in a lengthy

[44] Comments of Stefano Sannino, Deputy Director-General of EU Directorate General for Enlargement, 24 Jan. 2011, in NEZAVISNE NOVINE, *Stefano Sanino: Bh. lideri nemaju političku kulturu*, 24 Jan. 2011 (emphasis added).

[45] EU Delegation to BiH, Interview with Ambassador Peter Sorensen for Infokom magazine of the BiH Foreign Trade Chamber, 18 Jan. 2012.

political stalemate . . . ."[46] The situation surrounding court proceedings over the reshuffling has, according to the Progress Report, "paralysed the functioning of the Federation."[47] The ongoing political crisis in the FBiH preoccupies the leadership of the FBiH-based political parties, stymieing political progress at the BiH level. As the Progress Report observes, the failure to reshuffle has "contributed to fragmentation of policy-making at all levels."[48]

B. 2013 BiH Census

55. On 1 October 2013, BiH began conducting its first census since 1991. The BiH Parliamentary Assembly had approved the Census Law in February 2012. In September, the RS Government pledged its strong support to the RS Institute for Statistics, which has an important role under the Census Law in preparing, organizing, and implementing the census in RS territory.[49] The RS Government also instructed other public bodies involved in the census to carry out their legal obligations with timeliness, accuracy, and seriousness.[50] As of this report, the data collected is being analyzed by the RS Institute for Statistics. Various groups have begun to raise questions about illegal collection practices.

C. Coordination mechanism for EU integration

56. BiH, the RS, and the FBiH have taken important steps recently toward establishing a coordination mechanism for European integration that is consistent with EU standards. At a September meeting between RS Prime Minister Željka Cvijanović, FBiH Prime Minister Nermin Nikšić, BiH Council of Ministers Chairman Vjekoslav Bevanda, and EU Special Representative Peter Sorensen, the sides reached a high level of agreement on the coordination mechanism. On 1 October, the leaders of BiH's top political parties discussed the coordination mechanism further and agreed on principles for its resolution. The only outstanding issues with respect to the coordination mechanism are matters that need to be decided within the FBiH, with respect to the position and the role of the cantons in the coordination mechanism. Although all political actors in the FBiH agree that, in accordance with their constitutional powers, cantons also have a great responsibility in the process of the European integration, the issue of how to secure the participation of cantonal representatives in the coordination process, remains open between the Croat and Bosniak political actors.

D. Implementation of the *Sejdić-Finci* judgment

57. BiH's top political leaders have made progress recently toward at last implementing the European Court of Human Rights' judgment in *Sejdić-Finci v. BiH*, but there remain outstanding issues for the FBiH's Bosniak and Croat political parties to resolve. BiH risks suffering sanctions if implementation continues to be delayed, so it is essential for the FBiH's political leadership to urgently resolve their remaining differences.

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[46] European Commission, Bosnia and Herzegovina 2013 Progress Report, 16 Oct. 2012, p. 9.

[47] *Id*.

[48] *Id*. at p. 10.

[49] Summary of the 25th session of the Government of Republika Srpska.

[50] *Id*.

58. The *Sejdić-Finci* decision rejected provisions of the BiH Constitution that make individuals who are not members of BiH's Constituent Peoples ineligible to run for BiH's three-member Presidency or its House of Peoples. The RS has long advocated a simple solution for members of the BiH Presidency and House of Peoples representing the RS: to simply eliminate all ethnic qualifications. For office holders representing the FBiH, the RS has for years made clear that it would accept whatever solution the FBiH's Croat and Bosniak parties agreed to. However, the FBiH's Bosniak and Croat parties have been unable to agree on how to elect the members of the Presidency and the House of Peoples from the FBiH.

59. In August 2013, Jakob Finci, one of the two plaintiffs in the *Sejdić and Finci* case, praised RS President Milorad Dodik's proposal that there be one member of the BiH presidency from the RS, two from the FBiH, and no ethnic qualifications. Mr. Finci said that he and Dervo Sejdić, his co-plaintiff, believe that President Dodik's proposal is the "most correct and concrete."[51]

60. In the first half of October 2013, the leaders of the seven top parties in BiH met twice with senior EU officials in Brussels in an intense EU-facilitated effort to reach final agreement. Among the agreed principles for resolution is that two members of the BiH Presidency will be directly elected from the FBiH and one directly elected from the RS.[52] The agreement, however, leaves open the issue of how each of the FBiH's members of the Presidency is to be elected. The European Union organized an additional meeting at the end of October among the Bosniak and Croat parties, whose continued disagreement is the only obstacle to resolving this problem. Discussion among these parties continues. Once the FBiH's Bosniak and Croat parties find a resolution to this issue, the RS will support their agreement and *Sejdić and Finci* can be implemented promptly.

E. The SDA party blocked urgent amendments to the Personal Identification Number law

61. This year's dispute over BiH's Law on Personal Identification Number (PIN) of Citizens should have been resolved much earlier this year, but the Bosniak SDA party blocked urgent new amendments to the law from going into effect.

62. The PIN law went out of force in February, leaving babies born in BiH after February without PINs vital to health and travel. The Constitutional Court had revoked the law after the BiH Parliamentary Assembly of BiH was unable to agree on amendments to the PIN law that would respect the Dayton structure of BiH. Even after the PIN law was revoked, representatives of Bosniak parties continued to block this law, arguing that it would "enhance the influence of the entities" despite the fact that this should have been merely a technical issue.

63. In early June, hundreds of citizens protested in the streets of Sarajevo and other cities about the continued absence of a PIN law. High Representative Valentin Inzko even went into the street himself to express his support for the protesters in person. Between 6 and 7 June, some protestors blockaded the BiH Parliament building, confining members of parliament, staff, and

[51] *Dodikov prijedlog najkorektniji i najkonkretniji*, VIJESTI.BA, 13 Aug. 2013.

[52] *BiH: Agreement on How to Come to Solution on Pressing Issues, European Commission*, 1 Oct. 2013.

even hundreds of participants in a foreign business delegation.

64. Finally, on 17 July, the BiH Council of Ministers agreed on a set of amendments to the PIN law and several other important administrative laws.[53] The next day, the BiH House of Representatives unanimously passed the necessary amendments to the PIN law.[54] The BiH House of Peoples approved the legislation on the same day, acting in urgent procedure.[55]

65. A week later, however, the SDA party led the Bosniak Caucus of the BiH House of Peoples to block the newly approved amendments from going into effect, claiming that the speedy manner of their passage somehow violated the "vital national interest" of Bosniaks.[56] By invoking the "vital national interest" principle in this case, the SDA prolonged what was already an intolerable delay in the enactment of the necessary legislation. But mysteriously, few in the international community have criticized this abuse of parliamentary procedure. Those few have not singled out the responsible party, the SDA.

F. State and military property

66. Achieving resolution of BiH's longstanding disagreement over the allocation of state and military property has been prevented for a long time by the largest Bosniak parties' refusal to implement the solution to which they agreed. In March 2012, BiH's largest Bosniak, Serb, and Croat parties reached a breakthrough agreement on the distribution of state and military property.[57] In November 2012, the leaders of the six parties comprising the partially reconstituted BiH Council of Ministers endorsed the March 2012 agreement on state and military property, along with other agreements.

67. In October of the same year, after the Bosniak SDP accepted to have the issues of state and defense property resolved through the same act--and for the purpose of meeting the remaining requirements for the resolution of the OHR's status--leaders of SNSD and SDP reached an agreement on implementation of political principles from March of 2012. This agreement was articulated in the form of a legislative proposal, adoption of which in the executive and legislative BiH-level institutions is expected in the coming days. The second leading Bosniak party SDA remains strongly opposed to such a solution.

G. Blockage of elections in Mostar

68. Local elections were held in 2012 in every locality in BiH except the FBiH city of Mostar. Elections could not take place there because the BiH Electoral Law provisions that refer to the city of Mostar had been invalidated by the BiH Constitutional Court yet never replaced. The Constitutional Court held in 2010 that the electoral law of BiH (which was imposed by High Representative Paddy Ashdown in order to dilute the voting power of the majority Croats)

[53] *Law on unique ID number adopted*, OSLOBODJENJE, 17 July 2013.

[54] *Bosnia: Personal ID number law adopted*, B92, 18 July 2013.

[55] *Bosnia Belatedly Adopts ID Number Law*, BALKANINSIGHT, 18 July 2013.

[56] *Bosniak MPs Veto Adoption of ID Law*, BALKANINSIGHT, 23 July 2013.

[57] European Commission, Bosnia and Herzegovina 2012 Progress Report, 10 Oct. 2012, p. 9.

violated anti-discrimination and voting rights provisions of the BiH Constitution and the International Covenant on Civil and Political Rights. Despite the fact that the terms of every member of the Mostar City Council expired on 5 November 2012, city council members have remained in place. It is up to the FBiH parties involved to urgently negotiate a resolution to this dispute so that elections consistent with the Constitution can be held.

V. BiH justice system institutions are resisting the adoption of European standards.

69. Despite the need to reform BiH judicial institutions to meet European standards, these institutions have staunchly resisted the necessary changes. The Court of BiH is even resisting compliance with a judgment of the European Court of Human Rights that found the Court of BiH's sentencing practice violates Article 7 of the European Convention on Human Rights. BIH's system for appointment of judges and prosecutors is contrary to European standards, but BiH's High Judicial Prosecutorial Council (HJPC) has made it clear that it will fight any reform that curtails the HJPC's sweeping power. The BiH Prosecutor's Office also violates European standards through abuses of power and failure to prosecute many of the worst war crimes against Serbs. Moreover, throughout the BiH judicial system, there is a disturbing lack of transparency. BiH's judicial institutions must cooperate with reform if the BiH judicial system is to meet European standards. For a more detailed exposition of these points, please see Attachment 2 to this report.

A. Reform of the Court of BiH

70. At the initiative of the RS, an extensive review of the BiH justice system was initiated by the EU through the mechanism of a structured dialogue ("EUD") in 2011. The EUD brings all relevant elements of the justice systems of the entities, Brčko District, and BiH into participation in a series of analyses and discussions of needed reforms under the facilitation of EU Commission staff and outside experts from other European institutions, including the Venice Commission. The BiH Court and Prosecutor's office have been shown by this analysis to fall far short of European and international standards in a number of respects.

1. Exercising criminal jurisdiction where the CC BiH does not prohibit the conduct in question (Article 7.2, Law on Court of BiH)

71. The Law on Court of BiH was imposed by High Representative Paddy Ashdown in 2000, and has frequently been misused by BiH prosecutors and OHR to interfere in entity and BiH political affairs. The vague terms of Article 7.2 of the Law on the Court grant BiH prosecutors authority to prosecute under entity criminal law in the prosecutor-friendly BiH Court any conduct that "may have . . . detrimental consequences" to BiH. (Hereinafter, "L/C" refers to the existing Law on Court of BiH. "CC BiH" refers to the Criminal Code of BiH.)

72. EU experts have agreed that Article 7.2 violates European standards, including the right to legal certainty and the rule of the natural judge; however, the BiH Court and Chief Prosecutor have waged a determined lobbying campaign to preserve the provision. Legal certainty is a basic element of the rule of law and has been recognized as a general principal of EU and international law. In its recommendations after the July EUD Plenary, the EU rightly insisted that any new BiH Law on Courts "transpose[] the agreed principles in the most appropriate way to ensure

legal certainty and respect of the principle of the natural judge."

2. The ECtHR held the Court of BiH's practices violate Art. 7 of the European Convention and that the Court must apply the law in effect at the time of the crime whenever application of that law could result in a lesser sentence.

73. In its 18 July 2013 decision in *Maktouf and Damjanović v. BiH* ("*Maktouf*"),[58] the ECtHR held that the Court of BiH violated the prohibition of Art. 7 of the European Convention against retroactive imposition of a punishment greater than that provided by the law in effect at the time of the crime.[59]

74. The requirements of the *Maktouf* judgment for the Court of BiH are clear. In any judgment in which the Court of BiH applied the sentencing provisions of the 2003 BiH Code (as it has done in almost all its decisions to date), the Court has violated Art. 7 if the application of the 1976 SFRY Code could have resulted in a lesser sentence. Such cases must be reopened and the sentences re-determined under the 1976 SFRY Code. The Court of BiH must apply the *Maktouf* principle in all future cases.

