

**Republika Srpska's Eighth Report to the UN Security Council**

**November 2012**

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## **Republika Srpska's Eighth 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 8th Report to the UN Security Council. The report reviews developments since the 7th Report and presents the RS Government's views on the principal issues facing Bosnia and Herzegovina (BiH).

Section I of the report examines the status of BiH's political development. Between December and May, BiH's elected leaders made rapid progress toward EU integration by working together in a spirit of compromise. That progress came to a standstill at the end of May when BiH's two largest Bosniak parties descended into an acrimonious feud. In October, however, the two largest parties in the RS and the largest party in the Federation of Bosnia and Herzegovina ("Federation") reached several important agreements designed to improve BiH's economy and reform public institutions. The RS leadership will continue working to forge consensus so that BiH can build on the accomplishments it has already made in 2012. The RS, for example, has developed a proposal—which Dervo Sejdić and Jakob Finci have praised—for implementing the European Court of Human Rights' *Sejdić-Finci* decision. The RS is eager to continue working with BiH leaders to bring BiH into compliance with the decision at the earliest possible date. Section I of the report also discusses the RS commitment to help find a solution to the longstanding dispute over state and defense property.

In Section II, the report explains the need to enact reforms to BiH institutions to align them with the Constitution and unleash political and economic progress. It points out some distinct advantages of BiH's decentralized Dayton system, including the fact that it limits the impact of political paralysis at the BiH level. BiH's decentralized structure has also allowed the RS to continue making strides in reforming its economy and laying the foundations for lasting prosperity. Unfortunately, decrees by the High Representative have unconstitutionally transferred many competencies from the Entities to the BiH-level agencies. BiH-level institutions are often characterized by inefficiency and abuse of power.

Section III examines the RS's efforts, through the EU Structured Dialogue on Justice, to reform the BiH judicial system so that it fulfills international standards and conforms to the BiH Constitution. In particular, BiH's mechanism for the appointment and discipline of judges and prosecutors must be reformed in order for it to function more efficiently and conform to international and European standards. In addition, the Court of BiH needs to be replaced with an institution that meets the requirements of the BiH Constitution and European standards.

Section IV concerns the legacy of BiH's 1992-1995 conflict. It includes an analysis showing, through statistics and examples, troubling disparities between the BiH judicial system's treatment of war crimes against Bosniaks and war crimes against Serbs.

Section V of the report focuses on the need to close the Office of the High Representative (OHR), which has long stifled BiH's political and economic development. Since the RS's previous report, international support for the High Representative and his self-bestowed "Bonn Powers" has continued to dwindle. Aside from the patent illegality of the Bonn Powers, the High

Representative's role in BiH stunts the normal process of political consensus building that takes place in self-governing democratic states.

Lastly, Section V explains why—after almost 17 years of peace and stability in BiH—there is no justification for the Security Council to continue acting under Article VII of the UN Charter.

The RS hopes this report will assist Security Council members in their deliberations about BiH and help all readers better understand the situation in BiH and the RS's positions.

**I. BiH's elected leaders are working in a spirit of cooperation to move BiH forward.**

**A. During the first months of 2012, BiH leaders made rapid progress to resolve major outstanding issues.**

1. Between the end of December 2011 and the end of May 2012, the elected leadership of BiH worked together with great success to resolve controversies that have long stood in the way of EU integration and other goals. The leaders of BiH's six main political parties met regularly to negotiate solutions to many of the most difficult issues that have been dividing them.

2. BiH's rapid progress only began after it had become clear that the High Representative would not employ the so-called Bonn Powers on behalf of the Bosniak parties, as he had done during last year's formation of the government of the Federation.

3. The progress forged by BiH's elected leaders earned widespread international praise. In February, for example, U.S. Deputy Secretary of State William J. Burns said, "Progress in forming the Council of Ministers and completing some EU-required reforms shows that leaders can put aside personal differences and narrow political interests, and work on practical solutions that can deliver positive results for this country and its citizens."<sup>1</sup> Later that same month, U.S. Ambassador Patrick S. Moon also hailed BiH's political progress, saying, "Over the last few weeks we have seen a new energy and optimism in this country that gives us hope for the future."<sup>2</sup>

4. In March, Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, told the European Parliament, "[T]here is now a new positive momentum on the European Union agenda in Bosnia and Herzegovina."<sup>3</sup> European Parliament Rapporteur Doris Pack said, "In six weeks, more has happened than we could have expected in Bosnia and Herzegovina."<sup>4</sup> On 13 March, the European Union issued a statement welcoming "recent positive developments, . . . which show that progress could be achieved through constructive and meaningful dialogue."<sup>5</sup>

5. In April, former High Representative Carl Bildt said, "BiH politicians in recent months have shown that they can go forward without interference from international actors."<sup>6</sup>

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<sup>1</sup> Deputy Secretary of State William J. Burns, Press Statement, 18 Feb. 2012.

<sup>2</sup> Speech by U.S. Ambassador to BiH Patrick S. Moon to Sarajevo Economics Faculty, 29 Feb. 2012.

<sup>3</sup> Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, Address at the plenary debate on Bosnia and Herzegovina, 14 March 2012.

<sup>4</sup> European Parliament, *Iceland, former Yugoslav Republic of Macedonia and Bosnia and Herzegovina*, 14 March 2012.

<sup>5</sup> EU Statement on Bosnia and Herzegovina: Committee of Ministers' Deputies 1137th meeting, 14 March 2012.

<sup>6</sup> Onasa, *Karl Bildt u Sarajevu: Bh. političari su pokazali "da mogu" ići naprijed bez vanjskog uplitanja*, DNEVNI AVAZ, 5 April 2012.

6. The burst of progress began in December 2011, when BiH's six major Serb, Bosniak, and Croat parties ended a long deadlock by agreeing on a new BiH Council of Ministers. The principal sticking point in the talks on the BiH Council of Ministers was the Bosniak-dominated Social Democratic Party's refusal to allow the next chairman of the Council to come from one of the Croat parties, as required by the rotation principle. The agreement on the Council of Ministers rightly gave the chairmanship to a member of one of the major Croat parties. The new chairman of the Council of Ministers, economist Vjekoslav Bevanda, assumed office on 12 January and the new Council of Ministers became functional soon thereafter.

7. Also in December 2011, the six leaders resolved two key disputes that had long held back BiH's EU integration progress. First, they agreed on a new law on state aid, which prohibits aid by BiH institutions that would affect the market. Second, they agreed on a census law, which will soon allow BiH to hold its first census since 1991. In December, the leaders also agreed on BiH's 2011 budget, which the BiH Parliamentary Assembly promptly approved.

8. On 1 February, the BiH Parliamentary Assembly enacted the Census Law, and two days later, it approved the Law on State Aid. Peter Sørensen, the Head of the EU Delegation to BiH, praised the state aid legislation as "fully compatible with the EU 'acquis'" and noted that it was "prepared with substantial support from the European Commission."<sup>7</sup> The EU Delegation to BiH and the EU Special Representative welcomed the adoption of the two new laws, calling them "crucial for the next steps of the country on its EU integration path."<sup>8</sup>

9. In a joint article, German Foreign Minister Guido Westerwelle and British Foreign Secretary William Hague also praised this progress, writing:

Bosnia and Herzegovina's Parliament has passed State Aid and Census Laws. This means that the only remaining task to be completed before the Stabilisation Agreement can be brought into force is the credible effort we called for last March to resolve the incompatibility of the country's constitution with the ruling of the European Court of Human Rights.<sup>9</sup>

10. On 29 February, the Parliamentary Assembly overcame yet another long deadlock to approve a law providing for a new biometric identity card.

11. On 9 March, the six parties reached agreement on the highly charged and longstanding controversies over disposal of state and military property. On the same day, the parties agreed on basic principles for bringing BiH into compliance with the European Court of Human Rights' *Sejdic and Finci* decision. As discussed in Section I-B-3, below, the RS is committed to doing everything in its power to see that the decision is implemented at the earliest possible date.

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<sup>7</sup> EU Delegation to BiH, Interview with Ambassador Peter Sorensen for Infokom magazine of the BiH Foreign Trade Chamber, 18 Jan. 2012.

<sup>8</sup> EU Delegation to BiH, *EU Delegation to BiH/EUSR on State Aid Law and Census Law*, 3 Feb. 2012.

<sup>9</sup> Guido Westerwelle and William Hague, *From Words to Action*, EU Delegation in Bosnia and Herzegovina, 3 April 2012.

12. On 31 May, the BiH Parliamentary Assembly approved BiH's 2012 budget, which opened the door for BiH to begin negotiations on a new International Monetary Fund loan. The IMF approved a 405 million euro loan to BiH on 26 September.

13. BiH's rapid advances in the first half of 2012 prove that its elected leaders can find common ground when the international community respects BiH's sovereignty and gives its leaders political space. Any resurgence of OHR intervention into BiH's internal affairs would jeopardize efforts by BiH's constitutional leadership to resume political progress at the BiH level.

**B. A summer of paralysis at the BiH level has given way to renewed progress.**

**1. Infighting between Bosniak parties caused the BiH Council of Ministers to collapse.**

14. At the end of May 2012, a split between BiH's two main Bosniak parties abruptly brought five months of progress to a halt. As the International Crisis Group wrote:

The governing coalitions of the state and the FBiH collapsed on 31 May 2012 with a spectacular, bitter divorce between two leading parties, Zlatko Lagumdžija's SDP and Sulejman Tihić's SDA. The reasons for the split remain obscure as both sides hurl accusations. The breach opened when the SDA voted against the state budget, claiming to have been excluded from drafting it and dissatisfied with its austere provisions. In response, Lagumdžija (backed by the rest of the state coalition) moved to expel the SDA from the state Council of Ministers and followed up over the next days by pushing the SDA out of four cantonal governments (Sarajevo, Tuzla, Zenica-Doboj and Una-Sana). The SDA retaliated by establishing a new government in Goražde canton without the SDP.<sup>10</sup>

15. According to an October Reuters article, "critics see a naked battle for power and patronage" between the SDP and SDA "that could delay reforms that Bosnia must adopt if it is to catch up with the rest of the ex-Yugoslavia on the road to join the European Union."<sup>11</sup>

16. Although a new coalition has been formed, the process of recreating the BiH Council of Ministers is unfinished. At a joint appearance with leaders of BiH's major parties, RS President Milorad Dodik said, "I want to say clearly that the SNSD continues to cooperate with political parties, primarily with the SDS in Republika Srpska, and continues with its partnership with the SDP, the two HDZs and partners chosen by the SDP, namely, the SBB, and that we will do what it takes to have a more functional Council of Ministers." The RS Government is hopeful that the reconstitution of the BiH Council of Ministers will be completed soon.

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<sup>10</sup> ICG 2012 Report, p. 10.

<sup>11</sup> Maja Zuvela, *Bosnia parliament dismisses ministers, crisis deepens*, REUTERS, 22 Oct. 2012.

## **2. The October 2012 Agreements**

17. On 31 October, the leaders of the two largest Serb parties and the largest Bosniak party in the BiH Parliamentary Assembly signed a package of important agreements to strengthen BiH's economy and improve administrative effectiveness and accountability.<sup>12</sup> These agreements, which are also supported by the two largest Croat parties, will be proposed to the BiH Council of Ministers.

18. One agreement resolves a longstanding dispute over the allocation of funds from BiH's electricity distribution company. An agreement on transportation, among other elements, advances plans for the construction of the Putnik Hill tunnel between the RS and the Federation. The tunnel, which is on the vital European 5C corridor, will promote economic growth in both the RS and the Federation. Another agreement gives BiH's legislative bodies a voice in the final selection of prosecutors, as legislatures have elsewhere in Europe. The parties also agreed on reforms to the BiH Law on Civil Servants designed to improve accountability. Among the other new pacts between the parties are agreements on international trade, public procurement, the BiH Central Bank, and election lists.

19. These agreements, if fully implemented, will boost BiH's economy and improve its public administration. However, as outlined in Section II, below, BiH institutions still require many key reforms. In addition, there remain other important issues on which BiH's leaders must come together.

## **3. Sejdić-Finci**

20. The RS institutions are committed to doing whatever it can to ensure that BiH complies with the European Court of Human Rights' decision in *Sejdic-Finci v. BiH*. In September, RS President Milorad Dodik met with the two plaintiffs who brought the case, Dervo Sejdić and Jakob Finci, to explain to them the RS's proposal to fix the offending provisions of the BiH Constitution. The two men praised the RS proposal and thanked Dodik for being, they said, the first BiH politician who expressed readiness to discuss with them the implementation of the court's ruling. Dodik told Sejdić and Finci that the RS was ready to immediately enter into a procedure to amend the BiH Constitution to bring BiH into compliance with the decision.

## **4. State and Defense Property**

21. The RS remains committed to helping resolve the longstanding disputes over the status of state and defense property as soon as possible. In March 2012, the six major parties in the BiH Council of Ministers reached agreement on a formula for resolving the disputes over state and defense property and other issues. Then, in July 2012, the BiH Constitutional Court adopted a decision invalidating an RS law pertaining to the state and military property issues.<sup>13</sup>

22. The Decision held that the "state of BiH "is the title holder of state property. (para 80) According to the Court's analysis, however, this finding does not, in itself, determine whether

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<sup>12</sup> Elvira M. Jukic, *Bosnia Leaders Hatch Deal on Vital Issues*, BALKAN INSIGHT, 1 Nov. 2012.

<sup>13</sup> Constitutional Court of Bosnia and Herzegovina, Case No. U 1/11, 13 July 2012.

Entity or BiH-level governing authorities have the power to regulate state property. This is because, as the Decision pointed out, “the term ‘Bosnia and Herzegovina’ designates sometimes the state as a whole, [that is] the global system comprising the central institutions and the entities (for instance in Article I(1)), and sometimes the higher level of government opposed to the lower ones represented by the entities.” (para 70) In other words, the property of the “state of BiH” could equally refer to property of the central institutions or of the Entities..

