



**REPUBLIC OF SRPSKA  
GOVERNMENT**

**OFFICE OF THE PRIME MINISTER**

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No.04.1.821-1/21

28 April 2021

**His Excellency Mr. António Guterres  
Secretary-General  
The United Nations  
1 United Nations Plaza  
New York, New York, USA 10017-3515**

Dear Mr. Secretary-General:

To assist the Security Council in its upcoming meeting on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 25<sup>th</sup> Report to the UN Security Council. The RS reaffirms its support for the Dayton Accords, which have preserved peace and stability in BiH for more than 25 years, and it looks forward to BiH's continued progress on the path toward EU membership.

The report first outlines basic facts about the RS, including its democratic tradition, its dedication to human rights, and its commitment to the Dayton Accords and BiH's EU integration. Part II of the report highlights why it is essential for the stability and prosperity of BiH that the Dayton Accords, including the BiH Constitution, be implemented as written. Unfortunately, the illegitimate actions of the international High Representative and the BiH Constitutional Court have eroded the Dayton structure, leading to BiH's current dysfunction. In Part III, the report explains that any proposals for legal or constitutional change in BiH require caution and consensus, though limited reforms will be necessary to implement decisions of the European Court of Human Rights. In Part IV, the report outlines why it is well past time for the presence of the Office of the High Representative (OHR) in BiH to end. Part V examines BiH's progress toward EU membership and the barriers to such progress posed by the continued presence of the OHR and foreign judges on the BiH Constitutional Court.

We ask that this letter and the report be distributed to the Security Council's members. Should you or any Security Council member require information beyond what is provided in the report or have any questions regarding its contents, we would be pleased to provide additional information.

Yours sincerely,

**Prime Minister of the Republic of Srpska  
Radovan Višković**

**Republika Srpska's 25th Report to the UN Security Council**

**May 2021**

# Republika Srpska's 25th Report to the UN Security Council

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## **Republika Srpska's 25th Report to the UN Security Council**

### **Introduction and Executive Summary**

Republika Srpska ("RS"), a party to the treaties that make up the 1995 Dayton Peace Accords and one of the two Entities that make up Bosnia and Herzegovina ("BiH"), is pleased to submit this 25th Report to the UN Security Council.

Part I of the report outlines basic facts about the RS and its positions, including its democratic tradition and dedication to human rights. It emphasizes the RS's commitment to the Dayton Accords and the enactment of reforms necessary for BiH's EU integration. It further underlines that the RS supports expanding cooperation with regional partners and continuing cooperation with NATO, though not through NATO membership.

In Part II, the RS emphasizes the need for the Dayton Accords, including the BiH Constitution, to be implemented as written. Dayton has been the most successful peace treaty in recent history because it recognized BiH's political reality by including a decentralized structure and protections for each of BiH's constituent peoples. Unfortunately, international High Representative (HR) and the BiH Constitutional Court have eroded this structure in violation of Dayton. This erosion has led to BiH's current dysfunction. The situation has been exacerbated by the continued failure of certain powerful people and institutions in BiH to accept the Dayton Constitution. The head of BiH's most powerful Bosniak political party, for example, recently refused to rule out war and referred to the entire Serb community as "genocidals."

Part III of the report explains that any proposals for legal or constitutional change in BiH require caution and consensus. First, it is vital that any legal or constitutional changes respect BiH's essential Dayton structure. Second, efforts to promote legal or constitutional change in BiH must respect BiH's sovereignty rather than being imposed by foreigners. Third, any legal or constitutional changes to the BiH Constitution must be effected through the processes set out in the Constitution. The RS welcomes recent US policy statements in support of the Dayton Accords, and it agrees with Secretary of State Blinken on the need for limited constitutional change to implement decisions of the European Court of Human Rights.

In Part IV, the report outlines some of the many reasons why the Office of the High Representative's (OHR) presence in BiH should end. The secretive appointment process for a new HR is contrary to Annex 10 of the Dayton Accords, the instrument by which the HR was created. The HR's continuing threats to use the so-called "Bonn powers," which are patently illegal, and increasingly acknowledged as such, are provocative and destabilizing. Moreover, the HR's continued presence undermines BiH's progress, as former HRs have recognized.

Part V examines BiH's progress toward becoming an EU member, as well as important barriers to such progress. As long as BiH has an HR claiming lawless dictatorial powers and a Constitutional Court with three seats reserved for foreigners, it will remain a protectorate rather than a fully sovereign state eligible for EU membership, as EU officials have recognized.

Notwithstanding the challenges in BiH, the RS believes that BiH can succeed if foreign and domestic actors accept and support the letter of the Dayton Accords.

# Republika Srpska's 25th Report to the UN Security Council

## I. Introduction to Republika Srpska

### A. Democracy and human rights

1. Republika Srpska (RS) is a democratic Entity with a 25-year history of free, fair, and competitive elections. It reveres and upholds human rights, and it is welcoming to members of all religions and ethnic groups. The RS Government vigorously supports efforts to promote mutual understanding and respect among the various groups in the RS. The RS supports implementing decisions of the European Court of Human Rights by removing ethnic qualifications for the members of the BiH Presidency and House of Peoples from the RS.

### B. Commitment to the Dayton Accords as written

2. The RS is dedicated to honoring and implementing the Dayton Accords, which have been a cornerstone of regional peace for over 25 years. The Accords not only brought peace, but also created a formula for stability and democratic governance in a country with deep-rooted ethnic divisions.

3. The RS simply insists, *as all parties should*, that the Dayton Accords be respected, and the RS will continue seeking to enforce and protect the Accords through all political and legal means.

4. The RS is committed to the future of BiH as a successful and stable country, founded and guided by the principles underlying the Dayton Accords. To that end, the RS's political leadership called in April 2021 for an open political discourse among BiH's two Entities and three constitutional peoples aimed at restoration of the letter and basic principles of the Dayton Accords.

5. At the same time, the RS recognizes what should be obvious to all members of the international community—that constant pressure and threats to eradicate the Accords' protections and guarantees for all constituent peoples will necessarily cause some Serbs and Croats, and others in the region, to raise questions about the future of BiH. As discussed further below, the only threat to the future and stability of BiH comes from those who have never accepted the Dayton Accords and actively work to subvert them.

### C. EU integration

6. The RS is fully committed to enacting reforms necessary for BiH's European integration, and it has already made significant progress, including by harmonizing regulations with the EU's *acquis* and implementing economic reforms and anti-corruption measures. The RS will continue to implement EU-recommended reforms and work toward EU integration, even if geopolitical conditions in the EU itself have delayed additional expansion of the EU at this time.

### D. Relations with neighbors and international community

#### 1. Regional cooperation

7. The RS strongly supports the mini-Schengen initiative, a project to lift barriers in the Western Balkans that has so far been joined by Albania, Serbia, and North Macedonia. The RS hopes that BiH will join mini-Schengen and other efforts to deepen ties and cooperation in its neighborhood.

8. The RS has continued to reach out to other countries in the region in an effort to improve relations and foster cooperation. For example, the RS sent aid after the Croatian region of Banija was hit by an earthquake in December 2020. Accompanying RS President Željka Cvijanović on a visit to the earthquake-hit town of Petrinja, Croatian Deputy Prime Minister Boris Milosevic said that if there was something positive about the disaster, it was solidarity and “us helping one another irrespective of religious or ethnic differences.”<sup>1</sup>

## **2. The RS supports cooperation with NATO but opposes BiH membership in any alliance.**

9. The RS seeks to maintain stance of neutrality similar to that of Austria, Sweden, Finland, or Ireland. The RS seeks for BiH what Thomas Jefferson sought for the United States: “Peace, commerce, and honest friendship with all nations—entangling alliances with none.” Only 20% of the electorate in the RS supports NATO membership,<sup>2</sup> so it is only natural that NATO membership is opposed by every significant RS party, whether in the government or the opposition.

10. Moreover, because NATO’s agreed target for defense spending among members is 2% of GDP, NATO membership would likely require a doubling of defense spending by BiH.<sup>3</sup> The increase in military spending required by NATO membership would require damaging tax increases or painful spending cuts that BiH simply cannot afford.

