



European Network of Councils  
for the Judiciary (ENCJ)

Réseau européen des Conseils  
de la Justice (RECJ)

## **European Network of Councils for the Judiciary**

### **Report to the High Judicial and Prosecutorial Council of Bosnia and Herzegovina**

by

**The Honourable Mr Justice Vos**

and

**Judge Gianluca Forlani**

**19<sup>th</sup> June 2013**

1. This report has been written by Mr Justice Geoffrey Vos, a Judge of the Chancery Division of the High Court of England and Wales, and representative of the Judges' Council of England and Wales, and Judge Gianluca Forlani, Italian Judge and representative of the Consiglio Superiore della Magistratura of Italy.
2. Mr Justice Vos and Judge Forlani were requested by the European Network for Councils for the Judiciary ("ENCJ") to act as its representatives and to prepare this report in relation to a request for assistance (the "Request") from the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ("BiH") (the "HJPC").
3. In brief terms, the Request concerns changes proposed in BiH to the methods by which prosecutors are appointed, by amendments to the Law on High Judicial and Prosecutorial Council of BiH (the "Law"). A copy of the existing Law is attached to this report at Appendix 1.
4. The HJPC's Request to the ENCJ is entitled "*SNSD/SDP Proposal for Changing the Procedures for Appointing Prosecutors: November 2012*". The terms "*SNSD*" and "*SDP*" are explained in the following paragraphs.
5. Three main political parties are the predominant members of the governing coalition (out of 6 in total) in BiH that support the proposal to change the procedures for appointing prosecutors in BiH. They are:-
  - (1) The SNSD, which is the Alliance of Independent Social Democrats (In Serbian: Savez nezavisnih socijaldemokrata). The President of the SNSD, Mr Milorad Dodik, is the President of the Republika Srpska. SNSD membership is predominantly Serbian.
  - (2) The SDP, which is the Social Democratic Party of BiH, another member of the governing coalition, whose leader is Mr Zlatko Lagumdžija. The SDP is a multi-ethnic party with many Bosniak members.
  - (3) The SBB, which is the Union for a Better Future of BiH (Bosnian: Savez za bolju budućnost BiH), whose leader is Mr Fahrudin Radončić, the founder of Dnevni Avaz, the largest daily newspaper in Bosnia and Herzegovina.
6. The two independent entities comprising BiH are:-
  - (1) The Republika Srpska ("RS") (which has a population of approximately 90% ethnic Serbians).
  - (2) The Federation of Bosnia and Herzegovina (the "Federation"), whose President, Živko Budimir is presently under investigation

for alleged corrupt practices. The population of the Federation includes Serbs, Croats and Bosniaks.

The Brčko District of BiH is a separate area, whilst not itself an entity.

7. Mr Justice Vos and Judge Forlani visited Sarajevo between 12<sup>th</sup> and 14<sup>th</sup> May 2013. They held a series of meetings with EU representatives, representatives of the Office of the High Representative (“OHR”), members of the HJPC, judges and prosecutors and with politicians on both sides of the debate about the proposed changes to the Law. Details of the main meetings are shown in the “*Agenda for the fact-finding visit of the ENCJ Delegation*” attached as Appendix 2. A list of the people that participated in all our meetings is attached at Appendix 3. In total, we attended 14 formal meetings and held other less formal discussions.
8. The structure of the BiH, Federation and RS Courts, and the legislative and political structures are set out in the charts that are attached at Appendix 4.

#### The Request

9. The Request from the HJPC (attached at Appendix 5) indicates that the proposal to change the procedures for appointing prosecutors in BiH (the “Proposal”) includes the following:-
  - (1) A proposal to amend the Law so as to provide for:-
    - (a) A competition procedure, conducted by the HJPC, for chief prosecutors, deputy chief prosecutors and prosecutors;
    - (b) Chief prosecutors at all levels to be appointed by responsible legislative bodies upon a proposal by the Council of Ministers, entity and cantonal governments from a list of successful candidates prepared by the HJPC.
    - (c) An unblocking mechanism so that if the responsible political bodies fail to complete an appointment within 3 months, the HJPC should appoint an acting chief prosecutor pending an appointment as above.
    - (d) Deputy prosecutors at state, entity, cantonal and district level to be appointed by the chief prosecutor of the corresponding level, from the list of successful candidates prepared by the HJPC.
    - (e) Prosecutors at state, entity, cantonal, and district level to be appointed by the chief prosecutor based on a proposal from the HJPC.

- (f) Special prosecutors (where they exist) to be appointed on the same basis.
  - (2) A proposal to amend the Law so as to change the composition of the HJPC so as to replace members appointed by responsible bar associations with university professors or representatives of bar associations appointed by the House of Representatives of the Parliamentary Assembly of BiH after a public competition.
10. The HJPC has indicated in an email of 28<sup>th</sup> March 2013 that it is asking the ENCJ to provide an opinion on whether or not these proposed changes to the Law represent an improvement on the existing method of appointment of prosecutors in BiH. The HJPC asks that special attention is paid to the effect of the proposed changes on the independence and accountability of the prosecutorial service.
  11. The HJPC has also made it clear that the timing of the Proposal is unclear, but at the time of writing there is still no formal legislative proposal before the Parliament Chambers of BiH.