B. Reform of the HJPC and the judicial appointments system

75. The regime of appointment and discipline of judges and prosecutors in BiH, imposed in early 2002 by the High Representative, requires a comprehensive reform in order for BiH to attain international and European Union standards. On 31 October 2012, the leadership of two of BiH's largest parties, the SNSD and the SDP, reached a breakthrough agreement on reforms to a number of institutions, including the HJPC. That agreement, which was subsequently endorsed by all of the parties in the BiH Council of Ministers (CoM), includes a much-needed reform to BiH's system for appointing prosecutors.

76. Despite the CoM's proposed reform's total consistency with European standards, it initially received a very hostile reception from the HJPC, which attacked it in letters to the EU and other institutions and arranged for other organizations to raise objections. More recently, on 26 September 2013, the HJPC posted a statement flatly rejecting all "political proposals that advocate . . . a decrease of legal powers of the HJPC BiH."[60]

77. The RS Government is committed to important reforms based on a democratic process,

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[58] Case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, Applications Nos. 2312/08 and 34179/08, 18 July 2013.

[59] Art. 7(1) provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[60] Statement of the HJPC BiH, posted at www.hjpc.ba, 26 Sept. 2013.

including through inter-party agreement and the EU Structured Dialogue. It is imperative that the HJPC also recognize and respect such a process.

78. Late last year, the HJPC appointed a new BiH chief prosecutor who was clearly ineligible for the position under BiH law. The Law on Prosecutor's Office of BiH establishes just one requirement for the HJPC to follow when appointing a chief prosecutor: the appointee must be one of the prosecutors in the BiH Prosecutor's Office. The Law on the HJPC supplements this basic requirement with a series of more detailed qualifications. On 12 December 2012, however, the HJPC appointed Goran Salihović, then serving as Chief Judge of the Sarajevo Municipal Court, as BiH Chief Prosecutor. In making this appointment, the HJPC either ignored or disregarded Article 3-2 of the Law on the Prosecutor's Office of BiH (Official Gazette of BiH 49/09) which reads:

> The Chief Prosecutor and the Deputy Chief Prosecutors shall be selected and appointed by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina *from the Prosecutors of the [BiH] Prosecutor's Office.*[61]

79. When Mr. Salihović was appointed, he was not a prosecutor in the BiH Prosecutor's Office and, indeed, had never worked as any kind of prosecutor.

C. The BiH Prosecutor's Office violates European standards and the rule of law.

80. By failing to respect the principle of equality before law, the BiH Prosecutor's Office violates the BiH Constitution, international conventions, and European standards. Its failure to pursue justice for crimes against Serbs—demonstrated by statistics and many specific examples—denies Serbs equality before law. Moreover, its Chief Prosecutor's abuses of authority are an affront to the rule of law.

1. The Chief Prosecutor has threatened the head of the top BiH law enforcement agency.

81. The BiH Prosecutor's Office posted a video on its website in which the Chief Prosecutor threatens the director the top BiH's law enforcement agency, the State Investigation and Protection Agency (SIPA), for making allegations against him and threatens to prosecute the director for "pressing false charges." The Prosecutor's Office of BIH has also posted on its website articles that virulently attack the director.

2. Obstruction of the exhumation of Serb victims from mass grave

82. This year, crews began excavations at Sarajevo's city dump in an effort to find a suspected mass grave of Serb citizens of Sarajevo. However, after early excavations found human remains and confirmed the presence of a mass grave, the BiH Prosecutor's Office declined to pay the contractors for their work, thus forcing a suspension of the exhumation

[61] Emphasis Added.

process.

3. Obstruction of the Šemsudin Mehmedović investigation

83. On July 19, 2013, BiH's SIPA arrested Šemsudin Mehmedović, a member of the BiH Parliamentary Assembly and vice president of the Bosniak SDA party, in connection with war crimes against Serb civilians. The arrest was conducted consistently with the BiH Criminal Procedure Code and was grounded, in part, in a provision allowing for an arrest when there is reason to fear that a suspect will hinder an investigation by influencing witnesses. SIPA filed a criminal report over obstruction of judicial institutions because of evidence it had gathered of threats to witnesses in the case and to SIPA officers. After Mehmedović's arrest, however, the BiH Prosecutor's Office quickly ordered his release. It also refused SIPA's routine request to search certain locations in connection with the case, an action SIPA says is unprecedented in the history of its war crimes investigations.

D. BiH justice institutions lack transparency

84. BiH judicial institutions operate without the transparency that is essential in a free society, denying the public information to which they are entitled under law. The Court of BiH routinely fails to publish important decisions, including appellate verdicts. Beyond that, the Court even refuses specific requests for review of verdicts submitted in accordance with the BiH Law on Free Access to Information.

VI. The Security Council should end the application of Chapter VII, which has no factual or legal basis.

85. After almost 18 years of peace in BiH, there is no justification for the Security Council to continue invoking Chapter VII of the UN Charter. Article 39 of the UN Charter allows the Security Council take certain measures "to maintain or restore international peace and security" if it has determined "the existence of any threat to the peace, breach of the peace, or act of aggression." There is simply no factual evidence that the situation in BiH meets any of these requirements for invoking Chapter VII.

86. At the last Security Council meeting about BiH on 14 May, there was a consensus, as there is at every such meeting, that BiH's security situation is "calm and stable." International recognition of BiH's deeply-rooted peace grows stronger with each year of continued stability. Sometimes, however, those who wish to continue a heavy-handed international presence in BiH try, implausibly, to attribute the calm and stable security situation to the very small EUFOR Althea mission that remains in BiH. But it has long been domestic institutions—not a foreign force—that ensure BiH's enduring peace.

87. As French Deputy Permanent Representative Martin Briens said at the Security Council's 14 May meeting, "The security situation on the ground has remained calm and stable—*something for which Bosnia and Herzegovina's institutions have been fully responsible*. That has been the state of affairs for several years, and we should welcome it."[62] Mr. Briens pointed out

[62] Emphasis added.

that the authorities in BiH "have always been able to ensure security, and therefore do not need the European military presence for that purpose, as is regularly recalled in the reports of the [EUFOR Althea] Operation Commander."

88. Mr. Briens noted, "The reconfiguration of the European Union-led force Operation Althea (EUFOR Althea), resulting from a calm and stable environment, has made it possible to reduce the forces stationed there to 600 persons and to focus them on capacity-building and training." He emphasized, "The Security Council must acknowledge that change, the nature of EUFOR Althea in the autumn, when it scrutinizes the role of the mission."

89. It is past time for the Security Council to recognize the international consensus that the situation in BiH does not threaten international peace and security and cease acting under Chapter VII of the UN Charter.

VII. Conclusion

90. As the RS Government works to improve the economic condition of its citizens, it asks members of the international community to respect the Dayton Accords and support local reform initiatives in BiH. The most important way the international community can support reform in BiH is by closing the OHR, which abuses the rule of law and stifles BiH's political development. The RS has continued to implement important economic reforms and to align its laws with EU standards. Though the RS is also supporting reforms at the BiH level, progress has been slow because of deep political divisions in the FBiH and obstruction by Bosniak parties. Dysfunction at the BiH level is among the reasons why it is essential to preserve BiH's decentralized constitutional structure, which enables the RS's functional governance and program of economic reform. Although the BiH judicial system needs to change in order to meet European standards, its institutions are fighting the necessary reforms. BiH, though burdened with deep political divisions like so many countries, has been peaceful and secure for many years; there is no security threat that could possibly justify the Security Council acting under Chapter VII of the UN Charter. The RS submits this report in the hopes that it will help members of the Security Council and the international community better understand the RS's positions and the situation in BiH.

Attachment 1

The OHR Must Be Closed

The Office of the High Representative (OHR), which undermines BiH's political and economic development, must be closed at last. After almost 18 years of peace, there is no justification for the continuation of a foreign official claiming authority to override the rule of law, the Dayton Accords, the sovereignty of BiH, and the human rights of its people. Annex 10 of the Dayton Accords, which is the legal basis for the High Representative's authority, does not provide for the "Bonn Powers" the High Representative claims or anything resembling them. Moreover, it is now widely understood that the OHR is a barrier to BiH's political maturation. The High Representative must adhere to the limits of his mandate under the Dayton Accords, and the OHR must be closed at the earliest possible date.

A. The so-called "Bonn Powers" are an affront to the rule of law, democracy, and human rights.

The illegality of the dictatorial authority claimed by the High Representative is plain to anyone who has read the High Representative's strictly limited mandate under the Dayton Accords or is familiar with BiH citizens' civil and political rights under the BiH Constitution and international conventions.

Ambassador Inzko continues to assert powers that drastically exceed the High Representative's mandate under Annex 10 of the Dayton Accords and violate the human rights of BiH citizens. The High Representative's scope of authority under Annex 10, as summarized by Matthew Parish, a former OHR attorney, is to be "a manager of the international community's post conflict peace building efforts, and a mediator between the domestic parties."[1] Annex 10 does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the entities, or their citizens. Yet the High Representative continues to claim virtually unlimited powers, such as to decree laws, depose elected officials, and punish individuals without a hearing.

The term "Bonn Powers" originates from a statement issued two years after the Dayton Accords by the PIC, an *ad-hoc* collection of countries and organizations, at a conference in Bonn, Germany. The PIC did not purport to expand the authority conferred on the High Representative under the Dayton Accords, nor could it, of course; the PIC could hardly claim authority to rewrite a legally binding treaty witnessed by six PIC members just two years earlier.

Instead, the PIC said it "welcomes the High Representative's intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions" on certain issues. Thus, the High Representative's self-serving, self-claimed expansion of power came to be known as the "Bonn Powers." As Parish, the former OHR attorney, has recognized, the PIC's Bonn statement "ran quite contrary to the spirit and text of Annex 10 to the [Dayton Accords], and was *legally quite indefensible*."[2]

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[1] Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007, p. 13.

[2] *Id.*, p. 14 (emphasis added).

Apart from their lack of a legal basis, the dictatorial authorities claimed by the High Representative are obviously incompatible with the human rights of BiH citizens, such as the right to a fair trial under the European Convention on Human Rights[3] and the right to free elections under Protocol No. 1 of the European Convention.[4]

For the remainder of the OHR's tenure in BiH, the High Representative must observe the legal limits of his position as laid out in the Dayton Accords.

B. The OHR undermines democratic consensus-building.

The OHR's presence in BiH undermines the spirit of compromise that is essential to progress in any democracy—and particularly a multinational state like BiH. As a major, extra-constitutional center of power, the OHR badly distorts the incentives necessary for settling disagreements among BiH's Constituent Peoples and major political parties. The presence of a High Representative who claims autocratic powers encourages parties to adopt maximalist positions in hopes of enlisting his help, whether through formal decrees, pressure, or other forms of interference. Instead of doing the hard work of negotiation and compromise, some parties often appeal to Amb. Inzko to dictate a "solution."

The Bosniak political parties, in particular, habitually make maximalist demands in hopes that the High Representative will intervene on their behalf or otherwise bolster their position in talks. These hopes have often been fulfilled. The International Crisis Group wrote in a November 2009 report that the SDP, one of the two main Bosniak parties, considers the OHR its "main negotiating leverage."[5] As the Crisis Group explained:

> The OHR has become more a part of Bosnia's political disputes than a facilitator of solutions, and the High Representative's executive (Bonn) powers are no longer effective. The OHR is now a non-democratic dispute resolution mechanism, and that dispute resolution role should now pass to Bosnia's domestic institutions with the temporary and non-executive assistance of the EUSR.[6]
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> The conflict over the future of the OHR should end now; the office should close . . . If BiH cannot work in its present form, keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach.[7]

[3] European Convention on Human Rights, art. 6.

[4] Protocol, European Convention on Human Rights, art. 3.

[5] International Crisis Group, *Bosnia's Dual Crisis*, 12 Nov. 2009, pp. 5-6.

[6] *Id*. at p. 1.

[7] *Id*. at p. 16.

There is a growing realization inside and outside BiH that the High Representative's presence hinders the negotiations and give-and-take necessary for democratic government to function. Even the High Representative's principal deputy, Roderick Moore, admitted in a September 2012 interview, "[T]here have been some tendencies to get the international community [i.e., the OHR] involved in the local political processes, which I think is harmful."

