Republika Srpska's 12th Report to the UN Security Council

October 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 12th Report to the UN Security Council, which outlines the RS Government's views on key issues facing Bosnia and Herzegovina (BiH). Among the issues it examines are those surrounding the RS priorities of improving economic opportunities, reforming BiH-level institutions, protecting BiH's decentralized constitutional structure, and securing the closure of the Office of the High Representative (OHR).

I. Recovery, growth, and jobs

In May, floods caused by BiH's heaviest rains in 120 years caused immense damage to RS homes, businesses, farms, and infrastructure. The RS has mobilized every available resource for relief, recovery, and rebuilding while ensuring transparency and accountability for the funds raised and spent. The RS is continuing to implement economic reforms to improve the RS's environment for business and investment. The RS is also pressing ahead with legal and regulatory reforms necessary for European integration, even as BiH's progress is blocked by disagreements within BiH's other Entity, the Federation of Bosnia and Herzegovina (FBiH). Moreover, the RS is stepping up its fight against corruption and its vigilance against terrorism.

II. The failure of BiH-level institutions must be corrected.

BiH-level institutions are badly in need of reform. Although the Constitution provides for only a small number of BiH-level institutions, years of OHR decrees and other interventions have left Sarajevo with a jumble of expensive, ineffective, and unconstitutional agencies. A July report by the International Crisis Group (ICG) calls the BiH-level bureaucracy a "zombie administration, providing full employment for civil servants but few services to citizens." The RS is working in particular to reform the BiH-level justice system, which the EU has acknowledged requires changes to meet European standards.

III. BiH's indispensible Dayton structure

The RS is committed to protecting the structure established in the BiH Constitution. Its mechanisms to protect BiH's Constituent Peoples are vital to the country's stability. The Constitution's limits on BiH-level competencies are essential to BiH's proper functioning; the deadlocks that are common in BiH-level policymaking would be much less likely if BiH-level governance were limited to its constitutional competence. The Constitution is also important because its federal structure enables Entities to enact policy innovations for which it would have been impossible to develop consensus at the BiH level.

IV. Closure of OHR is long overdue.

The OHR must be closed at last. The High Representative's claimed authority to decree laws, depose elected officials, and punish individuals without any due process is unlawful and undermines BiH's political development. Despite an evaporation of international support for the OHR in recent years, the OHR has continued to interfere detrimentally in BiH policymaking, such as with his obstruction late last year of legislation to implement a broad agreement on state and military property.

V. The Security Council should end the application of Chapter VII.

Security Council resolutions and other sources have repeatedly acknowledged the "calm and stable" situation in BiH. After almost 19 years of peace in BiH, there is simply no justification for the application of Chapter VII.

I. Recovery, Growth and Jobs

A. Flood relief and recovery in the RS

1. The impact of May's floods

1. In May, the heaviest rains BiH has seen in 120 years brought floods and landslides affecting over one million citizens, displacing about 20,000, destroying businesses, damaging infrastructure, and ruining farms. Communities in both Entities suffered, but the majority of the damage was in the RS. Despite this, BiH-level officials and agencies insisted that assistance funds be distributed equally between the RS and the FBiH, not taking into consideration the urgent recovery requirements based on actual needs in those two entities.

2. An early World Bank assessment estimated that flood damage in the RS totaled more than KM 2 billion, exceeding the Entity's annual budget of KM 1.9 billion.[1] In the town of Doboj alone, three elementary schools and five intermediate and secondary schools were rendered unusable. The entire first floor of the town's primary health center and the entire downtown area were also flooded. Several of the 23 reported flood-related fatalities in BiH occurred in Doboj.[2] A number of other towns in RS suffered similar damage.

3. In the immediate aftermath of the rains, citizens from both Entities, as well as BiH-level authorities and the BiH military, undertook admirable efforts to help save citizens in flooded communities and to mitigate the most dangerous effects of the floods. In numerous cases, citizens made extraordinary efforts to help others across entity and state lines.[3] But these efforts have subsequently been overshadowed by the endemic mismanagement and paralysis that plague so many BiH-level institutions.

2. International response

4. The people of the RS are deeply grateful for the rapid response of our neighbors to this disaster. Emergency teams from the region and across Europe made extraordinary efforts in the early days after the floods. The EU leadership and the governments of individual states within and without Europe acted quickly in arranging new donations, credits, and loans to cover the most urgent needs of our citizens. These efforts prevented the disaster from becoming worse, in both humanitarian and economic terms. The UNDP and EU have now taken on longer-term projects to help protect and rebuild the RS and BiH.

5. The RS will be dealing with the effects of these floods for years to come, and we hope that our partners in the international community will continue to help us meet the needs of our citizens efficiently and sustainably. We also urge the international community to insist on accountability and transparency from all BiH institutions involved in flood reconstruction.

3. RS response and recovery

6. The preponderance of responsibility for flood relief and reconstruction rests with the Entity and local governments; the RS has mobilized every available resource to ensure that those displaced by floods are taken care of, and that homes, businesses, and schools are

[1] *1.1 billion euros in flood damages*, SRPSKA TIMES, 18 June 2014.

[2] *Rapid Needs Assessment, Floods in Bosnia and Herzegovina*, RELIEFWEB, 26 May 2014

[3] Elvira M. Jukic, *Flood Relief Solidarity Trumps Ethnic Divisions*, BALKAN INSIGHT, 26 May 2014.

rebuilt as quickly as possible. The RS Government has also done its utmost to make sure that local community leaders are at the forefront of the recovery process, with the full support and assistance of Entity authorities. The RS established a solidarity fund almost immediately after the floods in order to collect, track, and fairly distribute the donations received. The RS also created a solidarity tax. Using these funds, RS authorities, working with community leaders and elected officials at the town and municipality levels, began distributing electronic payment cards to affected citizens just weeks after the floods.[4] The government also began working immediately to secure emergency assistance from other nations and organizations and to solicit donations from RS citizens abroad. In the days immediately following the heavy rains, the RS established an account to receive such donations, and used social media and other novel avenues to provide up-to-date information on flood damage to RS citizens and the international media, and to encourage and collect individual donations. The government has also been careful to ensure transparency and accountability for all funds raised from individual donors, states, and international organizations.[5]

7. The RS Government has prioritized the reconstruction of schools and housing. Though the number of housing units and school buildings damaged in the floods is daunting, authorities are making every effort to bring citizens home and open schools with minimal delays. For those unable to return home, the solidarity fund disbursements make it possible to find temporary housing.

8. Despite the partisan tensions that are typical in the months leading up to national elections, the RS Government has taken the reconstruction effort as an opportunity to foster inter-party cooperation, in many cases placing officials from the opposition parties in charge of local efforts. The government has sought to ensure that local stakeholders are involved in each step of the recovery process. The prime minister and other ministers have made many visits to the hardest-hit areas, and the government has held plenary sessions in some of the flood-damaged towns.[6]

9. As the RS rebuilds its infrastructure, it is focusing on making improvements to help mitigate the impact of future natural disasters. In the words of Prime Minister Cvijanović, the RS is "rebuilding better than it used to be." Houses destroyed by landslides are being rebuilt on more stable foundations, in safer locations. River and canal levies, as well as roads bordering waterways, are being redesigned using the most modern methods available. The Ministry of Agriculture, Forestry, and Water Management is already implementing reconstruction and improvement plans affecting rivers and canals throughout the entity, using funds from the European Investment Bank. A total of 134 such infrastructure projects are underway or are slated to begin in the coming months.[7]

B. The RS is continuing to implement reforms to improve its environment for business and investment.

10. The RS understands that it is critical to build on economic reforms to promote job creation. The RS is continuing to reform and implement laws and regulations to make it easier for firms to invest and businesses to flourish. The RS's new "one-stop shopping"

[4] SRNA, *Electronic payment card 'Obnova Srpske' presented,* 19 June 2014.

[5] SRNA, *P.M. Cvijanovic meets representatives of local communities and damage inventory commissions*, 20 July 2014.

[6] RS Government, *16th special session of the Government held in Samac,* 21 July 2014.

[7] RS Government, *P.M. Cvijanovic and Minister Mirjanic on a field visit to Gradiska and Laktasi*, 19 Jun. 2014.

system for business registration, which became operational in December, has already energized formation of new businesses. In the first half of 2014, the number of businesses registered grew as much as 47% compared to the same period in 2013.[8] The EC's newly released 2014 Progress Report for BiH praises the RS's "progress on reforms in the area of business registration."[9] According to the Progress Report, "[t]he implementation of the ambitious business environment reform in Republika Srpska continued in 2013 and early 2014 with the establishment of one-stop-shops for business registration as of December 2013, the reduction of the number of required procedures (from 11 to 5) and of business start-up costs (from € 500-750 to € 200)."[10] The new system, the Progress Report says, "provides for the streamlining of procedures and enables businesses to register within three days, at a cost of one BAM."[11]

11. The RS has implemented many other major economic reforms in recent years, such as the first regulatory "guillotine" in the region (a process by which unnecessary and burdensome regulations are abolished); regulatory impact assessments; new commercial courts; reform of land registry and construction permits; and new tax deductions for equipment investments. The RS Government has fully liberalized the RS for foreign investors and since 2012 has been operating a Foreign Investor Aftercare Program under which the institutions of RS and municipal officials facilitate foreign investors' activities.[12]

12. Studies that have examined the RS's business environment have praised RS reforms. Even before the RS's most recent reforms, the World Bank's 2011 report *Doing Business in South East Europe* cited the RS's largest city, Banja Luka, as one of the two cities in the region that had improved their business environments the most.

13. 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, whose business environment is largely dictated by FBiH and canton regulations. BiH's decentralized structure has allowed the RS to develop a much more congenial business environment than the FBiH's.

14. To illustrate how different the RS and FBiH business environments are, it is useful to examine the two categories in which BiH (Sarajevo) performs worst in the *Doing Business* report. In the category of Dealing with Construction Permits, the *Doing Business* report ranks BiH 175th out of 189 countries. By contrast, a separate World Bank report ranks Banja Luka as the 3rd best in that category out of 22 cities in Southeast Europe.[13] In the category of Starting a Business, the World Bank ranks BiH 174th. The U.S. Department of State's 2014 Investment Climate Statement for BiH observes, "The World Bank estimates that in the city of Sarajevo, starting a business requires an average of 37 days and 11 separate procedures, well above the average for the region." In contrast, the U.S. report notes that the RS's 2013

[8] SRNA, *More Registered Entities in the Republic of Srpska*, 11 July 2014.

[9] European Commission, Bosnia and Herzegovina 2014 Progress Report, 8 Oct. 2014, p. 41.

[10] *Id*. at p. 28.

[11] *Id*. at p. 41.

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

[13] *Doing Business in South East Europe*, World Bank, 2011, p. 1.

business-registration reform "reduces the required processes dramatically, and initial reports indicate the time to register a business in the RS is down to an average of one week."[14]

C. RS Advancement of EU integration Agenda

15. As part of its efforts to encourage economic growth and job creation, the RS continues 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 help spur economic development.

