



**REPUBLIC OF SRPSKA  
GOVERNMENT**

OFFICE OF THE PRIME MINISTER

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No: 04/1.- 1272/11

Date: 7 May 2011

**H.E. Mr. Ban-Ki-moon**

Secretary General  
United Nations

**H.E. Mr. Gerard Araud**

President  
United Nations Security Council

Your Excellencies:

To assist the Security Council with its deliberations on Bosnia and Herzegovina, scheduled for 9 May 2011, the Government of Republika Srpska has prepared the attached 5th Report to the UN Security Council. The Government of Republika Srpska, as a treaty party to the agreements comprising the Dayton Accords and as one of the two Entities that comprise BiH, respectfully requests that the Security Council take its views into consideration during this debate.

Please accept, Excellencies, the assurances of my highest consideration.

Aleksandar Dzombic

Prime Minister



**The 5th Report of Republika Srpska to the United Nations Security Council: Reply to  
High Representative's Letter and Special Report of 4 May 2011 to the UNSC**

**May 2011**

# **The 5th Report of Republika Srpska to the United Nations Security Council: Reply to High Representative's Letter and Special Report of 4 May 2011 to the UNSC**

**May 2011**

## **I. Introduction**

Republika Srpska, a party to all of the annexes that comprise the Dayton Accords, submits this 5<sup>th</sup> Report to the United Nations Security Council on the situation in Bosnia and Herzegovina. The Report takes note of the High Representative's 4 May 2011 letter to the Security Council and Secretary General of the United Nations and the accompanying "special report" as well as statements made in the High Representative's semiannual report to the Security Council.<sup>1</sup> In this regard, the Government of Republika Srpska must express its strong objections to these documents. These documents seek to mislead the Council regarding both the relevant facts and law. To assist the Council in understanding these issues raised by the High Representative and the current situation in Bosnia and Herzegovina, the Government provides this 5<sup>th</sup> Report and attaches to this Report three additional documents that provide detailed analyses relevant to these issues. These documents are entitled *Referenda are Vital Instruments of Democracy*, *The High Representative's Assault on Judicial Independence* and *The High Representative's Annulment of the Central Election Commission's Decisions is a Gross Violation of the Law and Highly Destabilizing to BiH*. The 5<sup>th</sup> Report and the attached documents supplement the letter from Republika Srpska President Milorad Dodik to the United Nations Secretary General and President of the Security Council, dated 6 May 2011.

The High Representative's primary position in his documents of 4 May is that criticism of his actions, or even public discussion of them via a legally organized referendum, would constitute violation of the Dayton Accords. Such a position is obviously incorrect as a matter of law. The Dayton Accords mandates a democratic form of governance in Annex 4 (the BiH Constitution) and in Annex 6, which requires that the Government of BiH and the Entities ensure to BiH citizens the highest level of protection of their human, civil and political rights. Providing for a discussion and survey of citizens' views regarding the High Representative's practice of imposing law and amending constitutions by decree and of punishing citizens without any legal process is protected by the Dayton Accords, the BiH Constitution and by the international human, civil and political rights treaties to which BiH is a party. It is not actions of the RS Government, but rather recent and past actions of the High Representative that threaten the stability of BiH, as respected international organizations have pointed out.

After years of continued abuse of authority by the High Representative, rule by autocratic decree in violation of the Dayton Accords and international law continues to destabilize BiH. It has been more than 15 years since the Dayton Accords was signed. Such actions cannot and should not be further tolerated expressly or implicitly. The international community can play a beneficial role in its relations with BiH, but only if members of the international

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<sup>1</sup> The High Representative, consistent with its usual practice, did not notify Republika Srpska that it had prepared and intended to transmit these documents, despite Republika Srpska's status as a party to the annexes that comprise the Dayton Accords. The High Representative's lack of transparency with respect to documents is contrary to procedure owed to parties to the treaty that established the High Representative, inhibits useful debate in the Security Council and undermines constructive dialogue between the High Representative and Republika Srpska. Republika Srpska reserves its position with respect to those statements in these documents that it does not address in this letter and its attachment.

community respect and defend the rule of law and constitutional democracy, including with regard to their own actions and actions of the High Representative.

The Dayton Accords provides stability by protecting constitutional rights of entities and Constituent Peoples in a decentralized structure. Republika Srpska remains committed to fulfilling its obligation to adhere to the Dayton Accords. Questioning actions of the High Representative and seeking the views of our citizens are not violations of the Dayton Accords, but are a means of exercising democracy and legally protected rights. Republika Srpska urges the Security Council to reject the efforts by the High Representative and others to undermine the Dayton Accords and violate the human, civil and political rights guaranteed to BiH citizens therein.

## **II. In an unprecedented and improper request, the High Representative seeks retroactive endorsement of his unauthorized and illegal acts.**

Amid intensifying criticism and concern over the High Representative's actions—not only from representatives of two of the three Constituent Peoples of BiH but from members of the international community—the High Representative is now seeking a blanket endorsement by the Security Council for all of its actions, past, present and future. Specifically, in its 4 May letter, the High Representative asks the Security Council to “consider expressing full support . . . for all official acts taken by the High Representative, reaffirming that such acts were taken with the approval of the Security Council acting under the authority of Chapter VII of the UN Charter.”

The Council has never before given such an endorsement of all acts of an international official, even one of its own appointees. If the Security Council were to take this extraordinary step in the case of High Representatives appointed pursuant to the Dayton Accords, it would be endorsing scores of illegal actions that have been condemned as violating human rights and democratic rights of BiH citizens.

It would be endorsing the High Representative's summary punishment, without process or appeal, of hundreds of individuals—punishments the Council of Europe's Parliamentary Assembly called “irreconcilable with democratic principles” and which the Venice Commission called “unacceptable.” It would be endorsing actions imposing laws that the European Commission held to “be in breach the Stabilization and Association Agreement (SAA) and the related Interim Agreement on trade, which the European Union concluded with BiH in 2008.” It would be endorsing the High Representative's actions against individuals that the BiH Constitutional Court held violated the European Convention on Human Rights. It would be endorsing the High Representative's decree threatening any institutions or officials in BiH who implemented the Constitutional Court's decision. It would be endorsing the High Representative's 27 March decree that invalidated a duly promulgated decision of the BiH Central Election Commission annulling the Bosniak-led formation of the Federation Government as unlawful—a decree that the International Crisis Group said “undermined state bodies and the rule of law.”

Such unlawful actions were not, despite the High Representative's claims, taken with the approval of the Security Council. Nor, as a matter of law, would an expression of support *ex post facto* by the Security Council render them lawful. If the actions of the High Representative were in fact consistent with law and his mandate, the High Representative would not now be seeking the Security Council's blessing, retroactively and without examination, for them.

### **III. The High Representative's campaign to suppress any discussion of his actions is contrary to the Dayton Accords and international law, which do not prohibit the planned referendum.**

The High Representative's effort to suppress discussion and criticism of his rule by decree—including through the RS National Assembly's 13 April 2011 Conclusions and through the holding of a referendum—is completely inconsistent with the Dayton Accords.

Referenda seeking the views of citizens constitute a fundamental instrument of democratic governance. Democratic governance is required by the Dayton Accords, including the BiH Constitution. Referenda are used at state and sub-state levels throughout the democratic world and are endorsed by the Council of Europe and other major international organizations.

The right to criticize and advocate change in political institutions is protected by the BiH Constitution. Article II of the BiH Constitution and Annex 6 of the Dayton Accords require that the governing authorities in BiH guarantee their citizens the highest level of protection provided by international law for human, civil, and political rights. Among such rights are the guarantees that citizens and their elected officials may freely engage in discussions of political issues.

The High Representative's efforts to outlaw criticism of his decrees and other actions are also clear violations of the international law protecting human, civil and political rights that binds all elements of government in BiH as well as the High Representative himself. Such law is clearly stated in Annexes 4 and 6 of the Dayton Accords. Any attempt to suppress a referendum designed to ascertain the public's views would violate the right to free expression as guaranteed by Article 10 of the European Convention on Human Rights and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It would also deny citizens their right to "take part in the conduct of public affairs" as recognized by Article 25 of the ICCPR.

