

Picard Kentz & Rowe LLP
1750 K Street, NW
Suite 800
Washington, DC 20006

PICARD KENTZ & ROWE

tel +1 202 331 4040
fax +1 202 331 4011

MEMORANDUM

TO: The Honorable Hoyt Yee, Deputy Assistant Secretary for European and Eurasian Affairs
The Honorable Maureen Cormack, Ambassador of the United States of America

FROM: Picard Kentz & Rowe, International Law Counsel to Government of Republika Srpska

DATE: January 4, 2017

SUBJECT: Your Recent Communications to the President and Prime Minister of Republika Srpska

The President and Government of Republika Srpska have asked Picard Kentz & Rowe, as the Government's international law counsel, to respond to the demands made and consequences threatened in your recent communication with President Dodik and Prime Minister Cvijanović. This is particularly appropriate because the communication raises important issues of international law.

This memorandum will address your demands in turn; however, at the outset it is important to note that the communication directly violates 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.¹ It also violates a diplomat's obligation under the Vienna Convention on Diplomatic Relations "not to interfere in the internal affairs of [the] State."²

¹ 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).

² Vienna Convention on Diplomatic Relations (1961) Art. 41(1).

The demands made of Republika Srpska's President and Prime Minister were:

- (1) Discontinue work with BiH President Covic and HDZ party members to develop legislation to reform the BiH Constitutional Court, as provided for in the BiH Constitution, to replace foreign judges with judges from BiH.
- (2) For the President of Republika Srpska to appear in the BiH Prosecutor's Office in Sarajevo to be interviewed, notwithstanding the President's expressed willingness to be interviewed in Republika Srpska, as has been done previously.
- (3) Impede the publication of the recent referendum in the official gazette of Republika Srpska, although such publication is required by law.
- (4) Rescind the provision of SNSD's platform issued April 25, 2015, declaring that the SNSD would call for a referendum to seek citizens' views on whether Republika Srpska should continue in its status as an Entity of BiH, if reforms were not made to restore the constitutional competencies and structure guaranteed by treaty under the Dayton Peace Accords.

These U.S. officials' demands, and associated threats for noncompliance, not only contravene fundamental principles of international law, namely, that a foreign government and its diplomats should not interfere in the affairs of any other state; but agreeing to such demands, as explained in more detail below, would compel the President and Prime Minister to violate their sworn duty to uphold the Constitution and laws of Republika Srpska and to protect the interests of Republika Srpska and its citizens.

Demand #1: Cease Legitimate Efforts to Reform the BiH Constitutional Court

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.

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

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.³

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.”⁴ 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.”⁵

The Constitutional Court lacks legitimacy.

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.

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.”⁶ 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.⁷

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

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 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.

⁵ 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).

⁶Graziadei at 5 (footnotes omitted).

⁷See 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.

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.”⁸ The ethnic group 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.”⁹ 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”¹⁰

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 Republic Day “exemplified the judiciary’s politicization.”¹¹ 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.

Another prominent example is the Court’s 5-4 decision upholding the High Representative’s creation of the Court of BiH, despite that court’s manifest unconstitutionality. As the International Crisis Group has written, the BiH Constitution “allotted judicial matters to the Entities, apart from a state Constitutional Court.”¹² Four out of the six judges from BiH rightly found the law creating the Court of BiH 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.

The Constitutional Court’s legitimacy is also undermined by the foreign judges’ lack of independence from the High Representative. One of the foreign judges that voted to uphold the High Representative’s creation of the Court of BiH, Joseph Marko, 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*”¹³ A 2010 study of the Constitutional Court called it the “usual practice” for the Constitutional Court to “seek the opinion of the High Representative prior to making a decision.”¹⁴

Perhaps the clearest example of the High Representative’s pervasive interference with the Constitutional Court is the High Representative’s standing order that the Court must not challenge any of the High Representative’s decisions. After a 2006 Constitutional Court verdict

⁸ 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.

⁹ Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

¹⁰ International Crisis Group, *What Does Republika Srpska Want?*, 6 Oct. 2011, p. 16.

¹¹ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 9.

¹² International Crisis Group, *Bosnia’s Future*, 10 July 2014, p. 27.

