



REPUBLIC OF SRPSKA
PRESIDENT OF THE REPUBLIC

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His Excellency António Guterres
Secretary-General
The United Nations
1 United Nations Plaza
New York, New York, USA 10017-3515

Dear Mr. Secretary-General:

To assist the Security Council in its upcoming debate on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 18th Report to the UN Security Council. Among the key issues addressed in the report are the unlawful transformation of the BiH constitutional system since the Dayton Accords, the need to reform BiH Constitutional Court, the effort to transfer RS property to the BiH military, and growing concerns among European leaders regarding the threat of radical Islam in BiH.

Section I of the report examines how the decentralized BiH constitutional system created in the Dayton Accords has been unlawfully subverted, violating the treaty rights and protections of Republika Srpska and its citizens, and contributing to the increasing dysfunction of BiH. For years, the High Representative used unlawful decrees and coercion to pursue the centralization agenda of the SDA and other Bosniak political parties. Since the High Representative's so-called "Bonn Powers" became discredited and fell out of use, the SDA has relied on its domination of BiH institutions, such as the unlawfully created BiH Court and Prosecutor's Office, to further undermine the constitutional autonomy of BiH's two Entities.

In Section II, the report addresses the need to reform the BiH Constitutional Court to replace its three foreign judges, whom the 1995 BiH Constitution envisioned would remain on the court only for a five-year transitional period. The Constitutional Court lacks legitimacy among Republika Srpska and its citizens because of its lack of independence, the presence of foreign judges, and the foreign judges' alliance with Bosniak judges to pursue the agenda of the High Representative and the SDA. The presence of foreign judges is incompatible with BiH sovereignty and democracy, and EU officials have made clear that BiH cannot accede to the EU with such judges sitting on its Constitutional Court.

Section III explains why Bosniaks' drive to transfer RS property to the BiH military is unlawful and destabilizing. The Court of BiH's recent decision ordering RS officials to transfer an RS property to the ownership of the BiH Ministry of Defense is contrary to law. The decision, which is part of the SDA agenda to centralize authority and undermine Republika Srpska, is also completely unnecessary for the BiH military's use of the property at issue.

Section IV of the report addresses why it is appropriate for the RS National Assembly to proclaim its position with respect to BiH's membership in NATO and, potentially, to hold a referendum on the issue. It is entirely proper for Republika Srpska to give voice to its citizens on an issue that concerns them. This is especially the case because of the role the BiH Constitution gives the RS National Assembly in treaty ratification. Any notion that BiH has already legally committed itself to joining NATO disregards the fact that only ratification of the North Atlantic Treaty in accordance with BiH's constitutional procedures can so commit BiH.

Section V examines the need to reform the BiH justice system, which is another BiH institution that the SDA uses for its political agenda. For years, the BiH Prosecutor's Office has made investigative and prosecutorial decisions based on politics instead of justice. Moreover, the BiH justice system has continued its long pattern of discrimination against Serb victims of war crimes. The most recent example is the Court of BiH's shameful acquittal of Naser Orić, who openly boasted of war crimes during the war.

In Section VI, the report addresses reforms necessary for the Court of BiH and the High Judicial and Prosecutorial Council (HJPC) to meet European and other international standards. The Court of BiH, an unlawful creation of the High Representative, requires significant reforms, including a curtailment of the infinitely elastic jurisdiction it claims. The HPJC system unlawfully created by the High Representative, must be reformed to be harmonize with BiH's constitutional structure, European standards, and the practice of democratic federal states. Republika Srpska has been seeking judicial reforms through the EU's Structured Dialogue on Justice since 2011, but Bosniak officials have blockaded all proposed reforms, including those endorsed by EU experts.

Section VII of the report examines growing concerns in Europe about BiH's role as a sanctuary for jihadists. The SDA has helped turn BiH into a safe haven for extremism, and European leaders have recently expressed alarm regarding the security risks to Europe this poses. Consistent with its Islamist ideology, the SDA invited mujahidin to Bosnia and Herzegovina during the war and has continued its close ties to radical Islamists since then.

Section VIII addresses BiH institutions' obstruction of the Reform Agenda for EU integration. Republika Srpska has continued to demonstrate its commitment to BiH's integration by meeting all of its obligations under the Reform Agenda. BiH-level institutions, by contrast, have failed to meet their obligations, such the enactment of new excise tax legislation.

In Section IX of the report, Republika Srpska asks that the international community respect the Dayton Accords and BiH sovereignty, including by closing the Office of the High Representative.

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

Yours sincerely,



PRESIDENT

Milorad Dodik

Republika Srpska's 18th Report to the UN Security Council

October 2017

Republika Srpska's 18th Report to the UN Security Council

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Republika Srpska's 18th Report to the UN Security Council

Introduction and Executive Summary

I. The Subversion of the Dayton System

Republika Srpska remains committed to Bosnia and Herzegovina (“BiH”) as it is defined and structured in the Dayton Accords. Since shortly after the Dayton Accords entered into effect, the highly decentralized political structure of BiH established in the BiH Constitution has been under attack by the SDA and other Bosniak political parties and their supporters in the international community. They have steadily and unlawfully replaced the Dayton structure with a dysfunctional centralized state. For years, the High Representative used illegal decrees and coercion to pursue the centralization agenda of the SDA and other Bosniak political parties. As the High Representative’s use of the so-called “Bonn Powers” has been discredited and declined in recent years, the SDA has used its domination of BiH institutions—often unlawfully created by decree and coercion—to further erode the autonomy of the two Entities supposedly guaranteed under the Dayton Accords. The BiH Constitutional Court, with its foreign judges, has also been used as a political instrument to unlawfully alter the Dayton structure. As a former chief of staff of the Constitutional Court’s president described, “[C]onstitutional-law development has been exclusively a consequence of international interventionism.”¹ After changes since Dayton, he said, “[t]he constitutional-law organisation does not reflect the formal text of the Constitution.”² “The Constitutional Court,” the former chief of staff said, “has granted legitimacy to a host of imposed laws and introduced a balance between BiH sovereignty and international governance.”³

II. The BiH Constitutional Court must be reformed.

The BiH Constitutional Court must be reformed to replace its three foreign judges if BiH is to restore the rule of law and prevent further unlawful deterioration of the Dayton Accords. The terms of the BiH Constitution indicate that the parties’ intent was for the foreign judges to be replaced after a five-year transitional period. The Constitutional Court’s legitimacy is undermined by the presence of foreign judges, the court’s lack of independence, and the foreign judges’ alliance with Bosniak judges to act as political instruments of the High Representative and the SDA. As EU officials have made clear, BiH cannot accede to the EU with foreign judges sitting on its Constitutional Court. Moreover, the presence of foreign judges on the court is incompatible with BiH sovereignty and democracy. All of BiH’s Serb and Croat leaders advocate ending the role of foreign judges, but Bosniak parties have blocked this essential reform because they do not want to break up the political alliance of foreign and Bosniak judges.

III. The Bosniaks’ drive to seize RS property used by the BiH military is unlawful and destabilizing.

¹ Oslobodjenje interview with Nadim Ademović, 24 Apr. 2010.

² *Id.*

³ *Id.*

The Court of BiH's 2016 *Han Pijesak* decision ordering RS officials to transfer RS state property to the ownership of the BiH Ministry of Defense is contrary to law, including the Agreement on Succession Issues, BiH and RS law, BiH Constitutional Court jurisprudence, and the Dayton Accords. The decision is part of the Bosniak agenda to centralize power and undermine Republika Srpska. The transfer of RS property being used by the BiH Ministry of Defense is also wholly unnecessary, especially because Republika Srpska already allows the BiH Armed Forces to use all of the state property it needs. Any attempt to prosecute RS civil servants for failure to transfer such property would be unnecessary, unjustified, and unprecedented.

IV. It is right and proper for Republika Srpska to declare its position on NATO membership and, potentially, to hold a referendum on the issue.

The RS National Assembly in October 2017 approved a resolution proclaiming military neutrality with respect to military alliances until a potential referendum on the issue is held. Republika Srpska is well justified in declaring its position—and in potentially holding a referendum—on the issue of BiH's potential membership in NATO. This is especially so because of the role the BiH Constitution explicitly gives Republika Srpska in treaty ratification. Any claim that BiH has already, by law, committed to NATO membership ignores the BiH Constitution's clear requirements for ratification of treaties.

V. The BiH justice system, another political instrument that has been used to undermine Dayton, causes significant instability; it must be reformed.

The BiH Court and Prosecutor's Office are two BiH institutions that the SDA uses for its political agenda. The BiH Prosecutor's Office has long made investigative and prosecutorial decisions based not on justice but on politics. A recent example is the BiH Prosecutor's office's baldly political attempt to imprison four members of the RS Referendum Commission. The BiH justice system has also continued its long pattern of discrimination against Serb victims of war crimes.