#### Brief chronological background

12. On 14<sup>th</sup> December 1995, the Dayton Agreement established a new structure for Bosnia and Herzegovina under international supervision.
13. On 11<sup>th</sup> March 2004, the RS and the Federation entered into a Transfer Agreement by which they agreed, pursuant to Article III.5 (B) of the Constitution of BiH to transfer responsibility for their respective judiciaries, including matters concerning the affairs and functions of judges and prosecutors, to the new HJPC, which was to be responsible for the autonomy, independence, impartiality, competence and efficiency of the judiciary and the prosecutorial service within the Federation and the RS at the level of the state of BiH.
14. In June 2004, the Law was adopted by the BiH Parliament.
15. The HJPC decided in March 2009 to increase the number of judge positions in BiH from 896 to 1,023 (and reserve judge positions from 132 to 330), and in 2010 to increase the number of prosecutors' positions in BiH from 260 to 390.
16. In June 2012 the European Commission for Democracy through Law (the "Venice Commission") produced its Opinion No. 648/2011 CDL-AD(2012)014 entitled "*Legal Certainty and the Independence of the Judiciary in B&H*" saying at paragraph 85 that: "*[i]t is obvious that in practice the HJPC has played an extremely important role in strengthening the independence of the judiciary and in furthering contacts and co-operation among judges and prosecutors*". This Opinion is attached at Appendix 6.

17. In October 2012, the HJPC proposed a broad range of amendments to the Law aimed at improving the operation of the HJPC. The HJPC contends that these changes are proposed “*to ensure that [the HJPC] is fully in line with the highest European standards*”. The amendments proposed are attached at Appendix 7, but the main changes suggested can be summarised as follows:-
- (1) There should be Judicial and Prosecutorial Departments of the HJPC with 12 members on each. The Judicial Department would include the 8 judge members and the 4 politically appointed members. The Prosecution Department would include the 8 prosecutor members and the 4 politically appointed members. Decisions of Departments require at least 5 votes from the judicial or prosecutorial membership to pass.
  - (2) The membership of the HJPC should be expanded from 15 to 20 members. The main changes are:-
    - (a) To create a council with 8 judges, 8 prosecutors and 4 politically appointed members, instead of one with 5 judges, 5 prosecutors, 1 judge or prosecutor, 2 attorneys, and 2 politically appointed members.
    - (b) To add 2 politically appointed representatives so as to provide for 4 representatives as follows:-
      - (i) One member appointed by the House of Representatives of the Parliamentary Assembly of BiH by a 2/3rds majority, on the proposal of the BiH Council of Ministers;
      - (ii) One member appointed by the House of Representatives of the Parliament of the Federation by a 2/3rds majority, on the proposal of the Federal Ministry of Justice of the Federation;
      - (iii) One member appointed by the National Assembly of RS by a 2/3rds majority, on the proposal of the Government of RS;
      - (iv) One member appointed by the Presidency of BiH.
    - (c) To provide for both a judge and a prosecutor from the Brcko District instead of one in either category.
    - (d) To provide for a judge from each of the cantonal and municipal courts of the Federation instead of one in either category.

- (e) To provide for a judge from each of the district or High Commercial Court, and the basic court or district commercial court, of RS, instead of one in either category.
  - (f) To provide for two prosecutors from the cantonal prosecutors' offices of the Federation instead of one.
  - (g) To provide for two prosecutors from the district prosecutors' offices of the RS instead of one.
  - (h) To exclude the two attorney representatives elected by the Bar associations of the Federation and the RS.
- (3) The mandate of members of the HJPC should be reduced to one term of 4 years, instead of having the option of being renewable for a second 4-year term.
  - (4) The introduction of obligatory written examinations for first time appointments of both judges and prosecutors at any level, and changes to the criteria for and machinery for appointment.
  - (5) The introduction of performance evaluation at a minimum of 3-yearly intervals for both judges and prosecutors.
  - (6) A series of other changes to the disciplinary and other processes.
18. In late October 2012, the SNSD and the SDP announced a set of 16 political and legislative changes including the Proposal for changing the procedures for appointing prosecutors.
  19. On 1<sup>st</sup> November 2012, the Norwegian Embassy issued a press release expressing concern at the Proposal.
  20. On 2<sup>nd</sup> November 2012, EU Ambassador Peter Sørensen, EU Special Representative and Head of Delegation spoke to the HJPC saying that the top priorities of the Structured Dialogue on Justice between the EU and BiH (the "Structured Dialogue") included addressing the Law on the HJPC to strengthen its independence as well as to increase the accountability of judges and prosecutors.
  21. In early November 2012, the Association of Prosecutors of the Federation issued a press release opposing the Proposal, saying that it "*seriously endangers and jeopardises independent, impartial and professional judiciary in [BiH]*".
  22. On 7<sup>th</sup> November 2012, the members of the Justice Network in BiH issued a press release saying that they "*most seriously condemn attempts to undermine the judicial system through the [Proposal]*".

