REPUBLIC OF SRPSKA
PRESIDENT OF THE REPUBLIC

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No:01-010-2470/14
Date: May 5, 2014

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 15 May debate on Bosnia and Herzegovina (BiH), Republika Srpska (RS), 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 Eleventh Report to the UN Security Council.

The RS Government's policies are guided by its central goal of improving economic conditions for its citizens. Section I of the Report examines some of the actions the RS is taking to promote economic growth, such as continuing to enact reforms to improve the business environment, fight corruption, and align RS laws and regulations with EU standards. Section II explains the need for significant reforms of BiH-level institutions, including justice institutions, whose practices are often incompatible with European standards and citizens' rights under the BiH Constitution and international conventions. Section III of the Report examines the importance of respecting BiH's constitutional structure, including the division of competencies between BiH and the entities and mechanisms to protect BiH's Constituent Peoples. Section IV explains the counterproductive effects of interference by the High Representative and others in BiH's

domestic politics. Finally, Section V of the Report explains why, after more than 18 years of peace in BiH, there is no factual or legal basis for the Security Council to invoke Chapter VII of the UN Charter.

I would ask that this letter, the report, and its four 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 respond.

Yours sincerely,

PRESIDENT OF REPUBLIKA SRPSKA

Milorad Dodik

Republika Srpska's Eleventh Report to the UN Security Council

April 2014

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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 11th Report to the UN Security Council, which outlines the RS Government's views on key issues facing Bosnia and Herzegovina (BiH). The RS's principal goal remains the improvement of economic conditions for its citizens. Consistent with that goal, the RS is reforming its laws and regulations to promote economic growth and fight corruption, seeking reforms of BiH-level institutions, insisting on respect for BiH's constitutional structure, and calling for an end to the High Representative's harmful interference with domestic politics. The RS reaffirms its ten previous reports to the Security Council. It thanks states and their representatives for taking this and earlier reports into account as they consider the situation in BiH.

I. Economic growth

Section I describes the variety of ways in which the RS is taking action to boost economic growth. The RS continues to reform its laws and regulations to improve its environment for job-creating investments and businesses. In December, for example, the RS inaugurated a new one-stop shopping system for business registration, which drastically cuts the time, procedures and expense of opening a business. The RS is also encouraging economic growth by continuing to align its laws and regulations with EU standards. BiH's progress toward EU membership has, unfortunately, stalled because of disagreements within BiH's other entity, the Federation of Bosnia and Herzegovina (FBiH), over the establishment of a coordination mechanism for EU integration and the implementation of a verdict of the European Court on Human Rights. BiH has also failed to enact urgent, EU-supported legislation to amend the BiH residency law because of a Bosniak political party's obstructions. Another way the RS is promoting economic growth is by intensifying its fight against corruption, including through its recent approval of a new four-year Anticorruption Strategy.

II. Reform of BiH-level institutions

Section II addresses the need for significant reforms of BiH-level institutions. Though the EU's Structured Dialogue on Justice has helped illuminate areas in which the BiH justice system requires reform, BiH-level institutions are stubbornly resisting change. As explained in Section II and the four attachments to this report, reforms are necessary to: (1) stop abuses by the BiH Prosecutor's Office, including ethnic discrimination in war crimes cases; (2) put an end to the Court of BiH's arbitrary, and sometimes lawless, assertion of jurisdiction over entity criminal cases; (3) implement the European Court of Human Rights' ruling in *Maktouf v. BiH*; (4) improve BiH's system for appointing judges and prosecutors; and (5) bring transparency to secretive BiH judicial institutions. Section II also explains the need for an examination of BiH-level institutions, many of which were unlawfully imposed by the High Representative, violate the BiH Constitution's allocation of governmental competencies, duplicate functions performed by entities and cantons, and waste money. Finally, Section II discusses the need for anti-corruption programs.

III. Respecting the Dayton structure of BiH

Section III explains the importance of respecting the structure of BiH established in the BiH Constitution, which is an integral part of the Dayton Accords. The constitutional mechanisms to protect each of BiH's Constituent Peoples are vital to the country's stability. The Constitution's strict limits on the BiH level's competencies are essential to the country's proper functioning, but they were disregarded as the High Representative centralized many competencies in Sarajevo. The frequent deadlocks that characterize the BiH level today would be much less likely if the BiH level limited its governance to its constitutional competence. The BiH Constitution is also important because its federal structure enables entities to enact reforms and other policy innovations that would have been impossible to develop the consensus for at the BiH level. Particularly in countries in which political preferences vary widely by region, decentralization boosts efficiency and economic development.

IV. What is the result of foreign funding of and intervention into domestic political activities?

Section IV examines the damaging effects of interference by the High Representative and others into domestic politics in BiH. The High Representative and other foreign diplomats embraced this year's street protests against BiH, FBiH, and cantonal institutions as examples of representative democracy—even after the demonstrations turned violent—while at the same time attacking and delegitimizing officials chosen in free and fair elections. The High Representative also continues to undermine efforts to negotiate compromise solutions to political disputes.

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

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." The Security Council's own resolutions have repeatedly acknowledged the "calm and stable" situation in BiH. After more than 18 years of peace in BiH, there is simply no justification for the UN Security Council to continue acting under Chapter VII.

I. Economic growth

1. The RS's highest priority is creating favorable conditions for job creation and economic growth. This includes reforming its laws and regulations to make it easier for firms to invest and new businesses to take root and grow. It also includes working steadily to align RS laws and regulations with the EU standards. The fight against corruption is another important part of the RS's economic development efforts, including a wide-ranging new initiative. Finally, the RS looks forward to working closely with the EU as it joins the RS in focusing on how best to improve the economic situation. The RS will continue to defend the wide autonomy for the two entities established by the BiH Constitution, which gives the RS flexibility to make reforms even when there is political deadlock in Sarajevo.

2. The RS economy has been battered in recent years by the European financial crisis, but it has now returned to solid levels of economic growth. The RS GDP registered year-over-year growth of at least 1.9% in every quarter of 2013, even as some countries in the region suffered negative growth. Foreign investment is making a significant contribution to the RS economy as investors from Europe, North America, China and elsewhere join domestic investors in launching new projects in energy, agriculture, tourism and infrastructure development.

A. A welcoming environment for investment and business

3. The RS Government is continuing to enact and implement reforms to make the RS an attractive place to invest and an easy and inexpensive place to start a business.

4. In December 2013, for example, the RS's new one-stop shopping system for business registration became operational. It has already increased the number of new businesses in the RS. The new system, which required the enactment of a sweeping set of legal reforms, is designed to cut the time required for registering a new business from 23 days to 3, the number of required procedures from 11 to 5, and the cost from €500-750 to €100. The European Commission and the International Monetary Fund have praised the RS's business registration reforms. Germany's Friedrich Ebert Foundation wrote in a March 2014 report that the RS reforms "will significantly ease pressure on businesses."[1]

5. In January 2014, in order to promote economic activity and job creation, the RS approved an amendment to the income tax law introducing a non-taxable portion of income.[2] In March 2014, the RS adopted a new law on multilateral compensation, which is intended to improve liquidity in the real estate sector, and amendments to the Law on Foreign Exchange Operations, which are designed to streamline payment procedures in foreign operations.[3]

6. Since 2006, the RS Government has implemented many important reforms in order to improve its economy. These include, for example:

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[1] Goran Stankovic, *2013 Annual Review of Labour Relations and Social Dialogue in South East Europe: Bosnia and Herzegovina*, Friedrich Ebert Stiftung, at 4.

[2] *BAM 200 Income Non-Taxable from 1 February*, InvestSrpska.net, 31 Jan. 2014.

[3] *Adopted Law on Unified System of Multilateral Compensation and Cession*, InvestSrpska.net, 5 March 2014.

- the first regulatory "guillotine" in the region (a process by which unnecessary and burdensome regulations are abolished);

- regulatory impact assessments

- establishment of commercial courts

- adoption of the Law on Public-Private Partnership

- reform is underway of land registry and relevant legislation, as well as reform of the legislation governing construction permits, etc.

- new tax deductions for equipment investments

7. The RS has been fully liberalized for foreign investors. There are no differences between domestic and foreign investments. Foreign investors enjoy national treatment. Under the latest amendments to the Law on Foreign Investment of the Republic of Srpska, there are no restrictions for investing in any sector, apart from public information. The latest amendments to the Law also liberalized the defense industry sector for foreign investment. Profit expatriation is free, a foreign person's contribution is exempt from duty and tax payment, and acquisition of real estate is free.

8. Since 2012, the RS Government, supported by the International Finance Corporation, has operated a Foreign Investor Aftercare Program under which the institutions of RS and municipal officials facilitate foreign investors' activities.[4]

9. The RS continues to work on business-friendly reforms, such as amendments to bankruptcy legislation and modifications to the fiscalization system.

10. Even as taxes have been raised in almost every country in the region, taxes have remained stable in the RS.

11. In addition to the RS's business-friendly reforms, many other factors make the RS a profitable location for foreign investment. The RS has an excellent geostrategic position located between the East and the West, the North and the South, at only about 500 km from Vienna and 680 km from Munich. The recently established Banja Luka-Belgrade flight enables fast connections with all important destinations in the world. With Croatia's accession to the EU last year, the Republic of Srpska is at the very border with the EU. BiH's Stabilization and Association Agreement and Interim Agreement on Trade with the EU enable free export to the EU of almost all goods that meet its standards.

12. Investors in the RS also obtain access to emerging markets, i.e., Central European Free Trade Agreement (CEFTA) countries with their market of about 30 million people, as well as more than 70 million under the Free Trade Agreement between BiH and Turkey.

[4] *Training Held within Foreign Investor Aftercare Program*, InvestSrpska.net, 27 March 2014.

13. Moreover, investors in the RS benefit from electricity prices that are the lowest in the region and much lower than in the EU or in the FBiH. The RS's labor cost to quality ratio is also favorable.

14. The RS's increasingly business-friendly environment, unfortunately, is often overlooked because it is wrongly associated with the poor scores BiH receives each year in the World Bank's *Doing Business* report. The *Doing Business* report on BiH has almost nothing to do with the ease of doing business in the RS because its evaluations are based entirely on case scenarios of a fictional company in Sarajevo, the capital of the FBiH. BiH's decentralized structure has allowed the RS to develop a completely different—and much more congenial—business environment than the FBiH's.

15. Studies that have examined Republika Srpska's business environment have praised RS reforms. For example, the World Bank's 2011 report *Doing Business in Southeast Europe* cited Republika Srpska's largest city, Banja Luka, as one of the two cities in the region that had improved their business environments the most.

16. Foreign firms that have recognized the RS's potential include Arcellor Mitall, Zarubezhneft, EFT, Volksbank, Hypo Alpe Adria, and many others. Major investments underway in the RS include construction of the Ugljevik 3 thermal power plant block, worth 400 million euro, and construction of the Stanari thermal power plant, total worth 550 million euro, and construction of the Banja Luka-Doboj motorway.

B. Working toward EU integration

17. Consistent with its emphasis on job creation and economic growth, the RS continues to do whatever it can to support EU integration. Although membership in the EU is a long-term goal, the steps that BiH and the entities take toward integration can contribute to faster economic development.

1. Legal and regulatory revisions to support EU integration

18. The RS has been working diligently for many years to harmonize RS laws and regulations with the EU's *acquis communautaire*. Apart from being vital to BiH's European integration, alignment with the *acquis* is important in and of itself because it modernizes and upgrades RS laws and regulations, thus promoting economic growth and other goals. 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 loose federal structure established by the BiH Constitution, the vast majority of requirements related to harmonization of laws with the *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 it continues to work steadily toward harmonizing RS law with EU standards.

19. In its 2013 Progress Report for BiH, the European Commission wrote, "The Government of the RS has remained engaged in approximation of draft legislation with the *acquis*. Its administrative capacity to monitor EU-related legislation remains satisfactory."[5] The Progress

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

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.[6]

20. 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.

2. Disagreements within the FBiH continue to block BiH progress toward EU membership.

21. Unfortunately, BiH's progress toward EU membership has halted in recent months because of the failure of the FBiH's Bosniak and Croat parties to resolve disputes with each other on two key matters: the establishment of a coordination mechanism for EU integration and the implementation of the European Court of Human Rights' judgment in *Sejdić-Finci v. BiH*.

a) Coordination mechanism for EU integration

22. Last October, a solution for the establishment of a coordination mechanism for EU integration seemed to be close at hand. In September, EU Special Representative Peter Sorensen and top leaders of BiH, the RS, and the FBiH, reached a high level of agreement on the coordination mechanism. On 1 October, the leaders of BiH's top political parties reached further agreement. The only outstanding issues with respect to the coordination mechanism were matters that need to be decided within the FBiH, with respect to the position and the role of its cantons. Unfortunately, the coordination mechanism remains an unresolved issue because FBiH leaders have been unable to resolve their differences on these issues. The RS will adhere to what it agreed to last year while it awaits resolution of the intra-FBiH issues.

