

# Western Collusion in Undermining the Rule of Law in Bosnia and Herzegovina: An Overview

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	I
INTRODUCTION.....	1
I. BIH’S POST-WAR RULE OF LAW REFORMS – AN EU-INTEGRATION ROLE MODEL.....	4
II. WESTERN COMPLICITY IN UNDERMINING THE RULE OF LAW – THE LEGACY OF THE PAST DECADE.....	7
The 2009 international judges and prosecutors’ decision.....	8
The 2011 RS Law on Courts.....	9
The Law on Courts of BiH.....	10
The Constitutional Court of BiH’s international judges under pressure.....	11
Decentralization of war crimes prosecution.....	12
Rolling back police reform achievements.....	13
III. THE WEST’S SUCCESSFUL PUSHBACK AGAINST THE OCTOBER 2017 HJPC CONCLUSIONS.....	13
IV. THE EU’S DECLARED RULE OF LAW PRIORITY – ONE AND A HALF YEAR(S) ON.....	15
V. CONCLUSIONS AND RECOMMENDATIONS.....	16

## EXECUTIVE SUMMARY

Three legal cases/political scandals during 2018-19 grabbed the attention of the domestic public and the international community in Bosnia and Herzegovina (BiH). The first two concerned the unresolved deaths of two young men, Dženan Memić in Sarajevo and David Dragičević in Banja Luka. The improper investigative conduct of the police and judiciary regarding their deaths raised suspicions of cover-ups and political interference. The third concerned corruption allegations against Milan Tegeltija, then president of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC), the BiH judiciary's self-managing body.

The three cases marked the nadir of a steady decline of the rule of law institutions in BiH over the last decade and a half, and stand in stark contrast to 2005 when BiH was a frontrunner among Western Balkan countries aspiring to European Union (EU) membership. Rule of law achievements until then had been the result of substantial and systematic judicial and (to a lesser degree) police reform carried out during the immediate post-war period under the leadership of the international community.

The subsequent decline was the result of continuous and largely successful efforts by ruling ethnic elites in rolling back previous reform achievements. While state-level institutions such as the Court of BiH, the Prosecutor's Office of BiH and the HJPC were particular targets of attack, the independence of the judiciary (and operational autonomy of the country's various police administrations) were subjected to systematic, grinding attrition. This U-turn in the development of the rule of law in BiH was enabled by the international community's policy shift in 2005 from the immediate post-war "Dayton" phase to the "Brussels" phase and towards a dogmatic adherence to the concept of "local ownership," which has proven an utter failure. It created a power vacuum soon filled by the ethnic elites' unfulfilled nationalistic agendas and corrupt interests and left the international community and its institutions, now headed by the EU, without a political strategy. Weakened by this lack of a political strategy, the international community suffered from insufficient political will to push back seriously against the ruling elites' reform rollback attempts. As a result, it compromised over the rule of law to an extent which amounted to *de facto*, and in several cases outright, collusion.

The main episodes of that relationship that ensued over the last decade include: the December 2009 decision to prematurely terminate the mandate of international judges and prosecutors dealing with organized crime and corruption, the 2011 Republika Srpska (RS) Law on Courts that contained provisions that undermined the authority of the HJPC, negotiations on a BiH Law on Courts that proceeded within the framework of the so-called EU-led Structured Dialogue on Judicial Reform, various attacks on the Constitutional Court of BiH (CC BiH), the post-2012 decentralization of war crimes prosecutions, and continuous attacks and initiatives aimed at undermining the operational autonomy of the police.

These largely successful attacks on key rule of law institutions resulted in systematic reform rollbacks that have had a huge and devastating impact on those working in the rule of law institutions, and on citizens more generally. Most officials in the judiciary and police over time have given up defending the independence of their institutions as well as their own professional integrity. Even more damaging, BiH citizens have lost all hope in the rule of law institutions, in the delivery of justice, in securing public and

personal security, and in the international community, particularly the EU, as an actor defending and promoting the rule of law. That attitude of resignation and the sense that fundamental improvements are impossible represent a foundational factor underlying citizens' mass exodus from BiH that has been unfolding over the last couple of years.

In 2019, the European Commission (EC) published three key programmatic documents on BiH – the May Avis, its Opinion on BiH's application for candidate status, and an accompanying Analytical Report, and the December "Expert Report on Rule of Law Issues in BiH" known as the Priebe Report, declaring the rule of law to be the EU's new top priority in BiH and requesting and conditioning substantial, comprehensive reform. However, two years on, there is close to zero progress on those reform conditions in BiH. Moreover, both the Avis and the Priebe Report had failed to address the EU's legacy of past co-responsibility for successful reform rollbacks in the rule of law institutions. Without the EU owning up to the responsibility it shares for the damage done to the judiciary and the police through these episodes and taking action to repair that damage, substantial progress in promoting the rule of law will be impossible, and making the rule of law the Union's top priority will remain a mere empty declaration.

This paper serves as an introduction to a policy paper/note series entitled "*The Decline of the Rule of Law in Bosnia and Herzegovina and the Role and Responsibility of the International Community*" that constitutes a central component of a project launched in 2019 by the Democratization Policy Council (DPC) with the support of the Heinrich Böll Foundation office in Bosnia and Herzegovina. It is aimed at initiating a dialogue among Western diplomats and officials on the international community's co-responsibility for the decline of the rule of law in BiH – with each subsequent paper covering one of the key episodes stated above – focused on how the damage done can be repaired, and how international actors can contribute to a re-strengthening of the rule of law institutions in BiH.

## **Recommendations**

More detailed and granular recommendations will be offered throughout this policy paper/note series.

To (re)strengthen the rule of law in BiH, the EU and its Western allies need to undertake several crucial measures:

- EU officials need to strongly advocate in BiH for implementation of the rule of law-related reforms contained in the 2019 Avis and the Priebe Report and actively and explicitly link them to the broader issue of constitutional reform, particularly with respect to the establishment of a Supreme Court and the defense of state-level judicial institutions,
- the EU and other Western actors should drop the artificial "deadline driven" prioritization of reform of the BiH electoral system, including "limited constitutional reform," an issue that is better addressed once they've agreed on a comprehensive, long-term policy strategy on BiH, including constitutional changes, and instead focus on rule of law reform issues,
- the EU, the OSCE, and bilateral Western donors need to reconceive their existing individual programs for engagement of foreign judges and prosecutors in an advisory role in the BiH judiciary

as a single joint strategy that focuses on the judicial institutions that prosecute sensitive cases of high-level (political) corruption and organized crime,

- the EU and other Western actors need to forcefully advocate and push for both previously planned and additional legislative measures which aim to re-establish the basic accountability and judicial integrity of judges and prosecutors and of HJPC members. Such actions must include the immediate adoption of the prepared amendments to the Law on HJPC and the subsequent adoption of a new Law on HJPC aimed at a comprehensive reform of the Council (its functions, competences, tools and procedures) to improve its functioning and to reconstitute its independence. Among the specific measures to include in new legislation should be a one-time reappointment process of all Council members based on a revamped vetting process and a basis for the further evolution of existing (quantitative and qualitative) criteria by which the HJPC evaluates the performance of judges and prosecutors,
- the EU and the US need to acknowledge and address the legacy of their past actions in the rule of law arena and remedy the damage inflicted on the judiciary; in particular, the RS Law on Courts must be amended and Western representatives should encourage the appropriate domestic actors to file a request for review on constitutionality with the CC BiH aimed at a potential revision of the Ljubić ruling, instead of insisting on its implementation,
- the EU, together with its Western partners, and in close cooperation and consultation with broader civil society, needs to develop and implement a comprehensive strategy to counter the denial and glorification of war crimes prevalent in society including among politicians,
- EU representatives, EU member states and other Western ambassadors in BiH need to empower judges and prosecutors and other judicial officials who uphold the independence and integrity of the judiciary by backing them in their work and independent decision-making through public statements of encouragement and direct support to the institutions they serve,
- the EU, the OSCE and other Western actors need to closely monitor the Prosecutor's Office of BiH's handling of the Memić case and press for the Office to also open an investigation into the Dragičević case,
- the EU needs to work with independent BiH experts and other stakeholders to develop and adopt a comprehensive police reform strategy that contains conditionality comparable to the existing conditionality for the judiciary. Because the police issue is not adequately covered by the EU acquis, the initiative must come from the European Council, i.e., from dedicated member states, and as part of the political criteria for EU accession (the Copenhagen criteria),
- EU and other Western officials must consistently apply reform conditionality, particularly on the rule of law in BiH, as well as on the rules that define and guide their presence and work in BiH. Evading self-set rules sends a devastating message to political elites and the wider public in BiH, inflicts lasting damage on the country's legal culture, and discredits Western efforts to strengthen the rule of law.

