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REPUBLIC OF SRPSKA
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Ref. No: 04.1.-2083/19
Date: 30 October 2019

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

Dear Mr. Secretary-General:

To assist the Security Council in its upcoming meeting on Bosnia and Herzegovina (BiH), Republika Srpska (RS), a party to the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords) and the annexes that comprise its substance, presents the attached 22nd Report to the UN Security Council.

The RS is committed to the Dayton Accords and to working toward BiH's future as a successful and prosperous member of the European Union (EU).

Part I of the report explains why it is important that the structure of BiH established in the BiH Constitution (Annex 4 of the Dayton Accords) be respected by all parties and the international community. The RS believes that the Dayton formula can work, as was recently demonstrated when the RS and the Federation of Bosnia and Herzegovina both adopted a joint four-year program of socio-economic reforms to stimulate growth and competitiveness in line with EU recommendations. Unfortunately, some elements of the international community fail to understand and respect the importance of the Dayton principles for BiH's future stability and success, and so they continue to undermine the Dayton system, resulting in unnecessary political conflicts and stalemates. Moreover, the Dayton Accords face attacks from BiH's largest Bosniak party, the SDA. The RS, in contrast, unreservedly accepts the Dayton Accords and merely seeks the implementation of the BiH Constitution as written.

In Part II, the RS emphasizes its commitment to working toward BiH's eventual membership in the EU. The RS has already made significant progress on reforms necessary for EU integration, and it will continue working diligently toward BiH's EU accession. Regrettably, BiH's progress toward EU membership is being impeded by the presence of an HR that claims dictatorial powers, and by the SDA's blockade on the implementation of BiH's 2018 election results. The RS is confident, however, that when impediments such as these are removed, BiH can meet the EU's membership criteria while adhering to the Dayton framework.

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Part III examines the SDA's continuing blockade of formation of the BiH Council of Ministers, as well as governments at other levels, since BiH's 2018 elections. The RS asks the international community to condemn the SDA's failure to respect and implement the outcome of democratic elections.

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

Yours sincerely,

PRIME MINISTER
Radovan Viskovic

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Republika Srpska's 22nd Report to the UN Security Council

October 2019

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

Republika Srpska's 22nd Report to the UN Security Council

Table of Contents

I. BiH's Dayton structure must be respected by all parties and the international community. .. 3

A. The Dayton Accords have been highly successful. 3

B. The Dayton formula 3

1. The Dayton Accords incorporated the foundational international law principle of self-determination. 4

2. The Dayton formula was designed to minimize political conflict, but it has not been respected. 5

3. Threats to weaken Dayton's protections for BiH's peoples has brought discord. 5

4. The subversion of the Dayton system has weakened BiH's security. 5

C. Elements of the international community continually undermine and work against the Dayton principles. 6

1. Many foreign officials fail to understand or appreciate the Dayton principles. 6

2. The High Representative's claimed powers vastly exceed its actual legal authority under Dayton. 7

3. The High Representative has centralized BiH in violation of the Dayton structure, causing unnecessary political strife. 7

4. The HR's claim that the RS has no right to submit reports to the Security Council is symptomatic of a lack of understanding and respect for the Dayton formula. 8

5. The HR should disavow the illegal "Bonn Powers" and close its doors. 9

D. The SDA's active hostility to Dayton 10

1. The SDA's inflammatory declaration calling for the abolition of the Dayton structure in favor of a unitary state should be strongly condemned by the international community. 10

2. The SDA's provocative challenge to the RS's name 13

E. The RS accepts and stands by Dayton, and it insists that the international community do likewise. 13

II. The RS is committed to BiH's EU integration. 14

A. RS progress on EU integration 14

B. Obstacles to progress on EU integration 14

C. BiH can meet the EU's membership criteria within the Dayton framework. 15

D. Courts and justice issues 15

III. The international community should no longer tolerate the SDA's persistent rejection of the democratic process. 15

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

A. The SDA is blocking formation of authorities of BiH, the Federation, and some cantons because it is disappointed with the 2018 election results. 16

B. The SDA's NATO pretext 16

1. The SDA set an impossible condition as a pretext to prevent forming BiH-level authorities 16

2. The RS supports cooperation with NATO but opposes BiH's NATO membership. 17

3. There is no legal requirement of NATO integration 17

4. EU integration is unrelated to, and unaffected by, NATO membership 18

C. The 5 August Agreement 18

D. Effects of Council of Ministers blockade 19

E. BiH's federalized system limited the impact of the SDA's blockade. 19

F. Inter-entity transfer agreements are not permanent. 20

IV. Conclusion 21

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

Republika Srpska's 22nd Report to the UN Security Council

Introduction and Executive Summary

Republika Srpska (RS), a party to the treaties that make up the 1995 Dayton Peace Accords and one of the two Entities that make up Bosnia and Herzegovina (BiH), is pleased to submit this 22nd Report to the UN Security Council.

Part I of the report explains why the structure of BiH established in the BiH Constitution (Annex 4 of the 1995 Dayton Accords) must be respected by all parties and the international community. The Dayton Accords have been highly successful at bringing a durable peace to BiH, largely because the democratic constitutional system they established respects the rights of BiH's two Entities and three constituent peoples.

The Accords created a formula for stability and democratic governance in a country with deep ethnic divisions by incorporating the foundational international law principle of self-determination. The Dayton formula minimized political conflict by leaving most administrative competences to the Entities. When the Entities are left to exercise the autonomy granted to them under the Dayton Accords, they are fully capable of cooperating to advance reforms in a cooperative manner, as demonstrated by the recent adoption of coordinated socio-economic reforms by both the RS and the Federation of Bosnia and Herzegovina; however, years of misguided and unconstitutional centralization led by the international High Representative (HR) has undermined the Dayton formula. Threats to the Constitution's protections for BiH's constituent peoples undermine inter-ethnic trust and understanding, and the HR's unconstitutional centralization of security and intelligence matters has hurt BiH's security.

Unfortunately, some elements of the international community fail to appreciate the importance of the Dayton principles for BiH's future stability and success, and so they continue to undermine the Dayton system. The HR continues to claim dictatorial authority over BiH that conflicts with his strictly limited responsibilities laid out in Annex 10 of the Dayton Accords. In addition, over the years, the HR has used its claimed dictatorial authority to centralize BiH in violation of the Dayton system, causing unnecessary political strife and insecurity among the constituent peoples. HR Valentin Inzko's outlandish claim that it is illegal for the RS to submit reports to the Security Council, made following the submission of the RS's previous report to the Security Council, exemplifies the HR's disrespect for the Dayton formula. For all of these reasons, among others, the HR should close its doors.

In addition to threats from elements of the international community, the Dayton Accords face attacks from BiH's largest Bosniak party, the SDA. In September, the SDA adopted an extremist declaration calling for the complete abolition of the Dayton structure—including the Entities and the protections for constituent peoples—in favor of a unitary state. Earlier this year, the SDA also announced that it would ask the BiH Constitutional Court to declare the RS's name unconstitutional, an initiative aimed at undermining the constitutional status of the RS.

The RS, in contrast to the SDA and the HR, unreservedly accepts the Dayton Accords and merely seeks the implementation of the BiH Constitution as written.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

In Part II of this report, the RS emphasizes its progress and commitment to working toward BiH's eventual membership in the EU. The RS welcomed the Opinion of the European Commission (EC) on the application of BiH for EU membership, which it received in May, and it will continue working diligently toward BiH's EU accession. The RS has already made significant progress on EU integration, including by harmonizing regulations with the EU's acquis and implementing economic reforms and anti-corruption measures.

Unfortunately, BiH's progress toward EU membership is being impeded by the presence of an HR that claims dictatorial powers and the SDA's blockade on the formation of authorities. The RS has no doubt, however, that when impediments such as these are removed, BiH can meet the EU's membership criteria while adhering to the Dayton framework. The RS agrees with the EU that major reforms are necessary to BiH's courts and justice system, including the replacement of the foreign judges on the BiH Constitutional Court with BiH citizens.

Part III of the report calls for the international community to condemn the SDA's continued rejection of the Democratic process. Since BiH's October 2018 national elections, the SDA has been blocking formation of the BiH Council of Ministers and as well as the governments of the Federation and some of the Federation's cantons. As a pretext to block formation of the BiH Council of Ministers, the SDA set an impossible precondition—support for submitting an Annual National Program (ANP) to NATO, which is a key step toward membership. The SDA knows that this condition is unrealistic because the RS National Assembly has voted overwhelmingly for military neutrality. The RS is not anti-NATO and actively supports and engages in cooperation with the alliance, but it opposes BiH's membership. Contrary to the claims of some supporters of NATO membership, there is no legal requirement whatsoever for BiH's NATO integration, nor is there any connection between BiH's NATO status and its goal of EU membership.

BiH's federalized system, thankfully, has limited the detrimental impact of the blockade at the BiH level. In light of the BiH-level dysfunction exemplified by the SDA's blockade, it is natural for the Entities to reassess whether it is practical and desirable to continue giving consent for BiH to exercise competences not assigned to it by the BiH Constitution.

The RS is committed to the Dayton Accords and to working toward BiH's future as a member of the European Union (EU).

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

Republika Srpska's 22nd Report to the UN Security Council

I. BiH's Dayton structure must be respected by all parties and the international community.

A. The Dayton Accords have been highly successful.

1. As the Dayton Accords approach their 25th anniversary next year, it is time for the international community and all Dayton parties to affirm their support for the structure established by the BiH Constitution (Annex 4 of the Dayton Accords), which has been successful in bringing peace to BiH and sustaining it for so many years. Contrary to many predictions, BiH has neither returned to war nor seen any significant ethnic violence since Dayton. Although BiH politics is marked by divisive rhetoric—as in most open democracies—differences are resolved peacefully and lawfully. BiH has rebuilt and recovered from the war, joined the Council of Europe, and entered into a Stabilization and Association Agreement with the European Union. Its GDP per capita has more than quadrupled since 2000, and it is continuing to grow.

2. The key reason for Dayton's success is its respect for BiH's two Entities and three constituent peoples. As the late American diplomat Richard Holbrooke said in 2007, "Bosnia is a federal state. It has to be structured as a federal state. You cannot have a unitary government, because then the country would go back into fighting. And that's the reason that the Dayton agreement has been probably the most successful peace agreement in the world in the last generation, because it recognized the reality." [1]

3. The Entities are able to work cooperatively together when given space to negotiate with each other internally. The RS and the Federation, for example, recently adopted a joint four-year program of socio-economic reforms to stimulate growth and competitiveness in line with EU recommendations.[2] The agreement on the joint program was welcomed across the political spectrum in BiH and in the international community. This is the way Dayton was supposed to work, and can work.

4. That is not to say BiH is functioning smoothly today. The BiH level of administration, in particular, has become extremely dysfunctional. The reason for that dysfunction, however, is not Dayton. On the contrary, the reason is the refusal by key members of the international community as well as BiH's main Bosniak party, the SDA, to accept Dayton. Once BiH implements Dayton as written and the international community and the SDA finally accept BiH's Dayton structure, BiH will become a much more functional and successful polity.

