



REPUBLIC OF SRPSKA GOVERNMENT

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16 November 2009

H. E. Ambassador Thomas Mayr-Harting
President of the United Nations Security Council
Permanent Mission of Austria to the United Nations
600 Third Avenue, 31st Floor
New York, NY 10016

Your Excellency:

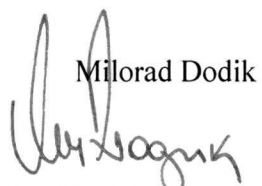
As you are aware, the Security Council has scheduled a debate on Bosnia and Herzegovina (“BiH”) on 23 November 2009. The Government of Republika Srpska (the “Government”), as a signatory to each of the 11 annexes to the Dayton Accords and as one of the two Entities that comprise BiH, respectfully requests that its views be taken into consideration by the Council during this debate.

To assist the Council with its deliberations, the Government has prepared the attached Second Report of Republika Srpska to the Security Council on the Situation in Bosnia and Herzegovina. (The first Report to the Security Council was provided in February 2009.) The Report begins by examining the significant political progress that has been made this year in BiH by BiH’s elected officials. The Report also takes note of the conclusions of experts that there is no threat to international peace and security in BiH. Next, the Report explains how progress in BiH has been hindered by serious, heightened intervention of the High Representative and certain States into internal BiH affairs. The Report then describes the relevant law, including that which applies to the Peace Implementation Council and the High Representative, and the need for adherence to the law and a mechanism for redress when breached. Finally, the Report outlines the Government’s response to the High Representative’s unlawful actions and the Government’s commitment and program for achieving EU integration and constitutional reform.

The Government believes firmly that, in the absence of unlawful international interference, BiH’s elected leaders can accelerate political progress and build a better future for BiH.

The Government, which speaks for many citizens of BiH directly affected by the Council's decisions, trusts that the Council will give its views careful consideration.

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

A handwritten signature in black ink, appearing to read 'Milorad Dodik', is positioned above the printed name.

Milorad Dodik

PRIME MINISTER OF THE REPUBLIC OF SRPSKA



REPUBLIC OF SRPSKA

GOVERNMENT

**SECOND REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON
THE SITUATION IN BOSNIA AND HERZEGOVINA**

November 2009

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SECOND REPORT OF REPUBLIKA SRPSKA TO THE SECURITY COUNCIL ON THE SITUATION IN BOSNIA AND HERZEGOVINA

1. In light of serious recent developments that undermine democracy, human rights and the rule of law in Bosnia and Herzegovina (“BiH”), the Government of Republika Srpska (“Government”) respectfully submits this Second Report to the United Nations Security Council to assist the Council in its upcoming deliberations on BiH. The Government provides this Report as a party to the agreements comprising the Dayton Accords, including the Agreement on the Civilian Implementation of the Peace Settlement set forth in Annex 10 thereto (“Annex 10”).

2. The Government reiterates its request that the Security Council and the broader international community proceed in a manner that respects the sovereignty of BiH, international legal agreements, including the Dayton Accords, and other principles of international law and the rule of law. In addition, the Government wishes to call the Security Council’s attention to the urgent need for the cessation of further violations of international law and basic human rights committed by the High Representative and his office (“OHR”). This should be accomplished through (1) the OHR’s closure and, until then, its adherence to its limited mandate established by the parties to Annex 10; and (2) the urgent establishment of a mechanism whereby civilians who have been harmed by human rights violations of the High Representative can seek legal recourse.

I. Executive Summary

3. In the Government’s first Report to the Council in February of this year, the Government highlighted the uninterrupted peace and significant progress that has been made in BiH since the end of the war nearly fourteen years ago, including the important progress made through compromise among the key political leaders initiated in November 2008 in Prud.

4. Some reports lately have portrayed BiH as sliding backwards or in crisis. But the record of BiH’s recent progress, attested to by independent observers, disproves this faulty portrayal. As explained in Section II of this Report, BiH has continued to make important progress in many areas, including the Brčko District constitutional amendment, visa liberalization, EU integration, the economy, human rights (except for actions of the High Representative targeting citizens), and security and crime prevention.

5. An even more groundless claim is that there is a serious threat of a resumption of hostilities in BiH. Section III of this Report shows that this claim is refuted by the informed, independent assessments of international military and security officials. These assessments all attest that the security situation in BiH is stable and secure. The current situation does not constitute a threat to international peace and security, and thus there is no longer a factual or legal basis for the Security Council to act under Chapter VII of the UN Charter. Nor can false assertions of a danger of renewed hostilities be grounds for continuation of the OHR or accepting the continued use of the Bonn Powers in contravention of law.

6. In its Report to the Council in February 2009, the Government warned of the possibility that BiH’s progress could be impeded by certain actors in the international community

attempting to use the appointment of a new High Representative to implement a dangerous policy of “muscular intervention” into the governance and domestic affairs of BiH:

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

7. Unfortunately, as described in Section IV of this Report, this damaging policy has been aggressively implemented since the appointment of Ambassador Valentine Inzko as the High Representative. The new High Representative has exercised his peremptory powers 20 times during the first six months of his tenure, almost seven times as often as his predecessor exercised them during the previous six months. Moreover, the nature of his decrees has been highly and unnecessarily intrusive. His decrees have included, *inter alia*, declaring invalid a set of conclusions approved by the Republika Srpska National Assembly (“RSNA”), removing and banning officials from public positions without any due process, and jeopardizing significant property rights of the Republika Srpska and its citizens.

8. And this month, leaked OHR reports revealed that the OHR has been secretly investigating and alleging criminal activity by numerous prominent government, political, religious and business leaders within BiH. The OHR has reportedly delivered this information to a number of international diplomats and missions.

9. Although BiH officials have continued to move BiH forward, progress could be stalled by continued foreign intervention into domestic political and economic affairs—by the threat and use of the Bonn Powers or other coercive means. Such actions are fundamentally destabilizing and disruptive of the consensus building and reform efforts of BiH’s own authorities.

10. In addition to hampering BiH’s progress, these actions are unlawful. Section V of this Report examines the legal authority of the High Representative and the Peace Implementation Council (“PIC”) and explains why their actions routinely exceed their legal mandates. Neither the Dayton Accords nor the UN Security Council has given the PIC authority to intervene in BiH’s domestic affairs or international relations. The High Representative’s narrow mandate, which is described clearly in Annex 10 of the Dayton Accords, does not include sweeping authorities such as the power to enact laws or remove democratically elected officials. Moreover, the Security Council has never assigned additional powers to the High Representative.

11. Section VI of this Report explains the Government's response to the damaging and unlawful actions of the High Representative and certain members of the PIC Steering Board. The Government is renewing its call for the termination of the position of High Representative. Until such time, the Government, acting according to resolutions of the RSNA, cannot accept as valid under international law any further attempts of the High Representative to use the Bonn Powers.

12. Additionally, the Government has called upon the Presidency of the EU and the Council of Europe's Commissioner for Human Rights to support the creation of an independent international tribunal to provide redress to individuals whose human rights have been violated by the High Representative's use of the Bonn Powers. To date, the High Representative has successfully blocked all existing legal forums in BiH and the European Court of Human Rights such that injured individuals have no remedy whatsoever.

13. As explained in Section VII of this Report, despite the serious attempts to undermine sustainable progress, the Government is committed to continue working to improve the lives of all BiH citizens, including through accession to the EU. Issues of EU accession, including constitutional reform, are not matters of peace implementation and thus are not within the High Representative's mandate; nor are they under the authority of the PIC.

14. The Government will continue striving to improve governance through reforms aimed at achieving greater efficiency and functionality. However, constitutional reform in the name of "efficiency" and "functionality" cannot be a cover for a hidden agenda to transform BiH's Constitution contrary to the fundamental principles of governance established by treaty at Dayton. Efficiency and functionality can be achieved in a decentralized, federal state—as in many other countries.

15. Constitutional reform should generally follow the sequence set out by the PIC Steering Board in June 2009 and the Presidency of the EU in October 2009.. Namely, constitutional reform, which the EU has stated is *not* required for application for EU membership, should be taken up after the closure of the OHR, which the EU has stated *is* required for application for EU membership.

16. The failure of the recent meetings at Butmir is a lesson in how not to achieve reform. At Butmir, certain members of the PIC Steering 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. All but one of the political leaders present rejected the package. The Butmir process failed because it (1) proposed unwelcome constitutional restructuring that would raze the Dayton architecture that protects the vital interests of BiH's Constituent Peoples and makes BiH a viable state; (2) sought to circumvent the transparent and legal process required to change the Constitution; and (3) attempted to add constitutional reform onto the PIC's 5+2 Agenda as another condition for OHR closure. This attempt to satisfy some Bosniak politicians' desire for a unitary state before the OHR's closure undermined the hosts' credibility as neutral mediators.

17. As discussed in Section VIII, the way forward for BiH must be based on full commitment and adherence to the following principles:

- International law and rule of law must be adhered to by all parties, including the international community and especially the High Representative.
- The High Representative (and peremptory powers) must come to an end; a legal remedy must be made available for individuals whose rights have been violated by the High Representative.
- BiH must be treated as an equal and fully sovereign state free from international intervention in its domestic affairs.
- Constitutional reform must be accomplished through a transparent, democratic and constitutional process in order to achieve legitimate and enduring reform.
- The accession process to the EU and Euro-Atlantic structures—including so-called “reforms” in the name of “efficiency” and “functionality”—must not be a guise for fundamental restructuring of the Constitution that removes safeguards set forth in the Dayton Accords that brought about and ensure peace. The rights and competencies of the Entities as established in the Dayton Accords must be respected.

18. The Government believes that BiH can accelerate legitimate and sustainable political progress. The international community’s contribution should be to respect the rule of law, BiH sovereignty, and the federal structure mandated by the Dayton Accords. Without unlawful interference by the High Representative and PIC Steering Board, BiH’s leading parties can negotiate in good faith, develop consensus, and build a better life for BiH’s citizens.

II. BiH Authorities Are Achieving Political Progress

19. As the Security Council has repeatedly declared, the primary responsibility for implementation of the Dayton Accords lies with the democratically elected authorities in BiH themselves.¹ Some reports suggest that there has been no recent political progress in BiH and that its elected officials are incapable of reaching agreements to move the country forward. This is a fabrication propagated by those who want BiH to continue to be treated as if it were a protectorate. In reality, BiH authorities, in the past year, have continued to make progress on a broad range of fronts. As explained in the examples below, the hard work of governance is being vigorously pursued by BiH’s elected officials.

¹ See UNSC Resolution 1845 ¶ 2 (November 20, 2008); UNSC Resolution 1785 ¶ 2 (November 28, 2007); UNSC Resolution 1722 ¶ 2 (November 21, 2006); UNSC Resolution 1639 ¶ 2 (November 21, 2005); UNSC Resolution 1575 ¶ 2 (November 22, 2004); UNSC Resolution 1491 ¶ 2 (July 11, 2003); UNSC Resolution 1423 ¶ 2 (July 12, 2002); UNSC Resolution 1357 ¶ 2 (June 21, 2001); UNSC Resolution 1305 ¶ 2 (June 21, 2000); UNSC Resolution 1247 ¶ 2 (June 18, 1999); UNSC Resolution 1174 ¶ 2 (June 15, 1998); UNSC Resolution 1088 ¶ 3 (December 12, 1996).

A. Breakthrough Agreements in the Prud Process

20. On November 8, 2008, in the town of Prud, the leaders of the three main political parties negotiated a series of landmark agreements, expressing a firm consensus on key issues that had previously divided them. These included agreement on apportionment of state property, resolution of defense property, the legal status of Brčko District, conduct of a census, key constitutional reforms, and other important issues. The UN Security Council, the PIC, and the High Representative praised the Prud agreements.² On January 26, 2009, the leaders of the three main parties met again in Banja Luka and reached further significant agreements.

21. In February, the three leaders agreed on an amendment to the BiH Constitution on the final status of the Brčko District, and the BiH Council of Ministers recommended it to the Parliamentary Assembly. Both houses of the BiH Parliamentary Assembly approved the constitutional amendment in March. The European Commission's 2009 Progress Report for Bosnia and Herzegovina (hereinafter "EC Progress Report") calls the approval of the Brčko Amendment "a major development and step forward."³

B. Rapid Progress toward Visa-Free Travel to EU

22. In the past several months, BiH has dramatically accelerated its progress toward meeting the European Commission's long list of stringent conditions for visa-free travel to the EU. The EC's 2009 Progress report finds, "In the framework of the visa liberalisation dialogue process, Bosnia and Herzegovina has made good progress in the areas of justice, freedom and security . . ."⁴

23. On 2 October 2009, the European Stability Initiative ("ESI") reported on its extensive study of BiH's recent performance with respect to each of the Commission's conditions, finding that BiH has made "phenomenal progress in a short period of time."⁵ In May, BiH had lagged far behind Serbia and Montenegro. The Commission on 15 July 2009 offered visa-free travel to both Serbia and Montenegro.⁶ By September, however, BiH had surpassed both countries in its fulfillment of the Commission's conditions.⁷ This progress, according to ESI, "required a

² S.C. Res. 1845 (20 Nov. 2008); Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008; *Miroslav Lajčák's exclusive interview for www.reci.ba: "New EU strategy for BiH,"* 10 Nov. 2008.

³ Commission of the European Communities, *Bosnia And Herzegovina 2009 Progress Report* (Commission Staff Working Document), 14 Oct. 2009 (hereinafter "EC Progress Report"), at 8.

⁴ EC Progress Report at 6.

