

REPORT ON THE SITUATION IN BOSNIA: HOW THE INTERNATIONAL COMMUNITY CAN BEST SUPPORT CONTINUED PROGRESS

The Government of Republika Srpska (“Government”), as a party to the agreements comprising the Dayton Accords, including the Agreement on Civilian Implementation set forth in Annex 10 thereto (“Annex 10”), provides this Report to the United Nations Security Council. The purpose of this Report is to present to the Security Council the Government's views with respect to important developments in Bosnia and Herzegovina (“BiH”) and the way in which the Government believes the Security Council and other interested members of the international community can best support BiH going forward, some thirteen years after the ending of hostilities.

The Government appreciates the Security Council’s support in Resolution No. 1845 of the landmark agreements reached through negotiation and compromise among the three major political parties (of Serb, Croat, and Bosniak Peoples) on key issues now facing the country.¹ On January 26, 2009, further significant agreements were reached by these same parties. These are only the latest of important achievements by the authorities and institutions within BiH during the past months, as described in more detail below.

Although there remains more to be done on reform and development, as is the case with all democracies, much has been achieved during the past thirteen years of peace. BiH enjoys remarkable stability and is contributing positively to the region and the international community. This success can be attributed largely to the sound foundation created by the agreements reached in the Dayton Accords and adherence to the principles and obligations set forth therein. The Dayton Accords provide a strong and coherent legal framework for enduring peace and stability and BiH integration into Europe.

The progress made within BiH by its authorities and institutions requires that the international community adapt its manner of supporting BiH to reflect the nation’s status as an equal member of the international community, contributing to international peace and security in accordance with BiH's international and constitutional legal obligations. It is imperative that the

¹ See UNSC Resolution 1845, p. 3 (November 20, 2008).

approach taken by the Security Council and the international community now reflect current circumstances.

The Government wishes to express its grave concern that the actions of some within the international community could undermine the foundation for long-term peace and stability of BiH. Some within the international community seek to impose a structure and system of government that is in direct contravention of the federal structure and system agreed to by the parties in the Dayton Accords—a structure and system that enabled the three constituent Peoples to reach agreement in Dayton and that is the basis for durable peace and stability among them in the future. Rather than support the efforts of BiH’s elected leaders to work through the processes established in the BiH Constitution, those wishing direct foreign intervention intend to achieve their objectives by the exercise of peremptory powers against the democratically elected authorities and constitutional institutions of BiH. They justify such actions by attempting to create a false perception that the situation within BiH is “in crisis.”

As the Security Council is aware, Ambassador Miroslav Lajcak recently announced his resignation as High Representative to BiH. The Government wishes to express its appreciation for the efforts made by Ambassador Lajcak during his tenure. At the same time, his announcement provides an important opportunity for the Security Council and other interested members of the international community to carefully reassess the current situation in BiH as the Security Council addresses the issue of whether a new High Representative should be appointed. The Government urges the Security Council and the broader international community to consider the need to proceed in a manner that respects the sovereignty of BiH, international legal agreements and other principles of international law.

The Government provides this Report to aid the Security Council in its deliberations over these important issues.

I. Primary Responsibility for Dayton Implementation

As the Security Council has repeatedly declared, the primary responsibility for implementation of the Dayton Accords lies with the authorities in BiH themselves.² The authorities in BiH are meeting their responsibilities.

On November 8, 2008, as noted in Security Council Resolution No. 1845, the leaders of the three main political parties reached landmark agreements in Prud, expressing a firm consensus on major issues to be resolved. These include agreement on important constitutional reforms, apportionment of state property, conduct of a census, the legal status of the Brcko District, and other key issues. On January 26, 2009, the leaders again met in Banja Luka and reached further significant agreements with respect to the implementation of the agreements reached in Prud.

The agreements reached by the three parties demonstrate that the authorities within BiH are reaching agreement on even the most difficult political issues through their own efforts and through negotiation and compromise. It should be noted that these agreements directly address the objectives that the Peace Implementation Council (“PIC”) set out, in the Declaration by the Steering Board of the Peace Implementation Council, dated February 27, 2008, and the Communiqué of the Steering Board of the Peace Implementation Council, dated November 20, 2008.

