

THE BONN POWERS – STILL NECESSARY?

Introduction

Bosnia-Herzegovina (BiH), as well as the entire region of South East Europe, is indeed at a crossroads. It has only been very recent since new members from the wider region joined the European Union (EU) as well as NATO. This, coupled with the European Community's (EC) recent positive avis regarding Croatia's status as a formal candidate country, has moved Bosnia and Herzegovina both geographically and politically closer to Euro-Atlantic structures.

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In the 9th year of Dayton peace implementation, the academic and political discussion about the present international structure and set-up of BiH as a *de facto* protectorate has gained momentum.¹⁹⁴ Not surprisingly, there has been a great deal of calls for more ownership.¹⁹⁵ The discussion ranges from more or less radical views that call for the phasing out or even immediate abolishment of the “Bonn powers” or the High Representative (HR) as such,¹⁹⁶ to the other end of the spectrum where a “policy drift”¹⁹⁷ - defers a definite decision by the International Community (IC) about an end-date of the HR and/or his powers to an unforeseeable date in the future.

Before addressing the “necessity” of the special supranational powers of the international arbitrator in BiH it is useful, in a more retrospective way, to address first the origins and evolution of these powers.¹⁹⁸ This also helps to

¹⁹⁴ There appears to be a wide recognition that BiH can be considered as *de facto* or *quasi* protectorate. See Christian Steiner/ Nedim Ademovic, *Kompetenzstreitigkeiten im Gefuege von Dayton*, in Wolfgang Graf Vitzthum/Ingo Winkelmann (Eds.), *Bosnien-Herzegowina im Horizont Europas*, Tuebinger Schriften zum Staats- und Verwaltungsrecht, Band 69, Duncker & Humblot, Berlin (2003), p.118.

Some authors qualify BiH as a trusteeship. See Elizabeth Cousens and Charles Cater, *Towards Peace in Bosnia, Implementing the Dayton Accords*, International Peace Academy Occasional Paper Series, Lynne Rienner, Bolder-London (2001), pp. 130. Surprisingly, many BiH authors and constitutional law experts do not even mention the constitutional existence of the High Representative. See e.g. Snezana Savic, *Die Staatsorganisation von Bosnien-Herzegowina*, in Vitzthum/Winkelmann (Eds.), *Bosnien-Herzegowina im Horizont Europas*.

¹⁹⁵ See Wolfgang Petritsch, *Das »Ownership« Konzept*, *Bosnien und Herzegowina 5 Jahre nach Dayton. Hat der Friede eine Chance?* Wieser Verlag, Klagenfurt (2001) pp. 243. See also Christophe Solioz/Svebor Dizdarevic, *Ownership Process in Bosnia and Herzegovina*, Nomos Verlagsgesellschaft, Baden-Baden (2003).

¹⁹⁶ For one of the most critical (although partly exaggerated and tendentious) articles see Gerald Knaus and Felix Martin, *Lessons from Bosnia and Herzegovina, Travails of the European Raj*, *Journal of Democracy* Volume 14 Number 3, 3 July 2003.

¹⁹⁷ Interview with Mark Wheeler, former Director of the Sarajevo Office of the International Crisis Group, Sarajevo, 29 April 2004.

¹⁹⁸ This article does not discuss the interventionist powers and practices of other international actors in BiH such as the Commander of the NATO-led Stabilization Force (SFOR), the former United Missions in Bosnia and Herzegovina (UNMIBH) and its

understand and to clarify what these powers actually are and should address some of the existing myths. Such a description demonstrates the development of the special powers as a strategic tool of the IC to address state and identity building issues in the early days of BiH statehood, to a less frequently used and “soft” instrument for initiating and accelerating reforms that are considered vital for the self-sustainability of BiH.

The second part of this article attempts to put the issue into context of BiH’s integration into Euro-Atlantic structures. By choosing this approach, it is hoped that the paper will constructively and without polemic, contribute to the discussion on the necessity of the Bonn powers and when the internal sovereignty of BiH shall be fully handed back to the domestic authorities and its citizens.¹⁹⁹

Origins and development of the Bonn powers

December 1995: the Dayton system

The general mandate given to the HR was defined in Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina (DPA)²⁰⁰. Initially, there were no explicit mention of any extraordinary powers of the HR. The position was defined to “facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations” which, involves monitoring the implementation of the peace settlement, the

International Police Task Force (IPTF), or the former Provisional Election Commission.

¹⁹⁹ Sarcevic argues that BiH, while having full external sovereignty, has limited internal sovereignty and is hence in a “state of antinomy” of its sovereignty. Edin Sarcevic, *Verfassungsgebung und «konstitutives Volk»: Bosnien-Herzegowina zwischen Natur- und Rechtszustand*, in *Jahrbuch des oeffentlichen Rechts*, volume 2001, p.529.

²⁰⁰ Initialed in Dayton on 21 November 1995 and signed in Paris on 14 December 1995. For the full text of the DPA see OHR, *Bosnia and Herzegovina, Essential texts*, 3rd revised and updated edition, Sarajevo 2000. See also www.ohr.int

“resolution of any difficulties”, but most importantly makes the HR himself the “final authority in theatre regarding interpretation” of Annex X.²⁰¹

In November 1995, at the time when the DPA was hammered out within 2 weeks in a remote military base in the US state of Ohio with the primary purpose of stopping the war in Bosnia, the “fathers of the accords” were not occupied about defining the distinct role of the international arbitrator. It was more about striking the balance between diverging territorial interests and the “Landkarte.” Stopping the bloodshed and military aspects were the focus of the negotiations by the parties.²⁰²

Consequently, the primary job of the civilian “watchdog” in BiH was to assist the military in securing the grounds during an initial “one year transition period” for the first democratic post-war elections, which were eventually held in September 1996. It was not intended to establish a post-war BiH in the form of a full-fledged protectorate headed by a strong European authority with the objective of monitoring and fostering the setting up of a state that had emerged from a former Yugoslav republic and which, in its first years of existence, went through a war that cost 250,000 of its citizens their lives and expelled around half of its population from their homes.

1995-1997: “Continuation of war by political means”

The first months after the DPA entered into force were dominated by physical reconstruction and humanitarian aid. It soon became clear that the political representatives of the three “constituent peoples” were not as cooperative as expected. Evidently, a more vigorous - and more interventionist - approach was needed to address and counter obstruction from nationalist hardliners.²⁰³

²⁰¹ DPA, Annex X.

²⁰² See Petritsch, *Bosnien und Herzegovina 5 Jahre nach Dayton*, p.52.

²⁰³ Aida Omerovic calls this assumed cooperation “wild optimism.” Aida Omerovic, *The role of the High Representative in the politics and administration of Bosnia and Her-*

It was in this climate of continued fuelling hatred by nationalist hardliners that in May 1997 the Sintra Peace Implementation Council (PIC) confirmed the HR's "right to suspend any media network or programme whose output is in ... blatant contravention of either the spirit or letter of the Peace Agreement."²⁰⁴ At the time, this was the first explicit instrument the HR received and used, together with SFOR's assistance, to counter nationalist rhetoric by occupying the transmitters of the Pale-based public broadcaster of the Republika Srpska (RS) Radio and Television Station.²⁰⁵

The Sintra mandate paved the way for turning the HR into a more robust actor and thus was the precursor for the December 1997 PIC in Bonn which welcomed "the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement ... in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary."²⁰⁶

The December 1997 PIC was the birth of what is commonly referred to as the "Bonn powers." These powers were further specified by making explicit reference to the following issues: (1) timing, location and chairmanship of meetings of the common institutions; (2) interim measures to take effect when parties are unable to reach agreement, (which were to remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned); (3) other measures to ensure implementation of the Peace Agreement including actions against persons holding public office or officials who are absent from meetings

zegovina, 1996-2001, MPhil dissertation, Downing College, Cambridge, 2002 (pp.7, 14).

