REPUBLIC OF SRPSKA
GOVERNMENT
OFFICE OF THE PRIME MINISTER
Trg Republike Srpske 1, Banja Luka, Tel: 051/339-103, Fax: 051/339-119, E-mail:kabinet@vladars.net

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His Excellency Mr. 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 meeting 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 23rd Report to the UN Security Council. The RS is confident that BiH can succeed if all major parties, foreign and domestic, honor the Dayton accords.

Part I of the report emphasizes the RS's firm commitment to the Dayton Accords as well as the importance of other parties in BiH and in the international community also accepting and respecting the accords.

In part II, the report explains how the response to the coronavirus pandemic in BiH shows that that the Dayton constitutional system works, even at a time of deep divisions and during an unprecedented worldwide crisis.

Part III of the report examines rule of law issues, first highlighting the need to reform the BiH Constitutional Court to replace the court's foreign judges with BiH citizens. It also emphasizes that the international High Representative ("HR") and other foreign officials need to stop subverting the Constitutional Court's integrity with external influence. Part III, moreover, underlines that respect for the rule of law in BiH must begin with respect for the Dayton Accords. Lastly, it explains why a recent decision of the Constitutional Court is contrary to the BiH Constitution.

In part IV, the report examines how the OHR, instead of acting in accordance with its mandate under the Dayton, plays a damaging role in BiH. During the coronavirus crisis, the HR and his office have done nothing to help BiH respond and has even sought to undermine the effectiveness of the Entity governments. Part IV, moreover, highlights the fact that state property issue, which is a source of bitter division in BiH, would have been resolved years ago if not for the HR's interference. Finally, part IV examines recent examples of the HR's failure to act as a neutral facilitator.

We 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, we would be pleased to provide additional information.

Yours sincerely,

Prime Minister of the Republic of Srpska
Radovan Višković

Republika Srpska's 23rd Report to the UN Security Council

May 2020

Republika Srpska's 23rd Report to the UN Security Council

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Republika Srpska's 23rd Report to the UN Security Council

Introduction and Executive Summary

Republika Srpska ("RS"), a party to the treaties that make up the 1995 Dayton Peace Accords and one of the two Entities that make up Bosnia and Herzegovina ("BiH"), is pleased to submit this 23rd Report to the UN Security Council.

Part I of the report emphasizes the importance of respect for the Dayton Accords. The RS continues to be firmly committed to the Dayton Accords, including the BiH Constitution. In order for BiH to succeed and prosper, other actors in BiH, such as BiH's Bosniak political parties, must likewise respect the Dayton compromise. It is also essential that the international community, including the High Representative ("HR"), abide by and honor the terms of the Dayton Accords.

In part II, the report explains why the response to the pandemic in BiH proves that the Dayton constitutional system works, even at a time of deep divisions and during a severe worldwide crisis. BiH's decentralized structure has enabled the RS to take rapid and effective measures to deal with the pandemic and its economic effects. This is despite attempts by BiH's Bosniak political parties, led by the SDA, to exploit the crisis for its political ends, as discussed in Attachment 4 to the report.

In part III, the report examines rule of law issues, first explaining why the BiH Constitutional Court, which is dominated by a political alliance of its three foreign judges and two Bosniak judges and which lacks independence from the Office of the High Representative ("OHR"), must be reformed if the rule of law is to be upheld and respected in BiH. As explained in Attachment 1 to the report, this reform must include replacing the foreign judges with BiH citizens, as the European Union has indicated should be a key priority. The Constitutional Court must also respect the limits of its own jurisdiction.

Part III next emphasizes that the HR and other foreign officials need to stop subverting the Constitutional Court's integrity with ex parte communications and other external influence on the Constitutional Court's foreign judges. Part III also explains why respect for the rule of law in BiH must begin with respect for the Dayton Accords, the entirety of which is binding law. Finally, Part III explains why a recent decision of the Constitutional Court is contrary to the BiH Constitution—a point examined in greater detail in Attachment 2 to the report.

In part IV, the report examines how the OHR, far from performing its proper role under Dayton, plays a deleterious role in BiH. During the unprecedented crisis created by the COVID-19 outbreak, the OHR has done nothing to help BiH respond and has even tried to siphon scares resources and undermine the effectiveness of the Entity governments, which bear the primary responsibility to address it. Part IV also explains that the issue of state property, which remains a source of bitter division in BiH, would have been resolved years ago if not for the HR's uninvited interference. Lastly, part IV examines recent examples of the HR failing to act as a neutral facilitator but instead creating and exacerbating problems.

The RS is convinced that BiH can succeed if all major parties, foreign and domestic, accept and abide by Dayton.

Republika Srpska's 23rd Report to the UN Security Council

I. Commitment to the Dayton Accords

A. The RS complies fully with the BiH Constitution and the rest of the Dayton Accords.

1. The RS, as a party to the Dayton Accords, remains fully committed to the Accords, including the BiH Constitution. It respects the legal structure, rights, and obligations set forth in these agreements—including those set out in the BiH Constitution (Annex 4 of the Accords)—and it calls on the other parties and witnesses to the Accords to do so as well. This means respecting Entity autonomy and the rights of Constituent Peoples as guaranteed under the BiH Constitution, as well as refraining from interfering in the domestic affairs of BiH.

2. The RS supports BiH as it is defined in the BiH Constitution, and it will continue to seek the full implementation of the Dayton Accords. The RS has every right to insist that the constitutional structure established under the Accords be fully honored.

3. Contrary to the allegations of some of the RS's critics, the RS has no plan to pursue secession from BiH. The RS simply insists that the Dayton Accords be respected, and it will continue seeking to enforce and protect the Accords through political and legal means.

4. The Dayton compromise has been successful in preserving peace in BiH for almost 25 years. BiH can be highly functional if it is allowed to operate as set out in the BiH Constitution. BiH can have a bright future as a successful and stable country, but that future must be built in accordance with the Dayton Accords.

B. Other actors in BiH and the international community must also respect the Dayton Accords for BiH to succeed and prosper as a country.

5. If BiH is to succeed, the Dayton Accords must be respected not just by the RS, but also by other actors in BiH and in the international community.

6. Unfortunately, the SDA and other Bosniak political parties have never accepted the Dayton compromise and work tirelessly to undo it. The HR has already, through decrees and coercion, achieved much of the SDA's agenda of centralizing BiH, but the Bosniak parties are not satisfied. This past September, the SDA adopted a declaration calling for the complete abolition of the Dayton structure—including the Entities and the protections for constituent peoples—in favor of a unitary state that would be dominated by the SDA. The SDA also announced last year that it would ask the BiH Constitutional Court to declare the RS's very name unconstitutional, despite the fact that the name is recognized repeatedly in the text of the Constitution and, of course, throughout the Dayton Accords.

7. Some elements of the international community also fail to appreciate the importance of the Dayton principles for BiH's future stability and success, and so they continue to undermine the Dayton system. Most prominently, the HR continues to claim dictatorial authority over BiH that conflicts with its strictly limited responsibilities laid out in Annex 10 of the Dayton Accords. In addition, as noted above, the HR has used its claimed dictatorial authority to centralize BiH in

violation of the Dayton system. Many of these centralizing dictates have only caused dysfunction and created obstacles to the efficient administration of standard governmental duties, as exemplified by the problems caused the HR's intervention into the restitution of land in the RS, discussed in Part IV below. The HR, moreover, never condemns attempts by the SDA and other Bosniak parties to undo the Dayton compromise by undermining the Entities and the rights of BiH's constituent peoples.

8. Some foreign diplomats speak as if the Dayton constitutional system is merely a series of temporary measures. In September, for example, U.S. Special Representative for the Western Balkans Matthew Palmer said, "The Dayton Agreement was never meant to be a fixed framework, but rather a changing framework."[1] This is incorrect as a historical statement as the parties involved in negotiating Dayton knew that the agreement needed to be concrete, detailed, and comprehensive rather than leaving issues unresolved and a potential source of political conflict.[2] In fact, the term "changing framework" is an oxymoron. Anything that changes due to the temporary political objectives of the parties or outside forces is not a framework at all, but the very opposite of a framework, the whole purpose of which is to provide fixed parameters. Moreover, comments like these, even if made with the best intentions, further embolden the SDA to seek abolition of the Entities and the other Dayton protections for BiH's constituent peoples, and cause other groups guaranteed a measure of protection and autonomy under Dayton to feel threatened, and to react accordingly.

II. BiH's decentralized structure has enabled rapid and effective measures to deal with the coronavirus pandemic.

9. The response to the COVID-19 pandemic proves that BiH's constitutional system can work, and does work, even when there are profound political divisions, and even during the most trying of circumstances. The BiH level of administration, as many Security Council members are aware, suffers from deep ethnic and political divisions, especially because of the constant push by Bosniak parties, led by the SDA, to undermine the Dayton system and rule BiH without input or cooperation from Serb and Croat partners. It is fortunate, then, that the BiH level has only limited responsibilities with respect to addressing the coronavirus pandemic; if those responsibilities were expanded, the negative effects on the health and wellbeing of all citizens of BiH would be nothing short of disastrous.

10. Because health, according to the BiH Constitution, is an Entity responsibility, RS authorities, instead of waiting for a deeply divided BiH level to act, have been able to move swiftly and decisively to address the COVID-19 pandemic and its economic impact.

11. The RS has been efficient and proactive, acting early on in the pandemic to slow COVID-19's spread. For example, on 10 March, when there were just five diagnosed cases of COVID-19

[1] *Bo Trumpov pisatelj trilerjev uredil razmere na Balkanu?*, Delo, 2 Sep. 2019.

[2] As U.S. diplomat Richard Holbrooke, the lead negotiator of the Dayton Accords explained, "what is not agreed on during proximity talks will never be agreed." Derek H. Chollet, The Secret History of Dayton 158 (2005).

in BiH, the RS closed its schools and banned public gatherings.[3] The RS's healthcare system has performed ably.

12. When coordination between the Entities has been necessary, the Entities have generally cooperated effectively with each other. Coordination within BiH is necessary particularly in case of any incompatibility of the measures introduced by the Entities. The two Entities' measures with respect to the coronavirus have differed, just as the responses in federal units in all other federated countries have differed, but those differences only demonstrate the importance of Entity autonomy and highlight how difficult it would have been—and how long it would have likely taken—for the BiH level to reach the necessary consensus on what measures to employ.

13. The BiH level, within its limited area of competence, has also done its part, most significantly with the Armed Forces' deployment to bolster controls and establish quarantines at BiH's borders, as authorized by the BiH Presidency. The BiH level and the Entities have also been able to cooperate with each other effectively to tackle the crisis, notwithstanding attempts by certain officials from Bosniak parties to utilize the health crisis for political gain, as discussed in Attachment 4 to this report.

III. The rule of law in BiH

A. The Constitutional Court must be reformed.

14. The Constitutional Court, which is dominated by an alliance of foreign and Bosniak judges, is a threat to BiH's Constitutional order, and it must be reformed if BiH is to be a country ruled by law.

15. The BiH Constitution left substantial autonomy to the Entities as part of its formula for stability and democratic governance in a country with deep ethnic divisions. Through years of illegal decrees and coercion, however, the HR has significantly eroded Entity autonomy in violation of the Constitution and the HR's strictly limited authority under Annex 10 of the Dayton Accords.

16. The BiH Constitutional Court, instead of doing its job of safeguarding the Constitution, through the alliance of its three foreign judges and two Bosniak judges, consistently gave its imprimatur to the HR's unconstitutional centralization of BiH. One foreign member of the court 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."[4]

17. The Constitutional Court has consistently used constitutionally groundless cases brought by Bosniak officials to further diminish the autonomy granted to the RS under the Dayton Accords. For example, the Court outlawed Republika Srpska's flag, anthem, and coat of arms, and forbade the RS from marking the date of its birth with a holiday. None of those decisions find any support whatsoever in the actual text of the BiH Constitution. Most recently, the Court has become even

[3] *Republika Srpska authorities shut down schools in response to COVID-19 outbreak*, N1, 10 Mar. 2020.

[4] Joseph Marko, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina, European Diversity and Autonomy Papers (July 2004) at 17 and 18.

more aggressive and has come for the RS's agricultural property. Bosniak officials are even claiming that the very name "Republika Srpska" is itself unconstitutional.

18. This constant assault on the very identity of the RS, and on the autonomy guaranteed to the RS by the Dayton Accords, is all the more offensive because it is effected through the collusion of foreign judges—judges who are not citizens or residents of BiH, who are not even speakers of BiH languages, who consider themselves to be Platonic guardians who need not bother with the actual text of the Constitution they are sworn to uphold, and who instead follow the mandate of an unelected foreign diplomat who continues to claim dictatorial powers over BiH. The BiH Constitutional Court will always suffer a legitimacy deficit, and rightfully so, as long as its membership includes foreign judges.

19. Independent empirical research demonstrates that the foreign judges vote as a bloc with the Bosniak judges, and in accordance with the dictates of the OHR, in favor of the unconstitutional centralization of BiH.

20. The RS cannot be expected to accept an alliance of foreign and Bosniak judges misusing the Constitution agreed at Dayton to attack the RS's identity and constitutionally-guaranteed autonomy until there is nothing left of the RS. After all, the eradication of the RS is the stated goal of the SDA, and unfortunately it is being aided in that effort by the HR and the foreign judges, who are answerable to no one, and who disregard the bounds of their authority and the Constitution.

1. The foreign judges must be replaced by BiH citizens.

21. As explained in detail in Attachment 1 to this report, a BiH law must be adopted to replace the BiH Constitutional Court's foreign judges with judges who are citizens of the country whose Constitution they are charged to uphold. The BiH Constitution makes clear that the foreign judges on the Constitutional Court were intended only as a five-year transitional measure in the immediate aftermath of war. Both Croat and Serb leadership in BiH have long demanded the replacement of the foreign judges, as is their right. Moreover, among the "key priorities" the EU identifies for BiH in its Opinion on BiH's Application for EU Membership is to "reform the Constitutional Court, including addressing the issue of international judges."[5] The RS and the Croat leadership are only demanding to do what the Constitution intended and EU integration requires.