Referenda are used throughout the world as a means of educating and informing citizens and seeking their views on the degree to which public institutions to which they are subject are properly organized and correctly functioning. It is clearly within the right of the Government of Republika Srpska to provide a forum, through holding a public referendum, for citizens to register their views on institutions that wield power over them, including the High Representative and the BiH Court and Prosecutor. The High Representative's claim that the upcoming referendum violates the Dayton Accords is incorrect and obviously self-serving.<sup>2</sup>

The gauging of citizens' views through the time-honored democratic mechanism of a referendum is fully consistent with the Dayton Accords. Neither the Dayton Constitution nor any other part of the Dayton Accords restricts referenda. The Dayton Constitution leaves it to the Entities to decide whether they wish to use referenda. Articles 70 and 77 of the RS Constitution have long specifically provided for the use of referenda. The Council of Europe's Venice Commission has thoroughly scrutinized the consistency of the RS

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<sup>2</sup> In part the High Representative misrepresents the facts, asserting that the referendum is binding. As the RS Government and international observers such as the International Crisis Group have explained, the referendum seeks the views of RS citizens on important questions of governance, but the result, itself, is not binding. The referendum solicits the views of RS citizens with respect to laws decreed by the High Representative, including those on the BiH Court and Prosecutor's Office.

Constitution with the Dayton Constitution,<sup>3</sup> and it has never taken any issue with the RS Constitution's referendum provisions.

Properly functioning, democratic and constitutionally authorized governmental institutions should have no fear of operating transparently and allowing examination and criticism of their work. Proposals for reform should be encouraged, not forbidden. The High Representative's hostility toward public examination of his work demonstrates how far his rule has departed from international human, civil and political rights norms.

#### **IV. The High Representative has destroyed the independence of the BiH courts and prosecutors.**

An independent and impartial judicial system is fundamental to the rule of law, which is an essential element of a functioning democracy. The BiH-level Court and Prosecutor's Office are neither independent nor impartial. The Council of Europe, former international appointees who have served in the High Representative's legal staff and on the Constitutional Court of BiH, and international academics have all attested that the High Representative has severely and routinely interfered in the legal operations of the BiH-level judicial system. The High Representative imposed the BiH Court and Prosecutor's Office by decree, despite the BiH Constitution making no provisions for such institutions, and has since treated these institutions as the High Representative's own. As a result, there is no independent or impartial judicial system, as international observers and experts have frequently noted.

As one London-based NGO wrote, "[I]nternational officials, lawyers and legal experts have . . . complained to [Balkan Crisis Report] about the extent of the involvement of the OHR in the everyday functioning of the courts, urging the High Representative to loosen his iron grip on Bosnia's judiciary."<sup>4</sup> In 2007 the High Representative went so far as to overrule by decree a decision of the Constitutional Court that found decrees of the High Representative to have resulted in violation of the European Convention on Human Rights and banning any BiH institution from implementing the Court's ruling.<sup>5</sup>

Despite international criticism and recommendations that this serious breach of the rule of law be remedied, along with Republika Srpska's own call for inquiry and reform, no steps have been taken by the High Representative to do so. Republika Srpska has a constitutional obligation to address this serious issue to restore the constitutionality and independence of the judiciary; thus the RSNA issued its conclusions on 13 April 2011 to take appropriate lawful actions for this purpose.

#### **V. The High Representative recent unlawful annulment of the BiH Central Election Commission's decisions is a destabilizing attack on the vital protections for BiH**

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<sup>3</sup> See, e.g., Venice Commission, *Compatibility of the Constitution of the Republika Srpska with the Constitution of Bosnia and Herzegovina following the Adoption of Amendments LIV – LXV* by the National Assembly of Republika Srpska, Secretariat Memorandum on the basis of the Commission's opinion appearing in document CDL(96)56 final.

<sup>4</sup> Aida Sunje, *Courting Controversy in Bosnia*, Institute for War and Peace Reporting, BCR Issue 562, 2 Aug. 2005.

<sup>5</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 (23 Mar. 2007).

**Constituent Peoples that are the foundation of the Dayton Accords and at the core of the present crisis in BiH.**

On 27 March 2011, the High Representative issued a decree purporting to annul the BiH Central Election Commission's decisions that had held that the formation of the Federation government by the Bosniak-led political parties was unlawful. The High Representative's decree violates fundamental provisions of the BiH Constitution, Federation law and judicial decisions, BiH law, the Dayton Peace Accords, and international law, and is a further assault on judicial independence in BiH. As the President and CEO of the International Crisis Group stated in her 2 May 2011 letter to EU officials:

The government of the larger of its two entities, the Federation, was formed illegally on 17 March and is being disputed by the two largest ethnic Croat parties. . . . The 27 March decision by the High Representative to suspend the ruling by the Central Election Commission that annulled formation of the Federation government, and the consequent interference with the right to appeal that ruling, have undermined state bodies and the rule of law.<sup>6</sup>

While the RS Government is reluctant to comment on matters most directly affecting the Federation, unfortunately the High Representative's actions in this case also have a direct effect upon Republika Srpska. The High Representative's actions seriously threaten the entire legitimacy of the state of BiH. The Dayton Accords, which include the Constitution of BiH, put in place strong protections for each Entity and for each of the three Constituent Peoples. The High Representative's actions have eliminated the constitutionally protected voice of the Croat people in the Federation. If this can be done in the Federation with impunity, the Serb people too are threatened. Most immediately, the threat arises with respect to formation of the Council of Ministers and other institutions of BiH. While the High Representative wishes to turn international attention away from the situation it has created by attacking Republika Srpska on its planned referendum, the fact is that the crisis the High Representative has created by his unlawful actions in the Federation is a grave threat to the Dayton Accords and cannot be overstated.

**VI. The High Representative's interpretive authority which must be exercised in accord with international law, is restricted to Annex 10 and his rule by decree is unlawful.**

The first sentence of the High Representative's "special report" is incorrect on its face. It asserts that the High Representative is "the final authority regarding the interpretation of the General Framework for Peace, as mandated by Annex 10 of said Agreement and various UN Security Council Resolutions." As the High Representative knows—and indeed states in his letter to the Security Council of May 4—its interpretive authority is limited to Annex 10 of the Dayton Accords alone. Article V of Annex 10, the Agreement on Civilian Implementation of the Peace Settlement, provides, "The High Representative is the final authority in theater *regarding interpretation of this Agreement on the civilian implementation*

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<sup>6</sup> Letter from Louise Arbour, President and CEO of International Crisis Group to PIC Steering Board Ambassadors, 2 May 2011.

*of the peace settlement.*”<sup>7</sup> Security Council Resolution 1031 (1995), the very resolution cited by the High Representative in its 4 May 2011 letter to the Security Council, “Confirms that the High Representative is the final authority in theatre regarding interpretation of *Annex 10* on the civilian implementation of the Peace Agreement.”<sup>8</sup>

Equally important, the High Representative’s authority to interpret Annex10 is circumscribed by his international law obligation to interpret Annex 10 in good faith. The High Representative’s claim that he is the final authority regarding interpretation of the whole of the Dayton Accords, rather than just Annex 10, is itself a violation of its obligation to interpret Annex 10 in good faith. Moreover, the Dayton Accords provides specific mechanisms for interpretation for many of its other provisions. For example, the Dayton Accords designates the commander of IFOR as the “final authority in theatre regarding interpretation of Annex 1,” and Annex 4, the BiH Constitution, is to be interpreted by the Constitution Court of BiH and the Entities who created it. Also flawed is the High Representative’s claim in bad faith, in paragraph 3 and 4 of his 4 May letter, that because he is the “final authority in theatre regarding interpretation of Annex 10” that none of his actions whatsoever can be questioned and that they are *ipso facto* lawful.

The High Representative’s assertion of the power to impose laws and other decisions by decree violates the Dayton Accords. Annex 10, the source of the High Representative’s legal authority, cannot, in good faith, be interpreted to empower the High Representative to decree laws, amend constitutions, create BiH government institutions, summarily punish individuals, or otherwise act as a foreign dictator over BiH and its citizens. Indeed, no official in any state governed according to the rule of law has such powers. As summarized by Matthew Parish, the former head of one of the legal departments at the OHR, the High Representative’s legal mandate under Annex 10 is to be “a manager of the international community’s post conflict peace building efforts, and a mediator between the domestic parties.”<sup>9</sup> Any good-faith reading of Annex 10 supports Mr. Parrish’s view of the limited scope provided to the High Representative by its legal mandate.

## **VII. Conclusion**

The unlawful actions of the High Representative are destabilizing to BiH and injurious to its citizens. Questioning actions of the High Representative, including by seeking the views of citizens regarding the High Representative’s actions and institutions that affect their lives, is not a violation of the Dayton Accords. It is the important exercise of democratic and human rights protected by the Dayton Accords. Indeed, the High Representative’s efforts to suppress discussion of the legal validity and political desirability of his own decrees, including by the threat or use of sanctions, is itself contrary to the Dayton Accords. After more than a decade of continued abuse of authority by the High Representative, rule by autocratic decree in violation of the Dayton Accords and international law continues to seriously destabilize BiH and can no longer be condoned.

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<sup>7</sup> Emphasis added.

<sup>8</sup> Emphasis added.

<sup>9</sup> Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007, p. 13.