B. The Dayton formula

5. The Dayton Accords did not just end the war; they also created a formula for stability and democratic governance in a country with deep ethnic divisions. Too often, foreign officials mistake

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

[2] *Rival Bosnia regions agree to joint program of EU-related reforms*, Reuters, 10 Oct. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

the checks and balances built into the Dayton formula as obstacles rather than important safeguards.

1. The Dayton Accords incorporated the foundational international law principle of self-determination.

6. Dayton was not merely a temporary cease-fire or an expedient, an exercise in realpolitik. Rather, it was an articulation and implementation of foundational principles of international law, key among them the right of self-determination. Rights of self-determination animate the entire structure of the Dayton Accords.

7. Dayton's General Framework Agreement provides in its first article, "The Parties shall conduct their relations in accordance with the principles set forth in the United Nations Charter, as well as the Helsinki Final Act and other documents of the Organization for Security and Cooperation in Europe." Among the "Purposes of the United Nations" identified in the UN Charter is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." In addition, Article 55 of the UN Charter calls for "respect for the principle of equal rights and self-determination of peoples." The Helsinki Final Act[3] and the OSCE's Charter of Paris for a New Europe also recognize a right of self-determination of peoples.

8. The BiH Constitution provides, "Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution."[4] It also provides, "*The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina* without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[5] Among the agreements listed in Annex I are the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR). Both the ICCPR and the ICESCR provide for a right of self-determination of peoples in their very first article.

9. Thus it is clear that the Dayton Peace Accords, including the BiH Constitution, incorporate many of the key international agreements articulating the right of self-determination. It is this principle that underlies the constitutional structure and protections found in the Dayton Accords

10. The RS recognizes that the right to self-determination is not an absolute right that operates in isolation from other principles of international law. It understands that in the context of BiH, self-determination is to be preserved and protected in accordance with the terms of the Dayton Accords, not by subverting or rejecting the Dayton formula. Dayton preserves the right of self-determination by leaving BiH's Entities broad autonomy and establishing mechanisms to protect BiH's three constituent peoples.

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[3] Helsinki Final Act, Art. VIII.

[4] BiH Constitution, Art. II (7).

[5] BiH Constitution, Art. II (4) (emphasis added).

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

11. The Dayton principles hold that constituent peoples must be guaranteed rights, protections, a voice in governance, and a measure of political autonomy in recognition of their right to self-governance. These Dayton principles prevent a centralization of power into the hands of any one people, region, or political party.

2. The Dayton formula was designed to minimize political conflict, but it has not been respected.

12. Problems achieving state-level consensus are inherent in a multinational country like BiH. The BiH Constitution alleviated that problem by strictly limiting the BiH level's competences, thus minimizing the scope of contentious decisions required at the BiH level. The BiH Constitution enumerates ten responsibilities of BiH institutions[6] and provides, "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."[7] Unfortunately, the unconstitutional centralization of competences led by the High Representative sabotaged this design. Such centralization has resulted in the frequent deadlocks and crises that have marked BiH-level governance in recent years.

3. Threats to weaken Dayton's protections for BiH's peoples has brought discord.

13. The Dayton constitutional system is designed to protect each of BiH's three peoples from domination by one or more other peoples. Such protections are necessary not just to ensure peace and stability, but also to allow BiH's peoples to break down inter-ethnic barriers and work cooperatively together. Only when BiH's peoples each feel secure from domination by the others are they able to build trust and work across ethnic lines toward common goals.

14. Attempts by one people to dominate another cause distrust and discord between peoples. Inter-ethnic cooperation becomes almost impossible when a people feels under siege.

15. The SDA's recent declaration, described in part II, below, which calls for a single "Bosnian" identity as well as abolition of the Entities and other protections for BiH's peoples, predictably provoked heated reactions from Serbs and Croats and dealt a damaging blow to inter-ethnic trust and understanding. Any effort by the majority people to tell other peoples that they cannot identify with their history and heritage makes them adhere to them all the more tenaciously. Only when all major parties accept BIH's ethnic diversity and the Dayton protections for constituent peoples will BiH's peoples be able to rebuild inter-ethnic trust.

4. The subversion of the Dayton system has weakened BiH's security.

16. The BiH Constitution leaves security and intelligence matters to the Entities. Ignoring this fact, the High Representative ordered the enactment of a law establishing the Intelligence and Security Agency of BiH and forbidding all "other civilian intelligence-security structures." Giving

[6] BiH Constitution, Art. III (1).

[7] BiH Constitution, Art. III (3)(a).

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

all security and intelligence authority to the BiH level has undermined BiH's security.

17. BiH-level institutions have long failed to treat the threat of radical Islamic terrorism with the seriousness it warrants. The SDA, as detailed in a 2016 RS paper submitted to the UN Security Council,[8] is an Islamist party that over the years has helped turn BiH into a safe haven for jihadists. Germany's *Der Spiegel* has written, "German investigators believe there are around a dozen places in Bosnia where Salafists—followers of a hardline Sunni interpretation of Islam—have assembled radicals undisturbed by the authorities."[9]

18. As Radio Free Europe/Radio Liberty observed, "There are countless examples of local authorities in Bosnia failing to act properly against Islamic extremism."[10] BiH has also had Europe's highest per-capita rates of citizens who left to join ISIS. On 11 April 2019, German authorities deported three BiH nationals suspected of plotting terrorist attacks for ISIS.[11]

19. The BiH-level justice system—another derogation from the Constitution forced on BiH by the High Representative—has handed down amazingly lenient sentences, usually involving no prison time, to returned ISIS fighters. As the U.S. State Department wrote in its BiH country report on terrorism in 2018, "Foreign terrorist fighters frequently received sentences below the minimum prescribed by the BiH criminal code."[12]

20. The RS Interior Ministry does everything it can to reduce the growing Islamist terrorist threat in the region. It cooperates closely with other security services. For example, the RS Interior Ministry's Special Anti-Terrorist Unit has engaged in training exercises with US Navy SEALs and other special operations personnel. In April 2019, members of the Special Anti-Terrorist Unit travelled to the United States for training on legal aspects of countering terrorism. While the RS is committed to fighting terrorism, its ability to do so is limited by the centralization of security and intelligence competences at the BiH level.

C. Elements of the international community continually undermine and work against the Dayton principles.

1. Many foreign officials fail to understand or appreciate the Dayton principles.

21. The international community has too often failed to understand the importance of the Dayton Principles—the importance of the federated structure and the checks and balances—for peace, stability, and prosperity in BiH.

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[8] How Bosnia and Herzegovina Has Become a Terrorist Sanctuary, Attachment to Republika Srpska's 16th Report to the UN Security Council, Oct. 2016.

[9] Walter Mayr, *Sharia Villages: Bosnia's Islamic State Problem*, DER SPIEGEL, 5 Apr. 2016.

[10] Nenad Pejic, *Wahhabist Militancy in Bosnia Profits from Local and International Inaction*, JAMESTOWN TERRORISM MONITOR 9, Issue 42, 17 Nov. 2011.

[11] *Germany deports three Bosnians suspected of plotting terrorist attacks*, N1, 11 Apr. 2019.

[12] U.S. Department of State, Country Reports on Terrorism 2017, 19 Sept. 2018.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

22. There seems to be a persistent misconception in the international community that federalism leads to weak governance in BiH. The success of federal systems throughout Europe and globally in countries like Germany. Switzerland, and the United States shows that this is not true—and, in many cases, is the very opposite of the truth. Often, it is the allowances for regional autonomy that are accommodated in a federal structure that allow different groups to form successful unions.

23. International officials sometimes speak as if the Dayton constitutional system is merely a series of temporary measures. In September, for example, U.S. Special Representative for the Western Balkans Matthew Palmer said, "The Dayton Agreement was never meant to be a fixed framework, but rather a changing framework."[13] Comments like these, even if made with the best intentions, only serve to embolden the SDA to seek abolition of the Entities and the other Dayton protections for BiH's constituent peoples, and cause other groups guaranteed a measure of protection and autonomy under Dayton to feel threatened, and to react accordingly.

24. The efforts of the HR and certain foreign powers intervening in BiH affairs to make BiH into a polity that they could more easily manage and control, by attempting to force centralization of political power even when it was in direct contravention of the Constitution, has instead led to today's paralysis at the BiH level.

2. The High Representative's claimed powers vastly exceed its actual legal authority under Dayton.

25. As explained in detail in Attachment 1 to this report, *The Illegality of the Bonn Powers*, the so-called "Bonn powers," which the international HR claims empower it to impose laws and punish individuals by simple edict, are manifestly unlawful. The Dayton Accords, which are the sole source of the HR's lawful authority, cannot reasonably be interpreted to give the HR such dictatorial power. Neither the Peace Implementation Council—an ad hoc group of countries with no legal authority over BiH—nor the UN Security Council have ever bestowed on the HR legal authority beyond its mandate under the Dayton Accords.

26. Annex 10 of the Dayton Accords defines a strictly limited mandate for the HR, authorizing it to engage in such activities as to "[m]onitor," "[m]aintain close contact with the Parties," "[f]acilitate," "[p]articipate in meetings," and "[r]eport." The HR's mandate does not include any suggestion of the authority to make decisions binding on governments and BiH citizens. Moreover, the Bonn powers' use violates the right to self-determination of BiH's peoples and the human rights of BiH citizens under important binding treaties.

27. The HR's exercise of the Bonn powers was lawless, weakened respect for civic institutions, sowed seeds of discord, and was a significant cause of the detrimental effects that have arisen as a result of the recent political paralysis at the BiH level.

3. The High Representative has centralized BiH in violation of the Dayton structure, causing unnecessary political strife.

[13] *Bo Trumpov pisatelj trilerjev uredil razmere na Balkanu?*, Delo, 2 Sep. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

28. Over the years, the HR has used the Bonn Powers to systematically centralize governmental authority in Sarajevo in defiance of the BiH Constitution. As the International Crisis Group has written, "High Representative Paddy Ashdown imposed laws creating vast new powers of the state, sometimes at Entity expense."[14] The HR often centralized functions through simple decrees, such as when it created the Court of BiH and the Prosecutor's Office of BiH or decreed amendments to the constitutions of both Entities in order to clear the way for centralized appointment of judges and prosecutors.

29. When the HR did not outright decree centralizing changes, it brought them about through threats and other coercion against elected officials, such as when it presented the BiH Parliamentary Assembly with legislation creating the Intelligence and Security Agency and ordered its enactment into law.[15] As the late former High Representative Paddy Ashdown admitted in testimony to the UK Parliament, it took "a great deal of cracking of arms" in order for BiH politicians to accept measures going "beyond Dayton."[16]

30. The Crisis Group wrote in 2014 that a "pattern of internationally-sponsored state building without local buy-in has recurred repeatedly. It produced a 'flood' of new agencies, many of which set up offices and hired staff but lacked clear tasks, so did little or nothing."[17] To illustrate BiH's runaway centralization, the number of employees of BiH institutions grew from fewer than 3,000 in 2000 to more than 22,000 in 2015.

4. The HR's claim that the RS has no right to submit reports to the Security Council is symptomatic of a lack of understanding and respect for the Dayton formula.

31. At the UN Security Council's May 8 meeting about BiH, HR Valentin Inzko made the outlandish claim that BiH's "entities cannot send reports" to the Security Council and suggested that the semiannual reports the RS submits to the Council are "illegal." Inzko's claims flatly contradict the BiH Constitution and a ruling on this very issue by the BiH Constitutional Court. No international or domestic law is violated in even the slightest way by the RS communicating directly with the Security Council and its members.

