REPUBLIC OF SRPSKA
PRESIDENT OF THE REPUBLIC

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

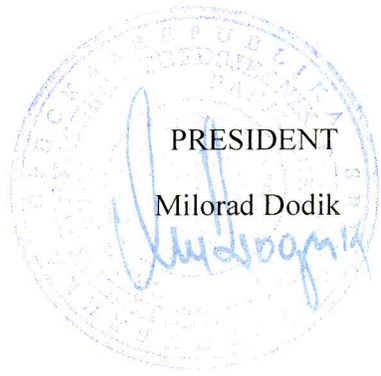
Dear Mr. Secretary-General:

To assist the Security Council in its upcoming debate on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 13th Report to the UN Security Council. The Report emphasizes the RS Government's strong support for the EU's new initiative for BiH and the indispensability of BiH's decentralized structure.

The report first outlines BiH's Written Commitment to enact reforms consistent with the BiH Constitution and what the RS is doing to ensure the document's implementation. This includes the RS's continuing pursuit of economic reforms, examination of BiH's costly and ineffective institutions, development of judicial reforms necessary to meet European standards, and negotiation of a coordination mechanism for BiH's levels of governance. Next, the Report examines why BiH's decentralized Dayton structure is essential to both BiH's stability and its functional governance. The Report also explains the need for BiH—Europe's largest per-capita exporter of fighters to ISIS—to be especially vigilant in preventing terrorism at home. The serious challenge of terrorism confronting BiH was tragically highlighted on 27 April by a deadly attack by an Islamic radical on RS police in Zvornik. Arrests in connection with the attack include at least one returnee from the fighting in Syria. Lastly, the Report examines why the Office of the High Representative must close, why UN members should oppose a counterproductive resolution on the Srebrenica atrocities, and why the UN Security Council, after more than 19 years of peace in BiH, should decline to invoke Chapter VII of the UN Charter.

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

Yours sincerely,



PRESIDENT

Milorad Dodik

Republika Srpska's 13th Report to the UN Security Council

May 2015

Republika Srpska's 13th Report to the UN Security Council

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Republika Srpska's 13th Report to the UN Security Council

Introduction and Executive Summary

Republika Srpska (RS), a party to all of the annexes that comprise the Dayton Accords, respectfully submits this 13th Report to the UN Security Council, which outlines the RS Government's views on key issues facing Bosnia and Herzegovina (BiH). This Report focuses, in particular, on the RS Government's strong support for the EU's new initiative for BiH and the indispensability of BiH's decentralized federal structure.

I. The RS supports the new EU initiative based on BiH leaders' Written Commitment to enact reforms in accordance with the Constitution and Dayton Accords.

Section I describes BiH's new Written Commitment to enact a series of important reforms consistent with the Constitution and what the RS is doing to fulfill the document's commitments. The RS is pursuing a far-reaching reform program, consistent with the EU's initiative, to raise growth, fight unemployment, and advance EU integration. In order for BiH to fulfill the Written Commitment, there must also be a thorough examination of the costly and often useless BiH-level agencies that were the result of BiH's forced centralization. Moreover, as the Written Commitment requires, the RS is working with the EU on vital judicial reforms that are necessary for BiH to meet EU standards. Of particular importance is correcting serious discrimination in war crimes prosecutions by the BiH Prosecutor's Office, as highlighted during this reporting period by the failure of the Chief Prosecutor to even investigate war crimes of atrocities committed by the El Mujahid involving Bosniak officials. The RS will also continue to work to establish a coordination mechanism in the process of BiH's EU integration, in accordance with constitutional competencies, as the Written Commitment requires—although divisions within the FBiH have prevented agreement to date.

II. BiH's Dayton structure is indispensible to the stability and functional governance required for EU integration.

Section II describes why the RS is committed to the BiH structure established in Annex 4 of the Dayton Accords, the BiH Constitution. The Constitution's mechanisms for protecting BiH's Constituent Peoples are essential to the country's stability. Moreover, the Constitution's limits on BiH-level competences are vital to BiH's proper functioning. The proliferation of competences at the BiH level in defiance of those limits has resulted in the frequent deadlocks that characterize BiH-level policymaking today. The Constitution's federal structure is also important because it enables Entities to enact policy innovations for which it would not have been possible to develop consensus at the BiH level. As EU officials have often recognized—and as Europe's highly successful federal states demonstrate—BiH's decentralized constitutional structure is not a barrier to BiH's membership to the EU.

III. BiH, as Europe's largest per-capita exporter of fighters to ISIS, must be especially vigilant against terrorism.

Section III examines how BiH came to be the world's fourth-largest per-capita contributor of fighters to ISIS and the need for the BiH to be especially vigilant in preventing terrorism. The serious challenge of terrorism confronting BiH was tragically highlighted on 27 April by a deadly attack by an Islamic radical on RS police in Zvornik.

IV. Other key issues

Section IV first emphasizes that the Office of the High Representative (OHR) must close and cease its harmful interference in BiH's internal affairs while it remains open. Next, it explains why UN members should reject a divisive and simplistic resolution with respect to the 1995 Srebrenica atrocities. Finally, Section IV explains why, after more than 19 years of peace in BiH, there is no justification for the application of Chapter VII of the UN Charter.

I. The RS supports the new EU initiative based on BiH leaders' Written Commitment to enact reforms in accordance with the Constitution and Dayton Accords.

1. In February 2015, BiH's major political leaders signed a Written Commitment to enact a series of reforms to advance BiH's EU accession and strengthen economic growth, all while respecting the BiH Constitution. On behalf of the Alliance of Independent Social-Democrats, the President of the RS signed the Written Commitment, that the RS National Assembly unanimously approved, while the RS Government will do its part to see that all of the Written Commitment's reforms are carried out in accordance with the principles set forth therein. Implementing the Written Commitment will require political agreement and support at all levels of authority.

2. The Written Commitment rightly welcomes the EU's renewed approach to BiH, which was articulated in the 15 December 2014 Conclusions of the EU Foreign Affairs Council. The EU's renewed approach emphasizes "reforms and issues of direct concern to citizens," and makes economic reforms the priority. After the Written Commitment was signed, the EU Foreign Affairs Council voted to activate the EU's Stabilization and Association Agreement (SAA) with BiH, which is also focused on economic reforms. In BiH's decentralized federal system, the great majority of economic matters are solely in the competence of the Entities rather than the BiH level. Thus, the Entities will be working directly with the EU on economic reforms necessary for EU integration.

3. Republika Srpska takes special note of the Written Commitment's initial promise: "to respect the Constitution of Bosnia and Herzegovina and the General Framework Agreement for Peace in Bosnia and Herzegovina, sovereignty, territorial integrity and political independence of Bosnia and Herzegovina . . . ." Reforms carried out under the new initiative must be consistent with this commitment. Thus, for example, the first paragraph of the Written Commitment provides that "[t]he agenda of the institutions of government *at all levels* in Bosnia and Herzegovina, and *in accordance with respective constitutional competencies*, will include the necessary reforms for advancing Bosnia and Herzegovina's process of accession to the European Union . . . ."[1] In this regard, the Written Commitment calls for establishing a "[a]n efficient and effective Mechanism for the coordination of institutions *at all levels of government* in Bosnia and Herzegovina in the process of accession to the European Union . . . ."[2]

4. As detailed in the remainder of this section, *the RS is already* enacting reforms consistent with the Written Commitment, and it will work vigorously to support and advance the initiative's fulfillment.

A. The RS is implementing an ambitious program of reforms to promote jobs, growth, and EU integration.

[1] Written Commitment of Bosnia and Herzegovina, 23 Feb. 2015, at para. 1 (emphasis added).

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

1. The RS is moving to enact a new round of economic reforms that build on the RS's earlier measures to improve its business and investment environment.

5. Consistent with the Written Commitment and the Compact for Growth and Jobs, the RS is continuing to reform and implement laws and regulations to make it easier for firms to invest and businesses to flourish. On 6 March 2015, the RS National Assembly voted to advance a set of 13 pieces of reform legislation proposed by the RS Government to reduce the economic burden of taxes and introduce better practices in the RS economy.

