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# The EU in Bosnia and Herzegovina: powers, decisions and legitimacy

Bart M.J. Szewczyk



European Union Institute for Security Studies

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**The EU in Bosnia  
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Bart M.J. Szewczyk



## The author

Bart M.J. Szewczyk is a Senior Associate at Wilmer Cutler Pickering Hale & Dorr in Washington, D.C., and was a Visiting Fellow at the EUISS between June and September 2009. He is also completing a Ph.D on contemporary sources of legitimacy in the European Union at Cambridge University. He has clerked at the International Court of Justice and the US Court of Appeals for the Third Circuit, and is a member of the American Society of International Law and the European Society of International Law. He holds a Juris Doctor from the Yale Law School, a Master in Public Affairs from the Woodrow Wilson School at Princeton University, an M.Phil (Gates Scholar) from Cambridge University, and a BS in Economics from the Wharton School at the University of Pennsylvania.

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## Summary

This *Occasional Paper* analyses the issue of the Bonn Powers in Bosnia – whereby the Office of the High Representative (OHR) can enact laws and remove elected officials – by comprehensively assessing the legitimacy of past OHR decisions. Adopting an established theory of legitimacy developed by Harold Lasswell and Myres McDougal, it argues that empirical legitimacy is best conceived as serving common interests of effective actors within an authorised process, and normatively prescribes that such process should be shaped to maximise values of human dignity. Given this theoretical framework, it examines the process authorised under the Dayton Agreement, which created the political structure that currently exists in Bosnia. It discusses the origins of the Bonn Powers and surveys the various criticisms that have been levelled against them. It then develops an overall analysis of all OHR decisions to date and provides a critique of those categories of decisions that appear inconsistent with the Dayton order and its proclaimed organising principles. Moreover, it provides a focused assessment of a sample of the most problematic decisions, e.g. the removal of elected officials, to show how their empirical legitimacy can be analysed. Finally, the paper concludes with policy recommendations, focusing on the issue of whether the Bonn Powers should be renounced or retained in the future.

The paper finds that the use of the Bonn Powers is generally legitimate, even though certain decisions and categories of decisions merit criticism. Given the ongoing political problems in Bosnia, the paper recommends that the Bonn Powers be retained by the OHR or the EU Special Representative, but with restraints, such that they are used only to *preserve the peace, promote the democratic process, and protect human rights* – objectives justified under the Dayton Agreement. In addition, the paper suggests specific improvements in the decision-making process to enhance the legitimacy of the Bonn Powers and prevent their misuse, such as establishing a formal hearing process to have all factual and legal arguments presented by all relevant parties before a decision is taken and to ensure that the decision can be subsequently reviewed in the light of these arguments in the court of public opinion.



# Introduction

Under the radar, a new storm is brewing in Bosnia and Herzegovina. The public order created by the Dayton Peace Agreement of 1995 to cease the conflict and bloodshed of the previous three years is under profound strain – to such an extent that the current political atmosphere is, according to some observers, as tense and dangerous as before the war.

An integral institution to the Dayton order in Bosnia has been the Office of High Representative (OHR), which under the so-called Bonn Powers has made nearly 900 decisions over thirteen years, e.g. enacting laws and removing elected officials.<sup>1</sup> According to some, these decisions constitute the glue that holds Bosnia together, while according to others, they are a cancer on the Bosnian body politic. The legitimacy of these powers has been repeatedly challenged on the grounds that they are undemocratic and dictatorial, compelling the international community and the EU to reconsider their use.

Responding partly to these criticisms, the EU, which has *de facto* control over international governance in Bosnia as discussed below, has aimed since 2006 to close the OHR and terminate the Bonn Powers, but maintain the presence of an EU Special Representative (EUSR) to guide Bosnia towards EU accession. An integral element of this transition strategy has been constitutional reform to overcome the friction that has characterised the complicated Bosnian institutional structure under Dayton, whereby a representative of each of the three ethnic groups has veto power over any proposed legislation. However, both efforts have continually stalled and do not show much promise of future success.

Meanwhile, the situation in Bosnia has increasingly deteriorated and the current state of affairs is dire, as demonstrated by political deadlock preventing progress on any substantive issues,<sup>2</sup> renewed threats about dissolving the state,<sup>3</sup> official defiance of the OHR's authority by Republika

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1. At the time of writing in January 2010.

2. See 'EU, US convene Bosnia talks concerned about political stalemate', *Agence France Presse*, 2 October 2009; 'Presidency member says situation in Bosnia "catastrophic"', *BBC Worldwide Monitoring*, 15 July 2009.

3. See 'Serb member in Bosnian presidency says country closer to dissolution than unity', *BBC Worldwide Monitoring*, 15 September 2009; 'Bosnian Muslim leader warns OHR closure to lead to conflict', *BBC Worldwide Monitoring*, 19 July 2009.

Srpska (RS),<sup>4</sup> RS threats to call a local referendum on the status of the Dayton Peace Agreement,<sup>5</sup> and litigation proceedings commenced by Republika Srpska authorities against all High Representatives that have used the Bonn Powers.<sup>6</sup> In this context, former High Representative Paddy Ashdown has warned that 'Europe, which failed the Balkans in the 1990s, risks doing so again, and could destroy its credibility as a foreign policy player.'<sup>7</sup> Similarly, Louise Arbour describes the current situation in Bosnia as one of turmoil and chaos.<sup>8</sup> Even more ominously, two academics writing in *Foreign Affairs* have argued that current trends may lead to a 'redivision of Bosnia and a return to war.'<sup>9</sup>

Recent attempts to overcome the current stalemate among the Bosnian parties have proved insufficient. On 9 and 20 October 2009, the EU and US initiated talks at the EUFOR military headquarters in Butmir, but failed to reach any agreement. As a consequence, the Peace Implementation Council (PIC)<sup>10</sup> had to defer once again its plans to close the OHR and could only 'urge ... the leaders of BiH to refrain from divisive rhetoric and behaviour that further polarises the political atmosphere in BiH.'<sup>11</sup> Pursuing the same strategy of transition, the 'EU member states of the PIC Steering Board reiterated that an EU membership application by BiH cannot be considered as long as the OHR exists.'<sup>12</sup>

Underlying the transition policy since 2006 has been the assumption that the soft power of EU accession will be attractive enough to pull together the various Bosnian political actors, maintain stability in Bosnia, and facilitate progress. Given that this premise has been disproven by the facts, it is an apt time to reconsider the planned renunciation of the Bonn Pow-

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4. Statement by the Ambassadors on the RS Government Conclusions, 25 September 2009. Available at: [www.ohr.int/pic/default.asp?content\\_id=43990](http://www.ohr.int/pic/default.asp?content_id=43990).

5. See RS Government's Position of 14 December 2009 and the RS National Assembly Conclusions of 28 December 2009.

6. See 'Bosnia to "fall apart" if Western pressure continues - Bosnian Serb PM', *BBC Worldwide Monitoring*, 13 October 2009; 'Bosnian Muslim leader warns OHR closure to lead to conflict', *BBC Worldwide Monitoring*, 19 July 2009.

7. 'In Balkans, a daunting money pit for the EU', *The International Herald Tribune*, 1 October 2009.

8. Louise Arbour, 'Bosnia's Continuing Chaos', *Foreign Policy*, 18 November 2009.

9. Patrice C. McMahon and Jon Western, 'The Death of Dayton', *Foreign Affairs*, vol. 88, no. 5, September/October 2009, p. 83.

10. For more details on the membership and structure of the PIC, see Annex 1.

11. Communiqué of the Steering Board of the Peace Implementation Council, 19 November 2009. Available at: [http://www.ohr.int/pic/default.asp?content\\_id=44119](http://www.ohr.int/pic/default.asp?content_id=44119).

12. *Ibid.*

ers and determine whether there may be continuing justification in preserving at least some of them as a last resort in the medium-term future. Whether or not some form of Bonn Powers is considered as part of the EU's policy options, even if formal authority is transferred from the OHR to the EUSR, will depend to a large extent on how the past use of such powers is assessed – as arbitrary and illegitimate, and thus treated as an *exceptio* without precedential value (perhaps even as the anti-precedent to be shunned and avoided); as legitimate and consistent with EU principles, and to be repeated with confidence and conviction in the future if the circumstances require; or as legitimate in the past but unnecessary or inappropriate for the future. While policy-makers and policy analysts may disagree on this particular issue, everyone agrees that the strategy pursued over the past three and a half years has not worked and needs to be reappraised.

This *Occasional Paper* seeks to assist in thinking and deciding about this problem by comprehensively assessing the legitimacy of past OHR decisions. Adopting an established theory of legitimacy, Section 1 argues that empirical legitimacy is best conceived as serving common interests of effective actors within an authorised process, and normatively prescribes that such a process should be shaped to maximise values of human dignity. Section 2 examines the process authorised in Bosnia under the Dayton Agreement, which created the current political institutions in the country. Section 3 discusses in greater detail the origins of the Bonn Powers and surveys the existing criticism to which they are subject. Section 4 develops an overall analysis of all OHR decisions to date and critiques those categories of decisions that appear inconsistent with the Dayton order and its proclaimed organising principles. Section 5 provides a focused assessment of a sample of the most problematic decisions, in particular concerning the removal of elected officials, to show how their empirical legitimacy can be analysed. Finally, the paper concludes with policy recommendations as to whether the Bonn Powers should be renounced or retained in the future.

The paper finds that the use of the Bonn Powers is generally legitimate, even though certain decisions and categories of decisions merit criticism and there is clearly room for significant improvement. Indeed, the order established by the Dayton Agreement is paradigmatic of EU legitimacy in contemporary practice and can be described using a concept recent-

ly introduced by Robert Cooper, the Director-General for External and Politico-Military Affairs at the Council of the European Union. Cooper argued in favour of ‘a new understanding of legitimacy’ and noted that ‘we worked out some while ago that democracy on its own was not enough, that it needed to be liberal democracy, democracy with limits,’ such as a constitution with individual rights enforced by an independent judiciary. In the same vein, he proposed that ‘we need to think in terms of the future of liberal international democracy, of democracy in which legitimacy partly derives from being able to work with the international community,’ pointing to EU practice as reflecting this new type of political order.<sup>13</sup>

The notion of liberal international democracy – *an order wherein primary political decision-makers are elected by the people they govern (democratic element) and human rights (liberal element) are, as a last resort, protected by international institutions (international element)* – should help clarify the purposes of EU policy in Bosnia and guide its decision-making in the future. It should also help overcome the prevailing sense of unease and discomfort, particularly within the EU, that has continually accompanied the Bonn Powers, which though in some tension with concepts of state sovereignty and national democracy, can be reconciled with these traditional principles.

The ongoing political problems in Bosnia are unlikely to be resolved by any internal non-violent solutions due to the failure of constitutional reform talks and the likelihood of conflict associated with any partition. To maximise values of human dignity in a public order, the paper recommends that the Bonn Powers be retained by the OHR or the EUSR, but with restraints, such that they are used only *to preserve the peace, promote the democratic process, and protect human rights* – objectives justified under the Dayton Agreement. In addition, the paper suggests specific improvements in the decision-making process to enhance the legitimacy of the Bonn Powers and prevent their misuse, such as establishing a formal hearing process to have all factual and legal arguments presented by all relevant parties before a decision is taken and to ensure that the decision can be subsequently reviewed in the light of these arguments in the court of public opinion.

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13. Speech at the Woodrow Wilson School at Princeton University, 18 April 2009. Available at: [www.princeton.edu/webmedia](http://www.princeton.edu/webmedia).

Given the EU's engagement and history in Bosnia, which is the theatre of its largest civilian and military commitment to date, in the aftermath of collective gross negligence that failed to prevent mass atrocities from occurring,<sup>14</sup> the EU's credibility as a foreign policy actor is largely tied up with Bosnia's fate. Indeed, much rests on the question of the future of the Bonn Powers, both for Bosnia and the EU. The resolution of this issue will largely depend on how the legitimacy of previous decisions is assessed: this is the subject of the next section.

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14. See, e.g., Brendan Simms, *Unfinest Hour: Britain and the Destruction of Bosnia* (London: Allen Lane, 2001).