23. On 9<sup>th</sup> November 2012, the President of HJPC wrote to the European Commissioner for Enlargement and Neighbourhood Policy, H.E. Mr Stefan Fule, suggesting that the Proposal would, if implemented: *“constitute a serious and flagrant rollback of the judicial reform process. In effect it would undermine the independence of the prosecutorial service in BiH and bring it back under political control”*. The President wrote that the Proposal was wholly out of line with the practice in other countries in the region, and was outside the parameters of the Structured Dialogue.
24. On 3<sup>rd</sup> December 2012, the European Commission held the “Taiex” seminar in Sarajevo chaired by its director for the Western Balkans, Mr Pierre Mirel. The conclusions reached are attached at Appendix 8.
25. On 21<sup>st</sup> December 2012, Mr Pierre Mirel wrote to the President of HJPC, Milorad Novković, saying that *“[HJPC’s proposals] shall aim at consolidating role and prerogatives of the institution you preside and not undermine its proper functioning”*. He enclosed the conclusions of the seminar including: *“the current system provides for independence of the HJPC in appointing judicial posts at all levels, including for prosecutorial offices. As mentioned by members of the Venice Commission, specific procedures can be revised and ameliorated; yet, any structural reform that reintroduces a strong role of the other pillars of the state, the executive and legislative, would determine a rollback, especially if specific safeguards are not introduced to prevent overexposure of appointments to influence of political parties”* (emphasis added).
26. In February 2013, the Request was transmitted by HJPC to the ENCJ. The ENCJ responded by saying that in principle the ENCJ did not give opinions on draft legislation, but that it would be possible to set out the generally applicable ENCJ principles.
27. In March 2013, the HJPC produced an informative memorandum dated November 2012 to the ENCJ entitled *“... a fundamental and irreversible component of the Judicial Reform Process in BiH”*. This memorandum is attached to this report at Appendix 9.
28. On 8<sup>th</sup> May 2013, the RS made a submission to the United Nations Security Council containing extensive criticisms of the HJPC. An extract from that submission is attached to this Report at Appendix 10.

#### The practice on appointment of prosecutors in other European states

29. The procedures adopted for the appointment of prosecutors in European states varies widely. The HJPC prepared a document entitled *“Table of Appointment Practices for Prosecutors in the Relevant European Countries”*, which summarises the procedures adopted in 8 countries in the region, and 4 other countries including Italy and France.

30. Moreover, systems of criminal justice also vary widely (see the Venice Commission Report referred to in paragraph 8(1) of Appendix 11). There is no uniform model for all states. There are, for example, important differences between adversarial and inquisitorial systems, and between systems where a judicial officer controls investigations, and those where a non-judicial prosecutor or the police control them. There are also systems where prosecution is mandatory and those where the prosecutor has a discretion not to prosecute, where the public interest is better served by that course. It is, therefore, important to see the BiH criminal justice system in its proper context.
31. The procedures in Germany and the UK were the subject of some discussion during our visit to BiH:-
- (1) In Germany, the Federal prosecution agency, *Bundesanwaltschaft*, is headed by the Federal chief prosecutor (*Generalbundesanwalt*). Federal prosecutors are appointed by the President of the Federal Republic, upon a proposal of the Federal Minister of Justice and with the consent of the Federal representative body of the States (*Bundesrat*). On a state level, the chiefs of the prosecutor's offices (*Generalstaatsanwalt*) are appointed by and responsible to the State Minister of Justice, although the appointment processes vary from state to state within the Federation.
  - (2) In the UK, the Director of Public Prosecutions is appointed by the Attorney General under section 2(1) of the Prosecution of Offences Act 1985. The role was first created in 1845. The Attorney General is the legal adviser to the Executive and an elected member of the House of Commons, the lower house of the two-tier Parliament. There is now an independent panel which makes the selection after input by the Attorney General.

Relevant international principles as to the appointment and independence of prosecutors

32. We have reviewed a large number of international, European and ENCJ principles that bear upon the appointment and conduct of prosecutors. They are too voluminous and discursive to attach to this report. We have, however, prepared Appendix 11 which refers to the main documents to which we have had regard in preparing this report.
33. These documents explain in particular that:-
- (1) The distinct but complementary roles of judges and prosecutors are a necessary guarantee for the fair impartial and effective administration of justice.
  - (2) Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.



- (3) The consistent case law of the European Court of Human Rights in relation to article 3 paragraph 5 and article 6 of the European Convention on Human Rights recognises the requirement of independence of judges and prosecutors from executive power.
  - (4) The integrity and independence of the judicial system is compromised if the executive can prevent prosecutors carrying out all proper enquiries
34. We have sought to summarise the principles applicable to the Request from the materials set out in Appendix 11 and from our own experience as follows:-
- (1) The independence of criminal investigations should be guaranteed in every state.
  - (2) Strong safeguards must be in place to ensure the independence of prosecutorial bodies so that every offence is enquired into, especially those committed by those with political or economic power.
  - (3) Prosecutors should themselves be impartial and both structurally and functionally (or operationally) independent. A lack of independence erodes credibility of the prosecutorial authority and undermines public confidence in the justice system.
  - (4) States have a duty to ensure that prosecutors can carry out their functions without improper interference, by putting formal safeguards in place.
  - (5) Prosecutors must be individuals of ability and integrity, with appropriate training and qualifications.
  - (6) Prosecutors should be selected on the basis of objective criteria by a fair and impartial decision-making procedure, incorporating safeguards against appointments based on partiality, prejudice or any form of discrimination
  - (7) Even in countries where appointment of prosecutors involves the executive and/or the legislature, selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism.
  - (8) Recruitment bodies for prosecutors should (a) be selected on the basis of competence and skills, and should make their decisions impartially based on objective criteria, (b) be composed of a majority of professionals; (c) avoid any possible political or other external interference.

35. It will be observed from what we have said that, whilst the EU acquis includes much on the need for judges to be appointed independently of government, there are less clear principles applicable to the appointment of prosecutors. Indeed in many countries, the government does have a hand in prosecutorial appointments.
36. What is clear, however, is the prosecutors are required under European principles to be independent, accountable, efficient and effective.

