

# The Bosnian Hiatus: A Story of Misinterpretations

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**A**fter seven years of debate, the decision to close the office of the High Representative in Bosnia and Herzegovina (OHR), an international body overseeing the peace implementation in Bosnia, has not yet been implemented. Bosnia is a potential EU candidate, but the majority of member states do not consider Bosnia capable of negotiating membership with the Union while the OHR remains the supreme authority governing the country. However, there was never enough political will on the part of any of the actors to bring about closure of the OHR.

*This paper presents an overview of the different opinions that have been blocking this closure. In addition, it argues that Bosnia's political structures have no genuine wish for the OHR to hand over ownership of the processes in the country, so they are creating crises to prevent the closure of the OHR. Finally, the paper examines the EU's role in these processes, and the implications of the inability of the EU27 to reach consensus on Bosnia.*

### Introduction

Bosnia and Herzegovina (hereinafter: Bosnia or BiH) has often been described as a failed state, but in reality it is actually not that far behind other Western Balkan countries that have aspirations to join the EU. Due to recent developments, however, there is a danger that this gap will widen.

A few weeks ago, the EU Council decided to give the green light to the EU Commission to accept Serbia's

EU membership application and start the 'Avis'.<sup>1</sup> Montenegro and Albania are even more advanced in the process and have already received the Avis.<sup>2</sup> Bosnia, however, cannot even submit its membership application. It is the only Western Balkan country (except Kosovo)<sup>3</sup> that has not yet officially applied for EU membership. As things stand, this is not likely to change any time soon – both the Council and the European Commission have explicitly defined the OHR closure as a precondition for BiH to apply for EU membership.<sup>4</sup>

The OHR is one of the most frequently used acronyms when talking about Bosnia: the Office of the High Representative. It is the international

<sup>1</sup> Once a country applies for EU membership, the Union sends back a detailed questionnaire to the potential candidate state. This questionnaire comprises questions about the country's institutions, policies and infrastructure. On the basis of thoroughly reviewed answers, the EU Commission issues the Avis, or opinion on the application. The opinion of the EU Commission indicates when the applicant country might be ready to start accession negotiations.

<sup>2</sup> On 9 October 2010, the EU Commission concluded that the accession negotiations should be opened with both Montenegro and Albania once those countries meet a set of custom-tailored key priorities.

<sup>3</sup> Kosovo is, however, a special case since five of the EU member states have not recognised its sovereignty.

<sup>4</sup> General Affairs Council of the Council of Europe, *Conclusions on Enlargement/Stabilisation and Association Process*, Brussels: Progress Report, 7-8 December 2009.

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institution responsible for overseeing the implementation of the civilian aspects of the 1995 Dayton Peace Agreement, which ended the 1992-1995 war in Bosnia and Herzegovina. The current High Representative in Bosnia, Austrian diplomat Valentin Inzko, stated in a recent interview that the decision on the OHR closure will come in “two or three years – maybe even sooner.”<sup>5</sup> Why is it necessary for BiH to wait that long to even start the *Avis* exercise?<sup>6</sup>

Regardless of the policy that “each country moves step by step towards EU membership as it fulfils its commitments,”<sup>7</sup> the Stabilisation and Association Process (SAP) can be seen as a regional course of action.<sup>8</sup> The SAP stimulates regionality in order to prevent less advanced countries from backsliding, while upholding fair conditionality based on individual merit.<sup>9</sup> If a country is advanced, like Croatia, of course it would not be held back because of others. Still, if a country is lagging behind like Bosnia is, or is blocked like the FYRM because of the name issue with Greece, it is bad for the process. Having this in mind, Bosnia’s current predicament is detrimental to the overall SAP process, and will have a negative impact on the whole region.