32. Nothing in the Dayton Accords in any way restricts the rights of the Entities to communicate directly with the United Nations and other international organizations, or with individual members of the Security Council. Not only are there no restrictions on such communications, the BiH Constitution (Annex 4 of the Dayton Accords) explicitly envisions that the Entities may engage in such communications. For example, Article III(2)(d) of the Constitution

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[14] International Crisis Group, *Bosnia's Future*, 10 July 2014 ("2014 ICG Report"), at 27.

[15] *See* Marina Caparini, *Security Sector Reconstruction: Western Balkans* in ALAN BRYDEN AND HEINER HEINER HÄNGGI, EDS., REFORM AND RECONSTRUCTION OF THE SECURITY SECTOR, 143, 153 (2004).

[16] The testimony is available at http://www.parliamentlive.tv/Event/Index/a4551237-3e0f-4c02-afbe-8c0cefa94948.

[17] 2014 ICG Report at 28.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

authorizes the Entities to "enter into agreements with states and international organizations with the consent of the Parliamentary Assembly."

33. Indeed, in 2010, the BiH Constitutional Court explicitly affirmed the RS's right to submit reports to the UN Security Council. Mr. Inzko should be aware of this decision, which was announced early in his tenure.

34. There has never been any objection by the Security Council to the RS reporting directly to the Council on the situation in BiH. In fact, many international organizations and members of the Security Council maintain offices in Banja Luka or frequently visit the city specifically in order to facilitate direct communications with the RS Government. It would be preposterous to suggest that such direct communications by the RS are somehow illegal or otherwise improper in any way.

35. As a party to the international agreements that make up the Dayton Accords, the RS has the right to communicate with members of the international community regarding its rights and duties under those agreements. Moreover, this right is recognized in the BiH Constitution and was specifically affirmed by the BiH Constitutional Court.

36. The RS has been submitting regular reports to the Security Council for ten years. It is inexplicable that the propriety of this practice should be questioned by Mr. Inzko at this late date, and it is particularly difficult to understand how Mr. Inzko could suggest that all such communications need to go through the BiH-level structure at a time when BiH's largest Bosniak party, the SDA, is blockading formation of the BiH Council of Ministers—a political crisis that the HR's misguided efforts to centralize political power in BiH has helped to cause.

5. The HR should disavow the illegal "Bonn Powers" and close its doors.

37. OSCE Chairman and former HR Miroslav Lajčak recently said that gone are the days when decisions were made by the international community instead of BiH politicians and reiterated that the goal is not to continue an international protectorate but help BiH become fully independent.[18] Lajčak also said that the international community should be in BiH to advise and mediate rather than make decisions.[19] Another former HR, Wolfgang Petritsch, said in May that the "OHR is a post-war institution" and that the time of the Bonn powers is over.[20]

38. In its recent Opinion on BiH's application for EU membership, the EU recognized that the continued operation of the HR, with its self-asserted right to exercise so-called "Bonn powers," hinders BiH's progress toward EU integration. Regarding the HR, the EC Opinion says: "Such extensive international supervision is in principle incompatible with the sovereignty of Bosnia and Herzegovina and therefore with EU membership."[21]

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[18] *Лајчак: Један народ не може бити прегласан*, RTRS, 16 Sep. 2019.

[19] *Id.*

[20] *Wolfgang Petritsch for N1: The time of the Bonn Powers is over*, N1, 22 May 2019.

[21] Commission Opinion at p. 7.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

39. It is long past time for the HR to renounce its fictitious "Bonn Powers" and close its doors for good.

D. The SDA's active hostility to Dayton

1. The SDA's inflammatory declaration calling for the abolition of the Dayton structure in favor of a unitary state should be strongly condemned by the international community.

40. The extremist declaration adopted on 14 September by the SDA party makes it more clear than ever that BiH's largest Bosniak party is committed to the destruction of the Dayton Accords.

41. Under the BiH Constitution, BiH is composed of two Entities: Republika Srpska and the Federation of Bosnia and Herzegovina. The SDA's call for a "regionalized" state "called the Republic of Bosnia and Herzegovina, with three levels of government: state, regional and local" is, of course, nothing less than a call for elimination of the RS and the Federation—which are both a crucial part of BiH's constitutional structure that prevents BiH's domination by a single ethnic group—as well as the Federation's cantons, which are essential for ensuring that Croats have a voice in governance.

42. The "Republic of Bosnia and Herzegovina" was a Bosniak-dominated unitary regime that, like the RS, was a party to the agreements that make up the Dayton Accords, including the BiH Constitution. The BiH Constitution superseded the Constitution of the Republic of Bosnia and Herzegovina and made clear that the country's name is "Bosnia and Herzegovina." The SDA's call for revival of the "Republic of Bosnia and Herzegovina," then, makes clear that it wants to tear up the BiH Constitution, an essential element of the Dayton Accords.

43. The "obstructions and blockages" that the SDA seeks to eliminate are the BiH Constitution's federal structure and its mechanisms to protect BiH's three constituent peoples.[22] This structure and these mechanisms are in fact crucial elements of the Dayton Accords that are necessary for ensuring that one of BiH's peoples cannot oppress the others. That is exactly why the SDA wants to eradicate them. The SDA's goal is a unitary state to be ruled by BiH's most populous people, the Bosniaks.

44. All parties who aspire to tyrannical rule dislike "obstacles and blockages" that operate as checks and balances on their power, but the parties that drafted, negotiated, and agreed to the Dayton Accords foresaw the dangers of the dominance of mere numerical superiority in BiH, and therefore wisely built in the "obstructions" that the SDA finds frustrating to its efforts to dominate BiH society.

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[22] The SDA has already acted to undermine protections for BiH's constituent peoples. For example, one reason politics in BiH's Federation Entity are in crisis is last year's election of Željko Komšić as the "Croat" member of the BiH Presidency. Komšić is a nominally Croat politician who advocates the SDA and Bosniak political agenda and has almost no support among Croats. Bosniak politicians disenfranchised Croat voters by encouraging Bosniaks to vote for Komšić instead of a candidate for the Bosniak seat in the Presidency. This gave Bosniaks two seats on the Presidency and the Croats zero.

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45. The parties that negotiated and agreed to the Dayton Accords understood that, as is the case in dozens of stable and prosperous federations throughout the world, the path to peace and security in BiH lies in dispersing rather than consolidating political power, and therefore the Dayton formula grants a large measure of rights and autonomy to the peoples and Entities that make up BiH.

46. The SDA's declaration, though containing several grandiloquent aphorisms such as calling for "achieving social and national equality of constituent peoples and citizens throughout BiH," demands that the peoples of BiH be equal only on the SDA's terms. The SDA is so brazen in its calls for radical change in the current BiH structure and domination by the Bosniak element that it calls for "affirmation of the Bosnian identity as a common identity of all BiH citizens." Rather than celebrating the ethnic diversity of BiH, this call for uniformity on the SDA's terms is an overt and ominous threat to Serbs and Croats. It represents an explicit call to eventually eliminate all Serbian and Croatian culture and heritage in BiH. One can scarcely imagine the outrage if the people of Wales and Scotland were told that henceforth they could only identify as "British." Since BiH was formed almost 25 years ago, never has any mainstream political party in BiH made such a radical and offensive attack on the ethnic traditions of other constituent peoples of the country.

47. Reactions to the SDA's declaration both inside and outside BiH recognized it as a destabilizing rejection of the Dayton principles.

48. RS President Željka Cvijanović said the SDA had lost touch with reality, including the fact that three peoples live in BiH and that it is not possible to form any kind of "Republic of BiH."[23] She said there should be no illusion that "some kind of Bosnia tailor-made for one people will exist."[24] The leader of BiH's largest Croat party, Dragan Čović, emphasized that BiH's constituent peoples must be equal and that without such equality there is no BiH.[25] Similarly, the Croat National Assembly (HNS), an organization of Croat parties in BiH, stressed that BiH is only possible with three equal constituent peoples.[26] Many Bosniaks—even within the SDA itself—also blasted the declaration. Šemsudin Mehmedović, an SDA member of the BiH House of Representatives, criticized the declaration as radical.[27]

49. In response to the SDA declaration, OSCE Chairman Miroslav Lajčak warned that if BiH is to be preserved, the principle that none of the peoples should be outvoted and pushed out of the game must be maintained and that not to do so would be highly dangerous for the country.[28]

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[23] *SDA Losing Touch with Reality*, SRNA, 13 Sep. 2019.

[24] *SDA Losing Touch with Reality*, SRNA, 13 Sep. 2019.

[25] *Bosnian Croat leader: Civic state model inapplicable in Bosnia*, N1, 14 Sep. 2019.

[26] *Croat parties condemn SDA's declaration of long-term goals*, N1, 15 Sep. 2019.

[27] *Šta je donio sedmi Kongres SDA: Mostar ispod crte, Mehmedović u ofsajdu i "radikalna" deklaracija*, Klix, 14 Sep. 2019.

[28] *Лајчак: Један народ не може бити прегласан*, RTRS, 16 Sep. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

Serbian Prime Minister Ana Brnabić said of the SDA's declaration, "This is extremely dangerous—a public call for non-compliance with the Dayton Agreement."[29]

50. The HR, asked to comment, said, "The Steering Board of the Peace Implementation Council is constantly reaffirming its clear commitment to territorial integrity of Bosnia and Herzegovina and its fundamental structure as an integral, sovereign state, which consists of two entities, as determined by the Constitution."[30] The HR further said, "Every change of internal organisation of Bosnia and Herzegovina must be adopted in line with the procedures foreseen by the Constitution, which requires broad support within the political spectrum of Bosnia and Herzegovina including all constituent peoples."[31]

51. Even the U.S. Embassy joined the criticism. Four days after the SDA adopted its declaration, the U.S. Embassy wrote on its Twitter account, "We are concerned over some unhelpful and divisive political positions presented in the recent SDA declaration. This type of rhetoric does not attempt to solve the everyday problems of the citizens of BiH, but further inflames existing political tensions."

52. An analysis in *New Europe* said:

> [The SDA] may have opened Pandora's Box after adopting at its recent congress a resolution calling for the reorganisation of Bosnia and Herzegovina as a unitary republic with Sarajevo as its political, administrative, cultural and economic center. The proposal is a violation of the 1995 Dayton Peace Accords that ended Bosnia's brutal three-year civil war Dayton specifically defined Bosnia as a state comprising two entities . . . made up of the country's three main ethno-religious groups . . . .[32]

53. In attacking the checks and balances of the Dayton Accords, the SDA has again shown its fundamental disdain for the principles underlying the Dayton Accords, and indeed democracy itself—a disdain also seen in the SDA's efforts to block the implementation of results of any democratic election result not to its liking, whether in Mostar, in the Federation, or in the BiH national elections.

54. All BiH citizens who love peace, and all members of the international community who care for the future of BiH and the stability of the region, should vigorously resist the SDA's efforts and condemn its recent declaration and affirm the importance of the Dayton principles

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[29] *Brnabić: SDA Declaration Extremely Dangerous*, SRNA, 16 Sep. 2019.