Other significant accomplishments during the past year include, *inter alia*, the following:

- BiH entered into a Stabilization and Association Agreement with the European Union, enacted by the Parliamentary Assembly and approved by the Presidency.
- Another free and fair election in BiH has been successfully conducted.
- There have been no significant public disturbances within Republika Srpska, as have been seen in Serbia and elsewhere, in response to the Kosovo authorities’ declaration of independence due to the Government’s efforts to moderate negative reactions.

² See UNSC Resolution 1845 ¶ 2 (November 20, 2008); UNSC Resolution 1785 ¶ 2 (November 28, 2007); UNSC Resolution 1722 ¶ 2 (November 21, 2006); UNSC Resolution 1639 ¶ 2 (November 21, 2005); UNSC Resolution 1575 ¶ 2 (November 22, 2004); UNSC Resolution 1491 ¶ 2 (July 11, 2003); UNSC Resolution 1423 ¶ 2 (July 12, 2002); UNSC Resolution 1357 ¶ 2 (June 21, 2001); UNSC Resolution 1305 ¶ 2 (June 21, 2000); UNSC Resolution 1247 ¶ 2 (June 18, 1999); UNSC Resolution 1174 ¶ 2 (June 15, 1998); UNSC Resolution 1088 ¶ 3 (December 12, 1996).

- The Fiscal Council of BiH became operational and held several sessions, making it possible to draft budgets for BiH institutions for adoption by the Presidency. It was the first time since Dayton that the following year's budget was submitted for adoption before December 31. The budget has now been passed by the BiH House of Representatives.
- The Council of Ministers of BiH adopted a number of important bills, strategies, and decisions, including police reform legislation; legislation on public roads and aviation; legislation on the Agency for Air Navigation Services; legislation on the Information Society Development Agency; legislation on boundaries and immigration, including the Integrated Border Management Strategy, the Immigration and Asylum Strategy, and a related action plan for 2008-2011; and strategies for implementing obligations deriving from the Stabilization and Association Agreement and the European Partnership.
- The BiH Council of Ministers established a working group for negotiations on liberalization of the visa regime and adopted the working group's implementation plan.
- BiH neared completion of negotiations for membership with the World Trade Organization.

The Government also wishes to emphasize other key indications of progress, stability, and peace. Since the signing of the Dayton Accords over thirteen years ago, there has been no resumption of hostilities or serious threat of such. BiH citizens live, work, and travel freely throughout BiH, regardless of their ethnicity. BiH has been admitted to the Council of Europe for more than six years, is a candidate for NATO membership, and has participated in UN peacekeeping. In addition, last year Republika Srpska became a member of the Assembly of European Regions. And most recently, on January 28, 2009, the Eastern European Group of the United Nations confirmed that it had selected BiH for nomination in 2009 as the Group's single candidate for membership on the Security Council.

Despite these significant developments within BiH, pronouncements by the Security Council as set forth in its resolutions with respect to BiH have remained virtually the same for the past decade, including acting under Chapter VII of the U.N. Charter. The developments set out above demonstrate that BiH citizens and their elected officials are working together, notwithstanding the usual disputes common to democratic systems, and that BiH is stable and secure. The Government calls upon the Security Council and other members of the international

community to adapt its manner of supporting BiH to reflect the significant progress that has been made.

II. Impediments to Dayton Implementation and Consensus Building

A. The Threat of Increased Foreign Intervention

Unfortunately, with the resignation of the High Representative, important progress by BiH's major political leaders is threatened by foreign proponents of heightened direct intervention into the governance and domestic affairs of BiH. The interventionists' program includes an attempt to prevent closing the Office of the High Representative and instead, aggressively increasing the use of peremptory powers (the so-called "Bonn Powers") either by the appointment of a new High Representative committed to this approach or by seeking to endow a new EU Special Representative with similar peremptory powers.

To create support for these actions, those who favor greater intervention have waged a media campaign falsely describing BiH as being "in crisis." They are also collaborating with smaller BiH political factions to derail the significant progress made by leaders of BiH's main Serb, Croat, and Muslim political parties to implement the recent agreements reached. Those remaining political figures in BiH who favor increased foreign intervention are seeking to advance their narrow interests by substituting foreign support via peremptory powers for their declining support in BiH. The objective of such efforts is to create a unitary structure within BiH rather than to implement the federal structure that is required by the Dayton Accords and set forth in the BiH Constitution.

