

## Notes

### Macedonia's Ohrid Framework Agreement Reexamined in Response to Internal and External Crises: Reason for Cautious Optimism on Europe's Southeastern Border

#### *Columbia Journal of Transnational Law* Writing Prize in Comparative and International Law, Outstanding Note Award

*In recent years, a number of variables put Macedonia at an increased risk of instability. These factors include Macedonia's tense relationship with Greece, the strain posed by the European migration crisis, the potential for domestic interethnic conflict, and Macedonia's recent government scandals. Because of the security risks that an unstable Macedonia poses to the European Union, it is crucial for the EU to seek new ways to ensure Macedonia remains stable. This Note assesses the continued durability of the current set of legal tools—most importantly the framework established by the 2001 Ohrid Framework Agreement (“Ohrid”)—to cope with the increased strain posed by recent destabilizing crises in Macedonia. The Note argues that the substantive liberal democratic legal framework established by Ohrid is largely effective but that the EU needs to increase the procedural impediments to future Macedonian governments enacting illiberal reform after Macedonia becomes an EU member. This Note contributes to existing dialogue by offering an assessment of the steps that both Macedonian and European leaders can take to increase Macedonia's internal stability: through changes to exist-*

*ing domestic legal regimes and by developing stronger ties between Macedonia and regional European legal regimes. Despite the significant risks of instability given current geopolitical factors, there is reason for cautious optimism given the country's strong baseline of rule of law and proven desire to join the EU. At the same time, however, European leaders must take tactically preemptive steps to create a clearer and more certain path to EU membership for Macedonia.*

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## INTRODUCTION

The Republic of Macedonia, or the former Yugoslav Republic of Macedonia (“FYROM”), depending on who is speaking, is a country that rarely makes international headlines outside of the Balkan region.<sup>1</sup> But the tiny country in southeastern Europe, comprised of just two million people over an area roughly the size of Vermont,<sup>2</sup> made international headlines a number of times in 2015 following a series of somewhat spectacular and still-not-quite resolved scandals. First, there was the massive wiretapping scandal, allegedly orchestrated by the country’s decreasingly popular and increasingly authoritarian prime minister, Nikola Gruevski (“the Wiretapping Scandal”).<sup>3</sup> Next came the urban shootout between alleged nationalist Kosovar-Albanian separatists and a very-well-armed cadre of Macedonian national police that left eighteen dead in the town of Kumanovo (“the Kumanovo Crisis”).<sup>4</sup> And then came the dual pro- and anti-government camps of protestors that shut down swaths of Skopje for

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1. The contemporary State, which is generally referred to as “Macedonia,” “Republic of Macedonia” or “FYROM,” will be referred to as “Macedonia” for the duration of this Note.

2. *The World Factbook: Europe: Macedonia*, CENT. INTELLIGENCE AGENCY (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/mk.html> (expand “People and Society:: Macedonia” section).

3. Joanna Berendt, *Macedonia Government is Blamed for Wiretapping Scandal*, N.Y. TIMES (June 21, 2015), <http://www.nytimes.com/2015/06/22/world/europe/macedonia-government-is-blamed-for-wiretapping-scandal.html>.

4. Sase Dimovski, *Kumanovo Gunmen Face Trial in Macedonia*, BALKAN INSIGHT (Feb. 8, 2016), <http://www.balkaninsight.com/en/article/kumanovo-gunmen-face-trial-in-macedonia-02-08-2016-1>; *Macedonia Police Killed in Clashes with ‘Terrorists’*, BBC (May 10, 2015), <http://www.bbc.com/news/world-europe-32674121>.

much of the summer (“the Summer Protests”).<sup>5</sup> And finally, of course, tiny Macedonia found itself making headlines intermittently throughout much of 2015 as a pivotal transport point on the route of refugees making their way into the EU (“the European migration crisis”).<sup>6</sup>

Given Macedonia’s small size, alongside the fact that it has not experienced a large-scale conflict like many of its neighbors, including Kosovo and Bosnia and Herzegovina (“BiH”), it might seem unimportant for the EU and the international community to devote resources to ensuring the country remains stable. But because of Macedonia’s pivotal location on the EU’s southeastern frontier, these recent destabilizing factors should not be treated as isolated incidents and ignored by EU leaders. Rather, the EU needs to take recent instability—both those events that seem to indicate a deterioration of democratic institutions internally, such as the Kumanovo Crisis, the Wiretapping Scandal and the Summer Protests, and external factors with the potential to destabilize an already fragile situation, mainly the European migration crisis—as an opportunity to reevaluate the strength of Macedonia’s domestic legal institutions and the possible avenues through which Europe can better incorporate Macedonia into regional institutions.

Although Macedonia met the conditions for prospective membership into the EU as early as 2009, membership discussions have stalled in recent years and Macedonia has not been offered membership into the EU.<sup>7</sup> Macedonia’s path to EU membership remains both opaque and uncertain. However, both Macedonia and the

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5. Sinisa Jakov Marusic, *Anti-Gruevski Protests Resume in Macedonia*, BALKAN INSIGHT (June 5, 2015), <http://www.balkaninsight.com/en/article/daily-protests-resume-in-macedonia>; Valentina Pop, *Macedonia Becomes Latest Stage for Russian Tensions with the West*, WALL STREET J. (June 2, 2015), <http://www.wsj.com/articles/macedonia-becomes-latest-stage-for-russian-tensions-with-the-west-1433202972>.

6. Yannis Behrakis et al., *Stranded Migrants Try to Storm into Macedonia, Tear Down Fence*, REUTERS, Nov. 26, 2015, <http://www.reuters.com/article/us-europe-migrants-greece-macedonia-idUSKBN0TF1S420151126>; Suzanne Daley, *Thousands of Migrants Stranded in Greece as Route North is Narrowed*, N.Y. TIMES (Dec. 9, 2015), <http://www.nytimes.com/2015/12/10/world/europe/greece-macedonia-migrants-refugees.html>; Alison Smale & Stephan Castle, *Migrant Influx Prompts Macedonia, Britain and France to Increase Security*, N.Y. TIMES (Aug. 20, 2015), <http://www.nytimes.com/2015/08/21/world/europe/macedonia-detains-migrants-from-greece-at-border.html>; Ognen Teofilovski, *Fourteen Migrants Killed in Macedonia, Hit by Train in Gorge*, REUTERS, Apr. 24, 2015, <http://www.reuters.com/article/us-macedonia-migrants-idUSKBN0NF0JD20150424>.

7. Martin Banks, *EU Urged to Apply Pressure on Greece over Macedonia Accession*, PARLIAMENT MAG. (June 26, 2015), <https://www.theparliamentmagazine.eu/articles/news/eu-urged-apply-pressure-greece-over-macedonia-accession>.

EU face risks to their continued stability if the EU cannot find ways in which to allow Macedonia a clearer and more certain path to EU membership. Given the unique set of potentially destabilizing factors facing Macedonia, it is crucial for the EU to use the EU membership process as a way to promote long-term stability in Macedonia. The main factors that risk destabilizing Macedonia include Macedonia's tense relationship with its neighbors, the strain that the European migration crisis has put on Macedonia, and the potential for escalation of simmering interethnic conflict within Macedonia's borders between ethnic Albanians and ethnic Macedonians.

This Note assesses the continued durability of the current set of legal tools—most importantly the framework established by the 2001 Ohrid Framework Agreement (“Ohrid”)<sup>8</sup> and the prospect of potential EU membership—to cope with the increased strain posed by recent destabilizing crises in Macedonia. The Note argues that the *substantive* liberal democratic legal framework established by Ohrid is largely effective but that the EU needs to increase the *procedural* impediments to future Macedonian governments enacting illiberal reform after Macedonia becomes an EU member. This Note contributes to existing dialogue by offering an assessment of the steps that both Macedonian and European leaders can take to increase Macedonia's internal stability: through changes to existing domestic legal regimes and by developing stronger ties between Macedonia and regional European legal regimes. Despite the significant risks of instability resulting from current geopolitical factors, there is reason for cautious optimism given the country's strong baseline of rule of law and proven desire to join the EU. At the same time, however, European leaders must take tactically preemptive steps to create a clearer and more certain path to EU membership for Macedonia.

Part I of this Note commences with a background on the Macedonian domestic legal regime, with a focus on Ohrid. The Note focuses on Ohrid because this agreement provides the legal foundation that has governed power sharing between ethnic Albanians and Macedonians in Macedonia since the 2001 conflict. Part I then examines the role that the prospect of EU membership has played over the past two decades in strengthening liberal democratic reform in Macedonia. Part II assesses three of the greatest impediments that Macedonia and the EU must address as Macedonia works toward EU membership: the risk that Macedonia will dismantle its liberal democratic institutions after being granted EU membership; the potential for interethnic conflict; and bilateral relations with Greece, a country that has been vetoing Macedonia's membership in the EU. Part II al-

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8. OHRID FRAMEWORK AGREEMENT (Maced.).

so offers recommendations for the EU and Macedonia to make EU membership a reality for Macedonia. Part III provides a brief set of key recommendations based on the comprehensive set of recommendations discussed in the three subsections of Part II.

## I. BACKGROUND: THE OHRID FRAMEWORK AGREEMENT AND MACEDONIA'S CURRENT DEGREE OF INTEGRATION WITH EUROPEAN LEGAL REGIMES

### A. *The Ohrid Framework Agreement: Macedonia's Domestic Legal Regime for Managing Power Sharing Between Ethnic Albanians and Macedonians*

This Section consists of two subsections. First, it examines the history that led to the ratification of Ohrid. Second, it analyzes Ohrid's key provisions to determine the ways in which Ohrid may have contributed to peace between ethnic Albanians and Macedonians, Macedonia's two largest ethnic communities, since it was ratified in 2001.

#### 1. History Leading to the Ratification of the Ohrid Framework Agreement

In 1946, following a reorganization of Yugoslavia after World War II, Macedonia was governed as a constituent republic within Yugoslavia with federal status<sup>9</sup> ("the Yugoslav Republic of Macedonia" or "YROM") until it declared independence from Yugoslavia in 1991.<sup>10</sup> The 1974 Yugoslav Constitution accorded equal rights to all ethnic groups within Yugoslavia, including both ethnic Macedonians and ethnic Albanians.<sup>11</sup> Thus, the ethnic Macedonian population, which comprised sixty-five percent of YROM's population, and the large ethnic Albanian minority, which comprised twenty to twenty-five percent of YROM's population, both received equal treatment under Yugoslav law.<sup>12</sup>

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9. The Yugoslav Republic of Macedonia, as it existed between 1946 and 1991, will be referred to as "YROM" for the duration of this Note.

10. John B. Allcock, *Yugoslavia, Former Federated Nation [1929-2003]*, ENCYCLOPEDIA BRITANNICA (Feb. 29, 2012), <http://www.britannica.com/place/Yugoslavia-former-federated-nation-1929-2003>.

11. Jenny Engström, *Multiethnicity or Binationalism? The Framework Agreement and the Future of the Macedonian State*, 1 EUR. Y.B. MINORITY ISSUES 335, 335-36 (2003).

12. REPUBLIC OF MACED. STATE STATISTICAL OFFICE, CENSUS OF POPULATION,

The situation changed when Macedonia declared independence from Yugoslavia in 1991.<sup>13</sup> Albanian leaders in Macedonia were fearful that Albanians would be marginalized by the new State because the 1991 Macedonian Constitution failed to clearly define the legal status of Albanians and other minority groups.<sup>14</sup> In fact, the preamble of the 1991 Constitution defined the Republic of Macedonia as “a national state of the Macedonian people, in which full equality as citizens and permanent coexistence with the Macedonian people is provided for Albanians, Turks, Vlachs, Romanics and other nationalities living in the Republic of Macedonia.”<sup>15</sup> In other words, the language of the 1991 Constitution created a State *for* ethnic Macedonians, in which members of other ethnic groups were *allowed to coexist* as equals under the law with the ethnic Macedonian majority.

