

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

In the exercise of the powers vested in the High Representative by Article V of Annex 10 (Agreement on Civilian Implementation of the Peace Settlement) to the General Framework Agreement for Peace in Bosnia and Herzegovina, according to which the High Representative is the final authority in theatre regarding interpretation of the said Agreement on the Civilian Implementation of the Peace Settlement and by Article II:1(d) of the same Annex which requires the High Representative to facilitate the resolution of any difficulties arising in connection with civilian implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina;

Recalling paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn on 9 and 10 December 1997, in which the Peace Implementation Council welcomed the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of any difficulties as aforesaid "by making binding decisions, as he judges necessary" on certain issues including (under sub-paragraph (c) thereof) "measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities [which ...] may include actions against persons holding public office";

Noting that in paragraph X.4 of the Annex to the Declaration of the Peace Implementation Council made at Madrid on 16 December 1998 it was stated that the Council acknowledged that leaders whom the High Representative bars from official office "may also be barred from running in elections and from any other elective or appointive public office and from office within political parties until further notice";

Recalling Paragraph 4 of Resolution 1174 (1998) of the United Nations Security Council of 15 June 1998, by which the Security Council, under Chapter VII of the United Nations Charter "... reaffirms that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on 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;"

Noting that, under Chapter VII of the United Nations Charter, the United Nations Security Council expressly affirmed the aforementioned Declarations of the Peace Implementation Council in a series of resolutions, including by way of illustration, Resolutions 1247 (1999), 1423 (2002), 1491 (2003), 1551 (2004), 1575 (2004), 1639 (2005) and 1722 (2006).

Recalling, that as a consequence of their respective failures to undertake acts within their individual capacities necessary to fulfill Bosnia and Herzegovina's obligation to fully cooperate with the International Criminal Tribunal for Former Yugoslavia, by Decisions 219/04 and 317/04, the High Representative **removed** Dr. Dragan Kalinic from his positions as **Chairman of the National Assembly of Republika Srpska and President of the Srpska Demokratska Stranka**, and removed Mr. **Milorad Bilbija from his position as Deputy Head Operative Administration of the Intelligence and Security Agency**, and further barred both individuals from standing for elections and holding any official, elective or appointive office until authorised so to do by the High Representative;

Noting that on 8 July 2006, the Constitutional Court of Bosnia and Herzegovina, in its Decision on Admissibility and Merits No. AP-953/05 in the Appeal of Milorad Bilbija and Dragan Kalinic (hereinafter: "the Decision of the Court") declared the said Appeal admissible and concluded that "the appellants right to an effective legal remedy under Article 13 of the European Convention has been violated " and ordered Bosnia and Herzegovina to take certain measures "within the scope of their positive obligation to secure an effective legal remedy..." with respect to the aforementioned Decisions of the High Representative;

Recalling Bosnia and Herzegovina's obligation under Article I of the General Framework Agreement for Peace in Bosnia and Herzegovina pursuant to which the Parties to the said Agreement shall, *inter alia*, "conduct their

relations in accordance with the principles set forth in the United Nations Charter”;

Recalling further that, as a member state, Article 25 of the United Nations Charter obliges Bosnia and Herzegovina to accept and carry out decisions of the Security Council;

Bearing in mind that Article 103 of the United Nations Charter provides that “...in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”;

Noting that in its Communiqué issued following its meeting held in Brussels on 27 February 2007, the Steering Board of the Peace Implementation Council noted with concern that domestic actors in Bosnia and Herzegovina have challenged actions undertaken on the basis of Dayton and UN Security Council Resolutions under Chapter VII [of the United Nations Charter]; reminded all institutions that Bosnia and Herzegovina’s international obligations under the General Framework Agreement for Peace in Bosnia and Herzegovina and the United Nations Charter must be respected; and called upon the High Representative, in close coordination with the Steering Board Ambassadors, to take appropriate actions to ensure that Bosnia and Herzegovina fulfils these international obligations;