⁵ European Stability Initiative, *Bosnian Visa Breakthrough* (preliminary version), 2 Oct. 2009 ("hereinafter ESI Visa Study"), at 4, available at www.esiweb.org/pdf/schengen_white_list_bosnian_visa_breakthrough.pdf.

⁶ Gerald Knaus, *Bosnia's Visa Breakthrough and the Power of Europe*, European Stability Initiative, 28 Sept. 2009, available at www.esiweb.org/index.php?lang=en&id=67&newsletter_ID=42.

⁷ Knaus.

summer of hard work on the part of Bosnia's leaders—and a series of compromises between Bosnia's political parties in the sensitive area of security policy. The results are remarkable.”⁸

24. In June, as noted in the ESI study, the BiH Parliamentary Assembly, using urgent procedure, adopted four key laws on “border control, control of weapons and military equipment, international legal aid in criminal matters and prevention of money laundering and financing of terrorist activities.”⁹ In a 31 August 2009 speech, the High Representative said, “[W]ith the recent passage of four laws related to visa liberalization which had previously failed in the parliamentary assembly, we saw evidence that BiH political representatives *can* work out their differences.”¹⁰

25. The parties also agreed to adopt or amend Entity legislation on weapons and on transportation of dangerous matter.¹¹ Responding to the Commission’s concerns about lack of information exchange between law enforcement agencies, the state, Entity, and Cantonal police bodies agreed to “exchange a wide range of information, from criminal records to investigations, ID checks and the possession of weapons.”¹² BiH has also recently accelerated the introduction of new biometric passports.¹³ In addition, BiH since May has put in place an automated system for forwarding to Interpol information on lost and stolen passports.¹⁴ Moreover, on 23 September 2009, the agencies stationed at BiH’s borders reached an Agreement on Mutual Cooperation.¹⁵

26. On 24 September 2009, the BiH Council of Ministers adopted and sent to parliament a law establishing an independent anti-corruption body.¹⁶

27. In a 30 September 2009 press release, the High Representative acknowledged “faster progress” toward meeting the Commission’s criteria as he welcomed the BiH Council of Ministers’ adoption of a Strategy and Action Plan against money laundering and terrorist financing and an Agreement on Cooperation and Exchange of Information from Police and Prosecutorial Records.¹⁷ As the High Representative’s release recognized, “BiH political leaders

⁸ ESI Visa Study at 4.

⁹ *Id.* at 4.

¹⁰ Speech by High Representative and EU Special Representative Valentin Inzko To a Conference of Ambassadors and Heads of Mission of BiH, 31 Aug. 2009, available at www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=43901.

¹¹ ESI Visa Study at 4.

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Office of the High Representative, *High Representative Welcomes Today’s Decisions by Council of Ministers on Visa Liberalisation*, 30 Sept. 2009, available at www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=44012.

are responsible for fulfilling [the Commission's] criteria, and on this occasion they have demonstrated that they can carry out their responsibilities"¹⁸

28. BiH's rapid progress since May toward satisfying the Commission's visa liberalization criteria demonstrates its leaders' ability to compromise and approve necessary reforms.

C. EU Integration

29. The EC Progress Report finds that BiH's implementation of its Interim Agreement with the EU "has been satisfactory overall in its first year" ¹⁹ The Report notes, "As a potential candidate for EU membership, Bosnia and Herzegovina aligned itself with 100 [Common Foreign and Security Policy] declarations from a total of 128 relevant declarations adopted by the EU during the reporting period."²⁰ BiH also, according to the Report, "joined its first Community programme - the 7th Framework Programme for research, technological development and demonstration activities."²¹ In January 2009, BiH, "became an associated country and eligible to fully participate in the programme."²²

30. Among the requirements for EU integration are the enactment of a BiH Law on Obligations and the modernization of the banking supervision system.²³ The main political parties have agreed to implement these two measures, which the High Representative says "are key elements in preparing this country for full participation in the free movement of goods, services, workers and capital – the principle that underpins EU membership."²⁴

D. Economy

31. Although BiH continues to need further economic development, its political leaders have continued to improve its economic competitiveness in spite of the global economic crisis. Until the onset of the crisis, BiH was one of Europe's fastest growing economies.²⁵ As the High

¹⁸ *Id.*

¹⁹ EC Progress Report at 5.

²⁰ *Id.* at 6.

²¹ *Id.* at 7.

²² *Id.* at 44.

²³ Remarks by High Representative and EU Special Representative Valentin Inzko At the Vienna Economic Talks, 27 September 2009, available at www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=43993.

²⁴ *Id.*

²⁵ Speech by High Representative and EU Special Representative Valentin Inzko at the Velden Economic Forum, 16 September 2009, available at www.ohr.int/ohr-dept/presso/presssp/default.asp?content_id=43950.

Representative said on 27 September 2009, “[E]ven as crises have come and gone, there has been steady and substantial progress in upgrading almost every aspect of the BiH economy.”²⁶

32. The EC Progress Report finds, “Despite the repercussions of the global financial crisis on Bosnia and Herzegovina, the financial sector remained sound and well-capitalised and its liquidity position was not seriously undermined.”²⁷ In May, according to a press release, the High Representative “commended the Central Bank Governor for the Bank’s timely and effective reactions that have maintained confidence in the BiH banking sector and protected the country’s fiscal stability.”²⁸ In August, moreover, the High Representative praised the new Governing Board’s quick reappointment of the Central Bank governor.²⁹ BiH, the Progress Report says, “is an open economy” that “has constantly gained market shares in the EU during the past decade.”³⁰

33. The Fiscal Council of BiH became operational in 2008 and submitted budgets for BiH institutions. It was the first time since the Dayton Agreement that the following year’s budget was submitted for adoption before December 31. The BiH Parliamentary Assembly approved the budget in January 2009. According to the EC Progress Report, BiH made progress toward “improving fiscal sustainability and entrenching the rule of law.”³¹

34. In the past year, BiH has also continued negotiations for membership in the World Trade Organization. According to the EC Progress Report, BiH “has made good progress in bringing its trade relevant legislation in line with the WTO requirements.”³² The Report also takes note of BiH’s progress in the customs field.³³

35. In June 2009, BiH enacted a new Law on Excise Duties, bringing BiH’s rules closer to those of the EU.³⁴

36. On 30 July 2009, the High Representative said, “We are in a race – we have to fix the economy month by month even as we try to secure a longer-term fix for the political system.

²⁶ Remarks by High Representative and EU Special Representative Valentin Inzko At the Vienna Economic Talks, 27 September 2009, available at www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=43993.

²⁷ EC Progress Report at 28.

²⁸ *HR/EUSR Inzko Welcomes Continuing Success of BiH Central Bank*, OHR Press Release, 22 May 2009.

²⁹ *Inzko Welcomes Swift Re-Appointment of Central Bank Governor*, OHR Press Release, 12 Aug. 2009.

³⁰ EC Progress Report at 31.

³¹ *Id.* at 8.

³² *Id.* at 44.

³³ *Id.* at 36.

³⁴ *Id.* at 37.

This requires ad hoc decision-making and creative politics. For all its faults, Bosnia and Herzegovina’s political establishment is rather good at both those things.”³⁵

E. Human Rights

37. BiH citizens—with the exception of individuals targeted by decrees of the High Representative—continue to enjoy freedom of expression, freedom of assembly, freedom of association, and all the other freedoms guaranteed in the BiH Constitution and the European Convention on Human Rights. The EC Progress Report recognizes that civil and political rights “are broadly respected” in BiH.³⁶

38. The EC Progress Report praises BiH’s adoption in July 2009 of “a comprehensive State-level anti-discrimination law.”³⁷ The Report calls the new law, which “covers a wide range of sectors (employment, social security, education, goods and services, housing),” “a positive step towards uniform protection across Bosnia and Herzegovina.”³⁸ The Report praises BiH’s “good progress . . . as regards asylum” during the year and says that “[o]verall, the asylum and international protection system in Bosnia and Herzegovina is largely in line with EU and international standards.”³⁹ In what the Report calls a “positive step,” in October of 2008, BiH ratified the Revised European Social Charter.⁴⁰ Moreover, according to the EC Report, BiH “has continued its good progress in relation to property rights.”⁴¹

39. The PIC Steering Board, in its 26 March 2009 Communiqué, praised the BiH Council of Ministers’ adoption of a Revised Strategy for the Implementation of Annex VII of the General Framework Agreement for Peace (the Agreement on Refugees and Displaced Persons). The BiH House of Representatives approved the Revised Strategy in May.

F. Security and Crime Prevention

40. The EC Progress Report takes note of BiH’s recent “progress in the fight against terrorism.”⁴² According to the Report, the BiH Criminal Code has been amended “for its harmonisation with the Council of Europe Convention on the Prevention of Terrorism”⁴³

³⁵ Speech by the High Representative and EU Special Representative, Valentin Inzko to the Permanent Council of the OSCE, 30 July 2009, available at www.ohr.int/ohr-dept/press/presssp/default.asp?content_id=43778.

³⁶ EC Progress Report at 15.

³⁷ *Id.* at 19.

³⁸ *Id.*

³⁹ *Id.* at 56.

⁴⁰ *Id.* at 19.

⁴¹ *Id.*

⁴² *Id.* at 61.

⁴³ *Id.*

41. According to the EC Progress Report, BiH's "cooperation with ICTY has remained good."⁴⁴ More particularly, the Progress Report said, "Cooperation between ICTY and the State-level and Entity authorities is adequate at operational level, and access to witnesses and archives remains good."⁴⁵ Moreover, in December 2008, the BiH Council of Ministers adopted a National War Crimes Strategy, which the PIC Steering Board welcomed in its 26 March 2009 Communiqué.

42. The EC Progress Report also recognizes BiH's "progress in the fight against drugs."⁴⁶ The report notes, "The national strategy for drug control, suppression and prevention 2009-2013 was adopted in March 2009 by the Council of Ministers and parliament, and an action plan was adopted."⁴⁷

G. Other Areas of Progress

43. The EC Progress Report also takes note of BiH authorities' progress in many other areas. It recognizes "progress in the area of public administration reform, which is a key European Partnership priority," noting improvements in coordination and capacity.⁴⁸ The Report notes, "The general secretariats of the governments at the State and Entity level and in the Brčko District have signed a memorandum of understanding on mutual cooperation which should contribute to the European Partnership priority of enhancing coordination at political, legal and technical level."⁴⁹ Last December, the BiH Parliament completed the process of naming the members of the new state-level Office of the Ombudsman.

44. The Progress Report also cites BiH's progress this year in air transport. The country "became a full member of the Joint Aviation Authorities (JAA). Relations with the European Air Security Agency (EASA) have been put on a formal footing by a working arrangement signed on 7 July 2009."⁵⁰

45. In the field of Intellectual Property law, BiH, the EC Progress Report notes, "has ratified the Protocol relating to the Madrid Agreement concerning the International Registration of Marks, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the International Classification of Patents Treaty, the Hague Agreement concerning the International Deposit of Industrial Designs, the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, and the Rome Convention for the Protection of Performers, Producers of

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 21.

⁴⁶ *Id.* at 58.

⁴⁷ *Id.*

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.* at 49.

Phonograms and Broadcasting Organisations.”⁵¹ Moreover, in July 2009, BiH “adopted the Strategy on Development of the Institute for Intellectual Property (2008-2015).”⁵²

46. The EC Progress Report also cites BiH’s progress during the past year in other fields, such as education, antitrust, public procurement, trans-European transport networks, agriculture, and rural development.

III. Accomplishment of Peace Implementation under Dayton Accords and Elimination of Threat to International Peace and Security

47. Despite the political disruptions caused by the interference of the High Representative, as described in detail below, the current situation in BiH does not constitute a threat to international peace and security under the UN Charter. Since the signing of the Dayton Accords almost 14 years ago, there has been no resumption of hostilities or serious threat of such. BiH citizens live, work, and travel freely throughout BiH regardless of their ethnicity or religion.

A. Recent Military Assessments

48. Military assessments utterly refute any suggestion that the situation in BiH is a threat to international peace and security. According to the latest quarterly report on the activities of EUFOR submitted by the EU to the President of the Security Council, “[t]he overall security situation in Bosnia and Herzegovina remained calm and stable throughout the reporting period. Although nationalistic rhetoric continued, it had no impact on the safe and secure environment.”⁵³ The previous four EUFOR reports made identically positive assessments,⁵⁴ and earlier reports also emphasized the stable and calm security situation in BiH.⁵⁵

⁵¹ *Id.* at 40.

⁵² *Id.*

⁵³ *Report of the High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 June 2009 - 31 August 2009) at 4.

⁵⁴ *Report of the Secretary-General and High Representative of the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission (EUFOR) in Bosnia and Herzegovina* (1 March 2009 – 31 May 2009) at 4; *Report of the Secretary-General and High Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 Dec. 2008 – 28 Feb. 2009) at 3; *Report of the Secretary-General and High Representative of the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 Sept. 2008 - 31 Nov 2008) at 4; *Report by the Secretary-General and High Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission (EUFOR) in Bosnia and Herzegovina* (1 June 2008 – 31 Aug 2008) at 3.

