



REPUBLIC OF SRPSKA  
PRESIDENT OF THE REPUBLIC

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His Excellency Ban Ki-Moon

Secretary General

The United Nations

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New York, New York, USA 10017-3515

September 30th 2015

Dear Mr. Secretary General,

I am writing to respond to a Special Report addressed to you from the High Representative in Bosnia and Herzegovina, dated 4 September 2015. The High Representative failed to provide a copy of the Special Report to Republika Srpska (RS) and only made the Report public on 17 September 2015. The RS strongly objects to the Special Report, in which the High Representative renders a "determination" that Republika Srpska is in breach of the Dayton Peace Accords (DPA). For reasons explained in detail in the RS's Response, enclosed herein, the High Representative lacks the legal authority to promulgate such a determination, and his legal reasoning and facts asserted in reaching his determination are wholly without merit.

The supposed basis for this determination is the RS's plans to hold a referendum to ascertain citizens' views about the High Representative's illegal imposition of laws on BiH, including the laws on the Court and Prosecutor's Office. The Report continues the High Representative's long pattern of suppressing dissent against his self-proclaimed authority to unilaterally decree laws, amend constitutions, and punish those who disagree with his actions. The Report states that "measures taken [by the High Representative] in implementing the GFAP [Dayton Peace Accords] over the last 20 years must not be called into question." The RS's Response to the High Representative's Report explains why the Secretary General, Security Council, and other



members of the international community should join the RS in rejecting the High Representative's "determination" and the serious errors of law and fact set forth in the Report.

First, the RS Response demonstrates that the High Representative, despite his claims, is not the "final authority" to interpret the DPA. Annex 10 of the DPA, which is the sole source of the High Representative's authority, gives the High Representative authority to interpret only Annex 10 itself. Moreover, the High Representative's claim to be the final authority to interpret the BiH Constitution or decisions of the BiH Constitutional Court is completely without legal foundation. Most importantly, the High Representative has no authority to declare the RS "in breach" of the DPA, a power reserved to the parties.

Second, The UN Security Council has never purported to augment the High Representative's authority under Annex 10. In particular, it has never authorized the High Representative to impose laws by decree, impose extrajudicial punishments on citizens, overrule the BiH Constitutional Court, or otherwise rule as if it was entirely above BiH and international law. The RS has not acquiesced to the High Representative's unlawful assertions of power.

Third, the planned referendum is protected by the BiH Constitution, the DPA, and international law. The BiH Constitution explicitly gives priority to the protection of human, political, and civil rights above all other law, and it expressly gives the RS the right and obligation to ensure that this principle is upheld. The RS has a constitutional duty to protect these rights of its citizens, which have been violated by the laws imposed and the actions taken by the High Representative and the institutions he has created. Any attempt to suppress a referendum designed to ascertain the public's views would violate the right to free expression as guaranteed by the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The referendum warrants protection particularly because the High Representative has prevented any challenge to his actions and imposed extrajudicial punishments on citizens who have opposed them.

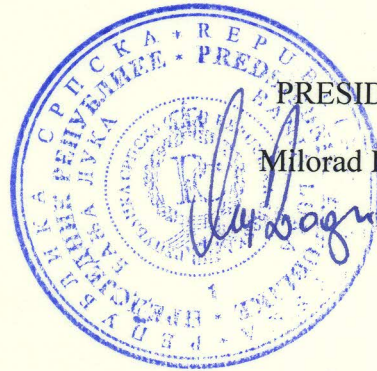
Fourth, the RS's planned referendum is an important part of its efforts to make vital reforms to the BiH justice system. Reforms are necessary, for example, to stop discrimination against Serb victims of war crimes, halt the Court of BiH's unlawful expansion of its jurisdiction, improve the BiH justice system's transparency, and implement an important decision of the European Court of Human Rights. The referendum is necessary in part because the High Representative has prevented all legal review of his decrees and other actions, whether in the BiH Constitutional Court, the European Court of Human Rights, or anywhere else. At the same time as the RS is preparing for the referendum, it is vigorously pursuing judicial reforms through the EU's Structured Dialogue on Justice, an initiative that has lately shown more promise. The RS's planned referendum is an important and legitimate mechanism to support the RS's efforts to reform institutions that have a direct adverse impact upon RS citizens.

Finally, the Report wrongly assumes that the RS will respond to the results of the referendum by taking illegal actions. The referendum does not result in any decision; rather, it is a way for RS citizens to express their opinions—a right guaranteed in all democratic states. Thus, it cannot be claimed that holding the referendum constitutes a breach of the DPA. Under the RS Law on Referendum and Civic Initiative, it is only after a referendum has been held, within a six month period, that the RS National Assembly is to enact decisions. This process of making relevant



decisions will certainly be subject to discussions with the RS and BiH institutions. Whatever actions the RS decides to take in response to the results of the referendum will be consistent with the BiH and RS Constitutions. The High Representative has wrongly condemned the RS for actions as a result of the referendum that he has not specified and which the RS has not taken.

For these reasons, and others set forth in more detail in the enclosed Response, the RS requests that the Secretary General, Security Council and members of the international community reject the High Representative's Special Report. We respectfully request that a copy of this letter and enclosed Response be sent to the members of the Security Council.



PRESIDENT

Milorad Dodik

**Response of the Government of Republika Srpska to the Special Report  
of the High Representative to the Secretary General of the UN**

**September 2015**

# **Response of the Government of Republika Srpska to the Special Report of the High Representative to the Secretary General of the UN**

## **Executive Summary**

In a “Special Report” to the UN Secretary-General recently made public, the High Representative claims to have “determined” that Republika Srpska (RS), is in breach of the GFAP (Dayton Peace Accords), in particular Annexes 4 (the BiH Constitution) and 10. The supposed basis for this determination is the RS’s plans to hold a referendum to ascertain citizens’ views about the High Representative’s illegal imposition of laws on BiH, including the laws on the Court and Prosecutor’s Office. The Report continues the High Representative’s long pattern of suppressing dissent against his unlawful rule by decree. The Report states that “measures taken [by the High Representative] in implementing the GFAP over the last 20 years must not be called into question.” The RS’s Response to the High Representative’s Report explains why the Secretary General, Security Council, and other members of the international community should join the RS in rejecting the High Representative’s “determination” and the serious errors of law and fact set forth in the Report.

Part II of the Response demonstrates that the Report exceeds the High Representative’s legal authority. The High Representative, despite his claims, does not have authority to interpret the Dayton Peace Accords (DPA). Annex 10 of the DPA, which is the sole source of the High Representative’s authority, gives the High Representative authority to interpret only Annex 10 itself. The High Representative has no authority to interpret the BiH Constitution or decisions of the BiH Constitutional Court. Moreover, the High Representative lacks the authority to declare a breach of the DPA.

Part III of the Response explains that the RS’s planned referendum solicits citizens’ views about actions of the High Representative that were not authorized by Annex 10 or the UN Security Council resolutions and that, as such, it does not violate either. Annex 10 grants the High Representative only very limited powers of facilitation—not the dictatorial powers he invoked to impose the laws at issue in the RS’s planned referendum. Although the High Representative has authority to interpret Annex 10, such authority is subject to the requirement of good faith and other principles of international law.

