

# Complex Public Power Regulation in Bosnia and Herzegovina after the Dayton Peace Agreement

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**ABSTRACT** Since the Dayton Peace Agreement, an international High Representative based in Bosnia and Herzegovina (BiH) has been charged with guiding and monitoring the country's peace implementation process. As the High Representative has come to play an increasingly active role in the country and to exercise governmental or public power in his own right, a complex system of 'public power regulation' has developed. Pursuant to this system, the public power exercised by domestic governmental authorities in BiH is regulated both through local checks and constraints (e.g. democratic elections and judicial review) and through interventions by the High Representative. In turn, the High Representative has allowed for some regulation of his own public power by international actors and actors/institutions within BiH. However, opportunities for regulating the High Representative are quite limited, raising concerns about the legitimacy of his exercise of public power in the country.

In the 10 years that have passed since the signing of the Dayton Peace Agreement, much has been written concerning the international response to the conflict in Bosnia and Herzegovina (BiH) (see, e.g., Berdal, 1996; Ghebali, 1995; Weiss, 1999). In particular, the UN's difficult experience with peacekeeping has prompted a host of scholars and policy makers to reflect upon the proper role of international actors deployed in situations of ongoing conflict. In this regard, various questions arise: what type of mandates should be provided to peacekeepers and other international actors? How much discretion should they possess in interpreting their mandates? How should they relate to local actors in the territories where they operate? Underlying each of these questions is the need to secure a balance between effective and legitimate international action.

Though less widely recognized, similar questions have arisen in post-conflict BiH in connection with the High Representative, the international actor with overall responsibility for civilian aspects of post-conflict peace implementation in the country.<sup>1</sup> The position of High Representative was created through the combination of an Annex to the Dayton Peace Agreement (Agreement on Civilian Implementation of the Peace Settlement, 1995, in OHR, 2000, pp. 56–57)<sup>2</sup> and a Chapter VII Security Council Resolution (UN

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Security Council, 1995) in order to guide and monitor local peace building efforts. Specifically, the Annex provides that the High Representative shall “monitor the implementation of the peace settlement” and “facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation” (Agreement on Civilian Implementation of the Peace Settlement, 1995, Arts II(1)(a) and (d), in OHR, 2000, pp. 56–57).

Over time, the High Representative has come to play an extremely active role in the country, partly as the result of intransigence and obstruction on the part of domestic authorities. Lord Paddy Ashdown, who served as High Representative until January 2006, has observed that the first two years after Dayton were spent “locked in sterile negotiation with many of the people who had caused the war in BiH in the first place, while the people of BiH continued to suffer” (High Representative, 2004). However, since late 1997, the individuals who have held the position of High Representative have interpreted their mandate quite broadly: enacting legislation and other legal instruments in BiH, amending legal instruments adopted by domestic authorities, and removing individuals from public office.

Because the High Representative has not completely sought to displace local executive and legislative authorities in BiH, there are now two main sites of public power in the country: domestic authorities/institutions and the Office of the High Representative (OHR). The challenges faced by the High Representative and his office are of course quite different from those faced by the UN in BiH before Dayton. Yet, as with the UN, the High Representative’s involvement in BiH has generated an debate about the role of international actors in domestic settings. A recurring question in this debate is: how does one best ensure the effectiveness and legitimacy of the High Representative and international actors who perform a similar function while, at the same time, promoting the effectiveness and legitimacy of domestic authorities in the territories where these actors operate?

Some assessments of the High Representative that have emerged from this debate have been quite positive. For example, while the European Commission for Democracy through Law (Venice Commission) produced an Opinion in 2005 containing suggestions for the gradual reduction of the High Representative’s activist role in BiH, the Commission made haste to note that the High Representative has had a generally beneficial impact on peace implementation in the country (European Commission for Democracy through Law, 2005, para. 87). Other commentators have been more critical, questioning the necessity of individual decisions taken by the High Representative as well as the potential impact of the High Representative’s activist approach on local capacity building and long-term economic and political recovery in BiH. In this vein the European Stability Initiative (ESI) sent a widely publicized ‘open letter’ to the High Representative in July 2003 claiming that the latter’s extraordinary powers in BiH were counterproductive—“an obstacle to the development of effective institutions and a healthy democratic process” (European Stability Initiative, 2003).