23. As a practical matter, the Decision leaves the issue of state property where it was before the Court’s ruling. Realistically, relevant decisions on this issue cannot be made without agreement among the major parties, such as had been reached early this year. The RS will continue its efforts to facilitate agreement among political leaders on state and defense property and all other issues of importance to BiH.

## **II. BiH institutions must be reformed to adhere to the Constitution and unleash economic and political progress.**

### **A. The decentralized BiH of the Dayton Constitution is the only BiH that can work.**

24. The recent paralysis of the BiH Council of Ministers demonstrates the wisdom of the Dayton Constitution’s structure, which leaves most functions to the Entities. As explained in Section I, above, a political standoff between the two main Bosniak parties brought progress at the BiH level to a four-month standstill. The decentralized Dayton system, however, limits the impact of paralysis at the BiH-level because it entrusts day-to-day public administration principally to the Entities. The effect of the recent period of deadlock at the BiH level has been mitigated in Republika Srpska, which has continued its brisk pace of reform. In a more centralized system, the periodic episodes of deadlock at the BiH level could have devastating effects throughout BiH.

#### **1. Decentralization improves efficiency, especially in states like BiH.**

25. Decentralization is beneficial to administrative efficiency, and it has been used successfully in many countries. Agencies can usually deliver services to citizens most efficiently when they are organized at the levels closest to the citizens they serve.

26. Academic research shows that decentralization improves efficiency, especially in countries—such as BiH—in which political preferences vary widely by region.

27. A 2009 study by BAK Basel Economics, a Switzerland-based independent research institute, determined that decentralization benefits economic performance. The study, commissioned by the Assembly of European Regions (“AER”), a network of regions from 33 European countries, found that “decentralisation, amongst other factors, has a significantly positive influence both on the level and the dynamics of economic performance of countries and regions: The higher (ceteris paribus) the decentralisation indicator, the higher the economic

performance.”<sup>14</sup> As the then AER Secretary General Klaus Klipp said at the study’s release, “Centralism hammers development of countries at the cost of its citizens.”<sup>15</sup>

28. The AER study emphasizes that benefits of decentralization are greatest in countries where policy preferences differ based on region. According to the study:

The demand for public goods can differ substantially between regions because the preferences of citizens are formed by regional traditions. . . . The bigger the differences in regional preferences within a country, the greater the potential benefits from decentralisation. By supporting decentralisation different preferences of the population can be better incorporated into policy. This helps to ensure that an individual’s needs will be considered more adequately.<sup>16</sup>

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

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

31. Switzerland, of course, is widely admired for the effectiveness of its government institutions. It protects the interests of its diverse language and dialect groups in part by vesting broad autonomy in 26 cantons. The autonomy of Swiss cantons is so broad that they are entitled to conclude international treaties.<sup>17</sup>

32. More and more governments in Europe have determined that decentralization, not centralization, increases efficiency.

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<sup>14</sup> *From Subsidiarity to Success: The Impact of Decentralisation on Economic Growth, Part 2: Decentralisation and Economic Performance* (May 2009) (researched and produced by BAK Basel Economics, commissioned and published by Assembly of European Regions), available at [www.aer.eu/fileadmin/user\\_upload/PressComm/Publications/AER\\_Study\\_on\\_decentralisation/Studies/BAK-Part2-FINAL%2Bcover.pdf](http://www.aer.eu/fileadmin/user_upload/PressComm/Publications/AER_Study_on_decentralisation/Studies/BAK-Part2-FINAL%2Bcover.pdf) (“From Subsidiarity to Success”), p. 4.

<sup>15</sup> Valentina Pop, *Centralised states bad for economy, study shows*, EUObserver, 18 May 2009.

<sup>16</sup> From Subsidiarity to Success, p. 15 (citations omitted).

<sup>17</sup> *Id.*

**2. The RS's economic reforms would have been impossible in a centralized state.**

33. The decentralized nature of BiH has enabled the RS Government to enact, in the past several years, far-reaching market reforms designed to create the conditions for strong and sustained economic growth. The RS Government will continue promoting economic growth by instituting further market reforms and adhering to sound fiscal policy. This is particularly important because of the global economic crisis, to which the citizens of the RS and BiH are not immune.

34. International experts have recognized the RS Government's rapid progress on economic reform, especially in comparison to the Federation. For example, the International Monetary Fund in 2009 wrote, "In recent years, policies have been diverging between the two Entities, with the RS making steady progress on reforms and the Federation finding it difficult to mobilize action on needed reforms."<sup>18</sup> In its 2012 Progress Report for BiH, the EU criticized "the slow pace of economic restructuring, *especially in the Federation.*"<sup>19</sup>

35. According to the EU's 2012 Progress Report for BiH, the RS has privatized about 69% of the RS's initial stock of state-owned capital intended for privatization. The Federation, by comparison, has privatized only about 42% of the initial stock of state-owned capital intended for privatization.<sup>20</sup> A 2009 European Commission staff report said, "Due to a more ambitious privatisation and structural reform agenda, the fiscal space was larger in the Republika Srpska than in the Federation."<sup>21</sup> The International Crisis Group wrote, "[T]he RS government is more efficient than the [Federation's], consumes a much smaller percentage of GDP and is implementing reforms more quickly. RS has also privatised many more state enterprises, an area where the [Federation] lags."<sup>22</sup>

36. In a May 2011 report, the US Congressional Research Service (CRS), wrote, "Observers have noted that the Republika Srpska has moved more quickly on economic reforms and has enjoyed higher economic growth than the Federation due to a less cumbersome governing structure in the RS."<sup>23</sup> In a February 2012 report, CRS wrote that implementation of International

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<sup>18</sup> International Monetary Fund, Request for Stand-By Arrangement, Bosnia and Herzegovina, 17 June 2009, p. 4.

<sup>19</sup> emphasis added.

<sup>20</sup> EC 2012 Progress Report on BiH, p. 27.

<sup>21</sup> Proposal for a Council Decision providing macro-financial assistance to Bosnia and Herzegovina, 29 Oct. 2009, SEC(2009) 1459, p. 4.

<sup>22</sup> *Id.*

<sup>23</sup> Steven Woehrel, *Bosnia: Current Issues and U.S. Policy*, Congressional Research Service, 2 May 2011, p. 6.

Monetary Fund plans for budget cuts “has been more difficult in the Federation” than in the RS.<sup>24</sup>

37. The World Bank’s report, *Doing Business in Southeast Europe 2011*, singles out Banja Luka, the RS’s largest city (and the only RS city it studied), as one of two cities in the region that improved the most since 2008.<sup>25</sup> In Banja Luka, the report says, “[b]usiness reforms were implemented in all 4 areas measured, resulting in significant benefits in terms of time and cost savings for entrepreneurs.”<sup>26</sup> In particular, the report praises improvements in efficiency from RS’s 2010 Law on Construction and Urban Planning, a 2010 reform to the RS Law on Courts, and a 2009 reform to the RS Law on Court Fees.<sup>27</sup> According to the report, the time it takes to start a business in Banja Luka has been cut by 33 days since 2008; it now takes 21 days.<sup>28</sup> By comparison, in Sarajevo, in the Federation, it takes 50 days.<sup>29</sup> The *Doing Business* report says Banja Luka “deserves special mention for recent improvements in contract enforcement.”<sup>30</sup> According to the report, the costs of enforcing a commercial claim in Banja Luka are now the lowest in the region.<sup>31</sup>

38. Since the RS submitted its last report the Security Council, it has continued to move aggressively to create the conditions for robust job and income growth. In June, for example, the RS National Assembly amended RS law to provide for a tax-base reduction for investments in plants and other immovable property used for manufacturing and processing.<sup>32</sup> Also in June, the RS Government adopted a regulation reforming notary fees to reduce their burden on businesses and citizens.<sup>33</sup> In July, the RS Government adopted regulations for a new program to encourage direct investment and employment growth in the RS.<sup>34</sup> In August, with the support of the European Bank of Reconstruction and Development, the RS issued an invitation for implementation of the Dobož-Vukosavlje Motorway, which is a part of the European 5C corridor and a key element in economic development efforts.<sup>35</sup> On 3 October, the RS power utility signed

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<sup>24</sup> Steven Woehrel, *Bosnia: Current Issues and U.S. Policy*, Congressional Research Service, 29 Feb. 2012, p. 5.

<sup>25</sup> World Bank, *Doing Business in South East Europe 2011*, pp. 2-3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at pp. 3, 21, 35

<sup>28</sup> *Id.* at p. 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at p. 35

<sup>31</sup> *Id.* at p. 34

<sup>32</sup> *Adopted Law Amending Profit Tax Law*, InvestSrpska.net, 5 June 2012.

<sup>33</sup> *RS Government Adopted Regulation Setting Notary Fees And Costs Award In the Republic of Srpska*, InvestSrpska.net, 1 June 2012.

<sup>34</sup> *Adopted Proposal Regulation on Implementation of the Investment and Employment Support Program*, InvestSrpska.net, 5 July 2012.

<sup>35</sup> Dobož to Vukosavlje motorway project presented, Republic of Srpska Motorways.

a memorandum of understanding with Croatia to jointly finance the construction of a 170-million-euro, 300-megawatt hydroelectric plant.<sup>36</sup>

39. The RS continues to demonstrate greater fiscal responsibility than the Federation. The RS's 2012 budget increases total spending by 4%, while the Federation's 2012 budget hikes total spending by 11%.<sup>37</sup> The EU's new annual progress report on BiH praises the RS's new Pension Law, saying that it "should improve the long-term sustainability of the Entity's finances."<sup>38</sup> The Federation, the EU notes, is still examining pension issues with a working group.

40. In addition, in the area of public internal financial control, the EU's report says the Federation is "lagging behind the State and Republika Srpska."<sup>39</sup>

41. The EU's 2012 progress report praises the RS's new Law on Crafts and Entrepreneurship, which, the EU says, "simplified business registration procedures for entrepreneurs."<sup>40</sup> The EU report also notes the RS's adoption a new Consumer Protection Law and legislation giving jurisdiction over certain business issues to five regional commercial courts.<sup>41</sup>

42. The EU's 2012 Progress Report on BiH noted with approval the RS's efforts progress on international cooperation. The report said: "Implementation of the Dayton/Paris Peace Agreement continued. In the framework of the Special Parallel Relations Agreement between the Republika Srpska and Serbia, a joint session took place in Belgrade in December, leading to the signing of four agreements on internal affairs, IT, the environment and agriculture."<sup>42</sup>

43. The RS will continue to build on the success of its reforms, which have helped give the RS the highest economic growth rates, lowest unemployment, and most competitive economy in BiH. The RS's market reforms have fueled economic growth and pushed unemployment lower. From 2006 to 2011, the RS's per capita GDP leapt by 34% in spite of a contraction in 2009 due to the global economic crisis.<sup>43</sup> In spite of continued economic struggles in Europe and around the world, the RS's growth resumed in 2010 and continued during 2011, according to the most recent statistics.<sup>44</sup> Although the unemployment rate is high throughout BiH, it is 3.1 percentage points lower in the RS than in BiH as a whole. The RS Government's market reforms have also

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<sup>36</sup> *Signed MoU on HPP Dubrovnik Two*, InvestSrpska.net, 3 Oct. 2012.

<sup>37</sup> EC 2012 Progress Report on BiH, p. 26.

<sup>38</sup> *Id.*

<sup>39</sup> EC 2012 Progress Report on BiH, p. 29.

<sup>40</sup> EC 2012 Progress Report on BiH, p. 27.

<sup>41</sup> EC 2012 Progress Report on BiH, p. 27, 31.

<sup>42</sup> EC 2012 Progress Report at p. 21.

<sup>43</sup> Database of Economic Indicators of the Republika Srpska, Main Economic Indicators, Comparative Review, available at [www.irbrs.net/statistika.aspx?tab=2&god=2011&lang=eng](http://www.irbrs.net/statistika.aspx?tab=2&god=2011&lang=eng) ("Comparative Review of Economic Indicators")

<sup>44</sup> Republika Srpska Institute of Statistics, available at [www.rzs.rs.ba/English.htm](http://www.rzs.rs.ba/English.htm).

helped to boost wages in the RS. From 2006 to 2011, average wages in the RS jumped 55.3%,<sup>45</sup> an improvement more than 19.5 percentage points better than that of the Federation.<sup>46</sup> Wages have continued to rise in the RS during 2012.<sup>47</sup>

44. In 2012, the RS initiated or continued major investments, such as the construction of the thermal plant Ugljevik 3, exceeding EU 500 million euros, and the construction of the thermal plant Stanari with the financial support of the China Development bank, exceeding 550 million euros. Recently, the Italian company Metallege announced an investment exceeding 30 million euros in Mrkonjić Grad. A strategic partner to invest into the hydropower project Gornja Drina, a system of 4 hydropower plants, was selected (German RWE), which will invest more than 450 million euros. These investments will continue into 2013.

45. Soon, the RS is expected to sign a memorandum of understanding (MOU) on the Upper Horizons project, a major joint venture for the construction and operation of three hydropower plants on the Trebišnjica River. The plants will sell electricity to Italy and transmit it via a submarine cable. Under the MOU, foreign investors will finance the \$650-million-euro cost of the three plants' construction. The Upper Horizons project will bring the RS an enormous infusion of foreign investment and benefit the RS economy for decades to come. To that end, the Power Utility of the RS, the Republic of Serbia and the Italian company SECI (Maccaferri Group) signed an agreement for the construction of three hydro power plants on the Drina River worth 800 million euros. Last month, McDonald's opened a restaurant in Banja Luka, its first in the RS. Although the restaurant itself is not a large investment, the arrival of McDonald's signals growing international confidence in the RS's stability, rule of law, and economic prospects.

46. The RS could not have made and benefited from the reforms of the past several years without BiH's decentralized structure. The Federation has taken an entirely different course than the RS in recent years. It has chosen not to enact economic reforms, pursue privatization or impose fiscal restraint, and this has led to financial crises and economic underperformance. The Federation's choice not to reform highlights the dangers of proposals to transform BiH into a unitary state with power centralized in Sarajevo. In a centralized state, the policies and choices of the Federation, with its larger population, would dominate, and the types of economic reforms the RS has enacted would be in grave jeopardy. It is the decentralized structure of the Dayton Constitution that has given the RS the freedom to enact its economic reforms and create the conditions for lasting prosperity.