### Factual findings

37. In all the meetings we conducted with politicians, we asked why they thought the Proposal was a necessary (or unnecessary) change and whether they thought that other possibilities for reform could achieve the same ends. Each of these politicians, whom we believe to have been chosen as a representative sample, accepted that their objectives could be met by means other than the implementation of the Proposal. Each of them expressed themselves willing to consider other options.
38. The predominant reasons given by the politicians who were broadly in favour of the Proposal for that view were as follows:-
  - (1) The failure of the prosecutorial service to prosecute those responsible for corruption and organised crime.
  - (2) The failure to achieve convictions in these areas, even where prosecutions were brought.
  - (3) The lack of accountability of prosecutors for their actions in bringing prosecutions in particular types of cases.
  - (4) In particular, the failure of prosecutions in high profile cases due to limitation issues, and the payment of compensation to acquitted defendants.
39. The prosecutors we met (many, but not all, of whom were members of the HJPC and so not entirely representative) told us that they thought they were under-funded but independent of government influence and took their decisions on the basis of the facts and the evidence. They all thought, however, that the press sought to influence their decisions by a continuous barrage of criticism. None of the prosecutors we met, however, thought that such pressure had been successful either in relation to themselves or their colleagues. In relation to the prosecutors we met, we thought we could accept the truth of what they said in this regard. In addition, we met a number of judges, who made impressive points, and emphasised their independence.
40. The unanimous view of the members of the HJPC was that the Proposal was a retrogressive step, and that some or all of the proposals

for reform made by the HJPC itself were desirable. There was a difference of opinion about whether prosecutor/judge specific Departments for the appointment of prosecutors and judges respectively would be desirable, but the predominant view was that such a development would be advantageous as it would ensure that the appointers had direct knowledge of the roles for which the appointment was being made.

41. There is little doubt that influential members of the international community take the clear view that the Proposal is undesirable.

#### Introduction to our Opinion

42. We shall make no attempt in this Report to re-invent the wheel. Many of the persons we met, both in an individual and representative capacity, have years of experience in BiH, and have an in-depth knowledge of the present situation.
43. Nonetheless, we feel that with the benefit of copious written materials and a wide range of meetings in country, we were able to understand the basic parameters of the complex political and legal situation in BiH.
44. Our role, as we understand it, is to report upon the applicable ENCJ principles, taken together with relevant International and European standards, and to seek to explain how we consider those standards can be applied to the situation as we found it on the ground in BiH.
45. We have already sought above to distil the relevant principles and standards applicable to the appointment of prosecutors. It was highlighted in many of our meetings that some well-regulated EU members such as the UK and Germany have for many years operated a practice whereby the executive has a prominent role in the appointment of prosecutors. Whilst this is undoubtedly true, it was also pointed out to us by many of the international actors that we met that the situation in BiH is different from that in those countries. BiH has only recently emerged from a devastating conflict, and is seeking to consolidate and build upon the recent creation of entirely new democratic and judicial structures. It has chosen a formal constitutional basis for its HJPC. Its situation, in the view of many, cannot sensibly be compared with old democracies like the UK. We agree with this approach, and would only comment that it has not been suggested in recent times that there has been any improper political influence on prosecutors in these other countries.
46. Despite this, it is important for us to point out that prosecutors in the neighbouring states of Serbia, Macedonia, Croatia and Montenegro all seem to be appointed in one way or another by their legislatures. We

did not, however, investigate the situation in those states and so cannot sensibly comment further on them.

47. Before expressing our views, we think it is important to understand the legitimate influence of government upon prosecutorial agencies.

#### Distinction between prosecutorial policy and individual prosecution decisions

48. A clear distinction can be drawn between the policy that affects the work of prosecutors on the one hand and the discretionary decisions made by prosecutors in a particular case on the other hand.
49. It is the legitimate business of government to decide, in accordance with the platform upon which they were elected, to legislate for changes in the criminal and procedural laws and policies that prosecutors should follow. For example, a government elected on a platform that promised to tackle corruption and organised crime would be acting legitimately if it enacted legislation designed to achieve those ends. Moreover, where a criminal prosecution is not mandatory under the law, there would be nothing objectionable in that government, at least by legislation, laying down policies that demanded that prosecutors prioritised the prosecution of these crimes. Even in a mandatory prosecution system, the legislature can change the criminal law to make it easier to prosecute some chosen crimes.
50. These aspects of government activity are to be clearly distinguished from the individual decisions of prosecutors as to the prosecution of particular cases. In any particular case, a prosecutor must be free to make his/her decision on the basis of the evidence available on applicable legal principles without interference from the executive or from Parliament. This is what is meant, in the principles extracted above, by functional independence.
51. The problem in BiH is exacerbated by the fact that there is a multitude of functioning governments; 10 at cantonal level in the Federation, one each at entity level of the Federation and the RS, one in the Brčko District of BiH, and one at State level in BiH, each of which may wish legitimately to influence the policy affecting criminal prosecutions at their level.
52. In our view, an internationally and European compliant appointments procedure for prosecutors must recognise the distinction that we have mentioned. It should not jeopardise the ability of prosecutors to exercise their professional discretion in particular cases, but should allow for the government's legitimate right to influence prosecutorial priorities, in accordance with the system in operation in a particular state.

53. One of the leading politicians that we met supporting the Proposal told us of a belief that any competent prosecutor could and should exercise his/her independent professional judgment, whether appointed by the executive or the legislature or not. This may or may not be right in a particular case, but we believe that the perception of independence is often as important as the independence itself.