23. It should be noted that the governments of the RS and the FBiH have been coordinating effectively even in the absence of a formal coordination mechanism. In January, for example, the entity prime ministers agreed on the distribution and investment of revenues from BiH's jointly owned electricity transmission company TRANSCO BiH.[7] The prime ministers have also recently resolved other issues with respect to TRANSCO BiH and agreed on an approach to talks with the International Monetary Fund.[8] The recent successful coordination between the RS and the FBiH shows that a coordination mechanism can work without upsetting BiH's constitutional structure.

b) Implementation of the *Sejdić-Finci* Judgment

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

[7] *Distribution of the revenues from TRANSCO agreed in Brussels*, Government of Republic of Srpska, 28 Jan. 2014.

[8] *Prime Ministers Cvijanovic and Niksic discuss Transco BiH*, Government of Republic of Srpska, 20 March 2014.

24. Efforts to implement the European Court of Human Rights' judgment in *Sejdić-Finci v. BiH* have followed a similar pattern—the solution is already agreed with respect to the RS but still awaits agreement with respect to the FBiH. The *Sejdić-Finci* decision requires the BiH Constitution to be amended to enable individuals who are not members of BiH's three Constituent Peoples to run for BiH's three-member Presidency and 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. 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.

25. In 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 (with no ethnic qualification).[9] Thus, Although the agreement resolves the issue with respect to the RS, it leaves open the issue of how each of the FBiH's two members of the Presidency is to be elected. Unfortunately, the FBiH's Bosniak and Croat parties have, since then, failed to reach an agreement on this last remaining obstacle. *Sejdić-Finci*. Once the FBiH's Bosniak and Croat parties resolve this issue, the RS will support their agreement and *Sejdić and Finci* can be implemented promptly.

3. A Bosniak party is obstructing legislation to meet BiH's obligations for EU visa liberalization.

26. BiH has failed, because of a Bosniak political party's intransigence, to enact legislation that is important to meeting BiH's obligations in connection with visa liberalization. The legislation, which would amend BiH's residence law, is especially crucial because the current law has no provisions requiring applicants to show evidence that they live at the address at which they wish to register. This hole in the law has encouraged the rampant practice of registering one's residence using a fraudulent address, which undermines legal security and threatens the integrity of elections. The European Commission noted in its 2013 Progress Report for BiH that there was a "campaign asking voters to register their residence in Srebrenica even if they were not actually living there."[10]

27. In consultation with EU officials, legislation was drafted to amend the BiH residence law to resolve the problem. After the BiH Council of Ministers approved the residence legislation on 17 July 2013, EU Special Representative Peter Sorensen issued a statement welcoming its approval and calling on the BiH Parliamentary Assembly to approve the residence legislation "without any further delay."[11] Ambassador Sorensen noted that the residence legislation is "relevant for the requirements set out in the visa roadmap, which continue to be assessed by the European Commission in the framework of Post Visa Liberalisation Monitoring Mechanism."[12] The BiH House of Representatives quickly approved the residence legislation.

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

[10] European Commission, Bosnia and Herzegovina 2013 Progress Report, 16 Oct. 2012, p. 10.

[11] Statement by the EU Delegation to BiH/EUSR on adoption of Law on single reference number and Law on temporary and permanent residence, Delegation of the EU to BiH/EUSR, 17 July 2013.

[12] *Id*.

Unfortunately, the Bosniak caucus in the House of Peoples blocked the legislation from becoming law by alleging that it is destructive of a vital interest of Bosniaks. In December 2013, the BiH Constitutional Court, in an 8-to-1 decision, rejected the Bosniak caucus's claim, holding that the residence legislation "does not contain a single provision that puts any of the constituent peoples in a more or less favorable position, in this particular case the Bosniak people, nor does it affect the constitutional right of return of refugees and displaced persons . . . ."[13] Since the Constitutional Court's decision, however, the Bosniak SDA Party has continued to block the residence legislation from being considered in the BiH House of Peoples.

28. The blocking of this vital, EU-supported legislation at the BiH level leaves in place a legal gap that allows fraudulent residence registrations to continue unabated, a fact that is particularly troubling as the October 2014 BiH-wide elections approach. For these reasons, the RS Government on 17 April 2014 adopted a decision temporarily setting forth verification standards for registering residence in the RS. These standards are the same as those in the EU-approved legislation already passed by the BiH House of Representatives. They are also the same as the standards that have been in place in the Brčko District since 2010.

In comments about the residence law on 28 April 2014, Ambassador Sorensen emphasized the need for BiH to fulfill "all obligations it has upon itself in connection with the visa liberalization."[14] He said he does not believe the RS Government's decision "will solve much," and urged action at the BiH level. The RS agrees that the BiH Parliamentary Assembly should approve the necessary legislation. The RS Government's decision will only remain in force until the residence legislation is enacted at the BiH level. That will happen as soon as the SDA Party allows a vote on the legislation in the House of Peoples.

4. The RS welcomes the EU's new emphasis on economic development.

29. The RS welcomes the EU's recently adopted approach to BiH—especially its emphasis on economic development—as outlined in the 14 April 2014 Conclusions of the EU Foreign Affairs Council. The RS Government looks forward to working cooperatively with the EU to help the initiative bring the greatest possible economic benefit to its citizens.

C. Intensifying the fight against corruption

30. One of the most important ways the RS is promoting economic growth is by fighting corruption. The RS Government has made strides in fighting corruption in recent years, and it is intensifying its fight against corruption with its recently adopted Anticorruption Strategy for 2013-2017.

1. Past RS anticorruption efforts

31. The RS has implemented many of the measures identified in its 2008-2012

[13] Case U 27/13, Decision on Admissibility and Merits, para. 27. Constitutional Court of Bosnia and Herzegovina, 29 Dec. 2013.

[14] Statement regarding SRNA report on Ambassador Sorensen's comments on the Law on Residence, Delegation of the EU to BiH/EUSR, 29 Apr. 2014.

Anticorruption Strategy and made progress toward achieving its goals. The RS strengthened the legal and institutional framework for combating corruption by taking measures such as:

- establishing an a specialized unit at the Ministry of Interior for combating organized crime and corruption;
- enacting the Law on Conflict of Interest and establishing the Republic Commission for establishment of conflict of interest;
- enacting the New RS Criminal Procedure Code;
- initiating amendments to the RS Criminal Code to harmonize it with the Council of Europe's Criminal Law Convention on Corruption and its additional protocol; and
- establishing of an agency for management of expropriated property.

Over the last several years, the Special Prosecutor's Office and Ministry of Interior of the RS have intensified their work on corruption cases. Also, significant progress has been made in the conduct of financial investigations and confiscation of property obtained through commission of crimes in accordance with the RS Law on Expropriation of Property Obtained through Commission of a Criminal Offense.

32. Although corruption is often difficult to measure, EU-sponsored studies indicate that bribery is much less common in the RS than it is in the FBiH or the Western Balkans as a region. According to a 2013 report on bribery by the UN Office of Drugs and Crime, funded by the EU, the prevalence of bribery by businesses is 10.2% in the Western Balkans, 13.2% in the FBiH, and 5.5% in the RS.[15] According to the same report, the prevalence of bribery by individuals is dramatically lower in the RS (10.5%) than it is in the FBiH (25.3%).[16] The RS corruption rate is also lower than the 12.5% rate in the Western Balkans.[17] Moreover, a 2011 Report by the UN Office of Drugs and Crime found that attempts to illegally buy votes are roughly half as common in the RS as in the FBiH.[18]

2. The RS's Anticorruption Strategy for 2013-2017

33. Despite the progress that has been made, the RS Government understands well that corruption still imposes unacceptable costs on the economy and society; there is much work left to be done. Thus, in order to improve RS institutions' effectiveness in combating corruption, the RS in December approved a new Anticorruption Strategy for 2013-2017 whose goal is to raise the RS's anticorruption culture to the level of developed European countries.

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[15] *Business, Corruption And Crime In Bosnia And Herzegovina*, UN Office on Drugs and Crime (2013) at 16. The same report says that the average number of bribes paid (for each businesses that paid a bribe) is also substantially lower in the RS (4.8) than it is in the Federation (7.4) or the Western Balkans (7.1). *Id*.

[16] *Id*. at 17. The report also says that the average number of bribes paid (for each individual who paid a bribe) is slightly lower in the RS (5.2) than it is in the Federation (5.7). *Id.*

[17] *Corruption in the Western Balkans*, UN Office on Drugs and Crime (2011) at 7.

[18] *Corruption in Bosnia and Herzegovina*, UN Office on Drugs and Crime (2011) at 32, Fig. 20.

34. The new Anticorruption Strategy looks in detail at the achievements and shortcomings of the previous strategy and at the specific needs of the RS as determined by past experience. The strategy takes into account the existing anticorruption components of more than a dozen RS laws already on the books and crafts a program to address the challenges that still exist.

35. Among the broad priorities of the Anticorruption Strategy are:

- increasing trust in public institutions by improving transparency, access to information, professionalism, and independence;
- strengthening policies and mechanisms for preventing and deterring corruption by public officials;
- securing adequate financial, human, and other resources for the proper implementation of anticorruption laws; and
- ensuring that prescribed sanctions fulfill their purpose; taking illegally acquired property and efficiently punishing breaches of conflict of interest laws.

Other goals for the Anticorruption Strategy include:

- further improving the legal and institutional framework for preventing and combating corruption;
- increasing the efficiency with which irregularities are discovered, poor administration is corrected, and crimes of corruption are investigated and punished;
- more active RS involvement in international anticorruption efforts;
- strengthening external and internal control of the work of governmental institutions and public companies;
- promoting a "zero-tolerance" approach toward corruption;
- developing and implementing ethical standards; and
- improving awareness about the rights and duties of state institutions, commercial subjects, civil society, and citizens in the shared fight against corruption;
- improving the education, professionalization, and specialization of personnel for combating corruption.

The RS Government will work vigorously to fulfill the Anticorruption Strategy's goals.

36. In order to fulfill the goals of the Anticorruption Strategy, the RS Government adopted during a special session on 15 March 2014 an Action Plan that details the activities under each sector in accordance with the Strategy's goals, assigns responsibilities, and sets deadlines. At the same session, the Government reached a Decision on establishment, organization, and

competencies of the Commission for Implementation of the Anticorruption Strategy [of] the Government of Republika Srpska, which governs the Commission's composition, organization, jurisdiction, and responsibilities. Members are currently being appointed to the Commission, which will include representatives of the executive, legislative, and judicial branch, and the Chief Auditor of the Supreme Office of the Republika Srpska Public Sector Auditing, as well as members from the non-governmental sector, academic community, and the media.

37. Significant and serious activities related to combat against corruption in Republika Srpska will be continued in the next period.

D. The RS's reforms to promote economic growth would be impossible without BiH's decentralized Dayton structure.

38. The RS could not have enacted the reforms described in this section about without BiH's decentralized structure. The FBiH, in contrast to the RS, has, by and large, failed to enact economic reforms. The FBiH's failure to reform highlights the dangers of proposals to further centralize governance in BiH. In a centralized state, the policies and choices of the FBiH, with its larger population, would dominate, and the types of economic reforms the RS has enacted would be highly improbable.

II. Reform of BiH-level institutions

A. Reform of the Justice System

39. The EU-sponsored Structured Dialogue on Justice has revealed a deeply flawed justice system at the BIH-level with practices in its institutions that are incompatible with European standards and violate international agreements on human, civil, and political rights. The problems with the BiH-level justice system are discussed in detail below and in the four attachments to this Report. They include, for example:

- The Court of BiH is so non-transparent that it has failed to make public the text of any of its war crimes decisions since August 2012.

- The Court of BiH is a first-instance court, yet it also renders final judgments from which there is no appeal to an independent judicial institution, even though the right to such an appeal is required by the European Convention on Human Rights and Fundamental Freedoms (European Convention).

- The European Court of Human Rights recently ruled that sentences imposed upon two persons convicted of war crimes violated the European Convention. The judgment noted that the same sentencing practices had been consistently used by Court of BiH for many years. In a press release, the President of the Court of BiH insisted that the Court would make no changes to its practices.

- In January 2014 the Bosniak member of the BiH Presidency invited the notorious Bosniak war-time commander Naser Orić to the Presidency to announce that Orić would never be prosecuted for his actions, whether inside or outside BiH. In 2009, a district prosecutor in the RS, having earlier been assigned by the Court of BiH to investigate

charges against Orić, had assembled evidence sufficient to bring war crimes indictments against Orić and others. But before these indictments could be brought, the Court of BiH—with the blessing of the BiH Prosecutor's Office—transferred these cases to the BiH Prosecutor's Office, which has never issued an indictment. The recent public embrace of Orić by President Izetbegovic was in response to a request from Serbia, pursuant to international agreements, for custody of Orić to respond to a Serbian indictment for war crimes.

40. Notwithstanding these and other serious violations of European standards, representatives of the BiH institutions in question, supported by some officials of the international community, have criticized RS efforts for reform as "undermining state institutions." RS insistence that these serious institutional problems be made the priority of the Structured Dialogue have been condemned as somehow "blocking progress." The RS will continue to work hard for reforms to address the serious abuses described below and urges the international community to support these reforms.