In addition to the preamble, there was ample evidence throughout the text of the 1991 Constitution that ethnic Macedonians intended to dominate the new State. For example, Article 7 stipulated that the Macedonian language was the official State language even though the sizeable Albanian minority spoke Albanian.<sup>16</sup> Because of fear of marginalization in an autonomous Macedonian State, many ethnic Albanians within Macedonia boycotted the 1991 independence referendum and staged their own community vote in which the overwhelming majority supported territorial autonomy for ethnic Albanian regions within Macedonia.<sup>17</sup>

Although the Albanian population was in favor of independence from the Serbian dominated Yugoslavia, Macedonian “ownership” of the new Macedonian State of which they were now citizens was troubling to many members of the ethnic Albanian community. Even though an otherwise civic concept of citizenship permeated the 1991 Constitution, Macedonian ownership of the State, as evidenced by the constitution’s preamble, led to a tense and unequal relationship between the Albanian and Macedonian communities following independence.<sup>18</sup> For example, Albanian participation in State institu-

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HOUSEHOLDS AND DWELLINGS IN THE REPUBLIC OF MACEDONIA, 2002: FINAL DATA 34 (May 2005), [http://www.stat.gov.mk/pdf/kniga\\_13.pdf](http://www.stat.gov.mk/pdf/kniga_13.pdf). Note that no official census has been conducted since 2002. *Population Census*, REPUBLIC MACED. STATE STAT. OFF., [http://www.stat.gov.mk/OblastOpsto\\_en.aspx?id=31](http://www.stat.gov.mk/OblastOpsto_en.aspx?id=31) (last visited Mar. 3, 2017).

13. Engström, *supra* note 11, at 336.

14. *Id.*

15. MACED. CONST. pmb.; *see also* Engström, *supra* note 11, at 337.

16. MACED. CONST. art. 7; *see also* Engström, *supra* note 11, at 338.

17. Engström, *supra* note 11, at 336.

18. *Id.* at 336–37; Albert van Hal, *Back to the Future: The Referendum of November 7th in Macedonia*, 16 HELSINKI MONITOR 36, 37–38 (2005).

tions remained low—prior to 2001, Albanians represented less than ten percent of most ministries and five percent of the police force.<sup>19</sup>

Nonetheless, in the years following independence, a cold peace began to emerge. This peace lasted throughout the 1990s until widespread interethnic conflict emerged between Macedonians and Albanians in the form of skirmishes across the country from February to August of 2001.<sup>20</sup> The fighting resulted in more than 200 casualties and 100,000 people exiled or internally displaced.<sup>21</sup> Relations between ethnic Macedonians and Albanians reached a historic low point.<sup>22</sup> Fighting ceased in August 2001, with the signing of Ohrid between ethnic Macedonian and Albanian leaders.<sup>23</sup> With participation from the international community, most notably the EU and NATO,<sup>24</sup> Ohrid's drafters aimed to build a lasting basis for peace between the two ethnic groups by amending the 1991 Constitution to address the longstanding concerns of the Albanian community pertaining to Albanians' role as citizens of the Macedonian State.<sup>25</sup> Over half of ethnic Macedonians ("Macedonians") did not approve of the signing of Ohrid.<sup>26</sup> Macedonian disapproval of Ohrid stemmed in large part from widespread belief within the Macedonian community that the agreement was forced on their leaders by external forces, including Albanian separatist terrorist coercion and international pressure.<sup>27</sup> In short, Macedonians felt a lack of ownership over the document when it was signed because of the lack of public participation in the ratification process.<sup>28</sup> But despite resentment by Macedonians toward Ohrid, there was no interethnic violence between Albanians and Macedonians for the fourteen years between 2001 and the 2015 Kumanovo Crisis—and, remarkably, despite the potential for the

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19. van Hal, *supra* note 18, at 36–37.

20. Ulf Brunnbauer, *The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments*, J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. 2 (2002), <http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2002/nr1/Focus1-2002Brunnbauer.pdf>.

21. *Id.*

22. *Id.*

23. Engström, *supra* note 11, at 335.

24. Pieter van Houten & Stefan Wolff, *The Dynamics of Ethnopolitical Conflict Management by International and Regional Organizations in Europe*, J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. 23 (2008), [http://www.ecmi.de/fileadmin/doc/JEMIE\\_1-2008-van\\_Houten.pdf](http://www.ecmi.de/fileadmin/doc/JEMIE_1-2008-van_Houten.pdf).

25. Engström, *supra* note 11, at 341–42.

26. Ivana Tomovska, *Post-Conflict Developments and Decentralization in Macedonia*, 7 EUR. Y.B. MINORITY ISSUES 135, 138 (2010).

27. van Hal, *supra* note 18, at 40.

28. *Id.*

Kumanovo Crisis to lead to further confrontation, it did not result in any further interethnic hostilities.<sup>29</sup>

## 2. The Ohrid Framework Agreement

Because of the long period of peace that followed Ohrid's ratification, it is worth analyzing the legal mechanisms by which Ohrid addresses the concerns of both the Macedonian and Albanian communities. Ohrid has been highly effective because it relies on decentralized government rather than dividing State power along ethnic lines as the primary mechanism for empowering ethnic Albanians. Structurally, Ohrid is a fairly straightforward document. It begins by outlining a set of general principles that are intended to act as the foundation to a more equitable power sharing arrangement between ethnic Albanians and Macedonians.<sup>30</sup> These general principles are then implemented through Annex A, which lists amendments to the 1991 Constitution, Annex B, which lists legislative modifications, and Annex C, which lists a number of implementation and confidence-building measures.<sup>31</sup>

Ohrid begins with the language:

The following points comprise an agreed framework for securing the future of Macedonia's democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and the Euro-Atlantic community. This Framework will promote the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens.<sup>32</sup>

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29. Sinisa Jakov Marusic, *Macedonia: Deadly Shootout Tests Ethnic Relations*, BALKAN INSIGHT (Dec. 30, 2015), <http://www.balkaninsight.com/en/article/macedonia-deadly-shootout-tests-ethnic-relations-12-29-2015>.

30. OHRID FRAMEWORK AGREEMENT arts. 1–7 (Maced.).

31. The parties agreed to adopt the constitutional amendments listed in Annex A within 45 days of signing Ohrid. *Id.* art. 8.1. Annex B creates a binding commitment that “[t]he parties will take all necessary measures to ensure the adoption of the legislative changes set forth hereafter within the time limits specified.” *Id.* annex B, pmbl. The implementation and confidence-building measures in Annex C are directly binding on the parties. *Id.* annex C. The parties to the agreement, while not ever explicitly mentioned in Ohrid, can be assumed to be the Macedonian government and ethnic Albanian armed groups (mentioned in Article 2.1) between whom the agreement brokered peace.

32. *Id.* pmbl. Annex A of Ohrid also revises the Preamble of Macedonia's Constitution to begin:

The citizens of the Republic of Macedonia, taking over responsibility for the

In contrast to the preamble of the 1991 Constitution, which emphasized ownership of the Macedonian State by the Macedonian ethnic group, Ohrid's preamble is notably different in two fundamental respects. First, it stresses the equality of all citizens before the law; and, second, it emphasizes Macedonia's place in the European community.

Far short of the partition or semi-autonomous status of Albanian regions advocated by many Albanian leaders in 1991, the 2001 document recognizes Macedonia as a multiethnic State, and refuses to allow territorial or power-sharing divisions to be written along ethnic lines—Article 1.2 provides, “Macedonia’s sovereignty and territorial integrity, and the unitary character of the State are inviolable and must be preserved. There are no territorial solutions to ethnic issues.”<sup>33</sup> Learning, in large part, from the shortcomings of the Dayton model<sup>34</sup>—with its structure based on dividing governance of an already very small country along ethnic lines and removing nearly all competencies from the central state government<sup>35</sup>—Ohrid’s drafters

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present and future of their fatherland, aware and grateful to their predecessors for their sacrifice and dedication in their endeavors and struggle to create an independent and sovereign state of Macedonia, and responsible to future generations to preserve and develop everything that is valuable from the rich cultural inheritance and coexistence within Macedonia, equal in rights and obligations towards the common good—the Republic of Macedonia, in accordance with the tradition of the Krushevo Republic and the decisions of the Antifascist People’s Liberation Assembly of Macedonia, and the Referendum of September 8, 1991, they have decided to establish the Republic of Macedonia as an independent, sovereign state, with the intention of establishing and consolidating rule of law, guaranteeing human rights and civil liberties, providing peace and coexistence, social justice, economic well-being and prosperity in the life of the individual and the community, and in this regard through their representatives in the Assembly of the Republic of Macedonia, elected in free and democratic elections, they adopt.

*Id.* annex A, pmbl.

33. *Id.* art. 1.2.

34. The Dayton Accords brokered peace to end the Bosnian conflict. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugoslavia, Dec. 14, 1995, 35 I.L.M. 89 [hereinafter Dayton Accords]. Annex 4 of the Dayton Accords acts as the constitution for the contemporary State of BiH. *Id.* annex 4. The term “Dayton model” refers to the Dayton Accords’ approach to resolving ethnic conflict through federalism and power sharing arrangements drawn along ethnic lines. Lenard J. Cohen, *Fabricating Federalism in “Dayton Bosnia”*: *Recent Political Development and Future Options*, in *FEDERALISM DOOMED? EUROPEAN FEDERALISM BETWEEN INTEGRATION AND SEPARATION* 116, 138 (Andreas Heinemann-Grüder ed., 2002).

35. Constance Grewe & Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, 15 *MAX PLANCK Y.B. U.N. L.* 1, 10 (2011); Aisling Lyon, *Between the Integration and Accommodation of Ethnic Difference: Decentralization in the Republic of Macedonia*, 11 *J. ON ETHNOPOLITICS & MINORITY ISSUES EUR.*, no. 3, 2013, at 80, 92.

opted instead for a less drastic decentralized approach that afforded enhanced competencies to local governments while still leaving a good degree of decision-making authority in the hands of the central state government. As a corollary to Article 1.2, Article 1.5 explains, “The development of local self-government is essential for encouraging the participation of citizens in democratic life, and for promoting respect for the identity of communities.”<sup>36</sup>

In order to achieve the general principles asserted in Ohrid, the Agreement’s annexes include a number of constitutional and legislative amendments, the most important of which for the discussion in this Note include: (1) increased competencies for municipalities; (2) equitable representation in government institutions for minorities; (3) use of language; (4) special parliamentary procedures; and (5) changes to the selection process for judges.

Perhaps the most important change to come from Ohrid is that it increased the power of municipal governments, thereby decentralizing the power of the central government. Article 3, on “Development of Decentralized Government,” calls for the drafting of a revised Law on Local Self-Governance, which affords municipalities new competencies, primarily in the areas of “public services, urban and rural planning, environmental protection, local economic development, culture, local finances, education, social welfare, and health care” in conformity with the European Charter on Local Self-Government.<sup>37</sup> Article 3 calls for municipality boundaries to be redrawn following the 2002 census<sup>38</sup>—an effort that was predominantly aimed at ensuring Albanians would constitute at least twenty percent of Skopje.<sup>39</sup> This was significant because it ensured that the country’s capital and far-and-away largest city would be required to offer all municipal services in the Albanian and Macedonian language, pursuant to Article 6,<sup>40</sup> which requires municipalities to offer municipal services in the language of a minority community if at least twenty percent of the municipality speaks that language.<sup>41</sup> By decentralizing governance, supporters argued that Ohrid would ensure that the Albanian community would have more capacity to self-govern,<sup>42</sup> without relying on the de facto division of power along

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36. OHRID FRAMEWORK AGREEMENT, art. 1.5 (Maced.).

37. *Id.* art. 3.1.

