



REPUBLIC OF SRPSKA
PRESIDENT OF THE REPUBLIC

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

Dear Mr. Secretary-General:

To assist the Security Council in its upcoming debate on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 17th Report to the UN Security Council. Among the key issues addressed in the report are Bakir Izetbegovic's unlawful scheme to unilaterally represent BiH before the International Court of Justice (ICJ), efforts by his SDA party and its international allies to undermine the protections of the Dayton Accords, the importance of BiH's Dayton structure, and Republika Srpska's agenda for reform.

In Section I, the report examines Bakir Izetbegovic's flagrantly unconstitutional attempt to unilaterally initiate new proceedings against Serbia before the International Court of Justice (ICJ) despite the opposition of the other two members of the BiH Presidency. Izetbegovic's move was a provocative attempt to undermine the legitimacy of Republika Srpska and the rights of the Serb People. It also defied the ICJ's clear instructions. Republika Srpska has responded to Izetbegovic's ICJ scheme by seeking legal accountability and reforms to restore the rule of law. Republika Srpska urges BiH's friends to condemn Izetbegovic's unlawful attempt to seize for himself powers reserved to the BiH Presidency.

Section II of the report addresses other efforts by Izetbegovic, his SDA party, and their international supporters to undermine the legal status of the Entities and Constituent Peoples under the Dayton Accords. Izetbegovic challenged the legitimacy of Republika Srpska's existence by seeking to outlaw RS Day, the longstanding and peaceful holiday marking the day Republika Srpska was founded. Though Republika Srpska modified RS Day to be consistent

with the Constitutional Court's November 2015 decision on the matter, the SDA and its supporters nonetheless accused Republika Srpska of defying the decision. In support of the SDA agenda, U.S. officials made demands on RS officials that unlawfully interfered in BiH's domestic affairs and threatened sanctions if the demands were not met—a threat that the outgoing Obama administration carried out against the RS president in its last week in office. The SDA has also continued to use the BiH Prosecutor's Office as a political weapon against RS officials.

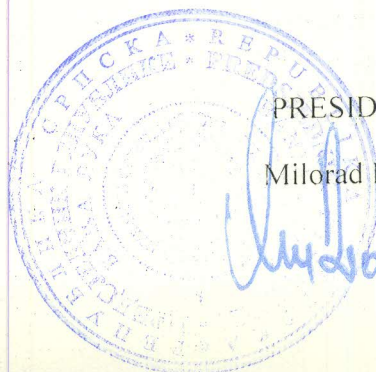
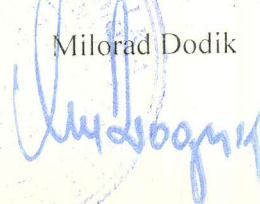
Section III explains that BiH's constitutional structure, created under the Dayton Accords, is indispensable and must be restored. The BiH Constitution, recognizing what long-term stability in BiH requires, left the Entities broad autonomy, strictly limited BiH-level competencies, and built in safeguards for each of BiH's Constituent Peoples. The High Representative, unfortunately, disregarded such protections—along with BiH's entire constitutional system—as he centralized BiH using his fabricated “Bonn Powers.” The same constitutional protections that the High Representative disregarded now enable BiH's Bosniak parties to block all reforms to restore the Dayton structure.

In Section IV, the report outlines Republika Srpska's agenda for reform. Republika Srpska despite the SDA's allegations, is not seeking to secede from BiH. Republika Srpska is instead working to implement the decentralized Dayton system, which the EU has made clear is no barrier to EU membership. Republika Srpska is continuing to pursue judicial reform through the EU-sponsored Structured Dialogue on Justice, despite SDA obstruction of essential changes. The BiH justice system requires significant reforms, including measures to prevent discrimination against war crimes victims based on ethnicity and to prevent politics from guiding the BiH Prosecutor's Office's decisions. It is also essential to reform the BiH Constitutional Court, which is plagued by political influence and whose seats reserved for foreigners are incompatible with BiH sovereignty and EU membership. Republika Srpska is also rapidly and faithfully implementing its part of the EU-sponsored Reform Agenda.

Section V of the report addresses other threats to BiH's security and progress. It explains that Republika Srpska has supported the necessary measures to fulfill the Reform Agenda at the BiH level, but that BiH institutions have, unfortunately, failed to implement them. Section V also explains how the SDA, an Islamist party, has helped make BiH a sanctuary for jihadists. The SDA also last year pressured the director of the BiH Statistics Agency into unlawfully imposing a program for the BiH census that inflates census results for political purposes.

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

Yours sincerely,

 PRESIDENT
Milorad Dodik


Republika Srpska's 17th Report to the UN Security Council

April 2017

Republika Srpska's 17th Report to the UN Security Council

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Republika Srpska's 17th Report to the UN Security Council

Introduction and Executive Summary

Republika Srpska (RS), a party to all of the annexes that comprise the Dayton Accords, respectfully submits this 17th Report to the UN Security Council, which outlines the RS Government's views on key issues facing Bosnia and Herzegovina (BiH). Among the issues examined in this report are Bakir Izetbegovic's unlawful attempt to unilaterally represent BiH before the International Court of Justice (ICJ), efforts by his SDA party and its international allies to undermine the protections of the Dayton Accords, the importance of BiH's Dayton structure, and Republika Srpska's agenda for reform.

I. Bakir Izetbegovic should be held accountable for his provocative and flagrant violation of the BiH Constitution in his attempt to misrepresent BiH before the ICJ.

Section I of the report examines Bakir Izetbegovic's recent violation of the BiH Constitution. In March, he attempted to initiate new proceedings against Serbia before the ICJ based on a 2007 ICJ judgment involving Serbia despite the other two members of the BiH Presidency opposing such action. The Constitution empowers only the BiH Presidency to represent BiH before international institutions such as the ICJ, and a single member of the Presidency has no authority to take decisions on its behalf. Yet Izetbegovic made no effort even to consult the other members of the presidency with respect to initiating new proceedings before the ICJ. Izetbegovic's move was a provocative attempt to undermine the legitimacy of Republika Srpska and the rights of the Serb People. His actions defied the ICJ's clear instruction that Sakib Softic, BiH's agent from the original lawsuit a decade earlier, was no longer authorized to represent BiH. Republika Srpska has responded to Izetbegovic's ICJ scheme by seeking legal accountability for those responsible and reforms to restore the rule of law. Republika Srpska urges members of the international community to condemn Izetbegovic's unlawful attempt to seize for himself powers reserved to the BiH Presidency.

II. Izetbegovic's unconstitutional actions involving the ICJ were a part of the SDA's continuing efforts to undermine the legal status of Republika Srpska and the Serb and Croat Peoples under the Dayton Accords with the aid of its supporters within the international community.

In section II, the report describes other efforts by the SDA and its international supporters to undermine the legal status of the Entities and Constituent Peoples under the Dayton Constitution. Izetbegovic challenged the legitimacy of Republika Srpska's existence by seeking a ban on RS Day, the longstanding and peaceful annual celebration of the day Republika Srpska was founded. Republika Srpska modified RS Day to be consistent with the Constitutional Court's November 2015 decision, but the SDA and its allies nonetheless accused Republika Srpska of defying the Constitutional Court. In support of the SDA agenda against Republika Srpska, U.S. officials made demands on the RS president and prime minister that unlawfully interfered in BiH's domestic affairs, threatening sanctions if the demands were not met—a threat that was carried out by the Obama administration in its last week in office. The SDA has also continued to use

the BiH Prosecutor's Office as a political weapon against RS President Milorad Dodik and other officials in violation of the rule of law.