22. The SDA, however, has continued to be utterly recalcitrant, and has refused to even discuss the issue, trusting that its efforts to turn BiH into a centralized state dominated by the Bosniaks will continue to be supported by the HR and the foreign judges that follow the HR's instructions. The SDA's categorical refusal to even discuss the issue would seem to support the conclusion that there is an alliance of foreign and Bosniak judges (who are former high-ranking SDA officials) on the Court—an alliance the SDA dare not disrupt.

[5] Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, 29 May 2019.

23. The refusal by the SDA to address the issue also shows its utter contempt for the Constitution's intent and for the interests of the other Constituent Peoples, as well as their confidence in their alliance with the foreign judges.

24. The continued role of foreign judges on the Constitutional Court is fundamentally undemocratic. The judges on the Constitutional Court are not in place because of any decision by any elected official. BiH citizens did not have any power, however indirect, over their selection or appointment, and the foreign judges cannot be removed by any action of BiH citizens or elected officials.

25. The RS knows of no other sovereign state in the world that has seats on its constitutional court reserved for foreign judges, let alone judges appointed by a foreign individual without any requirement of domestic consent.

26. The RS is certainly not alone in criticizing the continued presence of foreign judges on the BiH Constitutional Court. Numerous international scholars have noted that the presence of the foreign judges on the BiH Constitutional Court undermines the Court's legitimacy and its authority.

27. BiH cannot advance toward EU membership until it is fully sovereign, and it will not be fully sovereign until the highest authority on the interpretation of the BiH Constitution is a court composed of citizens of BiH.

28. As the EU has emphasized, judicial appointments in BiH should be based on merit. But the foreign judges have no specialized training in or understanding of the BiH Constitution, the local legal system, or the relevant social and historical context. They generally do not even reside in BiH or speak any of BiH's languages and do not have to live with the consequences of their unappealable decisions, except to the extent that they expand the role of the Court and its judges. Their merit or lack thereof is never subject to a process of selection by elected officials of BiH.

29. The RS is fully committed to the rule of law in BiH, but that law must be based upon a fair interpretation of the Constitution as agreed at Dayton, not baseless dictates and decisions of unelected foreigners with no legal, constitutional, or democratic legitimacy. The time has long passed for this abuse of Dayton to cease, and for BiH to be governed by the citizens of BiH.

30. The RS is committed to using only peaceful and legal measures to resolve differences in BiH. The international community needs to understand, however, that the continuing subversion of the Dayton system by foreign judges who do not even read BiH's languages is unacceptable, and that all parties in BiH and the international community should be committed to putting BiH on a path toward full sovereignty.

2. The Constitutional Court's jurisdiction must be limited to that set out in the Constitution.

31. Respect for the decisions of the Constitutional Court depends upon the Court's respect for the limits of its jurisdiction. The BiH Constitutional Court, however, issues decisions in cases that are outside the jurisdiction defined in Article VI(3) of the BiH Constitution. One example is the Court's February 2020 majority decision in case number U-8/19, discussed in Part III(D), below,

and in Attachment 2 to this report. In that case, a majority of the court exercised jurisdiction—and ruled in favor of the claimants to overturn an RS law—despite there being no good-faith claim that any provision of the Constitution was violated.

32. Moreover, the Court has often disregarded the fact that the Constitution limits the Constitutional Court's appellate jurisdiction to "issues under this Constitution" The Court has often interpreted this provision unreasonably so as to give the Court the power to review rulings of Entity courts with respect to Entity law and other non-constitutional matters. Indeed, the Constitutional Court's rulings in these cases appear to have the same effect as if the Court were exercising ordinary appellate jurisdiction—a form of jurisdiction the Constitution makes clear the Court does not have.

33. It is hypocritical for the Constitutional Court to demand respect for the rule of law while disregarding the law that limits its own jurisdiction.

B. The HR and other foreign officials must stop subverting the integrity of the Constitutional Court.

1. Ex parte communications with judges and attempts to influence their decisions render the Court's decisions suspect.

34. In numerous instances in the past, the HR, members of the OHR staff, and other senior figures of the international community in BiH have subverted the integrity of the Constitutional Court, both overtly and covertly.

35. In an overt manner, the OHR, by decree, 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,*"[6] and has thereby demanded that its own dictates are to be considered the supreme law of the land in BiH. The law in BiH is not a set of statutes validly adopted by constitutional, democratic means, and international rules of treaties, conventions, or customary international law; rather, the law is what the OHR says it is. This state of affairs is made known overtly to every judge on the Constitutional Court every time the HR asserts its rights to invoke the imaginary Bonn powers.

36. The OHR has exercised control over the Constitutional Court in less overt ways as well. As noted above, a former foreign judge of the Constitutional Court admitted after leaving the court that there was a "tacit consensus between the Court and the High Representative that the Court . . . *will always confirm the merits of his legislation* . . . ."[7] There are indications of numerous instances in which members of the international community have had communications with Constitutional Court judges and staff on pending matters, and even attempted, successfully, to obtain advance notice of certain rulings and even influence the outcome of pending matters. In

[6] 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).

[7] Joseph Marko, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina, European Diversity and Autonomy Papers (July 2004) at 17 and 18 (emphasis added).

most jurisdictions, attempts to influence court judges outside the official channels of accepted court procedure constitute a criminal act; in BiH, however, certain members of the international community and foreign judges on the Constitutional Court are able to engage in such behavior with no accountability.

37. Indeed, in a stunning admission that judicial impropriety is the norm on the Court, a 2010 study of the Constitutional Court co-authored by Nedim Ademović, the former chief of staff of the BiH Constitutional Court's president, said it was the "usual practice" for the Constitutional Court to "seek the opinion of the High Representative prior to making a decision."[8]

38. In a 2010 interview, Ademović said approvingly, "[C]onstitutional-law development has been exclusively a consequence of international interventionism."[9] He boasted, "The BiH Constitutional Court has granted legitimacy to a host of imposed laws and introduced a balance between BiH sovereignty and international governance."[10] It never seems to have occurred to Ademović that the job of the Constitutional Court is to interpret the Constitution, and that no one at Dayton or in BiH has ever endowed the Court with any authority, much less the ability, to grant legitimacy to or balance the geopolitical interests of foreign powers. In any case, judges who view their roles in this way have no respect for law, for the Court, or for the Constitution, and their decisions will never be considered a legitimate exercise of judicial authority.

39. As a result of this international interference that has corrupted the judicial process in BiH and prevented the development of a truly independent, competent, legitimate Constitutional Court, today the BiH Constitutional Court is not a judicial body at all; though the judges may be draped in robes and the trappings of judicial probity, the Court has become a tool for geopolitical manipulation by outside forces. It is, to say the least, ironic that many of the elements of the international community who most loudly lecture on the importance of judicial integrity and respect for the rule of law are the same parties who have purposefully acted in a manner to corrupt the judicial process and erode the Court's legitimacy.

2. Admission of external influence on foreign judges is reprehensible and has hindered the development of a respected judiciary in BiH.

40. The meddling of the HR and the international community in judicial affairs in BIH means that judges on the Constitutional Court know that sinecure only requires that they do as they are instructed; regardless of how ill-conceived and poorly reasoned their decisions are, so long as they follow their instructions from unelected outsiders, their positions will be protected. They know their continued employment in a job that demands almost nothing from them requires that they do as they are instructed by the HR, not by the Constitution and the laws of BiH, if they want a long career unhindered by the threat of removal.

[8] Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), p. 821.

[9] Oslobodjenje interview with Nadim Ademović, 24 Apr. 2010.

[10] *Id.*

41. The message this sends throughout the legal profession, and indeed throughout all of BiH civil society, is that courts are not places where the rule of law is applied in the interests of justice; rather, they are places where politics and external influences induce unelected judges to force illegitimate decisions upon the domestic electorate. With outrageous hypocrisy, the international officials who have subverted the legitimacy of the Court then attack RS political leaders and threaten severe consequences for those who dare to point out that decisions rendered via this illegitimate process are not, in fact, legitimate.

42. The hypocrisy of those who profess to care about the rule of law, while claiming to be above the law, is apparent to all citizens in BiH and produces a cynicism toward the courts and toward the international community itself that is well earned.

C. Respect for the rule of law in BiH starts with respect for the Dayton Accords.

1. It is outrageous for the OHR to claim that lack of respect for Constitutional Court decisions crosses a "red line," while at the same time banning any court review of his own decisions.

43. In response to the recent criticism from the RS of the BiH Constitutional Court's poorly reasoned U-8/19 decision, HR Inzko in February said that a lack of respect for Constitutional Court decisions crosses a "red line." One marvels at the nerve it takes to make such a statement when HR Inzko himself maintains a *complete ban* on all court challenges to his own decisions.

44. In 2006, the BiH Constitutional Court held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the HR. In response, the HR, in an astonishing assertion of absolute authority unbounded by any law, declared that its actions are not subject to any review by any BiH authority, issuing a decree nullifying the court's verdict. Even the Bonn powers, as Professor Bernhard Knoll points out, "do not foresee, or imply, a competence to revoke a decision of Bosnia's highest constitutional organ."[11] The HR's decree, which remains in place today, 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*."[12] According to the decree:

> Notwithstanding any contrary provision in any legislation in Bosnia and Herzegovina, any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or *takes issue in any way whatsoever with one or more decisions of the High Representative*,

[11] Knoll at 315.

[12] Office of the High Representative, 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).

> shall be declared inadmissible unless the High Representative expressly gives his prior consent.[13]

45. Dr. Knoll has rightly observed that by issuing this order, the HR "set the international community on a war path with Bosnia's constitutional organs."[14]

46. For HR Inzko to warn that alleged RS disrespect for Constitutional Court decisions crosses a "red line," while at the same time banning any form of court review of his own decisions, is the very height of hypocrisy, inconsistency, and cynicism.

47. HR Inzko's "red line," moreover, is selective. The EU Special Representative in BiH, Ambassador Johann Sattler, recently noted that all levels of administration in BiH have been failing to implement the Constitutional Court's decisions. Yet HR Inzko has reserved his threats for the RS alone, showing yet again his unwillingness or inability to play a neutral role in BiH affairs.

48. In fact, the truth of the matter is that the RS has a much better record than the Federation or the BiH level authorities with respect to implementing Constitutional Court decisions. In April 2018, the then-president of the Constitutional Court, a Bosniak, said there were nine decisions of the court that had not been implemented, and just one of those—a decision involving the RS law on enforcement procedure—was to be implemented in the RS.

49. For a decade, authorities of the Federation have failed to implement the Constitutional Court's 2010 decision declaring the Mostar electoral system unconstitutional. The Federation's disregard for the Mostar decision has prevented Mostar citizens from voting in local elections for almost 12 years. Yet even though the failure to implement the Mostar decision has disenfranchised the people of Mostar for many years, HR Inzko has never said the Federation has crossed a "red line" or otherwise harangued Federation officials for their alleged lack of respect for the rule of law. Such biased and inflammatory rhetoric is reserved for the RS.

2. The entirety of the Dayton Accords is binding law.

50. If the rule of law is to be honored, all provisions and annexes of the Dayton Accords must be treated as the binding international legal instruments they are, not a buffet from which one can select only those items desired.

51. The Bosniak political parties, the HR, and some in the international community have a habit of ignoring or even defying provisions of the Dayton Accords that are inconvenient to their political goals. For example, they try constantly to undo the Dayton compromise that gives most administrative competences the Entities and protects the rights of the Constituent Peoples. They disregard the strictly limited set of powers the parties gave the HR in Annex 10. They ignore or

[13] 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, 23 March 2007 (emphasis added).

[14] Knoll at 313.

defy the clear requirements of Annex 2 of the Dayton Accords, the Agreement on Inter-Entity Boundary Line.

52. As BiH prepares to celebrate the 25th anniversary of the Dayton Accords this December, the parties and witnesses to the accords, as well as the HR, must honor the rule of law by respecting the entirety of the Accords rather than only selected provisions.

D. The Constitutional Court's recent U-8/19 decision is contrary to the BiH Constitution.

53. As explained in Attachment 2 to this report, the BiH Constitutional Court's February 2020 decision in case number U-8/19 flatly contradicts the BiH Constitution. In the decision, a majority of the BiH Constitutional Court held that BiH has the title to state property, that it therefore has the "exclusive right to regulate state property," and that agricultural lands referred to in an RS law constitute state property. The decision is a political act and a usurpation of power that conflicts with not just the BiH Constitution, but also other annexes of the Dayton Accords, earlier decisions of the Constitutional Court, and post-Dayton practice.

54. The BiH Constitution, contrary to the U-8/19 decision, makes clear that state property and agricultural land are responsibilities of the Entities. The BiH Constitution uses a simple and clear method of defining which matters are the responsibilities of BiH institutions and which are the responsibilities of the Entities. It provides, "The following matters are the responsibility of the institutions of Bosnia and Herzegovina" and enumerates ten specific matters. The Constitution further provides "All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."[15] The Constitution's enumeration of matters that are the responsibility of BiH institutions does not include anything even remotely suggesting authority over state property or agriculture.

IV. The HR is a source of, rather than a solution to, BiH's problems.

A. The OHR has done nothing to help BiH respond to the coronavirus.

55. The coronavirus pandemic has highlighted a stark difference between the OHR and those government officials in BiH acting within their proper constitutional authority. BiH's constitutional officials are responsible for the public's well-being and are answerable to that public. The OHR, despite claiming dictatorial authority, is answerable to no one. It should not be surprising, then, that the RS's president and government ministers have been vigorous in confronting the pandemic and its economic effects while recently donating half their monthly salaries to the RS Solidarity Fund. The OHR, meanwhile, notwithstanding its extensive budget and staff of almost 100, has done nothing to help BiH deal with a once-a-century pandemic and, as far as the RS can tell, no material funds have been donated to assist those suffering from the pandemic by the OHR, HR Inzko, or his extensive staff.