#### Opinion on the Proposal itself

54. It is worth recapitulating the essential elements of the Proposal as follows:-

- (1) The HJPC would select a list of suitably qualified prosecutors for each role that needed to be filled.
- (2) Chief prosecutors would be selected from the HJPC's list by the relevant legislature based on a proposal from the relevant executive with an unblocking mechanism to prevent a stand-off occurring.
- (3) Deputy, special and other prosecutors at all levels would be selected from the HJPC's list by the chief prosecutor at that level.
- (4) The 2 attorney members of the HJPC would be replaced by university professors or representatives of bar associations appointed by the House of Representatives of BiH after a public competition.

55. We shall deal with each of these 4 proposals in turn.

#### *An HJPC list of suitable candidates*

56. The first proposal to the effect that the HJPC would select a list of suitably qualified prosecutors for each role that needed to be filled is unobjectionable, provided the HJPC then goes on to select the successful candidate from that list. Presumably, the HJPC creates some kind of shortlist under the current procedure.

#### *The legislature to choose the chief prosecutor from the HJPC's list*

57. The second proposal to the effect that the legislature can choose chief prosecutors from the HJPC's list is the crux of the problem we have to consider. The chief prosecutor is central to the independence of the

prosecutorial service, because all prosecutors are accountable to him/her, so that he/she can (at least in theory) influence prosecutorial decisions taken by all his/her subordinates.

58. We suggested to the SDP representatives that we met that this second element in the Proposal would not solve the problems they identified, namely the inadequate prosecution of corruption and organised crime, because it would simply result in the governing political parties being forced to choose a prosecutor from the political sphere from which their supporters were drawn. This state of affairs would have the potential to prevent the prosecution of corruption within that political sphere, and would be unlikely to support the independence and impartiality of the prosecutors' offices. In answer, we received a reiteration of the point that any prosecutor on the HJPC's list would be professional and effectively incorruptible. That of course might in a particular case be so, but once again we believe that perception is quite as important as reality. It is obviously undesirable that the public, or a section of the public, should fear or suspect that an appointment has been made on political or any other discriminatory grounds.
59. We also asked the political representatives we met whether their concerns could be met by the creation of a mechanism to allow government to lay down prosecutorial policy. There was not much enthusiasm for this, which led us to wonder why not if the objective was to clamp down on corruption and organised crime wherever it occurred.
60. We have concluded that the second proposal namely to allow the legislature to choose the Chief Prosecutor from a list prepared by the HJPC is an undesirable development. It does not comply with the principles we have set out in the following respects:-
  - (1) It does not guarantee the independence of criminal investigations, in that it risks that the appointee will be appointed for political reasons with the accompanying perception that only crimes by the opposing group will be investigated.
  - (2) It has inadequate safeguards to ensure the independence of prosecutorial bodies so that every offence is enquired into, for the reasons we have given. This is particularly so as regards offences committed by those with political or economic power.
  - (3) The proposal would risk the perception of a lack of functional independence of the chief prosecutor from the government.
  - (4) The proposal risks undermining public confidence in the justice system for the reasons we have given.

*Other prosecutors chosen by the chief prosecutor from HJPC lists*

61. The third proposal that other prosecutors should be chosen by the chief prosecutor from lists prepared by the HJPC was slightly eclipsed in our discussions by the second proposal. In our view, however, this part of the Proposal is also objectionable, because it places complete power in the hands of one person and reduces transparency and accountability. Any lack of independence in the appointment of the chief prosecutor could be replicated many times over in his/her appointment of deputy and other prosecutors throughout the system.
62. Applying the principles we have set out above:-
- (1) The independence of criminal investigations could not be guaranteed if every prosecutor was chosen by one political appointee, the chief prosecutor.
  - (2) There would be no safeguards to ensure that every offence was enquired into, because of the possibility of political influence over the chief prosecutor and all his appointees.
  - (3) Appointment by the chief prosecutor risks creating a culture of patronage, whereby the subordinate prosecutors felt themselves beholden to the chief who had appointed them. As a result, structural and functional independence could be jeopardised, and public confidence in the justice system could be undermined.
  - (4) A free choice made by a chief prosecutor would not constitute a selection process on the basis of objective criteria by a fair and impartial decision-making procedure, incorporating safeguards against appointments based on partiality, prejudice or any form of discrimination.
  - (5) The process of choice by the chief prosecutor would not avoid at least the perception of undue influence, favouritism or nepotism.
63. Our conclusion on this third proposal is that it is undesirable for the reasons we have given.

*Removing the bar association nominees from the HJPC*

64. Again, this fourth proposal to replace the bar association nominees on the HJPC with academics or attorneys nominated by the legislature was somewhat eclipsed by the other elements of the proposals.
65. It seems to us that there is an element of common ground here. The HJPC's own proposal suggests removing the bar association representatives, and replacing them with an increased number of government appointees. Provided there is a clear majority of judges

and prosecutors on the HJPC, there is nothing unconventional about a small number of government representatives on a Council for the Judiciary. ENCJ recommendations deprecate the appointment of a Minister of Justice to a council for the judiciary, but that is not proposed here.

66. In the circumstances, we regard the fourth proposal as unobjectionable.

#### Conclusions on the Proposal

67. For the reasons we have given, we are not satisfied with the twin proposals that (i) chief prosecutors should be selected from an HJPC list by the relevant legislature based on a proposal from the relevant executive, and (ii) deputy, special and other prosecutors at all levels should be selected from an HJPC list by the chief prosecutor at that level.
68. These proposals violate several of the principles and standards that we have extracted from authoritative international and European materials. In general, they give rise to the risk that all the prosecutors at both State and entity level (and even at cantonal and district level) will either have been or will be perceived to have been appointed for political reasons. This would risk undermining the confidence of the public in the judicial and prosecutorial system.