38. *Id.* art. 3.2.

39. van Hal, *supra* note 18, at 42–43.

40. OHRID FRAMEWORK AGREEMENT, art. 6.5 (Maced.).

41. *Id.* annex A, art. 7.

42. Lyon, *supra* note 35, at 89–90.

ethnic lines used in the Dayton Accords that has made BiH divided and largely ungovernable. Others, however, worried that Ohrid left authority too decentralized, which would eventually lead to the dissolution of an impotent central State.<sup>43</sup> Supporters countered those who expressed this fear by arguing that despite decentralization mechanisms, Ohrid simply allowed communities to govern themselves while affording few ways for municipal leaders to assert undue influence on policymaking best left for the central government.<sup>44</sup>

To alleviate underrepresentation of minorities in the police force and other governmental institutions, Article 4, on “Non-Discrimination and Equitable Representation,” calls on authorities to rapidly fix the underrepresentation in the police force and other governmental institutions; it also reserves three of the nine seats on the Constitutional Court for individuals “claiming to belong to the communities not in the majority.”<sup>45</sup> The primary aim of Article 4 was two-fold—first, to ensure that municipal leaders more clearly represented their communities, and, second, to allow ethnic minorities to have a more *de jure* means of ensuring that they would be represented at the state level.<sup>46</sup> As intended, the new provisions have led to increased representation by ethnic Albanians at both the municipal and state level.<sup>47</sup>

In addition to the Equitable Representation provision, Article 5, on “Special Parliamentary Procedures,” grants a veto right for ethnic minorities to any law “directly affect[ing] culture, use of language, education, personal documentation, and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and the boundaries of municipalities.”<sup>48</sup> Article 5 requires any law falling into these categories to receive a “majority of the votes of Representatives claiming to belong to the communities not in the majority of the population.”<sup>49</sup> Because Albanians comprise a supermajority of all minority citizens, they comprise a supermajority of these Representatives, which means that Article 5 amounts to an absolute veto right for ethnic Albanians over a large category of legislation.<sup>50</sup>

Finally, Article 7 to the Macedonian constitution, listed in

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43. Tomovska, *supra* note 26, at 143.

44. Lyon, *supra* note 35, at 90.

45. OHRID FRAMEWORK AGREEMENT, art. 4.3 (Maced.).

46. *Id.* art. 4; van Houten & Wolff, *supra* note 24, at 21.

47. van Houten & Wolff, *supra* note 24, at 21.

48. OHRID FRAMEWORK AGREEMENT, art. 5.2 (Maced.).

49. *Id.* art. 5.1.

50. Engström, *supra* note 11, at 341.

Annex A, stipulates that while Macedonian is the national language of Macedonia, “[a]ny other language spoken by at least 20 percent of the population is also an official language”<sup>51</sup> and “[a]ny person living in a unit of local self-government in which at least 20 percent of the population speaks an official language other than Macedonian may use any official language to communicate with the regional office of the central government with responsibility for that municipality.”<sup>52</sup> In tandem, these provisions have afforded a higher degree of self-governance to Macedonia’s ethnic Albanian community and led to the greater inclusion of ethnic Albanians at the state level without mechanisms that set up a federalized system or divide representation rights and governance responsibilities along ethnic lines.

*B. Macedonia’s Desire to Join the EU as a Catalyst for Liberal Democratic Reform in Macedonia*

In addition to the domestic legal regime set up by Ohrid, Macedonia’s desire to join the EU has helped maintain stability since 2001. This section briefly highlights the steps Macedonia has taken in its decade-long bid for EU membership. Macedonia’s desire to join the EU has contributed to its stability because Macedonia adopted numerous liberal democratic reforms meant to protect the rights of ethnic Albanians, and other minority groups, as a condition to EU membership. However, the EU needs to offer Macedonia a clearer path to membership if the EU wants the Macedonian government to continue to implement stability-promoting liberal democratic reforms.

More so than anything else, the prospect of EU membership has acted as the driving force behind efforts by Macedonian leaders to pass new laws to protect ethnic Albanians and other minorities.<sup>53</sup> For example, many analysts attribute the adoption of the 2008 law on the use of languages spoken by at least twenty percent of citizens primarily to informal pressure by the EU and not to domestic pressure.<sup>54</sup> As former European Commissioner Olli Rehn remarked, “Enlargement has proven to be one of the most important instruments for European security. . . . [T]he EU has achieved far more through its

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51. OHRID FRAMEWORK AGREEMENT, annex A, art. 7(2).

52. *Id.* annex A, art. 7(4).

53. Simonida Kacarska, *Minority Policies and EU Conditionality—The Case of the Republic of Macedonia*, 11 J. ON ETHNOPOLITICS & MINORITY ISSUES EUR., no. 3, 2013, at 60, 67–68.

54. *Id.*

gravitational pull than it could ever have done with a stick or a sword.”<sup>55</sup> But despite the “gravitational pull” of the EU, it has been over a decade since Macedonia became a candidate for EU membership, and despite all of the country’s work so far, the EU has not provided a clear path to membership.

### 1. The Stabilization and Association Process and Stalled EU Membership Discussions

Macedonia’s greatest efforts to implement liberal democratic reform on its path to EU membership have been spent implementing legislation to comply with the principals of the Copenhagen criteria. The Copenhagen criteria, which act as the rules for defining whether a country is eligible to join the European Union, stipulate that in order to join the EU, a new member needs to be a stable democracy, respect human rights and the rule of law, and ensure the protection of the rights of minorities.<sup>56</sup> As a means of building a path to membership for the Balkan States, European leadership began the Stabilization and Association Process (“SAP”) in 1999, specifically aimed at the former Yugoslav States of Macedonia, BiH, Croatia, Serbia, and Montenegro, in addition to Albania.<sup>57</sup> The aims of the SAPs were “to stabilise the political and economic situation in the Western Balkans,” to strengthen relations among the new States, and to provide benchmarks to check the integration capability of each of the countries as they prepared to join European institutions.<sup>58</sup> Macedonia was the first country to sign a Stabilization and Association Agreement (“SAA”) under the SAP with the EU in 2001, demonstrating its determination to move forward with its EU accession.<sup>59</sup> In November 2005, the European Commission issued an opinion stating that Macedonia met the requirements for EU candidacy.<sup>60</sup> By 2009, Macedonia had fulfilled all of the criteria necessary to start accession negoti-

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55. Gentjan Skara, *The Role of the EU as a Peacebuilder in the Western Balkans*, ROMANIAN J. EUR. AFF., Dec. 2014, at 26, 35.

56. *Accession Criteria*, EUR. COMMISSION (Dec. 6, 2016), [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en).

57. Mladen Karadzoski & Artur Adamczyk, *Macedonia and Her Difficult Neighbours on the Path to the EU*, 17 Y.B. POLISH EUR. STUD. 209, 211 (2014).

58. *Id.*

59. Mislav Mataija, *The Unfulfilled Potential of Stabilisation and Association Agreements Before SEE Courts*, in JUDICIAL APPLICATION OF INTERNATIONAL LAW IN SOUTHEAST EUROPE 11, 11 (Siniša Rodin & Tamara Perisin eds., 2015).

60. Karadzoski & Adamczyk, *supra* note 57, at 213.

ations.<sup>61</sup> But despite all of Macedonia's progress on its path to EU membership, Greece's ability to veto Macedonia's candidacy has held up negotiations for the past decade.<sup>62</sup>

So far, even though all Western Balkan countries, aside from Kosovo, have signed SAAs, the EU has only allowed Croatia to go through the full process of SAP negotiations to accession negotiations for full EU membership.<sup>63</sup> Nonetheless, many consider it only a matter of time before the EU absorbs the Western Balkan States because: (1) given the countries' small sizes (there are fewer people in Albania, BiH, Kosovo, Macedonia, Montenegro, and Serbia combined than there are in the Netherlands), absorption should prove relatively easy from the EU's perspective; and (2) their location on the EU's southeastern border makes their stability a strategic priority for the EU.<sup>64</sup> But in order for the incentive of future membership to remain an effective tool for the EU to promote liberal democratic reform in Macedonia, the EU needs to offer Macedonia a clearer and more definitive path to membership. As Macedonia's leaders have begun to doubt that their country will ever be offered membership, the incentive of potential membership has grown less effective—over the decade that Macedonia has been left in the waiting room, issues such as government corruption have grown worse.<sup>65</sup>

## 2. Application of European Law by Macedonian Courts

Aside from Macedonia's eager participation in the SAP, decisions by Macedonian courts to apply European law in domestic decisions provides additional evidence on the effectiveness of potential EU membership as a tool to promote stability through liberal democratic reform. In the Macedonian court system, a decision by a court is binding only on the parties involved in the suit, and decisions by upper courts are not formally binding on lower courts.<sup>66</sup> However,

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61. Banks, *supra* note 7.

62. Karadzowski & Adamczyk, *supra* note 57, at 214.

63. Mirna Vlašić Feketija & Adam Łazowski, *The Seventh EU Enlargement and Beyond: Pre-Accession Policy Vis-à-vis the Western Balkans Revisited*, 10 CROATIAN Y.B. EUR. L. & POL'Y 1, 2 (2014).

64. Milenko Petrovic, *Defining the Limits of EU Eastern Enlargement: Fatigue, Values or 'Absorption Capacity'?*, 13 REV. EUR. L., no. 2–3, 2011, at 77, 83.

65. Karadzowski & Adamczyk, *supra* note 57, at 227.

66. Marija Risteska & Kristina Miševa, *The Application of International Law in Macedonia*, in JUDICIAL APPLICATION OF INTERNATIONAL LAW IN SOUTHEAST EUROPE, *supra* note 59, at 199, 207.

Article 118 of the constitution specifies that “international agreements” ratified pursuant to the constitution are an important part of the domestic legal order and cannot be changed by domestic laws.<sup>67</sup> This means that Macedonian courts can, and often do, refer to international laws, including the SAA<sup>68</sup> and decisions by the European Court of Human Rights (“ECtHR”)<sup>69</sup> in their decisions. However, Macedonian judges generally do not refer to international law as persuasive authority. Instead, judges tend to take the extreme of either following international and EU law to the letter or not following it at all.<sup>70</sup> This tendency stems from the fact that most judges have a limited knowledge of foreign languages and of international and EU law.<sup>71</sup>

In terms of the SAA, Macedonian courts can either apply the rules of the SAA directly or they can use the SAA itself to trigger interpretation of national legislation to see whether it conforms to the EU *acquis*.<sup>72</sup> While the SAA is sometimes used as a source of international authority, the main source of international law applied by international courts are decisions by the ECtHR and the articles of the European Convention on Human Rights (“ECHR”).<sup>73</sup> In most cases, courts do not directly apply either ECtHR cases or the ECHR, but instead, they cite mirroring provisions in the Macedonian constitution or in domestic legislation.<sup>74</sup> However, in rare cases, such as *Sexual Workers v. Ministry of Interior*, lower courts have directly cited to the ECHR in their decisions.<sup>75</sup> The Constitutional Court, which, as the exception to the rule, often refers directly to the ECHR in its decisions, has, at least in one case, found the ECHR provisions insufficient for resting claims.<sup>76</sup> As the Court explained in *Georgi Pavlov v. Appellate Court of Shtip*, “The Convention’s provisions can be considered as an additional argument when deciding on the rights and freedoms the Court is entitled to protect under Article 110(3) of the Constitution of Macedonia.”<sup>77</sup> In *Kraus v. Poland*, the Constitutional

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67. MACED. CONST. art. 118.