While a large part of the responsibility for the current impasse lies with Bosnia’s leaders, the “unwieldy structures” and the negative dynamics created by the Dayton Peace Agreement, the EU is to be blamed for not opening up a walkable path for Bosnia. In short, Bosnia cannot apply for EU membership as long as there is the OHR, but it is the EU that does not have the ability to tackle the issue of closing down the OHR with its international partners, because some of the EU member states oppose the closure. Let us explore how the EU managed to manoeuvre itself into such a corner.

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<sup>5</sup> Nezavisne Novine, “Valentin Inzko: Zatvaranje OHR-a zavisi od PIC-a i domaćih političara”, 2 June 2010.

<sup>6</sup> In the most optimistic scenario, when BiH submits the application and receives the questionnaire, it will need 4-5 months to complete it. Then there will be follow up questions, after which the Commission could issue an *Avis* in following 2 months, and then Bosnia could become a candidate in another two months. However, this optimistic timeframe is highly unlikely.

<sup>7</sup> “The Stabilisation and Association Process”, European Commission (<http://ec.europa.eu/enlargement>).

<sup>8</sup> EU Council official, interviewed by the author, June 2009.

<sup>9</sup> Bertelsmann Foundation, Center for Applied Policy Research, Policy Planning Staff, German Ministry of Foreign Affairs, Conference Report, *Integrating the Balkans: Regional Ownership and European Responsibilities. Balkan Forum*, Berlin, 15-16 July 2002.

## EU and the peace process in Bosnia

At the beginning of the crisis in the former Yugoslavia, the Common Foreign and Security Policy (CFSP)<sup>10</sup> discussions had only just started, and this new policy lacked the means or experience to address the conflicts properly.<sup>11</sup> There was no precedent to guide the EU’s involvement, and the leaders only possessed a superficial knowledge of the politics and history of Yugoslavia.<sup>12</sup> Europe acted as if it was a unified force with the new CFSP, when in fact there was a great deal of reluctance from individual member states about their involvement in the region.<sup>13</sup> In addition, there was also disagreement between the European, US and Russian politicians on how the crises should be handled.<sup>14</sup>

The fiasco of the EU’s CFSP during Yugoslavian wars<sup>15</sup> saw more than 100,000 deaths and over a million refugees from Bosnia alone. It was only after the US-led NATO military intervention in 1995 that the General Framework Agreement for Peace in

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<sup>10</sup> The Common Foreign and Security Policy (CFSP) is a continuation of former European Political Cooperation, which began in 1970 and was formalised in 1986 and required that member states only consult one another informally on international policy issues. In response to the many geopolitical changes in Europe during the 1980s and 1990s, such as the fall of the Soviet Union, the reunification of Germany, the breakup of Yugoslavia, leaders of the 12 countries that made up the European Union at the time recognised the necessity to develop formal instruments for foreign policy. The 1992 Maastricht Treaty established the CFSP as one of European Community pillars, and created procedures for intergovernmental decision-making on international policy issues. The European Council defines the principles of CFSP, and based on these guidelines the Council of Ministers takes decisions unanimously.

<sup>11</sup> Filippo Andreatta (1997), *The Bosnian War and the New World Order: Failure and Success of International Intervention*, Occasional Paper No. 13, WEU Institute for Security Studies.

<sup>12</sup> Steven L. Burg & Paul S. Shoup (1999), *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*, New York: M.E. Sharpe.

<sup>13</sup> Filippo Andreatta (1997), *The Bosnian War and the New World Order: Failure and Success of International Intervention*, Occasional Paper No. 14, WEU Institute for Security Studies.

<sup>14</sup> According to Filippo Andreatta, the US had no troops on the ground and as a result, proposed more idealistic strategies for settlement. These proposals were resented by the Europeans who were trying to foster diplomatic solutions and to protect their own deployed troops. Once America and Europe were finally able to agree on how to retaliate to the hostilities, Russia tried to block them in order to gain more influence in the region through its historic Slavic and Orthodox connections to the Serbs.