## Introduction

From 2018-19, three episodes in Bosnia and Herzegovina (BiH) that can be viewed as both legal cases and political scandals, caught the attention of the domestic public and of the international community in the country. Together, they marked a low point in a decade-long downward trajectory of the rule of law in BiH.

The first two cases concerned the unresolved deaths of two young men, David Dragičević in March 2018 in Banja Luka, and Dženan Memić in February 2016 in Ilidža, on the outskirts of Sarajevo. The two cases sparked citizen protests, spearheaded by the men's fathers and at times unified, against the clearly improper conduct of authorities, including police and prosecutors. The cases share compelling similarities in how they were handled by both police and prosecutors:<sup>1</sup> deliberate negligence in securing forensic evidence; shifting assessments of the manner of death which alternated between accident and murder, ending in declarations that they were accidents; ample evidence of unprofessional conduct by both the judiciary (particularly the prosecution) and the police throughout the entire legal process, as confirmed by parliamentary inquiry committees (the Republika Srpska National Assembly and Canton Sarajevo Assembly<sup>2</sup>); compelling accusations that the murders were connected to the ruling elites; and confirmed suspicions of "elements of a cover-up"<sup>3</sup> by the rule of law institutions, and in the Dragičević case through the direct intervention of the Republika Srpska (RS) government and of then entity President Milorad Dodik in the criminal investigation. The long-running protests – the 'Justice for David' protests in the RS were the largest and lengthiest demonstrations against the rule of Milorad Dodik in a decade and a half – drew citizens from all strata and of all ages. They were a clear sign that citizens had lost hope in the state to ensure equal access to justice and that they needed to take things into their own hands. Thus, the parents of David Dragičević organized their own second forensic examination of the body of their son. Muriz Memić, the father of Dženan, explained at a press conference that "from now on, I am the chief prosecutor, and Dalida Burzić [the Sarajevo cantonal prosecutor in charge] is the criminal."<sup>4</sup>

The third case concerned corruption allegations against Milan Tegeltija, then president of the 15-member High Judicial and Prosecutorial Council of BiH (HJPC). The HJPC, a state-level, independent body charged with ensuring an independent, impartial and professional judiciary, formed the centerpiece of the international community-led post-war judicial reform strategy. Among its many tasks is disciplinary responsibility for judges and prosecutors. Despite publication of a video that showed Tegeltija accepting bribes from a domestic businessman in return for a promise to intervene in the man's court case,<sup>5</sup> an

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<sup>1</sup> Complete minutes of the RS National Assembly inquiry committee; "DOSSIER: Slučaj Dženana Memića, potraga za istinom i pravdom," *Analiziraj.ba*, July 23, 2018, available at: <https://analiziraj.ba/2018/07/22/dossier-slucaj-dzenana-memica-potruga-za-istinom-i-pravdom/.s>

<sup>2</sup> *Izveštaj "Ad hoc" tijela Komisije za sigurnost Skupštine Kantona Sarajeva*, January 31, 2017.

<sup>3</sup> *Izveštaj Anketnog odbora s ciljem sagledavanja svi relevantnih činjenica vezanih za slučaj stradanja Davida Dragičevića*, Anketni odbor Narodne Skupštine Republike Srpske, Banja Luka, June 2018.

<sup>4</sup> Slučaj Dženana Memića, potraga za istinom i pravdom.

<sup>5</sup> "Predsjednik VSTV-a uhvaćen u korupciji: Milan Tegeltija trgovao krivičnim istragama!," *Zurnal.info*, May 21, 2019, available: <https://zurnal.info/novost/22105/milan-tegeltija-trgovao-krivicnim-istragama>; "Pogledajte video

HJPC disciplinary process was concluded with no disciplinary action taken against Tegeltija. On the contrary, in an anonymous, informal vote, the Council expressed unanimous support for its president.<sup>6</sup> As a consequence of the HJPC's actions, citizens' trust in the HJPC and the judiciary reached an all-time low. In a poll conducted directly after the proceedings were made public, 74 percent of citizens across the entire country expressed dissatisfaction with the state of the BiH judiciary, while an absolute majority in both entities supported the resignation of Tegeltija, as well as all other members of the HJPC.<sup>7</sup>

Against that backdrop, in 2019 the EU declared the rule of law a new priority of its BiH policy. In May 2019, the European Commission (EC) published the *Avis*, its Opinion on BiH's application for EU membership, and an accompanying Analytical Report.<sup>8</sup> And that December, it published the "Expert Report on Rule of Law Issues in Bosnia and Herzegovina,"<sup>9</sup> informally known as the "Priebe Report", partly in reaction to public demand in BiH for better justice in response to the mishandling of the Memić and Dragičević cases.<sup>10</sup> It was compiled by a group of independent European experts headed by former EC official Reinhard Priebe, a German national. According to EC officials, Priebe was recruited from outside the Commission to take "a more systematic approach to the judiciary."<sup>11</sup>

The three EC documents stand out for their candid language on the rule of law and descriptions of the dire state of the judiciary in BiH, as well as for their strong recommendations on conditionality. Thus, the Analytical Report states that "corruption is widespread" and that "all levels of government show signs of political capture."<sup>12</sup> In the Opinion, the EC lays out 14 sets of reform conditions, so-called "priorities" – about half of them relating to strengthening the rule of law – that must be met for the EU just to *open* accession negotiations with BiH. Moreover, the Opinion makes a direct link between the constitutional structure of the state and its weak rule of law and underscores the fragmentation of the judiciary and the lack of a "state-level supreme court." Establishment of a supreme court is a condition under priority no. 4 that aims at "fundamental improvement of the institutional framework, including at the constitutional level."<sup>13</sup> More directly, the Priebe Report stresses the importance of constitutional

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potkivanja: Ti ćeš meni sve dostaviti pa ću ja vidjeti sa Dalidom!," *Zurnal.info*, May 23, 2019, available at: <https://zurnal.info/novost/22111/ti-ces-meni-sve-dostaviti-pa-cu-ja-vidjeti-sa-dalidom>.

<sup>6</sup> "State of play on the major crisis in BiH judiciary, involving the President of the High Judicial and Prosecutorial Council," EUSR BiH report to Thomas Mayr-Harting, Managing Director for Europe and Central Asia, European External Action Service (EEAS), Sarajevo, June 24, 2019.

<sup>7</sup> Non-public opinion poll commissioned by an international organization in BiH on citizens' views on the HJPC and BiH judiciary, dated June 2019.

<sup>8</sup> *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, Analytical Report*, Communication from the Commission to the European Parliament and the Council, Brussels, May 29, 2019, both available at: [https://ec.europa.eu/commission/presscorner/detail/de/COUNTRY\\_19\\_2778](https://ec.europa.eu/commission/presscorner/detail/de/COUNTRY_19_2778).

<sup>9</sup> *Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, European Commission, Brussels, December 5, 2019, available at: [http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf?utm\\_source=Klix.ba&utm\\_medium=Clanak](http://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf?utm_source=Klix.ba&utm_medium=Clanak).

<sup>10</sup> Interview with EU officials, Brussels, January 2020.

<sup>11</sup> Interview with EU officials, Brussels-Sarajevo, May 2019.

<sup>12</sup> *Analytical Report*, p. 28.

<sup>13</sup> *Avis*, p. 8, pp. 14-16.



changes. In the section on “overcoming constitutional weaknesses,” the authors note that „serious work on reforming the constitutional framework of the country has to start without any further delay.“<sup>14</sup>

Given that between 2000 and 2005 substantial and systematic judicial reform and (more limited) police reform was successfully carried out in the country under the leadership of the international community in BiH, the current dire state of the rule of law and rule of law institutions in BiH is nothing short of astonishing. By 2005, BiH was the frontrunner among the Western Balkan potential candidates for EU membership on rule of law reforms.<sup>15</sup> BiH's fall from head of the pack to the current low point in its rule of law development was largely the result of a successful policy of continuous and systematic rollback of judicial and police reforms pursued by ruling elites over the last decade. The international community, but particularly the EU (and the US), bears a substantial degree of responsibility for acquiescing to the targeted destruction of previously achieved progress on strengthening the rule of law. The 2005 shift in Western policy towards BiH from US to EU leadership and from an internationally driven post-war policy of establishing basic features of state functionality, democracy and rule of law to a policy of domestic „ownership“ was a failure that left the West without a consistent and clearly defined policy for moving forward in the absence of genuine local political interest in reform progress. The subsequent lack of sufficient political will to push back against reform rollback resulted in inconsistent and ineffective Western performance which – even if unintentional – effectively empowered BiH's ruling elites, but also included *direct acts of collusion* by high-level officials of the EU and the US. The dire state of many key rule of law institutions in BiH today is a direct result of that Western malperformance.