Attempts by states and other subjects of international law to interfere with the treaty obligations set forth in the Dayton Accords should not be encouraged by the Security Council. Indeed, such actions could pose a threat to international peace and security. Any system of government that does not enjoy a consensus from within – but is imposed from without – will not be considered legitimate by its own citizens. This is particularly true with respect to changing the federal structure agreed upon by the parties in the Accords. Replacing this structure with a unitary system removes the protections essential for the constituent Peoples who constitute minorities in BiH. It is precisely these protections, the essential centerpiece of the Dayton Accords, that encourage cooperation and consensus building today and make BiH a

viable state. Such protections provided by a federal system of government are hardly unique to BiH. Federal structures in other democracies within Europe and elsewhere have been successful forms of governance for states that consist of diverse peoples.³

B. Modification of the Dayton Accords and BiH Constitution

As evident from the agreements on constitutional reform reached in Prud and subsequently in Banja Luka, the main political parties in BiH recognize that certain amendments to BiH's Constitution, set forth in Annex 4 of the Dayton Accords, are desirable to improve good governance and to conform to standards required for European Union membership. These parties have agreed to various modifications so long as they are made pursuant to the procedures set forth in the Constitution. The modifications have been designed so as not to undermine the foundational principles set forth in the Dayton Accords. The Government is committed to supporting these efforts.

In international law, once a treaty is in force, the principle of *pacta sunt servanda* provides that the treaty is binding upon the parties and must be performed in good faith.⁴ Of course, a treaty may be amended by agreement of the parties to it. States and international organizations not party to the Dayton Accords are free to offer their views as to the Dayton Accords; however, any amendments would require the agreement of all parties and certainly cannot be imposed by the High Representative or the PIC. Any such action would violate the sovereignty of BiH recognized in the Dayton Accords. It would also violate Article 2 of the UN Charter and general principles of international law as evidenced, *inter alia*, by General Assembly Resolution No. 2625 Annex of October 24, 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.

³ Examples include Germany, Spain, Belgium, Switzerland, and Canada, among many others.

⁴ See Vienna Convention on the Law of Treaties, Art. 26; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 591-92 (6th ed. 2003).

C. Peace Implementation Council

The Peace Implementation Council (“PIC”) is made up of some 55 states, international organizations, and non-governmental organizations. It is hardly surprising that views among these states, institutions and organizations vary widely. Even on the smaller Steering Board of the PIC there are differences of view, *inter alia*, as to whether the institution of High Representative should continue or be terminated and what preconditions should be imposed upon BiH officials for such termination. Thus, the political leadership of BiH is confronted with a cacophony of opinion among members of the PIC as to the actions and policies to be pursued. For these reasons the PIC today is not a force for orderly and progressive domestic governance.

Thirteen years ago, with the support of the international community, BiH ended its civil war by the signing of the Dayton Accords. At that time, BiH faced the tremendous challenge of rebuilding a war-torn country and restoring long-term peace and stability. Members of the international community recognized this challenge and gave support to BiH. In early December 1995, interested states and organizations met in London at the Peace Implementation Conference and organized themselves into the PIC. According to paragraph 3 of the Conclusions of the Peace Implementation Conference, issued on December 12, 1995, “[t]he purpose of the London Peace Implementation Conference is to mobilize the international community behind a new start for the people of Bosnia and Herzegovina.” In this regard, the Conclusions further stated the following:

The realization of these objectives involves *an initial phase* of peace implementation during which the international community, including a wide range of international and regional organizations and agencies, will be deeply involved in assisting the implementation of the tasks flowing from the Peace Agreement. These tasks include the military disengagement of the parties, agreement on regional stabilization measures, arrangement to promote the return of refugees and displaced persons, and the holding of free and fair elections for new democratic structures in Bosnia and Herzegovina. *This will lay the base for the longer term development by the peoples of Bosnia and Herzegovina themselves of their institutions and economy and the normalization of external*

*relations of Bosnia and Herzegovina both with her neighbors and with the international community.*⁵