6. The RS Government reiterates its commitment to reforms in its 2015 Economic Policy Document. In January 2015, it set up a Committee for Economic System Reform and a committee for public sector reform. These committees are chaired by vice prime ministers of the RS Government and include, as their members, line ministers and social partners – representatives of trade union organizations and the business community. The focus of the Committee for Economic System Reform is on the activities of enacting and amending relevant legislation to implement the economic system reform, fighting the grey economy, and labour and employment related measures. The Committee for Public Sector Reform is working to define and coordinate the activities of implementing reforms at the level of the Republic, local governments, public enterprises, health care and education sectors.

7. The goal is to lift the financial burden off the economy and improve its liquidity; limit public spending; create a more efficient and cost-effective public administration and public sector as a whole; and improve accountability in spending of public funds and managing human resources.

8. In light of the above, the first set of laws has already been debated: on 6 March 2015, as proposed by the RS Government, the RS National Assembly voted to enact 13 reform-oriented laws to improve the RS economy. These include new draft laws on fiscal responsibility, corporate income tax, property tax, deferred payment of tax debt, terms of settlement of financial obligations, accounting and auditing, the advocacy, and auto insurance.[3] The package also includes laws to amend the Law on Personal Income Tax, the Law on Contributions, the Law on Health Protection, the Law on Single Registry of Financial Reports, the Law on Investment Funds.[4] In addition, the National Assembly enacted a law amending the Law on Fiscal Cash Registers.[5] To that end, the RS Government has already prepared and endorsed (on 9 April 2015) the second set of laws amending the current laws and an action plan for fighting the "grey economy" and submitted them to the parliament for further procedure. The amendments will amend the laws on crafts and entrepreneurship, inspection services, tax procedure, public services and municipal police.

2. The RS's economic reforms have earned international praise.

9. The RS's new "one-stop shopping" system for business registration, which became operational in December 2013, 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

[3] *Okončana Sedma posebna sjednica: Usvojen set nacrta reformskih zakona*, RS National Assembly, 6 March 2015.

[4] *Id.*

[5] *Id.*

period in 2013.[6] The EC's 2014 Progress Report for BiH praises the RS's "progress on reforms in the area of business registration."[7] 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)."[8] 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."[9] In a new document, the European Stability Initiative, recommended that in order to ease business registration, "[a]ll the Federation needs to do is to copy the reforms adopted in Republika Srpska."[10]

10. 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 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.[11]

11. 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.

12. In contrast, the annual *Doing Business* report for BiH (rather than for specific cities) ranks BiH poorly. But one often cannot rely on reports of the business environment of BiH to assess the business environment of the RS. Most such reports, like the World Bank's annual *Doing Business* report, evaluate the situation in the largest city in the country, Sarajevo in the case of BiH. The evaluations are frequently based 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.

13. 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 182nd 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.[12] In the category of Starting a Business, the World Bank ranks BiH 147th. The U.S. Department of State's 2014 Investment Climate Statement for BiH observes, "The World Bank estimates that in the city of Sarajevo,

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

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

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

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

[10] *Bosnia as Wunderkind of Doing Business, Outline of 14 steps to take*, European Stability Initiative, 19 March 2015, at p. 13.

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

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

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 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."[13]

3. The RS continues to align its laws and regulations with the EU's *acquis*.

14. The RS has been working steadily to harmonize RS laws and regulations with the EU's *acquis communautaire* and regulations of the Council of Europe. The RS has already subjected 1,630 laws, , and general acts to this procedure since 2007. This is vital to European integration because, under the 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.

15. In its 2014 Progress Report for BiH, the European Commission 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 . . . ."[14] 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*."[15] Meanwhile, "political turbulences" in the Federation "had a negative impact on the adoption of EU-related legislation."[16] 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*."[17]

4. To promote jobs and growth, state property, including military property, must be allocated in accordance with law.

16. State property, including military property, must be allocated in accordance with applicable law so that valuable resources can be put to work at Entity and Canton levels to promote growth and jobs.

17. In 2005, then-High Representative Paddy Ashdown pronounced three edicts freezing all state property possessed by BiH, the RS, and the Federation. Despite Ashdown's contention that the edicts were intended to be temporary, ten years later, state property remains frozen.

18. More recently, High Representative Valentin Inzko scuttled legislation that would have unfrozen state property, including military property, in accordance with applicable law. Also, during this reporting period, statements were made within the international community implying that the BiH Presidency or Council of Ministers could unilaterally determine the disposition of state property. However, as a matter of law, neither the BiH Presidency nor the

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[13] *2014 Investment Climate Statement – Bosnia and Herzegovina*, U.S. Department of State, June 2014, p. 1.

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

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

[16] *Id*.

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

Council of Ministers has such authority. Nor does the High Representative have the legal authority to do so.

19. The RS will only support a solution that addresses disposition of all state property, not just military property, and that does so in accordance with applicable law. BiH's Bosniak political parties, for reasons explained in earlier RS Reports to the Security Council,[18] have long been reluctant to unfreeze non-military state property but eager to unfreeze military state property. For BiH to unfreeze military property alone would mean that non-military state property will stay frozen for the foreseeable future.

20. There has been no showing of extraordinary need or urgency to justify the expedited and separate allocation of military property. The alleged need to register defense property as owned by the Ministry Of Defense *for NATO purposes* is highly questionable. There is no uniform practice among NATO members as to the title of property used for NATO purposes by a member state. Technical matters such as title to property used by a state's military institutions, are internal issues regulated by domestic law of each NATO member. In addition, no need by the BiH Ministry of Defense for additional property has been shown.

5. The RS's fight against corruption

21. As explained in Attachment 1 to the RS's 12th Report to the UN Security Council, 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.[19] 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 detailed Action Plan for its Anticorruption Strategy for 2013-2017.

22. On 24 April 2015, the RS Government established a commission to implement the Anticorruption Strategy, chaired by the RS Minister of Justice. The commission comprises 12 members from the following RS institutions: the Ministries of Home Affairs, Finance, Administration and Local Governance, Health and Social Welfare, Education and Culture, Labour and Veteran Issues. Also represented in the commission are representatives from the RS: National Assembly, Supreme Court, Prosecutors Office, Supreme Audit Authority, and Commission for Prevention of Conflicts of Interest.

23. Moreover, the new commission includes six observers from NGOs, media, the academic community, RS student union, RS trade union organization, and RS employers' organization.

24. Also, the RS Government issued a decision identifying the RS Ministry of Justice as the institution responsible for anticorruption activities in the RS. The Ministry of Justice, for the purpose of implementing the activities and providing administrative and technical support,

[18] *See* Republika Srpska's Ninth Report to the UN Security Council, May 2013, section V-E-1.

[19] 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.

created a separate department to implement the Anticorruption Strategy.

25. In addition, the application for reporting suspected corruption cases and other irregularities became operational on 1 September 2014. Citizens can use this application to report corruption or other irregularities (they can identify themselves or report anonymously). The application is posted on the Government's web site and web sites of all ministries and RS agencies. Under the rules, the reports are forwarded to relevant authorities, and the person who reported the case is duly notified of the outcome within specified deadlines.

B. The cost and utility of BiH-level agencies should be thoroughly examined in order to identify needed reforms as a key priority in fulfilling the new EU initiative.

26. The Written Commitment on EU integration recently approved by BiH's political leadership pledges "reforms necessary in order to establish institutional functionality and efficiency at all levels of government." To meet this commitment, BiH will have to confront what the International Crisis Group calls its "zombie administration": the scores of expensive, ineffectual, and often useless BiH-level agencies created through BiH's involuntary and unconstitutional centralization. In the years following the Dayton Accords, the High Representative forced the centralization of a wide range of functions in defiance of BiH's Dayton Constitution, which reserves all but a few competences to the Entities. As the Crisis Group has written, "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."