1. The RS welcomes the new EU Compact on Growth and Jobs

16. The RS welcomes the EU's new focus on economic growth in BiH, including the recently-announced Compact for Growth and Jobs. The Compact calls for reforms in six specific areas: employment taxes, access to employment, ease of doing business, investor protection, anticorruption, and social welfare. The economic reforms discussed in section [I-B], above, all work toward the goals laid out in the EU compact. As detailed in section [I-D] below, the RS Government has also made significant progress in implementing its anticorruption strategy, having already put in place anticorruption measures far exceeding those at the FBiH and BiH levels. The RS encourages the EU to emphasize entity and local ownership of the reform process as the Compact is implemented, as successful reforms cannot be imposed from the BiH-level down.

2. The RS continues to revise its law and regulations to support EU programs and EU accession.

17. The RS has been working steadily to harmonize RS laws and regulations with the EU's *acquis communautaire*. The RS has already subjected more than 1,300 laws, bylaws, and general acts to this procedure since 2007. This is vital to European integration because, under the federal structure established by the BiH Constitution, the vast majority of requirements related to harmonization of laws with the *acquis* must be implemented by the Entities. Just as important, alignment with the *acquis* upgrades RS laws and regulations, thus promoting economic growth and other goals. According to European Commission (EC) reports, the RS has significantly outpaced the FBiH in achieving reforms required by the SAA and Interim Agreement.

18. In its 2014 Progress Report for BiH, the EC says that the RS "remains engaged in the approximation of draft legislation with the *acquis*" and that the RS's "administrative capacity to monitor EU-related legislation remained good . . . ."[15] The Progress Report further observes: "In the Republika Srpska National Assembly, the EU Integration Committee continued to cooperate closely with the government in assessing the level of compliance of proposed legislation with the *acquis*."[16] Meanwhile, "political turbulences" in the Federation "had a negative impact on the adoption of EU-related legislation."[17] According to the Progress Report, "Legislative offices of different governments in the Federation do not cooperate systemically to harmonise legislation or to approximate it to the *acquis*."[18]

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[14] *2014 Investment Climate Statement – Bosnia and Herzegovina*, U.S. Department of State, June 2014, p. 1.

[15] European Commission, Bosnia and Herzegovina 2014 Progress Report, 8 Oct. 2014, p. 9.

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

[17] *Id*.

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

3. Disagreements within the FBiH are blocking progress

19. Unfortunately, as explained below, progress toward EU integration at the BiH level has stopped because of the failure of the FBiH's Bosniak and Croat parties to resolve disputes with each other.

20. In October 2013, a solution for the establishment of a coordination mechanism for EU integration was close at hand. The top leaders of BiH, the RS, and the FBiH, with the help of EU, had reached a high level of agreement. The solution was agreed with respect to the RS; the only outstanding issues were matters that need to be decided within the FBiH, with respect to the position and the role of its cantons. Unfortunately, FBiH leaders have been unable to resolve their differences on these matters.

21. 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. In October 2013, the leaders of the seven top parties in BiH, with EU facilitation, agreed 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).[19] 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 to implementing *Sejdić-Finci*.

22. BiH has failed, because of Bosniak political intransigence, to enact EU-supported 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 omission has encouraged the rampant practice of registering one's residence using a fraudulent address, which undermines legal security and threatens the integrity of elections.

23. The EC's 2013 Progress Report for BiH observes that "The results of municipal elections in Srebrenica were resolved only after legal challenges in the courts, following a campaign asking voters to register their residence in Srebrenica *even if they were not actually living there*."[20] At the time of that campaign, *Deutsche Welle* reported: "All Bosniaks in the country are encouraged to register their residence in Srebrenica and then to vote in the elections for 'their' candidate, Camil Durakovic. A competition for newly registered voters . . . reached absurd heights."[21] By the time of the article, the number of Bosniak voters registered in the town had jumped from about 2000 to 6,600.[22] The EC's 2014 Progress Report for BiH reiterates EC concerns about the campaign and says, "Following legal challenges to the results of the 2012 municipal elections in Srebrenica, amendments to the State-level law on residence to improve security and certainty remain to be adopted."[23] Fraudulent residence registrations have continued in 2014. It has recently come light that in

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

[20] European Commission, Bosnia and Herzegovina 2013 Progress Report, 16 Oct. 2013, p. 10 (emphasis added).

[21] *An election in Bosnia shadowed by the past*, DEUTSCHE WELLE, 6 Oct. 2014.

[22] *Id*.

[23] European Commission, Bosnia and Herzegovina 2014 Progress Report, 8 Oct. 2014, p. 7.

two RS municipalities, there are more registered voters than residents.[24]

24. In consultation with EU officials, legislation was drafted in 2013 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 it "without any further delay."[25] He 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."[26] The BiH House of Representatives quickly approved the residence legislation, but its enactment was blocked in the House of Peoples by alleging that it is destructive of a vital interest of Bosniaks. The Constitutional Court rejected this claim in an 8-1 vote,[27] but the residence legislation has not yet been passed in the House of Peoples.

25. The blocking of this vital, EU-approved legislation at the BiH level allowed fraudulent registrations to continue unabated. In order to curb such fraud, the RS in 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 and the standards that have been in place in the BiH's Brčko District since 2010. The BiH residence law delegates registration and de-registration of residence in the RS to "public security stations within the RS Ministry of Internal Affairs." The RS was within its rights to establish rules for how its own officials implement this responsibility, including rules to prevent them from processing fraudulent registrations.

26. BiH must approve the EU-supported amendments to the residence law in order to stop rampant fraud, protect the integrity of elections, and meet BiH's obligations with respect to visa liberalization.

D. Republika Srpska's fight against corruption

27. As explained in Attachment 1 to this Report, Republika Srpska is encouraging economic growth by expanding its fight against corruption. The RS has been successfully implementing anticorruption measures for years. EU-sponsored UN studies indicate that bribery is well under half as prevalent in the RS as in the FBiH—and also much less prevalent than in the Western Balkans as a whole.[28] The RS's anticorruption efforts stand in contrast to the BiH level, where anticorruption initiatives have made little progress despite international funding. To build on the success of earlier anticorruption measures and raise the RS's anticorruption culture to EU levels, the RS is now implementing a recently approved detailed Action Plan for its Anticorruption Strategy for 2013-2017.

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[24] Tanjug, *Some Bosnian towns have more voters than residents*, 18 Aug. 2014.

[25] 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.

[26] *Id*.

[27] Case U 27/13, Decision on Admissibility and Merits, para. 27. Const. Ct. of BiH, 29 Dec. 2013.

[28] The prevalence of bribery by businesses is 5.5% in the RS, 13.2% in the FBiH, and 10.2% in the Western Balkans. *Business, Corruption and Crime In Bosnia And Herzegovina*, UN Office on Drugs and Crime (2013) at 16. The prevalence of bribery by individuals is 10.5% in the RS, 25.3% in the FBiH, and 12.5% in the Western Balkans. *Id*. at p. 17; *Corruption in the Western Balkans*, UN Office on Drugs and Crime (2011) at 7.

E. The RS will remain vigilant and cooperate closely with other security agencies against the jihadist threat.

28. On 3 September 2014, security agencies from around BiH, including the RS Ministry of Interior, conducted a nationwide operation that resulted in the arrest of 16 people in connection with the financing, organization, and recruitment of jihadists to go to Syria and Iraq.[29] With hundreds of people having left BiH to fight alongside radical Islamist forces in Syria and Iraq, BiH undoubtedly faces a heightened terrorist threat. The RS has long taken an active role in the fight against terrorism. The RS Ministry of Interior works closely with security bodies in BiH and abroad to collaborate against terrorist threats. These efforts must only intensify in the months and years ahead.

29. The menace of terrorism is nothing new in BiH. In the 1990s, radical Islamist organizations and fighters came from around the world to fight in BiH and left behind an extremist movement that has haunted BiH ever since. In 2010, for example, Wahhabi terrorists bombed a police headquarters in the town of Bugojno in central Bosnia, killing police officer Tarik Jubuskic and injuring six others. In October 2011, another Wahhabi terrorist armed with an AK-47 and hand grenades attacked the U.S. Embassy in Sarajevo, hitting it with 105 bullets.

30. The radical Islamist movement that took root in BiH during the 1990s war helped make BiH fertile ground for recruitment by terrorist forces fighting in Syria in Iraq. According to expert estimates, several hundred people have travelled from BiH to fight in Syria.[30] All security agencies in BiH must be vigilant to stop terrorist recruitment and prevent those who return from Syria and Iraq from bringing terror home.

F. The RS's program of reform will continue under a renewed electoral mandate.

31. On 12 October 2014, voters in the RS elected a new National Assembly and reelected the RS president, continuing the RS's unbroken succession of free and fair elections in the 19 years since the Dayton Accords. The election campaign was marred by foreign diplomats' active politicking and the BiH Central Election Commission's extremely slow processing of election results, but RS voters nonetheless made their voices heard. RS voters gave a renewed mandate to the current governing coalition, thus ensuring that the government to be formed will carry on the current government's program of reform. The new government will continue the RS's pro-growth, pro-investment policies, its progress toward EU integration, and its push for BiH government reform consistent with the BiH Constitution and the Dayton Accords as a whole.

II. The failure of BiH-level institutions must be corrected

A. The cost and utility of BiH-level institutions should be thoroughly examined and reforms made.

32. In the RS's 11th Report to the UNSC, the RS called for an immediate and thorough examination of BiH level institutions to determine their cost and utility. In that Report, the RS described how many of the centralized BiH institutions that were unlawfully imposed by

[29] Elvira M. Jukic, *Bosnia Arrests 16 Suspected Jihad Recruiters*, BALKAN INSIGHT, 3 Sept. 2014.

[30] Daria Sito-Sucic, *Bosnian police detain 16 for involvement in Syria, Iraq conflict*, REUTERS, 3 Sept. 2014.

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. Since the submission of the 11th Report, similar criticism from the international community has been publicized. While maintaining its position regarding the unconstitutionality of most of BiH's institutions, the RS reiterates the need for careful and transparent analysis of the failure of centralized institutions of BiH efficiently and effectively to perform.

