

**Government of Republika Srpska Post-Election Priorities: Economic Growth;  
Restoration of Constitutional and Democratic Government; European Integration**

**Fourth Report of Republika Srpska  
to the UN Security Council**

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## **I. Introduction**

1. On October 3, 2010, voters in the Republika Srpska (“RS”), one of the two Entities that comprise Bosnia and Herzegovina (“BiH”), elected a new National Assembly and President of Republika Srpska, continuing an unbroken succession of free and fair elections in the 15 years since the Dayton Accords. The next four years are considered by the RS to be a period of great importance in which much progress can be achieved. This report outlines three areas of priority of the RS Government as it looks to the future: encouraging economic growth, restoring constitutional and democratic government to Bosnia and Herzegovina, and advancing BiH’s European integration. The United Nations Security Council and members of the international community can best assist further progress within BiH by supporting these priorities in a manner that respects BiH’s sovereignty and the rule of law.

### **A. Economic Growth**

2. Economic growth is one of the highest priorities of the RS Government and should be the primary focus of the international community with respect to its relations with BiH. The RS Government will continue promoting economic growth by instituting market reforms and sound fiscal policy. It will build on the success of earlier reforms, which have helped give the RS the highest economic growth rates, lowest unemployment, and most competitive economy in BiH. The RS Government is committed to maintaining the decentralized structure as established for BiH in the Dayton Accords, which is beneficial to economic growth. The ongoing economic crisis in the Federation of Bosnia and Herzegovina (“Federation”), shows what could befall the RS if power were to be centralized in Sarajevo.

3. The Office of the High Representative in Bosnia and Herzegovina (“OHR”), through its policies, actions, and very presence, retards economic growth, market reform, and foreign investment throughout BiH. The OHR has caused considerable economic loss and damages to BiH, its Entities and citizens. A most recent example is the debacle caused by the High Representative’s decisions regarding the sale of electricity to Brčko, which has caused significant economic damage to Brčko and has led the European Commission to condemn the decisions as violating the Energy Community Treaty and Stabilization and Association Agreement and other EU standards. The RS Government will work to reverse the OHR’s economically destructive actions, as the National Assembly did this summer by voting to repeal the High Representative’s “temporary” freeze order on RS’s state property decreed on March 21, 2005.<sup>1</sup>

### **B. Restoring Constitutional and Democratic Government**

4. The RS Government will continue to work for the long-overdue closure of OHR in order to restore constitutional and democratic government to BiH. The peremptory powers asserted by the High Representative, including the authority to enact laws, amend constitutions, and punish public officials by unilateral decree, have no legal basis in the Dayton Accords, Security

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<sup>1</sup> See Decision Enacting the Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska, March 21, 2005.

Council resolutions, or anywhere else. The High Representative has continued to use preemptory powers and intimidation in violation of BiH and international law. Even worse, the High Representative has to date successfully blocked all judicial review of his actions. The OHR's main priority is indefinitely prolonging its dominion over BiH, and the Peace Implementation Council ("PIC") Steering Board's conditions for supporting OHR's closure, unfortunately, are ideal for this purpose.

5. The RS Government will also seek OHR's closure because it is required for progress in accession to both the European Union ("EU). The EU has repeatedly stated that even application for EU membership cannot occur until after OHR closure. The OHR remains the major obstacle to fulfillment of the Copenhagen Criteria. Its actions are contrary to applicable human and political rights treaties and economic treaties. The RS will oppose any effort to replace OHR with a new international official who asserts decree powers similar to those claimed by the High Representative. Such an official would similarly block progress toward European integration and could not be established as a matter of law without the consent of BiH and its Entities.

6. The RS Government has a legal duty to observe the BiH and RS Constitutions and domestic and international law. These obligations require the RS Government not to recognize or enforce OHR decisions that conflict with applicable law. The RS Government is acting to restore judicial and prosecutorial independence and the judicial structure, which have all been badly damaged by the OHR. Practices such as the OHR consulting with Constitutional Court justices on active cases and reviewing draft Court decisions before they are finalized, as publically acknowledged, are among the many unlawful actions of the OHR that must be addressed. The RS Government will also work to halt OHR's human rights abuses and seek justice for its victims. In addition, the RS Government plans to seek a referendum soliciting voters' views about the High Representative's imposition of laws extending the mandate of foreign judges and prosecutors in BiH by decree.

### **C. European Integration**

7. The RS Government supports BiH's accession to the EU and is committed to the success of BiH's EU integration. It will be vigilant, however, to ensure that the accession process is not misused by local and international parties as a pretext for making drastic constitutional changes unnecessary for accession and detrimental to the RS and BiH as a whole. The accession process should be a conventional one in which talks on any necessary constitutional changes come much later than the present pre-application stage. Certainly, for reasons explained in this report, such talks are impossible until OHR leaves BiH, with the sole exception of an amendment to comply with the European Human Rights' decision in *Sejdić and Finci v. BiH* ("*Finci*"). During the time that OHR remains in BiH, the RS Government will continue to advance BiH's EU integration, including by working for the implementation of the EU-BiH Stabilization and Association Agreement ("SAA") and for BiH's fulfillment of the EU's Copenhagen Criteria for membership.

8. Any constitutional amendments that may eventually be required for EU membership must be the result of a transparent and lawful process and a domestic consensus achieved without foreign interference. Moreover, any such constitutional changes must retain the fundamental protections for Entity autonomy and the equality of BiH's Constituent Peoples guaranteed by the BiH Constitution (Annex 4 of the Dayton Accords).

9. In the coming months and years, the RS Government will work to forge a domestic consensus for measures to improve BiH's governance while preserving the Dayton framework. The RS Government believes BiH's democratically elected leaders, if given political space, can work successfully together to build this consensus.

10. As summarized above and outlined in greater detail in this Fourth Report to the UN Security Council, the RS Government will work diligently to achieve its priorities of strong economic growth, the restoration of constitutional and democratic government to BiH, and European integration consistent with the Dayton framework.

## **II. Economic Growth is the RS Government's primary goal and should be the focus of the international community's relations with BiH and its Entities.**

11. The RS Government's central objective is to ensure the conditions for strong and sustained growth in the RS economy. In the past several years, the RS Government has enacted a host of market reforms designed to encourage such growth. These reforms have succeeded in giving the RS the highest growth rates in BiH, cutting unemployment, and raising wages. It is the decentralized structure of the Dayton Constitution that gives the RS the freedom to enact reforms such as these. The dangers of centralizing power in Sarajevo are underlined by the Federation's failure to reform and its ongoing economic crisis. The OHR's presence in BiH and its interventions in governance are inhibiting growth throughout BiH. The RS Government has taken steps to respond to such interventions, including by enacting legislation lifting the OHR's economically crippling freeze on state property. Promoting economic growth is the central focus of the RS government. In its relations with BiH, the international community's focus should be the same.

### **A. The RS Government has vigorously pursued market reforms.**

12. The RS Government has moved resolutely in recent years to enact market-oriented economic reforms, including the privatization of state-owned enterprises. It has worked cooperatively with international financial and regulatory bodies to improve RS laws and regulations in order to increase the RS's competitiveness, boost private enterprise, and attract foreign direct investment.

13. The RS Government was the first in the Balkans to employ the Regulatory Guillotine process to rapidly review regulations and eliminate those that are unnecessary.<sup>2</sup> Since launching the Regulatory Guillotine process in 2007, the RS Government has already eliminated 25% of the regulations affecting the launch of business operations and more than half of inspection procedures.<sup>3</sup> The time required for company registration in the RS has been reduced from more than 30 days to just a week.<sup>4</sup> By comparison, according to the World Bank and IMF's 2010 Doing Business study, launching a business in Sarajevo (in the Federation) still takes 60 days.

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<sup>2</sup> Republika Srpska Investment-Development Bank, *Positive Attitude Towards FDI*, available at [www.irbrs.net/Investiranje.aspx?id=10&par=1&lang=eng](http://www.irbrs.net/Investiranje.aspx?id=10&par=1&lang=eng).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*



14. The Government has also eased or eliminated other procedures that raise the cost of doing business.<sup>5</sup> The number of inspection measures has been cut by 43%.<sup>6</sup> The Regulatory Guillotine reforms have already saved businesses millions of Euros.<sup>7</sup> In addition to saving time and money, reducing business registration and licensing requirements minimizes opportunities for corruption.

15. In addition to eliminating unnecessary regulations, the RS Government has simplified tax regulations and bankruptcy proceedings. With the help of USAID, Banja Luka, as a pilot city, has instituted a new electronic system for construction permitting under which permits will be issued in fewer than 60 days.<sup>8</sup> Moreover, the new Law on Business Companies, which took effect on January 1, 2010, is expected save businesses millions of Euros annually by simplifying procedures.<sup>9</sup> In addition, as the International Crisis Group (“ICG”) notes in a recent report, “Every RS ministry . . . tries to harmonise new regulations and laws with the EU *acquis*.”<sup>10</sup>

16. In order to liberalize its economy, the RS Government has also implemented a far-reaching privatization program. As of July 2010, the RS had privatized 713 companies, improving the competitiveness of the RS economy and raising funds for RS accounts. The privatization of RS Telecom and RS Oil alone raised €700 million.<sup>11</sup> The effect of privatization is shown in the growth of the RS’s GDP from KM 5,115.60 in 2005 to KM 8,489.30 in 2008.<sup>12</sup>

17. The RS Government is continuing to reform its legal framework in order to cut bureaucracy, simplify regulations, and otherwise improve the business climate. International experts have recognized the RS Government’s commitment to economic reform. For example, the International Monetary Fund, in its Request for Standby Arrangement for BiH last year, wrote, “In recent years, policies have been diverging between the two Entities, with the RS making steady progress on reforms and the Federation finding it difficult to mobilize action on needed reforms.”<sup>13</sup> High Representative Inzko has also acknowledged the RS’s economic reforms. In his address to the Security Council in May, for example, the High Representative said:

The Federation has considerable difficulties to deal efficiently with the necessary IMF conditions, which may affect the Bosnia and

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> International Crisis Group, *Federation of Bosnia And Herzegovina – A Parallel Crisis*, Europe Report N°209, Sept. 28, 2010 (“ICG September 2010 Report”), p. 13.

<sup>11</sup> ICG September 2010 Report at n. 151.

<sup>12</sup> Database of Economic Indicators of the Republika Srpska, Main Economic Indicators, Comparative Review, available at [www.irbrs.net/statistika.aspx?tab=2&god=2009&lang=eng](http://www.irbrs.net/statistika.aspx?tab=2&god=2009&lang=eng) (“Comparative Review of Economic Indicators”).

<sup>13</sup> International Monetary Fund, Request for Stand-By Arrangement, Bosnia and Herzegovina, June 17, 2009, p. 4.

Herzegovina's fiscal sustainability in the medium- and long-term. In this regard, as far as IMF negotiations are concerned, the situation is much better in Republika Srpska.<sup>14</sup>

18. In an October 2009 proposal, the European Commission's staff wrote, "Due to a more ambitious privatisation and structural reform agenda, the fiscal space was larger in the Republika Srpska than in the Federation."<sup>15</sup>

19. In a report last year, the ICG wrote that "[t]here is some validity" to RS assertions "that certain state institutions do not function well."<sup>16</sup> The ICG explained, "[T]he RS government is more efficient than the [Federation's], consumes a much smaller percentage of GDP and is implementing reforms more quickly. RS has also privatised many more state enterprises, an area where the FBiH lags."<sup>17</sup> The ICG's Srecko Latal wrote last year that the RS has been proceeding with an aggressive privatization policy which has placed it in a much better position [than the Federation] when dealing with the current economic crisis."<sup>18</sup>

**B. The RS Government's market reforms have given the RS the highest economic growth rates in BiH.**

20. The RS's market reforms have fueled economic growth and pushed unemployment lower. From 2006 to 2009, the RS's per capita GDP grew 26.7% despite a small contraction in 2009 due to the global economic crisis. By comparison, during the same period the Federation's per capita GDP grew by 19.9% and the European Union's per capita GDP declined slightly.<sup>19</sup> From 2006 to 2009, according to the International Labor Organization ("ILO"), unemployment in the RS dropped by just over seven percentage points.<sup>20</sup>

21. This year, the RS economy appears to be resuming its growth. In the first half of 2010, the RS recorded a year-over-year industrial production growth rate of 7 percent.<sup>21</sup> This is compared to a 1.3 percent rate in BiH as a whole and a negative 2.3 rate in Croatia.<sup>22</sup> According to ILO figures, unemployment in the RS is now 5.5 percentage points lower than in the Federation.<sup>23</sup>

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<sup>14</sup> Speech by High Representative Valentin Inzko To the UN Security Council, May 24, 2010.

<sup>15</sup> Proposal for a Council Decision providing macro-financial assistance to Bosnia and Herzegovina, Oct. 29, 2009, SEC(2009) 1459, p. 4.

<sup>16</sup> International Crisis Group, *Bosnia's Incomplete Transition: Between Dayton And Europe*, Europe Report N°198, 9 March 2009, p. 9.

<sup>17</sup> *Id.*

<sup>18</sup> Srecko Latal, *Bosnian Federal Government Loses Ground*, BalkanInsight.com, April 21, 2009.

<sup>19</sup> Comparative Review of Economic Indicators.

<sup>20</sup> *Id.*

<sup>21</sup> Republika Srpska Investment-Development Bank, *Economic Monitor*, Sept. 2010, p. 3.

<sup>22</sup> *Id.*

<sup>23</sup> Comparative Review of Economic Indicators.

22. The RS Government's market reforms have also helped to boost wages in the RS. From 2006 to 2009, average wages in the RS jumped 51 percent.<sup>24</sup> Wages in the RS have historically been significantly lower than those in the much more urbanized Federation, and they still lagged by 13.4 percent in 2006. Since then, however, average wages in the RS have risen to rough parity with those in the Federation.

**C. Decentralization benefits economic performance, particularly in countries with conflicting regional preferences.**

23. Decentralized structures such as that of BiH improve economic performance. This is particularly the case in countries like BiH where policy preferences differ starkly between regions.

24. A 2009 study by the Swiss-based independent research institute BAK Basel Economics determined that decentralization benefits economic performance. The study, commissioned by the Assembly of European Regions ("AER"), a network of regions from 33 European countries, found that "decentralisation, amongst other factors, has a significantly positive influence both on the level and the dynamics of economic performance of countries and regions: The higher (ceteris paribus) the decentralisation indicator, the higher the economic performance."<sup>25</sup> As AER Secretary General Klaus Klipp said at the study's release, "Centralism hammers development of countries at the cost of its citizens."<sup>26</sup>

25. The AER study emphasizes that decentralization is most beneficial in countries where policy preferences differ based on region. According to the study:

The demand for public goods can differ substantially between regions because the preferences of citizens are formed by regional traditions. . . . The bigger the differences in regional preferences within a country, the greater the potential benefits from decentralisation. By supporting decentralisation different preferences of the population can be better incorporated into policy. This helps to ensure that an individual's needs will be considered more adequately.<sup>27</sup>

26. Thus, the need for a decentralized state structure is particularly acute in BiH, which has vast differences in policy preferences between citizens in the RS and the Federation.

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<sup>24</sup> Comparative Review of Economic Indicators.