¹³ JOSEPH MARKO, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, European Diversity and Autonomy Papers (July 2004) at 17 and 18 (emphasis added).

¹⁴ Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), p. 821.

held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the High Representative, the High Representative responded by handing down a decree nullifying the court's verdict. The decree, which remains in effect today, also banned any proceeding before the Constitutional Court or any other court that "*takes issue in any way whatsoever with one or more decisions of the High Representative.*"¹⁵

As recently as October 2015, the High Representative went so far as to declare itself, and not the court, as the final interpreter of the Constitution.

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

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 1996.¹⁶

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.¹⁷ 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 December 20 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 2016.¹⁸ 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.

Reforming the BiH Constitutional Court is essential for BiH to become a fully sovereign state and an EU member, and Republika Srpska is within its legal right to continue to press for such reforms until they are enacted.

Demand #2: Submit to Interview in Sarajevo by BiH Prosecutor's Office

The demand of U.S. officials that President Dodik submit to an interview in Sarajevo by the BiH Prosecutor unnecessarily undermines the constitutionally protected integrity of the institution of the RS Presidency and the safety of the President. The President made clear he is willing to be interviewed, despite the spurious nature of the investigation, but only in Republika Srpska, as he has done before. The President is within his constitutional rights to do so, and his position is

¹⁵ 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).

¹⁶ BiH Constitution, Art. VI(1)(d).

¹⁷ Rodolfo Toe, *Bosnian Croats, Serbs Unite Against Foreign Judges*, BALKAN INSIGHT, 2 Dec. 2015.

¹⁸ Danijel Kovacevic, *Bosnian Serbs Threaten Showdown over Foreign Judges*, BIRN, 20 Dec. 2016.

more than reasonable. In order to clearly demonstrate the absence of any personal motives for avoiding the hearing and thus deny the expressed stereotype that the entire political and legal argumentation of the Republic of Srpska on unsustainability of such a model of existence and operation of the Court and Prosecutor's Office of BiH is based on the aspiration that individuals avoid the processes, the President Dodik went to Sarajevo, where he was interrogated.

The BiH Prosecutor's Office is constitutionally obligated to carry out its functions in a manner that maintains separation of powers and non-interference of presidential functions. As is the practice in western democracies, the President must be allowed to perform his constitutional functions, and the actions of other branches of government, including the judiciary, must take this into account even with respect to investigation of alleged wrongdoing. This principle was followed recently, for example, during the investigation by the BiH Prosecutor's Office related to a claim by the Association of War Victims and their families - Mothers of Srebrenica. In that case, President Dodik agreed to be interviewed and the interview was conducted on November 16, 2016, in Banja Luka. There is no reason why this approach could not, or should not, have been followed again.

President Dodik has offered to do the same with respect to the investigation related to the referendum held within Republika Srpska, despite the fact that the investigation is politically motivated and illegitimate. In September, just days after Republika Srpska held its referendum on Republic Day, the BiH Chief Prosecutor issued a summons to President Dodik for questioning and said that the investigation of President Dodik over the referendum would be "a priority."

The Chief Prosecutor failed to explain why the investigation of President Dodik's role in a referendum that had already taken place should be a priority, particularly given that his office has never brought charges for any alleged violation of a Constitutional Court decision. Since 2004, authorities have failed to implement 91 decisions of the Constitutional Court.¹⁹ 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. The BiH Prosecutor's actions are an example of flagrantly selective use of the criminal law for political ends.

Investigating President Dodik over the referendum is substantively unlawful. President Dodik did not enact the Decision providing for the September 25 referendum and had no authority to stop it from taking place. The Decision on the Referendum was initiated by the caucuses of all Serbian parties in the RS National Assembly. Hence, neither the President nor the RS Government initiated or enacted the Decision.