#### Proposals by the HJPC

69. It was no part of the Request that we consider the desirability of the HJPC's proposals for amendments to the Law. Nonetheless in discussing the Proposal, it was inevitable that we would debate to some extent what was seen as a competing proposal from the HJPC. In fact, however, it is to be noted that the HJPC's proposals are really a product of the EU's Structured Dialogue involving a large number of international actors.
70. It is, therefore, beyond the remit of this report to consider the HJPC's proposals in detail, although we may note in passing that several of the proposals seem uncontroversial even amongst the proponents of the Proposal. For example, the suggestion that there should be 4 government appointed members of the HJPC, and none appointed by bar associations, seems to accord with the fourth element of the Proposal. And the proposal for Departments of prosecutors and judges respectively seems to have won fairly (but not wholly) universal support.
71. Since so much work has been done by so many on the HJPC's proposals we do not think we should seek to comment in detail upon them at this stage.



## Conclusions and Recommendations

72. We have concluded as follows.
73. The first and fourth elements of the Proposal to the effect that (i) the HJPC should select a list of suitably qualified prosecutors for each role that needed to be filled, and that (ii) the 2 attorney members of the HJPC should be replaced by university professors or representatives of bar associations appointed by the House of Representatives of BiH after a public competition, are unobjectionable.
74. The second and third element of the proposals to the effect that (i) chief prosecutors should be selected from an HJPC list by the relevant legislature based on a proposal from the relevant executive, and (ii) deputy, special and other prosecutors at all levels should be selected from an HJPC list by the chief prosecutor at that level, violate internationally accepted principles and standards, and risk jeopardising prosecutorial and judicial independence in BiH, and undermining public confidence in the prosecutorial and judicial system.

Mr Justice Vos  
Judge Forlani

19<sup>th</sup> June 2013

## List of Appendices to the Report

1. Appendix 1: The Law on High Judicial and Prosecutorial Council of BiH (the “Law”) *hardcopy*
2. Appendix 2: Agenda for the fact-finding visit of the ENCJ Delegation.
3. Appendix 3: Meetings in Sarajevo held by The Hon Mr Justice Vos and Judge Forlani on 13<sup>th</sup> and 14<sup>th</sup> May 2013.
4. Appendix 4: The structure of the BiH, Federation and RS Courts, and the legislative and political structures.
5. Appendix 5: The Request from the HJPC *hardcopy*
6. Appendix 6: The Venice Commission’s Opinion No. 648/2011 CDL-AD(2012)014 entitled “*Legal Certainty and the Independence of the Judiciary in B&H*” *hardcopy*
7. Appendix 7: The amendments to the Law proposed by HJPC in October 2012. *hardcopy*
8. Appendix 8: The conclusions reached at the European Commission’s “TaieX” seminar in Sarajevo on 3<sup>rd</sup> December 2012 chaired by its director for the Western Balkans, Mr Pierre Mirel *hardcopy*
9. Appendix 9: The HJPC’s memorandum dated November 2012 to the ENCJ entitled “... *a fundamental and irreversible component of the Judicial Reform Process in BiH*”. *hardcopy*
10. Appendix 10: RS’s submission to the United Nations Security Council dated 8<sup>th</sup> May 2013. *hardcopy*
11. Appendix 11: Relevant international principles as to the appointment and independence of prosecutors.

Mr Justice Vos  
Judge Forlani

19<sup>th</sup> June 2013

### Appendix 3

#### Meetings in Sarajevo, Bosnia Herzegovina

#### held by The Hon Mr Justice Vos and Judge Forlani on 13<sup>th</sup> and 14<sup>th</sup> May 2013

#### Monday 13<sup>th</sup> May 2013

1. Mr Peter Sørensen – EU Special Representative and Head of Delegation: and Mr Henrik Villadsen, Head of legal Affairs to the EU Delegation and Special Representative.
2. Mr Sven Marius Urke: International Adviser to the HJPC.
3. Mr Šefik Džaferović: SDA: President of the Legal and Constitutional Committee of the House of Representatives of BiH, also a former judge and Mr Krstan Simić: SNSD: President of the Legal and Constitutional Committee of the House of the Peoples of BiH.
4. Mr Mehmed Bradarić and Ms Lidija Korać, members of SDP.
5. Mr Mirsad Dugum, member of SBB.
6. The Minister of Justice at BiH level: Mr Barisa Čolak and Ms Popadić, his assistant.
7. President of HJPC BiH: Judge Milorad Novković, and Mr Admir Suljagić, Director of HJPC Secretariat.
8. EU Delegation to BiH: Legal Department, Mr Lucio Valerio Sarandrea and Mr Julian Berthoud.
9. Ms Anne McLeod and Ms Christine McNeill of the British Embassy.
10. Dinner attended by Mr Sven Marius Urke, Mr Stephen Walsh, and Mr Admir Suljagic (all of HJPC), Mr Henrik Villadsen (General legal counsel and Head of Legal Office of the EU Delegation/EUSR to BiH), Mr Ali Lejlić (Second secretary, political officer, Embassy of the US to BiH), Ms Andreja Šporer (Senior legal adviser, Office of the High Representative), and Mr Mersudin Pružan – prosecutor from the Cantonal Prosecutor's Office Middle Bosnia.

