

## The Legal Basis of Republika Srpska's Planned Referendum

1. The referendum called for by the President of Republika Srpska (RS) and the RS National Assembly seeks to address violations of the Dayton Peace Accords and the BiH Constitution in a manner fully consistent with both. The following analysis briefly sets out the legal basis for the proposed referendum. The laws creating the BiH Court and Prosecutor's Office were decreed by the High Representative in defiance of the Dayton Constitution and BiH's democratic institutions. The referendum approved by the RS National Assembly on 15 July 2015 gives citizens an opportunity to register their views about the imposition and implementation of those laws. Far from being a challenge to the Dayton Accords, the referendum is an opportunity for RS citizens to affirm them.

### **I. Referenda are constitutional and part of Europe's democratic heritage.**

2. Referenda are fully consistent with the BiH Constitution and the practice of democratic states throughout Europe and around the world. BiH Constitution Article 3.3.(b) says that **"General principals of international law will be an integral part of legislation of Bosnia and Herzegovina and entities."** Also, Preamble of BiH Constitution calls upon UN Charter, Universal declaration of human rights, and other acts of international law. That is why interpretation of BiH Constitution should consider a fact that BiH Constitution is a part of international agreement that defines that its legal character is based on international law.

3. The Dayton Accords contain no provisions that could possibly be interpreted as prohibiting or restricting referenda. As the Council of Europe's Parliamentary Assembly said in a 2007 resolution, "Referendums are an instrument of direct democracy which belong to the European electoral heritage."<sup>1</sup> The Council of Europe's Congress of Local and Regional Authorities recognized in a 2007 resolution that "referendums, whether at national, local or regional level, constitute one of the main instruments of direct democracy giving citizens the possibility to take part in political decision making as well as in public matters which directly concern them . . . ."<sup>2</sup>

4. The RS 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 the RS Constitution with the BiH Constitution,<sup>3</sup> and it has never objected to the RS Constitution's referendum provisions. The RS's 2010 referendum law was drafted in light of the Code of Good

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<sup>1</sup> Council of Europe, Parliamentary Assembly Res. 1592 (2007), 23 Nov. 2007, para. 1.

<sup>2</sup> Council of Europe, Congress of Local and Regional Authorities Res. 235 (2007).

<sup>3</sup> 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.

Practice of the Venice Commission<sup>4</sup> and the Recommendations of the Council of Europe's Committee of Ministers on citizens' participation in public life at the local level.<sup>5</sup>

## **II. The RS's planned referendum is lawful and justified.**

5. There is nothing in the nature of the RS's planned referendum that would render it unlawful. The planned referendum solicits citizens' views about the High Representative's imposition of laws, especially, the laws on the BiH Court and Prosecutor's office, and the implementation of those laws in the RS.

### **A. The BiH Court and Prosecutor's Office were established unlawfully.**

6. The establishment of the BiH Court and Prosecutor's Office was unlawful both because the High Representative lacked the legal authority to impose them and because the BiH Constitution reserves judicial functions to the Entities.

#### **1. The High Representative had no legal authority to impose the laws establishing the BiH Court and Prosecutor's Office.**

7. The absence of any legal authority for the High Representative to decree laws is apparent from the strictly limited mandate set out for the High Representative under [Annex 10](#) of the Dayton Accords. As summarized by Matthew Parish, a former OHR attorney, the High Representative's Dayton mandate is to be "a manager of the international community's post conflict peace building efforts, and a mediator between the domestic parties."<sup>6</sup> Annex 10 does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens or to act in a legislative, executive or judicial capacity. The so-called "Bonn Powers" were asserted by the High Representative, not provided by the Dayton Accords, as the language of the Bonn Declaration discloses.

8. Former UK Ambassador to BiH Charles Crawford, who helped invent the "Bonn Powers," has written, "[A]s far as I could see the Bonn Powers had *no real legal basis at all*. They amounted to an international political power-play bluff which successive High Representatives wrapped up in legal language to make the whole thing look imposing and inevitable."<sup>7</sup> As Parish, the former OHR attorney, recognized, the Bonn Declaration "ran quite contrary to the spirit and text of Annex 10 . . . and was *legally quite indefensible*."<sup>8</sup> The series of laws imposed by decree, removal without right or process of elected and appointed government

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<sup>4</sup> CDI AD 2007-2008.

<sup>5</sup> 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.

<sup>6</sup> Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007, p. 13.

<sup>7</sup> Charles Crawford, *Bosnia: the Bonn Powers Crawl Away to Die*, available at [charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/](http://charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/) (emphasis added).