Recalling the obligation under Article IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, as well as under Resolution 1088(1996) of the United Nations Security Council of 12 December 1996, for all parties under the Peace Agreement to cooperate fully with all entities involved with the peace settlement, including the International Tribunal for the Former Yugoslavia through, *inter alia*, “the surrender for trial of all persons indicted by the Tribunal and provision of information to assist in Tribunal investigations;”

Recalling further that pursuant to Article II (8) of the Constitution of Bosnia and Herzegovina, all competent authorities in Bosnia and Herzegovina are obliged to cooperate with and provide unrestricted access to, *inter alia*, the International Tribunal for the Former Yugoslavia;

Emphasizing that the Decisions to remove Milorad Bilbija and Dragan Kalinic from their respective positions were taken as a consequence of the failure of Bosnia and Herzegovina to meet its international and domestic obligations to cooperate fully with the International Criminal Tribunal for Former Yugoslavia, a failure in which the above mentioned public office holders have played a role, especially by obstructing in the territory of the Republika Srpska the apprehension of a number of persons indicted under Article 19 of the Statute of the International Criminal Tribunal for Former Yugoslavia;

Bearing in mind the theory of functional duality developed by the Constitutional Court in its Decision U9/00 of 3 November 2000 whereby the Court opined that acts of the High Representative, when acting in substitution for the authorities of Bosnia and Herzegovina, could be open to review by the Constitutional Court, insofar as those acts would otherwise be subject to review under national law, while the powers exercised solely under Annex 10 (hereinafter: the international mandate of the High Representative) are not subject to such review;

Recalling that the High Representative has, based on his powers deriving from Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, agreed to waive the immunity he enjoys under the said Annex and consented to the review of certain of his acts within the framework of the above mentioned domestic theory of functional duality;

Considering that the High Representative intends to continue to consent to the review of certain of his acts within the framework of the above-mentioned domestic theory of functional duality;

Considering that the Decisions removing officials from office in order to further the civilian implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina are not based, if measured against the above mentioned domestic theory of functional duality developed by the Constitutional Court, upon the position of the High Representative equated to that of domestic institutions but derive specifically from his international mandate under Article V of Annex 10;

Welcoming the fact that the Constitutional Court of Bosnia and Herzegovina, in its Decision on the Appeal of

Milorad Bilbija et Al., has acknowledged that the High Representative derives his powers from international law, including legally binding decisions of the United Nations Security Council;

Welcoming further that the Constitutional Court of Bosnia and Herzegovina has referred to its afore-referenced theory of functional duality in paragraphs 40 and 57 of the Decision of the Court and that the Constitutional Court thus concluded that it was not competent to review certain decisions of the High Representative;

Recalling that the High Representative is not in any way accountable to any one State, that he is not an organ of Bosnia and Herzegovina or any other State and that his actions cannot engage the responsibility of any one State, including Bosnia and Herzegovina, as a matter of international law;

Noting the fact that under the Decision of the Court, the Court's observation to the effect that Bosnia and Herzegovina should ensure the protection of the appellants' rights "as per its positive obligation" is linked to a qualification under paragraphs 72 through 74 of the Decision of the Court with the result that Bosnia and Herzegovina would need, according to the Court, to make a representation before the international bodies responsible for appointing the High Representative to bring the alleged violations of constitutional rights to their attention;

Noting further with serious concerns the failure on the part of the Constitutional Court of Bosnia and Herzegovina, when purporting to give consideration to Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina to invite the High Representative to make representations or participate in the proceedings as *amicus curiae* despite his being the final authority in theater regarding the interpretation of the Agreement on the Civilian Implementation of the Peace Settlement;

Interpreting under Article V of Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina that, pursuant to the said Agreement, the Acts Decisions and Orders of the High Representative, whether involving intervention in the domestic legal order of Bosnia and Herzegovina, its Entities, Cantons or District or otherwise, do not derive their legal force from any transfer of competence from Bosnia and Herzegovina, its Entities, Cantons or District to the High Representative and that the actions of the High Representative do not engage the responsibility of any State, including Bosnia and Herzegovina, as a matter of international law;