1. The failure of BiH-level institutions is well known.

33. The RS's criticism that many BiH level institutions are costly and ineffective is well founded. The International Crisis Group (ICG), in a section of its latest report of July 2014 on Bosnia entitled, "VI. Rebuilding the Dayton Institutions - A. *The Errors of the Past*", the ICG describes the serious problem as follows:

> The international community's belief that Bosnia "must become a cohesive state, with central state structures that exercise real power" was a motor of change. High Representative Paddy Ashdown imposed laws creating vast new powers of the state, sometimes at entity expense. During his tenure, Bosnian leaders established many more state bodies and powers as unconstitutional departures from Dayton, but the Constitutional Court upheld them.
>
> The fate of the Court of Bosnia Herzegovina, the state court, shows how state building can go wrong. Dayton allotted judicial matters to the entities, apart from a state Constitutional Court. In 2000, the PIC ordered Bosnia's leaders to create a state court; when the legislature did not, OHR imposed a law creating the Court of BiH. It was meant to fill a gap in Dayton: no one had jurisdiction over the violations of state law. But OHR went farther, amending the law to create special panels for organized crime and corruption in 2002; giving the Court jurisdiction over the violations of entity criminal law and imposing a criminal code and a code of criminal procedure in 2003; and in 2004, adding a war crimes department. The new code adopted Anglo-American adversarial norms foreign to Bosnia's lawyers, trained in the continental inquisitorial system.
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> This pattern of internationally-sponsored state building without local buy-in has recurred repeatedly. It produced a "flood" of new agencies, many of which set up offices and hired staff but lacked clear tasks, so did little or nothing. Some were created at EU request but functioned poorly due to political deadlock, lack of proper legislation or insufficient professional and technical capacity. A minister from a party traditionally in favor of building state-level institutions said there are about twenty "useless" state agencies: "we have no idea what they do, but we cannot say that in public". Some state bodies perform worse than the entity institutions they replaced; a prominent businessman complained an agricultural export project went nowhere because the BiH Veterinary Office never issued permits.
>
> The result is a zombie administration, providing full employment for civil servants but few services to citizens. The communications Regulatory Agency has accomplished little in seven years and seems

> powerless to tame notoriously politicized public broadcasters. The State Aid Agency, created with much effort, met once, where-upon its director resigned. The commission on concessions has made no awards in its twelve years; the foreign investment promotion agency has never secured an investment. Agencies proliferate and perform badly or not at all but view criticism as an attempt to subvert their independence.[31]

34. In addition to the seven BiH-level institutions provided under the BiH Constitution, the "'flood' of new agencies," as described by the ICG, that resulted from the unlawful "internationally-sponsored state building without local buy in" has resulted in more than 60 additional BiH-level institutions existing today. This is particularly striking in light of the relatively small size of BiH and its Constitution's reservation of most functions to the Entities. The situation is in stark contrast to the mostly larger EU member states, where aside from their ministries, member states have at most about twenty agencies. Astonishingly, BiH's centralized institutions employ nearly 23,000 people who, as the ICG explains, do "little or nothing" and provide "few services to citizens." The priority for funding this "zombie administration" has led to an enormous growth in public spending. This incredible waste of resources is indefensible and must be corrected.

2. The BiH military budget must be reduced in light of economic conditions and post-flooding recovery needs.

35. The BiH armed forces cost its citizens nearly four times as much as the next most expensive BiH institution, the Indirect Taxation Authority. Unlike nearly all other European states, which have reduced military spending in the face of economic challenges, BiH has not yet cut its military budget. According to the World Bank, May's floods in BiH caused nearly $2.7 billion in damages. These immense costs make it even more essential to substantially reduce BiH's military budget.

3. Implementing reform

36. For the reasons set forth above, it is essential that an immediate and thorough examination of BiH institutions be conducted. The RS has proposed the establishment of joint assessment committees led by RS and FBiH authorities, with possible inclusion of an EU representative. The committees would assess transparency, efficiency, justification of expenditures, and most importantly, and the need for the institution in question. In cases where duplication with entity and cantonal institutions is found, the presumption would be to eliminate the central institutions—as is consistent with the BiH Constitution—and redirect funding to entity and cantonal institutions.

B. The RS is working with the EU on crucial reforms to the BiH justice system.

37. As part of the EU-BiH Structured Dialogue, the RS is working to develop reforms to address serious abuses in the BiH justice system and bring the system up to European standards. The EU has offered many constructive ideas from European experts. The Structured Dialogue has revealed a deeply flawed justice system at the BIH level with laws and practices that are incompatible with European standards and violate international agreements on human, civil, and political rights. Certain key reform efforts are discussed

[31] ICG Report at 27-28 (citations omitted).

below.

1. Ethnic discrimination by the BiH Prosecutor's Office

38. The BiH Prosecutor's Office must stop discriminating against Serb victims in its investigations and prosecutions of war crimes. As detailed in Attachment 2 to this Report, 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.

39. 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 10 times as many Serbs for crimes against Bosniak civilians as vice versa. Out of the 145 individuals who the BiH Prosecutor's Office has charged with crimes against humanity, 140 were accused of crimes against Bosniaks. *Not a single member* of the ARBiH or other Bosniak fighting force has been charged with crimes against humanity.

40. In a 2011 report, the International Crisis Group wrote that "many of the most serious" war crimes against Serbs "remain unprosecuted." Attachment 2 to this Report describes many examples of these failures, such as BiH Prosecutor's Office's failure to seek justice for the Army of the Republic of BiH's murder of 33 Serb civilians—including women, children, and the elderly—in Čemerno, despite evidence tying the crimes to specific individuals.

2. The Court of BiH's unlawful expansion of its criminal jurisdiction

41. The RS is working through the Structured Dialogue to develop reforms to halt the Court of BiH's unlawful expansion of its criminal jurisdiction. As explained in Attachment 3 to this Report, the Court of BiH for years has unlawfully expanded its jurisdiction into criminal matters legally reserved to Entity judicial institutions.

42. One way the Court of BiH has done this is by exploiting the vague terms of the Article 7.2(b) of the Law on Court of BiH to take jurisdiction over Entity criminal cases essentially whenever it chooses. EU officials and experts have accepted that this provision and the Court's practices in interpreting it are inconsistent with European standards on legal certainty and the principle of the natural judge. In July 2014, the EU hosted a three-day seminar on these issues at which EU officials and experts presented constructive ideas to reform the Law on Courts and Criminal Procedure Code to address these problems. The EU's gathered experts emphasized that it is crucial for jurisdictional limits to be defined clearly under the law. As one expert observed, "Having a vague and unclear definition of competence is like not having a definition at all."

43. The EU's Conclusions after the seminar emphasized that reforms should "clear the ground from any potential misuse that affects human rights in individual cases."[32] The EU's assembled experts, according to the Conclusions, called for

[32] Conclusions by the European Commission Services, TAIEX legislation review seminar on the extended criminal jurisdiction of the State level judiciary in relation to European standards on legal certainty and the principle of the natural judge, 23-25 July 2014 ("EU Conclusions"), p. 7.

> complementing the existing draft reform with more stringent parameters; these could allow a clear definition of the jurisdiction, thus eventually moving away from a situation of uncertainty and, as expressly mentioned in the course of the concluding debate, also overcome potential cherry picking of cases by the state level judiciary. Only additional steps in this direction could allow reducing excessive margins of discretionary power, limiting discretion in taking over cases.[33]

44. In addition to urging reforms to the Law on Court of BiH, the EU's Conclusions called for BiH to assess the need to amend other statutory provisions "in order to properly address the key issues at stake (the natural judge principle and certainty of the law vis-à-vis the extended competence of the Court of BiH in criminal matters) . . . ."[34]

45. At the same seminar, the President the BiH High Judicial and Prosecutorial Council (HJPC) presented the results of a study, conducted at the EU's request, of the Court of BiH's jurisprudence regarding its jurisdiction under Article 7.2(b). Despite only reviewing the very limited materials provided to it by the Court of BiH, the HJPC largely confirmed RS criticisms of the Court's practices. As recounted in the EU's summary of the meeting at which the HJPC's study was presented, HJPC President Milan Tegeltija "emphasised that the practice of the Court of BiH has not developed consistent and harmonised jurisprudence in applying existing criteria. In the majority of cases, the Court of BiH elaborated its extended criminal jurisdiction in very general, inconsistent terms and without specifications or even, on some occasion[s], without explanation whatsoever."[35]

46. The Court's failures in this respect directly defy the BiH Constitutional Court's 2009 holding that the extended jurisdiction provision "imposes [an] additional and serious obligation on the judiciary to determine, through consistent development of the court case-law, the contents of these standards as well as to decide, in each particular case, considering the given circumstances, whether stipulated conditions for jurisdiction of the Court of BiH are met." In light of the Court of BiH's failures, the EU experts urged important procedural reforms to ensure that the Court provides reasoned decisions with respect to jurisdiction and that those decisions are subject to appeal when they are rendered. As explained in Attachment 3 to this report, the Court also exceeds the legal limits of its jurisdiction by willfully misreading Article 23.2 of the BiH Criminal Procedure Code and disregarding explicit requirements of the BiH Criminal Code (CC).

47. The RS will continue to work through the EU Structured Dialogue and through other means to develop reforms to prevent these judicial abuses. In so doing, the RS Government maintains its position that the Court and Prosecutor's Office of BiH, which were established by decree of the High Representative, were created in violation of the BiH Constitution.

3. Further justice system reform

48. 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. The right to such an appeal is required by the European Convention on Human Rights. The EU recognized this as

[33] EU Conclusions at p. 4.

[34] EU Conclusions at p. 8.

[35] EU Conclusions at pp 2-3.

unacceptable and supports the creation of a separate and independent appellate court with jurisdiction limited to that of the Court of BiH.

49. As explained in Attachment 4 to the RS's 11th Report to the Security Council, the RS is working through the EU Structured Dialogue to bring the OHR-imposed system for appointment of judges and prosecutors into line with European and other international standards.

4. The Court of BiH's failure to implement the *Maktouf* decision

50. As explained in Attachment 4 to this Report, the Court of BiH has resisted implementing the European Court of Human Rights' 18 July 2013 decision in *Maktouf and Damjanović v. BiH*. The decision held that the Court of BiH violated the defendants' human rights when it—following the Court's longstanding practice—sentenced defendants using a new criminal code even though the code in effect at the time of the crimes could have resulted in a shorter sentence.

5. The BiH Prosecutor's Office's politically motivated indictment of the Director of SIPA

51. The BiH Prosecutor's Office, abetted by the Court of BiH, is using the criminal justice system as a weapon for a rankly political attack on the director of the BiH State Investigation and Protection Agency (SIPA), Goran Zubac. In June, the BiH Prosecutor's Office issued a dubious indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during February's unrest in FBiH cities.[36] BiH Chief Prosecutor Goran Salihović has been attacking Zubac since 2013, when SIPA arrested Šemsudin Mehmedović, an MP of the BiH Parliamentary Assembly and vice president of the SDA party, in connection with war crimes. As if to remove all doubt as to the political nature of the indictment against Mr. Zubac, the Bosniak member of the BiH Presidency, Bakir Izetbegovic, in August said of the SIPA director that "[w]e will likely send him to prison."[37]

52. 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.

6. The BiH judicial system's lack of transparency is unacceptable and getting worse

53. The BiH Judicial System operates in an unacceptably non-transparent way, denying the public the information to which it is entitled and engendering mistrust. In particular, 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 released the text of a single decision* since halting their public release in August 2012. Until recently, the Court nonsensically attributed its refusal to release any recent verdicts to "on-going activities" to amend the court's rulebook on public access to information. In May 2014, the Court finally adopted its new rulebook, which requires verdicts and other decisions to be posted on the Court's

[36] Denis Dzidic, *Bosnia Investigative Agency Chief's Protest Charge Confirmed*, BALKAN INSIGHT, 20 June 2014.

[37] *Izetbegovic: SDA must "win well" in elections*, OSLOBOĐENJE, 27 Aug. 2014.

website.[38] Yet the Court still has not posted any decisions since August 2012. The Court often waits weeks before announcing indictments and other decisions. The Court has often refused—without explanation—specific requests for verdicts submitted in accordance with the BiH Law on Free Access to Information. This year, the Court rendered its activities even less transparent when it suddenly removed from its website all of its past weekly activity reports, which are often the only way to determine what decisions the Court has taken with respect to a defendant. In addition to expunging its entire archive of activity reports, the Court now deletes each new report as soon as a new one is published. Withholding these reports from public view can serve no purpose other than to conceal the Court's activities.