The PIC Steering Board has shown increasing concern about the tendency for some political authorities in BiH to expect the OHR intervene to solve their disputes. Unfortunately, the Steering Board does not seem to fully appreciate that such dependence is inevitable for as long as the OHR claims "Bonn Powers." In March 2013, the SDP, the Bosniak party that leads the FBiH Government, demanded that the OHR impose a "solution" in the FBiH's current political crisis. On 26 March, the PIC Steering Board wisely rejected this demand, saying, "Authorities must stop expecting the International Community to do their job for them and instead explain how they intend to move forward . . . ."[8] The Steering Board should not be at all surprised at this expectation, however. The OHR's long history of imposing "solutions," combined with OHR's continued claim that it possesses "Bonn Powers," ensures that this expectation of foreign intervention will continue to undermine the culture of compromise that is so essential to BiH's future.

The High Representative has tried to disclaim any responsibility for BiH's dysfunction. In his statement after the PIC Steering Board meeting on 25 May, Amb. Inzko said, "Given that the policy of the PIC Steering Board, the OHR and the entire international community over the last several years has been to leave decision-making almost entirely with the BiH institutions, attempts at blaming the international community"—meaning the OHR—"for the country's problems are simply hollow excuses." This is a remarkable claim, especially coming as the FBiH and BiH as a whole are still suffering through a crisis directly triggered by a 2011 intervention by Amb. Inzko.

The current crisis of governance in the FBiH began as a result of the High Representative's attempt to decree a "solution" to a dispute over the formation of a new FBiH government. The High Representative tried to mediate the dispute but failed. Following the failure of the mediation, the largest FBiH party, acting in flagrant violation of the FBiH Constitution, formed a new FBiH Government that marginalized the Croats. In a March 2011 decision, the BiH Central Election Commission rightly declared the formation of the FBiH government unlawful and annulled it.

The High Representative, however, quickly responded by overruling the Central Election Commission's decision, effectively imposing a new, illegally-formed government on the FBiH. The High Representative's imposition of the FBiH Government is widely considered—both inside and outside BiH—to have been unlawful and politically disastrous. The 2011 intervention, as the President of the International Crisis Group wrote, "undermined state bodies and the rule of law."[9] The two largest Croat parties, in a joint statement, said the decree "represents the introduction of an emergency in the state and the destruction of constitutional order." In an

[8] Statement by the Ambassadors of the Steering Board of the Peace Implementation Council, 26 March 2013.

[9] Letter from Louise Arbour, President and CEO of International Crisis Group, to PIC Steering Board Ambassadors, 2 May 2011.

interview last year with Principal Deputy High Representative Roderick Moore, Croatia-based newspaper Večernji List said the High Representative's imposition of the FBiH government "led to the biggest crisis since the signing of the Dayton Agreement."

The High Representative's 2011 decree and the long history of political interventions by OHR continue to undermine political consensus building. The government coalition effectively imposed on the FBiH by Amb. Inzko in 2011 collapsed little more than a year later after a breakdown in relations between the two largest Bosniak parties. The stalemate over replacing that coalition government continues to drag on, stalling progress at the BiH level as well as in the FBiH. Efforts by the OHR and other members of the international community to facilitate talks to break the FBiH stalemate have been unsuccessful.

Amb. Inzko's attempt to deny OHR's role in BiH's dysfunction also ignores the role OHR played in creating many of BiH's dysfunctional institutions. For example, BiH's deeply unsatisfactory court and prosecutorial systems are OHR inventions that were foisted upon BiH. More importantly, Amb. Inzko's denial of OHR's responsibility ignores the perverse effect the OHR's very presence has on BiH's political development.

C. The High Representative continues to interfere with BiH's constitutional governance.

Despite the growing understanding of the High Representative's harmful effect on BiH's political development, Amb. Inzko has continued, in recent months, to interfere with BiH's constitutional processes.

1. The Law on Personal Identification Number of Citizens

In June, for example, Amb. Inzko injected himself deeply into a dispute in the BiH Parliamentary Assembly over the Law on Personal Identification Number (PIN) of Citizens, even threatening to decree his own "solution." When protests over the failure to enact the necessary PIN law began in the streets of Sarajevo, Amb. Inzko declared his solidarity with the protestors. After protestors blockaded the Parliamentary Assembly building, confining hundreds of people there against their will, Amb. Inzko came to the see the blockaders in person. He promised them that he would call a meeting of the PIC Steering Board Ambassadors about the issue.[10]

Later in the week, Amb. Inzko threatened to cast the BiH Parliamentary Assembly aside and decree a "solution," saying, "The best thing would be that the domestic process speeds up, *but other options of the International Community are also possible.*"[11] "All options are on the table," he said.[12] However, after the meeting with the PIC Steering Board Ambassadors, Amb. Inzko issued a statement making it clear that the Steering Board had refused to allow the High Representative to "solve" the dispute by extralegal means. Completely contradicting Amb. Inzko's earlier threats, the statement said, "The Steering Board joined me in placing full

[10] Office of the High Representative, *Elected Officials of BiH Must Live up to Their Responsibilities*, 11 June 2013.

[11] *Inzko- ID Number Case: The International Community might offer the solution*, SARAJEVO TIMES, 8 June 2013. (emphasis added).

[12] *Inzko: All options are on the table*, DNEVNI AVAZ, 10 June 2013.

responsibility for resolving this issue with local authorities. The Steering Board did not want to free the BiH elected officials from their responsibility."

It was only after the PIC Steering Board Ambassadors made it clear that the High Representative would not intervene that the Parliamentary Assembly, on 17 July, passed the necessary law on PINs. Unfortunately, the law was blocked from immediately going into effect by a parliamentary maneuver by the Bosniak SDA party.

2. State and defense property

The High Representative has also interfered in the controversy about state and defense property. In March 2012, BiH's main Serb, Bosniak, and Croat political parties reached an agreement on resolving the distribution of state and military property, an agreement that was endorsed in November 2012 by all of the parties on BiH's current Council of Ministers. But Bosniak politicians are now demanding the enactment of a law on military property alone, excluding the non-military state property that was an essential part of the agreement. Not surprisingly, the High Representative has taken the side of the Bosniak parties, demanding the enactment of a law on military property and ignoring the March 2012 agreement.

3. Judge Kreso

Amb. Inzko is trying to protect Judge Meddžida Kreso, the highly outspoken President of the Court of BiH, from criticism and taking her side in a legal debate. Judge Kreso has long been a controversial figure because of her Court's performance and her own media comments. She brought further criticism in July when her Court issued a press release reacting defiantly to a judgment of the European Court of Human Rights. The press release was legally unfounded and pre-judged issues that would soon come before the Court. On 26 September, BiH's High Judicial and Prosecutorial Council, the body that appointed Judge Kreso, issued a statement admonishing Judge Kreso and the BiH Chief Prosecutor over their media comments.[13] A week later, Amb. Inzko met with Judge Kreso and made it clear whose side he was on, issuing a press release criticizing her detractors. Amb. Inzko, apparently referring to the European Court of Human Rights' decision, said, "Court decisions, whether domestic or international, can only be implemented as they are rendered and should not be used to attack the court and its president."[14]

4. The OHR's double standard

The High Representative frequently blames the RS and its elected leaders for the dysfunction of BiH institutions, despite the RS's efforts to make them work and despite OHR's leading role in creating the dysfunction. When Bosniak parties block BiH's political progress, as they frequently do, the High Representative almost always ignores the obstruction or blames elected officials in general.

For example, as noted at the beginning of this attachment, the High Representative interfered heavily in the controversy about the PIN law, condemning BiH's political leadership and even

[13] Statement of the HJPC BiH, posted at www.hjpc.ba, 26 Sept. 2013 (emphasis added).

[14] *Id*.

threatening to end the dispute by casting the Parliamentary Assembly aside altogether. However, after both houses of the BiH Parliamentary Assembly passed the necessary PIN law and the Bosniak SDA blocked its implementation through a parliamentary maneuver, Amb. Inzko was silent.

Another example is the High Representative's comments on BiH's failure to implement the European Court of Human Rights' *Sejdić-Finci* decision. Even though it has long been clear that the only impediments to implementing *Sejdić-Finci* decision are disagreements among FBiH parties, Amb. Inzko acts as if the RS is part of the obstruction.

It is bad enough that the High Representative interferes in BiH's internal politics; it is even worse that he has adopted his own favored political parties.

5. Renewed attacks and threats against democratic leaders

In recent months, the High Representative has frequently tried to justify his claimed extralegal authority by attacking BiH's legitimate leaders. He tries to delegitimize democratic leaders by setting them against the citizens who elected them. For example, in a June speech in Dublin, the High Representative said BiH is a "special case" because in BiH, "the views of the people and the views of the leadership diverge and there is a huge gap between the people and their leadership."[15] European values, Amb. Inzko claimed, "are fully understood by the people of Bosnia and Herzegovina" but "not yet fully understood by their leaders."[16] In his statement after the most recent PIC Steering Board meeting on 25 May, Amb. Inzko claimed that "a tiny minority of political leaders have been unable or unwilling to represent the interests of [BiH's] four million citizens."[17]

Amb. Inzko even closed his statement after the PIC Steering Board meeting with a vague but chilling threat against democratic self-government in BiH:

> In the past we have called on political leaders to adopt more constructive and realistic postures; we have worked with them and wherever possible we have supported them. But the results have not been encouraging and citizens, civil society, have to ask themselves whether changes are necessary or not and how long this can continue.[18]

The purpose of Amb. Inzko's Dublin speech was to seek support for more heavy-handed OHR interference in BiH's constitutional governance. Though Amb. Inzko's words were vague, his message was clear. Amb. Inzko called for "[c]onfronting more directly political parties and

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[15] Valentin Inzko, *Rethinking the International Community's Approach*, Address to EU parliamentarians in Dublin, Ireland, 25 June 2013 ("Dublin Speech").

[16] *Id*.

[17] Office of the High Representative, *Press Conference Following the Meeting of the Steering Board of the Peace Implementation Council*, 23 May 2013.

[18] *Id*.

actors" who, in his view, "undermine reforms and . . . promote division." That means taking action against democratic parties and leaders with whom he disagrees.

Amb. Inzko also urged "[p]reventing a roll-back of previous actions by reaffirming the role of the OHR and EUFOR in maintaining the progress achieved in the post-Dayton period." That means telling BiH, under the threat of force, that its constitutional bodies may not reconsider laws that were imposed by High Representatives.

Worst of all, Amb. Inzko urged a reconsideration of "our policy of the last seven years,"[19] suggesting a return to something like the era that ended seven years ago. That was the era when High Representative Paddy Ashdown ruled BiH like an absolute monarch, imposing hundreds of statutes and other edicts, deposing freely elected officials who displeased him, and imposing extrajudicial punishments on whomever he chose.

Amb. Inzko is impatient to declare self-rule in BiH a failure, although it has never really been established. Every High Representative since 1998, including Amb. Inzko, has disregarded BiH's sovereignty and constitutional institutions to decree what is law. High Representatives have imposed statutes, amended constitutions, deposed elected leaders from office, centralized power in Sarajevo, punished individuals without due process, and nullified lawful decisions. When the BiH Constitutional Court unanimously found a human rights violation in the lack of a remedy for the High Representative's extrajudicial punishments, the High Representative immediately nullified the court's "final and binding" decision and forbidding any proceeding that "challenges or takes issue in any way whatsoever with one or more decisions of the High Representative." Amb. Inzko, throughout his tenure, has maintained the legally preposterous claim that Annex 10 of the Dayton Accords bestows upon him autocratic powers to rule and punish by unilateral decree.

Amb. Inzko's renewed threats to intervene directly in BiH's governance only exacerbate the detrimental effect the OHR has on BiH's politics. The international community should reject Amb. Inzko's extralegal threats against BiH's democratic institutions and acknowledge the OHR's leading role in creating BiH's political dysfunction. For BiH to be truly self-governed, the High Representative's claim to autocratic powers needs to end once and for all.

D. The international community is growing to recognize the OHR's detrimental impact on BiH.

Many in the international community are coming to understand the OHR's perverse effect on BiH's political development. As this understanding grows, the High Representative is losing international support for his claimed "Bonn Powers" and for his office's continued operation.

At the 14 May 2013 Security Council debate on BiH, not a single participant spoke favorably of the High Representative's claimed "Bonn Powers." Key participants in the meeting made clear their support for ending OHR's current role in BiH.

[19] Dublin Speech.