The EU's mere declaration that its top political priority in BiH now is to strengthen the rule of law is inadequate and will not result in meaningful change. The EU cannot be successful moving forward without first undertaking a critical self-examination of its past performance aimed at confronting and remediating the lasting damage done to the rule of law. This essential task must be integrated into the EU's reform conditionality requirements for BiH. Regrettably, the three 2019 EC documents on BiH do not address this issue. The question of whether sufficient political will exists for the EU to fight for lasting constructive change in BiH has been raised not only by EU member states representatives, but allegedly by Priebe himself while working on his report.<sup>16</sup> Taking on the legacy of past misconduct will be a litmus test for whether the Union's declared priority in BiH is underpinned with sufficient political will.

This paper is the first in a series of policy papers/notes entitled “*The Decline of the Rule of Law in Bosnia and Herzegovina and the Role and Responsibility of the International Community*” that aims to document and detail the dynamics of the West's performance – both its successes and its failures – in promoting and advancing the rule of law in BiH to better enable the West to successfully realize the aims proclaimed in the three 2019 EC documents. The series constitutes a central component of a policy dialogue project launched in 2019 by the Democratization Policy Council (DPC) with the support of the Heinrich Böll Foundation office in Bosnia and Herzegovina designed to inform and provide guidance to

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<sup>14</sup> Priebe Report, V.96.

<sup>15</sup> Interview with a legal expert involved in an EC commissioned 2004 evaluation of judicial reforms in all Western Balkan states, February 2021.

<sup>16</sup> Interviews with EU member states representatives and accounts of Western diplomats' conversations with Reinhard Priebe, Sarajevo 2019.

Western policymakers on the best ways to promote and advance the rule of law in BiH.

This introduction is the first paper in the series. Each subsequent paper will focus on a key international intervention in greater detail, and provide recommendations on how to repair the damage inflicted with the ultimate goal of (re)strengthening the rule of law in BiH. Section one of this paper provides an overview of the main BiH post-war judicial and police reform efforts and achievements. Section two offers a summary of the principal episodes of Western *de facto* and actual collusion with BiH's political elites to systematically roll back reforms that directly contributed to the decline of key rule of law institutions. Each episode will be the featured topic of each of the remaining papers in the series. Section three analyzes a recent example of a successful Western pushback against an attempted rule of law reform rollback, demonstrating that the West has leverage when there is sufficient political will to exercise it. Section four briefly examines the state of implementation of the EU's announced objective to strengthen the rule of law in BiH one and a half years after publication of the Priebe Report. The final section draws conclusions and provides general recommendations for further action.

This paper, and the entire series, is based on over a decade of continuous research on, and monitoring of, the development of the rule of law in BiH and the performance of the ruling elites and that of the international community, particularly the EU, but also the US. Research and monitoring was facilitated by frequent fact-finding missions to BiH, by access to relevant public and non-public material and documents (in English and Bosnian), and by numerous interviews with representatives of the BiH judiciary, police and state authorities and with Western diplomats and representatives of relevant international organizations active in the field of the rule of law in BiH, including Western lawyers and police experts. To the best of the author's knowledge, no comparable research and analysis has been undertaken and published to date.

## I. BiH's post-war rule of law reforms – an EU-integration role model

Re-establishing the rule of law was a cornerstone of the international community's post-war efforts in BiH to restore public order and safety and support a sustainable democratic and multiethnic society. Rule of law reforms undertaken in BiH can be viewed as part of a second wave of international rule of law promotion efforts that started in the mid-1980s in Latin America and rapidly expanded via the former socialist block to other regions of the world.<sup>17</sup> Post-Dayton, the judiciary and police in BiH were burdened by the dual legacy of the late socialist era and wartime cooptation.<sup>18</sup> In socialist Yugoslavia, the judiciary functioned on the basis of civil law traditions and largely secured the rule of law. In the context of the economic and wider socio-political systemic crisis of the 1980s, a dramatic erosion of legal culture and the rule of law began. During the 1992-95 Bosnian war, the rule of law was mostly suspended as the judiciary and police were transformed by the warring sides into tools of a policy of

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<sup>17</sup> Thomas Carothers (Ed.), *Promoting the Rule of Law Abroad. In Search of Knowledge*, Washington D.C., 2006, pp.15 ff.

<sup>18</sup> "The Judiciary," in: *Assessing the potential for renewed ethnic violence in BiH. A security risk analysis*, DPC-Atlantic Initiative policy report, Sarajevo-Berlin 2011, pp. 48-52; available at: [http://www.democratizationpolicy.org/pdf/DPC-AI\\_BiH%20Security\\_Study.pdf](http://www.democratizationpolicy.org/pdf/DPC-AI_BiH%20Security_Study.pdf).

ethnic cleansing and mass criminalization. Post-Dayton BiH inherited both a culture of impunity and a constitutional order that atomized responsibility for the rule of law. The country was subdivided into two entities, the Republika Srpska and the Federation of BiH, with the Federation further subdivided into 10 cantons. Courts and police agencies proliferated at the entity and cantonal/regional level and in Brčko District. Thirteen justice ministries and 13 interior ministries were created to oversee the sprawling rule of law system with originally only the Constitutional Court of BiH (CC BiH) at state level.

Judicial reform was carried out during the first half of the 2000s and was driven by the highest civilian international authority in BiH, the High Representative, head of the Dayton-created Office of the High Representative (OHR). An Independent Judicial Commission (IJC) comprising international and national law experts was established in 2000 by the High Representative. Over a period of four years, the IJC coordinated and guided a judicial reform process that profoundly reframed the institutional and legal setting in BiH.

As one of the core reforms aimed at re-professionalizing and de-politicizing the judiciary and overcoming its fragmentation, the HJPC was established and unified (from initial entity-level judicial and prosecutorial councils) into one state-level body in 2004.<sup>19</sup> The HJPC is vested with the sole authority to appoint all judges and prosecutors in BiH at all levels (except for constitutional court judges at state and entity levels). It has exclusive authority over disciplinary procedures for judges and prosecutors, a key role in drafting judicial budgets, a coordinating role over training and judicial reform which includes the management of donations, and a range of other competencies to ensure the effective and efficient operation of courts and prosecutors' offices. Eleven of its 15 members are judges and prosecutors elected by their peers, two are lawyers elected by their respective entity Bar Associations and two are representatives from the legislative and executive branches of government, with the ostensible aim to institutionally insulate the body from political influence.

Under the auspices of the HJPC, the IJC conducted two major structural reforms that to date remain unique for the Western Balkans in terms of consistency, rationality, and insulation from political interference.<sup>20</sup> The first was a court restructuring<sup>21</sup> reform based on rational, apolitical criteria. It reduced the number of first-instance courts by 41 percent and re-established the multiethnic character of courts and prosecutors' offices throughout the country. The second reform was a systematic vetting process by way of conducting a full-scale reappointment process for all judges and prosecutors aimed at purging those who were unqualified or had problematic war records. It removed 30 percent of sitting judges and saw 80 percent of acting court presidents not re-appointed to their previous positions.

Other vital reform measures included a substantial increase in the salaries of judges and prosecutors that were legally protected, and the introduction of information and communication technology (ICT)

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<sup>19</sup> High Judicial and Prosecutorial Council of BiH, *The HJPC – a fundamental and irreversible component of the Judicial Reform Process in BiH*, Informative Overview, Sarajevo, October 2012.

<sup>20</sup> Sven Marius Urke, "Establishment of an independent and accountable judiciary in countries in transition: Bosnia and Herzegovina as a case study", in: Nils Asbjørn Engstad, Astrid Lærdal Frøsethøg, Bård Tønder, Dommernes uavhengighet, Oslo 2012, pp.347-372.