The support of the international community through the PIC played an important role in the *initial phase* of peace implementation, including military disengagement and establishment of free and fair elections. However, thirteen years later, the tasks for which the Peace Implementation Council formed itself have been completed. Now is the time “for longer term development by the peoples of Bosnia and Herzegovina *themselves* of their institutions and economy” However, despite correctly recognizing limits to its involvement in 1995, now some thirteen years later, the PIC routinely intrudes into the details of the domestic affairs of a sovereign state. To cite just a few of many examples, in its Communiqués and Declarations of last year, the PIC Steering Board took up such issues as regulations on BiH visas, the investigative actions of the State Prosecutor regarding allegations of local law violations, the jurisdiction of judicial authorities over certain domestic legal issues, and BiH “Fiscal Sustainability (promoted through an Agreement on a Permanent ITA Co-efficient methodology and establishment of a National Fiscal Council).”⁶ Such issues are clearly BiH domestic affairs and not within the scope of assistance requested or consented to in Dayton Accords.

Also troubling is the PIC’s perception of its authority with respect to interpretation and enforcement of the Dayton Accords. In its Declaration of November 20, the Steering Board provides as follows:

The PIC Steering Board reminds the authorities of the decision it took at its meeting on 27 February 2008 that the five objectives and two conditions must be delivered by the BiH authorities prior to OHR-EUSR transition. Until such time as the PIC Steering Board determines the five objectives and two conditions are met, OHR will remain in place and continue to carry out its mandate under the GFAP, ensuring full respect of the Peace Agreement.

As a matter of international law, the PIC has no legal authority over BiH, including its Entities. Nor does it have legal authority over the High Representative, who sits as chairman of its Steering Board. The PIC, including its Steering Board, exists as a self-organized council of

⁵ Conclusions of the Peace Implementation Conference, ¶ 4 (emphasis added).

⁶ See, e.g., Declaration by the Steering Board of the Peace Implementation Council, February 27, 2008; Communiqué of the Steering Board of the Peace Implementation Council, November 20, 2008,.

states and organizations. It derives no powers of direct intervention into BiH's domestic affairs from the Dayton Accords or from any other international legal instrument. No resolution of the Security Council has granted such powers to the PIC. Its declarations and decisions are pronouncements of the views of its member states and organizations. While of interest to BiH as diplomatic communications, such pronouncements have no legal force or effect.

The Government wishes BiH to have friendly relations with all member states of the United Nations, but these should be carried out according to international law, including the Dayton Accords, and without any states or international organizations threatening or seeking to interfere into the domestic affairs of BiH or claiming the right to enforce its views as if they were requirements of law.

D. High Representative

Asserting the authority of the PIC,⁷ the High Representative has continued to claim and exercise peremptory powers of decree and removal of local officials, and continued to intervene in local political affairs in a way that is fundamentally disruptive of the consensus building and reform efforts of BiH authorities. Since April 2008, as discussed below, these powers have been used to remove a government official from office without due process; seize the travel documents of persons indefinitely; block bank accounts; and implement legislation bypassing the legislative process required by the BiH Constitution. As described in detail below, there is no legal basis for the continued exercise of these peremptory powers; moreover, their use has violated the BiH Constitution, the Dayton Accords, other international treaties, and general principles of international law.

Such intervention has clearly become an impediment to continued progress. Repeated threats of removal of local officials, rule by decree, and strident and repeated criticism of democratically elected national leaders by the High Representative and others within his Office impede progress in domestic consensus building, agreement on shared goals, and the development of cooperative relations among the various political units, political parties, and Peoples of BiH. Thirteen years after the end of hostilities and the signing of the Dayton Accords,

⁷ See, e.g., Office of the High Representative, Decision to Remove Mr. Predrag Ceranic from his current position in the Intelligence and Security Agency of Bosnia and Herzegovina (May, 30, 2008) (Preamble).

use of such colonial-era powers cannot facilitate lasting reform or progress. Reform, democratic governance, and rule of law cannot be advanced by the use of dictatorial powers by foreign officials. By any objective measure, the utility of these peremptory decree and removal powers has long since been exhausted.