²⁰⁴ Steering Board of the Peace Implementation Council, Political Declaration, Sintra, 30 May 1997, www.ohr.int

²⁰⁵ Petritsch, *Bosnien und Herzegovina 5 Jahre nach Dayton*, pp. 94, 164.

²⁰⁶ PIC Bonn Conclusions, Main Meeting, XI, Bonn 10 December 1997, www.ohr.int

without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement.²⁰⁷ Obviously, these were still the early days of shaky peace curfews at night, the practical inability to cross the inter-entity boundary line (IEBL), and a general political atmosphere of mutual distrust when actually keeping the members of the tri-partite BiH Presidency in a room was considered a major success. From that moment on, HR Westendorp no longer needed to resort to his predecessor's (Carl Bildt) "shuttle diplomacy" as the only available diplomatic negotiation tactics. Without having any enforcement mechanism however, Westendorp was able to actually interfere in domestic politics.²⁰⁸ Luckily today, the climate of hatred rhetoric no longer exists in BiH and the IC no longer has "hate-filled radio broadcasts inciting violence against peacekeeping troops as our prime "enemies."²⁰⁹ Instead of enemies, the IC speaks of partners, whether it is the partners it had "self-selected" through post-2000 elections engineering, such as the Lagumdžija-led multi-ethnic Alliance for Change, or the HDZ-SDS-SDA coalition composed mainly of the three large mono-ethnic political parties that regained parliamentary majorities as a result of the October 2002 general and presidential elections.

1997-1999: The Bonn Powers and the development of statehood in BiH – The Day After

Over the years, the reform agenda for BiH has changed since Carlos Westendorp's strengthened mandate and gradually evolved along with a steady progress the country made towards a more mature and self-sustainable state, requiring different instruments for the IC to respond to obstructionism or violations and attempts to undermine the DPA, as well as to initiate, boost or accomplish sectoral reform processes. Clearly, the early responsive use of the Bonn powers was a different one from today's proactive reform-pushing approach.

²⁰⁷ PIC Bonn Conclusions, Main Meeting, XI, Bonn 10 December 1997, www.ohr.int

²⁰⁸ Omerovic, *The Role of the High Representative*, pp. 31, 40.

²⁰⁹ Knaus and Martin, *Lessons from Bosnia and Herzegovina*, p.69.

In general terms, the Bonn Powers can be divided into (1) removals of holders of public offices, (2) imposition of legislation, and (3) other measures including executive decisions, and financial sanctions.²¹⁰

Broadly speaking, the application of the extraordinary powers by the HR from the 1997 Bonn Conference to today can be connected with or resulted in several evolutionary phases characterizing the development of the statehood of post-war BiH. These inter-connected political, economic, and social processes can serve as a useful reference for the interdependence between the use of the HR's interventions and the staged developments of the process of BiH's rapprochement with Euro-Atlantic structures.²¹¹

Although the necessity to have a more robust enforcement mechanism for the implementation of the civilian part of the DPA was recognized by HR Bildt it was not until HR Westendorp received the green light from the IC,²¹² as described above, for the use of his newly interpreted authority mainly to put together the most fundamental building blocks and "integrationist legislation" of the state: the symbols of its identity, including the citi-

²¹⁰ The OHR Legal Department distinguished between "substitution powers" and "international powers" of the HR depending on whether the HR acts in lieu of domestic legislative or executive bodies, or whether he refers to his unique authority to intervene in emergency situations on behalf of the IC. The distinction follows the "functional duality" concept developed by the BiH Constitutional Court. OHR, Internal legal note (2004). On the "delicate coexistence" between the HR and the Constitutional Court see Laurent Pech, «*La garantie internationale de l'ordre constitutionnel de Bosnie-Herzégovine*», *Revue française de droit constitutionnel*, no 42, 2000, pp.421-440. See also Steiner/ Ademovic, *Kompetenzstreitigkeiten im Gefuege von Dayton*.

²¹¹ Solioz divides the period after Dayton in a "stabilization and reconstruction phase" (1995 to 1997), followed by "outside intervention" (1997 to 2000), and finally "partnership" (2001-2002). Christophe Solioz, *Bosnia and Herzegovina: the Art of the Possible*, in Soliz/ Dizdarevic (Eds.), *Ownership Process in Bosnia and Herzegovina*, p.15.

²¹² New people in US administration and the US willingness to become more dedicated to the civilian side of the DPA may have been additional factors that made a stronger HR possible. See Omerovic, *The role of the High Representative*, p.34.

zenship law (the first and only decision imposed in 1997), the flag, national anthem, currency, licence plate etc.

In the “state and identity building period” the HR began to dismiss obstructionists to the return of minority refugees and Internally Displaced Persons (IDPs). The return of refugees and IDPs, in particular to those former homes where they constitute an ethnic minority, was a key element of DPA’s Annex VII as the forced expulsion of people had been a key feature and main objective - and not a mere by-product - of the war of “ethnic cleansing.”²¹³

In March 1998, three months after the Bonn meeting, the Mayor of the southern town of Stolac, Pero Raguz, was the first elected official in post-war BiH who was removed by the HR, due to his active participation in preventing and obstructing the return of displaced persons.²¹⁴

In that year, Carlos Westendorp passed a total of 31 decisions²¹⁵, followed by nearly 100 HR’s decisions in 1999, where a trend towards imposing property and return related arbitrations and laws can be noted, peaking in November 1999 when HR Petritsch removed 22 politicians, mayors and housing officials in one single day.²¹⁶ Surprisingly, there was relatively little protest against this move amongst the political leadership of the nationalist parties at that time. It was argued that this “political whip of the international community” by the HR in the lead up to the general elections was carried out geographically and ethnically balanced. However, since most of these low-key officials were considered nothing else than executors of their

²¹³ Edward P. Joseph, *The Limits of Lessons for Iraq*, East European Studies Publication 286, p.2, East European Studies Woodrow Wilson Center, wwics.si.edu

²¹⁴ Decision removing Pero Raguz from his position as Mayor of Stolac, 4 March 1998, (incomplete text on www.ohr.int.) On the first dismissals by HR Westendorp see Petritsch, *Bosnien und Herzegowina 5 Jahre nach Dayton*, pp. 108.

²¹⁵ All statistics in this paper are taken from the information on the HR’s decisions on www.ohr.int

²¹⁶ Part of Petritsch’s motivation was also to accelerate the overall DPA implementation by a more robust action against obstructionist in the light of the overall donors’ fatigue. See Petritsch, *Bosnien und Herzegowina 5 Jahre nach Dayton*, p.140.

respective political parties, this big bang replacement of disobedient officials was coined as merely “cutting the tail of a lizard.”²¹⁷

In 1999, 75% of the imposed rulings involved such “PLIP” (property law implementation plan) related cases of officials obstructing land allocation, property laws implementation, the legal status of apartments, occupancy rights and thus the return of refugees and displaced persons.

In addition to the dismissal of less prominent and low-level office holders entangled in PLIP-obstructionism, RS President Nikola Poplasen, was the first high-level official removed by HR Westendorp in 1999 for obstructing the implementation of election results.²¹⁸

1999-2001: from international interventionism to...