⁵⁵ For example, a EUFOR report in early 2008 noted, “Although there were some protests and demonstrations in Republika Srpska as a result of the Kosovo declaration of independence, the overall security situation in Bosnia and Herzegovina remained calm and stable throughout the reporting period. Local police proved capable of handling the demonstrations.” *Report of the Secretary-General and High*

49. The most recent EUFOR report notes that while the global economic downturn led to a number of strikes in BiH, “[a]ll of these were professionally and capably handled by Bosnia and Herzegovina law enforcement agencies, and had no impact on the overall security situation.”⁵⁶ Moreover, “[t]he annual Srebrenica commemoration in July was conducted without significant incident.”⁵⁷ Looking forward, the latest EUFOR report states, “The security situation is expected to remain stable despite the prospects of continuing political tension.”⁵⁸

B. Recent High Representatives’ Reports

50. The High Representatives’ reports to the Secretary General also acknowledge the stability of the situation in BiH. In his most recent report to the Secretary General covering November 2008 through April 2009, the High Representative said the “safe and secure environment” in BiH “was not threatened during the reporting period” and that “[l]ocal law enforcement agencies proved able to deal with all public unrest issues during the period.”⁵⁹ Earlier High Representatives’ reports have also taken note of the “safe and secure environment” in BiH.

51. The High Representative continues to hold this view. In a 28 October 2009 interview, the High Representative said assertions in the foreign media of the danger of a new war in BiH “are not realistic.”⁶⁰

C. EU Observations

52. At a recent meeting, the Council of the European Union “noted that, despite the challenging political environment, the security situation in Bosnia-and-Herzegovina (BiH)

Representative for the Common Foreign and Security Policy of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina (1 Dec. 2007 – 29 Feb. 2008) at 4.

⁵⁶ *Report of the High Representative for the Common Foreign and Security Policy and Secretary-General of the Council of the European Union on the activities of the European Union military mission in Bosnia and Herzegovina* (1 June 2009 - 31 August 2009) at 4.

⁵⁷ *Id.*

⁵⁸ *Id.* at 5.

⁵⁹ *Thirty-fifth Report of the High Representative for Bosnia and Herzegovina* (1 Nov. 2008 - 30 April 2009) at 16.

⁶⁰ Interview: Valentin Inzko, EU Special Representative and High Representative in BiH: “We will prevent any conflict,” DNEVNI AVAZ, 28 Oct. 2009. See also a 3 Nov. 2009 speech in which the High Representative said, “[T]his region has moved on from the violence and failure of the nineties – but its image in the rest of the continent and further afield does not always reflect the progress that has been made. Although the image too is changing; the fact that tourism in BiH is up by 12% this year on last year is an indication that confidence in BiH’s security is growing.” Opening Address By High Representative and EU Special Representative Valentin Inzko, Conference on the Implementation of the OSCE Code of Conduct On Politico-Military Aspects of Security in South Eastern Europe, 3 Nov. 2009.

remained stable.”⁶¹ During the past year, according to the EC Progress Report, “[l]ocal law-enforcement agencies proved able to deal with public unrest issues.”⁶²

D. BiH Contributions to International Peace and Security

53. Far from threatening stability, BiH is contributing to international peace and security. On October 14, 2009, BiH was elected to serve its first ever term as a member of the UN Security Council. Moreover, on 2 October 2009, BiH took a major step toward NATO membership by submitting to its secretary-general a request for a membership action plan.

54. BiH, the EC’s Progress Report says, “has continued to participate actively in regional cooperation.”⁶³ This has included its participation in “regional initiatives, such as the South East European Cooperation Process (SEECP), the Regional Cooperation Council (RCC), the Central European Free Trade Agreement (CEFTA), the Energy Community Treaty and the European Common Aviation Area Agreement (ECAA). Sarajevo hosts the RCC Secretariat.”⁶⁴ Moreover, during the first half of 2009, BiH held the presidency of the Energy Community Ministerial Council.⁶⁵ In addition, BiH has become a full member of the Union for the Mediterranean.⁶⁶

55. In the past year, BiH has also drawn ever closer to the international community by signing and ratifying international agreements. In the environmental field, BiH ratified the Cartagena Protocol on Biosafety, the UN Convention on Biodiversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Bern Convention on Conservation of European Wild Species and Habitats, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.⁶⁷

56. In the field of nuclear safety, BiH signed the Convention on Early Notification of a Nuclear Accident, the Convention on Physical Protection of Nuclear Material and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.⁶⁸

57. On 27 July 2009, BiH signed the UN Convention on the Rights of Disabled Persons and its Optional Protocol. In January 2009, BiH ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

⁶¹ Council of the European Union, Press Release, 2943rd Council meeting, General Affairs and External Relations, Brussels, 18-19 May 2009 at 16.

⁶² EC Progress Report at 6.

⁶³ EC Progress Report at 24.

⁶⁴ *Id.* at 22-23.

⁶⁵ Energy Community Ministerial Council, Meeting Conclusions, 26 June 2009, available at www.energy-community.org/pls/portal/docs/350204.PDF.

⁶⁶ EC Progress Report at 7.

⁶⁷ *Id.* at 47.

⁶⁸ *Id.* at 51.

58. The EC Progress Report also notes BiH's good relations with its neighboring countries. The Report cites newly signed or ratified agreements with Albania, Croatia, Montenegro, and the former Yugoslav Republic of Macedonia.

59. The Report, moreover, welcomes as a "positive development" BiH's "adoption of a new law on international agreements, which will make the procedure for conducting bilateral or multilateral agreements clearer and more efficient."⁶⁹

E. No Factual Basis for Continuing Chapter VII

60. The situation in BiH does not warrant the Security Council to continue to act under Chapter VII of the UN Charter. After 14 years of peace, and given the considerable progress and stability that exists in BiH as described above, there is no longer justification for a determination that the situation in BiH constitutes a threat to international peace and security. The facts simply do not support it. As described above, a calm, safe, and secure environment has long prevailed in BiH, and numerous free and fair elections have been held. BiH has been elected to the UN Security Council, admitted to the Council of Europe, become a candidate for NATO membership, participated in UN peacekeeping, and signed a Stabilisation and Association Agreement as an important step toward EU membership. BiH's political leaders have demonstrated that they are capable of resolving difficult issues through negotiation and compromise.

61. Misuse of Chapter VII powers damages Security Council credibility and weakens the long-term viability of Chapter VII itself. This is particularly of concern where Chapter VII powers are falsely asserted as authority for imposing upon a democratically elected government the preferences of foreign states or international organizations regarding the details of domestic governance. The Security Council should forego further reference to Chapter VII with respect to the situation in BiH.

IV. Obstruction of Progress by Advocates of Muscular Intervention

62. The recent progress by BiH's elected officials, described above, has come despite disruption and opposition by advocates of muscular intervention. Although BiH is not in any crisis, their actions raise cause for concern. These activists have implemented a policy of heightened direct intervention in the domestic affairs of BiH through the High Representative's aggressive use of the Bonn Powers. During the first six months of his tenure, High Representative Inzko has employed the Bonn Powers an astonishing twenty times—nearly seven times as often as his predecessor, Ambassador Lajcak, had employed them during the previous six months.

63. A key objective of advocates of muscular intervention is to prevent the OHR's closure (or preserve peremptory powers within an "enhanced" EU Special Representative) in order to transform BiH from the federal state mandated by the Dayton Accords into an anti-Dayton

⁶⁹ *Id.* at 23.

unitary state. Closure of the OHR based on the PIC Steering Board's 5+2 Agenda⁷⁰ appears to be virtually unachievable for two reasons. First, the OHR and certain members of the PIC Steering Board have continuously expanded the requirements for meeting the conditions and objectives in the 5+2 Agenda. Second, and more importantly, some Bosniak leaders want the OHR to remain open, at least until the OHR and certain members of the PIC are able to impose on BiH a constitutional restructuring that transforms it into a centralized state. These leaders, therefore, have refused to cooperate in meeting the conditions and objectives. In this way, those in favor of muscular intervention have transformed the 5+2 Agenda into a permanent barrier to the OHR's long-overdue closure.

64. The resignation of Ambassador Lajcak and appointment of Ambassador Inzko as the new High Representative in March 2009 opened the way for the muscular intervention policy to be implemented on the ground. High Representative Lajcak was unwilling to participate in this interventionist agenda and, just prior to his resignation, warned of its danger:

As long as the country has a HR with unlimited powers, it is a kind of protectorate. Unless we decide to close down the OHR, the role and authority of the HR will broaden and it will surely mean that European issues are taking a back seat, as the OHR and European perspective do not go hand in hand. European philosophy is one of partnership, and strengthening the OHR is a continuation of a protectorate. I came to BiH for European integration, so if we are to press ahead with the OHR, I do not see myself there. In that case, we should have someone else; an EU politician who is a proponent of a protectorate. I am not that kind of politician, and there is no doubt about that.

65. The Government also warned of this possibility in its Report on the Situation in Bosnia and Herzegovina to the Security Council of February 2009. In that Report, the Government said that with Ambassador Lajčák's resignation, "important progress by BiH's major political leaders is threatened by foreign proponents of heightened direct intervention into the governance and domestic affairs of BiH."

66. Unfortunately, upon the appointment of a new High Representative amenable to implementing the approach advocated by the interventionists, the policy of "muscular intervention" was immediately implemented. Under his tenure, High Representative Inzko, with the support of certain members of the PIC Steering Board, has engaged in a series of intrusive actions that are unrelated to implementation of the civilian aspects of the Dayton Accords or to international peace and security. These actions have derailed the Prud process and disrupted consensus building among BiH political leaders.

67. These actions cannot be justified under Chapter VII of the United Nations Charter and violate the Dayton Accords (including the High Representative's mandate set out in Annex 10), the BiH Constitution, Article 2 of the Charter and major international legal obligations of

⁷⁰ As shown in Section V, below, the PIC has no legal authority to demand that any such requirements be met or to determine whether or not the OHR remains open.

members of the United Nations, including international treaties on human, civil and political rights. Moreover, as the Government explained in detail its February 2009 report to the Security Council, the Bonn Powers vastly exceed the High Representative's mandate and authority, which flow from the Dayton Accords.

68. The presence of any High Representative or any international official with Bonn Powers frustrates efforts to negotiate compromises among BiH's Constituent Peoples. Such consensus-building is far more difficult with a High Representative who steps in and imposes solutions favoring one side. The High Representative's presence, thus, corrodes the spirit of give and take necessary for BiH's continued progress.

69. Some of the recent destabilizing actions of the High Representative and other interventionists are described below.

A. The PIC Communiqué of March 2009⁷¹

70. On March 26, 2009, the PIC Steering Board issued a communiqué expanding the list of conditions and demands it calls its "5+2" formula for the closure of the OHR. One of many examples is the Steering Board's treatment of its "Objective Three – Completion of the Brčko Final Award." The Previous PIC communiqué describes the criteria for meeting Objective Three as follows: "Brcko District itself must be given a mechanism by which it can have guaranteed access to the BiH Constitutional Court concerning disputes it may have with the Entities and the State regarding their obligations under the Awards of the Arbitral Tribunal and the status and powers of the District."⁷²

71. In March 2009, after BiH's three main political parties hammered out an agreement on the issue, the BiH Parliament enacted the Constitutional Amendment on the Brčko District, which met the conditions of the PIC's Objective Three. The Principal Deputy High Representative and Brčko Supervisor wrote the Prime Minister of Republika Srpska, leader of one of the parties, stating that the text of the amendment "meets the criteria of providing an amendment that is in conformity with the Awards of the Tribunal and the Constitution, and provides the Brcko District effective access to the Constitutional Court."⁷³ He stated that once the amendment entered into force, he would "be ready, with the approval of the High Representative, to notify the Arbitral Tribunal on the completion of the conditionality foreseen in paragraph 67 of the Final Award as well as to termination of the Supervisory regime to the Peace Implementation Council Steering Board."⁷⁴

⁷¹ The High Representative's 21 May 2009 Report to the UN Security Council was also unnecessarily divisive and unbalanced, indicative of the new policy of muscular intervention. The Government will not comment on the report's contents, but notes its disagreement with many of the points raised in the report.

⁷² Communiqué of the Steering Board of the Peace Implementation Council, November 20, 2008, p. 3.

⁷³ Letter of February 6, 2009, addressed to H.E. Milorad Dodik Prime Minister of the Government of the RS and signed by Raffi Gregorian, Acting High Representative, Supervisor of Brcko.

⁷⁴ *Id.*

72. Yet despite the BiH legislature's enactment of an amendment meeting the requirements of Objective Three, there has still been no conclusion of the Final Award or termination of the Supervisory Regime. Instead, the PIC Steering Board's March Communiqué asserted *new* requirements for fulfillment of Objective Three. These included "full implementation of the constitutional amendment,"⁷⁵ a requirement impossible to measure. In addition, the PIC Steering Board said, "The Entities and the District must resolve remaining issues under the Final Award, such as mutual debt, entity citizenship, and a memorandum of understanding on electricity supply" to fulfill Objective Three.⁷⁶

73. Even if the PIC had the legal authority to require that certain conditions be met to close the OHR, which it does not, the PIC has shown that its policy of conditionality cannot be trusted. Its five objectives and two conditions for supporting OHR closure seem to be infinitely expandable.

B. Decree Purporting to Repeal RSNA Conclusions

74. Another abuse of authority and unlawful intrusion into the domestic affairs of BiH by the new High Representative occurred in its response to a set of Conclusions adopted on 14 May 2009 by the Republika Srpska National Assembly.

75. The RSNA concluded that that the transfer of competencies from the Entities to BiH institutions through decisions of High Representatives was unconstitutional and had not brought positive results. The RSNA further concluded that such competencies should be subject to "an in-depth discussion" with the other governmental bodies within the Federation and BiH institutions. In the event that resolution could not be reached on certain issues through the proper political process, the Conclusions provided for resolution of remaining legal disputes through the judicial process in accordance with the rule of law.