<sup>25</sup> *From Subsidiarity to Success: The Impact of Decentralisation on Economic Growth, Part 2: Decentralisation and Economic Performance* (May 2009) (researched and produced by BAK Basel Economics, commissioned and published by Assembly of European Regions), available at [www.aer.eu/fileadmin/user\\_upload/PressComm/Publications/AER\\_Study\\_on\\_decentralisation/Studies/BAK-Part2-FINAL%2Bcover.pdf](http://www.aer.eu/fileadmin/user_upload/PressComm/Publications/AER_Study_on_decentralisation/Studies/BAK-Part2-FINAL%2Bcover.pdf) ("From Subsidiarity to Success"), p. 4.

<sup>26</sup> Valentina Pop, *Centralised states bad for economy, study shows*, EUObserver, May 18, 2009.

<sup>27</sup> From Subsidiarity to Success, p. 15 (citations omitted).

**D. The economic crisis in the Federation demonstrates the dangers of centralizing power in Sarajevo.**

27. The economic crisis in the Federation shows why efforts to centralize power in Sarajevo would not only violate the Dayton Accords but, if successful, would be disastrous for the RS economy. As the High Representative said in his most recent speech to the Security Council, in the Federation “a divided government has limped from crisis to crisis during the reporting period.”<sup>28</sup> As the ICG’s recent report says, “The Federation plunged into a financial crisis in 2008 from which it shows no sign of emerging.”<sup>29</sup> If BiH were to be centralized, the Federation, which has a population almost twice as large as that of the RS, would dominate. For a view of what a centralized BiH would look like, one need only look to the Federation’s broken political culture and exceptionally ineffectual government.

**1. Unnecessary regulations inhibit investment and breed corruption.**

28. The economy of the Federation is characterized by innumerable unnecessary barriers to investment. According to the World Bank and IMF’s 2010 Doing Business report, starting a business in Sarajevo takes 16 procedures and 60 days. Obtaining a construction permit takes 23 procedures and 264 days. Registering a property takes 7 procedures and 84 days. According to the ICG report, a regulatory reform consultant opined “that the Federation lags far behind RS, which overhauled regulations in 2006 and by 2008 had harmonised its legislation with the BiH constitution.”<sup>30</sup> In statement on May 24, 2010, the PIC Steering Board ambassadors admonished the Federation over “delays in implementation of structural measures agreed under the [IMF] Stand-By Arrangement.”<sup>31</sup> In addition to raising costs for business, the Federation’s multiplicity of registration and licensing requirements breeds corruption. As the head of the European Bank for Reconstruction and Development in Sarajevo said in a recent interview: “Some 53 signatories are needed to get building permits in Sarajevo. It’s crazy. If only 10 per cent of those 53 officials are corrupt, that is already a big problem. This is not acceptable.”<sup>32</sup> A local expert quoted in the ICG report says the corruption problem is worst in the Federation’s cantons “because there is the least control and judicial oversight.”<sup>33</sup>

**2. The Federation has failed to control its budget.**

29. A central reason for the Federation’s financial crisis is its inability to control spending directed toward powerful interest groups. As the ICG writes, “The global recession hurt, but the real culprit is excessive spending, especially to fulfil 2006 election promises to interest groups, including veterans and persons with disabilities.”<sup>34</sup> Bankruptcy, the ICG says, “was averted in

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<sup>28</sup> Speech by High Representative Valentin Inzko to the UN Security Council, May 24, 2010.

<sup>29</sup> ICG September 2010 Report, p. 16.

<sup>30</sup> *Id.*, p. 13.

<sup>31</sup> Statement by the Peace Implementation Council Steering Board Ambassadors, May 24, 2010.

<sup>32</sup> ICG September 2010 Report, n. 136.

<sup>33</sup> *Id.*, p. 18

<sup>34</sup> *Id.*, p. 16.

2009 only after the IMF promised the state (BiH) €1.2 billion in budget support, but repayment must begin in 2012.”<sup>35</sup> Moreover Federation officials have continued to “delay key reforms and try to renegotiate conditions.”<sup>36</sup> In his May speech to the Security Council, the High Representative said, “The Federation has failed to complete the appointments to government and Judiciary functions and to make budget cuts required by the IMF in the face of determined opposition from members of war veterans’ organisations.”<sup>37</sup> The ICG concludes that governments in the Federation will soon “face the almost impossible mission of servicing the [Federation’s] growing debt without triggering massive public unrest.”<sup>38</sup> The Financial Times, similarly, wrote in October that in contrast to the RS, which “has met obligations to the International Monetary Fund . . . the Federation hovers on the brink of bankruptcy and has failed to make budget cuts, say IMF officials.”<sup>39</sup>

### **3. The Federation has failed to privatize state-owned enterprises.**

30. Again in contrast to the RS, the Federation has failed to privatize large state-owned companies. Plans in recent years for the Federation to privatize state-owned energy and telecommunications companies collapsed. As Srečko Latal of the ICG wrote last year, politicians in the Federation “for the past three years have completely halted the reform process and have allowed excessive public spending—ineffective social payments, including raising their salaries, has led their spending to run amok.”<sup>40</sup> The ICG wrote in its September report, “The Federation has no clear strategy when and how to privatise its strategic companies, nor how to develop its energy sector.”<sup>41</sup>

### **4. The business image of the RS already suffers from the Federation’s poor business environment.**

31. The RS’s business-friendly environment is often overlooked because it is wrongly conflated with the totally different environment in the Federation. For example, the widely cited *Doing Business in Bosnia and Herzegovina* report published by the World Bank and IMF does not examine the environment for doing business in the RS or even BiH as a whole. Instead, the report is based on case scenarios of a fictional company in Sarajevo, the capital of the Federation.

32. The conditions affecting a business operating in the Federation are determined almost entirely by the laws, regulations, and practices of the Federation and its governmental units. The picture the report paints is a bleak one: BiH ranks 116<sup>th</sup> out of 183 economies in ease of doing

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Speech by High Representative Valentin Inzko to the UN Security Council, May 24, 2010.

<sup>38</sup> ICG September 2010 Report, p. 16.

<sup>39</sup> *Fear of Bosnia break-up hangs over poll*, FINANCIAL TIMES, 1 October 2010

<sup>40</sup> Srečko Latal, *Bosnian Federal Government Loses Ground*, BalkanInsight.com, April 21, 2009.

<sup>41</sup> ICG September 2010 Report, p. 17-18.

business.<sup>42</sup> The *Doing Business* studies of BiH, because they are based on case scenarios solely in the Federation, have virtually no relevance to the ease of doing business in the RS.

## **5. How can Sarajevo govern the RS if it is incapable of governing the Federation?**

33. The Federation's political dysfunctionality and ongoing financial crisis serve as a warning of what a centralized BiH state would bring to the RS.

34. As Ian Bancroft, cofounder of TransConflict, wrote in October, "much of" the support for then-RS presidential candidate Milorad Dodik

derives from the steps taken to reform the Republika Srpska's economy, promote foreign investment and create employment opportunities. The same cannot be said about the Federation, which remains hamstrung by bloated bureaucracy, ineffective decision-making structures and poorly-controlled public spending (particularly to war veterans); leaving it lingering on the verge of bankruptcy for several years now. It is clear that persistent failures to reform the Federation have impeded efforts to strengthen state structures. Many in the Republika Srpska question why they should seek closer ties with what they perceive to be a failed part of the state.<sup>43</sup>

35. At the end of its September report on the Federation, the ICG writes that all three of the Federation's largest parties "advocate a much stronger role for the BiH state, with clear supremacy over the entities. Yet, none have articulated how they would use this supremacy, notably over the RS. Nor have they used their dominant position in the Federation to enact reforms."<sup>44</sup> The report concludes, "Only by endorsing compromise politics, offering full protection to Croats, ignoring RS provocations *and accepting the reality that the country's future is as a decentralised state* can Bosnia's leaders revitalise first the Federation and then Bosnia itself."<sup>45</sup>

### **E. Actions of the OHR are blocking BiH economic growth, market-oriented measures and foreign investment in both Entities of BiH.**

#### **1. The OHR's very presence discourages economic development in BiH.**

36. Some 15 years after the end of the war in BiH, the OHR's continued presence cripples BiH's ability to attract foreign investment by stigmatizing it as an international protectorate. When foreign investors look at BiH, they see not a stable, sovereign and democratic state

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<sup>42</sup> In the only category of the study not dominated by the laws, regulations and practices of the Federation and its governmental units—trading across borders—BiH ranks a comparatively respectable 63<sup>rd</sup> in the world.

<sup>43</sup> TransConflict, *Bosnia must "cease being a protectorate"*, Oct. 2010.

<sup>44</sup> ICG September 2010 Report, p. 23.

<sup>45</sup> *Id.* (emphasis added).

governed according to its constitution and laws, but a protectorate overseen by a foreigner who acts as if his word is law. Though BiH is not unstable, dangerous, or lawless, the presence in BiH of a High Representative who claims to wield such extraordinary authority signals to the world that it must be.

37. In order to justify its existence and preserve the OHR's power, OHR officials frequently exaggerate and even cause BiH's problems. OHR officials often make public and derogatory statements about BiH and its public officials. For example, in a speech in December, the Principal Deputy High Representative accused BiH's duly-elected officials of "keeping Bosnia and Herzegovina in the economic neighborhood of Uganda and Cambodia."<sup>46</sup> While BiH—particularly the Federation—has room for improvement as a business location, the OHR's exaggerated rhetoric unnecessarily scares away foreign investment and inhibits economic progress in BiH.

## **2. The unpredictability caused by OHR intervention inhibits economic progress.**

38. The OHR inhibits economic development in BiH by adding unpredictability to the economy. In a normal democratic country, a business considering whether to grow or invest must consider the legal and regulatory landscape and how the country's constitutionally established authorities might change it. In BiH, in addition to these factors, a business must consider whether the OHR, an extra-constitutional overseer, will suddenly decree changes to laws and regulations or summarily remove and ban from office duly elected or appointed officials. The High Representative has often engaged in both of these practices. Uncertainty is the enemy of economic development, and the OHR is an ongoing source of considerable uncertainty in BiH.

## **3. Unlawful and anti-competitive OHR decrees needlessly raised electricity prices and breached international agreements.**

39. A recent example of the economic toll of the OHR's interference is its unlawful and disastrous intervention into the supply of electricity to Brčko, a self-governing district held in condominium by the RS and the Federation. On September 18, 2009, the High Representative unilaterally issued a series of decrees that have directly caused a sharp increase in electricity prices in the Brčko District. The decrees brought about this rate hike by mandating that a low-cost electricity producer based in the RS and a high-cost electricity producer based in the Federation each supply 50% of Brčko's electricity needs. Before the High Representative's September 2009 decrees, Brčko had naturally purchased all of its power from the low-cost producer in the open market. In order to partially offset the OHR-imposed price increase caused by mandating purchase of electricity from the Federation, the Principal Deputy High Representative and Brčko Supervisor issued an order using Brčko funds to subsidize electricity purchases.

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<sup>46</sup> Speech by Principal Deputy High Representative Raffi Gregorian at the Presentation of the Global Competitiveness Report 2009-2010, Dec. 9, 2009.

40. The series of decrees imposed a gratuitous hardship on the people of Brčko, depleted public funds Brčko could have used for other purposes, and took business away from the low-cost electricity producer. Even with the waste of public funds to offset a needless price increase, the subsidized price was still significantly higher than Brčko citizens would have paid if the High Representative had not interfered. In addition, the decrees violate the OHR's 2001 agreement with the Entities and Brčko on the district's electricity supply—the agreement the OHR itself had signed—and vastly exceed the High Representative's Dayton authority. Moreover, as the European Commission informed the Principal Deputy High Representative by letter, and as explained in Section III(B)(4) below, the decrees' anti-competitive provisions cause BiH to breach its obligations under the SAA, the Interim Agreement on Trade, and the Energy Community Treaty.

41. The decrees' arbitrariness, anti-competitive principles, inconsistency with international agreements, and fiscal irresponsibility undermined market liberalization efforts and BiH's standing as a place to do business. The High Representative's harmful and unlawful interference in the Brčko electricity market exemplifies the ways in which the OHR continues to damage BiH's economy.

**F. The RS Government's lifting of the OHR-decreed freeze on RS state property will accelerate economic growth.**

42. Another destructive OHR intervention in BiH's economy has been a series of decrees in which the High Representative has kept state property frozen in government hands for the past five years. On September 14, 2010, the RS National Assembly ("RSNA") addressed this problem by approving a new Law on the Status of State Property which is under the Prohibition of Disposal. The new law lifted the economically damaging prohibition on the disposal of state property of the RS, which the High Representative imposed by decree in 2005 as a "temporary" measure that was to last no more than a year. The new law also ensures that the institutions of BiH, including the Ministry of Defense, have the use of property they need to perform their functions for as long as needed.

**1. The High Representative decreed laws freezing state property.**

43. During the tenure of High Representative Lord Paddy Ashdown, the OHR sought to dramatically expand by decree the competencies of the state government and established new state-level institutions. To support this expansion, on September 24, 2004, the PIC Steering Board chaired by the High Representative "called on all levels of authority in BiH to carry out the necessary steps to ensure that all the institutions of BiH—at the state level—have the premises they need . . ."<sup>47</sup> On March 21, 2005, Lord Ashdown issued an edict imposing on the RS the "Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska," freezing the disposal of such property. Similar laws were also imposed on the Federation and BiH. Lord Ashdown contended that the temporary prohibition was necessary because state property of the Federation and the RS needed by the newly-created BiH institutions to function might otherwise be disposed of. In 2008, the High Representative, by decree, removed the

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<sup>47</sup> Communiqué by the PIC Steering Board, Sept. 24, 2004.



expiration dates from the freeze laws, requiring resolution of the state property issue in order for the freezes to be lifted.

## **2. Bosniak parties abrogated their agreement to PIC-proposed “functional and territorial compromise.”**

44. In October 2008, the PIC Steering Board urged a “functional and territorial compromise” on state property that “sees the State-level institutions owning those properties needed for them to ‘functionally’ exercise their constitutional competencies, while other levels of government would own the remaining State Property based on ‘territorial’ principles.”<sup>48</sup> The Steering Board made clear that the only property required to be allocated to BiH was that property needed for the functional exercise of competencies of the BiH institutions. Based on the territoriality principle, which had been the basis for state property ownership since the Dayton Accords, all other property would remain under Entity ownership.

45. In a November 2008 meeting in Prud, the leaders of BiH’s main Serb, Bosniak, and Croat parties agreed to resolve the state property issue using the “functional and territorial” criteria established by the PIC Steering Board. They agreed to allocate to BiH the property needed for running state institutions and leave the remaining property with the Entities and municipalities. The PIC and UN Security Council warmly endorsed this “Prud Agreement,” and High Representative Lajčák supported political leaders’ efforts to implement the agreement.

46. However, in an abrupt change of position, the Bosniak political leader Sulejman Tihić asserted that all state property throughout BiH must be registered as the property of BiH. Only then could state property be reallocated to the Entities (or municipalities). The new Tihić position conflicts with the applicable law and practice. The Dayton Accords, including the BiH Constitution, the practice of the Entities and relevant government statutes, decrees and judicial decisions all establish that state property is vested in the Entities, not BiH, unless an agreed transfer is effected. The High Representative’s actions have also recognized that state property belongs to the Entities. For example, a law decreed by the High Representative in 1998, approved by the Parliament in 1999, and upheld by the Constitutional Court in 2007 “expressly recognizes the right of the Entities to privatize non-privately owned enterprises and banks located on their territories.”<sup>49</sup> Additionally, the titles and terms of the freeze order laws, which address “State Property of the Federation” and “State Property of the Republika Srpska” (and the recognition that separate laws were needed for state property of each Entity), show the High Representative was aware that state property is vested in the Entities.