<sup>8</sup> *Id.*, p. 14 (emphasis added).

officials, and judicial judgments illegally influenced or directly set aside were in violation of the Dayton Accords and the BiH Constitution, which established democratic processes and international human and political rights as law with constitutional authority for BiH, as Articles 2.2. and 3.3.(b) of BiH Constitution foresee.

9. Despite the absence of any authority for him to impose laws, the High Representative established the BiH Court and Prosecutor's Office by decree. According to the High Representative's 2000 decree imposing the Law on Court of BiH, the law was to remain in effect "until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, *without amendments and with no conditions attached.*"<sup>9</sup> The BiH Parliamentary Assembly's eventual adoption of the law according to the High Representative's strict instructions was essentially meaningless, especially because it came at a time when the High Representative was routinely issuing decrees removing politicians from office, banning them from public employment, seizing travel documents, and freezing bank accounts. Beginning in 2000, the High Representative issued decrees removing and banning from public employment nearly 200 BiH citizens, including elected presidents, legislators, judges, and other officials. This threat of severe personal sanctions was real to politicians and officials and served as an effective form of unlawful coercion upon the Parliamentary Assembly and others.

10. The High Representative's practice of imposing extrajudicial punishments against BiH citizens without any form of due process earned sharp international condemnation. In a 2004 resolution, the Parliamentary Assembly of the Council of Europe said, "[T]he Assembly considers it irreconcilable with democratic principles that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse."<sup>10</sup> In a March 2005 opinion, the Council of Europe's Venice Commission said of the High Representative's extrajudicial punishments:

The termination of the employment of a public official is a serious interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required.

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The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and*

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<sup>9</sup> Decision imposing the Law on the State Court of BiH, Office of the High Representative, 12 Nov. 2000 (emphasis added).

<sup>10</sup> Parliamentary Assembly of the Council of Europe, Res. 1384 (2004), June 23, 2004.

*Herzegovina]. He pursues a political agenda . . . . As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.*

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The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable.<sup>11</sup>

11. These pronouncements condemned the actions of the High Representative taken during the period in which the High Representative ordered the Parliamentary Assembly to enact the law upholding its creation of the BiH Court. Despite the condemnation by the Parliamentary Assembly of Europe and the Venice Commission, the High Representative continued to issue and enforce his decrees and to summarily remove and ban additional citizens from public positions without due process.

## **2. The BiH Constitution reserves judicial matters to the Entities.**

12. The laws creating the BiH Court and Prosecutor's Office are also unconstitutional because the Constitution reserves judicial matters to the Entities. As the International Crisis Group pointed out in a 2014 report:

The fate of the Court of Bosnia Herzegovina, the state court, shows how state building can go wrong. *Dayton allotted judicial matters to the entities, apart from a state Constitutional Court.* In 2000, the PIC ordered Bosnia's leaders to create a state court; when the legislature did not, OHR imposed a law creating the Court of BiH."<sup>12</sup>

13. The [BiH Constitution](#) explicitly states, "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."<sup>13</sup> The BiH Constitution carefully enumerates the competences of BiH, none of which—other than the BiH Constitutional Court—include judicial matters. Thus, judicial matters are in the competence of the Entities, and the laws creating the BiH Court and Prosecutor's Office are unconstitutional.

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<sup>11</sup> European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62<sup>nd</sup> plenary session, paras. 94, 96, and 98 (March 11-12, 2005) (emphasis added).

<sup>12</sup> International Crisis Group, *Bosnia's Future*, 10 July 2014, p. 27 (emphasis added).

<sup>13</sup> BiH Constitution, Article 3(a).

**3. Constitutional Court judges were committed to always upholding the High Representative's legislation.**

14. When the Law on Court of BiH decreed by the High Representative was challenged before the BiH Constitutional Court, four out of the six judges from BiH correctly found it unconstitutional. Yet the law was upheld, in a 5-4 decision, because the Constitutional Court's three foreign judges voted as a bloc, along with the two Bosniak judges, to protect the High Representative's creation. One of those foreign judges, Austrian professor 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 . . .*"<sup>14</sup>

15. When this "tacit consensus" was for once ignored by a majority of the Constitutional Court in a 2006 decision holding 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 the High Representative has never rescinded, also purported to forbid any proceeding before the Constitutional Court or any other court that "*takes any issue in any way whatsoever with one or more decisions of the High Representative.*"<sup>15</sup>

**B. The BiH Court and Prosecutor's Office have lost public confidence.**

16. Apart from the unconstitutionality of the BiH Court and Prosecutor's Office, their performance since they were imposed on BiH has given RS citizens no confidence in their impartiality or commitment to the rule of law.