54. The BiH Prosecutor's Office removed all indictments from the internet in 2010 and in February 2012 stopped making indictments available even by special request.[39]

55. On 7 October 2014, an HJPC working group determined that the Court of BiH's verdicts were public and should be published without regard to the nature and gravity of the crimes.[40] It instructed the BiH Court and Prosecutor's Office to adopt, within 90 days, a rulebook detailing the procedure for processing documents on the internet.[41]

III. BiH's indispensible Dayton structure

A. BiH's constitutional structure, mandated by the Dayton Accords, is essential to stability.

56. The RS calls on the Security Council and the international community 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. The RS is committed to respecting the Dayton Accords. As President Dodik recently said, "We are adamant in building [the RS] within the competencies stipulated in the Constitution of Bosnia and Herzegovina and the Dayton Agreement."

57. The BiH Constitution maintains stability and democratic government in BiH by establishing a federal, two-entity structure and various mechanisms carefully designed to protect the entities and BiH's three Constituent Peoples. The deadlock between BiH's Bosniak and Croat parties on how to implement the European Court of Human Rights' decision in *Sejdić-Finci v. BiH*[42] demonstrates the delicacy of the balance struck in the Dayton Constitution. This deadlock was presaged by Judge Giovanni Bonello's dissenting opinion in the case, which emphasized the "clear and present danger of destabilising the national equilibrium"[43] that the Dayton Constitution established. The Dayton Accords, Judge Bonello wrote,

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[38] *Press Release of the Court Of Bosnia and Herzegovina*, 4 June 2014.

[39] Selma Ucanbarlic, *Indictments and War-Crimes Verdicts Can Be Online*, BIRN BiH, 7 Oct. 2014.

[40] *Id*.

[41] *Id*.

[42] The RS has long supported the prompt implementation of the *Sejdić-Finci* decision (the RS proposal has been endorsed by the two plaintiffs). The RS supports removing ethnic qualifications from BiH office holders from the RS. The failure implement *Sejdić-Finci* is entirely due to a continued deadlock between Croat and Bosniak parties as to how to resolve the issue with respect to BiH office holders from the FBiH.

[43] *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06), ECHR 2009, Dissenting Opinion of Judge Bonello, at p. 56.

> were hammered out in protracted and persistent negotiations which aimed at creating institutional bodies based almost exclusively on systems of checks and balances between the three belligerent ethnicities. It was ultimately a most precarious equilibrium that was laboriously reached, resulting in a fragile tripartite symmetry born from mistrust and nourished on suspicion.
>
> Only the action of that filigree construction extinguished the inferno that had been Bosnia and Herzegovina. It may not be perfect architecture, but it was the only one that induced the contenders to substitute dialogue for dynamite. It was based on a distribution of powers, tinkered to its finest details, regulating how the three ethnicities were to exercise power-sharing in the various representative organs of the State. The Dayton Agreement dosed with a chemist's fastidiousness the exact ethnic proportions of the peace recipe.[44]

58. The Dayton Constitution recognizes that the stability of BiH depends on strong constitutional protection 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. As the International Crisis Group observed in its recent report on BiH, "A purely civic state is inconceivable to Serbs and Croats."[45]

59. The Constitution reserves most governmental functions to the Entities and establishes other important mechanisms, such as the ability of two thirds of the House of Representatives members from an Entity to veto a piece of legislation. The Constitution's mechanisms protecting the interests of the Constituent Peoples and the Entities mean that legislation on a contentious issue must be the product of negotiations and consensus building rather than the dictate of a bare majority. This is a challenge, but it is what is necessary to ensure BiH's stability while protecting its Constituent Peoples from repression or marginalization. Moreover, as explained in section III-B, below, these constitutional protections would be much less of a challenge if the BiH level were to respect the constitutional limits of its competence.

B. Functional governance requires a BiH level that respects its constitutional limits.

60. 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.

61. 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

[44] *Id.* at p. 53.

[45] ICG Report at ii.

level's competencies, thus minimizing the scope of contentious decisions required at the BiH level.

62. 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" 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.

63. 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.

64. 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. 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.

65. As the International Crisis Group wrote in its recent report on BiH, "Bosnia is in effect a strongly decentralised federation and will remain one. There is nothing wrong with that as a basic design; decentralisation is common and growing in Europe."[46]

66. 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. 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.

67. It is widely recognized that the RS functions more effectively than the FBiH. In its most recent report on BiH, the ICG discusses at length the governance problems in the FBiH, but says the RS's "troubles are not structural and do not call for immediate reform."[47] The

[46] ICG Report at p. 35.

[47] ICG Report at p. 21.

same report also finds that the RSNA "is the most efficient of Bosnia's major legislatures."[48] Differences such as these underline the importance of Entity autonomy under BiH's constitutional system.

IV. Closure of OHR is long overdue.

68. As most in the international community now recognize, the OHR's claimed authority to decree laws, depose elected officials, and punish individuals without any due process is both unlawful and counterproductive. One of the key recommendations of the International Crisis Group (ICG) in its July 2014 report on BiH, states: "To the members of the Peace Implementation Council (PIC), in particular the EU and U.S.: Treat Bosnia as a normal country by closing the Office of the High Representative, dissolving the PIC and sponsoring a UN Security Council resolution welcoming these steps."[49] The RS reaffirms Attachment 1 to its 10th Report to the UN Security Council, which details why the High Representative's asserted "Bonn Powers" violate the Dayton Accords and the civil and political rights of BiH citizens. The same document explains how OHR's presence undermines BiH's political development. Although the OHR has lost significant support from the international community, the High Representative's harmful interference in BiH's affairs continues. Three recent examples are discussed below.

A. The High Representative's obstruction of the agreement on state and military property

69. Members of the international community frequently—and rightly—urge BiH's elected officials to reach across ethnic and Entity lines to resolve disputes that are holding back BiH's progress. When BiH's diverse parties achieve such agreements, however, the OHR often sabotages the agreements before they can be implemented. Resolution of the longstanding dispute over state and military property was in sight until the OHR scuttled a draft law that would have implemented a six-party agreement on the issue.

70. In November 2012, all six parties then represented on the BiH Council of Ministers endorsed an agreement on resolution of the state and military property issue. A draft law was prepared in 2013 to implement the agreement. But before the law could be passed, Amb. Inzko, citing "concerns" about the draft, intervened so as to wreck the inter-entity and inter-ethnic consensus for the legislation. The result of OHR's intervention, as recounted in Amb. Inzko's May 2014 Report to the UN Secretary General, was that the "BiH Council of Ministers adopted a report . . . indicating that *the earlier consensus on the draft no longer existed* and recommending its withdrawal from further procedure."[50]

71. Amb. Inzko defends his blocking of the draft law by referring to OHR's "concerns" about the legislation's compatibility with a July 2012 Constitutional Court decision relating to state property. The draft law, in Amb. Inzko's view, gave the BiH level insufficient rights over state property. But the Constitutional Court's decision had held that the authority to regulate state property lies in the BiH Parliamentary Assembly. The decision did not try to prescribe in any detail what a law regulating state property should look like, but instead identified principles BiH would need to take into account. The decision said that BiH's

[48] ICG Report at p. 22.

[49] ICG Report at iii.

[50] High Representative's 45th Report to the UN Secretary General, para. 11 (emphasis added).

regulation of state property would need to "take into consideration . . . the whole constitutional order of BiH," emphasizing in particular "compliance with the competencies of the Entities and protection thereof." This is what the draft law was designed to do.

72. In addition to the groundlessness of Amb. Inzko's "concerns," the High Representative lacks legal authority to determine whether legislation is consistent with Constitutional Court jurisprudence. The BiH Constitution, i.e., Annex 4 of the Dayton Accords, established the Constitutional Court for deciding constitutional disputes, and any state and military property law enacted by BiH would be subject to constitutional challenge.

73. The Security Council and other members of the international community should reject the High Representative's destructive interference in BiH's governance. It should especially repudiate Amb. Inzko's practice of sabotaging the delicate compromises necessary to resolve longstanding disputes and move BiH forward.

B. The High Representative's attempts to undermine justice system reform.

74. No one thinks the BiH justice system is performing well. Yet Amb. Inzko is trying to make the institutions the OHR imposed on BiH immune from criticism and thus impervious to reform. In his May 2014 Report to the UN, Amb. Inzko condemned RS officials' criticisms of BiH-level justice institutions. OHR's attempts to silence criticism of these institutions are incompatible with efforts to reform them in conjunction with the EU-BiH Structured Dialogue. As the EU said in a May 2014 statement, "the reform of state-level judiciary remains a core priority." The EU agrees with many of the RS's criticisms of the OHR-imposed justice system and has emphasized the need for thorough domestic debate—a debate that Amb. Inzko is trying to shut down.

75. President Dodik's recognition that the BiH Court and Prosecutor's Office are unconstitutional is widely shared. The International Crisis Group recently wrote that "Dayton *allotted judicial matters to the entities*, apart from a state Constitutional Court," but "OHR imposed a law creating the Court of BiH."[51] Amb. Inzko's efforts to suppress political opinion related to the BiH judicial system show his determination to block reforms of the OHR-created institutions, which international experts recognize must change.

1. The High Representative's failure to disavow extrajudicial punishments

76. Another action of the High Representative taken during this reporting period also shows why it the OHR is detrimental to progress and rule of law. On 19 August 2014 the High Representative acted to cancel orders OHR had previously issued to remove and ban individuals from being appointed or elected as pubic officials or officials within political parties, and orders seizing travel documents of individuals preventing freedom of travel.[52] The original actions of the OHR were implemented simply by decree without any due process or right of appeal in flagrant contravention of the most basic human rights. Many of these original decrees were issued as early as 1999.

77. In its recent decisions, the OHR admitted that "the removal of officials from public office is an extraordinary measure and a direct intervention in the political process in Bosnia

[51] ICG Report at p. 27 (emphasis added).

[52] OHR, *High Representative lifts remaining bans on individuals*, 19 Aug. 2014.

and Herzegovina."[53] However, despite this acknowledgement, the OHR issued its decisions canceling its prior actions with no acknowledgment that its original decrees were determined by the Constitutional Court of BiH[54] to be in violation of the Constitution and the human rights instruments enshrined therein or any acknowledgement of the damage and injury sustained by the persons banned. Nor was any apology or compensation offered. Instead, the OHR continued to justify its former actions and threatened again to renew extrajudicial punishments against individuals by future OHR decrees if it so chooses.

V. The Security Council should end the application of Chapter VII.

78. It is a well-established fact that BiH does not pose a threat to international peace and security. As the ICG wrote in its latest report on BiH: "Today Bosnia is at peace, with minimal threat of relapse into armed conflict. Its standard of living has caught up with the neighbourhood; its cities, towns, roads, bridges, mosques and churches have been rebuilt or repaired. Former enemies socialize across the once-impassable line between wartime rivals without a second thought."[55]

79. The Security Council has made similar observations. For example, in Resolution 2019, the Council observed, "the overall security situation in Bosnia and Herzegovina has been calm and stable for several years."[56] Since then, the Security Council has recognized that the "security environment has remained calm and stable."

80. The Security Council's unjustified continuation of Chapter VII measures is not without adverse consequences. Economically, it creates a barrier to foreign investment by portraying BiH as unstable and thus high risk, driving potential investors away. It also contributes adversely to BiH's credit rating, which has a significant effect on a country's ability to borrow money on the markets. Additionally, economic sectors that rely on tourism are harmed due to the perceived risk to one's safety associated with BiH affected by the Security Council maintaining that BiH poses a threat to international peace and security.