47. The RS Government has continued in good faith to seek agreement on the apportionment of state property. Unfortunately, the RS Government’s desire for resolution has not been shared among the main Bosniak parties. This is because a resolution on state property is a remaining requirement established by the PIC for closure of the OHR. The main Bosniak parties do not want such an agreement because they want the OHR to remain in place. This problem has been recognized by third-party experts. For example, in a recent report on BiH, the ICG stated:

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<sup>48</sup> Statement by the Ambassadors of the Peace Implementation Council’s Steering Board, Oct. 30, 2008.

<sup>49</sup> Framework Law on Privatization of Enterprises and Banks in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 14/98 and 12/99).

“Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform . . . . [R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia’s most controversial issue, the fate of the OHR.”<sup>50</sup>

### **3. The new law lifts the costly freeze and ensures BiH property necessary to fulfill its functions.**

48. This stance of the major Bosniak parties ensures that, under the freeze laws imposed by the High Representative, the economically debilitating prohibitions on disposal of state property would remain in effect indefinitely. This is why the RSNA determined to adopt the only solution now available: lifting the freeze by passing a new law that replaces the Law on the Temporary Prohibition of Disposal of State Property of Republika Srpska.

49. The new law approved by the RSNA reflects the territorial and functional principles espoused by the PIC. It provides that all state property in the RS under prohibition of disposal will be officially registered as property of the RS, documenting in the property register the long-established law and practice in BiH. The new law also lifts the High Representative’s 2005 freeze on disposing of RS state property.

50. Public properties of the RS Government cannot continue to remain frozen indefinitely; instead such property should be used in an economically efficient manner, particularly now, in the midst of a global economic crisis. By permitting the sale and lease of government-owned properties, the new law will help the RS and its subdivisions to improve their fiscal condition and make land available for the flowering of private enterprise.

51. At the same time, the new law directs the RS Government to sign an agreement with the BiH Council of Ministers transferring use rights for any property necessary for BiH institutions, including the Ministry of Defense, to fulfill their functions. The new law specifies that the property that is transferred to BiH institutions will be transferred without payment and for as long as the property is needed. The new law also provides that the BiH institutions using the properties will have the right to adapt these properties to suit their use.

52. The new law is a responsible and forward-looking resolution of the status of state property in the RS. By lifting what was supposed to have been a temporary freeze on disposal of state property, it removes a costly and unnecessary obstacle to economic growth.

### **III. Closure of the OHR Is Essential For European Integration.**

53. The High Representative’s departure from BiH is required for progress toward BiH’s accession to the EU. The presence in BiH of any other international official who claims powers similar to those asserted by the High Representative would similarly block European integration for BiH.

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<sup>50</sup> International Crisis Group, Bosnia’s Dual Crisis, Europe Briefing N°57, Nov. 12, 2009 (“ICG November 2009 Report”), p. 10.

**A. Progress toward EU membership requires the departure of the OHR.**

**1. The EU will not consider a BiH application for membership until the OHR's closure.**

54. The European Union has repeatedly stated that it will not even consider a membership application from BiH until the OHR closes. In May, for example, the United Kingdom's ambassador to UN, Mark Lyall Grant, told the Security Council, "The European Union has made clear that a membership application from Bosnia and Herzegovina cannot be considered while the Office of the High Representative remains in place."<sup>51</sup> On September 29, 2009, a representative of the EU Presidency testified to the US Helsinki Commission that "[a]s long as OHR remains in place, a Bosnian EU membership application cannot be considered."<sup>52</sup> Thus, until the OHR closes, BiH cannot even begin the EU application process.

55. The application is the first in a long and time-consuming series of steps that a potential candidate and EU institutions must take before the potential launch of membership negotiations. These include, for example: the European Commission's presentment to the applicant of a legislative questionnaire hundreds of pages long; the applicant's responses to this questionnaire; the Commission's preparation of an opinion on the application; the Commission's recommendation for or against granting the applicant candidate status; the European Council's decision on whether to grant such status; the Commission's recommendation for beginning membership negotiations, and the European Council's decision setting a start date for negotiations. All of these steps must take place before the membership negotiations even begin. Every month that the OHR remains in operation is another month in which BiH and the EU are prevented from working toward fulfillment of these demanding steps—another month wasted.

**2. OHR activities prevent BiH fulfillment of the Copenhagen Criteria on both democracy and human/political rights grounds.**

56. The EU's refusal to consider an application from BiH as long as the OHR is in place is warranted because the OHR prevents BiH from fulfilling the Copenhagen Criteria for membership. Throughout the EU accession process, the European Commission examines the extent to which the country seeking membership fulfills the Copenhagen Criteria. As summarized by the German Foreign Office, the Copenhagen Criteria

require that candidate countries have:

- stable institutions to guarantee democracy, the rule of law, human rights and respect for and protection of minorities (**political criterion**);

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<sup>51</sup> 6319<sup>th</sup> Meeting of the UN Security Council, S/PV.6319 (May 24, 2010), p. 18.

<sup>52</sup> Address of Bjorn Lyrvall, Director General for Political Affairs, Ministry for Foreign Affairs of Sweden/Presidency of the EU to the U.S. Helsinki Commission, Sept. 29, 2009, at 8.

- a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU's internal market (**economic criterion**);
- the ability to take on all the obligations of membership, i.e. the entire body of EU law and policy known as the *acquis communautaire*, and adherence to the aims of political, economic and monetary union (**acquis criterion**).

At the Luxembourg European Council in December 1997, it was decided that compliance with the political criterion agreed in Copenhagen was a prerequisite for the opening of any accession negotiations. By contrast, the economic criterion and the ability to fulfil all the obligations of membership (*acquis criterion*) were to be assessed in a “forward-looking, dynamic way.”<sup>53</sup>

57. The actions of the OHR clearly prevent BiH from fulfilling the political criterion. BiH does have stable democratic institutions as guaranteed by the Dayton Constitution. Unfortunately, BiH will not be a true democracy—and cannot say it has stable institutions guaranteeing democracy—as long as the High Representative, an unelected foreigner, asserts the power to enact and repeal laws by decree.

58. Similarly, the OHR’s actions prevent BiH from being able to guarantee the rule of law or human rights. As explained in section IV of this report, the High Representative has issued hundreds of decrees summarily removing public officials and banning them from government employment. The individuals given these “civil death” sentences are given no notice, no evidence, no hearing, and no opportunity to appeal their punishments. These summary punishments flagrantly violate a number of provisions of the European Convention on Human Rights (“ECHR”), including the right to “a fair and public hearing . . . by an independent and impartial tribunal established by law.”<sup>54</sup>

59. In 2006, the BiH Constitutional Court unanimously held that the absence of a legal remedy to challenge the High Representative’s decision violated the ECHR.<sup>55</sup> But in direct contempt of the rule of law and human rights, the High Representative issued a new order nullifying the Constitutional Court’s decision and further decreeing: “[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.”<sup>56</sup> The order also provided that “no liability is

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<sup>53</sup> Federal Foreign Office of Germany, *The Copenhagen Criteria*, available at [www.auswaertigesamt.de/diplo/en/Europa/Erweiterung/KopenhagenerKriterien.html](http://www.auswaertigesamt.de/diplo/en/Europa/Erweiterung/KopenhagenerKriterien.html).

<sup>54</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No. 5, 213 UNTS 221 (“European Convention on Human Rights”), art. 6.

<sup>55</sup> Bilbija, AP-953-05 (BiH Const. Ct. 8 July 2006).

<sup>56</sup> 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 (Mar. 23, 2007), art. 3.

capable of being incurred on the part of the Institutions of [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*.”<sup>57</sup> Thus, in addition to forbidding review of his decisions, the High Representative banned victims of his human rights violations from obtaining any kind of remedy. In the same order, the High Representative even went so far as to threaten to remove and ban any official who took steps toward establishing a mechanism to review his decisions.<sup>58</sup>

### 3. OHR orders compel BiH to violate its *human rights* treaty obligations, including provisions of the SAA.

60. By complying with decrees of the High Representative, BiH violates a number of treaties to which it is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols and the International Covenant on Civil and Political Rights.<sup>59</sup> Among the rights to which BiH is committed by virtue of the Dayton Accords and other treaties are the right to a fair hearing, the right to an effective remedy, and no punishment without law.<sup>60</sup> When the High Representative summarily decrees that an individual will be removed and banned from public employment, BiH’s implementation of the order directly violates these fundamental rights.

61. When BiH implements such orders, it also violates the Stabilization and Association Agreement it signed in 2008 with the European Communities and its Member States. The SAA provides at Title I, Article 2:

*Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter*

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<sup>57</sup> *Id.*

<sup>58</sup> As former OHR official Matthew Parish observes in a recent article:

Article 2 [of the order] reads: Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the General Framework Agreement for Peace in Bosnia and Herzegovina and shall be treated in itself as conduct undermining such implementation.” (Emphasis added.) This language was well known to be associated with dismissals of officials from public office.

Matthew Parish, *An Essay on the Accountability Of International Organizations*, INT’L ORG. L. REV., Vol. 7, No. 2 (2010), n. 158.

<sup>59</sup> See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4 and Agreement on Human Rights, General Framework Agreement, Annex 6.

<sup>60</sup> Other rights guaranteed by these treaties and often violated by the implementation of OHR removal orders include: freedom of expression; freedom of assembly and association; the right to free elections; protection of property; and the right to take part in public affairs.

*of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.* (emphasis added)

62. By implementing—under coercion—the High Representative’s decrees to summarily remove and ban officials from public employment, BiH violates several of its obligations set forth in the SAA, including respect for democratic principles, human rights as defined in the listed instruments, principles of international law, and the rule of law.

#### **4. OHR actions force BiH to violate *economic treaty obligations*, including provisions of the SAA.**

63. Orders of the High Representative also compel BiH to breach economic treaties. For example, the High Representative last year issued a series of anticompetitive decrees that, in addition to sharply increasing electricity prices in Brčko District, also violate BiH’s obligations under several treaties to which it is a party. On September 18, 2009, the High Representative handed down edicts purporting to amend laws of BiH, the RS, and the Federation with respect to electricity supply and distribution in Brčko District. The decrees have imposed on the citizens of Brčko a large—and wholly unnecessary—increase in electricity rates. In addition, the edicts violate the OHR’s 2001 agreement with the Entities and Brčko on the district’s electricity supply, vastly exceed the High Representative’s lawful authority, and cause BiH to breach its obligations under international agreements.

64. Under the 2001 agreement, Brčko had the freedom to choose its electricity supplier from among the RS, the Federation, or suppliers abroad. As long as Brčko had the freedom to choose its supplier, it naturally chose the lowest cost supplier, which has long been the RS generating company, Elektroprivreda Republika Srpska (“EPRS”). Each year prior to 2010, EPRS and Brčko have negotiated a price for the electricity to be sold and transmitted to Brčko. For almost a decade, this arrangement worked reliably and without significant problems.

65. Then, on September 18, 2009, the High Representative inexplicably scuttled this arrangement and dictated that beginning in 2010 the Brčko market would be served 50% by EPRS and 50% by EPBiH, the main generating company in the Federation. The effect of this anticompetitive dictate is to reserve one-half of the Brčko market to EPBiH even though it charges significantly higher rates. On June 20, 2010, to partially offset the OHR-imposed price increase, the then-Principal Deputy High Representative and Brčko Supervisor, Raffi Gregorian, issued a decree subsidizing electricity for Brčko customers using funds controlled by Brčko District.

66. The OHR’s decrees have stunted Brčko’s economy and imposed a hardship on Brčko citizens by sharply raising electricity costs. In addition, the decrees deprive EPRS of sales of electricity it should be entitled to make as the low-cost supplier. They also violate the 2001

agreement on Brčko's electricity supply, which establishes Brčko's "freedom to choose the electric energy supplier either from BiH, or foreign supplier(s), or them combined."<sup>61</sup> The decrees, moreover, are unlawful because the High Representative lacks any authority under the Dayton Accords to enact laws by decree (discussed in Section IV(C) *infra*).

67. What's more, as the European Commission informed the Principal Deputy High Representative and Brčko Supervisor, Raffi Gregorian, the decrees put BiH in violation of several international agreements to which it is a party. The 50-50 division of the Brčko electricity market between a high-cost supplier and a low-cost supplier is plainly anti-competitive and inconsistent with the SAA<sup>62</sup> and the Interim Agreement on Trade,<sup>63</sup> to both of which BiH is a party.

68. The 50-50 division is also flatly inconsistent with Directive 2003/54/EC of the European Parliament and of the Council, and thereby violates the Energy Community Treaty, which requires BiH to implement that Directive. Mandating that two companies equally share Brčko's electricity supply and locking out all other companies is contrary the Directive's command that Member States "shall not discriminate between [electricity] undertakings as regards either rights or obligations."<sup>64</sup> The Directive also requires that when Member States impose "public service obligations" on electricity undertakings, these obligations must "guarantee equality of access for EU electricity companies to national consumers."<sup>65</sup> Limiting Brčko's electricity supply to two BiH companies breaches this provision because it completely bars EU electricity companies from the Brčko market. The Principal Deputy High Representative's June 30, 2010 subsidy partially offsetting the OHR-imposed price increase also violates the Interim Agreement on Trade<sup>66</sup> as well as the Energy Community Treaty.<sup>67</sup>

69. In a July 16, 2010 letter to the Principal Deputy High Representative, a high European Commission official criticized the September 2009 and June 2010 decrees as inconsistent with international agreements and as undermining the Commission's market liberalization efforts in BiH. The official wrote:

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<sup>61</sup> Agreement on Implementation of the Entity Obligations from the Final Arbitral Tribunal Award on Brčko with respect to Electricity Supply, Sept. 25, 2001, art. 4.

<sup>62</sup> Stabilisation and Association Agreement between the European Communities and Their Member States, of the One Part, and Bosnia and Herzegovina, of the Other Part ("Stabilisation and Association Agreement"), Art. 41 (prohibiting discrimination in the procurement of goods in favor of state monopolies), and Art. 71.1 (prohibiting practices between undertakings that prevent or distort competition).

<sup>63</sup> Interim Agreement on Trade and Trade-Related Matters between the European Community, of the One Part, and Bosnia and Herzegovina, of the Other Part ("Interim Agreement on Trade"), Art. 26 and Art 36.1 (same prohibitions as Art. 41 and Art. 71.1 of the Stabilisation and Association Agreement).

<sup>64</sup> Directive 2003/54/EC of the European Parliament and of the Council, art. 3, para. 1.

<sup>65</sup> *Id.*, para. 2.

<sup>66</sup> Interim Agreement on Trade, Art. 36.1 (prohibiting state aid that distorts competition).

<sup>67</sup> Treaty Establishing the Energy Community ("Energy Community Treaty"), Art. 18 (prohibiting public aid that distorts competition).

The 30 June 2010 order together with the 18 September 2009 Decisions of the OHR [go] against the objectives of the Energy Community Treaty with regard to market liberalisation and competitive market conditions.

Although the Energy Community Treaty requires full opening of the energy market only after 2014, the European Commission has been working with the competent authorities in the country since the entry into force of the Energy Community Treaty (2006) to change the necessary legislation in order to meet the objective of market liberalisation.<sup>68</sup>

70. The European Commission official also observed, “The Supervisory order of 30 June 2010 is in breach of the Stabilisation and Association Agreement (SAA) and the related Interim Agreement on trade, which the European Union concluded with BiH in 2008.”<sup>69</sup>

71. Thus, instead of helping BiH fulfill its international obligations and observe EU standards, the OHR is actually compelling BiH to flout them.