The UN Security Council has never purported to augment the High Representative’s authority under Annex 10, and it has never authorized the High Representative to decree laws, impose extrajudicial punishments, overrule the BiH Constitutional Court, or otherwise rule BiH like a dictator. The RS has not acquiesced to the High Representative’s unlawful assertions of power.

In Part IV of the Response, the RS explains why the planned referendum is protected by the BiH Constitution, the DPA, and international law. The BiH Constitution explicitly gives priority to the protection of human, political, and civil rights above all other law, and it expressly gives the RS the right and obligation to ensure that this principle is upheld. Any attempt to suppress a referendum designed to ascertain the public’s views would violate the right to free expression as guaranteed by the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The referendum warrants protection particularly because the High

Representative has prevented any challenge to his actions and imposed extrajudicial punishments on citizens who have opposed them.

Moreover, the RS's planned referendum concerns issues in the constitutional competence of the RS as an Entity. The BiH Constitution assigns no judicial authority (except for the BiH Constitutional Court) to BiH institutions and explicitly states that "[a]ll governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities." The High Representative's abuse of his Annex 10 mandate is an Entity issue because the RS, a party to Annex 10, may take any action not prohibited by valid law, to protect Entity competencies. Judicial matters are within the competence of the RS as an Entity.

Part V of the Response demonstrates that the High Representative's Report grossly mischaracterizes the rationale for and consequences of the RS's planned referendum. Contrary to the High Representative's claims, the referendum is not an attack on the sovereignty or territorial integrity of BiH, as the RS has made clear all along. The referendum will not, despite the Report's assertions, undo all of the laws and institutions that the High Representative has unlawfully imposed by BiH—a fact demonstrated by the RS's detailed proposals to reform, not abolish, the BiH Court and Prosecutor's Office. Notwithstanding the High Representative's unwarranted assumptions, whatever actions the RS Government takes in response to the results of the referendum will be consistent with law.

The RS's planned referendum is an important part of its efforts to make vital reforms the BiH justice system. Reforms are necessary, for example, to stop discrimination against Serb victims of war crimes, halt the Court of BiH's unlawful expansion of its jurisdiction, improve the BiH justice system's transparency, and implement an important decision of the European Court of Human Rights. The referendum is necessary in part because the High Representative has prevented all legal review of his decrees and other actions, whether in the BiH Constitutional Court, the European Court of Human Court of Rights, or anywhere else. At the same time as the RS is preparing for the referendum, it is vigorously pursuing judicial reforms through the EU's Structured Dialogue on Justice, an initiative that has lately shown more promise. The RS's planned referendum is an important and legitimate mechanism to support the RS's efforts to reform institutions that have a direct adverse impact upon RS citizens.

# **Response of the Government of Republika Srpska to the Special Report of the High Representative to the Secretary General of the UN**

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## **Response of the Government of Republika Srpska to the Special Report of the High Representative to the Secretary General of the UN**

### **I. Introduction**

1. On 17 September 2015, the High Representative made public a “Special Report” it submitted to the Secretary-General of the United Nations dated 4 September 2015. In the Report, the High Representative announces: “I have determined the Republika Srpska (RS) to be in clear breach of the GFAP, in particular of Annexes 4 and 10.” The basis for this so-called “determination” is that the RS questions the legality of actions he has taken. The High Representative’s Report states that “measures taken [by him] in implementing the GFAP over the last 20 years must not be called into question.” The Secretary General, Security Council, and other members of the international community should join the RS in rejecting this “determination” and the serious errors of law and fact set forth in his Report, including his assertion of authority to declare that a party to the Dayton Peace Accords (DPA) is in breach thereof.

2. For the past several years, through official reports to the UN Security Council and in other official communications, the RS has repeatedly articulated in detail its position that the High Representative has violated the BiH Constitution and international law in numerous instances, including by violating fundamental political and human rights of BiH citizens. The High Representative has filed his Special Report *now* because the RS seeks the views of its citizens on these issues through a referendum. This referendum is authorized by law and safeguarded by international treaties protecting citizens’ rights to express their views and to participate in public affairs.

3. It is important to note that the position of High Representative derives its existence and powers from the RS and the other parties to Annex 10 of the DPA (attached to this document). The High Representative was created by treaty. As such, his authority is limited to that granted to it by the parties to that treaty. Refusing to respect his limited Annex 10 scope of authority, the High Representative has claimed to be above the law, including the BiH Constitution and international protections of human, civil and political rights—and has acted accordingly. The current and previous occupants of this office have committed serious breaches of human rights and other violations of BiH and international law. In addition to imposing laws by decree—setting aside the legislative process required by the BiH Constitution—he has further asserted that such decreed laws are not subject to review even by the BiH Constitutional Court, whose constitutional mandate is to opine on such laws. He has also blocked legal recourse to the European Court of Human Rights and has asserted that his actions are beyond review of any judicial body anywhere.

4. The treaty parties that created the High Representative neither granted the High Representative the authority to rule and punish by decree, nor could they have done so. A fundamental element of the DPA is recognition of BiH’s sovereignty and obligations to protect the political and human rights of its citizens. Nor did the UN Security Council grant the peremptory powers the High Representative claims. In his Report, The High Representative now seeks to suppress expression of the views of RS citizens and to seek UN support for his action.

After twenty years of peace and stability since the DPA came into effect, the High Representative still claims powers to block expressions of criticism of his activities over the past two decades, including the planned referendum. This claim, including his “determination” that planning a referendum is in breach of the DPA, is simply his most recent attack on the rule of law, democracy, and sovereignty within BiH.

5. The High Representative bases his position on three arguments. Specifically the High Representative claims that through planning to hold the referendum the RS: (1) has violated its obligations arising under Annex 10 of the DPA and UN Security Council Resolutions; (2) has violated its obligations under Annex 4 of the DPA; and (3) will further an alleged plan of “secession and state dissolution.” As demonstrated below, each of these arguments is completely incorrect and unsubstantiated as to fact and law.

6. More fatal to the High Representative’s claim, however, is his fundamental premise that he is “the final authority” to interpret the DPA and as such has authority to render legal determinations that a party to the GFAP is in breach of one or more of its treaties, including BiH’s Constitution (Annex 4). The High Representative enjoys no such authority, and consequently his Special Report has no legal foundation.

7. What is truly at issue today in BiH is a serious difference between the High Representative and those who would like to reform important aspects of the dysfunctional and unconstitutional governing structure created by the High Representative over the past 20 years. Such reform would restore the decentralized system protecting human, political and civil rights established by the BiH Constitution and set in place by the DPA. The High Representative and certain BiH political parties, backed by certain members of the international community, oppose reform and would continue the illegal activities of the High Representative indefinitely, so long as he continues to enforce their preferences by decree. But government by decree and illegal interference in the democratic processes established by the Constitution are completely in conflict with European standards of democracy and self-government and the desires of most BiH citizens for constitutional government and accession to the European Union. The RS Government will continue by all peaceful and legal means to press for reform and oppose illegal actions of the High Representative. This is, in fact, the purpose of the planned referendum.