27. Leaving aside the unconstitutionality of the centralized agencies and the illegitimacy of the edicts and coercion by which they were created, it has long been clear that centralization has weighed BiH down with costly and ineffective bureaucracy. The Crisis Group wrote that a "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." The Crisis Group further wrote:

> 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. . . . Agencies proliferate and perform badly or not at all but view criticism as an attempt to subvert their independence.

28. BiH agencies also often violate international standards of transparency and accountability.

29. In order to address these problems, there must first be a thorough examination of centralized BiH-level institutions. The need for—or redundancy of—each such institution must

be addressed, as well as its efficiency, transparency, and justification of expenditures. Useful tools for making such assessments will include reports of the BiH Audit Office and the annual reports that every BiH institution is legally required to disseminate. Based on the results of these assessments, BiH could eliminate wasteful and ineffective BiH-level agencies and return their functions to the Entities. Entity agencies will be closer and more accountable to the people they serve, easier to reform, and less susceptible to the political deadlocks that are inherent at the BiH level, given the deep political differences between the electorates of the two Entities.

30. BiH must reckon with the failure of forced centralization and begin shedding the burden of its poorly performing agencies. For this reason, priority must be given to reform institutions and agencies *at the BiH level* to fulfill the obligations set out in the Written Commitment as part of the new EU initiative.

C. The RS is working with the EU on crucial reforms to the BiH justice system, as the Written Commitment requires.

31. 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 below. It is also noteworthy that the representatives of the BiH Court and Prosecutor's Office also take part in the Structured Dialogue and come up with different legal solutions, which is a direct interference in the work and independence of the legislative and executive branches of government. This is absolutely unacceptable and the Structured Dialogue should be led by the representatives of the legislative and executive branches of government.

1. The Court of BiH must be reformed to limit its jurisdiction to BiH-level laws, leaving the adjudication of Entity laws to Entity court systems.

32. One of the most important problems that is being addressed by the Structured Dialogue is the Court of BiH's "extended jurisdiction." The Court of BiH has unlawfully expanded its jurisdiction into criminal matters legally reserved to the Entity courts by intentionally misusing Article 7.2(b) of the Law on Court of BiH and other provisions of BiH criminal law and procedure.

33. It is important to remember that the Court of BiH and BiH Prosecutor's Office were imposed on BiH by a foreign High Representative and that their very existence conflicts with the BiH Constitution. As the International Crisis Group pointed out in a recent report, "Dayton allotted judicial matters to the entities, apart from a state Constitutional Court."[20]

34. Among the promises of BiH leaders' Written Commitment are "[m]easures for strengthening the rule of law," including "ensuring full legal certainty for any natural or legal person." EU officials and experts have concluded that Article 7.2's "extended jurisdiction" provisions and the Court's practices in interpreting violate European standards on legal certainty, as well as the principle of the natural judge.

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

35. At an EU TAIEX meeting in July 2014, experts from EU countries explained why the current law is unacceptable and offered helpful suggestions for reforms. The EU's conclusions after the meeting emphasized that a reformed law needs to provide objective and very stringent parameters for extended jurisdiction in order to eliminate the Court of BiH's "excessive margins of discretionary power." It is essential for the Structured Dialogue to build on the progress that has already been made toward solving the extended jurisdiction problem. Until the necessary reforms are implemented, the BiH judicial system will be incompatible with the principle of legal certainty and other EU standards.

2. An independent court must be established to adjudicate appeals from the Court of BiH.

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

3. The Court of BiH must implement the European Court of Human Rights' *Maktouf* decision.

37. The European Court of Human Rights' decision in *Maktouf v. BiH* 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. As explained in Attachment 2 to this Report, the Court of BiH has resisted, in many ways, implementing the *Maktouf* decision. For example, 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. What is of particular concern is that the BiH Court and Prosecutor's Office have continued the practice of raising and confirming indictments - since the ECHR decision in *Maktouf* indictments have been confirmed against 74 persons for war crimes under the BiH CC despite the fact that the alleged crimes did exist and were prescribed by the SFRY CC.

4. The BiH High Judicial and Prosecutorial Council's authority must be limited to BiH institutions.

38. In 2002, the High Representative imposed on BiH a system for the appointment and discipline of judges and prosecutors that concentrates and centralizes power in an unaccountable HJPC. The current HJPC system has not delivered an efficient judicial system free of corruption, conflicts of interest, or ethnic bias. The system requires major reforms in order to be harmonized with BiH's constitutional structure, European standards and the practice of democratic federal states throughout the world. For example, the HJPC's authority to appoint, manage, discipline and remove judges and prosecutors must be limited to the BiH-level court and prosecutors office.

5. The BiH judicial system is nontransparent.

39. The BiH Judicial System operates in an unacceptably nontransparent way, denying the public the information to which it is entitled and engendering mistrust. In particular, the Court of BiH's nontransparency makes it impossible to properly evaluate its work and understand the

way it applies the law. Apart from war crimes verdicts, the Court of BiH has not released the text of a single decision since halting their public release in the autumn of 2012. Release of war crimes verdicts resumed only recently after two years of secrecy. 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.

40. Last 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.

41. 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.[21]

42. On 7 October 2014, a working group of the BiH High Judicial and Prosecutorial Council (HJPC) determined that the Court of BiH's verdicts were public and should be published without regard to the nature and gravity of the crimes.[22] Yet the Court of BiH has continued to withhold from the public all decisions except for war crimes verdicts.

D. The BiH justice system must stop discriminating against Serb victims of war crimes and protecting Bosniak officials.

43. War crimes must be tried and punished, regardless of the ethnic identity of their perpetrators and victims. The BiH Justice System has shown, instead, a consistent pattern of discrimination against Serb victims of war crimes. This denies Serbs the equality before law to which they are entitled, and it undermines reconciliation.

1. The RS strongly objects to the recent decision of the BiH Prosecutor's Office not to investigate the president of the BiH House of Representatives for his involvement in atrocities committed by the El Mujahid.

44. A recent example is the BiH Prosecutor's Office's decision not even to investigate new evidence linking the current president of the BiH House of Representatives to war crimes by the El Mujahid Detachment, one of the Islamic State's barbaric forebears. The El Mujahid was a sadistic unit of the Army of the Republic of Bosnia and Herzegovina (ARBiH) that routinely tortured and beheaded Serb prisoners. Many former El Mujahid members, both inside and outside BiH, have joined the Islamic State.

45. Mirsad Kebo, a former Vice President of the Federation of BiH and former member of the Bosniak SDA party, recently submitted to the BiH Prosecutor's Office thousands of pages of evidence of war crimes against Serbs. Kebo's submission includes evidence that Šefik Džaferović, the current president of the BiH House of Representatives and vice president of the SDA, was complicit in El Mujahid atrocities. During the war, Džaferović was head of the Criminal Police Department for State Security in Zenica, which was the El Mujahid's

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

[22] *Id.*

headquarters. The evidence presented by Kebo includes, for example, documents indicating that Džaferović was just ten meters away when El Mujahid members beheaded a Serb civilian in Vozuća. Kebo's submission also includes evidence against Sakib Mahmuljin, wartime commander of the ARBiH 3rd Corps, which the International Criminal Tribunal for the former Yugoslavia has found exercised *de jure* and effective control over the El Mujahid. On 11 March 2015, however, the BiH Prosecutor's Office determined that it would not even investigate evidence implicating Džaferović or Mahmuljin.

2. Protecting Bosniak officials and political elite from war crimes prosecution is a reoccurring problem that must end.

46. This is not the first time the current BiH Chief Prosecutor has obstructed investigation of a high-level SDA politician linked to the El Mujahid. The BiH Chief Prosecutor has abused his powerful office in order to protect Šemsudin Mehmedović, a member of the BiH Parliamentary Assembly and vice president of the SDA party, from investigations. In 2009, the BiH Prosecutor's Office initiated a war crimes investigation of Mehmedović, but, according to the BiH State Investigation and Protection Agency (SIPA), the Prosecutor's Office has obstructed the investigation ever since. In 2013, SIPA arrested Mehmedović, citing evidence of threats to witnesses and SIPA officers, but the Prosecutor's office immediately ordered his release. After the arrest, the BiH Chief Prosecutor began to wage war on SIPA Director Goran Zubac. The Prosecutor Office website began to feature threats and virulent attacks against Zubac from the Chief Prosecutor. Then, in June 2014, the BiH Prosecutor's Office issued a baldly political indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities. The use of a prosecutor's powers to settle political scores is anathema to the rule of law.