# 1. Theory of legitimacy

Since there is nothing as practical as a good theory,<sup>15</sup> this section briefly discusses the theory of legitimacy developed by Harold Lasswell and Myres McDougal under which legitimacy is empirically described as serving common interests of effective actors within an authorised process. While recognising the realities of the internal and external power dynamics of any political order, the theory normatively prescribes that policy-making should be oriented towards maximising the values of human dignity. With a primarily empirical and descriptive orientation,<sup>16</sup> the approach could be described most accurately as ‘realistic idealism’<sup>17</sup> or ‘principled pragmatism.’<sup>18</sup> This theory is broader and thus more applicable to different contexts than the more specific approaches previously adopted in EUISS publications, e.g. equating legitimacy with democracy<sup>19</sup> or defining legitimacy as based on the general conviction that a decision is acceptable;<sup>20</sup> therefore, it is more useful in understanding how a legitimate political order is established and maintained in a variety of factual contexts.<sup>21</sup> Finally, Lasswell and McDougal’s analysis appears to be consistent with the perspective of policy analysts and policy-makers who, having to build politically-feasible coalitions to address real-world problems, deter-

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15. See W. Michael Reisman and Aaron M. Schreiber, *Jurisprudence: Understanding and Shaping Law* (New Haven, CT: New Haven Press, 1987).

16. For other analyses based on this empirical or sociological perspective on legitimacy, see Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (New York: Columbia University Press, 2009); Ian Clark, *Legitimacy in International Society* (New York: Oxford University Press, 2007); David Beetham, *The Legitimation of Power* (London: Palgrave Macmillan, 1991); Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); Max Weber, *Economy and Society: Outline of An Interpretive Sociology* (1914; New York: Bedminster Press, 1968 – English translation by Guenther Roth and Claus Wittich (eds.)).

17. See the collection of ‘Essays in Honor of W. Michael Reisman’ in *Yale Journal of International Law*, vol. 34, no. 2, Summer 2009, pp. 499-614.

18. Hillary Rodham Clinton, ‘Remarks on the Human Rights Agenda for the 21st Century’, 14 December 2009. Available at: <http://www.state.gov/secretary/rm/2009a/12/133544.htm>.

19. Wolfgang Wagner, ‘The democratic legitimacy of European Security and Defence Policy’, *Occasional Paper* no. 57 (Paris: EUISS, April 2005).

20. Martin Ortega, ‘Military intervention and the European Union’, *Chaillot Paper* no. 45 (Paris: WEUISS, March 2001).

21. For general analyses of international territorial administration, see, e.g., Ralph Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008); Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge: Cambridge University Press, 2008); Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* (Oxford: Oxford University Press, 2007); Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005); Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2005).

mine what interests are served by a given solution and the widest extent of the community that shares such interests.<sup>22</sup>

Lasswell and McDougal argue that there is an inherent interaction between power and legitimacy in any order, from the global community to the community of two individuals mutually influencing each other (e.g., in a marriage or friendship). Within any community, they observe, exists ‘an ongoing process of effective power . . . in which decisions are in fact taken and enforced by severe deprivations or high indulgences, irrespective of the wishes of any particular participant.’ Within this process of effective power, Lasswell and McDougal distinguish between two kinds of decisions:

1. ‘those that are made, quite arbitrarily, through sheer naked power or calculations of expediency’ and
2. ‘those that are taken from perspectives of authority in the sense that they are made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of decision, with enough bases in effective power to secure consequential control, and by authorised procedures.’<sup>23</sup>

In this manner, the capricious use of power is distinguished from the legitimate exercise of power resulting from an authorised process.

Such authorised process, pursuant to which decisions are legitimate, is established by ‘effective elites of the global community, after the fashion of elites in lesser communities, seek[ing] to clarify and secure their *common interests*.’ Thus, a legitimate process is one that serves substantive outcomes, which are deemed to be in the common interest of effective actors. Which actors are effective depends on the decision and authorised process in question. Recognising that ‘[t]o some extent every member of the world community or of any component thereof is affected by power and strives to influence power outcomes,’ Lasswell and McDougal list the following categories of ‘shapers’ and ‘sharers’ of power relevant for purposes of analysis: nations, governments, sub-national communities such

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22. See, e.g., Álvaro de Vasconcelos (ed.), ‘The European Security Strategy 2003-2008: Building on Common Interests’, *ISS Report* no. 5 (Paris: EUISS, February 2009).

23. Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society* (New Haven, CT: New Haven Press, 1992), pp. 141, 142, 335, 369.

as provinces and cities, intergovernmental organisations, social classes, interest groups, pressure groups, and gangs. Common interests, in turn, depend on the shaping and sharing in eight categories of values – power, enlightenment, wealth, well-being, skill, affection, respect and rectitude – which Lasswell and McDougal argue all human beings want, as evidenced by the various religions and philosophies that have existed throughout the history of humankind. Thus, Lasswell and McDougal argue that legitimate decisions are made and policies chosen ‘which are expected to yield net value advantages.’<sup>24</sup>

Specifying their normative perspective, Lasswell and McDougal expand on John Austin’s view that decisions should be evaluated from the perspective of utilitarianism – or the extent to which a rule serves the greatest good for the greatest number in John Stuart Mill’s famous formulation.<sup>25</sup> In much the same way that maximising utility served as Austin’s benchmark, Lasswell and McDougal adopt the maximisation postulate, but apply it across eight specific value categories rather than Mill’s more general notion of utility.

Schematically, the causal effect in the process of creating legitimacy through the interaction between power and interest can be depicted as shown in the following diagram. As depicted in the model, a decision is made jointly between two actors (power of A and B). Here, power is understood as participation in a decision-making process to achieve X objective, and the relative influence of each actor depends on the coercive, economic, and persuasive resources at their disposal.<sup>26</sup> As Sir Jeremy Greenstock

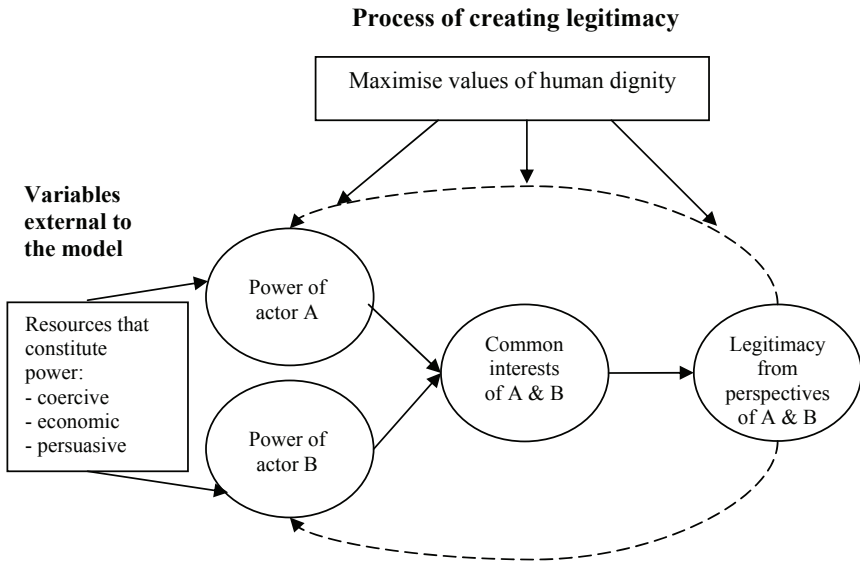
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24. Ibid. at 142, 369, 417-23 (emphasis added). Confirming these insights at the nation-state level with a comprehensive empirical study across 72 countries during the late 1990s and early 2000s, one scholar found that ‘while seemingly self-interest variables like financial satisfaction and national happiness prove important, variables with a presumably stronger common-interest orientation, such as governance, rights, and general welfare, prove more important’ to creating legitimacy. (Gilley, *Right to Rule*, op. cit. in note 16, p. 43). Indeed, Gilley found that 53% of variation in legitimacy among the 72 states could be explained statistically by the combination of these three variables: good governance, democracy/rights, and development. Interestingly, the effect of each factor was equal in terms of contributing towards legitimacy. Notwithstanding these three specific universal common interests applicable to all nation-states, Gilley points out that nearly half of legitimacy sources are particular to a given nation-state. Thus, Gilley concluded that ‘Weber’s twin concerns with universal and particularistic modes of state legitimation was (*sic*) well founded because nearly half of the differences cannot be explained. Universals and particulars seem to be almost cosmically balanced in the political world.’ Ibid., p. 48.

25. See John Stuart Mill, *Utilitarianism* (1863).

26. For comprehensive discussions of the concept of power, see Leslie Gelb, *Power Rules: How Common Sense Can Rescue American Foreign Policy* (New York: HarperCollins, 2009); Joseph S. Nye, Jr., *The Powers to Lead* (New York: Oxford University Press, 2008); Joseph S. Nye, Jr., *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004); Joseph S. Nye, Jr. and Robert Keohane, *Power and Interdependence* (New York: HarperCollins, 1989); Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* (New Haven, CT: Yale University Press, 1961).

recently put it, ‘money means influence, quantity means influence ... as much as argument.’<sup>27</sup> For the purposes of the model, actors A and B could be two individuals, two organised groups, two states, or two international organisations, as long as they reflect the totality of power in making a particular decision in question. To the extent that this exercise of power serves the common interests of A and B, as opposed to exclusive interests of either A or B, it is legitimate from their perspective as well as from the perspective of any other actor with power to affect the decision whose interests are enhanced incidentally or, at the very least, not adversely affected. Along with other variables external to this model, the legitimacy of a given decision, in turn, will affect the power of A and B responsible for the decision as norms of legitimacy support continued exercise of power to the extent that the served common interests are perceived to remain constant.



Given this framework, there are many degrees of empirical legitimacy from the perspective of numerous communities, sometimes in conflict, ranging from clearly illegitimate decisions serving exclusive interests of one individual at the expense of others to clearly legitimate decisions serving inclusive interests of all, e.g., preserving planet Earth from nuclear

27. Sir Jeremy Greenstock, Hearing before the Iraq Inquiry, London, 15 December 2009.

annihilation.<sup>28</sup> Normatively, these numerous decision-making processes should be shaped to maximise values of human dignity.

How can this theory of legitimacy be applied to decisions taken by the High Representative/Special Representative (HR/SR) in Bosnia? One must first identify the authorised process. In Bosnia, the Dayton Agreement set the authorised process by establishing territorial boundaries, the governed population, the governing institutions, and the relative competencies among them. It was the social compact reached by the warring parties at the end of the Bosnian war and continues to have broad support throughout the country.

Within the authorised process under the Dayton Agreement, there are several groups of effective actors. Based on the ability to vote, willingness to pay taxes, general compliance with or defiance of the law, and capacity to mobilise and protest, the Bosnian population at large consists of nearly five million effective actors.<sup>29</sup> Though admittedly in various degrees, each Bosnian citizen has some power over decision-making in Bosnia and therefore decisions taken by the HR/SR will persist only to the extent they are effectively legitimated where it counts – ultimately with each Bosnian citizen with any (even if the most minimal) influence over HR/SR rule. As Paddy Ashdown recognised, ‘the strongest check and balance of all is the people of Bosnia, on whose consent international authority ultimately depends.’<sup>30</sup> Also dependent on the consent of the governed, there are the governing institutions established under the Dayton Agreement such as Entity and State institutions, as discussed in the following section, all of which have varying resources at their disposal to affect a given decision.

Having identified the effective actors within the authorised process, one can conclude that a particular decision or order serves the interests of those actors that consented to it or do not resist it, as can be observed in

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28. See also Beetham, *op. cit.* in note 16, p. 20 (Legitimacy ‘is not an all-or-nothing affair.’).

29. For size of Bosnia’s population, see Central Intelligence Agency, *The World Factbook* (2009), available at: [www.cia.gov/library/publications/the-world-factbook/geos/bk.html](http://www.cia.gov/library/publications/the-world-factbook/geos/bk.html).