11. Notwithstanding its commitment to neutrality, the RS supports, encourages, and actively participates in BiH’s continued cooperation with NATO, including through the Partnership for Peace program, which BiH joined in 2006, and through BiH’s Individual Partnership Action Plan, which was first agreed with NATO in 2008. The RS also supported the Council of Ministers’ February 2021 decision to establish a Commission for Cooperation with NATO and to approve the Reform Program to be sent to NATO headquarters. The RS also cooperates closely with the United States and other NATO members on anti-terrorism and other security matters. In its earlier proclamations, the RS advocated for demilitarization of BiH as the best and most useful solution. There are huge expenses on defense and armed forces at the level of BiH, and these funds could have better use in many areas such as health care and social welfare, education, and support to the real sector to generate and retain jobs.

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<sup>1</sup> *President of Bosnia's RS entity wishes Petrinja and Glina speedy recovery*, HINA, 10 Feb. 2021.

<sup>2</sup> Eda, Findings of the survey on attitudes of Republika Srpska citizens on NATO and Euro-Atlantic integration presented, 14 Nov. 2019 (available at [edabl.org/citizens-of-republika-srpska-do-not-want-to-join-nato-but-prefer-to-join-the-european-union/](https://edabl.org/citizens-of-republika-srpska-do-not-want-to-join-nato-but-prefer-to-join-the-european-union/)).

<sup>3</sup> At a March 2017 NATO-sponsored seminar in Sarajevo, then-MP Šefik Džaferović said that BiH is “allocating less than 1% of its GNP to defense, and much of this is spent on personnel. Greater defense outlays will eventually be required.” Report, *The Western Balkans: Transition, Challenges, European Aspirations and Links to the MENA Region*, NATO Parliamentary Assembly, 21 Apr. 2017.

## **II. The Dayton Accords must be implemented as written.**

12. For BiH to remain stable and thrive, the Dayton Accords, including the decentralized governance established in the BiH Constitution, must be faithfully implemented. Past deviations from this formula, and current threats to alter the delicate balance struck in the Dayton Accords, have caused political tensions and threatened the future stability of BiH.

### **A. The Dayton formula is a necessary recognition of BiH's political reality.**

13. The BiH Constitution as agreed at Dayton has been successful at preserving peace and stability in BiH for more than 25 years because it was tailored to BiH's political and historical reality, which is characterized by three peoples whose members fear domination by one or more of the others. The Constitution reserves most governmental competences to the Entities and includes various mechanisms carefully designed to protect the interests of the Entities and constituent peoples. Not only has experience demonstrated that the Dayton formula can succeed in maintaining peace and fostering progress in BiH, but there is no viable alternative to this structure, and never has been. Even a half century of repressive government in the former Yugoslavia failed to extinguish Yugoslavia's separate ethnic identities and rivalries, which continued throughout the Soviet era and manifested themselves immediately as soon as the control of the repressive authoritarian regime receded.

14. As Richard Holbrooke, the chief US negotiator of Dayton, said in 2007, "Bosnia is a federal state. It has to be structured as a federal state. You cannot have a unitary government, because then the country would go back into fighting. And that's the reason that the Dayton agreement has been probably the most successful peace agreement in the world in the last generation, because it recognized the reality."<sup>4</sup>

15. Opponents of the Dayton compromise blame it for BiH's political divisions, but this misguided thinking confuses cause and effect. As University of Pittsburgh Professor Robert M. Hayden pointed out in a recent article, "Bosnia isn't the way it is because of Dayton; rather, Dayton is the way it is because of the nature of Bosnian society."<sup>5</sup>

16. There has been no significant ethnic violence in BiH since the Dayton Accords were agreed. Contrary to the assertions of some who focus only on day-to-day political squabbles in BiH, real threats to the stability and future of BiH come not from the persistence of ethno-religious identities, or even provocative political rhetoric. Rather, material threats to the stability and future of BiH come from those elements who seek to undo the Dayton formula and eliminate the protections that have preserved peace in the country.

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<sup>4</sup> Holbrooke: *Kosovo Independence Declaration Could Spark Crisis*, Council on Foreign Relations, 5 Dec. 2007 (available at [cfr.org/kosovo/holbrooke-kosovo-independence-declaration-could-spark-crisis/p14968](https://www.cfr.org/kosovo/holbrooke-kosovo-independence-declaration-could-spark-crisis/p14968)).

<sup>5</sup> Robert Hayden, *The Ethno-Territorial Separation of Bosnia Was the Key to Ending the War and Keeping Peace*, *The National Interest*, 10 Jan. 2021.



**B. The High Representative and the BiH Constitutional Court have centralized BiH and eroded the rights of the constituent peoples in violation of the Dayton formula.**

17. Since the Dayton Accords were agreed, successive High Representatives have assisted in the efforts of BiH's Bosniak political parties in their relentless campaign to dismantle the Dayton compromise and achieve the wartime Bosniak goal of a unitary state dominated by Bosniak politicians. The HR has already, through a series of illegal decrees and coercion, achieved much of this agenda, with scores of new BiH-level agencies created in violation of the BiH Constitution's division of competences.

18. Nonetheless, the HR and the Bosniak parties are still not satisfied. In 2019, the SDA adopted a provocative declaration calling for the complete abolition of the Dayton structure—including the Entities and the protections for constituent peoples—in favor of a unitary state that would be dominated by the SDA.

19. Instead of performing its duty to uphold the Constitution, the BiH Constitutional Court has too often endorsed unconstitutional centralization and the weakening of constitutionally guaranteed protections for BiH's constituent peoples. In effect, the body that is most responsible for establishing and honoring the rule of law in BiH has regularly ignored the law. The BiH Constitution 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>6</sup> Yet despite this clear instruction, the Constitutional Court majority has routinely approved BiH-level competences that are neither expressly, nor even implicitly, assigned to the BiH level.

20. In a 2010 interview, Nedin Ademović, the former chief of staff of the Constitutional Court's president, said approvingly, "[C]onstitutional-law development has been exclusively a consequence of international interventionism."<sup>7</sup> He boasted, "The BiH Constitutional Court has granted legitimacy to a host of imposed laws and introduced a balance between BiH sovereignty and international governance."<sup>8</sup>

21. The Constitutional Court has consistently flouted the rule of law, ignored clear constitutional requirements, and acquiesced to the HR's illegal imposition of laws by decree, which is quite obviously contrary to the democratic legislative system established in the Constitution. When the Constitutional Court once dared to side against the HR, the HR responded by issuing a decree, still in effect today, that overruled the court and forbade any court in BiH from "tak[ing] issue in any way whatsoever with one or more decisions of the High Representative."<sup>9</sup>

22. The reason a majority of the Constitutional Court has reliably supported the dismantling of the Dayton compromise is that in key cases the court's three foreign judges vote as a bloc with the

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<sup>6</sup> BiH Constitution, Art. III (3)(a) (emphasis added).

<sup>7</sup> Oslobodjenje interview with Nadim Ademović, 24 Apr. 2010.

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

<sup>9</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 March 2007.

two Bosniak judges, thus outvoting the four other BiH citizens on the court. The foreign judges of the Constitutional Court of BiH do not contribute to the preservation of the Dayton structure. On the contrary, they have voted for decisions that cause justified dissatisfaction of one or two peoples as they violate fundamental rights, in most cases, of Serbs and the RS.

23. The Constitutional Court's failure to protect BiH's Dayton structure makes it all the more important for elected officials in BiH to do so.