Whatever one’s view on these issues, an understanding of the High Representative’s experience in BiH is useful both as a point of departure for considering the appropriate role of international actors in post-conflict situations and as background for future international administrators. This article will focus on one important feature of this experience: the complex system of ‘public power regulation’ that has emerged in BiH since Dayton. The first section briefly discusses the use of public power regulation as a means of enhancing the effectiveness and legitimacy of power holders and provides an overview of the

complex system of public power regulation in BiH. The second and third sections examine the operation of this system in practice, with the latter highlighting those areas where the system fails to provide a powerful check on the High Representative. The aim is not to assess the overall effectiveness and legitimacy of the actors exercising public power in BiH,<sup>3</sup> particularly given that both of these concepts have a highly subjective component, but rather to draw attention to the complex public power regulation system in BiH that has emerged as a product of efforts to define the relationship between international and local actors in the country, as well as efforts to promote the effectiveness and legitimacy of these actors.

### **Promoting Effectiveness and Legitimacy through Complex Public Power Regulation**

In the domestic political context public authorities are commonly subject to mechanisms of public power regulation, or mechanisms used to check and constrain the exercise of their power. These mechanisms differ by context, but public power regulation generally denotes: standards governing the conduct of public authorities, structures designed to ensure that their decisions are reached through a transparent process and informed by a plurality of opinions, and structures for reviewing their decisions and other actions. Although these mechanisms can have the effect of slowing the public decision-making process, they can also promote effective governance by minimizing *ultra vires* action and abuse of power. Mechanisms of public power regulation can also be used as a means to enhance governmental legitimacy, by helping to ensure that public authorities are responsive to, and capable of being held accountable by, the main stakeholders in the governance process, the governed community.<sup>4</sup> While there is a range of different views on what constitutes ‘legitimate power’ or ‘legitimate authority’ (see, e.g., Caron, 1993; Franck, 1995; Kjær, 2004, pp. 12–15; Roth, 2000; Tucker & Hendrickson, 2004, p. 18), the concept is used here in a general sense to refer to power that is ‘justified’ (Bodansky, 1999, p. 601). For present purposes what is important is that power is often justified or legitimized through its subjection to checks and constraints. As Paul Wapner suggests:

Providing justification for, and practical implementation of, legitimate political power has been one of the longest and most formidable challenges for political theory. In the modern era, Hobbes, Locke, Rousseau and others continually reflected upon how to constitute and maintain legitimate, authoritative political power. Almost across the board, each suggested that the answer lies in creating some form of constitutional or institutional constraint. That is, power needs to be bound by, or better, bridled to, multiple and cross-cutting forms of legitimate power to guard against arbitrary abuse. (Wapner, 2002, p. 156)

It is largely for this reason that mechanisms of public power regulation have come to be regarded as a hallmark of good governance at the domestic level (see, e.g., Secretary-General of the UN, 2000, p. 5).<sup>5</sup>

Domestic authorities in BiH are subject to mechanisms of public power regulation that are similar to those found in most Western democracies (e.g. democratic elections and judicial review). These mechanisms, which allow for checks on domestic authorities by individuals and institutions within the governed community, will be detailed in the next

section. The High Representative and other international actors involved in peace implementation in BiH have been heavily involved in promoting public power regulation, in an attempt to build effective, legitimate domestic authorities that can serve as a potential bulwark against the resurgence of conflict in the region. The public power of authorities in BiH is also regulated through interventions by the High Representative, who has come to exercise public power in BiH in his own right. For example, the High Representative regulates domestic authorities by setting parameters for their decision making, as well as by issuing binding decisions intended to rectify actions of the authorities that he perceives to be problematic.

As noted above, the High Representative's role in this regard has evolved over time. During the early stages of peace implementation, the High Representative was largely concerned with bringing together public officials from the Bosniak, Croat and Serb communities in BiH for the purpose of establishing the governance structures foreseen in the BiH Constitution (Bildt, 1998, ch. 15). However, the High Representative ultimately came to the conclusion that effective implementation of his mandate required more robust action. As Lord Ashdown has noted:

The international community felt strongly that after all Bosnia and Herzegovina had been through, and the failure of the outside world to prevent those horrors, that it would be intolerable to preside over a post war environment in which war was in effect continued by other means. We were not prepared to accept that hard-line officials could sabotage the provisions of the Dayton Agreement with impunity, or . . . cripple various governments and parliamentary assemblies, or hobble the legislative process, rendering it incapable of passing the legislation necessary to cement democracy and re-start the economy. (High Representative, 2004)

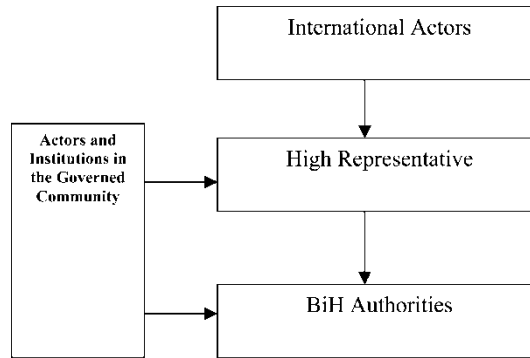
As a result, the High Representative began to interpret the instruments creating his position in a manner that would allow him to check and constrain domestic authorities as described above. One consequence of the High Representative's robust interpretation of his mandate and his exercise of public power in BiH is that questions have arisen concerning whether (and to what extent) the High Representative should himself be subject to mechanisms of public power regulation. For, if standards, review procedures and other checks on power are useful in promoting the effectiveness and legitimacy of domestic authorities, why not apply them to the High Representative? Indeed, given the High Representative's support for the use of such mechanisms in connection with domestic authorities, he is susceptible to charges of hypocrisy to the extent that he refuses to allow their use in connection with his own conduct.