For example, the address to the Security Council by French Deputy Permanent Representative Martin Briens showed France's recognition of the OHR's detrimental effect on BiH's political development. Mr. Briens noted that a "reconfiguration" of the OHR was "being considered, including by the European Union" and emphasized:

> These considerations do not reflect a positive assessment of the political situation; quite the opposite, continuing political difficulties require us to rethink and adjust our strategy. Maintaining at any price an approach dating from the 1990s does not serve Bosnia and Herzegovina. We would like to reduce the [OHR] to a scale consonant with its residual responsibilities by strengthening its transparency and complementary nature with the Office of the EU. The current Government crisis reminds us that it is high time to change our approach to ensure that Bosnian politicians shoulder their responsibilities. When they do, the role of the High Representative must be *strictly limited* to the essential core of his mission within the framework of the civil tranche of the Dayton Peace Agreement.[20]

EU Delegation Head Thomas Mayr-Harting said the EU "look[s] forward to continuing the discussion with the international community on the reconfiguration of the international presence, in the appropriate forum."

Russian Deputy Permanent Representative Petr V. Iliichev said, "We caution the High Representative against using the obsolete Bonn emergency powers, which have only exacerbated situations that were already negative in Bosnia and Herzegovina over the past year."

In an interview in July, departing Swedish Ambassador to BiH Bose Hedberg noted the move to end the OHR's current role, saying, "The international presence in BiH will continue, but with a different philosophy in connection with providing support through an advisory role and of course financial support in order to implement reforms."[21]

The U.S. Congressional Research Service's most recent report on BiH noted:

> Many observers in and outside of Bosnia believe that OHR retains little credibility in Bosnia, and therefore should be eliminated in the near future. On the other hand, some countries, including the United States, do not want to eliminate OHR before the objectives and conditions are met, perhaps for fear of suffering a blow to their own credibility.[22]

[20] Emphasis added.

[21] Bernard Milosevic, *Hedberg doubts that Sejdic-Finci will be implemented by year's end*, SRNA, 26 July 2013.

[22] Stephen Woehrel, *Bosnia and Herzegovina: Current Issues and U.S. Policy*, Congressional Research Service Report, 24 Jan. 2013, p. 7.

A January 2013 paper by Sofía Sebastián of the Madrid-based think tank FRIDE, argued, "Given the OHR's loss of credibility and effective capability to fully engage in the reform process, a timeline for progressively dismantling the office should be defined."[23]

Washington-based Freedom House, in its recent report *Freedom in the World 2013*, raised BiH's score for "political rights" in part because of a "gradual reduction of international supervision."[24] While this improvement in BiH's rating is welcome, it underlines the need to completely eliminate the High Representative's interference in BiH's constitutional governance. The threat and reality of this interference, in addition to denying BiH citizens the political rights to which they are entitled, undermines international perceptions of BiH.

E. The "5+2" formula for OHR closure must be scrapped.

Some members of the international community continue to assert that before OHR can be closed, BiH needs to fulfill a list of "five objectives and two conditions" identified by the PIC Steering Board in 2008. The 5+2 formula, unfortunately, is inherently counterproductive and unworkable. Conditioning OHR's closure on the achievement of the 5+2 compounds the OHR's detrimental effects on BiH's political development by giving the OHR's favored parties a vested interest in ensuring that the conditions are not fulfilled. Three of the five objectives—and one of the two conditions—were accomplished years ago, but the remaining two objectives and one condition make fulfillment of the list a virtual impossibility.

The International Crisis Group, in a report criticizing the 5+2, notes, "Experts in the [PIC] Secretariat warned that new [5+2] conditionality could backfire and be manipulated by local politicians, especially those who wanted the OHR to remain in Bosnia, so would have an interest to block fulfilment of the conditions."[25] The experts were right. Bosniak parties—particularly the SDA—ardently want the OHR to remain open because they consider the OHR a valuable ally. As a result, the SDA and other parties, for as long as the 5+2 is held over BiH's head, will do whatever is possible to prevent accomplishment of the two remaining objectives—resolution of the state and military property issues. As the International Crisis Group explained, "[R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia's most controversial issue, the fate of the OHR."[26]

Fulfilling the second condition of the 5+2—"a positive assessment of the situation in BiH by the PIC Steering Board, based on full compliance with the Dayton Peace Agreement"—may be an impossibility. The extreme subjectivity of this judgment essentially gives each PIC Steering Board member power to block OHR closure by claiming that BiH is not in "full compliance" with the Dayton Accords. The PIC Steering Board includes close allies of BiH's Bosniak parties, such as Turkey, who would likely obstruct OHR closure for as long as OHR remains a useful ally.

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[23] Sofia Sebastián, *Bosnia's Logjam*, FRIDE Policy Brief No. 153, Jan. 2013.

[24] Freedom House, *Freedom in the World 2013*, p. 8.

[25] International Crisis Group, *Bosnia: Europe's Time to Act*, 11 Jan. 2011, FN 81.

[26] *Id*. at p. 11.

The international community must not allow the long-overdue closure of OHR to be held hostage by a set of conditions that is impossible to fulfill.

Attachment 2

The BiH Justice System Must Be Reformed to Meet European Standards

Despite the need to reform BiH judicial institutions to meet European standards, these institutions have staunchly resisted the necessary changes. The Court of BiH is fighting important reforms, including an amendment to its jurisdiction that is widely agreed to be imperative. The Court of BiH is even resisting a judgment of the European Court of Human Rights. BIH's system for appointment of judges and prosecutors is contrary to European standards, but BiH's High Judicial Prosecutorial Council (HJPC) has made it clear that it will fight any reform that curtails the HJPC's sweeping power. The BiH Prosecutor's Office also violates European standards through abuses of power and failure to prosecute many of the worst war crimes against Serbs. Moreover, throughout the BiH judicial system, there is a disturbing lack of transparency. BiH's judicial institutions must cooperate with reform if the BiH judicial system is to meet European standards.

A. Reform of the Court of BiH

At the initiative of the RS, an extensive review of the BiH justice system was started by the EU through the mechanism of a structured dialogue ("EUD") in 2011. The EUD brings all relevant elements of the justice systems of the entities, Brčko District, and BiH into participation in a series of analyses and discussions of needed reforms under the facilitation of EU Commission staff and outside experts from other European institutions, including the Venice Commission. The work of the EUD thus far has clearly shown that major changes in BiH institutions are required to bring them into compliance with fundamental principles of European and international law and, indeed, with the mandates of the BiH Constitution.

The BiH Court and Prosecutor's office have been shown by this analysis to fall far short of European and international standards in a number of respects. Rather than cooperating, however, the BiH Court and Prosecutor have strongly resisted reform. At the most recent session of the EUD held in Brussels in July the recently appointed Chief Prosecutor and the representative of the Court—one of its judges—vigorously opposed a new draft BiH Law on Courts which had emerged from expert studies of the current law and discussions in earlier sessions of the EUD. Since then, behind-the-scenes lobbying efforts of the Court and Prosecutor have stalled efforts to produce a final draft of the Law on Courts, which the EU had scheduled for introduction into BiH legislative process in October. (Hearinafter, "L/C" refers to the existing Law on Court of BiH. "CC BiH" refers to the Criminal Code of BiH.)

1. Exercising criminal jurisdiction where the CC BiH does not prohibit the conduct in question (Article 7.2, Law on Court of BiH)

The Law on Court of BiH was imposed by High Representative Paddy Ashdown in 2000, and has frequently been misused by BiH prosecutors and OHR to interfere in entity and BiH political affairs. The vague terms of Article 7.2 of the L/C grant BiH prosecutors authority to prosecute under entity criminal law in the BiH Court any conduct that "may have . . . detrimental consequences" to BiH.

EU experts have agreed that Article 7.2 violates European standards, including the right to legal certainty and the rule of the natural judge; however, the BiH Court and Chief Prosecutor have

waged a determined lobbying campaign to preserve the provision. Their primary tactic has been to substitute different words they argue will "objectify" the current terms of the law. But their new terms still leave the BiH Prosecutor and Court the same broad power to define criminal conduct ex post facto.

Most at the July Brussels meeting of the EUD (including the Venice Commission) agreed that the current L/C did not meet European standards of legal certainty and that even new language in a proposed draft, although an improvement, should be further reviewed as a priority matter. Over objections from the BiH Prosecutor and the representative of the BiH Court, the meeting agreed to produce a final draft L/C by the end of the summer.

2. Legal certainty and the rule of the natural judge

In its recommendations after the July EUD Plenary, the EU rightly insisted that any new BiH Law on Courts "transpose[] the agreed principles in the most appropriate way to ensure legal certainty and respect of the principle of the natural judge." Legal certainty is a basic element of the rule of law and has been recognized as a general principal of EU and international law. As the Venice Commission has noted, the principle of legal certainty is found in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.[1]

The European Court of Human Rights recognizes legal certainty as "one of the fundamental aspects of the rule of law."[2] In a 2012 report about BiH's legal system, the Venice Commission reiterated its belief that "the principle of legal certainty plays an essential role in upholding trust in the judicial system and the rule of law."[3] Legal certainty is especially important in criminal law. The European Court of Human Rights emphasizes that "where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied."[4]

An element of legal certainty is the principle of the natural judge, which requires that an accused is entitled to be tried before the tribunal determined by law for the alleged crime. If a court's jurisdiction over an accused is subject not to law but to an after-the-fact interpretation of highly ambiguous criteria, as in the case with the BiH Court's application of Article 7.2 of the BiH Law on Court, the principle of the natural judge is violated.

B. The Court of BiH refuses to comply with the *Maktouf* judgment of the European Court of Human Rights (ECtHR).

1. The ECtHR held the Court of BiH's practices violate Art. 7 of the European Convention and that the Court must apply the law in effect at the time of the crime whenever application of that law could result in a lesser sentence.

[1] Venice Commission, Report on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (18 June 2012), para. 7.

[2] European Court of Human Rights, Zasurtsev v. Russia (no. 67051/01, 27 April 2006), para. 48.

[3] Venice Commission, Report on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (18 June 2012), para. 25.

[4] European Court of Human Rights, Jėčius v. Lithuania (no. 34578/97, 31 July 2000), para. 56.

In its 18 July 2013 decision in *Maktouf and Damjanović v. BiH* ("*Maktouf*"),[5] the ECtHR held that the Court of BiH violated the prohibition of Art. 7 of the European Convention against retroactive imposition of a punishment greater than that provided by the law in effect at the time of the crime.[6] The defendants had been convicted of war crimes against civilians committed during the 1992-1995 war, but were sentenced under the provisions of the Criminal Code that BiH enacted in 2003. The 1976 SFRY Criminal Code, the law in effect at the time of the crimes, permitted less stringent sentences. The ECtHR held that the Court of BiH's use of the 2003 BiH Code violated Art. 7 of the Convention and that the 1976 SFRY Code should have been applied.[7]

In so ruling, the ECtHR held that the sentencing practice that the Court of BiH has routinely used violates the fundamental rights of defendants: the Court of BiH has denied any obligation to use the sentencing provisions of the 1976 SFRY Code rather than the 2003 BiH Code.[8] However, the ECtHR made clear that the 1976 SFRY Code must be used whenever its application could result in a lower sentence. It is not necessary to determine in advance of such application that the 1976 SFRY Code would necessarily result in a lesser sentence; it is sufficient that it could do so.[9]

The ECtHR's ruling is binding on BiH pursuant to Art. 46.1 of the European Convention. The violation of the Convention is also a violation of the BiH Constitution, which provides in its Art. II.2 that the rights and freedoms set forth in the Convention shall apply directly in BiH, and shall have priority over all other law.

Although the ECtHR made its ruling on the "particular circumstances" before it,[10] the effect of the ruling is clearly broader than those specific facts. Indeed, the only "particular circumstance" of the *Maktouf* case that is relevant to the Art. 7 determination is the fact that the application of the 1976 SFRY Code could have resulted in a lesser sentence. From this it appears that *Maktouf* necessarily means that it is a violation of Art. 7 to apply the 2003 BiH Code to sentencing in *any* situation in which the 1976 SFRY Code provisions applicable to the crime could result in a lesser sentence.

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[5] Case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, Applications Nos. 2312/08 and 34179/08, 18 July 2013.

[6] Art. 7(1) provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[7] *Maktouf* at para. 76.

[8] The Court of BiH had applied the 1976 SFRY Code sentencing provisions in five "less serious" war crimes cases, but BiH disavowed this, taking the position that the 2003 BiH Code should have been applied in all cases. *Maktouf* at paras. 29, 63.

[9] *Id.* at paras. 70, 76.

[10] *Id*. at paras. 65, 76.