3. The protest by members of political parties in the BiH House of Representatives against the president of the House is reasonable; the international community should condemn the BiH Prosecutor's Office for failure to discharge its duties.

47. In response to the evidence submitted against Džaferović by Kebo, members of the House of Representatives from the SNSD and DNS (the parties of the RS's governing coalition) and the SBB (a major Bosniak party), submitted a request for Džaferović to be dismissed as president. After the House of Representatives refused to put the request on the agenda, members from the SNSD, DNS, and SBB walked out of the chamber in protest. The SNSD and the DNS have continued to walk out of sessions to protest the continued refusal to put Džaferović's dismissal on the agenda and the political decision of the BiH Prosecutor's Office not to investigate. Though the SDA and some of its supporters in the international community have assailed these protests, the RS Government considers them fully appropriate and justified. They are a civil and legal way to protest the outrage of Džaferović's continued role as President of the House of Representatives, in light of the evidence of his involvement in the atrocities committed against Serb victims by the El Mujahid.

48. As the world bands together to defeat ISIS, it is more important than ever to investigate and prosecute the perpetrators of El Mujahid's atrocities—and those who harbored them. Despite this, there has been not a word of concern expressed publically by the international community over the Chief Prosecutor's refusal to investigate.

49. As explained in Attachment 3 to this report, the BiH Prosecutor's Office's protection of SDA politicians is part of a larger pattern of discrimination against Serb victims of war

crimes. The paper demonstrates this discrimination using statistics and examples, including the fact that no one has ever been held to account for the El Mujahid's many grisly murders of Serb prisoners. The RS government has a legal and moral duty to its citizens to ensure that these terrible atrocities committed upon its citizens be justly addressed and must take steps to ensure this happens. The international community should demand that the BiH Prosecutor's Office discharge its duties without regard to ethnicity or political party.

E. The RS supports other important BiH-wide reforms to promote EU integration.

1. The RS supports establishing a coordination mechanism at all levels of governance, as the Written Commitment provides, although divisions within the FBiH have prevented agreement to date.

50. The key to BiH's EU integration and future success is the establishment of an efficient and effective coordination mechanism based on the constitutional competences of each level of governance. BiH leaders must negotiate and establish such a coordination mechanism as soon as practicable, as they have committed to do under the Written Commitment. Agreement is possible if there is a political will for it in the FBiH. In October 2013, a solution for the establishment of a coordination mechanism 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 needed to be decided within the FBiH, with respect to the position and the role of its cantons. Unfortunately, FBiH leaders have since been unable to resolve their differences on these matters.

2. Divisions within the FBiH have prevented implementation of the *Sejdić-Finci* decision.

51. Efforts to implement the European Court of Human Rights' judgment in *Sejdić-Finci v. BiH* have followed a similar pattern to negotiations over the coordination mechanism—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).[23] 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*.

II. BiH's Dayton structure is indispensible to the stability and functional governance required for EU integration.

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

52. 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

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

the Dayton Agreement."

53. 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*[24] 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"[25] that the Dayton Constitution established. The Dayton Accords, Judge Bonello wrote,

> 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.[26]

54. 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."[27] The RS is not alone in its concern about protecting the rights of Constituent Peoples of BiH. Croatia's new president has endorsed

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[24] 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.

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

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

[27] ICG Report at ii.

efforts by BiH's Croat political parties to protect fully the rights of the Croats as a Constituent People.[28]

55. 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.

56. 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.

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

58. 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.

59. 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 competences 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.

60. 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 competences 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

[28] Elvira M. Jukic, *Croatia's New President Faces Questions on Bosnia Visit*, BALKAN INSIGHT, 27 Feb. 2015.

own constitutional competencies—but whose power is limited to those competencies.

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

61. BiH's decentralised structure and its Constitution give 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.

62. 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."[29] The same report also finds that the RSNA "is the most efficient of Bosnia's major legislatures."[30] Differences such as these underline the importance of Entity autonomy under BiH's constitutional system.

D. Decentralization is consistent with EU integration policy and practice among EU members.

63. BiH's decentralized constitutional structure is not a barrier to EU membership, which has been frequently made clear by EU officials.

64. In December 2012, for example, European Commissioner for Enlargement Štefan Füle said, "The decentralized structure of BiH is not an obstacle to the process of EU accession." Another top EU official said in 2011, "BiH must be in a position to adopt, implement and enforce the laws and rules of the EU. *It is up to Bosnia and Herzegovina to decide on the concept which will lead to this result*."[31]

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

> I should underline that the EU recognizes that Bosnia and Herzegovina has a specific constitutional order. We support this, and please remember that there are also different types of internal structure within many of the existing Member States.[32]

66. No EU member or candidate state has ever been required to change its constitutional

[29] ICG Report at p. 21.

[30] ICG Report at p. 22.

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

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

structure from a decentralized federal system to a centralized one in order to qualify for EU accession. Nor is BiH required to do so, as EU officials have made clear.

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

68. 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."[33]

E. Calls to restore Entity competences and protect Constituent Peoples

69. For many years, the RS has diligently sought reforms that would return BiH and Entity competences to what the BiH Constitution, Annex 4 of the Dayton Accords, requires. As explained elsewhere in this Report, the unconstitutional centralization of competences at the BiH level is the legacy of the period when the High Representative exercised self-invented powers of rule by decree. In addition to being unconstitutional—as well as illegally enacted by decree or under duress—the centralization of competencies has led to unacceptably ineffective and inefficient governance and the destruction of important constitutional protections for BiH's Constituent Peoples. Unfortunately, BiH's Bosniak parties, often with the support of the High Representative and others in the international community, have shown themselves to be inflexible in defense of the unconstitutional and dysfunctional status quo. It is in this context that the SNSD, the largest party in the RS's governing coalition, adopted a declaration on 25 April 2015, which says:

> If, by end 2017, there are no visible processes and measurable results in terms of establishing the RS's positions in line with the Annex 4 of the Dayton Peace Agreement, the RS National Assembly should call for a referendum on the independent status of the RS in 2018.
>
> Based on the referendum results, the RS authorities, in line with the role of the party as established in the Annex 4 of the Dayton Peace Agreement, should propose a peaceful disassociation and concurrent mutual recognition to the FBiH .
>
> In the territory of BiH, thus created independent states would form a Union of states of BiH, with open borders and free movement of peoples and goods.

70. President Dodik, who also serves as President of the SNSD, emphasized after the declaration's approval that the RS wants to remain in BiH but that the RS's constitutionally protected competences with respect to the judiciary, finance, and other areas, must be restored.[34]

71. The SNSD is far from alone in recognizing that BiH's status quo is untenable. For example, BiH's largest Croat party, the HDZ, recently called for changes to further decentralize

[33] ICG Report at p. 35.

[34] *Srpska Has Right to Choose Its Own Fate*, SRNA, 27 Apr. 2015.

the current government structure to protect the rights of BiH's Constituent Peoples. The proposed change would grant authority to a group of majority-Croat cantons in the Federation that would be similar to the autonomy that lawfully belongs the two Entities under Annex 4 of the Dayton Accords. HDZ President Dragan Covic, a member of the BiH Presidency, said, "We want to make changes to the internal setup of Bosnia and Herzegovina because organized like this, Bosnia and Herzegovina cannot survive."

III. BiH, as Europe's largest per-capita exporter of fighters to ISIS, must be especially vigilant against terrorism.

72. BiH is the world's fourth-largest per-capita contributor of fighters to ISIS—and Europe's largest.[35] Thus, BiH, much more than other countries in Europe, must be highly vigilant against the threat of radical Islamist violence, including the exportation of fighters to ISIS and other jihadist movements. Unfortunately, some in Sarajevo deny the extent of the threat. In a 24 April 2015 interview, the High Representative's top deputy, when asked about whether there is a particular risk of violent extremism in BiH, said that "[t]here is nothing that makes [BiH] more susceptible to certain threats than in any other state."[36] In contrast to the OHR's dismissive statements, the RS has been warning of the growing terrorist menace. The RS's concerns have been justified.