III. The Dayton structure is essential to BiH's future.

Section III explains that the structure created by the Dayton Constitution is indispensable and must be restored. The Constitution, in recognition of what is necessary for long-term stability in BiH, left the Entities broad autonomy, strictly limited BiH-level competencies, and established protections for each of BiH's Constituent Peoples. Unfortunately, the High Representative bypassed those protections as he centralized BiH using his wholly fabricated "Bonn Powers." The very constitutional protections that the High Representative bypassed now enable BiH's Bosniak parties to veto even modest reforms to restore the Dayton structure.

IV. Republika Srpska's agenda for reform seeks to restore the political structure established by the Dayton Accords so that stability and prosperity are possible in BiH.

Section IV describes Republika Srpska's agenda for reform. Republika Srpska despite SDA claims, is not seeking to secede from BiH. Instead, Republika Srpska is working to implement the decentralized system guaranteed by the Dayton Constitution. As the EU has made clear, BiH's constitutional structure is no barrier to EU membership. Republika Srpska is continuing to seek judicial reforms through the EU-sponsored Structured Dialogue on Justice, despite the SDA's obstruction of necessary changes. It is essential to reform the BiH justice system in order to ensure that war crimes victims are treated the same regardless of their ethnicity and that the BiH Prosecutor's Office makes its decisions based on law instead of politics. It is also imperative to reform the BiH Constitutional Court, which is plagued by political influence and whose seats reserved for foreigners are incompatible with BiH sovereignty and EU membership. Republika Srpska is also rapidly implementing its part of the EU-sponsored Reform Agenda.

V. Other threats to security and progress

In section V, the report examines other threats to BiH's security and progress. Republika Srpska has supported the necessary measures to fulfill the Reform Agenda at the BiH level, but BiH institutions, unfortunately, are undermining BiH's progress by failing to implement them. Section V also explains how the SDA, an Islamist party, has helped make BiH a sanctuary for jihadists. The SDA also pressured the director of the BiH Statistics Agency into unlawfully imposing a program for the BiH census that inaccurately inflates census results for political objectives.

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

Section VI asks members of the international community to respect the Dayton Accords and BiH sovereignty. This includes supporting reforms to restore BiH's Dayton structure, refraining from intervening in BiH's domestic political disputes, and closing the Office of the High Representative, which is incompatible with BiH sovereignty and EU membership. It also includes ending the UN Security Council's unjustified application of Chapter VII of the UN Charter to BiH.

Republika Srpska's policies will be guided by its commitment to the Dayton Accords, the Reform Agenda, and other reforms to improve the wellbeing of its citizens.

I. Bakir Izetbegovic should be held accountable for his provocative and flagrant violation of the BiH Constitution in his attempt to misrepresent BiH before the ICJ.

1. In its 16th Report to the UN Security Council in October 2016, Republika Srpska explained how the Bosniak member of the BiH Presidency, Bakir Izetbegovic, and his SDA party have sought to manufacture crises in BiH and undermine inter-Entity and inter-ethnic cooperation. Since that report, Izetbegovic and the SDA have only stepped up their misconduct.

2. On 23 February 2017, Izetbegovic, unilaterally submitted an application for revision of a 2007 judgment of the International Court of Justice (ICJ) in the case *Bosnia and Herzegovina v. Serbia and Montenegro*. The original proceedings and decision of the ICJ were the source of significant political turmoil within BiH and the region. Although the case had been filed more than 20 years ago and the final judgment issued nearly 10 years prior, Izetbegovic sought to exploit the ICJ for his own perceived political gain by submitting an application for revision of the Court's judgment without any legal basis and in the face of warnings by domestic, regional and international governments. In doing so, Izetbegovic acted as if the interests and rights of Serbs within BiH did not exist.

3. Izetbegovic's action was a premeditated, direct violation of the Constitution of BiH, taken with knowledge that such action required support from the other co-equal members of the BiH Presidency and that the other members would not support it. Izetbegovic also acted with the knowledge, as he put it, that the "process of the revision in this case would cause the biggest crisis in BiH since the signing of the Dayton peace agreement."¹ Although some in the international community warned Izetbegovic against taking this action, it is remarkable that the international community has yet to publically condemn him for now having taken it. Izetbegovic's move to appeal the ICJ judgment against the wishes of the Croat and Serb members of the Presidency is emblematic of the SDA's broader contempt for the constitutional protections guaranteed to Serbs and Croats in the Dayton Accords. Izetbegovic should be held accountable for his illegal and provocative attack on BiH's constitutional order.

A. Izetbegovic's application violated the BiH Constitution.

4. Under the BiH Constitution, only the Presidency is empowered to represent BiH before international institutions such as the ICJ.² The BiH Constitution further provides that the Presidency shall "endeavor to adopt all Presidency Decisions . . . by consensus" and that such decisions nevertheless must be adopted by two Members "when all efforts to reach consensus have failed."³ There has been no decision by two members of the Presidency in support of submitting an application to the ICJ. In fact, Izetbegovic did not even attempt to obtain consensus among the Serb and Croat members of the Presidency. The application Izetbegovic directed to be filed with the ICJ was never submitted to other members of the Presidency for their decision.

¹ Mladen Dragojlovic, *IBNA/Analysis: Tensions in BiH Still High*; INDEPENDENT BALKAN NEWS AGENCY, 14 Feb. 2017.

² BiH Constitution, Art. V.3.

³ BiH Constitution, Art. V.2.c.

5. It is clear, therefore, that the pleading filed with the Court was not submitted on behalf of BiH, as the Statute of the ICJ requires and the ICJ itself concluded. Responsible authorities under the BiH Constitution—members of the Presidency Mladen Ivanic and Dragan Covic—were not given an opportunity even to review the pleading. The constitutional establishment of a three-member Presidency—with shared and exclusive authority to represent BiH and its three Constituent Peoples before international organizations—is itself proof of the importance to BiH stability that decisions are made by *all* of the Presidency members when issues arise of this sort.

6. Izetbegovic’s presentation of an application for revision of the ICJ’s prior judgment is unlawful and destructive to the stability of BiH. Legal actions to criminally prosecute this serious violation of law are warranted and should be instituted.

B. Izetbegovic’s ICJ application was a provocative attempt to undermine RS legitimacy.

7. The main goal of Izetbegovic’s illegal application to the ICJ was the same as that of the original lawsuit: to undermine Republika Srpska’s legitimacy. As American law professor Francis Boyle, who helped write the original complaint, admitted, the main motivation of the lawsuit was “the abolition of the RS.”⁴ Izetbegovic knew that Serbs within BiH—and their elected representatives within BiH and RS institutions, including the BiH Presidency—staunchly opposed applying to the ICJ for a revision of its 2007 judgment, particularly since there was no substantive legal basis for doing so. By directing that the application to the ICJ be submitted, Izetbegovic wholly disregarded the importance of the rights of Serbs within BiH and acted as if their interests did not matter.

C. Izetbegovic defied the ICJ’s instruction that Sakib Softic was no longer BiH’s agent.

8. On 9 March 2017, the president of the ICJ issued a statement rejecting Izetbegovic’s attempted application. He explained that the content of the letters the Court received from the three members of the BiH Presidency “demonstrates that no decision has been taken by the competent authorities, on behalf of Bosnia and Herzegovina as a State, to request the revision of the Judgment of 26 February 2007”⁵ Izetbegovic, in his letter to the ICJ, falsely claimed that no decision of the Presidency was necessary because BiH’s agent from the original lawsuit, Sakib Softic, remained BiH’s agent for purposes of an application for review. But the ICJ president’s statement makes clear that the ICJ had informed Softic in a May 2016 letter, that an application for review would require a new appointment as agent.⁶ As the president of the ICJ wrote, “By letter dated 26 May 2016, the Registrar informed Softić that a new appointment would be required. No document attesting to the appointment of Softić for the purposes of proceedings for the revision of the 2007 Judgment has been received by the Court.”⁷ Izetbegovic thus directed Softic to file the application despite being fully aware that Softic was not BiH’s

⁴ *BOJL: Politicka cena - Republika Srpska*, DANAS, 3 March 2003.