68. Mataija, *supra* note 59, at 15.

69. Risteska & Miševa, *supra* note 66, at 211.

70. Mataija, *supra* note 59, at 18.

71. Risteska & Miševa, *supra* note 66, at 210.

72. Mataija, *supra* note 59, at 15.

73. Risteska & Miševa, *supra* note 66, at 211, 215–16.

74. *Id.*

75. *Id.* at 211

76. *Id.*

77. *Id.*

Court seemed to indicate that it views the ECHR and other international agreements as subservient to the constitution. The Court wrote, “[D]omestic courts in Macedonia work in accordance with the Constitution, the law and ratified international agreements that are in conformity with the Constitution.”<sup>78</sup> Thus, while Macedonia’s courts are not necessarily consistent across decisions in how they cite the ECHR and the SAA, Macedonia’s courts, and especially its Constitutional Court, are eager to apply European law in their decisions.

## II. IMPEDIMENTS TO A STRONGER RELATIONSHIP BETWEEN MACEDONIA AND THE EUROPEAN UNION

It is clear from examining both the Ohrid Framework and Macedonia’s eagerness to implement liberal democratic reform as a condition to EU membership that there exists a strong basis for cooperation between Macedonia and the EU. Through the following section, this Note examines three of the greatest potential roadblocks to strengthening that relationship and recommends ways the EU can work with Macedonia to overcome them while providing Macedonia with a clearer path to EU membership. The three impediments discussed include the risk that Macedonia will dismantle its liberal democratic institutions after being granted EU membership, the potential for interethnic conflict, and bilateral relations with Greece, a country that has been vetoing Macedonia’s membership in the EU. The major recommendations include that Macedonia should increase constitutional barriers to future illiberal reform, that Macedonia should keep the interethnic power sharing arrangement designed by Ohrid largely intact, and that the EU should take a hard line against Greece to push it to concede on its refusal to allow Macedonia to join the EU without a name change.

### *A. Locking in European Liberal Democratic Values: Learning from Hungary’s Constitutional Deterioration Following EU Accession*

Despite Macedonia’s current eagerness to implement liberal democratic reform, there is a high risk that Macedonia will undo this reform once membership is granted. This section analyzes the risks that EU membership poses to Macedonia’s liberal democratic institutions and recommends that the EU push Macedonia to adopt constitu-

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78. *Id.* at 216.

tional mechanisms that increase the barriers to future illiberal constitutional reform to mitigate these risks. It uses a case study of Hungary's rapid dismantlement of liberal democratic reform after it was admitted into the EU in order to examine how the EU can prevent a similar dismantlement in Macedonia. This section consists of three subsections. First, it examines Hungary's rapid dismantlement of the liberal democratic laws that it enacted as a condition of EU membership. Second, it discusses procedural tools currently used by the EU to punish Hungary and other States that violate membership obligations to protect human rights. Third, it offers recommendations on how the EU can learn from what happened in Hungary to push States to continue to adhere to liberal democratic values after membership is granted. The recommendations are threefold. First, the EU should allow for broader treaty enforcement mechanisms, and it should impose more stringent punishment on violators. Second, the EU should work with Macedonia to draft domestic procedural rules that increase the barriers to constitutional change. Third, the EU should work to protect the autonomy of Macedonia's courts from the Macedonian government by fostering greater cooperation between Macedonian and European courts.

### 1. Hungary's Rapid Transformation From Liberal Democracy to "Illiberal Democracy"<sup>79</sup>

Hungary's rather spectacular response to the European migration crisis during the summer of 2015 dwarfed news concerning responses by any other EU Member State.<sup>80</sup> Hungarian Prime Minister Viktor Orbán's center-right government engaged in numerous activities aimed at creating a hostile environment for the steady stream of migrants transiting through his country on their way to Western Europe that were derided by many members of the international community.<sup>81</sup> The Hungarian government dismissed calls for member countries to offer refuge to even a few hundred refugees to alleviate

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79. Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279, 280 (2015) ("Prime Minister Viktor Orbán proudly proclaimed in a passionate address that he . . . intended to build an illiberal democracy in the heart of Europe.").

80. See, e.g., Luke Fry, *Refugee Crisis Timeline: How the Crisis Has Grown*, INDEPENDENT (London) (Sept. 15, 2015), <http://www.independent.co.uk/news/world/europe/refugee-crisis-timeline-how-the-crisis-has-grown-10502690.html>.

81. Foo Yun Chee & Sandor Peto, *Hungary Rejects EU Criticism Over Asylum Law*, REUTERS, Dec. 10, 2015, <http://in.reuters.com/article/hungary-asylum-idINKBN0TT2A120151210>.

the crisis faced by the EU.<sup>82</sup> Other former Soviet Bloc EU members echoed similar, albeit less extreme sentiments toward the prospect of absorbing migrants to help the Member States to the West.<sup>83</sup> And, as Poland's pivot to the right indicates, even Eastern Member States that have experienced tremendous economic growth since they joined the EU are rethinking the extent to which they are ready to accept the accompanying human rights obligations they took on in assuming EU membership.<sup>84</sup>

On the other hand, Macedonia and Serbia, which both saw thousands of refugees cross their borders in 2015 and 2016, have shown an eagerness to cooperate with the EU.<sup>85</sup> Of course, as non-members, Macedonia and Serbia do not face the same potential obligation of permanently resettling refugees within their borders as does Hungary; but it is clear from Macedonia's response, including swift changes to its transitory visa policies to streamline migration<sup>86</sup> and cooperation with EU security forces at the Greek border,<sup>87</sup> that Macedonia is much more willing to cooperate with EU policies than many of the Eastern Member States.

Most analysts agree that Hungary displayed a clear disregard for the liberal democratic values on which the EU was built in its hard-line refusal to cooperate with its Western European neighbors to

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82. *Migrant Crisis: EU Ministers Approve Disputed Quota Plan*, BBC (Sept. 22, 2015), <http://www.bbc.com/news/world-europe-34329825>.

83. Gregor Aisch & Sarah Almkhtar, *Seeking a Fair Distribution of Migrants in Europe*, N.Y. TIMES (Sept. 22, 2015), <http://www.nytimes.com/interactive/2015/09/04/world/europe/europe-refugee-distribution.html>; Heather Horn, *Is Eastern Europe Any More Xenophobic Than Western Europe?*, ATLANTIC (Oct. 16, 2015), <http://www.theatlantic.com/international/archive/2015/10/xenophobia-eastern-europe-refugees/410800>; Rick Lyman, *Eastern Bloc's Resistance to Refugees Highlights Europe's Cultural and Political Divisions*, N.Y. TIMES (Sept. 12, 2015), <http://www.nytimes.com/2015/09/13/world/europe/eastern-europe-migrant-refugee-crisis.html>.

84. *Poland's Religious Politics: Courting Disaster: An Attack on Judicial Independence Reveals the Government's Ideology*, ECONOMIST (Jan. 2, 2016), <http://www.economist.com/news/europe/21684826-attack-judicial-independence-reveals-governments-ideology-courting-disaster>.

85. *Joint Communication to the European Parliament and the Council: Addressing the Refugee Crisis in Europe: The Role of EU External Action*, JOIN (295) 40 final (Sept. 9 2015), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015JC0040&from=EN>.

86. Sinisa Jakov Marusic, *Macedonia Faces Massive Surge in Refugees*, BALKAN INSIGHT (Oct. 9, 2015), <http://www.balkaninsight.com/en/article/macedonia-faces-soaring-number-of-refugees-10-08-2015>.

87. *Joint Communication to the European Parliament and the Council: Addressing the Refugee Crisis in Europe: The Role of EU External Action*, *supra* note 85.

resettle refugees. But Hungary's response to the European migration crisis is unsurprising considering the steady stream of illiberal policies enacted under Prime Minister Viktor Orbán's leadership, since his Fidesz party came into power in 2010,<sup>88</sup> six years after Hungary joined the EU in 2004.<sup>89</sup> During its first four years in power, Fidesz enacted significant constitutional changes that quickly dismantled the sweeping liberal reforms that Hungary passed in order to join the EU.<sup>90</sup> In the summer of 2014, an increasingly emboldened Prime Minister Orbán proudly declared that he intended to build an "illiberal democracy" in the middle of Europe.<sup>91</sup>

Despite Hungary's recalcitrance to cooperate with Western European leaders to absorb refugees in 2015, Hungary and other Eastern Member States (which have since shifted hard to the right) were eager to cooperate with EU demands to change their legal codes prior to their acceptance into the EU.<sup>92</sup> The European Union's inability to reign in a rogue Hungary so soon after accepting it into the EU contrasted with the EU's ability to exert influence over Macedonia might seem to provide strong justification for the EU to keep Macedonia in the membership waiting room. However, Hungary's period of illiberal reform also provides lessons in how the EU can reform its own institutions and the domestic legal institutions of aspiring members so that potential members, like Macedonia, still have strong incentives to adhere to European liberal democratic values after membership. While Hungary's dismantlement of liberal democratic reforms shows how States can rapidly repudiate liberal democratic reforms once the EU grants membership, it also provides a compelling example of how the EU can shift from using carrots before membership to sticks after membership to incentivize continued adherence to European liberal democratic values.

First, it is important to examine how the opportunity to join the EU provides strong incentives for States to adopt liberal democratic laws despite public indifference toward such values. Under Article 2 ("Article 2") of the Treaty on European Union ("TEU"), also known as the Maastricht Treaty, Member States agree to adhere to:

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88. Miklós Bankuti et al., *Disabling the Constitution*, J. DEMOCRACY, July 2012, at 138.

89. Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis*, 23 TRANSNAT'L L. & CONTEMP. PROBS. 51, 103 (2014).

90. *Id.* at 60–61.

91. Uitz, *supra* note 79, at 280.

92. *See* Scheppele, *supra* note 89, at 103.

the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.<sup>93</sup>

These high-level, liberal democratic values are protected by Member States through domestic constitutional provisions and implementing legislation; and, in preparing their bid for membership, prospective members must prove that their domestic laws afford their citizens these rights.<sup>94</sup> While many Eastern Bloc States wanted to join the EU much more so because of the prospect of economic integration with Western Europe than because of a desire to build States based on liberal democratic values,<sup>95</sup> the EU conditioned membership on a showing that States were ready to adhere to these moral principles—the incentive structure, thus, acted as a means of using potential Member States' aims of bolstering economic integration to push them to adopt liberal democratic values.<sup>96</sup>

The adoption of liberal democratic provisions outlined in Ohrid—including equality for minority groups—despite the lack of corresponding public sentiment for such values makes more sense when one considers the strong incentive to adopt legislation supporting these values posed by the prospect of EU membership.<sup>97</sup> Indeed, adoption of liberal democratic constitutional provisions “has been successful almost exclusively in those” ex-Soviet Bloc States that were able to link adoption of legislation to promote liberal democratic values to prospective EU membership.<sup>98</sup>

In spite of the ability of State governments to use EU accession to gain public support for human rights legislation that the general population does not otherwise support, the Hungary case study demonstrates how quickly a State can revert back to illiberal tendencies after joining the EU. Prime Minister Orbán's center-right Fidesz political party came to power after winning only fifty-three percent of

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93. Consolidated Version of the Treaty on European Union art. 2, Feb. 7, 1992, 2012 O.J. (C 326) 1 [hereinafter TEU].

94. van Houten & Wolff, *supra* note 24, at 10.