<sup>21</sup> David Pimentel, *Restructuring the courts: in search of basic principles for the judiciary of post-war BiH*, Florida Coastal School of Law, January 2008, available at: [http://works.bepress.com/david\\_pimentel/1](http://works.bepress.com/david_pimentel/1)

throughout the whole of the judiciary, including an automatic, randomized case allocation system to protect against outside interference in the courts. Through the imposition of new legislation, the High Representative established the Court of BiH and the Prosecutor's Office of BiH. The Court<sup>22</sup> has state-wide, first- and second-instance jurisdiction that originally was limited to administrative disputes and electoral appeals. Two sections, or chambers – one for war crimes and one for organized crime, economic crime and corruption – were later added. The War Crimes Chamber initially was established to try lower to mid-level cases referred to it by the UN's International Criminal Tribunal for the former Yugoslavia (ICTY) and later gained jurisdiction to try war crimes cases initiated in BiH. The Organized Crime and Corruption (OCC) Chamber took on endemic (high-level, including political) corruption and organized crime cases in which the protected object was the State. In addition, the Court gained jurisdiction over cases that endangered the sovereignty, territorial integrity and independence of BiH. The structure and jurisdiction of the Prosecutor's Office of BiH mirrored that of the Court. In 2004, a Registry was established as an international institution authorized to manage and support the two sections of the Court of BiH as well as the Prosecutor's Office of BiH. International lawyers were prevalent in all these state-level bodies. The Prosecutor's Office initially was staffed exclusively by foreign prosecutors, while international lawyers and judges made up a fair share of the Court's judges in the two Chambers and also served in smaller numbers in various capacities in the HJPC. These international placements were in addition to those of one third of the judges in the CC BiH as foreseen in the Dayton Constitution. On-the-job learning served as the basis for an intended and gradual transition to domestic judges and prosecutors in subsequent years. Finally, new and largely harmonized Criminal Codes and Criminal Procedure Codes were adopted at state and entity levels.<sup>23</sup>

Similar structural reforms were undertaken to improve the professionalism of law enforcement. They included a reduction in the number of police officers to below the pre-war level, a professional vetting process for police officers that took into account wartime activities, the establishment of police administrations headed by newly established police directors at the entity level and by commissioners at the cantonal level with statutory operational independence from the interior minister, and the establishment of civilian oversight bodies with lead roles in appointing directors and commissioners.<sup>24</sup>

Those rule of law reforms faced basic challenges that marked the global post-1989 rule of law promotion agenda, which included the lack of a universally accepted definition of the rule of law, the need to adjust institutional solutions from an alien socio-political background to the socio-cultural context of BiH,<sup>25</sup> and the need to balance (judicial) independence with accountability.<sup>26</sup> The reforms

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<sup>22</sup> The Court of BiH, *The Court of BiH*, Sarajevo 2007, available at: [http://www.sudbih.gov.ba/files/docs/brosura/brosura\\_eng.pdf](http://www.sudbih.gov.ba/files/docs/brosura/brosura_eng.pdf).

<sup>23</sup> Sven Marius Urke, "Establishment of an independent and accountable judiciary in countries in transition: Bosnia and Herzegovina as a case study."

<sup>24</sup> "The police forces in BiH," in: *Assessing the potential for renewed ethnic violence in BiH*, DPC-Atlantic Initiative policy report, Sarajevo-Berlin 2011, pp. 39-47.

<sup>25</sup> See: *Promoting the Rule of Law Abroad*.

<sup>26</sup> David Pimentel, "Reframing the Independence vs. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity," *Cleveland State Law Review* Vol. 57 Issue 1, 2009, available at: <https://engagedscholarship.csuohio.edu/clevstrev/vol57/iss1/3/>.

implemented in BiH ultimately created important institutional conditions for the independence, effectiveness, efficiency and financial sustainability of the rule of law institutions. They were innovative not only when compared to developments in the wider Western Balkans region, but also when compared to many EU member states.<sup>27</sup>

Despite the success of the reforms, many problems remained.<sup>28</sup> In particular, the ethnoterritorial fragmentation of the judiciary (and of the police agencies) was a fundamental structural obstacle that threatened the sustainability of all of the rule of law reforms. It was understood within the international community that the reforms conducted before 2005 were not the end point, but rather the first chapter in a long-term process within the framework of BiH's EU integration process. The establishment of a state-level supreme court to ensure the consistent interpretation of the law throughout the country was a core reform condition in the EC's 2008 EU-BiH partnership document.<sup>29</sup> And an OHR-led police reform initiative begun in 2004, which aimed to transfer all police competences to the state level and conduct a territorial reorganization of the police agencies based on rational criteria, was made a condition for BiH's EU integration.<sup>30</sup> There was a strong foundation in place to begin an intentional and measured handover of full responsibility to BiH professionals in a manner that would ensure judicial independence and in turn position the country for further progress in reform. However, these reforms began to be reversed just as they were taking root.

## II. Western complicity in undermining the rule of law – the legacy of the past decade

Despite the success of these initial judicial and police reforms, the rule of law reform process in BiH did not continue as planned after 2005. The international community shifted its policy towards a policy of “local ownership,” which entailed handing over full responsibility to domestic political elites to continue reforms on their own within the framework of EU integration. However, without a constitutional order that guaranteed at least basic state functionality and popular accountability, or that provided a shared vision, this policy shift backfired. Unintentionally for the EU, it enabled a return to nationalist rhetoric and attacks on post-war state-building and democratization reforms, leading to wholesale use of the tools of patronage and fear that had served the political elites so well prior to the reform of the sector. This endeavor was spearheaded by the leadership of the RS, including its then Prime Minister Milorad Dodik, who initially targeted state-level judicial institutions. But he was soon joined by all the other political elites, once they recognized there would be no international response. The result was a systematic and profound rollback of rule of law reforms with the aim to return to a (post) war rules-free environment and to govern with no accountability – all while ostensibly remaining on the EU path, and sharing a legitimizing stage with leading EU and EU member state figures.

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<sup>27</sup> Many EU member states, for example, do not have judicial and prosecutorial councils or computerized court case allocation systems in place.

<sup>28</sup> “The judiciary,” pp. 49-50; “The police forces in BiH,” pp.41-43.

<sup>29</sup> Council decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008D0211>.

<sup>30</sup> “The police forces in BiH.” pp.40-41.

A divided West refused to publicly acknowledge the manifest failure of the new approach and lacked the will to change course and pursue a consistent policy on rule of law. The police reform initiative collapsed in 2007. The EU accepted a “substitute” agreement from political leaders to create several powerless state-level police agencies and to sign a written commitment for future police reform – Brussels never followed up on the latter.<sup>31</sup> In the face of effective and united resistance to reform, the EU simply caved and ignored the terms of its own BiH Partnership Document. The state-level Supreme Court condition disappeared from EC progress reports after 2010, and a 2012 Venice Commission opinion supporting the establishment of such a court was disregarded by Brussels – despite the Commission itself having requested the opinion.<sup>32</sup>

Encouraged by early success in blocking further rule of law reforms, BiH’s political elites have been profoundly successful over the last decade at undermining and rolling back post-war achievements that had effectively re-established and strengthened rule of law institutions. The following episodes expose the weak, inconsistent and compromising political performance of the West that has had such a destructive impact on the rule of law in BiH.

#### The 2009 international judges and prosecutors’ decision

In December 2009, the international community faced a crucial decision for the future of the reformed judiciary in BiH – whether to extend the executive mandate of international judges and prosecutors whose contracts were to conclude on December 31, or let it expire. Throughout the year, international actors had unsuccessfully tried to convince BiH authorities to extend for an additional three years the contracts of foreign lawyers formally embedded in BiH’s judicial system under a 2006 transition agreement. The request was vigorously supported by the leadership of state-level judicial institutions who warned of a possible collapse of the transition to local ownership process.<sup>33</sup> Yet the request met broad, multiethnic political resistance, catalyzed and led by Dodik. His attacks on the Court of BiH and the Prosecutor’s Office of BiH became personal in 2008 when the prosecution launched a corruption investigation into the construction of a new RS government building, with Dodik as one of the suspects. By September 2009, a near consensus in the Peace Implementation Council (PIC), including Western members and Turkey, with Russia isolated, emerged for the High Representative to exercise his power and impose an extension. However, in October, the so-called Butmir process, an EU-US constitutional reform initiative led by then Deputy Secretary of State James Steinberg and then-foreign minister of Sweden Carl Bildt when Sweden was presiding over the EU, was underway. The Butmir process, which aimed for minimal constitutional reform in order to close OHR and declare success on the ownership policy approach, changed the dynamics. Although by December it was clear that the initiative had failed, Steinberg, out of an unfounded hope in a 2010 revival of Butmir, managed to reverse the US position on international judges and prosecutors. On December 14, a divided PIC Steering Board, pressured by an RS

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<sup>31</sup> *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, Opinion No. 648/2011, Venice Commission, 15-16 June 2012 <http://www.venice.coe.int/webforms/documents/CDL-AD%282012%29014.aspx>.