⁵ Press Release of the International Court of Justice, 9 March 2017, p. 2.

⁶ *Id.*

⁷ *Id.* at p. 1.

agent and thus not authorized to file documents on behalf of BiH.

D. RS response to Izetbegovic's provocation

9. Republika Srpska has responded to Izetbegovic's latest attack on BiH's constitutional order the way it has responded to earlier provocations: peacefully and according to law. Member of the Presidency Mladen Ivanic sent a letter of protest to the ICJ, as did BiH Foreign Minister Igor Crnadak.⁸ The RS National Assembly passed a resolution setting forth legal measures to be taken in response to the crisis Izetbegovic attempted to initiate. The resolution calls for: appropriate legal action to be taken against those who have violated the law; BiH-level officials from the RS to take necessary and lawful steps to prevent any further unilateral actions by officials in BiH institutions that require decision-making by representatives of all three Constituent Peoples; lawful measures to be taken to reform BiH institutions, including the judiciary, in order to restore the rule of law and the terms of the Dayton Peace Accords; commencement of procedure in the BiH Parliamentary Assembly to end the participation of foreign judges on BiH's Constitutional Court; and RS officials at the BiH and Entity level to defend all rights and principles established by the Dayton Peace Accords.

E. The BiH Prosecutor's Office has failed to investigate Izetbegovic's offense against the Constitution.

10. Despite the fact that Izetbegovic was most responsible for unconstitutionally initiating the ICJ application, the BiH Prosecutor's Office has failed even to investigate his actions. The BiH Prosecutor's Office has opened an investigation against Softic, the unlawful agent, but not against Izetbegovic, under whose instructions Softic was acting. The failure of the BiH Prosecutor Office to investigate Izetbegovic is evidence of its political bias in favor of Bosniak officials and policies and its lack of independence.

F. The international community should condemn Izetbegovic's latest misconduct.

11. Although key members of the international community warned Izetbegovic against filing his unilateral ICJ appeal, they have not publicly condemned him since he filed it. Before Izetbegovic's attempted appeal, the Head of the OSCE in BiH, Jonathan Moore, criticized Izetbegovic's plan to unilaterally apply to the ICJ, stating: "This process calls into question the status and consensus of the BiH presidency, for which there is no justification. . . . [T]he revision of the lawsuit is not a good decision, it is not communal nor is it practical at this time."⁹ Just before the submission of the ICJ appeal application, the PIC Steering Board ambassadors "expressed concern about the serious political situation that has developed in BiH as a result of the initiative to request a revision of the 2007 ruling of the International Court of Justice (ICJ) in the case of Bosnia and Herzegovina against Serbia and Montenegro."¹⁰ The Steering Board

⁸ President Ivanic and Minister Crnadak are both officials from Republika Srpska serving within BiH level institutions.

⁹ *Ambassador Jonathan Moore, head of the OSCE mission in BiH: unfortunately, rhetoric is cheaper than results*, OSLOBODJENJE, 9 Feb. 2017.

¹⁰ Statement by the Ambassadors of the Steering Board of the Peace Implementation Council, 23 Feb. 2017.

ambassadors further stated that “political leaders should refrain from unilateral actions and return to the principles of compromise, dialogue and consensus in making decisions, as well as respecting the BiH constitution, institutions and the rule of law.”¹¹

12. Yet the international community has been silent since Izetbegovic ignored their warnings and filed his unconstitutional and provocative appeal. Republika Srpska urges the international community to condemn Izetbegovic’s unlawful and dangerous attempt to claim for himself powers reserved to the BiH Presidency. His action challenges a cornerstone of the BiH Constitution: shared competency among and representation of the Constituent Peoples within the Presidency. Izetbegovic’s attempt to unilaterally act on behalf of BiH, in direct and open violation of the Constitution, clearly presents the prospect of a material breach of the Dayton Peace Accords, seriously undermining the international agreement that ended the war and safeguards the peace and security of BiH.

II. Izetbegovic’s unconstitutional actions involving the ICJ were a part of the SDA’s continuing efforts to undermine the legal status of Republika Srpska and the Serb and Croat Peoples under the Dayton Accords with the aid of its supporters within the international community.

A. Challenge to Republika Srpska’s RS Day holiday

13. Despite the BiH Constitution’s recognition of Republika Srpska, and the special status of the three Constituent Peoples, the SDA has waged an unrelenting campaign to undermine constitutional protections for the Serb and Croat Peoples within BiH. Bakir Izetbegovic’s unconstitutional attempt to begin new proceedings against Serbia before the ICJ, as described above, is only his latest of many attempts to do this. Izetbegovic earlier used his position as a member of the BiH Presidency to file a Constitutional Court complaint against Republika Srpska’s celebration of the date of its creation, 9 January 1992, an observance that has occurred peacefully for the past 20 years. Notwithstanding Republika Srpska being a party to the treaty that created the BiH Constitution, the SDA specifically claimed that the holiday violated the BiH Constitution because Republika Srpska’s creation, in essence, was illegitimate and that the holiday is offensive to Bosniaks and thus should not be celebrated. It also claimed that Republika Srpska’s holiday unlawfully discriminated against Bosniaks because the day of the celebration fell on an Orthodox Christian religious holiday. The SDA has not, it should be noted, challenged religious or national holidays celebrated by Bosniaks or Croats.

14. In November 2015, the BiH Constitutional Court’s two Bosniak members—both of them former high SDA officials—joined with its three foreign members to outvote the court’s Serb and Croat members to uphold Izetbegovic’s complaint. This decision followed a long and troubling pattern of the Court, with the backing of the High Representative, politically outvoting BiH judges in support of the Bosniak agenda rather than following the rule of law.

¹¹ *Id.* Members of the PIC Steering Board are Canada, France, Germany, Italy, Japan, Russia, United Kingdom, United States, Presidency of the European Union, European Commission, and Organisation of the Islamic Conference, represented by the Republic of Turkey. The Republic of Turkey did not join in the relevant part of the statement.

15. The SDA hoped to provoke the citizens and political leaders of Republika Srpska to react in a way that the SDA could portray to the international community as a violation of the Constitution and a step toward secession. The RS National Assembly, with the support of all Serb political parties, passed a resolution condemning the political outvoting of the Court and calling on the RS Government to organize an advisory referendum. Citizens of Republika Srpska also reacted strongly through the media and communication with their local officials. Izetbegovic's challenge to the RS observance was widely seen as a direct affront to their Serb nationality and a challenge to the very existence of Republika Srpska. Many believed that if the SDA could successfully nullify the celebration of their Republic, the SDA would seek to further erode the rights and protections granted to the Entities and the Constituent Peoples in the BiH Constitution.

16. Predictably, the SDA responded with an aggressive campaign to depict the actions of Republika Srpska as a direct assault on BiH-level institutions, a rejection of EU accession, and the first step in secession. By so doing, the SDA hoped for international sanctions on Republika Srpska and its officials, especially Republika Srpska's president.

17. Despite the SDA's efforts, the RS National Assembly, with the unanimous support of all Serb parties, pressed forward with its plans to solicit the views of RS citizens through an advisory referendum, in accordance with the RS Law on Referendum and consistent with the RS and BiH constitutions.