1. Ethnic discrimination by the BiH Prosecutor's Office

41. The BiH Prosecutor's Office must stop discriminating against Serb victims in its investigations and prosecutions of war crimes. As detailed in Attachment 1, the BiH Prosecutor's Office has been indifferent at best to the prosecution of war crimes by Bosniaks against Serbs and has even been protective of certain Bosniak perpetrators. The pattern of discrimination against Serb victims of war crimes violates Protocol 12 to the European Convention, among other instruments.

42. 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. This failure shows in the BiH Prosecutor's Office's record. For example, the Court of BiH has finalized convictions of almost 10 times as many Serbs for crimes against Bosniak civilians as vice versa. The BiH Prosecutor's Office has brought Crimes Against Humanity charges against 121 Serbs, 14 Croats, and *zero* Bosniaks. In a 2011 report, the International Crisis Group (ICG) wrote that "many of the most serious" war crimes against Serbs "remain unprosecuted." Attachment 1 describes examples of such failures to seek justice. Among them are:

- blocking of the prosecution of Bosniak commander Naser Orić and others for a series of major war crimes in the Srebrenica area in spite of much evidence and Orić's open boasting about atrocities;

- failure to seek justice for the Army of the Republic of BiH's (ARBiH) murder of 33 Serb civilians in the village of Čemerno, including women, children, and the elderly—despite evidence tying the crimes to specific individuals;

- failure to prosecute ARBiH 5th Corps Commander Atif Dudaković for a series of grave war crimes, despite much evidence against him and the Prosecutor's Office's earlier promises that he would be indicted;

- failure to seek justice for heinous and well-established crimes against Serbs by the El Mujahid Detachment of the ARBiH 3rd Corps, such as its murder of 52 Serbs at a prison camp; and

- failure to bring indictments for ARBiH forces' slaughter of 21 fleeing Serb civilians near Kukavice (the case had been assigned to the RS Prosecutor but was taken away just as it was approaching indictment).

43. Since his appointment in December 2012, Chief Prosecutor Goran Salihović has frequently abused his power. For example:

- In 2013, the Prosecutor's Office suspended the exhumation of a mass grave of Serb victims in Sarajevo by refusing to pay the contractors for their work.

- Mr. Salihović has obstructed the BiH State Investigation and Protection Agency's (SIPA) investigation of Šemsudin Mehmedović, an MP of the BiH Parliamentary Assembly and vice president of the SDA party, in connection with war crimes against Serbs. New evidence of Mr. Salihović's protection of Mr. Mehmedović arose on 14 January 2014 when the BiH Prosecutor's Office transferred a weapons concealment case in which the Mr. Mehmedović is the prime suspect to the SDA-controlled prosecutor's office of Zenica-Doboj Canton.

- The Chief Prosecutor has threatened prosecutorial independence. Contrary to law, he ordered that prosecutors in his office may not make prosecutorial decisions, such as indictments, without first submitting them to him.

44. A first step toward correcting these abuses would be to establish strict requirements for the Chief Prosecutor to report on the progress of war crimes investigations and to state reasons for taking over entity cases or referring BiH cases to entity authorities.

2. Illegal expansion of Court of BiH jurisdiction in violation of fundamental human rights

45. As explained in Attachment 2, the BiH Court and Prosecutor's Office have long expanded their jurisdiction illegally into entity criminal law implementation. They exploit the vague terms of Article 7(2) of the Law on Court of BiH or apply an indefensible interpretation of Article 23(2) of the BiH Criminal Procedure Code. The Law on Court of BiH and the Criminal Procedure Code must be amended to prevent any further such abuses.

46. The extremely ambiguous terms of Article 7(2) allow offenses under entity criminal law to be prosecuted in the Court of BiH instead of entity courts in a number of circumstances, including when the alleged conduct "may have . . . detrimental consequences" to BiH. The Court interprets this phrase so broadly as to allow it to take jurisdiction over any entity case. EU experts have found 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—and so far effective—lobbying campaign to preserve the provision. Their primary tactic has been to substitute different words they argue will "objectify" the current terms

of the provision. But the variations that have been proposed still leave the BiH Prosecutor and Court the same broad power to define criminal conduct ex post facto.

47. An examination of Article 7(2) cases (see Attachment 2) shows that the BiH Court and Prosecutor's Office have applied it arbitrarily. The Court usually fails to provide reasons for invoking Article 7(2), and the cases in which the Court states reasons simply demonstrate that the Court has acted without restraint or defined standards. There is no reason to believe the Court would treat a reworded successor provision any differently.

48. In addition, as explained in Attachment 2, the BiH Court and Prosecutor's Office have willfully misinterpreted Article 23(2) of the BiH Criminal Procedure Code in order to take jurisdiction over many cases that belong in entity judicial systems. Article 23(2) gives the Court of BiH priority to conduct trials for crimes over which it has jurisdiction before other courts conduct their own trials for crimes over which they have jurisdiction. But the BiH Court and Prosecutor's Office implausibly claim that this provision gives the Court of BiH jurisdiction over any entity-law charges as long as the case includes a BiH-law charge against at least one defendant. This interpretation has no support in BiH statutes and disregards the primary role of entity law in the BiH justice system. It also, like Article 7(2) of the Law on Courts, is in conflict with legal certainty and the rule of the natural judge.

3. Failure to implement the European Court of Human Rights' *Maktouf* decision

49. In its 18 July 2013 decision in *Maktouf and Damjanović v. BiH*, the European Court of Human Rights held that the Court of BiH violated the European Convention on Human Rights' prohibition against retroactive imposition of a punishment greater than that provided by the law in effect at the time of the crime. As explained in Attachment 3, *Maktouf*'s requirements for the Court of BiH are clear. In any judgment in which the Court sentenced a defendant under the 2003 BiH Code, the Court has violated the European Convention if applying 1976 SFRY Code could have resulted in a lesser sentence. The sentences in all such cases must be re-determined under the 1976 Code, and the Court must apply the *Maktouf* principle to all cases going forward.

50. Unfortunately, the Court of BiH has, by and large, resisted implementing *Maktouf*. Although the Court has since reopened the cases of the plaintiffs from the *Maktouf* case and reopened other specific cases at the direct order of the BiH Constitutional Court, it has continued to violate defendants' rights in new decisions since *Maktouf* and has done nothing to correct its longstanding violation of defendants' rights in past cases.

51. Apart from the reopened cases, the Court has issued 48 verdicts (final and non-final) since *Maktouf*, only eight of which applied the 1976 Code (i.e., the code that *Maktouf* says *must* be applied unless it could not have resulted in a lower sentence). Moreover, the Court of BiH has failed to establish any means of facilitating relief for those whose human rights were violated by the Court's sentencing practices but who lack the resources to pursue a lengthy and costly appeals process. There is also no indication that the Court has even met the BiH Criminal Procedure Code's basic requirement that it notify convicted persons or their counsels whenever it learns that there is a reason for reopening their cases.

4. The HJPC System

52. In 2002, the High Representative imposed on BiH a system for the appointment and discipline of judges and prosecutors that concentrates and centralizes power in an unaccountable HJPC. As described in Attachment 4, this regime requires comprehensive reforms in order to be harmonized with European standards and the practice of democratic federal states throughout the world.

53. In 2012, all of the parties represented in the BiH Council of Ministers (CoM) agreed on an important reform to improve prosecutors' legitimacy and accountability, preserve their 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 fail to give democratic institutions any meaningful role.

54. The HJPC, unfortunately, rejects any proposals that that would, in the words of an HJPC statement, "decrease the legal powers of the HJPC BiH." The RS Government is committed to important reforms based on a democratic process, including through inter-party agreement and the Structured Dialogue. It is imperative that the HJPC also recognize and respect this process.

5. Transparency

55. The BiH Judicial System operates in an unacceptably non-transparent way. For example, the Court of BiH has not posted the text of a single war crimes verdict since August 2012.

56. The BiH Judicial System operates in an unacceptably non-transparent way, denying the public the information to which it is entitled and engendering mistrust. For example, the Court of BiH's non-transparency makes it impossible to properly evaluate its work and understand the way it applies the law. The Court has not posted the text of a single war crimes verdict since August 2012. The Court's website offers an unbelievable excuse for the Court's refusal to publish verdicts:

> There are on-going activities to amend the *Rulebook on Public Access to Information under the Court's Control and Community Outreach,* which is why no recent verdicts of the Court will be available at the Court's web site.

The Court has failed to explain why "activities" to amend an internal rulebook could conceivably require it to block public access to its decisions. The Court also routinely refuses—without explanation—specific requests for verdicts submitted in accordance with the BiH Law on Free Access to Information.

B. An immediate and thorough examination of BiH-level institutions is essential.

57. Many of the centralized BiH institutions that were unlawfully imposed by the High Representative are neither consistent with the BiH Constitution's allocation of competencies between Entities and the BiH level nor effective in providing services to citizens. Notwithstanding these fundamental flaws—and these institutions' tendency to violate

international standards of transparency and accountability—the institutions have generally received uncritical support from the international community. It is now time to recognize that these institutions must justify their existence based on the need for their services and their performance. The recent public demonstrations in Sarajevo clearly show that BiH citizens are not satisfied with the results of the centralizing program of High Representatives. The truth is that many of these imposed institutions were intended to facilitate consolidation of power in the Office of High Representative rather than to serve the people.

1. High cost, few responsibilities

58. BiH institutions have extremely high expenditures despite having dramatically fewer responsibilities and functions than entity-level institutions. In general, BiH institutions deal with paper while the entities deal with people. All of the sectors that play the most important roles in the daily lives of the people who live in the RS and BiH as a whole fall under the jurisdiction of the entity and cantonal governments. Healthcare, social protection, education, commerce, incentives to companies, labor market and employment relations, as well as energy-sector, infrastructure, transportation, and many other areas, are daily concerns of the entity governments. However, BiH's 2013 budget was 1.74 billion convertible marks (KM), almost as high as the RS's 2013 budget of 1.94 billion KM. 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.

59. One particularly vivid example of unjustified BiH-level expenditures is the BiH armed forces. The armed forces cost citizens nearly four times as much as the next most expensive BiH institution, the Indirect Taxation Authority. Unlike nearly all other European states, BiH has not yet cut its military budget. 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 . . . . Eighteen European countries have seen real-terms falls of more than 10% in military spending since 2008 . . . ." States making major cuts have included Latvia (51%), Greece (26%), Spain (18%), Italy (16%), Ireland (11%), Belgium (12%)."

2. Donors uncritically support ineffective and unnecessary institutions.

60. Further exacerbating these problems 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 a 2013 report by the U.S. Congressional Research Service, 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."

3. Implementing reform

61. For these reasons it is essential that an immediate and thorough examination of BiH institutions be conducted. The RS proposes the establishment of joint assessment committees led by RS and FBiH authorities and including a representative from the EU. Transparency, efficiency, justification of expenditures, and most importantly, the need for the institution in question would all be assessed and the results made public. In all cases where duplication with entity and cantonal institutions is found, the presumption would be to eliminate the central institutions and redirect funding to entity and cantonal institutions for strengthening and training at that level. Where employees of the BiH institutions are found to be well-trained and dedicated to efficient performance of services to citizens, they would be offered comparable assignments at entity and cantonal level institutions.

4. Responding to public and civil society demands.

62. The examination and reform program described above would be the best possible response BiH and the international community could make to the demand for government responsiveness reflected in the public demonstrations seen in the past few months in many cities and towns in BiH.

C. Anticorruption efforts

1. Anticorruption efforts are essential at BIH-level agencies.

63. An important element of the BIH-level reform effort discussed in section B, above, must be an attack on corruption. The BiH-level Agency for the Prevention of Corruption and Coordination of the Fight against Corruption (APIK) has received international funding for some time but has made little progress on the BiH anticorruption action plan. At present, APIK is unable to even operate its telephone line, by which citizens are supposed to be able to report official corruption. It would be sensible to focus this agency's efforts on reform of BIH-level agencies. The need for anticorruption efforts at the BIH level is well recognized.

2. Anticorruption programs are most effective when organized at entity and cantonal levels.

64. Corruption is a formidable obstacle to political progress and reform. Successful anticorruption programs are essential for economic development and the establishment of trust between governing institutions and citizens. But, as is the case with most reforms in BiH, successful anticorruption policy cannot be imposed from the BiH level down. Instead, BiH-level authorities should focus on measures that address corruption at the BiH level of government. The entity and cantonal governments are in the best position to implement their own anticorruption strategies, calling upon the assistance of the EU and civil society organizations with expert training and practical experience in government reform.

65. The FBiH and the RS have very different systems of governance, and face different problems. For instance, as noted in section I(C)(1), above, a 2013 report by the UN Office on Drugs and Crime says bribery is more than twice as prevalent in the FBiH as it is in the RS. This comparison suggests that the FBiH has made far less progress in discouraging and prosecuting corruption—and therefore needs a different set of measures—than does the RS. The RS is also much more successful than the FBiH or BiH at passing and implementing laws. It has become

routine in both the BiH and FBiH parliaments for bills to be held hostage, most often by the Bosniak-majority parties.

66. The RS National Assembly, on the other hand, has been able to pass a large number of anticorruption measures and exercise oversight regarding their implementation by RS ministries. Recently, as explained in section I(C)(2), above, the RS has adopted an extensive new anticorruption strategy, designed to run through 2017.