## **B. The OHR's forced transfer of Entity competencies to BiH bodies violated the BiH Constitution.**

47. The BiH Constitution, Annex 4 of the Dayton Accords, sets forth the governance structure for BiH. BiH is composed of the two Entities (art. 1(4)), but nevertheless includes BiH-level institutions, charged with specific functions. Article 3(1) identifies the complete list of

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<sup>45</sup> Comparative Review of Main Economic Indicators.

<sup>46</sup> Monthly Statistical Review of the Federation Of B&H, Feb. 2012, available at [www.fzs.ba/Bilten0212.pdf](http://www.fzs.ba/Bilten0212.pdf).

<sup>47</sup> Republika Srpska Institute of Statistics, available at [www.rzs.rs.ba/English.htm](http://www.rzs.rs.ba/English.htm).

competencies that BiH institutions will have, primarily focused on external relations rather than internal governance. This is an exhaustive list, as all other competencies are expressly given to the Entities according to article 3(3)(a). In other words, any BiH institution that performs a function or exercises a competency not listed in article 3(1) does so in contravention of the BiH Constitution.

48. It is worth reviewing the list of constitutional authority given to state institutions in BiH. The list is as follows:

1. Foreign policy
2. Foreign trade policy
3. Customs policy
4. Monetary policy as provided in Article VII
5. Finances of the institutions and for the international obligations of Bosnia and Herzegovina
6. Immigration, refugee, and asylum policy and regulation
7. International and inter-Entity criminal law enforcement, including relations with Interpol
8. Establishment and operation of common and international communications facilities
9. Regulation of inter-Entity transportation
10. Air traffic control

49. As noted, most of these matters are aimed at either external relations or external activity of BiH.

50. In 2009, the RSNA held a debate regarding the transfer of competencies from the Entities to BiH institutions. A total of 68 competencies were discussed and it was determined that only three such transfers were legal. A dispassionate review of the 65 transferred competencies at issue shows how far out of line with the BiH Constitution they were. Metrology, oil quality and drug abuse, for example, fall neither within the specified list of state competencies, set out above, nor even within the general ethos of that list. Certainly such competences would constitutionally fall within the umbrella provision granting the Entities the authority and jurisdiction to manage any non-enumerated functions.

### **C. BiH-level bodies are rife with inefficiency and abuse.**

#### **1. BiH institutions lack transparency and accountability to citizens.**

51. BiH Institutions are inexcusably opaque in their operations and unaccountable to the tax payers who fund them. The concepts of transparency and accountability, while distinct in many respects, are inextricably intertwined. As Chalmers & Tompkins note, “It is plainly impossible to hold anyone to account if you do not first have a sense of what it is you are holding them to account for. Without transparency, there can be no effective accountability.”<sup>48</sup> In BiH, however, a lack of transparency only serves to bolster an even greater lack of accountability in state institutions.

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<sup>48</sup> Damian Chalmers & Adam Tomkins, “European Union Public Law” (Cambridge) 317 (2007).

52. In the first meeting of the UN General Assembly in 1946, Resolution 59(1) stated unequivocally that “Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated.” Nearly 50 years later, the UN Special Rapporteur on Freedom of Opinion and Expression, in his 1995 Report to the UN Commission on Human Rights, reasserted the central importance of transparency: “Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.”<sup>49</sup> These strong normative statements in favor of free access to information held by public officials are further supported by provisions of both the Universal Declaration of Human Rights of 1948 and the International Covenant for Civil and Political Rights of 19 (ICCPR)—two of the three instruments considered to comprise the “International Bill of Rights.”

53. According to its Preamble, the BiH Constitution is explicitly “*Inspired* by the Universal Declaration of Human Rights, [and] the International Covenant[] on Civil and Political Rights” among other human rights instruments. Indeed, the ICCPR is specifically integrated into the laws of BiH via Annex I of the Constitution which lists “Additional Human Rights Agreements to Be Applied in Bosnia and Herzegovina.” The international legal right to freedom of information is therefore also a constitutional right in BiH.

54. International legal norms strongly favor open access to information held by public officials. Indeed, in BiH there is an actionable right under both Constitutional law and international law in pursuit of freedom of information. In addition to the overarching international laws and legal principles guiding the right to access information in BiH, the state has actually adopted laws to clarify not just the right to information, but the procedure for accessing it.

55. BiH was the first country in the Balkans to pass a freedom of information act (FOIA). The BiH FOIA was developed at the direction of High Representative Carlos Westendorp in 2000, aided by the substantive guidance of the OSCE. Both the RS and the Federation adopted the law in 2001, and it took effect in July of that year. The Act has been amended twice over the last decade, but it remains in effect.

56. The BiH FOIA acknowledges “that information in the control of public authorities is a valuable public resource and that public access to such information promotes greater transparency and accountability of those authorities.”<sup>50</sup> On that foundation, the act establishes “that every person has a right to access this information to the greatest extent possible consistent with the public interest, and that public authorities have a corresponding obligation to disclose information.”<sup>51</sup> Furthermore, the Act specifically establishes, under the heading “Interpretation,” that “This Act shall be interpreted so as to facilitate and promote the maximum and prompt

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<sup>49</sup> UN Doc. E/CN.4/1995/32, para. 35.

<sup>50</sup> Freedom of Access to Information Act (BiH), no 28/2000 (17 Nov. 2000), art. 1(a) [hereinafter “BiH FOIA”].

<sup>51</sup> BiH FOIA art. 1(b).

disclosure of information in the control of public authorities at the lowest reasonable cost.”<sup>52</sup> These foundational principles are consistent with the international laws discussed above.

57. Unfortunately, however, the BiH FOIA has proven ineffective in wresting information that should be public out of the hands of BiH Institutions. Not only do public authorities fail to disclose information when requested; an overreaching and misguided Personal Data Protection Agency currently seeks to withdraw what little information has been made public.

58. The Agency for the Protection of Personal Data (“the Agency”), established to implement the 2006 Law on the Protection of Personal Data has pursued the concept of privacy with such zeal as to reduce—and in some cases eliminate—the visibility of governmental activity, including that of the judiciary. One of the most troubling displays of overreaching by the Agency has been its attempt to cleanse judicial records—indictments, court documents, court decisions, etc.—of any personal data, thus both limiting and anonymizing the information that is made public. Indeed, the course pursued by the Agency squarely contravenes the European Convention on Human Rights and Fundamental Freedoms which requires the public pronouncement of court judgments. Furthermore, the activity of the Agency is contrary to the ethos of good and transparent governance that is vital both to democracy at large and to membership in the EU.

**2. Money is too often squandered at the BiH level instead of being used at the Entity and cantonal levels where services are actually delivered to citizens.**

59. Bosnia and Herzegovina was established in the Dayton Accords as a highly decentralized state. Other than the 10 competencies specifically designated to BiH institutions under article 3(1) of the Constitution, all governance in BiH fell to the responsibility of the Entities. Even after numerous competencies have been transferred—some voluntarily, most by force—to BiH institutions, the principal responsibility for governing in BiH still rests with the Entities. It is worrying, therefore, to see that BiH institutions have extremely high expenditures, despite having significantly less in terms of responsibilities and functions compared to the Entities.

60. In 2010, the BiH expenditure was 1.27 Billion KM compared to 1.59 Billion KM in the RS and 1.73 Billion KM in the Federation. In financial terms, therefore, BiH institutions have taken on the economic equivalency of a third Entity without providing concomitant services. Indeed, the RS paid one third of the capital to create the Central Bank, yet the all dividends are used to fund BiH institutions. The most significant political crisis of this past year revolved around callous attempts to continue expanding the already inexplicably large BiH budget in the face of economic downturn—a move that highlights the lack of responsibility by the chief proponents of wasteful BiH institutions.

61. In an effort to ameliorate the negative economic effects of irresponsible BiH institutions that cause severe hardship to BiH citizens, the RS has begun exploring creative solutions to reducing financial waste and increasing the funds available to support initiatives producing economic development and stability. To this end the RS has recently proposed demilitarization in BiH. In 2010, the Ministry of Defense spent 324,758,367 KM—by far the most of any BiH

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<sup>52</sup> BIH FOIA art. 2.

institution, accounting for more than a quarter of BiH-level expenditure and nearly four times the next most expensive BiH institution, the Indirect Taxation Authority. One significant way of improving the economic situation in BiH, therefore, would be to sharply reduce military expenses. The RS will continue exploring other options, as well, in pursuit of economic prosperity for the citizenry.

**3. BiH-level security and foreign policy bodies imperil fundamental BiH interests.**

**a) BiH-level bodies undermine the fight against terrorism.**

62. The October 2011 terrorist attack on the U.S. Embassy in Sarajevo was a stark reminder of the danger that terrorists inspired by Islamic radicalism pose to BiH citizens, whether they are Bosniak, Serb, or Croat. Unfortunately, within BiH the RS alone treats the threat of these violent extremists with the seriousness it deserves. Further centralization of BiH security agencies would undermine the ability of both BiH and the RS to fight terrorism.

63. In the 1990s, Radical Islamic organizations and fighters came from around the world to BiH to fight in the war, and their legacy continues to haunt BiH. The embassy attack isn't the only recent terrorist attack that BiH has suffered. In 2010, terrorists bombed a police headquarters in the town of Bugojno in central Bosnia, killing one police officer and injuring six others. The perpetrators of many terrorist acts around the world have spent time in BiH.

64. The RS takes an active role in the fight against terrorism both in BiH and abroad. In February, for example, the RS Ministry of the Interior joined with the EU to organize a two-day seminar on cyber terrorism.<sup>53</sup> At the seminar, police and prosecutorial officials from BiH, Serbia, Croatia, and Montenegro learned from EU experts about how to more effectively thwart the use of information technology by terrorist organizations. Other RS agencies and officials have been active in international anti-terrorist organizations and programs.

65. If BiH is to protect innocent civilians against the terrorist threat, all of its police and security agencies must face up to the threat's existence. Unfortunately, the leadership of BiH's central security agencies often dismisses or minimizes the threat of violent extremism to BiH citizens. The leaders of these central agencies have also sometimes refused to share important information about terrorist threats with the RS. Unfortunately, continuing to concentrate power in these same agencies will weaken—not strengthen—the fight to protect all BiH citizens against terrorism. Most of the international organizations active in BiH provide financial support to security agencies in BiH such as the Task Force—which was set up in a synthetic manner but remains nonfunctional—rather than the RS Ministry of Interior, which works on these issues.

66. There is even the threat that terrorists and terrorist-supporting states have sympathizers in BiH's security apparatus. The influential Security Board of the SDA, the largest Bosniak party in BiH, is headed by Bakir Alispahic, who has long been on the U.S. Government's watch list of

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<sup>53</sup> RS Ministry Of Interior Organizes Seminar On Fight Against Cyber Terrorism, EU Police Mission, 7 Feb. 2012, available at [www.eupm.org/Detail.aspx?ID=3761&TabID=9](http://www.eupm.org/Detail.aspx?ID=3761&TabID=9).

suspected terrorists.<sup>54</sup> In August, according to a major Sarajevo-based newspaper, the U.S. and U.K. ambassadors to BiH met with BiH Security Minister Sadik Ahmetovic to tell him firmly that the SDA and BiH institutions must break off their secret relations—including espionage, political and financial ties—with the Iranian regime.<sup>55</sup>

#### **b) Foreign Minister's Abuse of Authority**

67. In August, BiH Foreign Minister Zlatko Lagumdžija acted with disregard for the BiH Constitution when he instructed BiH's UN representative to vote in favor of a UN General Assembly resolution without a decision from the BiH Presidency. Article V, paragraph 3, of the BiH Constitution provides that the Presidency "shall have responsibility for . . . [c]onducting the foreign policy of Bosnia and Herzegovina" and "[r]epresenting Bosnia and Herzegovina in international . . . organizations." It is well established that the three-member Presidency must approve BiH's votes in the UN and other international organizations. Mr. Lagumdžija acted with disdain for the division of power enshrined in the BiH Constitution.

#### **4. BiH-level bodies have impeded economic development.**

68. Public bodies at the BiH level often serve as impediments to economic development in the RS. One recent example is the BiH Energy Ministry's inexplicable behavior with respect to the Upper Horizons hydroelectric project. A small—yet indispensable—element of the Upper Horizons project, described in section II-A-2 above, is for the BiH Council of Ministers to provide consent that the hydroelectricity generated in the plants constructed through the cooperation project with the Republic of Italy should be statistically treated as hydroelectricity generated in Italy. Such a statement or consent is necessary for the Republic of Italy to fulfill its obligations arising from European directives concerning the minimum proportion of energy generated from renewable sources, which is 20%. In return, the Republic of Italy would guarantee a high electricity purchase price for a period of 15 years, i.e. 155 euros per MWh of generated electricity. Unfortunately, instead of cooperating eagerly with the RS Ministry of Industry, Energy and Mining to move such an important project forward, the BiH Council of Ministers has been slow to agree to send these statistics, even though the RS Ministry of Industry, Energy and Mining has provided all of the necessary information. Sadly, this is typical of the barriers BiH-level ministries place—without reason—in front of projects to develop the RS economy.

#### **D. EU Integration**

69. The RS Government strongly supports BiH's integration into the EU. It will work with determination toward BiH's accession to the EU while preserving the decentralized constitutional system established in the Dayton Accords.

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<sup>54</sup> U.S. Department of the Treasury, Specially Designated Nationals List, available at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

<sup>55</sup> *Radikali prešli dozvoljenu crtu: Ahmetović i SDA upozoreni zbog "iranaca"!*, DNEVNI AVAZ, 3 Aug. 2012.