E. Limited Mandate

The position of High Representative was created by agreement of the parties, including Bosnia and Herzegovina, the Federation, and Republika Srpska as set forth in Annex 10 to the Dayton Accords. The mandate and authority of the High Representative flow from that instrument. According to Annex 10:

In view of the complexities facing them, *the Parties request* the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, *to facilitate the Parties' own efforts* and to mobilize and, as appropriate, coordinate the activities of organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below.⁸

These “tasks” given to the High Representative by the Parties included the following:

Article II

Mandate and Methods of Coordination and Liaison

The High Representative shall:

- a) Monitor the implementation of the peace settlement;
- b) Maintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects.
- c) Coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of

⁸ Dayton Accords, Annex 10, Art. I.2 (emphasis added).

the peace settlement. The civilian organizations and agencies are requested to assist the High Representative in the execution of his or her responsibilities by providing all information relevant to their operations in Bosnia-Herzegovina.

d) Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.

e) Participate in meetings of donor organizations, particularly on issues of rehabilitation and reconstruction.

f) Report periodically on progress in implementation of the peace agreement concerning the tasks set forth in this Agreement to the United Nations, European Union, United States, Russian Federation, and other interested governments, parties, and organizations.

g) Provide guidance to, and receive reports from, the Commissioner of the International Police Task Force established in Annex 11 to the General Framework Agreement.⁹

Annex 10 did not authorize the High Representative to exercise peremptory powers. It is inconceivable that the parties would have agreed to grant a foreign official the power to amend constitutions, violate constitutional provisions, enact legislation, create new state institutions, remove democratically elected officials, or violate the human rights guaranteed to BiH citizens.

Moreover, Annex 10 does not provide that the High Representative shall continue until such time as the Dayton Accords are fully implemented. Nor does Annex 10 provide that the High Representative (and certainly not the PIC) has the authority to determine *when* the Dayton Accords have been fully implemented.

Although the parties granted the High Representative the authority to act as “the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement,” the parties did not grant the High Representative final authority to interpret the Dayton Accords apart from Annex 10. The parties to the Dayton Accords retain that right pursuant to applicable international law. It must also be emphasized that while the High Representative has “final authority” of interpretation with respect to Annex 10, his authority is

⁹ *Id.*, Art. II.

limited – it must be exercised in accordance with general international law, including the Vienna Convention on the Law of Treaties.¹⁰ His “interpretation” of Annex 10 obviously cannot be an excuse for actions of the High Representative that violate international law or exceed his mandate. Indeed, such actions are void or voidable and entail international responsibility.¹¹

III. Violation of International Law

The continued use of peremptory powers by international officials is not only disruptive of progress in BiH, it violates international law. The exercise of such powers cannot continue.

The use of peremptory powers of decree and removal continues thirteen years after the end of hostilities in BiH. During this time, as described above, there has been no resumption of hostilities, numerous free and fair elections have been held, and BiH has been admitted to the Council of Europe, become a candidate for NATO membership, participated in UN peacekeeping, selected for nomination for membership on the Security Council, and signed a Stabilization and Association Agreement as an important step toward EU membership. Nonetheless, these powers continue to be used by the High Representative. Since April 2008, these powers have been used by the High Representative to (1) immediately remove a government official from office, barring him from holding any public office or office within a political party indefinitely; (2) seize the travel documents of persons indefinitely, prohibiting their liberty of movement to exit BiH; (3) block the bank accounts of 35 individuals indefinitely; and (4) implement legislation bypassing the legislative process set forth in the BiH Constitution.¹²

Such actions are taken without any notice, administrative or judicial process, or opportunity for appeal by injured parties.

Exercise of these peremptory decree and removal powers is inconsistent with the Constitution and international legal commitments of BiH, inconsistent with the general standards as to human and civil rights required of members of the European Union and all states party to

¹⁰ See Vienna Convention on the Law of Treaties, Art. 31.

¹¹ See e.g. Eli Lauterpacht, “The Legal Effect of Illegal Actions of International Organisations,” in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 89-90 (1969).

¹² These Decisions of the High Representative are available on the OHR’s website at www.ohr.int.

the human and civil rights treaties to which BiH is a party, and inconsistent with the most fundamental principles of the rule of law and international law. The powers exercised vastly exceed any mandate ever granted to the High Representative. The exercise of such powers must end so that the rule of law can be restored, the rights of citizens protected, and international legal obligations fulfilled.