Although it is not always recognized or acknowledged, the public power exercised by the High Representative is regulated in a limited fashion through 1) involvement of international actors and members of the governed community in the High Representative's decision-making process; and 2) judicial review of the substantive content of legislative decisions issued by the High Representative. However, these regulatory mechanisms, which will be discussed further below, are much less rigorous than the mechanisms applied to domestic authorities in BiH. The High Representative, for instance, is not a democratically accountable authority and a significant number of the High Representative's decisions are not subject to judicial review (as will be discussed in the third section). It is perhaps for this reason that, in response to questions about his legitimacy,

the High Representative has not relied heavily on these mechanisms as justification for his exercise of public power in BiH, but has instead tended to emphasize the legal basis for his involvement in BiH and political support for his actions. For instance, the High Representative has often stressed that his actions are necessary for implementation of the Dayton Peace Agreement (Bajtarevic, 2003) and pointed to the support for his actions from the Peace Implementation Council (PIC), a body composed of over 50 countries and agencies which is formally responsible for providing political guidance to the OHR (High Representative, 2004). The High Representative has also pointed to Chapter VII Security Council Resolutions and opinion polls carried out in BiH that demonstrate support for his efforts (High Representative, 2004; 2003).

In this context, it is important to bear in mind that the High Representative and other international actors who exercise public power in domestic contexts are inherently vulnerable to charges of illegitimacy, given that they come from outside the territories that they govern.<sup>6</sup> The main reason for this is that legitimacy in the domestic governmental context is increasingly associated with adherence to the principle of popular sovereignty, the notion that the people in a given territory are responsible for defining their own political destiny. Popular sovereignty has been associated with both the post-World War II decolonization process and with the growing idea of a 'democratic entitlement' (Franck, 1992, p. 77).<sup>7</sup> While this would seem to argue for the creation of elaborate regulatory mechanisms that could be used to lend legitimacy to the exercise of public power by the High Representative and similar actors, certain difficulties exist in this regard. First, although international actors have taken on domestic governmental tasks in a number of cases, the relative novelty of international administration means that public power regulation in that context is necessarily less developed than public power regulation in more traditional governmental settings. Second, there are difficulties associated with the wholesale transfer of mechanisms used in the domestic governmental context to that of governance by international actors. For instance, democratic elections are the quintessential mechanism used for constraining the public power of domestic governmental authorities, but they are not easily adapted to international administration. Third, by virtue of their international status, the High Representative and similar actors commonly enjoy protection from certain types of regulation. For instance, pursuant to Annex 10, the High Representative and his staff enjoy broad criminal, civil and administrative immunities.

Fourth, political pressures may complicate the application of robust mechanisms of public power regulation to international administrations. For instance, where such actors operate within a fairly short time frame and are forced to compete for continued funding and support, they may face pressure from donors to avoid checks and constraints that might have the effect of delaying their work. The High Representative and similar actors may also be resistant to local constraints on their power based on a fear that such constraints could be deliberately used to undermine their efforts. Put differently, these actors may feel that, whatever the general benefits of public power regulation in terms of effectiveness and legitimacy, powerful regulatory mechanisms would tend to undermine their effectiveness given the difficult circumstances in which they operate. Finally, any system established for the purpose of regulating the High Representative and similar actors would need to take account of the fact that these actors perform their functions both on behalf of the communities they govern and on behalf of other international actors (the PIC in the case of the High Representative)—groups that are likely to have different ideas of how regulation should be structured.



**Figure 1.** Public power regulation in BiH post-conflict (arrows denote regulation)

In sum, one of the consequences of the High Representative’s robust role in BiH is that a complex system of public power regulation has emerged in the country (see Figure 1). Specifically, the public power exercised by domestic governmental authorities is regulated through mechanisms used in many western democracies, such as democratic elections and judicial review. In addition, it is regulated by the High Representative as part of the latter’s attempt to implement his Dayton mandate effectively. In turn, the High Representative has allowed for some regulation of his own public power by international actors and members of the governed community in BiH, although, because of various political, legal and structural difficulties, such regulation is limited. The sections that follow will flesh out this system in greater detail.