It is well known, including by U.S. officials, that the SDA exerts improper influence on the BiH Prosecutor's Office. The Prosecutor's Office dutifully protects powerful SDA members and allies from prosecution and targets political rivals of the SDA. U.S. Deputy Chief of Mission Nicholas M. Hill observed in 2015 that the Chief Prosecutor is "largely believed to be heavily influenced by Bosniak political forces" and that there are "complaints that the prosecutor's office

¹⁹ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 10.

has too many strong-willed SDA acolytes on its staff.”²⁰

Despite the illegitimacy of the request and serious threats of violence made against him, President Dodik voluntarily submitted to questioning by the Prosecutor’s Office in Sarajevo, wishing to demonstrate clearly the absence of any other motives for having refused to be questioned. Given this fact, this *de facto* closes the issue raised in the conversation with the U.S. officials. President Dodik nonetheless still holds that there are no legal grounds requiring him to be interviewed outside of Republika Srpska and that there are no constitutional grounds for the Court of BiH and the BiH Prosecutor's Office to exist as they are and calls for agreement on judicial reforms to ensure compliance with the Constitution.

Demand #3: Prevent Publication of the Results of the Referendum on Republic Day

The demand by U.S. officials that President Dodik and Prime Minister Cvijanović prevent the publication of Republika Srpska’s referendum on its Republic Day in the official gazette is misguided. First, the President and the Government lack the legal authority to obstruct the publication of the referendum. Its publication is a matter of RS law under the competence of the RS National Assembly. The National Assembly is following the procedures set forth in the law with respect to its publication. Second and most important, the RS has the right to hold and publish the results of the referendum in its official gazette. Indeed, the referendum has already been successfully concluded and the opinions expressed by the RS citizens are available for elected officials within the RS to consider in setting future policy and law. The RS has set forth its reasons and legal basis for holding the referendum in a number of official statements and published reports,²¹ which are summarized below.

On September 25 of this year, Republika Srpska held a referendum to ascertain its citizens’ views about whether 9 January should be marked and celebrated as the Day of Republika Srpska. It is important to note that the holiday has been peacefully observed on January 9 for the past 20 years. Nonetheless, SDA President, Bakir Izetbegovic 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, January 9, 1992, in an attempt to create a political crisis. The SDA specifically claimed that the holiday violated the BiH Constitution because Republika Srpska’s creation, in essence, was illegitimate. The referendum thus concerned an issue of profound importance to RS citizens and was in accord with applicable law. RS citizens voted overwhelmingly in favor of retaining the 9th of January as the date of Republic Day.

The referendum was designed to inform the RS National Assembly as it considers how to implement the BiH Constitutional Court’s November 26, 2015, decision concerning Republic Day. That decision left to Republika Srpska the authority and responsibility to implement the decision to ensure that the celebration of the Day of Republika Srpska was in harmony with the BiH Constitution. The decision did not forbid Republika Srpska from celebrating the date of its founding. Publication of the result of the referendum in the official gazette is simply the last of many steps taken by the RS National Assembly to ensure that that the referendum is conducted

²⁰ Nicholas M. Hill, *Moving Beyond Narrow-Minded Politics*, MREŽA ZA IZGRADNJU MIRA 8 July 2015.

²¹ Refer to last two or three reports to the UNSC; did we also have a special report to the Sec Gen and UNSC that touched on this?

according to its laws.

SDA 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 Republic Day and nothing else. President Dodik and other Republika Srpska leaders have repeatedly made clear their belief that BiH can be successful if the Dayton structure is respected.

The Republika Srpska Constitution has long specifically provided for referenda at Articles 70 and 77. The Council of Europe's Venice Commission has thoroughly scrutinized the consistency of Republika Srpska's Constitution with the BiH Constitution,²² and it has never objected to the Republika Srpska's Constitution's referendum provisions. Republika Srpska's 2010 Law on Referendum and Civic Initiative was drafted in light of the Code of Good Practice of the Venice Commission²³ and the Recommendations of the Council of Europe's Committee of Ministers on citizens' participation in public life at the local level.²⁴ Referenda are fully consistent with the BiH Constitution and the practice of democratic states throughout Europe and around the world. The Dayton Accords contain no provisions that could reasonably be interpreted as prohibiting or restricting referenda.

In a recent report, the U.S.-based NGO Freedom House said the Constitutional Court's decision on Republic Day "exemplified the judiciary's politicization."²⁵ The Constitutional Court's two Bosniak judges, who are both former high SDA officials (General Secretary and Vice President), vote consistently according to the SDA's political interests rather than each case's legal merits. Meanwhile, the court's foreign judges vote according to the wishes of the High Representative, which usually align with the SDA's agenda.