**1. There is a decided bias against Serb victims of war crimes and in favor of the largest Bosniak party.**

17. War crimes must be tried and punished without regard to the ethnic group or political connections of their perpetrators and victims. The BiH Justice System has shown, instead, a consistent pattern of discrimination against Serb victims of war crimes and a penchant for acting according to the wishes of the Bosniak SDA party. This denies Serbs the equality before law to which they are entitled, and it undermines reconciliation.

18. 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. Even U.S. Deputy Chief of Mission Nicholas M. Hill recently observed that the Chief Prosecutor is "largely believed to be heavily influenced by Bosniak political forces" and that there are "complaints that the prosecutor's office has too many strong-willed SDA acolytes on its staff." 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.

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<sup>14</sup> Joseph Marko, FIVE YEARS OF CONSTITUTIONAL JURISPRUDENCE IN BOSNIA AND HERZEGOVINA, European Diversity and Autonomy Papers (July 2004), p.17 and 18 (emphasis added).

<sup>15</sup> 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).

This failure is apparent in the BiH Prosecutor's Office's record. Out of 7,480 Serb civilian war deaths (as estimated by the ICTY), just ten have led to a final conviction in the Court of BiH.

19. Some examples of the Prosecutor's Office's refusal to seek justice include:

- its refusal even to investigate newly uncovered evidence—10,000 pages of documents submitted by a former Bosniak SDA member—linking the President of the BiH House of Representatives to complicity in crimes by the sadistic El Mujahid Detachment of the Army of the Republic of BiH's (ARBiH) 3<sup>rd</sup> Corps;
- its blocking of the prosecution of Bosniak commander Naser Orić and others for a series of major war crimes in the Srebrenica area in spite of significant evidence and Orić's open boasting about atrocities;
- its failure to seek justice for the ARBiH's murder of 33 Serb civilians in the village of Čemerno, including women, children, and the elderly—despite evidence tying the crimes to specific individuals;
- its obstruction of the BiH State Investigation and Protection Agency's (SIPA) efforts to investigate Šemsudin Mehmedović, an SDA Member of the House of Representatives, over the illegal imprisonment and abuse of hundreds of Serb civilians in Tešanj, where Mehmedović was chief of police (the BiH Prosecutor's office went so far as to prosecute SIPA Director Goran Zubac on dubious charges, with the SDA member of the BiH Presidency crowing, “[w]e will likely send [Zubac] to prison.”<sup>16</sup>);
- its failure to prosecute ARBiH 5<sup>th</sup> Corps Commander Atif Dudaković for a series of grave war crimes, despite substantial evidence against him and the Prosecutor's Office's earlier promises that he would be indicted;
- its refusal to seek justice for well-established crimes against Serbs by the El Mujahid Detachment, such as its murder of 52 Serbs at a prison camp; and
- its failure to prosecute other crimes against Serbs.

There must be an end to this serious breach of justice due to the failure of the BiH Prosecutor's Office to discharge its duties without regard to ethnicity or political influence.

## **2. The BiH Court and Prosecutor's Office have unlawfully expanded their own jurisdiction.**

20. The BiH Court and Prosecutor's Office have also expanded their own jurisdiction through unlawful means, including by exploiting the vague provisions of Article 7.2 of the Law on Court of BiH to take jurisdiction over Entity-law charges essentially whenever they see fit. As the BiH High Judicial and Prosecutorial Council concluded in a 2014 study, in most of the

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<sup>16</sup> *Izetbegovic: SDA must “win well” in elections*, OSLOBOĐENJE, 27 Aug. 2014.

relevant cases “the Court of BiH elaborates its expanded jurisdiction in very general, inconsistent terms and without specification, simply defining it without detailed explanation of the criteria of Article 7, paragraph (2) of the Law, while in a significant number of cases an explanation was not even given.” EU officials and experts have accepted that Article 7.2 and the Court’s practices in interpreting it are inconsistent with European standards on legal certainty and the principle of the natural judge.

21. The BiH Court and Prosecutor’s Office have often used Entity-law charges as a political weapon against high officials. A recent case raising strong suspicions of such abuse came in April 2013 with the arrest of Federation of BiH (FBiH) President Živko Budimir, who had been at the center of a political struggle over attempts to reshuffle the FBiH Government. The Washington-based NGO Freedom House noted “broad concern that the charges are political.”<sup>17</sup> The Court of BiH took jurisdiction over the case despite the fact that the allegations related only to governmental corruption at the FBiH level, finding that the alleged offenses “by all means reflect on the dignity of the State of Bosnia and Herzegovina and its judicial system.” President Budimir was later released and the charges rejected, but only after spending weeks incarcerated and months in legal jeopardy.