76. The RSNA held that any future transfer of competencies should not be imposed on BiH by the High Representative, but instead should be done "based on the Constitution, clearly prescribed local procedures, consensus and compromise, democratically, and based on the interest of citizens of the Republika Srpska and BiH."⁷⁷

77. On June 20, 2009, the High Representative issued a decision claiming to repeal the Conclusions.⁷⁸ The High Representative's arguments in support of his decision are without any legal merit. Among the High Representative's allegations were that the Conclusions undermined the division of responsibilities established in the BiH Constitution and interfered with the Dayton Accords. This, however, was blatantly false. A key purpose of the Conclusions was to ensure

⁷⁵ Communiqué of the Steering Board of the Peace Implementation Council, March 26, 2009, p. 3.

⁷⁶ *Id.*

⁷⁷ Conclusions, Republika Srpska National Assembly, No. 01-788/09 (14 May 2009).

⁷⁸ Decision Repealing the Conclusions of the Republika Srpska National Assembly No. 01-787/09 and No. 01-788/09, 14 May 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43633.

that any transfers of competencies be consistent with the Constitution and that the fundamental principles of the Dayton Accords be honored and open debate occur among the various elected representatives throughout BiH on these issues.

78. It is a hallmark of functioning and vibrant constitutional federal democracies for the regional and central governments of sovereign states to continually assess and debate the division and exercise of competencies. When disputes cannot be settled through the political process, they are resolved peacefully through resort to judicial proceedings.

79. The questioning and debate called for in the Conclusions should be encouraged by BiH's friends, not condemned. In any event, actions such as the RSNA's passage of the Conclusions are internal affairs of an Entity of a sovereign state. The High Representative's attempt to repeal the RSNA Conclusions was an unnecessary intrusion into the domestic affairs of the BiH and its Entities and a violation of international law.

80. Moreover, it is beyond the authority of the High Representative to act as a judicial body and impose on the duly elected legislative bodies of BiH and the Entities its interpretation of what is constitutional or to restrict the expression of views regarding this issue. It is essential to constitutional democracy that elected officials – and everyone else – be free to express their opinions on all issues of governance.

C. Undermining PIC-Endorsed State Property Agreement

81. Another example of the new High Representative's obstruction of legitimate progress achieved by local officials, and changing the terms of the PIC's 5+2 Agenda for closure of the OHR, is the High Representative's actions related to Objective One: resolution of the issue of apportionment of state property.⁷⁹ When BiH's three main political parties in November 2008 agreed on a PIC-endorsed compromise to resolve the state property issue, one would have expected the OHR to fully support the agreement's implementation. Although High Representative Miroslav Lajčák backed the agreement, since his departure the OHR has inexplicably supported SDA leader Sulejman Tihić's decision to walk away from it.

82. In a 30 October 2008 Statement, the PIC Steering Board set as the criteria for accomplishing Objective One what it called a "functional and territorial compromise" to resolve the state property issue. According to the Statement, the compromise "sees the State-level institutions owning those properties needed for them to 'functionally' exercise their constitutional competencies, while other levels of government would own the remaining State Property based on 'territorial' principles."⁸⁰ The Statement further explained, "In order to deliver in full on the PIC's State property obligation the authorities in BiH must register ownership of all State property needed by the State to exercise its constitutional competencies in the land registries."⁸¹

⁷⁹ Declaration by the Steering Board of the Peace Implementation Council, 27 Feb. 2008.

⁸⁰ Statement by the Ambassadors of the Peace Implementation Council's Steering Board, *State Property: PIC Support For Functional And Territorial Compromise*, 30 Oct. 2008.

⁸¹ *Id.*

83. The PIC Steering Board made clear that the only property required to be allocated and registered at the state level was that property needed for the functional exercise of competencies of the BiH institutions. Based on the territoriality principle, which had been the basis for state property ownership since the end of the war, all other property would remain under the ownership of the Entities.

84. In November 2008 meeting in Prud, the leaders of the three main political parties in BiH agreed to resolve the state property issue using the “functional and territorial” criteria established by the PIC Steering Board. They agreed to allocate state property to BiH, Entities and municipalities based on their functional needs and location of property in the respective territories. This agreement was reached after the Prime Minister of Republika Srpska made the important concession not to oppose on constitutional grounds the right of BiH-level institutions to own (rather than lease) immovable state property.

85. The PIC, UN Security Council and High Representative warmly endorsed this “Prud Agreement.”⁸² In subsequent months High Representative Lajčák worked with political leaders to have this agreement implemented.⁸³ The three leaders formally confirmed their agreement on state property and other matters in January 2009 and proposed that legislation be prepared for implementation, which High Representative Lajčák endorsed.⁸⁴

86. In a sudden and dramatic change of position, in June 2009, the Bosniak political leader Sulejman Tihić asserted that all state property throughout BiH was the property of BiH at the state level and must be registered as such. Only then could state property be allocated to the Entities (or municipalities). Mr. Tihić’s new position is wholly contrary to the functional and territorial criteria set out by PIC as necessary to fulfill Objective One of PIC’s 5+2 Agenda. This position is also in conflict with the BiH Constitution as well as the law and practice of both Entities and BiH.

⁸² Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008 (“The PIC Steering Board welcomes the political agreement on State Property reached on 8 November [at Prud] as well as the High Representative’s intention to facilitate the resolution of State Property *in a manner that endows the State with ownership over assets needed to fulfill its Constitutional responsibilities*” (emphasis added)); S.C. Res. 1845 (20 Nov. 2008) (“*Noting with satisfaction the agreement between the leaders of three main parties in Bosnia and Herzegovina reached on 8 November 2008, Calling for these proposals to be rapidly put into concrete form...*”); *Miroslav Lajčák's exclusive interview for www.reciba: “New EU strategy for BiH,”* 10 Nov. 2008.

⁸³ *Lajčák: Consensus is the best way for progress of BiH*, OHR Press Release, 27 Nov. 2008 (reporting that Lajčák and Haris Silajdzic, the Bosniak member of the BiH Presidency, “agreed that the BiH [Council of Ministers] should firstly proceed with an inventory of *the property the state needs to exercise its competencies*”) (emphasis added).

⁸⁴ *Lajčák meets Tihić: Prud Process Must Be Finalized in the Parliament*, OHR Press Release, 3 Feb. 2009 (quoting Lajčák as stating: “After the signing of the SAA, the Prud process is a positive development in BiH’s political life, since it represents a local process aimed at reaching agreements and making compromises that result in the strengthening of the state. The Prud process as such enjoys strong support from the international community, which expects that agreements originating from the Prud process will be implemented through the parliamentary procedure as soon as possible.”).

87. Rather than condemn Mr. Tihic's obstruction, the OHR has now undertaken an inventory in support of the Mr. Tihic's new position.⁸⁵ The inventory is to consist of all state property as of 1991 wherever located and of whatever ownership status, formerly privatized or otherwise.⁸⁶ It is certain that this inventory—wholly unnecessary to fulfill Objective One—will be a lengthy and controversial process. It will dramatically broaden the scope of State property that has been in dispute and delay closure of the OHR.

88. The PIC has yet to insist that the functional and territorial criteria outlined by the PIC Steering Board and agreed at Prud, be carried out and Objective One be declared met. In fact, certain members of the Steering Board sought to impose a solution to the state property issue during the October meetings at Butmir, discussed below, that was contrary to the PIC's earlier criteria and the Constitution and existing laws of BiH. The Government cannot accept such a proposal, which was rejected by nearly all of the political parties represented at the Butmir talks.

D. Removal and Banning of Individuals from Office and Employment

89. The OHR this year has continued its unlawful practice of removing BiH citizens from public positions and banning them indefinitely without any hearing. On 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that an official from the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office.⁸⁷ The High Representative banned both police officials from any public positions indefinitely.

90. Despite the seriousness of the charges and severe harm to their livelihoods and reputations, these officials were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within BiH was wholly circumvented. The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative emphasized that these decisions have "immediate effect and will not require any further procedural steps."

91. Two days later, the Principal Deputy High Representative and Brčko Supervisor banned three security companies and all individuals they employ or contract from performing any security functions in Brčko for five years. He banned a fourth security company from expanding

⁸⁵ OHR Inventory Team Established (Decision of the High Representative), 12 Sept. 2009, available at www.ohr.int/decisions/plipdec/default.asp?content_id=43935.

⁸⁶ *High Representative Launches State Property Inventory*, OHR Press Release, 12 Aug. 2009.

⁸⁷ Decision to Remove Mr. Radislav Jovičić from his current position in the State Investigation and Protection Agency of Bosnia and Herzegovina, 6 June 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43576; Decision To remove Mr. Himzo Đonko from his position as the Police Commissioner of Herzegovina-Neretva Canton, 6 June 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43570.

contracts or undertaking new contracts in Brčko for five years. The ban imposed on one company, Alpha Security, was based on the Principal Deputy High Representative's allegation that it "has been conducting hostile personal and technical surveillance and investigations" of him and his staff.⁸⁸ The bans imposed on the other companies and their employees and contractors are based solely on the Principal Deputy High Representative's allegation that these companies "have relationships with Alpha security."⁸⁹ The banned companies and their employees were given no hearing or other forum to challenge the grounds on which they were suddenly deprived of their livelihoods.

92. These actions demonstrate that violations of BiH citizens' human rights by the use of preemptory removal powers are not merely relics of the immediate post-war years; such actions continue today, some 14 years after the end of BiH's civil war. Where else in the free world—let alone Europe—are persons condemned for supposed wrongdoing, stripped of their positions and employment, and banned from further public positions indefinitely—all by simple decree without any hearing or recourse to appeal?

E. Selective Repeal of Removal Orders

93. On 21 August 2009, the High Representative repealed earlier High Representatives' decrees removing and banning from office four members of the Serbian Democratic Party ("SDS"), including Dragan Kalinic, a former Speaker of the Republika Srpska Parliament and SDS President.⁹⁰ The orders repealing these removal decrees fail to explain why these four men's bans have been lifted while the same sanctions against more than 100 other BiH citizens remain in place. With respect to the rehabilitated individuals, each order simply recites that the High Representative concluded "that the reasons for his removal no longer apply and that he no longer poses a threat to peace implementation, institutional integrity or democracy in Bosnia and Herzegovina." The orders do not attempt to explain why "the reasons for removal no longer apply" or why the four rehabilitated men are no longer "a threat to peace implementation, institutional integrity or democracy" in BiH.

⁸⁸ Supervisory Order Prohibiting Certain Private Security Agencies from Operating in the Brcko District of Bosnia and Herzegovina, 8 June 2009, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=43584.

⁸⁹ *Id.*

⁹⁰ Notice of Decision by the High Representative to Lift the Ban Imposed on Dragan Kalinić by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43881; Notice of Decision by the High Representative to Lift the Ban Imposed on Savo Krunic by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43875; Notice of Decision by the High Representative to Lift the Ban Imposed on Jovo Kosmajac by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43877; Notice of Decision by the High Representative to Lift the Ban Imposed on Nemanja Vasić by the High Representative Decision, dated 30 June 2004, 21 Aug. 2009, available at www.ohr.int/decisions/removalssdec/default.asp?content_id=43879.

94. BiH citizens are left to wonder what distinguished these four men from the other banned officials. The rehabilitation of Kalinic, who is seen by some as a potential challenger to the sitting Prime Minister, has raised suspicions that he was rehabilitated in order to pose a challenge to the existing leadership in the upcoming elections.

95. The Government supports the lifting of all OHR bans because the original decrees denied the accused even the barest form of due process or any forum for appeal. The Government is disturbed, however, by the OHR's selective rehabilitation of individuals for reasons that remain – at best – mysterious. The High Representative's rehabilitation of a select few individuals without any explanation of what distinguishes them from those who remain banned highlights the arbitrariness of the OHR's asserted powers.

F. Efforts to Maintain Influence over the Judiciary and Law Enforcement

96. After World War II, as colonies around the world were gaining their independence, some colonial powers maintained their control by leaving in place foreign colonial administrators and military commanders behind a facade of independence. The new High Representative and other interventionists now favor a similar plan for BiH. The Government strongly opposes this tactic. The appointment of foreign personnel as officials in BiH's institutions is not consistent with a return to constitutional government and the rule of law.

97. Under BiH's Constitution, except for three judges of the Constitutional Court, there are no provisions for foreigners to serve as officials in BiH's institutions.⁹¹ However, today there are numerous foreign officials who govern BiH's citizens, including judges and prosecutors in BiH's Court and Prosecutor's Office, and other positions within the Registry (with a staff of over 270) that serves both.⁹² For example, nearly half of the prosecutors in the section of the Prosecutor's Office for Organized Crime, Economic Crime and Corruption are foreigners, including the Deputy Prosecutor who heads that section.⁹³ Most of these officials were originally appointed by decision of the High Representative.⁹⁴

98. These foreign judges and prosecutors are free from the accountability properly imposed on BiH citizens who serve in the same positions. They are granted immunity from criminal and civil liability⁹⁵ at the same level as diplomats under the Vienna Convention on Diplomatic Relations.⁹⁶ Granting such immunity to judges and prosecutors is contrary to fundamental

⁹¹ Constitution of Bosnia and Herzegovina, Art. VI.

⁹² Information on judges of the Bosnia's Court is available at www.sudbih.gov.ba. Information on prosecutors of Bosnia's Prosecutor's Office is available at www.tuzilastvobih.gov.ba. Information on the Registry is available at www.registrarbih.gov.ba.

⁹³ Information on prosecutors of Bosnia's Prosecutor's Office is available at www.tuzilastvobih.gov.ba.

⁹⁴ *See id.*

⁹⁵ The Government reserves its position regarding the legality and enforceability of the immunity in question with respect to non-citizens of Bosnia.