95. See Petrovic, *supra* note 64, at 78–79.

96. *See id.*

97. *See id.*

98. *Id.*

the vote in a fair election in 2010.<sup>99</sup> Hungary's election law converted that slight majority into two-thirds of the seats in the country's parliament.<sup>100</sup> Prime Minister Orbán was able to swiftly change the constitution due to two main institutional factors (Hungary's unicameral legislature and a constitutional provision allowing constitutional change to occur with just two-thirds of parliamentary support)<sup>101</sup> alongside his willingness to test the Constitutional Court's ability to check his power (most significantly, he ignored a 1995 constitutional amendment requiring that the government receive a four-fifth's vote to settle the procedural rules for a new constitutional drafting process).<sup>102</sup>

Prime Minister Orbán quickly dismantled many of the checks that had been adopted in Hungary's 1989 constitution meant to guarantee rule of law and protect human rights pursuant to Article 2 of the TEU, including transferring competencies reserved for regional and local governments to the central government.<sup>103</sup> The government also defeated efforts by the Constitutional Court—long regarded as the bastion of liberal democratic values in Hungary—to rule on whether the docket of proposed constitutional amendments conflicted with Hungary's obligations under Article 2 of the TEU, through a court-packing scheme, among other dubious tactics.<sup>104</sup>

The Fourth Amendment to the Hungarian Constitution (“the Fourth Amendment”), adopted in 2013 with the backing of Prime Minister Orbán,<sup>105</sup> marked the strongest affront to Hungary's obligations under Article 2 of the TEU. Among other provisions, the Fourth Amendment barred the Constitutional Court from reviewing constitutional amendments for substantive conflicts with the constitution, narrowly defined the family in a manner antiquated compared to the liberal definitions in use by other European States, permitted government entities to make homelessness illegal, permitted the government to tie university scholarships to residence in Hungary after graduation and made hate speech against “the Hungarian nation” ac-

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99. Scheppele, *supra* note 89, at 61.

100. *Id.*

101. *Id.*

102. Uitz, *supra* note 79, at 285.

103. Scheppele, *supra* note 89, at 70.

104. *Id.* at 78–87; Uitz, *supra* note 79, at 288.

105. *Fourth Amendment to the Fundamental Law of Hungary and Technical Note*, Council Eur., Venice Commission (Opinion no. 720), (Mar. 21, 2013), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2013\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)014-e).

tionable.<sup>106</sup>

## 2. EU Procedural Tools to Punish States for Violating Maastricht Treaty Obligations

Despite its strong rebukes, the EU has been unable to use its influence to correct Hungary's retreat from European liberal democratic values. In the Tavares Report, adopted by the European Parliament in July 2013,<sup>107</sup> the European Union concluded, Hungary's "systemic and general trend of repeatedly modifying the constitutional and legal frameworks in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 [of the] TEU . . . ."<sup>108</sup> The Report went on to warn that many of the provisions adopted in the Fourth Amendment, "unless corrected in a timely and adequate manner . . . will result in a clear risk of a serious breach of the values referred to in Article 2."<sup>109</sup>

Notwithstanding the strong language used in the Tavares Report, the EU has not managed to discipline Hungary in any meaningful way for adopting the Fourth Amendment.<sup>110</sup> The EU cannot revoke a Member State's membership from the EU; but the EU has two major mechanisms through which it can discipline a member that flagrantly violates its obligations under the TEU. Both of these options are inadequate when considering the underlying goal of incentivizing the Member State to reform its constitution to comply with its TEU obligations.

The first mechanism is to withdraw a Member State's vote in the European Council, which suspends a State's participation in EU policymaking.<sup>111</sup> This mechanism is an ineffective tool to thwart flagrant violations for a number of reasons. First, revoking a State's right to participate in EU policymaking does not put any sort of economic strain on a country's citizens. In other words, because it has

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106. Scheppele, *supra* note 89, at 83–84.

107. *Results of Vote in Parliament: Final Vote 03/07/2013*, EUR. PARLIAMENT/LEGIS. OBSERVATORY, <http://www.europarl.europa.eu/oeil/popups/sda.do?id=23165&l=en> (last visited Mar. 3, 2017).

108. *Report of the Committee on Civil Liberties, Justice and Home Affairs on the Situation of Fundamental Rights: Standards and Practices in Hungary*, at 28 (June 24, 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0229+0+DOC+PDF+V0//EN>.

109. *Id.*

110. See Bankuti, *supra* note 88, at 141.

111. TEU, *supra* note 93, art. 7; see also Scheppele, *supra* note 89, at 105.

no *tangible* negative impact on citizens, it is unlikely to act as a catalyst to spur them to vote out the law-breaking regime. Second, if a regime already does not care about participating in EU policymaking, revoking its right to do so may just serve as further justification for its decision to break EU law. Put differently, if the EU revokes the regime's right to participate in EU policymaking, the regime can further justify breaking EU law to its citizens by pointing to the fact that the State now has no say whatsoever over policies enacted by the unelected EU bureaucrats in Brussels.

The second mechanism is the *infringement action*, which allows the European Commission ("EC") to file a complaint against a Member State in the Court of Justice of the EU ("CJEU") for a specific violation of a Treaty obligation.<sup>112</sup> The CJEU can impose serious monetary penalties against the State until the Member State brings its laws in conformation with EU law.<sup>113</sup> The EC has only brought two infringement actions against Hungary, the more dramatic of which challenged Hungary's decision to lower the judicial retirement age, which removed ten percent of the Hungarian judiciary.<sup>114</sup> However, rather than challenging the law under the far-more-elusive commitment to rule of law provision under Article 2 of the TEU, the EC challenged Hungary with the more tangible, and easy to prove, infringement of age discrimination.<sup>115</sup> The primary issue with the infringement action, as it is currently utilized, is that the mechanism is too narrow; in other words, the EC has no way, using the infringement action, to challenge the entire Fourth Amendment as a violation of Article 2, but can only use the action to challenge specific violations within the Amendment.<sup>116</sup>

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112. Kim Lane Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions*, at 3 (Nov. 2013), [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf) (presented at the Assises de la Justice forum in Brussels).

113. Scheppele, *supra* note 89, at 105–06.

114. *Id.* at 106.

115. *Id.*

116. Scheppele, *supra* note 112, at 3.

### 3. Policy Recommendations to Deter Illiberal Reform: Bolstering Legal Mechanisms to Increase the Procedural Hurdles to Prevent Macedonia from Dismantling Liberal Democratic Reforms After EU Membership is Granted

Like Hungary, Macedonia did not necessarily enact Ohrid or subsequent implementing legislation pursuant to Article 2 because of popular support for the liberal democratic values embodied in Article 2. Rather, the potential for EU membership provided the bulk of the impetus for enacting Ohrid.<sup>117</sup> In order to protect Macedonia from a fate similar to Hungary's dismantlement of constitutionally protected rights after joining the EU, the EU needs to bolster legal mechanisms that allow it to punish Macedonia for deviating from treaty obligations after it joins the EU.

First, EU treaty enforcement mechanisms can be strengthened in a number of ways that will bolster the longevity of the liberal democratic components of Ohrid. For example, a "systemic infringement action," as proposed by Kim Scheppele, might demonstrate to future Macedonian leadership that it will be punished if it chooses to abandon the principles articulated in Ohrid.<sup>118</sup> A systemic infringement action would allow the EC to bring suit against Macedonia not just for a specific violation of treaty obligations, but also for a *pattern of infringement* by pointing to various laws enacted by it that, taken together, demonstrate a violation of TEU obligations.<sup>119</sup> This would bolster the EU's ability to punish Macedonia for trying to pass illiberal reforms similar to the Fourth Amendment in Hungary. In connection with this expanded systemic infringement action, the CJEU can also expand the suite of penalties for violations of systemic infringement to include higher fines and other action such as personal penalties and sanctions for individual government officials. Although this expanded means of punishing violators is unlikely to deter a regime willing to risk its own demise to remove a State from the EU, it would change the calculus for an opportunistic regime that is merely using the implementation of hard-line illiberal reform to gain domestic popular support.

In addition to reforming EU tools, the EU can work with Macedonian leaders to draft state-level procedural rules that make it more difficult for future governments to undo Ohrid and other liberal democratic reforms Macedonia is currently enacting as part of the EU accession process. Learning from the shortcomings of Hungary's

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117. See Petrovic, *supra* note 64, at 78.

118. Scheppele, *supra* note 112, at 5.

119. *Id.*

procedural safeguards against illiberal reform, the goal of these procedural changes should be to create higher barriers to constitutional change. Procedurally, it is about as easy to change the constitution in Macedonia as it was in Hungary when Prime Minister Orbán came to power; in Macedonia, constitutional change is currently allowed by a two-thirds parliamentary vote.<sup>120</sup>

But it is possible to expand minority protection procedural tools already codified in Ohrid to increase the barriers to constitutional change. Most significantly, the majority-of-the-minority veto provision in Ohrid could be expanded. The majority-of-the-minority veto provision requires that “certain” constitutional amendments be approved by *both* a two-thirds vote in parliament and “a majority of votes of the Representatives claiming to belong to” minority communities.<sup>121</sup> However, the list of the types of constitutional changes to which this provision applies is narrow enough that a regime similar to Prime Minister Orbán’s could easily work around the provision by arguing that it is not applicable to a particular suite of laws the regime is trying to enact as part of a push toward illiberal reform. The list of provisions for which the veto currently applies includes only “[l]aws that directly affect culture, use of language, education, personal documentation, and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and boundaries of municipalities.”<sup>122</sup>

The EU should advocate that this veto right be expanded to require a veto right for *all* laws in conflict with *any* EU treaty obligation. An expanded majority-of-the-minority provision has the potential to effectively deter illiberal constitutional reform because it places those that have the most to lose from illiberal constitutional reform (i.e. minority groups) in the position to stop such reform. Of course, such a tool would be ineffective against a regime that is undeterred by the threat of interethnic civil or regional war. The potential for spillover of interethnic conflict in Macedonia is high because two of

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120. MACED. CONST. art. 131 (“The decision to initiate a change in the Constitution is made by the Assembly by a two-thirds majority vote of the total number of Representatives. The draft amendment to the Constitution is confirmed by the Assembly by a majority vote of the total number of Representatives and then submitted to public debate. The decision to change the Constitution is made by the Assembly by a two-thirds majority vote of the total number of Representatives. The change in the Constitution is declared by the Assembly.”).

121. OHRID FRAMEWORK AGREEMENT, art. 5.1 (Maced.) (“On the central level, certain Constitutional amendments . . . cannot be approved without a qualified majority of two-thirds of votes, within which there must be a majority of the votes of Representatives claiming to belong to the communities not in the majority in the population of Macedonia.”); see also van Houten & Wolff, *supra* note 24, at 21.

122. OHRID FRAMEWORK AGREEMENT, art. 5.2 (Maced.).

Macedonia's neighbors, Albania and Kosovo, are overwhelmingly comprised of ethnic Albanians.<sup>123</sup> But it would significantly increase the procedural barriers on an opportunistic regime that is merely attempting to use illiberal constitutional reform as a means of gaining popular support, so long as that regime remains law abiding.<sup>124</sup> Prime Minister Orbán arguably acted legally when he dismantled the system of liberal reforms that Hungary enacted to join the EU just a decade earlier.<sup>125</sup> In retrospect, it seems that the primary culprit in Hungary's recent illiberal shift was not the substantive laws or even popular sentiment for illiberal policies. Rather, deficient procedural safeguards seem to be primarily at fault for Hungary's rapid transformation into a flagrant infringer of EU law—procedural rules allowed a government which received only a slim majority of the popular vote to completely rewrite the Hungarian Constitution in just a few short years.<sup>126</sup> Therefore, it seems prudent for the EU to work with Macedonia to draft *procedural* rules, such as an expanded majority-of-the-minority veto, that increase the barriers to constitutional change in order to protect the *substantive* laws the EU is requiring Macedonia to adopt as a condition of future EU membership.

Finally, the EU should work toward bolstering the relationship between the Macedonian Constitutional Court and European Courts. In building up to Hungary's EU accession, the country's Constitutional Court was empowered both to use the Constitution to constrain the authority of successive governments and to be highly accessible to ordinary citizens to challenge legality of new legislation.<sup>127</sup> Even in the face of Prime Minister Orbán's constitutional coup in 2010, the Constitutional Court continued to rule on legislation conflicting with EU law, finding it unlawful.<sup>128</sup> But the court found itself unable to enforce its decisions once Prime Minister

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123. *The World Factbook: Europe: Albania*, CENT. INTELLIGENCE AGENCY (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/al.html> (expand "People and Society:: Albania" section) (reporting that Albania's population is 82.6% ethnically Albanian); *The World Factbook: Europe: Kosovo*, CENT. INTELLIGENCE AGENCY (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (expand "People and Society:: Kosovo" section) (reporting that Kosovo's population is 92.9% ethnically Albanian).