In 2000, the trend towards other reform areas became more visible with HR Petritsch’s “three-pillar-course” of refugee return, institution-building, and economic reform.²¹⁹ In that year, out of a total of 86 HR’s decisions there were 28 removals. The remaining related to these three key reform areas and included some of today’s fundamentals of the BiH state including the Law on the State Border Service.²²⁰ A number of these decisions imposed or amended laws on wage taxes, privatization of enterprises, internal payments systems, technical standards, social security and other employment related measures. In terms of reconciliation, an area that is often neglected, Petritsch allocated the land for a cemetery and monument for the Srebrenica victims, which was inaugurated as “Srebrenica-Potocari memorial” by former US President Clinton in September 2003.²²¹

²¹⁷ Emir Habul, *Cutting the Lizard’s Tail*, AIM Sarajevo, 19 December 1999, www.aimpress.ch

²¹⁸ Decision removing Mr. Nikola Poplasen from the Office of President of Republika Srpska, 5 March 1999, www.ohr.int

²¹⁹ Petritsch, *Bosnien und Herzegovina 5 Jahre nach Dayton*, pp. 130.

²²⁰ Decision imposing the Law on State Border Service, 13 January 2000, www.ohr.int

²²¹ See HR’s Decisions in 2000, www.ohr.int

The individuals removed from office at that time were no longer mostly community-level urban planning officers, but they included the Head of the FBiH tax administration,²²² privatization obstructionists,²²³ the Minister of Agriculture of the Federation of Bosnia and Herzegovina,²²⁴ members of the De-mining commission²²⁵ etc. This indicates the trend of HR's closer direct involvement in all reform sectors and shows that there is a connection between the area of reform and those obstructing the process in a given sector, as well as the response by the HR.

2001 began as another year of mostly PLIP related, media-reform targeted and economy-boosting impositions totalling 53 decisions, including the removal of managers in public companies.²²⁶ With the removal of Ante Jelavic, the Croat member of the BiH Presidency and President of the HDZ, HR Petritsch made a decisive step in addressing the promotion of the third-entity project, an attempt by the Croat mono-ethnic party and other influential forces in (and outside of) Herzegovina to turn this part of the Federation of Bosnia and Herzegovina (FBiH) into a separate Croat entity based on the war-time Herceg-Bosna mini-state.²²⁷ Together with the subsequent SFOR-

²²² Decision removing Dr. Ramiz Dzaferovic from his position of the Director of the Federation Tax Administration and member of the Governing Board of the Payment Bureau, 27 July 2000, www.ohr.int

²²³ Decision removing Mr. Stiepo Andrijic from the position of President of the Management Board of the Federation Privatization Agency, 22 May 2000, www.ohr.int

²²⁴ Decision removing Dr. Ahmed Smajic from his position of Minister of Agriculture, Water Resources and Forestry of the Federation of Bosnia and Herzegovina, 27 July 2000, www.ohr.int

²²⁵ Decision removing Berislav Pusic, Enes Cengic, and Milos Krstic from the positions of chair/member of the Demining Commission, 12 October 2000, www.ohr.int

²²⁶ See Decision removing Edhem Bicakcic from his position as Director of Elektroprivreda for actions during his term as Prime Minister of the Federation of Bosnia and Herzegovina, 23 February 2001. Bicakcic was removed a second time by HR Ash-down in 2003. See Decision to remove Mr. Edhem Bicakcic from his present position (in Elektroprivreda), and to bar him from any further employment, 14 March 2003, www.ohr.int

²²⁷ Decision removing Ante Jelavic from his position as the Croat member of the BiH Presidency, 7 March 2001, www.ohr.int

aided raids and the take over and putting under international administration of the Mostar-based Hercegovacka Banka,²²⁸ the financial heart of this “Samo-uprava movement,” the Jelavic removal was part of a package of measures geared at maintaining the constitutional basis and balance of the Dayton-state, and is thus another important category in the use of the HR’s emergency powers.²²⁹

2002: “Transposition”

The late Petritsch and early Ashdown periods mark not only a change in style, but also another stage in the transformation from an internally non-sovereign to a more self-sustainable, “ownership” country, which could be described as a phase of “transposition”; initiating, encouraging and accelerating this transition by imposition.

In his last year as HR, Wolfgang Petritsch continued his efforts to foster the return of displaced people, to build and strengthen state-level institutions and capacities, and to reform the economy to attract more foreign investments, but with several measures in the area of judicial reform he also prepared the road for Ashdown’s “jobs and justice programme.” Petritsch also laid the organizational foundation for a streamlined international presence in BiH. In order to optimize coordination among the various international actors in BiH, who all have their own “constituencies”, with frequently diverging and conflicting agendas, Petritsch set up a “Cabinet” including the Heads of the most important international organizations (which today is called the Board of Principals). Together with the PIC Steering Board (SB) Ambassadors in Sarajevo, these were and have been the most senior policy

²²⁸ Decision appointing a Provisional Administrator for the Hercegovacka Banka, 5 April 2001, www.ohr.int

²²⁹ It could be argued that the separatist movement was partly triggered by the OSCE’s elections engineering and last-minute changes to the election laws which disadvantaged, frustrated and radicalized the Bosnian Croats. *See* Omerovic, *The role of the High Representative*, p. 68.

coordination bodies and international advisory and steering groups the HR relies upon, including when discussing the use of the Bonn powers.²³⁰

Under these new structures, Petritsch created three new functional international task forces (which were further subdivided into expert panels and working groups) on economic, judicial and institution building matters. These were modelled after the existing and successful Return and Reconstruction Task Force (RRTF). After this “refined Task Force model” was endorsed by the PIC SB, the IC was in well-coordinated and coherent control of the entire spectrum of reform activities in all the relevant sectors.²³¹ This was an immensely important prerequisite for the reform-boosting success of the subsequent years and it ensured that the HR was in a position to effectively execute his Dayton-given mandate as the IC’s coordinator.

However, the highlight in 2002 was the implementation into legislation of what became known as the “coco decisions,” a series of rulings of the Constitutional Court of BiH, judging on a motion from late President Alija Izetbegovic that declared several provisions of the entity constitutions as discriminatory and not in line with Annex IV of the DPA, the BiH Constitution.²³²

²³⁰ The HR meets with the Principals and PIC SB Ambassadors on a weekly basis to discuss policy issues and coordinate on all relevant issues including media and lobbying strategies.

²³¹ Communiqué by the PIC Steering Board, Brussels 28 February 2002, www.ohr.int

²³² See for example, International Crisis Group, *Implementing Equality: “The Constituent Peoples” Decision in Bosnia and Herzegovina*. Balkans Report Number 128, 16 April 2002. For the development of the “5/98” decision see also Ingo Winkelmann, *Der Bundesstaat Bosnien-Herzegowina*, in Vitzthum/ Winkelmann (Eds.), *Bosnien-Herzegowina im Horizont Europas*.