VI. The Court of BiH and HJPC must be reformed to meet European and other international standards.

The Court of BiH, an unlawful creation of the High Representative, requires reforms to meet EU standards. Among the necessary reforms is a curtailment of the infinitely elastic jurisdiction claimed by the court and the creation of an independent appeals court. The Court also lacks independence and is often subject to influence by the SDA for political purposes, as international officials and NGOs have critically noted. EU representatives have agreed with Republika Srpska on the need for these reforms. The High Judicial and Prosecutorial Council (HJPC) system, another unlawful creation of the High Representative, must be reformed to be harmonize with BiH's constitutional structure, European standards, and the practice of democratic federal states. These institutions do not exist under the BiH Constitution and were created by the decrees and political coercion of the High Representative with the support of the Bosniaks to unlawfully centralize judicial power. Republika Srpska has been seeking reforms to BiH's justice system through the EU's Structured Dialogue on Justice since 2011, but Bosniak officials have intransigently blocked all proposed reforms, including those endorsed by EU experts.

VII. European Officials and journalists express growing concern over the increasing jihadist threat BiH poses.

Concerns about the use of BiH as a terrorist sanctuary are rising among European officials and journalists. The SDA has helped turn BiH into a safe haven for jihadists, who threaten BiH, Europe, and the rest of the world. Consistent with its Islamist ideology, the SDA invited mujahidin to Bosnia and Herzegovina during the war and has continued its close ties to radical Islamists. As Germany's *Der Spiegel* recently wrote, "German investigators believe there are around a dozen places in Bosnia where Salafists -- followers of a hardline Sunni interpretation of Islam -- have assembled radicals undisturbed by the authorities."⁴

VIII. The BiH level is obstructing implementation of the Reform Agenda for EU integration.

Republika Srpska has continued to show its commitment to BiH's EU integration by fulfilling all of its obligations under the EU-sponsored Reform Agenda. Unfortunately, BiH-level institutions have failed to meet their obligations, such as the approval of new excise tax legislation. Despite the BiH level's failures to meet its commitments, Republika Srpska will continue its strong support for the Reform Agenda and work for agreement on all matters relating to the Reform Agenda consistent with RS constitutional competencies.

IX. The international community should respect the Dayton Accords and BiH sovereignty.

Republika Srpska asks BiH's friends in the international community to respect the Dayton Accords and BiH sovereignty. The international community should support reforms to restore the Dayton structure, refrain from intervening in BiH's domestic politics, and close the Office of the High Representative, which is incompatible with BiH sovereignty and EU membership. In addition, the UN Security Council should end the unjustified application of Chapter VII of the UN Charter to BiH.

Republika Srpska will continue its commitment to the Dayton Accords, the Reform Agenda, and other reforms to improve the wellbeing of its citizens.

⁴ Walter Mayr, *Sharia Villages: Bosnia's Islamic State Problem*, DER SPIEGEL, 5 Apr. 2016.

I. The Subversion of the Dayton System

1. Republika Srpska is committed to BiH as defined in the BiH Constitution, which is Annex 4 of the Dayton Accords. Unfortunately, since shortly after the Dayton Accords, the highly decentralized political structure of BiH established in the BiH Constitution has been unlawfully replaced by a dysfunctional centralized state. Through years of illegal decrees and coercion, the High Representative created under the Dayton Accords gave BiH's Bosniak parties—chiefly the SDA—precisely what the Dayton Accords were designed to prevent: a centralized state that Bosniaks—as the most populous of BiH's Constituent Peoples—could control to the detriment of BiH's other Constituent Peoples.

2. The High Representative centralized BiH in part using his self-bestowed “Bonn Powers” to decree laws, constitutional amendments, and extrajudicial punishments. These dictatorial powers were a legally preposterous violation of BiH's sovereignty and its citizens' rights. As Former UK Ambassador to BiH Charles Crawford, who helped invent the “Bonn Powers,” has admitted, “the Bonn Powers had no real legal basis at all.”⁵

3. When he was not decreeing laws or punishing individuals without due process, the High Representative was coercing BiH officials into submission, in part using the threat of their removal and ban from public employment. As former High Representative Paddy Ashdown recently admitted in testimony to the UK Parliament, it took “a great deal of cracking of arms” in order for BiH politicians to accept measures going “beyond Dayton.”⁶ Referring to European Commissioner for External Relations Chris Patten and NATO Secretary General George Robertson, Ashdown said, “We used those pretty brutally.”⁷

4. As the High Representative's power has ebbed in recent years, the SDA has used its domination of BiH institutions, including the illegally-created BiH Court and Prosecutor's Office, to undermine further the fundamental rights of the Serb and Croat Peoples and the autonomy of the two Entities guaranteed under the Dayton Accords. A key recent example, examined in section III, below, is the SDA's use of the Court of BiH in an attempt to unlawfully seize RS public property and transfer it to BiH. The BiH Constitutional Court, with its foreign judges, has also been used as a political instrument to unlawfully alter the Dayton structure.

II. The BiH Constitutional Court must be reformed.

5. The BiH Constitutional Court must be reformed if BiH is to become a fully sovereign country and move forward with EU integration. Three of the nine members of the BiH Constitutional Court are foreigners selected by the President of the European Court of Human Rights without any domestic consent. No other sovereign state in the world has seats on its constitutional court reserved for foreign judges, let alone judges appointed by a foreign

⁵ Charles Crawford, *Bosnia: the Bonn Powers Crawl Away to Die*, available at charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/ (emphasis added).

⁶ The testimony is available at www.parliamentlive.tv/Event/Index/a4551237-3e0f-4c02-afbe-8c0cefa94948.

⁷ *Id.*

individual judge without a requirement of domestic consent.

6. The foreign judges were a transitional measure that was never intended to be in place for the long term. The terms of the BiH Constitution indicate that the parties' intent was for the foreign judges to be a temporary feature of the court and for legislation to be passed after five years replacing them. Unfortunately, the SDA and other Bosniak parties have blocked all legislation to replace the foreign judges with BiH citizens. They want the foreign judges to remain because they reliably vote to centralize BiH, regardless of a case's constitutional merits.

A. The Constitutional Court lacks legitimacy.

7. The most precious asset of any court that exercises judicial review is public legitimacy. Without such legitimacy, the public will not accept court decisions, especially those that nullify legislation approved by democratic institutions. The Constitutional Court's legitimacy is badly undermined by the presence of foreign judges, the court's lack of independence, and the foreign judges' political alliance with Bosniak judges to serve the agenda of the High Representative and the SDA.

1. The presence of foreign judges on the Constitutional Court undermines the court's legitimacy.

8. The BiH Constitutional Court will always suffer a legitimacy deficit as long as it includes judges who—in addition to lacking democratic legitimacy—are not even BiH citizens or speakers of the local languages. Worse still, they are appointed by a foreign judge without a requirement of consent by any institution in BiH.

9. In a recent article about the BiH Constitutional Court, Stefan Graziadei of the University of Antwerp points out that foreign judges “are not trained in the domestic legal system, often do not understand the local language(s), and as citizens of another country they appear to be ill-equipped to uphold the supreme law of a country with which they share no bond of citizenship.”⁸ In addition, as Tim Potier has pointed out, the use of foreign judges in a country's highest court prevents a society's ownership of its constitution and system.⁹

10. A 2016 study of the BiH Constitutional Court published by the Sarajevo-based Analitika Center for Social Research said with respect to the foreign judges: “Even though agreeing that the provision had its justification at first, most of our interlocutors now see such a feature as unnecessary, and as overstaying its welcome almost twenty years later, with one constitutional scholar noting that such hybridization of [the BiH Constitutional Court] is ‘demeaning,’ while the first president of the Court after the Dayton Agreement saw in it ‘elements of

⁸ Stefan Graziadei, *Six models for Reforming the Selection of Judges to the BiH Constitutional Court*, Centre for Southeast European Studies, Working Paper No. 14 (Jan 2016) at 5 (footnotes omitted).

⁹ See Tim Potier, *Making an Even Number Odd: Deadlock-Avoiding in a Reunified Cyprus Supreme Court*, JOURNAL ON ETHNOPOLITICS AND MINORITY ISSUES IN EUROPE, Vol. 7 (2008), at 4.

protectorate.”¹⁰

2. Members of the Constitutional Court and academic community acknowledge that the Court acts subserviently to the High Representative and his agenda rather than independently as law requires.

11. The Constitutional Court’s legitimacy suffers badly from the court’s subservience to the High Representative.

12. A former foreign judge, Austrian professor Joseph Marko, admitted after leaving the Constitutional Court:

[T]he entire system was based upon the tacit consensus between the Court and the High Representative that the Court in exercising its power to review all legislative acts whomever they will emanate from *will always confirm the merits of his legislation* as can be seen from those judgments.¹¹

13. As the Analitika study of the Constitutional Court observed, “The Court did not scrutinize the legal basis given by the [High Representative] for its actions but uncritically accepted them.”¹²

14. The High Representative ensures the subservience of the BiH Constitutional Court in a number of ways, but his most overt interference with the Constitutional Court is the 2006 order—still in effect—that no court may disagree with any of the High Representative’s decisions. After a 2006 Constitutional Court decision held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the High Representative, the High Representative responded by handing down a decree nullifying the court’s verdict. The decree, which remains in effect today, also banned any proceeding before the Constitutional Court or any other court that “*takes issue in any way whatsoever with one or more decisions of the High Representative.*”¹³

¹⁰ Nedim Kulenović, *Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation*, Analitika Center for Social Research, 2016 (“Analitika Study”) at 15.