### **Regulating the Public Power of Domestic Authorities in BiH**

As discussed in the previous section, public authorities in BiH are subject to a number of formal checks and constraints that are quite similar to those found in other Western democratic countries. These checks and constraints apply at various levels of governance in BiH—including the state, the sub-state Entities (Republika Srpska and the Federation of BiH) and governmental units within the Entities. For reasons of space, this section will concentrate on the main mechanisms of public power regulation found in the Dayton Peace Agreement, including the Constitution of BiH contained in Annex 4.<sup>8</sup>

Article III of the Constitution specifies the division of responsibilities between the BiH state and sub-state Entities in the country, formally enshrining a high degree of territorial decentralization.<sup>9</sup> Although the language contained in Article III has been interpreted in an increasingly flexible manner over time, it nevertheless represents an important substantive constraint on the power of public authorities throughout the country. The Constitution further provides that public authority at the state level is to be checked and constrained through a separation of powers and through direct democratic elections for the BiH Presidency and the BiH House of Representatives, one of the two chambers of the BiH Parliamentary Assembly.

Another formal check on the power of public authorities in BiH is found in Article II(1) of the Constitution, which provides that: “Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms”. Article II(2) goes on to provide for the direct application in BiH of

the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Apart from the application of basic human rights standards to public officials, the Constitution also contains mechanisms designed to prevent discrimination/disenfranchisement of the three constituent peoples in BiH. For instance, the BiH House of Peoples is to be composed of five Croats, five Bosniaks, and five Serbs (Constitution of Bosnia and Herzegovina 1995, Article IV(1), in OHR, 2000, pp. 41–46),<sup>10</sup> and the tripartite BiH Presidency is to be composed of a Bosniak, a Croat and a Serb (Constitution of Bosnia and Herzegovina, 1995, Article V, in OHR, 2000, pp. 41–46). The Constitution also provides members of the Presidency and members of the House of Peoples with a ‘vital interest’ veto (Constitution of Bosnia and Herzegovina 1995, Articles V(2)(d), IV(3)(e), in OHR, 2000, pp. 41–46), for the purpose of preventing threats to the interests of one or more of the constituent peoples. These elaborate checks and constraints on public power are an understandable legacy of the conflict in BiH and certainly present a means of regulating public power, but one should note that they have been criticized for their inefficiency and rigidity (see, e.g., European Commission for Democracy through Law 2005, Section IV(1)).

The Dayton Peace Agreement provides for both judicial and non-judicial mechanisms of reviewing the conduct of domestic authorities. The Constitution in Annex 4 to the Agreement establishes a Constitutional Court with exclusive jurisdiction to decide disputes arising under the Constitution “between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina” (Constitution of Bosnia and Herzegovina, 1995, Article VI(3)(a), in OHR, 2000, pp. 41–46). The Court also has jurisdiction over “issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina” (Constitution of Bosnia and Herzegovina, 1995, Article VI(3)(c), in OHR, 2000, pp. 41–46), as well as appellate jurisdiction over constitutional issues arising out of a judgement of any other court in BiH (Constitution of Bosnia and Herzegovina, 1995, Article VI(3)(b), in OHR, 2000, pp. 41–46).

Finally, Annex 6 to the Dayton Peace Agreement makes provision for two key human rights review bodies. It establishes a Human Rights Chamber with jurisdiction to consider alleged or apparent violations of human rights by the State of BiH, the Federation of BiH and Republika Srpska (Agreement on Human Rights, 1995, Ch. II, Arts II and VIII, in OHR, 2000, pp. 47–50).<sup>11</sup> The Chamber operated throughout 2003, but has since been succeeded by a Human Rights Commission that operates within the Constitutional Court of BiH. Annex 6 also establishes an Ombudsman with the authority to investigate alleged or apparent human rights violations by public authorities in BiH (Agreement on Human Rights, 1995, Ch. II, Arts II and V, in OHR, 2000, pp. 47–50).<sup>12</sup> Originally, the Ombudsman position was filled by individuals from outside the region, but the current Ombudsman institution in BiH is headed by individuals from the three constituent peoples in the country. This institution does not have the ability to take legally binding decisions, but nevertheless plays a role in constraining the power of domestic authorities through its power to issue reports and make recommendations.

Notwithstanding the existence of these formal mechanisms for regulating and constraining public authority in BiH, the High Representative has taken action to

further constrain the power of domestic authorities. In many cases, he has done so by means of political pressure. In addition, the OHR has played a particularly influential role in setting the agenda of domestic legislative bodies, and in helping to prepare legislation and other legal instruments for promulgation by these bodies.