56. In April, the OHR even asked BiH's Security Ministry for additional security because some of its staff claim to "feel insecure" about Presidency Member Milorad Dodik's statement that the

[15] Emphasis added.

OHR is a hostile organization for Serbs. This has been Mr. Dodik's public position for 14 years and is an accurate assessment shared by many in the region; nonetheless there has not been a single act or even credible threat of violence against the OHR. In this time of unprecedented crisis, when the OHR should be trimming its budget and making the same sacrifices that others throughout BiH are making, for the OHR staff to ask BiH to waste resources on needless security measures is a ludicrous and insulting act of self-aggrandizement.

57. Further, with no reasonable justification, HR Inzko has also been pressuring BiH authorities to approve a budget for BiH-level institutions that is not adjusted to account for the dramatic decline in tax receipts that will surely result from the coronavirus pandemic. Because of the way BiH's indirect tax system works, this would be disastrous for the finances of the Entities. Under the indirect tax system, which was adopted in 2003 only under heavy pressure from the HR, indirect tax receipts first fully fund the needs of the BiH level, then distribute whatever remains to the Entities. Thus, the burden of any shortfall in indirect tax receipts is borne entirely by the Entities. This year, there will undoubtedly be a severe shortfall as the coronavirus and efforts to curb it take their economic toll. It would be deeply irresponsible to require the Entities, which bear primary responsibility for confronting the coronavirus pandemic and its economic effects, to bear alone the budgetary pain that the pandemic will bring.

B. The HR's interference in property issues exemplifies how harmful its presence has been.

1. The current crisis over the issue of state property is entirely a result of prior meddling by the OHR.

58. The state property issue that is the source of bitter division in BiH today would have been resolved years ago if the HR had not scuttled a landmark agreement on the issue between domestic political parties.

59. In November 2012, all six parties then represented on the BiH Council of Ministers endorsed an agreement on resolution of the state and military property issue. A draft law was prepared in 2013 to implement the agreement. Before the law could be enacted, however, HR Inzko, citing "concerns" about the draft, intervened so as to wreck the inter-entity and inter-ethnic consensus for the legislation. The result of the HR's intervention, as recounted in HR Inzko's May 2014 Report to the UN Secretary General, was that the "BiH Council of Ministers adopted a report . . . indicating that *the earlier consensus on the draft no longer existed* and recommending its withdrawal from further procedure."[16]

60. HR Inzko defended his blocking of the draft law by referring to his office's "concerns" about the legislation's compatibility with the BiH Constitutional Court's July 2012 U-1/11 decision relating to state property. The draft law, in HR Inzko's view, gave the BiH level insufficient rights over state property. But the Constitutional Court's U-1/11 decision held that the authority to regulate state property lies in the BiH Parliamentary Assembly. The decision did not try to prescribe in any detail what a law regulating state property should look like, but instead identified principles BiH would need to take into account. The decision said that BiH's regulation

[16] High Representative's 45th Report to the UN Secretary General, para. 11 (emphasis added).

of state property would need to "take into consideration . . . the whole constitutional order of BiH," emphasizing in particular "compliance with the competencies of the Entities and protection thereof." That is exactly what the 2013 legislation HR Inzko torpedoed was designed to do.

61. Leaving aside the groundlessness of HR Inzko's "concerns," it is obviously not the HR's role to determine whether legislation is consistent with Constitutional Court jurisprudence, and it is outrageous for him to claim either the competence or authority to do so. Despite HR Inzko's frequent misguided claims to the contrary, the Dayton Accords give the HR authority to interpret only one part of the Accords: Annex 10, the agreement under which his position was established.[17] The BiH Constitution, i.e., Annex 4 of the Dayton Accords, established the Constitutional Court for deciding constitutional disputes, and the 2013 legislation on state property, if it had been enacted, would have be subject to constitutional challenge. HR Inzko instead took the matter into his own hands.

62. This uninvited, unwelcome, disruptive intervention by HR Inzko into a matter in which he had no authority to act led many local leaders in BiH to question his motives in the matter; the agreement's implementation would have fulfilled the final two objectives of the Peace Implementation Council's "5+2" formula for closing the HR's office, coloring the HR's actions with more than a mere tint of self-interest. It was one of many actions from the OHR that seem to raise the question of whether the key objective of that institution is its own self-preservation.

63. The results of the HR's actions here, as in other areas, where extremely detrimental to the development of a stable and functional democracy in BiH. His quashing of the agreement to resolve the state and military property issue was a severe blow to BiH's political progress, preventing the negotiated political settlement of a longstanding and acrimonious issue. But the damage from HR Inzko's intervention goes beyond even that. When the HR sabotages BiH leaders' compromise solutions, it does not just block the resolution of the issue at hand—it makes all compromises even more difficult to achieve than they already are in a politically divided country like BiH. Each compromise a democratically elected leader makes to reach agreement on a contentious issue carries a political risk. Elected leaders and political parties are not going to make politically risky concessions if the resulting agreement is liable to be undone by a foreign diplomat, rendering their concession a pointless liability that accomplished nothing.

2. The HR should not have interfered with restitution of property to private owners.

64. Another example of the HR's deleterious interference in property issues is its annulment of the RS's program for restitution of property wrongfully seized by the communist-era Yugoslav government. Restitution of private property is an important part of BiH's full transition to a market economy in accordance with the goals enshrined in the Preamble to the BiH Constitution. As the U.S. State Department has recognized, "Achieving passage and effective, timely implementation

[17] Agreement on Civilian Implementation of the Peace Settlement, Annex 10 of the Dayton Accords, art. V ("The High Representative is the final authority in theater regarding interpretation of *this Agreement on the civilian implementation of the peace settlement* [Annex 10].") Emphasis added.

of restitution laws and procedures is both a critical indicator of rule of law in a democratic society and a crucial feature of a market economy."[18] The RS enacted three laws to enable restitution.

65. However, on 30 August 2000, in another shocking and damaging intervention into the constitutional processes in BiH, the High Representative proclaimed a decree annulling all three RS laws. He imposed these illegal decrees not because of any perceived threat to the Dayton Accords; rather, with colossal bureaucratic hubris, he opined, in the words of the OHR's own press release, that the RS's "restitution program [was] unfeasible, ill conceived, and . . . [would] not benefit the citizens of the RS, nor the people whose property was nationalized there."[19] It is not and never will be within the OHR's competence or authority to usurp the rightful prerogatives and responsibility of the elected leaders of the RS to determine what is and is not feasible or beneficial for the citizens of the RS. These illegal and ill-conceived decrees from the HR blocked the RS from providing restitution to private parties, undermining the efforts of the elected leaders in the RS to protect private property, institute the rule of law, and develop its market economy.

C. The HR does not act as a neutral facilitator.

66. Under Annex 10 of the Dayton Accords, the High Representative (HR) is supposed to "facilitate the Parties' own efforts" and "[f]acilitate the resolution of any difficulties arising in connection with civilian implementation" of the Dayton Accords. Time and again, the HR has shown that he disregards this mandate. Moreover, the HR is utterly incapably of fulfilling these roles when he has demonstrated consistent hostility to one of the parties to Dayton, having long ago abandoned any pretense of neutrality. HR Inzko's disdain for the RS, and his alliance with the Bosniak parties, makes it impossible for him to fulfill his role as a neutral facilitator among the parties to Dayton. In fact, he has become just the opposite of a facilitator and acts merely as a partisan meddler and scold who can be expected to consistently pick sides in favor of the SDA and other Bosniak parties in any political disputes that arise in BiH. As such, he is a hindrance to the resolution of political differences, rather than a facilitator.

1. The HR consistently issues public pronouncements that are hypocritical, disruptive, and offensive.

67. The HR's public pronouncements are often so hypocritical that they rightly diminish respect for the OHR and for the international community generally. As explained above, the OHR has shown hypocrisy most prominently by condemning the RS's alleged lack of respect for court decisions and for the rule of law in general, while declaring that no laws or court decisions may so much as question an HR decree. Even beyond that, however, almost every statement issued by the OHR proves to be an unhelpful irritant to the BiH political climate. Typical of the pronouncements that seem designed only to inflame annoyance, HR Inzko used International Women's Day as an occasion to attack BiH's governments, saying, "The Gender Equality Law of BiH – which was not imposed, but an entirely domestic undertaking – determines a minimum of 40 percent female

[18] *Property Restitution in Central and Eastern Europe*, U.S. Department of State, Bureau of European and Eurasian Affairs, 3 Oct. 2007.

[19] *The High Representative Annuls RS Restitution Laws*, Office of the High Representative, 31 Aug. 2000.

representation across a wide range of authorities, including legislatures and governments. Anything below that level of participation may be considered as inequality and regarded as disrespecting of the rule of law. Those governments not implementing the law are violating it."[20] Inzko further said that the women of BiH are "criminally underutilized."[21]

68. Yet the OHR has almost never had women in leadership roles. Of the 28 current and past OHR officials identified on the OHR website, not a single one is a woman. By contrast, RS President Željka Cvijanović and almost 40% of RS Government ministers are women. The RS Government calls on HR Inzko to release a directory of his staff to demonstrate that the OHR is committed to the advancement of women in its ranks.

69. Similarly, a January OHR press release congratulated Ms. Alma Zadić on her appointment as justice minister of Austria. Ms. Zadic is an immigrant from BiH, so HR Inzko seized the opportunity to issue yet another gratuitous, condescending, insulting slap at BiH: "Inzko added that that the question should be asked whether Alma Zadić would have ever been appointed as Minister of Justice at the state, entity or cantonal level had she stayed in Bosnia and Herzegovina."[22] When there appear to be far more women in leadership of the RS and BiH than in the OHR, one might more profitably ask whether Ms. Zadić would ever enjoy a promotion to a senior position within the OHR.

2. The HR has willfully misled the public about the reform of the BiH Constitutional Court.

70. As noted above, among the "key priorities" the EU identifies for BiH in its Opinion on BiH's Application for EU Membership is to "reform the Constitutional Court, including addressing the issue of international judges." In a February interview, however, HR Valentin Inzko took a position contrary to that of the EU, criticizing the proposal for the BiH Constitutional Court's foreign judges to be replaced by BiH citizens and claiming that such a reform would require a change to the Dayton Peace Accords.

71. N1 reported, regarding the initiative to replace the foreign judges:

> Inzko asked why anyone would have anything against some foreigner if they all want to join the EU. If the foreign judges ever were removed, it would change the balance of powers in the Court and that would require a change of the Dayton Peace Agreement. It would lead to the "Dayton 2" . . . .

HR Inzko's opposition to replacing the Constitutional Court's three foreign judges is understandable, given that they, along with the two Bosniak judges, reliably support HR Inzko's goal of centralizing BiH at the expense of the Entities, regardless of the legal merits of a given case. However, Inzko's claim that replacing the foreign judges would require changing the Dayton

[20] High Representative congratulates critically the International Women's Day, OHR, 8 Mar. 2020.

[21] *Id.*

[22] Inzko congratulates Alma Zadić on her appointment as Austrian Justice Minister, OHR, 10 Jan. 2020.

Accords is simply and quite obviously false. Article V(1)(d) of the BiH Constitution provides that five years after the appointment of the initial Constitutional Court judges, the "BiH Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights," i.e., the three foreign judges.

72. The placement of foreign judges on the BiH Constitutional Court was a transitional measure that was never intended to be in place for the long term. BiH's Serb and Croat parties have long favored enacting the necessary legislation to replace the foreign judges with BiH citizens, but the SDA, understanding the foreign judges to be its staunch political allies, has stubbornly resisted.

73. HR Inzko should stop trying to block the EU-endorsed reform of replacing the foreign judges, and he should stop issuing blatantly false statements to mislead the public about what the reform would require.

3. HR Inzko improperly attended a celebration of 1 March, which is not a BiH holiday.

74. HR Inzko also demonstrated his lack of neutrality by joining a celebration of the Federation's 1 March "Independence Day" holiday at the BiH Presidency building, as if it were a BiH state holiday. It is not. Indeed, Serbs in BiH consider it a sorrowful anniversary. It marks one of the days of the 1992 referendum for Bosnia and Herzegovina to unilaterally secede from Yugoslavia. Serbs strongly objected to the setting up of the referendum and did not participate in the referendum itself. Today, Serbs consider 1 March to be the anniversary of an illegitimate referendum that tore the Serbs of Bosnia and Herzegovina away from their country, Yugoslavia, and led to the outbreak of war. The decision by HR Inzko to honor this day showed again his disdain for the Serb community in BiH and again demonstrated that he is incapable of acting as the neutral facilitator that is the HR's mandate under the Dayton Accords.

4. The HR's threat to decree a gag law

75. In recent months, HR Inzko, has been suggesting he might try to impose on BiH a law criminalizing the expression of certain opinions about BiH's wartime history. As explained in detail in Attachment 3 to this report, a decree imposing such a gag law would be lawless, foolish, and unenforceable. The suggestion of such a decree is an assault on BiH's democratic constitutional system and an unwarranted threat to reconciliation, free historical inquiry, and freedom of expression.

76. The HR has no legal authority to cast aside BiH's democratic legislative system and decree laws, and thus no such measure would be legally binding upon the citizens of BiH. In order for any law to be legally binding, it must be duly approved by the BiH Parliamentary Assembly as required by the BiH Constitution. That body, however, soundly rejected a proposed gag law on 23 January 2020.

77. Moreover, a gag law that forbids questioning how the massacre at Srebrenica is classified would violate BiH citizens' right to freedom of expression, which is explicitly recognized by the BiH Constitution and by the European Convention on Human Rights. Such a law would also run

directly counter to the rulings of the European Court of Human Rights protecting the right to free expression.

78. The RS and its leaders strongly support investigating all wartime atrocities and bringing all war criminals to justice, regardless of their ethnicity or that or their victims. Imprisoning those who express certain historical opinions, far from promoting reconciliation, serves only to deepen mistrust and resentment.