30. Paddy Ashdown, ‘We want to achieve legislation stamped “Made in Bosnia”’, *Frankfurter Allgemeine Zeitung*, 10 July 2003. But see Rebecca Everly, ‘Assessing the Accountability of the High Representative’, in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina* (Burlington, VT: Ashgate Publishing Company, 2008) p. 95. (‘While this may be true, particularly given the High Representative’s lack of enforcement powers, it is a poor substitute for streamlined, institutional mechanisms – perhaps tantamount to a ruler claiming that he is accountable to his constituents because of the possibility that they can revolt against him.’).

media coverage of such decisions, as well as in public opinion polls that reflect the perspective of the Bosnian population. From this perspective, decisions taken by the HR/SR are problematic in terms of legitimacy, since they are made against the expressed will or consent of elected Bosnian governments or officials who have some resources to resist the decision and seek its reversal. For this reason, such decisions can be best characterised as *countermajoritarian* and constitute the main focus of analysis for this paper. Notably, the HR/SR's decisions can be countermajoritarian even if supported by a majority of the Bosnian population, as they are made against the will of democratically-elected officials and governments. An analogous approach can be observed in constitutional law that focuses on pivotal judicial decisions, whereby decisions of democratically-elected institutions are overturned, since judicial review by constitutional courts in liberal democracies is similarly countermajoritarian. Normatively, these decisions can be assessed based on whether they contribute to or detract from a public order of human dignity.

In summary, the paper analyses the HR/SR's countermajoritarian decisions, their public justifications, and the resultant public responses by drawing on a broad set of arguments and evidence relevant to the process of transforming power into right or practice into principle through serving common interests of effective actors.<sup>31</sup> It assesses whether categories of decisions and specific decisions are justified from the perspective of the Dayton Agreement, to what extent they serve common interests, and whether there is actual support for these decisions among the governing institutions and the wider governed public. A legitimate HR/SR decision may conflict, by definition under the terms of the Dayton Agreement, with particular interests of specific individuals removed from office or an Entity or State institution whose law is overturned. However, a legitimate decision stands the test of time by serving long-term inclusive interests rather than short-term exclusive interests. Indeed, these long-term interests are reflected in the values enshrined within the Dayton Agreement. In the end, since legitimacy is not a binary notion but a matter of degree, an analyst can conclude only that a decision is more or less inclusive by serving wider or narrower interests, identify the interests and the community

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31. For a more comprehensive discussion of the methodology and illustrative case studies, see W. Michael Reisman and Andrew R. Willard (eds.), *International Incidents: The Law That Counts in World Politics* (Princeton, NJ: Princeton University Press, 1988); Bart M.J. Szweczyk, 'Pre-emption, Deterrence, and Self-Defence: A Legal and Historical Assessment,' *Cambridge Review of International Affairs*, vol. 18, no. 1, 2005, p. 119.

that shares them, and suggest ways to improve the decision-making process in order to maximise values of human dignity.

Why does this question of legitimacy matter? First, there is a risk of resistance to a political order or decision deemed illegitimate, with the ultimate threat of overthrowing the order or reversing the decision. Simply announcing a decision does not imply that it will be accepted, e.g., by the removed official or barred candidate and their respective power bases. Illegitimate decisions and orders, serving exclusive and narrow interests, are resisted and ultimately overturned over time as the power base supporting the decision or order shrinks and disintegrates. As High Representative, Paddy Ashdown noted starkly: ‘if I pass a decree that is refused, my authority is gone like the morning dew.’<sup>32</sup> In contrast, decisions that are questioned, debated, but eventually accepted further consolidate the legitimacy of an order. As the US Secretary of Defense Robert Gates observed recently in a different context, ‘[w]here foreign forces have had a large footprint and failed, in no small part it has been because the [local people] concluded they were there for their own imperial interests and not there for the interests of the [local] people.’<sup>33</sup> Similarly, Josef Joffe argued that a focus on common interests undergirded American power in the second half of the twentieth century, since the US was ‘a state that pursued its own interests by also serving those of others and thus created global demand for the benefits it provided. It is neither altruism nor egotism but enlightened self-interest that breeds influence.’<sup>34</sup> Thus, legitimacy is necessary for the stability and effectiveness of any decision or order over time. Robert Cooper pointed out that legitimacy serves to extend power over time, as it is ‘as much a source of power as force.’<sup>35</sup> Citing Henry Kissinger, Cooper also observed that ‘power is *restrained*, above all, by legitimacy.’<sup>36</sup> Indeed, legitimacy is both a source of and a constraint on power – it defines the scope of power over time and serves as the oxygen of power – which is why it is a crucial subject of political science and political decision-making.

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32. ‘Farewell Sarajevo’, *The Guardian*, 2 November 2005.

33. Peter Baker and Elisabeth Bumiller, ‘Advisers to Obama Divided on Size of Afghan Force’, *The New York Times*, 3 September 2009.

34. Josef Joffe, ‘The Default Power’, *Foreign Affairs*, vol. 88, no. 5, September/October 2009, pp. 21–25.

35. Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (London: Atlantic Books, 2003), p. 167.

36. *Ibid.* p. 175, footnote 36 (emphasis added).

Second, legitimacy is necessary from the perspective of the political decision-maker to overcome the inner doubt potentially associated with any choice projected over time and thereby entailing inherent risks and uncertainty of outcomes. In the case of the EU's role in Bosnia, this reason may be more important, given that there is sparse effective local opposition to the EU whereas there is significant danger that the EU – itself a construct of numerous decision-makers ultimately accountable to nearly 500 million European citizens – will lose interest in and resolve for this mission. In particular, there has been an inaccurate characterisation of the EU's engagement in Bosnia as an imperial venture with the HR/SR portrayed as a modern-day pro-consul<sup>37</sup> and a resultant unease with the use of the Bonn Powers. While the form of governance is novel, it is far from exploitative and instead is based on the common interests of the EU and Bosnia. However, the novelty of this political experiment has resulted in inappropriate terminology being applied due to the inadequacy of established political concepts, thus demanding a new theory and understanding.

Most importantly, there is a lack of general public understanding of the legitimacy of the EU's role in Bosnia, which in turn has undermined the political commitment to this mission and has led to rapidly declining EU troop levels in Bosnia at a time when internal tensions are escalating and governance increasingly dysfunctional. Without continued public support for this engagement, resources inevitably become scarce and allocated to areas of greater perceived need, to the extent that this mission is in danger of failing. Greater public support will only come with greater understanding among European citizens of how the EU's mission is neither purely selfish nor solely altruistic, but instead serves the common interests of both the EU and Bosnia. This, in turn, demands more effective communication of legitimacy on the part of European political decision-makers. Such process of communication and understanding can be facilitated with the concept of liberal international democracy, which captures the main elements of this novel political order and reflects the underlying common interests of all effective actors in a concise manner that gradually builds on existing and well-known concepts.<sup>38</sup> As Joseph Weiler noted,

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37. See, for example, Michael Ignatieff, *Empire Lite. Nation-Building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003).

38. For an example of a similar articulation of a new concept to capture the main elements of a complicated process, see Giovanni Grevi, 'The inter-polar world: a new scenario', *Occasional Paper* no. 79 (Paris: EUISS, June 2009).

legitimacy criteria evolve gradually, such that one should ‘speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside.’<sup>39</sup>

On the basis of this theoretical framework, the next section examines the contemporary Bosnian political architecture and its historical context.

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39. Joseph H.H. Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 64, 2004, p. 551.



## 2. Bosnia under the Dayton Agreement

The current institutional structure in Bosnia must be considered within the historical context of the disintegration of Yugoslavia that gave rise to it. Following declarations of independence in Slovenia and Croatia in 1991, Bosnia held a referendum in which Bosniaks and Bosnian Croats overwhelmingly voted for independence, whereas Bosnian Serbs, who preferred to remain within Yugoslavia, mostly boycotted the vote. On 7 April 1992, the European Community and the United States, among others, recognised Bosnia as a sovereign state and a civil war erupted among the three ethnic groups in what became the bloodiest conflict in Europe since World War II. After three years of fighting among the Bosniak, Croat, and Serb factions, approximately 100,000 deaths and with nearly half of the population displaced by war,<sup>40</sup> a NATO military intervention eventually compelled the warring parties to negotiations, which resulted in the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled on 21 November 1995 in Dayton, Ohio and signed the following month in Paris.<sup>41</sup>

The Dayton Agreement imposed peace on the three warring ethnic groups and created the Republic of Bosnia and Herzegovina. In addition to a general cessation of hostilities,<sup>42</sup> regional stability and arms control measures,<sup>43</sup> and internationally-recognised borders,<sup>44</sup> the peace settlement established a unique political order in Bosnia. Democratic values were circumscribed by internationally-protected liberal values, in particular human rights, such that at the same time a sovereign state was created, many of its political choices were predetermined, inviolable, and unalterable for all time. Three pillars – democratic (primary political decision-makers are elected by the people they govern), liberal (human rights enshrined as inviolable and unalterable in the Constitution), and international (OHR

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40. See Research and Documentation Center, *Human Losses in Bosnia and Herzegovina 1991-95* (June 2007).

41. For some of the historical accounts of this period, see James Dobbins, et al., *America's Role in Nation-Building: From Germany to Iraq* (Santa Monica, CA: Rand, 2003); Ivo H. Daalder, *Getting to Dayton: The Making of America's Foreign Policy* (Washington, DC: Brookings Institution Press, 2000); Richard Holbrooke, *To End a War* (New York: Random House, 1998).

42. The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A: Agreement on the Military Aspects of the Peace Settlement.

43. *Ibid.*, Annex 1B: Agreement on Regional Stabilization.

44. *Ibid.*, Annex 2: Inter-Entity Boundary Line and Related Issues.

and international judges) – constituted the fundamental political structure in Bosnia that arose out of the ashes of war and the terms of peace. The final result could most aptly be described as a liberal international democracy.

First and foremost, the Constitution of Bosnia and Herzegovina, included in Annex 4 to the Dayton Agreement, established democracy as the primary process for political decision-making. Its Preamble recognised that ‘democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society’ and committed itself to ‘sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina.’ Article I(2) of the Constitution declared that ‘Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.’ The Constitution gave rise to a Parliamentary Assembly – composed of the House of Peoples, with equal representation of five delegates each of the Bosniak, Croat and Serb ethnic groups – and a House of Representatives of 42 delegates. Moreover, it created a Presidency to consist of one member from each group and empowered each member with a veto over any legislation. However, such state-building provisions under the Constitution did not necessitate nation-building, as the Preamble acknowledges the existence of ‘Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina’ within the territory of the new state. Moreover, the Constitution recognises that the new State institutions coexist with democratic institutions established at the level of two Entities: the Croat-Bosniak Federation of Bosnia and Herzegovina (51 percent of the territory) and the Republika Srpska (49 percent of the territory). Each Entity was granted substantial autonomy such as competencies over taxation, commerce, and general legislation, whereas the State was granted authority over matters including foreign policy, external trade, customs, monetary policy, and international and inter-Entity criminal law enforcement.

Building on the democratic process established in Article I, Article II set specific horizons regarding human rights. Notwithstanding any decision of the Bosnia-Herzegovinian democratic institutions or the entire Bosnian people, the Constitution provided that ‘the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bos-

nia and Herzegovina.<sup>45</sup> Additionally, these rights ‘have priority over all other law.’<sup>46</sup> Such supremacy and direct applicability of the European Convention became a permanent feature of the Bosnian political fabric. Moreover, the Constitution immediately bound the new state with fifteen other international human rights agreements.<sup>47</sup> Lest a future Bosnian government decided to lift any of these restrictions, Article X prohibited in unequivocal terms amending any of the human rights provisions of Article II:

- II. Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

These binding human rights agreements were not a temporary or extraordinary measure to be reconsidered later by a sovereign and democratic Bosnia-Herzegovina. They reflected a permanent command from the international community regarding the legitimate conduct of any democratic institution within Bosnia.

Expressing commitment to human rights regimes would be of little consequence if it was not enforced in practice. In this regard, several institutions were created. A Commission on Human Rights, consisting of the Office of the Ombudsman and the Human Rights Chamber, was established to ‘assist in honouring their obligations’<sup>48</sup> under the human rights agreements. Additionally, the President of the European Court of Human Rights was given power to appoint three of the nine members of the Bosnian Constitutional Court, unless the Parliamentary Assembly determined otherwise after a period of five years.<sup>49</sup> Finally, Annex 10 of the Dayton Agreement established the OHR, which would ‘mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement.’<sup>50</sup> Given that under Article V ‘the final authority in theater regarding interpretation of this

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45. *Ibid.*, Annex 4: Constitution of Bosnia and Herzegovina, Article II(2).