67. Instead of channeling funding for anticorruption efforts exclusively through BiH-level institutions, the EU and other international donors should help fund the RS strategy and similar efforts at the FBiH and cantonal levels.

III. Respecting the Dayton structure of BiH

A. The fundamental role of the Dayton Constitution in ensuring BiH's stability

68. The RS urges the Security Council and the international community generally to respect the need for both broad entity autonomy and protection for Constituent Peoples, as set out in the BiH Constitution, which is an integral part of the Dayton Accords.

69. The conventional wisdom so often heard from international experts is that the Dayton Constitution is a barrier to effective government. This position is superficial and suggests a lack of understanding of the deep divisions of prevailing opinion and mutual suspicions among various groups comprising BiH. Indeed, attacks on the BiH constitutional structure from foreign states and international organizations, as well as from certain BiH political parties, tend to make decision-making more difficult in BiH when endangered groups feel that constitutional protections are at risk of elimination.

70. The Dayton Constitution recognizes that the stability of BiH, in the aftermath of the civil war of the 1990s, depends upon strong protection at the constitutional level of each of the three Constituent Peoples from the risk of discrimination or injury from either or both of the other two Constituent Peoples. These protections take the form, inter alia, of the tripartite presidency of BiH and the ability of representatives of a Constituent People to declare legislation to be destructive of a vital national interest. As the long and difficult debate regarding how to amend the BiH Constitution to implement the European Court's decision in *Sejdić-Finci* clearly shows, constitutional protections for each of the Constituent Peoples continue to be a deeply felt need for the majority of citizens.

71. Over time, on a case-by-case basis, this protection can be better aligned with the array of protections that each BiH citizen is entitled to enjoy pursuant to Article 2 of the BiH Constitution and international agreements to which BiH is a party. Meanwhile, it is now obvious that these protections cannot be lightly eliminated.

72. The RS views the Dayton Constitution as an essential element of stability for BIH. In this Constitution—like many others, including the U.S. Constitution—decentralized government and the need for compromise through democratic processes is recognized as more important than an "efficient" state administration. A system designed with only efficiency in mind can result in discrimination and oppression, particularly in states where there are strong differences of view

among major social groups and mutual suspicion of the motives of other groups.

B. The importance of the Constitution's limits to BiH-level power.

73. As those who follow the situation in BiH know, it is often highly difficult to develop the political consensus necessary for action at the BiH level. This should come as no surprise because prevailing views differ starkly between the electorates of the RS and the FBiH and between voters belonging to each of the three Constituent Peoples.

74. Problems in achieving state-level consensus are inherent in a multinational polity like BiH. Under the BiH Constitution as written, however, this was to be a manageable problem. That is because the Constitution established a federal system that strictly limited the BiH level's competencies, thus minimizing the scope of contentious decisions required at the BiH level.

75. Unfortunately, governance in BiH today does not conform to the constitutional mandate establishing a decentralized federal system. Starting soon after the Dayton Accords were signed, the High Representative steadily consolidated powers at the BiH level in defiance of the Constitution. First the High Representative gave himself legally specious "Bonn Powers"[19] to supersede the entire democratic system established by the Constitution. Then the High Representative used those powers of dictatorial decree—sometimes directly and other times indirectly—to systematically centralize governmental authority in Sarajevo.

76. The Dayton constitutional system, designed to minimize the occasions for political conflict, was turned upside down so as to maximize them. The High Representative's transfer of so many competencies to the level *at which consensus is hardest to achieve* is a recipe for waste and ineffective governance. The process of centralization led by High Representatives has resulted in the inefficient institutions and dysfunctional politics that characterize the BiH joint institutions level today.

77. Centralists who claim the BiH Constitution has failed and must be overhauled ignore the fact that the Constitution's implementation has been blocked. Starting shortly after the Dayton Accords were signed, the Constitution was disregarded by foreign High Representatives who imposed hundreds of laws by decree aimed at centralizing competencies at the BiH level. Although the High Representative has finally stopped decreeing laws, one of the legacies of the High Representative and his predecessors is a centralization of decision-making in Sarajevo that is totally inconsistent with the Constitution's careful limits on BiH-level authority.

78. The RS is working toward returning governance in BiH to the federal structure established in the Constitution. If the BiH level were to govern only in the areas of its constitutional competence, there would be few occasions for political conflicts between the entities or constituent peoples. The BiH level would be able to focus its energies on performing its own responsibilities well rather than wasting money duplicating or interfering with competencies that the Constitution entrusts to the entities.

[19] For a discussion of the illegality and counterproductive nature of the "Bonn Powers," please see Attachment 1 to the RS's 10th Report to the UN Security Council (November 2013).

79. The RS is not seeking a weak or ineffective BiH level; it is seeking a BiH level that is strong and effective with respect to its own constitutional competencies—but whose power is limited to those competencies.

C. BiH's federal structure allows for policy experimentation without waiting for BiH-wide consensus.

80. BiH's federal structure gives the entities the opportunity to adopt reforms that would be impossible to enact at the BiH level, given the inherent difficulty in achieving BiH-wide consensus. This enables the entities to learn from each other's policy successes and failures.

81. As noted in section I, above, the RS has enacted a wide range of reforms to improve its business environment, harmonize its laws with EU standards, and otherwise promote economic development—steps the FBiH has been much more hesitant to take. If BiH were a fully unitary state, reforms such as these would have been highly unlikely. The difficulty in achieving BiH-level consensus would have hampered reform efforts, especially given the FBiH's reluctance to enact reforms.

82. As the RS has explained in earlier reports to the UN Security Council, it is widely recognized that the RS functions more effectively than the FBiH. One example of the RS's more effective performance is law enforcement and public safety.

83. A 2011 study by the UN Office of Crime and Drugs funded by the European Commission and the Government of Norway, compared the five-year victimization rates for five crimes between the RS and the FBiH. According to the report, the victimization rates for robbery, burglary, and car theft are less than half in the RS than they are in the FBiH.[20] The RS's rates for assault/threat and personal theft are also substantially lower than those in the FBiH.[21] Moreover, as discussed in section I(C)(1), above, the UN Office of Crime and Drugs has also reported strikingly lower rates of bribery in the RS than in the FBiH or the Western Balkans region.

84. Differences such as these underline the importance of entity autonomy under BiH's constitutional system.

D. Decentralization improves economic development in countries like BiH.

85. Decentralization improves efficiency and economic development, especially in countries—such as BiH—in which political preferences vary widely by region.

86. According to a 2008 paper by the UNDP Bratislava Regional Centre:

> The need for decentralization and devolution of power from central to local authorities has become one of the priorities in changing the state in most [former socialist block] countries to make it more

[20] *Corruption in Bosnia and Herzegovina*, UN Office on Drugs and Crime (2011) at 46, Table 2.

[21] *Id*.

> democratic and efficient in delivering public services and promoting economic and social development.[22]

The same paper observes, "Decentralization increases opportunities for participation and accountability, thereby deepening democracy and increasing democratic legitimacy. This is especially so where a country's population is diverse, and needs and preferences vary between regions."[23] As the paper points out, "Greater local participation and accountability may indeed involve additional administrative costs but these must be weighted against the related economic (better allocation of resources) and democratic benefits (better addressing the needs of local populations)."[24]

87. A 2009 study commissioned by the Assembly of European Regions ("AER"), a network of regions from 33 European countries, found that "decentralisation, amongst other factors, has a significantly positive influence both on the level and the dynamics of economic performance of countries and regions: The higher (ceteris paribus) the decentralisation indicator, the higher the economic performance."[25] The AER study emphasizes that benefits of decentralization are greatest in countries where policy preferences differ based on region. According to the study:

> The demand for public goods can differ substantially between regions because the preferences of citizens are formed by regional traditions. . . . The bigger the differences in regional preferences within a country, the greater the potential benefits from decentralisation. By supporting decentralisation different preferences of the population can be better incorporated into policy. This helps to ensure that an individual's needs will be considered more adequately.[26]

Thus, the need for a decentralized state structure is particularly acute in BiH, which has vast differences in policy preferences between citizens in the RS and the FBiH.

88. There are many examples of successful, decentralized states. Although the BiH scheme is not identical to other constitutional systems, similar mechanisms of regional autonomy and protections that safeguard the interests of constituent peoples are found in successful democracies both inside and outside Europe. Federal structures in EU member states along with other democracies have been successful forms of governance for states that consist of diverse peoples. Examples include Spain, Belgium, Italy, Switzerland, and Canada, among many others.

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[22] *Decentralization in the Europe and CIS region*, Democratic Governance Practice, UNDP Bratislava Regional Centre, April 2008, at 4.

[23] *Id*. at 5.

[24] *Id*. at 6.

[25] *From Subsidiarity to Success: The Impact of Decentralisation on Economic Growth, Part 2: Decentralisation and Economic Performanc*e (May 2009) (researched and produced by BAK Basel Economics, commissioned and published by Assembly of European Regions) ("*From Subsidiarity to Success*") at 4.

[26] *From Subsidiarity to Success* at 15 (citations omitted).

89. Switzerland, of course, 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 is so broad that they are entitled to conclude international treaties.[27]

IV. What is the result of foreign funding of and intervention into domestic political activities?

90. Recent public protests against the FBiH's entity and cantonal governments and against BiH institutions in Sarajevo have thrown a spotlight on the multiple and longstanding failures of these governments and institutions to meet the needs of citizens. The frustrations directed at these institutions are easy to understand, and, of course it is the protestors' constitutional right to make their voices heard through demonstrations. But with elections coming up in only a few months, the interests of citizens would likely be better served by their active participation in the democratic process as established by the Constitution of BiH than by street demonstrations.

A. Free and fair elections or street protests and foreign-funded "experts"?

91. During the height of the protest movement, representatives of the United States and the EU spoke out in favor of the demonstrations, even after protesters began to engage in violent and destructive behavior. The embrace of public protests by diplomatic officials further undermines the authority of the FBiH Government. Over the past year, the U.S. Embassy has been sponsoring and advocating for a reform of the FBiH Constitution through a system that prioritizes the suggestions of outside experts and excludes elected representatives of the people. It is to be recalled that the origin of troubles in the current FBiH Government was the High Representative's illegal establishment of a government through its nullification of a decision of the BiH Central Election Commission.

92. The High Representative was particularly enthusiastic in his support for the protest movement, and not for the first time. The High Representative also publicly supported protesters who laid siege to the BiH Parliament in 2013. In public remarks and statements to the press, the High Representative held up these protests as examples of representative democracy, while lambasting and delegitimizing officials who were chosen in free and fair elections. It is difficult to see how the High Representative or other representatives of the international community can be credible champions of democracy in BiH while publicly working to subvert the constitutional authorities.

B. The High Representative continues to derail compromise.

93. It has previously been established that the Office of the High Representative's (OHR) presence in BiH hinders comprise and collaboration between parties and institutions. As the International Crisis Group reported in 2009, "the OHR has become more a part of Bosnia's political disputes than a facilitator of solutions," as certain parties often urge the High Representative to impose extra-legal solutions to self-imposed crises. Though the High

[27] *Id*.

Representative is now more hesitant than in years past to issue dictatorial decrees,[28] his behind-the-scenes activities and efforts to micromanage domestic affairs continue to destabilize the constitutional order in BiH and to reward factionalism over compromise and consensus-building. Most recently he has, yet again, derailed a negotiated compromise resolution of the state and military property issues.

94. The OHR's and international community's support for certain factions and parties is not only harmful to the democratic process and effective governance; it may well violate the BiH law forbidding foreign contributions to political parties and candidates for office.[29] Such laws are not unusual. The United States and many European countries also forbid contributions by foreign citizens and governments to political parties and candidates for election.[30]

95. The RS reaffirms Attachment 1 to its 10th Report to the UN Security Council, which explains in detail why the High Representative's claimed "Bonn Powers" are contrary to the Dayton Accords and the civil and political rights of BiH citizens and why the OHR's continued presence in BiH so badly undermines political progress.

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

96. After more than 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 bases for invoking Chapter VII. Indeed, the most recent two Security Council resolutions on BiH acknowledged that "the security environment has remained calm and stable."[31] This is not a new development. As Security Council Resolution 2019 (2011) noted, "the overall security situation in Bosnia and Herzegovina has been calm and stable for several years."

97. 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.

VI. Conclusion

[28] The President of the Venice Commission, in a Sarajevo speech to BiH Constitutional Court judges and other judges and officials in March 2014, stated: "Since the end of the Bonn powers, your authorities hold full responsibility towards this people and they should work towards reform rather than prevent it." Gianni Buquicchio, Ceremonial Session on the occasion of the 50th anniversary of Constitutional Justice in Bosnia and Herzegovina, Opening speech, 27 March 2014.

[29] *See* BiH Law on Political Party Financing, Art. 8 (2012).

[30] U.S. law bans contributions by foreign nationals (including states) to political parties and other contributions in connection with elections. It also bans independent expenditures by foreign nationals in connection with elections. *See* 2 U.S. Code §441e, Contributions and donations by foreign nationals. In 2012, the U.S. Supreme Court upheld the ban on foreign political contributions.