¹¹ JOSEPH MARKO, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, *European Diversity and Autonomy Papers* (July 2004) at 18 (emphasis added).

¹² Nedim Kulenović, [*Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation*](#), Analitika Center for Social Research (2016) (“Analitika Study”) at 36.

¹³ Office of the High Representative (OHR), Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, March 23, 2007 (emphasis added).

3. The Constitutional Court has been highly criticized by legal and political experts as a political instrument used to unlawfully alter the Dayton structure.

15. The Constitutional Court's legitimacy deficit is exacerbated by its political nature, including a longstanding alliance between the bloc of three foreign judges and the two Bosniak judges, which in crucial cases has outvoted the Serb and Croat judges on the court.

16. As *Balkan Insight* reported in 2015, "The three votes wielded by the foreign judges, together with the two Bosniak judges on the court, have often proved to be decisive, outvoting the two Serb and two Croat judges."¹⁴ Similarly, the International Crisis Group has explained, "The BiH Constitutional Court has repeatedly ordered the RS to amend its constitution over the objections of both Serb (and, often, both Croat) judges"¹⁵ Indeed, in *every case* in which the foreign judges have joined with the judges of one Constituent People to outvote the other judges, it has been the Bosniak judges to which the foreign judges have aligned themselves.¹⁶

17. The foreign and Bosniak judges are allied because they share a commitment to the political agenda of the High Representative and the SDA to unconstitutionally centralize BiH. The two Bosniak judges of the court are both former high SDA officials.

18. According to the Analitika study of the Constitutional Court, the court's approach "paved the way for a significant transfer of competences to the state level and the establishment of numerous new institutions"¹⁷ The study concludes:

That in all of the cases from its formative period [the BiH Constitutional Court] sided not with the democratically elected representatives but with an extraconstitutional force that imposed legislation in a domestic legal system, and all for the purpose of the strengthening of the central state and the rectification of the deficiencies of the circumstances of constitutional-making, further demonstrates the reality of [the] Court's activism and its role as a policymaker.¹⁸

19. In 2010, Nedim Ademović, former chief of staff of the BiH Constitutional Court's president, said, "[C]onstitutional-law development has been exclusively a consequence of international interventionism."¹⁹ He boasted, "The BiH Constitutional Court is one of the most successful institutions and projects in BiH. The BiH Constitutional Court has granted legitimacy to a host of imposed laws and introduced a balance between BiH sovereignty and international

¹⁴ Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

¹⁵ International Crisis Group, *What Does Republika Srpska Want?*, 6 Oct. 2011, p. 16.

¹⁶ Analitika Study at 16.

¹⁷ Analitika Study at 37.

¹⁸ Analitika Study at 24.

¹⁹ Oslobodjenje interview with Nadim Ademović, 24 Apr. 2010.

governance.”²⁰ According to Ademovic, “The constitutional-law organization does not reflect the formal text of the Constitution. It has extensively evolved and changed since Dayton to date, and the text of the Constitution has not reflected the changes.”²¹

20. The foreign judges have subordinated constitutional text to the political goal of centralizing BiH. One former foreign judge of the court admitted that constitutional text is “a source of inspiration rather than a determining factor” in deciding cases.²²

21. The alliance between the foreign and Bosniak judges has resulted in many of the Constitutional Court’s most political and legally baseless decisions. As the U.S.-based NGO Freedom House recently wrote, the Constitutional Court’s November 2015 decision on Republika Srpska’s RS Day holiday “exemplified the judiciary’s politicization.”²³ But that decision is only one example of the alliance of foreign and Bosniak judges turning the Court into a political instrument of the SDA and other Bosniak parties.

22. Another prominent example is the Court’s 5-4 decision upholding the High Representative’s creation of the Court of BiH despite that court’s manifest unconstitutionality. As the International Crisis Group has written, “Dayton allotted judicial matters to the Entities, apart from a state Constitutional Court.”²⁴ Despite the law’s obvious unconstitutionality, the Constitutional Court upheld the law in a 5-4 decision because the three foreign judges voted as a bloc, along with the two Bosniak judges, to protect the HR’s creation. One of those foreign judges later admitted that there was a “tacit consensus between the Court and the High Representative that the Court . . . *will always confirm the merits of his legislation . . .*”²⁵

23. In addition to legitimizing the unconstitutional centralization of BiH, the Constitutional Court has degraded the constitutional protections of BiH’s Constituent Peoples. For example, the BiH Constitution empowers representatives of a Constituent People to block legislation by declaring it to be destructive of a vital national interest. The Constitution empowers the Constitutional Court to review such declarations only “for procedural regularity.”²⁶ Defying the Constitution’s clear instructions, the Constitutional Court has chosen to go far beyond reviewing declarations “for procedural regularity,” instead subjecting them to an extremely high level of *substantive* scrutiny.²⁷ The result has been that vital national interest declarations have a success rate of just 18 percent.²⁸ The Constitutional Court, the Analitika study concludes, “subverted the

²⁰ *Id.*

²¹ *Id.*

²² Analitika Study at 26.

²³ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 9.

²⁴ International Crisis Group, *Bosnia’s Future*, 10 July 2014 (“2014 ICG Report”) at 27.

²⁵ JOSEPH MARKO, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, *European Diversity and Autonomy Papers* (July 2004) at 18 (emphasis added).

²⁶ BiH Constitution, Art. IV(3)(f).

²⁷ Analitika Study at 31.

²⁸ *Id.*

intention of the framers for the purpose of the easing of legislative procedure.”²⁹

B. BiH cannot become an EU member as long as its Constitutional Court includes foreign judges.

24. Reforming the BiH Constitutional Court is essential for BiH to become a fully sovereign state and an EU member. In private meetings, EU officials have made clear that BiH cannot become an EU member as long as it has foreign judges sitting on its Constitutional Court. As explained below, the presence of foreign judges on BiH’s highest court is inconsistent with BiH sovereignty and, as then-EU Enlargement Commissioner Olli Rehn said in a speech to the BiH Parliamentary Assembly in 2009, “there is no way a quasi-protectorate can join the EU.”³⁰

25. The foreign judges’ continued presence is inconsistent with Chapter 23—Judiciary and fundamental rights—of the *Acquis Communautaire*, which is the body of EU laws a candidate country has to comply with in order to become a member state. The European Commission specifies that compliance with Chapter 23 of the *Acquis* requires the “establishment of an independent and efficient judiciary [which] requires a firm commitment to eliminating external influences over the judiciary.”³¹ The presence of foreign judges on the BiH’s Constitutional Court is therefore inconsistent with the BiH accession to the EU.

26. EU Council recommendation CM/Rec(2010)12 states that “[j]udges, who are part of the society they serve, cannot effectively administer justice without public confidence. They should inform themselves of society’s expectations of the judicial system and of complaints about its functioning.”³² Foreign judges are hardly part of the BiH society, because, in addition to being foreign nationals, they live abroad, work in a foreign language, and sit on a limited number of cases.

C. A Constitutional Court with foreign members is inconsistent with sovereignty and democracy.

27. The presence of foreign judges on the BiH Constitutional Court is incompatible with BiH’s sovereignty.

28. As Professor Robert Hayden has observed, the role of foreign judges on the Constitutional Court “of course, compromises the sovereignty of Bosnia and Herzegovina, since it gives decision-making powers to people who may not, by constitutional mandate, be citizens

²⁹ *Id.*

³⁰ Olli Rehn, EU Commissioner for Enlargement, [Towards a European Era for Bosnia and Herzegovina: The Way Ahead](#), Address to Parliament of Bosnia and Herzegovina, 24 July 2009.

³¹ European Commission, European Neighborhood Policy And Enlargement Negotiations, *Chapters of the acquis*, COM (2017).

³² Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, art. 20 (Nov. 17, 2010).

of the country.”³³

29. Writing about the BiH Constitutional Court, the University of Antwerp’s Stefan Graziadei observes:

Even more at odds with national sovereignty is the idea that international judges may sit in national apex courts: “Because of the doctrine of state sovereignty, it sounds almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or a separate constitutional court of another country.” This is particularly true because such courts operate at the boundary between politics and law: they have the power to review legislation, which is based on the will of the people, for conformity with the national constitution.³⁴

30. Even one recently retired foreign Constitutional Court judge, Constance Grewe, admits that the presence of foreign judges “can be seen as an intrusion into the national affairs” or “as an attempt at supervision.”³⁵ That is exactly what it is.