“Suaviter in modo, Europaeis in re”

From the Bonn powers’ point of view, the imposition on 19 April 2002²³³ by HR Petritsch of amendments to the entity constitutions bringing them in line with the BiH Constitution was a breakthrough for several reasons: the HR acted not only as a negotiator and mediator among the domestic parties when brokering the underpinning political agreement, but instead of decreeing the full legislative package he used his powers only to close the legislative gap by amending those few provisions on which the entity legislators were unable to find a majority despite the existing so-called Sarajevo-Mrakovica Agreement. The “coco” impositions made it possible to have the 2002 general elections and the constitution of entity Parliaments and Executives were organized in accordance within a new, non-discriminatory system which gives all three constituent peoples equal rights in both entities and provides for an adequate constitutional status of the Others. Hence, this “gap-closing” intervention by Petritsch was, despite “a lot of arm-twisting,”²³⁴ one of the first “soft” impositions.

As a consequence to this major constitutional change, 2002 was the year with the highest number of Bonn power use by the HR totalling 153 decisions, over 30% of which were devoted to judicial reform, one fourth was “coco” and elections-related, and the remainder involved some – in BiH terms – “revolutionary” pieces of legislation such as the civil service law which started to address the immanent problem of political party patronage and crony appointments in the public sector.²³⁵ The latter proved to be a key reform instrument before and after the 2002 general elections, in particular in the light of changing governments from the reform-oriented (but moder-

²³³ Decisions on constitutional amendments in Republika Srpska and in the Federation of Bosnia and Constitutions, 19 April 2002, www.ohr.int

²³⁴ Wolfgang Petritsch, *The Fate of Bosnia and Herzegovina*, in Soliz/ Dizdarevic (Eds.), *Ownership Process in Bosnia and Herzegovina*, p.25.

²³⁵ Decision Imposing the Law on Civil Service in the Institutions of Bosnia and Herzegovina and Decision appointing Mr. Jakob Finci to the position of first Head of the Civil Service Agency, 23 May 2002, www.ohr.int

ate in success) Alliance for Change to a revival of the three mono-ethnic parties.²³⁶

In 2002, Paddy Ashdown, who followed Wolfgang Petritsch in May,²³⁷ continued the reform of the economy and the rule of law on which he shifted the entire focus of his “jobs and justice programme.” It did not take long until a new category of impositions emerged. One of Lord Ashdown’s most disputed removals was the dismissal of the Federation of BiH Minister of Finance, Nikola Grabovac, one month after Paddy Ashdown had taken over the position as HR. By dismissing the holder of an office who is “subject to the highest fiduciary duties in relation to the public finances” HR Ashdown introduced new standards for “ministerial responsibility” in BiH. The reason for barring someone from a public position was no longer obstructionism of “Dayton-proper”, *but of disobeying European standards of ethics and failing to maintain the confidence of the general public*. It was in this context that the HR considered the restoration of the principles of proper governance, transparency and rule of law which in turn are essential elements in the Dayton peace implementation process, and which have been “eroded by Mr. Grabovac’s conduct,” only feasible by removing Mr. Grabovac from office.²³⁸

²³⁶ Initially, there was fierce resistance from the nationalist parties which continued to attempt to put party-loyal civil servants (based on strict ethnic quotas) in key positions, by-passing the new recruitment system which the Civil Service Law provided for. It was only nearly a year after the imposition of the law and the appointment of the Agency Director that the civil service legislation was put into practice and all legal provisions began to be recognized and applied by BiH public institutions to recruitment and dismissal practices. However, the old practices of political party patronage continued beyond that date and are still prevalent, mostly in the FBiH despite the passage of a similar law in mid-2003. See OHR Press release, *High Representative Highlights Key reform Role of Civil Service Agency*, 6 February 2003, www.ohr.int

²³⁷ In his last days as HR Petritsch imposed 43 decisions on 22-24 May, mostly in the rule of law field in order to facilitate HR Ashdown’s start with a positive imposition record.

²³⁸ Decision removing Mr. Nikola Grabovac from his position of Minister of Finance of the Federation of Bosnia and Herzegovina, 14 June 2002. www.ohr.int

This is a significant innovation in BiH's post-war politics, that the most senior official and line manager and thus the individual on top of the hierarchy responsible for severe mismanagement, corruption or the misuse of public funds must bear the ultimate responsibility for this misconduct within the organization, even though the person himself was not necessarily "guilty" in the sense of having personally or financially benefited from illegal activities. By introducing this principle, which has to be seen as part of a wider range of activities to bring more transparency, accountability, and professionalism into the public sector, including the aforementioned civil service law, related laws on ministerial appointments²³⁹ and legislation limiting the self-granted privileges and immunities for domestic politicians,²⁴⁰ as well as increasingly promoting auditing measures in public enterprises,²⁴¹ the HR, via the use of his Bonn powers, has brought BiH closer to European standards! During this period, the HR, together with other international key agencies including SFOR, ICTY, OSCE etc. began also to be more actively engaged in verifying party nominees for certain ministerial and other positions ("vetting").

The Light at the End of the Tunnel?

In 2003, the number of HR's interventions decreased (compared with the previous year), totalling 100 decisions, out of which 7 were removals of office holders; one third of the decisions were related to the rule of law including the enactment of the BiH Criminal and Criminal procedure codes. A number of decisions involved the replacement of judges and prosecutors

²³⁹ Decisions Enacting the Laws on Ministerial Government and other Appointments of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina, 27 February 2003, www.ohr.int

²⁴⁰ Decisions Enacting the Laws on Gifts of the Republika Srpska and the Federation of Bosnia and Herzegovina, 6 March 2003; Decisions Enacting the Laws on Immunity of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina, 7 October 2002, www.ohr.int

²⁴¹ See for example Decision on the Special Auditor for the Republika Srpska, and Decision on the Special Auditor for the Federation of Bosnia and Herzegovina, 1 August 2002, www.ohr.int

who had been appointed in the war and communist periods. The screening of the supreme guardians of law is only a logical step in an overhaul attempt to entrench the rule of law and in the light of the civil service reform, this was still a “missing link” in the process of public sector professionalisation launched in 2002.²⁴²

Another interesting new form of soft impositions can be seen in the use of the Bonn powers for advancing the reform of the intelligence sector, which together with the defence and police structures is another remnant from the socialist and war time past of BiH. The intelligence law as drafted by a new commission²⁴³ (and not mainly by the OHR Legal Department) was merely “kick-started” and forwarded to Parliament for consideration thanks to the HR’s intervention, after the BiH Council of Ministers (CoM) had failed to do so.²⁴⁴

The Commission’s work is also an example for HR Ashdown’s increasing “soft”- approach by setting up a domestic body comprising of political representatives and experts under international chairmanship. This model has been applied to all main reform areas where HR Ashdown considered progress necessary for putting BiH “irreversibly on the road to statehood within

²⁴² See for example the 23 May 2002 decisions by HR Petritsch suspending various judges and prosecutors, the decision of the same day enacting the Laws on the High Judicial and Prosecutorial Councils of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina, and HR Ashdown’s decisions of 6 August 2002 on the appointments of the members of the High Judicial and Prosecutorial Councils, the mandate of the Independent Judicial Commission; the 21 August 2002 decisions enacting the Laws of Prosecutors’ Offices; and the 1 November 2002 decisions amending the laws on courts. In 2003, further amendments to the prosecutors’ offices laws were imposed on 24 January, new members to the HJPCs and international judges to the Court of BiH were appointed throughout the year and the relevant laws were further amended. www.ohr.int

²⁴³ Decision establishing the Expert Commission on Intelligence Reform, 30 May 2003, www.ohr.int

²⁴⁴ See Decision proposing the Law on the Intelligence and Security Agency of BiH to the Parliamentary Assembly of BiH, 17 December 2003, www.ohr.int