<sup>15</sup> Ana E. Juncos (2005), “The EU’s post-Conflict Intervention in Bosnia and Herzegovina: (re)Integrating the Balkans and/or (re)Inventing the EU”, *Southeast European Politics*, Vol. 6, No. 2, pp. 88-108.

Bosnia and Herzegovina (hereinafter: GFAP or the Dayton Agreement) was signed. The GFAP was in essence a US-managed initiative, both militarily and diplomatically. Annex IV of the Dayton Agreement is the current Constitution of Bosnia and Herzegovina.

During the GFAP negotiations, the European powers resented being sidelined by the US in the peace process, so they lobbied Washington for UN involvement in overseeing the implementation of Dayton agreement. The US refused and the Europeans responded with the idea of establishing a Peace Implementation Council (PIC) in order to obtain more influence in the implementation of the *civilian aspects* of the peace agreement.<sup>16</sup>

The PIC Steering Board provides political guidance to the UN Security Council mandated High Representative in Bosnia. PIC is a broad umbrella group of 55 countries and agencies that have contributed most to the peace effort in BiH. The steering board contains 11 members: four EU member states (France, Germany, Italy, the UK), two EU institutions (the Presidency of the European Union,<sup>17</sup> the European Commission), and five non-EU countries (Canada, Japan, Russia, the US and Turkey, which is representing the Organisation of the Islamic Conference).<sup>18</sup>

In Bosnia, although formally an independent state and not an international protectorate, it is the High Representative who has the “final authority in theatre”.<sup>19</sup> He has the power – colloquially known as the *Bonn powers* – to impose laws and other decisions and to dismiss obstructive local officials from office. No judicial institutions in Bosnia, not even the Constitutional Court,<sup>20</sup> have the jurisdiction even to

review the actions of the OHR. Each of the High Representatives so far has been a European.<sup>21</sup>

The main purpose of the Dayton Agreement was to stop the war, and very few actually believed that it would present a long-term political framework for Bosnia. Based on the Agreement, the Republic of BiH continued “its legal existence under international law as a state, with its internal structure modified.”<sup>22</sup> Losing the status of a republic, Bosnia became a *de facto* decentralised federation.<sup>23</sup> Following the conflict frontlines within Bosnia, two entities were established within Bosnia: the Federation of Bosnia and Herzegovina<sup>24</sup> and the Republika Srpska (RS). Because of its strategic importance,<sup>25</sup> the status of the city of Brčko in northeast Bosnia and its surrounding territory could not be agreed upon; so, it was decided that Brčko would be administrated by an international supervisor.<sup>26</sup>

The new constitution, the ‘Annex 4’, replaced the concept of *citizens* with three constituent ethnic groups – Bosniaks (Bosnian Muslim), Serbs and Croats. It also defined complex mechanisms of ethnic and entity vetoes and an electoral system based on ethnicity. Regardless of the “seductive appeal of ensuring equality of the ethnic groups”, such a system ultimately presents a “mild form of racism.”<sup>27</sup> This was confirmed by the European Court of Human Rights, which in December 2009 obliged Bosnia to amend the discriminatory amendments of its

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<sup>16</sup> Ibid.

<sup>17</sup> Since the Lisbon Treaty came into force, the EU presidency is not present at the PIC SB meetings; the EU is represented only by the European Commission.

<sup>18</sup> “General Information”, Office of the High Representative ([www.ohr.int](http://www.ohr.int)).

<sup>19</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (1995) Article V, Annex 10.

<sup>20</sup> In early 2007 the Constitutional Court of Bosnia published its ruling declaring the absence of any right of appeal for individuals sacked by the High Representative a violation of the European Convention on Human Rights. Under the Bosnian Constitution, the Convention is the highest law of the land. Instead of using the opportunity to soften, or at least bring in accordance with human rights standards, the PIC Steering Board “noted with concern that domestic actors in Bosnia and Herzegovina have challenged actions undertaken on the basis of Dayton and UN Security Council Resolutions.” It called upon the High Representative to take appropriate action, which he did on 23 March, issuing an “Order” on how the ruling is to be implemented: through OHR and nobody else.

