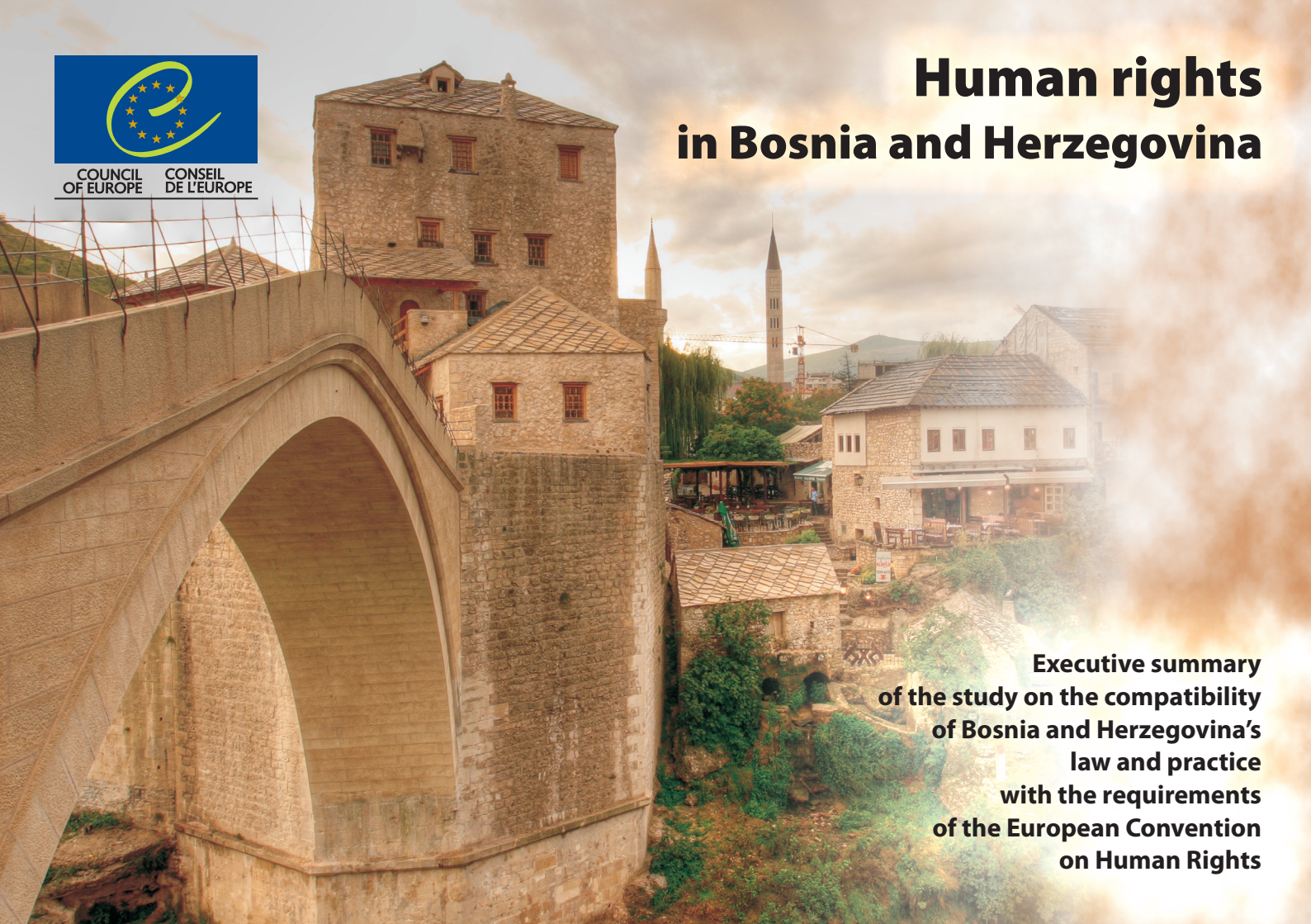

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Human rights in Bosnia and Herzegovina

Executive summary of the study on the compatibility of Bosnia and Herzegovina's law and practice with the requirements of the European Convention on Human Rights

Study on the Compatibility of Bosnia and Herzegovina's Law and Practice with the requirements of the European Convention on Human Rights

A Summary and Commentary

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Introduction

This executive summary seeks to provide an overview of key issues raised in the report on the compatibility of Bosnia and Herzegovina's (BiH) legislation and practice with the European Convention on Human Rights (ECHR) prepared by local experts. The report itself is of some complexity on account both of the constitutional situation (resulting in particular in multiple legislative instruments rather than a unified approach), the Convention's potential impact upon a wide range of aspects of domestic law and practice, and the constant development and refinement of Convention jurisprudence by the European Court of Human Rights. It is likely to be of considerable value to practitioners and commentators.