**5. Support for the OHR’s use of preemptory powers by the EU and EU members is inconsistent with their obligations under the SAA and other treaties.**

72. As members of the PIC Steering Board, the European Commission, the EU Presidency, and four EU members have endorsed the High Representative’s use of preemptory powers. By continuing to support the High Representative’s use of these self-claimed, extraordinary powers, these PIC Steering Board members are acting inconsistently with their economic and human rights obligations as parties to the SAA and other treaties.

73. The OHR, as a defendant before a U.S. federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.<sup>70</sup> In addition, the OHR asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.<sup>71</sup> If, as the OHR claims, it is an organ or instrumentality of these foreign states, its actions and the actions of the High Representative are attributable to such states.

74. The EU has a legal obligation not to support the High Representative’s use of preemptory powers; failure to meet this obligation undermines its stated objectives of furthering the EU accession process. For as long as the High Representative continues to exercise such powers — indeed continues to exist — EU accession will be obstructed.

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<sup>68</sup> Letter from European Commission to Raffi Gregorian, Principal Deputy High Representative and Brčko Supervisor, July 16, 2010.

<sup>69</sup> *Id.*

<sup>70</sup> Specially Appearing Defendants’ Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak*, Office of the High Representative, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

<sup>71</sup> *Id.* at p. 14.



**B. Use of any “substitute” form of preemptory powers by a so-called “reinforced” EU mission would similarly block EU accession.**

75. Some voices in the international community are pushing for the OHR’s departure from BiH to be followed by the introduction of a new EU or other international official who would assert powers similar to those asserted by the OHR. The presence of an official with such powers would prevent progress toward EU accession for the same reasons as does the presence of the OHR. Just like the High Representative, any new foreign official with executive powers would prevent BiH fulfillment of the Copenhagen Criteria and cause BiH to violate its international obligations.

**C. Solving defense property issues in BiH also requires closure of the OHR.**

76. The RS Government has agreed in internal negotiations to make public properties in the RS requested by NATO and BiH Defense Ministry officials available for their use without payment and for as long as the properties are needed. This policy has also been approved by the RS National Assembly. The RS Government’s position is extremely forthcoming, especially since, from a special perspective, most of the military property requested by BiH/NATO is in the RS rather than in the Federation. The OHR’s continued intervention into BiH governance and foreign relations, however, is creating both a practical and legal barrier to BiH progress toward NATO membership.

77. As explained elsewhere in this report, the involvement by the High Representative in sensitive internal negotiations among political leaders of BiH impedes the practical consensus-building and decision-making that is essential for BiH to successfully progress toward membership in NATO.

78. But the barrier to NATO membership constituted by the OHR and the High Representative is much more fundamental. Even a glance at the North Atlantic Treaty will illustrate that membership of a state ruled by an unelected, foreign official, appointed by foreigners, is inconsistent with the obligations imposed upon a member state by the Treaty. The second sentence of the Treaty describes NATO’s members as follows: “They are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”<sup>72</sup> So long as the High Representative and the OHR exist, ruling by decree and asserting immunity from all decisions of BiH courts and other BiH governing agencies, there can be no democracy, individual liberty or rule of law in BiH.

79. In addition, the North Atlantic Treaty requires that its members—sovereign states—be in a position to make decisions and commitments of resources to assist in strengthening the collective security of all the members. So long as the OHR exists, intervening in the foreign relations of BiH, the BiH government lacks the requisite sovereignty and authority to make such decisions and therefore is not qualified for NATO membership. The RS Government is committed to Euro-Atlantic integration, in a form that will not be harmful to Republika Srpska,

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<sup>72</sup> North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S., preamble (emphasis added).

its integrity and international personality, and that respects the public declaration conducted according to the Constitution and laws.

#### **IV. Restoration of constitutional and democratic government in BiH requires closure of the OHR.**

80. Beginning with the second High Representative, taking office in June 1997, appointees to this position vastly expanded their staffs, creating the “Office of High Representative,” an agency not authorized by the Dayton Accords. The OHR rapidly grew to around 800 officials, soon assuming the form of a parallel government, but one ruling by decree and without legal authority or regard to the BiH Constitution, international agreements, or the rule of law. Many senior members of this office have spent their entire careers there. Their influence has become immense, and their ability to intimidate citizens and legitimately elected and appointed BiH officials is enormous.

81. Though without valid legal authority, OHR officials and the High Representative have improperly used international peacekeeping and police forces to force compliance with their decrees. Even more corrosive of the rule of law, High Representatives have arbitrarily dismissed from government, political, and academic positions hundreds of people, barring them from political activities, and future government employment. In some cases their assets have been seized or frozen and they have been prohibited from leaving the country. These “civil death” sentences have been imposed without any legal process or right of appeal. Most are still in effect today. Other citizens have been subject to nonpublic intimidation. It is widely known that the OHR assembles dossiers on government officials, political leaders, and public figures through various intelligence activities. Threats to use such secretly collected information are often made privately to officials not sufficiently compliant with OHR directives, formal and informal.

##### **A. The High Representative has misused international military forces to threaten and intimidate compliance with unlawful peremptory powers.**

82. The OHR’s use of peremptory powers and intimidation has been reinforced by extensive misuse of the international “peacekeeping” forces to threaten and intimidate. Lord Ashdown observed: “the close relationship between the OHR and SFOR [the NATO peacekeeping force] under [General] John Sylvester and, later, his most able successors became the twin pillar on which my mandate was based.”<sup>73</sup> This “close cooperation” violates the Dayton Accords which provide a very limited and specific mandate for international military forces. The result has been serious injury to members of the civilian population of BiH which, not coincidentally, reinforces the ability of High Representatives to impose compliance with illegal and unauthorized decisions and orders.

83. A recent decision of the Court of Bosnia and Herzegovina in a claim against BiH filed by plaintiffs Starovlah & Starovlah, described one such incident:

On 28 March 2007, the plaintiffs filed the claim for damages against the respondent with the Court of BiH. The claim states that,

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<sup>73</sup> PADDY ASHDOWN, *SWORDS AND PLOWSHARES* (2007), p. 228.

on 1 April 2004 around 01:10, the members of NATO forces (SFOR) used explosive to blow up the door of the Parish House of Serb Orthodox Church “Holly Mother of God” in Pale, where plaintiffs and Zekić family lived. Then, they busted into the apartment of the plaintiffs and used blunt objects, implements, kicks and punches to cause Jeremija Starovlah and Aleksandar Starovlah serious bodily injuries. The injuries left difficult and permanent consequences to their health. The third plaintiff Vitorka Starovlah suffered mental trauma which caused strong mental pain, because she was not allowed to help her son and husband while that was happening, and later she suffered fear for their lives, recovery, as well as concern how her son Aleksandar would continue his life with injuries he suffered. SFOR transported the injured plaintiffs by helicopter to the Clinical Center in Tuzla where they were administered urgent medical aid and later they continued treatment at the Military Medical Academy in Belgrade and in rehabilitation centers. Previously, on 16 November 2004, the plaintiffs addressed the command of the NATO forces in Sarajevo, with the claim for damages, but their claim was denied on 19 January 2005, with the explanation there were no grounds for damages because it was a military operation.<sup>74</sup>

84. In another case, during a 2006 raid on the home of Dragomir Abazovic in the village of Basic Kula in the RS, EUFOR troops shot and killed Abazovic’s wife, Rada, and seriously wounded their 11-year-old son, Dragoljub. In December 2008, EUFOR denied the Abazovic family’s claim for compensation, claiming that EUFOR had acted according to its Security Council Mandate. EUFOR also denied the Abazovic family any right to appeal.

85. Such use of international military force is a violation of international law. The Dayton Accords set out very clearly the mandate of peacekeeping forces and the purposes for which military forces may be used, in Annex 1-A, entitled “Agreement on the Military Aspects of the Peace Settlement.” These purposes do not include domestic-police-type activities such as raiding homes to apprehend individuals suspected of crimes.

86. Nor do these purposes include enforcement of decrees and orders of the High Representative.<sup>75</sup> Military and civilian aspects of implementation of the peace settlement were to be kept quite separate. Dayton Accords Annex 10, for example, states in article II-8: “[T]he High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command.”

**B. The High Representative continues to use peremptory powers and intimidation in violation of BiH and international law.**

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<sup>74</sup> Court of Bosnia and Herzegovina, *Claim Filed by Jeremije, Aleksandar and Vitorka Starovlah partially granted*, Oct. 1, 2010, available at [www.sudbih.gov.ba/komponente/print\\_vijesti.php?id=1793&jezik=e](http://www.sudbih.gov.ba/komponente/print_vijesti.php?id=1793&jezik=e)

<sup>75</sup> See, for example, Dayton Accords Annex 1-A article VI 1-6.

87. For some thirteen years, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators and mayors, as well as judges, police officials, and public company executives. The High Representative has also taken actions that deny other rights to BiH citizens, such as blocking bank accounts and seizing travel documents, indefinitely.

88. Despite the grave injuries these actions inflict upon the individuals subject to the High Representative's sanctions, he allows them no notice of the specific charges against them, no access to the evidence against them, no right to confront those who accuse them (or even to know the identity of their accusers), no hearings, no opportunity to contest the allegations, and no opportunity for appeal. The High Representative's actions, lacking even the most rudimentary form of due process, manifestly violate the human rights of the individuals sanctioned by his orders. His actions are contrary to the Dayton Accords (including the BiH Constitution and the applicable Human Rights Agreements in Annex 6). The removals also violate the "General Principles" set forth in Article 2 of the SAA. The High Representative's actions are an affront to the principles of international law, the sovereignty of BiH and the rule of law. They are also enormously corrosive of domestic political institutions.

89. In addition to the High Representative's decrees punishing individuals, which are publicly announced, the High Representative and OHR also assert raw power in less transparent ways. The use of intimidation by the OHR is well-known and widely reported in BiH, but such informal threats and intimidation are deployed secretly. Occasionally, however, evidence becomes public.

90. In October 2009, OHR documents obtained by the Sarajevo-based newsmagazine *Global* showed that the OHR had been secretly investigating political and other local leaders on such issues as money laundering, corruption, organized crime, and terrorist connections.<sup>76</sup> The leaked OHR documents included a diagram of an alleged criminal network that included the names of most of BiH's top Bosniak leaders in government and other fields.<sup>77</sup> A note on the documents indicated that they were to be made public for the EU.<sup>78</sup> In an interview about the scandal, the High Representative confirmed the existence of a unit within the OHR that created these documents and that this unit shares documents. He announced initiation of an internal investigation but would not reply when asked whether the internal intelligence organization producing the reports in question would be shut down.<sup>79</sup>

91. Not surprisingly, there is no evidence that an internal investigation was conducted; no results of an internal investigation have been released.

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<sup>76</sup> *Teška zloupotreba pečata OHR-a (Heavy abuse of OHR's stamp)*, GLOBAL, 29 Oct. 2009.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Bosnian peace envoy apologizes for publication of OHR analyses on Muslim leaders*, BBC MONITORING translation of interview in DNEVNI AVAZ, 3 Nov. 2009.

92. The OHR has no legal authority to conduct an intelligence operation and certainly has no authority to provide libelous information secretly to foreign ambassadors. The conduct recently revealed is damaging to the reputations of BiH citizens and BiH itself, and the OHR should be held legally accountable for any harm unlawfully caused. These revelations raise serious concern with respect to privacy rights and OHR interference in the BiH judicial and prosecutorial institutions, illustrating the OHR's practice of intimidation behind the scenes to libel and slander of BiH officials.

93. High Representative Inzko, commenting on the scandal, said, "I have not ordered an investigation against any individual or organization outside of the OHR."<sup>80</sup> If this is the case, then it is evident that the OHR is operating outside the control of even the High Representative. The High Representative further said, "I think that my team has not produced any scandal."<sup>81</sup> His comments highlight the broader scandal that the OHR claims to be completely unaccountable for its use of sweeping powers which violate BiH and international law.

**C. The peremptory powers were never authorized by the Security Council, and their use is in clear violation of the Dayton Accords.**

94. The High Representative is an official designated by the Dayton Accords, Annex 10, to carry out certain specifically identified responsibilities set out in Annex 10.<sup>82</sup> Indicative of the source of his authority is the fact that the grant of immunity accorded him and his staff in Annex 10 is granted only by BiH and is applicable only to BiH institutions. No immunity is granted, for example, from general international legal obligations, and he is not an international organization. The OHR has no member states or organizations as do international organizations. He has a mandate granted by the parties to Annex 10, no other charter or document of organization. His immunity is not limitless even as to BiH institutions. It extends only to actions taken within the scope of his mandate. As a matter of international law, he is responsible to BiH, the RS, the Federation and the other parties to Annex 10 for proper performance of his duties.

95. The High Representative's actions and authority can only be measured against a reasonable and legally valid interpretation of the mandate in Annex 10, to which he has the serious legal and moral duty to strictly adhere.<sup>83</sup> Such interpretation must be guided by the canon that an agreement not be construed to give what is not explicitly given and the requirement of interpretation in good faith. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.<sup>84</sup> Such a restrictive interpretation is not necessary, however, to conclude that Annex 10 does not give the High Representative the powers

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II.

<sup>83</sup> *See, inter alia*, Vienna Convention on the Law of Treaties, Sections 26, 31, 32 and canons of treaty interpretation in general international law.

<sup>84</sup> *See* W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231 (1989).

he claims. Any good-faith reading of Annex 10 compels such a conclusion. The RS again invites all observers to read Annex 10, which is attached as an Annex to this report, in order to confirm the absence of the peremptory powers asserted by the High Representative.

96. Any actions by the High Representative outside his Annex 10 mandate are *ultra vires* and thus without any legal force or effect. Such actions are internationally wrongful acts, for which the High Representative bears legal responsibility.

### **1. There is no treaty authority for peremptory powers.**

97. Annex 10 does not authorize the High Representative to exercise the so-called “Bonn Powers.” Even general knowledge of the circumstances surrounding the conclusion of the Dayton Accords would make it impossible to conclude that the intent of the parties was to grant to a single, 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.<sup>85</sup> Certainly the plain language of Annex 10 does not grant such power to the High Representative or members of his staff. That Annex, moreover, must be read consistently with the other provisions of the Dayton Accords, including Annex 4, the BiH Constitution. Annex 4 establishes a carefully structured system of government for BiH in which powers are allocated and balanced among various organs at national and regional levels in BiH so that democratic governance is assured and the rights of the Constituent Peoples and Entities are protected. The High Representative has no authority in Annex 10 to act in violation of Annex 4 or Annex 6.

98. Whether used by the High Representative or a European Union Special Representative, exercise of these peremptory powers is inconsistent with the Constitution and international legal commitments of BiH, inconsistent with the general standards of human and civil rights required of members of the European Union, and inconsistent with the most fundamental principles of the rule of law and international law. Their use has been called into question or condemned by many international political and legal experts.<sup>86</sup> For example, the Council of Europe stated:

[T]he Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take

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<sup>85</sup> It must also be emphasized that while the High Representative has “final authority” of interpretation with respect to Annex 10, his authority is limited—it must be exercised in accordance with general international law, including the Vienna Convention on the Law of Treaties. See *inter alia* articles 31 and 32. 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.