V. Conclusion

79. The RS remains fully committed to the Dayton Accords, and it hopes all parties in BiH and members of the international community will likewise respect Dayton, including BiH's Constitution. Republika Srpska is also committed to BiH's full sovereignty and its EU integration, which means the OHR must be closed, and the foreign judges on the BiH Constitutional Court replaced with BiH citizens. The RS is confident that BiH can become a successful country and an EU member if all major parties, foreign and domestic, accept and abide by Dayton.

THE BIH CONSTITUTIONAL COURT MUST BE REFORMED TO REPLACE ITS FOREIGN JUDGES

Summary

- The continued role of foreign judges on the Constitutional Court of Bosnia and Herzegovina (BiH) is inconsistent with BiH's sovereignty and the rights of self-determination of its citizens.

- The presence of foreign judges on the court is fundamentally undemocratic and impedes European integration.

    - The judges on the BiH Constitutional Court are not in place because of any decision by any elected official. BiH citizens did not have any power, however indirect, over their selection or appointment.

    - BiH cannot advance toward EU membership until it is fully sovereign, and it will not be fully sovereign until the highest authority on the interpretation of the BiH Constitution is a court composed of citizens of BiH.

- In practice, the foreign judges, as shown by empirical research, have voted as a bloc with the Bosniak judges, in accordance with the dictates of the Office of the High Representative and in favor of the unconstitutional centralization of BiH governmental authority, in violation of the rights of the Entities.

- The foreign judges' obeisance to the OHR perpetuates the domination of BiH by foreign parties who violate the rights of BiH citizens, who sap resources that should be dedicated to developing BiH's domestic governing and civic institutions, and whose actions in some cases seem intended to extend their own tenures.

- The presence of foreign judges on the BiH Constitutional Court undermines the court's legitimacy and risks diminishing respect for and public acceptance of its decisions.

    - The EU has emphasized that judicial appointments in BiH should be based on merit. But the foreign judges—whatever their qualifications in their home countries—are poorly qualified to sit on the BiH Constitutional Court. They have no specialized understanding of the BiH Constitution, the local legal system, or the social and historical context in which they operate. They generally do not even live in BiH or speak any of BiH's languages.

    - Perhaps this lack of understanding and appreciation of BiH and its constitutional system helps explain why the foreign judges reliably vote, in alliance with the Bosniak members of the court, in favor of further centralization of BiH, even when the Constitution clearly forbids it.

- The foreign judges on the BiH Constitutional Court do not have to live with the results of their decisions, and are not affected by them, except to the extent that they expand the role of the court and its judges.

- The presence of foreign judges invites criticism that outside influences have generated particular results in importance cases. For example, all three foreign judges are citizens of countries that are NATO members (Italy, Romania, and North Macedonia). If a question came before the court dealing with a constitutional matter as to treaty powers implicating the sensitive issues surrounding BiH's attitude toward NATO, how could these foreign judges from NATO countries be considered neutral arbiters of the BiH Constitution on such a question?

- The BiH Constitution makes clear that the foreign judges on the Constitutional Court were intended only as a transitional measure in the immediate aftermath of war. The refusal by BiH's largest Bosniak party, the SDA, to replace the foreign judges almost a quarter century after the war's end subverts the Constitution's intent.

- The presence of foreign judges on the court also allows for subversion of the BiH Constitution by the political parties representing BiH's largest constituent people, which intend to dominate all of BiH, usurping the rights of the other constituent peoples and diminishing or even abolishing the Entities.

Introduction

It is essential that the Constitutional Court of Bosnia and Herzegovina (BiH) be reformed to replace the court's foreign judges with BiH nationals. Republika Srpska welcomes the European Commission's (EC) recognition that BiH must address the issue of foreign judges on the BiH Constitutional Court. As the EC's Opinion on BiH's Application for EU Membership states, "The issue of international judges in the Constitutional Court needs to be addressed."[1]

The BiH Constitutional Court must be reformed to replace the foreign judges with BiH citizens if BiH is to become a fully sovereign country and move forward with EU integration. The presence of foreign judges on BiH's Constitutional Court is inconsistent with BiH's sovereignty and democracy and undermines the court's legitimacy. Moreover, the foreign judges on the court have shown themselves to be far from the disinterested "swing votes" they were intended to be. In reality, the foreign judges have allied themselves with Bosniak bloc of the court—consistently in favor of BiH's unconstitutional centralization, subservient to the High Representative, and hostile to the Entities' rights under the BiH Constitution. This bias has further weakened the BiH Constitutional Court's legitimacy.

[1] Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, 29 May 2019, at 7.

A constitutional court with foreign members is inconsistent with BiH sovereignty, democracy, and self-determination.

The presence of foreign judges on the BiH Constitutional Court is incompatible with BiH's sovereignty and democracy. Republika Srpska knows of no other sovereign state in the world that has seats on its constitutional court reserved for foreign judges, let alone judges appointed by a foreign individual without any requirement of domestic consent.

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 of the country."[2]

In a 2016 article about the BiH Constitutional Court, Stefan Graziadei of the University of Antwerp 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.[3]

In a 2019 article reporting on his study of the foreign judges' role on the BiH Constitutional Court, the University of Hong Kong's Dr. Alex Schwartz writes, "It is usually taken for granted that the judiciary will be native to the polity it serves. Although judges are not typically elected by popular vote, it is probably implicit in the way judicial legitimacy tends to be constructed in modern states that judges are representatives of the demos, at least in some vague or indirect sense."[4]

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[2] Robert M. Hayden, Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts (1999) 131.

[3] 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 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).

[4] Alex Schwartz, *International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia*, 44 Law & Social Inquiry 1, 7 (Feb. 2019).

Even one former foreign member of the BiH 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."[5] That is exactly what it is.

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."[6]

Moreover, the foreign judges' role on the BiH Constitutional Court violates BiH citizens' right to self-determination, a foundational principle of international law recognized in agreements that are incorporated into the Dayton Accords.

The BiH Constitutional Court's foreign judges undermine the court's legitimacy.

The most precious asset of any court that exercises judicial review is the respect of the citizenry for the legitimacy of the court's decisions. Without such legitimacy, the public will not accept court decisions that nullify legislation approved by democratically elected institutions. The BiH Constitutional Court will always suffer a legitimacy deficit as long as its membership includes judges who—in addition to lacking democratic legitimacy—are not even BiH citizens, BiH residents, or speakers of BiH languages.

Dr. Schwartz's analysis of the role of the foreign judges on the BiH Constitutional Court concludes that "the foreign judges appear to have contributed to the Court's crisis of authority."[7] One decision Dr. Schwarz cites is the 2000 "Constituent Peoples" decision, which struck down a number of provisions in the Entity constitutions. The court's 5-4 decision, in which the foreign judges joined the Bosniak judges to make a majority, according to Dr. Schwartz, "relied on some rather esoteric argument."[8] Dr. Schwartz writes that the "decision probably damaged the Court's legitimacy by feeding the narrative that the foreign judges are too closely aligned with their Bosniak colleagues and the interests of the OHR."[9] Matthew Parish, a former OHR attorney, wrote of the case, "The

[5] 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.

[6] 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).

[7] Schwartz at 26.

[8] *Id*. at 22.

[9] *Id*. at 23.

whole episode smelled of a stitch-up between the international judges sitting on the Court and OHR to push through constitutional reform through the back door."[10]

A 2019 analysis of foreign judges by Professor Rosalind Dixon of the University of New South Wales Sydney and Professor Vicki Jackson of Harvard Law School observes:

> Judges who decide constitutional challenges to the actions of other parts of the government not infrequently face challenges to their "democratic" legitimacy. . . . [T]his challenge may be heightened where the holder of judicial office is a foreign judge." . . . Both the decision to have foreign judges sit and the selection (or selection methods) of those judges may implicate democratic legitimacy concerns**.**"[11]

The foreign members of the BiH Constitutional Court particularly raise such concerns because they not just foreign but also selected without the consent of any BiH institution.

Graziadei 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."[12] Similarly, Professors Dixon and Jackson write that foreign judges "may lack sufficient local contextual knowledge to appropriately perform the constitutional function."[13] Such judges, Professors Dixon and Jackson write, "will often have limited knowledge of local history, socio-political values and attitudes, and the kinds of national social, economic, and political conditions that can affect the implementation of a court decision."[14] In addition, as Professor 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.[15]

[10] Matthew Parish, A Free City in the Balkans (2010) at 153.

[11] Rosalind Dixon and Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 Colum. J. Transnat'l L. 283, 317 (2019).

[12] Graziadei at 5 (footnotes omitted).

[13] Rosalind Dixon and Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 Colum. J. Transnat'l L. 283, 317 (2019).

[14] Dixon and Jackson at 317.

[15] *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.

The foreign judges on the BiH Constitutional Court have a political alliance with Bosniaks to centralize BiH.

The BiH Constitutional Court's legitimacy is further undermined by foreign judges' role as reliable allies with the two Bosniak judges to centralize BiH in violation of the Constitution.

The main rationale for temporarily reserving seats on the BiH Constitutional Court for foreigners was to give the court three members who would stand apart from BiH's ethnic politics. In practice, however, the three foreign judges have formed a bloc with the two Bosniak judges, often outvoting the majority of BiH citizens on the Court.

Judge Grewe, a retired foreign member of the BiH Constitutional Court, observed that "the group of international judges allied to one ethnic group can outvote the two others."[16] There is no question which ethnic group that is.

As *Balkan Insight* reported, "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."[17]

Dr. Schwartz's empirical study confirms Balkan Insight's observation. Schwartz concludes, "[T]he foreign judges cannot be depended on to provide a moderating counterbalance to ethno-national divisions on the Court. Indeed, their positioning relative to the domestic justices implies that *they are more likely than not to tip the balance in favor of the Bosniak wing of the Court*."[18]

Dr. Schwartz, examining the court's decisions during two long periods in which the court's composition did not change, finds a clear division of the court between Serbs and Croats on one side and the foreign and Bosniak judges on the other. Dr. Schwartz finds that between 1997 and 2002, "the Court divides into two wings, with the Serbs and Croats on one end of the spectrum and the Bosniaks (together with the foreign judges) on the other."[19] He finds the same breakdown of the court in the period between 2010 and 2015.[20]

Dr. Schwartz's study also demonstrates a clear bias by the foreign judges toward centralization of BiH. He finds that the three foreign members of the court fall on the court's "centralist wing" with the two Bosniak judges.

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[16] 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. 42.

[17] Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, Balkan Insight, 2 Dec. 2015.

[18] Schwartz at 16 (emphasis added).

[19] *Id*. at 14.

[20] *Id*. at 15-16.

Dr. Schwartz rejects the possibility that the text of the BiH Constitution explains the foreign judges' "centralist tendencies." He writes:

> [I]f there are right answers when it comes to disputes about constitutional law in Bosnia, it cannot be denied that the constitutional text suggests a highly decentralized structure. The division of powers is such that most legislative and administrative competencies are the exclusive province of the entities (see Art. III). Furthermore, several of the Court's landmark decisions develop or rely on doctrines that find *little explicit support in the actual text*, turning instead on contested teleological interpretations of the constitution as a whole . . . . In short, *the "black letter" of the constitution probably does not explain the centralist tendencies of the foreign judges.*[21]

Schwartz observes that "given [the foreign judges'] centralist tendencies, it is no surprise that their presence is more a bone of contention than a source of authority."[22]

Schwartz also notes that in BiH, "all but two of the foreign judges have come from Western Europe. Rightly or wrongly, Western European perspectives on the Bosnian war are typically more sympathetic to Bosniaks (i.e., Bosnian Muslims) than to Bosnian Croats or Serbs."[23]

The alliance between the foreign and Bosniak judges has resulted in many of the Constitutional Court's most political and legally baseless decisions, handed down over the objections of the four Croat and Serb judges.

Perhaps the most 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, "The fate of the Court of Bosnia Herzegovina, the state court, shows how state building can go wrong. Dayton allotted judicial matters to the Entities, apart from a state Constitutional Court. In 2000, the [Peace Implementation Council] ordered Bosnia's leaders to create a state court; when the legislature did not, OHR imposed a law creating the Court of BiH."[24]

When the imposed law was challenged before the BiH Constitutional Court, four out of the six judges from BiH rightly found the law unconstitutional. The law was only upheld because the three foreign judges voted as a bloc, along with the two Bosniak judges, to protect the High Representative's creation.

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[21] *Id*. at 17 (emphasis added).

[22] *Id*.

[23] *Id*. at 4.

[24] International Crisis Group, Bosnia's Future, 10 July 2014 at 27 (footnotes omitted).

The foreign judges on the BiH Constitutional Court have been subservient to the High Representative.

The Constitutional Court's legitimacy is also undermined by the foreign judges' lack of independence from the High Representative. The foreign judges have shown obeisance to the wishes of the High Representative, which have usually coincided with the Bosniak political agenda of centralizing BiH and undermining the autonomy of Republika Srpska as guaranteed in the Constitution. One of the Constitutional Court's foreign judges 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]

Schwartz's analysis of BiH Constitutional Court cases in which the foreign judges were pivotal finds a "deferential approach to reviewing acts of the High Representative."[26] Schwartz writes that the foreign judges' review of laws decreed by the High Representative was so deferential that they used "questionable legal reasoning" in order to uphold them.[27]

The BiH Constitutional Court's foreign judges have been hostile to Entity rights, particularly those of Republika Srpska.

The foreign judges on the BiH Constitutional Court have shown a decided bias against the Entities, especially when it comes to Republika Srpska. Schwartz's analysis of BiH Constitutional Court cases in which the foreign judges were pivotal found "overreach" in cases challenging the Entities.[28] The International Crisis Group reported, "The BiH Constitutional Court has repeatedly ordered the RS to amend its constitution over the objections of both Serb (and, often, both Croat) judges . . . ."[29]

One prominent example of the foreign-Bosniak bloc's activism against Republika Srpska is the 2015 decision in which the Constitutional Court's three foreign members and two Bosniak members (both former high officials in the largest Bosniak political party) ruled that the 9 January holiday celebrating Republika Srpska's birth was unconstitutionally discriminatory.