124. The Author wants to emphasize that none of this passage is intended to reflect the actual current popular views within the ethnic Macedonian community. The language is intended to present a hypothetical situation in which Macedonia experiences a similar popular shift to the right that occurred in Hungary following EU membership.

125. Scheppele, *supra* note 89, at 60–71.

126. *Id.*

127. *Id.* at 68.

128. *Id.* at 73.

Orbán's government stripped it of much of its power of review<sup>129</sup>—the Venice Commission reviewed many constitutional changes, and expressed its steadfast support for the Constitutional Court in finding the government's affront on the court a direct affront to basic and fundamental European values.<sup>130</sup> But Venice Commission opinions are only advisory.<sup>131</sup> Macedonian Courts, if they had legal mechanisms that allowed them to turn to supranational courts to validate their decisions beyond an advisory sense, would be able to play a more obstructionist role in the face of a defiant government.

Macedonia has demonstrated a clear desire to move closer to Europe. The fact that this enthusiasm mirrors Hungary's enthusiasm for liberal reform before it joined the EU does not mean that Macedonia will necessarily dismantle the liberal democratic reforms it enacted as a condition of membership; it merely points to the fact that the EU needs to think more critically about the procedural toolset it will use to increase the barriers on future opportunistic regimes from dismantling liberal democratic reforms to meet the popular mood after membership is granted. By (1) allowing for greater penalties for infringement of EU law at the EU level, (2) enacting procedural safeguards at the State level to protect against future illiberal constitutional reform, and (3) protecting the autonomy of Macedonia's courts from the Macedonian government by fostering greater cooperation between Macedonian and European courts, the EU can protect itself against a repeat of what has occurred in Hungary.

*B. Managing Interethnic Relations: Comparison of Ohrid with Power-Sharing Mechanisms in BiH and Kosovo*

Although the EU needs to work with Macedonia to implement barriers to future illiberal reform, the EU should not advocate for changes to the decentralized system of government agreed to in Ohrid. Government decentralization in Macedonia has proven a remarkably effective tool for protecting the autonomy of the ethnic Albanian community as a means of maintaining the cohesion of the Macedonian State. This section compares Ohrid's system of decentralization to the ethnically-based division of power in BiH and the hybrid approach in Kosovo to demonstrate that it is unnecessary, and even potentially destabilizing, for Macedonia to adopt ethnically-based de jure power-sharing devices.

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129. *Id.*

130. *Id.* at 89–91, 100–03.

131. *Id.* at 89.

Following large-scale conflict in BiH and in Kosovo, and the smaller 2001 conflict in Macedonia, institutional actors—most notably NATO, the United Nations, and the European Union—played central roles in crafting the security documents to end each crisis.<sup>132</sup> The three documents that ended each crisis—The Dayton Accords (“Dayton”),<sup>133</sup> The Ahtisaari Comprehensive Proposal (“Ahtisaari”),<sup>134</sup> and Ohrid,<sup>135</sup> respectively—while security documents in the near-term, acted far more as sweeping constitutional restructurings for the longer-term.<sup>136</sup>

The three agreements, while similar in many respects, have ushered in eras of varying governability for each of the three countries’ leaders. BiH, on one end, remains virtually ungovernable a decade after the Dayton Accords was adopted.<sup>137</sup> The ungovernability of BiH is due, in large part, to the federalized approach imposed on BiH by the Dayton Accords, which divided governance of the country along ethnic lines between two ethnically distinct entity governments as the primary means in which the agreement protects the rights of members of the three ethnic groups.<sup>138</sup> The two entities include the very centralized ethnic Serbian dominated entity, the Republika Srpska, and the very decentralized ethnic Croat- and Bosniak-dominated entity, the Federation of Bosnia and Herzegovina (“the Federation”).<sup>139</sup> On the other end, Ahtisaari in Kosovo<sup>140</sup> and Ohrid

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132. See Martti Ahtisaari (Special Envoy of the Secretary General on Kosovo’s Future Status), *Comprehensive Proposal for the Kosovo Status Settlement*, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) (describing the situation in Kosovo); Patrice C. McMahon & Jon Western, *The Death of Dayton: How to Stop Bosnia from Falling Apart*, FOREIGN AFF., Sept./Oct. 2009, at 69, 69 (describing the situation in BiH); van Houten & Wolff, *supra* note 24, at 23 (describing the situation in Macedonia).

133. Dayton Accords, *supra* note 34.

134. Ahtisaari, *supra* note 132.

135. OHRID FRAMEWORK AGREEMENT (Maced.).

136. See Engström, *supra* note 11, at 335–36 (describing the situation in Macedonia); Grewe & Riegner, *supra* note 35, at 12–15 (describing the situations in both BiH and Kosovo); Visar Morina, *The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns*, 35 REV. CENT. & E. EUR. L. 129, 129–31 (2010) (describing the situation in Kosovo).

137. Florian Bieber, *The Challenge of Institutionalizing Ethnicity in the Western Balkans: Managing Change in Deeply Divided*, 3 EUR. Y.B. MINORITY ISSUES 89, 93 (2005); McMahon & Western, *supra* note 132, at 70.

138. McMahon & Western, *supra* note 132, at 69–70.

139. *Id.* at 69 (“The 1995 Dayton peace agreement divided Bosnia into two semi-independent entities: the Federation of Bosnia and Herzegovina, inhabited mainly by Bosnian Muslims and Bosnian Croats, and the Serb-dominated Republika Srpska . . . , each with its own government, controlling taxation, educational policy, and even foreign

in Macedonia<sup>141</sup> do not divide governance based on territorial divisions between ethnic groups. Rather, Ahtisaari and Ohrid rely on a number of alternative ways to protect the rights of minorities that do not sacrifice governability or cohesion of the State to nearly the same extent as Dayton.

A comparative analysis of the three documents leads to the conclusion that Ohrid strikes the best balance between protecting minority rights and ensuring governability and cohesion of the State. However, minority groups can still be better included in governance if Macedonia were to adopt certain mechanisms used in the other two agreements, which will, in turn, better promote Macedonia's long-term stability.

Apart from the geographic proximity of the three countries, the comparison of their minority rights regimes is relevant because all three were crafted under similar settings, which include post-conflict situations involving ethnic conflict, substantial international involvement, and documents that sought to develop medium to long-term institutional arrangements.<sup>142</sup> The three documents share many common provisions, including a veto right for minority groups<sup>143</sup> and power-sharing arrangements at the state level.<sup>144</sup> Additionally, the three documents share the negative implications associated with a lack of ownership by local populations due to the high degree of international involvement in the drafting processes.<sup>145</sup>

There are also several noteworthy differences between the three documents. First, Dayton and Ahtisaari both include provisions that call for long-term international involvement in domestic institu-

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policy.”); van Houten & Wolff, *supra* note 24, at 17 (“Whereas there is further devolution to cantons and eventually to municipal authorities in the Bosnian-Croat Federation, the Republika Srpska is an almost oddly centralized entity in the context of Bosnia, retaining most powers at the level of the entity government and endowing municipalities primarily with administrative functions in the areas of development, urban planning, budget, local infrastructure and specific local needs of citizens in the areas of culture, education, health and social welfare, and so on.”).

140. See Morina, *supra* note 136.

141. See Lyon, *supra* note 35.

142. Bieber, *supra* note 137, at 89.

143. See OHRID FRAMEWORK AGREEMENT, art. 5 (Maced.); Grewe & Riegner, *supra* note 35, at 29.

144. See Dren Doli & Fisnik Korenica, *Calling Kosovo's Constitution: A Legal Review*, 22 DENNING L.J. 51 (2010); Anna Morawiec Mansfield, Note, *Ethnic But Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052 (2003).

145. van Hal, *supra* note 18, at 40.

tions,<sup>146</sup> while Ohrid grants the international community a role in domestic governance only by broadly inviting the international community to participate in drafting laws and reforming domestic institutions.<sup>147</sup>

Dayton and Ahtisaari contain provisions that include international actors in domestic governance in each country in two main capacities. First, three international judges sit on each State's constitutional court out of a total of nine judges.<sup>148</sup> In BiH, the court's composition is further divided by rules requiring that four judges come from the Federation—two are generally Bosniaks and two are Croats—and that two come from Republika Srpska.<sup>149</sup> The three international judges, appointed by the President of the ECtHR and confirmed by the president of BiH, act as tie-breaker in cases where the judges from the three ethnic communities are deadlocked.<sup>150</sup> In essence, the international judges on the BiH court serve a mediating function both between each of the three ethnic communities and between BiH and international institutions; their presence has generally been viewed as effective in that regard.<sup>151</sup> In slight contrast, the Kosovo Constitutional Court is comprised of six local judges, nominated by the Kosovo Assembly, and three international judges, appointed by the International Civilian Representative with consultation from the President of the ECtHR.<sup>152</sup> Additional rules require that none of the international judges come from countries that directly neighbor Kosovo<sup>153</sup> and that two of the local judges come from minority communities.<sup>154</sup> Unlike the BiH judges, the international judges on the Kosovo Constitutional Court do not just participate when there is a deadlock.<sup>155</sup> Instead, a panel of three judges, both Kosovar and international, prepare each decision reached by the Kosovo Constitutional Court.<sup>156</sup> Considering the difficulties that Hungary's Constitutional Court faced after Prime Minister Orbán's constitutional coup discussed in Section II.A of this Note, a similar mechanism that

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146. Grewe & Riegner, *supra* note 35, at 41–44, 54–61.

147. OHRID FRAMEWORK AGREEMENT, annex C (Maced.).

148. Grewe & Riegner, *supra* note 35, at 41–43.

149. *Id.* at 41.

150. *Id.* at 42.

151. *Id.* at 43.

152. Morina, *supra* note 136, at 137–38.

153. *Id.* at 138.

154. *Id.*

155. Grewe & Riegner, *supra* note 35, at 44.

156. *Id.*

would place ECtHR-appointed judges on Macedonia's Constitutional Court might be beneficial in improving the court's autonomy and legitimacy.

In addition to the provisions that place international judges on each court, both Dayton and Ahtisaari include provisions that place an "international Representative with para-constitutional executive and legislative" power in charge of monitoring and implementing the peace plans.<sup>157</sup> In contrast to the positive reaction of local leaders and citizens to the placement of international judges on courts, these representatives are disliked in BiH and Kosovo.<sup>158</sup> Neither of these representatives are subject to domestic judicial review and the only checks on their authority come from the international community.<sup>159</sup> Although a good means of promoting stability in the post-conflict near-term, the fact that these representatives have no legally accountability to domestic populations<sup>160</sup> has led to outcries for their removal<sup>161</sup>—for instance, the President of the Republika Srpska has declared that he is prepared to boycott decisions by the High Representative and its Office ("OHR").<sup>162</sup> Ultimately, despite the potential for greater integration with ECHR and EU institutions that might result from amending Ohrid to include a similar European representative to monitor the Macedonian government's adherence to Ohrid, the potential for domestic backlash warns against doing so.

The three agreements also differ in how they address the issue of dividing competencies between central and local self-governments, which is a tool used by all three agreements in some capacity as a way to protect community autonomy. Despite some who argue that Ohrid's system of decentralized authority<sup>163</sup> is detrimental to the long-term cohesion of the Macedonian State,<sup>164</sup> when contrasting the success of Ohrid's version of community autonomy against the regimes built by Dayton and Ahtisaari, it is clear that

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157. *Id.* at 54.