## 1. BiH's decentralized Constitution is consistent with EU membership.

70. There is no reason why BiH cannot become an EU member state and preserve its decentralized constitutional order established in the Dayton Accords at the same time. On a number of occasions, the EU has made clear that this structure is not an obstacle to BiH's progressing towards membership in the EU. As a 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.*"<sup>56</sup>

71. In a February 2012 speech, the Head of the EU Delegation to BiH, Special Representative Sørensen said:

Bosnia and Herzegovina has a complex constitutional structure, enough words have been said about that. But there are internal arrangements in EU member states that can also be considered very complex. As I have said many times before: the EU fully respects the security, territorial integrity and constitutional order of Bosnia and Herzegovina.<sup>57</sup>

Similarly, in an interview in January 2012, Ambassador Sørensen said, "I should underline that the EU recognises 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."<sup>58</sup>

72. No EU member or candidate state has ever been required to restructure its constitutional architecture from a decentralized federal system to a centralized one in order to qualify for EU accession. Nor is BiH required to do so. It is a fact that BiH's decentralized system is not an obstacle to the obligations on its path to membership in the EU or its future obligations as an EU member state, which is demonstrated each day by the current EU members, such as Germany, Spain, Belgium, and Italy.

73. BiH's decentralized structure also reflects the core EU principle of subsidiarity, according to which "decisions are taken as closely as possible to the citizen." Moreover, the decentralized structure of the BiH Constitution is consistent with the widespread trend of decentralization in the EU and worldwide.<sup>59</sup>

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<sup>56</sup> 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).

<sup>57</sup> EU Delegation to Bosnia and Herzegovina, Speech delivered by Head of EU Delegation to BiH and EU Special Representative, Ambassador Peter Sorensen at Krug 99 session, 26 Feb. 2012.

<sup>58</sup> EU Delegation to BiH, Interview with Ambassador Peter Sorensen for Infokom magazine of the BiH Foreign Trade Chamber, 18 Jan. 2012.

<sup>59</sup> See Committee on the Environment, Agriculture and Local and Regional Affairs of the Council of Europe Parliamentary Assembly, *Regionalisation in Europe*, 14 Sept. 2007. According to this Council of Europe study, "Most of the larger countries of Europe have a well-developed sub-state level of

74. In order for BiH's Stabilization and Association Agreement and Interim Agreement with the EU to go into effect, BiH must make progress toward implementing the European Court of Human Rights' 2009 *Sejdic and Finci* decision. The RS has repeatedly expressed its readiness to amend the Constitution for this purpose, and, through its proposals and active involvement, has expressed its commitment, to reach a compromise and sustainable solution as soon as possible.

75. With regard to more far-reaching constitutional changes, Republika Srpska will be vigilant to ensure that the accession process is not misused by local and international parties as a pretext for making drastic changes that are unnecessary for accession and detrimental to the RS and BiH as a whole. The decentralized BiH structure established in the Dayton Constitution (Annex 4 to the Dayton Accords) is not an obstacle to BiH's advancement to EU membership, as the EU has reiterated on numerous occasions, and it must be protected and strengthened.

76. Any constitutional amendments that may be required for EU membership must be the result of a transparent and lawful process and a domestic consensus to be achieved by BiH institutions without foreign interference. In addition, any such constitutional changes must retain the fundamental protections for Entity autonomy and the equality of BiH's Constituent Peoples guaranteed by the BiH Constitution.

## **2. Republika Srpska is leading the way on meeting the EU's *acquis*.**

77. The RS has embraced the opportunity afforded it by the stabilisation and association process and, in line with its powers, through its permanent action has contributed to the implementation of reforms necessary for the full membership in the EU. As the International Crisis Group observes in its 2012 report on BiH, RS "ministers are working hard on the European project."<sup>60</sup>

78. According to the distribution of constitutional powers in BiH, the great majority of obligations concerning harmonization of laws and regulations with the EU's *acquis communautaire* is performed at the Entity level. According to the European Commission's reports, the RS has significantly outpaced the Federation in achieving the reforms required by the Stabilization and Association Agreement and Interim Agreement.

79. Since the end of 2007, Republika Srpska has been steadily and systematically harmonizing its laws and regulations with the EU's *acquis*.<sup>61</sup> Since that year, on the basis of annual action plans for legislation alignment, the RS Government has subjected more than 750 laws and regulations to this procedure. BiH and Federation institutions are much less advanced in their EU harmonization efforts.

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government formed of regions enjoying considerable autonomy and legislative powers." (p. 8). The study also noted, "Regional autonomy must be perceived as a means of enhancing democracy and giving it a firmer foothold in our countries, in parallel with the European unification process and against the background of globalisation." (p. 9).

<sup>60</sup> *Bosnia's Gordian Knot: Constitutional Reform*, Crisis Group Europe Briefing No. 68, 12 July 2012, p. 16.

<sup>61</sup> Summary of RS Government 52nd Session.

80. In the EC's new 2012 Progress Report on BiH, in the EU integration process, the RS performed much better than the Federation. The report takes note of many reforms by the RS to help align its laws and regulations with the *acquis*. For example, the EU report notes, "In Republika Srpska, the EU Integration Committee of the National Assembly cooperated with the government in assessing the level of compliance of proposed legislation."<sup>62</sup> The RS Government, the EU report observes, "often provided analysis and opinions on the level of approximation of draft legislation with the *acquis*. Its administrative capacity to monitor EU related legislation remained satisfactory."<sup>63</sup> The report cites no similar compliance efforts by Federation or BiH institutions.

81. The EU's 2012 Progress Report also applauds the RS's moves to align its environmental protection laws with the *acquis*. According to the EU report, for example, "Republika Srpska advanced the alignment with the Strategic Environmental Assessment (SEA) Directive by adopting the new Law on Environmental Protection."<sup>64</sup> The report also notes, "Republika Srpska adopted a strategy on chemical safety and implementing legislation on chemicals and biocides. The Federation did not start aligning its legislation with the *acquis*."<sup>65</sup> The report also praises the RS's adoption of a new Law on Air Protection.<sup>66</sup>

82. The report further observes, "While Republika Srpska and the Brcko District amended their criminal codes to introduce a criminal offence to suppress crimes linked to hate and extremism, the Federation needs to amend and harmonise its criminal code."<sup>67</sup> (56-57)

83. The RS has consistently expressed its willingness to provide all necessary assistance to the BiH level and Federation in the process of fulfilling EU-related obligations, such as, in the area of harmonisation of laws, adopting EU good practices, and the like.

### **III. Through the EU Structured Dialogue, the RS is working to reform BiH's judicial system so that it meets international standards and complies with the BiH Constitution.**

#### **A. The appointment and discipline of judges and prosecutors must be reformed to meet international standards.**

84. BiH's regime of judicial and prosecutorial appointment and discipline is inconsistent with European and other international standards. BiH's High Judicial and Prosecutorial Council (HJPC) must be reformed significantly in order for BiH to meet EU and international standards.

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<sup>62</sup> European Commission, Bosnia and Herzegovina 2012 Progress Report, 10 Oct. 2012, p. 10 ("EU 2012 Progress Report").

<sup>63</sup> EC 2012 Progress Report at p. 11.

<sup>64</sup> EC 2012 Progress Report at p. 44.

<sup>65</sup> EC 2012 Progress Report at p. 45.

<sup>66</sup> EC 2012 Progress Report at p. 44.

<sup>67</sup> EC 2012 Progress Report at p. 56-57.

## **1. Background of the HJPC.**

85. The BiH HJPC has formed in 2004 with the passage of a new law which abrogated the previous arrangement; in which each entity had its own HJPC while a third council was responsible for BiH-level institutions. This new Council was given powers of appointment and discipline for all judicial and prosecutorial positions throughout BiH and the Entities, with the exceptions of the three constitutional courts and Republika Srpska's system of commercial courts, and was tasked with proposing candidates for the Entities' constitutional courts.<sup>68</sup>

86. In its early years, the HJPC was subject to illegal interference by the OHR, which—despite the fact that the 2004 Law on HJPC set out clear procedures for the selection of HJPC members—made its own appointments to the Council. Today, the Council's composition reflects the requirements established by the 2004 Law, and the HJPC operates with much greater independence. The RS Government expects that by the end of 2012 the Council's last remaining foreign, OHR-imposed member will be gone.

87. In order to function more efficiently and to conform to international and European judicial and prosecutorial standards of independence and respect for the rights of the entities, the HJPC must undergo certain reforms. The RS Government has proposed the following solutions, which can be the basis for amicable and productive discussions under the framework of the European Union-led Structured Dialogue on Justice.

## **2. International standards require Entity appointments of Entity judges and prosecutors.**

88. It is almost unheard of in a democratic federal state for a federal unit's own judges and prosecutors to be appointed by a central institution. Throughout Europe and the world, virtually every democratic federal state rightly leaves to federal units the authority to appoint their own judges and prosecutors. In federal states such as Germany, the United States, and Australia, centralized appointment of judges would be unthinkable. It is even more important in BiH, which was established under Dayton as a highly decentralized state, that the Entities maintain control over the appointment and discipline of entity- and sub-entity-level judges and prosecutors.

89. The RS is particularly disadvantaged by the current HJPC system, as Council members from the RS are always outnumbered by BiH and FBiH members on the plenary Council. Furthermore, as each entity—and each sub-entity unit—has its own distinct laws, the entities are far better suited than the plenary Council to determine the most appropriate candidates for such appointments. The RS Government is proposing a set of amendments to the Law on HJPC and the HJPC Rules of Procedure designed to maintain the independence of the judiciary, while bringing the system of appointments and disciplinary oversight more closely in line with European standards and norms. As noted in section I-B-2, above, the major parties represented in the BiH Council of Ministers have agreed on a proposal to give the Entity legislatures the authority to appoint Entity prosecutors.

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<sup>68</sup> BiH Law on the High Judicial and Prosecutorial Council, 2004, Art. 17.

### **3. European standards require separate bodies for judges and prosecutors.**

90. By giving a single body jurisdiction over both judges and prosecutors, the HJPC system violates widely recognized European standards. In its January 2011 *Report on European Standards as regards the Independence of the Judicial System*, the Venice Commission wrote, “If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others’ appointment and discipline proceedings.”<sup>69</sup>

91. The nomination process as provided for in the HJPC law is completely inconsistent with the Venice Commission’s admonition. The RS Government was the first institution to raise this issue, which has since been recognized as a subject needing urgent reform by representatives of the European Union and the leadership of the HJPC itself.<sup>70</sup> In order to assist in the process of institutional reform, the RS Government has drafted proposed amendments to the Law on HJPC that would add additional members to the Council and form separate panels for judges and prosecutors.

### **4. Transparency**

92. As the reforms proposed here and other reforms are considered in the EU Structured Dialogue process or otherwise, complete transparency is essential. In the past, the HJPC, BiH Ministry of Justice and other elements of the BiH justice system as well as participating international organizations and NGOs and the OHR have often drafted proposals in secret and pressed for their urgent acceptance without allowing opportunities for RS participation in the drafting process or for RS internal consultations and consideration. If BiH and entity institutions are to be strengthened by the current justice system reforms, all changes must be the result of genuine consensus-building efforts.

#### **B. The Law on Court of BiH must be reformed.**

93. The Court of BiH as now established is in violation of the BiH Constitution. The Constitution assigns no such functions or powers to BiH, but instead allocates this authority to BiH’s two Entities. The establishment of such a court at the BiH level requires amendment of the Constitution based on formal agreement of the Entities. The Constitutional Court’s ruling to the contrary is fatally flawed because it was the product of the High Representative’s domination of the Court through his extensive powers over the appointment, removal and compensation of judges.

94. In considering the present status of the judiciary in BiH, the Venice Commission reviewed but did not approve the rationale upon which the Constitutional Court upheld the Law

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<sup>69</sup> European Commission on Democracy through Law (Venice Commission), *European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service*, CDL-AD(2010)040, 2 Jan 2011, p. 17.

<sup>70</sup> Novkovic, Milorad. “A common platform for changes of the HJPC Law.” Internal HJPC memo, June 2010, p. 5.

on Court of BiH.<sup>71</sup> In the Commission's view, the Constitutional Court's "extensive interpretation of state responsibilities has clear limits," and "it is difficult to imagine that the doctrine [of implied State powers] could be stretched any further than that already done by the enactment of the Law on the Court of BiH."<sup>72</sup> Further structural changes will require amendment of the BiH Constitution.<sup>73</sup>

95. In addition to its lack of a constitutional basis, the Court of BiH falls short of European and international standards in many respects.

- The provision for appellate review of decisions of the Court of BiH solely by that Court itself does not comply with the BiH Constitution or international standards.
- The control by the President of the Court of BiH in the assignment of judges to divisions, panels and cases is inconsistent with the ECHR's requirement of an independent and impartial tribunal.
- The power of the Court of BiH to impose on other courts binding legal positions and practice directions related to implementation and application of the law, violates the principle of independence within the judiciary and the BiH Constitution.
- The power of the Court of BiH to oust the jurisdiction of Entity Courts violates the rights of the Entities under the BiH Constitution and also the rights of defendants under Article 6 of the ECHR to an independent and impartial tribunal.
- The Court's discretionary power to exercise jurisdiction under Entity criminal laws is an unwarranted intrusion into the functions and powers of the Entities.

96. The Court of BiH must be replaced with an institution that meets the requirements of the BiH Constitution and European standards. Any Court of BiH must be established by amendment of the Constitution of BiH passed in accordance with constitutional procedures based on agreement of the Entities.

97. The Court of BiH must have expressly defined jurisdiction limited to matters that are appropriate and necessary for the institutions of BiH rather than the Entities to handle. The present Law on Court of BiH extends the Court's jurisdiction into matters that are clearly the responsibility of the Entities. For example, Article 7(2) of the Law grants the Court discretionary jurisdiction over criminal offenses under Entity laws, and that jurisdiction is subject to criteria that are so vague that they set no effective limits on the Court's exercise of authority constitutionally reserved to the Entities.

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<sup>71</sup> European Commission For Democracy Through Law (Venice Commission), *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, adopted by the Venice Commission at its 91<sup>st</sup> plenary session, paras. 16-20 (June 15-16, 2012) .

<sup>72</sup> *Id.*, paras. 20, 47.

