



Croatian American Association

November 30, 2018

Senior Advisor for Bosnia and Herzegovina Eric Carlson,
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Mr. Carlson,

On behalf of the Croatian American Association (CAA), a non-profit, non-partisan membership organization, we are compelled to write this letter to address the [recent interview](#) given by High Representative Valentin Inzko to the BiH news portal Vijesti.ba on November 21, 2018.

In his interview, Mr. Inzko stated that: *“Until the end of the electoral reform, the Constitution of the FBiH should be enforced in full, both when it comes to the census and when it comes to the so-called rule 1/1/1. To allow primacy to the Election law of BiH in relation to the Constitution of the FBiH, in the part pertaining to the composition of the institution in the Federation, can have very serious effect in the future.”*

High Representative Inzko, by putting the FBiH (entity) Constitution above the rulings of the Constitutional Court of BiH and above the state Election law, which are binding for both entities, is creating a very dangerous precedent. Encouraging or supporting the notion that entity Constitutions are above the rulings of the Constitutional Court of BiH and above the state (BiH) Constitution is unconstitutional and illegal. It creates a precedent which can undermine the whole constitutional and legal order in BiH and lead to unilateral actions by FBiH, RS, or the cantons that make up the FBiH.

Mr. Inzko claims that Central Election Commission’s decision regarding the implementation of the indirect elections for the House of Peoples of the Parliament of the Federation of BiH should be made in accordance with the 1991 census data and the so-called 1/1/1 rule which stipulates that at least one Bosniak, Croat and Serb delegate shall be elected in each of the ten cantons in the FBiH to the FBiH’s House of Peoples. This statement is incorrect on three different points and it carries a dangerous implication for the stability of BiH.

First, the Central Election Commission (CEC) of BiH does not have the constitutional authority or legal basis to currently implement the indirect elections of the delegates to the House of Peoples of the FBiH. The Constitutional Court of BiH has, on July 6, 2017, erased certain provisions of the Election law of BiH pertaining to the election of delegates to the House of Peoples of the FBiH. The Parliamentary Assembly of BiH is the only institution in BiH which has the authority to legislate at the state level and which can implement the Constitutional Court of BiH Ljubić ruling. The Constitutional Court has explicitly ordered the Parliamentary Assembly to do so. Until the Parliamentary Assembly of BiH replaces the erased provisions and implements the Ljubić ruling, there is no legal framework in the Election law of BiH which the CEC can use to constitutionally implement the election results for the House of Peoples of the FBiH.

Simply, CEC is not a legislative body. It can only use the Election law of BiH to implement election results, and currently, the Election law is missing key provisions which would allow the CEC to implement the results for the election of delegates to the House of Peoples of the FBiH. The Parliamentary Assembly must implement the Ljubić ruling while they still have the mandate, before the new House of Representatives of BiH convenes. Currently, it is not possible to elect delegates to the Bosniak and Croat club in the House of Peoples of the Parliamentary Assembly of BiH. This means that once the new session of the House of Representatives convenes, no one will have the constitutional and legal authority to resolve this issue and implement the Ljubić ruling, as there will be no Bosniak or Croat club in the House of Representatives, leaving the Parliamentary Assembly of BiH unable to legislate.

OHR will have to intervene, but its intervention must be in line with the Constitution of BiH and the BiH Constitutional Court's Ljubić and Čolak rulings, as well as with the overarching principle of the Dayton Peace Agreement and the BiH's constitution, which is the constituency and the mutual equality of the three constituent nations. After all, OHR is, according to the Annex 10 of the Dayton Peace Agreement, simply monitoring the civilian implementation of the Dayton Peace Agreement. The OHR cannot suspend or unilaterally change the Constitution of BiH and the Dayton Peace Agreement because it does not have the mandate to do so. All of its decisions must be in accordance with the Constitution of BiH. This leads us to the second and third point.

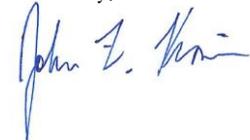
Secondly, Article IX.11.a. of the FBiH Constitution specifies which institutions in the FBiH must use the 1991 census data until Annex 7 is fully implemented. The House of Peoples of the FBiH is not one of these institutions. Article 20.16.A.(2) of the Election law also states that the 1991 census would only be used until a new census is organized, which happened in 2013. Furthermore, the Constitutional Court of BiH has, in the Čolak ruling (U-3/17), stated that using the 2013 census data for the election of delegates to the House of Peoples is constitutional. The Court has also stated in the Ljubić ruling (U-23/14) that constituent nations and Others need to be "legitimately represented" and that is only possible if the most recent census is used as, otherwise, the constituent nations would be overrepresented in some and underrepresented in other cantons.

Thirdly, the so-called 1/1/1 rule was ruled unconstitutional and erased from the Election law by the Constitutional Court. In paragraph 52 of the Ljubić ruling, the Court states plainly that this rule "*is contrary to the principle of constituent status of the peoples, i.e. equality of constituent peoples, thus contrary to the Constitution of Bosnia and Herzegovina, more specifically Article I(2) of the Constitution of Bosnia and Herzegovina.*" Any attempt to use this unconstitutional provision represents a threat to the constitutional and legal order in BiH. It would mean that entities (in this case FBiH) do not have to comply with the Constitution of BiH. This would be unconstitutional and may lead the country into chaos.

Article III/3.(b) of the Constitution of BiH clearly states that "*The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina.*" In other words, the Constitution of the FBiH must be changed to comply with the Ljubić ruling and the new Election law once the ruling is implemented, not the other way around. We have already seen this in practice in 2002 when the OHR used the 2000 ruling of the Constitutional Court of BiH to radically change the constitutions of the RS and the FBiH.

The statement of the High Representative undermines the Constitution of BiH, the Constitutional order in BiH and creates a dangerous precedent for possible future unilateral actions of entities and cantons. If the OHR ends up resolving the current constitutional crisis in BiH through an imposed decision, that decision must be in accordance with the Constitution of BiH, the rulings of the Constitutional Court of BiH and the rule of law. Only this would allow BiH to stabilize and become a prosperous and politically sustainable state based on the principles of democracy, federalism, and power-sharing. Such a Bosnia and Herzegovina would rightly find its place as a member of the European Union and NATO, which is our ultimate goal.

Sincerely,



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