[31] S.C. Res. 2123, U.N. Doc. S/RES/2123 (12 Nov. 2013), S.C. Res. 2074 (2012), U.N. Doc. S/RES/2074.

98. The RS's highest priority, as explained elsewhere in this report, is improving economic conditions for its citizens. Thus, the RS is continuing to enact and implement reforms to improve the ease of investing and doing business, align laws and regulations with EU standards, and combat corruption. It is also seeking important reforms of BiH justice institutions and other BiH agencies. The RS underlines that respecting BiH's constitutional structure is essential to BiH's political stability and proper functioning. It also emphasizes that interference in domestic political affairs by the High Representative and other foreign diplomats undermines BiH's democratic government. The RS hopes this report will help members of the Security Council and the international community better understand the situation in BiH. It asks that members of the international community support local reform initiatives in BiH and respect the Dayton Accords, including the BiH Constitution.

Republika Srpska's Eleventh Report to the UN Security Council
Attachment 1

The BiH Prosecutor's Office Abuses its Power

The pervasive abuse of power by the BiH Prosecutor's Office violates the BiH Constitution, international conventions, and European standards. The Office's failure or refusal to pursue justice for crimes against Serbs denies Serbs equality before law. Moreover, the BiH Chief Prosecutor's abuses of his authority are an affront to the rule of law.

I. 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 been indifferent, at best, to 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[1] and the International Covenant on Civil and Political Rights.[2] 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.[3]

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.[4] This failure shows in the BiH Prosecutor's Office's record. In its entire history, the Prosecutor's Office has achieved final convictions of only eight Bosniaks for war crimes against Serb civilians. By comparison, it has achieved 78 such convictions of Serbs for war crimes against Bosniak civilians. In addition, those 78 convicted Serbs received sentences 64% longer, on average, than the eight convicted Bosniaks.

Although it is impossible to quantify with any precision the proportion of war crimes victims belonging to each ethnicity, a 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 almost ten times as many Serbs for war crimes against Bosniak civilians as vice versa. For every year of imprisonment a Bosniak has received for war crimes against Serb civilians, a Serb has received almost 16 years of imprisonment for war crimes against Bosniak civilians.

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

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

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

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

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

crimes against Serbs "remain unprosecuted."[5] 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."[6] 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.

A. Naser Orić and atrocities against Serbs in the Srebrenica area

The BiH Prosecutor's Office and other BiH institutions and officials have long protected Naser Orić, Commander of Bosniak forces in the Srebrenica area during the 1990s war, from prosecution for war crimes.

In 1995, Orić bragged to Western reporters about atrocities in the Srebrenica area, showing them videos of Serbs' bodies and severed heads. As a Toronto Star reporter recounted, "Orić grinned throughout, admiring his handiwork. . . . When footage of a bullet-marked ghost town appeared without any visible bodies, Orić hastened to announce: 'We killed 114 Serbs there.'"[7] A Washington Post reporter, similarly, wrote that "Orić's war trophies don't line the wall of his comfortable apartment," but instead are "on a videocassette tape: burned Serb houses and headless Serb men, their bodies crumpled in a pathetic heap."[8]

Despite ample evidence in the possession of the BiH Prosecutor's Office linking Orić and his subordinates to a series of major war crimes in the Srebrenica area, the Office has failed to charge Orić or anyone else with these war crimes. What is worse, the BiH Prosecutor's Office has blocked efforts by prosecutors of the Republika Srpska to seek justice. Investigations of Orić and others for atrocities against Serbs in the Srebrenica area have always been politically dangerous for the BiH Prosecutor's Office because they shatter the false historical narrative that Bosniaks were the area's only victims of major war crimes.

On 9 February 2006, RS investigators submitted to the BiH Prosecutor's Office a 110-page report, supported by more than 600 evidentiary attachments, alleging war crimes by Orić and his subordinates. The report includes 50 separate counts, each detailing specific events during which war crimes were committed. Below are four examples of counts from the report.

- One count describes murders of civilians and other war crimes committed during a 16 January 1993 attack, commanded by Orić and his lieutenants, on 12 villages in the Skelani area. The count, which is supported by 37 evidentiary attachments, identifies 65 killed in the attacks, many of them women or children; six of the women were over the age of 70 when they were killed. According to the count, Bosniak forces expelled Serb civilians and killed or

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

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

[7] *Fearsome Muslim Warlord Eludes Serb Forces*, TORONTO STAR, 16 July 1995, p. A1.

[8] John Pomfret, *Weapons, Cash and Chaos Lend Clout to Srebrenica's Tough Guy*, WASHINGTON POST, 16 Feb. 1994.

imprisoned Serbs who remained. In addition, a sniper and other Bosniak forces killed Serb civilians who were trying to flee across a bridge—or swim across the river—into Serbia. Autopsy reports show that many of the dead from the Skelani-area attacks were mutilated.

- According to one count—supported by 48 evidentiary attachments—Orić commanded a Christmas Day attack on Serb villages in the Kravica area in which civilians were massacred. The count identifies 36 persons—including women and the elderly—who were killed during the attack. The count also outlines related crimes, including the torture of two women, Radojka Nikolić and Milisava Nikolić, during an interrogation by top Orić deputy Zulfo Tursunović. It cites evidence that Orić personally participated in crimes against Serb civilians in one of the villages.

- Another count, supported by 11 evidentiary attachments, outlines war crimes committed during attacks on the Serb village of Zagoni by forces under Orić's command. It identifies 21 persons killed—including women and the elderly. Most of the bodies of the deceased were found mutilated.

- One count, supported by 32 evidentiary attachments, identifies 24 dead and 20 still listed as missing from attacks by forces under Orić's command on the Serb villages of Zalazje and Obadi in June and July 1992. Evidence establishes that at least nine of the missing from the attacks were taken alive and imprisoned in Srebrenica. There has been no trace of these prisoners since, though one prisoner's identification card was discovered in the Orić's home.

In May 2006, the BiH Prosecutor's Office, having evaluated the war crimes charges against Orić and others, assigned some of the cases to the RS District Prosecutor and other cases to itself.[9]

The RS District Prosecutor investigated the cases assigned it by the BiH Prosecutor's Office and collected evidence sufficient for indictments against Orić and others in four cases. But on 23 April 2009, the Court of BiH abruptly took these cases away from the RS District Prosecutor before they could be brought to court. Even though the BiH Prosecutor's Office had assigned these same cases to the RS District Prosecutor three years earlier, it reversed itself and decided, in the words of the Court of BiH, that "only the Court of BiH and Prosecutor's Office of BiH can prosecute a case of such gravity." Orić's lawyers argued that continuation of the proceedings by

[9] Some Orić supporters, pointing to Orić's earlier trial in International Criminal Tribunal for the Former Yugoslavia (ICTY), implausibly claim that any new prosecution of Orić would amount to double jeopardy. But the ICTY only prosecuted Orić for a select few crimes, ignoring many of the most serious crimes committed by units under his command. In April 2009, the ICTY rejected a motion by Orić's lawyers to quash the investigations of Orić based on supposed double jeopardy. At the ICTY, Orić was only charged in connection with the murder of six prisoners and cruel treatment of ten prisoners at two locations in Srebrenica and with several episodes of "wanton destruction" of villages. The ICTY's Trial Chamber convicted Orić on the basis that he had unlawfully failed to prevent murders and cruel treatment of prisoners at the two Srebrenica locations. However, the ICTY Appeals Chamber overturned Orić's convictions because of its view that the Trial Chamber had failed to make certain necessary findings. Despite the ICTY case, Orić has never been charged in connection with the murders and other physical violence against civilians carried out by his subordinates.

the RS District Prosecutor would cause "a wide disturbance among the BiH public, because the Srebrenica genocide is a symbol of the suffering and is a sore point for many people in BiH.

In justifying its decision to take the cases away from the RS District Prosecutor and give them to the BiH Prosecutor's Office, the Court of BiH cited the number of victims, the high rank of Orić and others, and its assessment that the crime's "consequences are far-reaching; especially when the named events are viewed in a wider context of the committed genocide in Srebrenica in 1995."The Court also emphasized that what it called "both sides—the defense and [BiH] prosecution" agreed that these cases should be taken over. But the RS District Prosecutor was never given an opportunity to argue against the cases being stripped away and transferred to likely oblivion in the files of the BiH Prosecutor's Office. Indeed, the RS District Prosecutor only learned about the takeover when it received a letter from the Court more than two weeks after the decision.

Today, almost five years later, the BiH Prosecutor's Office has still taken no action in either the cases it took over or the cases it assigned to itself in 2006, despite requests for information and action from victims groups and legal authorities in Republika Srpska.

With Orić protected by powerful political influence in BiH, legal authorities in Serbia took up the investigation and have now indicted Orić on certain charges and asked for his extradition to Serbia for trial. In response, Bakir Izetbegovic, the Bosniak member of the BiH Presidency, and vice president of the SDA party, hosted Orić in his office and publicly announced that he will be protected. Izetbegovic even called Orić's prosecution in BiH "out of the question." The leaders of BiH's other major Bosniak parties, Minister of Foreign Affairs Zlatko Lagumdžija and then-Minister of Security Fahrudin Radončić also appeared at the event to conspicuously display their solidarity with Orić. The best that can be said for the event is that it brought out into the open the political protection that Orić and others have enjoyed for many years.

War crimes of this magnitude must be fully investigated and, if proven through a proper judicial process, Orić must be punished according to the law. The refusal of BIH authorities to take this action necessitated action by Serbia. BiH officials must not be allowed to block investigation and enforcement of the law against those suspected of committing war crimes, even if the suspects are their political allies.

B. 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 RS Ministry of Interior, there were 3,299 victims of war crimes of Serb origin in 10 municipalities in Sarajevo. BiH's top security agency, 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 2013, as described below). The concealment

and transport of bodies to 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.

C. Murder of 33 Serbs in the Village of Čemerno

On 10 June 1992, in the village of Čemerno in central Bosnia, ARBiH forces 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. Many bodies have been exhumed, including eight women and a child.[10] Despite all of the evidence in the case, there has been no indictment, and the BiH Prosecutor's Office has declined even to inform the RS authorities of the status of the case.

D. 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, more than 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.

E. The 3rd Corps and its El Mujahid Detachment

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

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.

F. Slaughter of Fleeing Serb Civilians at Kukavice

In the early afternoon of 27 August 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.

G. 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.

H. 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."[11]

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.

I. "Liquidation" of JNA Prisoners in Sarajevo's Grand Park

On 22 April 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.

J. 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.

K. Dobrovoljačka Street Ambush

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

On 3 May 3 1992, a 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. Victims' families filed an appeal against the decision, but the BiH Prosecutor's Office has not responded in the more than two years since.[12] RS officials also 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.

II. The BiH Chief Prosecutor has abused his office.

Since BiH Chief Prosecutor Goran Salihović took office in February 2013, he has engaged in a pattern of abuses, including abuses denying justice to Serb war crimes victims. Mr. Salihović's very appointment was plainly contrary to law. The HJPC appointed Mr. Salihović to the position of chief prosecutor even though he was legally ineligible for the position because he was not a prosecutor in the BiH Prosecutor's Office. The lack of respect for law in Mr. Salihović's appointment set the stage for his tenure as chief prosecutor. Below are several examples of the Mr. Salihović's abuses.

A. Obstruction of exhumation of Serb victims from mass grave

In 2013, 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 tried 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 Salihović issues exhumation orders regularly, for which his office pays regularly, both before and since 30 August 2013 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

[12] *Families Still Waiting for Decision on Appeal*, SRNA, 8 Apr 2014.

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.

B. Obstruction of the Šemsudin Mehmedović investigation

On 19 July 2013, the BiH 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 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. Further evidence of Mr. Salihović's protection of Mr. Mehmedović arose on 14 January 2014 when the BiH Prosecutor's Office transferred a case concerning the illegal concealment of a large stock of weapons—in which Mr. Mehmedović is the prime suspect—to the SDA-controlled prosecutor's office of Zenica-Doboj Canton.

C. The BiH Prosecutor's Office's inherently political *Sejdić-Finci* investigation

The BiH Prosecutor's Office's hyper-political nature is well illustrated by its newly launched criminal investigation into BiH parties' failure to agree on a constitutional amendment to implement the European Court of Human Rights' *Sejdić-Finci* decision. According to a December 2013 press release, the Office is "collecting evidence" in order to determine the "unidentified perpetrator." It has been questioning members of parliament and BiH ministers.[13] The RS Government has expressed its frustration with the failure of the Federation's Bosniak and Croat parties to reach the agreement necessary to implement the decision, but any attempt to criminalize the failure to reach a political agreement almost defies belief. One can scarcely imagine a more inherently political inquiry. The investigation can only be interpreted an outrageous attempt to pressure elected officials. It also wastes time and resources that could otherwise be spent on the enormous backlog of war crimes cases, especially the many cases of major war crimes against Serbs. This investigation and the Office's other political acts have no place in any country that wishes to live under the rule of law.