The report also reflects the expertise of its authors who have considerable understanding of domestic law. An external perspective (which this summary seeks to provide) can help highlight clear issues for further debate and discussion, but will suffer from two drawbacks. First, the actual content of domestic law and practice will run the risk of being misunderstood. What follows may be based in places upon an incomplete understanding. Second, the context in which domestic law and practice operate may similarly be based upon mistaken appreciation or ignorance. For example, much is made in the report of the quality of the judiciary and of the consequent need to ensure proper professional "updating" or further training on Convention principles, but whether this perception is grounded upon fact or rather relies upon conjecture (informed or otherwise) is not one which can be addressed in this study.

Format of the summary

This summary seeks to address the issues identified in the report which are of pressing concern.

The European Convention on Human Rights provides a minimum level of protection for individuals. It provides protection that is essentially subsidiary. In each State, some higher level of protection at domestic level in particular areas of domestic law and practice is inevitable: this helps mark the boundary between the "must do", and the "should do" and "could do" (the former reflecting the need to ensure formal and practical compliance with Convention norms). However, the "living instrument" nature of the treaty (reflecting the growing tendency to see Council of Europe standard-setting as an *acquis* of compatible and mutually-reinforcing standards as well as the relevance of contemporary European practice in determining whether interferences can be justified) suggest that there may be merit in early pre-emptive intervention. On the other hand, the "margin of appreciation" doctrine stresses both the deference to be accorded domestic decision-makers both in respect of the choice of means and also of the need for intervention: the "should do" categorisation is thus likely to be both tentative and open to considerable discussion.

The task given to me was thus in essence to try to provide an overview of the report to help stimulate further discussion at domestic level. The study is thus a means to an end, rather than a synopsis of a lengthy and multi-faceted report. I have sought to try to tease out of the extensive consideration the issues that, to my mind as an external commentator, seem to deserve more attention. I have applied a simple (and possibly too simplistic) approach to identifying issues, but one that may help clarify the determination of future priorities:

"Must do", "should do" and "could do" priorities

I have sought to address the issue of prioritisation by adopting an approach identifying the relative importance of recommendations highlighted in the report:

- Issues that require attention in light of a probable incompatibility with the Convention: **must do** priorities.
- Issues that require attention in light of a possible incompatibility in particular cases with the Convention: **should do** priorities.
- Issues that may be considered desirable in light of "best practice" at domestic level or emerging non-binding standards: **could do** priorities.

Each category thus reflects the element of risk associated with taking no action. The risk is already likely to have been considered in earlier Council of Europe compatibility studies at the time of accession to the Convention or at the time when issues were being addressed domestically by a range of bodies with law-making authority). Assuming several recommendations identified in the report are matters of long-standing law or practice, the decision

not to take action may be the outcome of deliberate discussion *not* to do so. Inaction may also involve the lack of political will, the determination that other issues should at present receive higher priority, or a lack of awareness of the human rights dimension to the issue. A risk-adverse strategy would seek to address "must do" priorities and as many of the "should do" issues as possible; a "best practice" approach would additionally address as many "could do" priorities.

The report is of considerable scope and complexity. Nevertheless, it may suffer in places from the criticism of *over*- and *under*-inclusion. The former involves issues strictly falling outside the scope of the Convention and further lacking support even from non-binding human rights norms. Such issues are to be found throughout the report, and call for some comment: if action is called for, then arguably this should be considered as being driven by non-human rights considerations (although considerations which may nevertheless still be viewed as worthy).

Under-inclusion is a more difficult consideration to address in this study, for observations may be based upon a failure to appreciate domestic provisions and practice. Nevertheless, any compatibility study should consider not only what existing legislation or practice could be incompatible, but also whether the absence of provision (or inaction on the part of State actors) itself gives rise to compatibility with a State's positive obligations under the Convention. (The authors of the report are certainly aware of this: in places, there is discussion as to failings to implement legal responsibilities.) This may be expecting too much from a study of the compatibility of existing provisions, of course: but it may at some point in the future be worthwhile examining this issue in greater depth.

The report contains a great number of recommendations. I have not attempted to address each recommendation, but those which appear to be of most concern (or where I feel that the recommendation could be of some potential benefit, albeit as a lower priority).