### **C. Deviation from Dayton has caused today's BiH-level dysfunction.**

24. As in numerous other countries with historically identifiable groups and regions, the BiH Constitution strictly limits the BiH level's competencies, thus minimizing the scope of contentious decisions that require consensus at the BiH level. The Dayton Agreement and its Annex 4 define BiH as a state union with very limited internal sovereignty, which for the most part belongs to the Entities—the RS and the Federation. The structure of government at the level of joint institutions, of which there are only three--the Presidency as a collective head of the state union and executive branch, the Constitutional Court of BiH and the Central Bank of BiH--also indicates the limited internal sovereignty of BiH. All other bodies are auxiliary, which is why they do not have the BiH designation in their name (for example, the Parliamentary Assembly and its two houses - the House of Representatives and the House of Peoples, as well as the Council of Ministers, which is not a government, but an auxiliary body of the Presidency of BiH). The laws imposed by the HRs, and endorsed by the BiH Constitutional Court, have grossly violated BiH's constitutional Dayton structure, deepening interethnic mistrust and instability in BiH.

25. Unfortunately, the unconstitutional centralization of competences, resulting in large part from the illegal and misguided actions of the HR, has sabotaged the Dayton design. It is not the BiH Constitution as agreed at Dayton that has caused dysfunction in BiH, but rather it is the distortion of that formula by the HR, and disregard of the requirements of the Constitution by the Constitutional Court; it is unconstitutional centralization that has been the source of many of the frequent and most contentious deadlocks that have marked BiH-level governance.

26. Former OHR attorney Matthew Parish acknowledged this obvious fact recently when he wrote that BiH's "problems have been compounded . . . by successive High Representatives and other international officials pressing the parties to create ever more federal structures in a push towards the centralisation of power."<sup>10</sup> He further explained:

Centralisation compounds the problems of consociationalism, not relieves them. It is decentralisation that defuses the political pressures of consociationalism when different groups do not want to compromise with one-another, not more centralisation. Switzerland survives with an approximately consociational constitution by keeping government competences away from Bern and leaving them in the hands of the geographically varied cantons.<sup>11</sup>

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<sup>10</sup> Matthew Parish, *How to exit Bosnia*, Transconflict, 8, Apr. 2021.

<sup>11</sup> *Id.*

**D. Certain powerful and influential people and institutions in BiH have still not accepted the Dayton Accords and thus actively subvert them at every chance.**

**1. Bakir Izetbegović's destabilizing anti-Dayton rhetoric**

27. Since the RS's previous report to the Security Council in October 2020, the leader of BiH's largest Bosniak political party, the Party of Democratic Action (SDA), Bakir Izetbegović, has often engaged in repugnant and destabilizing rhetoric. Last month, for example, Mr. Izetbegović said he could not say there would be no war and added, "I would rather die today than allow genocidals to rule part of Bosnia and Herzegovina."<sup>12</sup> Mr. Izetbegović's talk of war is threatening, and his reference to Serbs who had nothing to do with war crimes as "genocidals" is rank bigotry that cripples ethnic reconciliation. It should not be surprising that Serbs in BiH fear living under a centralized state ruled by politicians who think of Serbs in such terms. Nonetheless, the Serb member of the BiH Presidency responded to Mr. Izetbegović's comments by proposing talks to find a balanced solution that would satisfy all Entities and constituent peoples and saying, "We do not want to go to war, our option is peace. Let's talk about Dayton, the Constitution, without foreigners, and let's respect that agreement. We do not want any call for violence or imposition of any problems."<sup>13</sup>

28. In another example of Mr. Izetbegović demonizing Serbs as a people, he said in January 2021, speaking about BiH Presidency Chairman Milorad Dodik, that "when they say 'there are no bad people, there are only bad leaders' – I'm not so sure about that,"<sup>14</sup> implying that Serbs are a bad people because they support Dodik.

29. In January 2021, Mr. Izetbegović reiterated his disdain for the Dayton Accords and his rejection of BiH's Constitution, and acknowledged how much damage has already been done to the Dayton formula, explicitly saying there can be no return to the "original Dayton," because it is retrograde, meaning the BiH Constitution as written.<sup>15</sup> In March 2021, Mr. Izetbegović called for a "unitary state of Bosnia and Herzegovina," which was the Bosniak army's wartime goal.<sup>16</sup> In December 2020, Mr. Izetbegović threatened that BiH has "terrifying weapons" that anyone who has "bad intentions" toward BiH should think about.<sup>17</sup>

30. The international community should condemn such aggressive and hateful rhetoric and insist that political actors in BiH accept the Dayton Accords as the basis for governance in BiH.

**2. BiH's foreign minister has undermined ethnic reconciliation and the**

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<sup>12</sup> *Bakir Izetbegović: Ako bude rata, spreman sam stati ispred ljudi*, N1, 20 Apr. 2021.

<sup>13</sup> Додик: Српска не жели рат, позивамо на разговор, RTRS, 20 Apr. 2021.

<sup>14</sup> *Izetbegovic's statement about Dodik's voters causes uproar*, N1, 23 Jan. 2021.

<sup>15</sup> *Izetbegović: We have to find balance between ethnic and civic principles*, FENA, 20 Jan. 2021.

<sup>16</sup> *Izetbegović: It is necessary to strengthen pro-civic forces in BiH*, FENA, 21 Mar. 2021.

<sup>17</sup> *Bosniak leader: Bosnia has terrifying weapons as a message to its enemies*, N1, 11 Nov. 2020.

### **pursuit of justice for war crimes**

31. BiH Foreign Minister Bisera Turkovic, a member of the SDA party, has gone out of her way to undermine ethnic reconciliation and justice for war crimes. In January 2021, after a BiH court found former Bosniak army commander Sakib Mahmuljin guilty of war crimes for atrocities committed by with the El Mujahedin unit under his command, Ms. Turkovic took to Facebook to condemn the verdict and praise Mr. Mahmuljin.<sup>18</sup> She quoted with approval a threatening letter from Mr. Mahmuljin's son saying that "even after the war, it is a war."<sup>19</sup>

32. Ms. Turkovic also continues to pursue the SDA's foreign policy rather than BiH's. In January 2021, for example, Ms. Turkovic acting outside her competence, sent a diplomatic note to Croatia responding to Croatia's announcement that it would declare an exclusive economic zone, stating that it endangered BiH's rights.<sup>20</sup> The note did not reflect the position of the BiH Presidency, which is the body charged with competence for foreign policy in the BiH Constitution, and the chairman of the Presidency explicitly disagreed with Turkovic's position. Croatia rightly told Ms. Turkovic that it could not accept the BiH Foreign Ministry's note as BiH's legitimate and official position.

### **3. Constant attacks on BiH's Dayton structure in the courts**

33. For years, Bosniak officials have been launching frivolous complaints against RS laws in the Constitutional Court, asking the court to transfer additional competences to the BiH level in flagrant violation of the Constitution, or simply to frustrate legitimate acts of governance by the Entities. (Bosniak officials even filed a ridiculous case claiming that the RS's preparation and submission of these reports to the Security Council was somehow illegal, even though the reports have been invited and welcomed by certain Security Council members.)

34. In a recent example, despite the fact that the regulation of local forest lands are manifestly not a BiH competence, evidenced by the clear division of competences in the BiH Constitution and by the well-developed legal regime for forests enacted by both the Entities and cantons, Bosniak officials have asked the Constitutional Court to scrap the existing system, ignoring the Constitution's text, and decree a new BiH-level responsibility for the regulation of forests.

35. In another similar case filed recently, Bosniak politicians claimed that the RS could not grant concessions for power plants, even though the grants were perfectly consistent with a BiH law on concessions that was drafted with the assistance of experts from the EU and other members of the international community, and even though dozens of similar concessions had been granted for many years by both the RS and the Federation.

36. To cite yet another recent example, Bosniak officials recently asked the Constitutional Court to abolish the RS Ministry for European Integration and International Cooperation, even

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<sup>18</sup> Sandra Veljkovic, *Ministrica vanjskih poslova BiH brani osuđenog zapovjednika mudžahedina koji su ubijali Srbe i Hrvate*, Večernji list, 25 Jan. 2021.

<sup>19</sup> *Id.*

<sup>20</sup> *Croatia's FM rejects diplomatic note from Bosnia's FM on economic zone*, HINA, 11 Feb. 2021.

though the ministry's role, which is similar to that of regional bodies throughout Europe, does not in the slightest conflict with BiH's foreign-policy competence or otherwise violate the Constitution.