[30] *Top intl authority: Constitution clearly says Bosnia consists of two entities*, N1, 16 Sep. 2019.

[31] *Top intl authority: Constitution clearly says Bosnia consists of two entities*, N1, 16 Sep. 2019.

[32] Jovan Kovacic, *Dark Clouds Over Serbia*, New Europe, 23 Sep. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

2. The SDA's provocative challenge to the RS's name

55. Another example of the SDA's rejection of Dayton is the party's provocative and destabilizing decision to challenge the RS's name. In January 2019, the SDA announced that it would ask the BiH Constitutional Court to declare the RS's name unconstitutional, an initiative aimed at undermining the constitutional status of the RS.[33]

56. The SDA's initiative is in direct conflict with the words of the BiH Constitution, which provides in Article I, "Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska" (which means "Republic of Srpska"). It is absurd to argue that the Constitution, in its fundamental article defining Bosnia and Herzegovina, violates the Constitution. The text of the Constitution goes on to use the name Republika Srpska in ten other places, including when it bestows powers on the National Assembly of Republika Srpska. Moreover, the Constitution is a central element of the Dayton Peace Accords, to which Republika Srpska—by that name—is a party.

57. Nor does the name Republika Srpska violate human rights instruments. *If this were so, the names of most countries in Europe would violate human rights*. It is a common and accepted practice for states and political subdivisions to carry the names of their largest ethnic group. Most European states, such as Germany, France, Italy, Spain, and the Czech Republic, are named this way. Many European political subdivisions, such as England, Scotland, Catalonia, Basque Country, and Wallonia, are also named this way. There is nothing unusual about the way in which the RS is named.

58. Moreover, the international community, including the UN Security Council, the ad-hoc Peace Implementation Council, and even the HR, has long recognized the RS—by its name—as one of the two Entities that make up Bosnia and Herzegovina.

59. The SDA has argued that the BiH Constitutional Court's so-called Constituent Peoples (CP) Decision of 1 July 2000 supports the party's initiative to require the RS to change its name.[34] The CP Decision does no such thing. The Constitutional Court's orders in the CP Decision were quite narrow, and the reasoning of the decision does not remotely justify requiring the RS to change its name, which is enshrined in the BiH Constitution. Moreover, the reasoning of the decision that has been used to call for sweeping changes was actually rejected by a majority of the court.

60. The Dayton Accords have brought BiH almost 25 years of peace. The SDA's initiative attacking the RS's name, like its recent resolution calling for the eradication of the RS as a political entity, is politically destabilizing and strikes at the very heart of the Dayton Peace Accords. The initiative is part of the SDA's unrelenting campaign to attack the RS's legitimacy. It is time that the SDA accept the Dayton settlement and the RS's right to exist.

E. The RS accepts and stands by Dayton, and it insists that the international community do likewise.

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[33] *SDA to challenge Republika Srpska entity's name before Constitutional Court*, N1, 23 Jan. 2019.

[34] *SDA to challenge Republika Srpska entity's name before Constitutional Court*, N1, 23 Jan. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

61. The RS, unlike the SDA and the HR, unreservedly accepts the Dayton Accords and wants only for the BiH Constitution to be implemented as written. Serb politicians occasionally react with justifiable anger and frustration to the SDA's threats against Dayton's protections for constituent peoples and the RS's very existence. But the RS, despite the SDA's threats, is—and has always been—committed to Dayton. The RS believes BiH can succeed and prosper if the Dayton system is faithfully implemented.

62. The fact that the SDA feels sufficiently confident that it can ignore election results, attack the very name of the RS, and issue an extreme and hostile political agenda that explicitly rejects the Dayton structure, without any fear of negative consequences from the international community, goes a long way toward explaining the cynicism among other elements of BiH society toward those foreign parties and institutions that claim to be champions of international law, human rights, and democracy. It is long past time for the international community to condemn the SDA for its destabilizing actions, and to demand that the Dayton formula be respected—by the HR, the SDA, and indeed all relevant actors in the region.

II. The RS is committed to BiH's EU integration.

63. Just as it is committed to Dayton, the RS is also committed to BiH's future as an EU member. This commitment is described in detail in Attachment 2 to this report, *Report on EU Integration Issues*. On 29 May 2019, EU representatives presented to RS authorities the European Commission's (EC) Opinion on the application of BiH for EU membership. The RS welcomes the EC Opinion and will continue working diligently toward BiH's EU integration.

A. RS progress on EU integration

64. The RS has made significant progress on EU integration issues. The RS has been steadily harmonizing its legislation with the EU *acquis*. Since 2007, 3,121 RS regulations (including drafts, proposed laws, and bylaws) have undergone the procedure of harmonisation and assessment of conformity with the EU *acquis*. The RS has also worked diligently to implement the EU-sponsored Reform Agenda and enacted far-reaching reforms to improve its business environment and otherwise promote economic development. The RS, moreover, has taken important steps to combat corruption, such as establishing a special anti-corruption prosecution office.

B. Obstacles to progress on EU integration

65. Although the RS is doing everything in its power to promote BiH's EU integration, institutions outside the RS's control have, unfortunately, been impeding progress. The continued presence of an HR that claims dictatorial powers, along with the HR's legacy of imposed laws, are major obstacles to BiH's EU integration. BiH can meet the EU's membership criteria within the Dayton framework. The RS welcomes the EC Opinion's recognition that an HR with so-called Bonn powers is incompatible with BiH's sovereignty and EU membership.

66. Another major obstacle to BiH's progress on the road to EU membership is the SDA's blockade of formation of BiH authorities, which is described in part III, below. The SDA must stop ignoring the EU's call for the BiH Council of Ministers to be formed without political conditions.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

C. BiH can meet the EU's membership criteria within the Dayton framework.

67. The RS was pleased to see the EC Opinion's reaffirmation that a decentralized state structure is not incompatible with EU membership, and the RS is confident that BiH can meet the criteria for EU membership within the Dayton framework. In the EU's federal and devolved states, regions have vital competences, including in many areas that require transposition of EU directives. Federal and devolved constitutional structures have not prevented countries from meeting their EU obligations.

68. When the Entities are allowed to negotiate with each other internally, they are able to reach important agreements—even when the BiH level is paralyzed. For example, on 10 October 2019, the RS and the Federation adopted a joint four-year program of socio-economic reforms to stimulate growth and competitiveness in line with EU recommendations.[35]

69. As the integration process moves forward, the RS will continue to emphasize the wisdom and indispensability of the constitutional structure established by the Dayton Accords. As part I of this report has explained, the BiH Constitution maintains stability and democratic government in BiH by establishing a federal, two-entity structure and various mechanisms carefully designed to protect the Entities and BiH's three Constituent Peoples.

D. Courts and justice issues

70. The RS agrees with the EU that major reforms are necessary to BiH's courts and justice system. The RS welcomes the EC Opinion's recognition that BiH must address the issue of foreign judges on the BiH Constitutional Court. The continued presence of foreign judges on the Constitutional Court violates BiH's sovereignty and the right to self-determination and is incompatible with EU integration. The RS also agrees with the EC Opinion that the Law on the Court of BiH and the HJPC system, which were imposed on the country by the High Representative, must be reformed in order to meet European standards. Since 2011, the RS has worked for justice reforms through the EU-sponsored Structured Dialogue on Justice. Unfortunately, the Structured Dialogue has yet to result in a single reform.

71. The RS, moreover, agrees with the EU that the RS Constitution's reference to a death penalty, though unused, should be eliminated. The only reason the death penalty provision has not been abolished earlier is because of Bosniak parties' obstruction of the necessary constitutional amendment.

72. The RS, in addition, agrees with the EU that BiH must ensure equality and non-discrimination for all citizens, including by implementing the European Court of Human Rights' *Sejdić-Finci* decision and related decisions. The RS advocates eliminating all ethnic qualifications for members of the BiH Presidency and House of Peoples representing the RS.

III. The international community should no longer tolerate the SDA's persistent rejection of the democratic process.

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[35] *Rival Bosnia regions agree to joint program of EU-related reforms*, Reuters, 10 Oct. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

73. In addition to plotting the end of the Dayton Constitution, the SDA has been blocking formation of the BiH Council of Ministers since the October 2018 elections, showing that the SDA rejects not just Dayton but the democratic process itself.

74. The SDA's refusal to allow implementation of the 2018 election results has crippled the BiH level of administration and thrown BiH into crisis. BiH can hardly be considered a democratic country if the winning parties in the 2018 election have still not taken office.

A. The SDA is blocking formation of authorities of BiH, the Federation, and some cantons because it is disappointed with the 2018 election results.

75. Since BiH's October 2018 national elections, the SDA has been blocking the formation of authorities not just for BiH but also for the Federation and some of the Federation's cantons. The SDA has linked the formation of the Federation government to the formation of the BiH Council of Ministers, which it is blocking by setting an impossible precondition. The party is blocking implementation of the election results because of its dissatisfaction with those results. The SDA has little incentive to form new authorities because its party members hold leading positions in the caretaker authorities, including the chairman of the BiH Council of Ministers and the Prime Minister of the Federation.

B. The SDA's NATO pretext

1. The SDA set an impossible condition as a pretext to prevent forming BiH-level authorities.

76. The SDA has been blocking formation of the BiH Council of Ministers by demanding, as a condition, a commitment to BiH submitting an Annual National Program (ANP) to NATO, a key step toward joining the alliance. The SDA has ignored the European Union's call for the new Council of Ministers to be formed without political conditions. No other parties have set conditions on the formation of the Council of Ministers.

77. As the SDA knows, its ANP condition is unreasonable and unrealistic. The RS National Assembly has passed a resolution with broad support, committing the RS to military neutrality. Pressuring democratic political leaders to adopt positions rejected emphatically by their electorate is counterproductive and, in any case, leaders in a democracy who defy their electorate will be replaced with new leaders.

78. The ANP condition is a mere pretext for preventing implementation of the election results at the BiH level. The fact that the SDA is also blocking government formation in the Federation and some cantons shows that the SDA's blockade of Council of Ministers formation is not really about NATO. As Damir Džeba, a Croat delegate to the Federation House of Peoples recently pointed out, "if the ANP had not been set as a condition of blackmail for the formation of government, there would certainly have been something else."[36]

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[36] *Džeba: SDA jasno pokazuje da je protiv stabilizacije političkih i društvenih odnosa u BiH; na sceni provedba "Pokvić politike"*, Poskok.info, 16 Sep. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

79. In reality, the main reason for the SDA blockade of the new Council of Ministers is not to promote BiH's NATO membership but instead to keep the Serb parties that won the 2018 elections out of power at the BiH level. It is a profoundly antidemocratic attempt to disregard the choices of the RS electorate.

2. The RS supports cooperation with NATO but opposes BiH's NATO membership.

80. The RS seeks for BiH what Thomas Jefferson sought for the United States: "Peace, commerce, and honest friendship with all nations—entangling alliances with none." The RS supports, encourages, and actively participates in BiH's continued cooperation with NATO, including through the Partnership for Peace program, which BiH joined in 2006, and through BiH's Individual Partnership Action Plan (IPAP), which was first agreed with NATO in 2008. The RS also cooperates closely with the United States and other NATO members on anti-terrorism and other security matters.