## **Referenda Are Vital Instruments of Democracy**

### **I. Introduction**

The Government of Republika Srpska (“the Government”) fully supports the Dayton Accords – including the Constitution of Bosnia and Herzegovina (“BiH”) – and is committed to the rule of law and respect for human rights. These principles, and the Government’s responsibility to its citizens, have compelled it to protect the Republika Srpska and its citizens from the unlawful actions of the High Representative, who has frequently violated the Dayton Accords, the rule of law, and human rights.

The High Representative’s legal mandate is established by the agreement set out in Annex 10 of the Dayton Peace Accords. Annex 10 does not remotely suggest that the High Representative has the power to enact law by decree, overturn acts of parliament and institutions duly arrived at by elected representatives, amend constitutions, overturn court decisions, impose new institutions, transfer constitutional competencies, remove and ban judges and other public officials and employees, freeze assets, or restrict travel – all without any due process or appeal. Nor do any other legal instruments, including UN Security Council resolutions. Nonetheless, the High Representative has carried out such activities by decree on BiH, its Entities, and their citizens.

On 13 April 2011, the RS National Assembly (“RSNA”) approved plans for a referendum to allow the citizens of the RS to express their views on laws decreed by the High Representative, including those pertaining to Court of BiH and the BiH Prosecutor’s Office. Some in the international community have suggested that the RS is planning a secession referendum or that a referendum asking the citizens views on the High Representative is somehow in violation of the Dayton Accords. This is false. The Government has stated publically and privately that the referendum is not on secession. Additionally, the Dayton Accords do not prohibit referenda and certainly do not restrict citizens’ free speech regarding the High Representative, government institutions, or other political matters. The planned referendum gives RS citizens the opportunity to take part in the Government’s defense of the Dayton Accords.

In scores of speeches and statements, particularly during last year’s election campaign, the High Representative has suggested that the governing officials of BiH and the Entities do not represent 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 condemning plans for a referendum that would boost government accountability and increase opportunities for RS citizens to make their views known.

Referenda are widely used by governments across Europe and around the world as a mechanism for insuring democratic rule and are permitted by the laws applicable to BIH. It is particularly important for RS citizens to be heard in a country in which a single, unelected, foreign official claims extraordinary preemptory powers free from any review or limits. Any attempt to prevent RS citizens from registering their views in a referendum would be a direct affront to democracy and the rule of law.

## II. Legal

### A. Legality of referenda in general

Referenda are fully consistent with the Dayton Accords, which contain no provisions that could be interpreted as prohibiting or restricting them. Indeed, the Dayton Accords in Annex 4 (the BiH Constitution), Article I, paragraph 2 requires that BiH “be a democratic state, which shall operate under the rule of law and with free and democratic elections.” The Preamble of the BiH Constitution states: “Convinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.” The BiH Constitution also provides, “All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”<sup>10</sup>

Referenda are an integral part of the practice of democratic states across Europe and the world. As the Council of Europe’s Committee of Ministers stated in a 2008 Declaration, “[D]emocracy is one of the foundations of the Council of Europe and . . . it is expressed not only through elections but also through referendums . . . .”<sup>11</sup> In a 2005 Resolution, the Council’s Parliamentary Assembly proclaimed:

Referendums represent a long-standing political tradition in a number of Council of Europe member states; in others, the participation of citizens in the decision-making process through referendums is a more recent achievement, coinciding with their passage to pluralist and representative democracies.”<sup>12</sup>

Similarly, in a 2007 resolution, the Parliamentary Assembly said, “Referendums are an instrument of direct democracy which belong to the European electoral heritage.”<sup>13</sup>

Referenda by sub-state entities are a well-established part of democratic government. The Council of Europe has made clear that its strong support for referenda extends to those held at political subdivisions below the state level.

As the Council of Europe’s Congress of Local and Regional Authorities recognized in a 2007 resolution, “referendums, *whether at national, local or regional level*, constitute one of the main instruments of direct democracy giving citizens the possibility to take part in political decision making as well as in public matters which directly concern them . . . .”<sup>14</sup>

Moreover, the Council’s Committee of Ministers, in Recommendation No. R (96) 2, recommended that member states “acknowledge that *local and regional authorities* may, within the autonomy granted to them, make provisions for referendums and/or popular initiatives at local level, by specifying, if appropriate, the matters for which these instruments

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<sup>10</sup> Constitution of Bosnia and Herzegovina, art. III-3-a.

<sup>11</sup> Declaration by the Committee of Ministers of the Council of Europe on the Code of Good Practice on Referendums, 27 Nov. 2008.

<sup>12</sup> Council of Europe, Parliamentary Assembly Res. 1704 (2005), 29 April 2005, para. 1.

<sup>13</sup> Council of Europe, Parliamentary Assembly Res. 1592 (2007), 23 Nov. 2007, para. 1.

<sup>14</sup> Council of Europe, Congress of Local and Regional Authorities Res. 235 (2007) (emphasis added).

are admitted or forbidden as well as the consultative or decisionmaking character of the referendums . . . .”<sup>15</sup>

In its 2001 Recommendation to member states on the participation of citizens in local public life,<sup>16</sup> the Council’s Committee of Ministers recommended that states consider legislation enabling:

- ii. popular initiatives, calling on elected bodies to deal with the matters raised in the initiative in order to provide citizens with a response or initiate the referendum procedure;
- iii. consultative or decision-making referendums on matters of local concern, called by local authorities on their own initiative or at the request of the local community . . . .”

The Constitution of Republika Srpska has long specifically provided for referenda, stating at Article 77 that the RSNA may decide on individual issues after a vote of the citizens in a referendum.<sup>17</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.

## **B. Legality of the planned referendum**

There is nothing in the nature of the RS’s planned referendum that would somehow render it unlawful. The planned referendum solicits voters’ views about the High Representative’s imposition of laws on BiH by decree, including the laws regarding the Court of BiH and Prosecutor’s Office of BiH.

The proposed referendum is plainly suitable under the Council of Europe’s standard. 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>18</sup>

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<sup>15</sup> Recommendation of the Council of Europe Committee of Ministers to Member States on referendums and popular initiatives at local level, Rec(1996)2, adopted 15 Feb. 1996 (emphasis added).

<sup>16</sup> Recommendation of the Council of Europe Committee of Ministers to member states on the participation of citizens in local public life, Rec(2001)19, adopted 6 Dec. 2001, appendix II(c)(4).

<sup>17</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>18</sup> Council of Europe, Parliamentary Assembly Res. 1121 (1997), 22 April 1997, para. 15(ii).

The proposed referendum certainly does not in any way 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 is intended as an affirmation of representative democracy and human rights against a High Representative who shows them little regard.

### **III. Policy**

#### **A. The RS's 2010 referendum law**

The referendum law enacted by the RSNA on 10 February 2010 was drafted in light of the Code of Good Practice of the Council of Europe's Venice Commission (CDI AD 2007-2008) and the Recommendations of the Council of Europe's Committee of Ministers on citizens' participation in public life at the local level (Rec (2001) 19).<sup>19</sup> In addition, as required by RS Government rules of procedure, the RS Ministry for Economic Relations and Regional Cooperation analyzed the referendum legislation with respect to its consistency with EU regulations.<sup>20</sup> After examining EU law, the Ministry determined that there are no sources of *acquis communautaire* pertinent to the legislation.<sup>21</sup>

The Council's Parliamentary Assembly, in a 2005 resolution, recommended "the use of referendums as a means to reinforce the democratic legitimacy of political decisions, enhance the accountability of representative institutions, increase the openness and transparency of decision making and stimulate the direct involvement of the electorate in the political process."<sup>22</sup> In the same resolution, the Parliamentary Assembly said it "considers referendums as one of the instruments enabling citizens to participate in the political decision-making process . . . ."<sup>23</sup>

In a 2007 resolution, the Council's Parliamentary Assembly called referenda "a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and decision makers."<sup>24</sup> The Parliamentary Assembly, in a 2003 resolution, called on member states to consider "more direct elements of democratic decision-making, such as popular initiatives and referendums, in particular at local level, as a means of increasing the public's identifying with political decisions thus taken."<sup>25</sup>

#### **B. The planned referendum**

It is all the more important for citizens to be heard in a country in which a single, unelected official claims and exercises such extraordinary peremptory powers. The High

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<sup>19</sup> Memorandum from Jasna Brkić, Minister of Economic Relations and Regional Cooperation, Republika Srpska, to Zoran Lipovac, Minister of Administration and Local Self-Government, Republika Srpska, 21 Jan. 2010.

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

<sup>21</sup> *Id.*

<sup>22</sup> Council of Europe, Parliamentary Assembly Res. 1704 (2005), 29 April 2005, para. 5.

<sup>23</sup> *Id.* at para. 1.

<sup>24</sup> Council of Europe, Parliamentary Assembly Res. 1592 (2007), 23 Nov. 2007, para. 2.