37. The continued filing of these provocative and disruptive cases, based on claims with no constitutional legitimacy, demonstrates the constant effort of Bosniak parties to increase tensions and rewrite the Dayton Accords to diminish protections for the Entities and the constituent peoples.

#### **4. The continued disenfranchisement of the Croats**

38. The Bosniak political parties are committed to stripping the Croats of their constitutional protections as a constituent people. One way they have already succeeded in this respect is the 2018 election of Željko Komšić as the "Croat" member of the BiH Presidency. Mr. Komšić is a nominally Croat politician who advocates the SDA and Bosniak political agenda and has almost no support among Croats. Bosniak politicians disenfranchised Croat voters by encouraging Bosniaks to vote for Komšić instead of voting for a candidate for the Bosniak seat in the Presidency. This manipulative tactic effectively gave the Bosniaks two seats on the Presidency and the Croats none.

39. But the Bosniak parties are still not satisfied. SDA leader Bakir Izetbegović has often reiterated that the "minority" (the Croats) must not be allowed to block the will of the majority Bosniaks. For example, in October 2020, Izetbegovic, referring to Croats in the Federation Parliament, decried what he called the "domination of a minority over a majority."<sup>21</sup> SDA President Bakir Izetbegović recently threatened to use the Komsic phenomenon at lower levels of government as well in order to ensure that the Croat community has no effective involvement at all in governance.

#### **5. The constant threats to the rights of Entities and constituent peoples cause anxiety and discord.**

40. The BiH Constitution's protections for the constituent peoples are necessary not just to ensure peace and stability, but also to allow BiH's peoples to break down inter-ethnic barriers and work cooperatively together. Only when BiH's peoples each feel secure from domination by the others are they able to build trust and work across ethnic lines toward common goals. Attempts to centralize BiH and remove the protections for the constituent peoples cause distrust, anxiety, tension, and discord. Inter-ethnic cooperation becomes almost impossible when a people feels under siege.

41. When the HR and members of the international community support efforts to further centralize governance in BiH in direct violation of the formula agreed at Dayton, and publicly call for changes to the BiH Constitution for politically expedient ends, these actions only serve to destabilize the political climate by causing groups that are guaranteed a measure of protection and autonomy under Dayton to feel threatened, and to react accordingly.

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<sup>21</sup> *Izetbegović: Ne pristajemo na ucjene HDZ-a*, Vijesti.ba, 8 Oct. 2020.

42. Discussion by BiH Serbs and Croats in BiH, as well as others in the region, regarding an eventual peaceful dissolution of BiH arise as an inevitable reaction to these relentless threats to continue BiH's centralization in violation of the Constitution. Indeed, threats from certain Bosniak leaders to abolish the RS altogether will always cause Serb leaders to suggest that they would invoke the right of self-determination for the RS before accepting its elimination. If they are to remain a vital instrument of stability in the region, the Dayton Accords cannot be a contract that binds only one side, but must be respected by all.

### **III. Any proposals for legal and constitutional change require caution and consensus.**

#### **A. Any legal or constitutional changes must respect BiH's essential Dayton structure.**

43. Any legal or constitutional changes in BiH must leave intact the constitutionally-guaranteed autonomy of the Entities and the Dayton system's protections for the constituent peoples. This structure has preserved peace for more than a quarter century, and it will remain essential for guaranteeing stability in the future. Throughout the region's history, stable governance has required recognition of regional autonomy.

44. Former HR Carl Bildt wrote in January, "Those who question the Dayton structure for enshrining ethnic and national identities might be advised to try their hand at getting the Scots to accept total integration with England, or the Catalans or the Basques to accept a completely unitary Spain. Politics in countries like these tend to be based on national identities."<sup>22</sup>

45. Simply put, all threats to the Dayton compromise are threats to the stability, progress, and the future of BiH. Writing recently in *The National Interest*, Professor Hayden warned against destabilizing BiH by imposing a centralized system on Serbs and Croats:

Most of the proposals being made by denizens of U.S. think tanks to "fix Bosnia" are to have NATO help the Bosniaks in such a takeover, by imposing a centralized government on the Croats and Serbs. It is difficult to imagine a better way to destabilize Bosnia. It is even more difficult to find a defensible reason for such proposals.

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The Dayton system has kept the peace for twenty-five years. Why destabilize Bosnia now?<sup>23</sup>

46. Some US commentators advocating a Bosniak-dominated BiH have been participating in a lobbying campaign seeking an aggressive push by the United States and other countries to replace the Dayton system that has preserved peace for more than 25 years. For example, one recent think

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<sup>22</sup> Carl Bildt, *Bosnia to war, to Dayton, and to its slow peace*, *European Council on Foreign Relations*, 28 Jan. 2021.

<sup>23</sup> Robert Hayden, *The Ethno-Territorial Separation of Bosnia Was the Key to Ending the War and Keeping Peace*, *The National Interest*, 10 Jan. 2021.

tank report, entitled *Fixing Dayton: A New Deal for Bosnia and Herzegovina*, calls for the international community to forcefully impose a centralized “civic” system on BiH.

47. But any Western supporters of a “civic” BiH fundamentally misunderstand the country. Serbs and Croats in BiH have, through their votes, consistently and emphatically rejected the idea of a “civic” BiH. Even SDA President Bakir Izetbegović recently admitted that there is “zero” Croat or Serb support for “civic” parties.<sup>24</sup>

48. In fact, even most Bosniaks also reject “civic” parties, opting instead to support Bosniak nationalists. The nationalist Bosniak parties often support a “civic” system in BiH, but only when assured that such a BiH would be utterly dominated by BiH’s Bosniak majority.

49. In a piece responding to the *Fixing Dayton* report, Professor Hayden wrote:

There is still no reliable evidence that many Croats and Serbs of B&H are willing to accept governance by a centralized government. Trying to centralize the state against their repeatedly demonstrated opposition is likely to bring on the very conflict that the Report purports to fear.<sup>25</sup>

50. Realistic observers in BiH itself confirm this view. In response to a Western academic’s calls for “civic activism” for the elimination of BiH’s Entities and the Federation’s cantons, a prominent Croat journalist in BiH, Milan Šutalo, wrote:

No normal person, that is, only a crazy person, can believe that the citizens of Republika Srpska or of the cantons with a Croat majority would join these citizens’ protests to tear down the RS, or the cantons, “take away their money and turn it over to the central government in Sarajevo,” and bow down to one state president and a Bosnian government in Sarajevo!<sup>26</sup>

**B. Any efforts to promote legal and constitutional change must respect BiH’s sovereignty**

51. Although expert guidance from BiH’s friends is appreciated, reform efforts by foreign governments and organizations must respect BiH’s sovereignty. In order to be sustainable and legitimate, legal and constitutional change in BiH must not be the result of foreign pressure from any source. Past efforts by influential outsiders to pressure BiH into major changes have only set back BiH’s progress.

52. For example, the fiasco of the October 2009 Butmir meetings serves as a lesson in how not to achieve reform. At the Butmir military base in Sarajevo, certain members of the PIC Steering

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<sup>24</sup> Izetbegović: *It is necessary to strengthen pro-civic forces in BiH*, FENA, 21 Mar. 2021.

<sup>25</sup> Robert M. Hayden, *A “New Deal for Destabilizing the Bosnian Peace*, Wilson Center, 2 Mar. 2021.

<sup>26</sup> Milan Šutalo, “*Ugledni američki profesor*” *zapravo je ratni huškač i saboter Daytonskog sporazuma i mira u BiH*, Hrvatski Medijski Servis, 4 Apr. 2021.

Board—with the assistance of the OHR—tried to impose on BiH political leaders a package of drastic and destabilizing changes to the BiH Constitution. After a set of hastily organized, closed-door meetings, all but one of the political leaders present rejected the package.

**C. Any constitutional changes must follow constitutional processes.**

53. An essential element of respect for the rule of law is respect for legal process, and particularly respect for those constitutional processes governing the means by which the constitution itself is to be amended. Any attempt to impose legal reforms upon BiH by illegal means would only further erode respect for the rule of law and for those foreign elements who would engage in such a hypocritical effort.