81. Like Austria, Sweden, Finland, and Ireland, however, although the RS is not anti-NATO, it is in favor of neutrality. The RS believes that a policy of military neutrality toward all foreign powers, particularly in light of the region's troubled history with alliances, is the best means of assuring independence, peace, and stability for the citizens of BiH. The RS does not support BiH joining the Collective Security Treaty Organization or any other alliance either. The RS thinks BiH should simply live in peace and friendship with its neighbors without participating in geopolitical games.

82. Because NATO's agreed target for defense spending among members is 2 percent of GDP, NATO membership would require a major increase in defense spending, even though the military already consumes more than 40 percent of the budget for BiH-level institutions.[37] At a March 2017 NATO-sponsored seminar in Sarajevo, then-MP Šefik Džaferović said that BiH is "allocating less than 1% of its GNP to defence, and much of this is spent on personnel. Greater defence outlays will eventually be required."[38] BiH simply cannot afford this extra military expenditure at a time when budgets are pressed thin. The increase in military spending required by NATO membership would require damaging tax increases or painful spending cuts.

3. There is no legal requirement of NATO integration.

83. Some proponents of BiH's membership in NATO have claimed that Article 84 of the 2006 BiH Defense Law requires that the country pursue NATO membership. In reality, Article 84 has no legal force, because it is an illegal legislative act that was an attempt by the Parliamentary Assembly to usurp the Presidency's constitutional authority over seeking membership in international organizations.

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[37] 2018 BiH military spending figures from: Military expenditure (current USD), The World Bank, available at https://data.worldbank.org/indicator/MS.MIL.XPND.CD; BiH-institution budget figures from: 53rd Report of the High Representative for Implementation of the Peace Agreement on BiH to the Secretary-General of the UN, 8 May 2018.

[38] Report, The Western Balkans: Transition, Challenges, European Aspirations and Links to the MENA Region, NATO Parliamentary Assembly, 21 Apr. 2017.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

84. The BiH Constitution specifically provides, "The Presidency shall have responsibility for "[r]epresenting Bosnia and Herzegovina in international and European organizations and institutions *and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member*" (emphasis added). The BiH Constitution also gives the Presidency responsibility for "[n]egotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina" and "[c]oordinating as necessary with international and nongovernmental organizations in Bosnia and Herzegovina." More broadly, the BiH Constitution provides that the Presidency "shall have responsibility for . . . [c]onducting the foreign policy of Bosnia and Herzegovina."

85. Because all of these responsibilities—especially the responsibility to seek membership in international organizations—are constitutionally assigned to the Presidency, it is unconstitutional for Article 84 to purport to direct the Presidency and other officials "to conduct required activities for the accession of Bosnia and Herzegovina to NATO." The Constitution makes clear that those activities are in the sole discretion of the Presidency.

86. Moreover, the BiH Constitutional Court has recognized that the "internal system of Bosnia and Herzegovina is founded, inter alia, on the principle of separation of powers which is a crucial element of the concept of the rule of law . . . ."[39] The Constitutional Court has also held that separation of powers includes a "prohibition of mutual interference."[40] It is a violation of the Constitution and the principle of separation of powers for the BiH Parliamentary Assembly to interfere with responsibilities assigned by the Constitution to the Presidency—as illegal as if the Parliamentary Assembly passed a law ordering the BiH Constitutional Court to rule a certain way on a particular case before the Court. Article 84 purports to seize the powers granted to the Presidency, and as such its prohibited actions are blocked by the Constitution and have no legal effect.

87. Proponents of BiH's membership in NATO have also claimed that a decision of a past BiH Presidency regarding cooperation with NATO requires BiH officials to seek NATO membership. However, there is no Presidency decision to submit an ANP and, in any event, a past Presidency cannot lawfully bind the current Presidency with such a decision.

4. EU integration is unrelated to, and unaffected by, NATO membership.

88. EU officials have rejected the idea of a link between EU membership and NATO membership. Five current EU members are not members of NATO, and five European NATO members are not members of the EU. To conjure up a linkage between EU integration and NATO integration that neither the EU nor the U.S. recognizes is a cynical ploy that only serves to benefit those who would stand to lose from the reforms necessary for EU integration.

C. The 5 August Agreement

89. In August, an end to the crisis appeared to be at hand. On 5 August 2019, the largest Bosniak, Serb, and Croat political parties in Bosnia and Herzegovina (BiH)—the SDA, SNSD,

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[39] Decision on Admissibility and Merits, Case U-7/12, BiH Constitutional Court, 30 Jan. 2013, para. 28.

[40] Decision on Admissibility and Merits, Case U-20/16, BiH Constitutional Court, 30 Mar. 2017, para. 23.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

and HDZ—reached an Agreement on Principles for Formation of Authorities at the Level of BiH, which provided that the BiH Council of Ministers would be formed within 30 days. The agreement affirmed a "commitment in advancing relations with NATO, without prejudice to a future decision on BiH's membership," though it made no mention of the ANP. The RS strongly supported the 5 August Agreement and hoped that it would soon be implemented.

90. Soon, however, key SDA members, including Šefik Džaferović, the Bosniak member of the BiH Presidency, began to back away from the 5 August 5 and renew their demand for the ANP as a condition of allowing formation of the Council of Ministers. Now, BiH faces a crisis with no end in sight.

D. Effects of Council of Ministers blockade

91. Although the RS is performing its responsibilities as normal, the blockade of the new Council of Ministers has crippled the BiH level of administration. This is causing real harm not just to BiH's democratic functioning but also to ordinary BiH citizens. Without a Council of Ministers, for example, vital infrastructure projects, such as construction of the Belgrade-Sarajevo highway, are frozen. Moreover, as the EU has made clear, the BiH level cannot make progress on European integration until the new Council of Ministers is formed.

92. The blockade has also led to some absurd and unconstitutional situations. Five caretaker ministers from the previous electoral period have been sworn in as members of new parliaments. The caretaker chairman of the Council of Ministers is simultaneously the vice-chairman of the BiH House of Representatives. This violates the principle of separation of powers, which is fundamental to the rule of law under which Article 2 of the Constitution requires BiH to operate. The BiH Constitutional Court has recognized that the "internal system of Bosnia and Herzegovina is founded, inter alia, on the principle of separation of powers which is a crucial element of the concept of the rule of law . . . ."[41] The Constitutional Court has also held that separation of powers includes a "prohibition of mutual interference."[42] The simultaneous holding of BiH executive and legislative positions obviously violates this prohibition.

E. BiH's federalized system limited the impact of the SDA's blockade.

93. The SDA's blockade of formation of BiH-level authorities highlights the genius of the Dayton Constitution's decentralization of administrative competences. Despite the HR's unconstitutional centralization of many governmental responsibilities, most competences remain at the Entity level. Thus, even as the BiH level is paralyzed by the SDA's blockade, the RS is functioning normally. Everyday services RS citizens rely on are unaffected by BiH-level paralysis. Meanwhile, the RS Government and National Assembly are continuing to enact and implement reforms to improve the RS business environment. In September, for example, the National Assembly approved legislation enabling electronic registration of business entities.[43]

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[41] Case U-7/12, Decision on Admissibility and Merits, BiH Constitutional Court, 30 Jan. 2013, para. 28.

[42] Case U-20/16, Decision on Admissibility and Merits, BiH Constitutional Court, 30 Mar. 2017, para. 23.

[43] *Republic of Srpska National Assembly adopts draft laws for e-registration of business entities*, InvestSrpska.net, 30 Sep. 2019.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

F. Inter-entity transfer agreements are not permanent.

94. The SDA's continued blockade of Council of Ministers formation for more than a year after the BiH elections highlights the potential for chronic dysfunction of the BiH level of administration. The BiH Constitution attempted to minimize the damage such dysfunction might cause by entrusting the Entities with all but a few governmental competences.

95. In the years since Dayton, however, the two Entities—often under heavy pressure from the HR—reached several political agreements consenting to the exercise of additional competences by BiH. In light of the BiH-level dysfunction exemplified by the SDA's blockade of the new Council of Ministers, it is natural for the Entities to reassess whether it is practical and desirable to continue giving consent for BiH to exercise competences not assigned to it by the BiH Constitution. The Entities would be well within their legal rights to end one or more of the political agreements—sometimes called inter-entity transfer agreements (IETAs)—that gave BiH permission to exercise additional competences.

96. The rights and obligations of the Entities are governed by the Dayton Accords, including the BiH Constitution. As the BiH Constitutional Court has confirmed, an IETA is not an amendment to the BiH Constitution. Rather, it is merely a political agreement that does nothing to change the Constitution or the Dayton Accords. An IETA cannot effect a permanent change to BiH's constitutional structure. The BiH Constitutional Court correctly held in 2006 that IETAs are not part of the BiH Constitution and that the Court has no jurisdiction to determine whether a contested act is inconsistent with them.[44] Just as Entities can consent to the BiH level's responsibility over a matter, they can also withdraw such consent.

97. As former Office of the High Representative attorney Matthew Parish observed, treating IETAs as irrevocable would mean that "signature of an IETA would be tantamount to permanent amendment of the Constitution, an analysis without significant precedent in international or domestic law."[45]

98. The BiH Constitution lays out clearly the process for its own amendment in Article X(1). Apart from enacting a constitutional amendment according to this process, no politician, government, or legislature in BiH has authority to effect a change in BiH-level competences that is binding on future politicians, governments, and legislatures. As Article 1 of the Constitution states, BiH "shall operate under the rule of law" rather than the rule of men. The positions of politicians do not determine the constitutional competences of BiH's various levels of governance—the Constitution does.

99. The Constitution provides at Article III(3)(a), "All governmental functions and powers not *expressly assigned* in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities."[46] Any responsibilities that BiH assumes in accordance with an IETA are certainly

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[44] Decision on Admissibility and Merits, Case U 17/05, BiH Constitutional Court, 24 May 2006, at para. 16.

[45] Matthew Parish, *A Free City in the Balkans* 144 (2010).

[46] Emphasis added.

Received by NSD/FARA Registration Unit 11/08/2019 9:25:00 PM

not "expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina." Thus, such responsibilities remain, as a constitutional matter, "those of the Entities."

100. The Entities would be also justified in ending some IETAs because their consent for them was wrested by coercion and threats by external forces. It is a universal principle of law that an agreement entered into under coercion is voidable by the coerced party. The Vienna Convention on the Law of Treaties, for example, provides, "The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."[47] Contract law around the world, similarly, makes contracts void or voidable in cases when a party was not free from undue coercive influence. The Commission on European Contract Law's *Principles of European Contract Law* provides that a party may avoid a contract if its assent was procured through the wrongful threats of third parties.[48]

101. The RS's consent to IETAs often came under heavy pressure and threats from the High Representative. At the time of these agreements, the High Representative routinely imposed extrajudicial punishments on public officials—especially Serb public officials—who failed to do its bidding. In his book recounting his tenure at the OHR, Matthew Parish wrote of HR Paddy Ashdown, "By pressuring Entity representatives into signing IETAs, through express or implied threats of removal or other unpleasantness imposed by the High Representative's decision, Ashdown could expand significantly the scope of his state-building project."[49] Parish further observed, "RS politicians agreed to and voted for [Indirect Tax Authority] reforms under colossal pressure from Ashdown."[50] In its Final Report, the Independent Judicial Commission, a body created by the High Representative, admitted that the negotiation of the IETA on the High Judicial and Prosecutorial Council "only succeeded following intense high-level pressure."[51]

102. The historical record demonstrates clearly that the consent of RS politicians to IETAs was often the result of coercion by unelected external forces. Thus, given the defect in the formation of these agreements from the outset, the RS would be fully justified in withdrawing from them.

