



Remarks by PDHR Raffi Gregorian At a meeting of Circle 99

Taking a Stand on the Rule of Law

Good morning Excelencies,

Ladies and Gentlemen, It's a pleasure to be with you again. I had the honour of taking part in a discussion with Circle 99 just over a year ago.

First of all, my condolences on the loss of your esteemed member. By the sounds of it, he lived more than one lifetime in his many years, having experienced some of the most dramatic events of the 20th century as well as living into the 21st.

I was delighted to accept Adil Kulenovic's invitation to come back, because I believe this is an important forum. After the passage of a year we can view some of the key issues we discussed last time in a new light.

But I will, by way of example of all the things that are going on in this country, be focusing on the rule of law.

The situation generally, though, has not improved over the past 12 months. Indeed, the political situation has gotten much worse, despite serious efforts by some local leaders and international officials to find a way out of the stalemate.

Civil discourse has almost all but disappeared, with politicians and public figures alike finding it acceptable to use the coarsest and most vulgar language in public, and to concoct the most outrageous, offensive, and baseless accusations in a juvenile effort to show their presumed constituencies how tough they are.

Left unchecked, such incessant and increasingly barbaric behavior over a long period of time will come to affect the psyche of even the most educated and reasonable among us. But as I will suggest at the end of the speech, such bully-boy behavior is also producing an interesting counter-reaction, one which can be the basis of solving this country's problems and putting it back on track towards its manifest destiny as a part of a Europe whole, free and at peace.

Hard diagnosis

But first, let's take stock of where we are.

The PIC Steering Board has just completed another meeting. At its March meeting, which occurred just as the Brcko constitutional amendment was adopted, there was some optimism that similar progress could be made toward completing not just Brcko but the other remaining five objectives as well.

Indeed, in April the Council of Ministers finally appointed a working group to compile an inventory of state property—the absolute prerequisite for completing the state property objective. Although the State Property Commission had failed dismally for more than four years to achieve anything, we all hoped this move would get things back on track.

Despite the RS's attempt in May to assert pre-Dayton competencies and take the RS back to a point at which it had no legal recognition, optimism still existed at the PIC's June meeting that the Brcko objective could be completed fully by November and that the state property inventory would be finished and political discussions on apportionment finally underway.

Alas, by September that sense of optimism was replaced by the cold reality that some political leaders seem to

have no interest in fulfilling even binding legal obligations. The RS continued to block the inventory working group, so the OHR had to conduct the inventory itself; the RS prime minister alleged that proven war crimes had been staged affairs; the RS, having failed along with the Federation to meet 10 year old legal obligations under the Brcko Final Award, nonetheless rejected the High Representative's decisions intended to create the conditions for ending Supervision; the RS Government and National Assembly then questioned the legitimacy of the High Representative, the PIC, and the UN Security Council; and then tried to enact a plan that would illegally break up the state electricity transmission system, violate the Brcko Final Award, and put in jeopardy the reliability of the electricity system in the entire region.

In the Federation we saw repeated attempts by the President to illegally appoint judges outside the scope of law.

We also saw the start of an unprecedented—but not yet successful—effort by the US and EU to help break the political logjam of the past three years by mediating a broad solution that would not only permit OHR to close and a new EU structure to take over, but also open up the possibility for a MAP for NATO and possible candidate status with the EU.

In other words, the only progress made in the last five months has been the actions taken by the international community.

So is it any surprise that in last week's meeting, the PIC's limited optimism from March has been replaced by a deep sense of frustration? It is the kind of frustration that a rational person feels when confronted with the irrational and the inexplicable. Why on earth would any *rational* person refuse to fulfill beneficial legal obligations or turn down free help intended to make life better for everyone?

I tried to answer that question last year when I met with you. I suggested then that the incentives of the current political system are such that politicians are rewarded by maintaining the status quo. As my predecessor Larry Butler observed: politicians are more interested in dividing wealth than in creating it. In other words, politics in Bosnia today is about dividing spoils, not about governance and good public policy.