Issues of high priority: "must do" priorities

Section 1.2 *Election of BiH Presidency* : Restrictions on the right to stand and to vote for the presidency are highlighted as potentially discriminatory. While Protocol 1, Article 3 is not engaged (since the textual reference is to elections to the legislature), the ratification of Protocol 12 does pose the question whether domestic law is compatible with Convention requirements as only Serbs, Croats or Bosniaks can stand for election (and not the constitutional category of "Others"). Both the Venice Commission and the Parliamentary Assembly of the Council of Europe have called for constitutional reform to address this problem.

Sections 2.2.6; and 3.6 *et seq* *Missing persons; and murders committed during the war* : State authorities have positive obligation under Article 2 and 3 of the Convention to properly investigate murders, disappearances and the like. In order to underline the State's commitment to upholding the sanctity of life, there is a continuing need to emphasise obligations to address the issues of suspected war criminals and the identification of missing persons.

Section 3.2.2 *Criminal law provisions relating to torture, etc.* : In terms of Articles 3 and 8, it would be appropriate to ensure that criminal codes adequately prescribe the circumstances in which infringements of physical or mental integrity both by private individuals[1] and by those acting in an official capacity would constitute criminal offences.

Section 3.2.4.1 *Use of force by police officers* : In light of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) findings, it would be appropriate to ensure that officials (including prosecutors and judges) are made fully aware of positive obligations arising under Article 3 to address the use of unlawful police violence against suspects.

Section 5.2.7 *Bringing a suspect "promptly" before a judge or "judicial officer"* : Domestic law should be amended to ensure a person detained in terms of Article 5(1)(c) will be heard in person by a judge. Domestic law requires that a suspect is brought before a prosecutor who will decide to order release or continue detention, with the decision to continue detention again considered by a court. The report identifies a problem in that the court may determine the issue without hearing the suspect. The implication is also that the prosecutor cannot qualify as a "judicial officer". Article 5(3) rights must be granted automatically, and cannot be made dependent upon a specific request by an accused person. The responsibilities of the judge can be summarised as those of reviewing all the circumstances militating for or against detention, deciding whether a continuation of detention can be justified in accordance with legal criteria, recording the detailed reasons for determining that an accused should be remanded in custody awaiting trial, and ordering release if there are insufficient reasons for continuing detention.[2] The suggestion is clearly that the judge must hear the suspect himself.[3]

Section 5.2.8 *Determinations on the continuation of pre-trial detention* : Similar considerations apply to hearings required by Article 5(4). The report indicates certain shortcomings identified by the domestic courts.[4] In such applications for release, a hearing will be required in which the principle of equality of arms between the prosecutor and the detained person is respected and where the

1. See, e.g. *A v. United Kingdom* 1998-V.

2. *Aquilina v. Malta* 1999-III, para 49.
3. *SBC v. United Kingdom* (19 June 2001), paras 19–24 at para 22.
4. See CH/02/12427 (failure to ensure equality of arms).

actual presence of the detainee may be necessary. At the very least, there must be an opportunity to know the case to be met. Indeed, the opportunity to challenge in an effective manner the statements or views put forward by the prosecutor to justify the continuation of pre-trial detention in certain instances will presuppose that the defence be given access to relevant documents.[5] The report also suggests that domestic law should be strengthened to specify with greater care the circumstances in which loss of liberty can take place or the length of such loss of liberty. Such clarity would help ensure the requirements of Article 5(3) are satisfied.

Sections 5.2.7 and 5.2.8 *Guarantees in military justice proceedings* : The report highlights possible incompatibility between arrangements in military justice proceedings falling within the scope of Article 5(1)(c) with Article 5(3) and 5(4) requirements.

Section 6.3.1.1 *Restrictions on access to a court, etc.* : The report indicates a number of situations in which the domestic courts have determined that Article 6 has been violated. In particular, enforcement of court judgments seems of some pressing concern (but also notes that certain changes are contemplated). It may be appropriate to take action to monitor the effectiveness of such reforms. The report also contains a series of recommendations in this area (for example, in respect of judicial training).

Section 6.3.2 *Reasonable time guarantees in judicial proceedings* : The report highlights the considerable problems in securing "trial within a reasonable time". Compliance is assessed by taking account of the complexity of the factual or legal issues raised, the conduct of the applicant, and the conduct of the domestic authorities as assessed in light of what was at stake for the individual. The report highlights inefficiency as the main reason for lengthy proceedings, and suggests that recent reforms are inadequate (or even counterproductive). (In section 6.3.3, the issue of the adequacy of funding is also raised.) This issue is still one of pressing concern.

Section 6.3.3 *Judicial independence and impartiality* : The report suggests that the court system is grossly under-resourced, that the appointments system lacks transparency, and that measures providing for impartiality are not implemented in a consistent and proper manner. The report makes certain recommendations to address these concerns, including the introduction of criminal sanctions and enhanced professional training. The matter is of some obvious importance, and further consideration is doubtless necessary.