8. Before addressing the High Representative’s Report in more detail, it should be noted that in July, prior to the Report, the President of Republika Srpska, Milorad Dodik, sent a letter to members of the international community, including major embassies and diplomatic missions in Sarajevo, articulating the valid policy reasons and legal authority for the planned referendum; however, the High Representative chose to ignore the positions of the RS set forth therein. This paper is intended to supplement the RS President’s letter to respond to specific false assertions made in the High Representative’s Special Report.

## **II. The High Representative’s Special Report exceeds his legal authority.**

9. In the first sentence of his Report, the High Representative asserts the legal basis for his claimed authority to render a “determination” that the RS is in “clear breach” of the DPA:

*In my capacity as the final authority regarding the interpretation of the General Framework Agreement for Peace (GFAP), as mandated by Annex 10 of said Agreement and various United Nations (UN) Security Council Resolutions, I would like to inform the Security Council that I have determined the Republika Srpska (RS) to be in clear breach of GFAP, in particular of Annexes 4 and 10. (emphasis added)*

10. However, neither Annex 10 nor Security Council Resolutions authorize the High Representative to be “the final authority” regarding interpretation of the DPA. Even if the parties granted him such authority, which they did not, the High Representative would still not have authority as a matter of general international law to “determine” that a treaty party is in breach of the DPA. Such a power is reserved to the parties to the DPA. Consequently, his determination is *ultra vires*. It is another example of the gross overreach of the High Representative in the exercise of his legal mandate.

**A. The High Representative does not have authority to interpret the Dayton Accords.**

11. Apart from a limited power to interpret Annex 10 granted to the High Representative, power to interpret the BiH Constitution granted to the BiH Constitutional Court in Annex 4 and the granting of certain interpretation powers to the IFOR Commander in Annex 1A, all powers of interpretation of the DPA rest with the Parties to the DPA and its annexes. This is a fundamental principle of general international law including the Vienna Convention on the Law of Treaties (“VCLT”).

**1. Annex 10 grants the High Representative authority to interpret Annex 10 only.**

12. The High Representative was created by Republika Srpska and the other treaty parties of Annex 10 of the DPA, entitled “Agreement on the civilian implementation of the peace settlement.” Article V of Annex 10 provides: “The High Representative is the final authority in theater regarding interpretation of *this Agreement on the civilian implementation of the peace settlement*.” Thus, by the plain language of Annex 10, the parties clearly granted the High Representative interpretive powers expressly limited to Annex 10 itself. Even the High Representative’s limited authority to interpret Annex 10, which is an international treaty, is circumscribed by general international law and other sources of applicable law. His authority is limited, for example, by his obligation under the VCLT to interpret Annex 10 “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

13. It is also inconsistent with the structure of DPA to assert that the authority granted to the High Representative to interpret Annex 10 grants him authority to interpret the entire DPA. In other annexes of the DPA, authority is expressly granted by the treaty parties to others to interpret certain aspects of the DPA. For example, Article XII of Annex IA, Agreement of the Military Aspects of the Peace Settlement, provides: “In accordance with Article I [of this annex], *the IFOR Commander is the final authority in theater regarding interpretation of this Agreement*



on the military aspects of the peace settlement of which the Appendices constitute an integral part.” (emphasis added) This grant of interpretive authority over Annex IA is nearly identical to that granted to the High Representative with respect to Annex 10. Yet the IFOR Commander has not claimed, nor could he, that this provision granted him final authority to interpret other aspects of the DPA, as the High Representative has claimed.

14. A fundamental tenet of the international law on treaties provides that the parties to a treaty ultimately control its interpretation unless the treaty itself provides this power to alternative sources.<sup>1</sup> The DPA consists of a Framework Agreement and, as annexes, eleven additional agreements with varying parties to each. The High Representative is not a party to the Framework Agreement or any of its eleven annexes. To assert that the High Representative, and not the parties to these other annexes, has the authority to interpret them is directly contrary to international law.

**2. UN Resolutions, including those cited in the High Representative’s Report, clearly indicate that his interpretative powers are limited to Annex 10.**

15. The United Nations Security Council has never adopted any decision that endows the High Representative with interpretive powers beyond those granted in Annex 10. Confirming the plain language of Annex 10, in its first resolution about BiH after the Dayton Peace Accords, the Security Council approved a resolution “reaffirm[ing] that the High Representative is the final authority in theater regarding the interpretation of *Annex 10 on civilian implementation of the Peace Agreement . . .*” (emphasis added) S.C. Res. 1088 (1996). This same language is repeated in subsequent Security Council Resolutions.<sup>2</sup>

16. The High Representative in his Report concedes, as he must, this point. Paragraph 18 provides:

Specifically, the UN Security Council adopted Resolution 1031 under Chapter VII of the UN Charter, in which it confirmed that the High Representative is *the final authority in theatre regarding interpretation of Annex 10* on the civilian implementation of the GFAP. Since then UN Security Council has re-affirmed the authority of the High Representative through its annual resolutions of BiH. (emphasis added)

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<sup>1</sup> As Professor Gardiner points out, the basic rule of customary international law is that the parties to a treaty ultimately control its interpretations. The general principle underlying this rule was stated, *inter alia*, by the Permanent court as follows: “...it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it.” (Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina) PCIJ Advisory Opinion, Series B, No 8, p.37. Moreover, treaties are implemented pursuant to domestic law and generally interpreted for this purpose by the executive branch of the government of a party. Richard Gardiner, TREATY INTERPRETATION, p.109, 126 Oxford U. Press (2008).

<sup>2</sup> See, e.g., S.C. Res. 1174 (1998) (“reaffirm[ing] that the High Representative is the final authority in theater regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement . . .”).

17. Yet, despite the clear language of the Security Council resolutions, throughout his Report, the High Representative, acts as though the Security Council has granted him sweeping interpretive powers beyond those granted by the provisions of Annex 10.

**B. The High Representative does not have authority to interpret the BiH Constitution or decisions of the BiH Constitutional Court.**

18. The Parties to Annex 4 and the Constitutional Court have the authority to interpret BiH's Constitution—not the High Representative. The Parties enjoy this right, as explained above, pursuant to general international law including the VCLT, as treaty parties. The Constitutional Court has authority to interpret the Constitution by virtue of the Parties to Annex 4 granting the Court this power in Article VII of the Constitution.

19. Nowhere in Annex 4 or Annex 10 (or in any other annex to the DPA) is the High Representative provided interpretive powers with respect to the BiH Constitution. For the High Representative to possess judicial powers to render legal determinations regarding the constitutionality of actions by the Entities, BiH, or BiH institutions would be astonishing. The language of Annexes 4 and 10 is devoid of any such suggestion. Indeed, Annex 4 provides:

The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina . . .

20. Notwithstanding the clear terms of the Dayton Accords, the High Representative has made the extraordinary claim to be the final authority to interpret the Constitution. As recently as September 19, the High Representative stated:

I have a clear mandate as *the final interpreter* of the civilian aspects of the Peace Agreement, *which* includes the constitution of this country.<sup>3</sup>

21. Such a proposition turns the rule of law and the independence of the Constitutional Court on its head. Indeed, the High Representative's Report constitutes unlawful instructions to the Constitutional Court as to how to rule on the referendum if such matter comes before the Court. Unfortunately, the High Representative has a long history of unlawfully influencing and interfering with the Constitutional Court and has overruled its decisions. For example, High Representatives as early as the first five years after the DPA obtained a secret commitment from Constitutional Court judges to always uphold the High Representative's legislation. When the Law on Court of BiH decreed by the High Representative was challenged before the BiH Constitutional Court, four out of the six judges from BiH correctly found it unconstitutional. Yet the law was upheld, in a 5-4 decision, because the Constitutional Court's three foreign judges voted as a bloc, along with the two Bosniak judges, to protect the High Representative's creation. One of those foreign judges, Austrian professor Joseph Marko, later admitted that there was a

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<sup>3</sup> Remarks of the HR Valentin Inzko at the Conference "20 years of the Dayton Peace Accords – Views," Office of the High Representative, 19 Sept. 2015.

“tacit consensus between the Court and the High Representative that the Court . . . *will always confirm the merits of his legislation . . .*”

22. When this “tacit consensus” was for once ignored by a majority of the Constitutional Court in a 2006 decision holding that individuals must have an opportunity to appeal extrajudicial punishments imposed by decree by the High Representative, the High Representative responded by handing down a new decree nullifying the court’s verdict. The decree, which the High Representative has never rescinded, also purported to forbid any proceeding before the Constitutional Court or any other court that “*takes issue in any way whatsoever with one or more decisions of the High Representative.*”<sup>4</sup>

**C. The High Representative does not have authority to declare a breach of the DPA.**

23. Only a Party to the DPA may assert the right to declare that other Parties have breached the DPA, and no parties have done so.<sup>5</sup> A Party declaring a breach would be required to do so pursuant to the procedures of Article 65 of the VCLT which requires the Party to “indicate the measure proposed to be taken with respect to the treaty and the reasons therefore.” These rights and obligations with respect to declaring a breach of treaty run only to the treaty parties, not third states, international organizations or others.

24. Yet the High Representative, in the first sentence of his Special Report reports to the Security Council that he has “determined the Republika Srpska (RS) to be in clear breach of the GFAP, in particular of Annexes 4 and 10.” Declaration of a breach of the DPA is far beyond the scope of “interpretation” of any provision of Annex 10 of the DPA and beyond any other powers granted the High Representative in Annex 10 or in any Security Council resolution. In particular, Annex 10 does not grant the High Representative the powers of a treaty party of the DPA. For this reason the “determination” has no legal force.

**III. The planned referendum seeks the opinion of RS citizens on actions of the High Representative not authorized by Annex 10 and UN Security Council resolutions; as such, it does not violate either.**

25. The High Representative’s Special Report claims that the planned referendum violates Annex 10 and UN Security Council resolutions because it calls into question the many unauthorized and illegal judicial, executive and legislative actions imposed *by the High Representative*. There is no violation of law of either the treaty or the resolutions, however, for two reasons. First, neither Annex 10 nor Security Council resolutions authorized the High Representative’s imposition of judicial, executive and legislative actions by decree. It is the High Representative that violated the terms of the DPA through extreme abuse of the limited authority granted in Annex 10. Second, neither Annex 10 nor Security Council Resolutions preclude the parties to the treaty that created the High Representative from questioning, or seeking the views

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<sup>4</sup> Office of the High Representative (OHR), Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, March 23, 2007 (emphasis added).

<sup>5</sup> Vienna Convention on the Law of Treaties, Articles 26, 34, 56, 60, and 65.



of citizens regarding, his actions, especially when those actions relate to violations of political, civilian and human rights.

**A. The terms of Annex 10 grant only limited facilitative powers to the High Representative.**

**1. Annex 10 gives the High Representative no authority to impose laws by decree, supersede executive and judicial institutions and officials, or punish citizens acting as both prosecutor and judge.**

26. The absence of any legal authority for the High Representative to enact laws by decree is apparent from the strictly limited mandate set out for the High Representative under Annex 10 of the DPA. As summarized by Matthew Parish, a former OHR attorney, the High Representative's Dayton mandate is to be "a manager of the international community's post conflict peace building efforts, and a mediator between the domestic parties."<sup>6</sup> Annex 10 does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens or to act in a legislative, executive or judicial capacity.

27. In defining the High Representative's legal authority, Annex 10 uses such verbs and phrases as "monitor," "promote," "coordinate," "facilitate," "participate in meetings," "report," and "provide guidance." Annex 10 provides that the High Representative "shall respect [the] autonomy" of civilian organizations and agencies "within their spheres of operation while as necessary giving *general guidance* to them about the impact of their activities on the implementation of the peace settlement."<sup>7</sup> Annex 10 does not include words such as "enact," "suspend," "nullify," "impose," "decree," "punish," "ban," or any other words that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens—and certainly not decisions that violate human and political rights.

28. In order to expand his legal mandate under Annex 10, the High Representative asserted enormous additional powers that become known as the "Bonn Powers." The term "Bonn Powers" originates from a declaration made by the Peace Implementation Council (PIC), an ad-hoc collection of countries, at its conference in Bonn, Germany, held two years after Dayton. The "Bonn Powers" were asserted by the High Representative, not granted by the PIC, as the language of the Bonn Declaration reveals. The PIC did not purport in its declaration to grant additional authority, nor could it, given its absence of legal authority to amend the DPA. The PIC could hardly claim authority to rewrite a legally binding treaty witnessed by six PIC members just two years earlier.

29. Rather, the PIC stated that it "welcomes the High Representative's intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions" on certain issues. This is at most a policy statement, not a grant of authority. Thus, the "Bonn Powers" were nothing more than the High Representative's legally unsupported decision to

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

<sup>7</sup> Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II(1)(c) (emphasis added).

expand his post-war assistance mandate into comprehensive powers to govern, misusing the flimsy cover of “interpretation of Annex 10.” At that point, as Parish, the former OHR attorney, writes, “[s]uddenly the High Representative found himself moving from being a ‘facilitator’ and a mediator to being able to issue ‘binding decisions’, known as the ‘Bonn powers’.” As Parish has recognized, the PIC’s Bonn statement “ran quite contrary to the spirit and text of Annex 10 to the [DPA], and was *legally quite indefensible*.”<sup>8</sup>

30. Former UK Ambassador to BiH Charles Crawford, who helped invent the “Bonn Powers,” has written, “[A]s far as I could see the Bonn Powers had *no real legal basis at all*. They amounted to an international political power-play bluff which successive High Representatives wrapped up in legal language to make the whole thing look imposing and inevitable.”<sup>9</sup> Nevertheless, these powers of interpretation are now asserted by the High Representative to include, *inter alia*, displacement of the BiH Constitutional Court as final interpreter of the BiH Constitution.

## **2. The High Representative’s authority to interpret Annex 10 is subject to law.**

31. There being nothing in Annex 10 to support the High Representative’s self-asserted powers, the Bonn Declaration tried to justify them by referring to Annex 10’s provision making the High Representative the “final authority in theater regarding interpretation of this Agreement [Annex 10] on the civilian implementation of the peace settlement.” But, as previously discussed, the High Representative’s authority to interpret Annex 10, which is an international treaty—or to take any other action—is circumscribed by his mandate in Annex 10, general international law and other sources of applicable law.