81. The Security Council's position also adversely affects political progress. It is used by some actors in the international community who wish to intervene in the normal political affairs of BiH as justification for doing so. It also feeds the misperception that BiH is far from ready to advance to the next phases of EU membership.

82. The Security Council has authority to take certain measures under Chapter VII of the UN Charter "to maintain or restore international peace and security" only where there is "the existence of any threat to the peace, breach of the peace, or act of aggression."[57] The situation in BiH clearly no longer warrants the application of Chapter VII. It is therefore past time for the Security Council to cease acting under Chapter VII of the UN Charter. Failure to do so is unnecessarily detrimental to BiH's progress.

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[53] *Id*.

[54] *Appeal of Milorad Bilbija et al*, No. AP-953/05 (BiH Constitutional Court, 8 July 2006), para. 78.

[55] ICG Report at 1-2 (citations omitted).

[56] UN Security Council Resolution 2019 (2011).

[57] *See* Chapter VII of the UN Charter.

Republika Srpska's Fight Against Corruption

The RS Government continues to make progress in its successful fight against corruption through its Anticorruption Strategy. The RS recognizes that 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. 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. The Entity and cantonal governments are in the best position to implement their own anticorruption strategies, consistent with BiH's constitutional structure. The EU and civil society organizations with expert training and practical experience in government reform may also assist.

Past anticorruption efforts

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. Thus far, APIK has implemented only eight out of more than 80 planned measures to reduce corruption. APIK is unable to even operate its telephone line for citizens to report official corruption.

Republika Srpska has had much greater success fighting corruption at the Entity level. The RS Government adopted its first Strategy for Fighting Corruption in 2008, and successfully implemented many of the measures included in that strategy in the years since. 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.

EU-sponsored UN 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.[1] 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%).[2] It is also substantially lower than the 12.5% rate for the Western Balkans as a whole.[3]

I. The RS Anticorruption Strategy

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[1] *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 FBiH (7.4) or the Western Balkans (7.1). *Id*.

[2] *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 FBiH (5.7). *Id.*

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

In order further to improve RS institutions' effectiveness in combating corruption, the RS approved a new Anticorruption Strategy for 2013-2017, the goal of which is to raise the RS's anticorruption culture to the level of EU member states.

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.

Among the broad priorities of the Anticorruption Strategy are increasing trust in public institutions by improving transparency, access to information, professionalism, and independence; and strengthening corruption deterrence mechanisms.

In order to fulfill the goals of the Anticorruption Strategy, the RS Government in March adopted an Action Plan that details the activities of each government sector and agency 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.

Republika Srpska government agencies involved in the anticorruption effort have established close cooperation with their counterparts in neighboring countries. In particular, RS delegations from the ministries of Justice and Internal Affairs have worked closely with their counterparts in Montenegro and Croatia on the RS action plan and its implementation. This cooperation allows RS authorities to learn from the experiences of other governments, and to develop the RS action plan based on established best practices.

The RS government has also established training programs for RS law enforcement and judiciary officials, in order to instill best practices in those most directly involved in implementing the action plan. The RS has taken advantage of European Union support, via the TAIEX and IPA, to fund these training programs. Training and research programs relating to corruption have also been incorporated into the Interior ministry's permanent training academy.

II. Specific areas of interest

A. Public procurement

1. The BiH level's struggles in implementing its anticorruption strategy are exemplified by the 2010 BiH Law on Public Procurement.[4] The law established the BiH-level Public Procurement Agency, and gave it a mandate to monitor the transparency of all government procurement and contracts. However, in the years following the agency's establishment,

[4] Official Gazette of BiH, No. 39/14.

transparency of BiH-level deals actually *decreased* dramatically. In 2012 only 30% of the government's deals were considered transparent and open, compared to 90% in 2009.[5]

In response to the failures of the centralized anticorruption efforts, the RS has proposed a number of measures to combat corruption and waste at the Entity level, including measures to increase transparency in public procurements. Among these is the requirement that Entity and sub-entity governments issue annual reports on all public procurements, including any irregularities and any steps taken to address issues.

B. Protection of whistleblowers

Though legal protection for whistleblowers in government institutions is a relatively new development, it has become the norm in EU member states. The experience of European states shows that whistleblower laws are critical to the success of anticorruption efforts. The RS amended its Code of Conduct for Civil Servants to ensure protection of whistleblowers in 2011, well before the FBiH or BiH had made similar provisions. Further codifying whistleblower protections is among the priorities of the RS Government's action plan on corruption for 2013-2017.

C. Financial disclosure

The RS Government fully supports and cooperates with BiH regulations regarding financial disclosure for elected and appointed officials. Under the BiH Law on Elections, all candidates for elected office at the BiH, Entity, and local levels must provide the Central Elections Commission with regular statements of financial status, including detailed information on the income, assets, and liabilities of candidates and their families.

D. Freedom of information

The RS Law on Freedom of Access to Information[6] stipulates that information held by RS authorities is a valuable public resource, and that access to information is crucial to the democratic process. The Law gives all citizens the right to request information from RS and local government agencies. The Law, which was modeled on similar measures in European states, regulates the means by which citizens can request information, and the specific conditions under which authorities may refuse or restrict access to information. The Law also establishes the responsibility of RS authorities to assist in the fulfillment of requests for information filed under the BiH and FBiH Laws.

Despite the fact that a similar law on access to information exists at the BiH level, BiH authorities have failed in recent years to meet reasonable standards of transparency. BiH judicial institutions in particular have failed to ensure public access to information. As explained in section II-B-6 of the RS's 12th Report to the UN Security Council, this lack of transparency undermines the democratic system in BiH. For example, the Court of BiH has not posted the text

[5] See the report by the NGO Tender, "Results of the Implementation of the Public Procurement Law," January 2013. <http://www.tender.ba/images/stories/dokumenti/AKTUELNO/treci-kvartalni-godisnji.pdf>, p. 3.

[6] *Official Gazette of Republika Srpska*, No. 20/01.

of a single decision since August 2012. The Court's non-transparency makes it impossible to properly evaluate its work and understand the way it applies the law. Republika Srpska has been criticized for adopting laws that parallel BiH-level legislation; the record of BiH institutions in this regard, however, illustrates the necessity of RS legislation that protects the public interest.

E. Money laundering

BiH has long lagged behind much of Europe in taking measures to prevent money laundering and financing of terrorist organizations. Under pressure from MONEYVAL, the BiH Parliamentary Assembly passed legislation required by the EU in June 2014. However, continuing disagreements among BiH parties make it unlikely that the BiH-level legislation will be properly implemented and enforced.

In order to prevent and prosecute money laundering in RS, the RS National Assembly has passed legislation regulating financial transactions. The RS Ministry of Internal Affairs has established a new unit specializing in financial investigations, and has successfully prosecuted individuals involved in money laundering, most notably Zoran Copic, who was allegedly involved in laundering millions of dollars on behalf of a regional drug cartel. The Ministry has cooperated in many of its money laundering investigations with authorities in Serbia and Croatia, and has incorporated best practices from neighboring states into its own procedures.

Republika Srpska's 12th Report to the UN Security Council
Attachment 2
[All statistics are as of 15 October 2014]

Justice Requires Ending Discrimination against Serb Victims of War Crimes

The BiH Prosecutor's Office has long shown a pattern of discrimination against Serb victims of war crimes. This denies Serbs the equality before law to which they are entitled.

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 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 82 final convictions of Serbs for war crimes against Bosniak civilians.

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 more than *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 more than 15.4 years of imprisonment for war crimes against Bosniak civilians.

Out of the 145 individuals who the BiH Prosecutor's Office has charged with crimes against humanity, 140 were accused of crimes against Bosniaks. *Not a single member* of the ARBiH or other Bosniak fighting force has been charged with crimes against humanity.

Examples abound of war crimes against Serbs that have, inexplicably, never been prosecuted. In a 2011 report, the International Crisis Group (ICG) wrote that "many of the most serious" war crimes against Serbs "remain unprosecuted."[5] The ICG said that the BiH Prosecutor's Office

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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.

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

"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.

1. 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 the execution of Serb prisoners and the burning of Serb villages. Footage that surfaced in 2006 show Dudaković's forces destroying a Serb village in the Bosnian Krajina region in 1995 and Dudaković personally ordering such destruction. One video shows houses burning in a Serb village and Dudaković ordering: "Burn them all."[7] After the footage became public, the Bosniak member of the BiH Presidency promptly issued a statement rejecting all accusations against Dudaković.[8]

In July 2009, another video surfaced, this one showing Dudaković ordering his troops to immediately kill two captured soldiers.[9]

But the evidence against Dudaković goes far beyond videos. For example, a former member of Dudaković's 5th Corps recounted the organized slaughter of a group of Serb civilians between the ages of 40 and 60 in front of a motel in the area of Bosanski Petrovac:

> The prisoners prayed for help, and one older man asked to speak with the commander. One of the soldiers told him that the general [Dudaković] is in the motel and that he has ordered them to be killed. Shortly after, four soldiers with masks on and carrying automatic rifles came out and started shooting at the Serbian civilians. After that, they returned to the command area in the motel. I asked the soldier next to me who these men were, and he answered that they were the security team of Atif Dudaković.[10]

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

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

[7] Ian Traynor, *New Bosnian war footage shows 'crimes' against Serbs*, THE GUARDIAN, 9 Aug. 2006.

[8] *BiH presidency chairman rejects Serbia's accusations against wartime commander*, SETIMES.COM, 10 Aug. 2006.

[9] *Footage surfaces showing war crimes by Bosniak general*, SETIMES.COM, 23 July 2009.

[10] *Prosecutors meet to discuss Storm videos*, B92, 10 Aug. 2006.

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 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.

In July 2013, the Prosecutor's Office announced that it was conducting an "intensive investigation" of Dudaković, having earlier announced that it would complete the investigation by the middle of 2013.[11] Today, 19 years after the atrocities and eight years after BiH's chief prosecutor first announced an investigation of Dudaković, there has still, astoundingly, been no indictment.

2. 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.'"[12] 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."[13]

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.

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[11] Selma Ucanbarlic, *Intensive Investigation against Atif Dudakovic Continues*, BIRN-BiH, 2 July 2003.

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

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

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 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.[14]

[14] 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.

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 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, more than 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 in February 2014, Interpol Serbia issued an international arrest warrant. 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.

3. Mass crimes against Serb citizens of Sarajevo

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 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.

4. 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.[15] 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.

5. The 3rd Corps and its El Mujahid Detachment

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

6. Obstruction and retribution over 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

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

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.

Since SIPA's arrest of Mehmedović, the BiH Prosecutor's Office, abetted by the Court of BiH, has used the criminal justice system to attack SIPA Director Goran Zubac. In June 2014, the BiH Prosecutor's Office issued a dubious indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities.[16] BiH Chief Prosecutor Goran Salihović has been attacking Zubac since 2013, when SIPA arrested Šemsudin Mehmedović, an MP of the BiH Parliamentary Assembly and vice president of the SDA party, in connection with war crimes. As if to remove all doubt as to the political nature of the indictment against Mr. Zubac, the Bosniak member of the BiH Presidency, Bakir Izetbegovic, in August said of the SIPA director that "[w]e will likely send him to prison."[17]

7. Refusal to investigate torture and murder at five prison camps

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

8. The Tuzla Convoy Massacre

On 27 April 1992, the Presidency of the RBiH issued a decision permitting the peaceful departure of Yugoslav National Army (JNA) forces, confirming the RBiH's earlier agreement with Yugoslavia that guaranteed JNA forces' safe withdrawal. In addition, Col. Milo Dubajić,

[16] Denis Dzidic, *Bosnia Investigative Agency Chief's Protest Charge Confirmed*, BALKAN INSIGHT, 20 June 2014.