<sup>25</sup> Council of Europe, Parliamentary Assembly Res. 1353 (2003), 25 Nov. 2003, para. 15(a)(iii).

Representative, like most rulers who claim unbridled power, is intolerant of any suggestion – no matter the source – that his authority has limits. For example, in a 2006 decision, the BiH Constitutional Court unanimously held that the High Representative’s decrees summarily removing individuals from public office violate the BiH Constitution and human rights protected under the European Convention on Human Rights.<sup>26</sup> In response to that decision, the High Representative issued an order purporting to overrule the Constitutional Court decreeing that “any 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>27</sup> The High Representative has also sought to halt criticism of his unlawful acts by the Government and the RSNA. All of this makes it essential that the citizens of Republika Srpska have a mechanism through which to be heard.

#### **IV. Conclusion**

Peremptory authority to set aside the decisions of democratically and constitutionally selected legislatures, as exercised by an unelected, foreign individual – the High Representative – is inimical to democratic and constitutional governance. It is the High Representative’s assertion of unlimited powers that is the real affront to the Dayton Accords and the principles of democracy and rule of law that the Accords affirm. With its planned referendum, RS citizens will have an opportunity to make their voices heard about the High Representative’s actions.

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<sup>26</sup> Appeal of Milorad Bilbija et al, No. AP-953/05, para. 78 (8 July 2006).

<sup>27</sup> Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina fin the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

## The High Representative's Assault on Judicial Independence

### I. Introduction

**Judicial independence is a crucial element of the rule of law and the foundation of courts' legitimacy. The High Representative has severely undermined the independence of courts in BiH. In so doing, he has subverted the rule of law in BiH and diminished the legitimacy of its courts. The RS Government is committed to reversing the High Representative's judicial abuses and restoring judicial independence.**

### II. The High Representative has badly undermined judicial independence in BiH.

A key element in establishing the authoritarian rule of the High Representative was the 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.

In its annual report for 2003, the Sarajevo-based Helsinki Committee for Human Rights in Bosnia and Herzegovina condemned the judicial "reforms" carried out by the High Representative and the international community, which—far from ensuring judicial independence—made the judiciary beholden to foreign officials. As the Committee wrote:

[O]ne of the basic principles of the rule of law, the principle of the independence of judiciary, was supposed to be imperative in the course of reform. Unfortunately, however, this process took exceptionally long and resulted in obvious dependence of the members of judiciary on international community itself. This dependency on decisions and opinions of international community is still visible, and therefore, it did not contribute to the attainment to the desired goal, i.e. independence of judiciary."<sup>28</sup>

The Committee concluded, "It is with regret that we presume that judiciary will continue to be dependent on the international community, which will supervise the work of each and every individual judge and prosecutor in the forthcoming period."

In a 2005 report, the Institute for War and Peace Reporting, a London based NGO, wrote, "[I]nternational officials, lawyers and legal experts have . . . complained to [Balkan Crisis Report] about the extent of the involvement of the OHR in the everyday functioning of the courts, urging the High Representative to loosen his iron grip on Bosnia's judiciary."<sup>29</sup>

This international violation of judicial independence has continued unabated. As the BiH Helsinki Committee recognized in its annual report for 2007, the High Representative's

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<sup>28</sup> Helsinki Committee for Human Rights in Bosnia and Herzegovina, Report on the State of Human Rights in Bosnia and Herzegovina - Analysis for period from January to December 2003 ("2003 Helsinki Committee Report").

<sup>29</sup> Aida Sunje, *Courting Controversy in Bosnia*, Institute for War and Peace Reporting, BCR Issue 562, 2 Aug. 2005.

“powers seriously bring into question [the] judiciary's independence.”<sup>30</sup> In the same report, the BiH Helsinki Committee wrote that the lack of “any legal remedy” for the high representative’s decrees “limits the rule of law, because the independence of judiciary is not guaranteed in relation to this international institution.”<sup>31</sup>

#### **A. The High Representative has shattered the independence of the Constitutional Court.**

The BiH Constitutional Court, the highest judicial authority in BiH, is charged by the Constitution with upholding the human, civil, and political rights enshrined in the document. As is the case with any legitimate court, its ability to fulfill its responsibility rests on its independence to act judicially rather than politically.

The High Representative, however, has acted routinely to undermine the court’s independence.

According to Professor Joseph Marko, who served as one of the three foreign judges of the Constitutional Court, the High Representative has intervened directly with Constitutional Court judges to make known his wishes. Professor Marko observed that the Court’s assertion of even very limited jurisdiction over certain legislative 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>32</sup>

In their 2010 volume, *Constitution of Bosnia and Herzegovina Commentary*, scholars Christian Steiner and Nedim Ademovic note that in certain cases dealing with the High Representative’s powers, the “usual practice” of the Constitutional Court has been to seek the High Representative’s opinion before making a decision.<sup>33</sup>

In one case in which the Court failed to consult with the High Representative before issuing its decision,<sup>34</sup> 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 because it had, in effect, been requested by the High Representative who had no power to do so.<sup>35</sup>

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<sup>30</sup> Helsinki Committee for Human Rights in Bosnia and Herzegovina, Report on the State of Human Rights in Bosnia and Herzegovina - Analysis for period from January to December 2007 (“2007 Helsinki Committee Report”).

<sup>31</sup> *Id.*

<sup>32</sup> Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina*, European Diversity and Autonomy Papers (July 2004), 17 and 18.

<sup>33</sup> Christian Steiner and Nedim Ademovic, *Constitution of Bosnia and Herzegovina Commentary* (2010), 821 (“Steiner and Ademovic”).

<sup>34</sup> Constitutional Court of Bosnia and Herzegovina, Case No. U 13/02.

<sup>35</sup> Steiner and Ademovic at 821.

Steiner and Ademovic note the practice that certain Court decisions, including the one at issue in the High Representative's review request, were "unpublished."<sup>36</sup> Such a practice is inconsistent with Article VI (2)(b) 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)

The High Representative has even issued a decree unilaterally ousting two appointees to the Constitutional Court. Art. VI (1)(a) of the BiH Constitution provides that two members of the Constitutional Court "shall be selected . . . by the Assembly of the Republika Srpska." The Constitution gives the power to appoint these two members of the Constitutional Court to the "Assembly of the Republika Srpska" alone, and it does not give the High Representative or anyone else the authority to prescribe procedures for such appointments or to veto appointees. On July 26, 2002, acting in accordance with Art. VI (1)(a) of the BiH Constitution, the National Assembly of Republika Srpska appointed Prof. Miodrag Simovic and Prof. Radomir Lukić to the BiH Constitutional Court.

On 16th September 2002, acting without any legal authority, the High Representative issued a decree that purported to render "null and void and without any legal effect whatsoever" the decision of the RS National Assembly to appoint Profs. Simović and Lukić to the BiH Constitutional Court.<sup>37</sup>

The High Representative, in the decree, justified the ouster of the two Constitutional Court appointees solely by claiming that the RS National Assembly's decisions appointing them "were taken in breach of the procedures required to be followed pursuant to the Decision of the High Representative of Bosnia and Herzegovina taken on 11 January 2001." The High Representative's decree did not identify how the RS National Assembly's appointments allegedly breached procedures or even what procedures were supposedly breached. In any event, of course, the High Representative had no power to establish any such procedures in the first place.

In a further slap to the BiH judiciary, the High Representative, in the decree ousting the two new Constitutional Court appointees, declared that it "shall not be justiciable before any court in Bosnia and Herzegovina or otherwise."

Article VI (1) of the BiH Constitution provides that Constitutional Court judges shall serve until age 70 unless they resign or are removed for cause *by consensus of the other judges*. A former senior OHR attorney reports that on one occasion the High Representative pressured the court to dismiss its president. The High Representative's pressure included making a personal telephone call to at least one international judge.<sup>38</sup> When the three internationally appointed judges refused to support this effort, the High Representative issued an order unilaterally reducing their salaries.<sup>39</sup>

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

<sup>37</sup> Decision Annulling the Appointment of Two Judges from the RS to the BiH Constitutional Court, 16 Sept. 2002.

<sup>38</sup> MATTHEW PARISH, A FREE CITY IN THE BALKANS 97 (2010).

<sup>39</sup> *Id.* at 166.



When the Constitutional Court on one occasion proved to be insufficiently compliant with the High Representative's wishes, the High Representative's response was a stunning abuse of the rule of law, even by the standards of the High Representative. Despite the High Representative's pervasive efforts to control the Constitutional Court, in 2006 the Court issued a decision that took issue—delicately—with the High Representative's summary removal and banning of public employees. The Constitutional Court granted the appeal of two individuals whom the High Representative had summarily removed and banned from public employment, Milorad Bilbija and Dragan Kalinic. The Court unanimously held that the absence of a legal remedy to challenge the High Representative's decision violated the European Convention on Human Rights.<sup>40</sup> The Court concluded that the two individuals' "right to an effective legal remedy under Article 13 of the European Convention [had] been violated."<sup>41</sup>

However, in direct contempt of the rule of law and human rights, the High Representative responded in March 2007 by issuing a new decree nullifying the Constitutional Court's decision.