D. The Chief Prosecutor is threatening prosecutorial autonomy.

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. In 2013, however, the BiH Chief Prosecutor ordered that prosecutors in his office may not make prosecutorial decisions, such as indictments,

[13] *Glas Brotnja, Saslušavanje zastupnika i ministara BiH zbog neprovođenja odluke "Sejdić-Finci"*, 23 Jan. 2014.

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."[14] 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,"[15] 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.

E. 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."[16] 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.

F. 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

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

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

[16] *Prosecutor's Office of BiH Strongly Condemns the Attempts of Political Pressure in Relation to Work and Independence of the POBiH and Informs All Citizens that It Will Not Yield to Political Pressure,* Prosecutor's Office of BiH, 27 Aug. 2013.

> 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.[17]

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.

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

The Court of BiH's Abusive Jurisdictional Expansionism

Since its establishment, the Court of BiH, aided by the BiH Prosecutor's Office, has routinely abused the law in order to expand its criminal jurisdiction. The Court uses the vague terms of Article 7(2) of the Law on Court of BiH, an indefensible interpretation of Article 23(2) of the BiH Criminal Procedure Code, and other means to selectively transfer cases from the jurisdiction of entity judicial systems into its own.

The Court's misuse of Article 7(2) of the Law on Court has been extensively studied and criticized during the EU Structured Dialogue. As shown by the examples in Section I of this paper, the Court interprets the highly ambiguous terms of Article 7(2) so broadly as to allow it to take jurisdiction over entity cases essentially whenever it chooses. EU experts have found 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—and so far effective—lobbying campaign to preserve the provision. Their primary tactic has been to substitute different words they argue will "objectify" the current terms. But the variations that have been proposed still leave the BiH Prosecutor and Court the same broad power to define criminal conduct ex post facto.

The EU Structured Dialogue has not yet addressed the Court's indefensible interpretation of Article 23(2) of the BiH Criminal Procedure Code, by which the Court enables itself to take jurisdiction over any charge under entity law as long as there is also at least one charge under BiH law against at least one defendant. Section II of this paper examines how the Court of BiH has abused Article 23(2). The Court's legally baseless interpretation of Article 23(2) may well account for greater abuse of power than its misuse of Article 7(2).

As explained in Section III of this paper, the Court has even asserted jurisdiction over entity-law charges without even the pretense that the Law on Court of BiH, the BiH Criminal Procedure Code or any statute grants such jurisdiction.

The Court's extreme expansiveness with respect to its jurisdiction is directly contrary to Article 28 of the BiH Code of Criminal Procedure, which provides, "*The Court shall be cautious of its jurisdiction* and as soon as it becomes aware that it is not competent, it shall issue a decision that it lacks jurisdiction and once such decision has taken legal effect, it shall forward the case to the competent court."[1]

The Law on Court of BiH and the BiH Criminal Procedure Code must be amended to prevent any further such abuses.

I. The Court applies Article 7(2) of the Law on Court of BiH arbitrarily.

The Court of BiH's interpretations of Article 7(2) of the Law on Court of BiH help demonstrate why the provision must be repealed. Article 7(2) provides:

[1] Emphasis added.

> (2) The Court has further jurisdiction over criminal offences prescribed in the Laws of the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District of Bosnia and Herzegovina when such criminal offences:
>
> > (a) endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina;
> >
> > (b) may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina or may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an Entity or the Brčko District of Bosnia and Herzegovina.

The Court has often taken advantage of Article 7(2)(b)'s extraordinarily vague and ambiguous language in order to enlarge its own jurisdiction, applying it so aggressively as to allow it to take jurisdiction over entity-law cases essentially whenever it pleases.

Many of the Court of BiH's uses of Article 7(2) are difficult to evaluate because the Court often fails to explain why it applied the provision. As the European Court of Human Rights has recognized, Article 6(1) of the European Convention on Human rights requires courts to give reasons for their decisions.[2] Yet the Court of BiH frequently provides no reasons at all for its taking of jurisdiction in a case away from the court with territorial jurisdiction, a decision that is fundamental to the determination of the defendant's civil rights.

In a 2013 study, the BiH High Judicial and Prosecutorial Council (HJPC) examined 16 cases in which the Court of BiH asserted jurisdiction over cases with only entity-law charges. In 11 out of those 16 cases, the Court of BiH provided no explanation for why it was asserting jurisdiction. In addition to the cases the HJPC studied, there are many other cases in which the Court of BiH took over jurisdiction over entity-law cases but never explained why.

Moreover, the cases in which the Court states reasons for invoking Article 7(2) demonstrate that the Court has acted without restraint or defined standards. There is no reason to believe the Court would treat a reworded successor provision any differently. Below are some examples of the Court's arbitrary application of Article 7(2). A review of these cases makes clear that, as interpreted by the Court of BiH, there is little—if any—limit to its Article 7(2) jurisdiction.

A. Asim Karić et al. (X-KŽ-06/193)

In the Asim Karic case, the Court of BiH used Article 7(2) to convict a defendant of evading 18,000 convertible marks (KM) in taxes in violation of the RS Criminal Code. The second-instance panel claimed that the defendant's 18,000 KM in tax evasion brought about detrimental consequences outside the territory of the entity because "the Defendant had business dealings

[2] *ECtHR, Van der Hurk vs. the Netherlands*, judgment, 19 April 1994, para. 61.

with companies throughout BiH."[3] But the crime was not his business dealings; it was his alleged evasion of RS taxes. The Court never attempted to answer the obvious question of how the defendant's cross-entity business dealings somehow turned his small-scale evasion of Republika Srpska taxes into a crime with detrimental consequences outside Republika Srpska.

B. Goran Bilić et al. (X-K-07/383)

In the Goran Bilić case, the Court of BiH used Article 7(2) to prosecute several officials of the Herzegovina-Neretva Canton under the entity-law charges of abuse of authority and failure to report a criminal offense. The Court attempted to justify its invocation of Article 7(2) by claiming that "the offences were being committed in a systematic manner and for a long period of time, which resulted in the detrimental consequences going beyond the boundaries of the Canton and Entity" and that "such consequences have been reflected in the gradual loss of confidence of citizens in the governmental institutions leading to the feeling of legal uncertainty."[4] The Court made no attempt to give specific reasons why the alleged wrongdoing of officials in a single canton of a single entity would have "detrimental consequences beyond the territory of an Entity." Unable to identify any specific "detrimental consequences beyond the territory of an Entity," the Court resorted to speculating about "a gradual loss of confidence" in governmental institutions and a "feeling of legal uncertainty."[5] If the alleged "detrimental consequences" can be this vague and theoretical, there are few—if any—crimes over which the Court of BiH could not invoke Article 7(2).

C. Edhem Bičakčić and another (X-KŽ-09/702)

In the Bičakčić case, it was charged that the two defendants, as Prime Minister and Finance Minister, respectively, of the Federation, committed the offense of Abuse of Office or Official Authority under the Federation Criminal Code.

The Court of BiH acknowledged the "relatively vague terms" of Article 7(2)[6] but nonetheless found that it applied to this case because the defendants were high-ranking government officials. The Court wrote, "In conclusion, criminal liability of the highest-ranking state [Federation] officials amounts to a particularly manifested degree of social threat, and falls under categories such as 'serious repercussions' and 'other adverse consequences.'"[7] "The Indictment," the Court wrote, "is based on the premise that in violation of the law and failing to exercise their powers in a lawful manner, the accused had demonstrated the highest level of irresponsibility which

[3] Asim Karić et al., X-KŽ-06/193, Second-Instance Verdict, Court of BiH, 26 Jan. 2011, p. 16.

[4] Goran Bilic et al., X-K-07/383, Decision of 22 January 2008, Court of BiH, *quoted in* Tomislav Martinović et al., AP- 785-08, Joint Separate Dissenting Opinion of Judges Valerija Galić and Miodrag Simović, BiH Constitutional Court, 31 Jan. 2009, para. 11.

[5] *Id.*

[6] Edhem Bičakčić and another, X-KŽ-09/702, Verdict, Court of BiH, 9 Apr. 2010, p. 42.

[7] *Id*.

resulted in adverse consequences among the public in the form of discrediting the public authorities."[8]

The Court made no attempt to identify how, specifically, the alleged wrongdoing by two Federation officials would have detrimental consequences for BiH. Thus, the only justification for the Court of BiH to take a case over which an entity court had jurisdiction is the theoretical possibility that alleged wrongdoing by high-level Federation officials would discredit public officials outside the Federation.

D. Hugo Šanta (KPS-02/05)

In the Hugo Šanta case, the Court of BiH accepted a plea agreement with the accused having admitted to entity law offenses of document forgery and tax evasion. The Court asserted jurisdiction under 7(2) merely by reciting, "The acts that the accused admitted to may have serious consequences to the economy of Bosnia and Herzegovina and/or may cause detrimental consequences beyond the territory of the Entity or the Brcko District."[9] The Court provided no explanation for why it thought the accused's acts would have serious consequences to the BiH economy or cause other detrimental consequences beyond the territory of the entity.

E. Pero Tokalic et al. (KPŽ-13/10)

In the Pero Tokalic case, the Court of BiH convicted two natural persons and one company on an entity tax-evasion charge. The Court found that jurisdiction under Article 7(2) was justified because of the "large amount of the evaded tax (KM 1,346,512.82)" and the fact that "a broad network of legal persons . . . had business operation with the accused legal person, which even exceeded the borders of the Federation of BiH."[10] According to the Court, "[t]hese circumstances . . . clearly suggest the fact that this criminal offense may have repercussion or detrimental consequences to the economy of BiH."[11] The Court failed to explain why the evasion of Federation taxes, even in a large amount, would have "serious repercussions or detrimental consequences" to the BiH economy. The Court also failed to explain how the accused company's business operations with legal persons outside the Federation transformed all three defendants' evasion of Federation taxes into a crime with "serious repercussions or detrimental consequences" to the BiH economy.

F. Ranko Stanković et al. (X-K-07/387)

In the Ranko Stankovic case, the Court of BiH took jurisdiction over entity-law charges arising from a man's escape from prison even though the charges did not involve BiH officials and despite the failure of the Prosecutor's Office to allege any substantive consequences to BiH from the escape. The first-instance verdict in the Stankovic case is a rare example of a Court of BiH panel determining that jurisdiction under Article 7(2) was *not* justified. However, an appellate

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[8] *Id*. at p. 43.

[9] Hugo Šanta, KPS-02/05, Decision Accepting Plea Agreement, Court of BiH, 17 Mar. 2005, p. 2.

[10] Pero Tokalic et al., KPŽ-13/10, Second-Instance Verdict, Court of BiH, 15 Oct. 2010, p. 7.

[11] *Id*.

panel led by Court of BiH President Meddžida Kreso soon overruled the first-instance panel and reinstated the case.

Stankovic was charged under the RS Criminal Code with enabling the escape from prison of his brother, who had been convicted of war crimes. Two additional defendants were charged with forging documents, and seven RS employees were charged with "careless performance of official duties," all under the RS Criminal Code.

The BiH Prosecutor's Office asserted jurisdiction under Article 7(2) based on the argument that the escape of the prisoner damaged BiH's international reputation. The Prosecutor's Office based this assertion on a letter from the President of the International Tribunal for the Former Yugoslavia (ICTY) to the Foreign Minister and Justice Minister of BiH, which expressed concern about the escape and requested a comprehensive report about the case. But there were no practical consequences to the ICTY's relationship with BiH or any other detrimental consequences to BiH.

The first-instance panel rightly dismissed the case, holding that "the Prosecutor did not prove with objective evidence and verifiable facts that the commission of the criminal offenses falling under the jurisdiction of the regular courts of Republika Srpska caused detrimental consequences to the B-H state."[12] Writing for the first-instance panel, Judge Branko Perić noted, "The detriment manifested as a tarnished reputation of a country and its institutions must be a realistic and objectively provable fact, not an abstract allegation which cannot be verified."[13]

Judge Perić further observed:

> [T]he Prosecutor did not present to the Court a single piece of evidence on the basis of which it would be possible to conclude with certainty that the commission of any of the criminal offenses concerned caused a detrimental consequence to Bosnia and Herzegovina and its state institutions. The lack of evidence with respect to these facts makes the Prosecutor's allegations an arbitrary value judgment that cannot be objectively verified. To base a court's decision on anyone's subjective feeling or belief would be contrary to the very nature of courts and the fundamental principle that courts try on the basis of facts and laws.[14]

Judge Perić also made an important point about the need for caution in interpreting Article 7(2):

> The Court is of the opinion that the jurisdiction referred to in Article 13 [now Article 7] of the Law on the Court of B-H, especially Paragraph (2)(b), should be applied with caution, not only because it is an exception to the traditional system of

[12] Ranko Stanković and Others , X-K-07/387, Verdict, Court of BiH, 3 Feb. 2009, p. 9.

[13] *Id*.