[17] *Izetbegovic: SDA must "win well" in elections*, OSLOBOĐENJE, 27 Aug. 2014.

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."[18]

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

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

On 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.

10. Murders of Serb Civilians in Trnovo Municipality

In 1992, ARBiH forces brutally murdered many civilians, including young children, in the Municipality of Trnovo near Sarajevo. RS officials have gathered and submitted to the BiH Prosecutor's Office voluminous evidence about the crimes and suspects. Among the pieces of evidence submitted to the Prosecutor's Office is a recording proving that the ARBiH established a camp in Trnovo for Serb civilians, women, children, and the elderly in the summer of 1992—key evidence to disprove the claim that the civilians killed in Trnovo died in combat. Yet despite

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

the ample evidence in the case, more than two decades after these grisly crimes there has not been a single indictment.

11. Dobrovoljačka Street Ambush

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.[19] 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.

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

The BiH Court and Prosecutor Violate their Jurisdictional Limits

I. Introduction

Reforms are necessary to stop the Court of BiH and the BiH Prosecutor's Office from routinely violating the legal limits to their jurisdiction.

The BiH Criminal Procedure Code 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] In spite of this, the BiH Court and Prosecutor have reached beyond their legal jurisdiction repeatedly, particularly in criminal matters (where a court should be most cautious), to charge, investigate, indict and prosecute defendants for alleged crimes not enacted in BiH criminal law.

This paper examines how the Court exceeds its lawful jurisdiction, including in these principal ways:

- The Court interprets the highly ambiguous terms of Article 7.2(b) of the Law on Court of BiH so broadly as to allow the Court to take jurisdiction over Entity cases essentially whenever it chooses. For example, the Court has found even minor and localized crimes to cause BiH "detrimental consequences," allowing the Court to take jurisdiction.

- The Court implausibly interprets Article 23.2 of the Criminal Procedure Code to grant the Court jurisdiction over any charge under Entity law as long as there is also at least one charge under BiH law against one or more of the case's defendants. In reality, Article 23.2 does not give the Court any jurisdiction at all; it merely gives the Court of BiH priority in time to try an individual for charges for which it is competent first, before other courts try that individual for charges over which they are competent.

- The Court has sometimes unlawfully exercised jurisdiction over Entity crimes through misuse of the BiH Criminal Code. For example, an Organized Crime charge under the BiH Criminal Code explicitly requires that there has been an underlying crime prescribed by BiH law, yet the Court and Prosecutor have often convicted defendants of Organized Crime relying solely on violations of Entity criminal codes.

Before examining these jurisdictional abuses, it is important to recall that the Court of BiH's creation was unlawful. The Court was created by a foreign high representative who lacked any legal authority to impose laws or institutions by decree. Even leaving aside the Court's origin, its existence blatantly violates the BiH Constitution (Annex 4 of the Dayton Accords), which reserves all judicial authority to the Entities with the sole exception of the BiH Constitutional Court. As the International Crisis Group explained in a recent report on BiH:

> The fate of the Court of Bosnia Herzegovina, the state court, shows how state building can go wrong. Dayton allotted judicial matters

[1] BiH Criminal Code, Art. 28 (emphasis added).

> to the entities, apart from a state Constitutional Court. In 2000, the PIC [Peace Implementation Council] ordered Bosnia's leaders to create a state court; when the legislature did not, OHR imposed a law creating the Court of BiH. It was meant to fill a gap in Dayton: no one had jurisdiction over violations of state law. But OHR went farther, amending the law to create special panels for organized crime and corruption in 2002; giving the Court jurisdiction over violations of entity criminal law and imposing a criminal code and a code of criminal procedure in 2003; and in 2004, adding a war crimes department.[2]

A subsequent decision by the BiH Constitutional Court upholding the Court of BiH's validity was handed down at a time when the Constitutional Court, as a matter of internal policy, never challenged decisions of the High Representative.[3] It is also relevant to note, especially with respect to criminal cases, that there is no court of second instance which can provide criminal defendants the right of appeal required by the international agreements on human, civil and political rights to which BiH is a party.

Although this paper describes many illustrative cases, it must be noted that the Court and Prosecutor's lack of transparency makes it impossible to fully evaluate the means by which it has asserted jurisdiction over Entity-law charges. Many of the Court's decisions, including all decisions since August 2012, are unavailable. The Court provides scant information about many cases, often failing even to identify the criminal code or codes under which defendants were charged.

BiH must enact reforms, including amendments to the Law on Court of BiH and BiH Criminal Procedure Code, to prevent further such abuses.

II. Article 7.2 of the Law on Court of BiH is inherently flawed and the BiH Court and Prosecutor apply it arbitrarily.

As EU officials and experts have accepted, Article 7.2 of the Law on Court of BiH and the Court's practices in interpreting it are inconsistent with European standards on legal certainty and the principle of the natural judge. At a July 2014 EU seminar examining Article 7.2, the EU's gathered legal experts emphasized that it is crucial for jurisdictional limits to be defined clearly under the law. As one expert observed, "Having a vague and unclear definition of competence is like not having a definition at all." The EU's Conclusions after the seminar

[2] International Crisis Group, *Bosnia's Future*, Crisis Group Europe Report N°232, 10 July 2014, p. 27 (footnotes omitted).

[3] When the OHR-imposed law establishing the Court of BiH was challenged before the BiH Constitutional Court, four out of the six judges from BiH found the law unconstitutional. The law was only upheld, in a 5-4 decision, because the three foreign judges voted as a bloc to protect the High Representative's creation. One of those judges, Austrian professor Joseph Marko, later wrote that there was a "tacit consensus between the Court and the High Representative that the Court . . . *will always confirm the merits of his legislation* . . . ." Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina* (2004), p. 18 (emphasis added).

emphasized that reforms should "clear the ground from any potential misuse that affects human rights in individual cases."[4] The experts, according to the Conclusions, called for

> complementing the existing draft reform with more stringent parameters; these could allow a clear definition of the jurisdiction, thus eventually moving away from a situation of uncertainty and, as expressly mentioned in the course of the concluding debate, also overcome potential cherry picking of cases by the state level judiciary. Only additional steps in this direction could allow reducing excessive margins of discretionary power, limiting discretion in taking over cases.[5]

In addition to urging reforms to the Law on Court of BiH, the EU's Conclusions called for BiH to assess the need to amend other statutory provisions "in order to properly address the key issues at stake (the natural judge principle and certainty of the law vis-à-vis the extended competence of the Court of BiH in criminal matters) . . . ."[6]

At the same seminar, the President the BiH High Judicial and Prosecutorial Council (HJPC) presented the results of a study, conducted at the EU's request, of the Court of BiH's jurisprudence regarding its jurisdiction under Article 7.2(b). Despite only reviewing the very limited materials provided to it by the Court of BiH, the HJPC largely confirmed RS criticisms of the Court's practices. As recounted in the EU's summary of the seminar at which the HJPC's study was presented, HJPC President Milan Tegeltija "emphasised that the practice of the Court of BiH has not developed consistent and harmonised jurisprudence in applying existing criteria. In the majority of cases, the Court of BiH elaborated its extended criminal jurisdiction in very general, inconsistent terms and without specifications or even, on some occasion[s], without explanation whatsoever."[7]

A more detailed analysis of the Court of BiH's Article 7.2 jurisprudence outlined below demonstrates the depth of the problems with the provision and its arbitrary interpretation by the Court of BiH.

Article 7.2 provides:

> (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:

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[4] Conclusions by the European Commission Services, TAIEX legislation review seminar on the extended criminal jurisdiction of the State level judiciary in relation to European standards on legal certainty and the principle of the natural judge, 23-25 July 2014 ("EU Conclusions"), p. 7.

[5] EU Conclusions at p. 4.

[6] EU Conclusions at p. 8.

[7] EU Conclusions at pp. 2-3.

> (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 BiH Court and Prosecutor have 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 and Prosecutor'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.[8] Yet, as recognized by the EU and the HJPC, the Court of BiH frequently provides no reasons at all for its taking jurisdiction from the court and prosecutor with territorial jurisdiction, a decision that is fundamental to the determination of the defendant's civil rights. The Court's frequent failure to explain the basis for its jurisdiction over Entity-law charges violates the BiH Constitutional Court's 2009 holding that the extended jurisdiction provision in the Law on Court of BiH "imposes additional and serious obligation on the judiciary to determine, through consistent development of the court case-law, the contents of these standards as well as to decide, in each particular case, considering the given circumstances, whether stipulated conditions for jurisdiction of the Court of BiH are met."[9]

Below are some examples of the Court and Prosecutor's arbitrary application of Article 7.2.

A. Asim Karić et al. (X-KŽ-06/193)

In the Asim Karic case, the Court and Prosecutor 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 with companies throughout BiH."[10] 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)

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

[9] BiH Constitutional Court, *U 16/08*, Decision on Admissibility and Merits, 28 March 2009.

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

In the Goran Bilić case, the Court and Prosecutor 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."[11] 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."[12] If the alleged "detrimental consequences" can be this vague and theoretical, there are few—if any—crimes over which the Court and Prosecutor could not invoke Article 7.2.

C. Edhem Bičakčić et al. (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 acknowledged the "relatively vague terms" of Article 7.2[13] 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.'"[14] "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 resulted in adverse consequences among the public in the form of discrediting the public authorities."[15]

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)

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[11] *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.

[12] *Id.*

[13] *Edhem Bičakčić et al.*, X-KŽ-09/702, Verdict, Court of BiH, 9 Apr. 2010, p. 42.

[14] *Id*.

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

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."[16] 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 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."[17] 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."[18] The Court failed to explain why evasion of Federation taxes by the company and two persons, 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 crimes with "serious repercussions or detrimental consequences" to the BiH economy.

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

In the Ranko Stanković case, the Court 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 to allege any substantive consequences to BiH from the escape. The first-instance verdict in the Stanković case is a rare example of a Court of BiH panel determining that jurisdiction under Article 7.2 was *not* justified. However, an appellate panel led by Court of BiH President Meddžida Kreso soon overruled the first-instance panel and reinstated the case.

Stanković 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 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 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

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

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

[18] *Id*.

consequences to the ICTY's relationship with BiH or any other detrimental consequences to BiH.

The Court's 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."[19] 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."[20]

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.[21]

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 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.[22]

The Court's appellate panel, exercising no such caution, reversed the first-instance panel and held that there was jurisdiction under Article 7.2. Judge Meddžida Kreso wrote that "the conclusions by the First Instance Court that the concern by the ICTY President about the above

[19] *Ranko Stanković et al.*, X-K-07/387, Verdict, Court of BiH, 3 Feb. 2009, p. 9.

[20] *Id*.

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

[22] *Id*.

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 . . . .*"[23]

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."[24]

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.