A. The deadly April 27 terrorist attack on RS police in Zvornik

73. On 27 April 2015, an armed man believed to be affiliated with the Wahhabi movement attacked the police station in the Zvornik Municipality during a shift change. Shouting, "Allahu Akbar," he opened fire on RS police officers using two automatic weapons. He killed Officer Dragan Djuric and wounded two other officers. Two men were arrested in connection with the attack. Of great concern is the fact that one of them had recently returned from fighting in Syria.[37] This underscores the reality that Islamist radicals are not only leaving BiH to fight in Syria—they are returning home to commit terrorism in BiH. The Zvornik attack is also of particular concern to the RS Government because it targeted an RS institution and officials, particularly those responsible for maintaining peace and security.

74. In response to the terrorist attack, President Dodik called a meeting with representatives of all security-related agencies in the RS as well as the members of the BiH Presidency and Council of Ministers from the RS to coordinate appropriate responses to the terrorist attack. Following comprehensive consultations, the meeting's participants agreed on a common position. They condemned the attack and concluded the following: the priority now is to prevent any terrorist threats; the terrorist act was directed at RS institutions; terrorism is the major security threat in BiH, which contributes to the complexity of the security situation in BiH; and BiH is fertile soil for growth of terrorism. The meeting expressed strong support for coordination of police agencies and highlighted the need to exchange intelligence between all levels of government in BiH, especially in light of the fact that the relevant BiH institutions had failed to adequately analyse or share the intelligence indicating a potential terrorist act with

[35] This is based on figures from International Centre for the Study of Radicalisation and Political Violence, *Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s*, 26 Jan. 2015, cited in Swati Sharma, *Map: How the flow of foreign fighters to Iraq and Syria has surged since October*, WASHINGTON POST, 27 Jan. 2015.

[36] *Interview with PDHR David M. Robinson*, DNEVNI AVAZ, 24 Apr. 2015.

[37] Daria Sito-Sucic, *Man who fought in Syria detained in Bosnia over police killing*, REUTERS, 28 Apr. 2015.

the highest Entity authorities and representatives. The meeting's participants called on RS and BiH citizens to preserve peace and tolerance, prevent misinformation and refrain from hate speech.

75. In their words and actions since the Zvornik attack, RS officials have acted to ease ethnic tensions and prevent violence. President Dodik met with the RS's Bosniak vice president, Ramiz Salkic, and stated, "Anyone who commits a terrorist attack cannot be identified with the whole people" and emphasized that all Bosniaks are not to blame.[38] Prime Minister Cvijanović appealed for peace and tolerance and called on citizens not to spread panic and misinformation.[39] On the night of the shootings, she held an urgent session of the RS Government, which decided to raise security across the RS, not just to prevent additional attacks but also to prevent ethnic reprisals against Bosniaks and their property.[40] On the day after the attack, RS National Assembly President Nedeljko Cubrilovic called for peace and tolerance.[41]

76. It is a fundamental responsibility of the RS Government to ensure the security of its citizens, and it will continue to intensively review what steps should be taken to prevent further attacks by radical Islamists.

B. The roots and history of terrorism in BiH

77. Although the menace of terrorism has increased with the participation and return of Bosniaks from fighting with ISIS and other jihadist movements, terrorism is a longstanding problem in BiH. The serious terrorist threat to the RS and BiH has its roots in the 1990s civil war, when radical Islamist organizations and fighters came from around the world to fight in BiH. Terrorism 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.

78. The radical Islamist movement that took root in BiH during the 1990s war helped make BiH fertile ground for recruitment by terrorist forces. Although most Muslims in BiH reject Islamist radicalism, a substantial minority support it. A Pew poll released in 2013 found that that 15% of Muslims in BiH supported the imposition of sharia.[42]

79. High BiH officials from the SDA party, including the current President of the BiH House of Representatives, have been linked to one of ISIS's forerunners, the El Mujahid Detachment, which routinely tortured and beheaded Serb prisoners during the 1990s war. A 1996 article in *The Guardian* described the mujahidin as acting "as a kind of paramilitary guard" for the SDA and noted their especially close relationship with Šemsudin Mehmedović, who is now a member of the Joint Committee on Defense and Security in the BiH parliamentary

[38] *Bosnia mourns victim of attack in Zvornik*, TURKISH WEEKLY, 29 Apr. 2015.

[39] *Id.*

[40] Elvira M. Jukic, *Bosnia Police Station Attack Raises Ethnic Tensions*, BALKAN INSIGHT, 28 Apr. 2015.

[41] *Serb entity "has right to defend itself" – Dodik*, B92, 28 April 2015.

[42] Pew Research Center, *The World's Muslims: Religion, Politics and Society*, 30 April 2013.

assembly.[43] Many ISIS recruits are former El Mujahid fighters,[44] including at least one of six BiH natives the United States indicted this year for sending ISIS money and supplies.[45]

80. With hundreds of people having left BiH to fight alongside ISIS and other radical Islamist forces in Syria and Iraq, BiH undoubtedly faces a heightened terrorist threat, as evidenced by the deadly terrorist attack of 27 April on RS police. The RS will take an active role in the fight against terrorism to protect its citizens. These efforts must only intensify in the months and years ahead. The RS calls upon all levels of government in BiH to increase vigilance to stop terrorist recruitment and prevent those who have gone to support the radical Islamist forces in Syria and Iraq from bringing terror home.

IV. Other key issues

A. OHR should be closed and its destructive interference in BiH governance disavowed.

81. 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. 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. One of the key recommendations of the International Crisis Group (ICG) in its most recent 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."[46] Although the OHR has lost significant support from the international community, the High Representative recently reiterated his legally baseless claim to "executive powers" over the people of BiH.[47]

82. Moreover, OHR interference in BiH's internal affairs continues to undermine governance. When BiH's elected officials reach across ethnic and Entity lines to resolve important issues, the OHR often sabotages the agreements before they can be implemented. For example, Amb. Inzko scuttled BiH legislation that would have resolved BiH's longstanding deadlock on the state property issue and implemented a 2012 Constitutional Court decision on the subject. Amb. Inzko justified OHR's sabotage of the legislation by substituting himself for the BiH Constitutional Court and citing his groundless "concerns" about whether the legislation properly implemented the 2012 decision. The Security Council and others in the international community should recognize that it is time to close the OHR and, as long as it remains open, reject the High Representative's destructive interference in BiH's governance.

B. Srebrenica

[43] John Pomfret, *Iranians Form 'Terror Force' in Bosnia*, THE GUARDIAN, 9 July 1996.

[44] Timothy Holman, *Foreign Fighters from the Western Balkans in Syria*, CTC Sentinel (Combating Terrorism Center at West Point), June 2014, at p. 9.

[45] *Ramiz Hodžić Siki bio u odredu 'El-Mudžahid,'* DNEVNI AVAZ, 10 Feb. 2015.

[46] ICG Report at iii.

[47] *Interview with HR Valentin Inzko*, Oslobođenje, 30 March 2015.

83. The RS has long condemned unequivocally the atrocities committed by Serbs against Bosniaks at Srebrenica in 1995. In April 2015, RS President Milorad Dodik traveled to Srebrenica, laid a wreath at the Memorial to honor the victims, and pledged an RS financial contribution to this year's events marking the 20th anniversary of the crimes.[48] Srebrenica Mayor Camil Durakovic, a Bosniak, praised President Dodik's visit, calling it "a historical act, a positive visit which will significantly ease relations between the municipality of Srebrenica and the government as well as the entity of Republika Srpska."[49]

84. As President Dodik said in March 2015, the enormous crime at Srebrenica is "the biggest stain on the Serbs and an act of cowardice." The perpetrators of the Srebrenica killings must continue to be brought to justice. However, a UN General Assembly resolution singling out the suffering of just one people in a war in which all peoples suffered greatly from war crimes would undermine reconciliation in BiH and unfairly tar innocent Serbs. UN members should reject any such resolution.