46. *Ibid.*

47. *Ibid.*, Annex 4: Constitution of Bosnia and Herzegovina, Annex 1: Additional Human Rights Agreements To Be Applied In Bosnia And Herzegovina.

48. *Ibid.*, Annex 6: Agreement on Human Rights, Article II(1).

49. *Ibid.*, Article VI.

50. *Ibid.*, Annex 10: Agreement on Civilian Implementation, Article I(2).

Agreement on the civilian implementation of the peace settlement,' the High Representative became the international community's (and *de facto* European) executive in Bosnia charged with implementing its will even if contrary to domestic pressures. As discussed in section 3, this authority was interpreted by the PIC in December 1997 to include, among other things, taking binding decisions, as the HR judges necessary, to enact laws and remove officials.

Within this authorised process of a liberal international democratic order, tensions among the building blocks became quickly evident. The democratic process failed to function effectively for two years after the war. With wartime leaders back in power and paramilitary groups threatening refugees and intimidating ethnic minorities, internal Bosnian political forces were pulling the state apart. Given that under the Constitution each representative of the three ethnic groups in the Presidency had veto power over any legislation, there was inherent friction in the ability of the Bosnian political institutions to reach decisions. For instance, two years into its existence, Bosnia still lacked even basic attributes of statehood such as a common passport, currency, flag, anthem, or car registration plates, with the Bosnian political actors unable to reach agreement on these issues. Thus, the Constitution, which arose out of a stalemated war without a clear military victor among the three ethnic groups, helped preserve peace through inclusive power-sharing such that no ethnic group could be overpowered by the other groups, but *ipso facto* prevented political progress by entrenching the *status quo*.

After the 1997 conference in which the HR's Bonn Powers were specified, the HR quickly enacted a series of decisions imposing a law on citizenship, the designs of a common flag and currency, creation of an airport in Mostar, and foreign direct investment.<sup>51</sup> The legitimacy of these initial decisions was precarious, since it was unclear, for instance, how flag and currency designs related to preserving peace or protecting human rights under the Dayton Agreement. More disturbingly, there were few clear constraints on the HR's power, which 'would make a coup-rigging CIA operative envious' and which risked becoming perceived as absolute; as one aide

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51. *Decision imposing the Law on Citizenship of BiH*, 16 December 1997; *Decision imposing the Law on the Flag of BiH*, 3 February 1998; *Decision establishing an Interim Arrangement to run the Mostar Airport*, 1 March 1998; *Decision imposing the Draft Law on the Policy of Foreign Direct Investment in BiH*, 5 March 1998; *Decision imposing the design of bank notes*, 27 March 1998; *Decision on the flying of the flag of BiH*, 2 April 1998.

in the OHR conceded: ‘we don’t know what we can’t do.’<sup>52</sup> Indeed, there were few if any justifications provided in these decisions, whose personal letter format read like arbitrary diktat rather than authoritative decision.

Yet, these ‘interventions [were] popular among the silent majority of Bosnians who prefer[ed] western rule to the lawless ways of the nationalist parties.’<sup>53</sup> Moreover, the decisions were accepted by the State and Entity governments towards which they were directed. Even in their most extreme form – removal of elected officials – the countermajoritarian decisions under the Bonn Powers were routinely complied with.

Periodically, there have been attempts, unfortunately unsuccessful, to reach a new political compromise among the three ethnic groups by enacting constitutional reform and forging an institutional structure more conducive to reaching decisions without having to rely on the HR to break political deadlock. The most recent initiative in October 2009 by the EU and US to broker a political compromise among the Bosnian parties also failed in creating a self-sustaining order. Each time, the *status quo* could not be overcome, since it was self-preserving under the Constitution and the power dynamics among the three ethnic groups have not changed significantly since the Dayton Peace Agreement. Moreover, internal deadlock within Bosnia never led to self-destruction of the political structure since the HR’s decisions provided a release valve that would sustain the Dayton order. Finally, the same vice of the Bosnian Constitution that was constituted by veto power for each ethnic group also comprised the Constitution’s virtue, insofar as it precluded dominance of one group by the others.

The Dayton order, including the friction-prone constitutional structure, was a direct consequence of a lack of a clear internal victor at the end of the Bosnian war. Though it is lamentable that greater internal cohesion has not been reached within Bosnia, and that the three ethnic groups have not yet coalesced into an effective and self-sustaining political entity, the current political compromise dating from Dayton is certainly superior to an order wherein a particular group would have been able to exploit the others based on its more extensive power base or a new order created out

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52. ‘Bosnia. The protectorate’, *The Economist*, 14 February 1998.

53. *Ibid.*

of partition that would most likely involve significant bloodshed. Thus far, until a constitutional breakthrough is reached – which for the time being is unlikely – the HR’s Bonn Powers have provided the best solution to Bosnia’s internal problems compared to all feasible alternatives. However, as discussed in the following section, the use of the Bonn Powers has created its own problems and critiques that need to be addressed.

### 3. Bonn Powers

Though the international institutional structure in Bosnia is a matter of some complexity, the EU has always had the lead responsibility for civilian implementation of the Dayton Peace Agreement through *de facto* control of the OHR. Pursuant to agreement and tradition, Europeans head the OHR,<sup>54</sup> even though formally it is also responsible to the PIC. The choice of High Representative was an issue of some contention between the EU and US at Dayton. Ultimately, however, according to Ivo Daalder (then at the US National Security Council and now the US Ambassador to NATO), ‘the Europeans made clear that if Washington expected them to pay the lion’s share of reconstruction and other economic assistance, the civilian coordinating effort would have to be in Europe’s hands.’<sup>55</sup> Indeed, while the United States has opposed the appointment of at least three nominees for the OHR (out of the seven individuals to have held the post), Europeans maintained their original choices and thus have retained *de facto* control over the OHR. Since 2002, the double-hatted appointment of the High Representative as the EUSR<sup>56</sup> has confirmed this underlying chain of command. Located in the same headquarters close to the centre of Sarajevo,<sup>57</sup> the OHR and EUSR have many of the same staff members, who are formally double-hatted to serve under both entities. Moreover, most of the current bases of power exercised by the HR/SR flow from the EU: direct aid provided by the European Commission, the military presence of EUFOR, trade and investment from the EU to Bosnia, advice and training provided by the EU Police Mission, and the ultimate prospect of Bosnian accession into the EU with its associated source of benefits in the form of enhanced power, wealth, security, and other interests.

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54. Carl Bildt (1996-1997); Carlos Westendorp y Cabeza (1997-1999); Wolfgang Petritsch (1999-2002); Paddy Ashdown (2002-2006); Christian Schwarz-Schilling (2006-2007); Miroslav Lajčák (2007-2009); and Valentin Inzko (2009-present). Carl Bildt also carried the title of EU Special Envoy.

55. Daalder, *op. cit.* in note 41, at p. 157; see also Simon Chesterman, ‘Ownership in Theory and Practice,’ in David Chandler (ed.), *Statebuilding and Intervention: Policies, Practices and Paradigms* (London: Routledge, 2009) (‘[T] here was an implicit agreement among the guarantors at Dayton that the High Representative would always be European. . . .’).

56. For a comprehensive discussion of the role of EU Special Representatives in general, see Giovanni Grevi, ‘Pioneering foreign policy: the EU Special Representatives’, *Chaillot Paper* no. 106 (Paris: EUISS, October 2007); see also Cornelius Adebahr, ‘Organizational Learning in European Foreign Policy: The Role of the EU Special Representatives’, Working Papers no. 01/2008, Institute of European Studies and International Relations, Comenius University, Bratislava.

57. For power-implications of public buildings and their geographical locations, see Harold D. Lasswell and Merritt B. Fox, *The Signature of Power: Buildings, Communication, and Policy* (New Brunswick, NJ: Transaction Publishers, 1979).

Consequently, the EU is the leading international actor in Bosnia and will largely determine the fate of the OHR and the Bonn Powers in Bosnia.

The Bonn Powers were first recognised to be within the High Representative's authority under the Dayton Agreement by the PIC at its Bonn Conference in December 1997 after two years of post-war tension when Bosnia was in danger of renewed instability and violence. Due to the 'intransigence of the former warring parties during the first two years,' the PIC 'welcome[d] the High Representative's intention to use his final authority in theatre regarding interpretation of the [Dayton Agreement] in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary.'<sup>58</sup> Within his inherent authority under the Dayton Agreement, the PIC noted that the HR could determine the 'timing, location and chairmanship of meetings of the common institutions,' legislate 'interim measures to take effect when parties are unable to reach agreement,' and execute 'other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina. . . . Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.'<sup>59</sup> The United Nations Security Council, acting under Chapter VII of the UN Charter, subsequently endorsed this interpretation of the HR's authority under the Dayton Agreement.<sup>60</sup>

While the Bosnian Serb member of the tripartite Bosnian Presidency quickly objected to this type of "alarming and humiliating" pressure' from the international community,<sup>61</sup> the Bosnian Muslim ('Bosniak') and Bosnian Croat members of the Presidency welcomed the Bonn Powers.<sup>62</sup> Within six months, however, even the initially-supportive Bosniak President sent a letter to the OHR protesting against a speech delivered by the

58. Peace Implementation Council Bonn Conclusions, 10 December 1997, available at: [www.ohr.int/print/?content\\_id=5182](http://www.ohr.int/print/?content_id=5182).

59. *Ibid.*, Art. I, Art. XI(2).

60. United Nations Security Council Resolution 1174 (S/Res/1174), 15 June 1998.

61. 'Bosnian Serb leader protests about "alarming and humiliating" pressure', *BBC Summary of World Broadcasts*, 11 December 1997; 'Bosnian Serb leader against widening international envoy's power', *BBC Summary of World Broadcasts*, 13 December 1997.

62. 'Bosnian president threatens to withdraw recognition of Serb Republic', *BBC Summary of World Broadcasts*, 11 December 1997 ('In principle we do accept a wider mandate' for the HR.); 'Bosnian Croat leader agrees with extended mandate for international coordinator', *BBC Summary of World Broadcasts*, 12 December 1997.

deputy HR, which praised a particular deceased Croatian politician as a model for Bosnians to emulate. Notably, ‘the startling tone of [the] letter betrayed the feeling held by many Bosnians that [the OHR] is taking over the running of their country.’<sup>63</sup> During Ashdown’s particularly active term as HR/SR between 2002 and 2006, the director of the European Stability Initiative described his office as ‘imperial,’ insofar as it controlled ‘the commanding heights of what amounts to a system of “indirect rule,”’ over a country ‘where expatriates make major decisions, where key appointments must receive foreign approval, and where key reforms are enacted at the decree of international organizations.’<sup>64</sup> Thus, various analysts and academics have described the HR/SR’s decisions as ‘ad hoc,’ ‘arbitrary,’ or even ‘dictatorial,’ with repeated calls for an end to the so-called ‘international protectorate.’<sup>65</sup>

Others argue that the Bonn Powers resulted from a deteriorating security and human rights situation in Bosnia that implicated international interests. During the two years after the end of the war, the country was on the brink of collapsing into the previous vicious cycle of conflict and violence. Repeatedly, Human Rights Watch reported that former warlords and paramilitary groups were intimidating and harassing ethnic minorities, refugees were being blocked from returning to their homes, and various media outlets were fanning the flames of tension and inciting outright violence.<sup>66</sup> Moreover, the first national elections in September 1996 brought into power former wartime nationalistic leaders, who were more interested in pursuing secessionist goals along ethnic lines than building the new Bosnian state. For instance, the Serb and Croat members of the Bosnian Presidency had ‘often called for their enclaves to secede, with the

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63. ‘Bosnia’s president snaps at mediator’s “arrogance”’, *Agence France Presse*, 7 May 1998.