<sup>32</sup> Kurt Bassuener, Bodo Weber, *House of Cards: the EU’s “reinforced presence” in Bosnia and Herzegovina*, DPC Policy Paper, Sarajevo-Berlin May 2013, pp.9-10, available at: <http://www.democratizationpolicy.org/pdf/may.pdf>.

<sup>33</sup> Minutes of the December 2009 PIC Steering Board meeting.

referendum threat on the state-level judiciary, forced the High Representative into a compromise – to extend the executive mandate only of those judges and prosecutors working in the politically less sensitive chamber on war crimes, and this only because of strong pressure from the UN war crimes tribunal (ICTY).<sup>34</sup> The decision, presented by the High Representative and the US as a contribution to the process of building local ownership, sent a devastating message to domestic lawyers working in the judiciary, particularly at state level, and had a serious and damaging practical impact. It set in motion the decline of the work of the Prosecutor’s Office of BiH and its independence and efficiency in prosecuting high-level, politically sensitive cases of organized crime and political corruption.<sup>35</sup>

### The 2011 RS Law on Courts

In May 2011, then EU foreign policy chief Catherine Ashton struck a deal with Dodik that established the “EU-BiH Structured Dialogue on Judicial Reform.” The unofficial rationale for creating the Structured Dialogue was ostensibly to reign in the RS’ attacks on the judiciary; in reality it further showed that local elite obstruction worked and bought both legitimacy and time. A month earlier, the RS National Assembly (RSNA) had adopted more than two dozen conclusions that defied the authority of the state-level judiciary, including the Constitutional Court of BiH, a Dayton institution, and scheduled a referendum on the High Representative’s previous use of his executive authority, particularly on establishing the Court of BiH and the Prosecutor’s Office of BiH. Ashton disregarded the emerging consensus within the PIC for the High Representative to annul the RSNA conclusions and its referendum decision, instead agreeing with Dodik on the Structured Dialogue, a new EC tool that functioned outside the established enlargement process and that therefore had no enforcement mechanisms, in return for the RSNA withdrawing the referendum decision. Officially, the Structured Dialogue was introduced as a platform for dialogue on further judicial reform efforts among representatives of the BiH judiciary, the various justice ministries and the EU. Ashton’s move, however, legitimized the RSNA’s decisions, which violated the Dayton Peace Accords and the country’s constitution, providing cover for and incentivizing further ethnopolitical attacks on the judiciary by Dodik. The Structured Dialogue never yielded positive results, but rather encouraged further attacks on the judiciary and the rule of law.<sup>36</sup>

The first such attack came with the December 2011 RSNA adoption of a new RS Law on Courts. The entity law proposal had been drafted by the RS justice ministry and sent to the assembly earlier in the year, entirely bypassing the Structured Dialogue, the agreed-upon platform to discuss all judicial reform proposals. The HJPC, in accordance with its competence to provide opinions on draft laws, regulations or issues of importance that may affect the judiciary, had reviewed the draft law and identified more

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<sup>34</sup> Kurt Bassuener, *Lessons Learned?*, DPC blog, October 2, 2015, available at: <http://www.democratizationpolicy.org/lessons-learned/>.

<sup>35</sup> Kurt Bassuener, Bodo Weber, ‘Are we there yet?’ International impatience vs. a long-term strategy for a viable Bosnia, DPC Policy Brief, Berlin-Sarajevo May 2010, pp.4-6, available at: <http://www.democratizationpolicy.org/pdf/policybrief1.pdf>; “Phasing Out International Judges and Prosecutors,” in: *EULEX – Towards an integrated exit strategy. Strengthening the rule of law through EU-integration*, DPC-GLPS Policy report, Berlin-Prishtina, April 2014, pp.35-35, available at: [http://www.democratizationpolicy.org/pdf/EULEX Exit Strategy DPC-GLPS Policy Report \(04-14\)ENG.pdf](http://www.democratizationpolicy.org/pdf/EULEX Exit Strategy DPC-GLPS Policy Report (04-14)ENG.pdf).

<sup>36</sup> *House of Cards*, p.11; “Lessons from BiH,” in: *EULEX – Towards an integrated exit strategy*, p.36.

than a dozen problematic provisions for which it recommended either revision or deletion. Half of those provisions re-introduced political control over the judiciary by the entity justice minister and half usurped the authority of the HJPC, thereby violating the primacy of the Law on HJPC and rendering the draft entity law illegal. The law proposal drew criticism from most lawyers' associations and from the RS Judges' Association which defended the independence of the judiciary and the HJPC.

Faced with unified pressure from all relevant international organizations – the EC, the OHR and the Organization for Security and Cooperation in Europe (OSCE) – to withdraw the proposal, the RS representatives at a November Structured Dialogue session promised full cooperation with the HJPC and to revise the draft law in full compliance with the Council's recommendations. Despite such promises, however, the RS did not comply. On the eve of the December RSNA vote on the law, then EU Special Representative Peter Sørensen sent a letter to the RSNA chair requesting withdrawal of the law proposal – to no avail. In the adopted RS Law on Courts version, the RS justice ministry had either removed or revised a minor part of the disputed provisions referring to political interference, but had left intact all those that undermined the legal authority of the HJPC. EU officials had spent months insisting (unsuccessfully) that the RS fully comply with HJPC's valid objections to provisions in the RS law proposal. Yet, in a closed-door meeting in Brussels in January 2012 after the law was adopted, a high-level EC official shifted course, forcing the Serb president of the HJPC into a secret compromise deal with the RS justice minister regarding HJPC's authority that made a mockery of the rule of law and the concept of the independence of the HJPC.<sup>37</sup>

Confronted with Banja Luka's subsequent lack of interest to implement the clandestine deal, in December that same year the same EC official tabled a second compromise deal that further undermined the EU's original position of full support to the HJPC. The RS government also never implemented the second deal which forced the EC to conceal its contents and to deny that it was ever involved in this underhanded subversion of the justice system. The EU's shameful performance in BiH broke the RS judges and prosecutors' resistance to the entity authorities' re-politicization of the judiciary. Meanwhile, the RS law forced entity court presidents into violating the Law on HJPC. At the HJPC, the move destroyed the motivation of the president and the other RS members to defend the independence of the institution, initiating the long decline of the HJPC that ultimately peaked with the 2019 Tegeltija affair.<sup>38</sup>

### The Law on Courts of BiH

Encouraged by the RS Law on Courts episode, the RS leadership, supported by other political elites, turned its attention to a new target – the Law on Court of BiH. In line with a Venice Commission opinion,<sup>39</sup> from 2012 on the EC pushed for a new superseding Law on Courts of BiH through the mechanism of the Structured Dialogue, focusing on two recommendations: 1) to turn the Court's appeals chamber into a separate court of appeals; and 2) to more clearly specify the jurisdiction of the Court as defined in existing law. The latter refers to the supremacy the Court has over the entities in

<sup>37</sup> "Lessons from BiH," pp.36-37; House of Cards, pp.11-12.

<sup>38</sup> Ibid.

<sup>39</sup> *Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina.*



relation to attacks on the constitutional order, territorial integrity and sovereignty of BiH as well as economic crimes that inflict damage not limited to the entities (Art. 7(2) of the Law on Court of BiH). While not unfounded from a theoretical legal point of view, those recommended changes represent sophisticated legal issues compared to the core structural problems the BiH judiciary is facing. During the subsequent five years that the EU invested substantial time, money and expertise, including the engagement of TAIEX<sup>40</sup> experts, on the issue, the HDZ BiH-led BiH Ministry of Justice drafted more than half a dozen law proposals that shared a common denominator – getting rid of Art. 7(2).

In 2015, the EC undertook a last, failed mediation attempt. In a high-level meeting with the state and entity justice ministers in Brussels, two draft law proposals were discussed – one from the RS justice ministry that, if adopted, would have left BiH without a judicial body in charge of prosecuting attacks on the constitutional order, sovereignty and territorial integrity of the country, and one from the BiH justice ministry that equated to a general amnesty for high-level cases of organized crime and corruption. It was only in 2017 that the EC pulled the EU out of negotiations over the Law on Courts of BiH, thus indirectly pulling the plug on the Structured Dialogue without ever publicly communicating the decision.