⁹⁶ Decision on Granting a Diplomatic Status to the International Members of the Prosecutor's Office in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina (28/04). The Government

principles of the rule of law and democratic governance. Unlike diplomats, judges and prosecutors exercise considerable authority and discretion over citizens of BiH, including authority to apprehend, prosecute and incarcerate. Such authority and discretion in any jurisdiction can be abused if not checked by mechanisms of accountability. But there is no accountability for foreign judges and prosecutors in BiH.

99. This arrangement has resulted in political manipulation of the criminal justice system. Foreign judges in BiH have strong incentives to obey the OHR and other foreign officials who have been involved in setting their terms of work and compensation. Such criminal justice system abuses have been the subject of inquiries raised within BiH's Parliamentary Assembly.

100. Pursuant to the Law on Court of Bosnia and Herzegovina and the Law on the Prosecutor's Office of Bosnia and Herzegovina, foreigners may serve as judges and prosecutors only during a five-year transitional period, starting in 2004.⁹⁷ This transition period comes to an end this year.

101. The BiH Parliamentary Assembly recently voted to reject amending the law to extend the mandate of these foreign prosecutors and judges. The High Representative on 29 October 2009 expressed his "concern" at the Parliamentary Assembly's decision. He threatened to use his Bonn Powers to extend the mandate, saying that "full BiH co-operation with the ICTY is a priority for my office, and I am ready to use the full powers of my office to assure this if needed."⁹⁸ Yet, as the EC's recent Progress Report on BiH attests, BiH's "cooperation with ICTY has remained good."⁹⁹

102. The Government will oppose any further attempt to change the law to extend the period for foreigners to serve as judges and prosecutors beyond 2009. The High Representative should respect the BiH Parliament's decision not to extend the mandate of the foreign judges and prosecutors. A renewal of their mandate – especially if accomplished through a decree in defiance of the Parliament – would be a giant step back for constitutional government and the rule of law in BiH.

reserves its position regarding the constitutionality of this decision. *See also*, Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), which provides criminal and civil immunity for international judges (Art. 65(8)), but no immunity for judges who are citizens of Bosnia. *See also*, Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), which provides criminal and civil immunity for international prosecutors (Art. 18(a)(3)), but no immunity for prosecutors who are citizens of Bosnia.

⁹⁷ Law on Court of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), Art. 65(1). Law on the Prosecutor's Office of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), Art. 18(a)(1).

⁹⁸ OHR Press Release: Inzko Meets Brammertz: International Mandates Should Be Extended, 29 Oct. 2009.

⁹⁹ EC Progress Report at 24.

G. The Barrage of Unlawful Decrees on 18 and 19 September

103. On 18 and 19 September alone, the High Representative (and Principal Deputy High Representative as Brčko Supervisor) unleashed a barrage of 9 peremptory decrees.

104. One 18 September decree overruled a decision of the BiH Council of Ministers, comprised of representatives of the three Constituent Peoples, on the distribution of financial assets obtained under the Agreement on Secession Issues of the former Yugoslavia.¹⁰⁰ If implemented, the decree would divest the Republika Srpska (and the Federation) of important financial assets. The decree shows that even when BiH's leading parties and institutions reach agreement on necessary measures, the High Representative does not hesitate to trump BiH institutions in order to micromanage the country's internal affairs.

105. In another decree on the same day involving BiH's electric power transmission company, Elektroprenos, the High Representative stripped the Republika Srpska of vital shareholder protections in flagrant violation of the its rights as one of the company's two shareholders.¹⁰¹ On 19 September, the Principal Deputy High Representative and Brčko Supervisor also issued an order that claimed to vest property rights held by Elektroprenos with the Brčko District.¹⁰² If implemented, the order would result in the unlawful expropriation of significant property from the Republika Srpska and its citizens.

106. On 18 September, the High Representative also issued: a decree changing the electricity laws of both the Republika Srpska and the Federation;¹⁰³ a decree amending the Law on

¹⁰⁰ Decision Enacting the Law on the Distribution, Purpose and Use of Financial Assets Obtained Under Annex "C" to the Agreement on the Succession Issues, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43973. In a meeting on 6 November, however, Prime Minister Dodik and Federation Prime Minister Mustafa Mujezinovic reached an agreement to unblock the work of Elektroprenos. *Bosnia leaders agree to allow power grid function*, REUTERS, 6 Nov. 2009. Under the agreement, Elektroprenos will continue to work according to the law that created it, and the High Representative's order will not be implemented. *Bosnian Serb, Federation PM agree to ignore peace envoy's decision on power grid*, BBC MONITORING translation of BH RADIO 1, 6 Nov. 2009.

¹⁰¹ Decision Enacting the Amendments to the Law Establishing the Company for the Transmission of Electric Power in Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43975.

¹⁰² Supervisory Order regulating the status of all electric power transmission lines and facilities situated in the Brčko District of Bosnia and Herzegovina, 19 Sept. 2009, available at www.ohr.int/ohr-offices/brcko/bc-so/default.asp?content_id=43983.

¹⁰³ Decision Enacting the Law on Amendments to the Law on Electricity (Republika Srpska), 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43965; Decision Enacting the Law on Amendments to the Law on Electricity (Federation), 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43963.

Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina;¹⁰⁴ and orders changing the citizenship laws of BiH, the Republika Srpska, and the Federation.¹⁰⁵

107. As the Government expressed to the High Representative, the barrage of decrees issued on 18 and 19 September violated existing laws of BiH, Republika Srpska, and the BiH Constitution. The actions exceeded the authority of the High Representative and the Brcko Supervisor. As such, the decrees created unnecessary disputes and could not be accepted by the Government. They are each an affront to BiH, its Entities, and the rule of law.

H. OHR Investigation of Politicians, Religious Leaders and Businesspeople

108. Under the Dayton Accords, the High Representative is a foreign diplomat entrusted to assist implementation of the civilian aspects of the Accords. New revelations, however, show that the OHR has been conducting secret investigations of important BiH citizens and alleging criminal conduct in privately circulated reports. OHR documents obtained by the Sarajevo-based newsmagazine *Global* show that the OHR has been secretly investigating political and other local leaders on such issues as money laundering, corruption, organized crime, and terrorist connections.¹⁰⁶ The leaked OHR documents include a diagram of an alleged criminal network that includes the names of most of BiH's top Bosniak leaders in government and other fields.¹⁰⁷ A note on the documents says that they are to be made public for the EU.¹⁰⁸ In an interview about the scandal, the High Representative confirmed the existence of a unit within the OHR that created these documents and that this unit shares documents.¹⁰⁹

109. The OHR has no legal authority to run an intelligence operation and certainly has no authority to provide libelous information secretly to the ambassadors of friendly states. The conduct recently revealed is damaging to the reputations of BiH citizens and BiH itself, and the OHR should be held legally accountable for any harm unlawfully caused. These revelations raise serious concern with respect to privacy rights and OHR interference in the BiH judicial and prosecutorial institutions.

¹⁰⁴ Decision Enacting the Law on Amendments to the Law on Transmission of Electric Power, Regulator and System Operator of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43961.

¹⁰⁵ Decision Enacting the Law on Amendments to the Law on Citizenship of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43967; Decision Enacting the Law on Amendments to the Law on Citizenship of Republika Srpska, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43971; Decision Enacting the Law on Amendments to the Law on Citizenship of the Federation of Bosnia and Herzegovina, 18 Sept. 2009, available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=43969.

¹⁰⁶ *Teška zloupotreba pečata OHR-a (Heavy abuse of OHR's stamp)*, GLOBAL, 29 Oct. 2009.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Bosnian peace envoy apologizes for publication of OHR analyses on Muslim leaders*, BBC MONITORING translation of interview in DNEVI AVAZ, 3 Nov. 2009.

110. High Representative Inzko, commenting on the scandal, said, “I have not ordered an investigation against any individual or organization outside of the OHR.”¹¹⁰ If this is the case, then it is evident that the OHR is operating outside the control of even the High Representative. The High Representative further said, “I think that my team has not produced any scandal.” His comments highlight the broader scandal that the OHR claims to be completely unaccountable for its use of sweeping powers which violate BiH and international law.

I. Seeking to Impose Constitutional Change at Butmir

111. In October 2009, with the assistance of the OHR,¹¹¹ certain members of the PIC Steering Board crafted sweeping changes to the BiH Constitution and insisted that BiH’s political leaders accept them during hastily organized, closed-door meetings at the military base at Butmir. Only one of the several political leaders invited endorsed the demands.

112. The constitutional changes that were proposed by the EU and US are not technical and few, as those proposing them have falsely claimed; rather, they are fundamental and numerous. They include dramatically changing the structure and competencies of the House of Peoples, House of Representatives, Presidency, and Council of Ministers—calling for a new powerful position of Prime Minister—and the form in which officials were elected. They also sought to transfer certain competencies from the Entities to the state level.

113. The proposed constitutional restructuring would undermine the federal structure and mechanisms established as a matter of binding international law in the Dayton Accords that protect the vital interests of all of BiH’s Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, which encourage cooperation and consensus-building today and make BiH a viable state.

114. Only if constitutional changes result from a transparent, democratic and legal process, as required by the Dayton Accords and BiH Constitution, and reflect agreement of BiH’s Constituent Peoples will they be accepted as legitimate by BiH citizens and be sustainable. For this reason, they were rejected. In its latest Bosnia Strategy Review, the European Bank for Reconstruction and Development noted: “[C]onstitutional reform cannot be imposed from outside, but will have to be in the first place a result of consensus among the political stakeholders of BiH.”¹¹² High Representative Inzko has recently emphasized that changes to BiH’s Constitution are not possible without a consensus among BiH’s three Constituent

¹¹⁰ *Id.*

¹¹¹ *Statement by the HR/EUSR following the end of Butmir talks*, OHR Press Release, 21 Oct. 2009.

¹¹² *Strategy for Bosnia And Herzegovina*, European Bank of Reconstruction and Development, 4 Sept. 2007.

Peoples.¹¹³ Similarly, UK Ambassador Michael Tatham this month said, “The constitutional changes require a broad political consensus.”¹¹⁴

115. Unfortunately, key Bosniak politicians oppose constitutional change through domestic consensus-building. The current Bosniak member of the BiH Presidency and his party blocked constitutional reform in 2006. More recently, the same member of the Presidency and his party attempted unsuccessfully to block passage of the 2009 constitutional amendment on the Brcko District, which was an element of the PIC’s 5+2 Agenda.

116. To prevent OHR closure, some Bosniak leaders have also refused to cooperate to accomplish other parts of the PIC’s 5+2 Agenda. They are insisting that constitutional changes which they prefer—but do not have the necessary support in BiH to pass through legal, constitutional procedures—must first be imposed. For example, as explained above, Mr. Tihic backed out of his agreement on resolving the state property issue, even after its endorsement by the UN Security Council, the PIC, and the High Representative.

117. Now Mr. Tihic is repeatedly threatening that violence and renewed conflict will result if the constitutional restructuring he supports is not accepted. In October, for example, Mr. Tihic said, “If it continues to go on like this, there is no question there will be conflict.”¹¹⁵ He added, “It’s just a question of what kind of conflict there will be, and is it going to be in three months, six months or one year?” Such statements cannot be tolerated and should be strongly condemned by the international community. Certainly negotiations cannot be conducted in this environment.

J. Conclusion

118. A key objective of the foregoing acts of the High Representative and certain PIC Steering Board members is to *impose* a unitary structure within BiH rather than implement the federal structure that is required by the Dayton Accords and set forth in the BiH Constitution. These acts have hampered the legitimate progress that was underway among the key Serb, Croat and Muslim political leaders. Such imposition is a clear violation of BiH and international law as will be discussed in Section V below.

V. Adherence to International Law

119. The actions of the current High Representative and his staff and certain PIC Steering Board members, as described in the previous section above, not only impede progress and

¹¹³ *Changes in Bosnia only by consensus*, B92, 23 Oct. 2009.

¹¹⁴ *UK envoy urges Bosnian leaders to continue participating in Butmir talks*, BBC MONITORING translation of interview in OSLOBODJENJE, 2 Nov. 2009.

¹¹⁵ Nicole Itano, *E.U. and U.S. Talks Aim to End Bosnia Deadlock*, TIME, 8 Oct. 2009. See also Dan McLaughlin, *Last-ditch effort to drag Bosnia out of the mire*, IRISH TIMES, 9 Oct. 2009 (quoting Mr. Tihic saying: “Things have been getting worse. If this trend does not stop, it will lead to conflict, it is just a question of when.”); *Bosniak leader warns of “clashes”*, B92, 15 July 2009 (“Clashes are possible in Bosnia if the work of state institutions is blocked and the Office of the High Representative closes, warns SDA leader Sulejman Tihic.”).

destabilize BiH, such actions are also unlawful. They grossly exceed the legal authority of the High Representative and PIC. They constitute egregious violations of the legal duty not to intervene in matters within the domestic jurisdiction of another State—including with respect to BiH’s “inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.”¹¹⁶ And they are serious violations of human rights and political and social rights guaranteed by the Constitution of BiH and other international instruments. The High Representative has successfully blocked all attempts of citizens to seek a legal remedy for injury caused by his unlawful actions. The Government has responded to these actions consistent with its rights and obligations under the law.

A. Legal Authority of the Peace Implementation Council

120. The PIC is a self-organized, ad-hoc group of some 52 states and organizations. It is not an international organization in terms of international law. Of primary importance for purposes of this Report, the PIC has not been granted any powers of intervention into BiH’s domestic affairs or foreign relations by the Dayton Accords.¹¹⁷ Neither has the United Nations Security Council granted any authority under Chapter VII or other Charter provisions to the PIC to intervene into or supervise the domestic affairs or international relations of BiH or the Entities,¹¹⁸ although PIC statements and actions have often sought to give the impression that PIC somehow possesses such authority. As a matter of international law PIC declarations and communiqués are no more than statements of the views of PIC member states and organizations. While of interest to BiH as such, PIC communiqués and requirements have no legal force in BiH law or in international law.