In other cases, the High Representative has constrained public authorities more directly through the issuance of decisions with binding legal effect in BiH. For instance, where relevant local authorities failed to submit a draft state-level intelligence law to the BiH Council of Ministers, as requested by the High Representative, the High Representative issued a decision bypassing normal procedure and proposing the draft law directly to the House of Representatives (Decision Proposing the Law on the Intelligence and Security Agency of BiH to the Parliamentary Assembly of BiH, 2003). The High Representative has also issued binding decisions that establish local commissions for the purpose of preparing draft laws and other legal instruments. In such cases, the High Representative has specified items that must be included in the draft instruments (e.g. Decision Establishing the Expert Committee on Intelligence Reform, 2003).

Perhaps most significantly, the High Representative has issued decisions directly enacting legislation and other legal instruments with effect in BiH, including decisions repealing and amending locally adopted legislation e.g. Decision Annulling Five RS Laws Concerning State-Level Competencies, 1999). High Representative decisions of this type are published in relevant official gazettes in the country and are regarded as local legislation. The High Representative has issued 'legislative' decisions in a range of circumstances, for example where domestic authorities have failed to adopt legislation themselves (e.g. Decision Imposing the Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina, 2002) and where they have adopted legislation in a form that is unacceptable to the High Representative (e.g. Decision Imposing the Law on Amendments to the Law on Identity Cards of Citizens of Bosnia and Herzegovina, June 2002).

The substance of legislation issued by the High Representative often places ongoing constraints on domestic authorities. For instance, in 2002 the High Representative issued a series of legislative decisions narrowing the scope of executive immunity for public authorities (including the Decision Enacting the Law on Immunity of Bosnia and Herzegovina, 2002). Moreover, the High Representative enacted a law in 2000 establishing a State Court of BiH with jurisdiction, *inter alia*, to review decisions of state bodies (Decision Establishing the State Court, 2000). Finally, the High Representative has served as a check and constraint on public officials in BiH by issuing non-legislative decisions in targeted cases. He has, for example, issued decisions removing individuals from public office in BiH (e.g., Decision Removing Dragan Covic from his position as a member of the Presidency of BiH, 2005),<sup>13</sup> blocking the assets of individuals suspected of aiding indicted war criminals (e.g., Order Blocking All Bank Accounts of, held by, and/or in the name of Momcilo Mandic, 2003), and reallocating public funds originally allocated to political parties (e.g., Directive Reallocating Budgetary Itemisations Intended to Fund the SDS, 2004).

### **Regulating the Public Power of the High Representative**

As discussed above, although there are various hurdles involved in checking/constraining the public power exercised by the High Representative, the latter is not wholly unregulated. His actions are governed by Annex 10 to the Dayton Peace Agreement,

which was agreed by representatives of the erstwhile Republic of Bosnia and Herzegovina, the two sub-state Entities in BiH, the Republic of Croatia and the Federal Republic of Yugoslavia. Annex 10 is, however, a very general document, and the High Representative himself is the ‘final authority in theatre’ responsible for its interpretation. Indeed, it is the vague wording in Annex 10 and the High Representative’s power of interpretation that have allowed the High Representative’s role to evolve over time.

During the course of his tenure in BiH, the High Representative has recognized certain limited checks and constraints on his public power, including: 1) participation by domestic and international actors in the crafting of some High Representative decisions; and 2) judicial review of the substantive content of the High Representative’s legislative decisions. With regard to the first point, many of the High Representative’s legislative decisions are drafted in coordination with domestic legal experts and elected officials. In fact, it is often unclear during the drafting process whether such instruments will be adopted by domestic authorities or enacted by the High Representative. In some cases the High Representative’s legislative decisions are the product of extensive negotiations by domestic and international experts in the context of special commissions and working groups set up by the OHR. This is often the case with issues that are highly political (e.g. legislation regulating the work of the Council of Ministers), and where the High Representative seeks buy-in from local authorities. Participatory decision making in such cases is also partly motivated by the view that major changes to the political system in BiH should not be developed in complete isolation from members of the governed community.<sup>14</sup>

However, it is important to acknowledge the limits of such participation. First, the impetus for High Representative decisions often comes from the OHR itself, which specifies the basic parameters for such decisions. Second, there is no formal procedure for the participation of domestic officials/experts in High Representative decision making, and the level of domestic involvement in a given case will depend upon a variety of factors, including the perceived urgency of the decision, its perceived political importance, and the personality of international and domestic actors involved. Domestic actors do not have a veto over the High Representative’s ability to issue decisions or the substance of decisions. In other words, the High Representative retains the discretion to enact legislation in the face of domestic opposition. It is for this reason that officials in the OHR refer to ‘soft’ and ‘hard’ impositions—the former are High Representative decisions issued with the broad support of the major political parties in BiH, and the latter are decisions issued in the face of opposition.