158. Tim Banning, *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, 6 GOETTINGEN J. INT'L L. 259, 261 (2014).

159. Grewe & Riegner, *supra* note 35, at 54.

160. *Id.* at 54–58.

161. *Id.* at 58.

162. *Id.* at 58.

163. *See supra* Section I.A.2.

164. *See generally* Zhidas Daskalovski, *Language and Identity: The Ohrid Framework Agreement and Liberal Notions of Citizenship and Nationality in Macedonia*, J. ON ETHNOPOLITICS & MINORITY ISSUES EUR. (2002), <http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2002/nr1/Focus1-2002Daskalovski.pdf>.

Ohrid's system of decentralized authority, which still leaves necessary competencies for the central State, strikes the best balance between protecting minority rights and ensuring governability and cohesion of the State.<sup>165</sup>

Decentralization in BiH is the least successful of the three examples. BiH's population consists of 4.3 million people—forty-three percent Bosniaks, thirty-one percent Serbs, seventeen percent Croats, and nine percent other.<sup>166</sup> In 1995, Dayton split BiH into two entities, the Bosniak/Croat Federation and Serbian-dominated entity of Republika Srpska.<sup>167</sup> The share of Serbs living in Republika Srpska drastically increased from fifty-four percent in 1991 to ninety-seven percent in 1997.<sup>168</sup> The BiH Constitutional Court ruled in 2000 that the entities did not belong to any of BiH's recognized ethnic groups.<sup>169</sup> However, the fact that BiH citizens derive their citizenship from the entity that they live in (rather than from BiH) suggests that this de facto ethnic segregation between the two entities threatens the ability of BiH to remain as a single State in the long run. Examples of the disunity between the two entities include the facts that the entities are increasingly homogeneous, Republika Srpska has become more assertive of its Serb identity, and political parties rarely extend between entities.<sup>170</sup> In large part because Ohrid did not apply any similar sort of ethnically-based territorial divisions, no significant ethnically motivated population shift occurred in Macedonia following Ohrid's ratification in 2001.<sup>171</sup>

Kosovo citizens, unlike citizens of BiH, do not derive citizenship from a particular entity. Rather, all Kosovo citizens, regardless of where they live within the country, and regardless of whether they are Albanian or Serb, derive their citizenship directly from the State.<sup>172</sup> The Kosovo system, while increasing competencies for municipalities, stops far short of BiH's federalization of ethnic enti-

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165. Lyon, *supra* note 35, at 80.

166. Grewe & Riegner, *supra* note 35, at 10.

167. Mansfield, *supra* note 144, at 2057.

168. Grewe & Riegner, *supra* note 35, at 10.

169. Ustavni sud Bosne i Hercegovine [Constitutional Court of Bosnia and Herzegovina] U-5/98 (2000); *see also* Grewe & Riegner, *supra* note 35, at 19.

170. Grewe & Riegner, *supra* note 35, at 26; *Tensions Rise as Bosnian Serbs Vote in Banned Referendum*, RADIO FREE EUR./RADIO LIBERTY (Sept. 25, 2016), [.http://www.rferl.org/a/balkan-tensions-rise-as-bosnian-serbs-push-ahead-with-banned-referendum/28010813.html](http://www.rferl.org/a/balkan-tensions-rise-as-bosnian-serbs-push-ahead-with-banned-referendum/28010813.html).

171. REPUBLIC OF MACED. STATE STATISTICAL OFFICE, *supra* note 12.

172. Fisman Korenica & Dren Doli, *The Politics of Constitutional Design in Divided Societies: The Case of Kosovo*, 6 CROATIAN Y.B. EUR. L. & POL'Y 265, 275 (2010).

ties.<sup>173</sup> While initially plagued by a weak central State, in large part due to the parallel Serb governance institutions in the north that received significant assistance from Belgrade,<sup>174</sup> Kosovo's centralized system has proven adept at integrating Serb minorities now that Belgrade has reduced its support for parallel institutions.<sup>175</sup>

Finally, Ohrid has generally been regarded as the most successful of the three systems in terms of protecting the community autonomy of ethnic minorities without destroying the cohesion of the State.<sup>176</sup> But why has Ohrid been more successful than the other two arrangements, and how can it be amended to strengthen minority protection? Ohrid utilizes the dual minority protection devices of (1) greater capacity for involvement by minorities at the state level and (2) increased autonomy for municipal leaders to govern their communities.<sup>177</sup> On the state level, three main factors ensure that minorities are not blocked from participating in the government. First, an informal practice (as opposed to the *de jure* approach mandated in Dayton) has emerged for the parliamentary governing coalition to consist of both a Macedonian and an Albanian political party; this practice has ensured a place for Albanians in each successive government since Ohrid.<sup>178</sup> Second, requirements that a third of Constitutional Court judges be approved by a majority of Assembly members from minority communities ensures that minority communities will be able to play an active role in the judiciary.<sup>179</sup> Third, the Equitable Representation clause of Ohrid has allowed individuals from minority communities to access jobs in government agencies.<sup>180</sup>

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173. *Id.* at 279.

174. ORG. FOR SEC. & CO-OPERATION IN EUR.: MISSION IN KOS.: DEP'T OF HUMAN RIGHTS, DECENTRALIZATION & CMTYS., PARALLEL STRUCTURES IN KOSOVO 5 (2006–2007), <http://www.osce.org/kosovo/24618?download=true> (“After the end of the North Atlantic Treaty Organization (NATO) bombing campaign in 1999, the Kosovo Serbs that remained in Kosovo did not immediately recognise the newly-established United Nations Interim Administration Mission in Kosovo (UNMIK). Different factors such as limitations on lack of freedom of movement contributed to the *de facto* perpetuation of the Serbian administration. In Kosovo Serb inhabited areas structures such as courts, schools and hospitals continue to answer directly to Belgrade thus operating in parallel to the UNMIK administration.”).

175. *Kosovo Progress Report*, at 5, COM (2014) 700 final (Oct. 8, 2014), [http://ec.europa.eu/enlargement/pdf/key\\_documents/2014/20141008-kosovo-progress-report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-kosovo-progress-report_en.pdf).

176. Lyon, *supra* note 35, at 80.

177. OHRID FRAMEWORK AGREEMENT, art. 3 (Maced.).

178. van Hal, *supra* note 18, at 40–41.

179. OHRID FRAMEWORK AGREEMENT, art. 4.3 (Maced.).

180. *Id.* art. 4.2.

At the local level, and “in contrast with neighboring Kosovo, Macedonian municipalities comprising a significant minority ethnic community do not enjoy any special asymmetrical status. All 84 Macedonian municipalities have been granted the same competencies, regardless of local demographics,” which means that all municipalities are equal according to the law.<sup>181</sup> Paired with the abovementioned state-level mechanisms, this increased autonomy for municipalities has decreased tensions between the two largest ethnic communities in Macedonia without requiring any sort of explicit state or municipality power sharing scheme like in BiH or in Kosovo.

When comparing Ohrid against similar decentralization devices employed in BiH and Kosovo, it is evident that Ohrid has successfully stood the test of time. As the unified response by ethnic Albanians and Macedonians to the Kumanovo Crisis demonstrated,<sup>182</sup> Ohrid has proven durable in diffusing interethnic tensions even in difficult times. Ultimately, because constitutional mechanisms ensure that both Albanians and Macedonians have the legal ability to make decisions for their respective communities, calls for secession, or even for a greater degree of local autonomy, have been mostly absent since 2001.<sup>183</sup> Nonetheless, Ohrid can be made stronger by allowing minority groups aside from the Albanian community more access to participate in state-level decision-making, including the sizeable Turkish, Roma and Serb communities.<sup>184</sup> Ultimately, if all minority groups are to be included in governing Macedonia, the Macedonian government will need to adopt devices that make Macedonia less of the contemporary binational State,<sup>185</sup> in which the Macedonian and Albanian communities use informal devices to share power among themselves, and more one that better accounts for the needs of the additional fifteen percent of the population.<sup>186</sup> But Ohrid’s system of decentralized community autonomy alongside a strong central State structure has laid the necessary groundwork to make such an arrangement possible.

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181. Lyon, *supra* note 35, at 90 (citations omitted).

182. Marusic, *supra* note 29.

183. Lyon, *supra* note 35, at 89–94.

184. *Id.* at 95 n.15.

185. Engström, *supra* note 11, at 344.

186. Lyon, *supra* note 35, at 96.

*C. Managing Macedonia's Bilateral Relationship with Greece:  
Overcoming EU Mechanisms that Entrench a Member State's  
Ability to Lock Out Potential Members*

In addition to the areas for internal reform that the EU needs to focus on in order to make Macedonia ready to join the EU,<sup>187</sup> it is important to discuss how to address the most significant international roadblock between Macedonia and EU membership: Greece's ability to veto Macedonia's bid to join. The EU needs to take a hard line against Greece to push it to concede on its refusal to allow Macedonia to join the EU without a name change. Any EU Member State can veto a potential member's bid to join the EU.<sup>188</sup> Despite an assessment by the European Commission, and an accompanying recommendation in 2005 that the EU offer Macedonia candidate status, Macedonia's ability to enter the EU has been thwarted for the past decade over an ongoing dispute concerning the country's name "Macedonia" between it and its southern neighbor, Greece.<sup>189</sup> In addition to blocking Macedonia's bid to join the EU, Greece also blocked Macedonian membership into NATO despite NATO's initial offer for Macedonia to join.<sup>190</sup> Because of the situation posed by the latest bailout talks for Greece in 2015<sup>191</sup> and the strains of the European migration crisis on Greece,<sup>192</sup> Macedonia and the EU are faced with a unique opportunity to put pressure on Greece to finally resolve its grievances with Macedonia.

Before examining the roots of the dispute between Greece and Macedonia and assessing possible solutions, it is important to explore why the name "Macedonia" is so contentious. The first time in modern history that "Macedonia" was used to identify an administrative entity was in 1914, after the First Balkan War ended Ottoman rule over the Balkan region; "Macedonia" was used to describe the northern part of the territory gained by Greece following the war.<sup>193</sup>

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187. See *supra* Sections II.A.3, II.B.

188. See, e.g., Karadzoski & Adamczyk, *supra* note 57, at 214.

189. *Id.* at 220; Banks, *supra* note 7.

190. Karadzoski & Adamczyk, *supra* note 57, at 220.

191. European Commission Press Release IP/15/5512, Commission Signs Three-Year ESM Stability Support Programme for Greece (Aug. 20, 2015), [http://europa.eu/rapid/press-release\\_IP-15-5512\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5512_en.htm).

192. UNHCR Reg'l Bureau Eur., *Refugees & Migrants Sea Arrivals in Europe: Monthly Data Update: June 2016*, at 4 (Sept. 28, 2016), <https://data2.unhcr.org/en/documents/download/49921> ("Some 856,700 people arrived in Greece in the whole of 2015. There were 158,377 arrivals in the first six months of 2016 . . .").

193. Michael Ioannidis, *Naming a State—Disputing over Symbols of Statehood at the*

Following World War II, Yugoslav leadership used “Macedonia” in the 1946 Constitution to describe the constituent republic of “the People’s Republic of Macedonia.”<sup>194</sup> After the dissolution of Yugoslavia, the modern State of Macedonia became the first entity to use the name Macedonia to describe a sovereign State since antiquity.<sup>195</sup> Greece saw the use of the name “Macedonia,” alongside the chosen flag of Macedonia—which used a symbol used by Philip II of Macedon and Alexander the Great—as part of an effort by Macedonia to expand its territory into Greece’s northern regions.<sup>196</sup> Although the flag was retired in 1995 to appease Greece’s demands,<sup>197</sup> Macedonian leaders have refused to budge on the issue of completely removing the name “Macedonia” from the State’s name, agreeing in UN membership negotiations to be admitted under the name “the former Yugoslav Republic of Macedonia.”<sup>198</sup> Issues have reached a stalemate in recent years as leaders in both States have tied their political fortunes to continued promises not to budge on the name issue<sup>199</sup>—indeed, one can easily see how intertwined the name issue has become with Macedonia’s increasingly nationalistic regime’s *raison d’être* through the enormous statues of Alexander the Great and Philip II in Skopje and in other cities across the country.<sup>200</sup>

Because the nationalistic rationales asserted for keeping the name issue alive seem trivial in comparison to the potential benefits Macedonia stands to see from increased integration with Europe, and that Greece stands to see from better relations with its northern neighbor, it bears asking what steps can be taken to solve the impasse. Ultimately, the current geopolitical environment provides a climate ripe for reopening Macedonia’s bid to join the EU. The primary four factors that make the current environment conducive to membership negotiations include: the increased leverage the EU has over Greece as a result of bailout negotiations; the strain on Greece as a result of the influx of migrants; the EU’s general dissatisfaction

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*Example of “Macedonia”,* 14 MAX PLANCK Y.B. U.N. L. 507, 515 (2010).