31. The presence of foreign judges on the BiH Constitutional Court is also incompatible with BiH democracy. As an international expert panel on Cyprus observed, “Leaving the final decision in case of stalemate to foreign citizens in such critical organs as the Supreme Court and others is in stark contradiction to the principle of democracy.”³⁶

D. All Serb and Croat leaders support ending the role of foreign judges on the Constitutional Court but have been prevented from doing so because Bosniak leaders do not want to give up this political tool.

32. The BiH Constitution authorizes the Parliamentary Assembly to pass a new law replacing the foreign judges five years after their initial appointment, which occurred in 1996.³⁷ All of the Serb and Croat political parties in BiH are united in support of replacing the foreign judges on the Constitutional Court with BiH citizens.³⁸ As the president of the Croat National Council,

³³ ROBERT M. HAYDEN, *BLUEPRINTS FOR A HOUSE DIVIDED: THE CONSTITUTIONAL LOGIC OF THE YUGOSLAV CONFLICTS* (1999) 131.

³⁴ Graziadei at 4 (quoting Joseph Marko, *Foreign Judges: A European Perspective*, in *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong*, ed. by Simon Young and Yash Ghai (New York: CUP, 2014), pp. 637-65 (p. 637)). (footnotes omitted).

³⁵ Constance Grewe and Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW*, Vol. 15, p. 41.

³⁶ International Expert Panel Convened By The Committee For A European Solution In Cyprus, *A principled basis for a just and lasting Cyprus settlement in the light of International and European Law*, 2005 (quoted in Graziadei at 4).

³⁷ BiH Constitution, Art. VI(1)(d).

³⁸ Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, *BALKAN INSIGHT*, 2 Dec. 2015.

which represents all of the Croat parties, recently said, “Twenty years after the war, Bosnians are ready to take full control of this court.” On 20 December 2016, leaders of the SNSD and HDZ, the largest Serb and Croat parties in BiH, announced that their parties are jointly preparing a new Law on the Constitutional Court.³⁹ Unfortunately, the SDA is refusing to reform the Constitutional Court by passing a new law because it does not want to break up the alliance of former SDA leaders and foreign members that controls it.

III. The Bosniaks’ drive to seize RS property used by the BiH military is unlawful and destabilizing.

A. The recent military property decision of the Court of BiH and BiH Constitutional Court is legally indefensible and politically motivated.

33. The Court of BiH held in its 2016 *Han Pijesak* decision that RS officials must transfer RS state property being used by the BiH Armed Forces to the ownership of the BiH Ministry of Defense. In July 2017, BiH’s Constitutional Court wrongly held that the *Han Pijesak* decision did not violate Republika Srpska’s right to a fair hearing. There was no legal basis for the Court of BiH’s *Han Pijesak* decision. The case is part of the SDA’s attempt to use BiH-level courts as political instruments to transfer all state property from the Entities to BiH in order to circumvent the legal requirements applicable to the transfer of state property. The SDA’s purpose is to further centralize power and control, as part of its longstanding efforts to undermine the Dayton safeguards and structure, at the expense and in violation of constitutionally protected rights of the Entities under the Dayton Accords.

1. The Succession Agreement does not provide a basis for the transfer of state property to BiH ownership.

34. The *Han Pijesak* decision relies on the groundless assertion that the 2001 Agreement on Succession Issues of the former Yugoslav states gave the BiH level of government title to state property. The Succession Agreement and the legal history and practice regarding state property since it was signed demonstrate that this assertion is false.

35. Before the Succession Agreement, the Federal Republic of Yugoslavia (FRY) maintained that as the only successor state to the Socialist Federal Republic of Yugoslavia (SFRY), it retained ownership of all SFRY property and BiH was obligated to compensate it for any state property it intended to retain or use. Under the 2001 Succession Agreement, immovable state property of the SFRY was to “pass to the successor state on whose territory that property is situated.”⁴⁰ The passage of such state property would be effected without compensation to the FRY, except in cases where all parties to the Succession Agreement could agree that compensation should be provided.⁴¹

36. The Succession Agreement made no effort or claim to regulate the disposition of state

³⁹ Danijel Kovacevic, *Bosnian Serbs Threaten Showdown over Foreign Judges*, BIRN, 20 Dec. 2016.

⁴⁰ Agreement on Succession Issues, Annex A art. 2(1).

⁴¹ Agreement on Succession Issues, Annex A art. 8(2).

property *within* the successor state to which such property passed, but only to allocate SFRY state property *among* the successor states.⁴² To have done otherwise would have been a clear departure from international law principles of sovereign equality and the reserved domain of domestic jurisdiction. The object and purpose of the Agreement was to establish an agreement as to the distribution among the successor states of property of the former SFRY. Once territory has passed to a successor state based upon an international agreement, the ownership of that property within the receiving state is a matter of domestic law.⁴³

37. The Succession Agreement was signed on 29 June 2001, but negotiations had been ongoing since 1992. The same parties were involved in these succession negotiations as came to be involved in the negotiations leading to the Dayton Accords. If the drafters of the Dayton Accords had intended to vest ownership of successor state property in the BiH level government, they would have made that intention clear in the Dayton Accords.

38. The legal history and practice with regard to state property, including the BiH Constitutional Court's decisions, also demonstrate that the *Han Pijesak* decision's view of the Succession Agreement is incorrect.

39. In 2007, the BiH Constitutional Court upheld the constitutionality⁴⁴ of a 1999 BiH Privatization law that "expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territories."⁴⁵ The Constitutional Court rejected the claim that the Privatization Law, by recognizing the Entities' rights to privatize property in their territories, violated BiH's property rights.

40. Sixteen years have passed since the Succession Agreement, and there has been no amendment that even attempts to change the Privatization Law's terms regarding these property rights of the Entities. This further demonstrates that the Succession Agreement had no effect on the ownership of state property within BiH.

41. The fact that the Succession Agreement did not give the BiH level of government title to all state property is also shown by the High Representative's laws on temporary prohibition of the disposal of state property, first imposed in March 2005. These laws include the "Law on the Temporary Prohibition of Disposal of State Property *of the Federation*" and the "Law on the Temporary Prohibition of Disposal of State Property *of the Republika Srpska*." The titles and terms of these laws show that the High Representative considered state property transferred from the SFRY pursuant to the Succession Agreement not to be per se property of the BiH level of government. The very recognition that separate laws were needed for state property of the Federation and of Republika Srpska demonstrates this point.

⁴² See Agreement on Succession Issues, preamble para. 3.

⁴³ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed.) at 652 and sources cited therein.

⁴⁴ Muhamed Ibrahimović, Decision on Admissibility and Merits, Const. Ct. of Bosnia and Herzegovina, case no. U-19/06, 3 March 2007.

⁴⁵ Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 14/98 and 12/99).

42. In his decisions to establish the freeze order laws, the High Representative made no assertion, expressed or implied, that the Succession Agreement entered into among the successor states five years earlier vested property of the former Yugoslavia—the break-up of which had occurred years before—in the State-level institutions of BiH rather than the Entities. Had this been the effect of the Succession Agreement, there would have been no need for the High Representative’s decisions to temporarily prohibit disposal of state property of the Federation and Republika Srpska—such property simply would not have been considered to be owned by the Entities.

43. Even High Representative Valentin Inzko, who supports BiH’s accumulation of power at the expense of the Entities, wrote in a 29 October 2010 letter to the BiH Public Attorney that the Succession Agreement regulates only the ownership rights of internationally recognized states, and thus—in the absence of a relevant law or decision of the BiH Constitutional Court—*cannot serve as legal grounds for re-registration of property in the name of BiH*. The *Han Pijesak* decision nonetheless attempts to use the Succession Agreement for just such a purpose.

2. The *Han Pijesak* decision is contrary to BiH law.

44. The laws on temporary prohibition of disposal of state property, which are still in effect, forbid the disposal of state property until a law passed by the Parliamentary Assembly that specifies the disposition of such property “enters into force.” Attempts to register state property, including military property—except by the Parliamentary Assembly—violate the laws on temporary prohibition of disposal of state property.

45. The High Representative amended the laws on temporary prohibition of disposal of state property on 29 September 2006 to exempt “[t]he portion of State Property that will continue to serve defense purposes, pursuant to and in accordance with Articles 71-74 of the Law on Defense of Bosnia and Herzegovina.” However, as the appellate panel in the *Han Pijesak* decision acknowledged, no agreement on property right conveyance has been signed in accordance with Article 73 of the Defense Law. Thus, the exception does not apply and the *Han Pijesak* decision’s attempt to dispose of the subject property is unlawful. Moreover, under Article 73 of the BiH Defense Act, enacted in 2005, the disposal of defense property could only be done with the agreement of the Entity governments. This too is evidence that state property has not been considered property of BiH but that of the Entities.