G. Živko Budimir

The BiH Court and Prosecutor's Office have often used Entity-law charges as a political weapon against high officials. A recent case raising strong suspicions of such abuse came in April 2013 with the arrest of FBiH President Živko Budimir, who had been at the center of a political struggle over attempts to reshuffle the FBiH Government. As a recent report by the Washington-based NGO Freedom House notes, "there is broad concern that the charges are political."[25]

Budimir was arrested at the Prosecutor's instigation as a suspect in a corruption investigation involving the alleged selling of pardons, and the Court of BiH ordered his continued detention. The Court of BiH took jurisdiction over the case under Article 7 despite the fact that the allegations related only to governmental corruption at the FBiH level, finding that the alleged offenses "by all means reflect on the dignity of the State of Bosnia and Herzegovina and its judicial system."[26]

On 24 May 2013, the BiH Constitutional Court ordered Budimir's release after finding a lack of evidence to support his detention. In November 2013, The BiH Prosecutor's Office finally issued an indictment in the case. On 5 December 2013, however, the Court of BiH changed its earlier stance on Article 7's applicability and dismissed the case for lack of subject-matter jurisdiction. It found that the indictment failed to show that the alleged offenses "caused detrimental consequences for the state of Bosnia and Herzegovina, or its international reputation and legal order." The Court cited a "change of the circumstances" noting that the Prosecutor had not included a BiH-law Organized Crime charge in the indictment.

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

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

[25] Freedom House, *Nations in Transition 2014*: Bosnia and Herzegovina, p. 131.

[26] One of the BiH Prosecutor's allegations against Budimir was that he committed Organized Crime under the BiH Criminal Code "as read with" Organized Crime under the FBiH Criminal Code. For the reasons explained below in section V(A), this was a baldly unlawful use of Organized Crime charges under the BiH Criminal Code.

III. The Court unlawfully claims jurisdiction over Entity-law charges against all defendants in cases even where there is only one BiH-law charge against one defendant .

Using an indefensible interpretation of Article 23.2 of the BiH Criminal Procedure Code (CPC), 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.

This interpretation flatly contradicts the text Article 23.2, which does not give the Court of BiH any jurisdiction at all. 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.

As is clear from Article 23.2's plain language, the provision merely gives the Court of BiH priority to conduct its trial of a defendant for BiH-law offenses before an Entity court's trial of the same defendant for Entity-law offenses. Article 28 of the BiH Criminal Procedure Code requires the Court to "be cautious of its jurisdiction." Even if interpreting "priority" to mean "jurisdiction" or "competence" were plausible (it is not), a Court is far from "cautious of its jurisdiction" when it asserts jurisdiction that is not explicitly—or even implicitly—provided for in law.

Apart from Article 23.2's plain language, the construction of Article 23 demonstrates that its paragraph 2 is not a grant of jurisdiction. Paragraph 1 sets out the limits of the Court's subject-matter jurisdiction, in large part by reference to "the scope of its material jurisdiction set forth by law." Paragraph 1 makes clear that it is a grant of jurisdiction by beginning, "The Court shall have jurisdiction to . . ." and then enumerates all the activities for which the Court has jurisdiction. By contrast, Paragraph 2 nether states nor implies that it is a grant of jurisdiction. Indeed, Paragraph 2's only reference to the Court's competence is an acknowledgement that the Court is competent with respect to some offenses but not others. If Paragraph 2 had been meant as a grant of jurisdiction, it would have, like paragraph 1, included the phrase "The Court shall have jurisdiction" or something similarly explicit.

The fact that Article 23.2 is not a grant of jurisdiction is also confirmed by the fact that it does not require *any relation* between the BiH-law and Entity-law offenses in question. If Article 23.2 had been intended to save judicial resources by allowing the Court to consolidate BiH charges and Entity charges, it would have required such a relation. Because there is no requirement of a relation between the BiH offenses and Entity offenses, the Court's groundless reading of Article 23.2 has absurd implications. For example, if the Court of BiH's interpretation were correct, a BiH-law charge of copyright breach against a defendant would give the Court jurisdiction to try that defendant (and any codefendants) on Entity-law charges of child neglect.

A fair reading of Article 23.2 makes it clear that the provision gives the Court of BiH priority to conduct the trial for criminal offenses for which it is competent before other courts conduct their own trials for offenses over which they are competent. 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, as illustrated in the examples below, that is exactly what the BiH Court and Prosecutor routinely have done.

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 unlawful assertion of jurisdiction over RS-law criminal charges, the first-instance panel simply paraphrased Article 23.2 and then, without any explanation of its reasoning, pronounced that the provision grants the Court of BiH jurisdiction over offenses that are outside its jurisdiction. There is nothing in the text of Article 23.2 that could support this interpretation.

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.[27]

Again, the Court made an unexplained leap from the language of Article 23.2 to the Court's groundless interpretation of it.

But the Court and Prosecutor's abuses in this case, like many other cases, 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, among others, give the appearance of having been filed *as a pretext for giving the Court of BiH jurisdiction over RS-law charges.*

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 a BiH-law charge against him. This interpretation is even further from the text of Article 23.2, which concerns multiple offenses by a single defendant, not multiple offenses by multiple defendants. None of

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

the defendants in the Đerić case 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.

C. Marinko Čavar et al. (KPV-01/07)

One BiH-law charge that has often been used as a pretext for BiH Court jurisdiction over Entity-law charges is money laundering. In a number of cases, Court judges and panels have recognized that money-laundering charges must be dismissed because they are superfluous to the Entity-law charges and would result in double punishment of defendants. Yet this acknowledgement has not stopped these judges and panels from adjudicating the Entity-law charges, even though, in the absence of the superfluous charges, the Court would have been unable to take jurisdiction using its misinterpretation of Article 23.2.

For example, in the Marinko Čavar case, the Court of BiH accepted a plea bargain in which the defendants pled guilty to tax evasion under the FBiH Criminal Code while the money-laundering charge under BiH law (the only BiH-law charge) was dropped. In approving the withdrawal of the money-laundering charge, Court noted the need to avoid "double or multiple punishment" and found that "in the relevant case Money Laundering constituted a manner of the execution of the criminal offence of Tax Evasion . . . ." In other words, the charge was superfluous to the tax evasion charge, and it would have need to be dismissed even if it had not been dropped. Despite the fact that the case was only before the Court because of a superfluous charge (and the usual misinterpretation of Article 23.2), the Court sentenced the defendants for tax evasion under the FBiH Criminal Code.

D. Dragana Marinković et al. (KPV-09/04, KPŽ-38/05)

Similarly, in the Dragana Marinković case, the BiH Court and Prosecutor's Office took jurisdiction over RS-law charges against defendants by including a superfluous BiH-law charge of money laundering (on top of its usual misinterpretation of Article 23.2).[28] Defendants were indicted on charges of tax evasion and forgery under the RS Criminal Code and money laundering under the BiH Criminal Code. However, the Court of BiH's appellate panel dismissed the BiH-law money-laundering charge because the RS-law charges "entirely covered the unlawfulness of the specific event."[29] The appellate panel nonetheless convicted and sentenced the defendants for the RS-law crimes, even though the case only came before the Court because of the superfluous money-laundering charges under BiH law.

IV. The Court and Prosecutor assert jurisdiction over Entity-law charges even when there is no BiH-law charge in the case.

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

[28] The available materials about the case provide no explanation for the Court of BiH's jurisdiction over the RS-law charges, but the rationale is presumably based on the Court's usual misinterpretation of Article 23.2 of the BiH Civil Procedure Code.

[29] *Dragana Marinković et al*. (KPŽ-38/05), Appellate Panel Decision, 10 Oct. 2005, at p. 8.

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. Since that indictment, the Court has separated from the Brkić case the cases of all 16 of the defendants who were charged solely under the FBiH 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 convicted defendants after they pled guilty to crimes under the FBiH Criminal Code. There is no indication as to how—if at all—the Court 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 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 based its claim to jurisdiction on the Court's usual misinterpretation of Article 23.2. However, when the Prosecutor 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 . . . ."[30] 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 CPC. 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."[31]

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 CPC.

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

[31] *Id*.

C. Mladen Nikolić (KPV-01/08)

In the Mladen Nikolić case, the defendant was indicted for tax evasion under the FBiH Criminal Code.[32] Despite the fact that there were no BiH-law charges in the case, the Court failed to explain its reasoning—or even cite a legal basis—for taking jurisdiction. There is nothing in the Court's decision to suggest that Nikolić's crime was anything other than ordinary tax evasion under FBiH law. Nikolić's unpaid tax liability was KM 10,463, just slightly more than the KM 10,000 minimum necessary to qualify for a tax evasion prosecution under the FBiH Criminal Code.[33] Thus, in a case that quite obviously failed to meet the requirements of Article 7.2, the Court simply ignored the lack of a legal basis for its jurisdiction.

D. Ivica Čuljak (KPV-07/06)

Similarly, in the Ivica Čuljak case, the Court exercised jurisdiction without any explanation despite there being no BiH-law charges.[34] Nor could the Court explain, because it was a simple case of small-scale tax evasion under the FBiH Criminal Code. The defendant pleaded guilty, and the Court convicted and sentenced Čuljak to a KM 6,000 fine for evading KM 26,666 in Federation taxes. Again, in a case that could not possibly meet the requirements of Article 7.2, the Court exercised jurisdiction without citing any basis for it.

V. The BiH Court and Prosecutor's Office have unlawfully exercised jurisdiction over Entity crimes through misuse of the BiH Criminal Code.

A. Misapplication of BiH Criminal Code's Organized Crime provision to take jurisdiction over Entity crimes

The BiH Court and Prosecutor's Office have misused the law to expand their jurisdiction in another way— they have invalidly grounded charges of violating the BiH's Criminal Code's Organized Crime provisions on violations of Entity law. Under Article 250 of the BiH Criminal Code, Organized Crime charges explicitly require the perpetration (or attempt) of a crime "prescribed by the law of Bosnia and Herzegovina."[35] Yet contrary to the Article 250's unequivocal requirements, the Court of BiH often confirms and adjudicates Article 250 indictments by the BiH Prosecutor's Office that are based entirely on crimes prescribed by the laws of the Entities instead of the law of BiH.

In a typical example of such cases, the "P.G." case,[36] the BiH Prosecutor's Office indicted defendant Goran Pečaranin with Organized Crime under Article 250 of the BiH Criminal Code "in conjunction with Grand Larceny under Article 287" of the FBiH Criminal Code. The Prosecutor's Office's other charge against Pečaranin was Organized Crime under Article 250 of the BiH Criminal Code "in conjunction with Falsifying Documents referred to in Article 383" of

[32] The Mladen Nikolić case was separated from a larger case.

[33] Criminal Code of the Federation of Bosnia and Herzegovina, Art. 273 (1).

[34] The Ivica Čuljak case was separated from a larger case.

[35] BiH Criminal Code, Art. 250(1) (emphasis added).

[36] *P.G.*, S1 2 K 009609 12 KŽ, Court of BiH.

the FBiH Criminal Code. Thus, both charges failed to meet Article 250's requirement of a crime "prescribed by the law of Bosnia and Herzegovina." Instead of dismissing these obviously invalid charges, the Court of BiH convicted the defendant of them after a plea agreement.