121. Unfortunately, PIC communiqués of recent years have concerned themselves with the details of internal affairs of BiH, not with questions of international peace and security. The most recent PIC communiqués have become increasingly intrusive in the internal affairs of BiH.¹¹⁹ To cite just a few of many examples, in its recent communiqués and declarations the PIC Steering Board has taken up such issues as regulations on BiH visas, the investigative actions of the State Prosecutor regarding allegations of local law violations, the jurisdiction of Agreement on a Permanent ITA Co-efficient methodology and establishment of a National Fiscal

¹¹⁶ Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

¹¹⁷ While some PIC members signed the Dayton Accords as witnesses, such an act has no legal significance. As a leading authority notes, citing the Dayton Accords as an example, “The signature of a witness, however distinguished or powerful, has no legal significance; in itself, it will not make the state of the witness a guarantor of the performance of the treaty.” ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 101 (2d ed. 2007).

¹¹⁸ *See, e.g.*, S.C. Res. 1869 (2009), S.C. Res. 1845 (2008), and S.C. Res. 1785 (2007), which do not use the decisional language required by UN law and practice necessary to empower states or organizations to act as agents of or on behalf of the UN. *Compare, e.g.*, S.C. Res. 1244 (1999) (providing such authorizations in the case of Kosovo).

¹¹⁹ *See* Communiqué of the Steering Board of the Peace Implementation Council, 30 June 2009; Communiqué of the Steering Board of the Peace Implementation Council, 26 March 2009.

Council.¹²⁰ Such interference in internal affairs is inconsistent with international law. The demands in these communiqués have reached far beyond any legal obligation of BiH under the Dayton Accords or any other obligations of BiH and the Entities under other elements of international law. The Government wishes BiH to have friendly relations with all member states of the United Nations, including those that are members of the PIC; but, these relations must be conducted according to international law, recognizing the sovereignty of BiH and without asserting any threat of sanctions should BiH or the Entities choose not to accept the views offered.¹²¹

B. Legal Authority of the High Representative

122. The Agreement on Civilian Implementation of the Peace Settlement, as set forth in Annex 10 of the Dayton Accords does not give authority to the PIC or any state or group of states or organizations to direct the activities of the High Representative. Instead, the High Representative is an official designated by treaty, Annex 10, to carry out certain specifically identified responsibilities set out in Annex 10.¹²² Indicative of the source of his authority is the fact that the grant of immunity accorded him and his staff in Annex 10 is granted only by BiH and is applicable only to BiH institutions. It is not limitless within BiH and comprehends only actions within the scope of his mandate. Thus in performing his duties he is responsible to the BiH, the Republika Srpska, the Federation and the other parties to Annex 10.

123. His actions and authority can only be measured against a reasonable and legally valid interpretation of the mandate in Annex 10, to which he has the serious legal and moral duty to strictly adhere.¹²³ Such interpretation must be guided by the cannon that an agreement not be construed to give what is not explicitly given and the requirement of interpretation in good faith. In cases where a treaty delegates to an international official responsibilities touching upon domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.¹²⁴ Any actions outside this mandate are *ultra vires* and thus without any force or effect. Such actions could result in internationally wrongful acts for which the High Representative would bear responsibility.

¹²⁰ See, e.g., Declaration by the Steering Board of the Peace Implementation Council, 27 Feb. 2008; Communiqué of the Steering Board of the Peace Implementation Council, 20 Nov. 2008.

¹²¹ See, e.g., U.N. Charter, art. 2; Vienna Convention on Diplomatic Relations, art. 41; Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States, G.A. Res. 2625 (XXV) (1970).

¹²² Agreement on Civilian Implementation of the Peace Settlement (Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina), art. II.

¹²³ See, *inter alia*, Vienna Convention on the Law of Treaties, Sections 26, 31, 32 and cannons of treaty interpretation in general international law.

¹²⁴ See W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 MICH. J. INT'L L. 231 (1989).

C. No Authority to Use Peremptory Powers

124. Annex 10 does not authorize the High Representative to exercise the so-called Bonn Powers. Based upon what has been said above it is apparent that PIC had no authority to grant such powers to the High Representative; moreover, the language of relevant PIC statements does not purport to authorize the exercise of such powers. Instead, the PIC statement only “welcomes” the High Representative’s “intention” to take certain limited actions in connection with his authority to interpret Annex 10.¹²⁵ Even such limited language is not capable of adding any additional authority to the High Representative because the PIC has no judicial authority or function such as could clothe the High Representative’s actions with legitimacy under international law.

125. Even general knowledge of the circumstances surrounding the conclusion of the Dayton Accords would make it impossible to conclude that the intent of the parties was to grant to a single, foreign official the power to amend constitutions, violate constitutional provisions, enact legislation, create new state institutions, remove democratically elected officials, or violate the human rights guaranteed to BiH citizens.¹²⁶ Certainly the plain language of Annex 10 does not grant such power to the High Representative or any other official, State or international organization. That Annex must be read consistently with the other provisions of the Dayton Accords, including Annex 4, the BiH Constitution, which establish a carefully structured system of government in which powers are allocated and balanced among various organs of government so that democratic governance is assured and the rights of the Constituent Peoples and Entities are protected.

126. Whether used by the High Representative or a European Union Special Representative, exercise of these peremptory powers is inconsistent with the Constitution and international legal commitments of BiH, inconsistent with the general standards of human and civil rights required of members of the European Union, and inconsistent with the most fundamental principles of the rule of law and international law. Their use has been called into question or condemned by many international political and legal experts.¹²⁷ For example, the Council of Europe stated, “... the

¹²⁵ Conclusions of the Peace Implementation Conference, 9 and 10 Dec. 1997, Section XI(2).

¹²⁶ It must also be emphasized that while the High Representative has “final authority” of interpretation with respect to Annex 10, his authority is limited – it must be exercised in accordance with general international law, including the Vienna Convention on the Law of Treaties. See *inter alia* Articles 31 and 32. His “interpretation” of Annex 10 obviously cannot be an excuse for actions of the High Representative that violate international law or exceed his mandate. Indeed, such actions are void or voidable and entail international responsibility.

¹²⁷ See, e.g., Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT’L L. 1 (2004); Steven R. Ratner, *Foreign Occupation and International Territorial Administration; the Challenges of Convergence*, EUR. J. INT’L L. (2005), Vol. 16 No. 4; GREGORY H. FOX, *HUMANITARIAN OCCUPATION* (Cambridge University Press 2008); BERNHARD KNOLL, *THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS* (Cambridge University Press 2008); Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. INTERVENTION AND STATEBUILDING, Special Supp. 2007; Rebecca Everly, *Complex Public Power Regulation in Bosnia and Herzegovina After the Dayton Peace Agreement*, 5 ETHNOPOLITICS No. 1 (2006); Gerald Knaus and Felix Martin, *Travails of the European Raj*, 14 J.

Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.”¹²⁸ The Constitutional Court of BiH has also held that their use violates the Constitution.¹²⁹

D. No Authority of Security Council

127. The various resolutions of the Security Council having to do with BiH do not purport to assign responsibilities to the High Representative. Indeed, it is unlikely that the High Representative would have any legal authority to accept such responsibilities, as his authority is circumscribed by his Annex 10 mandate. United Nations practice is, of course, to appoint and authorize specifically designated U.N. officials or states to carry out tasks authorized by Security Council resolutions.¹³⁰ In contrast, the High Representative and his functions were created by the parties in Annex 10. Generally the Security Council acts through the Secretary General and his appointed special representatives.¹³¹ The High Representative is not an appointed special representative of the Secretary General. Certainly a scope of authority as extensive as that claimed by the High Representative cannot be implied on the basis of any Security Council Resolution issued.

VI. The Government’s Response to the High Representative’s Unlawful Actions

A. Ending the High Representative and Rejection of the Use of the Bonn Powers

128. As Carl Bildt, the Foreign Minister of the current EU Presidency, as well as others within the international community, have repeatedly stated, it is time for the High Representative to end.¹³² BiH must be treated as a full and equal sovereign member of the United Nations. The continuation of the High Representative seriously impedes this (and also blocks application for

DEMOCRACY, No. 3 (2003); RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION (Oxford 2008); DECONSTRUCTING THE RECONSTRUCTION, Dina Francesca Haynes ed., Ashgate 2008).

¹²⁸ *Assembly debate* on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

¹²⁹ *See Bilbija*, AP-953-05 (BiH Const. Ct. 8 July 2006).

¹³⁰ For comparison, see S.C. Res. 1244 (1999) regarding governmental administration in Kosovo and appointment of a Special Representative with detailed administrative powers. It is notable that the Special Representative in Kosovo established an Ombudsperson with authority to review the Special Representative’s actions. UNMIK Regulation No. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo. In BiH, by contrast, the High Representative has issued orders barring the courts and other BiH institutions from hearing or acting upon complaints of human rights or other violations of law by the High Representative.

¹³¹ *See* S.C. Res. 1244 (1999).

¹³² Asked in a June 2009 interview whether it is time to close OHR, Bildt replied, “Yes. I believe that it is time to give far more responsibility to the BiH politicians.” *Office of the High Representative Should be Closed*, NEZAVISNE NOVINE, 11 June 2009. See also *Diplomats Gather from East and West on Bosnia*, BALKAN INSIGHT, 6 Nov. 2009 (quoting Russian Foreign Minister Sergei Lavrov as saying that Russia would “invest its utmost efforts” to promote OHR’s prompt closure).

EU membership). Closure of the OHR will also ensure the end to the High Representative's violations of Human Rights.

129. However, closure of the OHR is unachievable based on the PIC Steering Board's 5+2 Agenda as formulated.¹³³ First, the High Representative and certain members of the PIC Steering Board have continuously changed the terms for meeting the conditions and objectives, as described in Section IV above. More importantly, a powerful segment of the Bosniaks do not want to see the High Representative closed, at least until the High Representative and certain members of PIC have first imposed restructuring of BiH into a unitary, centralized state, which does not have the necessary support among BiH citizens. Therefore, the Bosniaks have no incentive to cooperate in meeting the conditions and objectives, and can unilaterally prevent fulfillment of the 5+2 Agenda. The international community cannot allow such actions to hold hostage the closure of the High Representative and should remedy this situation.

130. Until such time as the High Representative closes, the Government will not accept any further attempts of the High Representative to use the Bonn Powers as being valid under international law.¹³⁴ In order to fulfill its constitutional responsibilities, the Government has also rejected as legally invalid the High Representative's use on 18-19 September (and the Brcko District Supervisor's order) of the Bonn Powers.¹³⁵

131. As a matter of international law, BiH and the Entities have no legal obligation to consent to the exercise of peremptory powers by the High Representative because their exercise is *ultra vires* and violates international law. As a matter of law such actions have no legal force or effect.¹³⁶ In addition, their implementation would cause BiH and the Entities to violate their own laws and constitutions, human and civil rights treaties, and other obligations under international law.

132. As a matter of policy as well as observance of international law, those supporting a European future for BiH and implementation of the Dayton Accords and the rule of law in BiH should support termination of the position of High Representative and termination of peremptory powers as well. Nearly fourteen years after the Dayton Accords and return of peace to BiH, direct intervention in government administration and law-making by the High Representative and the PIC should end. Instead, as discussed in Section VII below, building internal consensus through the hard work of bargaining and compromise among leaders elected by BiH citizens is the path to long-term stability.

¹³³ As shown in Section V above, the PIC has no legal authority to demand that any such requirements be met or to determine whether or not the OHR remains open.

¹³⁴ Conclusion, Republika Srpska National Assembly, 04/1-012-2-1752/09, 24 Sept. 2009.

¹³⁵ *Id.*

¹³⁶ *See, e.g.* Eli Lauterpacht, "The Legal Effect of Illegal Actions of International Organisations," in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 89-90 (1969).

B. Ensuring Legal Recourse for Injured Citizens

133. The Government is also seeking the support of the international community, including the European Union and the Council of Europe, for the establishment of an independent forum to remedy human rights violations by the High Representative.

134. For more than a decade, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators, and mayors, as well as judges, police officials, and public company executives. The High Representative has also taken actions against citizens that deny other rights, such as blocking bank accounts and seizing travel documents indefinitely. As described in Section IV, above, the current High Representative, Ambassador Inzko has continued this practice during the past six months.

135. In spite of the grave injury to the sanctioned individuals, the High Representative allows them no notice of the charges, no hearings, no opportunity to contest the allegations, and no opportunity for appeal.

136. The High Representative's removals and bans, lacking even the most rudimentary form of due process, manifestly violate the sanctioned individuals' human rights. These actions are contrary to the Dayton Accords (including the Constitution and the applicable Human Rights Agreements in Annex 6) and are an affront to general principles of international law, the sovereignty of BiH, and the rule of law. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the EU, other regional and economic and security organizations, and the United Nations itself are founded.

137. In this regard, the removal of public officials by the use of the Bonn Powers also violates the "General Principles" set forth in Article 2 of the Stabilisation and Association Agreement between BiH and the European Communities and its Member States. These principles constitute legal obligations of the parties to the SAA to respect democratic principles and human rights set forth in human rights instruments specified in Article 2 and the rule of law. They have been violated by certain member states of the European Communities that are members of the Steering Board of the PIC because of their endorsement of the High Representative's use of the Bonn Powers. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board. They have also been violated by BiH because of its implementation of removal decisions of the High Representative.