The requirements of the *Maktouf* judgment for the Court of BiH are clear. First, the ECtHR held that applying the 2003 BiH Code in the cases of the two *Maktouf* defendants violated the European Convention. Thus, the Court of BiH must re-determine the sentences of those defendants under the 1976 SFRY Code, which the ECtHR expressly held "should have been applied."[11]

Second, the principle of *Maktouf* necessarily applies to previously decided Court of BiH cases. In any judgment in which the Court of BiH applied the sentencing provisions of the 2003 BiH Code (as it has done in almost all its decisions to date), the Court has violated Art. 7 if the application of the 1976 SFRY Code could have resulted in a lesser sentence. Such cases must be reopened and the sentences re-determined under the 1976 SFRY Code.

Third, the Court of BiH must apply the *Maktouf* principle in all future cases. Sentencing must be done pursuant to the SFRY Code if doing so could result in a lesser sentence.

2. Instead of implementing *Maktouf*, the Court of BiH has defied its mandate.

On 18 July 2013, the same day the ECtHR issued its decision in *Maktouf*, the Court of BiH issued a defiant Press Release purporting to interpret the decision and prescribe its effects.[12] The Press Release, which is presumably from the Court's President, Judge Meddžida Kreso, distorts and misstates in a number of ways the ECtHR's decision and its consequences for past and future actions of the Court of BiH. The Press Release fails to acknowledge that the position the ECtHR rejected was the position the Court of BiH has maintained and applied heretofore with respect to its Art. 7 obligations. The Court disclaims any obligation to review any of its past decisions, claiming, "[T]he decision itself [*Maktouf*] will not affect the other verdicts delivered by this Court either." The Court asserts that it will review future sentencing on a case-by-case basis, but at the same time asserts that this is the same thing it has always been doing. However, a continuation of the Court's past practice will continue to violate the European Convention.

In attempting to escape the consequences of the ECtHR's ruling, the Court prejudges outcomes of cases that will come before the Court. For example, the Press Release declares, erroneously, that the Court of BiH will have "no other option but to apply the 2003 [BiH] Criminal Code in crimes against humanity cases." The paragraph of the *Maktouf* decision cited notes that, for crimes against humanity that were introduced into national law by the 2003 BiH Criminal Code, the courts in BiH have no other option but to apply that law.[13] However, the ECtHR's observation does not apply to acts that were already crimes under the 1976 SFRY Code, and this includes most acts characterized as crimes against humanity. Chapter Sixteen of the 1976 SFRY Code, entitled "Criminal Acts against Humanity and International Law," provides criminal penalties for genocide (Art. 141), war crimes against the civilian population (Art. 142), and a number of similar activities. The issue in any case before the Court of BiH is whether the crime for which the defendant was convicted was a crime under the 1976 SFRY Code. If so, *Maktouf* requires the Court to apply the 1976 Code if it could have resulted in a lesser sentence.

[11] *Id.* at para. 76.

[12] The Release is posted at www.sudbih.gov.ba/index.php?id=2860&jezik=e.

[13] *Maktouf* at para. 55.

The Press Release also errs in stating that for the "more serious forms of war crimes," the 1976 SFRY Code need not be taken into account. Such a blanket exclusion is contrary to the ruling of the ECtHR. The *Maktouf* decision states that the compatibility of a sentence with Art. 7 of the European Convention "must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favorable to the defendant."[14] *Maktouf* establishes no exemption to Art. 7 for the "more serious forms" of war crimes.

It is irresponsible for the Court to declare in a press release how it intends to rule in future cases without having heard the arguments of the parties affected. The Press Release goes further: it purports to tell the entity courts what they must do. (". . . the Entity courts therefore have no other option but to apply the 2003 [BiH] Criminal Code in crimes against humanity cases.") The Court of BiH has no authority to direct the entity courts by press release how to decide their cases or how to apply the decisions of the ECtHR.

The Criminal Procedure Code of BiH, in Art. 29(f) ("Disqualification"), provides that "A judge cannot perform his duties as judge if . . . circumstances exist that raise a reasonable suspicion as to his impartiality." Any judge of the Court of BiH who authored, authorized or participated in the Press Release of 18 July 2013 cannot be deemed impartial with respect to any issue addressed therein relating to the potential application of the sentencing provisions of the 1976 SFRY Code. Indeed, in attempting to exonerate itself and deny the consequences of *Maktouf*, the Court has disqualified itself as an impartial arbiter of the issues.

In subsequent decisions, the Court of BiH has failed to apply the principles of *Maktouf*. On 16 August 2013, the Court of BiH delivered a second-instance verdict on the sentences of defendants convicted of aiding and abetting genocide. The Court proceeded under Art. 171 of the 2003 BiH Code ("Genocide") even though the 1976 SFRY Code (in Art. 141, "Genocide") is virtually identical in its definition of the crime but permits less stringent sentences. The Court has not published its decision in this case so its reasoning for declining to apply the SFRY Code is unknown.[15]

Subsequently, the Court of BiH has handed down at least five decisions on sentencing applying Art. 172 of the 2003 BiH Code ("Crimes against Humanity") for crimes that are also subject to Art. 142 of the 1976 SFRY Code which permits lesser sentences. Only the Court's press releases (and not the decisions) are available, and the reasons for the failure to consider the 1976 SFRY Code provisions are not stated.[16] Because the Court of BiH has not published these decisions, it

[14] *Id*. at para. 65.

[15] S1 1 K 003417 10 Krž - Duško Jević and Mendeljev Đurić (16 August 2013). The Court's press release appears at: www.sudbih.gov.ba/index.php?id=2874&jezik=e.

[16] S1 1 K 008793 12 KrI - Goran Sarić (28 Aug. 2013), press release at www.sudbih.gov.ba/?id=2878&jezik=e; S1 1 K 005718 11 Krž - Jasko Gazdić (5 Sept. 2013), press release at www.sudbih.gov.ba/index.php?id=2888&jezik=e; S1 1 K 003365 12 Krž - Marinko Ljepoja (17 Sept. 2013), press release at www.sudbih.gov.ba/index.php?id=2906&jezik=e; S1 1 K 013165 13 Krž - Radoslav Knežević (17 Sept. 2013), press release at www.sudbih.gov.ba/index.php?id=2905&jezik=e; S1 1 K 013227 13 Krž - Saša Zečević (25 Sept. 2013), press release at http://www.sudbih.gov.ba/?id=2916&jezik=e.

is not known whether the Court even considered whether *Maktouf* required the *1976 SFRY Code to be applied to sentencing, or, if the Court did consider the issue, what its reasons were for declining to apply 1976 SFRY Code.*

On 27 September 2013, The BiH Constitutional Court held that the Court of BiH had violated the European Convention when it sentenced Zoran Damjanović under the 2003 BiH Code rather than the 1976 Code, emphasizing that a less severe sentence could have been imposed if the 1976 SFRY Code had been applied.[17] The Constitutional Court ordered the Court of BiH to adopt, in expedited procedure, a new decision in accordance with Art. 7 of the European Convention.[18] *On 4 October 2013, the Court of BiH reopened the cases of Zoran* Damjanović *and his co-accused,* Goran Damjanović, who was also a co-applicant in the *Maktouf* case before the ECHR. Four days later, the Court of BiH reopened the case of Abduladhim Maktouf, the other co-applicant in the ECHR case. However, outside of these cases linked with the *Maktouf* judgment, the Court of BiH has not announced the reopening of any cases to comply with the ECHR's holding. On 23 October 2013, the BiH Constitutional Court found violations of Art. 7 of the European Convention in 10 additional Court of BiH verdicts and ordered the Court of BiH to reopen the cases.

The Court of BiH has demonstrated that it intends to continue its pre-*Maktouf* practices and to ignore the ECtHR's ruling defining the requirements of Art. 7 of the European Convention. For its part, RS will continue to press actively to require the Court of BiH to follow the *Maktouf* ruling and apply it in all cases.

3. Implementation of the *Maktouf* judgment is just as important as implementation of *Sejdić-Finci*

Up until the issuance of the *Maktouf* judgment of the ECtHR in July, the Court of BiH's practice was to try and sentence all war crimes under the 2003 Criminal Code of BiH, even though this code was not in effect at the time the war crimes were committed. War crimes, including genocide and crimes against civilians, were prohibited under the SFRY criminal code which was in effect throughout Bosnia and Herzegovina during the civil war of the 1990s. All other courts in BiH prosecuted and sentenced war crimes under this code, as required by the European Convention on Human Rights and the BiH Constitution. The Court of BiH defended its application of the 2003 Criminal Code vigorously, despite many appeals. In fact, in a highly questionable step for a sitting judge, Judge Hilmo Vučinić of the Court of BiH made an appearance before the ECtHR in the Maktouf case to argue for the policy of his court, a policy the ECtHR struck down as in violation of the European Convention on Human Rights (ECHR). He continues to sit in war crimes cases.

As noted above, immediately upon issuance of the *Maktouf* judgment, the Court of BiH issued a defiant press release arguing that the court had been acting correctly and that no corrective action was required. Early decisions of the Court of BiH since the *Maktouf* judgment suggest that the

[17] Constitutional Court of BiH, News for 27 September 2013, at www.ccbh.ba/eng/press/index.php?pid=6836&sta=3&pkat=506.

[18] *Id.*

court will use every possible legal stratagem to avoid compliance with the clear meaning of the ECtHR's judgment.

While the Court of BiH is the logical public institution to correct the violations of law it has committed and to chart a new course in the future, the court's resistance does not release BiH from its obligations to comply. The ECtHR judgment was directed to BiH as a state, not to the Court. BiH institutions must obey the law and ensure that the Court of BiH does as well. BiH is responsible also for providing relief to those sentenced in violation of their legal rights. The same legal obligation to obey and implement the law also binds the governments of the entities. They should work in cooperation with BiH to ensure compliance in the future and relief for those punished contrary to the law.

Just as in the case of the *Sejdić-Finci* decision of the ECtHR, the international community, especially the EU, has a responsibility to urge compliance and facilitate efforts of institutions of BiH to ensure compliance and overcome obstruction by the Court of BiH and Prosecutor's Office of BiH as necessary. Failure to comply will unquestionably become a barrier to BiH's accession to the EU. The RS Government has already begun work on a mechanism to monitor the Court's compliance with the Maktouf decision. Republika Srpska encourages BiH officials to participate in this effort.

C. Reform of the HJPC and the judicial appointments system

The regime of appointment and discipline of judges and prosecutors in BiH, imposed in early 2002 by the High Representative, requires a comprehensive reform in order for BiH to attain international and European Union standards. Under the current regime, the High Judicial and Prosecutorial Council (HJPC) appoints and applies disciplinary measures against judges and prosecutors of both BiH and the entities, except for members of the three constitutional courts, for which the HJPC proposes candidates.[19] Moreover, the HJPC performs a wide array of other functions, some of which may lead to a conflict of interest with the functions of appointing and implementing disciplinary measures. It is time for the HJPC to start performing its multiple tasks in a transparent manner in order to enable an objective evaluation of its operation by government institutions and citizens who are affected by the operation of this body. Its large budget and allocation of funds to special projects must be made public, with sufficient detail to enable such evaluation. Most importantly, the system of appointment of judges and prosecutors in BiH needs comprehensive reforms in order to be harmonized with European standards and the practice of democratic federal states throughout the world.

1. Reforms of the prosecutorial appointment procedure agreed by elected officials must become law.

On 31 October 2012, the leadership of two of BiH's largest parties, the SNSD and the SDP, reached a breakthrough agreement on reforms to a number of institutions, including the HJPC. That agreement, which was subsequently endorsed by all of the parties in the BiH Council of Ministers (CoM), includes a much-needed reform to BiH's system for appointing prosecutors. The CoM reform would improve prosecutors' legitimacy and accountability, preserve their

[19] Law on the High Judicial and Prosecutorial Council of BiH, 2004, Art. 17

autonomy, and bring BiH into the mainstream of EU practice. BiH is the only country in Europe that excludes its political institutions completely from the process of appointing prosecutors, and it is one of only a few that give their democratic institutions no meaningful role. The CoM reform would also bring BiH closer to the nearly universal norm that prosecutors for federal units are appointed by the federal unit rather than a central authority.

a) The CoM reform would protect prosecutorial autonomy while improving public accountability.

Under the CoM reform, the HJPC would share responsibility for appointing prosecutors with elected bodies at all levels of government. The HJPC would conduct a comprehensive process of identification of candidates for the position of chief prosecutor. The HJPC would present its list of successful candidates to the BiH Council of Ministers or the relevant executive body of the entity, canton, or Brčko District, which would then forward its selection to the responsible legislature for final appointment. Deputy prosecutors would be appointed by the chief prosecutors from the list of candidates established by the HJPC. Other prosecutors would be appointed by the chief prosecutor upon proposal of the HJPC.

