



REPUBLIC OF SRPSKA  
PRESIDENT OF THE REPUBLIC

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Banja Luka, 26.04.2016.

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

Dear Mr. Secretary-General:

To assist the Security Council in its upcoming debate on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 15th Report to the UN Security Council. The report focuses primarily on the necessity of respect for the BiH Constitution, the need for reform of BiH's judicial and prosecutorial institutions, and the RS's concern that abuses of authority by BiH justice institutions are undermining the rule of law and threaten political stability and progress.

Section I of the report explains that BiH can be successful, but only if the BiH Constitution (Annex 4 of the Dayton Accords) is honored. The RS is continuing to play a leading role in reforms to improve the economy and advance BiH's EU integration. The RS strongly supports BiH's application for EU membership, but European integration should not be used as a pretext to centralize authority in violation of the Constitution. It is essential that leaders in BiH agree on a coordination mechanism that is consistent with BiH's Dayton Structure and that BiH's census be published in accordance with law.

In Section II, the report explains why BiH's judicial and prosecutorial institutions must be reformed in order to respect human rights and meet European standards. These institutions continue to discriminate against Serb victims of war crimes. The RS is seeking essential changes

to BiH's justice system through the EU-sponsored Structured Dialogue for Justice, though Bosniak parties have thus far blocked all reforms. The BiH's Constitutional Court also requires reforms, including the long-overdue replacement of foreign judges with BiH citizens, as provided for in the BiH Constitution.

Section III of the report examines recent abuses of authority by BiH-level justice institutions and how they threaten the rule of law throughout BiH. The BiH Prosecutor's Office abused the criminal justice system to drive the director of BiH's State Investigation and Protection Agency (SIPA) from office. Since then, SIPA's new director, authorized by the BiH Court and Prosecutor's Office, has engaged in provocative armed raids on RS police and other facilities as well as politically motivated arrests and harassment of BiH citizens. It is a well-known fact that the BiH Court and Prosecutor's Office are heavily influenced by Bosniak political leaders and, at times, certain officials from the international community. Abuses such as these undermine the rule of law, public institutions, separation of powers, and the intergovernmental cooperation necessary to combating terrorism and other crime.

As the RS implements reforms to promote economic growth and EU integration, it asks members of the international community to respect the Dayton Accords and support local reform initiatives in BiH. The RS believes that BiH can be a stable and successful part of Europe if the Dayton structure is respected.

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

Yours sincerely,

PRESIDENT OF REPUBLIKA SRPSKA

Milorad Dodik  


**Republika Srpska's 15th Report to the UN Security Council**

**April 2016**

# Republika Srpska's 15th Report to the UN Security Council

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# Republika Srpska's 15th 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 15th Report to the UN Security Council, which outlines the RS Government's views on key issues facing Bosnia and Herzegovina (BiH). Among the issues examined in this Report are the importance of respect for the Dayton Constitution, the need for reform of BiH's judicial and prosecutorial institutions, and the RS's concern that recent abuses of authority by BiH justice institutions are undermining the rule of law in BiH.

### **I. BiH stability and progress rests upon respect for the Dayton Constitution, the rule of law, and the necessity of building consensus to achieve positive change.**

Section I of the Report explains that BiH can be stable and successful and move toward EU membership if the Dayton Constitution is honored. The RS has taken the lead in implementing reforms to promote economic growth and BiH's European integration. Although the RS strongly supports BiH's application for EU membership, it is unfortunate that some in BiH are using European integration as an excuse to centralize governance in defiance of the Dayton Accords. Early this year, the BiH Council of Ministers secretly adopted changes to an EU-integration coordination mechanism that were not agreed upon with other levels of government and that violate BiH's constitutional structure. Publication of BiH's census is an important step toward BiH's EU membership, but the census results must be published in accordance with law.

### **II. BiH's judicial and prosecutorial institutions must be reformed.**

Section II describes why BiH's judicial and prosecutorial institutions require reforms if they are to respect human rights and meet European standards. The BiH Prosecutor's Office and BiH Court continue to discriminate against Serb victims of war crimes. Recent indictments and convictions indicate that the BiH Prosecutor's Office's pattern of failing to indict the perpetrators of crimes against Serb victims is getting worse. Moreover, the Prosecutor's Office treats Bosniak forces as immune from indictment for crimes against humanity, the charge that carries the most severe potential prison sentence. The Report notes some of the many examples of the BiH justice system's failure to seek justice for Serb victims of war crimes.

The RS continues to seek reforms to BiH's justice system through the EU-sponsored Structured Dialogue for Justice, working closely with EU experts and officials from BiH, the Federation, and Brčko District. There were signs of progress last year, but Bosniak officials have since acted to block necessary reforms. The RS recently suspended a planned referendum about the justice institutions imposed by the High Representative, but the RS remains fully within its rights to hold such a referendum in the future if reform continues to be blocked.

BiH's Constitutional Court must be reformed to restore the rule of law and confidence among BiH's Constituent Peoples. This necessity was highlighted by the court's recent decision—without any legally defensible basis—that the RS cannot celebrate the date of its founding. The decision is just the latest key ruling in which a bloc composed of the court's three foreign and two Bosniak judges outvoted the four Serb and Croat judges. The foreign judges lack independence from the High Representative and, as a former judge admitted, act under a

“tacit consensus between the Court and the High Representative that the Court . . . will always confirm the merits of his legislation . . . .” In order to ensure the legitimacy of the court, reforms are necessary, including the replacement of the foreign judges as foreseen in the BiH Constitution. RS officials at both the BiH and Entity level—and representing all of the RS’s major political parties—condemned the Constitutional Court’s decision and called for a referendum on the issue.

### **III. BiH justice institutions are abusing their power to support certain political parties.**

Section III describes how recent abuses of authority by BiH-level justice institutions threaten the rule of law throughout BiH. After BiH’s State Investigation and Protection Agency (SIPA) arrested an SDA member of the BiH Parliamentary Assembly, the BiH Prosecutor’s Office abused the criminal justice system to force SIPA’s director out of office. Then SIPA’s new director, authorized by the BiH Court and Prosecutor’s Office, began a series of provocative armed raids on police stations and other facilities in the RS. There have also been other politically motivated arrests, detention, and harassment of BiH and party officials and officials of private institutions. These abuses of justice institutions seriously undermine the integrity of key constitutionally protected government institutions and the separation of powers. These abuses also seriously undermine the trust and cooperation among cantonal, Entity, and BiH agencies that is essential to combating the threat of terrorism at time when that threat is growing throughout Europe. It appears, regrettably, that some diplomatic officials have, in violation of international law and practice, involved themselves in the abuses of authority described above.

As the RS continues to pursue reforms to improve its economy and advance EU integration, it asks members of the international community to respect the Dayton Accords and support local reform initiatives in BiH. The RS believes that BiH can be a stable and successful part of Europe if the Dayton structure is respected.

**I. BiH stability and progress rests upon respect for the Dayton Constitution, the rule of law, and the necessity of building consensus to achieve positive change.**

1. The RS believes that BiH can be stable and successful, if the constitutional structure and safeguards established in the Dayton Peace Accords are honored, rather than undermined. Its leadership continues to support EU accession and has taken the lead for many years in reforming RS laws and practices to be consistent with those of the EU. The fact that BiH is composed of three Constituent Peoples whose rights are protected by the Constitution need not be a barrier to government reform and progress so long as there is mutual respect for differences of opinion and commitment to consensus building. The myth that the Dayton Constitution is inconsistent with efficient government is being replaced by a consensus that recognition of Entity autonomy and diversity among cantons is no barrier to necessary reforms.

2. This growing consensus was reflected at a Washington conference in November 2015 marking the 20<sup>th</sup> anniversary of the Dayton Accords, which included top governmental officials from BiH, key US officials, representatives of international financial institutions, and many others from the international community. Participants rejected the notion that BiH should become more centralized in order to achieve reforms. For example, Ellen Goldstein of the World Bank and Nadeem Ilahi of the IMF both emphasized that BiH's decentralized constitutional structure was not what has held BiH back from creating an efficient and effective public sector.

3. BiH's two Entities, Republika Srpska and the FBiH, are committed to the EU-sponsored Reform Agenda and are cooperating closely with each other as they implement it. RS Prime Minister Željka Cvijanović and Federation Prime Minister Fadil Novalić explained at the conference how the Entities are working together to implement the Reform Agenda. High Representative Valentin Inzko praised the two prime ministers for being "very committed" to the Reform Agenda. He said, "I commend the Prime Ministers warmly for their reform efforts," and noted the "very good chemistry" between them.

4. Ian Brown, head of the European Bank for Reconstruction and Development's (EBRD) Sarajevo office, emphasized that imposed laws and reforms do not work and that the Reform Agenda belongs to BiH leaders, not international institutions. Gary O'Callaghan, the Senior Advisor to the EU Special Representative in BiH, highlighted the central role played by BiH leaders in developing the Reform Agenda. He noted that that the RS has gotten ahead of the Federation on reform during the past seven years.