5. See e.g. *Nikolova v. Bulgaria* 1999-II, para 58; *Lanz v. Austria* (31 January 2002), paras 43-45.

Issues of medium priority: "should do" priorities

Section 2.2.1 *Death penalty* : The report suggests that Article 11 of the RS Constitution is now anachronistic. If this is so, it is appropriate it be amended accordingly to reflect BiH's ratification of Protocol No 6 and13.

Section 3.2.4.2 *Prison conditions and health treatment* : Areview of regulations concerning health care and forcible medical intervention should be carried out in order to ensure compliance with minimum ECHR obligations and CPT recommendations. This is of particular importance in respect of the "forensic unit" identified in the CPT's report of its visit of 2003.

Section 4.2.2 *Slavery or servitude* : It is understood that domestic legal provisions regulating human trafficking has not yet been implemented. If this is indeed the case, there is now additionally a need to ensure whether legal provisions when brought into force will provide adequate protection against the exploitation of individuals in light of the *Siliadin v. France* judgment that States must penalise and punish via the criminal law any act aimed at maintaining a person in a situation incompatible wih Article 4.[6]

Section 5.2.4 *Separate detention provision for minors* : The report indicates a difficulty in the provision of a detention regime compatible with the imposition of detention for educational measures in facilities separate from adult offenders: special detention facilities are still to be built, and in consequence, juveniles are held in separate units in adult prisons. The CPT has noted that in certain prisons, juveniles and adults indeed are still held together.[7] This in itself would not necessarily give rise to a problem if the legal basis of the detention falls within Article 5(1)(a) rather than 5(1)(d).[8] However, the situation is entirely inappropriate, and juveniles should not be treated as merely a sub-category of adult prisoners but as a vulnerable group of detainees for whom adequate special treatment is necessary. The CPT is greatly concerned about the lack of appropriate facilities for minors (i.e., persons under 18) in BiH; furthermore, juveniles can be held on remand in adult prisons where material conditions of detention are at times appalling.[9]

Section 6.3.1.1 *Access to the courts, etc: 'decertification' procedures:* It may be appropriate to examine the implications of the Grand Chamber judgment in *Vilho Eskelinen and Others v Finland* which

6. *Siliadin v. France* 2005-VII.

7. CPT/Inf (2007) 34, p 8.
8. Cf *DG v. Ireland* 2002-III, paras 72–85.
9. CPT/Inf (2004) 40, para 105 (in Sarajevo Prison, "up to four minors were held 23 hours and 40 minutes per day in a dilapidated and unhygienic 8 m^2 cell with a semi-partitioned sanitary annex); moreover, the regime offered to them was no less impoverished than that of adult remand prisoners and, in particular, they were being offered no education", a situation which is "totally unsatisfactory").

extends the protection accorded by Article 6 to civil service, etc disputes (insofar as a State must now expressly exclude access to a court for the post or category of staff in question, and be able to show that there is an objective ground for having done so).[10] [Challenges by decertified police officers regarding the process by which the IPTF (a UN body) decertified or refused certification, however, have been declared incompatible *ratione personae* as this process was not within the competence of the BiH authorities.]

Sections 6.3.1.4 and 6.7.2 *Preparation of the defence* : The report highlights questions concerning the effective access to the indictment and supporting documentation. Article 6 requires that an accused "is afforded a reasonable opportunity to present his defence in conditions that do not place him at a disadvantage vis-à-vis his opponent".[11] The report suggests this may not always happen, and to this end, makes certain specific recommendations (including the free copy of all documents forming the basis of the indictment). Certainly, all relevant and material evidence must be made available to an accused's counsel (but not necessarily all evidence).[12] Accordingly, it may be appropriate to consider what further legislative or administrative amendments to existing provision may be necessary. Other issues are subsequently highlighted. Certain matters call for enhanced resources (in particular, the adequacy of legal aid provision). Others do not, and could be implemented readily (abolition of the formality of requiring judicial approval for defence counsel visits, for example).

Section 11.2.2 *Restrictions on the right of peaceful assembly* : Legislative restrictions on the right of peaceful assembly highlighted in the report (discrimination against non-citizens, restrictions on situation or on the right of a person prohibited by a court decision) potentially run the risk of violating Article 11 and should be reviewed.