Europe²⁴⁵ including defence reform²⁴⁶, intelligence reform, securing the financial sustainability of the state by indirect taxation reform²⁴⁷ and reintegrating the city of Mostar²⁴⁸. These commissions have successfully elaborated comprehensive legislative reform packages which were either implemented without direct interference or use of the Bonn powers – and have thus resulted in an even strengthened degree of domestic ownership (defence)²⁴⁹ – or by ‘closing the legislative gap’ with a soft imposition (Mostar).²⁵⁰

The presence alone of the power of the HR to dismiss a public figure, in combination with international pressure and the leverage of public opinion is sometimes sufficient for the concerned individual to bear the consequences and step down “voluntarily.” This was, for instance the case when Presidency member Mirko Sarovic gave up his position in 2003 over the Orao weapons export affair.²⁵¹

²⁴⁵ Inaugural speech by Paddy Ashdown, the new High Representative for Bosnia & Herzegovina, 27 May 2002, www.ohr.int

²⁴⁶ Decision establishing the Defense Reform Commission, 9 May 2003, www.ohr.int. For a detailed insight into the work of the Defence Reform Commission see the article in this publication by Christian Haupt on “*Negotiations on Defence Reform in Bosnia and Herzegovina.*”

²⁴⁷ Decision Establishing the Indirect Tax Policy Commission, 12 February 2003, www.ohr.int

²⁴⁸ Decision Establishing the Commission for Reforming the City of Mostar, 17 September 2003, www.ohr.int

²⁴⁹ See BiH Minister of Defence Appointed Co-Chair of DRC, 11 May 2004, www.ohr.int

²⁵⁰ See Decision on the Implementation Of the Reorganization Of The City of Mostar, 28 January 2004, www.ohr.int

²⁵¹ See PIC SB Political Directors Communiqué, Brussels, 28 March 2003, www.ohr.int. For details on the ORAO scandal see Haupt, *Negotiations on Defence reform*. A year after Sarovic’s resignation the HR imposed further sanctions against him including his removal from his political party position and the blocking of his bank accounts. Decision removing Mr. Mirko Sarovic from his position in the Serb Democratic Party, 10 February 2004; Order of 9 February 2004 Blocking all Bank Accounts of, held by and/or in the name of Mirko Sarovic, www.ohr.int

2003 saw two additional new categories of HR decisions which deserve to be mentioned: First, a couple of financial and logistical changes to banking laws were imposed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in order to make the closure of bank accounts in BiH possible to impede networks that support persons indicted for war criminals (PIFWCs).²⁵² Close cooperation with SFOR and Embassies, as well as the removal of key financial supporters, have dried out some financial support and made life more difficult for those indicted persons most wanted by the ICTY. These measures, which have been accompanied by a more robust and proactive search campaign for Radovan Karadzic by SFOR are also a step towards fighting organized crime more effectively due to the tight connections between criminal networks and groups supportive of war criminals.²⁵³

The second new type of decisions used by HR Ashdown for the first time in 2004 are financial sanctions imposed on political parties or individuals for non-compliance with agreed policies backed by the PIC SB. The area of education reform has been primarily affected by such sanctions as a response to the domestic parties' failures to depoliticize this sector (by administratively unifying "two schools under one roof" etc), in contrast to BiH's international obligations including the Council of Europe's post-accession criteria.²⁵⁴

In 2004 the removals by the HR have so far been almost exclusively related to those latter two categories. Not once have the Bonn powers been used

²⁵² See for instance Decision Enacting the Law on Further Amendments to the Law on the Banking Agency of the Federation of Bosnia and Herzegovina, Decision Enacting the Law on Further Amendments to the Law on the Banking Agency of the Republika Srpska, Decision Enacting the Law on Amendments to the Law on Banks of the Republika Srpska etc. of 7 March 2003, www.ohr.int.

²⁵³ See the orders by HR Ashdown of 7 July 2003 blocking bank accounts of individuals, including bank accounts held by and/or in the name of Ljiljana Zelen-Karadzic, www.ohr.int

²⁵⁴ See Directive Reducing Party Funding for the HDZ which reduces the budgetary itemization for the fiscal year for political party funding by a progressive 5 percent (per every week of delay), 27 April 2004, www.ohr.int

this year to enact a new law. The amendments to e.g. the civil service laws were made, as it had been the case before, when these laws were adjusted, in consensus with the domestic authorities in order to speed up the legislative process.²⁵⁵ Other impositions involved a bundle of decisions on the reunification of Mostar at the beginning of the year. The Mostar decree was a soft imposition of a reform package to reintegrate and reunify the divided Herzegovina capital, rid it from its parallel governing structures and put into legislative action what the domestic politicians in the expert commission under the chairmanship of former German Mayor Norbert Winterstein had mostly already agreed upon by themselves. However, this reintegration process would not have happened without the external stimulus by the HR!²⁵⁶

From Dayton to Brussels: replacing the push of the Bonn powers by the pull of Euro-Atlantic integration²⁵⁷

Despite its tremendous achievements since 1995, “leap-frogging” from a post-communist and war-torn former Yugoslav republic to a sovereign Council of Europe member state with a highly interesting investment market and the most stable currency in South East Europe, BiH is still in a stage of “triple-transformation:” from war to a peaceful democratic country, from a

²⁵⁵ This could be seen almost as a category per se, where the HR uses his powers in full agreement with the executive and legislative branches “out of convenience.” See Decision Enacting the Law on Amendments to the Law on Civil Service in the Institutions of Bosnia and Herzegovina of 14 March 2003, and Decisions enacting Laws on Amendments to the Laws on Civil Service in the Institutions and administrations of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina, 21 April 2004, www.ohr.int

²⁵⁶ Decision on the Implementation Of the Reorganization Of The City of Mostar, 28 January 2004, www.ohr.int

²⁵⁷ See Wolfgang Petritsch, *Bosna I Hercegovina od Dayton do Evrope*, Svjetlost, Sarajevo (2002); Paddy Ashdown, “*From Dayton to Brussels*,” Article by the HR, 12 May 2004, www.ohr.int

socialist economic system to a market economy, and from an aid-driven to an investment driven self-sustainable country.²⁵⁸

What does this transformation mean for the role of the IC and the HR in BiH today and are the Bonn powers in “the most decentralized state of the world”²⁵⁹ still necessary? What justifies the continued practice of external interference into internal politics of a sovereign country that is recognized by the United Nations and how can the existence of the HR be justified in the light of relatively stable political conditions in the wider region as well as in the country itself? Is BiH – a laboratory for “un État de droit”²⁶⁰ – also a playground for European Union strategists in testing EU instruments of “common” foreign, security, and defence policies,²⁶¹ or has the country become a “European Raj,” a neo-colonial outpost and “black hole” reigned by a “vigorous despot” and “benevolent dictator” without any democratic checks and balances?²⁶²

The use of the extraordinary powers has undergone several stages hand in hand with the transformation process of political maturing from a *de facto*

²⁵⁸ Zarko Papic, *The general situation in B-H and international support policies*, International Support Policies to South-East European Countries: Lessons (not) Learned in Bosnia and Herzegovina, Sarajevo (2001) pp.8, www.soros.org.ba

²⁵⁹ Sumantra Bose, *Bosnia after Dayton, Nationalist Partition and International Intervention*, Hurst, London (2002), p.23.

²⁶⁰ Pech, «*La garantie internationale de l'ordre constitutionnel de Bosnie-Herzégovine*», p.439.