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<sup>21</sup> The High Representatives thus far: 1. Carl Bildt (Sweden) 1995-1997; 2. Carlos Westendorp (Spain) 1997-1999; 3. Wolfgang Petritsch (Austria) 1999-2002; 4. Paddy Ashdown (UK) 2002-2006; 5. Christian Schwarz-Schilling (Germany) 2006-2007; 6. Miroslav Lajčák (Slovakia) 2007-2009; 7. Valentin Inzko (Austria) 2009- present.

<sup>22</sup> GFAP, Annex IV (The Constitution), Article I.

<sup>23</sup> European Commission for Democracy Through Law (Venice Commission), “Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative”, Venice, 11 March 2005.

<sup>24</sup> Which is, again, a decentralised federation composed of 10 cantons.

<sup>25</sup> It basically divides Republika Srpska into two parts providing the only land corridor from Western to Eastern part of Republika Srpska.

<sup>26</sup> The Brčko District, representing 0.9% of BH territory, was put under international arbitration by the High Representative, and Brčko District (even though, it has the status of the district Brčko is governed by mayor and district assembly) was established in 1999. It was the only part of BiH that was not under the jurisdiction of either entity governance, and was constituted as a direct international protectorate. The International Brčko supervisor was always the Principal Deputy High Representative, which was each time an American.

<sup>27</sup> Sienho Yee (1996), “The New Constitution of Bosnia and Herzegovina”, *European Journal of International Law*, Vol. 7, No. 2.

constitution, to align it with the European Charter of Human Rights (ECHR).<sup>28</sup> The ruling has not been implemented because there are different views among the political representatives of the country's three ethnic groups about how the constitution should be changed.

Because of the “complexities facing them”,<sup>29</sup> the parties<sup>30</sup> engaged in the GFAP were appointed by the High Representative to help accomplish the task of implementing the civilian aspects of the GFAP. Originally, in 1995, the plan for the internationally supervised transition to self-governing democracy in Bosnia was to last for only one year, until the 1996 election of state and entity bodies. After the elections, which, instead of the change in the Bosnian political landscape that most of PIC members had hoped for brought the same political leaders who fought the war back into power, the OHR closure deadline was prolonged for a further two year ‘consolidation period’. After only a year – in December 1997<sup>31</sup> – OHR’s mandate was extended indefinitely. It was during this PIC meeting that the High Representative was given the power henceforth to issue binding decisions, impose legislation and to remove officials from office.

Considering the situation in post-Dayton Bosnia, the decision to equip the OHR with the Bonn powers seems logical, even from today’s perspective. There was no freedom of movement, and war criminals roamed freely, mainly in Republika Srpska. There was open hate speech in the media. Thousands of refugees were expelled from their homes and were beaten when they returned.<sup>32</sup> The OHR indeed played a major role in helping to normalise the situation.

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<sup>28</sup> The Charter of Fundamental Rights of the European Union enshrines certain political, social, and economic rights for EU citizens and residents that are incorporated into EU law. The charter states that the Union must act and legislate consistently with the Charter or the EU courts will strike down European Union legislation which does not comply with it. The Charter solely applies to the member states and their implementation of European Union law and does not extend competencies of the Union beyond the ones given to it in the treaties. The document gained full legal effect in 2009, when the Treaty of Lisbon entered into force.

<sup>29</sup> GFAP, Annex X, Article I,2.

<sup>30</sup> The Republic of Bosnia and Herzegovina, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of Bosnia and Herzegovina, and the Republika Srpska.

<sup>31</sup> Peace Implementation Council, “PIC Bonn Conclusions: Self-sustaining Structures”, Bosnia and Herzegovina: PIC Main Meeting, December 1997.

