

Special Report of the High Representative to the Secretary General of the UN on the Implementation of the GFAP in BiH

Summary

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

2. On 15 July 2015, the Republika Srpska National Assembly (RSNA) adopted a decision to hold a referendum in the RS on the validity of the legislation on the Court and Prosecutor's Office of Bosnia and Herzegovina (BiH), and the applicability of these institutions' decisions on the territory of that entity, as well as on the authorities and decisions of the High Representative.

3. The RSNA took this step, despite a clear prior warning from the Steering Board Ambassadors of the Peace Implementation Council minus the Russian Federation, which did not join the statement that was issued on 14 July.

4. The referendum question provided in the RSNA *Decision on Calling the RS-Entity Wide Referendum* is as follows:

"Do you support the unconstitutional and unauthorized imposition of laws by the High Representative of the International Community in Bosnia and Herzegovina, particularly the imposed laws on the Court and Prosecutor's Office of BiH and the implementation of their decisions on the territory of Republika Srpska".

5. With the referendum at hand, the RS authorities are acting unilaterally in an area where the state of Bosnia and Herzegovina, not the entity, has constitutional authority. They would effectively ask citizens of the RS whether the entity should "opt out" of its requirement to comply with the laws establishing the state judicial authorities as well as the decisions taken by these authorities. As such, the referendum constitutes an open challenge to the sovereignty of Bosnia and Herzegovina and a violation of the RS's commitments and obligations arising under the BiH Constitution as set forth in Annex 4 to the GFAP.

6. The referendum also seeks to determine whether the authorities of the High Representative, in particular legislation enacted by the High Representative, should be recognized by the entity. As with the state judiciary, the entity does not have the authority to make this determination, since the authorities of the High Representative arise under international law, in particular under Annex 10 of the GFAP and various resolutions of the UN Security Council.

7. This act by the RSNA should also be seen in the context of the longstanding policy of officials from the ruling party in the RS – the Alliance of Independent Social Democrats (SNSD) – to challenge the sovereignty and territorial integrity of Bosnia and Herzegovina, including through open advocacy for the secession of the RS and the dissolution of the country. In this regard, it is worth highlighting that, in April 2015, the SNSD adopted as part of its official party platform the goal of pursuing the RS as an "independent State within its current borders" and called for a referendum on secession in 2018 if the party's demands with regard to redistributing competencies between levels of government are not met.

8. Having these considerations in mind, I consider that the adoption of this decision by the RSNA, together with the official positions expressed by the RS President before and after its adoption, represents one of the most serious violations of the GFAP since its signing 20 years ago and puts under serious threat peace implementation since then.

Legal Considerations

Violations of Obligations Arising under Annex 4 of the GFAP

9. Under the BiH Constitution as set forth in Annex 4 to the GFAP, the Republic of Bosnia and Herzegovina continued its legal existence as a state with its internal structure modified. The Constitution legally establishes that Bosnia and Herzegovina shall consist of two entities: the Federation of Bosnia and Herzegovina and the Republika

Srpska.

10. Among other things, Annex 4 also determines the division of responsibilities between the state of Bosnia and Herzegovina and the entities. In case of a dispute between the entities or between the state and one or more of the entities arising under the BiH Constitution, Article VI.3 of the Constitution gives the BiH Constitutional Court “exclusive” jurisdiction to decide, with Article VI.5 making clear that the Constitutional Court’s decisions are final and binding.

11. With this referendum, the RS authorities seek to undermine or deny the responsibilities of Bosnia and Herzegovina as expressly provided in the BiH Constitution, in particular with regard to “international and inter-entity criminal law enforcement” (Article III.1.(g)) as well as Bosnia and Herzegovina’s responsibilities necessary to preserve its sovereignty, territorial integrity and political independence (Article III.5.(a)). In addition, the RS authorities are disregarding the final and binding decisions of the BiH Constitutional Court, in particular the Court’s rulings related to the laws establishing the BiH Court and Prosecutor’s Office enacted by the High Representative and subsequently adopted by the BiH Parliamentary Assembly with the concurring votes of SNSD representatives and without the entity veto mechanism being invoked by delegates coming from the Republika Srpska.