54. All reforms—whether by statute or by way of constitutional amendments—must follow the transparent and legal processes set out in the BiH Constitution. The era of undemocratic dictates being imposed on BiH and its people by external forces in violation of Dayton and in defiance of BiH’s democratic constitutional processes is long past.

**D. The RS welcomes the recent statement of US policy on constitutional change.**

55. After Joe Biden was elected as president of the United States, supporters of a Bosniak-dominated BiH expressed unrealistic, optimistic expectations that the new US administration would launch an aggressive policy to replace the Dayton Constitution, despite the more than 25 years of uninterrupted peace brought by the Dayton structure.

56. The Biden Administration, however, rejected such a destabilizing policy. In a letter to the members of the BiH Presidency, US Secretary of State Antony Blinken called for the implementation of “limited constitutional change that is necessary to reform the electoral system consistent with the requirements of the European Union membership and the rulings of the European Courts.”<sup>27</sup> Secretary of State Blinken explicitly rejected the idea of “a ‘Dayton II’ to fundamentally reshape the power-sharing arrangements in the Dayton Peace Agreement.”<sup>28</sup> US Ambassador to BiH Eric Nelson has, similarly, reiterated the US commitment to the Dayton Accords and BiH with two Entities and three constituent peoples.<sup>29</sup>

57. Republika Srpska gratefully welcomes the US policy statements in support of the Dayton Accords, and it agrees with Secretary of State Blinken on the need for limited constitutional change to implement decisions of the European Court of Human Rights, as detailed in section E, below. The RS remains grateful for the leading role the United States played in drafting and brokering the Dayton Accords, and it hopes that the United States and other members of the international community will continue to support the Accords and resist and counteract destabilizing efforts to subvert or distort them.

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<sup>27</sup> *US State Secretary urges BiH Presidency to engage in constitutional change*, FENA, 1 Apr. 2021.

<sup>28</sup> *Id.*

<sup>29</sup> *Washington supports the Dayton Agreement*, SRNA, 29 Jan. 2021.



## **E. Implementation of European Court of Human Rights judgments**

58. The RS strongly supports amending the BiH Constitution to implement the European Court of Human Rights' judgment in the *Sejdić-Finci* and related decisions. It regrets that disagreement between BiH's Bosniak and Croat parties over how to implement these judgments with respect to elected officials in the Federation has prevented these long-overdue changes.

59. In the *Sejdić-Finci* decision, the European Court found a violation of the European Convention on Human Rights in provisions of the BiH Constitution that make individuals who are not members of BiH's three constituent peoples ineligible to serve in BiH's Presidency or House of Peoples. The European Court has since issued several similar decisions rejecting the BiH Constitution's requirements that members of the BiH Presidency and House of Peoples be from certain ethnic groups.

60. The RS has for many years advocated simply eliminating the requirement that members of the BiH Presidency and House of Peoples from the RS be Serbs. For office holders representing the Federation, the RS has long made clear that it would accept any solution the Croat and Bosniak parties agree to that does not disenfranchise any of BiH's three Constituent peoples.

61. In 2013, Jakob Finci, one of the two plaintiffs in the *Sejdić and Finci* case, praised then-RS President Milorad Dodik's proposal that there be one member of the BiH Presidency from the RS, two from the Federation, and no ethnic qualifications. Mr. Finci said that he and Dervo Sejdić, his co-plaintiff, believe that President Dodik's proposal is the "most correct and concrete."<sup>30</sup>

62. Unfortunately, BiH's leading Bosniak and Croat parties have, for more than a decade, failed to reach agreement on how members of the BiH Presidency and House of Peoples from the Federation should be elected. The Bosniak parties have rejected any proposal designed to prevent the election of two members of the Presidency by Bosniaks and none by Croats. It is this deadlock between the Bosniak and Croat parties that has prevented *Sejdić-Finci* and related judgments from being implemented for so many years.

## **IV. The continued problems caused by the OHR**

### **A. A new HR must not be appointed**

63. The secretive appointment process for a new HR is contrary to international legal instrument by which the HR was created. The existence and authority of the Office of the High Representative is based upon an international treaty, namely, the Agreement on Civilian Implementation, Annex 10 of the Dayton Accords. The parties to this treaty were the Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of BiH, and the RS.

64. Article 1.2 of this treaty provides that "the Parties request the designation of a High Representative" with a mandate "to facilitate the Parties' own efforts and to mobilize and, as

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<sup>30</sup> *Dodikov prijedlog najkorektniji i najkonkretniji*, VIJESTI.BA, 13 Aug. 2013.

appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement.”

65. The parties so requesting the appointment of the initial HR made no provision in this treaty for the appointment of successor HRs because it was assumed that the role would be of short duration.

66. In an utter perversion of the intentions and language of Annex 10, however, the Office of the High Representative has become an instrument by which certain members of the international community exercise overlordship over BiH, and all decisions regarding the appointment and role of the HR have been usurped and taken away from the parties to Annex 10. The parties’ consent to the role and appointment of the HR is now considered to be so irrelevant by certain members of the international community that the parties to Annex 10 are not even consulted in the appointment process. Indeed, the parties are not even invited to provide input on appropriate qualifications or duties for a new HR.

67. What is worse, the entire appointment process is treated as a secretive act of diplomatic alchemy; the parties to Annex 10 are not even given the courtesy of being informed as to how it is that a new HR is selected by whomever it is that does the selecting. It is as if those parties who feel themselves to be the parental guardians of BiH cannot even allow the Bosnian children to have any say in determining what sort of babysitter would be appropriate, or even to know how it is that one is to be selected.

68. All the while that these same members of the international community, and the HR himself, act in disregard of the language and limitations of Annex 10, ignore the rights of the parties to the treaty, and consider themselves immune from the most basic requirements of transparency and legal process, they continually profess concern for the rule of law in BiH. It should be no surprise that their hypocrisy so often elicits a cynical response from so many citizens of BiH.

**B. The HR’s continuing threats to use the illegal Bonn powers are provocative and destabilizing.**

**1. It is time for the HR to explicitly abjure any authority to use the Bonn powers.**

69. In violation of the Dayton Accords, the HR continues to claim legally absurd dictatorial powers to decree laws, nullify decisions of the Constitutional Court, and remove elected officials from office. He has even recently threatened to renew his illegal use of these so-called “Bonn Powers.”

70. As explained in detail in the attachment to [Republika Srpska’s 22nd Report to the UN Security Council](#), entitled, *The Illegality of the Bonn Powers*, the HR’s claimed authority to impose laws and punish public officials by simple edict is manifestly unlawful. The HR is an institution authorized by the parties to Annex 10 of the Dayton Accords, including the RS, to be a coordinator of international activities involved in the civilian aspects of the Dayton Accords and a facilitator of the parties’ efforts. The HR’s mandate does not include any authority, explicit or implicit, to decree laws or otherwise make decisions binding on governments and citizens of BiH. Annex 10 defines a strictly limited mandate, authorizing the HR to engage in such activities as to “[m]onitor,”

“[m]aintain close contact with the Parties,” “[f]acilitate,” “[p]articipate in meetings,” and “[r]eport.” As international relations scholar and former OHR attorney Matthew Parish has written, the HR’s “functions were limited to coordinating other international organisations’ work and monitoring and exhorting domestic officials to comply with their Dayton obligations.”<sup>31</sup>

71. The HR who first claimed the Bonn powers, Carlos Westendorp, has admitted, “At the Bonn conference, we managed to introduce a method by which the High Representative can take these decisions, which is not exactly in legal terms with Dayton. . . . It was not very legal, I have to admit.”<sup>32</sup>

72. Former UK Ambassador to BiH Charles Crawford, who also 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>33</sup>

73. International recognition of the Bonn powers’ illegality is continuing to grow. In an article published in January 2021 by the European Council on Foreign Relations, former Swedish Prime Minister Carl Bildt, who served as the first HR, pointed out, “The legal basis for [the Bonn powers] was questionable in the extreme.”<sup>34</sup>

74. In *New Eastern Europe*, Ivan Pepic of the Institute for Social and Political Research in Mostar also recently highlighted the lack of any legal basis for the Bonn powers, writing:

It is important to point out that the PIC Steering Board has not been given power by any international organisation and does not have the status of a UN subsidiary body. It is therefore unclear how the OHR has been transformed from programme coordinator into a “European protector” in Bosnia and Herzegovina with executive binding superpowers.