64. Gerald Knaus and Felix Martin, *Journal of Democracy*, vol. 14, no. 3, 2003, p. 62.

65. See, for example, European Stability Initiative, *The worst in class: How the international protectorate hurts the European future of Bosnia and Herzegovina* (2007); Stefano Recchia, ‘Beyond international trusteeship: EU peacebuilding in Bosnia and Herzegovina’, *Occasional Paper* no. 66 (Paris: EUISS, February 2007); David Chandler, ‘State-building in Bosnia: the limits of “informal trusteeship”’, *International Journal of Peace Studies*, vol. 11, no. 1, 2006, p. 17 (‘The pattern of *ad hoc* and arbitrary extensions of international regulatory authority was initially set by the PIC itself as it rewrote its own powers and those of the High Representative at successive Peace Implementation Council meetings.’); Ralph Wilde, ‘Representing International Territorial Administration: A Critique of Some Approaches’, *European Journal of International Law*, vol. 15, 2004, pp. 87–88 (‘. . . OHR in Bosnia and Herzegovina is criticized for seeking to promote democracy through dictatorial measures . . .’); European Stability Initiative, ‘After the Bonn Powers – Open Letter to Lord Ashdown’, 16 July 2003; David Chandler, *Bosnia: Faking Democracy After Dayton* (London–Sterling, VA: Pluto, 2000).

66. See, for example, Human Rights Watch, *Politics of Revenge: The Misuse of Authority in Bihac, Cazin, and Velika Kladusa*, August 1997; Human Rights Watch, *The Continuing Influence of Bosnia’s Warlords*, December 1996; Human Rights Watch, *Non-Compliance with the Dayton Accords: Ongoing Ethnically-Motivated Expulsions and Harassment in Bosnia*, August 1996.

area controlled by Croats joining Croatia and the Bosnian Serb Republic joining Belgrade.<sup>67</sup> In this context, the PIC opened its conclusions at the Bonn Conference by ‘deplor[ing] the fact that the protection of human rights in Bosnia and Herzegovina is still inadequate’ and ‘reiterat[ing] that the extensive list of human rights obligations, which form part of the Constitution of Bosnia and Herzegovina and the Peace Agreement, must be respected and that current laws must be reviewed to determine their compatibility with international standards of human rights.’<sup>68</sup> Thus, the origins of the Bonn Powers rested on the necessity to maintain the peace and enforce the human rights guaranteed under the Dayton Agreement, in order to prevent a regression to the dark days of ethnic conflict and mass murder. Over time, the Bonn Powers have been viewed as the ‘glue’ that holds Bosnia together and overcomes internal political deadlock<sup>69</sup> and in a March 2009 report on Bosnia, the International Crisis Group advised that some form of the Bonn Powers may still be necessary for the foreseeable future given continuing challenges in the country.<sup>70</sup>

These conflicting opinions among analysts and activists have reflected internal ambiguity within the PIC over the past three and a half years as to the need for the Bonn Powers. Emphasising local ownership and Bosnia’s transition to Euro-Atlantic integration, the PIC announced in June 2006 plans to close down the OHR, along with the Bonn Powers, within a year.<sup>71</sup> Eight months later, however, it was compelled to reverse its decision and extend the deadline each year subsequently upon review of the unstable situation on the ground.<sup>72</sup> Since then, the conditions have remained unacceptable. For instance, it observed in June 2007 that the ‘political situation in Bosnia and Herzegovina is of grave concern,’ given ‘a severe deterioration in the political atmosphere, as well as threats by some non-state

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67. Chris Hedges, ‘3 Leaders of New Bosnia: Pulling in 3 Directions’, *The New York Times*, 18 September 1996.

68. PIC Bonn Conclusions, 10 December 1997, available at: [www.ohr.int/pic/default.asp?content\\_id=5182](http://www.ohr.int/pic/default.asp?content_id=5182).

69. ‘Bosnian Federation analysts comment on Peace Implementation Council meeting’, *BBC Worldwide Monitoring*, 26 November 2008 (quoting Prof. Vjeko Domljan from the University of Mostar).

70. International Crisis Group, ‘Bosnia’s Incomplete Transition: Between Dayton and Europe’, *Europe Report* no. 198, 9 March 2009. In its most recent report of 12 November 2009, ICG advises closing the OHR and maintaining a ‘strengthened EUSR,’ without Bonn Powers *per se* but with authority to declare a party in breach of the Dayton Agreement. See International Crisis Group, ‘Bosnia’s Dual Crisis’, *Europe Briefing* no. 57, 12 November 2009.

71. Communiqué of the PIC Steering Board, 23 June 2006, available at: [www.ohr.int/pic/default.asp?content\\_id=37503](http://www.ohr.int/pic/default.asp?content_id=37503).

72. Communiqué of the PIC Steering Board, 27 February 2007, available at: [www.ohr.int/pic/default.asp?content\\_id=39236](http://www.ohr.int/pic/default.asp?content_id=39236).

actors to take security into their own hands.<sup>73</sup> Similarly, in November 2008 it ‘expresse[d] its deep concern about the frequent challenges to the constitutional order of BiH and, in particular, to the sovereignty and territorial integrity of BiH.’<sup>74</sup> In June 2009, the PIC continued to ‘express its concern and disappointment with the level of progress’ in Bosnia and insisted that ‘[s]tatements and actions challenging the sovereignty and constitutional order of BiH . . . display open disrespect for the fundamental principles of the GFAP, are unacceptable and have to stop.’<sup>75</sup> In November 2009, it stressed disturbingly that ‘personal attacks and threats of legal action against the High Representative and his staff are unacceptable.’<sup>76</sup> In the most recent statement, the PIC Ambassadors stated that the international community ‘strongly support[s] the High Representative’s actions, decisions and his ability to use his authorities to ensure full respect for the Dayton Peace Agreement ... that the RS Government’s positions of 14 December 2009 and the RS National Assembly Conclusions of 28 December 2009 violate the Dayton Peace Agreement [and that the PIC] in its entirety is clear that the authority of the High Representative to make binding decisions directly derives from Annex 10 of the Dayton Peace Agreement as endorsed by the Peace Implementation Council and reconfirmed by several United Nations Security Council resolutions adopted under Chapter VII of the United Nations Charter.’ The statement ‘also emphasize[d] to the Republika Srpska authorities that they cannot substitute their own interpretation of the Peace Agreement to that of the High Representative’ and ‘remind[ed] the Republika Srpska authorities that under the Dayton Peace Agreement, the High Representative is the final authority in theatre regarding the interpretation of the civilian implementation of the peace settlement.’<sup>77</sup>

Notwithstanding these disconcerting assessments, closure of the OHR and maintenance of a ‘Bonn-less’ EUSR have remained the EU’s objective and mantra, with the OHR-EUSR transition itself becoming the teleologi-

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73. Declaration by the Steering Board of the Peace Implementation Council, 19 June 2007, available at: [www.ohr.int/pic/default.asp?content\\_id=39997](http://www.ohr.int/pic/default.asp?content_id=39997).

74. Communiqué of the Steering Board of the Peace Implementation Council, 20 November 2008, available at: [www.ohr.int/pic/default.asp?content\\_id=42667](http://www.ohr.int/pic/default.asp?content_id=42667).

75. Communiqué of the Steering Board of the Peace Implementation Council, 30 June 2009, available at: [www.ohr.int/pic/default.asp?content\\_id=43665](http://www.ohr.int/pic/default.asp?content_id=43665).

76. Communiqué of the Steering Board of the Peace Implementation Council, 19 November 2009, available at: [http://www.ohr.int/pic/default.asp?content\\_id=44119](http://www.ohr.int/pic/default.asp?content_id=44119).

77. Statement by the Peace Implementation Council Steering Board Ambassadors, 8 January 2010, available at: [http://www.ohr.int/pic/default.asp?content\\_id=44410](http://www.ohr.int/pic/default.asp?content_id=44410).

cal objective rather than an element of a successful strategy in Bosnia. This planned disengagement has driven dwindling resource commitments and reduced the EU's influence over events in Bosnia. The EU's military mission has declined significantly, from 6,300 troops in EUFOR at the start of its mission when it took over from NATO in December 2004 to 2,000 as of September 2009,<sup>78</sup> with debates on further cuts to perhaps as few as 200 soldiers.<sup>79</sup> In 2009, the OHR's total budget was a mere €11.3 million, with 53 percent contributed by the EU, and its staff consisted of 34 international officials and 189 national contractors, with staffing plans for the EUSR of merely 80. This decrease in EU leverage in Bosnia has coincided with a greater demand for EU influence to overcome challenges to the Dayton Agreement. Thus, there is a clear disconnect between the current strategy and the actual circumstances in Bosnia.

Since it would be impossible to examine in detail each of the decisions pursuant to the Bonn Powers within the scope of this paper, the following section provides an overview of all countermajoritarian<sup>80</sup> decisions to show which categories of decisions can be justified from the perspective of the Dayton Agreement.

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78. See EUFOR Althea, available at: [http://www.euforbih.org/eufor/index.php?option=com\\_content&task=view&id=145&Itemid=62](http://www.euforbih.org/eufor/index.php?option=com_content&task=view&id=145&Itemid=62).

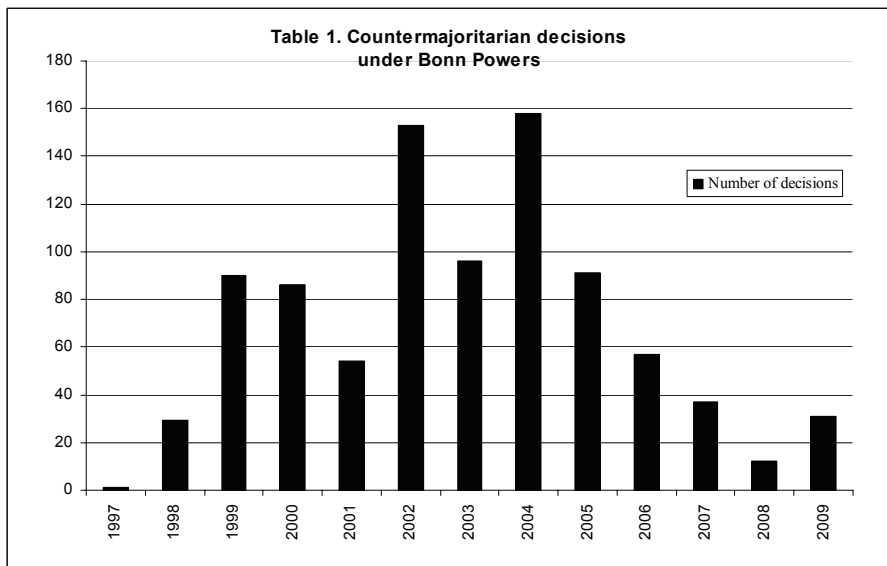
79. See 'ESDP/Bosnia: Transformation of Althea Mission Under Debate', *Europolitics*, 23 March 2009; 'Bosnia's Future: A Tearing Sound', *The Economist*, 2 April 2009.

80. See p. 18 of this paper.

## 4. Countermajoritarian decisions

Viewed holistically, it becomes apparent that the HR/SR's numerous interventionist decisions totalling 895 over 13 years are not arbitrary or capricious, but instead constitute a larger political order oriented towards certain organising principles. Since there are clear patterns of decision across time and public acceptance of these decisions, it is possible to identify an emerging political order and sources of legitimacy.

As the following tables demonstrate, use of the Bonn Powers has fluctuated over time and across different categories of decisions.<sup>81</sup> Table 1 shows that Bonn Powers began to be used with greater frequency in 1999, following the previous year's divisive elections, and reached their peak in 2002 and 2004 with nearly 160 countermajoritarian decisions each year. They decreased sharply since the 2006 PIC announcement to close the OHR, though the 2009 number to date is nearly double the 2008 total.