In a press release announcing its nullification decree, the Office of the High Representative made clear that it was defying the Constitutional Court and closing off the possibility of independent review for Bilbija and Kalinic. The press release said, "The Decision of the Court does not affect the decisions of the High Representative and individuals who have been banned from public life by such decisions, including both Milorad Bilbija and Dragan Kalanic [sic], remain banned until the High Representative decides otherwise."<sup>42</sup>

As discussed below, in addition to nullifying the Constitutional Court's decision, the High Representative's order purported to control future actions of lower courts as well.

The High Representative continues to attack the independence of the Constitutional Court. To cite one recent example, on 5 January 2011, the High Representative issued a decree suspending the 2010 RS State Property Law until a decision of the BiH Constitutional Court ruling on the RS law has entered into force. The 5 January 2011 decree notes that a request for a review of the constitutionality of the RS law has been filed with the Constitutional Court.

Article 77 of the BiH Constitutional Court's procedural rules permits the court to "adopt any interim measure it deems necessary in the interest of the parties or the proper conduct of the proceedings before the Constitutional Court." Article 77 even provides that the President of the Constitutional Court may adopt interim measures if it is not possible to convene the court. While no interim measures were justified, the High Representative nonetheless chose to prejudge the case filed with the Constitutional Court and issue his own interim measures by decree, usurping the competency of the Court.

The High Representative has also prejudged the Constitutional Court's consideration of whether it has jurisdiction to rule on the RS law. Under the High Representative's decree, the

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<sup>40</sup> Bilbija, AP-953/05 (BiH Const. Ct. July 8, 2006), paras. 72-76.

<sup>41</sup> *Id.* at para. 76.

<sup>42</sup> Office of the High Representative, High Representative Issues Order Concerning Implementation of Constitutional Court Decision AP-953/05, 23 March 2007.

suspension of the RS law is to continue “until a final decision of the Constitutional Court of Bosnia and Herzegovina on said Law enters into force.” This presupposes that the Constitutional Court will determine that it has jurisdiction to rule on the law. In reality, the Constitutional Court lacks jurisdiction to rule on this matter, but the High Representative commanded the Court to decide otherwise.

By issuing his decree purporting to suspend the operation of the RS law, the High Representative has also sent the Constitutional Court an unmistakable signal of his wishes with respect to the Court’s action on the RSNA law. The Constitutional Court’s judges ignore the High Representative’s desires at great risk. As explained elsewhere in this paper, the High Representative has demonstrated its willingness to penalize judges for failing to accede to its wishes, including by pushing for their ouster and reducing their salaries.

The High Representative’s latest interference in the Constitutional Court’s work shows the OHR’s profound disrespect for the independence of the Constitutional Court and the rule of law. As explained below, it is just part of the High Representative’s broader assault on the independence of the judiciary.

**B. The High Representative has ordered courts throughout BiH to issue decisions according to his preferences.**

The High Representative has often attacked the independence of courts throughout BiH by instructing them on how they are to rule.

As explained in Section A, above, the BiH Constitutional Court unanimously held in 2006 that the lack of a legal remedy to for an official removed and banned from public service to challenge the High Representative’s decree violated the European Convention on Human Rights. The High Representative responded by nullifying the Constitutional Court’s decision. But the High Representative’s nullification decree went much further. It gave all courts in BiH orders on how to handle any future proceedings that take “issue in any way” with the High Representative’s decisions. The order pronounced:

Notwithstanding any contrary provision in any legislation in Bosnia and Herzegovina, 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.

Any proceeding referred to in Paragraph 1 of this Article shall be effectively and formally notified to the High Representative by the concerned court without delay.<sup>43</sup>

The order also provided that “no liability is 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*

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<sup>43</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.

all.”<sup>44</sup> Thus, in addition to forbidding courts to adjudicate cases that take “issue in any way with” his decisions, the High Representative banned courts from affording victims of his human rights violations any kind of remedy. In the same order, the High Representative even went so far as to threaten to remove and ban any individual who took steps toward establishing a mechanism to review his decisions.<sup>45</sup>

Another example of the High Representative’s interference in the decisions of lower courts arose out of the 2002 decertification of police officers throughout BiH. In 2002, the UN Mission in Bosnia and Herzegovina declared 793 police officers unfit to exercise police powers and banned them from police service for life.<sup>46</sup> The UN Mission required the Ministries of Interior of Republika Srpska and the Federation to remove these individuals from their positions. Despite the severe sanctions against the decertified police officers, none had been given a hearing to contest the allegations against them. Some of the officers were never even given a reason for their lifetime ban.<sup>47</sup>

In 2003, hundreds of summarily banned police officers brought judicial proceedings challenging their decertifications, seeking to clear their names and regain their eligibility to work in law enforcement.<sup>48</sup> Some first-instance courts initially declared the police officers’ dismissals unlawful, in part because BiH laws did not allow for an international decertification to serve as the basis for termination of an employment contract.<sup>49</sup>

The OHR, however, refused to let the courts decide these cases. In a 13 May 2003 letter to Jean-Marie Guehenno, the UN Under-Secretary-General for Peacekeeping Operations, High Representative Ashdown asked for urgent action to stop the courts. The High Representative wrote:

The Courts are ignoring or misinterpreting the legal force of the UN decisions . . . . We have made and continue to make clear that decisions issued by your Mission on certification/de-

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<sup>44</sup> *Id.*

<sup>45</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>46</sup> European Stability Initiative, *On Mount Olympus*, 10 Feb. 2007 (“*On Mount Olympus*”), 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 16.

<sup>49</sup> *Id.*

certification cannot now be re-opened either by my office, by EUPM or any other organization. We have now reached the stage, however, where we need your rapid intervention in this matter.<sup>50</sup>

Ashdown's letter continued, "I believe it is important that the grounds under which the UN decisions were taken be restated clearly and authoritatively, and in a form that can be used in public, by UN Headquarters if this debate is to be put firmly to rest."<sup>51</sup> Ashdown asked for action "to set aside the verdicts or to stay their enforcement and the progress of the pending and impending cases."<sup>52</sup>

Guehenno responded 15 days later with a letter that contained the statements requested by Ashdown.<sup>53</sup> Guehenno endorsed the decertification process, said it "should not be undermined," and warned: "I should also stress that decisions by the Commissioner of the IPTF, in relation to police certification, remain final and binding."<sup>54</sup>

Nine days later, the OHR sent Guehenno's letter, accompanied by a letter from the Senior Deputy High Representative, to an extensive list of officials in BiH. The OHR's letter asked that the two letters be "widely disseminated to officials and members of the law enforcement bodies *and judiciary dealing with these matters so that no one is in any doubt about their responsibilities to implement the results of the certification process.*"<sup>55</sup> The OHR's letter warned, "Any other course of action would inflict grave damage on the integrity of the foundations that have been laid for democratic law enforcement in this country. *That is not something which Bosnia and Herzegovina or the international community could afford to accept.*"<sup>56</sup>

In its 2003 annual report on human rights, the BiH Helsinki Committee condemned this assault on judicial independence, calling it just one of many examples of the courts' "obvious dependence" on the decisions and opinions of the international community in BiH.<sup>57</sup> The Committee observed that in sending this letter to the courts

the international community directly interfered with the work of [the] judiciary and obviously demonstrated its intention to "control" the work of the court in the most inappropriate way. It would be difficult to imagine any judge in Bosnia and

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<sup>50</sup> *Id.* at 16 (quoting Letter from High Representative Lord Paddy Ashdown to UN Under-Secretary-General Jean-Marie Guehenno, 13 May 2003).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 17.

<sup>54</sup> *Id.* at 17 (quoting Letter from UN Under-Secretary-General Jean-Marie Guehenno to High Representative Lord Paddy Ashdown, 28 May 2003).

<sup>55</sup> *Id.* at 17 (quoting Letter from Ambassador Bernard Fassier, Senior Deputy High Representative, to Bosnian officials, 6 June 2003).

<sup>56</sup> *Id.*

<sup>57</sup> 2003 Helsinki Committee Report.