<sup>86</sup> 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 J. 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); Gerald Knaus and Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY, No. 3 (2003); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION (Oxford 2008); DECONSTRUCTING THE RECONSTRUCTION, Dina Francesca Haynes ed., Ashgate 2008).

enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.<sup>87</sup>

The Constitutional Court of BiH has also held that their use violates the Constitution.<sup>88</sup>

## **2. There is no Security Council authority for peremptory powers.**

99. The various resolutions of the Security Council having to do with BiH do not purport to assign peremptory powers to the High Representative. Indeed, it is unlikely that the High Representative would have any legal authority to accept such powers, as his authority is circumscribed by his Annex 10 mandate. United Nations practice is, of course, to appoint and authorize specifically designated U.N. officials or states to carry out tasks authorized by Security Council resolutions.<sup>89</sup> In contrast, the High Representative and his functions were created by the parties to Annex 10. Generally the Security Council acts through the Secretary General and his appointed special representatives.<sup>90</sup> The High Representative is not an appointed special representative of the Secretary General. Certainly a scope of authority as extensive as that claimed by the High Representative cannot be implied on the basis of any Security Council Resolution thus far issued.

### **D. The High Representative has blocked all judicial means of requiring accountability for his actions.**

100. The High Representative has to date successfully blocked all judicial review of his actions. The High Representative's orders routinely provide that they are to have "immediate effect without further procedural steps" and that they "override all inconsistent legislation and legal acts to the extent necessary to give [the orders] full effect."

101. The High Representative has successfully prevented the BiH courts from reviewing his actions. On 8 July 2006, the BiH Constitutional Court granted the appeal of two individuals the High Representative had removed from office. The Court concluded that their "right to an effective legal remedy under Article 13 of the European Convention [had] been violated," and ordered BiH to take certain measures "within the scope of their positive obligation to secure an effective legal remedy..."<sup>91</sup>

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<sup>87</sup> *Assembly debate* on 23 June 2004 (20<sup>th</sup> Sitting) (*see* Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20<sup>th</sup> Sitting).

<sup>88</sup> *Bilbija*, AP-953-05 (BiH Const. Ct. July 8, 2006).

<sup>89</sup> For comparison, see S.C. Res. 1244 (1999) regarding governmental administration in Kosovo and appointment of a Special Representative with detailed administrative powers. It is notable that the Special Representative in Kosovo established an Ombudsperson with authority to review the Special Representative's actions. UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. In BiH, by contrast, the High Representative has issued orders barring the courts and other BiH institutions from hearing or acting upon complaints of human rights or other violations of law by the High Representative.

<sup>90</sup> *See, e.g.* S.C. Res. 1244 (1999).

<sup>91</sup> *Bilbija*, AP-953/05 (BiH Const. Ct. July 8, 2006).

102. The High Representative responded with an order purporting to nullify the Constitutional Court’s decision and declaring that “any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or takes 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.”<sup>92</sup> The order also declared that: “Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation” of the Peace Agreement.<sup>93</sup>

103. The High Representative has also asserted before the European Court of Human Rights—and the Court has ruled—that that Court lacks jurisdiction to hear claims arising from the High Representative’s actions and that his actions do not engage the responsibility of BiH or other states.<sup>94</sup> The High Representative, however, has been inconsistent and entirely opportunistic in describing his legal status before courts and tribunals. As noted in paragraph 63 above, in a U.S. Federal Court proceeding, the High Representative stated that he was an “employee” of the states that are members of the PIC. This representation directly conflicts with his representation to the European Court of Human Rights that he is an “international official” whose actions cannot engage the responsibility of any state.

104. Thus, as matters stand, the High Representative has avoided any sort of judicial review of his orders, and the individuals subject to his sanctions have found no route to judicial relief from actions that are illegal or erroneous.

105. In 2005, the Venice Commission, after reviewing the powers of the High Representative and his exercise of them, concluded that: “The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable.”<sup>95</sup> The Commission found that the transfer of authority from the High Representative should take place “in the not too distant future,” but that “even pending such transfer, the present practice will have to be substantially modified to make it acceptable as an interim solution.”<sup>96</sup>

106. It has now been five years since the Venice Commission issued these conclusions. Not only has the transfer of authority envisioned by the Commission not occurred, but no substantial modification of the procedure has been implemented to make the High Representative’s role

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<sup>92</sup> 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 (Mar. 23, 2007), art. 3.

<sup>93</sup> *Id.*, art. 2.

<sup>94</sup> Decision as to the Admissibility of Application nos. 36357/04, et al., by Dušan Berić and Others against Bosnia and Herzegovina (Eur. Ct. HR 2005).

<sup>95</sup> Opinion on the constitutional situation in Bosnia and Herzegovina and the powers of the High Representative, adopted at the sixty-second session of the European Commission for Democracy through Law (Venice Commission), CDL-AD (2005) 004, ¶ 98.

<sup>96</sup> *Id.*



acceptable even as an interim solution. The state of affairs that was unacceptable five years ago has by now long outlived any justification that was claimed for it.

**E. The OHR has asserted control over the appointment of public officials.**

107. The OHR's unlawful intrusion into the constitutional and democratic governance of BiH is not only found in its actions to impose laws and constitutional amendments by decree; to corrupt the independence and neutrality of the judicial system; and to punish and control public officials by removing or threatening to remove them from office; the OHR also seized control over the appointment of government officials in BiH. Since 2000, the OHR wrongfully claimed and exercised authority to block the appointment of individuals selected for government offices notwithstanding that the official appointment process had been done in accordance with law. As with dismissals, no evidence of unsuitability was given and no legal process was followed by the OHR.

108. The most recent example of this occurred on September 2, 2010. The High Representative declared the Western-Herzegovina Canton Assembly's approval of three government ministers to be null and void. The reason for the decision was not based on any alleged irregularities with the appointment process prescribed by law or evidence of unsuitability of the candidates. Rather, the OHR simply asserted that the authorities in the Canton had not followed the "regular practice" in respect of the High Representative's vetting of these three ministerial appointees and that the vetting by the High Representative "remains essential to the peace implementation process."<sup>97</sup>

109. In response to the OHR's decision, the Canton submitted to the OHR's demands and allowed the OHR to vet the appointees. Shortly thereafter, the OHR informed the Canton that it had found the individuals to be acceptable and proclaimed the appointments effective. The OHR's nullifying of the appointments of September 2 had simply been an exercise by which the OHR could remind its "subjects" of its self-proclaimed sovereignty. While the High Representative announced on November 3, 2010, his intent to discontinue the vetting process, he reasserted the right to continue dismissal of officials. There is no such right as a matter of law. Its continued assertion is a continued affront to rule of law and democracy in BiH.

**F. The OHR's highest priority is self preservation.**

110. As the Council will recall, the RS Government has set out in detail in its three previous Reports the legal and policy reasons showing closure of the OHR to be an urgent priority. The High Representative and the OHR have not ceased their relentless efforts to maintain and extend their respective existences despite ever mounting evidence that they are barriers to both economic progress and to the European integration of BiH.

111. A revealing illustration has recently been provided by events surrounding the visit to Sarajevo of U.S. Secretary of State Clinton on October 12. In her public remarks and in an

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<sup>97</sup> Office of the High Representative, Decision Nullifying and Voiding the Decision of the Assembly of the Western-Herzegovina Canton on Approval of the Government of the Western-Herzegovina Canton adopted at its Session held on 27 August 2010, Sept. 2, 2010.

appearance before students and civil society representatives, Secretary Clinton repeatedly urged internal consensus-building as the way forward for BiH. When a student asked the Secretary for direct foreign intervention against a BiH political leader she responded:

But ultimately, the decisions about moving forward have to be made internally. Outside pressure, outside criticism has a role to play, but it's been my experience in working with many nations coming out of conflict over the years that eventually people have to sit down and work it out themselves.<sup>98</sup>

112. In sharp contrast to this sound advice, the High Representative, commenting to the press on the recent visits of Secretary Clinton and Commissioner Füle, said that the OHR's position was strengthened after the visits and said there are plans for "an increased number of associates at the OHR."<sup>99</sup>

113. Past OHR actions demonstrate that self-preservation is this agency's highest priority. The careerist, long-serving bureaucrats there have much to lose personally if the OHR is closed. They are relatively well paid and assert much more political power than they could possibly find in any other diplomatic or policy post. They have no intention of voluntarily giving up their power, even though it is largely illegitimate. Note that one of the PIC Steering Board's stated conditions for the OHR's closure is: "a positive assessment of the situation in BiH by the PIC Steering Board, based on full compliance with the Dayton Peace Agreement."<sup>100</sup> Based upon present and past performance, neither the OHR nor the High Representative will ever acknowledge that their legitimate tasks have been fulfilled and that it is time to let BiH govern itself according to its Constitution. Moreover, both agencies, the OHR and the High Representative will continue to fight against any form of accountability or transparency for their conduct. This is particularly problematic since the High Representative is also the chair of the PIC Steering Board; thus, it is unreasonable to believe that the PIC will ever conclude that its stated conditions for OHR closure have been met.

**G. The PIC's "5 plus 2" conditions are being cynically used to block the OHR's closure.**

114. Under the PIC's formula of five objectives and two conditions for supporting the end of the High Representative's mission, the OHR's closure is impossible. Although a formula such as 5-plus-2 could work if all parties in BiH wanted the OHR to close, this has not been the case. The major Bosniak parties have expected the OHR to continue using its coercive powers to assist them in achieving their objectives, including sweeping reform of the BiH Constitution to replace the Dayton federal system with a centralized state.

115. This problem has been recognized by third-party experts. For example, in a recent report on BiH, the ICG raised this concern:

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<sup>98</sup> Remarks by Secretary of State Hillary Rodham Clinton at Town Hall at the National Theatre in Sarajevo, Oct. 12, 2010.

<sup>99</sup> *Bosnia: High rep on constitutional changes*, TANJUG, Oct. 15, 2010.

<sup>100</sup> Communiqué of the Steering Board of the Peace Implementation Council, June 30, 2009.

The Bosniak parties, especially the SBiH and the SDP, who consider the OHR their main negotiating leverage, will not agree to complete the objectives required for closure until there is a deal on constitutional reform.<sup>101</sup>

Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform . . . [R]esolution of the state property issue is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia's most controversial issue, the fate of the OHR.<sup>102</sup>

116. The international community must not allow such actions to continue holding hostage the closure of the OHR.

**V. The RS Government is undertaking peaceful and legal efforts to restore the rule of law and constitutional governance.**

117. The citizens of BiH are entitled to enjoy democratic and constitutional government and the rule of law. The RS government has committed itself to providing justice and relief for its citizens suffering from the OHR's violations of citizens human, civil and political rights described above. The RS Government's efforts have been, thus far, met by vague charges from the High Representative that such efforts are "anti-Dayton." The RS Government rejects such charges. The High Representative's word is not law; his actions are subject to law, as shown in this report. The RS Government must be free to express and defend its legal positions and views publically. The RS Government will continue to use every peaceful and legal means of restoring constitutional and democratic governance and the rule of law in BiH.

**A. The RS Government has the legal duty to govern according to BiH and RS constitutions and domestic and international law. Decisions of the High Representative and the OHR in conflict with applicable law are legally invalid, and the RS Government will not recognize or enforce them.**

118. Article I, paragraph 2 of the BiH Constitution requires that BiH must "be a free and democratic state" and the RS Government must conduct its affairs according to the rule of law. When the High Representative issues decisions and orders that violate provisions of BiH domestic and international law, the RS Government must base its response to such decisions and orders upon the applicable law. Of course the High Representative is also bound by international law.<sup>103</sup>

119. In determining the applicable law, the RS Government must first look to the BiH Constitution and the Constitution of the RS. Next, the RS Government must look to any

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<sup>101</sup> ICG November 2009 Report, pp. 5-6.

<sup>102</sup> *Id.*, p. 10. See also n. 17.

<sup>103</sup> See Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, RECUEIL DES COURS, 1957, vol. 92, issue II, at 46 ("[I]nternational law is automatically, *ipso facto*, and permanently binding on international persons—and in particular, States.").

applicable international obligations imposed upon BiH and/or the Entities by international law. Of first importance, in this respect, are applicable treaties. Those most directly concerned with orders of the High Representative would be the Dayton Accords and the human, political, and civil rights treaties specified in Annex 6 of the Framework Agreement. B&H has become a party to all of these treaties and agreements.

120. It is of considerable importance from a legal hierarchy standpoint to recognize that Article II of the BiH Constitution in paragraph 2 adopts as domestic law the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (“European Convention”). Paragraph 2 states that these shall have priority over all other domestic law. Paragraph 3 enumerates other rights, including many of those incorporated in the European Convention. Paragraph 6 of Article II requires that all courts, agencies, governmental organs and instrumentalities operated by or within the Entities shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2.

121. Article III, paragraph 3(b) specifies that “The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.” Among such principles of particular relevance to the relations between the High Representative and the RS Government and BiH are: *pacta sunt servanda*; the obligation of good faith in both performance and interpretation of a treaty; *ex injuria non oritur jus*; and non-intervention in internal affairs.<sup>104</sup>

122. Also of considerable importance to the proper interpretation of the RS Government's legal responsibilities and duties are paragraphs 2 and 3 of Article I of the BiH Constitution. These articles state:

2. Democratic principles. Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free democratic elections.

3. Composition. Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter “the Entities”).

123. Paragraph 2 requires that the RS Government operate according to the rule of law and mandates governance by democratically elected officials. Paragraph 3 recognizes the primacy of the two Entities—Republika Srpska and the Federation of Bosnia and Herzegovina—as units of government. These paragraphs, among others, establish that the RS Government's legal obligations under the BiH Constitution cannot be subordinate to decisions and orders of a non-democratically elected foreign official, such as the High Representative, particularly when his orders do not conform to the rule of law, including international law.

124. The obligations of: democratic governance; primacy of human, civil and political rights treaties and constitutional provisions; and rule of law-based governance in the BiH Constitution have particular force among the legal obligations of the RS Government because they are among

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<sup>104</sup> See Herman Mosher, *General Principles of Law*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 511, 511-527 (1992).

the central principles and agreements included in the Dayton Accords. The plain language of the Dayton Accords and the inclusion of the above stated obligations in the BiH Constitution, which is Annex 4 of the Accords, give these obligations a foundational status among the international law obligations to which BiH and the High Representative are subject. In the overall context of the Dayton Accords, these obligations must be read to take precedence, in relations with the High Representative.

125. In addition, the RS Government must take account of Article III, paragraph 2(c) of the BiH Constitution which assigns wide responsibilities to the RS Government to protect the fundamental human, civil and political rights and fundamental freedoms of BiH citizens, guaranteed by the BiH Constitution.

126. The RS Government's responsibility, pursuant to the Dayton Accords, is to cooperate with the High Representative in connection with peace implementation does not supersede the RS Government's obligations under domestic and international law described above. When an order of the High Representative conflicts with the RS Government's duties under the constitutions of BiH and Republika Srpska or obligations under international law, the constitutional and legal obligations of BiH and RS law must have priority.

**B. The High Representative and the OHR are subject to the Dayton Accords and to international human, civil and political rights agreements.**

127. Annex 10 of the Dayton Accords is the High Representative's sole source of authority. Annex 10 does not give the High Representative anything resembling the sweeping powers that the High Representative asserts, such as the authority to enact, amend and repeal laws, remove and appoint judges and prosecutors, or remove and ban officials from office. Instead, Annex 10 instructs the High Representative to, for example, "facilitate," "mobilize," and "coordinate." Annex 10 provides that the High Representative "shall respect [the] autonomy" of civilian organizations and agencies "within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement."<sup>105</sup>

128. Article V of Annex 10 provides, "The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement." This provision, as its plain language makes clear, does not extend the High Representative's interpretive authority beyond Annex 10 to any other parts of the Dayton Accords such as Annex 4, which is the BiH Constitution.<sup>106</sup> That responsibility falls to the designated authorities of BiH and the Entities or, in certain respects, to the Dayton Accords parties.