In terms of types of decisions, the most common were removals and suspensions from office and decisions in the field of judicial reform (about

81. All source data is available at: [www.ohr.int](http://www.ohr.int).

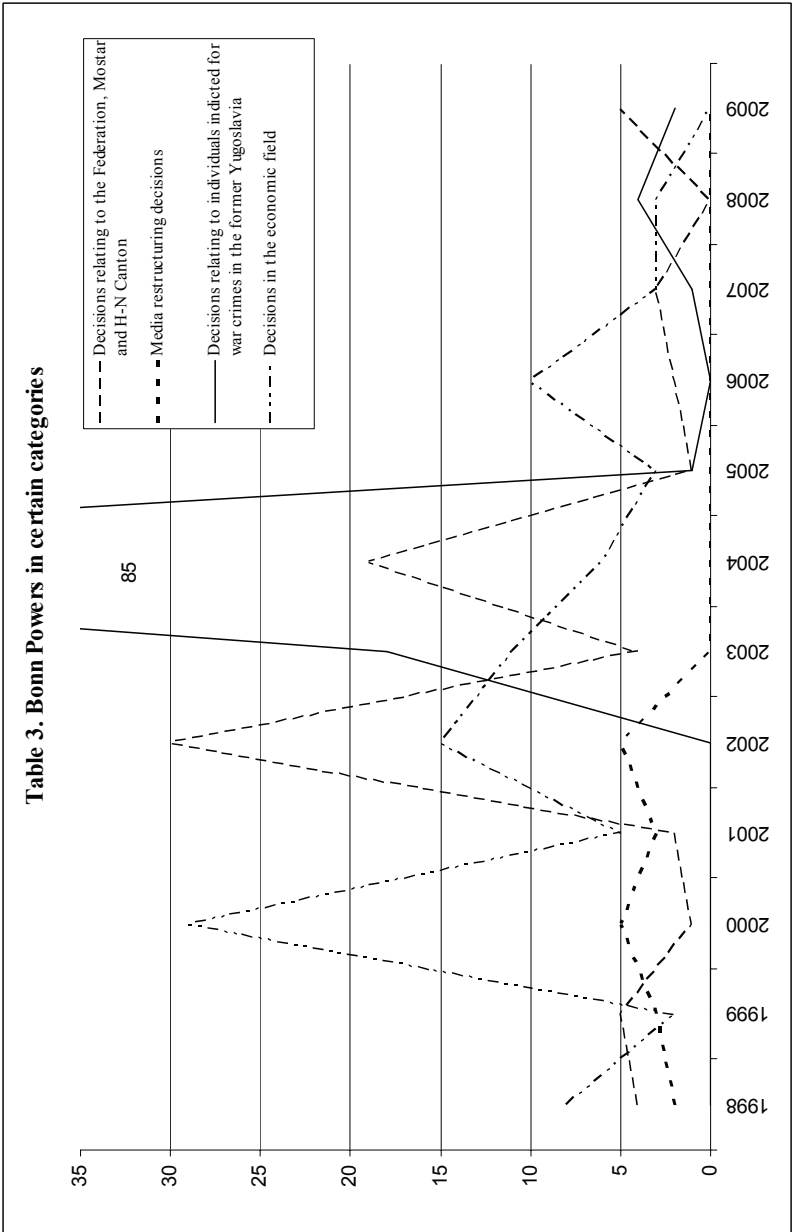
**Table 2. Distribution by category over time**

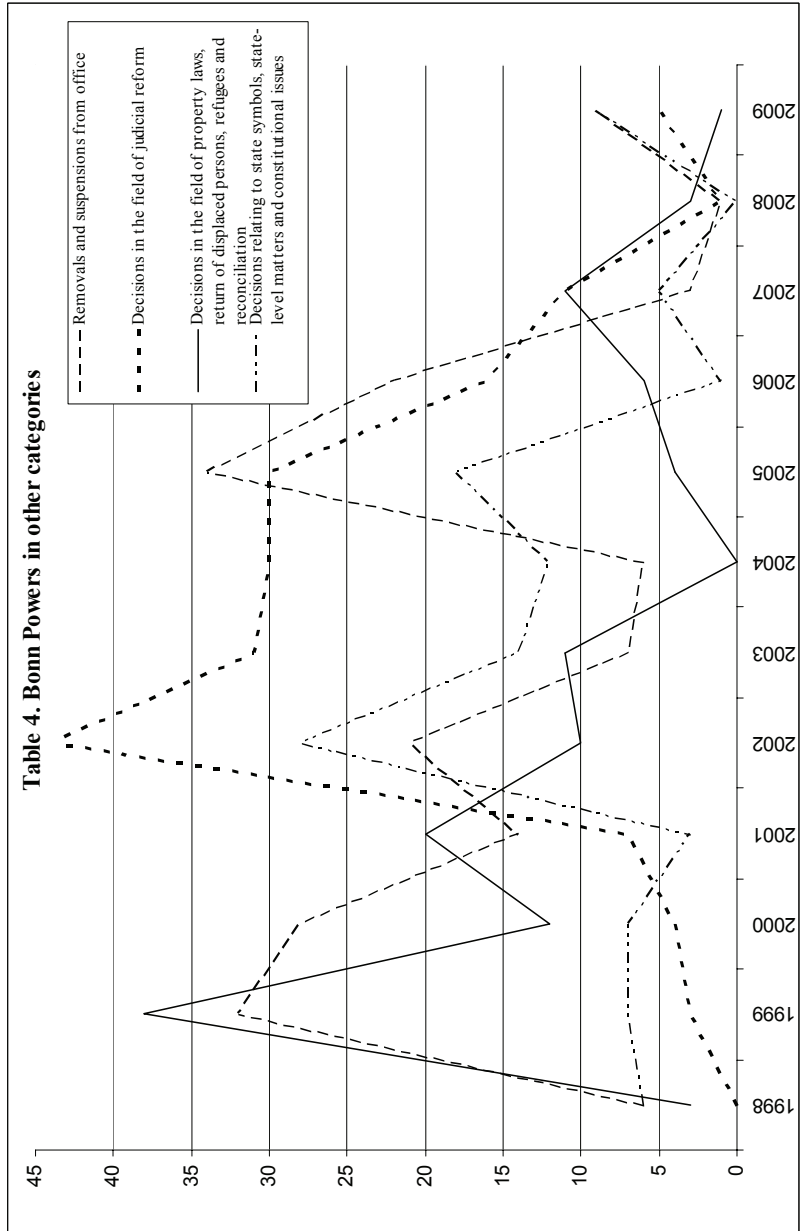
Year	Removals and suspensions from office	Decisions in the field of judicial reform	Decisions in laws, return of displaced persons, and reconciliation	Decisions relating to state symbols, state-level matters, and constitutional issues	Decisions relating to individuals indicted for war crimes in the former Yugoslavia	Decisions in the economic field	Decisions relating to the Federation, Media Mostar and restructuring H-N Canton decisions	Total
1997	0	0	0	1	0	0	0	1
1998	6	0	3	6	0	8	4	29
1999	32	3	38	7	0	2	5	90
2000	28	4	12	7	0	29	1	86
2001	14	7	20	3	0	5	2	54
2002	21	44	10	28	0	15	30	153
2003	7	31	11	14	18	11	4	96
2004	6	30	0	12	85	6	19	158
2005	34	30	4	18	1	3	1	91
2006	22	16	6	1	0	10	2	57
2007	3	11	11	5	1	3	3	37
2008	1	1	3	0	4	3	0	12
2009	9	5	1	9	2	0	5	31
Total	183	182	119	111	111	95	76	895
<i>as % of total</i>	<i>20.45%</i>	<i>20.34%</i>	<i>13.30%</i>	<i>12.40%</i>	<i>12.40%</i>	<i>10.61%</i>	<i>8.49%</i>	<i>2.01%</i>

20 percent each). Decisions in the economic field, decisions relating to state symbols, state-level matters and constitutional issues, decisions relating to individuals indicted for war crimes in the former Yugoslavia, and decisions in the field of property laws, return of displaced persons and refugees and reconciliation constituted between 10 and 14 percent of decisions each. The remaining 10 percent of decisions was divided between decisions relating to the Federation, Mostar, and H-N Canton (8 percent) and Media restructuring decisions (2 percent).

Overall, the perceived need for and exercise of the Bonn Powers has declined over time. In particular, four categories have witnessed only 31 countermajoritarian decisions by the HR/SR over the past three and a half years, as shown in Table 3 (see page 38). Decisions relating to individuals indicted for war crimes in the former Yugoslavia peaked in 2004 and have inevitably declined over time as war criminals are arrested, tried, convicted and imprisoned. Similarly, decisions with respect to discrete issues such as Mostar and the Federation may have been one-off problems without need for recurring involvement. Decisions relating to the restructuring of the media could present ongoing issues related to the democratic process and human rights that would require international intervention, but have not been the subject of concern since 2002 and thus are unlikely to present problems in the future. Finally, relatively few decisions have been taken in the economic field within the last three and a half years and, in any event, the decisions appear to be difficult to justify or explain from the perspective of authorised process under the Dayton Agreement in terms of preserving the peace, promoting the democratic process or protecting human rights in Bosnia.

However, there have been 104 decisions under four other categories since 2006 – nearly three-quarters of which consisted of removals and suspensions from office and decisions in the field of judicial reform – implying that there is a perceived need for continued international intervention in Bosnian democratic politics. In general, these categories of decision appear legitimate from the perspective of the authorised process under the Dayton Agreement, as a necessary last resort to preserve the peace, protect human rights, and promote the democratic process in Bosnia.





Consider the recent HR/SR decision to repeal a RS National Assembly law claiming that the Bosnian State had stolen 63 competencies, which should properly belong to Republika Srpska.<sup>82</sup> Had the RS law remained valid, it would have constituted a clear source of conflict between the State and the Entity, leading to significant instability and potential violence. To minimise this risk and keep the peace, it can be argued, the HR/SR was justified in issuing his decision.

Why are the Bonn Powers in Bosnia generally legitimate? Applying the theory developed by Harold Lasswell and Myres McDougal, as discussed in section 1, they are consistent with the authorised process established at Dayton and accepted by the effective actors to serve their common interests. From the perspective of local Bosnian populations, EU protection of human rights serves their interests even though at times it may be counter-majoritarian. Most Bosnians want peace to be kept, their human rights to be safeguarded, and to share in the benefits of a normal democratic process. Notwithstanding varying degrees of support for specific counter-majoritarian decisions, Bosnians have traditionally expressed support for the political order and the HR created under the Dayton Agreement.<sup>83</sup> Most recent polls show that 60 percent of Bosniaks and 59 percent of Croats still consider the OHR/EUSR necessary, though 63 percent of Serbs disagree.<sup>84</sup> Weighted according to the ethnic proportions of the population in Bosnia, these polls show that a plurality of all Bosnians consider the OHR/EUSR necessary. Moreover, even the unsatisfactory level of only 40 percent public trust in EU institutions in Bosnia registered in 2008 was significantly better than the 67 percent public dissatisfaction rate with respect to the Bosnian government or the staggering 79 percent level expressing that political

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82. *Decision Repealing the Conclusions of the Republika Srpska National Assembly No. 01-787/09 and No. 01-788/09 adopted on 14 May 2009*, 20 June 2009.

83. See, for example, 'Bosnian opinion poll shows SNSD is most popular party', *BBC Worldwide Monitoring*, 13 September 2005 ('As for the Office of the High Representative [OHR], the ratio of votes has not changed much: 44 per cent of respondents supported the work of this institution. However, support among Bosniaks, who have always been most favourably disposed toward the High Representative, continues to fall (currently 49.5 percent compared to 53.8 percent in February 2005). The Serbs' support for the OHR has slightly increased (currently 35.6 percent compared to 31.6 per cent in February 2005). The most interesting answers were obtained from Croat respondents: 50.8 percent supported the Office of the High Representative, which is an almost 15 percent increase compared to the previous period (35.9 percent in February 2005).'); 'We want to achieve legislation stamped "Made in Bosnia"', *Frankfurter Allgemeine Zeitung*, 10 July 2003 ('Opinion polls consistently show that Bosnians support these powers and think they are used not too much, but if anything too little.');

'Ashdown 'running Bosnia like a Raj'', *The Guardian*, 5 July 2003 ('... [O]pinion polling carried out for [the OHR] shows broad support for the use of [Bonn] powers when needed to force the pace of reform.');

'Bosnia. The protectorate', *The Economist*, 14 February 1998 (HR's 'have so far been popular among the silent majority of Bosnians who prefer western rule to the lawless ways of the nationalist parties'.).