3. The *Han Pijesak* decision is contrary to the BiH Constitutional Court’s decision on state property.

46. The BiH Constitutional Court’s 2012 Decision on state property (Case U-1/11) held that the issue of the allocation of state property “has not been resolved yet” and that the BiH Parliamentary Assembly has the exclusive authority to allocate state property. The Constitutional Court further held that in making such allocation, the Parliamentary Assembly must “take into consideration the interests and needs of the Entities.” The Parliamentary Assembly has not allocated the state property at issue in the *Han Pijesak* case. Thus, the *Han Pijesak* decision’s attempt to allocate the subject property to the BiH level plainly defies the holdings of the Constitutional Court’s U-1/11 decision.

a) The Constitutional Court’s U-1/11 decision did not hold that the BiH level of government holds title to state property.

47. The Constitutional Court’s U-1/11 Decision held that the “state of BiH” is the title holder of state property.⁴⁶ According to the Constitutional Court’s analysis, however, this finding does not mean the BiH level of government has title to state property. This is because, as the Decision pointed out, “the term ‘Bosnia and Herzegovina’ designates sometimes the state as a whole, [that is] the global system comprising the central institutions and the entities (for instance in Article I(1)), and sometimes the higher level of government opposed to the lower ones represented by the entities.”⁴⁷ In other words, the property of the “state of BiH” could equally refer to property of the central institutions or of the Entities. The Court emphasized that the issue of the disposition of state property “has not been resolved yet.”⁴⁸ If the Constitutional Court had meant that the BiH level of government is the title holder of state property, the Court would have considered the issue resolved, which it expressly did not.

48. Instead, the Constitutional Court, as explained below, held that the BiH Parliamentary Assembly has the exclusive authority to resolve the issue by allocating state property. At the same time the Court attached a “positive obligation” for the Parliamentary Assembly to “take into consideration the interests and needs of the Entities, so that they can also effectively exercise their public powers which are connected with their competencies.”⁴⁹ If the Constitutional Court had meant that the BiH level of government is the title holder of state property, it would not have attached such restrictions to the Parliamentary Assembly’s allocation of the property.

b) The *Han Pijesak* decision disregards the Constitutional Court’s holding the BiH Parliamentary Assembly has exclusive authority to allocate state property and that it has a positive obligation to recognize the needs of the Entities.

49. In U-1/11, the BiH Constitutional Court ruled that the exclusive competence to regulate the issue of state property is given to the BiH Parliamentary Assembly by Article IV (4) (e) of the BiH Constitution. The Constitutional Court also held that “there is a true necessity and positive obligation” for the Parliamentary Assembly to resolve the issue of allocation of state property “as soon as possible.”⁵⁰ Since the U-1/11 decision, however, the BiH Parliamentary Assembly has failed to enact legislation allocating state property.

50. The Constitutional Court also held that the BiH Constitution imposed a number of strict qualifications and standards on the allocation of state property by the Parliamentary Assembly.⁵¹

⁴⁶ Decision on Admissibility and Merits, Case No. U-1/11, BiH Constitutional Court, 13 July 2012 (“State Property Decision”) at para. 80.

⁴⁷ *Id.* at para. 72.

⁴⁸ *Id.* at para. 84.

⁴⁹ *Id.* at para. 83.

⁵⁰ *Id.* at para. 84.

⁵¹ *Id.* at paras. 83-84.

The Parliamentary Assembly, the Constitutional Court held, has “a positive obligation . . . to take into consideration, when exercising these responsibilities, the whole constitutional order of BiH.”⁵² Included in this positive obligation is “compliance with the competencies of the Entities and protection thereof, given the fact that the Constitution of BiH . . . is the one to protect the competencies of both the State and the Entities and to support the concept of effective exercise of the mentioned competencies.”⁵³ The Constitutional Court held that the Parliamentary Assembly must, in regulating state property, “take into consideration the interests and needs of the Entities, so that they can also effectively exercise their public powers which are connected with their competencies.”⁵⁴

51. The *Han Pijesak* decision, by treating state property as if it has already been allocated, defies the Constitutional Court’s holding. The *Han Pijesak* decision specifically contradicts the Court’s findings that the issue of state property has not been resolved yet; that only the BiH Parliamentary Assembly has the exclusive authority to allocate state property; and that the Assembly must take into consideration the interests of the Entities while exercising such authority.

4. The *Han Pijesak* decision is contrary to the Dayton Peace Accords and BiH Constitution.

52. Article I(3) of the BiH Constitution provides that BiH consists of “the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska.” Thus, BiH does not have a territory of its own, but the territories of the eEntities constitute BiH’s territory. This is evident in the Dayton Accords’ demarcation, under which 49 percent of the territory of the former Socialist Republic of Bosnia and Herzegovina belongs to Republika Srpska and 51 percent belongs to the Federation of BiH. The transfer of a portion of the RS territory to BiH directly decreases the percentage of the territory that belongs to the RS under the Dayton Accords.

53. Any claim that the “Continuation” provision of the BiH Constitution assigns state property to the BiH-level government is baseless. The recognition of the continuation of the “Republic of Bosnia and Herzegovina” under the official name of “Bosnia and Herzegovina” in article 1 of the BiH Constitution is irrelevant to the issue of whether state property is vested in the BiH-level government rather than the Entities. The same sentence that notes BiH “shall continue its existence as a state” makes the immediate proviso that this continuation is “with its internal structure modified as provided herein.”

54. Continuation of the state does not in itself govern what property BiH-level institutions, as opposed to other agencies and instrumentalities of BiH or the Entities, will own. Apart from any matters subject to international agreement binding upon BiH, such as those dealt with in Annexes 9 (Public Corporations) and 5 (Arbitration) of the Dayton Accords, the handling of state property upon its passage from the SFRY to the successor states pursuant to the Succession Agreement is a matter of the domestic law of BiH, including the BiH Constitution.

⁵² *Id.* at para. 83.

⁵³ *Id.*

⁵⁴ *Id.*

5. The *Han Pijesak* decision is contrary to RS law.

55. Property registration in Republika Srpska is governed by a well-developed and robust body of law: the RS Property Act, the RS Land Registry Act, and the RS Survey and Cadastre Act, the RS Survey and Land Cadastre Maintenance Act, and their regulations. These laws and regulations precisely enumerate the instruments that constitute grounds for property registration. Those officials responsible for property registration are legally obligated to follow them. Adhering to these laws, and finding that the BiH Ministry of Defense failed to provide the necessary legal basis for registration, the RS Geodetic Administration and RS Courts properly denied the BiH Ministry of Defense's requests that the *Han Pijesak* property be transferred to its ownership.

B. The effort to transfer state property to BiH ownership is part of the SDA's effort to undermine Republika Srpska.

56. As discussed above, the political history of BiH since the Dayton Accords has revolved largely around the SDA's drive to unconstitutionally centralize power in Sarajevo at the expense of Republika Srpska and its people. For years, the SDA relied on the Office of the High Representative to carry out this agenda through lawless decrees and coercion. More recently, as international support for the High Representative's claimed dictatorial powers has eroded, the SDA has relied on its domination of BiH judicial institutions. These include the BiH Court and Prosecutor's Office illegally created by the High Representative and the BiH Constitutional Court. The recent *Han Pijesak* decisions attempting to transfer RS property to the BiH Ministry of Defense are part of the SDA's continuing agenda to undermine and weaken Republika Srpska.

C. The transfer of the registration of military property to BiH ownership is wholly unnecessary.

57. Proponents of the transfer of property from Republika Srpska to the BiH Ministry of Defense argue that it is necessary in order for BiH to become a NATO member. The notion that BiH's highly speculative potential NATO membership requires that property be transferred to the BiH Ministry of Defense is nothing more than a pretext.

58. The 2010 decision by NATO foreign ministers to condition activation of BiH's Membership Action Plan (MAP) on registration of military property to the BiH level was a political decision made at the behest of Bosniak politicians seeking leverage in the longstanding dispute over the ownership of state property. The NATO foreign ministers' 2010 decision inappropriately interfered in BiH's domestic affairs and, by siding against Republika Srpska, undermined NATO's standing in the Entity.

59. There is no reason, however, why NATO cannot reverse its 2010 decision, which was completely unnecessary. The property registration condition has nothing to do with BiH's ability to fulfill the duties of a NATO member or with NATO's operational requirements. Republika Srpska already allows the BiH Ministry of Defense use of all of the military property it needs. As a practical matter, it makes no difference whether NATO operates on property owned by BiH or on property owned by an Entity, particularly when the Entity has given the BiH Ministry of Defense the right to use the property as long as it needs.

60. In any event, BiH's accession to NATO in the foreseeable future is extremely unlikely. Key NATO members have recently made clear that the alliance will not expand in the coming years. Moreover, support in BiH for accession is far from assured. As explained in section IV, below, the RS National Assembly has declared military neutrality with respect to military alliances until a possible referendum to make a final decision is held.

D. Attempts to criminally punish civil servants for failure to transfer the registration of military property to BiH are unnecessary, unjustified, and unprecedented.