Rule of Law - BiH's last defense line

The kleptocratic, patronage-based political system of which I speak is nowhere mentioned or called for in Dayton (although the international community certainly shares responsibility for allowing such a system to survive). Despite Dayton's many limitations, the political system is not one of them except in the sense that the initial weakness of state institutions allowed the entities to reinforce their wartime political systems and then project them onto the state government. The problem lies in the series of laws governing politics, elections, and conflicts of interest as well as in the continued political party control of real property. Until the people themselves demand a change of this system, the only domestic check on its excesses remains a handful of courageous citizens, journalists, NGOs, law enforcement and the judiciary.

Is it any wonder, then, that those who have the most to lose by reform of the current system would so fiercely attack those who try to uphold and apply the law or reform the system?

Nowhere is this more apparent than in the debate over whether a handful of international judges and prosecutors should be extended in the Court of BiH and the BiH Prosecutor's Office.

The state's judicial system is constitutionally founded, as the state has responsibility for international and inter-entity law enforcement. To exercise this responsibility, the state must have not only police, prosecutors, and courts, but also a criminal code and criminal procedure code. The Constitutional Court of BiH has repeatedly rejected challenges to the constitutional legitimacy of the state's judicial and law enforcement bodies.

Since 2002 the Court of BiH has been working to improve the security of BiH citizens and to entrench the rule of law in this society. State judges and prosecutors have investigated and tried serious cases of organized crime, including political corruption in both Entities. At the same time, the Court has processed a steady stream of serious terrorism and war-crimes cases.

The International Community provided the funds to establish the State Court and it funds today the international judges and prosecutors who have been vital to the establishment and political independence of the Court.

Despite the fact these officials come from other countries, and are funded by the international community, they are appointed by the High Judicial and Prosecutorial Council and they work under the direction of the President of the Court and the Chief Prosecutor just as national judges and prosecutors do.

For more than 18 months, the President of the Court, the Chief Prosecutor, and the HJPC have been asking the Council of Ministers and Parliamentary Assembly to extend the mandates of international judges and prosecutors for an additional three years. They have done so for two reasons. First, because for the past two budget years, the authorities have not only denied the funding needed to hire qualified nationals to replace the departing internationals, but they actually *cut* funding. This means no one has been hired to replace them, and even if funding was provided right now, it is too late.

Judges and prosecutors are not like instant coffee; you can't just add water and have them.

Second, the presence of the internationals not only helps build public confidence in the impartiality of the court, but also helps protect nationals from the sort of political pressures which have been on display for the past two years.

The international community knows that if issues like organized crime, terrorism, war crimes and corruption are not dealt with in BiH, we know from hard experience that these problems will migrate to the rest of the region and beyond. So we have a real interest in making sure that the state judicial system in BiH functions properly. That is why justice and home affairs issues are prominent requirements for issues like visa liberalization as well as NATO and EU membership.

It is also why over the past 12 months a wide array of international officials and organizations in more than 25 instances have strongly backed the Court President and Prosecutor's call for extension of the internationals. These include the President and Chief Prosecutor of the ICTY, the members of the PIC Steering Board (US, UK, Germany, France, Italy, Japan, Canada, Turkey/OIC, the EU Presidency, EC) . Also backing extension is the EU HR Javier Solana, HR/EUSR Inzko, and a wide array of international and local NGOs, including most recently Amnesty International.

If the mandates are not extended, cases that have already been going on for months or years would have to be heard again from the very beginning – witnesses, including protected witnesses for whom participation in these trials must have been extremely traumatic – would have to repeat their testimony, evidence would have to be reviewed by new prosecutors and judges, and the entire machinery of the Court would be overloaded. The rights of the accused would also be affected.

Among other things, this would mean that cases involving corruption at the highest level of political power would be delayed or dropped under political pressure.