18. The referendum was not designed to defy the Constitutional Court's November 2015 decision, but instead to inform the RS National Assembly about how to implement it. The BiH Constitutional Court's November 2015 decision left to Republika Srpska the authority and responsibility to implement the decision to ensure that the celebration of RS Day was in harmony with the BiH Constitution. The decision did not forbid Republika Srpska from celebrating the date of its founding but only required Republika Srpska to "harmonize" Article 3(b) of its Law on Holidays with the Constitution.¹²

19. As part of the process of harmonization, Republika Srpska held its 25 September 2016 referendum to ascertain its citizens' views about whether 9 January should continue to be marked and celebrated as RS Day as it had been—peacefully—for 20 years. RS citizens voted overwhelmingly in favor of retaining the 9th of January as the date of RS Day. After the referendum, the RS National Assembly drafted legislation to ensure that RS law is in compliance with the Constitutional Court's November 2015 decision, as well as with the expressed views of

¹² As Republika Srpska explained in detail in its 16th Report to the UN Security Council, the Constitutional Court's November 2015 decision cannot reasonably be interpreted to forbid the observance of Republika Srpska's founding date. Such an interpretation would require every public holiday in both Republika Srpska and the Federation to be declared unconstitutional. For example, public holidays marking Muslim and Catholic feasts would have to be abolished. Even holidays that are at least partially secular would be unconstitutional because they all coincide with religious feasts. If the Constitutional Court's decision were interpreted as forbidding the RS Day holiday because it allegedly favors one ethnic group over others, it would certainly also require forbidding the Federation's 1 March celebration of "Independence Day," which Serbs consider to be the anniversary of an illegitimate referendum that tore the Serbs of Bosnia and Herzegovina away from their country, Yugoslavia.

RS citizens. The RS National Assembly approved a new law that retained the 9 January date of RS Day, made clear that the date is to be marked and celebrated as a secular holiday, and made other modifications consistent with the Constitutional Court's decision.¹³

20. The SDA Party and its allies in the international community have tried to raise tensions by making the false claim that the referendum was a step toward secession of Republika Srpska from BiH. In reality, the referendum concerned the narrow question of the date of RS Day and nothing else. As explained below, President Dodik and other RS leaders have repeatedly made clear their support for Republika Srpska's continued existence as an Entity within BiH's Dayton structure.

21. Pursuant to the new law that modified RS Day to be consistent with the Constitutional Court's November 2015 decision—a law whose constitutionality has not been challenged—Republika Srpska once again peacefully celebrated RS Day on 9 January 2017. There is no legal basis to claim that Republika Srpska's observance of RS Day pursuant to the new law violated the BiH Constitutional Court's decision.

22. The SDA tried—but failed—to create a crisis over RS Day and the referendum over the date of its observance. However, the SDA succeeded, to some extent, in falsely depicting Republika Srpska as violating the Dayton Accords, including the BiH Constitution. Republika Srpska has acted calmly despite the SDA's provocations and attacks and by so doing has averted what could have become a crisis. Unfortunately, as explained below, the U.S. ambassador to BiH interjected the United States into the clearly domestic affairs of BiH in this matter on behalf of Izetbegovic and the Bosniaks to the detriment of the Serb People, and Republika Srpska legally established institutions and BiH stability.

B. Unlawful U.S. interference in BiH's domestic affairs in support of the SDA agenda

1. In response to the referendum, U.S. officials issued to the president and prime minister of Republika Srpska a series of demands that unlawfully interfered with BiH's domestic affairs.

23. In late December 2016, the U.S. ambassador and another U.S. official placed a telephone call to President Dodik and Prime Minister Cvijanović, issued four specific demands, and threatened severe sanctions if the demands were not accepted. Each of the demands related solely to internal political affairs, not relations with the United States or any other state. Except for one of the demands—a demand for an action President Dodik has since taken—none were for actions either the president or the prime minister could individually take within the scope of their legal authority. This would have been clear to the U.S. officials making the demands. The Government of Republika Srpska officially responded in early January 2017 to these demands in a letter to the ambassador conveying the Government's legal position. Within days thereafter, the outgoing Obama administration, in its last week, imposed on President Dodik sanctions that had been threatened by the U.S. officials for Republika Srpska's refusal to take the actions

¹³ Gordana Katana, *Bosnian Serbs step back from confrontation over divisive national holiday*, REUTERS, 25 Oct 2016.

improperly demanded in the U.S. officials' call.

2. The U.S. demands violated international law.

24. The RS Government considers the demands made by the U.S. officials to be in violation of international law. The U.S. demands directly violated the fundamental tenet of international law that foreign governments shall not interfere in the domestic affairs of sovereign states, but must respect their political independence.¹⁴ They also violated a diplomat's obligation under the Vienna Convention on Diplomatic Relations "not to interfere in the internal affairs of [the] State."¹⁵

25. For this reason, the RS Government objects to the U.S. Government's actions. Relations between foreign governments and international organizations and BiH and its Entities should be based on respect for international law, including the fundamental tenet that foreign governments and international organizations shall not interfere in the domestic affairs of sovereign states. Foreign interference in BiH's domestic affairs undermines the spirit of consensus-building and compromise that is essential to lasting progress in any democracy—and particularly a multinational state like BiH.

26. Contrary to claims of obstruction, the Government of Republika Srpska and its president repeatedly affirmed their commitment to the Accords, including through official statements and reports to the UN Security Council. They have called for full implementation and compliance with the Dayton Accords as the basis for BiH and sought domestic reforms for this purpose. Republika Srpska's Government, its top officials, and leading political parties have long insisted that the clear terms of the Dayton Peace Accords be honored by the major Bosniak parties as well as by the High Representative and members of the Peace Implementation Council.

C. Ongoing attempt to improperly use the BiH Prosecutor's Office as a political instrument to punish the RS president and other RS officials

27. The SDA, as explained further in section IV-C-2 of this report, exerts improper influence on the BiH Prosecutor's Office. The Prosecutor's Office reliably protects powerful SDA members and allies from prosecution and targets political rivals of the SDA. Even U.S. Deputy Chief of Mission Nicholas M. Hill observed in 2015 that the Chief Prosecutor is "largely believed to be heavily influenced by Bosniak political forces" and that there are "complaints that

¹⁴ Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27), para. 202. *See also* UN General Assembly Resolution 2625(XXV) (1970) (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations) ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law.") and UN General Assembly Resolution 2131 (XX) (1965) (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty).

¹⁵ Vienna Convention on Diplomatic Relations (1961) Art. 41(1).

the prosecutor's office has too many strong-willed SDA acolytes on its staff.”¹⁶ Actions by the Prosecutor against RS officials in connection with the 2016 referendum on the RS Day holiday constitute one recent example of such unlawful attacks by Bosniak political forces. The Prosecutor has used his office to investigate and attack the RS president, prime minister and chairman of the referendum commission, falsely charging that they violated a BiH Constitutional Court decision. The Prosecutor started the investigation without a finding by the court that these officials defied the decision. None of the individuals the Prosecutor is investigating had legal authority to enact the law providing for a referendum. In contrast, demonstrating the illogical and political nature of the investigation, the Prosecutor did not investigate those individuals who actually had legal authority over the law’s enactment—the Speaker and RSNA members—even though such investigation would also have been unwarranted.

28. Moreover, the Prosecutor’s office has never brought charges for violation of a Constitutional Court decision despite the fact that since 2004, authorities have failed to implement 91 decisions of the Constitutional Court.¹⁷ For example, the Constitutional Court’s 2010 decision declaring the Mostar electoral system unconstitutional remains to be implemented, preventing Mostar citizens from voting in local elections since 2008. Also, the Prosecutor’s actions have been timed for political advantage. For example, the summons to the RS president was announced one week before 2 October local elections. Such tactics have been used before, including with the support and participation of the High Representative, who in earlier times used such investigations as a pretext for summarily removing and banning officials from public office without any decision by a court.

III. The Dayton structure is essential to BiH’s future.

29. It is important to analyze the recent actions described above in the broader context of the Dayton Peace Accords and the long-term effort by the SDA to undermine the Dayton system to the Bosniaks’ political advantage by establishing a centralized government. This has been partially achieved with the help of certain members of the international community in breach of the Dayton Accords, the rule of law, and the stability of BiH.