61. Some Bosniaks are calling for BiH to prosecute RS civil servants if they fail to transfer the *Han Pijesak* property to the ownership of the BiH Ministry of Defense. Such prosecutions would amount to punitive politics and be unnecessary, unjustified, and unprecedented. Such prosecutions would be unnecessary in part because, as explained above, Republika Srpska already allows the BiH Ministry of Defense to use all of the military property it needs. Prosecutions in the *Han Pijesak* case would also be unjustified because, among other reasons, implementation of the court's decision is technically infeasible. The decision stipulates an ownership right, but there are no land books for the lots in question. In addition, the decision demands that the registration be made in new land registry records, which have not been set up yet. Punishing a civil servant as a criminal in such circumstances—with possible serious restrictions on his or her fundamental rights—would be draconian and conjure up images of lawless regimes.

62. Prosecutions of civil servants, moreover, would be unprecedented. In BiH's history, no one has ever been put on trial for failure to enforce a BiH Constitutional Court decision, despite the fact that since 2004, authorities of various governments in BiH have failed to enforce 91 decisions of the Constitutional Court. For example, the Constitutional Court's 2010 decision declaring the Mostar electoral system unconstitutional remains to be implemented, preventing Mostar citizens from voting in local elections since 2008. Attempts to criminally punish RS civil servants, then, would be baldly selective prosecutions demonstrating animus against Republika Srpska.

IV. It is right and proper for Republika Srpska to declare its position on NATO membership and, potentially, to hold a referendum on the issue.

63. On 18 October 2017, the RS National Assembly approved a resolution proclaiming military neutrality “in relation to the existing military alliances until a possible referendum to make a final decision on the issue is held.” Republika Srpska was well justified in proclaiming its position—and in potentially holding a referendum—on the issue of BiH's potential membership in NATO. BiH is not, contrary to some claims, legally committed to NATO membership. BiH's constitutional authorities have not ratified the necessary treaty with the NATO member states; nor has BiH's Membership Action Plan even been activated.

A. Republika Srpska's constitutional role with respect to treaties

64. Republika Srpska's critics have claimed that Republika Srpska has no authority to make decisions about BiH's potential membership in NATO. Such claims continue the common

pattern of ignoring or negating Republika Srpska's rights under the BiH Constitution. BiH's accession to NATO would require BiH to ratify a protocol to the North Atlantic Treaty of 1949,⁵⁵ and the BiH Constitution gives the RS National Assembly an important role in the ratification of treaties.

65. Under the BiH Constitution, the BiH Presidency negotiates treaties and ratifies them with the consent of the BiH Parliamentary Assembly.⁵⁶ However, the BiH Constitution provides that a "dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected . . . Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory"⁵⁷

66. This provision gives the RS National Assembly a clear constitutional role in the ratification of treaties. If the BiH Presidency were to attempt to ratify the North Atlantic Treaty—or any other treaty—the question of ratification could well come directly before the RS National Assembly. It is appropriate for the RS National Assembly to pass resolutions laying out its convictions on issues of importance to RS citizens and to solicit those citizens' views through referenda. This is especially the case with issues, such as potential treaties, that may come before the RS National Assembly.

67. The RS National Assembly's constitutional role with respect to treaties is among the reasons why it was appropriate for the RS National Assembly to pass a resolution about military neutrality and why the National Assembly would be justified in holding a referendum to determine the views of RS citizens on the issue.

68. Even if the RS National Assembly did not enjoy this constitutional role, which it incontestably does, a referendum by Republika Srpska would clearly be consistent with the rights Republika Srpska enjoys under the Constitution and the Dayton Accords. The referendum would play an important democratic role of informing members of the BiH Parliamentary Assembly representing Republika Srpska and the member of the BiH Presidency from Republika Srpska about the views of RS citizens on whether the North Atlantic Treaty should be ratified and whether it is destructive of a vital RS interest. Referenda on NATO membership have been held in many countries considering joining NATO.⁵⁸

B. The BiH Defense Act of 2005 does not bind BiH to joining NATO.

69. As explained above, if BiH were to join NATO, it would have to ratify the North Atlantic Treaty of 1949. Yet some officials and critics have made the legally baseless claim that BiH has already legally committed itself to NATO membership despite not having ratified the treaty. They point to Article 84 of the BiH Defense Act, which provides, "The Parliamentary Assembly, BiH Council of Ministers, Presidency and all defense subjects, within their legal and

⁵⁵ See, e.g., Protocol to the North Atlantic Treaty of 1949 on the Accession of Montenegro, 19 May 2016.

⁵⁶ BiH Constitution, Art. V-3(d).

⁵⁷ BiH Constitution, Art. V-2(d).

⁵⁸ See, for example, Spain, Hungary, Slovakia, and Slovenia.

constitutional competence are to conduct all necessary activities for admission of BiH to NATO membership.”

70. As explained above, the BiH Constitution provides that the BiH Presidency is to negotiate and ratify treaties with the consent of the BiH Parliamentary Assembly. Article 84 does not, by its terms, order that the North Atlantic Treaty be ratified. It appears directed at preparatory steps for potential membership. But even if Article 84 were interpreted as ordering ratification, such an order would obviously be unconstitutional. The BiH Parliamentary Assembly cannot, by passing a law, take away the Presidency’s constitutional authority over ratification of a treaties. Nor can the Parliamentary Assembly, through ordinary legislation, bind a future Parliamentary Assembly to confirm the ratification.

71. Thus, BiH is in no way bound to join NATO. If BiH were invited to join NATO, its membership would remain subject to a ratification decision by the BiH Presidency (including a potential “vital interest” declaration by a dissenting member) and a decision on confirmation by the BiH Parliamentary Assembly. RS resolutions and, potentially, an RS referendum, would help inform members of these BiH institutions as they considered ratification.

V. The BiH justice system, another political instrument that has been used to undermine Dayton, causes significant instability; it must be reformed.

A. The BiH Prosecutor’s Office serves politics rather than justice.

72. The BiH Prosecutor’s Office is another institution that the SDA has used as a political instrument. It has a long-established pattern of making investigative and prosecutorial decisions to suit the desires of the SDA. Even U.S. Deputy Chief of Mission Nicholas M. Hill observed in 2015 that the Chief Prosecutor is “largely believed to be heavily influenced by Bosniak political forces” and that there are “complaints that the prosecutor’s office has too many strong-willed SDA acolytes on its staff.”⁵⁹

73. To cite a recent example, in July 2017, the BiH Prosecutor’s Office brought egregiously political charges against four members of the RS Referendum Commission for allegedly failing to enforce a decision of the Constitutional Court. One can scarcely imagine a clearer example of selective prosecution. The Prosecutor’s Office had never before brought charges for failure to enforce a Constitutional Court decision, despite the fact that since 2004, authorities of various governments in BiH have failed to enforce 91 decisions of the Constitutional Court. As a substantive matter, the charges against the Referendum Commission members were groundless, as a preliminary judge of the Court of BiH recognized in rejecting the indictment.

74. In 2016, the SDA sought to have President Dodik prosecuted on the false allegation that he violated a Constitutional Court decision because of Republika Srpska’s holding of a referendum with respect to its RS Day holiday. The Prosecutor’s Office dutifully issued to President Dodik a summons for questioning and said the investigation of President Dodik over the referendum would be “a priority.” The real reason for the summons and the “priority” with which it was issued was to interfere in the local elections, which were then less than a week

⁵⁹ Nicholas M. Hill, *Moving Beyond Narrow-Minded Politics*, MREŽA ZA IZGRADNJU MIRA 8 July 2015.

away. In July 2017, the Prosecutor's Office finally abandoned the investigation of President Dodik for "insufficient evidence."⁶⁰ Just three days later, however, it was reported that the Prosecutor's Office had launched an investigation into the baseless charge by SDA President Bakir Izetbegovic that President Dodik engaged in "hate speech" at a July 7 commemoration.⁶¹

75. Another example of the use of the BiH Prosecutor's Office as a political weapon on behalf of the SDA is the case of Goran Zubac, former director of the BiH State Investigation and Protection Agency (SIPA). After SIPA arrested Šemsudin Mehmedović, an SDA member of the BiH Parliamentary Assembly, the BiH Prosecutor's Office began to wage war on Director Zubac. In June 2014, the Prosecutor's Office issued a baldly political indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities. Underlining the political nature of the indictment against Zubac and SDA influence over the Prosecutor's Office, Bakir Izetbegovic said in August 2014, "[w]e will likely send [Zubac] to prison."⁶² The Court of BiH convicted Zubac on the dubious charge, sentencing Zubac to one year's probation. In August 2015, the BiH Council of Ministers removed Zubac from office based on his conviction. The SDA had successfully used the Prosecutor's Office to purge the troublesome SIPA director.