103. It is also principle of both international law and domestic contract law that a party may withdraw from an agreement if there is a fundamental change of circumstances underlying the party's consent. The RS is not obligated to remain bound by an IETA that is not being implemented as agreed.

IV. Conclusion

104. The RS hopes all parties in BiH and members of the international community will respect the Dayton Accords, including BiH's constitutional system. The RS remains committed not just to

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[47] Vienna Convention on the Law of Treaties, art. 51.

[48] The Principles of European Contract Law (2002), arts. 4:111 and 4:108. *See also* Restatement (Second) of the Law of Contracts, §174.

[49] Parish at 178.

[50] Parish at 258.

[51] IJC Final Report, p. 96.

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the Dayton Accords, but also to BiH's future as an EU member. In order for BiH to move toward that goal, however, the HR must close its doors, and the SDA must lift its preconditions and allow the results of the October 2018 elections to be implemented. The RS is convinced that BiH can succeed and prosper if the Dayton Accords are respected.

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The Illegality of the Bonn Powers

"At the Bonn conference, we managed to introduce a method by which the High Representative can take these decisions, which is not exactly in legal terms with Dayton. . . . It was not very legal, I have to admit."[1]

"You do not [have] power handed to you on a platter. You just seize it."[2]

—Carlos Westendorp, High Representative, 1997-1999

I. Introduction.

The so-called "Bonn powers," which the international High Representative (HR) in Bosnia and Herzegovina (BiH) claims empower it to impose laws and punish individuals by simple edict, are manifestly unlawful. The 1995 Dayton Accords, which are the sole source of the HR's lawful authority, cannot reasonably be interpreted to give the HR such dictatorial power. Neither the Peace Implementation Council—an ad hoc group of countries with no legal power—nor the UN Security Council have ever bestowed on the HR legal authority beyond its mandate under the Dayton Accords. Moreover, the Bonn powers' use violates the human rights of Bosnia and Herzegovina (BiH) citizens under important binding treaties. Thus, the exercise of the Bonn powers violates international law. Such actions should not be permitted by the international community, and in any case cannot be considered legally binding.

The HR is an institution authorized by the parties to Annex 10 of the Dayton Accords, including Republika Srpska, to be a coordinator of international activities involved in the civilian aspects of the Dayton Accords and a facilitator of the parties' efforts. Annex 10 defines a strictly limited mandate, authorizing the HR to engage in such activities as to "[m]onitor," "[m]aintain close contact with the Parties," "[f]acilitate," "[p]articipate in meetings," and "[r]eport."

The HR's mandate does not include any suggestion of the authority to make decisions binding on governments and citizens of Bosnia and Herzegovina (BiH). As international relations scholar and former Office of the High Representative (OHR) attorney Matthew Parish wrote, the HR's "functions were limited to coordinating other international organisations' work and monitoring and exhorting domestic officials to comply with their Dayton obligations."[3]

Beginning in 1997, however, the HR claimed for itself, with no legal justification whatsoever, "Bonn powers" to rule and punish by decree, vastly exceeding any mandate under the Dayton Accords and casting aside the entire democratic system established by the BiH Constitution.

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[1] Adis Merdzanovic, *Democracy by Decree, Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina* (2015), 256.

[2] Quoted in, David Chandler, *State-Building in Bosnia: The Limits of 'Informal Trusteeship,'* International Journal of Peace Studies, vol. 11, no. 1, 17, 27 (2006).

[3] Matthew Parish, *A Free City in the Balkans* 86 (2010).

The term "Bonn powers" originates from a statement issued two years after the conclusion of the Dayton Accords by the Peace Implementation Council (PIC), an ad-hoc collection of countries and organizations, at a conference held in Bonn, Germany. The December 1997 statement "welcome[d] the High Representative's intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions" on certain issues.

The HR in place at the time of the Bonn Conference, Carlos Westendorp, later admitted, "At the Bonn conference, we managed to introduce a method by which the High Representative can take these decisions, which is not exactly in legal terms with Dayton. . . . It was not very legal, I have to admit."[4] Westendorp was brazen in his usurpation of illegal authority, telling a reporter in 1998, "You do not [have] power handed to you on a platter. You just seize it."[5] Such disregard for the careful terms of the Dayton Accords and the BiH Constitution is antithetical to the goal of instilling a culture of respect for the rule of law in BiH.

Parish wrote that after the Bonn meeting, "[s]uddenly the High Representative found himself moving from being a 'facilitator' and a mediator to being able to issue 'binding decisions', known as the 'Bonn powers'."[6] As Parish has recognized, the PIC's Bonn statement "ran quite contrary to the spirit and text of Annex 10 to the [Dayton Accords], and was legally quite indefensible."[7]

Using these so-called "Bonn powers," the HR has imposed scores of BiH, Federation, and Republika Srpska laws by edict, *and even decreed 105 amendments to the constitutions of Republika Srpska and the Federation.* The HR has also imposed extrajudicial punishments on hundreds of BiH citizens, nullified a BiH Constitutional Court decision, and banned any proceeding that takes issue in any way with the HR's decisions.

In recent years, the HR's exercise of the Bonn powers has declined because of increasing recognition of their illegality and illegitimacy and the damage they have done to BiH's ability to govern itself. Consequently, the HR has not issued a decree using its pretended authority since 2011.[8] At the May 8, 2019, meeting of the UN Security Council, however, the current HR, Valentin Inzko, pointedly asserted that the HR retains the authority to use the Bonn powers.

Many international observers have decried the corrosive effect that the HR and its asserted dictatorial powers have had on BiH's politics. The International Crisis Group, for example, has written that "keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach."[9] The Council of Europe's Venice Commission wrote in 2005 that an HR claiming dictatorial powers "is fundamentally incompatible with the democratic

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[4] Merdzanovic at 256.

[5] Chandler at 27.

[6] Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. Intervention and Statebuilding, Special Supp. 2007, 14.

[7] *Id.*

[8] In 2012 and 2014, HR Inzko lifted extrajudicial punishments against certain individuals.

[9] International Crisis Group, *Bosnia's Dual Crisis*, 12 Nov. 2009, p. 16.

character of the state and the sovereignty of BiH. The longer it stays in place the more questionable it becomes."[10] As Professor Bernhard Knoll has observed, "[T]the international community's practice of ruling by command may lastingly debilitate democratic development because it entails an abrogation of the Courts' monopoly over the correct interpretation of the constitution."[11]

This paper does not focus on the Bonn powers' perverse effects on BiH politics, their hindrance of the development of BiH as a functioning state, or the damage they caused to BiH's decentralized constitutional system. Rather, it focuses on the simple fact that the Bonn powers have no legitimate basis in law whatsoever, such that the exercise of such powers can have no binding legal force.

The question of the Bonn powers' legality as opposed to their desirability or political legitimacy—has been the subject of little scholarly attention; however, analyses of the legal basis for the exercise of the Bonn powers have concluded that the Bonn powers are unlawful.

Parish writes, "The PIC's 'interpretation' of the High Representative's powers at the Bonn Conference, and the High Representative's subsequent use of his new powers, starts to look legally preposterous, the sort of nonsense and confusion one would not expect from a first-year law student."[12] Parish further writes, "It is hard to escape the conclusion that the extent of the legal fiction involved in creating the Bonn powers was breathtaking. . . . There was no justification in international law for the way the Bosnia and Herzegovina was, almost overnight, transformed into a colony jointly administered by the international powers."[13]

Similarly, Dr. Miroslav Baros of Sheffield Hallam University writes, "Legally speaking, the assumption of the powers by the High Representative is ultra vires; there is neither legal basis nor justification for any powers outside those envisaged in the [Dayton Accords], which is to monitor and help with the implementation of the civilian aspect of the treaty."[14]

In a thorough legal analysis of the Bonn powers appearing in the *Goettingen Journal of International Law*, Tim Banning concludes, "[The Bonn powers] do not qualify as a legal power. Their existence is a powerful, but delusive legal fiction."[15]

Even Paddy Ashdown, during his tenure as HR, recognized that the authority of his decrees as HR derived only from their acceptance by BiH citizenry, saying, "If I pass a decree that is refused, my

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[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 (March 11-12, 2005) (2005 Venice Commission Opinion) at para. 90.

[11] Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (Cambridge Univ. Press 2012) at 317.

[12] *A Free City in the Balkans*, 90.

[13] *Id.* at 91-91.

[14] Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

[15] Tim Banning, *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, Goettingen Journal of International Law 6 (2014) 2, 259-302, at 302.

authority is gone like the morning dew."[16]

Further, the Bonn powers are not only unsupportable under international law, but in fact the exercise of such unconstrained powers by the HR constitutes a flagrant and grave violation of the applicable international law that is binding upon all parties to the Dayton Peace Accords, and therefore any such acts can have no binding legal effect upon any such parties.

II. The High Representative's exercise of purported Bonn powers vastly exceeds any conceivable legal mandate under the Dayton Accords.

The HR was not imposed on BiH, but was created by an international agreement, Annex 10 of the Dayton Accords, which was entered into by Republika Srpska, the Federation of Bosnia and Herzegovina, and other signatories to the Dayton Accords. Annex 10 is the sole source of the HR's legal authority.

The illegality of the dictatorial authority claimed by the HR is obvious to anyone who has read the HR's strictly limited mandate under Annex 10, which does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens. In defining the HR's legal authority, Annex 10 uses such verbs and phrases as "monitor," "maintain close contact with the Parties," "promote," "coordinate," "facilitate," "participate in meetings," "report," and "provide guidance." Annex 10 does not include words such as "enact," "suspend," "nullify," "impose," "decree," "punish," "ban," or any other words that would suggest the authority to make decisions binding upon BiH, the Entities, or their citizens.

Annex 10 cannot conceivably be read to empower the HR to substitute itself for a legislature, elected official, or court of law. As summarized by Parish, the HR is to be "a manager of the international community's post conflict peace building efforts, and a mediator between the domestic parties."[17]

Former UK Ambassador to BiH Charles Crawford, who helped invent the Bonn powers, has written, "[A]s far as I could see the Bonn powers had *no real legal basis at all*. They amounted to an international political power-play bluff which successive High Representatives wrapped up in legal language to make the whole thing look imposing and inevitable."[18]

In his analysis of the Bonn powers, Banning explains:

> The amendment and violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, as well as the annulment of decisions of the Bosnian Constitutional Court are measures which even dramatically

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[16] Ed Vulliamy, *Farewell, Sarajevo*, The Guardian, 2 November 2005, p. 10, quoted in Knoll at 298.

[17] *The Demise of the Dayton Protectorate* at 13.

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

> exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of Annex 10 of the GFA.[19]

There being nothing in Annex 10 to support the HR's self-asserted powers, the Bonn Declaration tried to justify them by referring to Annex 10's provision making the HR the "final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement [Annex 10]."