194. *Id.* at 516.

195. *Id.*

196. Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 U. PA. J. INT’L L. 531, 56–63 (2009).

197. Whitney Smith, *Flag of Macedonia*, ENCYCLOPEDIA BRITANNICA (Feb. 16, 2001), <http://www.britannica.com/topic/flag-of-Macedonia>.

198. Ioannidis, *supra* note 193, at 509.

199. Karadzovski & Adameczyk, *supra* note 57, at 222.

200. *Id.*; Matthew Brunwasser, *Macedonia Plays Up Past Glory*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/world/europe/24iht-macedonia24.html>.

with Greece; and the increased need by the EU for Macedonia to cooperate with the EU's efforts to manage the European migration crisis.<sup>201</sup>

Macedonia addressed all of Greece's stated concerns, apart from the name issue, in the time leading up to the European Commission's recommendation to grant Macedonia candidate status in 2005—including amending its constitution and issuing a legally binding statement to address Greece's concerns that Macedonia had designs on annexing portions of northern Greece.<sup>202</sup> Thus, all that prevents negotiations between Macedonia and the EU from progressing is the (so far unresolved) name issue.

In 2008, after Greece rejected Macedonia's bid to join NATO, Macedonia sought to use the International Court of Justice ("ICJ") to resolve the dispute, alleging that Greece violated the 1995 Interim Accord, an agreement that dealt with all grievances between the two States but left the name issue to be resolved through "continue[d] negotiations under the auspices of the Secretary-General of the United Nations."<sup>203</sup> The ICJ found that Greece's veto of Macedonia's NATO membership bid did, in fact, violate the Interim Accord.<sup>204</sup> The ICJ interpreted the Interim Accord to mean that Greece was not allowed to veto Macedonia's bid to join NATO under Article 11(1)<sup>205</sup> of the Interim Accord, which stipulated:

[Greece] agrees not to object to the application by or the membership [of FYROM] in international, multi-lateral and regional organizations and institutions of which [Greece] is a member; however, [Greece] reserves the right to object to any membership referred to above if and to the extent [FYROM] is to be referred to in such organization or institution differently than in paragraph 2 of United Nations Security Coun-

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201. Maïa de la Baume & Barbara Surk, *Macedonia Seeks Date for EU Membership Talks*, POLITICO (Mar. 17, 2016), <http://www.politico.eu/article/macedonias-eu-membership-nightmare-refugees-migrants-border-nato>.

202. Berlin, *supra* note 196, at 563.

203. Interim Accord art. 5, Greece-Maced., Sept. 13, 1995, 1891 U.N.T.S. 4; Markos Karavias & Antonios Tzanakopoulos, *Legality of Veto to NATO Accession: Former Yugoslav Republic of Macedonia Sues Greece Before the ICJ*, AM. SOC'Y INT'L L.: INSIGHTS (Dec. 29, 2008), <https://www.asil.org/insights/volume/12/issue/26/legality-veto-nato-accession-former-yugoslav-republic-macedonia-sues>.

204. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644 (Dec. 5).

205. *Id.* ¶ 113.

cil resolution 817 (1993).<sup>206</sup>

In its 2008 ruling, the ICJ found that Greece had violated 11(1) because Macedonia was referred to as FYROM in NATO membership negotiations just as it was when it was admitted to the United Nations.<sup>207</sup> But despite the decision by the ICJ, membership negotiations between NATO and Macedonia have not yet resumed.<sup>208</sup> Macedonia could bring a similar case under the Interim Accord for Greece's decision to veto Macedonia's bid for EU candidate status, arguing that Greece did so predominantly because Macedonia continued to use the name FYROM.

Finally, and most importantly, European institutions should use bailout negotiations to put pressure on Greece in a manner that allows Greece to save face with its citizens. Due to years of promising its citizens that it would fight Macedonia on the name issue, Greece's leadership now finds itself in a situation in which, for political reasons, it could face significant public backlash if it reaches an agreement with Macedonia that allows Macedonia to keep its name.<sup>209</sup> However, because of the intense pressure from the EU that came (and continues to come) as a result of bailout discussions and EU policies aimed to help alleviate the strain on Greece posed by the European migration crisis, Greece's leaders are in a unique position to create a storyline that casts *overwhelming EU pressure* as the impetus for making concessions in the name dispute. Ultimately, it is the future EU agreements that arise out of future negotiations concerning continued Greek solvency and migrant resettlement matters that hold the greatest potential for the EU to push Greece to allow Macedonian membership negotiations to resume. The name issue, while certainly a difficult one to resolve, is one that, given the current relationship between Greece and its fellow EU Member States, finally has the potential for resolution.

### III. TAKEAWAYS, RECOMMENDATIONS & POTENTIAL FUTURE IMPLICATIONS

The above Parts demonstrate that Ohrid provides a strong basis, grounded in solid institutional structures, to keep Macedonia sta-

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206. *Id.* ¶ 62.

207. *Id.* ¶¶ 62, 113.

208. *Relations with the Former Yugoslav Republic of Macedonia*, NORTH ATLANTIC TREATY ORG. (Apr. 7, 2016), [http://www.nato.int/cps/en/natolive/topics\\_48830.htm](http://www.nato.int/cps/en/natolive/topics_48830.htm).

209. Karadzowski & Adamczyk, *supra* note 57, at 222.

ble in the coming years. However, the above Parts also depict a number of impediments to a successful integration of Macedonia into the EU. This Part provides a brief set of key recommendations based on the comprehensive set of recommendations discussed in the three subsections of Part II. Specifically, this section proposes, first, that the EU needs to construct legal mechanisms designed to make it more difficult for future Macedonian governments to retreat from the liberal democratic values protected by Ohrid; second, that the EU should work with Macedonian leaders to internationalize the country's court system; and, third, the EU should take a strong stance against Greece's position to keep Macedonia out of the EU without a name change.

First, the EU needs to condition EU membership on Macedonia's adoption of legal mechanisms designed to make it more difficult for future Macedonian governments to retreat from the values protected by Ohrid. In other words, in addition to conditioning EU membership on Macedonia's adoption of liberal democratic substantive laws, the EU needs to condition membership on Macedonia's adoption of legal procedural tools that increase the barriers to future governments dismantling those substantive laws. The case of post-accession Hungary discussed in Section II.A of this Note should be troubling to EU leaders that support the liberal democratic values asserted in Article 2 of the TEU.<sup>210</sup> What has happened in Hungary is troubling for two main reasons. First, it seems to indicate that EU leaders cannot necessarily depend on the public, given the chance to elect its own leaders, to serve as an ally in supporting the continued enactment of liberal democratic reforms; as noted earlier, Prime Minister Viktor Orbán's government received a majority of popular support in democratic elections. Second, it demonstrates that the institutional roadblocks to undoing liberal democratic reforms the EU requires States to enact as a condition of EU membership are embarrassingly insufficient to deter a regime determined to undo them.

The confluence of the two abovementioned factors indicates that if the EU wants these laws to remain intact on the books (not even to mention in practice), it must take a more aggressive approach to prospective membership conditions. This approach should consist of two main categories of legal and institutional reform; those that fall into the *ex ante conditions to membership* requirements and the

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210. TEU, *supra* note 93, art. 2 (Member States agree to adhere to "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail").

*ex-post punishment* mechanisms.

First, the EU should condition membership on Macedonia's adoption of legal procedural stop gates to repeal liberal democratic reform. Much of the EU's push for reform has focused on working with Macedonia and other potential Member States to adopt *substantive* legal reform. As the Hungary example demonstrates, the EU also ought to be working more comprehensively with potential Member States on institutional design reform to create impediments for future governments to undo reform.

Second, the EU needs to enact more stringent punishment mechanisms on those Member States that violate their obligations under the TEU. These mechanisms should seek to increase the costs imposed on future governments for deviating from their TEU obligations, thereby changing the calculus for opportunistic State leaders on whether it is politically advantageous to deviate. The systemic infringement mechanism proposed by Kim Scheppele is an example of the sorts of mechanisms that fit into this category for legal procedural reform.<sup>211</sup>

In addition to increasing the barriers to deviation from liberal democratic principles after membership is granted, the EU should work with Macedonian leaders to internationalize the country's court system. As the Hungary example demonstrates, it is difficult for courts, in the face of an increasingly deviant regime, to protect liberal democratic values. The Constitutional Court of Hungary, without an effective supranational body to assist it in enforcing its decisions, quickly found itself unable to rein in Prime Minister Orbán's regime. The EU should work with Macedonia to put international judges on its Constitutional Court as discussed in Section II.B and it should examine ways in which to strike a more aggressive balance between (1) protecting Macedonia's government's autonomy and (2) providing supranational backing for decisions by its courts, thereby protecting courts' autonomy from a potentially deviant post-accession government. Conditioning EU membership on the adoption of supranational mechanisms to enforce state-level court decisions may be met by less resistance in Macedonia than in many recent additions to the EU given (1) the history of international intervention in the Balkan region, (2) the steadfast desire of many Macedonian citizens to join the EU, and (3) the degree of municipality autonomy afforded by Ohrid. Ultimately, court empowerment is a necessary prerequisite to longevity of the liberal democratic reforms that Macedonia is currently enacting as a condition of membership.

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211. Scheppele, *supra* note 112.

Finally, the EU needs to take a hard-line against Greece's resistance to allow Macedonia to join the EU without changing its name as discussed in Section II.C. The reforms discussed in the paragraphs above will be largely irrelevant if the EU does not find a way to push Greece to compromise on the name issue. The EU, faced with a Greece that has recently conceded to numerous demands as a result of solvency discussions, is in a strong position to pressure Greece to acquiesce on the name issue. In the wake of Brexit and the European migration crisis, the EU has much to gain by admitting Macedonia and the other Balkan States that still hold a strong desire to join the EU. The discussions with Greece should be swift, and they should be ancillary conditions to future solvency discussions rather than held as stand-alone discussions. Holding discussions on the name issue as an ancillary condition to solvency discussions will allow the Greek government to save face with the Greek public, thereby reducing the chance that political realities derail negotiations. The name issue, although seemingly small in comparison to the task of reforming Macedonian laws and institutions, is imperative to solve quickly and completely if the EU hopes to bring Macedonia into its ranks.

Ohrid has provided a strong basis for peace in Macedonia since 2001, but continued stability in Macedonia in the face of the changing nature of the crises faced by the State, both internally and as a result of external factors—including the European migration crisis—mandate action on the part of the EU to foster closer relations between Macedonia and the European Union. In this time of introspection for the EU, expansion is necessary, both for the sake of the EU's security and its continued cohesion. Accession for Macedonia is a low-hanging fruit in the scheme of the numerous daunting issues that the EU needs to resolve in the coming years. It would be to the benefit of both Macedonia and the EU to begin to craft a more tangible, and less opaque, means through which Macedonia can finally join the union it has sought to join for the greater part of its existence.

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