12. In Case No. U 26/01 of 28 September 2002 and Case No. U 16/08 of 28 March 2009, the BiH Constitutional Court upheld the *Law on Court of Bosnia and Herzegovina* and concluded that the state of Bosnia and Herzegovina has an obligation to exercise its constitutional responsibilities by *inter alia* establishing the BiH Court and Prosecutor’s Office.

13. Specifically, in its Decision in Case No. U 16/08 of 28 March 2009, the BiH Constitutional Court emphasized that certain criminal offences stipulated by the laws of the entities and the Brčko District can endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina, and that it is therefore the obligation of the state to effectively protect those values pursuant to the obligation of the state under the BiH Constitution and pursuant to the principle of rule of law under the Constitution.

14. The RS authorities, by seeking to substitute their own interpretation of the BiH Constitution – including Article III thereof – for the interpretation made by the BiH Constitutional Court, undermine the authority of the highest institution upholding the rule of law in the country. As referenced above, Article VI.5 of the Constitution provides that “[d]ecisions of the Constitutional Court are final and binding,” and Article III.3.(b) of the BiH Constitution provides, *inter alia* that “[t]he Entities and any subdivisions thereof are required to comply fully with this Constitution (...), and with the decisions of the institutions of Bosnia and Herzegovina”. The BiH Constitution is the only source of competencies and the lower levels of government cannot undermine the legitimate constitutional exercise of such responsibilities by the institutions of BiH.

15. Deciding through a referendum whether to apply the decisions of the BiH judiciary on the territory of the RS is unconstitutional and a direct attack on the sovereignty of the state of Bosnia and Herzegovina. Under the BiH Constitution, the Entities are required to comply fully with the BiH Constitution and with the decisions of the institutions of BiH, including state laws and decisions of state judicial institutions, which are applicable on the entire territory of BiH.

Violations of Obligations Arising Under Annex 10 of the GFAP and UN Security Council Resolutions

16. Through the referendum, the RS authorities also seek to challenge the High Representative and his authority, as provided for under Annex 10 of the GFAP and various UN Security Council Resolutions and in particular to establish the presumption that all laws enacted by the High Representative were enacted *ultra vires* by the High Representative, including those subsequently adopted by the parliament. Subsequent parliamentary adoption of laws enacted by the High Representative, such as in the case of the Law on Court of BiH and the Law on the Prosecutor’s Office, is an important step as it is a precondition for those laws to be amended or repealed by the parliament. That said a large number of laws enacted by the High Representative have never been adopted by the competent domestic institutions, including fifty such laws in the Republika Srpska.

17. The RS, as one of the Parties to Annex 10 to the GFAP, must respect obligations arising under the GFAP and must not violate actions undertaken on the basis of the GFAP and UN Security Council Resolutions adopted under Chapter VII of the UN Charter, which include decisions taken by the High Representative.

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

19. As recently as last November (see Resolution 2183 adopted on 11 November 2014), the UN Security Council determined “that the situation in the region continues to constitute a threat to international peace and security” and, “[a]cting under Chapter VII of the Charter of the United Nations,” reaffirmed “once again its support for the Peace Agreement” and called “upon the parties to comply strictly with their obligations under that agreement”. The Security Council further reminded the parties that “they have committed themselves to cooperate fully with all entities involved in the implementation of this peace settlement”. The Security Council also reaffirmed “that under annex 10 of the Peace Agreement the High Representative is the final authority in theatre regarding the interpretation of civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997”.

20. The announced referendum in the RS constitutes a violation of the entity’s commitments and obligations arising from Annex 10 to the GFAP and UN Security Council Resolutions adopted under Chapter VII of the UN Charter, which include decisions taken by the High Representative.

Additional Considerations

21. Beyond the *prima facie* violations of the GFAP entailed in the recent action by RS authorities, the referendum decision should also be viewed in the context of a longstanding policy by the ruling authorities in the RS, and in particular the current RS President, to undermine the authorities of the state of Bosnia and Herzegovina and to openly advocate for RS secession and state dissolution. I have documented this trend of challenges to the territorial integrity and sovereignty of BiH extensively in my regular 6-monthly reports to the UN Secretary General.