. . . Under international law . . . international organisations cannot generate or determine their own competencies and powers.<sup>35</sup>

75. In his November 2020 speech to the Security Council, the current HR, Mr. Valentin Inzko, suggested that the HR should return to the office’s former illegal practice of ruling by decree, saying, “In the past, the international community tried robust interventionism and hands-off local

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<sup>31</sup> Matthew Parish, *A Free City in the Balkans* 86 (2010).

<sup>32</sup> Adis Merdzanovic, *Democracy by Decree, Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina* (2015), 256.

<sup>33</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).

<sup>34</sup> Carl Bildt, *Bosnia to war, to Dayton, and to its slow peace*, *European Council on Foreign Relations*, 28 Jan. 2021.

<sup>35</sup> Ivan Pepic, *The next High Representative must reconsider European power-sharing solutions for Bosnia*, *New Eastern Europe*, 25 Jan. 2021.

ownership approaches. Given the reality on the ground, perhaps it is time to rethink our current approach.”

76. Fortunately, a return to the High Representative’s former dictatorial practices is impossible, because such powers are now widely understood—both inside and outside BiH—as illegal, illegitimate, and counterproductive. Any attempt by the High Representative to return to the office’s dictatorial past would only expose the office’s impotence.

## **2. The HR’s false claim that he has powers in addition to Annex 10 authority**

77. With more and more observers and officials openly acknowledging that Annex 10 provides no legal basis for the Bonn powers, the HR is now claiming that his authority comes not just from Annex 10, but also from UNSC resolutions.<sup>36</sup> His assertion on this point would never be endorsed by all members of the UNSC themselves, and in fact the UNSC has never purported to supplement the HR’s authority under Annex 10 or to delegate dictatorial authorities to the HR.

78. Although certain Security Council resolutions have endorsed conclusions of the Peace Implementation Council, to endorse is not to delegate. The statements in these resolutions were mere expressions of political support for the conclusions of the PIC, an ad hoc group with no legal power. In any event, the PIC conclusions the Security Council endorsed did not claim to supplement the HR’s authority under Annex 10. As former OHR attorney Matthew Parish has explained, the Bonn Conclusions merely interpret Annex 10, though “the interpretation they give is quite absurd.”<sup>37</sup>

### **C. The HR’s pernicious role in BiH**

79. Under Annex 10 of the Dayton Accords, the HR is supposed to “facilitate the Parties’ own efforts” and “[f]acilitate the resolution of any difficulties arising in connection with civilian implementation” of the Dayton Accords. Time and again over the years, successive HRs have shown disregard for this mandate and instead undermined BiH’s stability and progress.

80. The OHR’s influence was worst during the period when the HR used the claimed Bonn powers to run BiH like a dictator, rendering BiH political institutions impotent and irrelevant. The ill-conceived dictates and abuses of power foisted upon BiH during that period are the primary sources of BiH’s troubles today. For example, the EU has rightly emphasized the need for major reforms to BiH’s dysfunctional judicial system, but *that judicial system is almost entirely a product of the High Representative’s prior unlawful, ill-considered decrees.*

81. Even when the HR does not use his claimed dictatorial powers, he is a major barrier to progress in BiH. For example, the state property issue that is the source of bitter division in BiH today would have been resolved years ago if the HR had not scuttled a landmark agreement on the issue that was crafted between the major domestic political parties. His meddlesome quashing of

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<sup>36</sup> OHR: Bosnia’s RS parliament has no say over the end of intl oversight in BiH, N1, 10 Mar. 2021.

<sup>37</sup> Matthew Parish, *A Free City in the Balkans* 90 (2010).

the agreement to resolve the state and military property issue was a severe blow to BiH's political progress, preventing the negotiated settlement of a longstanding and acrimonious issue.

82. The results of the HR's actions here, as in other areas, were extremely detrimental to the development of a stable and functional democracy in BiH. But the damage from the HR's intervention goes beyond even that. When the HR sabotages BiH leaders' compromise solutions, it does not just block the resolution of the issue at hand—it makes all compromises even more difficult to achieve than they already are in a politically divided country like BiH. Each compromise a democratically elected leader makes to reach agreement on a contentious issue carries a political risk. Elected leaders and political parties are not going to make politically risky concessions if the resulting agreement is liable to be undone by a foreign diplomat, rendering their concession a pointless liability that accomplished nothing.

83. The International Crisis Group has recognized that “keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach.”<sup>38</sup>

84. In a recent interview, David B. Kanin, an adjunct lecturer at Johns Hopkins University's School of Advanced International Studies, observed:

Now you have people who say . . . that the Bonn Powers again need to be used, and that there should be more intervention and imposition by the Europeans and the Americans, because people in Bosnia & Herzegovina cannot do it by themselves. I think that is senseless, you will have more coercion but you won't have the development of any kind of civic state . . . That becomes a vicious circle. The international community says that people in BiH cannot make progress, that they cannot support themselves, that the international community must be there, but that then prevents any kind of development . . . That does not lead to anything lasting and stable in the region. My personal belief is that the only way to move forward is for all the problems in the region to be resolved by the people there, and that Westerners only function as moderators. Otherwise, Westerners will sit in those places as long as they can, and as long they have some interest [in sitting there], and when they are no longer there, then there will be conflict again.<sup>39</sup>

#### **1. Former HRs recognize the OHR's deleterious effects on BiH.**

85. In a February 2021 interview with Radio Free Europe former HR Wolfgang Petritsch called for the OHR to be closed, pointing out that the OHR “is now part of the problem, not the

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<sup>38</sup> International Crisis Group, *Bosnia's Dual Crisis*, 12 Nov. 2009, p. 16.

<sup>39</sup> Kanin: *Dayton je diplomatska pobjeda Slobodana Miloševića*, Al Jazeera, 13 Dec. 2020

solution.”<sup>40</sup> In another February 2021 interview, Mr. Petritsch said the OHR, “which was established for the purpose of resolving the situation immediately after the war, is a thing of the past. A quarter of a century later the situation is different, the geopolitical situation has changed dramatically and we cannot use the same approaches as 25 years ago.”<sup>41</sup>

86. In a recent panel discussion of the 25<sup>th</sup> anniversary of the Dayton Accords, Mr. Petritsch said, “When I read that these old Clintonites are coming back and want to basically restart what we did 20 years ago, this is something which we definitely—we Europeans—definitely have to hold back. This would not be a thing to reinforce the OHR, to use the Bonn Powers again. You cannot—a quarter of a century after the end of the war—do as if the war was just over.”<sup>42</sup>

87. Mr. Petritsch also recently said:

When I took over the responsibility from my predecessor Ashdown in 2002, it had already been agreed that the OHR would be eliminated in stages by 2006. But although the transition from SFOR to EUFOR was successfully carried out, and the International Criminal Court for the Former Yugoslavia was closed two years ago, the OHR is still there. . . . It is my sincere belief that it has long been time for a new reduction in the international presence in BiH.<sup>43</sup>

88. Former HR Carl Bildt wrote in January 2021, “The extensive use of the Bonn powers during the period undoubtedly strengthened the tendency of politicians in the country to evade their own responsibilities and to focus their attention more on influencing the policies of the OHR than on sitting down and hammering out painful compromises.”<sup>44</sup> Bildt further wrote, “The phase of imposed international decisions brought some progress but, at the same time, reinforced [a] destructive trend in the politics of the country.”<sup>45</sup> In a January 2021 interview with BHTV, Mr. Bildt said, “The times when the Bonn powers were used are gone. This is no longer a protectorate of the international community and one should move on.”<sup>46</sup>

## 2. The HR’s threats and ultimatums

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<sup>40</sup> Dragan Štavljanin, *Petritsch: Ne vidim svetlo na kraju tunela na Balkanu*, Radio Slobodna Evropa, 13 Feb. 2021.