There is no legally defensible basis for the Constitutional Court's decision. RS Day, which marks the anniversary of Republika Srpska's birth, is a celebration of Republika Srpska's existence—an existence the BiH Constitution, Annex 4 of the Dayton Accords, fully acknowledges and embraces.

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[25] Joseph Marko, Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina, European Diversity and Autonomy Papers (July 2004) at 17 and 18 (emphasis added).

[26] Schwartz at 22.

[27] *Id*. at 21.

[28] *Id*. at 22.

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

Republika Srpska is aware of no example in Europe—or anywhere else—of a public holiday being banned on the basis of anti-discrimination rules. Countries throughout Europe celebrate public holidays that mark days of special significance to members of a religious or ethnic group—almost always the country or political subdivision's most populous one. (Few European countries have public holidays for important feasts of Islam or other non-Christian religions, despite large Muslim minorities).

High Representative Inzko's native Austria observes no fewer than ten Christian feast days as public holidays. The three foreign Constitutional Court judges who voted to bar RS Day all come from European countries in which multiple Christian feasts are observed as public holidays.

The notion that holidays marking days of special significance to certain religious or ethnic groups is discriminatory finds no support in European law. As a 2013 study by the European Parliament observes, "Several constitutional courts, in dealing with the supposedly discriminatory character of rules establishing Sunday and the most important festivities of the Christian religion as public holidays, have dismissed these cases, holding that a legislative choice as such is not unreasonable, having regard to the religious and historical traditions of each society, and to the fact that these festivities have acquired, over time, a secular meaning."[30]

The BiH Constitutional Court's RS Day decision, then, was a purely political act. The U.S.-based NGO Freedom House observed that the decision "exemplified the judiciary's politicization."[31] As *Balkan Insight* editor Marcus Tanner wrote:

> [T]he obscure issue on the Republika Srpska's "National Day" should never have reached the front pages of the newspapers, let alone the courts, let alone the country's highest court. It is hard to see what business judges have in ruling on whether people should celebrate January 9th, 10th, 11th, or any other day.
>
> Almost every national holiday is "discriminatory" once it is examined under some sort of constitutional microscope.
>
> Viewed from that absurd angle, Ireland's national holiday, St Patrick's Day, discriminates against the entire Protestant community – who do not acknowledge Catholic saints – not to mention the country's growing non-Christian community. Does anyone there care? Of course not.[32]

[30] *Religious practice and observance in the EU member states*, European Parliament Directorate-General for Internal Polices, 2013, at p. 13.

[31] Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 9.

[32] Marcus Tanner, *The Bosnians Have Made a Mess of This Referendum*, Balkan Insight, 27 Sept. 2016.

The RS Day decision, unfortunately, is just one example of the foreign judges' bias against Entity rights in general and Republika Srpska in particular.

All Serb and Croat leaders support ending the role of foreign judges on the Constitutional Court.

The BiH Constitution includes a provision—intended as a transitional measure to last five years—in which three of the nine seats on the BiH Constitutional Court are reserved for foreigners. These foreign members, according to the Constitution, are "selected by the President of the European Court of Human Rights after consultation with the Presidency."[33] The other six seats are customarily held by two Bosniaks, two Serbs, and two Croats.

The placement of foreign judges on BiH Constitutional Court was a transitional measure that was never intended to be in place for the long term. The BiH Constitution provides that five years after the appointment of the initial judges, the "BiH Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights."[34]

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.[35] As the president of the Croat National Council, which represents all of the Croat parties, said in 2015, "Twenty years after the war, Bosnians are ready to take full control of this court."[36] Unfortunately, the largest Bosniak party, 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.

The fact that the BiH Constitution provides for the replacement of the foreign judges, after five years, through simple legislation rather than a constitutional amendment demonstrates that the foreign judges were never meant to sit on the court indefinitely. Thus, the SDA's refusal to consider legislation to replace the foreign judges subverts the intent of the BiH Constitution. Moreover, the effect of the foreign judges' continued presence is to subvert the Constitution by ensuring that a bloc of foreign and Bosniak judges reliably endorses centralization in violation of BiH's constitutional structure.

Reforming the BiH Constitutional Court is essential for BiH to become a fully sovereign state and an EU member, and for the court to build up its legitimacy. Republika Srpska hopes the international community will support BiH finally passing the legislation necessary to replace the foreign judges on its Constitutional Court.

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[33] BiH Constitution, art. VI(1)(a).

[34] BiH Constitution, art. VI(1)(d).

[35] Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, Balkan Insight, 2 Dec. 2015.

[36] *Id*.

THE CONSTITUTIONAL COURT'S U-8/19 DECISION IS CONTRARY TO THE DAYTON ACCORDS

In its February 2020 decision in case number U-8/19, a majority of the BiH Constitutional Court held that Bosnia and Herzegovina (BiH) has the title to state property, that BiH therefore has the "exclusive right to regulate state property," and that agricultural lands referred to in a Republika Srpska law constitute state property. This is a purely political decision that is contrary to the BiH Constitution, other annexes of the Dayton Accords, earlier decisions of the Constitutional Court, and post-Dayton practice. The decision has not the slightest support in the BiH Constitution, and is, in fact, in direct contravention of the Constitution. As such, it is an outrageous, blatant, unjust, and illegal attempt to usurp the rights of Republika Srpska and the Federation of Bosnia and Herzegovina.

I. Under the BiH Constitution, state property and agriculture are the responsibility of the Entities.

Contrary to the U-8/19 decision, the BiH Constitution makes clear that state property and agricultural land is the responsibility of the Entities. The BiH Constitution uses a simple and clear method of defining which matters are the responsibilities of BiH institutions and which are the responsibilities of the Entities. Article III(1) provides, "The following matters are the responsibility of the institutions of Bosnia and Herzegovina" and enumerates ten specific matters, like foreign policy and foreign trade policy. Article III(3) provides "All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."[1] The Constitution's enumeration of matters that are the responsibility of BiH institutions does not include anything suggesting authority over state property or agriculture. The BiH level does not even have any capability to manage agricultural land or state property. The Entities, by contrast, have Agriculture ministries and property management bodies, and have been managing agriculture and state property for many years.

II. Other annexes of the Dayton Accords further demonstrate that state property is the exclusive competence of the Entities.

The context of the BiH Constitution confirms that state property belongs to the Entities. The BiH Constitution, which is Annex 4 to the Dayton Accords, is a treaty, and, as the Vienna Convention on the Law of Treaties requires, a treaty must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[2] A key part of the BiH Constitution's context is the other annexes of the Dayton Accords.

Annex 9 of the Dayton Accords is an agreement between Republika Srpska and the Federation of Bosnia and Herzegovina to establish a Transportation Corporation "to organize and

[1] Emphasis added.

[2] Vienna Convention on the Law of Treaties, Art. 31.

operate transportation facilities, such as roads, railways and ports, for their mutual benefit."[3] The agreement specifies that the Entities "may at any time transfer to the Transportation Corporation additional funds *or facilities that belong to them* and the rights thereto."[4] Although the agreement provides for the Entities to transfer "facilities that belong to them," it has no such provision for the BiH level transferring facilities that belong to it—and it makes no such allowance for the transfer of facilities owned by the BiH level, because the understanding of the parties was that the BiH level would *have no such facilities*. Thus, Annex 9 makes clear that state property does not belong to BiH, but rather belongs only to the Entities.

It is clear from Annex 9 that the Constitution and the rest of the Dayton Accords envision voluntary cooperation between the Entities as the means of developing and operating transportation and other infrastructure facilities needed for the BiH economy. Obviously, such a concept was based on the understanding that the Entities were in possession and control of property that they could voluntarily and cooperatively use, not only for the welfare of their own citizens, but for facilities of use to the citizens of both Entities.

Annex 8 of the Dayton Accords provides for the establishment of a joint, inter-Entity Commission on National Monuments with the authority to designate as national monuments "movable or immovable property of great importance to a group of people with common cultural, historic, religious or ethnic heritage, such as monuments of architecture, art or history; archaeological sites; groups of buildings; as well as cemeteries."[5]

Annex 8 provides, "[T]he Entity in whose territory the property is situated (a) shall make every effort to take appropriate legal, scientific, technical, administrative and financial measures necessary for the protection, conservation, presentation and rehabilitation of the property, and (b) shall refrain from taking any deliberate measures that might damage the property."[6]

Thus, Annex 8 of the Dayton Accords clearly envisaged that the Entities would have sole authority over property issues.

III. The Constitutional Court provided no constitutional basis whatsoever for its holding.

The U-8/19 decision points to two provisions of the Constitution in an attempt to justify its holding that BiH is the title holder of the agricultural land in question: Article I(1) and Article IV(4)(e). Neither provision, however, provides even the slightest support for the Court's holding.

[3] Agreement on Establishment of Bosnia and Herzegovina Public Corporations, Dayton Accords Annex 9, Art. II(1).

[4] Agreement on Establishment of Bosnia and Herzegovina Public Corporations, Dayton Accords Annex 9, Art. II(5) emphasis added.

[5] Agreement on Commission to Preserve National Monuments, Dayton Accords Annex 8, Art. VI.

[6] Agreement on Commission to Preserve National Monuments, Dayton Accords Annex 8, Art. V(5).

A. Article I(1) of the Constitution has no relevance at all to title over property.

Article I(1) of the BiH Constitution provides in its entirety:

> **Continuation.** The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, *with its internal structure modified as provided herein* and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.[7]

Based on Article I(1) of the Constitution, the decision "concludes that Bosnia and Herzegovina is the titleholder of the property of its legal predecessors, i.e. the agricultural land constitutes a part of the State property, the titleholder of which is Bosnia and Herzegovina."[8]

This statement is a non sequitur. 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 rather than the Entities. Further, 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." The Court, in its reasoning, completely ignored this key proviso.

Continuation of the state has no bearing on what property BiH-level institutions, as opposed to other agencies and instrumentalities of BiH or the Entities, will own or regulate. 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.

B. Article IV(4)(e) of the Constitution is similarly irrelevant and is not a grant of additional competences to the BiH level.

The other provision of the Constitution the Court invoked to support its holding is Article IV(4)(e). The provision merely gives the Parliamentary Assembly responsibility for "[s]uch other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities." It is manifestly the case, however, that there have been no duties over state property assigned to BiH, and no mutual agreement of the Entities. Thus Article IV(4)(e) has no relevance to the state property question whatsoever.

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[7] Emphasis added.

[8] BiH Constitutional Court, Decision on Admissibility and Merits, Case U-8/19, para. 38.

Contrary to the Court's suggestion, Article IV(4)(e) is not a grant of additional, unnamed competences to the BiH level. To interpret it this way is to nullify completely the express language of Article III(3)(a) of the Constitution, which provides, "All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."[9]

Indeed, the interpretation of Article IV(4)(e) that the Court suggested is so outrageous, so unfounded, and so directly contrary to the express language of the Constitution, that it is inconceivable that any competent judges could expect such "reasoning" to be considered to have any legitimacy.

IV. Post-Dayton practice by all relevant actors in BiH shows that state property was understood to belong to the Entities.

The consistent law and practice in BiH in the years following the Dayton Accords, by all political bodies in BiH, was to recognize that state property belongs to the Entities rather than the BiH level. The international community recognized and supported this established law and practice. Later, however, the High Representative and certain members of the Peace Implementation Council (PIC) changed their position in order to accommodate the designs of the major Bosniak political parties.

A. Legislation

Laws passed by the BiH Parliamentary Assembly demonstrate the understanding that state property was vested in the Entities. In 1998, a *Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina*[10] ("Privatization Law") was put in place by decree of the High Representative. On 19 July 1999 the Parliamentary assembly of BiH adopted the same Framework Law. Relevant sections of the law read as follows:

Preamble

* * *

> Therefore, The Parliamentary Assembly of Bosnia and Herzegovina passes this Law expressly recognizing the right of the Entities to privatize non privately owned enterprises and banks located on their territories and to receive the proceeds there from according to legislation adopted by their respective Parliaments.

Article 2 Scope of the Law

[9] Emphasis added.

[10] Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 14/98, 12/99.

1. In accordance with the GFAP, this Law expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territories.

The determination whether or not an enterprise or bank is non-privately owned shall be made on the basis of entity legislation.

* * *

Article 3 Entity Privatisation Laws

* * *

2. The laws of the privatizing entity will cover only those rights and related liabilities located on its territory.

* * *

Article 4 Allocation of Proceeds and Claims

* * *

Proceeds from the privatisation of enterprises and banks located in the territory of one Entity shall be at the disposal of that Entity or the legal persons authorised to receive them under the laws of that Entity.

1. Claims against enterprises and banks to be privatised shall be deemed as a liability of the privatising Entity.

The Privatization Law demonstrates the acknowledgment of both the High Representative and the BiH Parliamentary Assembly that the Entities own all state property that is located within their territories. The legislation includes both enterprises and banks, and such enterprises would be expected to include among their assets immovable property, and movable tangible and intangible property. It is apparent, therefore, that state property, inclusive of all these forms of property, is vested in the Entities where the enterprises are located.

The language of the Privatization Law is significant in several respects. First, in Article 2 and in the Preamble, it "expressly recognizes" the entities' rights in state property rather than purporting to confer rights upon the Entities. If state property were originally vested in BiH or if BiH had power of disposition over state property, then the law would have conferred these rights on the Entities rather than recognizing their pre-existing rights. Second, the law explicitly recognizes that the Entities' rights set out in the law are "in accordance with the GFAP [the Dayton Accords]."

Moreover, Article 4 and the Preamble emphasize that the proceeds of privatizations belong to the privatizing entity rather than the BiH level. This makes clear the law's recognition that the Entities own state property.

It is also worth noting that in the years since the Privatization Law was enacted, it has been amended,[11] but its recognition of the Entities' rights to privatize land in their territories has remained untouched.