**Tuesday 14<sup>th</sup> May 2013**

11. Chief Prosecutor of the Federal Prosecutor's Office of FBiH, Mr Zdravko Knežević.
12. Prosecutor members of HJPC: Ms Fadila Amidzic (Fed) and Ms Jadranka Lokmić-Misirača (BiH deputy chief prosecutor) and Ms Ruzica Jukic (Judge from Federation).
13. Judge Meddžida Kreso, President of the Court of BiH, and Judge Hilmo Vučinić, Judge of the Court of BiH.
14. Lunch meeting with Mr Arben Murtezić, Chief Disciplinary Counsel of the HJPC.

19<sup>th</sup> June 2013

## Appendix 11

### Relevant international principles as to the appointment and independence of prosecutors

1. Theme 7 on Prosecutors from the ENCJ's Draft Distillation Report (2013) said:-

*“The autonomy of criminal investigations must be guaranteed, and their outcomes must be monitored by an independent entity.*

*Strong safeguards must be in place to ensure the autonomy and independence of the bodies in charge of investigations so that every offence is enquired into, especially those committed by those with political or economic power”.*

2. The conclusions of the section on impartiality of investigations in the ENCJ report entitled “Working Group of the European Network of Councils for the Judiciary: *Criminal Justice in the EU*” at [http://www.encj.eu/images/stories/pdf/workinggroups/encj\\_report\\_on\\_criminal\\_justice\\_in\\_the\\_eu\\_2007\\_2008.pdf](http://www.encj.eu/images/stories/pdf/workinggroups/encj_report_on_criminal_justice_in_the_eu_2007_2008.pdf) included the following:-

*“Sector B – Impartiality*

*With regard to the question of impartiality when conducting investigations it is more difficult to recap the answers provided by the members of the working group as there are huge differences in the specific solutions adopted by the legal and procedural systems to ensure real impartiality of investigations. All the same, we have identified the objectives common to all the States.*

*Although the States have different procedural systems (accusatorial to various degrees), legal and administrative systems, as well as legal cultures, all the members of the working group consider that it is essential for the autonomy of investigations to be guaranteed and for the outcome of investigations to be monitored by independent entities: a public prosecutor or a judge, depending on the choices made by the legal systems, also in relation to the different phases of the proceedings.*

*All the information provided on this matter highlights that participants mostly feel the need to strengthen and enhance safeguards with regard to the autonomy and independence of*

*the bodies in charge of investigations so as to ensure enquiries into every offence, especially into cases that generate greater social alarm, such as offences committed by politically and/or economically strong individuals.*

*In numerous countries, public opinion exercises a form of democratic control (although necessarily an indirect form of democracy) over the work of the investigating authorities that promotes the power of supervision with regard to the activities of the investigating authorities and can also nurture discussions on the validity and operational capacity of individual procedural systems.*

*The need for the judicial power (which basically also embodies investigations), to operate in conditions of real autonomy and independence while fully complying with the separation of State powers, is also strongly felt.*

*It is by identifying such common objectives, within the framework of a work in progress, that we can lay the foundation for developing instruments of agreement aimed at drafting a future protocol in the matter”.*

3. The ENCJ’s report on Judicial Ethics (2010) – London Declaration (2010) at:-

<http://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf> was:-

- (1) concerned with striking a balance between the independence of justice, the transparency of institutions, the freedom of the press and the public’s right to information;
- (2) the importance of preserving judicial independence, free from any pressure or manipulation; and
- (3) maintaining the impartiality and efficiency of judges that the public expects.

4. The ENCJ’s Dublin Declaration 2012 dealt with common minimum judicial standards in the field of recruitment, selection, appointment, promotion and training of members of the judiciary, including those related to the competent body to decide in this field. The two reports are at:-

- (1) The report entitled “Development of Minimum Judicial Standards: Report 2010-2011” is at:-

[http://www.ency.eu/images/stories/pdf/workinggroups/ency\\_report\\_project\\_team\\_minimum\\_standards.pdf](http://www.ency.eu/images/stories/pdf/workinggroups/ency_report_project_team_minimum_standards.pdf). It described the proposals on minimum standards regarding judicial recruitment, selection and appointment; judicial training and judicial ethics.

(2) The report entitled “Development of Minimal Judicial Standards II” is at:-

[http://www.ency.eu/images/stories/pdf/GA/Dublin/final\\_report\\_standards\\_ii.pdf](http://www.ency.eu/images/stories/pdf/GA/Dublin/final_report_standards_ii.pdf). It focused on indicators of standards regarding recruitment, selection, appointment and evaluation and promotion of members of the judiciary.

5. The United Nations’ Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul dated 7<sup>th</sup> June 2012 included the following important paragraphs:-

*“26. In assessing the independence and impartiality of prosecutors, it is important to examine both the structural independence of prosecution services and their operational independence and impartiality, or functional independence. A lack of autonomy and functional independence can erode the credibility of the prosecutorial authority and undermine public confidence in the justice system (A/HRC/17/30/Add.3, paras. 16 and 87). In this context, the United Nations Guidelines emphasize that States have a duty to ensure that prosecutors can carry out their functions without improper interference (para. 4).*

*27. There has been a growing tendency to move towards a more independent prosecution service model, in terms of its relationship with other authorities, notably the executive. In some countries, however, subordination of the prosecution service to the executive authority may often be more a question of principle than reality, in that the executive avoids intervening in individual cases or operational decisions, even though it is entitled to do so. Nonetheless, the fundamental problem remains as long as there are no formal safeguards against such interventions. The existence of an entitlement to such interventions can, in terms of public perception, be as damaging as an act of interference.*

*28. In this context, it is important to develop clear and adequate policy guidelines as well as codes of conduct and ethics, so that the parameters for action and the authority of the respective actors are clearly defined, so as to detect,*

*challenge and remedy any violation or abuse of authority that may arise.*

...