Third and finally, while there is often domestic input into legislative decisions issued by the High Representative, there is far less involvement of locals in the High Representative’s non-legislative or ‘sanctions’ decisions, which sometimes rely upon the element of surprise. For instance, in cases where the High Representative has issued decisions blocking the assets of individuals suspected of aiding indicted war criminals, he has not consulted with domestic authorities in BiH. In addition, the High Representative does not consult widely within the governed community before removing public officials, although the targeted officials are generally given advance warning. The dearth of domestic involvement in this context is perhaps unsurprising, given that such decisions are often far from participatory in traditional governmental settings. However, unlike authorities in traditional government settings, the High Representative is not subject to any formal legal standards concerning the issuance of such decisions. Thus, he has wide

discretion to determine the type of issues that may be covered by such decisions, as well as the individuals that such decisions may target. As will be discussed below, the High Representative's discretion in this context is heightened by the reluctance of judicial bodies in BiH to review his non-legislative decisions once they are in force.

With respect to judicial review of High Representative decisions, it is important to recall that the High Representative and members of his staff have wide-ranging immunity from criminal, civil and administrative jurisdiction under Article III(4) of Annex 10. Moreover, both the BiH Constitutional Court and the Human Rights Chamber have indicated that they do not have jurisdiction to review the High Representative's interpretation of his international powers or actions that he chooses to take pursuant to those powers. In a case brought before the Constitutional Court concerning a High Representative-enacted law establishing a BiH state border service, the Court noted that the international powers of the High Representative, as well as his exercise of those powers, "are not subject to review by the Constitutional Court" (Constitutional Court 2000, para. 5). Both the Court and the Chamber have refused in several cases to review non-legislative High Representative decisions suspending or removing individuals from public office (see, e.g., Human Rights Chamber, 1998; Constitutional Court, 2001).<sup>15</sup>

Nevertheless, both the Court and the Chamber have pronounced themselves competent to review the substantive content of the High Representative's 'legislative' decisions, which form part of the domestic law of BiH. Thus, in the above-mentioned border service case, the Court observed that, although it is not competent to review the High Representative's international powers, it is competent to review the content of laws enacted in BiH pursuant to these powers. Specifically, the Court noted that:

the High Representative . . . intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina. (Constitutional Court, 2000, para. 5)

The Court went on to review the substance of the law concerned, ultimately finding it to be consistent with the Constitution. The former president of the Human Rights Chamber supports the Constitutional Court's position on the reviewability of the High Representative's 'legislative' decisions in an introduction to a book on Chamber jurisprudence:

As an exception to [the] immunity of international actors in Bosnia and Herzegovina, the BiH Constitutional Court and the Chamber have held that they are competent to examine legislation imposed by the High Representative, i.e., legislation that is issued by the High Representative in the form of a decree, but then is published in the official gazettes and becomes part of the legal system of Bosnia and Herzegovina or of one of its Entities. (Picard, 2003, p. 25)

In at least one case, the Chamber has found legislative amendments enacted by the High Representative to be in violation of human rights guarantees and ordered remedial action (Human Rights Chamber, 2001).

The High Representative has acknowledged the competence of the Court and the Chamber to review his legislative decisions, but has consistently stated (in line with

both institutions) that his non-legislative decisions (e.g. decisions removing/suspending public officials) are non-justiciable. Many of the High Representative's non-legislative decisions include a specific provision to this effect (see, e.g., Order Blocking All Bank Accounts of, held by, or in the name of Ljiljana Zelen-Karadzic, 2003).<sup>16</sup>

Interestingly, the High Representative has indicated that his legislative decisions are subject to review by the European Court of Human Rights (ECHR) (Bajtarevic, 2003). In other words, the High Representative has suggested that, just as the ECHR may review locally enacted legislation in BiH for compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms once the possibility of local remedies has been exhausted, it may review High Representative decisions enacting legislation in substitution for local authorities. Any such cases would need to be brought against Bosnia and Herzegovina, as a party to the Convention. Yet, to date, the ECHR has not reviewed High Representative enacted legislation.

International political actors also play a role in regulating the public power of the High Representative, albeit a limited one from a legal standpoint. The Peace Implementation Council (PIC) mentioned in the first section has met five times at the ministerial level since 1995 in order to assess progress made by the OHR and to consider future action in BiH.<sup>17</sup> In connection with these meetings, the PIC has issued a series of declarations expressing support for the High Representative and his initiatives in BiH. Quarterly meetings of a PIC 'Steering Board' are also held at the political director level.<sup>18</sup> Because of the infrequency of these meetings and the need for flexibility in response to changing circumstances on the ground, weekly Steering Board meetings are also held in Sarajevo at the ambassadorial level.<sup>19</sup> It is standard practice at these meetings for the OHR to inform the Steering Board of proposed High Representative decisions and to allow Steering Board members to provide their views on such proposals.<sup>20</sup>