<sup>41</sup> *BIVŠI VISOKI PREDSTAVNIK WOLFGANG PETRITSCH: "Bruxelles kreće brže i odlučnije u reforme BiH, ONO ŠTO ĆE URADITI, bit će iznenađujuće..."*, Slobodna Bosna, 19 Feb. 2021.

<sup>42</sup> International Institute for Peace, *Bosnian and Herzegovinian Peace Agreement turns 25 - PART II*, 11 Jan. 2021, available at [youtube.com/watch?v=4WuhlrNjN1I](https://www.youtube.com/watch?v=4WuhlrNjN1I).

<sup>43</sup> Slavko Mitrović, *Mamuzanje mrtvog OHR-a, Glas Srpske*, 29 Dec. 2020.

<sup>44</sup> Carl Bildt, *Bosnia to war, to Dayton, and to its slow peace*, *European Council on Foreign Relations*, 28 Jan. 2021.

<sup>45</sup> *Id.*

<sup>46</sup> *Bildt: Smanjiti ulogu visokog predstavnika u BiH*, *Vijesti.ba*, 29 Jan. 2021.

89. Early this year, Mr. Inzko sent an ultimatum letter demanding that the RS National Assembly revoke recognitions given in 2016 to three individuals who were recognized along with numerous other individuals and organizations as part of the commemoration of the National Assembly's 25<sup>th</sup> Anniversary. Ambassador Inzko said revoking the recognitions would "remove collective responsibility from the Serb people" and would remove "collective guilt." It is deeply offensive and contrary to European values for Mr. Inzko to ascribe guilt to innocent Serb people—even Serb children—for crimes committed by individuals during the war. Collective guilt of a people is a poisonous, fascistic, and bigoted concept that is destructive to inter-ethnic reconciliation and harmony.

90. In February 2021, HR Inzko repeated his earlier suggestion that he could try to impose on BiH a law criminalizing the expression of certain opinions about BiH's wartime history. As explained in detail in Attachment 3 to Republika Srpska's 23<sup>rd</sup> Report to the UN Security Council, a decree seeking to impose such a gag law would be lawless, foolish, and unenforceable. The suggestion of such a decree is an assault on BiH's democratic constitutional system and an unwarranted threat to reconciliation, free historical inquiry, and freedom of expression.

91. The HR has no legal authority to cast aside BiH's democratic legislative system and decree laws, and thus no such measure would be legally binding upon the citizens of BiH. In order for any law to be legally binding, it must be duly approved by the Parliamentary Assembly as required by the BiH Constitution. That body, however, has repeatedly rejected a proposed gag law.

92. Moreover, a gag law that forbids questioning how the massacre at Srebrenica is classified would violate BiH citizens' right to freedom of expression, which is explicitly recognized by the BiH Constitution and by the European Convention on Human Rights. Such a law would also run directly counter to the rulings of the European Court of Human Rights protecting the right to free expression.

93. The RS and its leaders strongly support investigating all wartime atrocities and bringing all war criminals to justice, regardless of their ethnicity or that of their victims. The RS endorses scientific research by historians in order to truthfully and completely present and understand the suffering of all peoples during the events of the conflict of the 1990s, aiming to strengthen trust and tolerance among the peoples of BiH, as well as to achieve full reconciliation of current and future generations.

94. Imprisoning those who express certain historical opinions, far from promoting reconciliation, serves only to deepen mistrust and resentment.

**3. There is a consensus among Serbs and Croats in BiH that the OHR has created problems and must be closed.**

95. BiH's Serbs and their political representatives are nearly unanimous that OHR must be closed, but it is not only Serbs who have recognized the HR's destructive role in BiH.

96. The president of BiH's main Croat party (HDZ), Dragan Čović, in January 2021 called for the closure of OHR, saying, "I am grateful to the OHR for all the good things that it contributed to our country, but the weight of the political problems it caused in certain periods of time and through its unilateral actions by far exceeds the contribution of the OHR as an international

institution.”<sup>47</sup> During the 20 November 2020 Arria-formula meeting of the UN Security Council, Mr. Čović described in detail how Mr. Inzko’s report to the Security Council ignores the Bosniak political parties’ aggressive moves against Croats’ rights as a constituent people.

97. In November 2020, the Croat National Assembly of BiH, an organization made up of Croat political parties, denounced “false statements” by Mr. Inzko and pointed out that his report to the UN Security Council failed to criticize politics that “trample on the rights of the constituent peoples.”<sup>48</sup>

98. The major Croat media outlet *Dnevnik* also blasted the HR’s report to the UN Security Council, writing that “the content of the document is such that it seems like it was written in the headquarters of any Bosniak political party in BiH. Thus, Mr. Inzko’s report is filled with many slanders and pure lies about Croat and Serb politics in BiH.”<sup>49</sup>

99. One hopes that it will become apparent to Security Council members that, although reporting to the Security Council on developments in BiH may be a valuable service, it is a function that does not require an ambassador-level diplomat, a staff of 89, and all of their expenses, and it certainly does not justify the continued presence of a figure whose role has been so divisive.

## V. EU integration

### A. Progress toward EU integration

100. BiH’s leading Serb, Bosniak, and Croat parties are united in supporting BiH’s EU integration. The EC’s 2019 Opinion on BiH’s Application for Membership identified 14 key priorities for BiH to address in order to be recommended for the opening of EU accession negotiations. These criteria are more demanding than those that have been presented to other countries at this stage of their EU integration. Still, BiH’s leaders are working toward addressing the 14 priorities as quickly as possible.

101. Recently, representatives of a working group of BiH’s leading Bosniak, Serb, and Croat parties said that six of the 14 priorities have been completed and that an additional three priorities are addressed in legislation currently in procedure (legislation concerning public procurement, the High Judicial and Prosecutorial Council, and prevention of conflicts of interest).<sup>50</sup>

102. In February 2021, representatives of the BiH Parliamentary Assembly, the Federation Parliament, the RS National Assembly, and the Brčko District Assembly adopted a Plan of

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<sup>47</sup> ČOVIĆ: *HDZ pokraden, od građanske države nema ništa, treba zatvoriti OHR*, Hrvatski Medijski Servis, 7 Jan. 2021.

<sup>48</sup> Bosnian Croat parties: Int. admin. omitted many issues in his Report on Bosnia, N1, 5 Nov. 2020.

<sup>49</sup> BOŠNJAKI LOBIST Inzko pisao Vijeću sigurnosti UN-a, iznio teške klevete na račun Hrvata i Srba, *Dnevnik.ba*, 4 Nov. 2020.

<sup>50</sup> *HDZ BiH, SDA and SNSD express readiness to speed up BiH’s path to the EU*, FENA, 18 Mar. 2021.



Priorities for accelerating BiH's EU integration.<sup>51</sup> Also in February 2021, BiH's security minister presented EUSR Sattler with instructions operationalizing BiH's cooperation with Europol.<sup>52</sup> EUSR Sattler said this was a good example of compromise between the BiH and Entity levels of authority.<sup>53</sup> He hailed the political will that was necessary to reach the agreement and called it a "good example of what is possible in BiH."<sup>54</sup>

103. The Council of Ministers in February 2021 also adopted the Strategy for the Control of Small Arms and Light Weapons for 2021-2024 and an accompanying action plan, which are aimed at increasing the efficiency of all entities in the field and improving security in BiH and the region.<sup>55</sup>

104. BiH has also been moving to reduce greenhouse gas emissions in accordance with multinational initiatives. In April 2021, BiH submitted its updated Nationally Determined Contributions (NDCs) to the UN Climate Change Secretariat. In a joint statement, the EU Delegation to BiH, UN in BiH, and the embassies of the US, UK, France, Italy, and Sweden called the submission "a significant milestone for Bosnia and Herzegovina under the Paris Agreement." During the same month, the Council of Ministers adopted the Sustainable Development Goals Framework, a document that had been adopted earlier by the governments of the RS, the Federation, and Brčko District.<sup>56</sup> Ingrid Macdonald, the UN's resident coordinator in BiH, welcomed the Council of Ministers' action, saying, "This adoption is a recognition of the commitment to sustainable development, across sectors and different levels of government, and is the outcome of years of investment in building a truly country owned Framework for Agenda 2030."<sup>57</sup>

## **B. Barriers to progress**

105. Despite BiH's consensus on the importance of EU integration, important obstacles are standing in BiH's EU path. As long as BiH has a foreign overseer—the HR—and a Constitutional Court with three seats reserved for foreigners, it will remain a protectorate rather than a fully sovereign state eligible for EU membership, as has been previously noted by EU officials.