Under the CoM reform, the HJPC would retain its appropriate role as a source of "professional, non-political expertise" as suggested by the Venice Commission. The HJPC would even be empowered to appoint an acting chief prosecutor in case the appointment process became blocked. Importantly, the CoM reform, consistent with the Venice Commission's advice, gives no institution a monopoly of power over appointments. Instead, it requires cooperation among the HJPC, the relevant Council of Ministers or government, the relevant legislature, and the relevant chief prosecutor. A system in which the appointment power is divided among institutions is far more resistant to corruption and other abuses than is a system—like BiH's status quo—in which all authority is concentrated in one unaccountable body.

Among the reasons why it is almost universal for political institutions to play an important role in the appointment of prosecutors is the need for public accountability. The position of prosecutor combines an immense level of governmental authority with a high degree of individual discretion.[20] Democratically accountable institutions, if they wish to maintain public support, have every incentive to appoint chief prosecutors who will fairly and effectively tackle corruption and other crime.

The CoM reform, of course, would not make chief prosecutors directly accountable to the electorate. However, it would enable the voters of BiH, the entities, and the cantons, to reward or punish a government or parliamentary majority based on the success or failure of the prosecutor it chose. For a prosecutor's office to fully enjoy public legitimacy, it must have at least some link to the public it represents.

b) The CoM reform would bring BiH into line with European practice.

[20] *See* Robert F. Wright and Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010).

(1) BiH is alone in excluding democratic institutions from the appointment of prosecutors.

Among EU member states, candidates, and potential candidates, BiH is the only country that completely excludes democratically accountable institutions from the appointment of prosecutors. In only two other countries—Bulgaria and Italy—do unelected bodies similar to the HJPC play a dominant role in prosecutor appointments. But even these states reserve some role for political institutions. In Bulgaria, the top prosecutor is appointed by the president upon a proposal by the Supreme Judicial Council. Eleven of the council's 25 members are elected by the parliament, and its meetings are chaired by the minister of justice. Italy's council is presided over by the President, and one-third of its membership is appointed by parliament.

Every other EU member and aspiring member rightly builds democratic accountability and legitimacy into to the appointment process by giving political institutions an important role—usually the leading role. In many of these EU member states, political institutions have absolute—or near absolute—authority over prosecutor appointments—and even the authority to remove top prosecutors. Moreover, it is the norm in EU countries for chief prosecutors to be a key part of the process for appointing the prosecutors who are to work beneath them.

(2) The norm in EU states is for democratically accountable institutions to play a significant role—and usually the leading role—in the appointment of prosecutors.

In 19 of the EU's 28 member states, political institutions are fully in charge of appointment of the country's top prosecutor. EU members in which democratically accountable institutions dominate the appointment process for the top prosecutor include: Austria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Sweden, and the United Kingdom. In all of the remaining EU states except Bulgaria and Italy, political institutions play an important or leading role in the process for prosecutor appointments.

Some critics of BiH's CoM reform contend that a role for elected institutions in the appointment of prosecutors is appropriate only for Europe's more deeply rooted democracies. But all but one of the EU's post-communist democracies also gives political institutions either an important role or the dominant one.

For example, in Croatia, the EU's newest member, the top prosecutor is appointed entirely by democratically accountable institutions—without any role for a high council. The parliament appoints the top prosecutor upon the proposal of the government and after hearing the opinion of the relevant parliamentary committee. Deputy public prosecutors are appointed by a high council, while other higher-level prosecutors are appointed by the high council on the proposal of the chief prosecutor. Croatia's example certainly proves that giving political institutions an important role in prosecutor appointments should not be an impediment to EU accession. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia also give political institutions an important role—or the only role—in the appointment of their top prosecutors. Moreover, every EU candidate and potential candidates—apart from BiH—

gives democratically accountable institutions at least a prominent role in the appointment of their top prosecutors.

(3) Under the CoM reform, prosecutors in BiH would remain much more insulated from political institutions than they are in most EU countries.

As noted earlier, in 19 EU countries, political institutions are fully in charge of appointing top prosecutors. The CoM reform, by contrast, preserves an important role for the HJPC. In many EU countries, prosecutors' offices are subject to varying degrees of direct control by political institutions. Under the CoM reform, prosecutors' offices in BiH would continue to be fully autonomous and separate from all political institutions. In the systems of many EU states, political institutions also have the power to dismiss prosecutors. Under the CoM reform, the authority to discipline and remove prosecutors would continue to lie solely in the HJPC.

Few EU states give a politically insulated council like the HJPC any role in the appointment of prosecutors below the top prosecutor. The CoM reform, by contrast, gives the HJPC a key role in the appointment of deputy prosecutors and a central role in the appointment of all other prosecutors.

c) The Venice Commission approves of democratic institutions' role in appointing prosecutors.

Recent Venice Commission reports confirm that the CoM reform is fully consistent with European standards. The Commission has emphasized the need for prosecutors' offices to be accountable to the public and has approved of appointments of chief prosecutors by legislatures, governments, and presidents. In its January 2011 *Report on European Standards as regards the Independence of the Judicial System*, the Venice Commission quoted with approval an earlier ruling that found:

> It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process.[21]

The Venice Commission further wrote in its 2011 report, "No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government. The matter is variously resolved in

[21] European Commission for Democracy through Law (Venice Commission), Report on European Standards as Regards the Independence of the Judicial System, CDL-AD(2010)040, 3 Jan. 2011, para 34.

different countries."[22] Although the Venice Commission did not endorse any particular method for appointing prosecutors, it suggested that a good solution is "cooperation amongst state organs."[23] That is just what the CoM reform prescribes.

d) In federal states in Europe and throughout the world, prosecutors for federal units are appointed under those units' own laws using means that ensure democratic accountability.

Prosecutors for federal units in Europe and around the world are chosen using methods defined under the laws of the federal units themselves. These methods of selection vary from country to country—and within countries—but their common features are democratic accountability and independence from control by central institutions.

Prosecutors in each of Germany's länder are appointed by that land's politically accountable minister of justice using procedures established in that land's laws. Likewise, in Switzerland, the laws of each canton determine the method of selecting prosecutors. The top prosecutors for Swiss cantons are selected in varying ways, including direct election, appointment by canton governments, or election by canton legislatures. The United Kingdom has separate top prosecutors for England and Wales, Northern Ireland, and Scotland. The top prosecutor for England and Wales and the top prosecutor for Northern Ireland are appointed by their respective attorneys general. Scotland's top prosecutors are appointed by the First Minister, Scotland's highest political office holder.

In the United States, state prosecutors are selected in accordance with the laws of each state. In 46 out of 50 states, the top prosecutors are directly elected by the public. In Canada, the top prosecutors in each province are appointed by that province's politically accountable provincial attorney general. Similarly, in Australia, state prosecutions are overseen by state attorneys general and directors of public prosecution appointed by state governments.

BiH is extraordinarily rare—if not unique—as a state whose federal units' own prosecutors are appointed by a centralized authority. The CoM reform would bring BiH closer to the usual practice of federal democracies.

e) HJPC's campaign against to the CoM reform.

Despite the CoM reform's total consistency with European standards, it initially received a very hostile reception from the HJPC, which attacked it in letters to the EU and other institutions. More recently, on 26 September 2013, the HJPC posted a statement flatly rejecting all "political proposals that advocate . . . a decrease of legal powers of the HJPC BiH."[24] The HJPC's reaction suggests an institution interested, first and foremost, in protecting its own powers. The thoroughly self-serving title of the HJPC's analysis opposing the CoM reform is indicative: "The High Judicial and Prosecutorial Council – The Foundational and Irrevocable Component of the

[22] *Id*., para 35.

[23] *Id*.

[24] Statement of the HJPC BiH, posted at www.hjpc.ba, 26 Sept. 2013.

Reform of the Judicial System in BiH." When a non-democratic, non-constitutional public institution responds with defiant bluster to an agreement among elected officials, the need for reforming the institution becomes clear.

The RS Government is committed to important reforms based on a democratic process, including through inter-party agreement and the EU Structured Dialogue. It is imperative that the HJPC also recognize and respect such a process. The October Agreement on the appointment of prosecutors should be included in the Structured Dialogue process and implemented as a law.

2. International standards require entity judges and prosecutors to be appointed by entities.

It is almost unheard of democratic federal states for judges and prosecutors of federal units to be appointed by an institution of the central government. Throughout Europe and worldwide, in virtually every democratic federal state, federal units are rightly responsible for the appointment of their own judges and prosecutors. In federal states such as Germany, the United States, or Australia, centralized appointment of judges is unimaginable. It is even more important in BiH, which was established by the Dayton Accords as a highly decentralized state, that the entities keep control over the appointment and discipline of judges and prosecutors at the entity and lower-government levels.

The RS is in a particularly unfavorable position due to the current HJPC system, since members of the HJPC from the RS are at all times outnumbered by members from the levels of BiH and FBiH at the plenary Council. Moreover, as each entity and lower-government level has its separate laws, the entities are in a far better position to make the decisions about the best candidates for such appointments.

a) European standards require separate bodies for judges and prosecutors.

By giving a single body jurisdiction over both judges and prosecutors, the HJPC regime violates widely recognized European standards. In its January 2011 *Report on European Standards as regards the Independence of the Judicial System*, the Venice Commission wrote, "If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others' appointment and discipline proceedings."[25]

The nomination process as provided for in the current HJPC law is completely inconsistent with the Venice Commission's admonition. The RS Government was the first institution to raise this issue, which was subsequently recognized as an area needing urgent reform by representatives of the European Union and the leadership of the HJPC itself.[26] The RS encourages continued attention to this issue throughout the reform process.

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[25] European Commission for Democracy through Law (Venice Commission), *Report on European Standards as Regards the Independence of the Judicial System*, CDL-AD(2010)040, 3 Jan. 2011, at p. 17.

[26] Milorad Novkovic, "A common platform for changes of the HJPC Law," Internal HJPC memo, June 2010, p. 5.

b) The entities must have effective participation in oversight of HJPC reform.

The EU representatives involved in the Structured Dialogue process have put the responsibility for drafting a new HJPC Law in the hands of the BiH Ministry of Justice. The RS is concerned that the HJPC and BiH Ministry of Justice have not provided adequate opportunities for entity oversight and participation, and have failed to provide opportunities for public comment.

For the process of reform to be legitimate, full entity participation is essential. The RS Government calls upon the EU to ensure a full opportunity for entity participation through the Structured Dialogue. Too often in the past, entity participation and agreement has been treated as an afterthought once the HJPC, BiH agencies, OHR and members of the PIC, and related international organizations such as the OSCE have reached agreement. The EU Structured Dialogue potentially represents a change from such an approach. Without a more inclusive process, reform of the justice system, which is essential, will not be possible.

c) Transparency and accountability must be ensured.

As the reforms proposed in this paper and other reforms are considered in the EU Structured Dialogue process or otherwise, complete transparency is essential. If BiH and entity institutions are to be strengthened by the current justice system reforms, all changes must be the result of genuine consensus-building efforts.

Furthermore, the HJPC needs to increase the transparency of its internal operations. The Council's budget, resource allocation, and staff directory should be made available to the public. Public officials with important responsibilities, such as those persons who currently perform duties in the HJPC, must be identified to the public and be available for consultation with legislative and executive officials of the entities, cantons and municipalities their work affects. Only then can the affected government institutions and the citizens throughout BiH assess the efficiency and professionalism of the HJPC and the effectiveness of its activities. The standard of effectiveness is not the number of seminars held, the number of foreign advisors hired or the number of foreign tours to other judicial institutions made by HJPC members. Rather it is whether citizens throughout BiH have seen an improvement in the prosecutorial and judicial functions that touch their lives.

d) The HJPC Must Obey BiH Law When Making Appointments

Late last year, the HJPC appointed a new BiH chief prosecutor who was clearly ineligible for the position under BiH law. The Law on Prosecutor's Office of BiH establishes just one requirement for the HJPC to follow when appointing a chief prosecutor: the appointee must be one of the prosecutors in the BiH Prosecutor's Office. The Law on the HJPC supplements this basic requirement with a series of more detailed qualifications. On 12 December 2012, however, the HJPC appointed Goran Salihović, then serving as Chief Judge of the Sarajevo Municipal Court, as BiH Chief Prosecutor. In making this appointment, the HJPC either ignored or disregarded Article 3-2 of the Law on the Prosecutor's Office of BiH (Official Gazette of BiH 49/09) which reads:

> The Chief Prosecutor and the Deputy Chief Prosecutors shall be selected and appointed by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina *from the Prosecutors of the [BiH] Prosecutor's Office.*[27]

When Mr. Salihović was appointed, he was not a prosecutor in the BiH Prosecutor's Office and, indeed, had never worked as any kind of prosecutor.