In another example, the "L.M." case,[37] the BiH Prosecutor's Office indicted the defendant on a charge of Organized Crime under Article 250 "in conjunction with the criminal offense of aggravated theft under Article 287" of the FBiH Criminal Code. The case concerned a car theft. Again, the Court of BiH should have dismissed the indictment for being plainly contrary to Article 250's requirement of a crime "prescribed by the law of Bosnia and Herzegovina." Instead, after a plea agreement, the Court of BiH convicted the defendant of two new FBiH Criminal Code charges: felony concealment under FBiH Criminal Code Article 300 and felony larceny under FBiH Criminal Code Article 287. Thus, in this case about a car theft, the only BiH charge—Organized Crime—was manifestly invalid, and the plea bargain was for two Entity crimes.

B. Misuse of other BiH Criminal Code provisions requiring a supporting BiH-law offence

In addition to the misapplication of Organized Crime charges described above, the BiH Court and Prosecutor's Office have similarly misused Conspiracy and other charges.[38] Under Article 247 of the BiH Criminal Code, a charge of Conspiracy to Perpetrate a Criminal Offence requires that there have been an agreement "with another to perpetrate a criminal offence prescribed by the law of Bosnia and Herzegovina."[39] Several other charges under the BiH Criminal Code, such as Preparation of a Criminal Offence (Art. 248) and Associating for the Purpose of Perpetrating Criminal Offences (Art. 249) likewise require a "criminal offence prescribed by the law of Bosnia and Herzegovina."[40] Yet, directly contrary to the law, the Court of BiH allows charges like these to be supported by crimes prescribed by the laws of the Entities instead of those of BiH.

The Court of BiH has also adjudicated prosecutions for Tax Evasion under Article 210 of the BiH Criminal Code for violations of Entity tax laws, which is contrary to the BiH Criminal Code's explicit requirements. A Tax Evasion charge under Article 210 requires the evasion of "the payment of duties required under the tax legislation of Bosnia and Herzegovina," but there are cases in which the Court and Prosecutor ignored this requirement. In the Slobodan Župljanin et al. case[41] and the Nebojša Vasilić case,[42] the Court wrongly convicted the defendants under Article 210 of the BiH Criminal Code for evading both BiH and RS taxes.

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[37] L.M., S1 2 K 009744 12 K, Court of BiH.

[38] *See, e.g., Željko Đurić*, S1 2 K 006360 11 K, Court of BiH.; *Zijad Turković et al*., S1 2 K 006087 14 KŽ, Court of BiH.

[39] BiH Criminal Code, Art. 247.

[40] The crime of Preparation of a Criminal Offence, by its terms, applies only to "a criminal offence prescribed by the law of Bosnia and Herzegovina." BiH Criminal Code, Art. 248. The crime of Associating for the Purpose of Perpetrating Criminal Offences is limited to persons who associate "with an aim of perpetrating criminal offences prescribed by the law of Bosnia and Herzegovina ."

[41] *Slobodan Župljanin et al*., X-KŽ-08/594, Court of BiH.

[42] *Nebojša Vasilić*, X-K-07/483, Court of BiH.

Republika Srpska's 12th Report to the UN Security Council
Attachment 4
[All statistics are as of 15 October 2014]

The Court of BiH's Failure to Implement the *Maktouf* Decision

October 2014

I. Introduction

More than a year after the European Court of Human Rights' ("ECHR") 18 July 2013 judgment in *Maktouf and Damjanović v. Bosnia and Herzegovina*, the record shows that the Court of Bosnia and Herzegovina ("BiH") has resisted, in many ways, the implementation of the decision. In *Maktouf*, the ECHR held that the Court of BiH had 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 ECHR determined that the plaintiffs' rights under the European Convention had been violated because they "could have received lower sentences had [the 1976] Code been applied in their cases."[1]

Thus, 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. 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 dismissed motions to reopen cases in which *Maktouf* was indisputably violated. It has also violated 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 verdicts with respect to 54 defendants, 35 of whom received 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 12 of these 35 sentences as having applied the 1976 Code (i.e., the code in effect at the time of the crimes). Since *Maktouf*, the Court has imposed ten sentences that even exceed the maximum length permitted under the 1976 Code. Moreover, out of 64 war crimes indictments confirmed by the Court since *Maktouf*, only 12 were brought under the 1976 Code that was in effect at the time of the crimes.

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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.

[2] Court of BiH, 18 July 2013 Press Release.

The Court of BiH's nontransparency, including its suppression of all decisions 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*.

II. The Court is refusing to reopen unlawful verdicts except when ordered.

The Court of BiH has issued decisions to reopen the cases of 18 defendants, all of which resulted from either direct orders from the BiH Constitutional Court or the two *Maktouf* plaintiffs' petitions to reopen their cases. However, the Court of BiH has rejected—without explanation—all other requests by defendants to reopen their cases, even those whose sentences were in clear violation of the European Convention under *Maktouf*. In the cases that have been reopened under orders of the Constitutional Court, the Court of BiH has insisted, contrary to law, that it has no authority to order custody and must release the defendants as they await their new trials.

A. The Damjanović brothers

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, unlawfully imposed sentences. An appellate panel confirmed the Damjanović brothers' new sentences in a final decision on 12 March 2014.

B. Abdulhadim Maktouf's dubious new sentence

By the time of the ECHR's 2013 *Maktouf* decision, plaintiff Abdulhadim Maktouf had already finished serving the five-year sentence that was invalidated. On 8 October 2013, the Court of BiH granted a petition to reopen Mr. Maktouf's case. On 11 July 2014, the Court of BiH, ostensibly applying the 1976 Code, sentenced Maktouf—again—to five years in prison.

The failure to reduce Mr. Maktouf's sentence was peculiar because every one of the 17 other defendants whose cases were reopened because of the *Maktouf* decision have had their sentences reduced. All but two of their sentences were reduced by at least four years (the other two sentences were reduced by 2 and 3 years).

The Court's failure to reduce Mr. Maktouf's sentence was especially surprising given the history of his case. As the ECHR pointed out in its 2013 *Maktouf* decision, "the State Court [of BiH] held, when imposing Mr Maktouf's sentence, that it should be reduced to the lowest possible level permitted by the 2003 Code,"[3] which is five years (the lowest possible level under the 1976

[3] *Maktouf* at para. 70.

Code is one year). Because the Court of BiH had imposed the lowest possible sentence after Maktouf's original trial, one would expect that his new sentence under the 1976 Code, with its one-year minimum, would be less than the original five-year sentence. Yet the Court's new decision, allegedly applying the 1976 Code, leaves the original five-year sentence unchanged.

It is impossible to know for certain why, given all of these facts, Maktouf's sentence was not reduced (the Court's nontransparency makes it especially difficult to discover its reasoning). However, it is notable that because Mr. Maktouf had already finished serving his original five-year sentence, any reduction of it would have entitled him to be compensated for damages under Chapter XXX of the BiH Criminal Procedure Code. The facts surrounding Mr. Maktouf's case raise a strong suspicion that that the Court failed to reduce his sentence in order to protect itself against liability for damages.

C. 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 additional decisions based on the *Maktouf* principles, finding violations of the European Convention in the sentences of 15 more defendants.

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."[4] 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 direct orders, the Appellate Division of the Court of BiH has suspended the sentences of the 15 defendants mentioned above. The Appellate Division has conducted retrials of these cases itself rather than referring them to trial panels. Its panels have issued new final sentences in all of these cases, each of which reduces the previous, unlawfully imposed sentence.

D. Court of BiH's rejection of motions to reopen unlawful verdicts

The BiH Code of Criminal Procedure provides for final verdicts to be reopened in a number of circumstances, including when "new facts . . . would tend to bring about . . . [the person's] conviction under a less severe criminal law"[5] or when the ECHR or the BiH Constitutional Court "establish that human rights and basic freedoms were violated during the proceeding and that the verdict was based on these violations."[6] Yet the Court has, without explanation, rejected all motions to reopen proceedings since the *Maktouf* verdict (except for those of the *Maktouf* plaintiffs themselves). The Court has denied such motions even in cases in which violations of the *Maktouf* verdict are indisputable.

[4] Court of BiH, 18 July 2013 Press Release.

[5] BiH Criminal Procedure Code, Art. 327(c).

[6] BiH Criminal Procedure Code, Art. 327(f).

On 7 April 2014, the Court of BiH rejected Mendeljev Đurić's motion to reopen his case, despite the fact that his sentence quite obviously violated *Maktouf*'s requirements.[7] On 13 August 2013, the Court of BiH, in defiance of the *Maktouf* decision, had sentenced Đurić for genocide under the 2003 Code to 28 years—eight years longer than the maximum sentence for genocide under the 1976 Code. The sentence's violation of *Maktouf* is indisputable because application of the 1976 Code, with its 20-year maximum, not only could have—but *must* have—resulted in a shorter sentence than 28 years. Yet when Đurić moved for the case to be reopened to correct this clear and willful *Maktouf* violation, the Court rejected the motion. It was not until two weeks later that the Court announced the rejection in a single sentence of the weekly report that recounts the Court's activities.[8]

Similarly, on 27 March 2014, the Court of BiH denied Predrag Bastah's motion to reopen his verdict which, like Đurić's, was manifestly unlawful under *Maktouf*. The Court of BiH had sentenced Bastah to 22 years for genocide under the 2003 Code—two years longer the maximum under the 1976 Code. The Court waited three weeks before announcing its denial of the motion—without explanation—in a single sentence of its weekly summary.[9]

The Court of BiH's refusal to reopen proceedings in even the most obvious cases of *Maktouf* violations exemplifies the Court's resistance to the ECHR's decision.

E. Court of BiH's false claims about motions for custody

With respect to 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 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.[10]

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

[7] *Bosnian Serb's Srebrenica Retrial Plea Rejected*, BALKANINSIGHT.COM, 28 April 14.

[8] Weekly Activities of the Court of BiH Section I, II and III (21 April 2014 - 25 April 2014).

[9] Weekly Activities of the Court of BiH Section I, II and III (14 April 2014 - 18 April 2014).

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

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.

III. New indictments

Since *Maktouf*, the Court of BiH has confirmed 72 war crimes indictments, all but twelve 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.[11] There is no conceivable justification for retroactively applying the 2003 Code when the 1976 Code prohibits the same conduct. This is especially true 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.

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."[12]

[11] Although the 1976 Code does not include a specific article entitled "Crimes Against Humanity," [CH] 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 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 members of Serb and Croat fighting forces. 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.

[12] 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.

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 frustrate the European Commission's goal of harmonizing the practice of courts in the application of substantive criminal law to war crimes processing and deny those tried in the BiH Court equal treatment under law.

IV. Final Verdicts

Apart from the verdicts in reopened cases, the Court of BiH has rendered final verdicts in the cases of 26 other defendants since *Maktouf*, 15 of whom received prison sentences. For all but six 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 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 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 seven final sentences since *Maktouf* that exceed the longest sentence allowable under the 1976 Code (five were for crimes against humanity and two were for genocide).[13]

V. Non-Final Verdicts

In non-final cases, there have been verdicts in the cases of 28 defendants since the *Maktouf* decision, 19 of whom received prison sentences. Just six of the verdicts in non-final cases can be identified as having applied the 1976 Code. 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. Those principles were clearly 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]

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[15] 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 not published any of its verdicts, even though its own rulebook requires decisions to be posted on its website. This year,

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[13] *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; *Vaselin Vlahavoić*, S1 1 K 004659 13 KRŽ.

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

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

the Court deleted from its website its entire, years-long archive of weekly activity reports, which are the only official source of certain information, such as denials of requests to reopen cases. The Court now deletes each new activity report as soon as a new one is published.