A. The Nature of the Dayton system

30. The Dayton Accords reflected a realistic understanding of what was necessary to bring lasting stability to Bosnia and Herzegovina. The BiH structure provided for in the Dayton Constitution built on earlier proposals, which were all based on some form of decentralized, consociational structure to form a functioning union of three peoples with great distrust for each other, based upon their historical experiences. The BiH Constitution created a consociational system that left the Entities broad autonomy, strictly limited the competencies of BiH-level institutions, and provided protections for each of BiH’s Constituent Peoples. The Constitution fully satisfied none of the formerly warring parties. But the authors of the Dayton Constitution knew such a system with its features was the only way to create a sustainable form of governance for BiH.

¹⁶ Nicholas M. Hill, *Moving Beyond Narrow-Minded Politics*, MREŽA ZA IZGRADNJU MIRA 8 July 2015.

¹⁷ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 10.

B. The failure to implement the Dayton system

31. Unfortunately, the constitutional system so carefully devised in the Dayton Accords has often been flouted. BiH's Bosniak parties have been unwilling to accept BiH's consociational structure. As *Euractiv* recently observed, "the Muslim community wants more centralisation and even an end to the current system."¹⁸ By carefully limiting the competencies of BiH institutions, the BiH Constitution promotes functionality by minimizing the number of decisions required at the BiH level. But the High Representative's forced centralization of competencies at the BiH level sabotaged the Dayton design. By requiring decisions to be made at the most contentious possible level, centralization has maximized BiH's discord and dysfunction.

1. The High Representative centralized BiH in support of the Bosniak agenda through his false "Bonn Powers."

32. The High Representative achieved this destructive centralization by asserting and exercising a wholly fabricated set of powers to impose laws and constitutional amendments and punish individuals by decree. As former UK Ambassador Charles Crawford, who helped invent these so-called "Bonn Powers" has admitted, "the Bonn Powers had no real legal basis at all." The illegal centralization of BiH has turned the BiH level into what the International Crisis Group calls "a zombie administration, providing full employment to civil servants but few services to citizens." In addition to creating a bloated and dysfunctional level of governance, centralization has undermined the rule of law and deteriorated safeguards for BiH's Constituent Peoples.

2. The same constitutional safeguards that should have blocked BiH's centralization now enable the Bosniaks to block necessary reforms to restore the Dayton structure.

33. In recent years, as support for the Bonn Powers on the PIC Steering Board has declined, the High Representative has stopped issuing decrees using this pretended authority. Unfortunately, the damage is done. The High Representative's years of centralizing BiH through decree and coercion have left a legacy that is extremely difficult to undo through normal reform efforts. The very Dayton protections that the High Representative circumvented to impose centralization now make it exceedingly difficult to reverse that centralization. For example, under the BiH Constitution, laws passed by the BiH House of Representatives require the votes of at least one-third of the members from each Entity. Additionally, the Entity constitutions established specific requirements for their amendment. However, the High Representative bypassed such safeguards and simply imposed scores of new laws and constitutional amendments by decree. The High Representative further declared that such new laws and amendments were of full legal effect, ordered the BiH Parliament and RS National Assembly to adopt such laws and amendments without change, and pronounced that the High Representative's actions were beyond legal review, including by the BiH Constitutional Court or any other court. Imposed legislation included, for example, laws that created the BiH-level Court and Prosecutor's Office--which now often claims jurisdiction over Entity matters-- institutions which did not exist under the BiH Constitution. Had the High Representative not imposed such

¹⁸ *Bosnia counts EU path as only uniting factor, 25 years after war*, EURACTIV, 7 April 2017.

changes, the constitutional protections would have prevented the unlawful transfer of competencies from the Entities to the BiH-level, including the creation of unconstitutional institutions.

34. Under the protections built into the Dayton Constitution, BiH's Bosniak parties essentially have veto power over any legislation, including reforms to restore the Dayton structure. The Bosniak parties have refused to consider even modest reforms. For example, as explained below, Bosniak leaders have dismissed the need to reform the Court of BiH's practice of taking jurisdiction in Entity-law criminal cases, despite consensus on the need for such reforms among Serb and Croat parties—as well as the EU.

IV. Republika Srpska's agenda for reform seeks to restore the political structure established by the Dayton Accords so that stability and prosperity are possible in BiH.

A. Republika Srpska is not seeking secession from BiH.

35. The SDA and its allies in the international community often try to gather support against Republika Srpska by claiming that Republika Srpska is planning to secede from BiH. This claim is false, and Republika Srpska has repeatedly made clear its commitment to the Dayton Accords and BiH's territorial integrity. In a television interview in March 2017, President Dodik, said, "There will be no referendum on secession, and everyone who is attacking me and wants to proclaim me guilty knows that. My political attitude, as well as of my party (SNSD) is far from that plan. There is no plan of secession on the agenda of the RS."¹⁹

B. Republika Srpska is seeking to implement the Dayton system through legitimate political and legal means.

1. Decentralization is consistent with EU integration policy and practice among EU members.

36. BiH's decentralized constitutional structure is not a barrier to EU membership, as EU officials have frequently made clear. In December 2012, for example, European Commissioner for Enlargement Štefan Füle said, "The decentralized structure of BiH is not an obstacle to the process of EU accession." Another top EU official said in 2011, "BiH must be in a position to adopt, implement and enforce the laws and rules of the EU. *It is up to Bosnia and Herzegovina to decide on the concept which will lead to this result.*"²⁰

37. In a January 2012 interview, the Head of the EU Delegation to BiH, Special Representative Sørensen said:

I should underline that the EU recognizes that Bosnia and Herzegovina has a specific constitutional order. We support this,

¹⁹ *Official: there will be no Referendum in the RS!*, SARAJEVO TIMES, 18 March 2017.

²⁰ Comments of Stefano Sannino, Deputy Director-General of EU Directorate General for Enlargement, 24 Jan. 2011, in NEZAVISNE NOVINE, *Stefano Sanino: Bh. lideri nemaju političku kulturu*, 24 Jan. 2011 (emphasis added).

and please remember that there are also different types of internal structure within many of the existing Member States.²¹

38. No EU member or candidate state has ever been required to change its constitutional structure from a decentralized federal system to a centralized one in order to qualify for EU accession. Nor is BiH required to do so, as EU officials have made clear.

39. Moreover, the compatibility of decentralized structures with EU membership is demonstrated each day by current EU members such as Germany, Spain, Belgium, and Italy.

40. As the International Crisis Group wrote in its recent report on BiH, “Bosnia is in effect a strongly decentralised federation and will remain one. There is nothing wrong with that as a basic design; decentralisation is common and growing in Europe.”²²

2. Structured Dialogue on Justice

41. The RS Government has continued to seek reforms to BiH’s justice system through the EU’s Structured Dialogue on Justice, which began in 2011, but progress has been slow because SDA members and other Bosniak officials have fiercely opposed necessary reforms.

42. There were signs of progress during the second half of 2015. On 13 July 2015, the participants in the Structured Dialogue agreed on a change of format that narrowed the Structured Dialogue sessions to EU officials and experts and ministers of justice of BiH, RS, and Federation, and the president of the Brčko District Judicial Commission, with a broader set of participants involved in working groups that support the Structured Dialogue’s decision-makers.²³ Subsequent to these changes participants in the Structured Dialogue signed a protocol in September establishing a framework for some much-needed judicial reforms. Among the important reforms foreseen in the protocol are changes to the laws on the BiH Court and Prosecutor’s Office, the Criminal Code, and the Law on the High Judicial and Prosecutorial Council.