The Constitutional Court's political nature is one reason why many of its decisions have never been implemented by officials of all three constituent peoples. It is worth noting that U.S. officials are not threatening Bosniak and Croat officials who have for years failed to implement decisions of the BiH Constitutional Court and European Court of Human Rights, such as the *Sejdić and Finci* decision and the decision on the electoral system in Mostar, which has not held elections since 2008.²⁶

Demand #4: Change SNSD Platform

²² See, e.g., Venice Commission, Compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia and Herzegovina following the Adoption of Amendments LIV – LXV by the National Assembly of Republika Srpska, Secretariat Memorandum on the basis of the Commission's opinion appearing in document CDL(96)56 final.

²³ CDI AD 2007-2008.

²⁴ Rec (2001) 19; Memorandum from Jasna Brkić, Minister of Economic Relations and Regional Cooperation, Republika Srpska, to Zoran Lipovac, Minister of Administration and Local Self-Government, Republika Srpska, 21 Jan. 2010.

²⁵ Freedom House, *Nations in Transition 2016: Bosnia and Herzegovina*, p. 9.

²⁶ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009; Decision of the Constitutional Court in Case No. U 9/09.

As a party to the Dayton Peace Accords, Republika Srpska has a right to assess whether treaty obligations have been violated by other parties to the treaty and to seek remedies and recourse provided by international law, including the Vienna Convention on the Law of Treaties. The SNSD Platform should be understood in this proper context.

For many years, Republika Srpska has diligently sought reforms that would return BiH and Entity competences to what the BiH Constitution, Annex 4 of the Dayton Accords, requires. The unconstitutional centralization of competencies at the BiH level is the legacy of the period when the High Representative exercised self-invented powers of rule by decree. In addition to being unconstitutional—as well as illegally enacted by decree or under duress—the centralization of competencies has led to unacceptably ineffective and inefficient governance and the destruction of important constitutional protections for BiH's Constituent Peoples. Unfortunately, BiH's Bosniak parties, often with the support of the High Representative and others in the international community, have shown themselves to be inflexible in defense of the unconstitutional and dysfunctional status quo. It is in this context that the SNSD adopted a declaration on April 25, 2015, which says:

If, by end 2017, there are no visible processes and measurable results in terms of establishing the RS's positions in line with the Annex 4 of the Dayton Peace Agreement, the RS National Assembly should call for a referendum on the independent status of the RS in 2018.

Based on the referendum results, the RS authorities, in line with the role of the party as established in the Annex 4 of the Dayton Peace Agreement, should propose a peaceful disassociation and concurrent mutual recognition to the FBiH.

In the territory of BiH, thus created independent states would form a Union of states of BiH, with open borders and free movement of peoples and goods.

President Dodik, who also serves as President of the SNSD, emphasized after the declaration's approval that the RS wants to remain in BiH but that the Republika Srpska's constitutionally protected competences with respect to the judiciary, finance, and other areas, must be restored.²⁷

The SNSD is far from alone in recognizing that BiH's status quo is untenable. For example, BiH's largest Croat party, the HDZ, has recently called for changes to further decentralize the current government structure to protect the rights of BiH's Constituent Peoples. The proposed change would grant authority to a group of majority-Croat cantons in the Federation that would be similar to the autonomy that lawfully belongs the two Entities under Annex 4 of the Dayton Accords. HDZ President Dragan Covic, a member of the BiH Presidency, said, "We want to make changes to the internal setup of Bosnia and Herzegovina because organized like this, Bosnia and Herzegovina cannot survive."

²⁷*Srpska Has Right to Choose Its Own Fate*, SRNA, 27 Apr. 2015.

Conclusion

Relations between foreign governments and BiH and its Entities should be based on respect for international law, including the fundamental tenet that foreign governments shall not interfere in the domestic affairs of sovereign states. Republika Srpska and its officials are within their legal rights to reform RS laws and those at the BiH level, through legal and democratic processes, in an effort to protect their rights as parties to the Dayton Peace Accords, including Annex 4, which established the BiH Constitution. 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.