As Banning points out, however:

> The authority to interpret cannot be understood as a *carte blanche* for the OHR to create its mandate. Under this reading of *Annex 10* the OHR would acquire a status *legibus solutus*. However, international organizations are, as "[a] rule of thumb", not allowed to generate their own powers or to determine their competences.[20]

Moreover, the HR's authority to interpret Annex 10, which is an international treaty, is circumscribed by its very mandate in Annex 10, by general international law, and by other sources of applicable law. The HR's authority is limited, for example, by the obligation under the Vienna Convention on the Law of Treaties (VCLT)—as well as customary international law—to interpret a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[21]

The HR breached its obligation of good-faith interpretation by asserting and using powers of rule by decree, extrajudicial punishment, and other autocratic authorities. The terms of Annex 10 manifestly do not give the HR any legislative, executive, or judicial powers. Annex 10 cannot reasonably be read to empower the HR to decree laws or otherwise act as a final executive, prosecutorial, and judicial official. Examining the HR's authority under Annex 10 to "facilitate resolution of difficulties," which was used to justify the Bonn powers, Parish writes:

> On the natural reading of these words, the thought being captured is surely the idea of mediation between the parties. It is a long stretch of the meaning of "facilitate" to see it as including dictatorship and coercion.[22]

It is also inconceivable that Republika Srpska and other parties to Annex 10 would have agreed to divest themselves of the very democratic powers to govern that they established in the BiH

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[19] Banning at 302.

[20] Banning at 266 (quoting H. G. Schermers & N. M. Blokker, *International Institutional Law* 157, para. 209 (5th ed. 2011). (citations omitted).

[21] Vienna Convention on the Law of Treaties, Art. 31.

[22] *A Free City in the Balkans* at 89.

Constitution (Annex 4 of the Dayton Accords). Parish writes:

> The thought that the presidents of Croatia, Yugoslavia and the Republic of Bosnia and Herzegovina, in agreeing to Annex 10 to the DPA, intended to give such broad and sweeping dictatorial powers over the entire territory of Bosnia and Herzegovina to an unelected official over whose appointment and decisions they had no say, is quite far-fetched.[23]

Under the Vienna Convention on the Law of Treaties, part of the context for the purpose of treaty interpretation is "[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."[24] Thus, a key part of the context of Annex 10's terms is the rest of the Dayton Accords, including Annex 4, the BiH Constitution. Moreover, the Vienna Convention also requires that treaties be interpreted in a manner that is consistent with other binding legal obligations in effect between the parties,[25] and, as explained further below, the declaration and exercise of the Bonn powers violates key treaties incorporated into the Dayton Accords and made applicable among the parties.

The HR's imposition of laws and extrajudicial punishments without the barest due process or opportunity to appeal is, of course, antithetical to the BiH Constitution, which establishes a democratic system for approving laws, recognizes civil liberties, and directly incorporates the European Convention on Human Rights. The Constitution does not even mention the HR except for a single reference in its annex on transitional arrangements. (The annex merely designated the HR to chair meetings of the Joint Interim Commission, a temporary body that was empowered to do nothing more than "discuss practical questions" and "make recommendations and proposals.").[26]

Another part of the context for purposes of interpreting Annex 10 is the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP). Article 1 of the GFAP provides that "the Parties shall fully respect the sovereign equality of one another . . . and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State." The GFAP further provides that the "Parties shall fully respect and promote fulfillment of the commitments made" in Annex 4, the BiH Constitution. Thus, when interpreted in context, it is even clearer that a good-faith interpretation of Annex 10 could not include a grant of unbounded dictatorial authority over BiH.

A legally valid interpretation of the HR's mandate in Annex 10 must also be guided by the cannon of treaty interpretation stating that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon

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[23] *Id.* at 90-91.

[24] Vienna Convention on the Law of Treaties, Art. 31(2)(b).

[25] See *Id.* at Art. 31(2)(c).

[26] BiH Constitution, Annex II (1).

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domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.[27] Such a restrictive interpretation is not necessary, however, to easily conclude that Annex 10 does not give the HR the autocratic powers it claims. Any good-faith reading of Annex 10 compels such a conclusion.

It must also be pointed out that the HR's interpretive authority under Article V of Annex 10 is not nearly as broad as it claims. The HR's interpretive authority begins and ends with Annex 10. The Dayton Accords unambiguously limit the HR's interpretive authority to the interpretation "in theater" of Annex 10, entitled, "Agreement on the Civilian Implementation of the Peace Settlement." Annex 10 provides, "The High Representative is the final authority in theater regarding interpretation of *this Agreement on the civilian implementation of the peace settlement*."[28] Thus, as Dr. Baros observes, Article V of Annex 10 "clearly limits the power of interpretation designated to the High Representative to the interpretation of this particular Annex, not to the whole [Dayton Accords]."[29]

In spite of the clarity of the Dayton Accords on this point, the HR, through dogged repetition, has persuaded some that the HR is the "final authority" regarding the Dayton Accords as a whole. In his May 8, 2019, appearance before the UN Security Council, current HR Valentin Inzko once again claimed that the Dayton Accords make the HR "the final authority on interpretation of the Dayton Accords."

That statement is simply false. It is contradicted by the plain language of Annex 10, and by the other provisions of the Dayton Accords. The Dayton Accords designate other specific mechanisms for interpretation of many of its other provisions. For example, Annex 1A, the Agreement on the Military Aspects of the Peace Settlement, provides that "the IFOR Commander is the final authority in theatre regarding interpretation of this agreement on the military aspects of the peace settlement." Numerous other examples can be found in Annexes 1B, 2, 3, 4, 5, 6, 7, and 8.

Thus, in addition to Annex 10, the plain terms of the rest of the Dayton Accords are clear: The HR has no interpretive authority over the Dayton Accords outside of Annex 10.

III. The PIC had no authority to bestow additional powers on the HR, and never purported to do so.

The HR has often attempted to justify its assertion of dictatorial authority by referring to the Conclusions of the Peace Implementation Conference held in Bonn in 1997. This attempt fails because the PIC had no power to supplement the HR's Annex 10 authority in the Bonn Conclusions, and it has never even purported to do so.

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[27] W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 Mich. J. Int'l L. 231, 234 (1989).

[28] Emphasis added.

[29] Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

A. The PIC had no power to bestow additional authority on the HR.

The PIC never had the authority to supplement the Annex 10 mandate of the HR, let alone give him the powers of a dictator. For one organ to delegate authority to another, the delegating organ must have a principal-subordinate relationship with the receiving organ.[30] In addition, the "powers delegated may not exceed the extent of powers which the delegating organ itself possesses."[31]

One reason the PIC could not have bestowed authorities on the HR is that it did not have a principal-subordinate relationship with the PIC.

Annex 10, which is the only source of the HR's authority, does not so much as mention the PIC. More important, as Banning notes, is the fact that the General Framework Agreement for Peace in Bosnia and Herzegovina also makes no mention whatsoever of the PIC. He explains:

> If it would have been intended to vest the PIC with any meaningful legal role, it would have made its way into the agreement. Hence the required institutional link of a principal-subordinate relation between the PIC and the OHR does not exist.[32]

Indeed, it is clear that the "the PIC is a body created to support the OHR."[33]

The PIC also could not have bestowed additional powers on the HR—let alone sweeping dictatorial powers because an organ cannot delegate authority it does not itself have, and the PIC has never had any legal authority at all.

David Chandler, an expert on the Dayton Accords at the University of Westminster, writes:

> The PIC was a legal figment, designed to cohere the international management of the Dayton process, but *without* the restrictive ties of international law. Dame Pauline Neville Jones, former Political Director of the UK Foreign and Commonwealth Office and leader of the British delegation to the Dayton peace conference, was instrumental in the establishment of the PIC. As she later described it, "Everybody knew that this was a phoney."[34]

Parish observes:

> [T]he PIC does not have legal authority to interpret anything nor, indeed, *to do anything whatsoever of legal consequence*. It is just a

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[30] Banning at 293-94.

[31] *Id.* at 294 (footnotes omitted).

[32] *Id.* at 296.

[33] *Id.* at 295.

[34] David Chandler, *From Dayton to Europe*, 12 International Peacekeeping 3, 226, 338 (2007).

> meeting of people who are interested in what the High Representative (and Supervisor) are doing, the establishing act for which is a meeting of itself.[35]

Banning agrees, explaining that "a look at the 1995 London Conclusions, the founding document of the PIC, reveals that no express powers have been bestowed upon the PIC."[36]

It would be preposterous to assert that the PIC could claim authority to rewrite a legally binding treaty witnessed by six PIC members, and indeed it could be expected that numerous member countries of the PIC would themselves object to such an unsupportable assertion of authority.

B. The PIC did not purport to supplement the HR's Annex 10 authority.

In its Bonn Conclusions, the PIC did not even claim to supplement the HR's powers under Annex 10. Instead, the PIC said it "welcomes the High Representative's intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions" on certain issues. This is an utterly indefensible interpretation of Annex 10, as explained above, but nonetheless it does not purport to *supplement* the HR's authority under Annex 10. As Parish explains, the Bonn Conclusions merely interpret Annex 10, though "the interpretation they give is quite absurd."[37]

The Bonn Conclusion are, at most, a policy statement, not a grant of authority. As Banning explains, the language of the Bonn Conclusions "does not at all indicate the PIC's intent to actively grant additional powers to the HR. If it would have been intended to suggest the legally binding character of this provision, a wording such as 'the Council decides' could have easily been chosen instead of this passive formulation."[38]

The European Stability Initiative agrees, observing that "the PIC was careful to avoid the impression that it was conferring additional functions on the High Representative."[39] Similarly, Dr. Baros writes that even if the PIC had been legally entitled "to provide the High Representative with new, significantly extended powers, it did not actually do that."[40]

Thus, the Bonn Conclusions were nothing more than a policy statement by a body with no legal authority to grant the HR additional powers, and a policy statement that has been vastly expanded and misapplied by the HR.

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[35] *A Free City in the Balkans* at 91 (emphasis added).

[36] Banning at 294.

[37] *A Free City in the Balkans* at 90.

[38] Banning at 296.

[39] *Reshaping international priorities in Bosnia and Herzegovina, Part Two: International Power in Bosnia*, European Stability Initiative, 30 March 2000, at 26.

[40] Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

IV. The UN Security Council did not bestow additional powers on the High Representative.

On occasion, the HR has falsely claimed that it has two separate sources of authority: Annex 10, and UN Security Council resolutions. In reality, the Security Council, like the PIC, has never bestowed powers on the HR beyond its mandate under Annex 10. The Security Council has never taken any action contrary to its stated position that "the primary responsibility for the further successful implementation of the Peace Agreement lies with the authorities in Bosnia Herzegovina themselves."[41]

The HR has been inconsistent and opportunistic in describing its legal status before courts and tribunals. To prevent the European Court of Human Rights (ECtHR) from ruling on a complaint that the HR's extrajudicial punishments violated the claimants' human rights, the HR argued, in *Beric v. Bosnia*, that its actions could not engage the responsibility of any state because it derives its powers from various international instruments, including decisions of the UN Security Council. The ECtHR did not consider the merits of the claimants' case. Relying on the HR's arguments, the ECtHR, in a 2007 decision, found that it lacked jurisdiction over the claim, writing that "the High Representative was exercising lawfully delegated UNSC Chapter VII powers, so that the impugned action was, in principle, 'attributable' to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations."[42]

After the *Beric* decision, however, the HR jettisoned the arguments it made before the ECtHR in favor of an entirely contrary claim. As a defendant before a U.S. federal court, the HR 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.[43] This representation directly conflicted with the HR's representation to the ECtHR that it is an international organization whose actions cannot engage the responsibility of any state.