32. His authority is limited, for example, by his obligation under the VCLT to interpret Annex 10 “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The High Representative breached this good-faith obligation by asserting and using powers of rule by decree, extrajudicial punishment, and other autocratic authorities. The terms of Annex 10 manifestly do not give the High Representative any legislative, executive, or judicial powers. Annex 10 cannot, in good faith, be interpreted to empower the High Representative to decree laws or otherwise act as a final executive, prosecutorial and judicial official. It is inconceivable that the RS and other parties to Annex 10 would have agreed to divest themselves of the very democratic powers to govern which they established in the BiH Constitution in Annex 4 by granting to the High Representative such sweeping autocratic powers.

33. In addition to the international law obligation of good faith, the High Representative’s interpretations of Annex 10 must be consistent with other sources of law, including the BiH Constitution and the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights, to which BiH is a signatory. The High Representative’s imposition of laws, of course, is contrary to the BiH Constitution. The High Representative has

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

<sup>9</sup> Charles Crawford, *Bosnia: the Bonn Powers Crawl Away to Die*, available at [charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/](http://charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/) (emphasis added).

no role under the BiH Constitution, which established democratic processes for the enactment of laws. The Constitution does not even mention the High Representative except for a single reference in its annex on transitional arrangements (The annex designated the High Representative to chair meetings of the Joint Interim Commission, a temporary body that was empowered to do nothing more than “discuss practical questions” and “make recommendations and proposals.”).<sup>10</sup>

34. The High Representative’s assertion of the authority to exercise functions reserved to the executive and judicial branches of government within BiH by decree is also blocked, as a matter of law, by the democratic rights mandated by the BiH Constitution and the ICCPR.

35. Moreover, a legally valid interpretation of the High Representative’s mandate in Annex 10 must also be guided by the cannon of treaty interpretation stating that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.<sup>11</sup> Such a restrictive interpretation is not necessary, however, to easily conclude that Annex 10 does not give the High Representative the autocratic powers he claims. Any good-faith reading of Annex 10 compels such a conclusion.

**B. Security Council resolutions have never given the High Representative the extraordinary powers he has exercised and continues to claim.**

**1. The Security Council has never purported to expand upon the limited authority Annex 10 grants to the High Representative.**

36. The Special Report wrongly asserts that the High Representative has two separate sources of authority: Annex 10 and UN Security Council resolutions. In reality, the Security Council has never agreed to supplement the High Representative’s authority under Annex 10. Thus, Annex 10 is the sole source of the High Representative’s authority, and any actions by the High Representative in excess of Annex 10 are *ultra vires*.

**2. The Security Council has never authorized the dictatorial powers claimed by the High Representative.**

37. The various resolutions of the Security Council having to do with BiH do not purport to assign the powers of decree that the High Representative has used and continues to claim. Indeed, it is unlikely that the High Representative would have any legal authority to accept such powers, as his authority is circumscribed by his Annex 10 mandate. UN practice is to appoint and authorize specifically designated UN officials or states to carry out tasks authorized by Security Council resolutions. For example, a 1999 Security Council Resolution provides for the

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<sup>10</sup> BiH Constitution, Annex II(1).

<sup>11</sup> See W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT’L L. 231, 234 (1989).



appointment of a Special Representative in Kosovo and explicitly details the Special Representative's administrative powers.<sup>12</sup>

38. In contrast, the High Representative and his functions were created by the parties to Annex 10, and his authority is defined in Annex 10, not Security Council resolutions. Certainly a scope of authority as extensive as that claimed by the High Representative cannot be implied on the basis of any Security Council resolution thus far issued.

39. The Security Council has never authorized the High Representative to impose laws or Constitutional amendments. Yet the High Representative has imposed scores of BiH, Federation, and Republika Srpska laws by decree and even decreed 105 amendments to the constitutions of Republika Srpska and the Federation.

40. The Security Council has never authorized the High Representative to impose extrajudicial punishments on individuals, without any form of due process, in violation of their civil rights. But the High Representative has done exactly that, issuing decrees removing and banning from public employment nearly 200 BiH citizens, including elected presidents, legislators, judges, and other officials. The High Representative has issued additional decrees blocking individuals' bank accounts and seizing their travel documents, indefinitely. When imposing such punishments, the High Representative has allowed the victims no notice of the specific charges or evidence against them, no right to confront their accusers, no opportunity to contest the charges, and no appeal. Extrajudicial punishments such as these, as many observers have concluded, violate the European Convention on Human Rights and the International Convention on Civil and Political Rights, both of which are binding international law and domestic law in BiH.

41. The Security Council has never authorized the High Representative to overrule the BiH Constitutional Court or to ban court proceedings challenging his authority. Yet the High Representative did just that in 2007. After a 2006 Constitutional Court verdict held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the High Representative, the High Representative responded by handing down a decree nullifying the court's verdict. The decree, which remains in effect today, also banned any proceeding before the Constitutional Court or any other court that "*takes issue in any way whatsoever with one or more decisions of the High Representative.*"<sup>13</sup>

42. The Security Council has never adopted any decision that authorizes the High Representative to make "binding decisions" that violate international human, civil and political rights treaties, other international law, the BiH Constitution, or BiH and Entity laws. In short, the Security Council has never authorized the High Representative to exceed the limited authority he has under Annex 10.

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<sup>12</sup> For comparison, see S.C. Res. 1244 (1999) regarding governmental administration in Kosovo and appointment of a Special Representative with detailed administrative powers.

<sup>13</sup> Office of the High Representative (OHR), Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, March 23, 2007 (emphasis added).

**C. There has been no acquiescence on the part of the Republika Srpska to the High Representative's unlawful assertions of authority.**

43. Republika Srpska, a party to the DPA, has not acquiesced to the High Representative's assertions of authority to create law by decree or the other dictatorial authorities the High Representative has claimed. Republika Srpska has actively and peacefully disputed the High Representative's claims to such authorities publicly and privately and as a matter of record before the UN Security Council for many years. In his Special Report, the High Representative cites these formal and informal domestic and international law-based objections as grounds for "determining" that the RS Government is "in clear breach of the GFAP." Quite the opposite is true. The RS is insisting upon restoration of the legal rights of its citizens and its legally elected and appointed authorities in precisely the manner prescribed by international law. It is good evidence of how far from rule-of-law standards the High Representative's exercise of authority has brought BiH that the Special Report could "determine" that the formal and peaceful assertion of rights under the DPA by the RS could constitute a breach of that treaty.

44. It is extraordinary that the High Representative takes the position that Annex 10 and Security Council Resolutions censor a party to the DPA, and its citizens, from expressing their views regarding fundamental aspects of the DPA. It is even more extraordinary when one considers both that the High Representative was created by the RS (and the other parties to Annex 10) and that the matters of highest priority in the civilian implementation of the DPA, namely the protection of political and human rights, are the very subjects of the planned referendum.

**IV. Republika Srpska's planned referendum is protected by the BiH Constitution, the DPA, and international law.**

**A. The BiH Constitution gives priority to the protection of human, political and civil rights and fundamental freedoms over all other law.**

45. Article II.2 of the BiH Constitution provides: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. *These shall have priority over all other law*" (emphasis added). All BiH courts and institutions—and international organizations in their relations with BiH—must recognize the priority of the protections granted by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other human rights agreements in Annex 1 to the Constitution.