138. These decrees have continued despite their condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, the European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights.

139. Due to the efforts of the High Representative, those injured by the actions of the High Representative presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH not to review its actions or provide any remedy for BiH citizens for loss or injury flowing from implementation of the High Representative's decisions. The

High Representative has also asserted before the European Court of Human Rights—and the Court has ruled—that the Court lacks jurisdiction to hear claims arising from the High Representative’s actions and that its actions do not engage the responsibility of BiH or other states.

140. In October, the Government wrote to Swedish Foreign Minister Carl Bildt, in Sweden’s capacity as President of the EU, and Council of Europe Human Rights Commissioner Thomas Hammarberg and asked them to work to establish an independent international commission of respected legal experts to give individuals who have been removed from their positions a forum to seek redress. The commission’s mandate would be to determine whether the High Representative’s actions violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury.

141. A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some four years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.

142. It is a cherished principle in democratic societies that for there to be a right, there must be a legal remedy. A forum for the citizens of BiH whose rights the High Representative has breached would give them the remedy law demands. A more detailed exposition of this issue is attached as an Annex to this Report.

VII. EU Integration and Constitutional Reform

143. Despite the serious attempts to undermine sustainable progress, as discussed in Section IV, above, the Government is committed to continue working to build a better BiH, including through accession to the EU. However, sustainable progress cannot be achieved through continued outside intervention into local political affairs—by the threat and use of the Bonn Powers or other coercive means—which is fundamentally destabilizing and disruptive of the consensus building and reform efforts of BiH’s own authorities. Nor can the EU accession process be used as an excuse and opportunity to fundamentally reconstruct the BiH Constitution through illegitimate means in a manner that destroys the fundamental protections established by treaty at Dayton of the interests and rights of the Constituent Peoples of BiH. The Government supports integration into the EU and Trans-Atlantic structures and believes these are achievable.

A. No Authority of the High Representative or PIC Regarding EU Accession

144. EU membership is not an obligation undertaken or privilege granted by the Dayton Accords. Issues of accession to the EU, including BiH governmental restructuring, are not matters of peace implementation and thus do not fall within the High Representative’s mandate or scope of authority, nor under the auspices of the PIC.

145. On 16 June 2008 BiH signed a Stabilisation and Association Agreement (“SAA”) with the European Union. Thereafter BIH and the EU have proceeded to undertake a variety of tasks

to coordinate BiH legal structures with those required for membership. Such activities are matters for the parties to the SAA.¹³⁷ The Government supports EU accession and intends to work actively to prepare BiH institutions for accession. The Government recognizes that this is, for all aspiring members, a difficult and lengthy process. But it is not a process to be negotiated with members of the PIC or with the High Representative. To do so could only slow and complicate EU accession negotiations by conducting one round of negotiations with the PIC and High Representative and then being faced with additional or different requirements from the EU. There is neither precedent nor logic in BiH having to negotiate with non-EU member states as to the requirements and modalities of BiH accession.

B. Reform That Preserves the Constitutional Structure

146. Reform must respect the mechanisms and federal structure required by the Dayton Accords to protect the vital interests of the Constituent Peoples of BiH. Similar protections are found in other European states.

147. Replacing this federal structure agreed to in the Dayton Accords with a unitary system would remove the protections essential for each of BiH's Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, that established peace and encourage cooperation and consensus building today and make BiH a viable state. Such protections provided by a federal system of government are hardly unique to BiH. Federal structures in other democracies within Europe and elsewhere have been successful forms of governance for states that consist of diverse peoples.¹³⁸

148. At the same time, the Government recognizes that certain amendments to BiH's Constitution, set forth in Annex 4 of the Dayton Accords, are desirable to improve good governance and to conform to standards required for European Union membership. The Government can agree to various modifications so long as they are made pursuant to the procedures set forth in the Constitution and do not to undermine the foundational principles set forth in the Dayton Accords. The Government is committed to supporting these efforts. These include modifications that address the concerns of the Venice Commission regarding consistency with the European Convention on Human Rights.

149. However, constitutional reform in the name of "efficiency" and "functionality" cannot be a cover for restructuring BiH's Constitution to create a unitary state to appease a certain segment of the Bosniak population in BiH. Efficiency and functionality can be achieved in a decentralized, federal state—as is the case of many other countries.

C. OHR Closure, Not Constitutional Change, Required for Application to EU

150. The EU Presidency has made clear that constitutional reform is not a condition for EU application. On 29 September, a representative of the EU Presidency testified to the US Helsinki

¹³⁷ See, e.g., Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part, sections 76, 79, 80, 95, 97, 99, 102, 103 and 108.

¹³⁸ Examples include Germany, Spain, Belgium, Switzerland, and Canada, among many others.

Commission: “Let me also say that outstanding constitutional reform in BiH neither is a precondition for OHR closure nor required in order to apply for EU membership.”¹³⁹

151. At the same time, the EU Presidency has made clear that closure of the OHR *is* required for EU application. The EU Presidency identified the existence of the OHR as a “major obstacle” to applying for EU membership, and said that “[a]s long as OHR remains in place, a Bosnian EU membership application cannot be considered.”¹⁴⁰

152. Constitutional change has also never been considered a requirement for the closure of the OHR. The EU has made clear that there is no such requirement for OHR closure. As noted above, a representative of the EU Presidency, in recent testimony to the US Helsinki Commission, stated unambiguously that “constitutional reform” is not “a precondition for OHR closure.”¹⁴¹ The PIC has also made clear its position that constitutional restructuring is not required for closure of the OHR. The PIC’s 5+2 Agenda for OHR closure has never mentioned constitutional reform. In its most recent Communiqué, the PIC Steering Board stated, “While constitutional reform is not a part of the objectives and conditions for the OHR’s closure it remains an essential priority.”¹⁴²

D. Proper Reform Sequence and Process

153. According to the positions of the EU and PIC, as described above, the issue to be focused on to advance EU membership application is not constitutional reform, but closure of the OHR. Once the EU candidacy is completed, then is the time for addressing what constitutional reforms may be required for EU *accession*.

154. The timing of such reforms should also take into account the situation in BiH and the needs of the country. If the interests of BiH’s citizens are to be given priority, the most pressing issue facing BiH is not constitutional reform, but economic development to meet the difficult global financial crisis. This should be the primary focus of the international community at present.

155. When reforms are taken up, the process must be conducted in accordance with the legal procedures for amendment required by the Constitution. To be considered legitimate by the citizens of BiH, the reform process must be transparent and public debate encouraged. As in other constitutional democracies, reform of the Constitution, as compared to legislation and regulations, must be approached with great care. It is essential to allow the time required to build a high level of consensus.

156. Constitutional reform and EU accession are domestic issues for BiH’s citizens to control. Attempts to impose reforms by the High Representative, PIC, or other members of the

¹³⁹ Address of Bjorn Lyrvall, Director General for Political Affairs, Ministry for Foreign Affairs of Sweden/Presidency of the EU to the U.S. Helsinki Commission, 29 Sept 2009, at 8.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Communiqué of the Steering Board of the Peace Implementation Council, 30 June 2009.

international community would be both counterproductive to legitimate and enduring reform and an unlawful intrusion into the domestic affairs of a sovereign state.¹⁴³

E. The Failure of Butmir

157. As described in Section IV, above, with the assistance of the OHR, certain members of the PIC Steering Board attempted to restructure the BiH Constitution by crafting new sweeping changes to the Constitution and insisting that BiH's political leaders accept them during closed meetings at the military base at Butmir. Only one of several political parties—the Bosniak SDA party—endorsed these demands.

158. This attempt to change the BiH Constitution failed for several reasons. First, the constitutional changes that were proposed by the EU and US were not technical and few, but fundamental and numerous. They include dramatically changing the structure and competencies of the House of Peoples, House of Representatives, Presidency, and Council of Ministers—calling for a new powerful position of Prime Minister—and transferring certain competencies from the Entities to the state level. The proposed constitutional restructuring would raze the federal structure and mechanisms set forth in the Dayton Accords that protect the vital interests of *all* of BiH's Constituent Peoples. It is precisely these protections, the essential centerpiece of the Dayton Accords, which encourage cooperation and consensus-building today and make BiH a viable state.

159. Second, the Butmir process failed because it attempted to bypass the legitimate, democratic, and legal process required to change the BiH Constitution. The changes were prepared and presented in a nontransparent manner, and demands on the parties were made to accept it only in its entirety. Changes to the Constitution must be accomplished through a transparent, democratic and constitutional process that reflects the will of the Constituent Peoples in order to achieve legitimate and sustainable reform.

160. An additional reason for their failure was the attempt to change the 5+2 Agenda to a 5 + 2 + 1 Agenda, with the new condition being restructuring of the Constitution. Butmir was really an effort to appease the main Bosniak parties' desire to centralize the government and marginalize the Entities by locking in constitutional reforms *before* the High Representative closes. The Bosniaks know that the reforms they seek do not have the necessary support of the citizens of BiH and their elected representatives. Thus, they seek to achieve their reforms through pressure and imposition of the PIC and High Representative. Unfortunately, some within the international community who support muscular intervention and the demise of the Republika Srpska, support this endeavor. This attempt to satisfy some Bosniak politicians' desire for a unitary state before the OHR's closure undermined the hosts' credibility as neutral mediators.

¹⁴³ Such action would violate, e.g., Article 2 of the UN Charter and general principles of international law as evidenced, *inter alia*, by General Assembly Resolution No. 2625 Annex of October 24, 1970.

VIII. Conclusion

161. The Government remains committed to long-term peace and stability in BiH. But the way forward for progress in BiH must be based on adherence to the following principles:

- International law and rule of law must be adhered to by all parties, including the international community and especially the High Representative.
- The High Representative (and peremptory powers) must come to an end; a legal remedy must be made available for individuals whose rights have been violated by the High Representative.
- BiH must be treated as an equal and fully sovereign state free from international intervention in its domestic affairs.
- Constitutional reform must be accomplished through a transparent, democratic and constitutional process in order to achieve legitimate and enduring reform.
- The accession process to the EU and Euro-Atlantic structures—including so-called “reforms” in the name of “efficiency” and “functionality”—must not be a guise for fundamental restructuring of the Constitution that removes safeguards set forth in the Dayton Accords that brought about and ensure peace. The rights and competencies of the Entities as established in the Dayton Accords must be respected.

162. Finally, as the Government stated in its first Report to the Security Council, the Security Council should support the Dayton Accords as the binding legal framework for BiH. The agreements that constitute the Dayton Accords, including the BiH Constitution set forth in Annex 4, are the legal instruments to which the relevant parties are bound as the framework for “enduring peace and stability”¹⁴⁴ in BiH. As a fundamental principle of international law and pursuant to BiH domestic law, these cannot be amended or modified except by further agreement of the relevant parties. Attempts to impose a system of governance that is inconsistent with the Dayton Accords by foreign states or international organizations by the exercise of peremptory powers or other methods will not be legally valid nor will such actions have the support of BiH citizens.

163. Democracy, good governance and the rule of law cannot continue to develop within BiH, if the fundamental principles of democracy, good governance, and the rule of law are repeatedly violated by the very international representatives who claim to seek their establishment. The consensus on which the legitimacy of all governments ultimately rests must come from within.

¹⁴⁴ General Framework Agreement for Peace In Bosnia and Herzegovina (Preamble).

ANNEX

Citizens Whose Human Rights Have Been Violated by the High Representatives Must Have Legal Redress

I. The OHR's Use of the Bonn Powers to Remove Officials Violates Fundamental Human Rights and Binding International Agreements

A. The OHR's Political Tactics to Remove Individuals from Public Office and Employment

Since 1997 when the High Representative first claimed the so-called Bonn Powers, the High Representative has removed nearly 200 persons from public positions.¹ Among those removed have been:

- dozens of democratically elected officials, including legislators, mayors, governors, the Croat member of the BiH Presidency, and a president of Republika Srpska;
- sitting judges;
- police officials;
- lawyers for local housing agencies; and
- officials of public companies.

The High Representative's removals have usually included indefinitely banning the targeted persons from any public office or employment and often even from holding office in political parties. These removals were effected simply by decree of the High Representative, without any notice or hearing, administrative or judicial process or recourse to appeal, in gross violation of fundamental human rights of those individuals against whom such actions were taken.

These violations of human rights by the use of peremptory removal powers are not merely relics of the immediate post-war years; they continue today, some 14 years after the end of BiH's civil war. As recently as 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that Radislav Jovičić of the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that Himzo Đonko, the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office. The High Representative banned both police officials from any public positions indefinitely.

Despite the severe harm to their livelihoods and reputations, Jovičić and Đonko were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within Bosnia and Herzegovina ("BiH") was wholly circumvented.

¹ This number does not include the exercise of peremptory decree and removal powers by the Deputy High Representative with respect to the Brčko District, which has occurred frequently and recently. Nor does the number include 598 police officers banned for life from the profession as a result of the UN International Police Task Force's decertification decisions, supported by the High Representative.

The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative emphasized that these decisions have "immediate effect and will not require any further procedural steps."

The pattern used by the High Representative is to simply make allegations of wrongdoing against an individual, without providing detailed information or evidence, and then remove him from office by decree, often banning him indefinitely from elections, party positions and public employment. Often there is not even any attempt to seek legal action against the persons removed, despite the High Representative having leveled allegations against them that, if true, would usually amount to unlawful and even criminal conduct.