In any event, the *Beric* decision does not withstand scrutiny because its reasoning rests on false premises. The *Beric* court determined that the key question was whether the Security Council exercised "effective overall control" over the HR. Its affirmative answer to the question rested on three legs, each of which collapses under examination.

The court found first that the Security Council explicitly delegated authority to the HR in Resolution 1031 in 1995. In reality, there was no explicit or implicit delegation in the resolution, and nothing in the resolution suggested a supplementation of the HR's powers under Annex 10. Rather, the resolution merely

> [e]ndorse[d] the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the

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[41] See, e.g., UNSC Res. 1247 (1999) at para. 2.

[42] *Beric v. Bosnia and Herzegovina, Decision on Admissibility,* European Court of Human Rights (2007) at para. 28.

[43] Specially Appearing Defendants' Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak, Office of the High Representative,* U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

> implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved.

To "endorse" is not to delegate, and the powers the Security Council endorsed are only those limited powers found in Annex 10.

Second, the *Beric* court wrote that "UNSC Resolutions subsequent to the initial UNSC Resolution endorsed the Conclusions of the Peace Implementation Conferences, which further elaborated on the mandate of the High Representative (see, for example, UNSC Resolution 1144, endorsing the Conclusions of the Bonn Peace Implementation Conference)." In none of these decisions, however, did the Security Council decide to delegate dictatorial authorities to the HR. The Security Council's statements in these resolutions were mere expressions of political support for the conclusions of the PIC, an ad hoc group with no legal power. Again, to endorse is not to delegate.

Third, the *Beric* court emphasized that "the High Representative was required by [Resolution 1031] to report to the UNSC, so as to allow the UNSC to exercise its overall control." In this conclusion the court was simply mistaken; Resolution 1031 did not require—or even request—the HR to report to the Security Council.

In addition to the reasons explained above, the notion that the Security Council delegated dictatorial authorities to the HR is legally groundless because the Security Council could not grant such powers, as explained below.

A. The Security Council could not have delegated or attributed powers to the HR.

In order for the Security Council to delegate or attribute powers to the HR, as Banning points out, the HR would have to have been "established as a subsidiary organ of the UN SC according to Article 29 *UN Charter*."[44] An example of what this would look like is the UN Interim Administration Mission in Kosovo (UNMIK), which "was clearly placed under UN auspices, and . . . vested with the responsibility of '[p]erforming basic civilian administrative functions where and as long as required.'"[45] Similarly, the UN Interim Administration in East Timor (UNTAET) was "vested with the overall responsibility to exercise all administrative and legislative powers, as well as with executive powers, including the administration of justice, right from the beginning."[46]

In contrast, the HR and its functions were created only by the parties to Annex 10 with no involvement of the Security Council, and its authority is defined in Annex 10, not Security Council resolutions. At the time of the Dayton Accords, the Security Council merely expressed support for the establishment of the HR.[47] Banning concludes:

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[44] Banning at 298.

[45] *Id.* at 299.

[46] *Id.*

[47] *Id.*

> As the OHR was neither established as a subsidiary organ of the UN SC nor established under the auspices of the UN as for example the United Nations Mission in Bosnia and Herzegovina, the UN SC could consequently neither have delegated nor attributed powers to the OHR.[48]

B. The Security Council did not de facto bestow powers on the HR.

Moreover, the Security Council did not, even de facto, transfer powers to the HR.

Although the Security Council, in certain resolutions, has occasionally expressed a measure of political support for the Bonn powers, it has never purported to bestow such powers on the HR. In these resolutions, Banning explains:

> [T]he UNSC does not *decide* that the OHR has the power to make binding decisions, it only reaffirms what the PIC concluded. This must be understood as a mere expression of political support. Therefore it does not amount to an actual act of *de facto* granting of powers to the OHR.
>
> To infer a *de facto* grant of powers from a mere expression of UN SC support for an act which was in itself not a grant of power, but only the political advice of a diplomatic body, would truly be legal fiction. It would further imply that the UN SC intended to act outside of its powers because the OHR does not even form a subsidiary organ of the UN SC to which a power could be lawfully granted. In conclusion, it cannot be argued that the so-called 'Bonn Powers' were conferred upon the OHR by the UN SC.[49]

The extraordinary and dictatorial authorities claimed by the HR cannot be legally justified by the Security Council's mere expression of political support for the Bonn Conclusions, which themselves were a just a policy statement by an ad-hoc group with no legal authority. As Parish points out, "an act by the PIC without legal basis cannot be given subsequent legal legitimacy merely because the Security Council acknowledges what it has done."[50]

Moreover, like the PIC, the Security Council has never purported to supplement the HR's authority under Annex 10. Its expressions of support for the HR and its authority have always been based on Annex 10 and its misinterpretation by the PIC.

Thus, the Security Council has not, even de facto, supplemented the HR's power under Annex 10.

V. The exercise of the Bonn powers by the HR is an illegal violation of the rights of BiH

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[48] *Id.* at 299-300.

[49] *Id.* at 301.

[50] *A Free City in the Balkans* at 92.

citizens.

Apart from their lack of a legal basis, the dictatorial authorities claimed by the HR are obviously incompatible with the human rights of BiH citizens, and the exercise of such rights would constitute violations of important treaties protecting such rights. Under Annex 4 of the Dayton Accords, the BiH Constitution, the European Convention on Human Rights and its protocols "apply directly in Bosnia and Herzegovina" and "have priority over all other law."[51] The European Convention provides, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[52] The HR's extrajudicial punishments, such as its summary removal and banning of individuals from public office, manifestly violate this provision.

Moreover, the HR's rule by decree and its removal of elected officials violate the right to free elections guaranteed under Protocol No. 1 of the European Convention[53] and the International Covenant on Civil and Political Rights (ICCPR),[54] which also applies directly under the BiH Constitution.[55] In addition, the HR's decrees violate the very first article of the ICCPR, which provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The HR's practice of imposing extrajudicial punishments against BiH citizens without any form of due process or right of appeal has earned sharp international condemnation. In a 2004 resolution, the Parliamentary Assembly of the Council of Europe held, "[T]he 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."[56]

In a March 2005 opinion, the Council of Europe's Venice Commission concluded as follows regarding the HR's extrajudicial punishments:

> 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*

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[51] BiH Constitution, art. II (2).

[52] European Convention on Human Rights, art. 6.

[53] Protocol no. 1, European Convention on Human Rights, art. 3.

[54] International Covenant on Civil and Political Rights, art. 25.

[55] BiH Constitution, art. II (4) and (7), Annex I.

[56] Parliamentary Assembly of the Council of Europe, Res. 1384 (2004), June 23, 2004.

> *fair hearing or at least the minimum of due process and scrutiny by an independent court.*
>
> * * *
>
> The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable.[57]

A report by the Council of Europe Parliamentary Assembly condemned the HR's assertion of authority to remove and ban public officials from office without any right of appeal:

> 39. Your Rapporteur believes that such powers run counter to the basic principles of democracy and are reminiscent of a totalitarian regime. Their use, no matter how seemingly justifiable on public interest grounds, has an extremely harmful effect on the democratisation process in Bosnia and Herzegovina, since it causes feelings of injustice and undermines the credibility of democratic institutions and mechanisms.
>
> 40. In this respect, it should be recalled that the rights of the people of Bosnia and Herzegovina are protected by the European Convention on Human Rights.[58]

As the European Stability Initiative's Gerald Knaus and Felix Martin observed about the HR, "Banning individuals for life from public employment or political office without even giving them a chance to confront the charges against them plainly violates even the most basic notions of due process and is simply unacceptable in a democratic country."[59]

Austrian professor Joseph Marko, who served as a foreign member of the BiH Constitutional Court, wrote that the HR's removal of public officials from office "did not meet the lowest standards of rule of law."[60]

Commenting on the HR's asserted authority to enact laws by decree, the Venice Commission observed, "Art. 3 of the (first) Protocol to the [European Convention on Human Rights] requires the election of the legislature by the people, and this right is deprived of its content if legislation

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[57] 2005 Venice Commission Opinion at paras. 94, 96, and 98 (emphasis added).

[58] *Strengthening of democratic institutions in Bosnia and Herzegovina*, Council of Europe Parliamentary Assembly, Political Affairs Committee, Doc. 10196, 4 Jun. 2004.

[59] Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 3 J. Democracy 60, 72 (2003).

[60] Joseph Marko, *Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina*, European Diversity and Autonomy Papers EDAP 4/2005, at 16-17.

is adopted by another body."[61]

In 2006, the BiH Constitutional Court held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the HR. In response, the HR, in an astonishing assertion of absolute authority unbounded by any law, declared that its actions are not subject to any review by any BiH authority, issuing a decree nullifying the court's verdict. Even the Bonn powers, as Dr. Knoll points out, "do not foresee, or imply, a competence to revoke a decision of Bosnia's highest constitutional organ."[62] The HR's decree, which remains in place today, banned any proceeding before the Constitutional Court or any other court that "*takes issue in any way whatsoever with one or more decisions of the High Representative.*"[63] By issuing this order, Dr. Knoll observes, the HR "set the international community on a war path with Bosnia's constitutional organs."[64]Thus, the HR, using its illegal powers, declared itself above that law and shut down any forum for BiH citizens to challenge its violations of human rights.

VI. Conclusion.

As this paper demonstrates, the so-called Bonn powers claimed by the HR are wholly unlawful. Annex 10 to the Dayton Accords, which is the sole legal basis for the HR's authority, establishes a strictly limited mandate for the HR that cannot reasonably be interpreted to include any binding powers, let alone the dictatorial authorities the HR asserts. Moreover, contrary to the HR's claims, the PIC did not bestow additional authorities on the HR, nor did it have the power to do so. There is also no basis for the claim that the UN Security Council supplemented the HR's powers under Annex 10. The exercise of the Bonn powers constitutes a flagrant violation of the human rights of BiH citizens as expressed in important binding international treaties.

International organizations "are bound to act within the limits and in accordance with the terms of the grant made to them," and acts taken outside the limits of the terms of grant made to them, an "assertion of competence by an incompetent organ," is an illegal act.[65] Moreover, "there runs through . . . evidence of the practice of states and organisations and of the views of judges and writers of authority a single common thread: the recognition that as a matter of principle illegal acts ought not to give rise to valid and permanently effective consequences in law."[66]

Because the Bonn powers have no legal basis and violate the human rights of BiH citizens, as well as fundamental principles of international law, as recognized in applicable treaties and in customary international law, the exercise of these purported powers can have no binding legal effect and no binding force upon anyone. The effect of any such issuance by the HR can only be considered hortatory in nature unless and until the parties to whom such issuances are addressed

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[61] 2005 Venice Commission Opinion at para. 88.

[62] Knoll at 315.

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

[64] Knoll at 313.

[65] Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations* (1980) 89.

[66] Lauterpacht at 115.

consent to their application as a matter of law.

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