A. Violation of Human and Civil Rights Obligations and General Principles of International Law

As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 14 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the 1966 International Covenant on Civil and Political Rights; and the 1966 Covenant on Economic, Social and Cultural Rights.¹³ Also, under the Dayton Accords and BiH Constitution, it is required that “[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.”¹⁴

Among the legal principles to which BiH is committed by virtue of these provisions of the Dayton Accords and other treaties are ensuring its citizens the right to an effective remedy; the right to a fair hearing; no punishment without law; freedom of expression; freedom of assembly and association; protection of property; the right to take part in public affairs; and the right to liberty of movement.¹⁵ The peremptory powers exercised by the High Representative are in direct contravention of these fundamental principles.

B. Violation of BiH Constitution and the Rule of Law

In 2006, the Constitutional Court of BiH ruled that the use of the High Representative’s peremptory powers in removing public officials violated the Constitution of BiH.¹⁶ Because this Constitution is contained in the Peace Agreement, violations of the Constitution, particularly

¹³ See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4.

¹⁴ BiH Constitution, Art. III.3.b; General Framework Agreement, Ann. 4.

¹⁵ See, e.g., European Convention on Human Rights; International Covenant on Civil and Political Rights.

¹⁶ See *Bilbija*, AP-953-05 (BiH Const. Ct. July 8, 2006).

concerning human and civil rights, raise serious questions as to violations of treaty obligations as well.

The High Representative responded to the BiH Constitutional Court's decision by issuing a decision purporting to overrule the Constitutional Court and going well beyond.¹⁷ The decision declared the High Representative to be entirely above the rule of law and not subject either to review or responsibility for any actions taken, regardless of their consequences. In addition, the order declared that the BiH State has no power to protect the constitutional and international legal rights of its citizens where the actions of the High Representative are directly or indirectly at issue.¹⁸

The High Representative declared inadmissible any proceeding which “takes any issue in any way whatsoever with one or more decisions of the High Representative” and that “no liability is capable of being incurred . . . in respect of any loss or damage . . . from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.”¹⁹

¹⁷ See Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (March 23, 2007).

¹⁸ *Id.* This Decision of the OHR specifically provides that “[a]ny steps taken by any institution or authority in [BiH] in order to establish any domestic mechanism to review the Decisions of the High Representative. . . shall be considered by the High Representative as an attempt to undermine the implementation of the General Framework Agreement . . .” (Article 2); “[A]ny proceeding instituted before any court in [BiH], which challenges or *takes any issue in any way whatsoever* with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.” (Article 3 (emphasis added)); “[N]o liability is capable of being incurred on the part of the Institutions of the [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.” (Article 3 (emphasis added)); “[T]he provisions of the Order contained herein are . . . laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of [BiH] or its Entities *or elsewhere*, and no proceedings may be brought in respect of duties thereof before any court whatsoever at any time.” (Article 4 (emphasis added)); “[T]he High Representative is not in any way accountable to any one State . . . his actions cannot engage the responsibility of any one State.” (Preamble).

¹⁹ *Id.*, Art. 3 (emphasis added).

C. An International Organization is Responsible for its Internationally Wrongful Acts

Such use of peremptory powers is in direct conflict with the law applicable to international organizations.²⁰ Under international law, an international organization is bound to act only within the grant of powers made to it and in accordance with general principles of law. Nowhere in the High Representative's mandate can there be found powers to violate the BiH Constitution, the Dayton Accords, or other treaties binding BiH or other fundamental principles of international law.²¹ And when an international organization acts outside the grant of its powers, as the High Representative has done here, it is still responsible for internationally wrongful acts committed *ultra vires*.²²

D. Cessation, Non-Repetition, and Reparation

An international organization also incurs responsibility if it directs or controls a sovereign state in committing an internationally wrongful act²³ or if it coerces a sovereign state to commit an act that would be, but for the coercion, an internationally wrongful act of the state.²⁴ International law imposes upon international organizations engaged in committing an internationally wrongful act an obligation to cease the act if it is continuing and to offer appropriate assurances and guarantees of non-repetition.²⁵ An international organization committing an internationally wrongful act also has an obligation to make full reparation for any material or moral injury caused by the wrongful act.²⁶

²⁰ The High Representative has declared itself to be an international organization. See Written Observations on Behalf of the High Representative, Office of the High Representative, *Berić, et. al. v. Bosnia and Herzegovina*, Application Nos. 36357/04, et al., ¶¶ 1.1 and 5.9 (June 16, 2006).