43. However, since the signing of the Protocol, Bosniak leaders have acted to stall further progress. In response to the Protocol, the then-president of the Court of BiH, a Bosniak, sought to derail the agreed-to reforms. A key part of the reforms foreseen in the Protocol includes correcting the Court’s ability to arbitrarily extend its own jurisdiction, which EU experts and officials have repeatedly made clear is contrary to EU standards. Despite consensus among the ministers of justice of BiH, the Federation and Republika Srpska and the president of the Brčko District Judicial Commission, as well as the EU, that the extended jurisdiction practices of the Court of BiH must be reformed, Bosniak officials oppose reform. With respect to such reforms,

²¹ EU Delegation to BiH, Interview with Ambassador Peter Sorensen for Infokom magazine of the BiH Foreign Trade Chamber, 18 Jan. 2012.

²² ICG Report at p. 35.

²³ Members of the HJPC, BiH Court, BiH Prosecutors Office and other officials are not part of the Structured Dialogue, but may participate in working groups as requested by the Structured Dialogue members, where they are able to provide their views; however, they do not have decision-making competencies.

the then-president of the Court of BiH, Meddžida Kreso stated, “This cannot be allowed.”²⁴ Since then, Judge Kreso and other Bosniak participants from BiH institutions have continued to denounce reform efforts.

44. The Structured Dialogue’s EU sponsors recently tried to bridge the gap between the participants by asking them to propose new and more moderate positions on the Court of BiH’s extended jurisdiction. Republika Srpska’s Justice Ministry responded with a good-faith compromise proposal. Unfortunately, the BiH deputy minister of justice, an SDA member, responded with an even more extreme version of extended jurisdiction, completely ignoring the concerns about extended jurisdiction shared by Republika Srpska and EU experts.

45. Despite these actions, Republika Srpska continues to participate in good faith in the Structured Dialogue and hopes that agreement can be reached on key reforms, including in particular on a new draft BiH Law on Courts. BiH’s elected officials at all levels, with the EU’s help, should push forward these reforms notwithstanding Bosniaks’ intransigence.

C. Reform of the BiH-level justice system in particular is necessary.

1. The BiH Prosecutor’s Office continues to discriminate against Serb victims of war crimes.

46. Justice, human rights, and reconciliation require that war crimes be punished without regard to the ethnic identity of their perpetrators or victims. But more than 10 years after the Court of BiH began trying war crimes cases, the BiH justice system is continuing to discriminate against Serb victims of war crimes. Indeed, there are indications that this longstanding pattern of bias is getting worse. War crimes discrimination denies Serbs the equality before the law to which they are entitled under Protocol 12 of the European Convention on Human Rights. It also impedes reconciliation.

47. This discrimination is made possible because the BiH Prosecutor’s Office controls all investigations irrespective of whether they are conducted at a lower level of governance or at the BiH level and exercises discretionary powers with regard to the selection of sensitive cases. In this way, certain cases of war crimes committed by Bosniaks against Serbs are prevented from ever getting to court.

48. The International Crisis Group has criticized the Prosecutor’s Office for its failure to prosecute some of the war’s worst war crimes against Serbs. In 2012, a former international advisor to the BiH Prosecutor’s Office observed that many prosecutors there are highly reluctant to prosecute Bosniaks for crimes against Serbs and that they fail to vigorously pursue those cases. This failure is apparent in the BiH Prosecutor’s Office’s record, details of which the RS has provided in many of its prior reports to the Security Council.

49. A study by demographers at the International Criminal Tribunal for the former Yugoslavia (ICTY) estimates 7,480 Serb civilians died from the war. Out of these 7,480 Serb civilian war deaths, just 29 have led to a final conviction in the Court of BiH.

²⁴ Denis Dzidic, *Justice Reforms Fail to Halt Bosnian Serb Referendum*, BIRN, 14 Sept. 2015.

50. One way the BiH justice system discriminates is by treating members of Bosniak fighting forces as immune from indictment for crimes against humanity. This is especially important because, under the Court of BiH's practice, crimes against humanity is punishable by up to 45 years in prison, while all other war crimes are only punishable by up to 20 years. Out of the 298 indictments for crimes against humanity confirmed by the Court of BiH, not one has been against a member of the Army of the Republic of Bosnia and Herzegovina (ARBiH) or any other Bosniak fighting force. Because of the BiH Prosecutor's Office's policy against charging members of Bosniak fighting forces with crimes against humanity, there is a de facto two-tier justice system for war crimes—one for members of the Serb and Croat fighting forces, who may be sentenced to up to 45 years, and members of Bosniak fighting forces, whose sentences are limited to 20 years.

51. The BiH Prosecutor's Office's bias against Serb victims of war crimes—particularly those committed by Bosniaks—is also shown by many specific examples. Some of them are briefly summarized below:

- The BiH Prosecutor's Office has failed to prosecute ARBiH 5th Corps Commander Atif Dudaković for a series of grave war crimes, despite much evidence against him and the Prosecutor's Office's earlier promises that he would be indicted. Among the many pieces of damning evidence against Dudaković are videos showing Dudaković ordering the execution of prisoners and the burning of Serb villages. A former member of Dudaković's 5th Corps has been willing to testify about witnessing the organized slaughter of approximately 24 to 28 older Serb civilians in Bosanski Petrovac.
- The BiH Prosecutor's Office has failed to seek justice for the Army of the Republic of BiH's (ARBiH) murder of 33 Serb civilians in the village of Čemerno—including women, children, and the elderly. Nine years ago, the RS Ministry of Interior filed with the BiH Prosecutor's Office an amended criminal report on the Čemerno atrocities with supporting evidence against specific individuals, but the Prosecutor's Office has failed to bring any indictments. In June 2015, the Balkan Investigative Reporting Network's newsmagazine *TV Justice* reported on the massacre at Čemerno and the lack of any prosecutions for it.
- The BiH Prosecutor's Office has failed to bring anyone to justice for the 1992 massacre of Serb civilians in the village of Bradina. In the attack, 54 Serb civilians were killed, 26 of whom were buried in a pit dug at the porch of the Church of Holy Ascension. Most of the survivors were taken to camps, mainly the one in Čelebić, where at least 22 inmates died.
- The BiH Prosecutor's Office has failed to prosecute anyone for the St. Nicholas Day Massacre in which the 56 Serb civilians in Jošanica were murdered on 19 December 1992. This is despite RS authorities having identified perpetrators in 2001 and 2005 reports.
- The BiH Justice System is refusing to investigate evidence linking a key SDA member of the BiH House of Representatives to war crimes by the El Mujahid Detachment. Mirsad Kebo, a former vice president of the Federation of BiH and former member of the Bosniak SDA party, recently submitted to the BiH Prosecutor's Office 8,000 pages of evidence of war crimes against Serbs. Kebo's submission includes evidence that BiH House of Representatives Speaker and SDA Vice President Šefik Džaferović was complicit in El

Mujahid atrocities.

2. The BiH Prosecutor's Office serves politics rather than justice.

52. The BiH Prosecutor's Office has a long-established pattern of making investigative and prosecutorial decisions to suit the desires of powerful Bosniaks, chiefly in the SDA. During the height of the "Bonn Powers," the High Representative routinely banned officials from office by decree without any due process. Sometimes allegations of wrongdoing would be alleged, followed by a so-called investigation by the Prosecutor's Office, then removal from office by decision of the High Representative, often followed by a court decision finding no wrongdoing by the official now banned from office. However, with the Bonn Powers now discredited, the BiH Prosecutor's Office has become even more of a political instrument to attack the institutions and duly elected officials who oppose the unlawful centralization of constitutional competencies and seek to have the Dayton system restored.

53. As described above, the Prosecutor's Office, for political reasons, is currently investigating the RS president, prime minister, and other officials with respect to the false allegation that they violated a Constitutional Court decision with respect to the RS referendum. Another example of the use of the BiH Prosecutor's Office as a political weapon on behalf of the SDA is the case of Goran Zubac, former director of the BiH State Investigation and Protection Agency (SIPA). In 2009, the BiH Prosecutor's Office initiated a war crimes investigation of Šemsudin Mehmedović, an SDA member of the BiH Parliamentary Assembly, for war crimes, but the Prosecutor's Office has obstructed the investigation ever since. In 2013, SIPA arrested Mehmedović, citing evidence of threats to witnesses and SIPA officers, but the Prosecutor's office immediately ordered his release.