**A. The RS is playing a leading role in reforms to promote EU integration and economic growth.**

5. Republika Srpska has enacted far-reaching reforms in recent years to harmonize its laws with EU standards, improve its business environment, and otherwise promote economic development. In recent months, Republika Srpska has been implementing the EU-sponsored Reform Agenda and continuing to push forward with economic reforms.

6. In December 2015, fulfilling a key element of the EU-sponsored Reform Agenda, Republika Srpska enacted a new Labor Law in the face of fierce opposition, including from the SDS, the main opposition party in the RS. The new law facilitates job creation while protecting employee rights and brings the RS's labor and employment regulations into line with EU standards. The EU's 2015 Progress Report for BiH notes that the RS, as



recommended by the EU, adopted in September 2015 “a law on fiscal responsibility, including establishment of an independent Fiscal Council and a fiscal rule limiting government expenditures and deficits.”<sup>1</sup> In February 2016, the RS Government adopted an Action Plan for fulfillment of the EU’s recommendations from its 2015 Annual Report on BiH. The Action Plan sets out what each RS institution must do in order to fulfill European integration requirements and requires institutions to report accordingly.

7. Republika Srpska also continues to intensify its fight against corruption and organized crime. On 11 February 2016, the RS National Assembly enacted a law that establishes a special department in the RS Prosecutor’s Office for combating corruption, organized crime, and the most serious forms of economic crime. The RS has been praised by the Moneyval Committee in the area of criminal proceeds recovery and the fight against money-laundering, in particular for the Ćopić case, which will be included in Moneyval’s money-laundering typology as an outstanding example of prosecuting money-laundering and criminal proceeds recovery. In addition, it should be noted that the RS has a well-established asset recovery system and a functional asset recovery agency, which is fully capacitated to enforce the Law on Criminal Proceeds Recovery.

8. The EU’s 2015 Progress Report for BiH recognizes the RS Government’s commitment to economic reform. The Report, for example, notes, “In 2013 and 2014, Republika Srpska carried out an ambitious set of reforms to reduce business registration time and costs. The Republika Srpska authorities also started a single registry for companies.”<sup>2</sup> Similarly, the IMF’s most recent report on BiH said, “Important steps have been made in the last two years under the Fund-supported program to improve the business environment. In line with the [World Bank] recommendations a one-stop shop for business registration was established in the RS to make it easier to start and operate a business.”<sup>3</sup> In the first two years of the one-stop shop’s operations, the number of registered businesses increased by 30%. The European Stability Initiative recently recommended that in order to ease business registration, “[a]ll the Federation needs to do is to copy the reforms adopted in Republika Srpska.”<sup>4</sup> Also, in order to further implement comprehensive reforms in this area, as recommended by the RS Government, the RSNA, at its 10th regular session held on 17 March 2016, adopted a draft strategy to facilitate foreign investments in the RS for the period 2016 - 2020 and a corresponding action plan.

9. The RS has implemented many other major economic reforms in recent years, such as the first regulatory “guillotine” in the region (a process by which unnecessary and burdensome regulations are abolished); regulatory impact assessments; new commercial courts; reform of land registry and construction permits; and new tax deductions for equipment investments. The RS Government has liberalized the RS for foreign investors and

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<sup>1</sup> European Commission 2015 Progress Report on Bosnia and Herzegovina, 10 Nov. 2015, at p. 33.

<sup>2</sup> *Id.*

<sup>3</sup> International Monetary Fund, Staff Report For The 2015 Article IV Consultation, 9 Oct. 2015, at p. 9.

<sup>4</sup> *Bosnia as Wunderkind of Doing Business, Outline of 14 steps to take*, European Stability Initiative, 19 March 2015, at p. 13.

since 2012 has been operating a Foreign Investor Aftercare Program under which the institutions of RS and municipal officials facilitate foreign investors' activities.<sup>5</sup>

10. As part of reform-oriented incentives to investors, in February the RSNA enacted a new bankruptcy law, the purpose of which is to enable timely bankruptcy proceedings, reduce bankruptcy proceedings, ensure a higher level of control over the performance of trustees, ensure a higher level of protection of creditors, and shorten the time required for the proceedings.

11. The RS has actively participated in the regional project for certification of municipalities with favorable business environments (BFC SEE) along with Croatia, Serbia, Macedonia and Montenegro. The cities of Banja Luka and Bijeljina and municipalities of Teslić and Mrkonjić Grad were awarded the regional certificate. By the end of April, the city of Prijedor will have extended its existing certificate. A number of other local governments of the RS are now at different stages of the certification process.

12. The RS has continued to harmonize RS laws and regulations with the EU's *acquis communautaire* and regulations of the Council of Europe. The RS has already subjected more than 1,630 laws, regulations, and general acts to this procedure since 2007. This is vital to European integration because, under the structure established by the BiH Constitution, the vast majority of requirements related to harmonization of laws with the *acquis* must be implemented by the Entities. Just as important, alignment with the *acquis* upgrades RS laws and regulations, thus promoting economic growth and other goals.

13. Republika Srpska's increasingly business-friendly environment is drawing notice. This year, the Financial Times' Foreign Direct Investment (FDI) Magazine ranked Republika Srpska's third-largest city, Prijedor, among the top ten "Micro European Cities of the Future." Studies that have examined the RS's business environment have praised RS reforms. Even before the RS's most recent reforms, the World Bank's 2011 report Doing Business in South East Europe cited the RS's largest city, Banja Luka, as one of the two cities in the region that had improved their business environments the most.

14. The RS's reforms are helping the RS economy to recover from 2014's floods and the European economic crisis. The RS economy is expanding, unemployment is declining, and salaries are rising. The RS registered year-over-year GDP growth of 2.8 percent in the Fourth Quarter of 2015, the most recent quarter for which data is available.

**B. The BiH Council of Ministers secretly adopted changes to the agreed coordination mechanism that violate the Dayton constitutional structure.**

15. In a state like BiH where the two Entities have broad autonomy under the Constitution, trust and cooperation among Entity and BiH levels of government are essential to government reform and EU accession. Unfortunately, in January and February of 2016, the Council of Ministers at the BiH level engaged in unilateral and illegal activities that seriously undermine previous successes in consensus-building and threaten the adoption of a coordination mechanism required for EU accession. Agreement on the coordination mechanism had already been reached by all levels of government in July 2015. However, the Council of Ministers attempted, through deceptive tactics, to replace the accepted coordination mechanism with a new one that seriously violates the BiH constitutional

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<sup>5</sup> *Training Held within Foreign Investor Aftercare Program*, InvestSrpska.net, 27 March 2014.

structure and allocation of competences. The actions of the Council of Ministers have led to a new and unnecessary round of negotiations. Despite the Council of Ministers' having acted in bad faith, the RS is hopeful that agreement will be soon be reached that establishes a coordination mechanism consistent with the Constitution and Dayton structure.

16. For several years, creating a coordination mechanism for EU accession has been the subject of contentious negotiations and an impediment to BiH's application for EU membership. As a constitutional matter, agreement among the Entity governments and the BiH-level Council of Ministers is required to establish a coordination mechanism. Enactment and implementation of 80% of the measures required for the EU *acquis* are within the exclusive constitutional competencies of the Entities. Recognition of this constitutional and practical reality has been an essential element in creating a coordination mechanism that is consistent with the BiH Constitution and Dayton Structure and that can actually work in practice. This understanding was reflected, for example, in the Written Commitment of Bosnia and Herzegovina, signed by the Entities and the BiH Council of Ministers in February 2015. The first paragraph of the Written Commitment provides that "[t]he agenda of the institutions of government *at all levels* in Bosnia and Herzegovina, and *in accordance with respective constitutional competencies*, will include the necessary reforms for advancing Bosnia and Herzegovina's process of accession to the European Union . . . ."<sup>6</sup> In this regard, the Written Commitment calls for establishing a "[a]n efficient and effective Mechanism for the coordination of institutions *at all levels of government* in Bosnia and Herzegovina in the process of accession to the European Union . . . ."<sup>7</sup>

17. Approximately four months after the Written Commitment, and shortly after the Stabilization and Association Agreement (SAA) entered into effect on 1 June 2015, the RS Government, Federation Government, and BiH Council of Ministers agreed on a coordination mechanism, prepared over an extended period by a working group that included representatives from all levels of government. In October 2013, thanks to the working group's efforts, a solution for the establishment of a coordination mechanism for EU integration was close at hand. The top leaders of BiH, the RS, and the FBiH had reached a high level of agreement. The RS supported this solution; the only outstanding issues were matters that needed to be decided within the FBiH, with respect to the position and the role of its cantons. In July 2015, these outstanding issues were resolved, and the parties agreed to a coordination mechanism based on the 2013 draft, with the understanding that the draft would require minor technical updates to reflect the recent adoption of the SAA.