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

> regulating material jurisdiction, but primarily because "extracting" criminal cases out of the framework of regular judicial system might cause detrimental consequences in terms of lack of confidence in a part of the judicial system and doubt in the independence of the judiciary.[15]

The appellate panel, exercising no such caution, reversed the first-instance panel and held that there was jurisdiction under Article 7(2). Judge Kreso wrote that "the conclusions by the First Instance Court that the concern by the ICTY President about the above incident does not constitute a criterion of 'damaging consequences' are ill-founded, in particular for the reason that these *do not have to be solely of substantive nature . . . .*"[16]

Thus, according to the Court of BiH's interpretation, Article 7(2) can be satisfied *even when no substantive consequences for BiH have been alleged.*

According to Judge Kreso, "it suffices that the ICTY President addressed the responsible state agencies and sought a report on the incident from them to render the conclusion that the criminal offenses committed . . . tarnished the credibility and reputation of the BiH institutions."[17]

Yet BiH agencies and officials had no connection with the escape or any of the criminal charges connected with it. All of the public employees indicted were employed by Republika Srpska. Moreover, as noted above, the escape had no practical impact on BiH institutions.

II. The Court unlawfully claims jurisdiction under Article 23(2) of the BiH Criminal Procedure Code over entity-law charges whenever there is at least one charge against at least one defendant under BiH law.

Without any legal basis, the Court of BiH asserts jurisdiction over any criminal charges under entity law as long as there is also at least one charge against at least one defendant under BiH law. It is quite possible that the BiH Court has taken over more cases through improper use of this provision than by using Article 7(2) of the BiH Law on Courts.

The limits of the Court of BiH's criminal jurisdiction are defined by Article 7 of the Law on Court of BiH. Notwithstanding this, the Court of BiH has found a spurious additional source of jurisdiction by adopting a groundless and self-serving interpretation of Article 23(2) of the BiH Criminal Procedure Code.

Article 23(2) provides:

> Ako je ista osoba počinila više krivičnih djela, pa je za neka od tih djela nadležan Sud, a za neka drugi sudovi, prioritet ima suđenje pred Sudom.[18]

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[15] *Id*.

[16] Ranko Stanković and Others , X-K-07/387, Decision to Grant Appeal of BiH Prosecutor's Office, Court of BiH, 30 Jun. 2009, p. 5 (emphasis added).

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

According to the unofficial English translation on the Court of BiH's website, Article 23(2) provides:

> If a person committed several offenses and if the Court is competent with respect to one or more of them, while other courts are competent for the other offenses, in that case the priority shall be given to the trial before the Court.

The phrase "in that case" in this context means "in that event." It certainly does not refer to a "case" as in a criminal proceeding. Indeed, the phrase "in that case" does not appear at all in Article 23(2) except in the Court of BiH's unofficial English translation.

A fair reading of Article 23(2) makes it clear that the provision gives the Court of BiH priority to conduct trials for criminal offenses over which it has jurisdiction before other courts conduct their own trials for offenses over which they have jurisdiction. To interpret Article 23(2) as somehow giving the Court of BiH jurisdiction over offenses for which "other courts are competent" is an insult to the rule of law.

Yet that is exactly what the Court of BiH has done. Indeed, the Court of BiH asserts its specious Article 23(2) jurisdiction routinely and abusively. Below are examples of cases in which the Court of BiH has asserted jurisdiction under Article 23(2).

A. Momčilo Mandić et al. (KPŽ-02/06)

In the Momčilo Mandić case, the Court, based on its claimed Article 23(2) jurisdiction, took jurisdiction over RS-law criminal charges on the basis that there were also BiH-law criminal charges.

Responding to a defendant's challenge to this assertion of jurisdiction over RS-law criminal charges, the first-instance panel wrote:

> Paragraph 2 of [Article 23] stipulates that if the same person has committed several criminal offences, which is the case in this instance, and the BiH Court has jurisdiction over some of these offences, and other Courts have jurisdiction over other offences, the trial before the BiH Court shall be given preference.
>
> Given the clear provision of Article 23 of the BiH CPC, which stipulates the jurisdiction of the BiH Court, the defence objection that this Court did not have jurisdiction over the trial in relation to this case file is ungrounded.[19]

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[18] The Court of BiH website does not have a Cyrillic version of the translation of the BiH Law on Criminal Procedure.

[19] Momčilo Mandić et al., KPŽ-02/06, Verdict, 27 Oct. 2006, p. 150.

In the quotation above, the first-instance panel accurately summarized Article 23(2), but then, without any support, claimed that the provision gives the Court of BiH jurisdiction over offenses over which other courts have jurisdiction.

The appellate panel, similarly, wrote:

> Pursuant to the provisions of Article 23(2) of the CPC which foresees that "if a person committed several offences and if the Court is competent with respect to one or more of them, while other courts are competent for the other offences, in that case the priority shall be given to the trial before the Court", the subject matter of the charges had to be decided by one decision, as correctly done by the Court.[20]

Again, the Court made an unexplained leap from the language of Article 23(2) to its groundless interpretation of it.

But the Court's abuses in this case go beyond the baseless assertion of jurisdiction under Article 23(2). The two convicted defendants in the Momčilo Mandić case were both acquitted of the charges against them under the BiH Criminal Code. The charges under BiH law were frivolous because the alleged offenses took place *years before the BiH Criminal Code took effect*. The BiH-law charges in this case (and other cases) give the appearance of having been filed *as a pretext for giving the Court of BiH jurisdiction over entity-law charges.* Thus, in addition to adopting a groundless interpretation of Article 23(2), the Court of BiH has sanctioned abuses of it.

B. Zoran Đerić et al. (X-KŽ-06/282)

The Zoran Đerić case is an example of another form of abuse of the Court's claimed Article 23(2) jurisdiction. In the Đerić case, the Court granted indictments of 12 defendants, *only three of whom were charged with any crimes under the BiH Criminal Code*. The Court did not explain its assertion of jurisdiction over the other nine defendants, but it evidently reasoned that it could take jurisdiction over all defendants, as long as at least one of them had at least one BiH-law charge against him. This interpretation is even further from the text of Article 23(2), which talks about multiple offenses by a single defendant, not multiple offenses by multiple defendants. None of the defendants were convicted of any crime under the BiH Criminal Code, again raising the suspicion that the BiH-law charges against three defendants were a pretext for asserting jurisdiction over all 12 defendants.

III. The Court has retained jurisdiction over entity-law charges even after there are no BiH charges in the case.

A. Ramo Brkić et al. (S1 2 K 008645 12 K)

[20] Momčilo Mandić et al., KPŽ-02/06, Second-Instance Verdict, 29 Mar. 2007, p. 6.

On 25 January 2012, in the Ramo Brkić case, the Court of BiH granted indictments of a set of 23 defendants, just seven of whom were charged with crimes under the BiH Criminal Code. It is not clear what the Court's claimed basis was for asserting jurisdiction over the 16 defendants who were not charged with BiH-law crimes, but it was probably the Court's groundless interpretation of Article 23(2) as a grant of jurisdiction. Since that indictment, the Court of BiH has separated from the Brkić case the cases of all 16 of the defendants who were charged solely under the Federation Criminal Code. That, of course, left their cases without even the slightest connection to BiH-law charges. In 11 of those cases, the Court of BiH has since accepted a plea of guilty to crimes under the Federation Criminal Code. There is no indication as to how—if at all—the Court of BiH attempted to justify its assertion of jurisdiction over these defendants.

B. Mladen Ivanić (X-KŽ-06/282-1)

In the Mladen Ivanić case, the Court of BiH made perhaps its most remarkable rationalization of a jurisdictional grab. Early in the case, there were both BiH-law and entity-law charges against the defendant, so the Court of BiH based its claim to jurisdiction on the Court's usual misinterpretation of Article 23(2). However, when the Prosecutor's Office withdrew the BiH-law charges, the case was left with only RS-law charges against the defendant. The Appellate Panel's justification for retaining jurisdiction over the case was nothing short of extraordinary.

First, the Appellate Panel argued that the Court of BiH "has a certain supremacy compared to other courts on BiH territory when it comes to the issue of jurisdiction and that it can be considered a 'higher court' compared to the entity courts . . . ."[21] The Appellate Panel justified this baseless conclusion by citing the Court's jurisdiction over certain entity-law offenses under Article 7(2) of the Law on Court of BiH, the Court's power to resolve conflicts of jurisdiction under Article 7(3), and the Court's ability to transfer cases to entity courts under Article 27 of the BiH Criminal Procedure Code. The Appellate Panel did not attempt to explain how these specific powers could, together, create a general "supremacy" over entity courts.

Next, the Appellate Panel noted that the criminal procedure codes of the Federation and Republika Srpska both provide that "[i]f in the course of the main trial the court establishes that a lower court has jurisdiction the court will not submit the case to that court, but will conduct the procedure on its own and reach a decision."[22]

Based on these provisions in the *entity* criminal procedure codes, the Appellate Panel then argued that the Court of BiH, as the "higher court," should keep jurisdiction even when there are no BiH-law offenses in the case. The Appellate Panel made this argument based on a specific provision in the entity criminal procedure codes notwithstanding the absence of any similar provision in the BiH Criminal Procedure Code.

The Appellate Panel's extraordinary justification for retaining jurisdiction in the Ivanić case shows the lengths to which the Court of BiH will go in order to justify its agglomeration of criminal jurisdiction at the expense of the entities—and the rule of law.

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[21] Mladen Ivanić, X-KŽ-06/282-1, Second-Instance Verdict, Court of BiH, 16 Jul. 2010.

[22] *Id*.

Republika Srpska's Eleventh Report to the UN Security Council
Attachment 3

The Court of BiH is Failing to Comply with the *Maktouf* Verdict

I. Introduction

In its 18 July 2013 decision in *Maktouf and Damjanović v. Bosnia and Herzegovina*, the European Court of Human Rights ("ECHR") held that the Court of Bosnia and Herzegovina ("BiH") violated the European Convention on Human Rights' prohibition against retroactive imposition of a punishment greater than that provided by the law in effect at the time of the crime.

The analysis supporting the *Maktouf* judgment clearly mandates remedial action and action going forward by the Court of BiH. In any judgment in which the Court sentenced a defendant under the 2003 BiH Criminal Code, the Court has violated the European Convention if applying the 1976 Criminal Code of Yugoslavia could have resulted in a lesser sentence.[1] The sentences in all such cases must be re-determined under the 1976 Code, and the Court must apply the *Maktouf* principle to all cases going forward. The Constitutional Court of BiH has confirmed this mandate in its cases since the Maktouf judgment.

Unfortunately, as explained below, the Court of BiH has, by and large, resisted implementing the ECHR's judgment. On the day of the verdict, the Court issued a defiant press release mischaracterizing the judgment and claiming that it did not require the Court to change any of its practices.[2] The Court of BiH took no apparent action to implement *Maktouf* until after the BiH Constitutional Court issued it direct orders. Although the Court has since reopened the cases of the plaintiffs from the *Maktouf* case and reopened other specific cases at the direct orders of the Constitutional Court, it has continued to violate defendants' rights in new decisions since *Maktouf* and has done nothing to correct its longstanding violation of defendants' rights in past cases.

Since *Maktouf*, apart from the reopened cases, the Court has issued 50 verdicts, 31 of which imposed prison sentences. Every sentence that applies the 2003 Code defies *Maktouf* unless applying the 1976 Code could not have resulted in a lower sentence. Yet the Court of BiH identifies only ten of these 31 sentences as having applied the 1976 Code (i.e., the code in effect at the time of the crimes). Nine new sentences even exceed the maximum length permitted under the 1976 Code. Moreover, all but two of the 36 war crimes indictments since *Maktouf* have been brought under the 2003 Code instead of the 1976 Code that was in effect at the time of the crimes.

The Court of BiH's nontransparency, including its suppression of verdicts from public view, makes it impossible to fully evaluate its compliance with *Maktouf*. As outlined below, however, the information available makes clear that the Court is continuing to violate human rights in defiance of *Maktouf*.

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[1] *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 and 34179/08, ECHR 2013 ("*Maktouf*") at para. 70 ("What is crucial, however, is that the applicants could have received lower sentences had [the 1976] Code been applied in their cases.").

[2] Court of BiH, *Press Release regarding the Decision of the European Court of Human Rights in the cases Maktouf and Damjanović v. Bosnia and Herzegovina*, 18 March 2013 ("18 March 2013 Press Release").

II. Reopened cases.

The Court of BiH has issued decisions to reopen the cases of 15 defendants, all of which resulted from either direct orders from the BiH Constitutional Court or the two *Maktouf* plaintiffs' petitions to reopen their cases.

A. The Damjanović brothers and Abdulhadim Maktouf

The Court of BiH took no action to implement *Maktouf* until after the BiH Constitutional Court began forcing it, in specific cases, to do so. On 27 September 2013, the BiH Constitutional Court ordered the Court of BiH to reach a new verdict in the case of Zoran Damjanović (brother of *Maktouf* co-plaintiff Goran Damjanović) in accordance with the *Maktouf* principles. On 4 October 2013, the Court of BiH granted Goran Damjanović's petition to reopen the proceedings against him and simultaneously reopened the proceedings against his brother Zoran. A week later, the Court suspended the Damjanović brothers' sentences and ordered a new trial before a trial panel. On 13 December 2013, the trial panel reached a new first-instance verdict convicting them of War Crimes Against Civilians ("WCC") under the 1976 Code and reducing their previous sentences by 41% and 45%. An appellate panel confirmed the Damjanović brothers' new sentences in a final decision on 12 March 2014.