Herzegovina, whose appointment depends on a body such as High Judicial and Prosecutorial Council, established by the international community, to pass a decision that would differ from the one recommended in the letter of the High Representative.<sup>58</sup>

Despite the OHR's threatening letter, the European Stability Initiative notes that "some courts were not yet intimidated and continued to declare the dismissals unlawful. A few even ordered the reinstatement of the police officers."<sup>59</sup> In response, Guehenno wrote in October 2003 to the BiH Presidency and asked it to "take the necessary steps to set aside the judgements challenging the validity of the certification process and to ensure that no similar decisions are taken in the future."<sup>60</sup> As the ESI notes, Guehenno's letter "left unclear on what legal basis the Presidency was to interfere with the work of the courts, and how this was compatible with the principle of separation of powers or, indeed, the rule of law."<sup>61</sup>

Even after Ashdown became convinced that the UN's police decertification process had been deeply flawed, he rejected any role for BiH courts in reviewing decertification decisions. In an 8 March 2004 letter to Guehenno, Ashdown wrote, "These decisions will be highly political in nature. Leaving them to the BiH authorities would almost certainly lead to decisions whose effects would be to roll back the UN's achievements in police reform."<sup>62</sup> Guehenno agreed, telling Ashdown, in a 16 March 2004 letter, "We share your reluctance to entrust such a process to the local authorities . . . ."<sup>63</sup> As the ESI observes, the UN and the OHR disagreed as to the extent of the problems with the decertification process, and the "only action on which the two institutions could agree was intimidating the Bosnian courts and authorities into doing nothing."<sup>64</sup>

According to the ESI, "pressure from OHR and the UN eventually produced the desired effect. With very few exceptions, court rulings in favour of the police were ultimately overturned at second or third instance, or the cases were simply not decided . . . ."<sup>65</sup>

### **C. The High Representative has summarily dismissed judges.**

One way in which the High Representative has asserted control of the judiciary and undermined its independence has been the summary dismissal of judges. In a series of proclamations in 2002, the High Representative decreed that all judges and prosecutors of the Entities were required to resign and then reapply for their positions.<sup>66</sup> The High

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<sup>58</sup> *Id.*

<sup>59</sup> *On Mount Olympus* at 17.

<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 20.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at Executive Summary.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> *E.g.*, Decision Enacting the Law on Amendments to the Law on Courts and Judicial Service of the Republika Srpska, 1 Nov. 2002; Decisions Enacting the Law on the Federation Prosecutor's Office of the Federation of Bosnia and Herzegovina, 21 Aug. 2002. *See also* Gerhard Knaus and Felix Martin,

Representative did not even make an exception for the many judges who had been given life tenure after passing a comprehensive review in 2000.<sup>67</sup> The High Representative placed the burden of proof on each applicant to show that he was qualified. The High Judicial and Prosecutorial Councils (which as explained in Section D, below, were hand-picked by the High Representative), declined to reappoint approximately 30% of the sitting judges who reapplied.<sup>68</sup> In effect, the High Representative had summarily fired hundreds of judges—including judges with life tenure—without so much as a hearing.

The High Representative disregarded the Council of Europe’s firm opposition to his wholesale purge of the judiciary. In written comments following a closed-door meeting with OHR on 22 March 2002,<sup>69</sup> the Council criticized the High Representative’s plans to dismiss all of BiH’s judges, calling the proposed process “disguised disciplinary proceedings without any of the guarantees associated with such proceedings.”<sup>70</sup> The Council pointed out that “[c]orrupt or biased judges can be removed following disciplinary proceedings.”<sup>71</sup> It warned that there was “a substantial risk” that decisions in the process “may be considered as taken in violation of Article 6” of the European Convention on Human Rights.<sup>72</sup> The Council of Europe concluded its comments by emphasizing that problems in the BiH judicial system

have to be resolved in a constitutional and legal manner, respecting the very principles justifying the presence of the international communities in BiH. If the International Community is not willing to abide by its own principles when faced by major difficulties, what can we expect from local politicians?<sup>73</sup>

In a June 2004 report, the Parliamentary Assembly of the Council of Europe wrote, “We have heard a number of complaints regarding the reappointment process, in particular arbitrariness, lack of explanation of the decisions and absence of any appeal procedure.”<sup>74</sup>

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*Travails of the European Raj*, 14(3) J. DEMOCRACY 60, 61 (July 2003); Committee on the Honouring of Obligations and Commitments by member States of the Council of Europe, *Honouring of obligations and commitments by Bosnia and Herzegovina*, Doc. 10200 (4 June 2004), para. 160.

<sup>67</sup> Knaus and Martin at 65.

<sup>68</sup> Alexander Mayer-Rieckh, *Vetting to Prevent Future Abuses*, International Center for Transitional Justice, 2004, executive summary.

<sup>69</sup> Knaus and Martin at n. 8.

<sup>70</sup> Council of Europe, Comments on the “Discussion Paper on the Selection Process for the Interim High Judicial Council,” at [www.esiweb.org/pdf/esi\\_europeanraj\\_judicialreform\\_id\\_3.pdf](http://www.esiweb.org/pdf/esi_europeanraj_judicialreform_id_3.pdf) (“Council of Europe Comments”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Committee on the Honouring of Obligations and Commitments by member States of the Council of Europe, *Honouring of obligations and commitments by Bosnia and Herzegovina*, Doc. 10200 (4 June 2004) (“2004 Council of Europe Report”), para. 163.

An obvious and clearly intended result of the wholesale dismissal of judges and prosecutors was to make them compliant with the wishes of the High Representative upon whose satisfaction their continued careers would depend. In addition to dismissing judges, the High Representative has also issued 14 decrees summarily suspending individual judges. In 2004, the Parliamentary Assembly of the Council of Europe called on the High Representative to “stop the practice of removing officials, including judges and elected representatives, from office.”<sup>75</sup>

#### **D. The High Representative Dominates the Judicial Appointment Process throughout BiH**

The High Representative’s overwhelming influence over the judicial appointment process is another way in which he has weakened judges’ independence. Early in the previous decade, the High Representative illegally seized control of the judicial appointment process throughout BiH.

On 23 May 2002, the High Representative by decree amended the constitutions of the Federation and the RS to provide a constitutional fig leaf for his decrees that—on the same day—established High Judicial and Prosecutorial Councils (“HJPCs”) for each Entity.<sup>76</sup> The High Representative decreed that these HJPCs would have the power to make all appointments of judges and prosecutors in the Entities.<sup>77</sup> The High Representative also handed down a decree creating a state HJPC for BiH with the power to make all appointments to the State Court and the Prosecutor’s Office, except for foreign judges and prosecutors, the appointment power for which the High Representative bestowed on himself.<sup>78</sup>

The High Representative issued a decree appointing all of the original members of all three HJPCs<sup>79</sup> and continued to make all appointments to the HJPCs until the end of a “transitional period,” which lasted until 31 May 2004.<sup>80</sup> The High Representative appointed eight

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<sup>75</sup> 2004 Council of Europe Report, para. 10.

<sup>76</sup> Office of the High Representative, Decision Amending the Constitution of the Republika Srpska, 23 May 2002; Office of the High Representative, Decision enacting the Law on the High Judicial and Prosecutorial Council of the Republika Srpska, 23 May 2002; Office of the High Representative, Decision Amending the Constitution of the Federation of Bosnia and Herzegovina, 23 May 2002; Office of the High Representative, Decision enacting the Law on the High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina, 23 May 2002.

<sup>77</sup> Law on the High Judicial and Prosecutorial Council of Republika Srpska, imposed by the High Representative 23 May 2002, art. 18; Law on the High Judicial and Prosecutorial Council of the Federation of Bosnia and Herzegovina, imposed by the High Representative 23 May 2002, art. 18.

<sup>78</sup> Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, imposed by the High Representative 23 May 2002, art. 17.

<sup>79</sup> Office of the High Representative, Decision on Appointment of Members of the High Judicial and Prosecutorial Councils, 6 Aug. 2002.

<sup>80</sup> Alexander Mayer-Rieckh, *Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor’s Offices in Bosnia and Herzegovina*, in ALEXANDER MAYER-RIECKH AND PABLO DE GREIFF, EDS., *JUSTICE AS PREVENTION* (2007) 180, 197.

foreigners to serve on both of the Entity HJPCs.<sup>81</sup> These foreigners comprised half the membership of each Entity HJPC. The other half included six members from the Entity and two members from the other Entity.<sup>82</sup> Thus, only six of 16 members of each Entity HJPC were appointed from that Entity. The High Representative also appointed foreigners to be the president and vice president of all three Entity HJPCs.<sup>83</sup>

The HJPCs during this “transitional period” were extraordinarily important because they selected all of the judges of the Entities during the process in which all judges were dismissed and forced to reapply for their positions (as discussed in section C, above). The two Entity HJPCs in 2004 were merged into the central HJPC for BiH.

In addition to giving the OHR-dominated HJPCs the power to make all judicial and prosecutorial appointments in the Entities, the High Representative also decreed that they would have the power to discipline and even remove judges and prosecutors based on a long list of factors.<sup>84</sup> This further undermines the independence of judges throughout BiH.