84. See, for example, Gallup Balkan Monitor, *Perceptions of the EU in the Western Balkans*, June 2009.

parties and politicians do not represent the political views of respondents.<sup>85</sup> Thus, the Dayton order with the Bonn Powers, has proven empirically to be remarkably stable over time, even though it has faced periodic resistance from some parts of Bosnian society and is now severely tested by the Republika Srpska authorities. Indeed, without the Bonn Powers, the Dayton order might have collapsed long ago, as internal political deadlock would have eventually become unsustainable. However, its current challenges may be more related to an apparent lack of confidence on the part of the EU in the Bonn Powers, rather than intense opposition from Republika Srpska.

From the perspective of the EU, its interventionist presence in Bosnia serves its interests by keeping the peace and precluding the need for future humanitarian intervention, stabilising the country and preventing refugee flows, consolidating its democratic development and foreclosing the emergence of a criminal state or terrorist safe haven, and enlarging (and thereby further validating) the European model of governance. Its extensive presence in the country reflects these interests. However, due to a focus on other foreign policy matters over the past decade, the EU's interests in Bosnia may have become overlooked at the political leadership level.

From the perspective of other effective actors such as the United States, Russia or the United Nations, this form of EU administration in Bosnia serves their interests as it accomplishes the same general objectives they would have pursued and simultaneously reduces public demands on their resources. The United Nations Security Council has routinely expressed support for the HR and specifically for the use of the Bonn Powers in its resolutions under Chapter VII of the UN Charter. As one of the main brokers of the Dayton Agreement, the United States has consistently played an important supporting role in the civilian implementation of the peace agreement. Moreover, due to demands on its military and financial resources elsewhere, it actually prefers this role to a leadership position where it would bear primary costs and responsibilities. Even Russia, which as Serbia's historical ally has rhetorically opposed certain HR decisions,<sup>86</sup> has not used its veto in the PIC Steering Board or the UN

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85. See, for example, Gallup Balkan Monitor, *2008 Analytical Report*.

86. See, for example, 'Russia slams Bosnia peace envoy's plan to use powers for Europe integration', *BBC World-wide Monitoring*, 27 December 2007. ('Russia considers such an arbitrary and dangerous interpretation of the mandate of the High Representative [to use Bonn Powers to promote Bosnia's European Integration] by the UN Security Council to be inadmissible, the Russian Foreign Ministry said.')

Security Council to obstruct the HR/SR's role in Bosnia. Thus, because EU governance in Bosnia serves common interests of effective actors, it is legitimate and has resulted in a durable political order that faces little if any effective resistance.

From the perspective of an external analyst applying Lasswell and McDougal's theory, the Bonn Powers help maximise values of human dignity by overcoming internal deadlock within the Bosnian political structures, and thereby avoiding anarchy and chaos, being applied in a non-discriminatory manner against all violators of the Dayton Agreement, and protecting human rights as immutably enshrined in the Constitution. Nonetheless, some categories of decision, e.g. in the economic field, appear unnecessary to ensuring these basics of a political system and inconsistent with the overall Dayton order. Therefore, these types of decisions should be avoided.

Notwithstanding this analysis, there is at present a certain reluctance and discomfort on the part of the EU itself towards the Bonn Powers – the problem of legitimacy from the perspective of the political decision-maker to overcome inner doubt as identified in section 1. Indeed, the (then) EU High Representative Javier Solana recently stated that the 'Bonn Powers are not needed anymore,' because they were 'intended for a situation which is very different from the current one.'<sup>87</sup> The Bonn Powers are viewed as preventing local ownership and responsibility over decision-making, producing over-dependence on the HR/SR to reach political compromise, and fundamentally inconsistent with Bosnian accession negotiations with the EU.<sup>88</sup>

Such 'unease' with the Bonn Powers is not new<sup>89</sup> and in fact is quite understandable as there is a certain degree of tension between these powers, as they have been formulated, and traditional concepts of state sovereignty and national democracy, and thus a subject of concern for anyone committed to democratic principles, although they are consistent with the concept of liberal international democracy. What is often overlooked in

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87. Statement of 17 June 2009.

88. See, for example, International Crisis Group, 'Bosnia's Incomplete Transition: Between Dayton and Europe', *Europe Report* no. 198, March 2009.

89. See, for example, 'IWPR Views 'Increasing International Unease' Over B-H High Representative's Powers', *World News Connection*, 12 November 2004.

this one-sided balance sheet focused solely on costs are the benefits of the HR/SR in preserving the peace, promoting the local democratic process, and protecting human rights, as discussed above. In many respects, the Bonn Powers, admitted by Paddy Ashdown as constituting ‘extraordinary’ authority,<sup>90</sup> may have become ordinary, part of the constitutive fabric of post-Dayton Bosnia, and integral to the ongoing stable functioning of Bosnia.

Even decisions that are the most problematic from the perspective of traditional principles – removal of elected officials – can be empirically legitimate. Assessing in detail a sample of such decisions is the subject of the next section.

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90. Paddy Ashdown, *Swords and Ploughshares: Bringing Peace in the 21st Century* (London: Weidenfeld & Nicholson, 2007), p. 219. (‘By any standards, these powers, which are not subject to appeal or review, are extraordinary.’).



## 5. Removal decisions

In the first-ever removal decision on 4 March 1998, the HR determined that the Bosnian Croat mayor of Stolac was impeding the return of Bosniak refugees into the city and consequently must relinquish his post.<sup>91</sup> The mayor protested that ‘the Bosniak Muslim side [wa]s responsible for the failure to implement the pilot project of Muslim refugees return.’<sup>92</sup> However, he immediately complied with the decision and submitted an irrevocable resignation, and the Bosnian Croat party appointed a new mayor the following day.<sup>93</sup>

Was this decision legitimate? Given the speed and readiness with which it was complied and its general justification as a means of preserving the peace and promoting human rights through facilitating refugee return, it appears legitimate. However, the decision, delivered in letter format addressed from the HR to a specific individual, ran the risk of being perceived as arbitrary, rather than reflecting a general rule applicable to all. Instead of presenting clear logical links to specific provisions under the Dayton Agreement, it was communicated in broad terms that could be interpreted as being based on limitless removal power. Thus, while the outcome may have been legitimate, the decision did not appear to be grounded in (and thereby constrained by) authorised procedures. In Lasswell and McDougal’s language, the decision could readily appear arbitrary or capricious, and therefore illegitimate.

On 16 April 1998, the HR removed the deputy mayor of Drvar for failing to provide a secure environment for the return of Serb refugees into the predominantly Croat town. The triggering event was the previous day’s murder of two elderly Serbs in Drvar, for which, the HR argued, the deputy mayor ‘must . . . be held politically responsible.’<sup>94</sup> Though the official complied with the decision, he described it as ‘unfounded’ and the Bosnian Croat party protested that the HR’s decision ‘was not done in a principled manner, since similar demands were not made when Croats were killed.’<sup>95</sup> Within

91. *Decision removing Pero Raguz from his position as Mayor of Stolac*, 4 March 1998.

92. ‘Bosnian Croat Mayor Says Muslims Responsible for Problems in Stolac’, *BBC Worldwide Monitoring*, 4 March 1998.

93. ‘Main Bosnian Croat Party Puts Up New Candidate for Stolac Mayor’, *BBC Worldwide Monitoring*, 5 March 1998.

94. *Decision removing Drago Tokmakcija from his position as Deputy Mayor of Drvar*, 16 April 1998.

95. See, for example, ‘Bosnia: Drvar Official Says His Dismissal ‘Unfounded’,’ *BBC Worldwide Monitoring*, 18 April 1998; ‘Bosnian Croat Official Criticizes Foreign Official’s Intervention in Murder Case’, *BBC Worldwide Monitoring*, 18 April 1998.

a few days, large public protests erupted in Drvar, with Croats setting fire to international police offices, to the extent that the NATO-led Stabilisation Force had to take control of the town to maintain order and stability.<sup>96</sup> However, the Croat member of the State Presidency and the Croat Vice-President of the Federation immediately condemned these incidents and called for 'Drvar residents to calm down and refrain from demonstrations and violence and to respect public order', and peace was quickly restored.<sup>97</sup>

The legitimacy of this decision was tenuous. It was justified with broad authority as serving to implement the Dayton Agreement and delivered in a personalised letter format, which raised the same concerns of overreach and arbitrariness associated with the first removal decision. Moreover, it was an immediate reaction to a specific crime before a full investigation was conducted and suspects arrested,<sup>98</sup> rather than a generalisable decision based on the legitimate objective of facilitating the return of refugees. It was protested against not because it was undemocratic or because the deputy mayor was elected, but because it was perceived as neither principled nor even-handed. Even if its outcome was appropriate, the process by which the decision was reached left much to be desired.

The lowest degree of legitimacy was associated with the removal of a member of the Republika Srpska National Assembly<sup>99</sup> for stating that NATO 'air strikes on Yugoslavia [in the context of the emerging crisis in Kosovo] would also affect Republika Srpska and undermine the Dayton Agreement.'<sup>100</sup> In stark contrast to the prior removals, the official and his political base defied this decision, arguing that his 'statement [wa]s no different from numerous similar statements recently made by other representatives of political parties and organizations in the Serb Republic.'<sup>101</sup>

96. See, for example, 'NATO Takes Control of Bosnian Town of Drvar', *BBC Worldwide Monitoring*, 25 April 1998.

97. See, for example, 'Bosnian Presidency Member Calls for Peace and Order in Drvar', *BBC Worldwide Monitoring*, 25 April 1998; 'Bosnian Croat Official Criticizes Foreign Official's Intervention in Murder Case', *BBC Worldwide Monitoring*, 18 April 1998.

98. See, for example, 'Bosnia: Police Detain Suspect in Murder of Bosnian Serb Couple', *BBC Worldwide Monitoring*, 17 April 1998; 'Bosnian Croat Official Criticizes Foreign Official's Intervention in Murder Case', *BBC Worldwide Monitoring*, 18 April 1998.

99. *Decision removing Dragan Čavić from his position as a member of the newly elected RS National Assembly*, 8 October 1998.

100. See, for example, 'Leading Bosnian Serb MP Banned by Envoy for Kosovo Comments', *BBC Worldwide Monitoring*, 9 October 1998. -

101. See, for example, 'Bosnian Serb Party Rejects International Mediator's Ban on Serb Politician', *BBC Worldwide Monitoring*, 10 October 1998 (quoting party's public statement); 'Bosnian Serb Official Unrepentant Over Statement on NATO Threat to Yugoslavia', *BBC Worldwide Monitoring*, 16 October 1998 (Čavić's statement: 'It was not me who was suspended, but the will of the electorate expressed in democratic elections. Democracy was suspended.').

The official maintained his position in the National Assembly and nine months later, a new HR reversed his predecessor's removal decision and in effect conceded its illegitimacy.<sup>102</sup>

The process of legitimation was significantly improved after these initial decisions in 1998. Consider the following example concerning the removal of Republika Srpska President Nikola Poplasen, the leader of the Serb Radical Party and a former paramilitary official. After nearly six months of refusing to nominate a Serb Prime Minister, who commanded a majority in the Serb National Assembly, Poplasen was dismissed by the HR on 5 March 1999. As head of state of one of the Entities, his removal potentially posed a much greater challenge to democratic principles than dismissal of town mayors. However, the decision was justified in part on the basis of actually promoting the democratic process by removing a president who was obstructing the will of the people through abuse of his ceremonial power to appoint the prime minister. The other primary rationale was preserving the peace, which was jeopardised by the political vacuum in Republika Srpska. In addition, the method of communicating the decision improved. Rather than being addressed directly to Poplasen, the decision reads as a general opinion based on specific provisions in the Dayton Agreement and an extensive discussion of the justifications.

For the first few days, Poplasen, his party, and wider political base fiercely resisted the decision, with the National Assembly enacting a resolution in support of Poplasen and the latter even suggesting acts of violence.<sup>103</sup> However, the Serb government, which initially resigned in protest against the HR's decision, changed its position and issued a statement that 'it is likely that the High Representative dismissed the President of the Republic on the basis of the assessment that certain provisions were violated and

102. *Decision to lift the ban on Dragan Čavić's activities*, 30 July 1999. See also 'High Representative Reinstates Bosnian Serb Deputy's Mandate', *BBC Worldwide Monitoring*, 2 August 1999. Subsequently, Čavić served as Republika Srpska Vice-President between 2000 and 2002 and President between 2002 and 2006.