Conscious that the nature of the matters addressed by the Court could, if misinterpreted by the authorities, institutions and organs of Bosnia and Herzegovina, place them, when implementing the Decision of the Court, in violation of their aforementioned international obligations;

Bearing in mind that the peace implementation process requires the coordination of the activities of the agencies respectively set up under various Annexes to the General Framework Agreement for Peace in Bosnia and Herzegovina and that it is the exclusive responsibility of the High Representative to ensure that the implementation of the Decision of the Court does not come into conflict with the overall implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina as a whole and in particular does not call in question, directly or indirectly, the powers of the High Representative to sanction those individuals whose conduct impedes such implementation;

Conscious that, with respect to police officials who were denied certification by the United Nations Police Task Force, the Council of Ministers of Bosnia and Herzegovina has, by its adopting decision no 261/06 of 21 December 2006, taken an act that is incompatible with Bosnia and Herzegovina's obligations under relevant UN Security Council resolutions, Annex 11 of the General Framework Agreement for Peace and the UN Charter and that is incompatible with the terms of the UN Security Council Presidential Statement of 25 June 2004 which called upon the authorities of Bosnia and Herzegovina to ensure that all certification decisions of the United Nations are fully and effectively implemented;

Taking note of the Communiqué of the Peace Implementation Council of 27 February 2007 by which it extended the mandate of the High Representative through 30 June 2008, thereby affirming the continuing need to facilitate the parties' own efforts in the implementation of the civilian aspects of the peace agreement, including through the use of the authority accorded to the High Representative under Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina;

Recalling that it is already open for individuals to make representations to the High Representative to have their ban lifted, notwithstanding their previous removal, and that such lifting of the ban has occurred, to date, in fifty (50) cases.

Having borne in mind the totality of the matters aforesaid, the High Representative issues the following:

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

Article 1

In order to implement the Decision of the Court, the Presidency of Bosnia and Herzegovina shall address to the High Representative, as Chair of the Steering Board of the Peace Implementation Council, all matters raised in said Decision that ought to be considered by the international authorities referenced in the said Decision.

Article 2

Any step taken by any institution or authority in Bosnia and Herzegovina in order to establish any domestic mechanism to review the Decisions of the High Representative issued pursuant to his international mandate shall be considered by the High Representative as an attempt to undermine the implementation of the civilian aspects of the General Framework Agreement for Peace in Bosnia and Herzegovina and shall be treated in itself as conduct undermining such implementation.

Article 3

Notwithstanding any contrary provision in any legislation in Bosnia and Herzegovina, any proceeding instituted before any court in Bosnia and Herzegovina, which challenges or takes issue in any way whatsoever with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.

Any proceeding referred to in Paragraph 1 of this Article shall be effectively and formally notified to the High Representative by the concerned court without delay.

For the avoidance of any doubt or ambiguity, and taking into account the totality of the matters aforesaid, it is hereby specifically ordered and determined, in the exercise of the said international mandate of the High Representative and pursuant to its interpretation hereinunder and by virtue of the said Annex 10, that no liability is capable of being incurred on the part of the Institutions of Bosnia and Herzegovina, and/or any of its subdivisions and/or any other authority in Bosnia and Herzegovina, in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decision of the High Representative made pursuant to his or her international mandate, or at all.

Article 4

For the avoidance of doubt, it is hereby specifically declared and provided that the provisions of the Order contained herein are, as to each and every one of them, laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of Bosnia and Herzegovina or its Entities or elsewhere, and no proceedings may be brought in respect of duties in respect thereof before any court whatsoever at any time hereafter.

Article 5

This Order shall enter into force immediately and shall be published without delay in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Brcko District of Bosnia and Herzegovina, the Official Gazette of the

Federation of Bosnia and Herzegovina and the Official Gazette of Republika Srpska.

Sarajevo , 23 March 2007

Dr. Christian Schwarz-Schilling
High Representative