²⁶¹ BiH is about to become the first country outside of the EU where besides the European Commission as the European Communities’ “first pillar” all “second pillar” instruments of the EU’s Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP) will be employed on the ground. In practical terms, next to bilateral representatives of most of the 25 EU Member States including the rotating EU-Presidency and the Delegation of the European Commission, the Union is represented by the European Union Special Representative (EUSR), the European Union Police Mission (EUPM), the European Union Monitoring Mission (EUMM), as well as the future European Union Military Presence (EUFOR) that is to take over from NATO/SFOR by the end of 2004.

²⁶² See Knaus & Martin, “*Travails of the European Raj.*”

protectorate towards a self-sustainable state. The HR does not use his Bonn powers “in a vacuum,” neither in terms of domestic politics (as it has been pointed out), nor without prior consultation with and guidance from the PIC SB. Moreover, as shown before, the interventions have become less frequent and “softer.”

However, from a human rights point of view, to question the dismissal practices of democratically elected public officials by an international executive appears to be justified.²⁶³

The angle chosen in this article is a functional and “integrationist” one which attempts to put the necessity of the use of the special powers of the HR in the extraordinary and BiH-specific transformation context where, it is argued, the Bonn powers have served directly or indirectly for promoting and facilitating BiH’s sectoral rapprochement with the European Union and the North Atlantic Treaty Organization (NATO). In formal terms, the process started in May 2002, when the new HR, Lord Ashdown, was “double-hatted” through his appointment as European Union Special Representative.²⁶⁴

First stop: Thessalonica

In 2000, the EU presented a “Road Map” – a catalogue of 18 political, economic and human rights related requirements to be fulfilled by the BiH authorities as a first concrete step towards a closer association with the Union. Once these conditions are fulfilled, the EU would engage in a closer look at the readiness of BiH to enter into a more formal pre-accession relationship

²⁶³ Christine von Kohl, *Es geht um Bosnien-Herzegowina*, in Christine von Kohl, Vedran Dzihic (Eds.), *Balkan diskurs # 1, Bosnien Herzegovina: 8 Jahre nach Dayton – Krisen, Kritik, Perspektiven*, Vienna 2003, p.7.

²⁶⁴ Council of the European Union, Joint Action of 11 March 2002, on the Appointment of the EU Special Representative in Bosnia and Herzegovina, (2002/211/CFSP), Official Journal of the European Communities, L70/7 of 13 March 2002. *See also* PIC SB Political Directors, Communiqué, 28 February 2002, www.ohr.int

with the EU via negotiations of a Stabilisation and Association Agreement (SAA), the EU's main instrument for bringing transition countries closer to the set of complex processes and norms ("the *acquis communautaire*") of the Union.²⁶⁵

In the sectors of democratisation, human rights, and education for example, the Council of Europe, to which BiH acceded in April 2002, drafted a similar, although much longer list of criteria that BiH was expected to fulfil prior and following its entry into Europe's oldest international intergovernmental organisation (post-accession criteria). Two years after BiH's accession to the Council of Europe – the amount of time it takes for post-accession criteria implementation – these conditions have still not been fully met and the "strengthening of BiH's Statehood and democratic institutions is still in progress."²⁶⁶

In October 2003, EU Commissioner Chris Patten presented a feasibility study about the preparedness of BiH for the opening of an SAA. It was concluded that the Commission "hopes to be able to recommend the opening of SAA negotiations next year – on the condition that BiH makes significant progress in a number of areas identified as priorities for action..." These 16 priority areas include "compliance with existing conditionality and international obligations; more effective governance; more effective public administration; European integration; effective human rights provisions; effective judiciary; tackling crime, especially organised crime; managing asylum and migration; customs and taxation reform; budget legislation; budget practice; reliable statistics; consistent trade policy; integrated energy market; the BiH single economic space and public broadcasting." If the European Commission were to find "in the course of 2004" that sufficient progress was made

²⁶⁵ The EU's relations with Bosnia and Herzegovina, www.europa.eu.int

²⁶⁶ See Council of Europe, *Compliance with obligations and commitments and implementation of the post-accession programme*, SG\INF (2004)10 of 16 March 2004, www.coe.int

in these areas, it would recommend to the member states of the EU (the Council) to start SAA negotiations.”²⁶⁷

The process of Stabilisation and Association (SAP) and the EU’s Partnership Programmes with the “carrot” of a comprehensive financial support package (CARDS) are the main vehicles for BiH’s integration into the EU. The EU-Western Balkans Thessalonica summit in June 2003 indicated that at the end of this SAP would be “ultimate membership into the European Union, through adoption of European standards,” spelled out as precondition of the feasibility study.²⁶⁸

Immediately after the “yes, but” decision by the European Commission on the conditional decision to start SAA negotiations, the BiH Council of Ministers (CoM) passed a Decision on the Procedures in the Process of Coordination of the BiH Legislation with the *Acquis Communautaire* and drafted an ambitious action plan to translate the political, economic, human rights and other detailed technical criteria into legislative and executive measures.²⁶⁹ A first interim assessment given by the Commission in April 2004 stated that “on those of the 16 points relating to the political situation, progress has been moderate,” “BiH faces major economic challenges,” and “in terms of meeting the technical SAP requirements, the judgement of the Feasibility Study [of] a pattern of intermittent progress, interspersed with areas where crucial reform has not been completed, or in some cases even begun” remains valid. This interim SAA assessment continues by warning that “in

²⁶⁷ Commission of the European Communities, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, COM (2003) 692 final, Brussels, 18 November 2003, www.europa.eu.int

²⁶⁸ EU-Western Balkans Summit-Declaration, Thessalonica, 21 June 2003, www.europa.eu.int

²⁶⁹ Council of Ministers of Bosnia and Herzegovina, 33rd session, Decision of 3 December 2003, www.esi.gov.ba

too many areas where progress has been achieved, that progress has come only thanks to international pressure.”²⁷⁰

At its April 2004 meeting, the PIC “Steering Board noted the publication of the European Commission's annual Stabilization and Association Report on BiH, and its European Partnership with BiH. Acknowledging the progress the country has made in addressing the 16 areas for priority action set out in the EC's Feasibility Study in November 2003, the Steering Board stressed that much still needs to be done, and much more quickly if the BiH authorities' own targets are not to be missed. It urged the BiH authorities to address without delay the areas of concern listed by the European Commission, and to act expeditiously on the European Partnership document.”²⁷¹

In contrast to this, the CoM's Directorate for European Integration made a rather positive self-assessment about the status of implementation of the feasibility study requirements.²⁷²

Second stop: Istanbul

A similar integration process with Euro-Atlantic organizations is evolving in the defence field. At the December 2003 NATO Foreign Ministers meeting, Serbia and Montenegro and BiH were given a realistic perspective of joining NATO's Partnership for Peace Programme (PfP) under the condition that they “comply fully with their international obligations, including full cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY), in particular bringing to justice all those who are indicted by

²⁷⁰ Commission of the European Communities, Commission staff working paper Bosnia and Herzegovina, Stabilisation and Association Report 2004, COM (2004) 205, Brussels, 30 March 2004, www.europa.eu.int

²⁷¹ PIC SB Political Directors, Communiqué, 1 April 2004, www.ohr.int

²⁷² www.dei.gov.ba

the Tribunal, notably Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina, in accordance with UN Security Council Resolution 1503.”²⁷³