18. However, beginning on 26 January 2016, the BiH Council of Ministers put in jeopardy the agreement by engaging in deceptive and unlawful actions. Without knowledge or consent of the RS, the BiH Council of Ministers secretly approved a new coordination mechanism, which was dramatically different from the terms of the coordination mechanism agreed to by the parties in the summer of 2015. Four days later, on 30 January 2016, the Chairman of the BiH Council of Ministers, accompanied by the Prime Minister of the Federation, met with the RS Prime Minister in Banja Luka. At the end of their meeting, the Chairman of the Council of Ministers informed the RS Prime Minister that he would send her an updated draft of the coordination mechanism and asked the RS Prime Minister to review and provide comments on the draft. The RS believed, based on the agreement reached a few

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<sup>6</sup> Written Commitment of Bosnia and Herzegovina, 23 Feb. 2015, at para. 1 (emphasis added).

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

months prior, that the new draft would include only the minor technical changes that had been discussed.

19. Upon review of the new draft, the RS was shocked to find that the Council of Ministers had dramatically changed the coordination mechanism to which the parties had agreed after the complicated previous negotiations. The Chairman made no mention of the sweeping changes in his meeting with the RS Prime Minister. These changes were contrary to the Dayton structure and BiH Constitution to the serious detriment of the RS. The RS submitted comments to the Council of Ministers on 8 February 2016, explaining in detail the RS's strong objections to the new draft.

20. To its further dismay, the RS Government learned on 10 February 2016 that the BiH Council of Ministers had published in the BiH Official Gazette No. 8/16 dated 9 February 2016 the new draft the Chairman had given the RS shortly after the meeting of 30 January, without any consideration of the RS's comments. Even more objectionable, it was only then that the RS learned that on 26 January 2015—four days before the meeting in Banja Luka—the Council of Ministers had secretly voted to pass the new draft without any consultation with the RS or making public its decision. The Chairman of the Council of Ministers deceptively withheld this information from the RS Prime Minister in their meeting of 30 January and presented the document on the coordination mechanism as a draft to be commented on, when in fact the Council of Ministers four days earlier had already adopted it as final. In short, the presentation of the “new draft” and request for comment was nothing more than a political charade.

21. The RS immediately expressed its strong objections to the BiH Council of Ministers' unlawful actions regarding the new coordination mechanism, as a matter of both procedure and substance. Procedurally, the Council of Ministers lacked the legal authority to adopt a coordination mechanism without the agreement of the Entities. The action of the Council of Ministers also violated the Written Commitment and was an affront to the years of detailed, technical negotiations conducted in good faith by the RS with the BiH Council of Ministers and the Federation. The RS takes strong exception to the deceptive actions of the Council of Ministers in both adopting a new draft *in secret* and hiding its actions in its meeting on 30 January with the RS Prime Minister and thereafter. Such actions seriously undermine the trust and cooperation necessary for successful progress toward EU accession and government reform more generally.

22. Substantively, the new coordination mechanism seriously violates the Dayton Structure and BiH Constitution in ways that are legally and politically detrimental to the RS and practically not functional. As such, the RS cannot accept it. The new draft excludes some bodies that had been agreed on, transforms other such coordination bodies, and introduces new ones. It also changes important procedures and safeguards intended to promote cooperation and protect the constitutional rights of all parties. The result of these fundamental changes is to transfer many key powers to the BiH Council of Ministers at the expense of the Entity and cantonal governments. For example, the document purports to give the Council of Ministers authority to create important rules of procedure unilaterally and make a wide range of decisions that are binding on all levels of government in BiH despite not having such authority over these matters under the Constitution. Whereas the earlier coordination mechanism, agreed to by the parties in 2015, respects the constitutional competencies of the BiH Council of Ministers and the Entities, set forth in the BiH Constitution, the new mechanism disregards these constitutional competencies. Such a mechanism is in sharp

conflict with the constitutional allocation of powers and separates decision-making from the governmental authorities that must fund and implement the decisions in question.

23. Republika Srpska rightfully rejected the Council of Ministers' unlawful attempt to derail the previously agreed coordination mechanism and to deceptively put into place a mechanism that is contrary to the BiH Constitution and would be nonfunctional. Despite the bad-faith actions of the BiH Council of Ministers, the RS Government has acted in good faith in its response and allowed the BiH Council of Ministers the opportunity to correct its actions. Dragan Čović, the Croat member and the Chairman of the BiH presidency, called the RS reaction to the new mechanism "fair and acceptable" and indicated that he believed officials would come to agreement at all levels.<sup>8</sup> In February and March 2016 the RS participated in working groups with officials from the BiH Council of Ministers and the Federation to resolve the issue. On 21 March 2016, the RS Prime Minister met with the Chairman of the BiH Council of Ministers and Federation Prime Minister. Prior to that meeting, the RS Prime Minister explained that the coordination mechanism adopted unilaterally by the BiH Council of Ministers was dramatically different from the coordination mechanism which had been agreed to by the parties last year and reiterated that the mechanism must be consistent with the allocation of competences established in the BiH Constitution.<sup>9</sup> In addition, she stated:

The European path requires adequate coordination, correlation and interaction of various levels of governance with different levels of authorities in the process of European integration. . . . In this country we shall not run away from the story called consensus because this country and its peace rest on this crucial word. . . . It is my duty as the Prime Minister of Republika Srpska to act in accordance with the Constitution and to observe the law.<sup>10</sup>

24. As a result of the meeting, many important issues related to the coordination mechanism have been agreed upon and the remaining issues are to be addressed by a working group consisting of representatives from all levels of government within BiH. The working group has successfully resolved some of the remaining issues, as well as prepared several modalities for the resolution of other issues that should be agreed upon at the political level in the near future.

### **C. BiH's census must be published in accordance with law.**

25. The BiH census has been a contentious political issue for several years. Bosniak leaders were successful in blocking a new census after the war until 2013. Bosniak leaders finally consented due to pressure from the EU as part of the accession process. A key reason for their opposition was Bosniak fear of what the census would show regarding today's ethnic makeup of Bosniak-controlled areas during the war compared to the ethnic makeup pre-war.

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<sup>8</sup> Čović: *Prihvatljive primjedbe iz RS-a na mehanizam koordinacije*, OSLOBODJENE, 26 Feb. 2016.

<sup>9</sup> *Prime Minister Cvijanović on the Coordination Mechanism*, Government of Republika Srpska, 21 March 2016.

<sup>10</sup> *Id.*

26. The EU has indicated that publication of the 2013 census is necessary for BiH's application for EU membership to be considered credible. Publication of the census results is especially urgent because the BiH Law on Population Census requires publication by 1 July 2016.

27. Although publication of the census results is urgent, the methodology with which census figures are calculated must be in accordance with the Census Law. Unfortunately, Bosniak leaders are seeking, for political purposes, to manipulate census data in violation of the Census Law. The census should not be published using a faulty methodology that inflates residency figures in contravention of the Census Law. It must not include faulty data or count nonresidents as residents—or vice versa—in order to suit the political goals of any ethnic group. Twenty years after the end of the conflict, it is essential for Bosniaks to cooperate on the basis of facts regarding the number of residents and their correct location in all sections of BiH. Establishing the facts must be the goal for census methodology, as the census law requires.

28. Republika Srpska will continue to reject efforts to manipulate the census results for political ends. The census must be a tool for economic and social planning, not a political weapon.

## **II. BiH's judicial and prosecutorial institutions must be reformed.**

### **A. The BiH Prosecutor's Office continues to discriminate against Serb victims of war crimes.**

29. Justice, human rights, and reconciliation require that war crimes be punished without regard to the ethnic identity of their perpetrators or victims. But more than 10 years after the Court of BiH began trying war crimes cases, the BiH justice system is continuing to discriminate against Serb victims of war crimes. Indeed, there are indications that this longstanding pattern of bias is getting worse. War crimes discrimination denies Serbs the equality before the law to which they are entitled under Protocol 12 of the European Convention on Human Rights. It also impedes reconciliation.

30. The International Crisis Group has criticized the Prosecutor's Office for its failure to prosecute some of the war's worst war crimes against Serbs. Even U.S. Deputy Chief of Mission Nicholas M. Hill observed in 2015 that the Chief Prosecutor is "largely believed to be heavily influenced by Bosniak political forces" and that there are "complaints that the prosecutor's office has too many strong-willed SDA acolytes on its staff."<sup>11</sup> In 2012, a former international advisor to the BiH Prosecutor's Office observed that many prosecutors there are highly reluctant to prosecute Bosniaks for crimes against Serbs and that they fail to vigorously pursue those cases. This failure is apparent in the BiH Prosecutor's Office's record.

31. In a large number of cases, several years have passed since the cessation of the investigation against a number of reported persons for war crimes against Serbs and since the RS Ministry of Interior's (MoI) Complaint was filed; however, the Chief Prosecutor has remained silent or failed to decide how to proceed. This leads to a conclusion that the cases are delayed on purpose, wasting the precious time for prosecuting these crimes. It should also

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<sup>11</sup> Nicholas M. Hill, *Moving Beyond Narrow-Minded Politics*, MREŽA ZA IZGRADNJU MIRA 8 July 2015.

be noted that the BiH Chief Prosecutor has stopped the prosecution of a number of legitimate cases of war crimes as officially reported by the RS MoI. Moreover, investigations of war crimes perpetrated by multiple persons have been broken up into several cases and transferred to different district or cantonal prosecutors even though the crimes and events in question are the same. This practice of the BiH Chief Prosecutor puts both victims and witnesses in these cases in an unfavorable position because they are summoned to testify several times about the same circumstances by different prosecutors and police agencies. All this gives rise to dissatisfaction and fatigue of the witnesses and victims in criminal proceedings, who tend to give up on giving further testimony.