However, both the PIC and the Steering Board are political/diplomatic bodies. They may express their views concerning proposed actions by the High Representative and make concrete suggestions concerning such proposals, but neither body has legal authority over the High Representative. Neither body, for instance, issues binding standards governing the conduct of the High Representative.<sup>21</sup> Moreover, while the PIC/Steering Board is generally consulted on proposed High Representative decisions, members of these bodies do not have a veto over such proposals (although the views of certain powerful members such as the USA do in practice exert a powerful political influence on the High Representative).<sup>22</sup>

Further, the OHR often provides the PIC/Steering Board with an outline of proposed decisions rather than draft decisions themselves and, generally speaking, these bodies tend to focus on the broad political implications of the High Representative's proposals.<sup>23</sup> As a consequence, PIC/Steering Board involvement in the High Representative's decision-making process does not serve as a rigorous check on the legality of proposed decisions (e.g. whether a proposed decision falls within the High Representative's mandate or is consistent with international human rights standards). The High Representative also has a great deal of freedom in connection with decisions on highly technical issues that are of minimal interest to these bodies.<sup>24</sup>

Finally, although the PIC Steering Board is typically apprised of proposed High Representative decisions, this is not always the case. In rare cases, the High Representative has issued decisions of an executive nature in the absence of prior consultation with all members of the Steering Board. Such cases have arisen where the High Representative

has determined that security concerns surrounding his decisions make confidentiality a priority. This was the approach taken with regard to certain High Representative decisions blocking the assets of individuals suspected of aiding indicted war criminals.<sup>25</sup>

A word should also be said about the role of the UN in this regard. The UN Security Council has issued a series of Chapter VII Resolutions agreeing the designation of individuals for the position of High Representative and reaffirming the High Representative's interpretation of his powers. The High Representative also provides regular reports to the UN Secretary-General with an update on his activities. That said, the High Representative is not a UN official and does not receive instructions from the UN Department of Peacekeeping Operations or any other department of the UN. In practice, the UN Secretariat has little to no involvement in the day-to-day activities of the High Representative and the OHR.<sup>26</sup> The United Nations maintained a mission in BiH (UNMIBH) until the end of 2002 and, during that time, there was regular communication between the OHR and UNMIBH. However, UNMIBH was not responsible for directing or overseeing the work of the High Representative. Finally, no UN bodies have been established or used for the purpose of reviewing decisions issued by the High Representative. As concerns international judicial review, one should note that the International Court of Justice is not empowered to hear claims brought directly against international actors such as the High Representative or the OHR, and has not considered the legality of High Representative decisions either in an advisory opinion or indirectly in the course of a contentious case.

## Conclusion

Since the signing of the Dayton Peace Agreement, international involvement in Bosnia and Herzegovina has been directed and coordinated by the High Representative, a *sui generis* international actor established through a combination of an Annex to the Dayton Peace Agreement and a Chapter VII Security Council Resolution. The High Representative's presence in BiH raises a number of questions about the appropriate role of international actors in domestic post-conflict settings. Specifically, what types of powers should such actors possess? What are the appropriate limits on such powers? How should international actors interact with domestic authorities and other individuals in the territories where they are deployed?

In the case of the High Representative and his office, these questions have largely been addressed on the ground, in response to practical demands arising out of the peace implementation process. One interesting result of the attempt to delineate the respective roles of the High Representative and domestic authorities, as well as the attempt to promote the effectiveness and legitimacy of these actors, is the emergence of a complex system of public power regulation in BiH. Under this system, the public power exercised by domestic authorities in BiH is regulated both by local laws/procedures and by the High Representative. The public power exercised by the High Representative is, in turn, subject to certain checks and constraints through (1) limited participation of domestic and international actors in the High Representative's decision-making process; and 2) judicial review of the substantive content of the High Representative's legislative decisions. However, the mechanisms used to regulate the High Representative's public power in BiH are much more limited than those used to regulate the public power of domestic authorities. The High Representative is particularly unconstrained in connection with his issuance of non-legislative decisions, which are not developed in a participatory manner and

are not subject to judicial review. This raises serious concerns, specifically with regard to the High Representative's legitimacy as a public power holder in BiH. While the High Representative has frequently emphasized that he derives legitimacy from his Dayton mandate and from international/domestic political support for his efforts, it is doubtful whether this is sufficient to justify his robust exercise of public power in the country, given the recognized link between power regulation and good governance. The OHR is in the process of gradually scaling down its involvement in BiH, but the experience of the High Representative/OHR suggests that one of the key challenges facing architects of future international administrations will be to devise and improve mechanisms for checking the exercise of public power by these actors. One key question that should be addressed in this regard is how to enhance the legitimacy of international administration without sacrificing its effectiveness.