The NATO Foreign ministers even urged “both countries to envisage the Istanbul Summit as a realistic target by which they could meet the outstanding conditions,” and indicated that they would “assess the two countries' progress on their possible accession to PfP in advance of the Istanbul Summit.”²⁷⁴ The decisive date at which NATO is expected to decide about BiH's PfP membership and thus about BiH's further integration into Euro-Atlantic structures is the upcoming NATO summit of Heads of State and Government on 28-29 June 2004. In parallel with the North Atlantic Council's Final Communiqué, then NATO Secretary General (SG) Lord Robertson sent a letter to the BiH Presidency in which he reiterated that, “The Alliance stands determined to support [BiH] in achieving further progress on the road to Partnership for Peace Membership. In order to indicate more concretely the further steps on implementation of this highly important legislation on the path towards PfP, the NATO Council endorsed on 14 November a “Non Paper on benchmarks for Bosnia and Herzegovina Partnership for Peace Membership,” which was attached to the SG's 4 December 2003 letter.”²⁷⁵

The NATO benchmarks spelled out by Lord Robertson include legislative, institutional, budgetary, personnel and technical reform measures that the BiH authorities – in the framework of the Defence Reform Commission – are expected to implement in order to reach a positive decision at the Istanbul summit. On the other hand, these conditions contain political, “non-DRC benchmarks,” notably cooperation with the ICTY. As far as this ICTY cooperation is concerned, the Political Directors of the PIC SB stated at their 1 April 2004 meeting in Sarajevo that, “the BiH authorities are putting

²⁷³ Ministerial Meeting of the North Atlantic Council, Final Communiqué, paragraph 10, Brussels, 4 December 2003, www.nato.int

²⁷⁴ *Ibid.*

²⁷⁵ NATO, Secretary General, Letter to Presidents Paravac, Covic and Tihic, 4 December 2003, SG (2003) 1361.

this country's future at risk if they fail to cooperate fully with the ICTY. BiH will not have fulfilled its international obligations until it has taken all possible measures to transfer indictees, including Radovan Karadzic, to The Hague.” They added that despite some successes, “implementation of core reforms is being delayed and in some cases jeopardized by the politics of the governing parties. This may undermine BiH's chances of gaining membership in Partnership for Peace (PfP), and could limit the ability of the European Commission to recommend in 2004 the opening of negotiations on a Stabilization and Association Agreement.”²⁷⁶

In addition, the supreme organ representing the IC in BiH, “underlined that the steps taken to implement the Defence Reform Commission's recommendations between now and June will be of fundamental importance to NATO's decision on whether to accept BiH's application to join PfP. In this context, the Steering Board warned that the impetus behind reform had to be strengthened and the issues that are hampering progress had to be overcome. Full co-operation with the ICTY is also a core requirement and the BiH authorities, in particular the RS, will have to show results in this field. So far they have not done so.”²⁷⁷

In the light of this recent development, these two interdependent processes of EU and NATO integration are the umbrella for most of the reforms undertaken in BiH. They also define BiH's near-term (PfP), mid-term (SAA) and long-term (EU membership) political and foreign policy objectives. At the same time, these processes and their various sub-processes indicate the status of BiH's transformation from dependency to self-sustainability.

²⁷⁶ PIC SB Political Directors, Communiqué, 1 April 2004, www.ohr.int

²⁷⁷ Ibid.

“Non-stop”: OHR Sarajevo

In this current period of transformation BiH is somewhere in between the two poles of dependency and self-sustainability, but it is certainly closer to the destination than the point of departure.²⁷⁸ And it is this Euro-Atlantic path (and no longer the DPA implementation *strictu sensu!*) that is currently determining and will continue to influence the degree of interventionism BiH is exposed to from the side of the IC. Obviously, this co-governing by the IC has changed as BiH has moved forward on its European road, and as it was demonstrated in the first part of this article. With the transformation of the tools and instruments employed by the IC and the HR in particular, the role of the IC/HR itself has been altered, in the words of previous Senior Deputy High Representative Gerhard Enver Schroembgens, to that of a “midwife.”²⁷⁹

The fundamental innovative difference that the two integrationist processes initiated in the politics of BiH is that they caused a substantial shift in the responsibility of domestic elites and politicians towards more ownership. Not only have “positive competencies” been transferred from international to domestic structures, but also have domestic stakeholders been increasingly identified by the public opinion for mistakes and failures the consequences of which they have only themselves to blame.²⁸⁰

Against the background of this integrationist development based on externally defined conditions that need to be implemented internally by the BiH

²⁷⁸ Solioz sees BiH “somewhere half-way between a democracy and an authoritarian regime, in a grey zone characterized by somewhat disquieting socio-economic performances and sham pluralism, only poorly masking the domination of an elite that is partly corrupt, partly incompetent.” Christophe Solioz, *the Art of the Possible*, p.23.

²⁷⁹ Gerhard Enver Schroembgens, Speech to senior BiH officials participating in the Intergovernmental Task Force on Public Administration Reform, 23 June 2003.

²⁸⁰ For a transfer of positive competencies from the OHR to the BiH authorities see e.g. the termination transfer of the OHR RRTF capacity to the BiH Ministry for Human Rights and Refugees. PIC SB Political Directors, Declaration 12 June 2003, www.ohr.int

authorities themselves, the HR with the support from the PIC SB,²⁸¹ has made it clear that he would not use his powers to impose the 16 reform sectors that have been requested by the European Commission's Feasibility study, by repeatedly emphasizing that the "way to Europe does not lead through the Office of the High Representative."²⁸² This approach also eliminates the former "scapegoat" effect by which the HR has frequently been in a position where he had to use his authority to implement measures that were unpopular amongst domestic politicians and the public although there was often an understanding and inherent support by political elites for the necessity of such measures.²⁸³

The reluctance by the HR to impose reform is a decisive turning point in BiH's post-war development and the DPA implementation and can be regarded as the beginning of the end of the *de facto* protectorate. At the end of the day, the 16 Feasibility study priorities and the NATO conditions for BiH to join PfP (whether fully and timely implemented or not!) are – in the absence of any quantitative measurements – instruments to gauge the degree of BiH's self-sustainability. They are the weight on the scales, the "pitch" of which is the HR, who has his own "road map," the Mission Implementation Plan.²⁸⁴ Hence, the "HR's" exit strategy, which is substantially inter-linked

²⁸¹ "The PIC Steering Board noted the outcome of the EC's Feasibility Study and the 4 December NATO Ministerial meeting, which set out clearly the steps BiH needs to take in order to be in a position to meet both its aims of starting negotiations on a Stabilisation and Association Agreement and joining the Alliance's Partnership for Peace. The PIC Steering Board underlined that it was for the BiH authorities themselves to take the actions required, and that this should commence without delay and should form the major part of their core reform efforts in 2004. ... The responsibility for a successful outcome in both processes lies completely in Bosnia and Herzegovina's hands." PIC SB Political Directors, Communiqué, 11 December 2003, www.ohr.int

²⁸² High Representative's Message to Leaders of BiH, 25 September 2003, www.ohr.int

²⁸³ These interventions led to a dependency syndrome in situations of uncomfortable decisions which would also be unpopular in Western Governments. Petritsch, *Bosnien und Herzegowina 5 Jahre nach Dayton*, p.121.

²⁸⁴ The objective of the MIP is to set out four core tasks and to provide the HR with means of evaluating the progress in "ticking off" OHR activities in entrenching the

with the NATO and EU conditionality, is also an entry-strategy for BiH into Euro-Atlantic structures.²⁸⁵

From Trusteeship to Tutorship: the “Professor-Student relationship”²⁸⁶ between the HR and BiH Authorities

If the HR no longer imposes legislation, in particular not in the areas of the feasibility study, what can be and has become his “midwife-role” as in-theatre facilitator and arbitrator?