32. The prosecutors who act upon the orders of the BiH Chief Prosecutor in cases and investigations of war crimes against Serbs are often changed for no substantive reason, which further slows down the proceedings because a new prosecutor needs time to get acquainted with a case.

33. A study by demographers at the International Criminal Tribunal for the former Yugoslavia (ICTY) estimates 7,480 Serb civilians died from the war. Despite the many thousands of Serb civilians who were killed during the war, the BiH Prosecutor's Office, in its entire history, has achieved final convictions of only 13 Bosniaks for war crimes against Serb civilians. By comparison, it has achieved 93 final convictions of Serbs for war crimes against Bosniak civilians.

#### **1. Recent indictments indicate discrimination is worsening.**

34. Some Bosniaks have suggested that the BiH Prosecutor's office has recently been trying to show that it is not biased against Serbs. But statistics indicate that the office's discrimination against Serbs is actually getting worse. For example, since the beginning of 2015, less than 21% of new indictments have been for crimes committed, even in part, against Serbs. By comparison, more than 77% of indictments in this period have been for crimes committed, at least in part, against Bosniaks and 50% for crimes committed, at least in part, against Croats. These figures are even more lopsided against Serb victims than the figures for indictments before 2015.

#### **2. Bosniak forces are treated as immune from indictment for crimes against humanity.**

35. One way the BiH justice system discriminates is by treating members of Bosniak fighting forces as immune from indictment for crimes against humanity. This is especially important because, under the Court of BiH's practice, crimes against humanity is punishable by up to 45 years in prison, while all other war crimes are only punishable by up to 20 years. Out of the 235 indictments for crimes against humanity confirmed by the Court of BiH, *all but eight* have been for crimes alleged to have been committed against Bosniaks. Of the 235 indictments for crimes against humanity, not one has been against a member of the Army of the Republic of Bosnia and Herzegovina (ARBiH) or any other Bosniak fighting force. Because of the BiH Prosecutor's Office's refusal to charge crimes against humanity against members of Bosniak fighting forces, there is a de facto two-tier justice system for war crimes—one for members of the Serb and Croat fighting forces, who may be sentenced to up to 45 years, and members of Bosniak fighting forces, whose sentences are limited to 20 years.

### 3. Examples of the BiH Prosecutor's Office's Failure to Seek Justice for Serb Victims

36. The BiH Prosecutor's Office's bias against Serb victims of war crimes—particularly those committed by Bosniaks—is also shown by many specific examples. Some of them are briefly summarized below:

- The BiH Prosecutor's Office has failed to prosecute ARBiH 5<sup>th</sup> Corps Commander Atif Dudaković for a series of grave war crimes, despite much evidence against him and the Prosecutor's Office's earlier promises that he would be indicted. Among the many pieces of damning evidence against Dudaković are videos showing Dudaković ordering the execution of prisoners and the burning of Serb villages. A former member of Dudaković's 5<sup>th</sup> Corps has been willing to testify about witnessing the organized slaughter of approximately 24 to 28 older Serb civilians in Bosanski Petrovac.
- The BiH Prosecutor's Office has failed to seek justice for the Army of the Republic of BiH's (ARBiH) murder of 33 Serb civilians in the village of Čemerno—including women, children, and the elderly. Nine years ago, the RS Ministry of Interior filed with the BiH Prosecutor's Office an amended criminal report on the Čemerno atrocities with supporting evidence against specific individuals, but the Prosecutor's Office has failed to bring any indictments. In June 2015, the Balkan Investigative Reporting Network's newsmagazine *TV Justice* reported on the massacre at Čemerno and the lack of any prosecutions for it.
- The BiH Prosecutor's Office has failed to bring anyone to justice for the 1992 massacre of Serb civilians in the village of Bradina. In the attack, 54 Serb civilians were killed, 26 of whom were buried in a pit dug at the porch of the Church of Holy Ascension. Most of the survivors were taken to camps, mainly the one in Čelebić, where at least 22 inmates died.
- The BiH Prosecutor's Office has failed to prosecute anyone for the St. Nicholas Day Massacre in which the 56 Serb civilians in Jošanica were murdered on 19 December 1992. This is despite RS authorities having identified perpetrators in 2001 and 2005 reports.
- The BiH Justice System is refusing to investigate evidence linking a key SDA member of the BiH House of Representatives to war crimes by the El Mujahid Detachment. Mirsad Kebo, a former Vice President of the Federation of BiH and former member of the Bosniak SDA party, recently submitted to the BiH Prosecutor's Office 8,000 pages of evidence of war crimes against Serbs. Kebo's submission includes evidence that BiH House of Representatives Deputy Speaker and SDA Vice President Šefik Džaferović was complicit in El Mujahid atrocities.
- Some Bosniaks have suggested that last year's long-delayed indictment of Naser Orić was an attempt by the BiH Prosecutor's Office to show that it is not biased against Serbs. But the charges against Orić concern just a tiny sampling of the crimes of which he has been credibly accused, and the SDA is still trying to protect Orić from any measure of justice. Less than three days after Orić's trial finally began, it was reported that Federation Veterans Affairs Minister Salko Bukvarević, an SDA



member, had appointed Orić as his advisor despite—or perhaps because of—the fact that Orić is on trial for war crimes.

#### **4. Criticism of the BiH Prosecutor’s Office is growing.**

37. There is growing disquiet inside and outside BiH about the BiH Prosecutor’s Office’s performance in prosecuting war crimes. In an October 2015 interview, the chief prosecutor of the International Criminal Tribunal for the former Yugoslavia accused the BiH Prosecutor’s office of failing to sufficiently prosecute war crimes, saying he was “not always convinced all of [the prosecutors] had the commitment to move war crime cases forward.”<sup>12</sup> In October, the Balkan Investigative Reporting Network (BIRN) reported that BiH faces “a lack of political support to prosecute high-level [war crimes] perpetrators and an apparent lack of will among prosecutors to indict.”<sup>13</sup> According to BIRN, the BiH Justice Ministry “said that the prosecution is wasting time on cases that, at a later stage, are transferred to the entities’ judiciaries.”<sup>14</sup>

38. A January 2016 analysis by the supervisory body that monitors implementation of BiH’s War Crimes Strategy found that the BiH justice system had not come close to meeting the December 2015 deadline for completing the most complex war crimes cases.<sup>15</sup> The analysis determined that the BiH Prosecutor’s Office was still working on 346 of the most complex cases.<sup>16</sup> The analysis criticized the BiH Prosecutor’s Office for its failure to transfer more cases from the BiH level to Entity courts.<sup>17</sup>

39. Earlier this year, UK Judge Joanna Corner, on behalf of the Organization for Security and Cooperation in Europe (OSCE), began to conduct an analysis of the war crimes work of the BiH Prosecutor’s Office. But the BiH Prosecutor’s Office refused to give Judge Corner access to its investigations in order for her to conduct the analysis.<sup>18</sup> This adds to the BiH justice system’s reputation for nontransparency.

### **B. Structured Dialogue**

#### **1. RS’s Continued Participation in Structured Dialogue**

40. The RS Government has continued to seek reforms to BiH’s justice system through the EU’s Structured Dialogue for Justice, which began in 2011, but progress continued to be slow during this reporting period because Bosniak officials have fiercely opposed necessary reforms.

41. There were signs of progress during the last half of 2015. On 13 July 2015, the participants in the Structured Dialogue agreed on a change of format that narrowed the Structured Dialogue sessions to EU officials and experts and ministers of justice of BiH, RS,

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<sup>12</sup> Denis Dzidic, *Brammertz Warns Bosnia Prosecution on Looming Deadline*, BIRN, 8 Oct. 2015.

<sup>13</sup> Marija Tausan, *War Crimes Case Backlog Overwhelms Bosnia*, BIRN, 23 Oct. 2015.

<sup>14</sup> *Id.*

<sup>15</sup> *Bosnian War Crimes Case Strategy ‘Failing’*, BIRN, 29 Jan. 2016.

<sup>16</sup> *Id.*

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

<sup>18</sup> Denis Dzidic, *Bosnian Judiciary Closes War Crimes Files to OSCE*, BIRN, 4 Sept. 2015.

and Federation, and the President of the Brčko District Judicial Commission, with a broader set of participants involved in working groups that support the Structured Dialogue's decision-makers.<sup>19</sup> Subsequent to these changes participants in the Structured Dialogue signed a protocol in September establishing a framework for some much-needed judicial reforms. Among the important reforms foreseen in the protocol are changes to the laws on the BiH Court and Prosecutor's Office, the Criminal Code, and the Law on the High Judicial and Prosecutorial Council.