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<sup>105</sup> Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II(1)(c) (emphasis added).

<sup>106</sup> Confirming this plain language, in its first resolution about Bosnia after the Framework Agreement, the UN Security Council approved a resolution "reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . ." S.C. Res. 1088 (1996). *See also, e.g.*, S.C. Res. 1174 (1998) ("reaffirm[ing] that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . .").

129. Moreover, Annex 10 must be read in the context of the rest of the Dayton Accords. Any reading of Annex 10 that would give the High Representative powers to enact legislation or overrule legally enacted legislation, appoint judges and prosecutors, or remove and ban officials without due process is wholly inconsistent with Annex 4 (the BiH Constitution) and Annex 6 (the Human, Civil and Political Rights Guarantees).

130. A legally valid interpretation of the High Representative's mandate in Annex 10 must also be guided by the cannon of treaty interpretation stating that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.<sup>107</sup>

131. In sum, an order of the High Representative is legally invalid: (1) if it is inconsistent with the fundamental human, political and civil rights and freedoms specified as having legal priority in the BiH Constitution; (2) if it is inconsistent with general principles of international law, applicable treaties or other provisions of general international law; or (3) if it exceeds the authority granted the High Representative in Annex 10 by the parties to that agreement.

132. In some recent statements the High Representative has suggested that he is not bound by international agreements, presumably including the Dayton Accords and the international human, civil and political rights agreements to which BiH is a party. He has asserted that resolutions of the UN Security Council give him this "above the law" status. His position, however, is completely without legal justification. The High Representative cannot cite any specific UNSC decision for this proposition, nor does one exist. The so-called "Bonn Powers" were not granted by UNSC decisions but were simply asserted by the High Representative himself.<sup>108</sup>

**C. The RS Government is acting to restore human rights and provide justice to victims of the OHR.**

133. High Representatives have handed down edicts dismissing and banning hundreds of citizens from public employment, forbidding them from engaging in political activity, freezing their bank accounts, and depriving them of their right to travel without any form of due process.

134. Never was any evidence put forward against those condemned. Never were these victims allowed any hearing, any chance to prove their innocence, any right to appeal. Most of these decrees are still in effect. The injuries they impose are continuing.

135. The victims include the highest government officials of Entities and BiH, as well as simple citizens. Their "crime" was to refuse to follow orders from the unelected, foreign officials who exercised unchecked powers.

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<sup>107</sup> See W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231, 234 (1989).

<sup>108</sup> See, e.g. S.C. Res. 1896 (2009), S.C. Res. 1845 (2008), and S.C. Res. 1785 (2007), which do not use the decisional language required by UN law and practice necessary to empower states or organizations to act as agents of or on behalf of the UN. Compare, e.g.; S.C. Res. 1244 (1999) (providing such authorizations in the case of Kosovo).

136. As described in Section IV(D) above, some of those dismissed and banned from government employment or otherwise punished sought relief from BiH courts. High Representatives have prevented this. The High Representative has unlawfully ordered BiH's Constitutional Court, and all other courts and institutions within BiH, not to hear any claims against his activities. Orders of the High Representative have threatened to sanction any BiH official who complies with court decisions providing relief to parties injured by High Representative decisions. Indeed, as described below, one of the High Representative's primary activities has been to subject the BiH and Entities' judicial, civil, and criminal justice systems to his control. This effort has included OHR intervention into the deliberations of the highest judicial authority of BiH, the BiH Constitutional Court.

137. What is to be done to secure justice for these hundreds of victims? Since past High Representatives have prevented RS and BiH courts from providing justice, the RS Government has directed its legal counsel to prepare and file claims for relief of victims in other jurisdictions and before international human rights bodies. The RS Government will use all peaceful and legal means to secure justice for citizens whose most basic rights have been violated.

**D. The High Representative attacked the independence of the Constitutional Court.**

138. The first sentence of Article VI (Constitutional Court) Section 3. (Jurisdiction) states:

The Constitutional Court shall uphold this Constitution.

139. Article II of the Constitution requires all governmental authorities in BiH to ensure the "highest level of internationally recognized human rights and fundamental freedoms." The European Convention on Human Rights is applied directly as law in BiH with priority over all other law. Some 13 rights are specifically enumerated as being included but not by way of limitation.

140. Article X dealing with amendment to the Constitution forbids any amendment that would diminish any of the rights and freedoms referred to in Article II.

141. Clearly the fact that the Constitutional Court was bound to support human, civil and political rights and "fundamental freedoms" would be an enormous challenge to High Representatives and the OHR as they set about to rule BiH in defiance of these and other Constitutional provisions. One means of preventing a court challenge to his powers employed by the High Representative was that of summarily dismissing government officials, including judges. This practice is described in the sections below.

142. The High Representative also intervened directly with Constitutional Court judges to make known his wishes, as the international and constitutional law expert, Professor Joseph Marko, has noted in describing the Court's jurisprudence during its first five years. Professor Marko served as one of the three foreign judges of the Constitutional Court. He observed that the Court's assertion of even very limited jurisdiction over certain acts of the High Representative "was based upon the tacit consensus between the Court and the High

Representative that the Court in exercising its power . . . will always confirm the merits of his legislation as can be seen from those judgments.”<sup>109</sup>

143. Later in the Court’s history, in certain cases dealing with the High Representative’s powers

. . . the Court failed to seek the opinion of the High Representative prior to making a decision, unlike the usual practice . . . .<sup>110</sup>

144. After an opinion in one such case was issued by the Court, Case No. U 13/02, the High Representative persuaded the President and two Vice Presidents of the Court to request a review of the decision at a new, plenary session of the Court. Before that could happen, new judges took office and the new Court ruled that the plenary review session could not be held as it had, in effect, been requested by the High Representative who had no power to do so.<sup>111</sup>

145. Steiner and Ademovic also note the practice that certain Court decisions, including the one at issue in the High Representative’s review request, were “unpublished.”<sup>112</sup> Such a practice would seem inconsistent with Article VI section 2b of the Constitution which provides that the Court shall “... hold public proceedings and shall issue reasons for its decisions, *which shall be published.*” (emphasis added)

146. Article VI (1) of the BiH Constitution deals with the composition of the Constitutional Court. It provides that judges shall serve until age 70 unless they resign or are removed for cause *by consensus of the other judges.* A former senior legal official in the OHR reports that on one occasion the High Representative pressured the court to dismiss its president. When the three internationally appointed judges refused to support this effort, the High Representative issued an order unilaterally reducing their salaries.<sup>113</sup>

147. As described in Section IV(D) above, the High Representative ultimately resorted to ordering all courts and government agencies to disregard Constitutional Court decisions ruling his decisions inconsistent with the BiH Constitution.

**E. The RS Government is committed to restoring BiH judicial and prosecutorial independence and the judicial structure established by the BiH Constitution.**

148. A key element in establishing the authoritarian rule of the High Representative/OHR was destruction of the judicial independence of domestic courts and prosecutors offices. By making the judiciary subservient to the OHR, an important restraint on authoritarian rule in BiH was eliminated.

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<sup>109</sup> Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina*, European Diversity and Autonomy Papers (July 2004), p.17 and 18.

<sup>110</sup> Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), p. 821.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> MATTHEW PARRISH, *A FREE CITY IN THE BALKANS* (2009) p. 97.



149. The High Representative's attack on judicial independence was massive. For example, in 2002, the High Representative decreed that all judges and prosecutors were required to resign and reapply for their positions.<sup>114</sup> He placed the burden of proof on each individual applicant to show that he was qualified.

150. The Council of Europe opposed this action. It pointed out that this process was nothing less than a disciplinary proceeding without the procedural protections of such a proceeding.<sup>115</sup> An obvious and clearly intended result was to make judges and prosecutors compliant with the wishes of the High Representative upon whose satisfaction their continued careers would depend.

151. Not satisfied with making judges and prosecutors personally subservient, the High Representative created an entirely new system of courts and prosecutors over and above those constitutionally established for BiH. A new BiH State Court and related Prosecutor's Office was created which claims broad powers and jurisdiction.

### **1. The High Representative undermined judicial independence step by step.**

152. Until the early part of the last decade, there existed no State Court or Prosecutor's Office in BiH for two reasons. First, the BiH and Entity constitutions reserve these judicial competencies to the Entities, which have their respective courts and prosecutors' offices. Second, the democratically and constitutionally elected representatives of BiH and the Entities did not see fit to establish a State Court or Prosecutors Office through legally prescribed procedures.

153. In 2000, however, the High Representative took it upon himself to impose a State Court upon BiH's citizens by unilaterally decreeing a "Law on Court of Bosnia and Herzegovina." In 2002, the High Representative, again deeming his word to be law, imposed on BiH a "Law on Prosecutor's Office of Bosnia and Herzegovina." Over time, through a spate of further unilateral decrees of the High Representative, the State Court and Prosecutor's Office have grown and expanded all without benefit of legally valid procedures. By way of example:

- In 2002 and then again in 2003, the High Representative by decree vastly expanded the jurisdiction of the imposed institutions. This included adding jurisdiction over certain crimes governed by Entity law, which further encroached upon the clear jurisdictions of the Entities' judicial systems. Also in 2002, the High Representative by decree appointed the new State Court's seven judges.
- In 2003, the High Representative decreed that a limited number of foreigners would be appointed to positions as judges and prosecutors, in place of BiH citizens. According to the decrees, the foreign judges and prosecutors could only be appointed during a transitional period of four years. The High Representative went on to fill each of these positions by a series of decrees.

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<sup>114</sup> Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 14(3) J. DEMOCRACY (2003), p. 61.

<sup>115</sup> Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 14(3) J. DEMOCRACY (2003), pp. 64-65.

- In October 2003, the High Representative issued a decree removing the limits to the number of foreigners who could serve as judges and prosecutors.
- In 2003 and 2004, these foreign judges and prosecutors were granted near-absolute immunity from prosecution for any violations of law, a privilege enjoyed in other countries only by foreign diplomats, not by judges and prosecutors.
- In 2004, the High Representative by decree greatly broadened the types of positions foreign judges could fill.
- Also in 2004, the jurisdiction of the State Court and Prosecutor’s Office was further expanded and the transitional period for employing foreign judges and prosecutors was extended.
- In 2004, 2005, and 2006, the High Representative continued to appoint foreign judges and prosecutors by decree.

154. Step by step, these carefully devised arrangements resulted in intensified and more detailed domination of the criminal and civil justice system by High Representative appointees. By the end of 2009, for example, nearly half of all prosecutors in the section on Organized Crime, Economic Crime and Corruption were foreigners, including the Deputy Prosecutor, who headed that section.

155. The foreign judges and prosecutors in BiH, who claim extraordinary immunity, operate under powerful incentives to obey and please the High Representative and other foreign officials who are involved in their appointment, setting their terms of work and compensation. The system has been constructed so that these appointees’ loyalty is not to the law and Constitution of BiH but to the foreign appointing authorities in the OHR. The actions of the State Court and Prosecutor’s Office bear this out. Their criminal justice system abuses have been the subject of official inquiry.

156. In December 2009, the mandate of the foreign judges was set to end, according to the law. The BiH Parliament took up the issue of extending their mandates by amending the law, but for good reason, voted against an extension. In response, the High Representative issued an order on December 14 that “overruled” the decision of the democratically elected members of the BiH Parliament. The High Representative ordered that foreign judges and prosecutors remain—either as judges and prosecutors or behind-the-scenes authorities—now with the title, “advisors.”

## **2. The RS Government’s duty is to the rule of law.**

157. The RS Government is obligated to conduct its affairs according to the rule of law—including with regard to the State Court and Prosecutor’s Office. This is required by the domestic law of BiH, including the BiH and RS Constitutions, and applicable international law.

158. The High Representative lacks the legal authority to issue the decisions that established and altered the State Court and Prosecutor’s Office. The High Representative’s legal mandate is

established by the agreement set out in Annex 10 of the Dayton Accords. Annex 10 does not give the High Representative power to violate the Dayton Accords, other elements of international law or the Constitution of BiH. Annex 10 does not remotely suggest that the HR has the power to enact any legislation by decree, much less the power to establish courts with national jurisdiction and with the authority to overrule constitutionally mandated courts in the Entities. Annex 10 certainly does not require the BiH Constitutional Court to submit their proposed decisions to the High Representative for approval. Certainly Annex 10 does not allow the HR to overrule legally promulgated decisions of the elected members of BiH's Parliamentary Assembly. Nor does Annex 10 grant the HR authority to undermine the domestic legal system by appointing and removing judges and prosecutors in BiH—be they foreigners or BiH citizens.

159. The RS Government cannot accept as legally valid the High Representative's December 14, 2009 decision extending the service of foreign judges and prosecutors. The acts of BiH State Court and Prosecutor's Office are also of doubtful legal validity. These agencies were created and operate pursuant to decisions imposed by the High Representative, in contravention of BiH, Entity and international law. In its third report to the Security Council, the RS Government set out in full its legal position regarding these acts of the High Representative.

**F. Referenda play a legitimate role in a democracy. The RS Government will use them as appropriate to restore constitutional and democratic government.**

160. The RS Government intends to hold a referendum to allow the citizens of the RS to express their views on whether the RS Government should accept and implement actions of the High Representative extending the mandate of foreign judges and prosecutors, which are contrary to the Dayton Accords, human rights treaties and other principles of international law binding upon the RS Government.

161. In scores of speeches and statements during the recent election period, the High Representative has repeatedly suggested that the governing officials of BiH and the Entities were not representing their constituents' views and that the High Representative's actions are more aligned with their interests. In addition, the High Representative has frequently called on citizens to make their voices heard. Yet the High Representative is now opposing a new RS referendum law and the holding of referenda by the RS Government that would boost government accountability and increase opportunities for RS citizens to make their views known.<sup>116</sup>

**1. Referenda are widely used by governments across Europe and around the world as a mechanism for insuring democratic rule.**

162. It is all the more important for RS citizens to be heard in a country in which a single, unelected official claims extraordinary preemptory powers free from any court review or other limit. The RS Constitution has long specifically provided for referenda, stating at Article 77 that the RS National Assembly ("RSNA") may decide on individual issues after a vote of the citizens

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<sup>116</sup> Office of the High Representative, *Inzko in Banja Luka: RS politicians are not taking smart decisions*, Feb. 11, 2010.

in a referendum.<sup>117</sup> Article 70 of the RS Constitution gives the RSNA the power to organize a referendum. Moreover, the RS has had a statute providing for referenda since 1993, and a new RS Law on Referendum adopted on February 10, 2010.

## **2. The planned referendum is lawful.**

163. There is nothing in the nature of the referendum the RS Government is planning that would render it unlawful. Although the RS Government has not determined the precise language of any referendum questions, it intends to, in line with RSNA Conclusions dated October 1, 2010, propose a referendum to be held regarding the High Representative's decisions extending the mandate of foreign judges and prosecutors of the war crime department. The High Representative's order was contrary to the BiH Parliamentary Assembly's action which refused to continue the use of foreign judges and prosecutors. The proposed referendum is plainly suitable under the Council of Europe's standards. The Council's Parliamentary Assembly, in Resolution 1121, invited member states "to regard all subjects as suitable for being submitted to a referendum, with the exception of those which call in question universal and intangible values such as the human rights defined in the Universal Declaration of Human Rights and the European Convention of Human Rights, and the basic values of democracy in general and parliamentary democracy in particular."<sup>118</sup>

164. The proposed referendum does not question universal intangible values such as human rights or the basic values of democracy in general and parliamentary democracy in particular. Indeed, the proposed referendum will be an exercise and example of representative democracy and human rights, contrasting sharply with rule by a High Representative who shows disdain for such fundamental requirements of BiH and European law.