As described above, the transformation of the HR from a “toothless tiger” to a harsh arbitrator and ruler against separatist and obstructionist forces, and finally to a soft mediator and negotiator amongst parties, was a staged process embedded into the political development of BiH from the 1995 truce until the 2002 “coco” reforms. Since then, BiH has entered into its final and latest transformation stage of institution building and statehood-formation, and economic development towards a self-sustainable country. The more ownership and responsibility the domestic authorities are gaining in this “zero-sum-process,” the less intervention will be needed to secure the irreversibility of the process towards Europe. This final stage has been charac-

rule of law, reforming the economy, strengthening the capacity of BiH’s governing institutions, especially at state level, and embedding defence sector reforms so as to facilitate BiH into Euro-Atlantic structures. Mission Implementation Plan, February 2004, www.ohr.int

²⁸⁵ Some have argued that in order to make the HR’s actions and interventions more foreseeable it would be necessary to have a “legislative programme and strategy focusing on a more limited range of laws aimed at advancing the state-building process.” Christophe Solioz, *From Protectorate to Partnership*, in Soliz/Dizdarevic (Eds.), *Ownership Process in Bosnia and Herzegovina*, p.55. Others have requested that the OHR “limit itself to a clearly defined legislative agenda,” and that the HR declares publicly which areas he is going to use the Bonn powers in. Marcus Cox & Gerald Knaus, ESI, *Open Letter to Lord Ashdown*, Sarajevo 16 July 2003. This is exactly what the MIP, a public document, is and does in combination with the EU and NATO conditionality!

²⁸⁶ Ambassador Donald Hays, Interview, Sarajevo, 30 April 2004.

terized by a change in the role of the IC and the HR, built on his tasks as a mediator and negotiator.

The newly defined role of the HR as negotiator, coach, mentor, and councilor has not been institutionalized yet.²⁸⁷ In practice, however, the partnership relationship between the HR and the CoM “across the Miljacka River” is determined – as the functional commissions have shown²⁸⁸ – by a high degree of technical and political cooperation. This is a trend which, in particular at the technical level, needs to be further reinforced through joint drafting committees, working groups, twinning programmes etc., in order to continue and complete the shift and transfer of technical know-how and ownership to domestic bodies. Continued institution and capacity-building with IC assistance will also be necessary to turn these institutions in functioning state-apparatus and fill empty shells with manpower.²⁸⁹

As a consequence of the IC/HR’s state-building efforts,²⁹⁰ the CoM has reached a higher level of professionalism gained more and more self-confidence and there are signs of independent “delivery” in substance despite a wide range of areas where ethno-politics appear to dominate the overall interests of the country as a whole.

²⁸⁷ See the mandate of the EUPM to “monitor, mentor and inspect Local Police upper/mid management”, EUPM Mission Statement, www.eupm.org.

²⁸⁸ See the most recent appointment by the HR on 11 May 2004 of the BiH Defence Minister as Co-chairman of the DRC, www.ohr.int

²⁸⁹ There are numerous examples of domestic institutions in BiH that have been staffed with international representatives and experts, most prominently the DPA Annex VI (human rights institutions including the BiH Ombudsman and the former BiH Human Rights Chamber), the BiH Constitutional and State Courts, State Prosecutors Office, the Commission on Real Property Claims (CRPC) etc.

²⁹⁰ On 3 December 2002, HR Ashdown enacted the CoM Law. Decision Enacting the Law on the Council of Ministers of BiH, 3 December 2002, www.ohr.int. Together with the Law on Ministries, the legislation abolished the cumbersome and ineffective rotation principle of the Chair of the CoM. For the first time BiH has now a Prime Minister with a permanent administrative structure and services, part of which is the key office of the Director for European Integration.

Are the Bonn Powers Still Necessary?

There have been increasing requests for the “abolishment” of the Bonn powers or even the institute of the HR itself. In the specific context of the depicted BiH’s transformation from a *quasi*-protectorate under the DPA and the HR’s Bonn powers to a fully independent, sovereign and self-sustainable candidate for EU membership and eventually to full-fledged member in EU/NATO, the following functions of usage of Bonn powers can be identified and seem to be still justified, if used as an *ultima ratio* instrument, as long as the transformation process has not been completed, such as:

- **The “Checks and Balances Function”**

There are still powerful political, criminal and PIFWCs support networks of obstructionists in BiH that benefit from archaic parallel structures. As it was the case in the “third entity” movement the HR’s Bonn powers are an important safeguard against anti-Dayton tendencies that endanger the statehood of BiH, as long as the rule of law is not completely established and the civic concept of BiH statehood and identity remains weak.²⁹¹

- **The “Damocles Sword Function”**

The threat alone or the theoretical possibility by the HR to use his power is sometimes sufficient for a “person under fire” to acknowledge his/her responsibility e.g. by stepping down voluntarily (Sarovic). This has a deterrent effect on potentially obstructionist practices. The general obedience with dismissals shows also the reluctant acceptance by BiH office holders and society of the existence of the powers.

²⁹¹ The HR must “constantly attempt to ensure a balanced state of affairs between the two entities and with regards to the lower administrative units such as the Cantons in the Federation. Solioz, *the Art of the possible*, p.10.

- **The Reform Booster Function**

Outside of the parameters of the EC and NATO conditionality (until a further decision by NATO/EU has been made) and under strictly limited circumstances and with the political support from the PIC SB, the HR should, for a limited period, be able to revert to his Bonn authority to kick-start, initiate, accelerate and advance reforms in order to complete the transformation of BiH to a stage of full self-sustainability.

- **The *primus inter pares* Function**

As long as the role of the HR/EUSR as “*primus inter pares*” has not been entirely clarified in the EU GFSP/EDSP contexts, he should be equipped with “sticks” (complementary to the military and police force of the future EUFOR) to avoid becoming a “lame-duck” HR/EUSR. Unlike, for example the European Commission, the EUSR has no “carrots” to offer. The latent existence of (well to define) powers and coercive procedures will guarantee credibility vis-à-vis domestic stakeholders and ensure coherence and coordination between and among other EU and IC actors.

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The discussion on the necessity and legitimacy of the extraordinary powers of the HR will continue in the light of the forthcoming crucial months and developments for BiH’s further destiny within the Euro-Atlantic structures. Logically, a more formal discussion about the future of the HR and EUSR is connected to the success or failure by BiH authorities to meet the requirements they have accepted to fulfil. NATO’s decision about BiH’s accession to PfP at the Istanbul Summit, as well as the expected final “avis” of the European Commission on the preparedness of BiH for SAA negotiations will be the two main benchmarks for BiH’s Euro-Atlantic integration process. Together with the OHR’s MIP, the results of these external assessments will have an impact not only on the future of BiH, but also that of the HR’s Office and the further use and “necessity” of the Bonn powers.

Notwithstanding the legitimacy the IC still grants to the Bonn powers as such, there also seems to be a common understanding that they are an increasingly antagonistic factor in BiH's process of rapprochement. Last but not least in the eyes of the person who has final authority, HR Lord Ashdown made it clear that, "my job is to do get rid of my job".²⁹²

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²⁹² Speech by the HR for Bosnia and Herzegovina Paddy Ashdown to the BiH House of Representatives, 17 December 2002, www.ohr.int