54. After the arrest, the BiH Chief Prosecutor began to wage war on SIPA Director Zubac. The Prosecutor's Office's website began to feature threats and virulent attacks against Zubac. Then, in June 2014, the BiH Prosecutor's Office issued a baldly political indictment of Zubac based on the allegation that he failed to prevent damage to government buildings during the February 2014 unrest in FBiH cities.

55. As if to remove all doubt as to the political nature of the indictment against Zubac and Bosniak influence over the Prosecutor's Office, the Bosniak member of the BiH Presidency, Bakir Izetbegovic, in August 2014 said "[w]e will likely send [Zubac] to prison."²⁵ The Court of BiH issued and confirmed a verdict on the dubious charge, sentencing Zubac to one year's probation. In August 2015, the BiH Council of Ministers removed Zubac from office based on his conviction. The SDA had successfully used the Prosecutor's Office to purge the troublesome SIPA director.

56. Illegal and highly political actions of BiH prosecutors are unfortunately all too common. There is a recurring pattern: An official is accused and prosecuted for offenses that the prosecutor cannot prove or over which the Court of BiH lacks jurisdiction. There is much negative publicity about the accused and lengthy proceedings, which interfere with the official's ability to perform his duties, cause personal embarrassment and impose the expenses of defense.

²⁵ *Izetbegovic: SDA must "win well" in elections*, OSLOBOĐENJE, 27 Aug. 2014.

There are immediate demands from political opponents and some in the international community that the accused be dismissed from office pending the final outcome of proceedings. Finally, all charges are dismissed for lack of jurisdiction or lack of proof.

57. The 2013 arrest and detention of Federation President Zivko Budimir, along with four members of his staff and associates, on dubious substantive and jurisdictional grounds is a recent example. The case against President Budimir was ultimately dismissed for lack of jurisdiction.

58. In early 2006 Mirko Sarovic, currently BiH minister of foreign trade and economic relations, was charged with abuse of office and other crimes alleged to have been committed between 1998 and 2002 when Sarovic was RS vice president and then president. He was acquitted of all charges in October 2006. In 2005 and again in 2009, current BiH member of the Presidency Dragan Čović was charged with abuse of office and other crimes. After lengthy proceedings in both cases, Mr. Čović was acquitted of all charges. In both cases, these elected senior officials were effectively removed from office before the final outcome.

59. The BiH Prosecutor's Office must be reformed so that it follows the law rather than the political agenda of the SDA.

D. The BiH Constitutional Court also must be reformed.

60. The BiH Constitutional Court must be reformed 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. In private meetings, EU officials have made clear that BiH cannot become an EU member as long as it has foreign judges sitting on its Constitutional Court. The terms of the BiH Constitution indicate that the parties' intent was for foreign judges to participate on the court only as a transitional measure and provided for changes to their appointment to be made after five years through the passage of new legislation. Thus, the joint efforts of BiH's leading Serb and Croat parties to make the necessary reforms are certainly legal and should be encouraged to uphold the agreement reached in establishing the Constitution.

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

61. The presence of foreign judges on the BiH Constitutional Court is incompatible with BiH's sovereignty. In a recent article about the Court of BiH, Stefan Graziadei of the University of Antwerp observed:

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.²⁶

62. Even one recently retired foreign judge, Judge Grewe, admits that the presence of foreign judges “can be seen as an intrusion into the national affairs” or “as an attempt at supervision.”²⁷ That is exactly what it is.

63. 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.”²⁸

2. The Constitutional Court lacks legitimacy.

64. The most precious asset of any court that exercises judicial review is public legitimacy. 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 or speakers of the local languages. Worse still, they are not even appointed by any institution in BiH.

65. 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.”²⁹ In addition, as Tim Potier has pointed out, the use of foreign judges in a country’s highest court prevents a society’s ownership of its constitution and system.³⁰

66. The Constitutional Court’s legitimacy deficit is exacerbated by its political nature, including an alliance between the bloc of three foreign judges and the two Bosniak judges, which has often outvoted the majority of BiH citizens on the Court. Judge Constance Grewe, a recently retired foreign member of the BiH Constitutional Court, has observed that “the group of international judges allied to one ethnic group can outvote the two others.”³¹ The ethnic group

²⁶ 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).

²⁷ 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.

²⁸ 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).

²⁹ Graziadei at 5 (footnotes omitted).

³⁰ 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.

³¹ 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.

allied to the foreign judges is the Bosniaks. As *Balkan Insight* recently 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.”³² Similarly, the International Crisis Group has explained, “The BiH Constitutional Court has repeatedly ordered the RS to amend its constitution over the objections of both Serb (and, often, both Croat) judges”³³

67. 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. As the U.S.-based NGO Freedom House recently wrote, the Constitutional Court’s November 2015 decision on RS Day “exemplified the judiciary’s politicization.”³⁴ But that decision is only one example of the alliance of foreign and Bosniak judges turning the Court into a political instrument of the SDA and other Bosniak parties.

68. Another prominent example is the Court’s 5-4 decision upholding the High Representative’s creation of the Court of BiH, despite that court’s manifest unconstitutionality. 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. The decision provides no constitutional grounds for the Court’s creation. Nor could it because, as the International Crisis Group has pointed out, the BiH Constitution “allotted judicial matters to the Entities, apart from a state Constitutional Court.”³⁵ The Constitutional Court’s inability to provide the constitutional grounds for upholding the illegal creation of the BiH Court is evident by the reasoning of its own decision: “The establishment of the Court of Bosnia and Herzegovina can be expected to be an important element in ensuring that the institutions of Bosnia and Herzegovina act in conformity with the rule of law and in satisfying the requirements of the European Convention in regard to fair hearings before a court and effective legal remedies.”³⁶

69. The BiH Constitutional Court further claims that the formation of the Court of BiH “meets the requirement of an independent and impartial tribunal.” It is as if the “expectation” that the BiH Court will act in accordance with the rule of law and be independent and impartial somehow makes its creation constitutional, which of course is without legal merit. Moreover, the practice of the BiH Court clearly shows that the judiciary installed by the OHR is far from impartial or independent. Failed trials due to senseless indictments and annulled judgments as a result of superfluous and irresponsible actions of foreign prosecutors and judges systemically undermined the judicial system. With time, the shakiness of the Constitutional Court’s legal construction came to the forefront.

70. The Constitutional Court’s legitimacy is also undermined by the foreign judges’ lack of independence from the High Representative. One of the foreign judges who voted to uphold the

³² Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

³³ International Crisis Group, *What Does Republika Srpska Want?*, 6 Oct. 2011, p. 16.

³⁴ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 9.

³⁵ International Crisis Group, *Bosnia’s Future*, 10 July 2014, p. 27.

³⁶ BiH Constitutional Court, Decision, Case No. U-26/01, para. 24, 28 Sept. 2001.

High Representative's creation of the Court of BiH 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 . . .*"³⁷ A decree of the High Representative that remains in effect today bans 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.*"³⁸

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

71. No other sovereign state in the world has seats on its constitutional court reserved for foreign judges, let alone judges appointed by a foreign individual judge—president of the European Court of Human Rights—without any requirement of domestic consent. The foreign judges were a transitional measure that was never intended to be in place for the long term. Thus, the BiH Constitution authorizes the Parliamentary Assembly to pass a new law replacing the foreign judges five years after their initial appointment, which occurred in 1996.³⁹

72. 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.⁴⁰ As the president of the Croat National Council, which represents all of the Croat parties, recently said, "Twenty years after the war, Bosnians are ready to take full control of this court." On 20 December 2016, leaders of the SNSD and HDZ, the largest Serb and Croat parties in BiH, announced that their parties are jointly preparing a new Law on the Constitutional Court, which they expect to be completed by the end of 2016.⁴¹ Unfortunately, the SDA is refusing to reform the Constitutional Court by passing a new law because it does not want to break up the alliance of former SDA leaders and foreign members that controls it.