<sup>32</sup> For example, in 2000, a serious incident occurred in Krcevine village in the municipality of Capljina when four unknown suspects forcibly entered the Bosniak collective accommodation centre and harassed the returnees. In the aftermath of the event OHR provided help to protect these people.

Almost 100% of private property has been returned to the rightful owners as a result of OHR efforts. Its actions contributed greatly to establishing trust between the previously warring parties. Undoubtedly, the OHR’s presence and the use of Bonn powers “was beneficial for BiH and its citizens and a necessity following a bloody war.”<sup>33</sup> The OHR either directly imposed or initiated the processes that resulted in the passing of important legislation, which has helped create effective governance on the national level. The downside was, however, that the institution also took over the domestic government’s job of governing the country.

## Time for transition? From Dayton to Brussels

Moving slowly from a post-conflict country towards EU candidacy, it became evident that Bosnia must move away from direct international oversight. Back in 1999, the High Representative at the time, Wolfgang Petritsch, introduced the “ownership policy”, designed to encourage Bosnian leaders to take greater responsibility for their country:

Every piece of legislation that I impose with my authority as the High Representative, gives politicians in Bosnia and Herzegovina a perfect excuse not to do their job properly. The Bosnians have to take ownership of the progress of their country. My job is to ensure that the direction in which they go is that of a proper European country.<sup>34</sup>

But exercising ownership did not happen; on the contrary, the use of Bonn powers continued to increase until 2006. The High Representative, Lord Paddy Ashdown holds a record of removing 59 Bosnian officials from office in one single day. Ashdown was also the first High Representative to hold the position of the European Union’s Special Representative (EUSR). The EUSR was introduced in 2002 in Bosnia, mandated to “assist the country to move beyond peace implementation towards EU integration.”<sup>35</sup>

Ashdown’s actions were the antithesis of the “ownership policy”. Because he, in addition to the position of High Representative, held the mandate of the EUSR, the extensive use of the Bonn powers

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<sup>33</sup> European Commission for Democracy Through Law (Venice Commission), “Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative”, Venice, 11 March 2005.

<sup>34</sup> Ambassador Wolfgang Petritsch, Speech by the High Representative for Bosnia and Herzegovina, at the Steering Board Ministerial Meeting, Sarajevo, 22 September 1999.

<sup>35</sup> European Union Special Representative in Bosnia and Herzegovina ([www.eusrbih.eu](http://www.eusrbih.eu)).

pushed the EU into a role of an ‘EU member state builder’ in Bosnia. The PIC’s political support for such actions made the EU “mandated to negotiate with itself in determining every aspect of policy-making in Bosnia.”<sup>36</sup>

Although Ashdown’s mandate as the PIC-guided High Representative was to protect the Dayton Agreement, he openly expressed his thoughts on how it was “a superb agreement to end a war, but a very bad agreement to make a state.”<sup>37</sup> This opinion seems to have been shared by most of the PIC members, and as a result the framework used by the PIC and the OHR increasingly became shaped by the EU strategies of engagement rather than by Dayton itself.<sup>38</sup> Too strong an attachment to the GFAP was even interpreted as a barrier to legislative progress towards EU integration.<sup>39</sup>

The OHR/EUSR double hat arrangement was only supposed to be an interim solution, as the OHR closure for the first time became seriously considered by some of the PIC members, but the transition from the OHR to the EUSR was never made. In spite of the mantra that the soft EU pull power should replace the strong OHR push power, the EUSR has been marginal ever since it was introduced in 2002. It is “a largely virtual body with little operational reality.”<sup>40</sup>