**B. The RS has the express right and obligation to uphold this principle and protect its citizens' rights.**

46. Article II.1 of the Constitution states, "Bosnia and Herzegovina and both entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms." (Art. II.1) Section 6 of Article II places responsibility explicitly and directly upon "all courts, agencies, governmental organs, and instrumentalities operated by or within the entities" to implement the human rights and fundamental freedoms recognized in Article II. This

responsibility obviously includes how citizens within the RS are treated by the judicial systems to which they are subject.

**C. Any attempt to suppress a referendum designed to ascertain the public's views dealing with public institutions and the High Representative would violate Article II.**

47. Citizens throughout BiH, including in the RS, have a right under Article II to express their opinions on the performance and legality of all the institutions governing them, to call for reform or abolition of such institutions, and to request their Entity government to take any related action within the government's legal competence.

48. 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.

49. The planned referendum is protected by Article II as a peaceful and legally structured mechanism for freedom of expression by RS citizens of their views and opinions dealing with public institutions and the High Representative.

**D. The planned referendum requires heightened protection because of the subject matter involved.**

50. The question of the referendum involves the High Representative's exercise of legislative, judicial, and executive functions that directly affect human, political, and civil rights and fundamental freedoms of RS citizens. Heightened protection is particularly warranted because the High Representative has prevented any challenge to his actions and punished citizens who have opposed them without due process, as discussed in more detail above. Preventing it would block one of the few means for citizens to express their political views regarding the High Representative's actions without fear of reprisal.

51. As referenced above, a 2007 order of the High Representative, which has not been rescinded, forbids any proceeding before the Constitutional Court or any other court that "takes issue in any way whatsoever with one or more decisions of the High Representative." When accused of violating human rights, he has acted similarly. In 2007, the High Representative asserted in a case before the European Court of Human Rights that his actions are not reviewable by the European Court or the court of any state.<sup>14</sup> In his Special Report, the High Representative states that there are fifty laws that he has imposed by decree on the RS alone.<sup>15</sup> The High Representative has imposed 45 amendments to the RS Constitution by decree. He states in his Special Report that his laws imposed cannot be amended or repealed, unless they are adopted by the parliament. But in his orders decreeing laws, he also has expressly mandated that the respective parliaments must adopt his laws without amendment—something the Special Report

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<sup>14</sup> Written Observations on Behalf of the High Representative in *Berić v. BiH*, 16 June 2006.

<sup>15</sup> Special Report paragraph 16.

fails to disclose. In this way, the High Representative changed and amended Annex 4—the BiH Constitution—without any authority to do so. After the forced enactment of the changes and amendments by the BiH Parliament, Bosniak political parties refused to give any serious consideration to the unconstitutionality of the laws enacted in that way, but maintained that BiH-level institutions are permanently granted these competencies, although the procedure for amending the Constitution as an international treaty was not observed.

52. The obligations of the RS (as with all governments and institutions within BiH) to give priority and ensure the protection of human and political rights above all other law, under Article II, apply to protecting its citizens from political and human rights violations of the High Representative.

**E. The planned referendum is supported by applicable international law.**

53. Because the BiH Constitution is one of the annexes of the DPA, which have the status of international treaties, the Constitutional protections and rights discussed above are equally protections and rights guaranteed by international law applicable to BiH and the Entities as signatories. The language, object, and purpose of the DPA recognize the sovereignty of BiH, the extensive autonomy of the two Entities, the establishment of a democratic government, and the enforcement of the full extent of internationally recognized human and political rights for all citizens.

**F. The planned RS referendum concerns issues in the competence of the RS as an Entity.**

**1. The abuse of mandate of the High Representative is an Entity issue.**

54. The Entities were parties to Annex 10 of the DPA, which created the High Representative, and established the scope of its limited authority. As a major element of the democratic government structure of BiH, the RS may take any action not prohibited by a valid law to protect Entity competencies, particularly, as here, where the High Representative assumes legislative, executive, or judicial functions reserved for BiH or the Entities under the applicable constitutions. Furthermore, protecting the human and political rights of RS citizens related to the High Representative or otherwise is within the competence of the RS. As discussed above, Article II.1 of the BiH Constitution requires the RS to “ensure the highest level of internationally recognized human rights and fundamental freedoms.”

**2. Judicial powers are also within the Entity competencies.**

55. The BiH Constitution explicitly states, “All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”<sup>16</sup> The BiH Constitution carefully enumerates the competencies of BiH, none of which—other than the BiH Constitutional Court—include judicial matters. Thus, judicial matters are in the competence of the Entities.

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<sup>16</sup> BiH Constitution, Article 3(a) (emphasis added).

56. This includes matters of the BiH Court and Prosecutor's Office for at least three reasons. First, the BiH Court and Prosecutor's Office were not legitimately created BiH institutions. As the International Crisis Group pointed out in a 2014 report:

The fate of the Court of Bosnia Herzegovina, the state court, shows how state building can go wrong. *Dayton allotted judicial matters to the entities, apart from a state Constitutional Court.* In 2000, the PIC ordered Bosnia's leaders to create a state court; when the legislature did not, OHR imposed a law creating the Court of BiH."<sup>17</sup>

57. As explained above, the High Representative has never had the legal authority to impose laws on BiH. Despite this, the High Representative established the BiH Court and Prosecutor's Office through decrees. According to the High Representative's 2000 decree imposing the Law on Court of BiH, the law was to remain in effect "until such time as the Parliamentary Assembly of Bosnia and Herzegovina adopts this Law in due form, *without amendments and with no conditions attached.*"<sup>18</sup>

58. The BiH Parliamentary Assembly's eventual adoption of the law according to the High Representative's strict instructions was essentially meaningless, especially because it came at a time when the High Representative was routinely issuing decrees removing politicians from office, banning them from public employment, seizing travel documents, and freezing bank accounts.

59. In addition, the BiH Parliamentary Assembly lacked the authority to enact the laws on the BiH Court and Prosecutor's Office because, as explained above, judicial matters apart from the Constitutional Court are constitutionally reserved to the Entities.

60. Second, actions of the BiH Court and Prosecutor's Office directly affect citizens of the RS. The BiH Court and Prosecutor's Office have often used Entity-law charges as a political weapon against high officials. There is significant evidence, [as discussed below,] of numerous activities of the BiH Court and Chief Prosecutor which affect RS citizens and are within the jurisdiction of the Entities and contrary to recognized standards of justice and the rule of law. There is also significant evidence of ethnic discrimination by the BiH Court and Chief Prosecutor's office contrary to applicable political and human rights law. Thus, because actions by the BiH Court and Prosecutor's office have, *inter alia*, encroached illegally upon the judicial powers granted to the Entities, actions of the BiH Court and Prosecutor's Office are also within the competence of the RS.

61. Third, even if the BiH Court and Prosecutor's Office were considered to have been legitimately created and not in violation of political and human rights of RS citizens, which is not the case, the activities of these institutions would still be within RS competence. The reason for this is obvious and is based upon the primary foundation of the BiH state, set out in the

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<sup>17</sup> International Crisis Group, *Bosnia's Future*, 10 July 2014, p. 27 (emphasis added).

<sup>18</sup> Decision imposing the Law on the State Court of BiH, Office of the High Representative, 12 Nov. 2000 (emphasis added).