The High Representative’s domination of the selection of judges and prosecutors—both through his own appointments and through the HJPCs he created—severely compromises the independence of courts throughout BiH.

#### **E. The OHR Dominates the State Court and Prosecutor’s Office.**

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. The High Representative by decree created a new BiH State Court and related Prosecutor’s Office that claim broad powers and jurisdiction. They were established in violation of the BiH Constitution set forth in Annex 4 of the Dayton Peace Accords, and they operate in conflict with the rule of law and principles of democratic governance. Dominated by the High Representative, they are an affront to judicial independence and BiH sovereignty. The RS Government is fully committed to ending these abuses as its constitutional obligations require.

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.

In 2000, however, the High Representative took it upon himself to impose a State Court on BiH’s citizens by unilaterally decreeing a “Law on Court of Bosnia and Herzegovina.” In

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<sup>81</sup> Office of the High Representative, Decision on Appointment of Members of the High Judicial and Prosecutorial Councils, 6 Aug. 2002.

<sup>82</sup> Mayer-Rieckh at 197.

<sup>83</sup> Office of the High Representative, Decision on Appointment of Members of the High Judicial and Prosecutorial Councils, 6 Aug. 2002.

<sup>84</sup> *E.g.*, Law on the High Judicial and Prosecutorial Council of Republika Srpska, imposed by the High Representative 23 May 2002, arts. 48-51.



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.
- 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.

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.

The appointment of the foreign judges and prosecutors was badly flawed, and their performance in office has been poor. A former senior OHR attorney writes:

The international judges and prosecutors were appointed by decisions of the High Representative, mostly on the basis of diplomatic whim. (There was no formal or transparent process of selection and evaluation.) Because of a lack of demand for the international positions, the quality of the judges so appointed was very mixed and their knowledge of the Bosnian legal system, under which they were supposed to be working, mostly minimal.

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International judges would be appointed for two-year positions but were reappointed even if they were of poor quality, because

the international community did not know how to find alternative candidates. . . . The practice of the Court was awash with elementary mistakes, in significant part deriving from the lack of familiarity of international judges and prosecutors with domestic procedures.<sup>85</sup>

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. Essential elements of judicial independence have been eliminated. 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.

Recent statements by the President of the State Court, Medžida Kreso, have highlighted the court's supplicant relationship to the High Representative and the court's lack of independence. For example, in a 7 April 2011 statement to the Sarajevo daily *Dnevni Avaz*, Kreso called for the High Representative to halt a proposed referendum in the RS regarding the need for the State Court, saying, "The announcement of a referendum should be a clear signal for the [international community] to stop this process, as the domestic political elite has no power to do such thing."<sup>86</sup> Referring to Serbia's efforts to secure the extradition of war crimes suspects Ejup Ganić and Jovan Divjak, Kreso told *Dnevni Avaz* that the "entire region" is a "prisoner of the Serbian policy of prosecution of war crimes."<sup>87</sup>

The State Court and Prosecutor's Office has also demonstrated its lack of independence through its actions, which have shown a decided preference for those accused of war crimes against Serbs. For example, after investigating a massacre of Serbs in Tuzla, the ICTY identified five individuals for whom there was sufficient evidence for indictment. The BiH Prosecutor's Office, however, halted the investigation of these individuals.

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, 2009, 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."

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

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

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<sup>85</sup> PARISH at 167-168.

<sup>86</sup> Faruk Vele, *Medžida Kreso, predsjednica Suda BiH: Cijeli region je talac Srbije*, DNEVNI AVAZ, 8 April 2011.

<sup>87</sup> *Id.*

domestic law of BiH, including the BiH and RS Constitutions, and applicable international law.

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 Peace 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. 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.

The RS Government's responsibility to cooperate with the High Representative in connection with peace implementation does not supersede the RS Government's obligations under domestic and international law. When a decision of the High Representative conflicts with the RS Government's duties under the constitutions of BiH and Republika Srpska or its obligations under international law, the constitution and legal obligations under BiH and Republika Srpska law have legal priority. As a matter of law, where the decisions of the High Representative are incompatible with applicable law, they are not valid or enforceable.

For this reason, 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 the BiH State Court and Prosecutor's Office are also of doubtful legal validity. These agencies were created and operate pursuant to decrees imposed by the High Representative, in contravention of BiH, Entity and international law. In its Third Report to the Security Council in May 2010, the RS Government set out in full its legal position regarding these acts of the High Representative.

The RS Government's position is not only required by law and RS values, but also consistent with fundamental principles cherished by the U.S., EU and other democratic states. These include a commitment to democracy, transparency, accountability, protection of human rights and the rule of law.

#### **IV. Conclusion**

An independent judiciary is essential for the rule of law. The High Representative continues to force BiH courts and prosecutors to submit to his rule rather than the rule of law. So long as this continues, the actions of BiH courts and judicial officers, lacking independence, will also lack legitimacy.

# **The High Representative's Annulment of the Central Election Commission's Decisions is a Gross Violation of the Law and Highly Destabilizing to BiH**

## **I. Introduction**

The Government of Republika Srpska takes serious objection to the High Representative's *Order Temporarily Suspending Certain Decisions of the Central Election Commission of Bosnia and Herzegovina Adopted at its 21st Session Held on 24 March 2011 and any Proceedings Concerning Said Decisions*, dated 27 March 2011, and to the Peace Implementation Council Steering Board Communiqué, dated 30 March 2011, which supports this order. The decree violates fundamental provisions of the BiH Constitution, Federation law and judicial decisions, BiH law, the Dayton Peace Accords, and international law. It sets aside the international community's stated policies with respect to the formation of BiH's governments. It is a further assault on judicial independence in BiH. And it is a destabilizing attack on vital protections for BiH Constituent Peoples. The Government calls upon the High Representative and the PIC Steering Board to immediately reverse this dangerous course of action.

While the government is reluctant to comment on matters most directly affecting the Federation, unfortunately the High Representative's actions in this case also have a direct effect upon the RS in several different respects. First, the High Representative acted to put in place a new government in the Federation through illegal and unconstitutional procedures. The Central Election Commission has confirmed the illegality of the process through which the new Federation government has been formed. However, notwithstanding the High Representative's illegal and unconstitutional action, the RS Government is bound to obey the laws and constitutions of BiH and the Entities even if the High Representative does not. The RS Government, therefore, cannot recognize the new Federation Government as having authority to act on behalf of the Federation. The result is that the High Representative's decree has made it impossible for many joint institutions of BiH to function, and this has a negative impact upon the RS. Second, the High Representative's actions seriously threaten the entire legitimacy of the state of BiH. The Dayton Accords, which include the Constitution of BiH, put in place strong protections for each Entity and for each of the three Constituent Peoples. The High Representative's actions have eliminated the constitutionally protected voice of the Croat people in the Federation. If this can be done in the Federation with impunity, the Serb people too are threatened. Most immediately, the threat arises with respect to formation of institutions of BiH. Finally, it is obvious that so long as the High Representative is prepared to set aside the Constitution and laws in BiH in order to accommodate the most powerful Bosniak parties, the very foundations of the state established by the Dayton Accords is imperiled.

## **II. The CEC's Decisions and the High Representative's extralegal nullification.**

On 24 March 2011, the Central Election Commission of Bosnia and Herzegovina ["CEC"] issued two decisions and a conclusion. In the first decision, the CEC determined that elections to the House of Peoples of the Federation had not been conducted in all ten cantons of the Federation and that, because of this, the conditions for constituting the House of Peoples had not been met. In the second decision, the CEC determined that the election of the president and vice president of the Federation were not conducted in accordance with the BiH Election Law and annulled their elections. On the same day, the CEC issued a

Conclusion ordering the cantonal legislative bodies that failed to conduct elections to the House of Peoples to immediately conduct such elections.

On 27 March 2011, however, the High Representative cast aside this legally established process by handing down a decree “suspending” the two CEC decisions barring establishment of a new Federation government which the Commission determined had not been chosen in accordance with the Constitution and laws of the Federation. His order also blocked the process of judicial appeal of the CEC decision established by law by blocking “all proceedings concerning” the CEC decisions “until such time as the High Representative decides otherwise.” Thus the High Representative has given himself total control over legal process for establishment of the Federation government. Even worse, he has put in place an illegally organized government in the Federation, whose actions will be legally invalid.

The decree, as if to underline its own lawlessness, says that it “shall have precedence over any inconsistent provisions of any law, regulation or act, existing or future.” In addition, the decree proclaims that it “shall be directly applicable” and that “no further act is required to ensure its legal effect.” Thus, no opportunity for public discussion of this action was provided and no appeal is to be permitted. We hear admonitions almost daily from European officials regarding the importance of European values. Yet the PIC has endorsed the actions of a single, unelected official which set aside both domestic and international law in a matter central to the democratic governance of BiH. How can such an action be squared with European values?