73. Reforming the BiH Constitutional Court is essential for BiH to become a fully sovereign state and an EU member.

E. Republika Srpska is implementing the Reform Agenda for EU integration.

74. Republika Srpska remains committed to BiH's integration into the EU and is steadily implementing the EU-sponsored Reform Agenda. By 20 December 2016, Republika Srpska fulfilled all of its obligations scheduled for 2016 under the Reform Agenda and Letter of Intent to the IMF, and is continuing to push ahead on its obligations for 2017 and 2018.⁴² Republika Srpska has fulfilled 55 percent of its obligations under the Reform Agenda, well ahead of the

³⁷ JOSEPH MARKO, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, European Diversity and Autonomy Papers (July 2004) at 17 and 18 (emphasis added).

³⁸ 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, 23 March 2007 (emphasis added).

³⁹ BiH Constitution, Art. VI(1)(d).

⁴⁰ Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

⁴¹ Danijel Kovacevic, *Bosnian Serbs Threaten Showdown over Foreign Judges*, BIRN, 20 Dec. 2016.

⁴² Cvijanovic: *Fix Attitude to Reforms*, SRNA, 17 March 2017.

Federation and BiH Council of Ministers. Republika Srpska has also continued to harmonize its laws and regulations with the EU's *acquis communautaire* and regulations of the Council of Europe. Republika Srpska has already subjected more than 2,170 laws, regulations, and general acts to this procedure since 2007.

F. Obstruction at the BiH level to the Reform Agenda

75. The Reform Agenda, unfortunately, is being obstructed at the BiH level, primarily by the SDA and its coalition members. On 5 April 2017, the BiH House of Representatives failed to approve urgent legislation needed to fulfill BiH's commitments under the Reform Agenda and the credit arrangement that BiH agreed with the IMF in September 2016. Republika Srpska supported the legislation, which would have raised excise taxes, and said that it would pay all additional costs that farmers incurred under it. But the legislation nonetheless failed in the BiH House of Representatives.

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

[A] failure to adopt these measures will force a delay in the IMF review of its programme – planned for end April – and would necessitate a renegotiation of some aspects of the programme. This, in turn, could cause delays in other related programmes, including assistance from the European Union. It will also slow down the country's EU accession. Political leaders who set ambitious timelines for EU candidacy need to take responsibility to ensure that these measures are implemented.⁴³

77. Despite this setback, Republika Srpska will continue its strong support for the Reform Agenda and work for agreement on all matters relating to the Reform Agenda consistent with Republika Srpska's constitutional competencies.

G. The SDA has helped turn BiH into a jihadist sanctuary.

78. The SDA, as detailed in a recent Republika Srpska paper, has helped turn BiH into a sanctuary for jihadists, who pose a serious threat to BiH, Europe, and the rest of the world.⁴⁴ In a recent analysis, Germany's *Der Spiegel* wrote of BiH, "It increasingly looks as though a new sanctuary for IS fighters, planners and recruiters has been established right in the middle of Europe. . . . German investigators believe there are around a dozen places in Bosnia where Salafists -- followers of a hardline Sunni interpretation of Islam -- have assembled radicals undisturbed by the authorities."⁴⁵ BiH has provided more fighters to Iraq and Syria, per capita,

⁴³ *BiH failed to adopt important laws*, INDEPENDENT BALKAN NEWS AGENCY, 6 April 2017.

⁴⁴ <http://www.vladars.net/sr-SP-Cyrl/Documents/16th%20Report%20to%20UNSC%2027%20Oct%20%20-%20English.pdf>

⁴⁵ Walter Mayr, *Sharia Villages: Bosnia's Islamic State Problem*, DER SPIEGEL, 5 Apr. 2016.

than any other European country.⁴⁶

79. The SDA was founded as an Islamist party and remains one. SDA founder Alija Izetbegovic' *Islamic Declaration*, published in 1990, states, "There can be neither peace nor coexistence between the Islamic religion and non-Islamic social and political institutions."⁴⁷ Consistent with this ideology, the SDA invited mujahidin to Bosnia and Herzegovina during the war and has continued its close ties to radical Islamists. The BiH Prosecutor's Office has failed to seek justice for mujahidin atrocities against Serbs. In addition, BiH's SDA-dominated security apparatus is failing to curb the jihadist presence in BiH. As Nenad Pejic of Radio Free Europe/Radio Liberty observed:

There are countless examples of local authorities in Bosnia failing to act properly against Islamic extremism. . . . There are some claims that 'inaction' in Bosnia had its roots nearly 20 years ago when Bosnian authorities granted 50 passports to foreign mujahideen, most of whom were Salafist/Wahhabis This 'inaction' is not related to the police or court capacity or poor equipment, but rather to the ethnically divided BiH police and judiciary that has political sponsorship.

80. By supporting the SDA, members of the international community unintentionally increase the risk of terrorism in BiH and around the world.

H. BiH's invalid and unlawfully imposed census program

81. Under pressure from the SDA—including an apparent threat of prosecution from the BiH Chief Prosecutor—the director of the BiH Agency for Statistics unilaterally issued a decision purporting to adopt a unified processing program for the census that violated the BiH Law on Census. The director acted outside of his legal authority, and the program's methodology was inaccurate and contrary to the specific requirements set forth in the law. As Freedom House observed in a recent report, the publication of the census "was accompanied by many problems concerning the quality of data and validity of results."⁴⁸ The goal of the processing program the director purported to adopt was to artificially inflate the count of BiH's Bosniak population.

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

A. Members of the international community should support reforms that restore the Dayton structure and refrain from actions that undermine BiH's sovereignty.

82. BiH's friends in the international community, especially witnesses to the Dayton

⁴⁶ *Foreign Fighters in Iraq & Syria—Where Do They Come From?*, RADIO FREE EUROPE/RADIO LIBERTY, 29 Feb. 2016; John Schindler, *Operation CUT: Bosnia versus the Islamic State*, 22 Dec. 2015.

⁴⁷ ALIJA IZETBEGOVIC, *ISLAMIC DECLARATION*, p. 30.

⁴⁸ Freedom House, *Nations in Transition 2017: Bosnia and Herzegovina*, p. 2.

Accords, should support their faithful implementation, including reforms necessary to restore the structure established in the Dayton Constitution. Members of the international community should also refrain from taking sides in BiH's domestic legal and political disputes, undermining BiH's sovereignty.

B. The Office of the High Representative must close.

83. In order to qualify for EU membership, BiH must become a self-governing country whose sovereignty is fully respected. This is impossible as long as the High Representative remains in BiH and claims authority to decree laws, constitutional amendments, and punishments completely outside the Dayton constitutional system. If BiH is to become a fully sovereign state and an EU member, the High Representative's presence in BiH must come to an end.

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

84. The Security Council has authority to take certain measures under Chapter VII of the UN Charter "to maintain or restore international peace and security" only where there is "the existence of any threat to the peace, breach of the peace, or act of aggression."⁴⁹ BiH, though burdened with political divisions like so many countries, has been peaceful and secure for many years; there is no security threat that could possibly justify the Security Council acting under Chapter VII of the UN Charter. The Security Council should thus end the application of Chapter VII measures. Continuing to act under Chapter VII casts an unwarranted stigma on BiH and is detrimental to BiH's progress toward EU membership.

⁴⁹ See Chapter VII of the UN Charter.