In addition, as discussed below, the High Representative's Decision—some four years after the Succession Agreement—freezing disposal of state property provides further evidence of this point. According to these Laws, the immovable state property of the RS and the Federation that was subject to the Privatization Law was expressly excluded from prohibition. This demonstrates that the recognition of the Entities' property rights as expressed in the 1998 Privatization Law continued in 2005 when the freeze order laws were enacted, and in 2006, 2007, and 2008, when the freeze-order laws were amended.

B. Constitutional Court

In 2007, the BiH Constitutional Court upheld the constitutionality of the provisions of the Privatization Law set out above. The case, Number U-19/06, arose from a request by Muhamed Ibrahimovic, Chairman of the Federation House of Representatives.[12] Ibrahimovic argued, in the words of the Court, "that by division of the state property according to the territorial principle into the two Entities, the challenged Law sets up a basis for the Entities factually to become the holders of the state property and to be considered as separate states." The Constitutional Court rejected Ibrahimovic's claims, including his claim that the Privatization Law, by recognizing the Entities' rights to privatize property in their territories, violated BiH's property rights.

C. High Representative and PIC

During his tenure as High Representative, Lord Paddy Ashdown was no friend of the Entities' constitutional prerogatives, and he worked determinedly to expand BiH-level competences and powers. His efforts frequently disregarded the limitations of the Dayton Accords and the BiH Constitution of BiH; nevertheless, Lord Ashdown recognized that state property ownership was vested in the Entities.

For example, in 2005, he became concerned that the Entities' privatization programs might dispose of immovable state property that would be needed by the new BiH-level agencies that the High Representative created. With no legal authority to do so, he decreed freeze orders on BiH and the Entities forbidding their further disposition of certain categories of state property.[13]

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[11] Decision amending the Framework Law on Privatisation of Enterprises and Banks in BiH by introducing a clause protecting investors, Office of the High Representative, 11 May 2000; Decision amending the Law on Privatisation of Enterprises, Office of the High Representative, 20 Dec. 2000.

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

[13] Decision Enacting the Law on the Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina, 21 March 2005; Decision Enacting the Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska, 21 March 2005. In explaining the reason and intent of these decrees, their preambles state that no "effective measures" exist to protect "the potential prejudice posed by further disposal of State Property to enactment of appropriate legislation based on the [State

Separate freeze orders were directed to BiH, the Federation, and Republika Srpska. Obviously the freeze orders demonstrate the High Representative's acknowledgment that state property was vested in the Entities. The freeze orders made no assertion that the BiH level itself has any title or claim to title to state property located on the territory of the Entities.

The titles and terms of the freeze order laws—i.e., "Law on the Temporary Prohibition of Disposal of State Property *of the Federation"*[14] and ". . . State Property *of the Republika Srpska*"[15] (and the mere recognition that separate laws were needed for State Property of the Federation and of Republika Srpska)—show that the High Representative considered state property transferred from the SFRY pursuant to the Succession Agreement was not per se property of BiH and its institutions, but instead was property of the Entities. 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 four 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.

It is notable that these freeze orders and their acknowledgment of Entity control and rights to disposition of state property were imposed some four years after the signing of the Succession Agreement among the successor states of the former SFRY. The High Representative played a significant role in the negotiating process that led to the Succession Agreement's drafting and adoption, having been charged with dealing with state succession at the 1995 London conference of the PIC.[16] If the succession agreement had vested state property in the BiH level rather than the Entities, the High Representative would have been well aware of this fact, and no Entity freeze orders on state property, as a means of securing property for BiH institutions, would have been necessary.

This was also the understanding of the PIC as expressed in 2008. In setting forth the criteria for resolving the state property issue, the PIC Steering Board stated in 2008 that it was the Entities that owned the property that would be allocated to state-level institutions. In a 30 October 2008 Statement, the PIC Steering Board stated that, along with "register[ing] ownership of all State property needed by the State to exercise its constitutional competencies . . . [a] clear legal framework by which the State can *acquire* additional public property in line with any future

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Property] Commission's recommendation, which, *on the basis of Constitutional competences*, will enable the authorities to dispose of or otherwise allocate State Property . . ." (emphasis added).

[14] Law on the Temporary Prohibition of Disposal of State Property of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, No. 20/05, 17/06, 62/06, 40/07, 70/07, 94/07 (emphasis added).

[15] Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska, Official Gazette of Republika Srpska, No. 32/05, 32/06, 100/06, 44/07, 86/07, 113/07 (emphasis added).

[16] The Conclusions of the London conference are available online at www.ohr.int/pic.

expansion of competencies will also need to be established."[17] The PIC Steering Board understood that the BiH government would have to acquire state property from the Entities because the Entities, and not the BiH government, owned state property located in their territories.

These actions and decisions of all relevant actors in BiH make clear, beyond any doubt, that the common understanding of those interpreting and implementing the Constitution of BiH was that the Entities own and control all state property. The U-8/19 decision has offered no reasonable justification for its strained view to the contrary.

V. The 2012 decision that the U-8/19 ruling relied on was not grounded in the Constitution.

The U-8/19 Decision relied heavily on the Constitutional Court's 2012 decision in the U-1/11 Case, which held that title to state property belonged to BiH and that the BiH Parliamentary Assembly must enact a law allocating state property while complying with the interests of the Entities.

The U-1/11 decision was not grounded in the BiH Constitution. Instead, in order to conclude that state property was to be regulated by the BiH level, rather than by the Entities where it was located, the U-1/11 Court conducted a sort of "metaphysical" analysis of selected provisions, words, and phrases from the BiH Constitution, applying to them various legal theories (named but undefined in the Decision), including "normative hierarchy," Hans Kelsen's theory of "three levels in federal states," and "the notion of 'identity and continuity'" of the state. The result of the (asserted but not explained) application of these theories to the concept of "state property," according to the Decision, mysteriously provided a rationale for setting aside the Constitution, established law, and established practice.

The U-1/11 decision failed to mention, let alone distinguish, the Court's previous decisions that reached a directly contrary result and held that the Entities had the right of disposition of state property within their territory. The U-1/11 decision, moreover, took no account of the applicable legislative enactments of the BiH Parliamentary Assembly recognizing Entity authority or of the consistent practice and opinion of Entity and BiH officials, and even of the High Representative, in dealing with state property. As explained above, all of these laws, practice, opinion, and activities had been based on a common understanding that the BiH Constitution leaves each Entity the sole authority to deal with and dispose of state property within its territory.[18]

The U-1/11 Decision relied heavily on the 2001 Agreement on Succession Issues of the former Yugoslav states. As noted above, however, the Succession Agreement is completely irrelevant to the disposition of state property as between the Entities and BiH.

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[17] Statement by the Ambassadors of the Peace Implementation Council's Steering Board, 30 Oct. 2008.

[18] The Court's effort to distinguish its own earlier case approving article 68 of the RS Constitution was completely unpersuasive. The Court had previously approved the provision of article 68 which provided the RS government with broad authority over property in the RS.

Before the Succession Agreement, the Federal Republic of Yugoslavia (FRY) maintained that, as the FRY was the only successor state to the Socialist Federal Republic of Yugoslavia (SFRY), the FRY 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."[19] 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.[20]

The Succession Agreement made no effort or claim to regulate the disposition of state property *within* the successor state to which such property passed, but only to allocate SFRY state property *among* the successor states.[21] 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.[22]

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, they would have made that intention clear in the Dayton Accords.

As explained above, in 2007, the BiH Constitutional Court upheld the constitutionality[23] 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."[24] 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. Almost two decades have passed since the Succession Agreement, and there has been no amendment changing 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.

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[19] Agreement on Succession Issues, Annex A art. 2(1).

[20] Agreement on Succession Issues, Annex A art. 8(2).

[21] *See* Agreement on Succession Issues, preamble para. 3.

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

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

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

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.*

VI. The U-8/19 decision is contrary to several more recent Constitutional Court decisions.

The U-8/19 Decision contradicts three recent Constitutional Court decisions in which the foreign judges did not take part. In those decisions, the Constitutional Court upheld decisions of RS courts determining that agricultural land registered as state property in land registers, was governed by and was at the disposal of Republika Srpska.[25] In rejecting an appellant's claim that the RS violated its right to property under the BiH Constitution and Protocol No. 1 to the European Convention on Human Rights, the Constitutional Court noted with approval that the RS court "found that the said real estate was registered in land registers and other public registers as state property in part 1/1, administered and disposed of by the Republika Srpska."[26]

VII. The U-8/19 decision absurdly suggests that the Constitutional Court can declare virtually any land to be "state property."

In 2010, the High Representative took an inventory of state property throughout BiH and published the results in a Final Report on the State Property Inventory. The High Representative's inventory did not classify the agricultural land at issue in the U-8/19 case as state property.

In an effort to justify its view—contrary to the High Representative's inventory—that the agricultural land at issue in U-8/19 case could be considered state property, the Court wrote, in a mystifying passage:

> The Constitution of the Socialist Republic of Bosnia and Herzegovina (Article 92) stipulated that the good of general interest, such as, inter alia, land, forests, water and other natural resources enjoyed special protection and were used under the terms and in the manner as prescribed by the law. However, in addition to the fact that it was defined as public good of general interest, agricultural land is also used as means of work in the agricultural production being of general interest. In this connection, the Constitutional Court notes that agricultural land had the status of people's property in the legal system of the Socialist Republic of Bosnia and Herzegovina

[25] BiH Constitutional Court, Case AP-2108/14, 7 March 2017; BiH Constitutional Court, Case AP-4731/14, 19 Apr. 2017; BiH Constitutional Court, Case AP-2184/16, 11 Oct. 2018

[26] BiH Constitutional Court, Case AP-2108/14, 7 Mar. 2017.

> and socially-owned property at a later point, which encompassed the right to manage, use it and have it at their disposal.[27]

The court concluded:

> Taking into account the legal continuation of the State of Bosnia and Herzegovina under Article I(1) of the Constitution of Bosnia and Herzegovina, the Constitutional Court observes that it follows from the foregoing that the land, including agricultural land, constituted public or State-owned property.[28]

Though it is difficult to follow the Court's reasoning, such as it is, if taken at face value it could be interpreted to mean that the BiH level now has title to and control over whatever property was subject to ownership by the Yugoslav-era state. If that is what the Court meant, then the result is not just absurd and illegal, but dangerous. Yugoslavia was a communist system in which *virtually everything* was subject to claims of ownership by the state. If all property that the Yugoslav-era state could claim were to be considered state property now, and the Entities could make no provision for the disposition of that property, then there would be little that might *not* be state property in BiH, and the Constitutional Court would effectively have rendered a complete transformation of the BiH economy. Most private property would now be at risk of being declared state property by the Constitutional Court and its foreign judges. This absurd result would constitute a clear violation of the private right to property under Article II(3)(k) of the BiH Constitution. It would also be directly contrary to the Constitution's Preamble, which says the parties desire "to promote the general welfare and economic growth through the *protection of private property* and the promotion of a market economy."

On the other hand, if the Court was not intending to rule that all public and state-owned property in the former Yugoslavia was now BiH property, then the U-8/19 decision is an incomprehensible mess foisted upon the citizens by BiH by incompetent, unaccountable foreign judges.

VIII. The claimant in the U-8/19 case lacked standing.

The BiH Constitution provides that disputes may be referred to the Constitutional Court "only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity."[29] The claim in case U-8/19 was brought by members of the RS Council of Peoples, which is not a chamber of a legislature of an Entity. In fact, the Council of Peoples did not even

[27] BiH Constitutional Court, Decision on Admissibility and Merits, Case U-8/19, para. 37.

[28] *Id*.

[29] BiH Constitution, Art. VI(3)(a).

exist at the time of the BiH Constitution. It was established by an amendment to the RS Constitution that was forced on the RS by the High Representative.

Unlike the Federation House of Peoples, which is a chamber of the Parliament of the Federation, the Council of Peoples is not a chamber of the legislature of the RS and is not referred to as such in the RS Constitution. The RS's only legislature is its unicameral National Assembly, which has the power to enact laws on its own, except in special circumstances. The Council of Peoples, which is appointed by the caucuses of the National Assembly, is a special body that has only very specific functions.

Because the Council of Peoples is not a "chamber of a legislature," the members of the Council of Peoples who brought the U-8/19 claim lacked standing. The Constitutional Court was required by the Constitution to dismiss the case, and has no authority to expand its jurisdictional reach on its own volition, and hear cases not assigned to it by the Constitution. In the U-8/19 decision, the Court was acting far beyond the bounds of its own authority.

IX. Judges of the Constitutional Court violated judicial ethics.

The RS is aware of Constitutional Court judges being influenced by *ex parte* communications from foreign officials and divulging confidential information to those officials about the U-8/19 case. This is a flagrant violation of provisions against *ex parte* communications in Chapter 5.5 of BiH's Judicial Ethics Handbook. Foreign officials even had advance knowledge of the U-8/19 decision. Indeed, the RS Government first heard about the U-8/19 decision from a foreign diplomat before the decision was even announced.

Such illegal actions by the foreign judges on the Court clearly indicate that they are not acting as fair-minded interpreters of the BiH Constitution, but, rather, view themselves as installed to do the bidding of outsiders. Further, decisions that are the products of such improper actions and proceedings are not legitimate judicial decisions.

HIGH REPRESENTATIVE INZKO'S THREAT TO IMPOSE A GAG LAW

High Representative (HR) Valentin Inzko's talk of imposing on BiH a law criminalizing the expression of certain opinions about BiH's wartime history is an assault on BiH's democratic constitutional system and an unwarranted threat to reconciliation, free historical inquiry, and freedom of expression. The HR has no legal authority to cast aside BiH's democratic legislative system and decree laws, and thus no such measure would be legally binding upon the citizens of BiH. Moreover, a gag law criminalizing any questioning of whether the massacre at Srebrenica should rightly be considered a genocide would be unwise, unenforceable, illegal, and unconstitutional.