C. The Security Council should end the application of Chapter VII of the UN Charter.

85. 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."[50]

86. 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."[51] Since then, the Security Council has recognized that the "security environment has remained calm and stable."

87. 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.

88. 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.

89. 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

[48] Elvira M. Jukic, *Bosnian Serb Leader Pays 'Historic' Visit to Srebrenica*, Balkan Insight, 17 Apr. 2015.

[49] *Id*.

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

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

existence of any threat to the peace, breach of the peace, or act of aggression."[52] 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.

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

Republika Srpska's 13th Report to the UN Security Council
Attachment 1

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 report 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 report 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 in such cases, 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:

[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 13th Report to the UN Security Council
Attachment 2

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

I. Introduction

Almost two years 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 62 defendants, 41 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 17 of these 41 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 161 war crimes indictments confirmed by the Court since *Maktouf*, only 19 were confirmed under the 1976 Code that was in effect at the time of the crimes. Of the total indictments (161) since the ECHR's decision, 142 indictments were confirmed under the 2003 Code, of which 74 involved crimes prescribed by the 1976 Code and 68 were crimes against humanity.

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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 revised its decisions in the cases of 22 defendants, in the part concerning the qualification of the crime due to the application of a more lenient code, i.e. the SFRY CC, 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. Abdulhadim Maktouf and 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.

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, a Court of BiH trial panel, 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 19 other defendants whose cases were reopened because of the *Maktouf* decision have had their sentences reduced. All but three of their sentences were reduced by at least four years. On 25 February 2015, an appellate panel reduced Maktouf's sentence to three years.

B. Other cases reopened upon orders of the Constitutional Court

Since its 27 September 2013 order in the Zoran Damjanović case, the Constitutional Court has issued additional decisions based on the *Maktouf* principles, finding violations of the European Convention in the sentences of 21 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."[3] The sentences that the Constitutional Court has so far found to violate the *Maktouf* principles are mostly in the *upper half* of the range of sentences provided for in the 2003 Code, i.e. for more serious forms of war crimes.

In response to the Constitutional Court's direct orders, the Appellate Division of the Court of BiH has suspended the sentences of the 21 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.

C. 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"[4] 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."[5] 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.

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.[6] 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 – at least 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.[7]

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.

D. 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

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

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

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

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

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

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.[8]

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

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

III. New indictments

Since *Maktouf*, the Court of BiH has confirmed 161 war crimes indictments, all but 19 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.[9] 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

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

[9] 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.

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."[10]

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 42 other defendants since *Maktouf*, 27 of whom received prison sentences. For all but eight 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 nine final sentences since *Maktouf* that exceed the longest sentence allowable under the 1976 Code (seven were for crimes against humanity and two were for genocide).[11]

V. Non-Final Verdicts

In non-final cases, there have been verdicts with respect to 22 defendants since the *Maktouf* decision, 17 of whom received prison sentences. Just five 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.

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[10] 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.

[11] Dragomir Soldat et al., S1 1 K 011967 14 KRŽ; *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.

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[12] 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*. In 2014, 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.

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

Republika Srpska's 13th Report to the UN Security Council
Attachment 3

Discrimination Against Serb Victims of War Crimes Must End

All war crimes must be tried and punished, regardless of the ethnic identity of their perpetrators and victims. Unfortunately, the BiH Justice System has shown a consistent pattern of discrimination against Serb victims of war crimes. This denies Serbs the equality before law to which they are entitled, and it undermines reconciliation.

As shown in the statistics and examples below, the BiH Prosecutor's Office has been indifferent, at best, to prosecuting war crimes against Serb victims, particularly those committed by Bosniaks. 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]

Statistics show a decided bias against Serb victims of war crimes.

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 13 Bosniaks for war crimes against Serb civilians and prisoners of war. By comparison, it has achieved 92 final convictions of Serbs for war crimes against Bosniak civilians and non-Serbs, most of whom were Bosniaks.

A study by demographers at the International Criminal Tribunal for the former Yugoslavia (ICTY) estimates 7,480 Serb civilians died from the war. 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 7 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 16.5 years of imprisonment for war crimes against Bosniak civilians.

Out of 7,480 Serb civilian war deaths (as estimated by the ICTY), *just 10* have led to a final conviction in the Court of BiH.

Out of the 183 indictments for crimes against humanity confirmed by the Court of BiH, *all but four* have been for crimes alleged to have been committed against Bosniaks. There have been

[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.

167 crimes against humanity indictments against Serbs while there has *never* been a crimes against humanity indictment against a member of the Army of the Republic of Bosnia and Herzegovina (ARBiH) or any other Bosniak fighting force.

Examples of bias against Serb victims of war crimes

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 "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. Sakib Mahmuljin and the El Mujahid Detachment

Among the most barbarous atrocities of the BiH war were those committed against Serbs by the El Mujahid Detachment. The El Mujahid, a unit of the 3rd Corps of the ARBiH, was originally composed of foreign mujahidin, but it came to be composed primarily of local Bosniaks.[7] The El Mujahid, as confirmed by the ICTY, committed widespread war crimes, including the routine murder of Serb prisoners. Yet the El Mujahid's members—as well as their superiors in the 3rd Corps and its subordinate units, such as 3rd Corps Commander Sakib Mahmuljin—have gone unpunished for these grisly crimes.[8] Indeed, the BiH Prosecutor's Office announced on 11 March 2015 that Mahmuljin would not be investigated.[9]

The ICTY's 2008 *Delić* decision is far from a full accounting of the El Mujahid's barbarism against Serbs. The decision, however, provides damning findings of fact with respect to some of the El Mujahid's war crimes, as well as confirmation of the El Mujahid's subordination to—and control by—Sakib Mahmuljin's 3rd Corps.

Below is a list of some of the *Delić* decision's conclusions about atrocities the El Mujahid (abbreviated EMD) committed against Serbs:

- El Mujahid soldiers murdered 52 Serb prisoners at the Kamenica camp between 11 September 1995 and 14 December 1995. (paras. 298-307)

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

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

[7] Judgment, *Rasim Delić* (Trial Chamber), 15 Sept. 2008, para. 412 ("*Delić*").

[8] Sakib Mahmuljin was the Commander of the 3rd Corps from early 1994 until the end of the war. *Delić*, para. 117.

[9] *BiH Prosecutor: Order not to conduct investigations against Dzaferovi*c, Mahmuljin issued, OSLOBODJENJE, 11 March 2015.

- On 21 July 1995, in the village of Livade, El Mujahid soldiers beheaded two Serb prisoners, Momir Mitrović and Predrag Knežević, and displayed the two men's severed heads, still gushing blood, to other Serb prisoners. (paras. 245-252)

- On the night of 23 July 1995, at the Kamenica prison camp, EMB soldiers decapitated one Serb prisoner, Gojko Vujičić, and forced other Serb prisoners to kiss Vujičić's severed, bleeding head. El Mujahid soldiers also subjected Serb prisoners to cruel treatment in violation of the laws of war, including regular beatings and electric shocks. (paras. 253-273)

- On 11 September 1995, while forcibly marching a group of Serb prisoners on a road near Kesten, an El Mujahid soldier murdered Milenko Stanić**,** a mentally disabled Serb prisoner. On the same date, either an El Mujahid soldier or a solder from the 5th Battalion of the ARBiH 328th Brigade shot in the head another Serb prisoner, Živinko Todorović, and killed him. (paras. 287-294)

- In September 1995, at Kamenica camp, El Mujahid soldiers murdered a Serb prisoner who was in his seventies. (paras. 308-314)

The *Delić* decision also establishes the ARBiH 3rd Corps' responsibility for the El Mujahid Detachment. The decision finds

> beyond a reasonable doubt that from the time of its establishment in August 1993 until its disbandment in December 1995, the EMD was a unit *de jure* subordinated to the ABiH 3rd Corps or to one of the units that were subordinated in turn to the ABiH 3rd Corps. The Trial Chamber recalls that Rasim Delić, by virtue of his position as the Commander of the Main Staff from 8 June 1993 until the end of the war, was the *de jure* superior of the ABiH 3rd Corps which in this period was directly subordinated to him."[10] (para. 364)

The *Delić* decision, moreover, finds that the El Mujahid was under Rasim Delić's effective control during the period in which the crimes above were committed, relying mainly on the control of the El Mujahid by the 3rd Corps and its subordinate units, such as the 35th Division. The decision cites, among other evidence, the El Mujahid's compliance with combat and redeployment orders from the 3rd Corps and its subordinate units.[11] The El Mujahid, the decision notes, "never took part in combat or carried out a military operation without the authorisation of the 3rd Corps or one of its subordinate units . . . ." (para. 386) The 3rd Corps also transferred soldiers from other units to the El Mujahid (para. 414) and re-subordinated entire units to the El Mujahid. (para. 416) At the end of the war, it was the 3rd Corps that disbanded the El Mujahid. (para. 458)

[10] *Delić*, para. 364.