### **1. OHR**

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<sup>51</sup> *Parliament speakers adopt Plan of Priorities for accelerating BiH's path to EU*, FENA, 5 Feb. 2021.

<sup>52</sup> *EU's Sattler: Matter of Bosnia-Europol cooperation solved through compromise*, N1, 12 Feb. 2021.

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

<sup>54</sup> *Id.*

<sup>55</sup> *BiH CoM adopts Strategy for Control of Small Arms and Light Weapons in BiH*, FENA, 24 Feb. 2021.

<sup>56</sup> *Strömquist welcomes the adoption of the Sustainable Development Goals Framework*, FENA, 9 Apr. 2021.

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

106. The continued presence of the OHR in BiH is incompatible with BiH's sovereignty and, thus, incompatible with BiH's EU integration. Moreover, as explained below, the OHR's continued presence frustrates certain EU efforts in BiH.

107. The EU has repeatedly recognized that the continued operation of the OHR, especially with its self-asserted right to exercise so-called "Bonn powers," hinders BiH's progress toward EU integration. In February, EU Special Representative to BiH (EUSR) Johann Sattler said, "[T]he OHR's presence is incompatible with BiH's EU membership and we must therefore strive to phase it out."<sup>58</sup> At a forum on BiH's EU integration, EUSR Sattler said that BiH should strive to reduce the international community's presence since its current size is "incompatible with EU membership."<sup>59</sup> Regarding the OHR, the EC's 2019 Opinion says: "Such extensive international supervision is in principle incompatible with the sovereignty of Bosnia and Herzegovina and therefore with EU membership."<sup>60</sup>

108. The OHR also undermines EU efforts in BiH. As former HR Carl Bildt wrote in January, "the continued existence of the OHR as the custodian of the push of Dayton has often tended to dilute the impact of the EU efforts."<sup>61</sup>

109. In fact, the HR has become a resentful rival to the EU for international influence in BiH. In a 12 April 2021 interview, for example, HR Inzko took issue with EU Special Representative Johann Sattler's opinion that the OHR is incompatible with BiH's European perspective, saying dismissively, "As one of several members of the PIC Steering Board, the EU is of course entitled to its opinion."<sup>62</sup> Instead of treating the EU as BiH's main international interlocutor, the HR relegates the EU to "one of several members" of the PIC Steering Board, an ad-hoc body with no legal authority that is chaired by the HR himself.

## 2. Foreign members of BiH Constitutional Court

110. Another important barrier standing between BiH and EU integration is the continued presence of foreign judges on the BiH Constitutional Court. The BiH Constitution includes a peculiar provision—intended as a transitional measure to last five years—in which three of the nine seats on the BiH Constitutional Court are reserved for foreigners.

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<sup>58</sup> Sattler: *OHR treba gasiti*, HBŽ Vijesti, 17 Feb. 2021.

<sup>59</sup> EU Ambassador: BiH should strive to reduce intl community's presence, N1, 22 Feb. 2021.

<sup>60</sup> Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, 29 May 2019, at p. 7.

<sup>61</sup> Carl Bildt, *Bosnia to war, to Dayton, and to its slow peace*, European Council on Foreign Relations, 28 Jan. 2021.

<sup>62</sup> OHR, Euro Blic: Interview with HR Valentin Inzko, 12 Apr. 2021.

111. The EC’s 2019 Opinion rightly includes among its 14 “key priorities” for BiH, “addressing the issue of international judges” on the Constitutional Court.”<sup>63</sup> The RS appreciates the EC’s acknowledgement that the foreign judges on the Constitutional Court are inconsistent with EU integration.

112. The presence of foreign judges on BiH’s Constitutional Court is also incompatible with BiH’s sovereignty and democracy. The RS knows of no other sovereign state in the world that has seats on its constitutional court for foreign judges, let alone judges appointed by a foreign individual without any requirement of domestic consent. As Professor Hayden has observed, the role of foreign judges on the Constitutional Court “of course, compromises the sovereignty of Bosnia and Herzegovina, since it gives decision-making powers to people who may not, by constitutional mandate, be citizens of the country.”<sup>64</sup>

113. In a 2016 article about the BiH Constitutional Court, Stefan Graziadei of the University of Antwerp observes:

Even more at odds with national sovereignty is the idea that international judges may sit in national apex courts: “Because of the doctrine of state sovereignty, it sounds almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or a separate constitutional court of another country.” This is particularly true because such courts operate at the boundary between politics and law: they have the power to review legislation, which is based on the will of the people, for conformity with the national constitution.<sup>65</sup>

114. The BiH Constitutional Court’s foreign members also undermine the court’s legitimacy—the most precious asset of any court that exercises judicial review. Without such legitimacy, the public will not accept court decisions that nullify legislation approved by democratically elected institutions. Dr. Graziadei points out that foreign judges “are not trained in the domestic legal system, often do not understand the local language(s), and as citizens of another country they appear to be ill-equipped to uphold the supreme law of a country with which they share no bond of citizenship.”<sup>66</sup>

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<sup>63</sup> Commission Opinion on Bosnia and Herzegovina’s application for membership of the European Union, 29 May 2019.

<sup>64</sup> Robert M. Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (1999) 131.

<sup>65</sup> Stefan Graziadei, *Six models for Reforming the Selection of Judges to the BiH Constitutional Court*, Centre for Southeast European Studies, Working Paper No. 14 (Jan 2016) at 4 (quoting Joseph Marko, *Foreign Judges: A European Perspective*, in *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong*, ed. by Simon Young and Yash Ghai (New York: CUP, 2014), pp. 637-65 (p. 637)) (footnotes omitted).

<sup>66</sup> Graziadei at 5 (footnotes omitted).

115. The BiH Constitutional Court has exacerbated its legitimacy deficit by not producing English-language versions of certain important decisions, including decisions in which the foreign judges take part. If there is no English version of decisions, one wonders how the foreign judges—none of whom speak the local languages—can make independent and informed decisions on whether to join in those decisions or support the decisions’ rationales.

116. What is even worse, with foreign judges on the Constitutional Court who cannot speak the local language, the failure to produce English versions of the Court’s decisions even means that it is impossible for the foreign judges to read and understand an official version of the Court’s own prior case law. A more absurd condition for a country’s highest court—judges who cannot even read the court’s prior decisions—can hardly be imagined.

117. This ludicrous situation is rendered all the more disturbing by the fact that it is completely unnecessary. The foreign judges on the BiH Constitutional Court already do not participate in the vast majority of the court’s cases. As Matthew Parish recently pointed out, “if the Court can function without the international Judges 95% of the time, then it can function without the international Judges 100% of the time.”<sup>67</sup>

118. The ridiculous situation of a Constitutional Court with foreign judges doing the bidding of an unelected international bureaucrat exercising illegal powers renders the demands from these same foreigners that Constitutional Court decisions be accorded “respect for the rule of law” a cynical farce.

119. BiH’s main Serb and Croat parties strongly favor replacing the Constitutional Court’s foreign judges with BiH citizens and have introduced legislation to do so, but the SDA and other Bosniak parties refuse to consider the idea, thus again preventing BiH from operating as intended under the Dayton Accords and standing in the way of BiH’s progress toward EU membership.

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<sup>67</sup> Matthew Parish, *Constitutional reform in contemporary Bosnia*, Transconflict, 20 Apr. 2021.