CEC members were shocked by the High Representative’s extralegal action. CEC member Tihomir Vujičić said:

We were working strictly in line with the BiH Election Law. These are our competencies and jurisdiction. The OHR decision is a surprise, especially because our decisions can be appealed directly to the BiH Court, which has very short deadline to decide on the appeal. The fact is that President and vice presidents of the Federation were not elected in line with the Election Law because that was done without the presence of one third of the Croat Caucus. This alone was sufficient to annul the election.”

The decree even drew strong objections from Bosniak-dominated parties. The Party of Bosnia and Herzegovina said in a press release, “[W]hat we have here is the suspension of the Dayton Peace Agreement and the BiH institutions, which leads to anarchy.”<sup>88</sup> The Social Democratic Union said the new decree “egregiously violated the principle of legality and legitimacy of the institutions of the state.”<sup>89</sup>

**A. The 27 March decree sets aside the international community’s stated policies with respect to the formation of BiH’s governments.**

The 27 March decree is flatly inconsistent with the international community’s stated positions. In a statement on 8 March 2011, the United States strongly suggested that it would

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<sup>88</sup> European Union Policy Mission in B&H, PPIO Daily Media Summary, 29 March 2011.

<sup>89</sup> *Id.*

agree with the decisions the CEC ultimately reached and which have now been nullified by the High Representative. In that statement, U.S. State Department spokesman Philip J. Crowley said:

[W]e call upon the parties seeking to convene the Federation House of Peoples to postpone this action until delegates from all cantons are certified by the Central Election Commission. *Any attempt to convene the House of Peoples before the Central Election Commission certifies the delegates from all cantons raises serious legal concerns regarding the legitimacy of such a body.*<sup>90</sup>

Miroslav Lajčák, European External Action Service Managing Director for Europe and Central Asia, at a 24 February 2011 press conference in Sarajevo, said it was “not the European way” to interfere in the formation of BiH’s governments.

Nevertheless, the High Representative’s decree, which the PIC Steering Board has supported (though not unanimously), has unlawfully put in place a government, taking the side of the two largest Bosniak parties against the two largest Croat parties.

**B. The decree substitutes the High Representative’s political preference for the legal decision-making process.**

The CEC’s decisions were entirely legal and proper. The High Representative has not alleged otherwise. The High Representative asserted that his order was necessary for “legal certainty.” But nothing about the CEC’s decisions created legal uncertainty. On the contrary, the CEC’s duly promulgated decisions would have prevented the highly questionable actions of the Federation House of Peoples from taking effect, namely, the unlawful formation of the House of Peoples and election of the president and vice president of the Federation. If legal clarity had been the objective, the High Representative would have respected the decision of the competent authority and left in place the existing government--rather than replacing it with a new one--until judicial appeals had been decided. The course of legal certainty was the opposite of that taken by the High Representative. Indeed, legal certainty is impossible in a country in which a foreign diplomat may, at his whim, issue decrees that upend the country’s laws and legally established processes.

**C. The High Representative’s decree gives judicial institutions unmistakable instructions on how to rule, undermining yet again judicial independence.**

Though the OHR is not a court and has no appellate authority over BiH institutions, the High Representative nevertheless donned judicial robes to act as an appeals judge to overrule the CEC’s duly promulgated decisions. The High Representative justifies his 27 March decree as if he were an appellate court correcting a mistake of law by a lower court. For example, in the decree’s preamble, the High Representative writes that he is

*Convinced* that the Election Law of Bosnia and Herzegovina neither prevents the certification of the mandates of all those delegates elected in order to give effect to the above mentioned

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<sup>90</sup> U.S. Dept. of State, Statement on Bosnia and Herzegovina’s Government Impasse, 8 March 2011 (emphasis added).

provision of the Election Law of Bosnia and Herzegovina nor the publication in the relevant official gazettes of the results of the elections conducted in cantonal assemblies;

The decree goes on to elaborate on the High Representative's view that the CEC committed a legal error in its decisions. The 27 March decree essentially instructs the Federation Constitutional Court to set aside the CEC's decisions and uphold the formation of a new Federation government in spite of its manifest illegality.

In a masterpiece of circular argument, the High Representative rests his new legal interpretation on two of the High Representative's own earlier legal interpretations. The decree treats OHR legal interpretations as if they are binding constitutional law:

Recalling the Legal Opinion of the Office of the High Representative of 9 February 2001 . . . and the OHR interpretation of 15 January 2007, which clearly provided inter alia that the House of Peoples of the Federation of Bosnia and Herzegovina could hold its constitutive session with a simple majority of delegates elected by the Cantons, approve legislation and begin the process of making nominations to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina while the vacant posts in the House of Peoples of the Federation of Bosnia and Herzegovina would be filled as subsequent elections are approved;

The decree then explains that the Federation Constitution "must be interpreted" in such a way as to uphold the illegal formation of the Federation government:

Emphasizing that the institutional mechanisms provided for by the respective Constitutions at the Cantonal, Federal or State level cannot be paralyzed through boycott and that a Constitution in a democratic system must be interpreted with a view to ensuring effective institutional functioning.

The decree ignores the fact that—as the prominent Bosniak legal expert Sead Hodžić recently pointed out—the OHR's 9 February 2001 Legal Opinion has been set aside by the Federation Constitutional Court.<sup>91</sup>

The legal arguments put forth in the decree are quite unconvincing, but judges discount them at their peril. The High Representative has demonstrated its willingness to penalize judges for failing to accede to its wishes, including by pushing for their ouster and reducing their salaries.<sup>92</sup> The High Representative has also removed many judges from office and nullified

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<sup>91</sup> M. Kukan, *On the Trail of the Announcements of the Formation of the House of Peoples: The Possible Destruction of the Federation BiH*, DNEVNI AVAZ, 3 March 2011.

<sup>92</sup> For example, a former senior OHR attorney reports that in 2005, the High Representative pressured the Constitutional 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. MATTHEW PARRISH, *A FREE CITY IN THE BALKANS* (2009), p. 97.

court decisions that do not go its way.<sup>93</sup> This is only one of many serious actions by the High Representative that fatally undermines judicial independence.

Because the High Representative has made clear which way it intends the judiciary to rule, a decision that conformed to the High Representative's wishes and contradicted the Central Election Commission would lack legitimacy.

#### **D. The 27 March decree is destabilizing.**

By issuing his 27 March decree, the High Representative is taking part in a destabilizing attack on the Dayton Accords' vital protections for BiH's Constituent Peoples. It has long been the agenda of the SDP to centralize power in the Bosniak parties and marginalize BiH's other constituent peoples, the Serbs and the Croats. Unable to achieve changes to the BiH Constitution to centralize power in the Bosniak parties through the legally established amendment process, the SDP is now using extra-constitutional methods to achieve the same end.

Even worse than the SDP's agenda to centralize power in the Bosniak parties is the High Representative's now-open support for this policy. By handing down his 27 March decree, the High Representative has abandoned any pretense of objectivity in the dispute and is now an accessory to the SDP's unconstitutional actions to exclude Croat voters from the democratic election process. The basis of BiH's viability as a state is respect for its three Constituent Peoples. By assisting with the SDP's agenda, the High Representative is threatening BiH's stability.

If the PIC Steering Board and High Representative support the SDP in destroying the protected rights of the Croats in the FBiH with extra-constitutional maneuvers, the RS Government will have no confidence that the PIC Steering Board and High Representative have any interest in upholding the protections for BiH's three Constituent Peoples, set forth in the Dayton Accords, at the BiH state-level or within Republika Srpska.

### **III. Conclusion**

As a matter of law, the High Representative does not rule BiH at his discretion. As a matter of practice, the High Representative acts otherwise--in direct contravention of law. His order nullifying the decision of the CEC is the latest egregious example of this. Such actions cannot be supported without making a mockery of democracy and the rule of law or without destabilizing BiH's future.

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<sup>93</sup> In 2002, the High Representative decreed that all judges and prosecutors were required to resign and reapply for their positions and placed the burden of proof on each applicant to show that he was qualified. The High Representative, by unilateral decree, ousted two appointees to the BiH Constitutional Court and has issued 14 decrees summarily removing other judges from the bench. Despite the High Representative's pervasive efforts to control the BiH Constitutional Court, in 2006 the Court issued a decision that took issue—delicately—with the High Representative's summary removal and banning of public employees. The Court unanimously held that the absence of a legal remedy to challenge the High Representative's decision violated the European Convention on Human Rights. The High Representative responded not only by nullifying the Constitutional Court's decision but also by ordering all courts to dismiss any proceedings that "take issue in any way" with the High Representative's decisions.