## **VI. The EU accession process must be conventional and not politicized. Constitutional change is neither appropriate nor necessary at this pre-application stage, but BiH can still make progress toward accession.**

165. The RS Government supports EU accession and is committed to its success. However, the accession process cannot be misused—as it has been—by local and international parties as a pretext for sweeping constitutional reforms unnecessary for accession, but pursued to achieve unlawful political agendas. In the past, negotiations over potential changes to the BiH Constitution, in the name of EU accession, have lacked transparency and have been used by non-EU parties, including the Bosniak parties and the OHR, to press agendas unrelated to EU membership requirements. These agendas have focused on transforming BiH's constitution to centralize power in Sarajevo and scrap the Dayton structures that protect entity autonomy and equality of BiH's Constituent Peoples. Thus, there is rightly a great deal of suspicion among RS citizens over talks on constitutional changes.

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<sup>117</sup> In addition, Amendment XXXII to Article 76, paragraph 1 of the RS Constitution provides that the right to propose laws, other regulations and enactments lies with the President of the Republic, Government, every representative of the Assembly, or at least 3,000 voters.

<sup>118</sup> Council of Europe, Parliamentary Assembly Res. 1121 (1997), 22 April 1997, para. 15(ii).

166. To restore the trust necessary for EU accession to be achieved, efforts toward EU accession must follow a conventional process, consistent with EU practice, under which negotiations over constitutional amendments take place in later stages. Negotiations over constitutional changes certainly cannot begin until the OHR departs, with the single exception of a narrow amendment to satisfy the order of the European Court of Human Rights in *Sejdić and Finci v. BiH*.

167. At the same time, there is much that can be accomplished now aside from constitutional reform to further the accession process. Until the OHR departs, the RS will work diligently toward bringing BiH into compliance with the Copenhagen Criteria, by addressing the issues in the *Finci* case, and in implementing the SAA and the Interim Agreement on trade. Constitutional changes that may eventually be necessary for EU accession must be the result of a transparent and lawful process and a domestic consensus achieved without foreign interference. In addition, any such constitutional changes must retain the fundamental protections established in the Dayton Accords.

**A. BiH's EU integration should follow a conventional process in which negotiation of any constitutional changes comes in later stages.**

168. It is important that BiH's EU integration efforts follow a conventional process consistent with EU practice. It would be contrary to recent EU accessions for BiH to make changes to its constitution in the early stages of the integration process. None of the states that have become EU members in recent decades has amended its constitution before filing its application for membership. In any event, as explained below, talks on constitutional change cannot take place as long as the OHR is in BiH.

**1. At this very early stage of the EU integration process, constitutional changes are wholly unnecessary and premature.**

169. Whatever constitutional changes might eventually be required for BiH to become an EU member (beyond the *Finci* amendment) are completely unnecessary at this very early stage of the accession process.

170. There is no need for BiH to amend its constitution before applying for membership. As soon as the OHR has departed, a BiH application for EU membership will become eligible for consideration. EU officials have consistently made clear that BiH is not required to make any changes to its constitution before applying for EU membership.<sup>119</sup>

171. Rushing constitutional changes before an application is even filed in many ways defeats the purposes of later stages of the accession process. After an application is filed, BiH and EU bodies will move forward on a long series of steps that must take place even before membership negotiations begin. One key step is a potential candidate's responses to a questionnaire hundreds of pages long. The questionnaire and other steps in the accession process help define for both the potential candidate and the EU the areas in which the country is well prepared for accession

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<sup>119</sup> Olli Rehn, EU Commissioner for Enlargement, *Towards a European Era for Bosnia and Herzegovina: The Way Ahead*, Address to Parliament of Bosnia and Herzegovina, July 24, 2009.

and where it is lacking. It would be foolish to short-circuit this process of give and take by attempting to rush through constitutional changes.

172. It may be that no changes to the BiH Constitution at all are required. Florian Bieber of the University of Kent has recently concluded that outside of addressing the *Finci* decision, “no constitutional change is, strictly speaking, necessary for Bosnia to move towards further EU integration, and should not become a condition for doing so”<sup>120</sup> In a recent interview, Prof. Bieber said that “it is a mistake to claim that constitutional changes are required for a functional state,” that “political issues and blockades are not results of the Constitution,” and that “constitutional change does not change the political climate and the will of different political parties in power to make compromises.” Prof. Bieber added, “I believe that it is far more important to reach a mutual understanding on priorities in the reform process in BiH and to take that path.”<sup>121</sup>

## **2. Constitutional changes are not required for OHR closure.**

173. In its most recent communiqué, on June 30, 2010, the PIC Steering Board once again reiterated that “constitutional changes are not a part of the objectives and conditions for closure of the OHR . . . .”<sup>122</sup> Despite efforts by the High Representative and others to suggest otherwise, there is simply no link between the enactment of constitutional changes and the conditions for OHR closure. In fact, as explained in the next section, talks on constitutional changes cannot take place until the OHR departs BiH. However, as described in Section III(A) above, the EU has repeatedly made clear that OHR closure is a requirement for BiH’s membership application to the EU.

## **3. The OHR’s presence makes negotiations on constitutional change impossible. The RS Government will only participate in negotiations on constitutional reform after the OHR is closed.**

174. With the exception of an amendment tailored to resolving the problems identified by the European Court of Human Rights in its *Finci* decision, changes to the BiH Constitution cannot be considered until the OHR is closed. Constitutional changes cannot be enacted while the OHR remains in place because the OHR stifles the necessary consensus building among BiH’s political leaders. The OHR, like the Bosniak parties, supports a centralization of the BiH system that would eliminate the fundamental protections guaranteed in the Dayton Accords. As long as the OHR is in BiH, the Bosniak parties will not negotiate in good faith because they will continue to look to the OHR to pressure other parties in support of their shared positions. As the ICG has concluded, “The OHR has become more a part of Bosnia’s political disputes than a facilitator of solutions . . . .”<sup>123</sup> In addition, the ICG observed that “keeping the OHR open will

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<sup>120</sup> Florian Bieber, *Constitutional reform in Bosnia and Herzegovina: preparing for EU accession*, European Policy Centre Issue Brief, Apr. 2010, p. 3.

<sup>121</sup> *Biber: Manje "šargarepe" pomogle bi BiH*, RADIO SLOBODNA EVROPA, Nov. 30, 2010, available at [http://www.slobodnaevropa.org/content/intervju\\_florian\\_biber/2233859.html](http://www.slobodnaevropa.org/content/intervju_florian_biber/2233859.html).

<sup>122</sup> Communiqué of the Steering Board of the Peace Implementation Council, June 30, 2010.

<sup>123</sup> ICG November 2009 Report, p. 1.

not push [BiH's] citizens toward reform and may sow enough discord to push reform out of reach."<sup>124</sup>

175. As is mentioned above, some in the international community are calling for the High Representative to be replaced upon his departure with another international official who would assert powers similar to those asserted by the OHR. For all of the same reasons as the High Representative, the presence of an official who asserts similar powers would make constitutional negotiations impossible.

176. If the EU believes amendments to the BiH constitution are required for EU accession, the RS will discuss such proposals, but only after the OHR's departure.

**B. The RS will continue working toward BiH's EU integration while the OHR remains in BiH.**

177. Until the OHR departs, the RS is committed to working with the EU to accomplish whatever integration tasks are feasible to accomplish during the OHR's presence. First, the RS will continue working for BiH's fulfillment of the Copenhagen Criteria, principally by seeking the departure of the OHR and the amendment of the BiH Constitution to be consistent with the *Finci* decision. Second, the RS will continue working to implement the SAA and the Interim Agreement.

**1. The RS will work to ensure BiH's fulfillment of the Copenhagen Criteria, including by seeking a constitutional amendment ensuring BiH's compliance with the *Finci* decision.**

178. The RS will continue to work toward BiH's full satisfaction of the Copenhagen Criteria. As explained above, BiH at present cannot fulfill the political criterion because of the continued presence of the OHR as a non-democratic, unlawful overseer, and a frequent violator of human rights. The RS Government will work to prevent the continuance of OHR's illegal actions and for its closure in order to restore full sovereignty and democracy to BiH.

179. Another barrier to BiH's satisfaction of the political criterion is its failure, thus far, to resolve the constitutional deficiencies identified by the European Court of Human Rights in its December 2009 *Finci* decision. The RS Government continues to stand ready to amend the BiH Constitution immediately in order to comply with the court's decision. Action is now long overdue. Unfortunately, the main Bosniak parties have spurned the RS Government's proposals to quickly resolve this issue by amending the election eligibility provisions of the BiH Constitution. These parties are refusing to go along with the relatively simple fixes necessary to comply with *Finci* unless the RS agrees to a radical transformation of the BiH Constitution, which would cast aside the careful balance struck in the Dayton Accords and transform BiH into a centralized state. For this reason, what should have been easily achievable constitutional amendments have not been enacted.

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<sup>124</sup> *Id.*, p. 16.

180. Even the High Representative has acknowledged the Federation’s refusal to enact the necessary targeted reforms. In his most recent speech to the Security Council on May 24, he said, “While Republika Srpska representatives would agree to narrow constitutional amendments that would implement the 22 December ruling, Federation politicians, on their side, insist on more wide-ranging changes, seeking to use the court’s verdict to promote their own—very different—visions of how the country should be restructured.”<sup>125</sup>

181. The urgent need for modest changes to the Constitution in response to the ECHR’s decision should not be used as a pretext to push a sweeping and highly controversial transformation of the Dayton Constitution.

**2. The RS will work to implement the SAA and Interim Agreement.**

182. The RS Government will continue working to implement the SAA and the Interim Agreement. Among the tasks necessary for the implementation of the SAA is the approximation of RS, Federation and BiH legislation and policies to the *acquis*. The RS Government has worked steadily to do this for RS legislation and policies, and it will continue to do so. The RS Government will also do everything it can to ensure that the BiH government conforms legislation and policies to the *acquis* as quickly as possible.

**C. Any changes to the BiH Constitution must result from a transparent and legal process and a domestic consensus achieved without interference from abroad.**

**1. Changes to the BiH Constitution must be effected transparently and in accordance with constitutional procedures and international law.**

183. Any constitutional reforms must follow the amendment process prescribed in Article X of the BiH Constitution. In addition, pursuant to international law, changes to the Constitution (Annex 4 of the Dayton Accords), which is an international treaty, require agreement between the Parties to Annex 4 to amend the treaty.<sup>126</sup>

184. The process of amending the constitution must not take place behind closed doors; any amendments must be effected through a transparent process that keeps citizens informed of developments. Transparency will help ensure that constitutional changes reflect citizens’ views. It will also improve public acceptance of them.

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<sup>125</sup> Speech by High Representative Valentin Inzko To the UN Security Council, May 24, 2010.

<sup>126</sup> In 2005, the European Court of Human Rights asked the Venice Commission for its opinion about whether Annexes 4 and 6 to the Dayton Accords are “unilateral undertakings given by Bosnia and Herzegovina” or international treaties. In its Amicus Curiae Opinion, the Venice Commission concluded that the annexes to the Framework Agreement “are to be considered an integral part thereof, so they must be considered as international treaties. Their character and interpretation are therefore governed by international law, in particular the Vienna Convention on the Law of Treaties.” Because Annex 4 is in the nature of a treaty, its parties—including Republika Srpska—must consent to its amendment.



**2. Any amendments to the Constitution must be the result of a consensus achieved by BiH's elected officials without imposition from abroad.**

185. As the next section of this report explains, the RS Government is committed to working with parties throughout BiH to build consensus for reforms consistent with the Dayton framework. So long as the OHR remains, such consensus will be difficult to achieve, but building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is the only path to long-term stability.

186. Any changes to the BiH Constitution must not be imposed on the citizens of BiH from foreign countries. First, the imposition of changes from abroad would violate the Annex 4 of the Dayton Accords (the BiH Constitution), which prescribes the requirements for its amendment. Second, the imposition of such changes would violate international law. For example, it would breach the legal duty not to intervene in matters within the domestic jurisdiction of another State—including with respect to BiH's "inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state."<sup>127</sup> Finally, such an imposition would foment instability in BiH. BiH citizens would emphatically reject as illegitimate any constitutional changes that were seen as having been imposed from abroad.

**3. Negotiations on constitutional change for EU accession must be conducted with EU representatives, not the OHR, PIC or non-EU member states.**

187. Negotiations on what constitutional changes may be necessary for EU accession should be between political leaders from BiH and the appropriate EU officials. It is not appropriate or productive for the OHR or non-EU members of the PIC to seek to inject themselves into EU negotiations. Such interference only serves to increase distrust of the process among RS citizens and set back negotiations.

**D. The BiH Constitution must maintain its decentralized structure and its protections for Constituent Peoples.**

**1. The decentralized structure of the Dayton Constitution is consistent with EU standards and the European trend toward devolution.**

188. The decentralized organization of BiH established in Dayton Constitution is consistent with EU standards. As noted above, the political criterion of the Copenhagen Criteria requires "stable institutions to guarantee democracy, the rule of law, human rights and respect for and protection of minorities." The BiH Constitution provides for democratic institutions, the rule of law, human rights, and respect for and protection of minorities, though it must be amended to satisfy the *Finci* decision, as explained above. The main factor preventing BiH from satisfying the political criterion is OHR's continued presence in BiH.

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<sup>127</sup> Declaration on Principles of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

189. The Constitution is also consistent with the economic criterion: “a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU's internal market.” As explained in Section II(C) above, decentralized structures are economically beneficial, especially in states—such as BiH—in which political preferences vary widely between regions. The BiH Constitution's consistency with the economic criterion is also demonstrated by the RS Government's implementation of far-reaching market reforms to boost competitiveness. The Federation's failure to institute such reforms is due not to the BiH Constitution but to its own political culture.

190. Nor is the BiH Constitution inconsistent with the *acquis* criterion (“the ability to take on all the obligations of membership, i.e. the entire body of EU law and policy known as the *acquis communautaire*, and adherence to the aims of political, economic and monetary union”). The BiH Government has, consistent with the SAA, been gradually approximating its laws and regulations to the *acquis*. The RS Government has also moved steadily to approximate its laws and regulations to the *acquis*. The Federation, so far, is lagging in this respect, but the cause is the Federation's own political problems, not the BiH Constitution.

191. The fact that a decentralized federal system is consistent with the obligations of membership in the EU is demonstrated each day by the current EU members that have similarly decentralized systems, such as Germany, Spain, and Belgium. The level of government in an EU member state that implements EU laws varies from state to state and depending on the area of law. In some states, such as Germany, a level of government lower than the state level takes on a central role in implementing EU laws. In other states, the central government plays a more important role. The EU wisely does not mandate a single approach.

192. The wide range of responsibilities of territorial units below the state level in countries such as Germany, Spain, Belgium, and Italy does not prevent these countries from fulfilling their responsibilities as EU members. There is no reason that a similarly decentralized state such as BiH cannot conform its laws and regulations to the *acquis* and otherwise fulfill the obligations of an EU member.

193. BiH's decentralized structure also reflects the core EU principle of subsidiarity, according to which “decisions are taken as closely as possible to the citizen.”