42. However, since the signing of the Protocol, Bosniak leaders have acted to stall further progress. In response to the Protocol, the Bosniak-led Court of BiH has sought to derail the agreed-to reforms. A key part of the reforms foreseen in the Protocol includes correcting the Court's ability to arbitrarily extend its own jurisdiction, which EU experts and officials have repeatedly made clear is contrary to EU standards. Despite consensus among the Ministers of Justice of BiH, the Federation and RS and the President of the Brčko District Judicial Commission, as well as the EU, that the extended jurisdiction practices of the BiH Court must be reformed, Bosniak officials oppose them. With respect to such reforms, the Bosniak President of the Court of BiH, Meddžida Kreso stated, "This cannot be allowed."<sup>20</sup> Since then, Judge Kreso and other Bosniak participants from BiH institutions have continued to denounce reform efforts. Despite these actions, the RS continues to participate in good faith in the Structured Dialogue and hopes that agreement can be reached soon on key reforms, including in particular on a new draft BiH Law on Courts. BiH's elected officials at all levels, with the EU's help, should push forward these reforms notwithstanding Bosniaks' interference.

## **2. Suspension of Referendum**

43. Last year, the RS National Assembly approved the holding of a referendum to give RS citizens an opportunity to register their views about measures unlawfully imposed on them by the High Representative, including the laws that established the BiH Court and Prosecutor's Office. However, the SDS and other opposition political parties in the RS failed to support the referendum. Consequently, in February 2016, the referendum was suspended. Although the referendum has been suspended, Republika Srpska is fully within its rights under the Dayton Accords and other applicable law to hold a referendum in the future if its judicial reform efforts continue to be blocked. In the meantime, the RS is working diligently on reforming the BiH justice institutions through the Structured Dialogue, as described above.

### **C. The Needed Reform of the BiH Constitutional Court**

44. The BiH Constitutional Court's November 2015 decision that the RS cannot celebrate the date of its founding highlights the serious need for reform of the Constitutional Court to restore the rule of law and confidence among BiH's Constituent Peoples. In the November decision, the court's three foreign judges aligned with the two Bosniak judges to outvote the majority of BiH judges (two Serb and two Croat judges) on political rather than legal

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<sup>19</sup> Members of the HJPC, BiH Court, BiH Prosecutors Office and other officials are not part of the Structured Dialogue, but may participate in working groups as requested by the Structured Dialogue members, where they are able to provide their views; however, they do not have decision-making competencies.

<sup>20</sup> Denis Dzidic, *Justice Reforms Fail to Halt Bosnian Serb Referendum*, BIRN, 14 Sept. 2015.

grounds. The case was brought by one of the most divisive and powerful Bosniak politicians. Unfortunately, this is not an isolated incident but follows a long pattern of the court acting as a political instrument of the Bosniak parties and the High Representative. It is time for participation of foreign judges on the court to end, as should have happened 15 years ago according to the terms of the BiH Constitution.

**1. Law does not support the Constitutional Court's majority decision on the RS National Day.**

45. The court's three foreign judges and two Bosniak judges held that commemorating 9 January, the date of the RS's founding, as a public holiday discriminates against members of non-Serb ethnicities; but, the decision has no legally defensible basis. The Court's finding of discrimination rests on the fact that 9 January, in addition to being the date of the RS's founding, is also the feast day of St. Stephen on the Serbian Orthodox calendar. Such a rationale would ignore relevant law and the practice of virtually all European states.

46. First, Republic Day is not a religious holiday. It celebrates the date on which the RS was founded, not St. Stephen. The fact that the RS happened to be founded on January 9, the feast day of St. Stephen, is coincidental and of no significance. Every day of the year is the feast day of at least one saint. The feast day of St. Stephen is just one of hundreds of feast days, and it is not a public holiday in Serbia.

47. Moreover, even if Republic Day really were a religious holiday, that would hardly render it unlawful discrimination. If Christian holidays were to be considered discriminatory, most public holidays in Europe would be wiped off the calendar. Christmas, for example, is a public holiday in every European state. St. Stephen's Day itself is observed as a public holiday in at least 22 European countries, under the name of St. Stephen's Day, Boxing Day, or Second Christmas Day.

48. High Representative Inzko's native Austria observes no fewer than ten Christian feast days as public holidays, including St. Stephen's day. The three foreign Constitutional Court judges who voted to bar Republic Day all come from European countries in which multiple Christian feasts are observed as public holidays. For example, Judge Constance Grewe's native German state of Baden-Württemberg celebrates nine Christian feasts as public holidays, including St. Stephen's Day. Germany, like most other European countries, has no public holidays for important feasts of Islam or other non-Christian religions.

49. The notion that religious holidays are discriminatory finds no support in European law. As a 2013 study by the European Parliament observes, "Several constitutional courts, in dealing with the supposedly discriminatory character of rules establishing Sunday and the most important festivities of the Christian religion as public holidays, have dismissed these cases, holding that a legislative choice as such is not unreasonable, having regard to the religious and historical traditions of each society, and to the fact that these festivities have acquired, over time, a secular meaning."<sup>21</sup>

50. In a joint declaration on 29 November 2015 (attached to this Report), high RS officials at both the BiH and Entity level—and representing all of the RS's major political parties—condemned the Constitutional Court's decision, demanded legislation at the BiH

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<sup>21</sup> *Religious practice and observance in the EU member states*, European Parliament Directorate-General for Internal Polices, 2013, at p. 13.

level to reform the Constitutional Court within 120 days, and called for an RS referendum on the issue.<sup>22</sup> The joint declaration was signed by heads of the SNSD, PDP, DNS, SDS, and NDP political parties, RS President Milorad Dodik, RS Prime Minister Željka Cvijanović, RS National Assembly Speaker Nedeljko Čubrilović, RS Council of Peoples Chairperson Nada Tešanović, RS Member of the BiH Presidency Mladen Ivanić, BiH House of Representatives Deputy Speaker Mladen Bosić, BiH House of Peoples Speaker Ognjen Tadić, and BiH Council of Ministers Deputy Chairman Mirko Šarović.

## 2. The Constitutional Court lacks legitimacy.

51. The most precious asset of any court that exercises judicial review is public legitimacy. Without such legitimacy, the public will not accept court decisions that nullify legislation approved by democratically elected institutions. The BiH Constitutional Court will always suffer a legitimacy deficit as long as its membership includes judges who—in addition to lacking democratic legitimacy—are not even BiH citizens or speakers of the local languages. Worse still, they are not even appointed by any institution in BiH.

52. The Constitutional Court’s legitimacy deficit is exacerbated by the alliance between the bloc of three foreign judges and the two Bosniak judges, which has often outvoted the majority of BiH citizens on the Court. Judge Constance Grewe, one of the current foreign members of the BiH Constitutional Court, has observed that “the group of international judges allied to one ethnic group can outvote the two others.”<sup>23</sup> The ethnic group allied to the foreign judges is the Bosniaks. As *Balkan Insight* recently reported, “The three votes wielded by the foreign judges, together with the two Bosniak judges on the court, have often proved to be decisive, outvoting the two Serb and two Croat judges.”<sup>24</sup>

53. The alliance between the foreign and Bosniak judges has resulted in many of the Constitutional Court’s most ill-reasoned decisions, handed down over the objections of the four Croat and Serb judges. The Constitutional Court’s Republic Day decision is just the latest example of the alliance of foreign and Bosniak judges turning the Court into a political instrument of the Bosniak parties.

54. Another prominent example is the Court’s 5-4 decision upholding the High Representative’s creation of the Court of BiH, despite that court’s manifest unconstitutionality. As the International Crisis Group recently wrote, the BiH Constitution “allotted judicial matters to the Entities, apart from a state Constitutional Court.”<sup>25</sup> Four out of the six judges from BiH rightly found the law unconstitutional. The law was only upheld because the three foreign judges voted as a bloc, along with the two Bosniak judges, to protect the High Representative’s creation.

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<sup>22</sup> Joint Declaration of Political Leaders from Republika Srpska, 29 Nov. 2016.

<sup>23</sup> Constance Grewe and Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, Vol. 15, p. 42.

<sup>24</sup> Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

<sup>25</sup> International Crisis Group, *Bosnia’s Future*, 10 July 2014, p. 27.