²¹ See International Law Commission, Report on the Work of its Fifty-Fifth Session ¶ 53 (2003) (adopting Draft Article 3 on the Responsibility of International Organizations, which states that “[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization”).

²² See International Law Commission, Report on the Work of its Fifty-Sixth Session ¶ 71 (2004) (adopting Draft Article 6 on the Responsibility of International Organizations, which states that “[t]he conduct of an organ, an official or another person entrusted with part of the organization's functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions”).

²³ See International Law Commission, Report on the Work of its Fifty-Seventh Session ¶ 205 (2005).

²⁴ See *id.*

²⁵ See International Law Commission, Report on the Work of its Fifty-Ninth Session ¶ 343 (2007).

²⁶ See *id.*

E. International Criticism of Peremptory Powers

As is well known, the High Representative's use of peremptory decree and removal powers is not new. Since 1998 when these powers were introduced, the High Representative has issued over 800 decisions, removing over 120 persons from public positions and enacting or amending over 300 laws.²⁷ This has included the removal of acting judges, duly elected officials, including those holding the office of prime minister and mayor, as well as a professor of law at a state academic institution, often banning them indefinitely from holding any public positions. These actions have been taken without any notice, administrative or judicial process or opportunity for appeal. The decisions of the High Representative also include enacting laws creating new institutions not established in the constitutions and even constitutional amendments.²⁸

Understandably, the continued use of peremptory decree and removal powers – some thirteen years after the ending of hostilities – has also been much criticized by legal and international relations scholars and experts. Critics include former international officials who have served in BiH.²⁹

The Council of Europe and the Venice Commission have sharply criticized the use of these powers.³⁰ Council Resolution 1384 (2004) stated that "...the Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse." In March 2005, the Venice Commission issued an opinion stating, "as a matter of principle, it seems unacceptable that decisions directly affecting the rights

²⁷ These numbers do not include the exercise of peremptory decree and removal powers by the Deputy High Representative with respect to the Brcko District, which has occurred frequently and recently.

²⁸ The decisions are available on the OHR's website at www.ohr.int.

²⁹ See, e.g., Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 Duke J. Comp. & Int'l L. 1 (2004); Steven R. Ratner, *Foreign Occupation and International Territorial Administration; the Challenges of Convergence*, Eur. J. Int'l L. (2005), Vol. 16 No. 4; GREGORY H. FOX, *HUMANITARIAN OCCUPATION* (Cambridge University Press, 2008); BERNHARD KNOLL, *THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS* (Cambridge University Press, 2008); Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 Journal of Intervention and Statebuilding, Special Supp. 2007; Rebecca Everly, *Complex Public Power Regulation in Bosnia and Herzegovina After the Dayton Peace Agreement*, 5 Ethnopolitics No. 1 (2006).

³⁰ *Assembly debate* on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent Court.”³¹

As two experts have observed, the experience of BiH shows that:

No mission should be relied upon to impose limits on itself. The Bosnian illusion, shared by a large international human rights and democratization community, has been that universal laws of power – including the well-known tendencies of institutions to pursue their self-interest, reject blame for failures, evade hard decisions, and prolong their own tenures – somehow do not apply in the case of well-intentioned international state-building missions. The Bosnian reality shows clearly, however, that such laws describe the behavior of an international mission just as accurately as that of any other public institution.³²

The Security Council has never purported to authorize the High Representative to exercise the so-called Bonn Powers. Nonetheless, the High Representative has asserted that its legal authority for such actions is derived from the Security Council.³³ It is now time for the Security Council to definitively eliminate any basis for such assertions.