<sup>73</sup> *Id.*, para. 101.

98. The Court of BiH cannot continue to be its own appellate court. Appellate jurisdiction must be removed from the Court of BiH. Doing so, either by splitting the Court of BiH or by establishing a new court, will require an amendment of the BiH Constitution.

99. The powers of the President of the Court must be curtailed so that they are not inconsistent with the independence of other judges on the Court.

100. The Court of BiH must have no power to prescribe for other courts binding interpretations on the application of BiH law and international treaties, nor may the Court have jurisdiction to impose “practice directions” on other courts for the application of substantive criminal law.

101. The Court of BiH must have no power to oust the jurisdiction of Entity courts in cases based on acts that are crimes under Entity laws or to institute proceedings on the authority of Entity criminal laws. The Court of BiH should not be permitted to continue to apply retroactively the war crimes provisions of the 2003 BiH Criminal Code.

102. The Court of BiH should be required to make public all its decisions, including its past decisions. The disclosure of the decisions already handed down should be prompt and future decisions should be published as soon as they are made.

103. Suggestions to create a Supreme Court of BiH should be rejected. Such an institution would invade the Entities’ constitutional responsibility for the interpretation and application of their own laws. The creation of such a court would, of course, require an amendment of the Constitution. In any event, there are other methods available to resolve where necessary inconsistencies between the laws of the Entities and BiH. As the Venice Commission suggested, in the absence of a BiH supreme court “a common or joint body composed of the representatives from the supreme courts of the two Entities, with appropriate representation of the Appellate Court of the Brčko District and the Court of BiH, could ensure the harmonization of the case law.”<sup>74</sup>

#### **IV. The Legacy of the Conflict**

##### **A. BiH justice institutions have shown a bias against Serb victims in the prosecution of war crimes.**

104. The equality of each person before the law is a fundamental principle of the Constitution of Bosnia and Herzegovina (BiH) and the European Convention on Human Rights. An analysis of BiH war crimes prosecutions, unfortunately, reveals a pronounced disparity in the BiH judicial system’s treatment of crimes against Bosniaks and crimes against Serbs. This analysis, which rests on independent sources such as Court of BiH records, ICTY judgments and studies, and reports by major international NGOs and news agencies, demonstrates that Serb perceptions of disparate treatment of war crimes by the BiH justice system are well founded.

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<sup>74</sup> *Id.*, para. 102.c. The Commission recommended that a supreme court at the state level be established, but expressly recognized that this action “would require amending the Constitution of BiH. *Id.*, para 102.b.

## 1. Examples of Prosecutorial Bias

105. BiH justice institutions' lack of emphasis on Serb victims is evident in its failure to convict—or even prosecute—the perpetrators of some of the most heinous crimes committed during the war.

106. Fair-minded independent observers have found that many of the worst atrocities against Serbs have never been prosecuted. Earlier this year, Reuters observed, “Few cases have been opened against Muslim officials since the war, fueling Serb accusations against the Sarajevo authorities of practicing selective justice.”<sup>75</sup> In a May 2011 report, the International Crisis Group (ICG) wrote that “many of the most serious” war crimes against Serbs, “especially those committed by Croatian Forces, the Army of Bosnia and Herzegovina and affiliated mujahidin units in summer and fall 1995, remain unprosecuted.”<sup>76</sup> Moreover, the ICG observed, “Other serious crimes in September and October 1995 were identified publicly as priorities by the state-level Prosecutor’s Office as early as 2007 but have not been prosecuted.”<sup>77</sup> The ICG concluded that the BiH chief prosecutor “owes Serbs an explanation” and called on the BiH Prosecutor’s Office to “make the cases a high priority.”<sup>78</sup>

107. In an October 2011 report, the ICG wrote, “The worst crimes against Serbs happened in the fall of 1995, in western Bosnian municipalities (Bosanski Petrovac, Ključ, Mrkonjić Grad and Sanski Most) as advancing Bosniak and Croat forces killed hundreds of Serb civilians, many of them elderly.”<sup>79</sup> The ICG, as noted above, endorsed Serb leaders’ efforts to “demand justice for these exceptionally serious crimes.”<sup>80</sup>

108. Below are some of the most egregious examples of the BiH judicial system’s failure to prosecute major crimes against Serbs.

### a) Sakib Mahmuljin and the El Mujahid Detachment

109. Among the most barbarous atrocities of the BiH war were those committed against Serbs by the El Mujahid Detachment (EMD). The EMD, a unit of the 3rd Corps of the Army of the Republic of BiH (ARBiH), was originally composed of foreign Mujahidin, but it came to be composed primarily of local Bosniaks.<sup>81</sup> The EMD, as confirmed by the ICTY, committed widespread war crimes, including the routine murder of Serb prisoners. Yet the EMD’s

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<sup>75</sup> REUTERS, *Bosnia opens trial of Muslims for war crimes*, 19 Apr. 2012.

<sup>76</sup> INTERNATIONAL CRISIS GROUP, *Bosnia: State Institutions under Attack*, *Crisis Group Europe Briefing N°62*, 6 May 2011, p. 7.

<sup>77</sup> *Id.*, FN 45.

<sup>78</sup> *Id.*, p. 7 (emphasis added).

<sup>79</sup> INTERNATIONAL CRISIS GROUP, *Bosnia: What Does Republika Srpska Want?* *Crisis Group Europe Report N°214*, 6 Oct. 2011, p. 22.

<sup>80</sup> *Id.*

<sup>81</sup> Judgment, *Rasim Delić* (Trial Chamber), 15 Sept. 2008, para. 412 (“*Delić*”).

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.<sup>82</sup>

110. The International Criminal Tribunal for the former Yugoslavia's (ICTY) 2008 *Delić* decision is far from a full accounting of the EMD's barbarism against Serbs. The decision, however, provides damning findings of fact with respect to some of the EMD's war crimes, as well as confirmation of the EMD's subordination to—and control by—Sakib Mahmuljin's 3rd Corps.

111. Below is a list of some of the *Delić* decision's conclusions about atrocities the EMD committed against Serbs:

- EMD soldiers murdered 52 Serb prisoners at the Kamenica camp between 11 September 1995 and 14 December 1995. (paras. 298-307)
- On 21 July 1995, in the village of Livade, EMD 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. EMD 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 EMD soldier murdered Milenko Stanić, a mentally disabled Serb prisoner. On the same date, either an EMD soldier or a soldier 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, EMD soldiers murdered a Serb prisoner who was in his seventies. (paras. 308-314)

112. The *Delić* decision also establishes the ARBiH Third Corps' responsibility for the EMD. 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

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<sup>82</sup> Sakib Mahmuljin was the Commander of the 3rd Corps from early 1994 until the end of the war. *Delić*, para. 117.

Corps which in this period was directly subordinated to him.”<sup>83</sup>  
(para. 364)

113. The *Delić* decision, moreover, finds that the EMD was under Rasim Delić’s effective control during the period in which the crimes above were committed, relying mainly on the control of the EMD by the 3rd Corps and its subordinate units, such as the 35th Division. The decision cites, among other evidence, the EMD’s compliance with combat and redeployment orders from the 3rd Corps and its subordinate units.<sup>84</sup> The EMD, 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 EMD (para. 414) and re-subordinated entire units to the EMD. (para. 416) At the end of the war, it was the 3rd Corps that disbanded the EMD. (para. 458)

114. 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.<sup>85</sup>

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

115. Sakib Mahmuljin, in addition to commanding the 3rd Corps, had a close relationship with the EMD. 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’.”<sup>86</sup> Mahmuljin negotiated the agreement under which the EMD was subordinated to the 3rd Corps and participated in the August 1993 inaugural ceremony

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<sup>83</sup> *Delić*, para. 364.

<sup>84</sup> *Delić*, paras. 388-402.

<sup>85</sup> *Delić*, para. 461 (footnotes omitted).

<sup>86</sup> *Delić*, para 431.

commemorating the formation of the EMD.<sup>87</sup> Mahmuljin continued to meet with the EMD after its subordination to the 3rd Corps, visiting EMD headquarters at least twice.<sup>88</sup> According to the *Delić* decision, when three women whom the EMD 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.’”<sup>89</sup>

116. In spite of the well-established facts surrounding EMD 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 treatment” by the EMD toward Serbs.<sup>90</sup> But despite the well established authority of the 3rd Corps over the EMD, neither Sakib Mahmuljin nor any other ARBiH commander with responsibility over the EMD has ever had to answer for the unit’s many *murders* of Serbs.

117. The failure of BiH institutions to prosecute a single member of the EMD—or a single ARBiH officer with responsibility over the EMD—for war crimes against Serbs creates an appearance of disregard for the suffering of Serbs during the war.

#### **b) Atrocities against Serbs in Eastern Bosnia**

118. Although it is well established that Bosniak forces committed a multitude of atrocities against Serbs in the Srebrenica vicinity of Eastern Bosnia, BiH judicial institutions have failed to charge anyone with these crimes.

119. In a front-page article in 1995, Toronto Star reporter Bill Schiller recounted his chilling visit to the home of ARBiH commander Naser Orić’s home in Srebrenica:

I sat in his living room watching a shocking video version of what might have been called Nasir Orić’s Greatest Hits.

There were burning houses, dead bodies, severed heads, and people fleeing.

Orić grinned throughout, admiring his handiwork.

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<sup>87</sup> *Delić*, paras 176, 178.

<sup>88</sup> *Delić*, para. 411.

<sup>89</sup> *Delić*, para. 318.

<sup>90</sup> 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.

When footage of a bullet-marked ghost town appeared without any visible bodies, Orić hastened to announce: “We killed 114 Serbs there.”<sup>91</sup>

120. Washington Post reporter John Pomfret, who joined Schiller on the same visit to Orić’s home, 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.”

121. The ICTY’s prosecution of Naser Orić ignored many of the most serious crimes committed against Serbs in Eastern Bosnia by ARBiH units under Orić’s command. However, the ICTY’s *Orić* case does establish that Bosniaks murdered Serbs and committed “wanton destruction” of Serb villages in the Srebrenica area. The ICTY Trial Chamber convicted Orić for his role in some of these crimes. Although the ICTY Appeals Chamber overturned Orić’s convictions because it found that his command responsibility had not been demonstrated, the Appeals Chamber did not disagree with the trial court’s findings with respect to the underlying war crimes committed against Serbs in the Srebrenica area. The Appeals Chamber emphasized, for instance, that it “has no doubt that grave crimes were committed against Serbs detained at the Srebrenica Police Station and the Building between September 1992 and March 1993.”<sup>92</sup>

122. Below is a list of some of the *Orić* Trial Chamber’s conclusions about atrocities committed against Serbs, none of which were challenged by the Appeals Chamber:

- On 21 June 1992, Bosniak fighters attacked the exclusively residential Serb village of Ratkovići and the nearby hamlet of Gornji Ratkovići while their civilian inhabitants were present and committed “wanton destruction” without military justification. (paras. 593-608) The Trial Chamber cited the “deliberate torching of property after the fighting had ceased.” (para. 605)
- On 27 June 1992, Bosniak fighters and civilians committed “wanton destruction” of the Serb village of Brađevina, without military justification. (paras. 609-619). Again, the Trial Chamber cited the “deliberate torching of property after the fighting had ceased.” (para. 616).
- On 8 August 1992, Bosniak fighters attacked the solely residential Serb village of Ježestica while its civilian inhabitants were present and engaged in “wanton destruction” without military justification. (paras. 620-633) The Trial Chamber noted that the “destruction of property by Bosnian Muslims was not a result of fighting, but rather due to the deliberate burning of property.” (para. 630)
- On 25 September 1992, at the Srebrenica police station, a Bosniak fighter named Kemal Mehmetović, known as “Kemo,” murdered Dragutin Kukić, a Serb prisoner. Kemo beat

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<sup>91</sup> *Fearsome Muslim Warlord Eludes Serb Forces*, TORONTO STAR, 16 July 1995, p. A1.

<sup>92</sup> John Pomfret, *Weapons, Cash and Chaos Lend Clout to Srebrenica’s Tough Guy*, WASHINGTON POST, 16 Feb. 1994.

Dragutin Kukić to death with a wooden log, then fired shots into Kukić's body before dumping it in a reservoir. (paras. 379-384)

- On 7 January 1993, Bosniaks again attacked the exclusively residential Serb village of Ježestica while civilian inhabitants were present and engaged in “wanton destruction” without military justification. According to the Trial Chamber, the “the details of the attack were planned by Hamed Salihović [President of the Srebrenica sub-region's Bosniak War Presidency] and Ramiz Bećirović [Chief of Staff of the sub-Region].” Again, the Trial Chamber noted that the “substantial destruction of property by Bosnian Muslims was not a result of fighting, but rather a result of deliberate burning of property.” (paras. 661-670, 671-676)
- In early 1993, four Serb prisoners, Milisav Milovanović, Kostadin Popović, Branko Sekulić, and Dragan Ilić were murdered while under Bosniak military police detention in a building behind the Srebrenica municipal building. Dragan Ilić had been detained in the summer of 1992, when he was 16 or 17 years old (paras. 385-411).

123. Despite these and other well established war crimes by Bosniaks against Serbs in the Srebrenica vicinity, BiH judicial institutions have not charged a single Bosniak with a crime against a Serb in the area. Like the impunity of the El Mujahid Detachment and its 3rd Corps commanders, the impunity of those who committed so many atrocities of Serbs in Eastern Bosnia casts doubt on the fairness of BiH judicial institutions.

### c) **Atif Dudaković**

124. Despite abundant evidence that ARBiH Gen. Atif Dudaković, the wartime commander of the ARBiH's 5th Corps, committed major war crimes against Serbs and others, the BiH Prosecutor has yet to bring charges against him.