55. The International Crisis Group has explained, “The BiH Constitutional Court has repeatedly ordered the RS to amend its constitution over the objections of both Serb (and, often, both Croat) judges . . . .”<sup>26</sup>

56. The Constitutional Court’s legitimacy is also undermined by the foreign judges’ lack of independence from the High Representative. One of the foreign judges that voted to uphold the High Representative’s creation of the Court of BiH, Austrian professor Joseph Marko, later admitted that there was a “tacit consensus between the Court and the High Representative that the Court . . . *will always confirm the merits of his legislation . . . .*”<sup>27</sup> A 2010 study of the Constitutional Court called it the “usual practice” for the Constitutional Court to “seek the opinion of the High Representative prior to making a decision.”<sup>28</sup>

57. Perhaps the clearest example of the High Representative’s pervasive interference with the Constitutional Court is the High Representative’s standing order that the Court must not challenge any of the High Representative’s decisions. After a 2006 Constitutional Court verdict held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the High Representative, the High Representative responded by handing down a decree nullifying the court’s verdict. The decree, which remains in effect today, also banned any proceeding before the Constitutional Court or any other court that “*takes issue in any way whatsoever with one or more decisions of the High Representative.*”<sup>29</sup>

58. As recently as October 2015, the High Representative went so far as to declare itself, and not the court, as the final interpreter of the Constitution.

59. The collusion between the High Representative and the foreign judges has caused the Court to become a political body that upholds the High Representative’s decisions and policies. The Bosniak and foreign judges often vote as a bloc to overrule the Serb and Croat judges. Because the High Representative’s decisions and policies have favored Bosniak interests, the Court has become an instrument that protects their interests, to the detriment of the other Constituent Peoples.

60. In the aftermath of the Constitutional Court’s Republic Day decision, the High Representative publicly defended the role of the Constitutional Court’s foreign judges, and this is not surprising given their subservience to his office.

61. The Constitutional Court’s legitimacy deficit, particularly among the Serb and Croat peoples, is one reason why many of its decisions have never been implemented. In his most recent report to the UN Security Council, the High Representative complained of what he called the “persistent failure by authorities at various levels in Bosnia and Herzegovina to implement numerous past decisions of the BiH Constitutional Court.” Most prominently, the

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<sup>26</sup> International Crisis Group, *What Does Republika Srpska Want?*, 6 Oct. 2011, p. 16.

<sup>27</sup> JOSEPH MARKO, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, *European Diversity and Autonomy Papers* (July 2004) at 17 and 18 (emphasis added).

<sup>28</sup> Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), p. 821.

<sup>29</sup> Office of the High Representative (OHR), 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, March 23, 2007 (emphasis added).

Constitutional Court's 2010 decision declaring the Mostar electoral system unconstitutional remains to be implemented.

62. The presence of foreign judges on the Constitutional Court is an affront to BiH sovereignty. Even one of the current foreign judges, Judge Grewe, admits that the presence of foreign judges "can be seen as an intrusion into the national affairs" or "as an attempt at supervision."<sup>30</sup> That is exactly what it is.

**3. All RS Leaders at the Entity and BiH level have expressed support for ending the role of foreign judges.**

63. No other sovereign state in the world has seats on its constitutional court reserved for foreign judges, let alone judges appointed by a foreign court without any requirement of domestic consent. The foreign judges were a transitional measure that was never intended to be in place for the long term. Thus, the BiH Constitution authorizes the Parliamentary Assembly to pass a new law replacing the foreign judges five years after their initial appointment, which occurred in 1996.<sup>31</sup>

64. The 29 November 2015 joint declaration of political leaders from the RS, signed by, among others, the RS Prime Minister, the RS Member of the BiH Presidency, and the Deputy Chairman of the BiH Council of Ministers, demands that BiH enact legislation to reform the Constitutional Court, including through the abolition of foreign judges.

65. All of the Serb and Croat political parties in BiH are united in support of replacing the foreign judges on the Constitutional Court with BiH citizens.<sup>32</sup> As the president of the Croat National Council, which represents all of the Croat parties, recently said, "Twenty years after the war, Bosnians are ready to take full control of this court." Unfortunately, the main Bosniak party is refusing to reform the Constitutional Court by passing a new law because it does not want to break up the alliance of Bosniak and foreign members that controls it.

66. This section has addressed three longstanding and systemic problems of the BiH-level judicial and prosecutorial system that threaten stability and sustainability of BiH. Correction of these defects is particularly essential because each of them reflects the deeply embedded practice of discrimination against the Serb and Croat Constituent Peoples. Such entrenched discrimination is deeply damaging to the stability of BiH and the ability to reach consensus on BiH government reform. When such discrimination is supported by powerful elements of the international community, the sustainability of BiH is further strained. These problems are: continued Bosniak refusal to investigate and prosecute war crimes committed against Serbian and Croatian victims; Bosniak refusal to agree to reform the Law on Court of BiH to correct the arbitrary and politically oriented assertion by the BiH Court and Prosecutor of jurisdiction over Entity criminal law; and presence of politically influenced foreign judges on the Constitutional Court. A recent decision of the European Court of Human Rights highlighted abuses in the BiH prosecution of war crimes. EU recommendations support the need for reform of the Court of BiH's assertion of extended criminal jurisdiction. The aberration,

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<sup>30</sup> Constance Grewe and Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, Vol. 15, p. 41.

<sup>31</sup> BiH Constitution, Art. VI(1)(d).

<sup>32</sup> Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

compared with all European states, of inclusion of foreign judges on the BiH Constitutional Court is obvious.

### **III. BiH justice institutions are abusing their power to support certain political parties.**

67. This section addresses another dangerous failure of the BiH justice system, the abuse of prosecutorial power by political parties to attack political rivals. This form of abuse poses serious and immediate danger to respect for the rule of law and to the safety and security of citizens throughout BiH. The Chief Prosecutor, grossly abusing his legal authority, is engaged in a campaign to attack political competitors and enemies of the SDA and SDS. Regrettably, rather than seeking to control prosecutorial abuses, the BiH Court has threatened those raising legitimate criticisms with legal sanctions. An important reason that Bosniak leaders oppose reform of the BiH judiciary in the Structured Dialogue, particularly reform of the Court of BiH's practice of extended criminal jurisdiction, is that such reforms (which are supported by the EU) would curtail the ability of the Prosecutor to abuse his power for political purposes. So far, the High Judicial and Prosecutorial Council has remained silent rather than fulfilling its responsibility to take disciplinary action against these unlawful acts of prosecutors and judges.

68. Several investigations have been conducted for political purposes against members of the BiH Parliamentary Assembly with regard to decisions of this parliamentary body (e.g., an investigation arising from the failure to execute the Constitutional Court's decisions with regard to the Single Reference Number Law, an investigation arising from the failure to execute the European Court of Human Rights' decision in *Sejdić-Finci*, an investigation with regard to the population census in BiH, an investigation concerning the ratification of the Border Treaty between BiH and Montenegro, an investigation of the voting results with regard to a decision on an employment status of a member of the Parliamentary Assembly). All these investigations were conducted to exert pressure over the legislative body to make decisions advocated by the major Bosniak party.

#### **A. SIPA's Director was forced from office using dubious charges after SIPA arrested a powerful Bosniak politician.**

69. On 19 July 2013, BiH's State Investigation and Protection Agency (SIPA) arrested Šemsudin Mehmedović, an SDA member of the BiH House of Representatives, in connection with war crimes against Serb civilians. Since the arrest, the BiH Prosecutor's Office, abetted by the Court of BiH, has successfully used the criminal justice system to attack and push aside SIPA Director Goran Zubac. Soon after Mehmedović's arrest, the BiH Prosecutor Office's website began to feature threats and virulent attacks against Zubac. Mr. Zubac was accused of and convicted for the failure to act and provide assistance with regard to policing tasks that were not within the SIPA's purview. Also, SIPA agents are not trained in anti-riot actions. No investigation was conducted against the authorized persons or agencies that had the responsibility to act in these cases, including the cantonal police of Tuzla, Zenica and Sarajevo and the FBiH Police Administration. By contrast, last year SIPA and the BiH Chief Prosecutor failed to identify persons responsible for the attack against Serbia's prime minister, Mr. Vučić, at the Memorial Centre in Potočari, Srebrenica, where the members of the Directorate for the Coordination of Police Bodies were responsible and competent for securing the public gathering there.

70. In June 2014, the BiH Prosecutor's Office issued a baldly political indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities.<sup>33</sup> As if to remove all doubt as to the political nature of the indictment against Zubac and Bosniak influence over the Prosecutor's Office, the Bosniak member of the BiH Presidency, Bakir Izetbegovic, in August 2014 said "[w]e will likely send [Zubac] to prison."<sup>34</sup> The Court of BiH issued and confirmed a verdict on the dubious charge, sentencing Zubac to one year's probation. In August 2015, the BiH Council of Ministers removed Zubac from office based on his conviction.

71. During the criminal proceedings against Zubac, the BiH security minister and chief prosecutor exerted significant pressure upon the Independent Police Board and the Commission for Verification of Access to Confidential Information to remove Mr. Zubac from his position as SIPA director. Since these bodies refused to remove the SIPA director before the court decision became effective, at a session of the BiH Council of Ministers, the security minister reported that the chair of the Commission, a high ranking officer of the Armed Forces, had resigned his chairmanship and asked the defense minister to nominate a new candidate. When it was found out that there was no resignation whatsoever, Defense Minister Pendeš publicly spoke about this attempt of deceit only to be accused of abusive practices in the BiH Defense Ministry while she was the deputy minister there (an acquittal was issued by the Court of BiH in this case).