The EC's years-long willingness to offer domestic political representatives an EU-sanctioned platform to present entirely unacceptable proposals and to bully representatives of BiH's judiciary participating in the Structured Dialogue substantially contributed to a decline in the number of BiH judges and prosecutors willing and able to defend the independence and integrity of their institutions, in this case the Court of BiH. That losing battle was finally lost when the first court president, and most vocal voice of dissent in the Structured Dialogue, Meddžida Kreso, retired in 2016.<sup>41</sup>

#### The Constitutional Court of BiH's international judges under pressure

Constant attacks on the constitutional order over the last decade, primarily by the RS leadership and the HDZ BiH, have included the CC BiH with a specific focus on the court's international judges. By adding three foreign judges to the court's six domestic ones – two per each constituent people – the international co-authors of the Dayton constitution aimed to depoliticize constitutional law practice and educate domestic constitutional lawyers – with substantial success. That dynamic, however, began to wane about 10 years ago when BiH authorities began not implementing an increasing number of contentious court rulings – a punishable offense under the law for which no one was ever prosecuted – and when Dodik, his party (SNSD) and the HDZ BiH undertook initiatives on a regular basis to remove the three international judges from the composition of the court. As a consequence, the six domestic judges increasingly tended to rule according to ethnic affiliation in sensitive constitutional matters and in accordance with the corrupt interests of the ruling parties in politically sensitive cases, a qualitative shift from the situation during the first decade of the millennium. In parallel, and partly as a consequence,

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<sup>40</sup> The Technical Assistance and Information Exchange (TAIEX) is a European Commission enlargement policy instrument. TAIEX supports public administrations with regard to the approximation, application and enforcement of EU legislation as well as facilitating the sharing of EU best practices. See: [https://ec.europa.eu/neighbourhood-enlargement/tenders/taix\\_en](https://ec.europa.eu/neighbourhood-enlargement/tenders/taix_en).

<sup>41</sup> Interviews with BiH judicial officials, international judicial experts, European diplomats and EC officials, Sarajevo-Brussels 2012-17; Bodo Weber, *September 10: Showdown in Brussels? The RS Referendum, the Structured Dialogue and the European Union*, DPC non-paper, Sarajevo September 2015.

the standing of the international judges who were increasingly on the defensive weakened over time. This undermining of the independence of the CC BiH was compounded by the West's lack of political will to vigorously support and defend the foreign judges or to consistently push back against attacks on the constitutional order.

The decline of the court reached its low point with the 2016 so-called Ljubić ruling. In a court case evident from its filing that it was carefully calibrated to further ethnicize the BiH electoral system, a court majority ruled *partly* in favor of the appellant, HDZ BiH official Božo Ljubić.<sup>42</sup> That ruling amounted to a virtual hijacking of the CC BiH by the HDZ BiH and its leader, Dragan Čović, who managed to get the support of two international judges to get a majority by successfully obscuring the true political intent of the case. Čović thereby scored a landmark success in his long-term project to indirectly change the constitutional system through a revision to the BiH Election Law with the aim to establish a *de facto* third Croat ethnic entity.<sup>43</sup>

#### Decentralization of war crimes prosecution

In 2012, the EU urged BiH authorities to shift its national war crimes prosecution strategy towards decentralization by transferring a large percentage of cases from the state-level judiciary to the entity and cantonal levels, and to streamline war crimes prosecutions at the Prosecutor's Office of BiH – all of which would be supported by substantial European funds. That process, however, was complicated by corrupt practices at the Prosecutor's Office of BiH, which the EC did not forcefully address, as well as by RS government attacks on the state-level judiciary on which Brussels compromised. Legal and structural problems, such as the application of different criminal codes at the entity, cantonal and state levels, and the entity prosecution practice of reclassifying war crimes cases also plagued the transfer of cases and were never addressed. Cooperation with neighboring states' judiciaries, including through a previously agreed Memorandum of Understanding on state-level prosecutions in BiH and Serbia that the EU had pushed through, remained inadequate. Glorification of war crimes and war criminals by the ethno-political elites and their leaders has risen markedly since the shift in Western policy towards BiH during 2005-06. This conduct profoundly undermines justice, along with interethnic relations, by design. The embrace of convicted criminals and their crimes has been addressed in a merely declarative manner by the West.<sup>44</sup> The political elites setting the tone have never paid a price – and continue to be feted by the EU as “partners,” even “champions of European integration.”

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<sup>42</sup> On the substance and background of the court case, and the problematic nature of the ruling, see: Bodo Weber, “Bosnian Croat leadership on course to throw Bosnia and Herzegovina into electoral chaos,” available at: <https://ba.boell.org/de/2018/09/30/die-fuehrung-der-bosnischen-kroaten-stuerzt-die-wahlen-bosnien-und-herzegowina-ins-chaos>.

<sup>43</sup> Interviews with international and BiH constitutional law experts and former CC BiH judges, 2012-2021; Bodo Weber “Bosnian Croat leadership on course to throw BiH into electoral chaos,” available at: <https://ba.boell.org/de/2018/09/30/die-fuehrung-der-bosnischen-kroaten-stuerzt-die-wahlen-bosnien-und-herzegowina-ins-chaos>.

<sup>44</sup> Interviews with BiH judicial officials, international judicial experts, European diplomats and EC officials, Sarajevo-Brussels 2012-20.

### Rolling back police reform achievements

At the same time that ruling political elites were rolling back reform achievements in establishing and strengthening an independent judiciary in BiH, they were also targeting the more limited police reform achievements and witnessing the 2007 collapse of the OHR-EU police reform initiative. In the Federation, attacks focused on reversing the recent autonomy of the police agencies at entity and cantonal levels by amending the laws on internal affairs and on police officials. In the RS, where operational independence was never instituted, the Dodik government succeeded in transforming the police into a kind of praetorian guard of the regime. In 2012, in the midst of an international struggle with domestic actors to protect police reform achievements, and at a time when BiH's political elites were pushing to end the mandate of all international Dayton institutions, the EU terminated its EU Police Mission (EUPM), the successor to the UN-led International Police Task Force (IPTF), declaring the mission a success. To demonstrate it had not completely checked out of the policing business in BiH, Brussels added a police component to the rule of law section of the EU Delegation to BiH that has since been phased out.<sup>45</sup>

### III. The West's successful pushback against the October 2017 HJPC conclusions

For years, when faced with criticism of the EU's weak pushback against ruling political elites' attacks on the BiH judiciary, EU officials pointed to the Union and the wider international community's alleged limited leverage, particularly towards the RS and its leader Milorad Dodik. The case of the October 2017 HJPC conclusions, however, demonstrates that the West could still wield considerable political leverage in BiH given sufficient political will and unity. At its October 25-26, 2017 Council session, the HJPC, on the initiative of its President, Milan Tegeltija, adopted by majority vote five conclusions that had been drafted by Tegeltija and presented to Council members right at the start of the session.<sup>46</sup> The conclusions<sup>47</sup> referred to a ten-page document accompanied by 1,000 pages of annexes sent to the HJPC by an RS government body, the entity justice ministry's Republican Center for War and War Crimes Research and Missing Persons' Search,<sup>48</sup> accusing non-Serb judges and prosecutors at the Court of BiH and the Prosecutor's Office of BiH of improper professional conduct towards Serbs under indictment for

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<sup>45</sup> Interview with international police experts, Sarajevo 2011-2021; "The police forces in BiH," in: Assessing the potential for renewed ethnic violence in BiH; Bodo Weber, *The Police Forces in BiH – Persistent Fragmentation and Increasing Politicization*, AI-DPC BiH Security Risk Analysis Policy Note # 6, Berlin, November 2015, available at: [http://www.democratizationpolicy.org/pdf/AI-DPC BiH Security Risk Analysis Paper Series 6 The Police Forces in BiH.pdf](http://www.democratizationpolicy.org/pdf/AI-DPC%20BiH%20Security%20Risk%20Analysis%20Paper%20Series%206%20The%20Police%20Forces%20in%20BiH.pdf).

<sup>46</sup> Interviews with BiH judicial officials, Sarajevo 2017; Harun Išerić, *Politička instrumentalizacija Visokog sudskog i tužilačkog vijeća BiH na primjeru oktobarskih zaključaka Vijeća*, Foundation Public Law Centre, Sarajevo 2018, available at: [http://fcjp.ba/templates/ja\\_avian\\_ii\\_d/images/green/Harun\\_Iseric3.pdf](http://fcjp.ba/templates/ja_avian_ii_d/images/green/Harun_Iseric3.pdf).

<sup>47</sup> Zaključci VSTV-a BiH povodom „Informacije Centra za istraživanje rata i ratnih zločina i traženje nestalih lica Republike Srpske,” HJPC, October 26, 2017, available at: <https://vsts.pravosudje.ba/vstv/faces/vijesti.jsp?id=70539>.