125. Among the damning evidence against Dudaković is an amateur video taken in September 1995 that shows Dudaković ordering his troops to set fire to Serb villages in the Bosnian Krajina region.<sup>93</sup> The video, which first publically surfaced in August 2006, also shows houses and other property burning.<sup>94</sup> “Burn it all,” Dudaković says.<sup>95</sup> After the video became public, the Bosniak member of the BiH Presidency, Sulejman Tihić, promptly issued a statement rejecting all accusations against Dudaković.<sup>96</sup> In July 2009, another video surfaced, this one showing Dudaković ordering his troops to shoot two captured soldiers.<sup>97</sup>

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<sup>93</sup> *BiH presidency chairman rejects Serbia's accusations against wartime commander*, SETIMES.COM, 10 Aug. 2006.

<sup>94</sup> *Id.*

<sup>95</sup> Ian Traynor, *New Bosnian war footage shows 'crimes' against Serbs*, THE GUARDIAN (UK), 9 Aug. 2006.

<sup>96</sup> *BiH presidency chairman rejects Serbia's accusations against wartime commander*, SETIMES.COM, 10 Aug. 2006.

<sup>97</sup> *Footage surfaces showing war crimes by Bosniak general*, SETIMES.COM, 23 July 2009.

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

The prisoners prayed for help, and one older man asked to speak with the commander. One of the soldiers told him that the general [Dudaković] is in the motel and that he has ordered them to be killed. Shortly after, four soldiers with masks on and carrying automatic rifles came out and started shooting at the Serbian civilians. After that, they returned to the command area in the motel. I asked the soldier next to me who these men were, and he answered that they were the security team of Atif Dudaković.<sup>98</sup>

126. In September 2006, Republika Srpska filed with the BiH Prosecutor's Office a report against Atif Dudaković and other suspects for war crimes committed in 1994 and 1995 in several municipalities, including Bihać, Bosanski Petrovac, Ključ, Sanski Most, Krupa and other places. On 6 October 2006, BiH Chief Prosecutor Marinko Jurčević announced the opening of a war crimes investigation against Dudaković and several others.<sup>99</sup>

127. Republika Srpska filed another report against Dudaković in 2009, this one concerning the 1995 murder by Dudaković's 5th Corps of 26 Serb civilians in the area of Bosanski Petrovac Municipality. A BiH Prosecution spokesman in July 2009 confirmed that an investigation of Dudaković was "under way."<sup>100</sup>

128. In late 2009, Republika Srpska 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.

129. Today, some 17 years after the atrocities, six years after BiH's chief prosecutor first announced an investigation of Dudaković, and three years after the BiH Prosecution again confirmed that Dudaković was being investigated, there has still been no prosecution. The BiH Prosecutor must explain why, in spite of the overwhelming evidence against Dudaković and the magnitude of the crimes alleged against him, he has not been charged with a single crime. When such an obvious case for prosecutions languishes year after year in an endless and non-transparent "investigation," doubts as to the BiH justice system's fairness toward Serbs are well justified.

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<sup>98</sup> *Prosecutors meet to discuss Storm videos*, B92, 10 Aug. 2006.

<sup>99</sup> *BiH prosecutors investigate former Bosniak army commander Dudakovic*, SETIMES.COM, 10 Aug. 2006.

<sup>100</sup> *Bosnian Muslim commander to face war crimes probe*, CENTRE FOR PEACE IN THE BALKANS, 23 July 2009.

#### **d) The Tuzla Convoy Massacre**

130. On 27 April 1992, the Presidency of the Republic of Bosnia and Herzegovina (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.

131. 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 on vehicles' drivers. They then turned their fire on the passengers in the now-halted vehicles. At least 92 JNA members were killed in the massacre, including several military medical staff who had been riding in marked ambulances. At least 33 other JNA members were wounded.

132. The ICTY Prosecutor did not bring any indictments in the Tuzla Convoy case, but it gave the case “standard marking A,” meaning that it considered the evidence sufficient for indictments.

133. It was not until 2009 that the BiH Prosecutor finally brought an indictment arising out of the Tuzla Convoy massacre. In May of that year, the Court of BiH confirmed an indictment of Izet Smajić, a wartime police officer, who was accused of firing a pistol in the mouth of a wounded JNA member named Radovan Krstić.<sup>101</sup> However, simultaneous to the indictment, the BiH Prosecutor also made a motion to transfer the case to the Tuzla Cantonal Court.<sup>102</sup> The Court of BiH transferred the case to the Tuzla Cantonal Court on 18 June 2009.<sup>103</sup> That court acquitted Smajić in 2010, despite overwhelming evidence against him outlined in the BiH Prosecutor's indictment.<sup>104</sup>

134. The BiH Prosecutor's actions suggest a determination not to confront the Tuzla Convoy Massacre, the date of which Tuzla residents continue to celebrate each 15 May as “City Liberation Day.” Even when the BiH Prosecutor finally brought an indictment, it targeted a low-level police officer, Izet Smajić, in a discrete case of a crime by one individual against another. The charge was “War Crimes against the Wounded and Sick.” Because the case against Smajić did not depend on the broader context of the Tuzla Convoy Massacre, the BiH Prosecutor avoided ever alleging that the massacre itself was a war crimes violation. In addition, the BiH Prosecutor asked for the case to be transferred to the Tuzla Cantonal Court, where it must have known an acquittal was likely. The failure of the BiH Prosecutor to confront the illegality of the

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<sup>101</sup> Indictment of Izet Smajić, Prosecutor's Office of Bosnia and Herzegovina, 24 April 2009.

<sup>102</sup> Motion pursuant to Article 27 of The BiH CPC to transfer the Conduct of the Proceedings to the Court with Territorial Jurisdiction, Prosecutor's Office of Bosnia and Herzegovina, 24 April 2009.

<sup>103</sup> Court of Bosnia and Herzegovina summary of Izet Smajić case, available at [www.sudbih.gov.ba](http://www.sudbih.gov.ba).

<sup>104</sup> Similarly, in October 2009, the BiH Prosecutor brought an indictment of a Croat for a murder of a Serb in Kupres but simultaneously moved for the transfer of the case to Canton 10, which has a large Croat majority. The Court of BiH granted the motion, and the Canton 10 Court soon acquitted the accused.

Tuzla Convoy Massacre itself and the transfer of the case to the Tuzla Cantonal Court served to shield BiH judicial institutions from Bosniak criticism.

135. In May 2009, the BiH Prosecutor suspended its investigation of Tuzla's wartime mayor, Selim Beslagic, and other suspects in the Tuzla Convoy Massacre.<sup>105</sup> Thus, unless the investigation is reopened, BiH institutions will bring to justice not a single perpetrator of one of the worst atrocities of the war.

## **2. Statistics on Prosecutions and Convictions Demonstrate Bias against Serb Victims**

136. Statistics show that BiH judicial institutions were far more likely to deliver justice to a given Bosniak war crimes victim than a given Serb war crimes victim. The justice system, of course, should not seek to maintain a false ethnic balance of prosecutions and convictions. However, in a system free of ethnic bias, prosecutions and convictions should reflect the proportion of war crimes that were committed against members of each of BiH's peoples.

137. It is impossible to quantify with any precision the share of war crimes that were committed against members of each of BiH's peoples. That said, the most recent ICTY study of casualties during the BiH war, written by demographers of the ICTY prosecutor's office, makes clear that Serbs accounted for a large percentage of civilian war deaths, as well as total war deaths.<sup>106</sup> According to the ICTY study, Serbs accounted for 20.4% of the civilian war deaths and 21.7% of the total war deaths.

138. One might expect that war crimes prosecutions and convictions would reflect, at least somewhat, the proportions in which members of each people—particularly its civilians—were killed during the war. Unfortunately, this has been far from the case. Prosecutions in the Court of BiH have prioritized those accused of crimes against Bosniaks to an extent that is wildly inconsistent with the ethnic breakdown of civilian deaths during the war. At the same time, prosecutions in the Court of BiH have largely ignored those accused of crimes against Serbs, despite the war's devastating toll on Serbs in general and Serb civilians in particular.

139. The Court of BiH has produced final convictions of just five Bosniaks for war crimes against Serb civilians. Meanwhile, the Court has produced final convictions of 62 Serbs for war crimes against Bosniak civilians. Thus, for every final conviction of a Bosniak for war crimes against Serb civilians, there have been more than 12 such convictions of Serbs for war crimes against Bosniak civilians. This enormous disparity in the number of convictions cannot possibly reflect the reality of a war in which, according to the ICTY's estimate, 7,480 Serb civilians were killed.

140. The Serbs with final convictions for war crimes against Bosniak civilians have been sentenced to a total of 1,028 years of imprisonment. By contrast, the Bosniaks with finalized convictions for war crimes against Serb civilians have been sentenced to a total of 56 years of

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<sup>105</sup> *20 years since massacre of ambushed JNA troops*, TANJUNG, 15 May 2012.

<sup>106</sup> Jan Zwierchowski and Ewa Tabeau, *The 1992-95 war in Bosnia and Herzegovina: Census-Based Multiple System Estimation of Casualties' Undercount*, 1 Feb. 2010 ("ICTY Study").

imprisonment. Thus, for every year of imprisonment given to a Bosniak for war crimes against Serb civilians, a Serb has been sentenced to more than 18 years of imprisonment for war crimes against Bosniak civilians.

141. To put these figures in perspective: Bosniaks convicted for war crimes against Serb civilians have been sentenced to less than 3 days in prison for each Serb civilian death estimated by the ICTY. By comparison, Serbs convicted for war crimes against Bosniak civilians have been sentenced to more than 14 days for each Bosniak civilian death estimated by the ICTY.

142. Altogether, the Court of BiH has imposed final sentences of 1,226 years of imprisonment for war crimes against Bosniaks and just 103 years for war crimes against Serbs. The tremendous differences in sentencing by the Court of BiH, like the giant disparity in the number of convictions, are inconsistent with any reasonable assessment of the war.

143. What makes disparities such as these even more unjust is that they follow years of neglect for Serb victims by the ICTY. That court, in finalized cases, has sentenced Bosniaks to just 41.5 years for war crimes against Serbs while finalizing sentences of 902 years for RS Serbs for war crimes against Bosniaks (for the purposes of this comparison, a life sentence is counted as 50 years). That means that for every year of imprisonment the ICTY has given to a Bosniak for war crimes against Serbs, a Serb has been sentenced to almost 22 years of imprisonment for war crimes against Bosniaks.

144. The statistics on the Court of BiH's war crimes cases demonstrate that a given Serb war crime victim has been much less likely to receive justice than a given Bosniak war crime victim. These statistics compel the conclusion that the BiH judicial institutions are weighted against Serbs and in favor of Bosniaks.

145. It is necessary to respect the principle of equality before law. Ethnicity should not be a factor in whether a war crime is punished. But this investigation of major, unprosecuted war crimes against Serbs and the Court of BiH's record makes abundantly clear that the BiH judicial system has not treated Serbs fairly. There is no good explanation for BiH authorities' failure to prosecute the well-established war crimes against Serbs outlined above. Moreover, the Court of BiH's convictions and sentencing for war crimes show that a given Serb victim of a war crime is much less likely to see justice than a given Bosniak victim. The fundamental principle of equality before law demands that Serbs be treated equally to other ethnicities in the prosecution of war crimes.

## **B. The suffering of war crimes victims of all ethnicities must be recognized.**

146. Victims of conflict and particularly victims of war crimes and crimes against humanity suffer regardless of their racial, ethnic or religious background. In the process of post-conflict reconstruction and reconciliation, therefore, recognizing and respecting the suffering of all victims is vital for a successful transformation from the conflict to lasting peace and stability. Unfortunately for BiH, even a generation after the war, the ethnicity and religious affiliation of victims plays a significant role in how they are treated.

147. The most recent example of such disparate treatment war of victims based on their ethnicities came during last month's visit of ICTY Prosecutor Serge Brammertz to BiH. Despite

demands by the representatives of Croat and Serb war crime victims to meet with Brammertz during his visit, he declined, opting to meet solely the representatives of Bosniak victims. Such discrimination on the basis of ethnicity is unacceptable. This October, a letter was sent to ICTY, UNGA and UNSC, from the Chairman of the Association for Missing Persons of the Sarajevo-Romanija area and member of the Advisory Board of the Missing Persons Institute, Milan Mandić, protesting against such Brammertz's actions.

148. While the Geneva Conventions and their Additional Protocols require distinction between combatants and civilians as well as between the various belligerent parties, such distinction is unequivocally not permitted with regard to the treatment of the wounded, sick or shipwrecked.<sup>107</sup> The corollary to this legal requirement within the laws and customs of war is that all victims should be recognized and treated for the harm experienced as a result of the war, with no distinction made for their ethnic, racial, religious or other identifying traits. Indeed, in 1985, the United Nations clarified such principles in its Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>108</sup> The overarching principle of the Declaration is that "Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."<sup>109</sup> In defining the scope of the Declaration, the UN explicitly stated that no distinction on ethnic or religious lines was permissible when considering victimhood.<sup>110</sup> Local and international actors within BiH, however, continue to fall afoul of these principles.

149. In the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, victims are not in any way defined regarding their affiliations – ethnic, religious, political or otherwise.<sup>111</sup> Article 10 deals with the treatment of victims and provides: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."<sup>112</sup> Victims in BiH, therefore, must be recognized for their suffering, not their ethnic or religious background.

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<sup>107</sup> See, e.g., Additional Protocol I to the Geneva Conventions, art. 9(1) (1977).

<sup>108</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/GA/Res 40/34 (29 November 1985)

<sup>109</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, art. 4.

<sup>110</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, art. 3.

<sup>111</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/GA/Res 60/147 (16 December 2005).

<sup>112</sup> *Id* at art. 10.

150. Indeed, the ongoing failure to recognize victims of the war in BiH creates a situation whereby the unrecognized victims are further harmed in a process of re-victimization.<sup>113</sup> By applying the politically-oriented parsimonious wartime narrative of good versus evil to victim policies, domestic and international actors in BiH are potentially sowing the seeds of long-term tension by creating a segment of the population which has been disregarded and discarded in the post-conflict reconstruction initiatives. In order to counteract such a dangerous trend, all victims, regardless of their ethnic, religious or other background must be recognized for their suffering. Only once such recognition and reconciliation occurs can BiH fully proceed with the process of healing and the transition to long-term peace and stability.