**B. With its newly appointed director, SIPA has commenced a series of provocative armed raids on police stations and commercial facilities in the RS in coordination with the BiH Court and Prosecutor's Office.**

72. The relationship between RS and BiH-level law enforcement agencies has long been one of professionalism and mutual respect. The RS Ministry of Interior has made it a priority to build even stronger collaboration with SIPA and other law enforcement agencies in BiH. In July 2015, RS Interior Minister Dragan Lukač and Federation Interior Minister Aljoša Čampara signed a memorandum on strengthening police cooperation, including through the formation of joint investigative teams. Minister Lukač signed the memorandum strengthening police cooperation between the RS MoI and Brčko District Police and initiated and held in Banja Luka a number of meetings with ministers and heads of police agencies from all levels in BiH with a view to improving mutual cooperation. But with the appointment of a new SIPA director aligned with the SDS opposition party in the RS, cooperative and productive relationships have been sacrificed to political gamesmanship.

73. According to *Balkan Insight*, just 11 days after appointment of the new, SDS-aligned SIPA chief, military uniformed, masked SIPA officers, armed with automatic weapons, raided a bank in the RS. *Balkan Insight* reported: "The police did not specify the exact objectives of the raid. However, the timing coincided with the decision of the main opposition party in Republika Srpska, the Serbian Democratic Party, SDS, to accuse the President of the entity, Milorad Dodik, the administration of Pavlovic Banka, and the director of the Banking Agency of Republika Srpska . . . of numerous crimes including corruption."<sup>35</sup>

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<sup>33</sup> Denis Dzidic, *Bosnia Investigative Agency Chief's Protest Charge Confirmed*, BALKAN INSIGHT, 20 June 2014.

<sup>34</sup> *Izetbegovic: SDA must "win well" in elections*, OSLOBODENJE, 27 Aug. 2014.

<sup>35</sup> Rodolfo Toè et al, *Bosnian Police Raid Bank Linked to Dodik*, BALKAN INSIGHT, 18 Nov. 2016.



74. Next, in December 2015, the Court of BiH granted an extraordinary order sought by the BiH Prosecutor's Office for armed SIPA officers to conduct a nighttime raid on an RS police station, without any warning to RS officials. The raid was wholly unnecessary. There was no exigency to justify the raid; it was merely to collect evidence in a decades-old war crimes investigation. RS police would have readily provided SIPA with any available evidence at the police station had they been asked. The raid upset the professional and respectful relations that RS police and SIPA have long maintained and undermined the interagency cooperation that is essential to investigating war crimes, organized crime and corruption. Although the BiH chief prosecutor and SIPA are aware of the fact that the RS MoI's archives from the war period are available, they often opt for seeking warrants from the Court of BiH to search the premises of police stations under the pretext that RS MoI members, with whom they have cooperated in many cases, conceal war crime evidence. In this specific case, a building was searched that was built after the war at the same location as the previous police station, which was burned down, together with its archives, in a fire towards the end of the war in 1995. Thus, there was no evidence of war crimes that could have been concealed. Such searches are used to seize documentation that has no direct reference to the war crimes in question, which jeopardizes the protection of personal and confidential information and thus violates the international conventions BiH has ratified, including those protecting human rights.

75. Despite the provocative nature of SIPA's actions, the RS police station provided SIPA access to its facilities. The RS Government, however, informed BiH-level judicial officials that it would no longer cooperate with the BiH Court, Prosecutor's Office or SIPA until a new agreement could be reached on the procedures and modalities for collaboration. A new agreement was adopted, essentially accepting a draft prepared by SIPA. Unfortunately, SIPA has continued provocative actions in the RS despite the agreement.

76. A recent example illustrates the refusal of SIPA to observe the cooperation agreement and the use of SIPA for obvious political purposes. On 31 March, masked SIPA officers armed with automatic weapons raided the RS Banking Agency and the RS Investment-Development Bank, arresting several banking officials and seizing documents. Advance notice was given to the media, and these operations were widely covered by press and TV. SIPA even published on its website the TV coverage. As SIPA press releases acknowledged, the offense upon which the raids were based involved a 2014 bankruptcy of a private bank soon after the death of the bank's owner. The search was preceded by a months-long investigation conducted by the RS MoI under the supervision of the District Prosecutor's Office in Bijeljina and SIPA, and overseen by the BiH Chief Prosecutor, in which the trustee ensured full access to the bank's documentation. It should be noted that such a search may jeopardize the operations of the bank and the banking system as a whole and lead citizens to doubt the safety of their personal financial and business-related information. This is best borne out by the case of Pavlović Bank, which is a private bank of a U.S. citizen of Serb background; due to the search and apprehension of the bank's management and owner, the bank saw a significant run on deposits. It is difficult to believe that it was necessary for masked officers armed with automatic weapons needed to arrest officials who go to work every day in the same place because of possible involvement in a well-known bankruptcy occurring two years ago. Publicity released by SIPA noted that the deceased owner of the bank had been a member of the RSNA belonging to the largest party in the RS. After the theatrics, those arrested were released shortly thereafter because the court determined there was no legal basis for their continued detention. Such conduct is a strong demonstration of the BiH Prosecutor's use of the BiH-level justice agencies to achieve political objectives even

at the cost of severe damage to the interagency cooperation among police and prosecutorial agencies upon which effective law enforcement depends.

### C. Attacks on BiH and RS Institutions

77. In addition to the recent actions of the BiH Prosecutor and SIPA directed against the RS and its largest party, described above, there have been other politically motivated arrests, detention and harassment of senior BiH government and political party officials. The arrest and detention of SBB party President Fahrudin Radončić, former BiH Ministry of Security director Bakir Dautbasic, and some of their associates follow a familiar pattern. A legitimate investigation of suspected criminal actions which could have been handled quietly and cooperatively was instead effected by highly publicized arrests conducted by armed and masked SIPA agents on a surprise basis with no advance warning except, apparently, to the press and certain political leaders who announced the raids in a press conference almost before they occurred. Though wrongly described as actions to combat corruption, these actions instead fall within the long pattern of ethnic discrimination and abuse of authority to support certain political parties by BiH-level prosecutors and courts.

78. In response to understandable criticism of such action, including by attorneys for those under investigation, the BiH Prosecutor's Office has threatened individuals with severe sanctions.<sup>36</sup> The BiH Prosecutor's Office also called for a member of the HJPC to be dismissed on the basis of comments on a case.<sup>37</sup>

79. Illegal and highly political actions of BiH prosecutors are unfortunately all too common. The pattern is always the same. A political figure is accused and prosecuted for offenses that the prosecutor cannot prove or over which the BiH Court lacks jurisdiction. There is much negative publicity created about the accused and lengthy proceedings which interfere with the official's ability to perform his duties, cause personal embarrassment and impose the expenses of defense. There are immediate demands from political opponents and some in the international community that the accused be dismissed from office pending the final outcome of proceedings. Finally, all charges are dismissed for lack of jurisdiction or lack of proof.

80. The 2013 arrest and detention of Federation President Zivko Budimir, along with four members of his staff and associates, on dubious substantive and jurisdictional grounds is a recent example. The case against President Budimir was ultimately dismissed for lack of jurisdiction.

81. In early 2006 Mirko Sarovic, currently BiH Minister of Foreign Trade and Economic Relations, was charged with abuse of office and other crimes alleged to have been committed between 1998 and 2002 when Sarovic was RS Vice President and then President. He was acquitted of all charges in October 2006. In 2005 and again in 2009, current BiH member of the Presidency Dragan Čović was charged with abuse of office and other crimes. After lengthy proceedings in both cases, Mr. Čović was acquitted of all charges. In both cases, these elected senior officials were effectively removed from office before the final outcome.

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<sup>36</sup> BiH Prosecutor's Office, DEMANT TUŽILAŠTVA BOSNE I HERCEGOVINE, 15 Feb. 2016.

<sup>37</sup> BiH Prosecutor's Office, KOLEGIJ SVIH TUŽILACA TUŽILAŠTVA BiH TRAŽI SMJENU I SANKCIONISANJE POTPREDSJEDNICE VSTV-a RUŽICE JUKIĆ ZBOG NEPRIMJERENIH ISTUPA PROTIV PRAVOSUDNE ZAJEDNICE I TUŽILAŠTVA BiH, 16 Feb. 2016.

#### **D. Undermining the Fight against Terrorism**

82. The BiH Court and Prosecutor's destruction of credibility and waste of resources in pursuing political enemies has weakened the ability of BiH to respond to the terrorist threat to BiH and the Balkan region. The recent attacks in Paris and Brussels make clear that BiH is at risk as a result of its permissive policies toward existing radical groups such as the one that planned and facilitated an attack on the U.S. Embassy in Sarajevo.<sup>38</sup> As well-understood, past terrorist attacks in Europe and the U.S. have involved terrorists with connections to BiH.