Mr. Inzko's imposition of a gag law would be an unlawful attack on BiH democracy.

It would be manifestly illegal for the HR to impose a gag law—or any other law—on BiH. BiH is a sovereign state, and its Constitution establishes a democratic system for enacting laws. Mr. Inzko has no authority under the Dayton Accords, or any other source of law, to act as a dictator and impose laws on BiH. Annex 10 of the Dayton Accords, the sole source of the HR's legal authority, defines a strictly limited mandate for the HR, authorizing it to engage in such activities as to "[m]onitor," "[m]aintain close contact with the Parties," "[f]acilitate," "[p]articipate in meetings," and "[r]eport." The HR's mandate does not include any suggestion of dictatorial authority to make decisions binding on BiH citizens. Moreover, the imposition of a gag law on BiH would violate the right to self-determination of BiH's peoples and the human rights of BiH citizens under important binding treaties.

Because the HR has no authority to impose laws on the citizens of BiH, no gag law proposed by Mr. Inzko can be binding upon BiH citizens unless and until it is properly adopted by the BiH Parliamentary Assembly in accordance with applicable constitutional procedures. Far from adopting such a law, the Parliamentary Assembly recently rejected such legislation soundly. On 23 January 2020, the upper chamber of the Parliamentary Assembly, the House of Peoples, defeated a proposed gag law, with nine out of 15 members of the chamber voting against it.[1] The HR has no lawful power to overrule BiH's legislature on this or any matter.

A gag law would undermine reconciliation and unnecessarily stifle historical inquiry.

Reconciliation comes with justice, dialogue, and free historical inquiry in the search for truth. Republika Srpska (RS) and its leaders strongly support investigating all wartime atrocities and bringing all war criminals to justice, regardless of their ethnicity or that or their victims. One does not promote reconciliation by imprisoning those who express certain historical opinions. In fact, criminalization of certain opinions only serves to deepen mistrust and resentment.

[1] Lamija Grebo, *Bosnian MPs Reject Legislation to Criminalise Genocide Denial*, Balkan Insight, 23 Jan. 2020.

Moreover, suppression of ideas is the enemy of historical truth and understanding. As Prof. Robert Hayden has observed, "The whole point of criminalizing the presentation of a point of view is to prevent anyone from considering that some elements of it might be true."[2] It matters not whether certain issues have already been the subject of judicial or historical inquiry; the ongoing gathering, analysis, and understanding of facts regarding historical events is not to be arbitrarily cut short by enforcing one particular understanding of those events.

Even leaving aside the muzzling of speech, the fixation on the "genocide" classification inhibits reconciliation in BiH. Christian Axboe Nielsen of Aarhus University found in a 2013 paper that "[i]n Bosnia, the disproportionate attention on genocide helps to perpetuate the zero-sum approach that has informed Bosniak–Serb political negotiations since the end of the war."[3]

Last year, the RS established an independent international commission to examine the suffering of all peoples in and around Srebrenica between 1992 and 1995. The commission is headed by Israeli historian Gideon Greif, a professor at the University of Texas who is one of the world's leading Holocaust researchers. The commission's other members are similarly distinguished scholars from the United States, Japan, Australia, Nigeria, Italy, Serbia, and Germany. The commission is not an attempt to deny that large-scale atrocities were committed against Bosniaks in Srebrenica. Instead, it is a search for truth about crimes in Srebrenica—regardless of the ethnicity of the victims—during the entire war.

It is clear, as RS leaders have often stated, that terrible war crimes were committed at Srebrenica. The operational objectives of the actions in Srebrenica, however, and whether the resulting massacre should be labeled a genocide, are subjects of legitimate historical inquiry, debated not only in BiH but also among international scholars and experts on the region. For example, Prof. William A. Schabas, president of the International Association of Genocide Scholars, has written that categorizing the Srebrenica atrocities "as 'genocide' seems to distort the definition unreasonably."[4] Gen. Lewis MacKenzie, a former commander of UN forces in Sarajevo, has written that at Srebrenica, "[t]he Bosnian Muslim men and older boys were singled out and the elderly, women and children were moved out or pushed in the direction of Tuzla and safety. It's a distasteful point, but it has to be said that, if you're committing genocide, you don't let the women go since they are key to perpetuating the very group you are trying to eliminate."[5]

To render the expression or publication of such opinions criminal would be ridiculous, and does not serve to accomplish anything. Reconciliation among the citizens of BiH cannot be forced by

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[2] Robert M. Hayden, *"Genocide Denial" Laws as Secular Heresy: A Critical Analysis with Reference to Bosnia*, Slavic Review, Vol. 67, No. 2 (Summer 2008), pp. 384-407, at p. 386.

[3] Christian Axboe Nielsen, *Surmounting the myopic focus on genocide: the case of the war in Bosnia and Herzegovina*, 15 Journal of Genocide Research, 21 21 (Feb. 2013).

[4] William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 Fordham International Law Journal 23, 47 (2001).

[5] Lewis MacKenzie, The real story behind Srebrenica, The Globe and Mail, 14 July 2005.

forbidding an open discussion of history, particularly when that discussion is ongoing around the globe.

A gag law such as that proposed by Mr. Inzko can only seek to criminalize departures from supposed historical orthodoxies, which is unacceptable in a free civil society. In a 2016 *Foreign Policy* piece, Danish human rights expert Jacob Mchangama points out that the so-called "memory laws" that some European countries have adopted "serve as the model for criminalizing accurate but nationally inconvenient historical accounts, as well as entrenching deeply flawed alternative histories used as foundations for specific national ideologies and repressive political agendas."[6]

Mr. Inzko's own comments at a recent speech to a conference organized by the Max Planck Foundation for International Peace and Rule of Law show that criminalizing discussion is the exact opposite of what is needed in BiH. "Dialogue involves different—often completely opposite—viewpoints," Mr. Inzko said. "Reconciliation involves the restoration of understanding and empathy between people who have caused one another harm—or who are, at least, *believed* to have caused one another harm. . . . This is necessary in order to have the sort of challenging—and perhaps painful—dialogue that can lead to deep and lasting reconciliation. . . . Without this dialogue, there won't be reconciliation—the reconciliation that this country needs if it is to move forward."

A gag law would be impossible to enforce in any fair and effective manner.

Polls show that the vast majority of Serbs in the RS do not consider the massacre in Srebrenica to be a genocide. In a 2018 Al Jazeera poll, just 20% of Serbs in the RS said that what happened at Srebrenica was a genocide while 66% said it was not.[7] Thus, Mr. Inzko is proposing to criminalize the expression of an opinion held by the bulk of the RS's Serb population. When the expression of an opinion so widely held is criminalized, it must be enforced—if at all—only very sporadically, which typically means that enforcement becomes selective, unjust, and politically-motivated.

Moreover, these issues are discussed and debated throughout the region—and not just with respect to Srebrenica, but also with respect to other regional atrocities, such as the genocide waged against the Serbs and Jews by the Ustashe regime in Croatia in the 1940s. The HR is not capable of controlling debate about all such issues in Serbia, Croatia, and the entire region. Thus it is not possible to prevent discussion of these issues in widely read regional sources, and so it is impossible to somehow insulate the citizens of BiH from exposure to these issues. If a historian could publish a paper on Srebrenica in a journal in Serbia, for example, it would be fruitless and counterproductive to criminalize the publication of the same paper in BiH.

With or without Mr. Inzko's proposed gag law, the debate about Srebrenica will continue, inside and outside BiH. Outside BiH, people will remain free to openly discuss the issue. Inside BiH, the only difference the gag law would make would be to subject individuals—mainly Serbs—to

[6] Jacob Mchangama, *First They Came for the Holocaust Deniers, and I Did Not Speak Out*, Foreign Policy, 2 Oct 2016.

[7] *Istraživanje: Kako građani RS-a gledaju na genocid u Srebrenici*, Al Jazeera, 11 July 2018.

criminal sanctions for engaging in the same discussions. At best, then, a gag law would simply operate to move the debate to forums outside the reach of Mr. Inzko's law, which would accomplish nothing except to alienate the Serb population.

A gag law would violate the BiH Constitution and international human rights law.

A gag law that forbids questioning how the Srebrenica massacre is classified would violate BiH citizens' right to freedom of expression, which is recognized by the Article II(3)(h) of the BiH Constitution and the European Convention on Human Rights. Countries that respect human rights do not criminalize peaceful expressions of opinion.

Article 10 of the European Convention on Human Rights provides:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The second section of Article 10 allows for restrictions on the freedom of expression only

> [1] as are prescribed by law *and* [2] are necessary in a democratic society, [3] in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[8]

None of these potential justifications for restrictions on freedom of expression apply to a law criminalizing expressions of an opinion as to how the crimes of Srebrenica should be categorized. The debate in BiH about how the Srebrenica crimes should be labeled has gone on for nearly 25 years among politicians, scholars, and ordinary citizens, and it has never threatened public order or otherwise made restrictions on the freedom to debate the issue "necessary in a democratic society." Mr. Inzko has made no case, and could not succeed in making the case, that such extraordinary restrictions on free speech have suddenly become necessary in BiH now. Indeed, an attempt by the HR to impose such a law in BiH may generate more heated controversy than a discussion of Srebrenica itself.

The European Court of Human Rights has made clear that the second section of Article 10 does not give states license to adopt laws that severely restrict and criminalize free speech even when that speech amounts to a denial of a historical genocide. In a 2015 decision, the Grand Chamber of the European Court of Human Rights held that Switzerland's prosecution of a politician for denying the occurrence of the Armenian genocide (in which as many as 1.5 million Armenians

[8] Emphasis added.

may have perished) violated the politician's freedom of expression because the restriction was not necessary in a democratic society.[9] The court explained that freedom of expression applies

> not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, but these must be construed strictly, and the need for any restrictions must be established convincingly.[10]

The court also explained:

> Under the Court's case-law, expression on matters of public interest is in principle entitled to strong protection. . . . Statements on historical issues, whether made at public rallies or in media such as books, newspapers, or radio or television programmes are as a rule seen as touching upon matters of public interest.[11]

Thus, Mr. Inzko's threatened gag law would run counter to the rulings of the European Court of Human Rights. Further, it would run counter to the jurisprudence of the vast majority of the member states of the Peace Implementation Council. Such prior restraints on free speech would never be accepted in countries with a strong constitutional and common law tradition of respecting free speech, such as the United States or the United Kingdom, and even most civil law countries have declined to enact laws punishing genocide "denial."

A 2008 European Council Framework Decision provided for the criminalization of genocide "denial" under certain limited circumstances.[12] But according to a 2014 European Commission report to the European Parliament and Council, 17 EU members (which together comprise some 89% of the EU's population) did not criminalize genocide "denial."[13] Three additional EU members adopted stricter limits to criminalization than those described in the Framework

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[9] *Perinçek v Switzerland*, European Court of Human Rights, App no 27510/08, 15 October 2015.

[10] *Id*. at para. 196.

[11] *Id*. at para. 230.

[12] Council Framework Decision 2008/913. The Framework Decision provides for criminalization of public genocide "denial" only when the expression is, "directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin," and "carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."

[13] European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM/2014/027, p. 5.

Decision.[14] Moreover, the Framework Decision was issued before the European Court of Human Rights made clear that prosecuting genocide "denial" violates the freedom of expression under the European Convention on Human Rights. It is unsurprising that in the EU member states that criminalize certain genocide "denial," prosecutions are exceedingly rare. For example, a November 2017 report found that Croatia's genocide "denial" legislation had never been enforced, notwithstanding the ongoing debates within Croatia regarding various past atrocities.[15]

Moreover, the European Court of Human Rights is not the only court in Europe to find that bans on "genocide denial" are inconsistent with freedom of expression. In 2012, for example, France's *Conseil Constitutionnel* ruled that a law banning denial of "the existence of genocides recognized by the law" violated the freedom of expression.[16] Similarly, in 2017, the *Conseil Constitutionnel* struck down a law criminalizing "extreme negation, minimisation or trivialisation of a crime of genocide."[17]

For Mr. Inzko to try imposing a law criminalizing the expression of historical opinions about BiH's war would be an unlawful assault on BiH's democratic system. Such a law would undermine reconciliation and historical inquiry, be impossible to enforce effectively, and violate international law and BiH citizens' right to free expression. The international community should reject Mr. Inzko's threat to impose such a law and demand that he work solely within his limited mandate under the Dayton Accords.

[14] *Id*.

[15] Tamara Opačić, *INVESTIGATION: Selective Amnesia: Croatia's Holocaust Deniers*, Balkan Insight, 27 Nov. 2017.

[16] Conseil Constitutionnel, Décision n° 2012-647 DC of 28 Feb. 2012.

[17] Conseil Constitutionnel, Décision no. 2016-745 DC of 26 Jan. 2017.

RECENT POLITICAL ABUSES BY THE SDA AND BIH PRESIDENCY MEMBER ŽELJKO KOMŠIĆ VIOLATE THE DAYTON ACCORDS AND OBSTRUCT PROGRESS

In recent months, the SDA and other Bosniak political parties, as well as BiH Presidency Member Željko Komšić, have engaged in a series of political maneuvers designed to consolidate power at the expense of the Entity autonomy guaranteed by the Dayton Accords, and in so doing have abused their power.

The Bosniak parties, especially the SDA, have obstructed RS efforts to deal with the coronavirus and exploited the crisis in an effort to centralize BiH and consolidate power.

During the coronavirus pandemic, certain actions by the SDA indicate that the first priority for many senior figures in the party has remained the establishment of BiH as a centralized, Bosniak-dominated state, rather than responding effectively to protect the wellbeing of BiH citizens during an unprecedented public health crisis.