*59. The United Nations Guidelines prescribe that prosecutors be selected on the basis of objective criteria and that they be individuals of ability and integrity, with appropriate training and qualifications (para. 1). The IAP Standards of professional responsibility emphasize that recruitment (and promotion) should be decided on the basis of a fair and impartial decision-making procedure.<sup>36</sup> These criteria are also included in a number of regional standards.<sup>37</sup> Furthermore, selection criteria for prosecutors should embody safeguards against appointments based on partiality or prejudice and exclude any form of discrimination [Paragraph 2(a) of the United Nations Guidelines].*

*60. Appointment procedures depend to some extent on the institutionalization of the prosecution service. In a number of countries, access to the career of prosecutor occurs through a public competitive examination or other selection process. In other countries, appointment involves the executive and/or the legislative branch. In some cases, practical experience as a lawyer is required to be admitted to the prosecutorial career.*

*61. In countries where the prosecution service is part of or linked to the executive, the body regulating the career of prosecutors is generally the Office of the Prosecutor General or the Ministry of Justice. Where the prosecution service is linked to the judiciary or is totally independent, a body such as the Superior Council of the Judiciary or the Superior Council of Prosecutors or the Office of the Prosecutor General is usually mandated to regulate the careers of prosecutors.*

*62. In the view of the Special Rapporteur, a public competitive selection process (an examination) is an objective way to ensure the appointment of qualified candidates to the profession. Both selection and promotion processes should be transparent in order to avoid undue influence, favouritism or nepotism. Recruitment bodies should be selected on the basis of competence and skills and should discharge their functions impartially and based on objective criteria. This body should be composed by a majority of members from within the profession in order to avoid any possible political or other external interference”.*



6. The Guidelines on the role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990 included the following:-

*“1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.*

*2. States shall ensure that:*

*(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;*

*(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law”.*

7. Opinion no. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion no. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) included the following:-

*“3. The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.*

*4. Adequate organisational, financial, material and human resources should be put at the disposal of justice. ..*

*6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.*

7. *The CCJE and the CCPE refer to the consistent case-law of the European Court of Human Rights in relation to article 5 paragraph 3 and article 6 of the European Convention of Human Rights. In particular, they refer to the decisions whereby the Court recognized the requirement of independence from the executive power and the parties on the part of any officer authorized by law to exercise judicial power but which does not, however, exclude subordination to higher independent judicial authority. Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions.*

8. *For an independent status of public prosecutors, some minimal requirements are necessary, in particular:*

- *that their position and activities are not subject to influence or interference from any source outside the prosecution service itself;*
- *that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.*

9. *In a State governed by the rule of law, when the structure of prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability, and responsibility. Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively. In any case, due account shall be given to the interests of the victim.*

10. *The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organized on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint*

*training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality”.*

8. We have considered numerous other international and European declarations and statements of principle. They are largely to the same effect as those we have mentioned, but we list them here for the sake of completeness:-
- (1) The Venice Commission Report on European Standards as regards the independence of the judicial system: Part II – the Prosecution Service: Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).
  - (2) European Guidelines on Ethics and Conduct for Public Prosecutors (the “Budapest Guidelines”) adopted by the Conference on Prosecutors General of Europe on 31<sup>st</sup> May 2005.
  - (3) Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies).
  - (4) Recommendation CM/Rec(2012)11 of the Committee of Ministers to Member States on the role of public prosecutors outside the criminal justice system (Adopted by the Committee of Ministers on 19 September 2012 at the 1151st meeting of the Ministers’ Deputies).
  - (5) Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system (Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 at the 1151st meeting of the Ministers’ Deputies).
  - (6) Opinion (2012) No. 7 of the Consultative Council of European Prosecutors on the Management of the Means of Prosecution Services.
  - (7) The Universal Declaration of Human Rights (1948) as adopted by the UN General Assembly and the UN’s International Covenant on Civil and Political Rights (1966), and the UN Basic Principles on the Independence of the Judiciary (1985).
  - (8) The Bangalore Principles of Judicial Conduct (2002) and resolution 2006/23 of the UN Social and Economic Council.

- (9) The Universal Declaration on the Independence of Justice (The Singhvi Declaration) drafted at the request of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
- (10) The Universal Charter of the Judge (1999) approved by the International Association of Judges.
- (11) CCJE Opinion No.1 (2001) concerning the independence of the judiciary and the irremovability of judges.
- (12) CCJE Opinion No.3 (2002) relates to judicial ethics.
- (13) CCJE Opinion No.10 (2007) on the desirable functioning of judicial councils.
- (14) CCJE's Magna Carta of Judges (2010) is a consolidated version of the principles contained in CCJE's Opinions.
- (15) The Venice Commission's Report on Judicial Appointments (Opinion No. 403/2003).
- (16) The Venice Commission's Report on the Independence of the Judicial System (Opinion No. 494/2008).
- (17) The Venice Commission Opinion on Legal Certainty and the Independence of the Judiciary in BiH (Opinion No. 648/2011).
- (18) The European Charter on the Statute for Judges (1998).
- (19) The Judges' Charter in Europe (1997) from the European Association of Judges.
- (20) Giacomo Oberto on Judicial Independence in its Various Aspects: International Basic Principles and the Italian Experience -Turin (2013).
- (21) Edmondo Bruti Liberati on Le rôle du Conseil Supérieur de la Magistrature comme garant de l'indépendance de la magistrature et dans l'organisation des juridictions.
- (22) The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) produced by the OSCE's Office for Democratic Institutions and Human Rights.