22. Retroactive use of BiH Crime Code is creating a situation that convicted persons, for same crimes, are being sentenced for different time penalties and therefore an injustice is being made to all those that were judged by The Court of BiH. Furthermore, BiH Crime Code is defining crimes that were not envisaged by the Crime Code of former Yugoslavia, which is against the basic legal principle *nulla crimen, nulla poene sine lege*. It is specially unsustainable for The Court of BiH to take legally obligatory positions toward entity courts which is opposite to general principle of independence of a judge and a court as institutions, guaranteed by European Convention on Human Rights.

23. Only entities—BiH Federation and Republika Srpska as parties in BiH, are competent to change BiH Constitution. That cannot be done even by the Constitutional Court of BiH, as stated by international lawyers and judges of that very Court in the “Comment on BiH Constitution”, edition of Konrad Adenauer Foundation, Sarajevo 2011, where it says:

Revision and changes in Constitution can be done only by constitution maker. The Constitutional Court could at most identify inherent contradictions that are impossible to resolve in interpretation procedure in line with international law, and leave it to the constitution maker to eventually remove those contradictions by amending the text of the Constitution – in a foreseen procedure and with majority prescribed for that.

Constitution maker is Parliamentary Assembly of BiH, but changes to the Constitution of BiH has to be preceded by the agreement between entities as the only parties that can change or amend that part of international agreement, as envisaged by Articles 3.5.a), 4.4.d), 5.3.i) of BiH Constitution. Adopting Amendments is only a final act in a procedure of changing the annex of an international agreement.

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<sup>17</sup> Freedom House, *Nations in Transition 2014: Bosnia and Herzegovina*, p. 131.

24. For four years, Republika Srpska has sought, through the EU-sponsored Structured Dialogue on Justice, to address issues such as these, but not a single legislative change has resulted and the serious problems continue unabated.

25. It is legal and appropriate for the RS to hold this referendum as a forum for citizens to express their opinions about institutions that wield power over them despite having been imposed by the High Representative—rather than created by their representatives through the legitimate legislative process—in flagrant violation of the BiH Constitution.

**C. The planned referendum concerns an area of Entity competence.**

26. The referendum concerns a matter within the competence of the RS as an Entity. First, As explained in section A-2 above, the BiH Constitution allocates judicial matters to the Entities, except for the BiH Constitutional Court. The Constitution provides, “All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities,” and it does not assign any judicial matters—with the exception of the Constitutional Court—to BiH institutions. Thus, as the International Crisis Group has averred, “Dayton allotted judicial matters to the entities, apart from a state Constitutional Court.”<sup>18</sup> Because the Constitution allotted judicial matters to the Entities, the RS’s planned referendum is in an area of its competence.

27. Additionally, the RS Government has a legal duty under Article II, Section 1, of the BiH Constitution to “ensure the highest level of internationally recognized human rights and fundamental freedoms to its citizens.” These include the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which apply directly in BiH, having priority over all other law. Section 6 of Article II places responsibility explicitly and directly upon “all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities . . .” to implement the human rights and fundamental freedoms recognized in Section II. This responsibility obviously includes how citizens within the RS are treated by the judicial systems to which they are subject. For these reasons, among others, the RS is acting within its competences to hold a referendum soliciting the views of its citizens with respect to these matters.

**D. The planned referendum is consistent with Council of Europe standards.**

28. The planned referendum is plainly suitable under the Council of Europe’s standards for referenda. The Council’s Parliamentary Assembly, in Resolution 1121, invited member states:

to regard all subjects as suitable for being submitted to a referendum, with the exception of those which call in question universal and intangible values such as the human rights defined in the Universal Declaration of Human Rights and the European

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<sup>18</sup> International Crisis Group, *Bosnia’s Future*, 10 July 2014, p. 27.



Convention of Human Rights, and the basic values of democracy in general and parliamentary democracy in particular.<sup>19</sup>

29. The planned referendum certainly does not in any way violate the BiH Constitution or question universal intangible values such as human rights or the basic values of democracy in general and parliamentary democracy in particular. Rather, it gives RS citizens an opportunity to register their views on laws and institutions imposed by decree by the High Representative in violation of the rule of law and the Dayton Accords.

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<sup>19</sup> Council of Europe, Parliamentary Assembly Res. 1121 (1997), 22 April 1997, para. 15(ii).