<sup>48</sup> Republički centar za istraživanje rata, ratnih zločina i traženje nestalih lica, *Informacija o sudijama i tužiocima Suda i Tužilaštva BiH koji su obavljali pravosudne funkcije za vrijeme oružanih sukoba u Bosni i Hercegovini*, Banja Luka, October 13, 2017.

their alleged activities during the Bosnian war. The documents presented a distillation of the RS leadership's long-held ethnonationalist narrative on, and approach towards, the issue of war crimes; it also served as a foundation for the perpetual historical revisionism project underway. With the adoption of the conclusions, pushed through by Tegeltija after heated debate, the Council lent legitimacy to that narrative, undermined the independence of the judiciary and the HJPC, and threatened the continued existence of the Court of BiH and the Prosecutor's Office of BiH. In the most problematic parts of the conclusions, the HJPC requested from the two judicial bodies statistical data on the ethnic composition of war crimes indictees and convicts, and announced an initiative for an amendment to the Law on HJPC that would introduce extraordinary authority for the Council to remove judges and prosecutors outside the confines of the HJPC's Office of the Disciplinary Counsel's formal disciplinary procedures.

Over the next month, Tegeltija and his supporters among the HJPC members upholding the conclusions were subjected to mounting international pressure to reverse course. It was only at the November 27-28, 2017 session, after a failed attempt at an earlier session that same month, that the HJPC revised the original conclusions, removing all the problematic issues, complying with EU standards and recommendations, and agreeing to bring the process into the framework of the Structured Dialogue.<sup>49</sup> Compared to previous Western reactions to rule of law rollback attempts, this was preceded by concerted Western pressure. The initiative was taken by then German and UK ambassadors Christiane Hohmann and Edward Ferguson. Hohmann in particular had developed a strong personal interest in the judiciary.<sup>50</sup> The two mobilized other Western ambassadors and pushed then European Union Special Representative in Bosnia and Herzegovina (EUSR BiH) Lars Gunnar Wigemark, infamous for his compromise deals with BiH's political leaders, to stay the course and not enter into any agreements with Banja Luka at the expense of rule of law principles and the BiH judiciary.<sup>51</sup> On November 23, the EUSR BiH's rule of law section uninvited Tegeltija from an opening event of the EU-funded reconstruction of the Prosecutor's Office of BiH scheduled for the next month in which then EU Commissioner for Enlargement Negotiations, Johannes Hahn, was participating.<sup>52</sup> And on November 24, the US, UK and German ambassadors, together with the High Representative, in a joint letter to the HJPC members, requested the removal of the contested conclusions, and announced the conditioning of US funding for the Council's annual justice sector reform conference with compliance with that request.<sup>53</sup>

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<sup>49</sup> HJPC, November 28, 2017 revised conclusions, available at:

<https://vsts.pravosudje.ba/vstv/faces/vijesti.jsp?id=71124>; letters-public statements by the OSCE, OHR, UK & US embassy and the EUSR BiH Lars-Gunnar Wigemark, all dated October 27, 2017, available at:

<https://www.osce.org/bs/mission-to-bosnia-and-herzegovina/352991>, <http://www.ohr.int/zakljucici-vstv-a-ne-doprinose-ocuvanju-integriteta-i-nezavisnosti-sudija-i-tuzilaca/>, <https://ba.usembassy.gov/bs/ambasade-sjedinenih-americkih-drzava-ujedinjenog-kraljevstva-duboko-zabrinuti-zbog-zakljucaka-vstva/>, <http://europa.ba/?p=53185>.

<sup>50</sup> Interviews with Western diplomats and BiH judicial officials, Sarajevo 2017-18.

<sup>51</sup> Interviews with Western diplomats and BiH judicial officials, Sarajevo 2017.

<sup>52</sup> Communication from Chloe Berger, head of the EU Delegation to BiH section Justice & Home Affairs and Public Administration Reform, to Sabina Karhasanović, assistant to the chief of cabinet of the HJPC President, Sarajevo, November 23, 2017.

<sup>53</sup> Joint OHR, US, UK and German ambassador's letter to the members of the HJPC, Sarajevo, November 24, 2017.

#### IV. The EU's declared rule of law priority – one and a half year(s) on

One and a half years after the EC published the Priebe Report, and two years after it submitted the Avis on BiH's membership application to the EU, the Union's declaration that rule of law was its top priority in BiH has yielded practically no results. "On rule of law, the Priebe Report, we had zero progress since last year" noted a high-level EU official in autumn 2020.<sup>54</sup> The EC's annual BiH report published last October, and which unlike years past covered events over two years – 2019 and 2020 – was no less blunt. In the chapter on judiciary and fundamental rights, the EC summarized that "no progress was made during the reporting period," noting in relation to the Priebe Report that "the authorities and the judiciary have not taken action to address the findings of the Expert Report on Rule of Law issues." The report concludes that:

"Obstruction of justice reform by political actors and from within the judiciary, and the poor functioning of the judicial system continued to undermine the citizens' enjoyment of rights and the fight against corruption and organised crime."<sup>55</sup>

The only practical advance cited in the judicial sector in 2020 was the adoption of a revised National War Crimes Strategy in September that year. Adoption had been delayed two years due to disagreements among BiH authorities and external actors involved in the process.<sup>56</sup> Success could not be declared in 2020 on three legislative initiatives: a new law on public procurement, a new law on conflict of interest and amendments to the Law on HJPC. The EU Delegation in Sarajevo had declared those initiatives a priority and had set an informal end of the year deadline for their adoption that ultimately was not met. On the public procurement law, the EUSR BiH had to intervene in the Parliamentary Assembly of BiH in 2020 to prevent adoption of a draft law that ran counter to EU principles and recommendations. The amendments to the Law on HJPC that the EU is pushing aim to re-establish basic accountability in the judiciary, including in the HJPC itself. One novelty foreseen is to make the existing system of asset declaration of judges and prosecutors, and of HJPC members, efficient and credible by making asset declarations public, establishing an independent structure within the HJPC Secretariat tasked with their verification, and including a strong external, international monitoring mechanism. In addition, the draft provides for a conflict of interest mechanism that prevents the current practice of the HJPC appointing judges and prosecutors from within its own ranks. The EU conditioned payment of the second tranche of 250 million Euro of macro-financial assistance to BiH on adoption of the HJPC law amendments. The EU Delegation and the BiH Ministry of Justice agreed on the text of the draft amendments at the end of October 2020, but they still have not been adopted.<sup>57</sup>

Regarding the Memić and Dragičević cases, in May 2019, under public pressure, the Prosecutor's Office

<sup>54</sup> Interview with EU official, Sarajevo, October 2020.

<sup>55</sup> European Commission, *Bosnia and Herzegovina 2020 Report Accompanying the 2020 Communication on EU Enlargement Policy*, October 6, 2020, pp.15-16, available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia\\_and\\_herzegovina\\_report\\_2020.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf)

<sup>56</sup> Interview with BiH judicial official, Sarajevo October 2020; *Bosnia and Herzegovina 2020 Report*, p. 21.

<sup>57</sup> Interviews with EU and BiH judicial officials, Sarajevo October 2020; *Bosnia and Herzegovina 2020 Report*, pp. 18-19.

of BiH seized the investigation into the Memić case from the Sarajevo cantonal prosecutor.<sup>58</sup> It remains unclear whether that step will lead to any substantial progress in investigating and prosecuting the case.<sup>59</sup> No similar state-level investigation was opened in the Dragičević case and no progress has been noted on that case in the RS.

Against this background, lack of trust in the judiciary among BiH citizens has remained at the abysmally low level that it was at in 2019. This has been consistently documented – including by the EU’s own polling. In an opinion poll commissioned by the EU Delegation to BiH, and presented in November 2020 in the framework of the second Priebe Report-related public debate “Right to Justice,” 75 percent of respondents considered the state of the judiciary in BiH unsatisfactory – as compared to 74 percent in a comparable poll from June 2019.<sup>60</sup>

A significant event occurred in December 2020 when HJPC President Milan Tegeltija resigned because of a *second* corruption scandal. In November, BiH media released a leaked audio recording of Tegeltija allegedly promising a former HJPC member from the RS to name her sister to the position of judge in the Banja Luka Basic Court. Public pressure for him to step down had been building since the first scandal broke and this latest incident finally forced his resignation. During 2020, Tegeltija had already lost his grip over the majority of the Council members following changes to the Council’s composition. It is likely that the increased attention and pressure of the EU and wider Western actors on the HJPC contributed to his decision;<sup>61</sup> however, it will take substantial time to recover from the wasted years of his regressive tenure.