83. The abuse of prosecutorial and SIPA authority described in this report also seriously undermines the trust and cooperation among cantonal, Entity, and BiH-level authorities desperately needed to combat the threat posed by returnees from Syria, Iraq and elsewhere. A large number of BiH citizens, relative to its small population, have joined terrorist organizations fighting with Al Qaeda and ISIS. This presents a significant threat of terrorist incidents by returnees. Bosniak political and security authorities in Bosnia have been very slow and reluctant to accept the need for attention to this threat. At a recent conference, an expert on Balkan terrorist organizations noted that authorities in BiH faced gaps in monitoring associates of suspected and known extremists. *Balkan Insight* reported, "Speaking of a 'key figure' among Islamic extremists who is believed to have radicalised and supported violent jihadism, [Uros] Pena said that security agencies had failed to identify other Bosnians who the suspect was in touch with."<sup>39</sup>

84. In March, the Court of BiH sentenced a man who fought for ISIS to just one year in prison or, alternatively, a fine.<sup>40</sup> Such an outrageously lenient sentence is a meaningless penalty in light of the gravity of the crime and creates no deterrent against BiH citizens joining ISIS (and other jihadist organizations) and returning to Europe as serious terrorist threats.

#### **E. Protection of Citizens' Rights**

85. The Government of Republika Srpska intends to take all reasonable and appropriate legal measures to protect citizens' constitutional, human, civil, and political rights against violations of law and dangerous activities of the BiH Prosecutor and SIPA. Domestic and international law protects citizens and elected and appointed government officials from these sorts of politically motivated actions.

86. BiH and RS law includes prohibitions of abuse of authority by public officials. The BiH Constitution and international law protect citizens from violations of their human, civil, and political rights. The BiH and Entity constitutions provide for separation of governmental powers among legislative, executive, and judicial branches of BiH and the Entities. Among the near-universal provisions of European domestic law to protect separation of powers and prevent abuse of authority are laws that provide to senior elected and appointed public officials appropriate and conditional immunity and inviolability from criminal and civil prosecution. These widely accepted immunities from prosecution during an official's term of

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<sup>38</sup> Denis Dzidic and Amer Jahic, *Bosnia 'Failing to Share Terror Threat Intelligence'*, BALKAN INSIGHT, 1 April 2016.

<sup>39</sup> Rodolfo Toe, *Incomplete Analysis Hinders Anti-Extremism in the Balkans*, BALKAN INSIGHT, 30 March 2016.

<sup>40</sup> *Emin Hodžić sentenced to Prison for fighting in Syria*, SARAJEVO TIMES, 22 March 2016.

office prevent politically motivated abuses of the criminal justice system such as those described above. Decrees by High Representative Paddy Ashdown drastically diminished such immunities in BiH and the Entities, such that they contrast sharply with the law and practice throughout Europe.<sup>41</sup> This has contributed to the ability of the BiH Prosecutor and SIPA to abuse prosecutorial powers for political reasons, seriously threatening the integrity of BiH and Entity institutions in violation of constitutional principles of separation of powers and rule of law.

#### **F. Prohibition of Interference in Domestic Affairs by Foreign States**

87. International law and practice, including resolutions of the United Nations General Assembly, the United Nations Charter, and the Vienna Convention on Diplomatic Relations prohibit interference by embassies and diplomatic officials in the internal affairs of their host states. It appears that these widely accepted legal provisions have been violated by those embassies in Sarajevo known to have had involvement related to the actions of the BiH Prosecutor described in this report.

#### **IV. Conclusion**

88. As the RS Government works to improve the economic condition of its citizens and works toward EU integration, it asks members of the international community to respect the Dayton Accords and support local reform initiatives in BiH. An important way the international community can support reform in BiH is by closing the OHR, which has an unfortunate history of abusing the rule of law and interfering unlawfully in the internal affairs of BiH, stifling its development. The RS has continued to implement important economic reforms and to align its laws with EU *acquis*. Though the RS is also supporting reforms at the BiH level, progress has been slow because of deep political divisions at the BiH level and due particularly to obstruction by Bosniak parties. Dysfunction at the BiH level is among the reasons why it is essential to preserve BiH's decentralized constitutional structure, which enables the RS's functional governance and program of economic reform. The BiH-level judicial and prosecutorial system is in great need of change in order to meet European standards and preserve the rule of law; however, its institutions are fighting the necessary reforms and increasing their abuse of authority for political purposes.

89. BiH, though burdened with deep political divisions like so many countries, has been peaceful and secure for many years; there is no security threat that could possibly justify the Security Council acting under Chapter VII of the UN Charter. The Security Council should thus end the application of Chapter VII measures. Failure to do so is unnecessarily detrimental to BiH's progress.

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<sup>41</sup> For an examination of European law and practice, see Tilman Hoppe, *Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe*, VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW, Apr. 2011, at 538.

**Attachment -- Joint Declaration of Political Leaders of Republika Srpska  
on the Decision of the BiH Constitutional Court of 26 November 2015**

Expressing the RS commitment for a consistent observance of the GFPA, which acknowledges and guarantees the constitutional position of the RS as one of the two entities BiH is composed of;

Starting from the fact that the international sovereignty of BiH was established by the GFPA based on the institutional will expressed by the two entities and a political agreement reached by the representatives of the three constituent peoples;

Rejecting any attempt to call in question the RS and its subjectivity and sovereignty;

Noting the damaging consequences and effects produced by the Decision of the BiH Constitutional Court of 26 November 2015 with regard to peace, stability and trust in BiH;

Given the fact that the RS was promulgated on 9 January 1992 by the Assembly of the Serb People in BiH, before the armed conflicts in BiH, and that the RS, as such, did participate in the peace conference in Dayton and signed the Annexes to the Agreement as a party thereto;

Having regard to the fact that the Day of the Republic of Srpska, 9 January, is a legal holiday of the RS, which is further reiterated by the Venice Commission in its opinion of 14 October 2010 produced at the request of the BiH Constitutional Court;

We, the undersigned, with regard to the abolition of certain provisions of the RS Holidays Act, hereby adopt the following:

**DECLARATION**

1. The Decision of the BiH Constitutional Court of 26 November 2015, whereby certain provisions of the RS Holidays Act are found incompatible with the BiH Constitution is an unacceptable act, the aim of which is to deny the legality and legitimacy of the RS and the constitutional organisation of BiH established by the Dayton Peace Agreement and as such cannot be implemented because it is imposed; hence, we demand that the BiH Constitutional Court annuls this Decision;
2. The Decision was rendered under the influence of international judges, which demonstrates that the Constitutional Court is not autonomous and independent in its work; hence, we reject any interference of international judges in the Court's adjudication process, including the pressure exerted by the international representatives to implement this Decision;
3. We support the RSNA Declaration No. 02/1-021-457/15 of 17 April 2015 with regard to the application No.U-3/13 filed with the BiH Constitutional Court to evaluate the constitutionality of the RS Holidays Act;
4. The Decision of the Constitutional Court of 26 November serves the attempts to review historical events leading to the establishment of the RS on 9 January 1992, which is absolutely unacceptable;
5. We call on the RSNA to reject any future decision of the BiH Constitutional Court that intervene in the status issues of the RS that is rendered by outvoting;
6. The RS will continue to celebrate the Day of the Republic on 9 January in accordance with the RS Holidays Act, which contains no elements of discrimination whatsoever, does not jeopardise any ethnic or religious identity or equality of any of the three constituent peoples, and is fully compliant with universal values and European acquis;
7. We demand that the BiH Parliamentary Assembly, within 120 days, enact a bill on the BiH Constitutional Court, which would specify that decisions are rendered only when at least one judge from all constituent peoples and both entities vote. Under this Bill, the BiH Constitutional Court will not have any foreign judges;

8. If a new bill on the BiH Constitutional Court is not enacted within the period of 4 months, the political parties will decide whether they will further participate in the work of the BiH joint institutions and sign a joint declaration to that end;
9. We agree that an analysis of all decisions rendered by the BiH Constitutional Court since 2001 be carried out, and that the RS NA issue its conclusions in that respect, in particular with regard to the decisions where the three foreign judges and two Bosniak judges outvoted the other judges;
10. We agree that the RS NA render a decision and call a referendum for the people to decide whether to accept the Decision of the BiH Constitutional Court abolishing the Day of the Republic, 9 January;
11. We call on all stakeholders, political parties, associations, organisations, institutions and citizens to support the positions of the signatories to this Declaration with their signatures. The Office of the President will decide on the manner in which this will be appropriate and available.
12. We agree to sign this joint declaration and persist in the implementation of the above positions:

SNSD -Milorad Dodik

SNSD

PDP

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DNS

Socialist Party

NDP

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RS Government  
Željka Cvijanović, Prime Minister

RS NA  
Nedeljko Čubrilović, Speaker

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RS Council of Peoples  
Nada Tešanović, Chairperson

RS Member of the BiH Presidency  
Mladen Ivanić

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BiH PA House of Representatives  
Mladen Bosić, Deputy Speaker

BiH PA House of Peoples  
Ognjen Tadić, Speaker

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BiH Council of Ministers  
Mirko Šarović, Deputy Chairman

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Banja Luka, 29/11/2015