Also, what most of you may not realize, nearly a third of the staff supporting the Court and Prosecutor's Office as case officers, legal assistants, investigators, and translators will also depart, effectively strangling the Court to death.

Clearly, none of these things would serve the interests of BiH citizens, and any steps to impede the smooth functioning of the State Court would certainly not facilitate peace implementation or help Bosnia and Herzegovina's postwar rehabilitation.

Who is afraid of Rule of Law?

So why haven't the mandates been extended? Who could be against the rule of law?

Well, let's start with the Council of Ministers. It was the Justice Ministry's responsibility to prepare the necessary amendments requested by the Court President and Chief Prosecutor to extend international judges and prosecutors. Instead, the Minister of Justice, having delayed any action on the matter for more than a year, put forward amendments extending them only in the area of war crimes. That version passed the Council of Ministers, despite numerous direct appeals from the international community.

Parliamentarians in the BiH House of Representatives adopted the amendments in the first reading but in

committee a majority added language to make the amendments consistent with the request of the Court President and Chief Prosecutor, i.e., allowed extension of judges and prosecutors working on organized crime, corruption and terrorism cases to be extended. No doubt fearful that the legitimate and justifiable request of the judiciary might be adopted, certain people in the BiH House of Peoples voted against even an extension in the area of war crimes.

But why? It's no mystery. The people who have voted against the measures come from parties whose leaders are either convicted, indicted, or under investigation by state law enforcement. The legislative branch can invoke "vital national interest" and entity voting to shield elected officials from accountability by the judiciary, while brazenly and openly denying the judiciary the resources it needs to perform its constitutional responsibilities. This despite parties representing a numerical majority in the House of Representatives supporting full extension. I don't think this is what constitutional experts mean by "separation of powers."

Thus the purpose of the continuing political onslaught against the Court and Prosecutor's Office is now obvious: destroy the rule of law. It is my unwavering stance in defense of the rule of law that has made me the subject of vicious *ad hominem* attacks. Not having any real or even fact-based arguments against me, the enemies of the rule of law instead resort to fabricating information and smear tactics. Hence conspiracies involving dead judges and people who left BiH four years ago. The enemies of the rule of law use their control of media outlets to propagate their lies, knowing as Joseph Goebbels once observed that:

"If you tell a lie big enough and keep repeating it, people will eventually come to believe it. The lie can be maintained only for such time as the State can shield the people from the political, economic and/or military consequences of the lie. It thus becomes vitally important for the State to use all of its powers to repress dissent, for the truth is the mortal enemy of the lie, and thus by extension, the truth is the greatest enemy of the State."

And we expect more of such behavior in the period leading up to the elections. You can see it already in efforts to water down conflict of interest laws or attacks on public auditors. Politicians who have no answers for the difficult economic and social problems facing this country will try to scare people into supporting them with stories of ethnic bogeymen, claiming that as self-appointed defenders of their people that legal scrutiny of their individual actions is tantamount to questioning an entire nation. This calls to mind what Samuel Johnson observed in April 1775, that "patriotism [or in the context of BiH, perhaps chauvinist nationalism] is the last refuge of a scoundrel."

The members of the PIC Steering Board know all this, and the consequences of not extending the mandates of international judges and prosecutors for up to another three years. But do the people of Bosnia and Herzegovina?

It appears that they do now.

They see now clearly that just as those who fear the rule of law have united across ethnic lines to oppose it, that it is necessary for those who support the rule of law to unite to preserve it. But will the people have the courage of their convictions, or stay home on election day, thinking that their vote doesn't matter? The enemies of the rule of law are counting on that. No rule of law means no new investments and no new jobs and a falling, rather than growing, standard of living. No rule of law means your dreams of EU and NATO membership will remain just that – dreams. In this sense, the stakes of next year's elections couldn't be higher. It's time to take a stand for the rule of law.

Thank you