### **C. The identification of war victims must not be tainted by politics.**

151. The BiH Missing Persons Institute (MPI) was created jointly by the BiH Council of Ministers and the International Commission on Missing Persons (ICMP) in 2005. According to its founding agreement, the MPI was set up to accelerate the tracing and identification of persons missing as a result of the 1992-1995 conflict. It was to that end that the Central Records on the Missing (CRN) was set up within the MPI, compiling a definitive and verified list of missing persons based on various lists from both Entities, the ICMP, the International Committee for the Red Cross (ICRC), and various missing persons families' associations. An overarching and expressed aim of both the MPI and the creation of the CRN is to expedite the process of tracing and eliminate political manipulation of numbers of missing persons and verification of the single Central Records on the Missing.

152. Since one of the MPI's central goals is to safeguard the information surrounding missing persons from political manipulation, it is highly objectionable that one of the members of the Board of Directors—the organ of governance with the most direct access to and the responsibility for publicly presenting that information—is also a politician. Amor Mašović is both the Bosniak member of the MPI's Board of Directors and a member of the Federation of BiH Parliament from the SDA. These dual roles produce an unmistakable conflict of interest, significantly undermining the MPI, calling into question the legitimacy of its work, and serving as yet another example of the opaque and improper performance of BiH state institutions.

153. A part of this problem was that Amor Mašović himself prevented feeding the primary and complete database of the Federation Missing Persons Commission into the CRN (which was an obligation under the BiH Missing Persons Act (Articles 4, 5 and 21)). Because of that, the CRN never became fully operational although the Act required that it should be operational within one year as of the MPI's formation, i. e. on 1 January 2009. The situation is similar with the process of missing persons verification, where truly missing persons are identified; such persons are then included in the tracing list and their families become entitled to benefits specified in the law. Namely, the process of verification was conducted without checking official records for the persons reported as missing or the place and date of disappearance. In this way, an opportunity for politically motivated manipulation was created, as persons who had died before the war or had gone missing in a completely different place or time could be reported missing in the context of particular events when doing so would be politically convenient.

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<sup>113</sup> David Bloomfield, Teresa Barnes & Luc Huyse, eds., *Reconciliation After Violent Conflict: A Handbook*, 61 (2003)

154. Instead of sanctioning such abuses of the process of tracing the missing in BiH for political purposes of one party and nationalist political agendas, the ICMP as a co-founder launched a project of hasty verification, the effect of which was to cover up all manipulations and unlawful actions of responsible persons, which yet again harms the non-Bosniak families of the missing.

155. As noted, victims of war are victims irrespective of their ethnicity. Unfortunately, however, the inherent conflict of interest of having a Federation politician on the Board of Directors of the MPI violates international obligations toward victims by re-victimizing the families of the missing through ethnic-based manipulation of what ought to be considered a transitional justice process. Until Amor Mašović is removed from the MPI Board of Directors, it is impossible to trust that in the process of tracing the missing, the Institute is genuine with the families, particularly if one takes into account the well-established fact that the ICMP set up the PIP (Podrinje Identification Project, a project tracing only Bosniak missing persons) and that only 3% of Serb victims are identified annually despite the fact that 15-20% of the total number of missing persons are Serbs.

## **V. OHR's continued presence is inhibiting BiH's political and economic development.**

### **A. The powers claimed by the High Representative drastically exceed his authority under the Dayton Accords.**

156. The High Representative continues to assert powers that drastically exceed his mandate under Annex 10 of the Dayton Accords and violate the human rights of BiH citizens. The High Representative's scope of authority under Annex 10, as summarized by Matthew Parish, a former OHR attorney, is to be "a manager of the international community's post conflict peace building efforts, and a mediator between the domestic parties."<sup>114</sup> In defining the High Representative's legal authority, Annex 10 uses such verbs and phrases as "monitor," "promote," "coordinate," "facilitate," "participate in meetings," "report," and "provide guidance." Annex 10 does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens.

157. The extraordinary powers asserted by the High Representative—the so-called Bonn Powers—originate from a declaration made by the PIC, an *ad-hoc* collection of countries, at a conference in Bonn, Germany, two years after Dayton. The PIC did not purport in its declaration to grant additional authority to the High Representative—nor could it, given its own absence of legal authority. Rather, the PIC stated that it "welcomes the High Representative's intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions" on certain issues. This self-serving, self-claimed expansion of power by the High Representative came to be known as the "Bonn Powers." As Parish, the former OHR attorney, has recognized, the PIC's Bonn declaration "ran quite contrary to the spirit and text of Annex 10 to the [Dayton Accords], and was *legally quite indefensible*."<sup>115</sup> Neither the High Representative

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<sup>114</sup> Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007, p. 13.

<sup>115</sup> *Id.*, p. 14 (emphasis added).

nor the PIC, as a matter of law, had authority to expand the High Representative's limited powers granted under the Dayton Accords.

158. The RS Government continues to urge everyone to read Annex 10 and confirm for themselves that there is no provision that conceivably could be interpreted to give the High Representative extraordinary powers such as the authority to make laws by decree or punish individuals at the stroke of his pen. Indeed, no official in any state governed according to the rule of law has such powers.

159. The Bonn Powers have so little legal credibility that even High Representative Inzko last year said, "I am not a great supporter of the Bonn Powers."<sup>116</sup> But that has not stopped him from continuing to assert and (without legal authority) to exercise them. It is long past time for the international community to demand that the High Representative abandon internationally illegal exercise of "executive powers" and observe the limits of his Dayton authority.

### **B. Support for the High Representative and the Bonn Powers is diminishing.**

160. Support for the High Representative—and particularly his so-called Bonn Powers—is continuing to evaporate. The RS, for the reasons explained above, has long rejected the Bonn Powers as illegal and called for the closure of OHR. But the RS is far from alone.

161. On 13 February 2012, BiH Council of Ministers Chairman Bevanda, a Croat, said:

[T]he international community needs to withdraw all of the decisions which it has imposed contrary to the Constitution and laws of BiH. We primarily need an agreement of the local actors, and to have the international community present as someone who can be of help to us, and not hinder and create problems by taking incoherent moves. The suspension of the decision of the Central Election Commission (regarding the election of the Government in the Federation) is disastrous. . . . I believe that the only thing we need to do is stick to the laws and the constitution, nothing more.<sup>117</sup>

162. More and more international observers are also concluding that a High Representative wielding Bonn Powers must not continue. The Bonn Powers have always been founded not in law but in the support or acquiescence of key members of the international community. That foundation is crumbling. The international community, at last, is coming to understand the need to end the Bonn Powers and put BiH's future in the hands of its citizens and elected leadership.

163. In its most recent report on BiH, the U.S. Congressional Research Service wrote:

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<sup>116</sup> Xinhua, UN envoy refuses to force Bosnian politicians to form government, 16 Feb. 2011.

<sup>117</sup> 'Međunarodna uprava treba poništiti sve nametnute odluke, a ne da nam odnemaže nesuvislim potezima', DNEVNIK.BA, 13 Feb. 2012.

Many observers in and outside of Bosnia believe that OHR retains little credibility in Bosnia, and therefore should be eliminated in the near future. On the other hand, some countries, including the United States, do not want to eliminate OHR before the objectives and conditions are met, perhaps for fear of suffering a blow to their own credibility.<sup>118</sup>

164. The UN Security Council's May 2012 debate on BiH brought new indications that the era of the High Representative's dominion over BiH is nearing an end. The EU and its largest member states called, at a minimum, for a shifting of functions away from the OHR and toward the EU Special Representative.

165. In its statement before the Security Council, Germany suggested the OHR is obsolete and called for a transfer of OHR responsibilities to the EU. Germany pointedly rejected the need for continued foreign superintendence of BiH, observing, "[C]lose and far-reaching monitoring and supervision by the international community was undoubtedly a necessity in the past. It has not succeeded, however, in creating incentives for politicians in Bosnia and Herzegovina to seek compromise solutions rather than advancing their nationalist agendas."

166. After welcoming the "contribution" of the High Representative and OHR during the "past 17 years," Germany stressed:

It is now time, however, to focus on concepts and instruments that have shown to initiate positive developments, rather than on obsolete approaches. The EU perspective is finally occupying center stage in Bosnia and Herzegovina; we can now afford to relieve the Office of the High Representative of tasks that are fulfilled by the EU and its representatives on the ground.

167. While expressing support for the High Representative's efforts, France said, "His mission and the resources available to him obviously have to develop in accordance with the situation." France emphasized: "Five months after the European Union Council of Foreign Ministers adopted clear conclusions on reducing the size of Office of the High Representative in Bosnia and Herzegovina, on 5 December 2011, it is time to move on to action. We should recalibrate the work of the Office with a view to creating complementarity vis-à-vis the work of the European Union."

168. Serbia, the newest candidate for EU membership, said at the Security Council debate, "We believe that steps should be taken towards closing the Office of the High Representative and terminating the so-called Bonn powers, because the legitimately elected representatives of all peoples and entities have the ability and capacity to take over the responsibility for independently managing the affairs of the State."

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<sup>118</sup> Steven Woehrel, *Bosnia: Current Issues and U.S. Policy*, Congressional Research Service, 29 Feb. 2012, p. 6.

169. The EU itself, in a statement to which Germany, France, Portugal, and Croatia associated themselves, said the EU “looks forward to continuing discussion with the international community on the reconfiguration of the international presence, including its downsizing and possible relocation of the OHR, in the appropriate forum. In this regard, it notes the ongoing discussions on overlapping tasks between the OHR and the EU.”

170. The United States is also indicating its support for—at least—reducing the OHR’s role. In a September 2012 speech, U.S. Ambassador to BiH Patrick Moon said that the time for “intrusive international intervention” was over. Ambassador Moon explained:

Our approach for promoting these objectives in BiH has evolved from the immediate post-war period of intrusive international intervention, which was necessary at the time to overcome Dayton obstructionism and to ensure BiH had the basic tools required to enter the process of NATO and EU integration, toward a more subtle approach of using the NATO and the EU accession processes themselves as the drivers for reform.”<sup>119</sup>

171. The international community’s declining support for OHR intervention in BiH affairs was evident in a recent interview by Principal Deputy High Representative Roderick Moore, who emphasized that the “OHR does not intend to stay here forever.” Ambassador Moore said, “We wish the local politicians, local actors to take responsibility for decision-making. It is a strategic determination of the international community, in which the OHR plays a key role, to step back.” Ambassador Moore also said, “The OHR should not stay even a day longer than necessary. It is unusual - I am the first one to admit it - that the institution like the OHR still exists.”

### **C. The High Representative frustrates democratic consensus-building.**

172. Another reason the High Representative’s position must be terminated is that his looming presence undermines consensus building among BiH’s Constituent Peoples and major political parties. As a major, extra-constitutional center of power, the High Representative badly distorts the incentives necessary for striking compromises. Instead of engaging in the difficult give and take of political negotiations, many political actors seek to enlist the High Representative as a potent ally.

173. The Bosniak political parties, in particular, habitually make maximalist demands in hopes that the High Representative will intervene on their behalf or otherwise bolster their position in talks. These hopes have often been fulfilled. The International Crisis Group wrote in a November 2009 report that the SDP, one of the two main Bosniak parties, considers the OHR its “main negotiating leverage.”<sup>120</sup> The High Representative’s most recent major intervention on behalf of Bosniak parties, as explained in Section V-C-1, below, was his calamitous 2011 decree imposing a new government on the Federation.

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<sup>119</sup> Ambassador Patrick Moon, Speech to Paul H. Nitze School of Advanced International Studies, 10 Sept. 2012.

<sup>120</sup> ICG November 2009 Report, pp. 5-6.

174. During the first half of 2012, BiH's elected leadership reached a series of important compromises and enacted laws that moved BiH forward toward EU membership. These strides were only possible after it had become clear that the High Representative would not intervene to impose a solution.

175. There is a growing realization inside and outside BiH that the High Representative's presence hinders democratic consensus building. Even the High Representative's principal deputy, Roderick Moore, admitted in a September 2012 interview, "[T]here have been some tendencies to get the international community [i.e., the OHR] involved in the local political processes, which I think is harmful." Yet there are signs that the High Representative has forgotten the lesson of recent years—that intervention in BiH politics only serves to retard political development.

### **1. The High Representative's March 2011 Decree**

176. In early 2011, the High Representative took it upon himself to mediate a dispute over the formation of a new government of the Federation. He soon presented the disputing parties a "compromise" proposal, which the Bosniak parties accepted but the Croat parties rejected. Following the failure of the High Representative's talks, the largest Bosniak party formed a Federation government in flagrant violation of the Federation Constitution. The illegally formed government excluded the two largest Croat parties and gave positions reserved for Croats to either to Bosniak parties or fringe Croat parties such as the extremist HSP-BiH.

177. In a March 2011 decision, the BiH Central Election Commission rightly declared the formation of the Federation government unlawful and annulled it.

178. The High Representative, however, without any legal authority, quickly responded by handing down a decree overruling the Central Election Commission's decision, effectively imposing a new, illegally-formed government on the Federation.

179. The High Representative's imposition of the Federation Government is widely considered to have been unlawful and disastrous. The March 2011 decree, as the President of the International Crisis Group wrote, "undermined state bodies and the rule of law."<sup>121</sup> The two largest Croat parties, in a joint statement, said the decree "represents the introduction of an emergency in the state and the destruction of constitutional order." Even Bosniak parties blasted the decree; the Social Democratic Union said it "egregiously violated the principle of legality and legitimacy of the institutions of the state." In a September 2012 interview with Principal Deputy High Representative Roderick Moore, Croatia-based newspaper *Večernji List* said the High Representative's imposition of the Federation government "led to the biggest crisis since the signing of the Dayton Agreement."

180. The March 2011 decree badly undermined efforts to form a new BiH Council of Ministers. The High Representative's forceful intervention on behalf of the SDP signaled to the SDP that it could expect similar help in the BiH-level negotiations, emboldening it to eschew

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<sup>121</sup> Letter from Louise Arbour, President and CEO of International Crisis Group, to PIC Steering Board Ambassadors, 2 May 2011.

compromise. The High Representative's intervention to prop up a Federation government in which the Bosniak parties had marginalized the Croats also threatened the Croats' constitutional status as one of BiH's three Constituent Peoples. This exacerbated tensions between the major Croat and Bosniak parties, further crippling the negotiations on the formation of a new BiH Council of Ministers.