Constitution, i.e., that BiH is a democratic state where governance is based upon the rule of law. The BiH Court and Prosecutor's Office are established by BiH laws. These laws are subject to amendment and the institutions they create are subject to reform and, if necessary, abolition through the various processes spelled out in the Constitution and other laws. Indeed, the entire judicial system of BiH is currently under a process of examination and reform as part of negotiations with the EU for accession. The interest of citizens of the RS to express their views on these matters in an effective way, by instructing their government to take appropriate action, is obvious. It is equally obvious that if the High Representative is successful in blocking or otherwise manipulating the range of views on these reforms that may be heard in the reform process, effective reform will be prevented. The institutions illegally established by the High Representative will be made immune from the democratic process of governance established by the BiH Constitution.

62. It is constitutional and appropriate for the RS to hold this referendum as a forum for citizens to express their opinions about institutions that wield power over them. This is especially true of institutions having been imposed by the High Representative—rather than created by their representatives through the legitimate legislative process.

**V. The High Representative intentionally mischaracterizes the purposes and consequences of the planned referendum. The referendum is an effort to use a legally established mechanism of democratic governance to lawfully and peacefully press for reform of dysfunctional and discriminatory government institutions and powers put in place illegally.**

63. The Report attempts to depict the referendum as part of a scheme intended to bring about the “dissolution” of BiH and risks the “disintegration” of the country. This is a gross mischaracterization of Republika Srpska's purposes in holding the referendum and the results of doing so.

64. As President Dodik wrote in his July letter about the referendum to members of the international community:

. . . I would like to make clear several related positions of Republika Srpska

First, Republika Srpska remains committed to continuing the European Union Structured Dialogue on Justice established several years ago by agreement between Republika Srpska and EU leaders to address serious problems in the justice system of Bosnia and Herzegovina.

Second, Republika Srpska's leadership is fully committed to the effort that many in the international community and here in BiH have called for to reform government institutions to make them more efficient and responsive to the needs of citizens. Our government will continue its cooperative efforts with the EU and other experts to press for reforms that will strengthen our economy

and broaden our cooperation with other states in the region and with the wider international community.

Third, the referendum is not intended in any way to challenge the territorial integrity of Bosnia and Herzegovina but to strengthen Dayton Agreement and solutions envisaged by that agreement.

65. As explained below, far from being an attack on BiH's sovereignty and territorial integrity, the referendum is part of the RS's efforts to reform laws and institutions to address serious problems and improve governance.

**A. The referendum is not an attack on the sovereignty or territorial integrity of BiH.**

66. The High Representative's Report alleges that the RS's referendum is a "direct attack on the sovereignty of the state of Bosnia and Herzegovina." But the High Representative fails to explain how ascertaining the views of citizens about laws and institutions imposed on them by a foreign diplomat constitutes such an attack. As Republika Srpska has made abundantly clear, the referendum does not call into question BiH's sovereignty or territorial integrity. As President's Dodik's July letter to the international community emphasized, "the referendum is not intended in any way to challenge the territorial integrity of Bosnia and Herzegovina . . . ."

**B. The referendum will not undo all the laws and institutions that the High Representative has imposed.**

67. The planned referendum will not result in the undoing of all the laws and institutions the High Representative has imposed on BiH during the last 20 years. That is not the intention of the RS, even though those laws and institutions were imposed unlawfully. The RS, however, is firmly committed to seeking reforms of all laws and institutions, including those imposed by the High Representative, on the basis of the following principles: compliance with the rule of law and political and human rights; efficiency and functionality; EU accession standards; and adherence to the BiH and RS constitutions.

68. This position is evident in the RS's participation in the Structured Dialogue for Justice, which continues today. In the Structured Dialogue, the RS has not sought the dissolution of the BiH Court and Prosecutors Office, despite their unlawful origins and conduct. Rather, the RS has pursued specific reforms to the laws governing these institutions. These include, for example, reforms to correct the Court of BiH's practices of extending its jurisdiction to Entity laws, to require an independent court of second instance, and to ensure non-discriminatory and transparent practices in war crimes prosecutions, in order to bring these institutions in line with the principles stated above.

69. The RS has both the right and the obligation to seek reforms through all legal means, including referenda, to achieve these objectives. There is no legal basis for the High Representative to claim that the laws and institutions imposed by his decrees are exempt from potential reforms by those political institutions and elected officials who have been constitutionally authorized and obligated to enact them.

**C. Republika Srpska's response to the results of the referendum will be consistent with law.**

70. The Report wrongly assumes that Republika Srpska will respond to the results of the referendum by taking illegal actions. There is no warrant for this assumption. Whatever actions Republika Srpska decides to take in response to the results of the referendum will be consistent with the BiH and RS Constitutions. The High Representative has wrongly condemned the RS for actions as a result of the referendum that he has not specified and which the RS has not taken. The referendum does not result in any decision; rather, it is a way for RS citizens to express their opinions—a right guaranteed in all democratic states. Thus, it cannot be claimed that holding the referendum constitutes a breach of the DPA. Under the RS Law on Referendum and Civic Initiative, it is only after a referendum has been held, within a six month period, that the RSNA is to enact decisions. This process of making relevant decisions will certainly be subject to discussions with the RS and BiH institutions.

**D. Republika Srpska is holding the referendum as part of its longstanding effort to reform the BiH justice system.**

**1. Reforms are necessary to stop abuses by the BiH Court and Prosecutor's Office.**

71. The planned referendum is an important and legitimate mechanism to support the RS's efforts to reform laws and institutions, including reforming the BiH Court and Prosecutor's Office. Rather than hold a similar referendum four years ago, the RS agreed to participate in a Structured Dialogue on Justice to achieve these specific reforms. After four years, however, there has yet to be a single change to any law or institution. While the RS continues to participate in good faith in the Structured Dialogue, it has the right and obligation to seek other legal means of reform, especially where serious violations of the BiH Constitution, including breaches of human and political rights, continue unabated.

72. The EU's Structured Dialogue on Justice has revealed a deeply flawed justice system at the BiH level with laws and practices that are incompatible with European standards and violate international agreements on human, civil, and political rights. Some of the BiH justice system's deepest problems are described below.

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

73. There is significant evidence of ethnic discrimination by the BiH Court and Chief Prosecutor's office. Such discrimination is a serious challenge to post-conflict reconciliation and the fundamental structure of BiH as established by the DPA and the BiH Constitution. War crimes must be tried and punished without regard to the ethnic group or political connections of their perpetrators and victims. The BiH Justice System has shown, instead, a consistent pattern of discrimination against Serb victims of war crimes and a penchant for acting according to the wishes of the Bosniak SDA party. This denies Serbs the equality before law to which they are entitled, and it undermines reconciliation.