When the HJPC appointed Mr. Salihović, it said it believed he met the qualifications prescribed in the Law on the HJPC.[28] But that law's more detailed qualifications do not in any way replace—and are perfectly consistent with—the single, basic requirement of the Law on Prosecutor's Office—that the appointee be a prosecutor in the BiH prosecutor's office.[29]

It is not entirely clear why the HJPC ignored this unambiguous and basic legal requirement. But reliable sources report that the OHR and the U.S. Ambassador pressed the HJPC to appoint Mr. Salihović despite his legal ineligibility for the position. Whatever the cause, the appointment reflects poorly on the HJPC's professionalism and its respect for the law. The HJPC can scarcely afford to further undermine its legitimacy by ignoring the law.

D. The BiH Prosecutor's Office violates European standards and the rule of law.

By failing to respect the principle of equality before law, the BiH Prosecutor's Office violates the BiH Constitution, international conventions, and European standards. Its failure to pursue justice for crimes against Serbs—demonstrated by statistics and many specific examples—denies Serbs equality before law. Moreover, its Chief Prosecutor's abuses of authority are an affront to the rule of law.

1. The BiH Chief Prosecutor has abused his office.

Since BiH Chief Prosecutor Goran Salihović took office in February, abuses have multiplied. Mr. Salihović's very appointment was plainly contrary to law. As explained in section C, above, the HJPC appointed Mr. Salihović to the position of chief prosecutor even though he was ineligible for the position because he was not a prosecutor in the BiH Prosecutor's Office. The lack of respect for law in the Mr. Salihović's appointment set the stage for his tenure as chief prosecutor.

a) The Chief Prosecutor is threatening prosecutorial autonomy.

[27] Emphasis Added.

[28] Prosecutor's Office of BiH, *Goran Salihović Appointed As The Chief Prosecutor Of The Prosecutor's Office Of BiH*, 18 Jan. 2013.

[29] Article 29, paragraph 1 of the Law on HJPC requires that the appointee as Chief Prosecutor must have "a minimum of eight (8) years of practical experience as a judge, prosecutor, attorney or other relevant legal experience after having passed the bar examination . . . " and possess "proven management and leadership skills relevant to the operation of the prosecutors' office."

The Chief Prosecutor has tried to personally control the decisions of all other prosecutors, contrary to the applicable BiH law. Under the Law on Prosecutor's Office of BiH, individual prosecutors have autonomy in their decisions. Recently, however, the BiH Chief Prosecutor ordered that prosecutors in his office may not make prosecutorial decisions, such as indictments, plea bargains, and decisions on whether to investigate, without first submitting them to him. This order is contrary to the Law on Prosecutor's Office of BiH, which provides, "The Deputy Chief Prosecutors and Prosecutors may perform any action in the proceedings instituted before the Court of Bosnia and Herzegovina for which as provided by State Law the Chief Prosecutor has been authorized."[30] The law allows the Chief Prosecutor to "issue general instructions to the prosecutorial and administrative branches" of the Prosecutor's Office and to "make a general plan for the distribution of cases and for administrative matters,"[31] but it never suggests that the Chief Prosecutor can assert authority over specific prosecutorial decisions. For the BiH Chief Prosecutor to demand that prosecutors submit their decisions to him in advance threatens the autonomy to which they are entitled under BiH law.

b) The Chief Prosecutor has shown contempt for the BiH Parliamentary Assembly.

In July and August 2013, a working body of the BiH Parliamentary Assembly invited the Chief Prosecutor to participate in meetings about a 5-7 June 2013 crisis in which hundreds of people, including foreign dignitaries, were confined against their will inside the Parliamentary Assembly building. The Chief Prosecutor failed to answer the parliamentary working body's invitations other than to issue an angry press release condemning them. He blasted the invitations as "gross and unacceptable political interference in the independence of the judiciary" and said that he has no legal "authority to talk about cases pending within the prosecutor's office anywhere except in the courtroom." The Chief Prosecutor could have attended the meeting and declined to comment on matters that he considered inappropriate for comment. Instead, the Chief Prosecutor attacked the BiH Parliamentary Assembly and denied it information to which it is entitled in its efforts to prevent future crises.

c) The Chief Prosecutor has threatened the head of the top BiH law enforcement agency.

Despite the Chief Prosecutor's claim—made when it suited him—that he has no legal authority to talk about cases pending in his office "except in the courtroom," he has not hesitated to comment publicly about cases pending in his office whenever he wishes to do so. Indeed, the same HJPC that appointed the Chief Prosecutor in December recently found it necessary to admonish him—along with the President of the Court of BiH—against inappropriate media appearances and comments. In a statement on 26 September 2013, the HJPC wrote that it

> calls all members of the judiciary, *especially presidents of courts and chief prosecutors*, to abstain from all forms of appearances and comments in the media that could damage their reputation, the

[30] Law on Prosecutor's Office of BiH, art. 5(3).

[31] Law on Prosecutor's Office of BiH, art. 15.

> reputation of the institution they represent, as well as the entire judiciary. Members of the judiciary, as well as the HJPC BiH, must remain neutral, professional, and independent in their work.[32]

On the same day the HJPC's admonition appeared, the BiH Prosecutor's Office posted a video on its website in which the Chief Prosecutor threatens the director the top BiH's law enforcement agency, SIPA, for making allegations against him. In the video, the Chief Prosecutor accuses SIPA Director Goran Zubac of "trying to switch the focus of public attention and the HJPC from the cases that are currently pending in the Prosecutor's Office of BiH *in which the name of Mr. Zubac is being mentioned*." Later in the video, the Chief Prosecutor threatens to prosecute Mr. Zubac for "pressing false charges." The Prosecutor's Office of BIH has also posted on its website articles that virulently attack Mr. Zubac.

d) Obstruction of the exhumation of Serb victims from mass grave

This year, crews began excavations at Sarajevo's city dump in an effort to find a suspected mass grave of Serb citizens of Sarajevo. However, after early excavations found human remains and confirmed the presence of a mass grave, the BiH Prosecutor's Office declined to pay the contractors for their work, thus forcing a suspension of the exhumation process. The Chief Prosecutor is trying to mislead the public and international representatives with clams that in this particular case the public procurement procedure was not followed. The truth, however, is that the Prosecutor's Office of BiH has routinely paid all the expenses of all preliminary excavations and exhumations both before and since halting this one exhumation. Chief Prosecutor Salihovic issues exhumation orders regularly, for which he pays regularly, both before and since 30 August (International Day of Missing Persons) when he halted the exhumation in question. During a 24 September 2013 visit to the city dump exhumation site, EU Special Representative Peter Sorensen said it is important to continue the excavations, emphasizing, "Anything that prolongs the suffering of the families of missing persons must be resolved." Kathrynne Bomberger, the Director-General of the International Commission on Missing Persons, said the city dump site "demonstrates very well the atrocities that took place during the conflict and the attempts that were made to conceal crimes committed during the conflict." The BiH Prosecutor's Office's effective suspension of the exhumation indicates that such concealment of crimes is continuing to this day.

e) Obstruction of the Šemsudin Mehmedović investigation

On July 19, 2013, BiH's State Investigation and Protection Agency (SIPA) arrested Šemsudin Mehmedović, a member of the BiH Parliamentary Assembly and vice president of the Bosniak SDA party, in connection with war crimes against Serb civilians. The arrest was conducted consistently with the BiH Criminal Procedure Code and was grounded, in part, in a provision allowing for an arrest when there is reason to fear that a suspect will hinder an investigation by influencing witnesses. SIPA filed a criminal report over obstruction of judicial institutions because of evidence it had gathered of threats to witnesses in the case and to SIPA officers. After Mehmedović's arrest, however, the BiH Prosecutor's Office quickly ordered his release. It also refused SIPA's routine request to search certain locations in connection with the case, an action

[32] Statement of the HJPC BiH, posted at www.hjpc.ba, 26 Sept. 2013 (emphasis added).

SIPA says is unprecedented in the history of its war crimes investigations. In 2009, the BiH Prosecutor's Office had initiated an investigation of Mehmedović and others over the illegal arrest and abuse of Serb civilians in Tešanj, where Mehmedović had been chief of police. According to SIPA, however, the BiH Prosecutor's Office since then has consistently obstructed the investigation.

2. The BiH Prosecutor's Office has shown a pattern of discrimination against Serb victims of war crimes.

All war crimes must be tried and punished, regardless of the ethnic identity of their perpetrators and victims. Unfortunately, as shown in the statistics and examples below, the BiH Prosecutor's Office has shown little interest in prosecuting war crimes by Bosniaks against Serbs. The pattern of discrimination against Serb victims of war crimes violates the ban on discrimination by public officials in Protocol 12 to the European Convention on Human Rights[33] and the International Covenant on Civil and Political Rights.[34] It is also contrary to the EU Charter on Fundamental Rights, which provides for equality before the law and prohibits any discrimination based on ethnic origin, among other grounds.[35]

a) Statistics showing prosecutorial bias against Serb victims

In 2012, a former international advisor to the BiH Prosecutor's Office observed that many prosecutors there are highly reluctant to prosecute Bosniaks for crimes against Serbs and that they fail to vigorously pursue those cases.[36] This failure shows in the BiH Prosecutor's Office's record. In its entire history, the BiH Prosecutor's Office has achieved final convictions of only seven Bosniaks for war crimes against Serb civilians. By comparison, it has achieved 75 such convictions of Serbs for war crimes against Bosniak civilians. In addition, those 75 convicted Serbs received sentences 57% longer, on average, than the seven convicted Bosniaks.

Although it is impossible to quantify with any precision the share of war crimes that were committed against members of each of BiH's peoples, a 2010 study by demographers at the International Criminal Tribunal for the former Yugoslavia (ICTY) estimates that Serbs accounted for 20.4% of civilian war deaths and Bosniaks 69.8%. One might expect that, in a fair judicial system, convictions and sentences for war crimes against civilians would reflect, at least somewhat, each people's share of civilian war deaths. However, the BiH Prosecutor's Office has achieved final convictions of *10.7 times* as many Serbs for war crimes against Bosniaks as vice versa. For every year of imprisonment a Bosniak has received for war crimes against Serbs, a Serb has been received 16.8 years of imprisonment for war crimes against Bosniaks.

The BiH Prosecutor's Office's failure to vigorously pursue justice for Serb victims is all the worse because it builds on the ICTY's similarly one-sided record. The ICTY has convicted just five Bosniaks for crimes against Serbs while convicting 59 Serbs of crimes against Bosniaks. For

[33] Protocol No. 12 to the European Convention on Human Rights, art. 5.

[34] International Covenant on Civil and Political Rights, art. 26.

[35] EU Charter on Fundamental Rights, arts. 20, 21.

[36] Conversation with a former international advisor to the BiH Prosecutor's Office.

every year of imprisonment the ICTY has given to a Bosniak for war crimes against Serbs, the ICTY has given a Serb more than 29 years of imprisonment for war crimes against Bosniaks.

b) Examples of prosecutorial bias against Serb victims

Examples abound of war crimes against Serbs that have, inexplicably, never been prosecuted. In a 2011 report, the International Crisis Group (ICG) wrote that "many of the most serious" war crimes against Serbs "remain unprosecuted."[37] The ICG said that the BiH Prosecutor's Office "owes Serbs an explanation" for the failure to prosecute such cases, and should "make the cases a high priority."[38] But no good explanation is possible for the BiH Prosecutor's many egregious failures to prosecute, such as those in the examples below. These examples, of course, concern only a small portion of the war crimes committed against Serbs, but they provide a glimpse of the types of war crimes for which the BiH Prosecutor's Office has failed to seek justice.

(1) Mass crimes against Serb citizens of Sarajevo

The systematic and widespread practice of persecution, torture, and murder and concealment of these war crimes against citizens of Sarajevo of Serb origin have never been seriously investigated or prosecuted.