103. See, for example, 'Bosnian Serb Radical Party Calls for Defence of Sacked President', *BBC Worldwide Monitoring*, 6 March 1999; 'Bosnian Serb President Brushes Off Peace Envoy's Threats', *BBC Worldwide Monitoring*, 6 March 1999 (Poplasen: 'In the event that you [High Representative] make decisions contrary to the provisions of the Dayton Agreement and interests of all citizens of the Serb Republic, I will consider all popular reactions as legitimate and justified.');

'Serbian Ruling Party Says Bosnian Serb President's Dismissal "Null and Void"', *BBC Worldwide Monitoring*, 6 March 1999; 'Bosnia: Around 200 Serbs Protest Against President's Dismissal', *BBC Worldwide Monitoring*, 6 March 1999; 'Assembly rejects dismissal of President', *BBC Summary of World Broadcasts*, 9 March 1999; 'Sacked President on Right to Use Force to Ensure Serbs' Survival', *BBC Worldwide Monitoring*, 12 March 1999 ('... [W]e are ready to use other means to defend the Serb Republic, the Serb people and citizens. I have in mind here above all sticks, stones, tanks and weapons,' Poplasen said, adding that this was just 'a legitimate right to defend and ensure the survival of the Serb people in this region.').

that this made it impossible to continue with the implementation of the Dayton peace accords.<sup>104</sup> Similarly, the vice-president, who also initially refused to assume Poplasen's post, performed a *volte face* within two weeks and accepted the HR's decision.<sup>105</sup> Eventually, most of the effective actors in Bosnia complied with the HR's decision, viewing it as in their common interest, to the extent that the Serb government stripped Poplasen of all presidential privileges and instructed the local Serb police to bar him from entering the presidential building.<sup>106</sup>

Assessed normatively, this decision appears to help maximise values of human dignity, as Poplasen's intransigence appeared to serve no one but himself. His refusal to appoint a prime minister, notwithstanding a majority-backed candidate within the RS National Assembly, was a clear abuse of his ceremonial power of appointment and was itself arbitrary and capricious. The HR's decision, in turn, was justified insofar as it resolved a complete standstill of the political system and facilitated a normal functioning of the democratic process.

After the principle of the legitimate use of Bonn Powers to remove officials had been established during these initial decisions, other senior government officials were removed by the HR/SR for, among other things, corruption charges, failure to cooperate with the International Criminal Tribunal for the Former Yugoslavia, and obstruction of the Dayton Agreement.<sup>107</sup> In general, these decisions have followed the *Poplasen* model, in being generalisable and self-constrained through reference to specific violations of the Dayton Agreement. Notwithstanding these improvements, and the general legitimacy of HR/SR decisions, there are several ways in which the legitimacy of specific decisions and the general order can be further enhanced, as discussed in the next and final section.

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104. See, for example, 'Premier says government to re-examine resignation decision', *BBC Summary of World Broadcasts*, 11 March 1999; 'Bosnian Serbs Moderate Confrontation', *The New York Times*, 9 March 1999.

105. See, for example, 'Bosnian Serb Vice-President Ready to Accept Post of President', *BBC Worldwide Monitoring*, 23 March 1999.

106. See, for example, 'Serb government strips president of body guards', *BBC Summary of World Broadcasts*, 8 September 1999.

107. See, for example, *Decision removing Dragan Čavić from his position as a Member of the Presidency of BiH*, 29 March 2005; *Decision removing Mr. Zoran Djerić from his position of Minister of Interior of Republika Srpska*, 30 June 2004; *Decision removing Dr. Dragan Kalinić from his positions as Chairman of the National Assembly of Republika Srpska and as President of the SDS*, 30 June 2004. The subsequent lifting of the ban on Kalinić did 'not call into question the validity of the 2004 Decision.' See *Notice of Decision by the High Representative to Lift the Ban Imposed on Dragan Kalinić by the High Representative Decision*, 30 June 2004, 21 August 2009.

## Conclusion

To paraphrase Max Weber, the European Union, like '[e]very power' generally, has sought in the specific manner of the concept of liberal international democracy 'to establish and cultivate a belief in its legitimacy.'<sup>108</sup> The Dayton order in Bosnia, along with the Bonn Powers, is paradigmatic of EU legitimacy in contemporary practice. Thus, while the Bonn Powers may be no longer necessary or justified for decisions listed in Table 3 above,<sup>109</sup> the EU should consider maintaining as a last resort the option of countermajoritarian decisions in the categories of removals and suspensions from office, decisions in the field of judicial reform, decisions in the field of property laws, return of displaced persons and refugees and reconciliation, and decisions relating to state symbols, state-level matters and constitutional issues. Under the Dayton Agreement, these categories are legitimate insofar as they preserve the peace, promote the democratic process, and protect human rights. They are also consistent with the political order of liberal international democracy from which the EU draws its own sources of legitimacy and which constitutes its model of governance.

To further enhance the legitimacy of the Bonn Powers, countermajoritarian decisions should be reached after a full and transparent examination of all relevant arguments. Such a process could be based on a public hearing or submission of written documents, or both. The final decision should include a brief summary of the facts, discussion of opposing arguments, analysis of the applicable provisions of the Dayton Agreement and any other relevant legal documents, and the most specific justification possible. Indeed, since the HR/SR has effectively performed a role akin to a constitutional court in a liberal democracy in issuing countermajoritarian decisions, it can draw on the same mechanisms of legitimacy through which courts generate trust and confidence in their decisions. Formalising such a process would ensure the presentation of all factual and legal arguments before a decision is taken and facilitate a review of the decision in the light of these arguments in the court of public opinion.

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108. Weber, vol. 1, *Economy and Society*, op. cit. in note 16, p. 213.

109. Decisions relating to individuals indicted for war crimes in the former Yugoslavia, Decisions relating to the Federation, Mostar, and H-N Canton; Decisions relating to media restructuring; and Decisions in the economic field.

Any concerns over the formal transition of authority from the OHR to the EUSR are largely scholastic. Just as the PIC successfully asserted the Bonn Powers in 1997 by ‘welcoming’ the HR’s intention to use such powers, it can welcome the EU’s assertion of such powers under the Dayton Agreement to preserve the peace, promote the democratic process, or protect human rights. Moreover, insofar as these objectives are challenged in the future, countermajoritarian decisions can be considered by the EUSR to be within its inherent authority as guarantor of the Dayton Agreement and a constitutive pillar of the Bosnian political structure. Most important, even if the OHR is formally closed, the EU’s resources in Bosnia will remain mostly the same, giving it largely the same bases of power currently underpinning the OHR; thus, the SR can have the same authority as the HR/SR. Indeed, recent polls demonstrate that most Bosnians believe that there will be no significant changes upon transfer from the OHR to EUSR.<sup>110</sup>

This clarity of vision and unity of action should replace the hesitant and under-resourced strategy of the past three and a half years based on the hope that all will work out for the best in Bosnia due to the attractiveness of EU accession. Such assumptions have been discredited by the current state of affairs in Bosnia, which according to many is as tense and dangerous as in 1990 and 1991.<sup>111</sup> In fact, much of the political deadlock within Bosnia followed the announcement in 2006 of the OHR’s eventual closure, as recognised by the PIC,<sup>112</sup> since it invited each side to bide its time until the new political environment emerged before making any concessions or reaching compromise.

A reinvigorated strategy for success in Bosnia will demand greater EU leverage through increased resource commitments in terms of EUFOR troops, EUSR staff,<sup>113</sup> and EU money. EU influence has decreased over the

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110. See, for example, Gallup Balkan Monitor, *Perceptions of the EU in the Western Balkans*, op. cit in note 72.

111. See, for example, footnotes 7-9 on page 8 of this paper.

112. See, for example, Communiqué of the Steering Board of the Peace Implementation Council, 20 November 2008 (‘Regrettably many of these developments are not short term; they date back to the period in 2006 when the PIC Steering Board first indicated its readiness to close the OHR. The events of the last two and half years point to a failure of the BiH authorities and the political leaders to seize the opportunity to prove that they are capable of taking the country forward and are committed to upholding the GFAP.’).

113. To strengthen the EUSR, Daniel Serwer proposed a creative solution, whereby the EU and US would assign half of their staffs to the EUSR, with the other half returning to home ministries, thus creating a unified diplomatic voice behind the EUSR. See Jim O’Brien, *A New Agenda for Bosnia and Herzegovina* (Washington, D.C.: U.S. Institute of Peace, 2009).

past few years and needs to be restored, since the attractive power of EU accession has proven insufficient on its own as political glue in Bosnia. The political decision to commit the necessary resources and increase EU leverage will not be taken, however, unless the EU recognises its significant interests in Bosnia: preventing the need for future humanitarian intervention by keeping the peace, consolidating Bosnia's democratic development and foreclosing the emergence of a criminal state or terrorist safe haven, enlarging (and thereby further validating) the European model of governance, and demonstrating the credibility of EU foreign policy. A commitment at the level of political leadership, in turn, will be sustainable only if it is understood and supported by EU public opinion. Such communication can be facilitated through the concept of liberal international democracy, as it succinctly encapsulates the purposes underlying the Bonn Powers and the EU's role in Bosnia. As long as the EU continues to promote common interests of effective actors through its decisions in Bosnia, serving the Dayton Agreement and supported by public opinion, it can and should be regarded as legitimate, its influence will remain, and its anxieties should be replaced by confidence and resolve for the mission.

\* \* \*

In his last speech before leaving the US Supreme Court, Justice David Souter emphasised the importance of courts in liberal democracies: 'There has to be a safe place, and we have to be it.'<sup>114</sup> Similarly, if we consider Bosnia an experiment in liberal international democracy, the EU can – and should – be that safe place until an internally self-sustaining political order of human dignity emerges.

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114. 'Souter Bids a Fond Farewell', *The Washington Post*, 5 May 2009.



# ANNEXES

## **ANNEX 1 – Membership and Structure of the Peace Implementation Council**

The PIC, which has met at the ministerial level seven times and most recently in February 2007, consists of the following members: Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (resigned in May 2000), Croatia, Czech Republic, Denmark, Egypt, Federal Republic of Yugoslavia (succeeded by Serbia), Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Jordan, Luxembourg, Malaysia, Morocco, Netherlands, Norway, Oman, Pakistan, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States of America; the High Representative, Brcko Arbitration Panel (dissolved in 1999 after the Final Award was issued), Council of Europe, European Bank for Reconstruction and Development (EBRD), European Commission, International Committee of the Red Cross (ICRC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Monetary Fund (IMF), North Atlantic Treaty Organisation (NATO), Organisation for Security and Co-operation in Europe (OSCE), United Nations (UN), UN High Commissioner for Human Rights (UNHCHR), UN High Commissioner for Refugees (UNHCR), UN Transitional Administration of Eastern Slavonia (UNTAES; disbanded in January 1998) and the World Bank.

The Steering Board, which meets several times annually at the political director level and weekly at the ambassadorial level, consists of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, the United States, the presidency of the European Union, the European Commission, and Turkey (representing the Organisation of the Islamic Conference). Prior to these weekly meetings, EU Member States and institutions on the Steering Board meet separately to discuss policy and reach common positions.

## ANNEX 2 – Abbreviations

BiH	Bosnia and Herzegovina
EUFOR	EU Forces in Bosnia and Herzegovina
EUSR	EU Special Representative
H-N	Herzegovina-Neretva
HR	High Representative
NATO	North Atlantic Treaty Organisation
OHR	Office of High Representative
PIC	Peace Implementation Council
RS	Republika Srpska
SR	Special Representative
UN	United Nations





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43 avenue du Président Wilson - 75775 Paris cedex 16 - France  
phone: + 33 (0) 1 56 89 19 30  
fax: + 33 (0) 1 56 89 19 31  
e-mail: [info@iss.europa.eu](mailto:info@iss.europa.eu)  
[www.iss.europa.eu](http://www.iss.europa.eu)