74. The International Crisis Group has criticized the Prosecutor's Office for its failure to prosecute some of the war's worst war crimes against Serbs. Even U.S. Deputy Chief of Mission Nicholas M. Hill recently observed that the Chief Prosecutor is "largely believed to be heavily influenced by Bosniak political forces" and that there are "complaints that the prosecutor's office has too many strong-willed SDA acolytes on its staff." Sarajevo's *Bosnia Times*, recently analyzing whether the Prosecutor's Office can "show that it is independent and impartial" by indicting Bosniak generals, asserted, "The question is only whether it can ask for and whether it will get a political 'blessing' from ruling Bosniak structures. That blessing first has to come from Bakir Izetbegovic."<sup>19</sup>

75. In 2012, a former international advisor to the BiH Prosecutor's Office observed that many prosecutors there are highly reluctant to prosecute Bosniaks for crimes against Serbs and that they fail to vigorously pursue those cases. This failure is apparent in the BiH Prosecutor's Office's record. Out of 7,480 Serb civilian war deaths (as estimated by the ICTY), just ten have led to a final conviction in the Court of BiH.

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

- its refusal even to investigate newly uncovered evidence—10,000 pages of documents submitted by a former Bosniak SDA member—linking the President of the BiH House of Representatives to complicity in crimes by the sadistic El Mujahid Detachment of the Army of the Republic of BiH's (ARBiH) 3<sup>rd</sup> Corps;
- its failure to seek justice for the ARBiH's murder of 33 Serb civilians in the village of Čemerno, including women, children, and the elderly—despite evidence tying the crimes to specific individuals;
- its obstruction of the BiH State Investigation and Protection Agency's (SIPA) efforts to investigate Šemsudin Mehmedović, an SDA Member of the House of Representatives, over the illegal imprisonment and abuse of hundreds of Serb civilians in Tešanj, where Mehmedović was chief of police (the BiH Prosecutor's office went so far as to prosecute SIPA Director Goran Zubac on dubious charges, with the SDA member of the BiH Presidency crowing, "[w]e will likely send [Zubac] to prison."<sup>20</sup>);
- its failure to prosecute ARBiH 5<sup>th</sup> Corps Commander Atif Dudaković for a series of grave war crimes, despite substantial evidence against him and the Prosecutor's Office's earlier promises that he would be indicted; and
- its refusal to seek justice for well-established crimes against Serbs by the El Mujahid Detachment, such as its murder of 52 Serbs at a prison camp. El Mujahid members performed ritual decapitations of the victims, which 20 years later have become the standard practice of ISIS, which has appalled the world.

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<sup>19</sup> *Ko Su Bakirovi 'Kurbani'?* BOSNIA TIMES, 3 Aug. 2015.

<sup>20</sup> *Izetbegovic: SDA must "win well" in elections*, OSLOBODENJE, 27 Aug. 2014.

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

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

78. The BiH Court and Prosecutor's Office have expanded their own jurisdiction through unlawful means, including by exploiting the vague provisions of Article 7.2 of the Law on Court of BiH to take jurisdiction over Entity-law charges essentially whenever they see fit. As the BiH High Judicial and Prosecutorial Council concluded in a 2014 study, in most of the relevant cases "the Court of BiH elaborates its expanded jurisdiction in very general, inconsistent terms and without specification, simply defining it without detailed explanation of the criteria of Article 7, paragraph (2) of the Law, while in a significant number of cases an explanation was not even given." EU officials and experts have accepted that Article 7.2 and the Court's practices in interpreting it are inconsistent with European standards on legal certainty and the principle of the natural judge.

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

**c) BiH justice institutions operate without transparency.**

80. The BiH justice system operates in an unacceptably nontransparent way, denying the public the information to which it is entitled and engendering mistrust. For example, the BiH Prosecutor's Office recently refused to give a United Kingdom judge access to its investigations in order for her to conduct an Organization for Security and Cooperation in Europe (OSCE) analysis of war crimes investigations and prosecutions. Court of BiH halted the public release of all decisions in the autumn of 2012 and continues to withhold from the public all decisions except for war crimes verdicts. Last year, the Court even removed from its website its archive of its weekly activity reports, which are often the only way to determine what decisions the Court has taken.<sup>22</sup>

**d) The Court of BiH has failed to implement a European Court of Human Rights decision.**

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<sup>21</sup> Freedom House, *Nations in Transition 2014: Bosnia and Herzegovina*, p. 131.

<sup>22</sup> Denis Dzidic, *Bosnian Judiciary Closes War Crimes Files to OSCE*, BIRN, 4 Sept. 2015.



81. The European Court of Human Rights' decision in *Maktouf v. BiH* held that the Court of BiH violated the defendants' human rights when it—following the Court's longstanding practice—sentenced defendants using a new criminal code even though the code in effect at the time of the crimes could have resulted in a shorter sentence. The Court of BiH has resisted, in many ways, implementing the *Maktouf* decision. For example, it has dismissed motions to reopen cases in which *Maktouf* was indisputably violated. It has also violated defendants' rights in new decisions since *Maktouf* and has done nothing to correct its longstanding violation of defendants' rights in past cases.

**2. The High Representative has prevented any legal recourse or review of his actions.**

82. As explained elsewhere in this document, the High Representative has prevented all legal review of his decrees and other actions, whether in the BiH Constitutional Court, the European Court of Human Court of Rights, or anywhere else. He has mandated obedience to all laws promulgated by order without the right of representatives elected by the people to amend them. The proposed referendum provides a much weaker, yet important, substitute for the basic protections against abuse of power and bad policies, which are provided by legal review and parliamentary action found in democratic societies governed by the rule of law.. Where the High Representative is not subject to election by those subject to his asserted powers, and thus not accountable to an electorate able to express their views or to replace him by vote, the proposed referendum is even more vital. The High Representative seeks to prevent the referendum so as to ensure he is entirely above the law and unaccountable. If the referendum were somehow prohibited, what meaningful recourse would be left for the citizens to try to protect their political, civil and human rights related to the High Representative?

**3. Republika Srpska is continuing to pursue reform through the Structured Dialogue.**

83. The RS has participated in good faith for more than four years in the Structured Dialogue on Justice to seek reform, but not a single legislative change has resulted to correct violations of the BiH Constitution and EU standards. The Structured Dialogue, however, has recently shown more promise. At the most recent Structured Dialogue meeting on 10 September 2015, representatives of BiH, Republika Srpska, the Federation, and Brčko District signed a protocol establishing a framework for some much-needed judicial reforms. One important reform foreseen in the protocol would limit the Court of BiH's criminal jurisdiction to cases brought under BiH law—a change that would resolve RS and EU concerns about the court's arbitrary jurisdictional practices. Another key reform would establish a higher court to take appeals from the Court of BiH (the Court of BiH currently acts as its own court of appeal—flagrantly violating European judicial standards). As the next step in the Structured Dialogue, draft legislation will be discussed at a TAIEX seminar on 1-2 October in Sarajevo.

**4. The planned referendum is an important and legitimate mechanism to support the RS's efforts to reform institutions that have a direct adverse impact upon RS citizens.**

84. As an expression of public opinion, the referendum may properly and legally have an impact upon government action. There is widespread support within BiH for reform of various institutions illegally imposed by the High Representatives, yet reforms have been blocked by the very parties challenging the referendum. The referendum is a reasonable and legally protected means for citizens to facilitate and expedite reform efforts.

85. The referendum is a way in which the RS Government is upholding its obligation, under Article II, Section 1, of the BiH Constitution to “ensure the highest level of internationally recognized human rights and fundamental freedoms to its citizens” as it seeks to use the referendum to bring about reforms needed to protect these rights and freedoms.

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