[11] *Delić*, paras. 388-402.

The *Delić* decision concludes:

> The establishment of the EMD as an ABiH unit and the *de jure* subordination of it to the ABiH 3rd Corps by an order given by Rasim Delić is the first and a *prima facie* indicator of effective control exercised over that Detachment by Rasim Delić. The main objective of the creation of this Detachment as an ABiH unit was to associate its members fully with the war efforts of the RBiH by incorporating the unit into the Army's system of command and control. For all operational purposes, this objective was achieved at the latest when Operation Proljeće II [July 1995] was launched; as of this time, the EMD complied with the tactical parts of the combat orders and with many of the other orders handed down by its ABiH superior commanders. The Majority is of the view that the ABiH's ability to govern the EMD's participation and engagement in the armed conflict against the VRS lies at the core of the determination of Rasim Delić's command and effective control over the EMD.[12]

Thus, the ICTY has established that the 3rd Corps exercised effective control, in addition to de jure authority, over the El Mujahid as it committed its spree of atrocities.

Sakib Mahmuljin, in addition to commanding the 3rd Corps, had a close and direct relationship with the El Mujahid. According to the *Delić* decision, Mahmuljin, "was the ABiH officer who was most respected by EMD members. . . . There is hearsay evidence that EMD members considered Mahmuljin as their 'commander'."[13] Mahmuljin negotiated the agreement under which the El Mujahid was subordinated to the 3rd Corps and participated in the August 1993 inaugural ceremony commemorating the formation of the El Mujahid.[14] Mahmuljin continued to meet with the El Mujahid after its subordination to the 3rd Corps, visiting El Mujahid headquarters at least twice.[15] According to the *Delić* decision, when three women whom the El Mujahid subjected to cruel treatment asked a Mujahedin what would happen to them, the "Mujahedin told them that 'General Sakib would make the decision after he returns from the frontline.'"[16]

In spite of the well-established facts surrounding El Mujahid murders and other war crimes, not a single member of the unit has been charged with crimes against Serbs. The ICTY sentenced Rasim Delić to three years of imprisonment for failing to prevent or punish certain "cruel

[12] *Delić*, para. 461 (footnotes omitted).

[13] *Delić*, para 431.

[14] *Delić*, paras 176, 178.

[15] *Delić*., para. 411.

[16] *Delić*, para. 318.

treatment" by the El Mujahid toward Serbs.[17] But despite the well established authority of the 3rd Corps over the El Mujahid, neither Sakib Mahmuljin nor any other ARBiH commander with responsibility over the El Mujahid has ever had to answer for the unit's many *murders* of Serbs.

The failure of BiH institutions to prosecute a single member of the El Mujahid—or a single ARBiH officer with responsibility over the El Mujahid—for murders of Serbs suggests a disregard for the suffering of Serbs during the war.

2. Refusal to investigate evidence connecting the President of BiH House of Representatives to El Mujahid atrocities.

The BiH Justice System is refusing to investigate evidence linking the current president of the BiH House of Representatives to war crimes by the El Mujahid Detachment. Mirsad Kebo, a former Vice President of the Federation of BiH and former member of the Bosniak SDA party, recently submitted to the BiH Prosecutor's Office 8,000 pages of evidence of war crimes against Serbs. Kebo's submission includes evidence that BiH House of Representatives President and SDA Vice President Šefik Džaferović was complicit in El Mujahid atrocities. During the war, Džaferović was head of the Criminal Police Department for State Security in Zenica, which was the El Mujahid's headquarters. The evidence submitted by Kebo, for example, includes documents indicating that Džaferović was just ten meters away when El Mujahid members beheaded a Serb civilian in Vozuća.[18]

On 11 March 2015, however, the BiH Prosecutor's Office determined that it would not even investigate evidence implicating Džaferović. As explained under heading 3, below, this is not the first time the current chief prosecutor has protected an SDA member of parliament from a war crimes investigation.

3. Obstruction and retribution over the investigation of SDA MP Šemsudin Mehmedović

BiH Chief Prosecutor **Goran Salihović** has used extreme measures to protect Šemsudin Mehmedović, a member of the BiH Parliamentary Assembly and vice president of the SDA party, from war crimes investigations. During the war, Mehmedović was chief of police in one of the El Mujahid Detachment's key centers of activity.

In 1996, *The Guardian* described Mehmedović's relationship with the mujahidin:

> The Islamic fighters act as a kind of paramilitary guard for Mr. Izebegovic's Muslim and increasingly nationalist Party of Democratic Action [SDA]. Sources said they are particularly close to Semsudin Mehmedovic, the main Bosnian police official in the region and an influential hardliner in Mr. Izetbegovic's party.

[17] Rasim Delić died on 16 April 2010. On 29 June 2010, the ICTY Appeals Chamber terminated Delić's appeal and ruled, "The Trial Judgement shall be considered final." Decision on the Outcome of the Proceedings, *Rasim Delić* (Appeals Chamber), 29 June 2010, para.16.

[18] Kebo: Džaferović i Mahmuljin bili 10 metara od mjesta likvidacije srpskog civila, Dnevni Avaz,

> Mr. Mehmedovic has nurtured and protected these men as part of a plan to create a reserve force to terrorise potential political opponents, to harass Serbs and Croats, and to pressurise Muslims who might not support Mr. Izebegovic, local officials said.[19]

In 2009, the BiH Prosecutor's Office initiated an investigation of Mehmedović and others over the illegal imprisonment and abuse of hundreds 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.

On 19 July 2013, the BiH State Investigation and Protection Agency (SIPA) arrested Mehmedović in connection with war crimes against Serb civilians. The arrest was conducted consistent 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.

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. The BiH Prosecutor Office's website soon began to feature threats and virulent attacks against Zubac. Then, in June 2014, the BiH Prosecutor's Office issued a baldly political indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities.[20] As if to remove all doubt as to the political nature of the indictment against Zubac, the Bosniak member of the BiH Presidency, Bakir Izetbegovic, in August 2014 said "[w]e will likely send [Zubac] to prison."[21] In March 2015, the Court of BiH issued a first instance verdict on the dubious charge, sentencing Zubac to one year's probation.

Additional evidence of Salihović's protection of 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 Mehmedović was the prime suspect—to the SDA-controlled prosecutor's office of Zenica-Doboj Canton.

4. Atif Dudaković

Despite voluminous evidence that 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.

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[19] John Pomfret, *Iranians Form 'Terror Force' in Bosnia*, THE GUARDIAN, 9 July 1996.