76. The Prosecutor's Office has engaged in a recurring pattern of investigating or prosecuting political opponents of the SDA despite its inability to substantiate that a crime was committed. Examples of this pattern, apart from cases described above, include the failed prosecution of Federation President Zivko Budimir (a Croat), the failed prosecution of current BiH minister of Foreign Trade and Economic Relations Mirko Sarovic (a Serb), and the repeated failed prosecutions of current member of the BiH Presidency Dragan Covic (a Croat). This ploy often results—as it is intended to—in the person targeted by the Prosecutor's Office being removed or driven from office because of being prosecuted, only later to be exonerated of any wrongdoing.

77. Reforms are necessary to ensure that the BiH Prosecutor's Office is independent, accountable, and free from domination by a single political party or Constituent People or influence by the international community.

B. The BiH justice system continues to discriminate against Serb victims of war crimes.

78. Justice, human rights, and reconciliation require that war crimes be punished without regard to the ethnic identity of their perpetrators or victims. Unfortunately, the BiH justice system has followed a longstanding pattern of discrimination against Serb victims of war crimes. Out of 7,480 Serb civilian war deaths estimated by demographers at the International Criminal Tribunal for the former Yugoslavia (ICTY), *just 29* have led to a final conviction in the Court of BiH. In its past reports to the UN Security Council, Republika Srpska has described many examples of the BiH Prosecutor's Office's failure to charge the identified perpetrators of war crimes against Serb civilians.

⁶⁰ Press Release of BiH Prosecutor's Office, 14 July 2017.

⁶¹ Igor Spaic, *Bosnian Serb President in 'Hate Speech' Probe*, BALKAN INSIGHT, 18 July 2017.

⁶² *Izetbegovic: SDA must "win well" in elections*, OSLOBODENJE, 27 Aug. 2014.

1. BiH's Justice System's Shameful Protection of Nasir Orić

79. A recent example of the BiH justice system's refusal to punish the perpetrators of war crimes against Serbs is the Court of BiH's outrageous acquittal of Naser Orić, the chief Bosniak warlord in the Srebrenica area during the war. In 1995, Orić bragged to Western reporters about atrocities in the area, showing them videos of Serbs' bodies and severed heads. As a Toronto Star reporter recounted, "Orić grinned throughout, admiring his handiwork. . . . When footage of a bullet-marked ghost town appeared without any visible bodies, Orić hastened to announce: 'We killed 114 Serbs there.'"⁶³ A Washington Post reporter, similarly, wrote that "Orić's war trophies don't line the wall of his comfortable apartment," but instead are "on a videocassette tape: burned Serb houses and headless Serb men, their bodies crumpled in a pathetic heap."⁶⁴

80. In 2006, RS investigators submitted to the BiH Prosecutor's Office a 110-page report, supported by more than 600 evidentiary attachments, alleging war crimes by Orić and his subordinates. The report includes 50 separate counts, each detailing specific events during which war crimes were committed. One count, for example, describes murders of civilians and other war crimes committed during a 16 January 1993 attack, commanded by Orić and his lieutenants, on 12 villages in the Skelani area. The count, which is supported by 37 evidentiary attachments, identifies 65 killed in the attacks, many of them women or children; six of the women were over the age of 70 when they were killed. According to another count—supported by 48 evidentiary attachments—Orić commanded a Christmas Day attack on Serb villages in the Kravica area in which civilians were massacred. The count identifies 36 persons—including women and the elderly—who were killed during the attack.

81. The SDA, unfortunately, has long made clear that Orić is under its protection. For example, in February 2014, INTERPOL National Central Bureau (NCB) for Serbia issued an international warrant for Orić's arrest. In response, the SDA's Bakir Izetbegovic, the Bosniak member of the BiH Presidency, hosted Orić in his office and publicly announced that he would be protected.

82. Despite ample evidence in the possession of the BiH Prosecutor's Office linking Orić and his subordinates to many major war crimes in the Srebrenica area, the BiH Prosecutor's Office only charged Orić—belatedly—with killing three Serb prisoners of war. Orić was not charged in connection with any of the mass atrocities against civilians shown in the report and evidence submitted to the BiH Prosecutor's Office in 2006.

83. Even after charges were finally filed against Orić in 2015, the SDA signaled that Orić remained under its protection. Less than three days after Orić's trial began, it was reported that Federation Veterans Affairs Minister Salko Bukvarević, an SDA member, had appointed Orić as his advisor despite—or perhaps because of—the fact that Orić was on trial for war crimes.

84. On 9 October 2017, the Court of BiH acquitted Orić in spite of first-hand eyewitness testimony, among other evidence, that he committed the murders. The presiding judge in the case

⁶³ *Fearsome Muslim Warlord Eludes Serb Forces*, TORONTO STAR, 16 July 1995, p. A1.

⁶⁴ John Pomfret, *Weapons, Cash and Chaos Lend Clout to Srebrenica's Tough Guy*, WASHINGTON POST, 16 Feb. 1994.

was Saban Maksumic, a Bosniak who has himself been charged by eyewitnesses with physically abusing Serb prisoners while he was a military judge during the war. A 2005 report by the Istocno Sarajevo Public Safety Centre, supported by the statements of first-hand witnesses, charges that Judge Maksumic, among other crimes, ordered guards to beat a Serb prisoner, Sretko Damjanovic, until he signed a statement. A former juror judge in the military court at which Maksumic worked said Judge Maksumic bragged of beating “Chetniks” (Serbs) at night. Maksumic’s record on the Court of BiH shows that he hands down long sentences to Serb defendants while in the cases of Bosniak defendants he gives short sentences—sometimes below the mandatory minimum—or acquits them altogether.

2. Evidence recently submitted on current Bosniak judges and prosecutors implicating them in wartime wrongs against Serbs

85. Judge Maksumic is far from the only BiH judicial official implicated in wartime wrongs against Serbs. The RS Centre for the Investigation of Warfare, War Crimes and the Search for Missing Persons has prepared a report for the High Judicial and Prosecutorial Council (HJPC), supported by 960 pages of documents, concerning nine Court of BiH judges and 6 BiH prosecutors who held judicial functions during the war, and who, according to the report, participated in unlawful conduct against Serbs. Some of the judges and prosecutors were stationed at Camp Viktor Bubanj in Sarajevo, where they could hear the screams of beaten Serb prisoners but, according to witness statements, failed to take any action to prevent the torture. Some falsely accused Serbs of crimes. Some of them even personally took part in the mental and physical maltreatment of Serb prisoners. These wartime Bosniak judges and prosecutors examined in the report have been heavily involved in the prosecution and adjudication of war crimes cases, and some are still active. Collectively, they account for 91 convictions of Serbs and over 1,421 years of sentencing. They also have handled cases, according to the report, in which Bosniaks who committed atrocities against Serbs have been acquitted. These facts raise serious questions about their participation in war crimes cases and the cases in which they have been involved. Milorad Kojic, head of the RS Centre, said, “We expect the HJPC to take appropriate measures in accordance with the law. The Council must ensure an independent, impartial and professional judiciary.”⁶⁵

VI. The Court of BiH and HJPC must be reformed to meet European and other international standards.

A. The Court of BiH

86. The Court of BiH, which was unlawfully created by the High Representative, must be reformed if BiH is to meet European standards. Like the BiH Prosecutor’s Office, the Court of BiH has often acted according to the SDA’s political agenda rather than following the law. A prominent recent example is the court’s 2016 *Han Pijesak* decision, examined in section III, above, which disregarded the law in order to transfer property from Republika Srpska to the BiH Ministry of Defense.

87. Among the reforms necessary to the Court of BiH—as EU experts have agreed—is a

⁶⁵ *HJPC Can Fire Judges Who Put Serbs in Prisoner-Of-War Camps*, SRNA, 13 Oct. 2017.

reform to curtail the infinitely elastic jurisdiction claimed by the Court of BiH and the creation of an independent court to adjudicate appeals.

88. Shortly after their creation, the BiH Court and Prosecutor's Office began to expand their jurisdiction illegally into Entity criminal law implementation and have continued this practice up to today. They do this by exploiting the vague terms of Article 7(2) of the Law on Court of BiH or applying an indefensible interpretation of Article 23(2) of the BiH Criminal Procedure Code. EU officials and experts have agreed with the RS Government that the court's jurisdictional practices violate European standards on legal certainty and the principle of the natural judge.

89. In a June 2017 article published by the EU Delegation to BiH, Genoveva Ruiz Calavera, the Director for the Western Balkans in the European Commission's Directorate-General for Neighbourhood and Enlargement Negotiations, referred to this problem as she called for reforms to improve BiH citizens' confidence in the judicial system. She rightly emphasized that citizens need "legal certainty, meaning that they must know precisely which conduct is subject to liability and which judicial institution is competent to process a case."⁶⁶

B. HJPC

90. The High Judicial and Prosecutorial Council (HJPC) system, which was also unlawfully created by the High Representative, likewise requires major reforms in order to be harmonized with BiH's constitutional structure, European standards, and the practice of democratic federal states throughout the world. Contrary to the BiH Constitution and the practice of federal democracies throughout the world, the HJPC system imposed by the HR gives RS institutions no role whatsoever in the appointment of the RS's own judges and prosecutors. The HR's domination of the selection of judges and prosecutors—both through his own appointments and through the HJPC system he created—severely compromises the independence of courts throughout BiH.