## **2. The Mostar Dispute**

181. This autumn, the High Representative launched a new initiative to mediate between Bosniak and Croat parties, this time with respect to a dispute over the electoral system of the city of Mostar. The previous Mostar electoral system, which had been imposed by the High Representative, was declared unconstitutional by the BiH Constitutional Court in 2010.

182. The participants in the new Mostar talks undoubtedly remember the result of the High Representative's previous mediation effort: after the Croat parties rejected the High Representative's proposed solution, the High Representative issued a decree giving the Bosniak parties what they wanted. Recalling this history, along with earlier interventions on their behalf, the Bosniak parties have no incentive to compromise.

## **3. The OHR has stifled BiH's political development by disregarding democratic principles and human rights.**

183. Since the end of the conflict in 1995, BiH has only known governance subject to the final authority—whether actual or perceived—of the OHR. As Aleksandar Momirov's recent study explores, all international territorial administrations (ITAs) suffer from an inherent deficit in accountability.<sup>122</sup> While such deficiencies have traditionally been overlooked on the grounds of short term necessity,<sup>123</sup> the OHR in BiH has been the only model of governance that BiH has known for nearly a generation.

184. Momirov identifies three key public law explanations for why ITAs lack accountability and why such deficiencies cannot be easily rectified. First, "no legal framework exists within which ITA missions are expected to operate and, consequently, no clear yardstick against which the administering entity can be scrutinized are at hand."<sup>124</sup> Second, "while behaving as states rather than international organizations, the administering entities are shielded by a set of all-encompassing immunities, rooted in functional necessity-related arguments... [thereby] prevent[ing] international administrations from being subjected to judicial review."<sup>125</sup> Finally, since ITAs "enjoy an all-inclusive and highly concentrated mandate[,] ... international administrators enjoy the final say in virtually all matters of public concern leaving no space for

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<sup>122</sup> Aleksandar Momirov, *Accountability of International Territorial Administrations: A Public Law Approach*, 250 (2011).

<sup>123</sup> Momirov at 8.

<sup>124</sup> Momirov at 113.

<sup>125</sup> Momirov at 113-14.

independent judicial scrutiny or, effectively, any other form of institutional checks and balances.”<sup>126</sup> All three of these dynamics have been the hallmark of the OHR.

185. It is not surprising, therefore, that BiH domestic governance structures have replicated the opaque and unaccountable facets found in ITAs. Unfortunately, however, such deficiencies in transparency and accountability are anathema to good democratic governance and will, if perpetuated, frustrate citizens’ legitimate demands and prevent accession to the EU. The OHR legacy should be disavowed and the OHR terminated. The EU and the international community must focus on positive reinforcement for access to information and accountable governance by BiH institutions.

#### **D. Brčko supervision must be permanently closed.**

For several years, the PIC Steering Board has been discussing termination of international supervision of the Brčko District in BiH. Since last year termination has appeared imminent, as the traditional powers of the PIC appeared ready to agree with most European members who favored termination. Some Bosniak leaders, however, urged continuation of international rule, seeking to maximize the presence of their international supervisors they consider to be key allies. On 3 May, Bakir Izetbegovic, the Bosniak member of the BiH Presidency, published an open letter to the PIC Steering Board that opposed the end of the supervisory regime.

The PIC Steering Board—save one member—has come to recognize that BiH and its Entities have fulfilled all of the requirements for closure of supervisory regime in Brčko District. At its December 2011 meeting, the Steering Board said it would “work expeditiously with a view to taking a decision on ending Brcko supervision by the next meeting of the PIC.” Based on the communiqué and public statements that followed the December 2011 PIC Steering Board meeting, the RS Government had every expectation that that Brčko supervisory regime would be terminated at the Steering Board’s May 2012 meeting.

Instead, the PIC Steering Board made an ambiguous decision to “suspend” the supervisory regime. The Steering Board’s failure to terminate supervision stemmed from an objection by Turkey (representing the International Islamic Conference), a close ally of Izetbegović’s SDA party.

All conceivable conditions for closure having been fulfilled, there was no defensible reason for the failure to terminate supervision in May. The Brčko supervisory regime must be officially ended.

#### **E. Justice requires redress for OHR’s extrajudicial punishments.**

186. The High Representative continues to assert that he has the power to punish BiH citizens without hearing or appeal, simply by handing down a decree. This is unacceptable in a free society.

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<sup>126</sup> Momirov at 114.

187. In June 2011, Ambassador Inzko lifted some of the illegal punishments that his predecessors had imposed extrajudicially on individuals. The High Representative's June 2011 decisions lifted 58 bans on public employment and political activity that earlier High Representatives had imposed—unilaterally and without any form of due process—against BiH citizens.

188. Although Ambassador Inzko's June 2011 decisions were a small, positive step, they were far from what is required to correct the High Representative's grave and continuing abuse of human rights and the rule of law. The decisions did not acknowledge fault and did nothing to allow for compensation for grievous damage that these extrajudicial punishments inflicted on the lives of the banned individuals. Moreover, many BiH citizens remain banned from public life or continue to suffer under other illegally decreed sanctions. Remarkably, Ambassador Inzko continues to assert that he has the power to punish BiH citizens simply by handing down a decree.

189. Since 1998, the High Representative has removed and banned nearly 200 citizens of BiH, including democratically elected presidents, legislators and mayors, as well as judges, police officials, university professors, and public company executives. The High Representative has also issued other decrees blocking bank accounts and seizing travel documents, indefinitely. When imposing these punishments, the High Representative allows the victims no notice of the specific charges or evidence against them, no right to confront their accusers, no opportunity to contest the charges, and no appeal.

190. When the BiH Constitutional Court ruled unanimously that the absence of a remedy for citizens punished by the High Representative violated the European Convention on Human Rights, the High Representative issued a decree nullifying the decision and ordering judges to dismiss any proceeding that “challenges or takes issue in any way whatsoever with one or more decisions of the High Representative.”<sup>127</sup>

191. The High Representative's summary punishment of individuals flagrantly violates the due process and other protections of the BiH Constitution and the European Convention on Human Rights. It also violates the “General Principles” set forth in Article 2 of BiH's Stabilisation and Association Agreement with the European Union. Obviously, the High Representative's simultaneous pose as a prosecutor and judge radically exceeds his limited mandate in Annex 10 of the Dayton Accords. These actions are an affront to the principles of international law, the sovereignty of BiH and the rule of law.

192. In 2009, the Commissioner for Human Rights of the Council of Europe wrote about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the OHR as an example.<sup>128</sup> He wrote: “When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same checks and

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<sup>127</sup> Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, 23 March 2007.

<sup>128</sup> Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at [www.coe.int/t/commissioner/Viewpoints/090608\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/090608_en.asp).

balances as we require from a democratic government. . . . No-one, especially an international organization, is above the law.”<sup>129</sup>

193. The individuals summarily punished by the High Representative can never recover the lost years and the good reputations that were taken from them. Even so, the international community has a responsibility to do what it can to correct this injustice. All remaining extralegal sanctions against individuals, of course, must be lifted. The international community should renounce any support for the High Representative’s claim to authority to punish individuals by decree. But these steps are not enough. Those who were wronged by the High Representative’s violations of human rights are entitled to legal redress.

## **VI. The Security Council should eschew reference to Chapter VII.**

194. For the UN Security Council to act under Chapter VII of the UN Charter, it must “determine the existence of any threat to the peace, breach of the peace, or act of aggression.” The situation in BiH does not remotely meet any of these criteria and, thus, does not warrant the Security Council to continue to act in BiH under Chapter VII.

195. BiH has been at peace for almost 17 years. Military assessments continue to refute any suggestion that the situation in BiH is a threat to international peace and security. For many years, the EUFOR ALTHEA mission in BiH has reported that the situation in the country is “calm and stable.” As the German ambassador to the United Nations, Peter Wittig, recently observed, neither EUFOR ALTHEA nor its predecessor missions, SFOR and IFOR, ever had to intervene to maintain peace.<sup>130</sup>

196. In March, Commissioner Füle told the European Parliament that the EUFOR/ALTHEA Mission “now confirms on a regular basis that there is no threat to the safe and secure environment.”<sup>131</sup> Commissioner Füle noted that “in light of improvements in law enforcement we have . . . been able to decide on terminating the European Union Police Mission in June this year.”<sup>132</sup> In April, Journalist Tim Judah observed, “For all the lingering resentments and differences between the communities, disputes have remained within the political realm since 1995. They have never spilled back into violence.”<sup>133</sup>

197. The EU’s recent decisions reflect its appreciation of BiH’s longstanding stability. At its October 2012 meeting, the EU’s Foreign Affairs Council said it “welcomes the reconfiguration of Operation Althea, completed by 1 September 2012, with a reduced number of forces based in

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<sup>129</sup> *Id.*

<sup>130</sup> Permanent Mission of Germany in United Nations, Statement by Ambassador Wittig on Bosnia and Herzegovina in the Security Council, 15 Nov. 2011.

<sup>131</sup> Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, Address at the plenary debate on Bosnia and Herzegovina, 14 March 2012.

<sup>132</sup> Štefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, Address at the plenary debate on Bosnia and Herzegovina, 14 March 2012.

<sup>133</sup> Tim Judah, *Bosnia’s Come a Long Way, Don’t Be Fooled by War Memories*, BLOOMBERG, 8 April 2012.

Bosnia and Herzegovina . . . .”<sup>134</sup> A year earlier, EU foreign ministers had agreed to cut the size of the EUFOR/ALTHEA force from approximately 1,300 to 500-600.<sup>135</sup> Swedish Foreign Minister Carl Bildt, a former High Representative in BiH, told reporters, “I don’t think the problem in Bosnia is of a military nature; it is of a political nature.”<sup>136</sup> The EU, in the past year, has also shifted EUFOR to capacity building and training.<sup>137</sup>

198. Apart from the deeply-rooted peace, BiH has made tremendous progress during the years since the war. As Judah wrote, BiH’s “transformation since [the war] has been almost miraculous.”<sup>138</sup> BiH, its Entities, and their political subdivisions have held numerous elections, consistently certified by international observers as free and fair. In recent years, BiH has served as a member of the Security Council, satisfied the requirements for a NATO Membership Action Plan, participated in NATO operations and UN peacekeeping, been admitted to the Council of Europe, and signed a Stabilization and Association Agreement as an important step toward EU membership. BiH’s economy has grown in 15 out of the 16 years since the war. Moreover, the rapid political progress in the first half of 2012 showed that BiH’s constitutional leadership is capable of finding common ground and resolving thorny issues through negotiation and compromise.

199. In a March 2012 speech, the Head of the EU Delegation to BiH, Ambassador Sørensen said:

Bosnia and Herzegovina has managed to come a long way since those days in the early 90s. A majority of the refugees have returned, there is no ethnic violence, and the economy is slowly improving. Bosnia – to be frank – resembles more or less any other country in the Western Balkans with similar problems and advantages.<sup>139</sup>

200. The EU’s recently released 2012 Progress Report for BiH observes that both civil and political rights and economic and social rights “are broadly respected.”<sup>140</sup> In its summary of BiH’s progress on regional issues and international obligations, the report says:

Bosnia and Herzegovina’s cooperation with the ICTY has continued to be largely satisfactory and a number of important steps have been taken to process war crimes. . . . Efforts to find

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<sup>134</sup> Council conclusions on Bosnia and Herzegovina, 3191st Foreign Affairs Council Meeting, 15 Oct. 2012.

<sup>135</sup> EU agrees to cut down troop numbers in Bosnia military mission, DPA, 11 Oct. 2011.

<sup>136</sup> *Id.*

<sup>137</sup> Council conclusions on Bosnia and Herzegovina, 3191st Foreign Affairs Council Meeting, 15 Oct. 2012.

<sup>138</sup> Tim Judah, *Bosnia’s Come a Long Way, Don’t Be Fooled by War Memories*, BLOOMBERG, 8 April 2012.

<sup>139</sup> Address of the EU Special Representative to BiH, Meeting with the Joint Committee on European Affairs, The House of the Oireachtas (Irish Parliament), 28 March 2012.

<sup>140</sup> EC 2011 Report on BiH, pp. 17, 19.

the missing persons from the 1992-1995 conflict continued. The country has continued to participate actively in regional cooperation and to maintain good neighbourly relations.

A peacekeeping contingent from the BiH Armed Forces continues to participate in the NATO-led International Security Assistance Force in Afghanistan.

201. After all of these years of stability, and progress, there is simply no justification for a determination that the situation in BiH constitutes a threat to international peace and security. Misuse of Chapter VII powers damages the Security Council's credibility and weakens the long-term viability of Chapter VII itself. The Security Council should forego further reference to Chapter VII with respect to the situation in BiH.

## **VII. Conclusion**

202. After a highly productive beginning to 2012 and a summer deadlock caused by a rift between the largest Bosniak parties, BiH leaders are again working together in a spirit of cooperation to move BiH forward. The RS will continue its efforts to build consensus so that BiH can resolve urgent matters like the implementation of the *Sejdić-Finci* decision. The RS will also press for reforms to BiH institutions to improve their efficiency and accountability, align them with the Constitution, and foster economic progress. Through the EU Structured Dialogue on Justice, the RS is working to reform BiH's judicial system so that it meets European standards and conforms to the Constitution. The RS is also insisting that Serb victims of war crimes be treated equally to victims belonging to other Constituent Peoples. In addition, the RS continues to call for an end to the High Representative's detrimental role in BiH, especially his manifestly unlawful Bonn Powers. The RS, moreover, urges the Security Council to forego reference to Article VII of the UN Charter, which cannot be justified after 17 years of peace and stability in BiH. The RS Government submits this report in the hopes that it will help Security Council members better understand the RS's positions and the situation in BiH.