IV. UN Security Council

A. Appointment of New High Representative and Bonn Powers

The designation of a new High Representative would require a Security Council resolution. Annex 10 of the Dayton Accords requires a Council resolution to appoint a new High Representative.³⁴ This has been the practice since Dayton without exception.³⁵ The High Representative acknowledged in Written Observations to the European Court of Human Rights

³¹ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session (Venice, March, 11-12, 2005).

³² Gerald Knaus and Felix Martin, *Travails of the European Raj*, 14 *Journal of Democracy*, No. 3 (2003).

³³ See Written Observations on Behalf of the High Representative, Office of the High Representative, *Berić, et. al. v. Bosnia and Herzegovina*, Application Nos. 36357/04, et al., ¶¶ 3.1-3.14 (June 16, 2006).

³⁴ See Dayton Accords, Annex 10, Art. I.2.

³⁵ See, e.g., UNSC Resolution 1031 ¶ 26 (December 15, 1995) (concerning the appointment of Mr. Carl Bildt as the first High Representative).

that “the appointment of the High Representative has to be approved by the United Nations Security Council.”³⁶

Those supporting a European future for BiH, the Dayton Accords and the rule of law should support termination of the High Representative and the Bonn Powers. After thirteen years of direct intervention in government administration and law making, rule by the High Representative and the PIC should end. Building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is essential to long-term stability.

B. Chapter VII Powers

The situation in BiH does not constitute a threat to international peace and security and, thus, does not warrant the Security Council to continue to act under Chapter VII of the UN Charter.

After thirteen years of peace, and given the considerable progress and stability that exists in BiH as described above, there is no longer justification for a determination that the situation in BiH constitutes a threat to international peace and security. The facts simply do not support it. As described above, there has been no resumption of hostilities, numerous free and fair elections have been held, and BiH has been admitted to the Council of Europe, become a candidate for NATO membership, participated in UN peacekeeping, signed a Stabilization and Association Agreement as an important step toward EU membership, and been nominated for membership on the Security Council. Its political leaders have demonstrated, such as through the agreements reached in Prud and the subsequent related agreements reached in Banja Luka, that they are capable of solving difficult issues through negotiation and compromise.

Measures under Chapter VII are not intended or permitted to be used to impose upon democratically elected governments the preferences of foreign states or international organizations regarding the details of domestic governance. Nor are Chapter VII measures intended to permit internationally wrongful acts by an international organization. Yet these are

³⁶ Written Observations on Behalf of the High Representative, Office of the High Representative, *Berić, et. al. v. Bosnia and Herzegovina*, Application Nos. 36357/04, et al., ¶ 2.8 (June 16, 2006).

the purposes for which Chapter VII authority has been cited by the High Representative and the PIC.

Misuse of Chapter VII powers damages Security Council credibility and weakens the long-term viability of Chapter VII itself. The Security Council should forego further reference to Chapter VII with respect to the situation in BiH.

V. UN Facilitation

The question which now arises is how the United Nations can best facilitate continued progress in BiH. For the reasons set forth herein, the Government does not believe that the appointment of a new High Representative will be helpful. In addition, the continued exercise of peremptory powers against BiH institutions, authorities, and citizens by a High Representative or any other international official is neither authorized nor permitted by international law and will disrupt rather than facilitate the process of consensus building now underway in BiH. Further, there is no longer any basis for the use of Chapter VII authority with respect to BiH. In the Government's view, the Security Council should not appoint a new High Representative and should make clear that the Council does not authorize the use of peremptory powers. The Council should also discontinue acting under Chapter VII of the Charter.

Finally, the agreements that constitute the Dayton Accords, including the BiH Constitution set forth in Annex 4, are the legal instruments to which the relevant parties are bound as the framework for "enduring peace and stability"³⁷ in BiH. As a fundamental principle of international law and pursuant to BiH domestic law, these cannot be amended or modified except by further agreement of the relevant parties. The Security Council should support the Dayton Accords as the binding legal framework for BiH. Attempts to impose a system of governance that is inconsistent with the Dayton Accords by foreign states or international organizations by the exercise of peremptory powers or other methods will not be legally valid nor will such actions have the support of BiH citizens. The consensus on which the legitimacy of all governments ultimately rests must come from within.

³⁷ General Framework Agreement For Peace In Bosnia and Herzegovina (Preamble)