C. Refusal of Bosniak parties to consider reforms considered essential by EU experts.

91. The RS Government has been seeking reforms to BiH's justice system through the EU's Structured Dialogue on Justice, which began in 2011, but very little if any progress has been made because SDA members and other Bosniak officials have fiercely opposed necessary reforms, including changes endorsed by EU experts. The RS has continued to participate in good faith in the Structured Dialogue, despite the frustration stemming from the conduct of Bosniak officials. BiH's elected officials at all levels, with the EU's help, should push forward these reforms notwithstanding Bosniak officials' intransigence.

VII. European Officials and journalists express growing concern over the increasing jihadist threat BiH poses.

⁶⁶ Genoveva Ruiz Calavera, [*BiH Citizens need an Independent and Accountable Judiciary*](#), EU Delegation to Bosnia and Herzegovina, 15 June 2017.

92. The SDA, as detailed in a recent RS paper submitted to the UN Security Council,⁶⁷ has helped turn BiH into a sanctuary for jihadists, who pose a serious threat to BiH, Europe, and the rest of the world. BiH has provided more fighters to Iraq and Syria, per capita, than any other European country.⁶⁸ In a June 2017 article, the journal *New Eastern Europe* wrote, “Despite the Bosnian government claiming to control the religious situation, there are increasing reports of what is known as ‘Sharia villages,’ where most families live in polygamy under Islamic law, and symbols of ISIS are freely displayed in public places in breach of the established constitutional order.”⁶⁹ Germany’s *Der Spiegel* recently wrote, “German investigators believe there are around a dozen places in Bosnia where Salafists -- followers of a hardline Sunni interpretation of Islam - - have assembled radicals undisturbed by the authorities.”⁷⁰ In testimony to the UK House of Lords in September, Gen. Michael Rose, former Commander of the UN Protection Force in BiH warned of “a rising element of radicalization” in BiH, “particularly amongst the Muslim communities” and of “jihadists who are coming through and being exported.”⁷¹

93. Concerns about BiH’s use as a jihadist sanctuary are rising among European leaders. Czech President Milos Zeman has said ISIS could form its European base in BiH, where the group’s “black flags are already flying in several towns.”⁷² Similarly, Croatian President Kolinda Grabar-Kitarovic warned of “thousands of fighters returning to Bosnia from Syria and Iraq.”⁷³ In September 2017, the Croatian newspaper *Globus* reported that Croatia’s secret service had told Grabar-Kitarovic that Islamic radical groups have increasingly been establishing themselves in BiH near the Croatian border and that there are between 5,000 and 10,000 Islamic radicals living in BiH.⁷⁴

94. The SDA was founded as an Islamist party and remains one. SDA founder Alija Izetbegovic’ *Islamic Declaration*, published in 1990, states, “There can be neither peace nor coexistence between the Islamic religion and non-Islamic social and political institutions.”⁷⁵ Consistent with this ideology, the SDA invited mujahidin to Bosnia and Herzegovina during the war and has continued its close ties to radical Islamists. The BiH Prosecutor’s Office has failed to seek justice for mujahidin atrocities against Serbs. In addition, BiH’s SDA-dominated security apparatus is failing to curb the jihadist presence in BiH. As Nenad Pejic of Radio Free

⁶⁷ *How Bosnia and Herzegovina Has Become a Terrorist Sanctuary*, Attachment to [Republika Srpska’s 16th Report to the UN Security Council](#), Oct. 2016.

⁶⁸ *Foreign Fighters in Iraq & Syria—Where Do They Come From?*, RADIO FREE EUROPE/RADIO LIBERTY, 29 Feb. 2016; John Schindler, *Operation CUT: Bosnia versus the Islamic State*, 22 Dec. 2015.

⁶⁹ Tatyana Dronzina and Sulejman Muća, *De-radicalising the Western Balkans*, NEW EASTERN EUROPE, 22 June 2017.

⁷⁰ Walter Mayr, *Sharia Villages: Bosnia’s Islamic State Problem*, DER SPIEGEL, 5 Apr. 2016.

⁷¹ The testimony is available at www.parliamentlive.tv/Event/Index/a4551237-3e0f-4c02-afbe-8c0cefa94948.

⁷² Daria Sito-Sucic, *Islamic State flags not flying in Bosnia – PM*, Reuters, 12 Sept. 2017.

⁷³ *Id.*

⁷⁴ Igor Spaic, *Bosnia War Victims Slam Croatia President’s Terror Claims*, BIRN, 7 Sept. 2017.

⁷⁵ ALIJA IZETBEGOVIC, ISLAMIC DECLARATION, p. 30.

Europe/Radio Liberty observed, “There are countless examples of local authorities in Bosnia failing to act properly against Islamic extremism.”⁷⁶

VIII. The BiH level is obstructing implementation of the Reform Agenda for EU integration.

95. Republika Srpska continues to demonstrate its commitment to BiH’s EU integration, but BiH-level institutions are obstructing progress. Republika Srpska has fulfilled its obligations under the EU-sponsored Reform Agenda and the tasks put to BiH by the IMF. In addition, Republika Srpska has continued to harmonize its laws and regulations with the EU’s *acquis communautaire* and regulations of the Council of Europe.

96. Unfortunately, BiH institutions have failed to fulfill BiH’s commitments under the Reform Agenda. The BiH House of Representatives has failed to approve urgent legislation needed to fulfill BiH’s commitments under the Reform Agenda and the credit arrangement that BiH agreed with the IMF in September 2016. Republika Srpska supported the legislation, which would have raised excise taxes, and said that it would pay all additional costs that farmers incurred under it. But the legislation nonetheless failed in the BiH House of Representatives.

97. The failure of the BiH level to meet its responsibilities blocks the Entities from accessing much-needed IMF financing, delays EU assistance and international financial institutions’ support for infrastructure projects, and obstructs EU integration. As EU Special Representative, Lars Gunnar Wigemark said in April 2017:

[A] failure to adopt these measures will force a delay in the IMF review of its programme – planned for end April – and would necessitate a renegotiation of some aspects of the programme. This, in turn, could cause delays in other related programmes, including assistance from the European Union. It will also slow down the country’s EU accession. Political leaders who set ambitious timelines for EU candidacy need to take responsibility to ensure that these measures are implemented.⁷⁷

98. Despite the BiH level’s failures to fulfill BiH’s commitments, Republika Srpska will continue its strong support for the Reform Agenda and work for agreement on all matters relating to the Reform Agenda consistent with Republika Srpska’s constitutional competencies.

IX. The international community should respect the Dayton Accords and BiH sovereignty.

A. Members of the international community should uphold the Dayton structure and oppose actions that undermine BiH’s stability and sovereignty.

⁷⁶ Nenad Pejic, *Wahhabist Militancy in Bosnia Profits from Local and International Inaction*, JAMESTOWN TERRORISM MONITOR 9, Issue 42, 17 Nov. 2011.

⁷⁷ *BiH failed to adopt important laws*, INDEPENDENT BALKAN NEWS AGENCY, 6 April 2017.

99. BiH's friends in the international community, especially witnesses to the Dayton Accords, should support the Accords' faithful implementation. This includes opposing efforts to use BiH institutions unlawfully as political instruments to unlawfully undermine the Dayton Constitution. It also includes supporting reforms necessary to restore the structure established under the Dayton Accords.

100. Members of the international community should also hold Bosniak officials accountable for allowing the threat of jihadists to grow and to support action to address it.

B. The Office of the High Representative must close.

101. In order to qualify for EU membership, BiH must become a self-governing country whose sovereignty is fully respected. This is impossible as long as the High Representative remains in BiH and claims authority to decree laws, constitutional amendments, and punishments completely outside the Dayton constitutional system. It is also impossible as long as the High Representative furtively supports the use of BiH institutions to unlawfully advance an agenda to centralize the structure of BiH contrary to the Dayton Accords. If BiH is to become a fully sovereign state and an EU member, the High Representative's presence in BiH must come to an end.

C. The Security Council should end its unjustified application of Chapter VII of the UN Charter to BiH.

102. The Security Council has authority to take certain measures under Chapter VII of the UN Charter "to maintain or restore international peace and security" only where there is "the existence of any threat to the peace, breach of the peace, or act of aggression."⁷⁸ BiH, though burdened with political divisions like so many countries, has been peaceful and secure for many years; there is no security threat that could possibly justify the Security Council acting under Chapter VII of the UN Charter. The Security Council should thus end the application of Chapter VII measures. Continuing to act under Chapter VII casts an unwarranted stigma on BiH and is detrimental to BiH's progress toward EU membership.

⁷⁸ See Chapter VII of the UN Charter.