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

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

Among the many pieces of damning evidence against Dudaković are videos showing Dudaković ordering the execution of prisoners and the burning of Serb villages. Footage that surfaced in 2006 shows 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."[22] After the footage became public in 2006, the Bosniak member of the BiH Presidency promptly issued a statement rejecting all accusations against Dudaković.[23]

But the evidence against Dudaković goes far beyond videos. For example a former member of Dudaković's 5th Corps has been willing to testify about witnessing the organized slaughter of approximately 24 to 28 Serb civilians between the ages of 40 and 60 in front of a motel in Bosanski Petrovac. As he recounts:

> 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.[24]

The evidence compiled against Dudaković and others in the 5th Corps shows a recurring pattern: Ahead of advancing 5th Corps forces, Serbs fled from their villages. The Serbs who were unable to escape—often the elderly or the disabled—were killed. For example, when the 5th Corps entered the Serb village of Račić in October 1994, most residents had already fled. However 19 mostly elderly or disabled residents remained in the village because they could not escape. All but one of those who remained in the village were killed by the 5th Corps.

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. The report included 2,013 pages of evidence and 29 videos. In October 2006, the BiH Prosecutor's Office announced the opening of a war crimes investigation against Dudaković and several others.[25]

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

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

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

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

[25] *Dudaković under investigation*, B92, 6 Oct. 2006.

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.[26] 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.

5. 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.'"[27] 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."[28]

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

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

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

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

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

- 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.[29]

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

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

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 nine 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 National Central Bureau (NCB) for 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.

6. Mass crimes against Serb citizens of Sarajevo

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

According to official information of the RS Ministry of Interior, there were 3,299 victims of war crimes of Serb origin in 10 municipalities in Sarajevo. BiH's top security agency, SIPA, has data

showing at least 2,700 Serb victims of war crimes in the territory of the city of Sarajevo which was under the control of the Army of the Republic of BiH (ARBiH) during the conflict.

A large number of bodies of war crime victims were concealed and then transferred from their primary locations to secondary locations (one of which is the city dump where exhumation was halted by Chief Prosecutor Salihović on 30 August 2013, as described below). The concealment and transport of bodies to secret locations in Sarajevo could not have been conducted without the support of the official political, military, and police authorities. Immediately, at the onset of the conflict in BiH in April and May of 1992, large-scale arrests, tortures, and killings of members of the Serb intelligentsia commenced. In spite of all this, the BiH Prosecutor's Office has almost completely disregarded the widespread war crimes against Serb civilians in Sarajevo.

7. 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.[30] 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.

8. 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.

9. The Tuzla Convoy Massacre

On 27 April 1992, the Presidency of the RBiH issued a decision permitting the peaceful departure of Yugoslav National Army (JNA) forces, confirming the RBiH's earlier agreement with Yugoslavia that guaranteed JNA forces' safe withdrawal. In addition, Col. Milo Dubajić, commander of the JNA forces stationed in Tuzla, reached an agreement with Tuzla's civilian and military forces guaranteeing that the JNA forces would not be attacked during their withdrawal. Notwithstanding these guarantees, on 15 May 1992, as the JNA convoy withdrew along the prescribed route through of the city, RBiH snipers—acting on the orders of their superiors—opened fire—first on the drivers, then on the passengers—killing many. In 2002, the District Prosecutor's Office of Bijeljina submitted the case to the ICTY Prosecutor for review to

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

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."[31]

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.

10. "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.

11. Murders of Serb Civilians in Trnovo Municipality

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

12. Dobrovoljačka Street Ambush

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

On 3 May 3 1992, a JNA convoy travelling peacefully under an agreement for safe withdrawal from Sarajevo was ambushed by Bosniak forces on Sarajevo's Dobrovoljačka Street. According to the Commander of the UN forces in BiH, Major General Lewis MacKenzie, who was at the scene, Bosniak Territorial Defense Force (TDF) soldiers first blocked the road in the middle of the convoy, splitting the column of vehicles in half. The TDF soldiers then began shooting into some of the vehicles, killing and wounding many JNA personnel. In 2005, the Center for Public Security of Eastern Sarajevo submitted a criminal report against 15 suspects in the ambush. In November 2007, the BiH Prosecutor's Office finally issued an order for the investigation of 15 suspects. But the BiH Prosecutor's Office has not moved forward with any indictments, even though sources within the Prosecutor's Office indicate that investigators have found evidence of war crimes. In January 2012, Jude Romano, a foreign prosecutor within the BiH Prosecutor's Office (who had been appointed by a decree of the High Representative), decided to terminate the investigations. Victims' families filed an appeal against the decision, but the BiH Prosecutor's Office has not responded in the more than two years since.[32] 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.

13. Crimes in Sijekovac

The bloody atrocities against the Serb population in Bosanski Brod Municipality and across BiH started with the massacre in the village of Sijekovac in the night of 26/27 March 1992.

On 26 March, in the afternoon, members of HOS, a militia composed of Croat and Muslim units from Brod, ZENGA, Hanjar Division and the so-called HOS Interventions Squad from Sijekovac, entered the village. They committed atrocious crimes against the Serb civilians. In only one hour of rampage, they killed 19 Serbs; the youngest victim was 17 and the oldest victim was 72 years old. In the days to come, 41 Serbs were killed. However, the list of the civilians killed during the occupation of Brod is not exhaustive. For days, the bodies were transported in refrigerator trucks to be buried in mass graves or discarded in the Sava River. Some of the Serbs killed in Sijekovac are still reported as missing. The captured Serbs from this area were taken to camps in Bosanska Posavina, where they were subject to different forms of torture and abuse, from which many died.

The circumstances in which the Serbs lived in this area at the time are described in a document – a letter of confirmation – signed by the logistics commander of the 101st HVO Brigade, Ahmet Čaušević, whereby he confirms the "right" of the interventions squad from Sijekovac to "take in women for the purposes of the male sex; in case of resistance, force shall be allowed."

After the horrendous crime, Sijekovac was visited by members of the BiH Presidency, Biljana Plavšić, Fikret Abdić and Franjo Boras, and TV footage was broadcast on RTV Sarajevo and TV Yutel.

It is public knowledge that the army of the then-recognized Republic of Croatia entered Bosanski Brod during the night of 3-4 April 1992 and took part in all crimes committed in the area of

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

Municipality of Brod, hence in Sijekovac as well. The reason to attack was to allow passage for incursions of the Croats toward the town of Derventa and farther on, to central BiH.

A case file with exhibits was handed over to the ICTY investigators on 22 May 1992, and the ICTY transferred the case to the BiH Prosecutor's Office in 2006; to date, nothing has been done to prosecute these crimes.

Only Zemir Kovačević has been prosecuted at the BiH Court so far; he was convicted by a first-instance chamber for the murder of two Serb civilians and sentenced to ten-year imprisonment.

14. Crimes in the village of Bradina

Before the war, the village of Bradina was the largest Serb-populated place in Municipality of Konjic, with over 600 inhabitants. An attack on the village began on 25 May 1992 and was launched by heavily armed members of the Territorial Defense, RBiH Ministry of the Interior and HVO. In the attack, 54 Serb civilians were killed, 26 of whom were buried in a pit dug at the porch of the Church of Holy Ascension. Most of the survivors were taken to camps, mainly the one in Čelebić, where at least 22 camp inmates died from torture.

No one has been prosecuted for the horrendous crimes in Bradina although the RS Ministry of the Interior filed six charge sheets to relevant prosecutors offices in BiH, including reports and amended reports against 18 identified persons in respect of whom there was grounded suspicion that they had committed one or more war crimes against Serb civilians. The only prosecution for the crimes in Bradina at the Court of BiH was terminated because Miralem Macić, the defendant, passed away.

The fate of the Serbs from Bradinais best demonstrated by the fact that the entire Serb-populated area was razed to the ground, so there are practically no more Serbs there – only two Serb returnees.

15. Crimes in Jošanica

On 19 December 1992, a great Orthodox holiday, St. Nicola's day, the Muslim forces from Goražde massacred the population of a dozen hamlets of Jošanice in the Municipality of Foča. The massacre killed 56, including 19 women and three children. The fact that the youngest victim was only 3 years old, and the oldest victim was over 90 speaks of the monstrosity of the crimes. The victims were butchered; some of the women were raped and then killed in a most horrendous way; the village was burned down.

RS investigative and judicial authorities identified 26 perpetrators of the massacre and filed charge sheets in 2001, which were amended in 2005. However, neither the Hague nor BiH Prosecutors have ever prosecuted those responsible for the crimes in Jošanica.