The Court of BiH also granted a petition to reopen the case of Abdulhadim Maktouf on 8 October 2013.

B. Other cases reopened upon orders of the Constitutional Court

Since its 27 September 2013 order in the Zoran Damjanović case, the Constitutional Court has issued three additional decisions based on the *Maktouf* principles, finding the sentences of 12 defendants violated the European Convention.

The Constitutional Court's decisions refute the Court of BiH's baseless claim that *Maktouf* implies that "when it comes to more serious forms of war crimes, the application of the 2003 Criminal Code is not in contravention of the Convention,"[3] The sentences that the Constitutional Court has so far found to violate the *Maktouf* principles are mostly in the *upper half* of the range of sentences provided for in the 2003 Code, i.e. for more serious forms of war crimes.

In response to the Constitutional Court's orders, the Appellate Division of the Court of BiH has suspended the sentences of the 12 defendants. The Appellate Division has been conducting retrials of these cases itself rather than referring them to trial panels. Appellate Division panels have issued five new final sentences in these cases. These five new sentences under the 1976 Code all reduce the old sentences—and by similar proportions: 22%, 29%, 29%, 31%, and 33%.

C. Motions for Custody

With respect to 11 of the cases that the Constitutional Court ordered the Court of BiH to reopen, the BiH Prosecutor's Office asked the Court to order continued custody of the defendant. In a

[3] 18 March 2013 Press Release.

single decision covering 10 of those cases, the Court denied the motions. The Court's press release after the decision claimed:

> The BiH Criminal Procedure Code does not have explicit provisions to regulate the matter of the possibility to order custody in a situation when an accused person's serving his prison sentence or long-term prison sentence has been terminated, nor does it have any provisions that would serve as grounds for the deprivation of liberty at this stage of the proceedings.[4]

This is simply false. Article 332(5) of the BiH Criminal Procedure Code provides, "When a decision calling for the reopening of a criminal proceeding becomes legally binding, execution of the penalty shall be stayed, but on the recommendation of the Prosecutor the Court shall order custody if the conditions exist as referred to in Article 132 of this Code." These are the ordinary conditions the Court considers when a prosecutor seeks pre-trial custody of a suspect (such as risk of flight; risk of interference with evidence or influencing witnesses, accessories, or accomplices; risk of new criminal offenses; in exceptional circumstances, a threat to public order).

The Court routinely orders custody of suspects and defendants in other cases, and the Criminal Procedure Code specifically gives it the power to do so in reopened cases. It cannot be said for certain why the Court would make the legally groundless claim that it cannot consider a motion to retain custody of a defendant who is being retried. But the claim's obvious inconsistency with the law raises suspicions that the Court is claiming powerlessness to prevent these defendants' release in order to build pressure against the reopening of more cases.

D. Other observations about reopened cases

Seven of the 15 defendants whose cases have been reopened have received new sentences, either final or non-final. The new sentences have reduced the earlier sentences by an average of 33%. Nine of the verdicts in reopened cases are for WCC and six are for Genocide. No Crimes Against Humanity ("CH") cases have been reopened. A spokeswoman for the Court of BiH has said there will be "no delays" because of the need to reopen cases.[5]

III. New indictments

Since *Maktouf*, the Court of BiH has confirmed 36 war crimes indictments, all but two of which were brought under the 2003 Code. In almost every war crimes case ever brought before the Court of BiH, the same criminal conduct prosecuted under the 2003 Code could have been prosecuted under the 1976 Code.[6] There is no conceivable justification for retroactively applying

[4] Court of BiH, *BiH Prosecution motion to order custody refused*, 5 Dec. 2013.

[5] *The Court of BiH in Review*, TV Justice, Episode 49, Jan. 2014.

[6] Although the 1976 Code does not include a specific article entitled "Crimes Against Humanity," most acts defined as crimes against humanity in Art. 172 of the 2003 BiH Code were also crimes under the 1976 SFRY Code and could be prosecuted as crimes against humanity under that code. As the Court of BiH wrote in a pre-*Maktouf* verdict, "[O]ne should not ignore the fact that the basic criminal acts listed in Article 172 of the CC of BiH [Crimes Against Humanity] can be also found in the law that was in force

the 2003 Code when the 1976 Code prohibits the same conduct. This is especially since the ECHR held that a defendant cannot be sentenced under the 2003 Code if application of the 1976 Code could have resulted in a lower sentence.

Because war crimes cases in the entity courts are tried under the 1976 Code, the Court of BiH's new indictments under the 2003 Code also frustrate the European Commission's goal of harmonizing the practice of courts in the application of substantive criminal law to war crimes processing.

The European Commission Recommendations from the November 2013 Structured Dialogue Plenary Meeting took note of decisions by the ECHR and the BiH Constitutional Court finding that the Court of BiH had violated Article 7 of the European Convention. It observed:

> [H]armonised courts practice in the application of substantive criminal law to war crimes processing remains an important objective. Equality of citizens before the law and harmonised jurisprudence are key aspects in the on-going effort to advance clearing the war crimes cases backlog throughout the BiH judiciary."[7]

Sixteen of Court of BiH's new indictments since *Maktouf* are for CH, 11 are for WCC, three are for Genocide, three are for War Crimes Against Prisoners of War (WCP), and one is for War Crimes against the Wounded and Sick.

IV. Final Verdicts

Apart from the verdicts in reopened cases, the Court of BiH has rendered final verdicts in the cases of 23 other defendants since *Maktouf*. Out of these 23 defendants, 14 had been charged with CH, 8 with WCC, 4 with Genocide, and 1 with WCP. Thirteen of the final verdicts are prison sentences and 11 are acquittals. The Court has only applied the 1976 Code in four (or, at most five) final verdicts.

A. Final sentences applying the 2003 Code

For all but four or five of the final sentences since *Maktouf*, the Court has continued to apply the 2003 Code. The information available from the Court of BiH gives no indication as to why these defendants were sentenced under the 2003 Code instead of the 1976 Code or whether the Court even considered the *Maktouf* principles. At least some of these final verdicts are manifestly

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during the relevant period (at the time of perpetration of the offense), specifically in Articles 134, 141, 142, 143, 144, 145, 146, 147, 154, 155 and 186 of the [1976 Code], or that the charged acts were punishable under the criminal law that was in force at that time." *Momir Savić*, X_KRŽ-07/478, Appeal Judgment (19 Feb. 2010). The Prosecutor's Office of BiH has brought CH charges exclusively against Serbs and, to a lesser extent, Croats. Because of this, exempting CH cases from the *Maktouf* principles would create a regime in which Serbs and Croats are eligible for much higher sentences—even for less serious crimes—than Bosniaks.

[7] Recommendations of the Sixth Plenary Meeting of the "Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina," Recommendations by the European Commission Services, 14 Nov. 2013.

contrary to *Maktouf* because application of the 1976 Code could have—and, in some cases, definitely *must* have—resulted in a lower sentence. For example, the Court of BiH has imposed five final sentences since *Maktouf* that exceed the maximum sentence allowable under the 1976 Code (three were for CH and two were for Genocide).[8]

B. Final sentences applying the 1976 Code

In the cases of three defendants, appellate panels accepted the defendants' appeals with respect to criminal code application and sentenced them for WCC under the 1976 Code instead of under the 2003 Code.[9] In another case, an appellate panel retried the defendant and sentenced him for WCC under the 1976 Code.[10]

C. Final sentence applying an unspecified code

In another case, the appellate panel reduced the defendant's sentence for WCC from 15 to 13 years, but the Court of BiH has failed to publicly identify which criminal code it applied.[11]

V. Non-Final Verdicts

Apart from the reopened cases, there have been 27 non-final[12] verdicts since the *Maktouf* decision. Fifteen of these defendants were sentenced to prison, eight were acquitted, and four were ordered to be given new trials. Seventeen defendants have received non-final verdicts on WCC charges.[13] Eleven defendants have received non-final verdicts on CH charges. Four defendants have received non-final verdicts on WCP charges.

A. Non-final verdicts applying the 2003 Code

At least 13 of the 27 non-final verdicts since *Maktouf* have applied the 2003 Code. Seven of these 13 defendants were acquitted and six were convicted and sentenced. The information available from the Court of BiH gives no indication as to why defendants were sentenced under the 2003 Code instead of the 1976 Code or whether the Court even considered the *Maktouf* principles. It is certain that the Maktouf principles were disregarded in at least some of the cases, including four in which the length of the sentence exceeded the maximum allowable under the 1976 Code.[14]

B. Non-final verdicts applying the 1976 Code

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[8] *J.D. et al.*, S1 1 K 003417 10 KRŽ; *Radoslav Knežević*, S1 1 K 013165 13 KRŽ; *Saša Zečević*, S1 1 K 013227 13 KRŽ; *Petar Čivčić et al.*, S1 1 K 003365 12 KRŽ.

[9] *Muhidin Bašić et al.*, S1 1 K 007209 11 KRŽ; *Albina Terzic*, S1 1 K 005665 11 KRŽ.

[10] *Dražen Mikulić*, S1 1 K 006127 11 KRI.

[11] *Eso Macić*, S1 1 K 002594 11 KRŽ.

[12] This includes two cases in which the materials available from the Court of BiH do not make it clear whether an appeal is possible.

[13] One defendant received a non-final verdict on both CH and WCC charges.

[14] *Dragomir Soldat et al.*, S1 1 K 011967 13 KRI; *Marko Adamović et al.*, S1 1 K 003359 12 KŽK.

Just six of the 27 non-final verdicts since *Maktouf* can be identified as having applied the 1976 Code.

Three of these were trial panel verdicts sentencing defendants for WCC under the 1976 Code. In one such verdict,[15] the Court dismissed some CH counts, acquitted the defendant of other CH counts, and sentenced the defendant on a new charge of WCC under the 1976 Code.

The three other such verdicts applying the 1976 Code came in a single appellate panel decision.[16] One defendant was given an appealable sentence for WCP under the 1976 Code. The two other defendants in the case were also sentenced for WCP under the 1976 Code, but the information available from the Court of BiH does not make it clear whether an appeal is possible.

C. Non-final verdicts applying unspecified code

For eight more non-final verdicts, the Court of BiH has failed to provide any information as to the criminal code being used. In four of these verdicts, defendants were sentenced to prison terms, but the Court of BiH has failed to identify whether they were convicted and sentenced under the 1976 Code or the 2003 Code. The other four verdicts were appeals panels' orders for defendants to be retried, but the Court of BiH has failed to make clear which criminal code is to be used in the new trials.

VI. Failure to Correct Violations of Human Rights in Past Cases

The Court of BiH has done nothing to address the many individuals whose rights it has violated in past cases. It has failed to establish any means of facilitating relief for those whose human rights were violated by the Court's sentencing practices but who lack the resources to pursue a lengthy and costly appeals process. There is also no indication that the Court has even met the BiH Criminal Procedure Code's basic requirement[17] that it notify convicted persons whenever it learns that there is a reason for reopening their cases.

VII. Court of BiH's secrecy prevents full assessment of compliance

The Court of BiH's lack of transparency makes it impossible to fully evaluate the extent to which it is implementing *Maktouf*. Amazingly, since August 2012 the Court has refused to publish any of its verdicts.

The Court of BiH also routinely refuses—without explanation—specific requests for verdicts submitted in accordance with the BiH Law on Free Access to Information.

[15] *Najdan Mlađenović et al.*, S1 1 K 009947 12 KRI.

[16] *Mehura Selimović et al.*, S1 1 K 003368 13 KŽK.

[17] BiH Criminal Procedure Code, art. 329(3).

The HJPC System Must Be Reformed

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.[1] 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.

I. Agreed reforms would bring BiH closer to European norms.

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 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 federal units' prosecutors are appointed by the federal units 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

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

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.[2] 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.

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.

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

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.

4. 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.[3]

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 different countries."[4] Although the Venice Commission did not endorse any particular method for appointing prosecutors, it suggested that a good solution is "cooperation amongst state organs."[5] That is just what the CoM reform prescribes.

5. 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

[3] 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.

[4] *Id*., para 35.

[5] *Id*.

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 practice of federal democracies.

C. HJPC's campaign against 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."[6] The HJPC's reaction suggests an institution interested, first and foremost, in protecting its own powers. 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. International standards require entity judges and prosecutors to be appointed by entities.

II. It is almost unheard of among 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. This includes Germany, the United States, and Australia. Centralized appointment of judges is even more anomalous in BiH, which was established by the Dayton Accords as a highly decentralized state. As is well known, the "agreement" centralizing the appointment and discipline of judges and prosecutors in the HJPC was a product of intense pressure from the High Representative. The current system was not a product of a constitutional process based upon consent, nor has it produced an effective judicial or prosecutorial system free of corruption. 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.

III. European standards require separate bodies for judges and prosecutors.

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

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."[7]

IV. Transparency and accountability must be ensured.

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.

V. The HJPC Must Obey BiH Law When Making Appointments

In 2012, 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.*[8]

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.

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[7] 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.

[8] Emphasis Added.

When the HJPC appointed Mr. Salihović, it said it believed he met the qualifications prescribed in the Law on the HJPC.[9] 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.[10]

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.

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

[10] 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."