194. Moreover, the decentralized structure of the BiH Constitution is consistent with the widespread trend of decentralization in the EU and worldwide. For example, Italy in 2001 approved a constitutional reform giving its regions very broad autonomy.<sup>128</sup> Spain's Autonomous Communities, first established in 1978, have dramatically increased their responsibilities and now have broad legislative and executive authority. Even the United Kingdom, which has a unitary system of government, has recently devolved significant autonomy to Scotland, Wales, and Northern Ireland. According to a Council of Europe study,

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<sup>128</sup> Committee on the Environment, Agriculture and Local and Regional Affairs of the Council of Europe Parliamentary Assembly, *Regionalisation in Europe*, Sept 14, 2007, p. 8.

“Most of the larger countries of Europe have a well-developed sub-state level of government formed of regions enjoying considerable autonomy and legislative powers.”<sup>129</sup>

195. As the study said, “Regional autonomy must be perceived as a means of enhancing democracy and giving it a firmer foothold in our countries, in parallel with the European unification process and against the background of globalisation.”<sup>130</sup> Decentralized structures such as the BiH Constitution are perfectly consistent with membership in the EU.

**2. Entity autonomy and protections for the rights of BiH’s Constituent Peoples are essential to BiH stability and consistent with effective government.**

196. BiH was constituted by three Constituent Peoples with widely diverging political preferences. The protections established in the Dayton Constitution give members of each of BiH’s Constituent Peoples the crucial assurance that neither the state nor any single Constituent People or political party will not trample over their interests. Structures and mechanisms such as those established in the BiH Constitution are consistent with effective government and have been used by successful democracies in Europe and elsewhere.

197. Any reforms must retain the federal structure and mechanisms established by the Dayton Accords to safeguard the vital interests of BiH’s Constituent Peoples. Replacing this system—the indispensable foundation of the Dayton Accords—with a more centralized scheme would remove the protections essential for each of BiH’s Constituent Peoples. Legitimate reforms are possible within the Dayton framework, but the framework must be preserved.

198. The existence and stability of BiH is based upon the fundamental principle that BiH consists not of minorities, but three equal Constituent Peoples. The BiH Constitution, set forth in Annex 4 of the Dayton Peace Accords, is based on this important principle. The Constitution proclaims that BiH “shall consist of two Entities” and allocates competencies in a manner that creates a decentralized structure. The Constitution also provides important safeguards to uphold this principle and ensure that the interests vital to each of the constituent Peoples are respected. This structure is the result of agreement among these three Peoples, codified by treaty, which not only ended the war between them, but established a framework wherein they might live together as citizens of the same State. This structure, while perhaps not perfect, takes account of the realities of BiH.

199. Attempts by states and other subjects of international law to interfere with the treaty obligations set forth in the Dayton Accords should be of great concern to 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 Dayton Accords, which was carefully crafted to take account of the vital interests of each of the Constituent Peoples. Replacing this structure with a unitary system removes the protections essential for all of BiH’s

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<sup>129</sup> *Id.*, p. 9.

<sup>130</sup> *Id.*, p. 1.

Constituent Peoples. It is precisely these protections, an essential centerpiece of the Dayton Accords, which encourage cooperation and consensus building today and make BiH a viable state.

200. Although the BiH scheme is not identical to other constitutional systems, similar mechanisms of regional autonomy and protections that safeguard the interests of constituent peoples are found in successful democracies both inside and outside Europe. Federal structures in EU member states along with other democracies have been successful forms of governance for states that consist of diverse peoples. Examples include Spain, Belgium, Italy, Switzerland, and Canada, among many others.

201. Switzerland, of course, is widely known for the effectiveness of its government institutions. It protects the interests of its diverse language and dialect groups in part by vesting broad autonomy in 26 cantons. The autonomy of Swiss cantons is so broad that they are entitled to conclude international treaties.<sup>131</sup> In Italy's ethnically mixed Autonomous Province of South Tyrol a quota system based on ethnicity applies to the composition of political organs, public administration, civil service positions, judicial appointments, and allocation of funds for public purposes.<sup>132</sup>

### **3. The RS supports remedying the unequal position of the Croat People in the Federation.**

202. As the ICG recently reported, the Federation is near collapse and in serious need of reform. One of the serious problems in the Federation is that the Croat Constituent People's vital interests have not been protected due to their unequal position within the existing structure of the Federation. Bosniak parties' practice of "outvoting" Croats in the Federation has, according to a 2008 report to the Security Council by the High Representative, "increased political tensions between the two ethnic groups and [was] indicative of broader concerns about the position of the Croats in the Federation."<sup>133</sup> In 2002, High Representative Wolfgang Petritsch decreed amendments to the Entities' constitutions that, according to the ICG, had the effect of removing "the most potent protective mechanism the Croats had wielded."<sup>134</sup> The Federation's Constitution includes a vital national interest ("VNI") clause, under which Bosniaks or Croats may block legislation that undermines its vital interests. But, according to the ICG, "new rules made the VNI mechanism ineffective . . . ."<sup>135</sup>

203. To remedy the unequal position of the Croats in the Federation, the head of the leading Croat political party HDZ, Dragan Čović, has called for the creation of a third entity in BiH within the existing Federation through constitutional reform.

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<sup>131</sup> *Id.*

<sup>132</sup> JENS WOELK ET AL, ED., *TOLERANCE THROUGH LAW: SELF GOVERNANCE AND GROUP RIGHTS IN SOUTH TYROL* (2008).

<sup>133</sup> ICG September 2010 Report, p. 5

<sup>134</sup> *Id.*, p. 6.

<sup>135</sup> *Id.*

204. The RS Government recognizes the unfair treatment of the Croats by their Federation partner and supports the desire of the Croats for their own entity, so long as it is achieved through peaceful means; does not violate the political and territorial integrity of the RS; and preserves the decentralized structure and political safeguards established in the Dayton Peace Accords.

**4. No current EU members or candidate states have been required to centralize their constitutional structures as conditions for EU membership.**

205. No EU member or candidate state has ever been required to centralize its constitutional structure in order to accede to the EU. Indeed, during the years of their accession processes, some EU members, such as the Czech Republic and Slovakia, *decentralized* their government systems. Many other EU members, including Belgium, Germany, and Spain, have long had highly decentralized constitutional structures.

206. One of the reasons the EU has succeeded in uniting so many of Europe's democracies is that it has welcomed a diversity of governmental systems suited to states' differing histories and political cultures. While a unitary system may be suitable for certain countries, it would be entirely unworkable in a country like Belgium—or BiH. The EU should continue its tradition of working toward an applicant state's fulfillment of the Copenhagen Criteria rather than trying to prescribe for the state a new form of government.

**VII. The RS Government will work hard to build domestic consensus and international support for efficient government based upon the Dayton framework.**

207. With the elections in BiH successfully completed, now is the time for elected officials within BiH to work together—without external interference—to reach consensus on issues that will improve governance in BiH and the quality of life for its citizens. Progress will require mutual respect for the equality and vital interests of BiH's Constituent Peoples at both the Entity and state level; it will require ceasing to look for non-BiH parties to impose maximalist positions in hopes of fundamentally transforming BiH in order to consolidate power to the detriment of other Peoples. As the ICG concluded its latest report on BiH, "Only by endorsing compromise politics . . . and accepting the reality that the country's future is as a decentralized state can Bosnia's leaders revitalize first the Federation and then Bosnia itself."<sup>136</sup> The RS Government is prepared to cooperate fully in these efforts and calls upon other political leaders within the Federation and at the state level to participate in good faith towards this end. The consensus on which the legitimacy of all governments ultimately rests must come from within.

**A. The RS Government is committed to building broad consensus to improve governance through legitimate reforms.**

208. The RS Government is committed to furthering effective governance through legitimate reforms, including to achieve EU accession and integration into European structures. On the

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<sup>136</sup> *Id.*, p. 23.

basis of BiH's constitution, and as a practical matter, the Entities will play an important part in this process.

209. The RS has demonstrated this commitment by its successful participation in implementation of the Interim Agreement and the SAA, as part of EU accession. As the EU and others acknowledge, the RS is far ahead of the Federation and the BiH State institutions in carrying out reforms of laws and regulations to conform to EU standards and the *acquis*.

210. The RS's commitment to legitimate reform is also evident by its good faith negotiation and offers of compromise with respect to many important issues. To cite only a few of many examples: (1) the RS Government reached consensus on resolving the ownership of Defense Property by executing a written agreement with the Federation and the BiH Council of Ministers in 2007; (2) agreement was reached by the RS's leading political party (the SNSD) on ownership of State Property in the fall of 2008 and early 2009, in accordance with the PIC's functional and territorial criteria; (3) the RS Government in early 2009 reached compromise on a constitutional amendment relating to Brčko and its status *vis-a-vis* the Constitutional Court; (4) during the failed Butmir talks in the fall of 2009, the RS Government made serious proposals of reform and offers of compromise; (5) the RS Government showed its support for joining NATO's Membership Action Plan and made offers in the summer of 2010 that would have resolved the issue of immovable defense property; (6) also in the summer of 2010, the government offered a compromise on the BiH Census legislation, agreeing to allow the legislation to postpone implementation of the new census data to a future fixed date. In most of these instances, the agreements reached were later breached by the other parties, usually with the support of the High Representative, or the concessions offered in good faith were rejected in favor of maximalist positions.

211. As further evidence of the RS's commitment to improve governance, on May 14, 2009, the RSNA issued Conclusions calling for a serious, internal assessment and discussion among the Entity and State institutions as to how State and Entity government elements can most efficiently and effectively allocate governmental competencies. In particular, the Conclusions requested the Parliamentary Assembly of the BiH, Council of Ministers of BiH, and institutions of the Federation to join the RSNA and the RS Government in addressing these critical issues in order to pursue more efficient and effective government performance.<sup>137</sup>

**B. If given the political space, democratically elected leaders of BiH can and will negotiate with each other to produce a national consensus.**

212. To be considered legitimate by the citizens of BiH, the reform process must be transparent and public debate encouraged. As in other constitutional democracies, reform of the constitution, as compared to legislation and regulations, must be approached with great care. It

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<sup>137</sup> Unfortunately, the High Representative inappropriately condemned these Conclusions rather than support the peaceful review and resolution of the proper allocation of competencies among the Entity and BiH institutions—the type of debate which is welcome, not condemned, in constitutional, federal democracies. The OHR view was that any return of competencies to the entities would be a violation of the Dayton Accords while transfer of competencies from the Entities to the state government was permitted by Dayton. Such a view is incompatible with *inter alia* the Preamble and Article V of the Dayton Accords and Articles I and III of Annex 4 (BiH Constitution).

is essential to allow the time required to build a high level of consensus. Reform also must be conducted in accordance with the legal procedures for amendment required by the Constitution.

213. Constitutional reform and EU accession are domestic issues for BiH citizens to control. Neither reform nor accession are requirements of the Dayton Accords, and consequently, the issues are clearly outside the scope of the High Representative's mandate and authority and the scope of peace implementation. Thus, as a matter of law, progress toward EU integration and constitutional reform cannot be imposed by the High Representative or PIC or be a condition for closure of the OHR. Attempts to impose constitutional change by the High Representative, PIC, or other members of the international community have been both counterproductive to legitimate and enduring reform and an unlawful intrusion into the domestic affairs of a sovereign state.<sup>138</sup>

## **VIII. Conclusion**

214. The international community has made many positive contributions to BiH's recovery from the conflicts of the 1990s. Unfortunately, as this report and the RS Government's previous three reports to the Security Council have shown for more than a decade, the activities of the High Representative and the OHR have undermined BiH and Entity institutions, acted in disregard of the BiH Constitution and international obligations of BiH, and have punished hundreds of BiH citizens in a manner contrary to domestic and international law. While claiming to promote the rule of law and implement the Dayton Accords, the OHR and many High Representatives have acted in complete disregard of both. Among the many adverse effects of these illegal actions, perhaps the most pernicious has been disruption of the essential process of building domestic political consensus in support of policies that could command broad support from all citizens.

215. The RS government urges the Security Council not to support any further actions or programs of the international community affecting BiH which are inconsistent with the Dayton Accords and other obligations of members of the international community pursuant to international law.

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<sup>138</sup> Such action would violate, e.g., 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.

## **Annex 10 - Agreement on Civilian Implementation**

The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska (the "Parties") have agreed as follows:

### **Article I: High Representative**

The Parties agree that the implementation of the civilian aspects of the peace settlement will entail a wide range of activities including continuation of the humanitarian aid effort for as long as necessary; rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections according to the timetable in Annex 3 to the General Framework Agreement. A considerable number of international organizations and agencies will be called upon to assist.

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 the 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.

### **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 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.

In pursuit of his or her mandate, the High Representative shall convene and chair a commission (the "Joint Civilian Commission") in Bosnia and Herzegovina. It will comprise senior political representatives of the Parties, the IFOR Commander or his representative, and representatives of those civilian organizations and agencies the High Representative deems necessary.

The High Representative shall, as necessary, establish subordinate Joint Civilian Commissions at local levels in Bosnia and Herzegovina.

A Joint Consultative Committee will meet from time to time or as agreed between the High Representative and the IFOR Commander.

The High Representative or his designated representative shall remain in close contact with the IFOR Commander or his designated representatives and establish appropriate liaison arrangements with the IFOR Commander to facilitate the discharge of their respective responsibilities.

The High Representative shall exchange information and maintain liaison on a regular basis with IFOR, as agreed with the IFOR Commander, and through the commissions described in this Article.

The High Representative shall attend or be represented at meetings of the Joint Military Commission and offer advice particularly on matters of a political-military nature. Representatives of the High Representative will also attend subordinate commissions of the Joint Military Commission as set out in Article VIII(8) of Annex 1A to the General Framework Agreement.

The High Representative may also establish other civilian commissions within or outside Bosnia and Herzegovina to facilitate the execution of his or her mandate. The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command.

### **Article III: Staffing**

The High Representative shall appoint staff, as he or she deems necessary, to provide assistance in carrying out the tasks herein.

The Parties shall facilitate the operations of the High Representative in Bosnia and Herzegovina, including by the provision of appropriate assistance as requested with regard to transportation,

subsistence, accommodations, communications, and other facilities at rates equivalent to those provided for the IFOR under applicable agreements.

The High Representative shall enjoy, under the laws of Bosnia and Herzegovina, such legal capacity as may be necessary for the exercise of his or her functions, including the capacity to contract and to acquire and dispose of real and personal property.

Privileges and immunities shall be accorded as follows:

- a. The Parties shall accord the office of the High Representative and its premises, archives, and other property the same privileges and immunities as are enjoyed by a diplomatic mission and its premises, archives, and other property under the Vienna Convention on Diplomatic Relations.
- b. The Parties shall accord the High Representative and professional members of his or her staff and their families the same privileges and immunities as are enjoyed by diplomatic agents and their families under the Vienna Convention on Diplomatic Relations.
- c. The Parties shall accord other members of the High Representative staff and their families the same privileges and immunities as are enjoyed by members of the administrative and technical staff and their families under the Vienna Convention on Diplomatic Relations.

## **Article IV: Cooperation**

The Parties shall fully cooperate with the High Representative and his or her staff, as well as with the international organizations and agencies as provided for in Article IX of the General Framework Agreement.

## **Article V: Final Authority to Interpret**

The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.

## **Article VI: Entry into Force**

This Agreement shall enter into force upon signature.

For the Republic of Bosnia and Herzegovina

For the Republic of Croatia

For the Federal Republic of Yugoslavia

For the Federation of Bosnia and Herzegovina

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For the Republika Srpska