B. Violation of Human and Civil Rights Obligations

Exercise of preemptory removal powers is inconsistent with the general standards of human and civil rights required of members of the European Union and all states party to the human and civil rights treaties to which BiH is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the 1966 International Covenant on Civil and Political Rights; and the 1966 Covenant on Economic, Social and Cultural Rights.² BiH is also a party to the Helsinki Final Act. Moreover, under the Dayton Accords and BiH Constitution, it is required that "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."³

Among the legal principles to which BiH is committed by virtue of these provisions of the Dayton Accords and other treaties are ensuring its citizens:

- the right to an effective remedy;
- the right to a fair hearing;
- no punishment without law;
- freedom of expression;
- freedom of assembly and association;
- right to free elections;
- protection of property; and
- the right to take part in public affairs.

The preemptory powers of removal used by the High Representative are in direct contravention of these fundamental principles. Moreover, the decision to remove persons from public positions places BiH and its institutions in the position of violating the BiH Constitution by virtue of their implementing the High Representative's decisions.

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

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

C. Violation of the Stabilisation and Association Agreement

The use of the Bonn Powers to remove officials from office is also in violation of the Stabilisation and Association Agreement between Bosnia and Herzegovina and the European Communities and its Member States, signed in Luxembourg on 16 June 2008 (“SAA”). The SAA, under TITLE I GENERAL PRINCIPLES, at Article 2 provides:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. (emphasis added)

The High Representative’s removal of citizens from public positions through the use of the so-called Bonn Powers is contrary to these obligations set forth in the SAA, namely, respect for democratic principles, human rights, principles of international law, and the rule of law. Moreover, respect for these principles, which constitutes a legal obligation of the parties to the SAA, has been violated by BiH because of its implementation of decisions of the High Representative. They have also been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council (“PIC”) because of their endorsement of the High Representative’s use of the Bonn Powers. These foreign states include the following member states of the European Communities that are also PIC Steering Board members: France, Germany, Italy, and the United Kingdom. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board.

The Office of the High Representative, as a defendant before a US federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁴ In addition, the Office of the High Representative asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.⁵ If, as the Office of the High Representative claims, it is an organ or instrumentality of these foreign states, its actions are attributable to such states as are the actions of the High Representative.

⁴ Specially Appearing Defendants’ Motion to Dismiss, *Anthony Sarkis v. Mirolsav Lajcak*, Office of the High Representative, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

⁵ *Id.* at p. 14.

D. The Constitutional Court of BiH

The Constitutional Court of BiH has condemned the High Representative's use of the Bonn Powers to remove public officials as violating the human rights instruments guaranteed in the Constitution.⁶ In the case, *Appeal of Milorad Bilbija et al*, two senior officials were removed by decision of the High Representative from their respective positions as (1) Deputy Head of the Operative Administration of the Intelligence and Security Agency in Banja Luka and (2) Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. The applicants were also barred from holding other public and party duties, holding any official, elective, or appointed public or party office, and running in elections. The applicants argued that the High Representative's decision had violated their rights under the European Convention on Human Rights.

In response, in July 2006, the Constitutional Court concluded that:

In examining the formal aspects of the challenged decision and similar decisions of the High Representative including the consequences for the persons concerned, the Constitutional Court holds that such decisions have seriously raised issues of the existence of violations of some rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. Among others, the Constitutional Court notes that impossibility to challenge the decisions of the High Representative leaves such persons without any protection of their rights and fundamental freedoms.⁷

The Court went on to hold that:

The appellants' right to an effective legal remedy under Article 13 of the European Convention has been violated due to lack of an effective legal remedy within the existing legal system of Bosnia and Herzegovina, which could be pursued against the decisions of the High Representative concerning the rights of individuals . . .⁸

E. The Council of Europe

The Council of Europe has also sharply criticized the High Representative's use of the Bonn Powers to remove persons from public office and employment. In 2004, before the BiH Constitutional Court's *Bilbija* decision, Council Resolution 1384 stated that "the Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their

⁶ Appeal of Milorad Bilbija et al, No. AP-953/05 (8 July 2006).

⁷ See *id.* at para 36.

⁸ See *id.* at para 77.

validity and without there being a legal recourse.”⁹ In a March 2005 opinion, the European Commission for Democracy through Law (“Venice Commission”) said of the OHR’s decisions:

The termination of the employment of a public official is a serious interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required. . . .

The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and Herzegovina]. He pursues a political agenda As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.*¹⁰ (emphasis added)

More recently, on 3 June 2009, the Committee on Legal Affairs and Human Rights of the European Parliament issued a report entitled, “The state of human rights in Europe: the need to eradicate impunity.” This report provides:

The role of international actors is on the increase world-wide. . . . Some of them commit mistakes, even crimes, which have victims that deserve justice. . . . Rather than making it even more difficult to hold perpetrators of human rights violations responsible where these occur during operations under international mandate, the international community should set a positive example of transparency and accountability.¹¹

And on 6 June 2009, the Commissioner for Human Rights of the Council of Europe wrote about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the OHR as an example.¹² He wrote: “When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same

⁹ *Assembly debate* on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly* on 23 June 2004 (20th Sitting).

¹⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, paras. 94-96 (Venice, 11-12 March 2005).

¹¹ Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, *The state of human rights in Europe: the need to eradicate impunity*, para. 6, 3 June 2009 (Doc. 11934).

¹² Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

checks and balances as we require from a democratic government. . . . No-one, especially an international organization, is above the law.”¹³

Ironically, less than a month before the High Representative’s illegal removal of two officials on June 9, the OHR issued a press release quoting him as stating: “[T]he rule of law is based on a simple truth – that everyone is born equal, therefore is equal before the law and nobody is above or beyond the law.”¹⁴

II. Those Injured by the High Representative’s Violation of Human Rights Presently Have No Legal Recourse

A. The High Representative Has Blocked All Recourse within the Courts and Institutions of BiH for Those Persons Whose Human Rights Have Been Violated

On 23 March 2007, in response to the Constitutional Court’s *Bilbija* decision, in which the Court held, described above, that the High Representative’s use of removal powers violated fundamental human rights protected by the Constitution, the High Representative issued an order purporting to overrule the Constitutional Court and going well beyond.¹⁵ The order declared the High Representative to be entirely above the rule of law and not subject either to review by the Constitutional Court (or otherwise) or responsibility for any actions taken, regardless of their consequences. The order declared that the Bosnian State has no power to protect the constitutional and international legal rights of its citizens where the actions of the High Representative are directly or indirectly at issue. The order decreed that no liability is capable of being incurred by any institution or authority of BiH in respect of any loss or injury flowing from the implementation of its decisions.

The language of the order is a clear demonstration of the High Representative’s contempt for human rights and the rule of law:

“Any step taken by any institution or authority in [BiH] in order to establish any domestic mechanism to review the Decisions of the High Representative . . . shall be considered by the High Representative as an attempt to undermine the implementation of the General Framework Agreement” (Article 2)

“[A]ny proceeding instituted before any court in [BiH], which challenges or *takes any issue in any way whatsoever* with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.” (Article 3) (emphasis added)

¹³ *Id.*

¹⁴ *No Individual Can Be Above the Law; There Can Be No Space Beyond the Law*, OHR Press release of 14 May 2009, available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=43474.

¹⁵ See Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

“[N]o liability is capable of being incurred on the part of the Institutions of the [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.” (Article 3) (emphasis added)

“[T]he provisions of the Order contained herein are . . . laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of [BiH] or its Entities *or elsewhere*, and no proceedings may be brought in respect of duties thereof before any court whatsoever at any time.” (Article 4) (emphasis added)

“[T]he High Representative is not in any way accountable to any one State . . . his actions cannot engage the responsibility of any one State” (Preamble)

B. The High Representative Has Blocked the European Court of Human Rights as a Possible Forum for Citizens to Seek Redress and Has Asserted that Its Actions Do Not Engage the Responsibility of Any State

In October 2007, the European Court of Human Rights dismissed on jurisdictional grounds the claims of BiH citizens who had been removed from public positions by the High Representative’s use of the Bonn Powers. In this case, *Beric v. Bosnia and Herzegovina*, the Court did not decide on the merits of the claim that the actions of the High Representative violated human rights. Rather, it held that it lacked jurisdiction to decide the claim.

Although not party to the claim, the High Representative filed a comprehensive submission to the court as “Written Observations.” In its Observations, to avoid the Court finding that its actions could be reviewable, the High Representative argued that its actions were not attributable to BiH or any other state because:

1. The High Representative is an international organization (not subject to the Court’s jurisdiction which is limited to member states of the European Convention);
2. The High Representative is not subject to the control of any State and thus its acts are not subject to challenge in the courts of any State;
3. The High Representative is not an organ of any State and its actions do not engage the responsibility of any State as a matter of international law.

In reliance upon the High Representative’s arguments, the Court held that it lacked jurisdiction over the claim,¹⁶ thus preventing the two removed officials from having their claim reviewed by the European Court.

¹⁶ *Beric et al v. Bosnia and Herzegovina*, paras. 26-30, ECHR 2007.

C. The High Representative has attempted to block all legal recourse to those who are the subject of its removal orders

By its Order in response to the BiH Constitutional Court and its intervening in the European Court of Human Rights, the High Representative has made every effort to prevent any kind of review of its removal decisions. The High Representative declared and ordered that institutions within BiH, including its courts, should have no authority to review its removal decisions to provide a remedy for human rights claims or otherwise. The High Representative asserted and the European Court held that it could not review and determine whether BiH citizens were injured by the violation of their human rights due to implementation of the High Representative's decisions. If the High Representative's actions do not violate protected human rights, then why does the High Representative oppose their review by an independent judicial body? Why do the citizens of BiH, a sovereign state and member to the European Convention on Human Rights and the Council of Europe, not enjoy the same fundamental human rights as citizens of other member states? It is unconscionable that citizens within Europe can be removed from public office and employment—often banned indefinitely—by arbitrary decree, without any hearing, review, minimal due process, or opportunity to appeal.

III. A Mechanism to Remedy Human Rights Violations by the High Representative Must Be Implemented

A. Institutions responsible for protecting human rights in Europe have long called for the end of the High Representative's removals by decree and for a mechanism to remedy human rights violations caused thereby

In its March 2005 opinion on the High Representative's removal powers, the Venice Commission called for these decisions to be transferred to "the proper national institutions" and "made subject to full judicial control."¹⁷ The Commission held that "[t]he continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable."¹⁸ As described above, the Parliamentary Assembly and Commissioner for Human Rights of the Council of Europe, along with many other scholars and experts, have condemned the manner in which the High Representative has used the Bonn Powers to summarily remove individuals from office. *Thus the necessary and immediate step to prevent further violations of BiH citizens' fundamental human rights is for such actions to end.*

In addition, those individuals whose human rights have been violated must have a mechanism through which they may seek legal recourse, a point which has been long recognized. In this regard, the Venice Commission in 2005 had proposed that the Security Council set up a special body to review the cases of some 150 BiH police officers who challenged their lifetime bans

¹⁷ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 97 (Venice, 11-12 March 2005).

¹⁸ *Id.* at para. 98.

from the profession.¹⁹ Also in 2005, the Venice Commission recommended “setting up an independent panel of legal experts”²⁰ to address the High Representative’s removals by decree.

In addition to the Venice Commission, more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.²¹

B. An independent international commission should be established immediately to provide recourse to parties who have been injured by the High Representative’s violations of human rights

The international community should establish an independent international commission comprised of respected and experienced international jurists to provide individuals who have been removed from their public positions a forum to seek redress.²² The commission mandate would be to determine whether the actions of the High Representative violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. The commission could be given authority to issue interim measures as necessary to protect the rights of individuals. The commission would be required to make its decisions in accordance with general international law, including the law of state responsibility and responsibility of international organizations. The commission could sit in The Hague or some other neutral location in Europe and employ the services and procedural rules of an experienced and respected institution such as the Permanent Court of Arbitration. Given that members of the international community have been calling for a mechanism for nearly five years, the establishment of this commission should be completed this year.

C. The creation of an independent international commission is supported by Annex 6 of the Dayton Peace Accords

Annex 6 of the Dayton Peace Accords, at Article XIII: *Organizations Concerned with Human Rights*, provides:

The Parties join in inviting the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other

¹⁹ European Commission For Democracy Through Law (Venice Commission), *Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia And Herzegovina*, adopted by the Venice Commission at its 64th plenary session, para. 97 (Venice, 21-22 October 2005). The UN International Police Task Force, with the High Representative’s support, banned 598 police officers for life through its decertification process. The High Representative strongly resisted any review of these decisions in Bosnian courts.

²⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 98 (Venice, 11-12 March 2005).

²¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

²² The Republika Srpska proposes the establishment of an independent international commission, While reserving its position as to the jurisdiction of the European Court of Human Rights, the BiH Constitutional Court, and other existing adjudicatory bodies.

intergovernmental or regional human rights missions or organizations to monitor closely the human rights situation in Bosnia and Herzegovina

It is incumbent upon these organizations to actively oppose further violations of human rights by the High Representative and work to ensure a remedy is available for those individuals who have been injured by his past actions.

IV. Conclusion

Nearly 200 citizens of BiH have been removed from office by the High Representative by decree, without any notice or hearing, administrative or judicial process, or opportunity to appeal. These actions of the High Representative, as recognized by the Constitutional Court of BiH and the Council of Europe, violate fundamental human rights. Those who are the subject of the High Representative's actions presently have no legal recourse due to the actions of the High Representative to prevent this. The Dayton Peace Accords not only protect such human rights but also call upon international organizations to act for their protection. To provide legal recourse to individuals who have been removed from public office or employment by the High Representative, an independent international commission must be established. No legal or moral basis exists to justify this unconscionable and continuing violation of fundamental human rights.