According to official information of the Ministry of Interior of RS there were 3,299 victims of war crimes of Serb origin in 10 municipalities in Sarajevo. SIPA has data showing at least 2,700 Serb victims of war crimes in the territory of the city of Sarajevo which was under the control of the Army of the Republic of BiH (ARBiH) during the conflict.

A large number of bodies of war crime victims were concealed and then transferred from their primary locations to secondary locations (one of which is the city dump where exhumation was halted by Chief Prosecutor Salihović on 30 August this year, as described above). The concealment and transport of bodies to secondary locations at secret locations in Sarajevo could not have been conducted without the support of the official political, military, and police authorities. Immediately, at the onset of the conflict in BiH in April and May of 1992, large-scale arrests, tortures, and killings of members of the Serb intelligentsia commenced. In spite of all this, the BiH Prosecutor's Office has almost completely disregarded the widespread war crimes against Serb civilians in Sarajevo.

(2) Murder of 33 Serbs in the Village of Čemerno

On June 10, 1992, in the village of Čemerno in central Bosnia, forces of the Army of the Republic of Bosnia and Herzegovina (ARBiH) murdered 33 Serbs, including women, children, and the elderly. They burned the village down, and the return of Serbs to rebuild has since been obstructed. On 3 March 2007, the RS Ministry of Interior filed an amended criminal report with supporting evidence against Salko Opačina and others over the massacre. Witnesses in the case include a surviving victim of the shootings and another who directly observed the massacre.

[37] International Crisis Group, *Bosnia: State Institutions under Attack*, Crisis Group Europe Briefing N°62, 6 May 2011, p. 7.

[38] *Id*. (emphasis added).

Many bodies have been exhumed, including eight women and a child.[39] Despite all of the evidence in the case, there has been no indictment, and the BiH Prosecutor's Office has failed even to inform in any way theRS authorities of the status of the case.

(3) Atif Dudaković

Despite voluminous evidence that ARBiH Gen. Atif Dudaković, the wartime commander of the ARBiH's 5th Corps, committed major war crimes against Serbs and others, the BiH Prosecutor's Office has never brought charges against him. Among the many pieces of damning evidence against Dudaković are videos showing Dudaković ordering his troops to set fire to Serb villages in the Bosnian Krajina region in 1995. A former member of Dudaković's own 5th Corps has recounted the organized slaughter of a group of Serb civilians between the ages of 40 and 60. In September 2006, the RS Ministry of Interior filed with the BiH Prosecutor's Office a report against Dudaković and other suspects for war crimes committed in 1994 and 1995 against Serb civilians, police, and soldiers in Bihać, Petrovac, Kljuc, Sanski Most, Krupa, and other places. In October 2006, the BiH Prosecutor's Office announced the opening of a war crimes investigation against Dudaković and several others.

The next year, the BiH Prosecutor's Office said that Dudaković would be indicted, but no indictment was ever issued. The RS filed another report against Dudaković in 2009, this one concerning the 1995 murder by Dudaković's 5th Corps of 26 Serb civilians in the area of Bosanski Petrovac. In July 2009, the BiH Prosecutor's Office said that an investigation of Dudaković was "under way." In late 2009, the RS filed a third report against Dudaković, alleging that his units killed 132 Serb civilians in Bihać, Krupa, and Sanski Most during Operation "Sana 95." The report contained more than 1,000 pages of evidence. The BiH Prosecutor's Office received additional evidence against Dudaković in November 2011 when SIPA investigators searched the former "Orljani" barracks in Bihać, seized documents, and found seven corpses of Serbian soldiers. Today, some 18 years after the atrocities and seven years after BiH's chief prosecutor first announced an investigation of Dudaković, there has still, astoundingly, been no indictment.

(4) The 3rd Corps and its El Mujahid Detachment

Among the most heinous crimes of the war were those committed against Serbs by the famously sadistic El Mujahid Detachment (EMD), a unit of the 3rd Corps of the ARBiH. The EMD was originally made up of foreign mujahidin, but it came to be composed primarily of local Bosniaks. The ICTY found in its 2008 *Rasim Delić* judgment that the EMD had committed widespread and sadistic war crimes against Serbs. For example, the ICTY found that the EMD murdered 52 Serb prisoners at the Kamenica camp between September and December 1995. The ICTY also confirmed that that the EMD was under the control of the 3rd Corps. Yet not a single EMD member or one of its superiors—such as 3rd Corps Commander Sakib Mahmuljin—has been prosecuted for the EMD's grisly crimes against Serbs.

(5) Slaughter of Fleeing Serb Civilians at Kukavice

[39] *Za ubistvo 30 Srba još nema optužnica*, GLAS SRPSKE, 10 June 2008.

In the early afternoon of August 27, 1992, a convoy of Serb civilians including cars, trucks, and a bus full of women and children, was fleeing advancing RBiH forces when it drove into a slaughter. Near Kukavice, a group of RBiH members waiting for the convoy on steep embankments on both sides of the road rained fire down from their automatic weapons into the bus and other vehicles, killing 21 Serb civilians, including many women and children, and wounding many others. The New York Times' Roger Cohen, on visiting the scene in the aftermath of the attack, called it "powerful testimony to the crazed brutality of the war in Bosnia." The Court of BiH assigned the case to the RS prosecutor with territorial jurisdiction. Yet when the Center for Public Security of Eastern Sarajevo concluded its investigation and the case approached indictment, the Court of BiH took jurisdiction away from the RS prosecutor and gave it to the BiH Prosecutor's Office. More than 21 years after these grisly crimes and despite the advanced state of the case, the BiH Prosecutor's Office has brought no indictments.

(6) Atrocities in the Srebrenica Area

Although there is ample evidence, evaluated by the ICTY, supporting charges against specific individuals for atrocities against Serb civilians in the Srebrenica area of eastern Bosnia during 1992 and 1993, the BiH Prosecutor's Office has obstructed efforts to bring the victims justice. Bosniak commander Naser Orić gleefully bragged to Western reporters about his exploits in the region, showing them videos of Serb bodies and severed heads. Yet the BiH Prosecutor's Office has failed to charge Orić or anyone else with these crimes. What is worse, the BiH Prosecutor's Office has blocked efforts by district prosecutors of the RS to seek justice in the case. On May 25, 2006, the BiH Prosecutor's Office rightly declared that the investigation of Orić and others for war crimes against civilians should be continued by the RS district prosecutor. During its investigation of Orić and others, the RS district prosecutor collected evidence sufficient to indict five to six persons. But on May 11, 2009, the BiH Prosecutor's Office abruptly took the case away before it could be prosecuted. In the four years since, the case has, predictably, languished without any indictments.

(7) Refusal to investigate torture and murder at five prison camps

In December 2012, a BiH Prosecutor's Office abruptly stated that it would halt its investigation of 455 suspects for war crimes, such as the torture and murder of Serb civilians and POWs, at five prison camps. The decision not to investigate came more than *seven years* after police submitted a report of these crimes. The abrupt decision not to investigate these cases was particularly inappropriate because the prosecutor in charge made it just days after taking the cases over from her predecessor. It strains credulity to think that a prosecutor could—in just a few days—take over the cases against of 455 persons, analyze the extensive evidentiary records, and make a good-faith decision not to investigate.

(8) The Tuzla Convoy Massacre

On 27 April 1992, the Presidency of the RBiH issued a decision permitting the peaceful departure of Yugoslav National Army (JNA) forces, confirming the RBiH's earlier agreement with Yugoslavia that guaranteed JNA forces' safe withdrawal. In addition, Col. Milo Dubajić, commander of the JNA forces stationed in Tuzla, reached an agreement with Tuzla's civilian and military forces guaranteeing that the JNA forces would not be attacked during their withdrawal.

Notwithstanding these guarantees, on 15 May 1992, as the JNA convoy withdrew along the prescribed route through of the city, RBiH snipers—acting on the orders of their superiors—opened fire—first on the drivers, then on the passengers—killing many. In 2002, the District Prosecutor's Office of Bijeljina submitted the case to the ICTY Prosecutor for review to determine whether "the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect, or the continued detention of a prisoner." The ICTY Prosecutor categorized five suspects in the Tuzla Convoy cases under standard marking "A," meaning that it found that "the evidence is sufficient by international standards to provide reasonable grounds for the belief that [the suspect] may have committed the (specified) . . . serious violation of international humanitarian law."[40]

On 18 July 2005, the Center of Public Security of Bijeljina submitted to the BiH Prosecutor's Office a new, amended report on war crimes committed during the Tuzla Convoy Massacre. In 2009, when the BiH Prosecutor's Office finally brought an indictment arising out of the massacre, it was for only a discrete crime by a single police officer against a single individual (the Court of BiH immediately transferred that case to the Tuzla Cantonal Court, which acquitted the defendant). The BiH Prosecutor's Office failed to confront the illegality of the Tuzla Convoy Massacre itself or to indict the authorities behind it. In May 2009, the BiH Prosecutor's Office suspended its investigation of Tuzla's wartime mayor and other suspects in the massacre. Thus, unless the investigation is reopened, BiH institutions will not have brought to justice a single perpetrator.

(9) "Liquidation" of JNA Prisoners in Sarajevo's Grand Park

On April 22, 1992, members of the Larks (*Seve*), a para-intelligence group answerable to the RBiH's top leadership, executed a group of captured JNA members and Serb civilians in Sarajevo's Grand Park. In testimony at a 2013 hearing at the ICTY, Edin Garplija, a former agent of the RBiH Interior Ministry, recounted that he had investigated the Larks' "liquidation of captured soldiers and civilians" in the park and said there were "scores of witnesses" about it. Garplija said that criminal acts by the Larks were not charged in court "because a large team of people worked to conceal these crimes." Despite the investigations and many witnesses about the "liquidation" of prisoners in Grand Park, the BiH Prosecutor's Office has never brought an indictment.

(10) Murders of Serb Civilians in Trnovo Municipality

In 1992, ARBiH forces brutally murdered many civilians, including young children, in the Municipality of Trnovo near Sarajevo. RS officials have gathered and submitted to the BiH Prosecutor's Office voluminous evidence about the crimes and suspects. Among the pieces of evidence submitted to the Prosecutor's Office is a recording proving that the ARBiH established a camp in Trnovo for Serb civilians, women, children, and the elderly in the summer of 1992—key evidence to disprove the claim that the civilians killed in Trnovo died in combat. Yet despite the ample evidence in the case, more than two decades after these grisly crimes there has not been a single indictment.

[40] OSCE, War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles, March 2005.

(11) Dobrovoljačka Street Ambush

On May 3, 1992, a Yugoslav National Army (JNA) convoy travelling peacefully under an agreement for safe withdrawal from Sarajevo was ambushed by Bosniak forces on Sarajevo's Dobrovoljačka Street. According to the Commander of the UN forces in BiH, Major General Lewis MacKenzie, who was at the scene, Bosniak Territorial Defense Force (TDF) soldiers first blocked the road in the middle of the convoy, splitting the column of vehicles in half. The TDF soldiers then began shooting into some of the vehicles, killing and wounding many JNA personnel. In 2005, the Center for Public Security of Eastern Sarajevo submitted a criminal report against 15 suspects in the ambush. In November 2007, the BiH Prosecutor's Office finally issued an order for the investigation of 15 suspects. But the BiH Prosecutor's Office has not moved forward with any indictments, even though sources within the Prosecutor's Office indicate that investigators have found evidence of war crimes. In January 2012, Jude Romano, a foreign prosecutor within the BiH Prosecutor's Office (who had been appointed by a decree of the High Representative), decided to terminate the investigations. RS officials called for the case to be reopened, and the RS Ministry of Interior has even provided additional evidence in the case, but the BiH Prosecutor's Office has failed to resume the investigation.

E. BiH justice institutions lack transparency

BiH judicial institutions operate without the transparency that is essential in a free society, denying the public information to which they are entitled under law. The Court of BiH routinely fails to publish important decisions, including appellate verdicts. Beyond that, the Court even refuses specific requests for verdicts submitted in accordance with the BiH Law on Free Access to Information. That law requires public authorities to disclose information except when the disclosure "would reasonably be expected to cause substantial harm" to certain narrowly defined interests of BiH (e.g., foreign policy and protection of public safety). It is inconceivable that disclosing a court's verdict would affect—let alone cause "substantial harm"—to any of these interests. The BiH Constitutional Court also lacks transparency. With no good explanation, it denies requests for important court documents, such as an appeal against a decision of the RS Supreme Court and a request by a member of the BiH Presidency for evaluation of an RS law's constitutionality. In order to build public trust and comply with the law, BiH judicial institutions must act with much greater transparency.