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### **Notes**

1. The position of High Representative has been filled, successively, by Carl Bildt, Carlos Westendorp, Wolfgang Petritsch and Lord Paddy Ashdown and (as of 31 January 2006), Christian Schwarz-Schilling.
2. In Article I(2) of this Annex, the parties "request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts".
3. Of course, an actor's effectiveness may contribute to his/her legitimacy.
4. As Robert Rotberg observes: "When . . . rulers are perceived to be working for themselves and their kin, and not the state, their legitimacy, and the state's legitimacy, plummets" (Rotberg, 2004, p. 9).
5. The Secretary-General's report states: "Good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives. While there may be debates about the most appropriate forms they should take, there can be no disputing the importance of these principles."
6. In this vein, it is interesting to note that a recent article concerning the High Representative is entitled: 'Lessons from Bosnia and Herzegovina: travails of the European Raj' (Knaus & Martin, 2003).
7. Note, however, that, according to Brad Roth, "it is hardly clear that a meaningful 'democratic entitlement' is emerging as a part of international law" (Roth, 2000, p. 323).
8. One should note that the constitutions of both Entities in BiH, the Federation of Bosnia and Herzegovina and Republika Srpska, provide for checks and constraints on public power in the form of democratic elections, separation of powers and judicial review.
9. The complex, multi-layered nature of governance in BiH has been the subject of much criticism (e.g. European Commission for Democracy through Law, 2005, para. 45).
10. The House of Peoples is the second Chamber of the BiH Parliamentary Assembly.
11. See also the website of Human Rights Chamber, available at: <http://www.hrc.ba/english/default.htm>
12. See also the website of the Human Rights Ombudsman of Bosnia and Herzegovina, available at: [http://www.ohro.ba/articles/article.php?lit\\_id=geninfo](http://www.ohro.ba/articles/article.php?lit_id=geninfo)
13. The High Representative's removal decisions have historically barred targeted individuals from holding any official, elective or appointed public office, running in elections or holding office within political parties. Since early 2005, the High Representative has issued decisions lifting the ban in a number of individual cases. However, these recent decisions make clear that they are not intended to call into question the earlier removal decisions and do not entitle affected individuals to compensation.
14. The discussion in this section of the High Representative's legislative drafting process is based on the author's experience as a legal officer in OHR from autumn 2000 to autumn 2003 and on interviews with OHR officials in November 2004.

15. However, the European Commission for Democracy Through Law has observed that: "in a decision on admissibility of 29 September 2004 a chamber of the Constitutional Court rejected an application against a dismissal by the High Representative for non-exhaustion of local remedies. This may indicate that judicial control will after all become possible". European Commission for Democracy Through Law, 2005, FN 23.
16. The Order stipulates, *inter alia*, that "for the avoidance of doubt, it is hereby specifically declared and provided that the provisions of the Order contained herein are, as to each and every one of them, laid down by the High Representative pursuant to his international mandate and are not therefore justiciable by the Courts of Bosnia and Herzegovina or its Entities or elsewhere...and no proceedings may be brought in respect of duties carried out thereunder before any court whatsoever at any time hereafter".
17. OHR website, General Information, at: <http://www.ohr.int/ohr-info/gen-info/#pic>, accessed 25 March 2005.
18. *Ibid*. The Steering Board members are Canada, France, Germany, Italy, Japan, Russia, the UK, USA, the Presidency of the European Union, the European Commission, and the Organisation of the Islamic Conference (represented by Turkey).
19. OHR website, General Information, at: <http://www.ohr.int/ohr-info/gen-info/#pic>, accessed 25 March 2005.
20. Author interviews with OHR officials, November 2004.
21. Author interviews with OHR officials, November 2004. The role of the PIC is frequently misunderstood, perhaps because the preamble to High Representative decisions makes reference to PIC-issued declarations and other PIC documents. The prime example of this is the reference in all High Representative decisions to the Conclusions of the 1997 Bonn Peace Implementation Conference, in which the PIC "welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of any difficulties by making binding decisions, as he judges necessary" on certain issues, including "measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities" (Peace Implementation Council, Bonn Peace Implementation Conference, Summary of Conclusions, Section XI(2), in OHR, 2000, pp. 185–199). This language is often cited as the basis for the High Representative's extensive quasi-legislative and executive powers in BiH. However, the PIC does not itself confer powers on the High Representative via the Conclusions, but simply *welcomes* the High Representative's own decision to interpret his Annex 10 mandate in a robust manner.
22. Author interviews with OHR officials, November 2004.
23. Author interviews with OHR officials, November 2004.
24. Author interviews with OHR officials, November 2004.
25. Author interviews with OHR officials, November 2004.
26. Author interviews with OHR officials, November 2004.

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