## V. Conclusions and Recommendations

The post-war history of BiH witnessed the evolution of the most comprehensive rule of law reform process ever conducted in the Western Balkans. The basic elements of an independent, accountable and efficient judiciary were established and law enforcement agencies became more independent and adopted democratic policing principals. These and other hard-won achievements made BiH the frontrunner among the region’s (potential) candidate countries for EU membership. But BiH lost that

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<sup>58</sup> “Tužilaštvo BiH otvara istragu o ubistvu Dženana Memića, Tadićka pozvala na razgovor Muriza Memića,” Slobodna Bosna, May 29, 2020, available at: [https://www.slobodna-bosna.ba/vijest/115899/pochelo\\_je\\_tuzilastvo\\_bih\\_otvara\\_istragu\\_o\\_ubistvu\\_dzenana\\_memica\\_tadicka\\_pozvala\\_na\\_razgovor\\_muriza\\_memica.html](https://www.slobodna-bosna.ba/vijest/115899/pochelo_je_tuzilastvo_bih_otvara_istragu_o_ubistvu_dzenana_memica_tadicka_pozvala_na_razgovor_muriza_memica.html).

<sup>59</sup> Beginning of July this year, the Prosecutor’s Office of BiH filed indictments against five suspects, including two police officers, see: “Podignuta optužnica protiv pet osoba zbog prikriivanja dokaza u slučaju ‘Dženan Memić,’” Klix.ba, July 9, 2021, available at: <https://www.klix.ba/vijesti/bih/podignuta-optuznica-protiv-pet-osoba-zbog-prikriivanja-dokaza-u-slucaju-dzenan-memic/210709114>.

<sup>60</sup> EUD BiH commissioned poll, November 2019; on the June 2019 poll, see footnote 7.

<sup>61</sup> Interviews with BiH judicial officials, „Poslušajte kako Milan Tegeltija obećava imenovanja u pravosuđu: ‘Neka se prijavi za Gradišku i Prijedor, pa ćemo je kasnije prebaciti,’” *Istraga.ba*, November 26, 2020, available at: <https://www.istraga.ba/poslusajte-kako-milan-tegeltija-obecava-imenovanja-u-pravosuđu-neka-se-prijavi-za-gradisku-i-prijedor-pa-ćemo-je-kasnije-prebaciti/>, “Milan Tegeltija podnosi ostavku ‘zbog prijetnji i napada’, optuživši za njih SDA,” *Slobodna Evropa*, December 10, 2020, available at: <https://www.slobodnaevropa.org/a/tegeltija-ostavka/30993892.html>.

status due to the systematic reform rollback actions taken by domestic political elites over the past decade which profoundly undermined the rule of law and its institutions. As a result, the capacity of the judiciary and police to provide justice and security and to prosecute sensitive cases of high-level organized crime and (political) corruption in BiH today is practically non-existent. Even worse – as documented by numerous surveys and other field research<sup>62</sup> – Bosnia and Herzegovina’s citizens, who rate justice and public security high on their list of basic needs and interests, since 2005 have lost faith in the rule of law and rule of law institutions, and in their connection to the EU and the wider West.

The dramatic decline of the rule of law was precipitated by the West moving international policy in BiH during 2005-06 towards one of “transition to local ownership” which proved to be a failure in the absence of systems and structures to ensure accountable ownership. The lack of political will to adapt its policy and engage with BiH on its terms has left the West without a viable BiH policy. This policy vacuum has given domestic ethno-political elites maneuvering space for state capture based on the exercise of patronage and fear, which has thrived in the institutional dysfunctionality of the Dayton constitutional order. The undermining of rule of law institutions was a vital prerequisite for the ambition of political elites to govern with no accountability for their actions.

The West’s, particularly the EU’s, weak push back against BiH political elites’ constant reform rollback attacks on the judiciary and the police over the last decade amounted to *de facto* collusion in that endeavor and included episodes of outright collusion. The EU’s failure to abide by its own 2019 declaration that the rule of law and rule of law reforms was its new top priority in BiH is primarily linked to the overall failure of the EU, the European Council and the member states to take advantage of the opportunities provided by the EC with its publication of the *Avis*, the accompanying Analytical Report and the Priebe Report. These documents to some extent offered an initial masterplan for a long-term, comprehensive EU reform strategy for BiH, with constitutional reform at its core. Unfortunately, the 2019 EC documents failed to identify, recognize or address the issue of past EU/Western collusion to undermine the rule of law and its institutions in BiH. This makes them more likely to be doomed to repeat such policy malfeasance.

Any serious plan to implement the EU’s declared rule of law priority and reform conditionality in BiH must address the enduring legacy of the EU and wider West’s past performance in that regard. Moreover, such a plan must be integrated into a broader policy strategy for BiH, as not even the most ideal rule of law reform can be sustainable when the overall socio-political dynamic is moving in the wrong direction – as demonstrated by the fate of past reform efforts.

## Recommendations

More detailed and granular recommendations will be offered throughout this policy paper/note series. To (re)strengthen the rule of law in BiH, the EU and its Western allies need to undertake several crucial

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<sup>62</sup> See for example the comprehensive field research in BiH conducted by DPC in: *Sell Out, Tune Out, Get Out, or Freak Out? Understanding Corruption, State Capture, Radicalization, Pacification, Resilience, and Emigration in Bosnia and Herzegovina and North Macedonia*, DPC-Eurothink police study, April, 2021, available at: <http://www.democratizationpolicy.org/wp-content/uploads/2021/04/Eurothink-DPC-Final-Report-to-Publish-March-2021.pdf>.

measures:

- EU officials need to strongly advocate in BiH for implementation of the rule of law-related reforms contained in the 2019 Avis and the Priebe Report and actively and explicitly link them to the broader issue of constitutional reform, particularly with respect to the establishment of a Supreme Court and the defense of state-level judicial institutions,
- the EU and other Western actors should drop the artificial “deadline driven” prioritization of reform of the BiH electoral system, including “limited constitutional reform,” an issue that is better addressed once they’ve agreed on a comprehensive, long-term policy strategy on BiH, including constitutional changes, and instead focus on rule of law reform issues,
- the EU, the OSCE, and bilateral Western donors need to reconceive their existing individual programs for engagement of foreign judges and prosecutors in an advisory role in the BiH judiciary as a single joint strategy that focuses on the judicial institutions that prosecute sensitive cases of high-level (political) corruption and organized crime,
- the EU and other Western actors need to forcefully advocate and push for both previously planned and additional legislative measures which aim to re-establish the basic accountability and judicial integrity of judges and prosecutors and of HJPC members. Such actions must include the immediate adoption of the prepared amendments to the Law on HJPC and the subsequent adoption of a new Law on HJPC aimed at a comprehensive reform of the Council (its functions, competences, tools and procedures) to improve its functioning and to reconstitute its independence. Among the specific measures to include in new legislation should be a one-time reappointment process of all Council members based on a revamped vetting process and a basis for the further evolution of existing (quantitative and qualitative) criteria by which the HJPC evaluates the performance of judges and prosecutors,
- the EU and the US need to acknowledge and address the legacy of their past actions in the rule of law arena and remedy the damage inflicted on the judiciary; in particular, the RS Law on Courts must be amended and Western representatives should encourage the appropriate domestic actors to file a request for review on constitutionality with the CC BiH aimed at a potential revision of the Ljubić ruling, instead of insisting on its implementation,
- the EU, together with its Western partners, and in close cooperation and consultation with broader civil society, needs to develop and implement a comprehensive strategy to counter the denial and glorification of war crimes prevalent in society including among politicians,
- EU representatives, EU member states and other Western ambassadors in BiH need to empower judges and prosecutors and other judicial officials who uphold the independence and integrity of the judiciary by backing them in their work and independent decision-making through public statements of encouragement and direct support to the institutions they serve,
- the EU, the OSCE and other Western actors need to closely monitor the Prosecutor’s Office of BiH’s handling of the Memić case and press for the Office to also open an investigation into the Dragičević



case,

- the EU needs to work with independent BiH experts and other stakeholders to develop and adopt a comprehensive police reform strategy that contains conditionality comparable to the existing conditionality for the judiciary. Because the police issue is not adequately covered by the EU acquis, the initiative must come from the European Council, i.e., from dedicated member states, and as part of the political criteria for EU accession (the Copenhagen criteria),
- EU and other Western officials must consistently apply reform conditionality, particularly on the rule of law in BiH, as well as on the rules that define and guide their presence and work in BiH. Evading self-set rules sends a devastating message to political elites and the wider public in BiH, inflicts lasting damage on the country's legal culture, and discredits Western efforts to strengthen the rule of law.