Section 12.1.1 *Entitlement to social welfare provision, etc.* : The report proposes that entitlement to social welfare provision should be regularised, particularly in respect of nationality or citizenship criteria, matters which potentially could involve ECHR considerations if unjustifiably discriminatory in terms of Article 14.[13]

10. *Vilho Eskelinen and Others v. Finland*, Grand Chamber 2007.
11. *Bulut v. Austria* 1996-II, at para 47.
12. See e.g. *Dowsett v. United Kingdom* 2003-VII, para 50.
13. See e.g. *Gayguzus v. Austria* 1996-IV.

Issues of low priority: "could do" priorities

Section 5.2.9 *Legal provision for unlawful deprivation of liberty* : The report suggests that domestic law should distinguish with greater precision the right to compensation for detention without legal basis (Article 5(5)) and for detention following conviction when the conviction has subsequently been quashed (Prot 7, Art 3). This would seem useful, but of less pressing concern.

Section 6.3.1.3 *Right to silence, etc.* : The report suggests that there is doubt in domestic law as to whether an accused is a competent or compellable witness. This is discussed in the context of the rights to silence and to protection against self-incrimination, but the issue highlighted can be distinguished. While Article 6 of the ECHR does not specifically mention either the right to remain silent when being questioned by the police or the privilege against self-incrimination, these are "generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6" and which are based upon the assumption that the prosecution proves its case without recourse to methods involving coercion or oppression.[14] This does not entirely address the question of competency of an accused to give evidence on his behalf, or of his compellability by the trial court. The report at an earlier stage also discusses the recent importation of elements of accusatorial criminal justice at some cost of consistency. The manner of this imposition, the authors suggest, has been such as to inhibit full discussion by the legal profession of reform of the criminal procedure code. Such a wider discussion could prove useful if influenced by a clear grasp of Article 6 principles.

Section 6.3.1.6 *Admissibility of evidence, etc.* : Rules of evidence are essentially for domestic determination, and the admissibility of evidence improperly obtained is in principle a matter for domestic tribunals. Some attention to the issues identified in the concluding paragraph is desirable, however, even although the admissibility of evidence obtained in such circumstances would not probably be enough to render a trial unfair. In particular, regulation of the use of undercover agents may in certain cases be considered inappropriate, for the fair administration of justice cannot be "sacrificed for the sake of expedience" since the public interest cannot be used to justify the admission of evidence obtained through police incitement, and the use of undercover agents must be restricted and accompanied by appropriate safeguards.[15]

Section 6.8.2 *Plea-bargaining* : The report is critical of such a "novelty". While plea-bargaining may not readily fall within the scope of Article 6 on account of the element of waiver of rights,

14. *John Murray v. United Kingdom* 1996-I, at para 45.

15. *Teixeira de Castro v. Portugal* 1998-IV, paras 34–39.

the authors suggest that the practical reality is that an accused may feel under some compulsion to enter into such an arrangement. It may be appropriate to consider the extent to which this risk exists.

Section 8.5.3 *Foreign nationals: immigration and expulsion* : The report suggests that second instance determinations should be amenable to further challenge. While these matters generally fall outside the scope of Article 6, such a provision would help ensure that any Article 8 (or Article 3) considerations have been addressed adequately in particular cases. Adding a specific reference in domestic legislation that such considerations must be addressed could be of some utility.

Section 9.2.2 *Recognition of religious bodies, etc.* : Article 9 does not require the State to adopt a neutral stance towards religious bodies, and may favour one (or more) faiths through a range of measures including establishment, financial support or exemption from taxation, etc. Certain of the recommendations made in this section of the report could be usefully explored further to help support the implementation of the constitutional commitment to equality of recognition for all faiths, and to ensure that the individual right to manifestation of belief is respected (for example, by treating criminal acts motivated by the victim's belief as aggravated offences).

Section 12 ***passim*** *Property rights* : The report makes reference to a wide range of issues falling within the scope of Article 1 of Protocol 1. Many of these recommendations seem sensible, but much of this area is covered by a wide margin of appreciation on the part of the State. This area of the report is of considerable technicality, and it may be felt appropriate to instigate a longer-term programme of review with a view to introducing reform.

Issues with minimal human rights priority

Section 10.10 *Access to information* : The European Court of Human Rights has yet to recognise a right of access to information (outside of particular and restricted instances – for example, in relation to information on personal upbringing, and environmental hazard[16]). The recommendation that freedom of information legislation should be introduced should be seen in the light of this.

Section 12 ***passim*** *Property rights* : The report on occasion proposes harmonisation of domestic provision across the entities and Brcko District, largely on account of BiH constituting a "single economic space". Harmonisation of law is not required by the ECHR, and other examples of States with differing systems of property exist within Europe (for example, the United Kingdom).

16. See e.g. *Öneryildiz v. Turkey* [GC] 2004-XII.

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