22. Indeed, the RSNA took similar steps to organize a referendum on the state-level judiciary in April 2011, when it adopted a decision on referendum as well as a series of conclusions challenging the High Representative and his authorities, as well as all decisions and laws enacted by the High Representative pursuant to his mandate, and the authority of key state-level institutions. While the 2011 referendum initiative was subsequently repealed by the RSNA following the intervention of the then European Union High Representative for Foreign Affairs and Security Policy, the 2011 RSNA conclusions have remained in force.

23. On the issue of secession, it is worth mentioning the April 2015 Declaration issued by SNSD, the ruling political party in the RS, whose members in elected office have led the effort to organize this referendum. In this party document, the SNSD clarified its political agenda as working to focus on the status of the RS as an “independent State within its current borders” and condemned the alleged usurpation of its competencies by “the legal violence of the Office of the High Representative”. In this same document, the SNSD stated the party’s intention to organize a separate referendum on the independence of the RS in 2018 if the party’s conditions related to the distribution of competencies between the entities and the state are not met by 2017.

24. A separate issue, also raised in this Declaration, relates to the legal and practical effects of a referendum. While I have no doubt about the illegality of the announced referendum, RS legislation specifies that the RSNA will be obligated to adopt appropriate acts to implement the referendum result. In this regard, the SNSD Declaration cited above also elaborated that “[i]n case of unlawful activities undertaken by the High Representative and the instrumentalized judiciary, the Republika Srpska should take decisions about a strict implementation of the BiH Constitution and the RS Constitution and set deadlines required for their implementation. *The Republika Srpska shall provide regulation by virtue of law as to what decisions made by the BiH authorities shall be applicable on the territory of the Republika Srpska.*” [emphasis added]

25. Another consideration relates to the precedent which would be set by this referendum. The July 2015 RSNA decision on referendum purportedly puts into question all laws enacted by the High Representative – many of which established institutions deemed necessary for ensuring peace and stability and for carrying out competencies assigned to the state by the BiH Constitution. In line with relevant UN Security Council resolutions and the GFAP, the High Representative has enacted a significant number of decisions and laws which are fundamental to the sovereignty, territorial integrity, political independence, and international personality of Bosnia

and Herzegovina, such as the BiH flag, the national anthem, travel documents, and the establishment of the State Border Service, to name but a few.

26. Finally, the laws establishing the BiH Court and Prosecutor's Office and defining their jurisdiction, while initially enacted by the High Representative, were subsequently adopted by the BiH Parliamentary Assembly, where a required procedural mechanism allows for a defined number of delegates from the territory of the RS to block the adoption of any law that they judge as damaging to the entity's interest.

Conclusion

27. Under the authorities vested in me under Annex 10 of the GFAP and relevant resolutions of the UN Security Council, I hereby inform the UN Security Council of the following:

- No referendum can be conducted by an entity in a matter that does not fall within its constitutional competencies.
- Matters of state judicial institutions fall within the constitutional responsibilities of the state and do not fall under the entity's constitutional responsibilities.
- The status and powers of the High Representative are matters arising under the GFAP and international law, and therefore do not fall within the purview of the entities.
- The entities cannot adopt legal acts on these matters, by referendum or otherwise.
- The adoption by the entity of an act calling for a referendum of its citizens or the result of such a referendum that prevents the said entity from performing its obligations under Annex 4 and Annex 10 of the GFAP constitutes a material breach of Annex 4 and Annex 10 of the GFAP.

28. The attempts by the RS authorities to undermine existing state level institutions and constitutional responsibilities, to undo measures deemed necessary for implementing the GFAP, as well as to challenge the High Representative, his authority under Annex 10 and decisions of the High Representative(s) undertaken on the basis of the GFAP and UN Security Council Resolutions adopted under Chapter VII of the United Nations Charter could have a serious effect on the durability of the implementation of the civilian aspects of the peace settlement.

29. The measures taken in implementing the GFAP over the last 20 years in BiH must not be called into question, and the UN Security Council and the broader international community must focus their efforts on sustaining what has been achieved over this period. If the current course of action initiated by the RS authorities remains unchecked, there will be increased risk that BiH will slide further towards disintegration, which could have significant international peace and security implications.

Annex: Statement by the Ambassadors of the Peace Implementation Council Steering Board, July 14, 2015