The SDA has even attempted to obstruct the vigorous efforts of Republika Srpska ("RS") to respond to the coronavirus crisis. On 9 April, the International Monetary Fund ("IMF") said it stood ready to approve 330 million euros in emergency financing for BiH to address the coronavirus crisis, but warned that before the funding could be approved, BiH would first have to reach internal agreement on how to allocate it.[1] On 10 April, the BiH Fiscal Council, which was supposed to approve a loan request to the IMF, was unable to do so because SDA member and Federation Prime Minister Fadil Novalić failed to attend, thus preventing a quorum. It was only after the US and EU ambassadors organized a meeting with the leading Serb and Croat parties that the SDA finally negotiated with respect to the allocation. On 13 April, the parties reached agreement,[2] and the next day, the Council of Ministers agreed that the 62% of the funding would go to the Federation and the remaining 38% to the RS, with each Entity providing half a percent of their share to the Brcko District.[3]

On 21 April, the IMF's executive board approved the disbursement of 333 million euros in emergency assistance to BiH under the IMF's Rapid Financing Instrument ("RFI").[4] On the same day, however, the SDA members of the BiH Council of Ministers blocked a decision to draw funds

[1] Iskra Pavlova, *Bosnia to get 330 mln euro in IMF crisis financing if entities first agree on funds' distribution*, SeeNews, 9 Apr. 2020.

[2] *Political leaders agree on how IMF aid package should be divided among entities*, N1, 11 Apr. 2020.

[3] Iskra Pavlova, *Bosnian entities agree on distribution of 330 mln euro in IMF crisis financing*, SeeNews, 14 Apr. 2020.

[4] Iskra Pavlova, *IMF approves 333 mln euro in emergency coronavirus financing to Bosnia*, SeeNews, 21 Apr. 2020.

from the RFI by adding new, unprecedented conditions.[5] Finance Minister Vjekoslav Bevanda, a Croat, called the demands unacceptable and warned that they could indefinitely delay the disbursement of the funds.[6]

The SDA also blocked for almost a week the RS National Assembly's introduction of a state of emergency enabling the RS Government to take timely measures against the pandemic. SDA members of the RS Council of Peoples (a body not mentioned in the BiH Constitution, but imposed on the RS by the High Representative) threatened to veto the National Assembly's decision, claiming, without any basis, that the state of emergency may violate Bosniaks' vital national interests. Under pressure, the SDA members finally agreed to drop their obstruction after meeting with RS President Željka Cvijanović, but precious time had been lost.

What's more, BiH's foreign minister, SDA member Bisera Turkovic, has tried to obstruct RS efforts to secure pandemic aid from friendly countries in Europe. Without authorization from the BiH Presidency, which has the constitutional responsibility for BiH foreign policy, Turkovic wrote to EU High Representative Josep Borell and Hungarian Foreign Minister Peter Szijjarto complaining that European countries were sending aid to Republika Srpska, arguing that all aid must go to the BiH level instead.[7] But Entities asking for—and receiving—aid directly from other countries is fully consistent with the BiH Constitution. It is perfectly appropriate for units of federal states to procure aid from foreign states. The U.S. state of New York, for example, recently asked for and received medical supplies from foreign countries. The RS would never try to block efforts by other governments in BiH to secure needed international assistance. Indeed, RS officials have offered to help the Federation in this respect. The coronavirus pandemic is a time for BiH's governments to be especially supportive of each other, not to obstruct each other's efforts at obtaining aid.

It is essential, moreover, that the Bosniak leadership at the BiH level and in the Federation coordinate with the RS with respect to efforts to curb the pandemic. Unfortunately, that coordination has sometimes been lacking. For example, the Federation has failed to coordinate curfew and border quarantine measures with the RS, thus undermining RS efforts against the pandemic.

The SDA has also been trying to use the crisis to take away the constitutional authority of the Federation's cantons. As was recently noted by a cantonal committee of the HDZ, BiH's largest Croat party, "The SDA is not choosing either its means, nor the time to continue to implement its concept of an expressly centralized and unitary state. It will not divert from this path even in this terrible moment of threat to our entire homeland."[8] The president of the Croat Republican Party, Slaven Raguž, wrote that the main purpose of the newly-created Federal Civil Protection

[5] *Decision to draw IMF funds not adopted – Bosniaks did not vote for it*, SRNA 21 Apr. 2020.

[6] *Bosnia gets $361 mln IMF loan despite coronavirus spending plan row*, Reuters, 23 Apr. 2020.

[7] Danijel Kovacevic, *Hungary's Medical Aid Reopens Bosnia's Wounds*, Balkan Insight, 16 Apr. 2020.

[8] *HDZ BIH HNŽ ODGOVORIO SDA HNŽ: SDA pokušava "disciplinirati" i diskreditirati dužnosnike HDZ-a i stvoriti unitarnu državu, Vlada HNŽ pomaže bolnici u Konjicu*, Postok.info, 30 Mar. 2020.

Headquarters is to "centralize all power at the level of the Federation . . . so that the autonomy of the cantons can be abrogated." According to Raguž:

> All of the orders that Fahrudin Solak [the head of the Federation Center for Public Safety] is issuing are illegal, and, moreover, unconstitutional, because they are abusing a state of natural disaster to limit a good amount of the human and civil rights of the citizens of BiH. A coup d'etat has been carried out.[9]

The SDA, moreover, has used the coronavirus crisis as a pretext to try to force the creation of a new health ministry at the BiH level, despite the fact that the BiH Constitution clearly leaves health in the competence of the Entities. The SDA has also been engaging in single-party decision-making in the Federation, bypassing the HDZ and even other Sarajevo-based parties. The HDZ is also expressed concerns about intimations from Sarajevo that the Federation Constitution might be suspended.

The SDA's illegitimate takeover of the Central Election Commission

On 11 March 2020, the BiH House of Representatives, led by the SDA and Željko Komšić's DF party, removed two of the seven members of the BiH Central Election Commission (CEC) and replaced them with their own preferred candidates. The House also reappointed the two SDA members of the CEC. The moves violated the rules of procedure for election of CEC members, because the legally-required public competition for members was never held.

The Croat National Council (HNS), an umbrella organization of major Croat parties and groups, rightly called the SDA's maneuvers unconstitutional and illegal, and a "crude destruction of the functioning of a legal state in BiH," and that said that the SDA is creating "new crises and cleavages between the legitimate representatives of the constituent peoples of BiH." The SDA, the HNS wrote is "crudely violating agreements and attempts to stabilize BiH [and through its] unilateral actions is destroying the foundations and future of Bosnia & Herzegovina. [The SDA] is showing that it does not want partnership and does not want progress in this country . . . [The SDA] just wants BiH for itself and for the Bosniacs."

Similarly, a leading HDZ official, Predrag Kozul, recognized that the development "was one of the most serious attacks on the survival and integrity of BiH in recent times."

The SDA's moves to gain control of the CEC brought condemnation not just from the largest Serb and Croat parties, but even from a major Bosniak party, the SBB. SBB President Fahrudin Radoncic, who is also BiH's security minister, said, "While we are expending our health and the last atom of our strength to help citizens in the migrant crisis, and corona pandemic, and in other ways, [the SDA] is already planning how to again compromise the electoral process and manipulate the will of the citizens."

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[9] *"HRVATI NEMAJU POLITIČKI IDENTITET" Slaven Raguž u Podcastu Bura: Solak je samo isturena lutka na koncu SDA koja izdaje naredbe; Donesene odluke protuustavne i protuzakonite*, Postok.info, 22 Apr. 2020.

Radoncic added that if the SDA's grave abuses are allowed to stand, the upcoming elections will have no validity.

The SDA is refusing to define the inter-entity boundary line as mandated by the Dayton Accords.

Annex 2 of the Dayton Accords, the Agreement on Inter-Entity Boundary Line and Related Issues, requires the parties to "form a joint commission, comprised of an equal number of representatives from each Party, to prepare an agreed technical document containing a precise description of the Inter-Entity Boundary Line." Notwithstanding this clear requirement, and even though almost 25 years have passed since the Dayton Accords, this joint commission has never been formed. In February, NATO HQ Sarajevo recognized and confirmed that under Annex 2 of the Dayton Accords, the Federation of BiH, Republika Srpska, and BiH are still obliged to establish a joint commission to develop a document containing a precise technical description of the inter-entity boundary line.[10]

Without a precise description of the inter-entity boundary line, there is no way for the Entities to know exactly where their zones of competence lie, and, in border areas, no way for governments or citizens to know which Entity governs where. Without a complete demarcation of the inter-entity boundary line, there are citizens who cannot know in which jurisdiction they reside, to whom they pay taxes and receive benefits, and in which elections they are entitled to exercise their democratic rights.

Despite the Federation's obligation under Annex 2, the Federation's caretaker prime minister, SDA member Fadil Novalic, completely ruled out the Federation's participation in a joint commission on the inter-entity boundary line, stating that the Federation would "never participate in any inter-entity boundary line-related discussions."[11] This is in stark defiance of Annex 2's requirement that the parties, one of which is the Federation, form a joint commission on the inter-entity boundary line. To no one's surprise, High Representative Valentin Inzko, despite his claim to be a protector of the Dayton Accords, and despite his talk of "red lines" and the importance of the rule of law, has failed to criticize the SDA for its outright refusal to comply with Annex 2.

A parallel foreign policy

The BiH Constitution provides that the Presidency "shall have responsibility for . . . [c]onducting the foreign policy of Bosnia and Herzegovina."[12] Yet officials from Bosniak parties, including BiH's foreign minister and UN ambassador, have been trying to conduct their own parallel foreign policy without the BiH Presidency's approval. In March, for example, BiH UN Ambassador Sven Alkalaj gave a speech that presented not BiH positions but, instead, his party's positions on foreign-policy issues. The speech even virulently attacked one of the members of the BiH Presidency. Officials from Bosniak parties should respect BiH's Constitution and its provision

[10] *Dayton-based commitment – forming commission on inter-entity boundary line*, SRNA, 19 Feb. 2020.

[11] Danijel Kovacevic, *Bosnian Serbs Open New Battle Over Entity Borders*, Balkan Insight, 19 Feb. 2020.

[12] BiH Constitution, Art. V(3)(a).

endowing the Presidency with responsibility for BiH's foreign policy instead of infecting BiH foreign policy with partisan gamesmanship.

Presidency Member Komšić has abused his office by failing to share information with other members of the Presidency.

During his chairmanship of the BiH Presidency, Željko Komšić has abused his office by failing to cooperate responsibly with other members of the Presidency.

Komšić violated the Constitution by failing to inform the other members of the Presidency about a nomination to the BiH Constitutional Court by the president of the European Court of Human Rights (ECtHR). The BiH Constitution provides that the foreign members of the Constitutional Court "shall be selected by the President of the European Court of Human Rights after consultation with the Presidency." The chairman of the Presidency, which has no greater constitutional authority than that of the other Presidency members, has no special role in the consultations with the ECtHR President. On 18 November 2019, ECtHR President Linos-Alexander Sicilianos wrote to Komšić, who was then chairman of the Presidency, regarding Raimondi's nomination of Angelika Nussberger to be the next foreign member of the BiH Constitutional Court and requesting that the Presidency be consulted about the nomination. Komšić failed to inform his fellow members of the Presidency about Sicilianos's letter. More than a month later, Komšić wrote to Sicilianos, stating that he would inform the other members of the Presidency about the nomination. However, this statement proved to be false, as Komšić continued to keep the other members of the Presidency in the dark and purported to approve of Nussberger's nomination himself. This was a flagrant and unconstitutional power grab by Komšić. It also directly violated the Rules of Procedure of the BiH Presidency, which provide that the Presidency as a whole is to consider the nominee.

In another example of Komšić abusing his office, Komšić failed to inform the other members of the presidency that he was attending a meeting with EU leaders in Brussels. By attending the meeting without the other members of the presidency—and without even informing them that he would attend— Komšić improperly placed himself above his fellow Presidency members.

Naturally, HR Inzko had no criticism for these abuses by Komšić.

Further evidence confirms that the SDA and its allies are deliberately spreading misinformation about the RS in the media in an intentional effort to poison relations.

It has long been known by close observers of the press in BiH that the SDA engages in a purposeful misinformation campaign targeting the RS and the Serb and Coat communities generally. Now, additional information about this campaign has been openly shared even by SDA insider. In an interview in a Sarajevo news television program, Aljosa Campara, who is a member of the SDA presidency and interior minister of the Federation, complained about disinformation campaigns being run by the head of BiH's Intelligence-Security Agency, Osman Mehmedagic. According to Campara, Mehmedagic enlists Sarajevo journalist Avdo Avdic to write defamatory news stories

about various individuals and groups in BiH.[13] Avdic writes for the Sarajevo-based online magazine *Zurnal*, which is partially funded by USAID.

The same players and system have been used repeatedly in recent years to spread false allegations about the RS and the BiH's main Croat party. Most prominently, they were behind a false story that circulated in 2018 alleging that there were Russian-trained paramilitaries in the RS. This story was an outright fabrication without the slightest basis in fact, purposely planted in a calculated effort to stoke fear, mislead decision makers in Western capitals, and inflame fear among the citizens of BiH. Nonetheless, the outrageous falsehood received considerable attention in Western capitals. Within hours, the UK's *Guardian* had publicized the story, despite its coming from a little-known Sarajevo website, and the planted falsehood continues to be repeated in numerous media outlets.

In reality, despite the RS's friendly relations with Russia, there are no Russian-trained forces in the RS whatsoever, and never have been. Instead, RS Interior Ministry personnel train frequently with the U.S. armed forces. Almost every week, U.S. personnel may be found at the RS's new Zalužani police training center, engaging in various training and observation exercises. Despite this, the fabrication of Russian-trained paramilitaries in the RS is still frequently repeated by Western "experts" that seek to paint the RS in an unflattering light.

While the RS welcomes and appreciates foreign assistance in developing a vigorous independent press, it believes donors should be careful to ensure that they are not supporting media outlets that spread disinformation.

[13] *BUKTI VERBALNI RAT U SDA Čampara: Osmica naručuje tekstove od Avdića, Mostar i Stolac najvažnije točke za obranu BiH i Bošnjaka u njoj*, Poskok.info, 9 Mar. 2020.