Until 2003, no plan existed that stated when the right moment was to close the OHR.<sup>41</sup> Then, after assessing what had been implemented out of the Dayton Agreement so far, the OHR realised that the Agreement, particularly its annexes 7<sup>42</sup> and 9,<sup>43</sup> were not going to be implemented in the near future, if ever. Thus, the OHR Mission Implementation Plan (MIP) document was created in order “to identify the core tasks on which the OHR now needs to concentrate in

order to accomplish its mission”.<sup>44</sup> The MIP was updated in 2006, but regardless of its level of implementation, in June 2006 the PIC SB agreed that the OHR should immediately begin preparations to close on 30 June 2007, in order for it to be succeeded by the “reinforced EUSR”.<sup>45</sup>

The 2006 general election results in Bosnia spoiled the PIC’s plan. Nationalist rhetoric sharpened as the overall political situation in the country was perceived to worsen. So when the decision to close the OHR was revised in February 2007, the transition date was postponed to 30 June 2008. Finally, in its 2008 meeting, the PIC decided to extend the HR’s mandate indefinitely until a set of benchmarks had been fulfilled – the so-called “5+2” package.<sup>46</sup> The origins of “5+2” can be found in the “Mission Implementation Plan” as shown in Table 1 below.

If we examine the benchmarks of the 5+2 package, it becomes apparent that some have very little to do with the Dayton Agreement. In fact, some of the objectives – for example “the establishment of a National Fiscal Council” – were taken from different EU documents, such as the European Partnership with Bosnia, which has nothing to do with the OHR’s mandate.<sup>47</sup> Dayton gradually became subordinate to the requirements for eventual EU membership, and its unfulfilled parts have been left in the shadows of the 5+2 agenda. Not surprisingly, the PIC’s 5+2 conditionality was fully embraced by the EU – the EU shaped some of its requirements. This was a clear example of the “extreme flexibility in relation to the powers that international actors exercise over this nominally independent state.”<sup>48</sup>

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<sup>36</sup> David Chandler (2006), “State-Building in Bosnia” The Limits of ‘Informal Trusteeship’, *International Journal of Peace Studies*, Vol. 11, No. 1.

<sup>37</sup> “Farewell, Sarajevo”, *The Guardian*, 2 November 2005.

<sup>38</sup> Ibid.

<sup>39</sup> European Commission (2003c), “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.

<sup>40</sup> “OHR: Results First, Exit Later”, Center for European Integration Strategies, 24 January 2007.

<sup>41</sup> Author’s interview with former OHR senior staff member, June 2010.

<sup>42</sup> Annex 7 of the GFAP grants refugees and displaced persons the right to return home safely and either regain lost property or obtain adequate compensation.

<sup>43</sup> Annex 7 of the GFAP is supposed to establish BiH Public Corporations, such as Transportation Corporation, which organises and operates transportation facilities, such as roads, railways and ports.

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<sup>44</sup> Office of the High Representative (2003), *OHR Mission Implementation Plan*, Bosnia and Herzegovina, January ([http://www.ohr.int/ohr-info/ohr-mip/default.asp?content\\_id=29145](http://www.ohr.int/ohr-info/ohr-mip/default.asp?content_id=29145)).

<sup>45</sup> Office of the High Representative (2006), PIC Steering Board, *Towards Ownership: From Peace Implementation to Euro-Atlantic Integration*, Sarajevo: Communiqué.

<sup>46</sup> The five objectives are: Resolution of State Property, Resolution of Defence Property, Completion of the Brcko Final Award, Fiscal Sustainability of the State, Entrenchment of the Rule of Law. In addition to these objectives, there are also two conditions: signing of the SAA and a positive assessment of the situation in BiH by the PIC SB.

<sup>47</sup> European Partnership is a document that works as a means to realise the European perspective of the Western Balkan countries. This document identifies priorities for action, adapted to the country’s specific needs and state of affairs. In addition, the Partnership also provides guidance for financial assistance to the country.

<sup>48</sup> David Chandler (2006), “State-Building in Bosnia” The Limits of ‘Informal Trusteeship’, *International Journal of Peace Studies*, Vol. 11, No. 1.

Table 1. 5 objectives +2 conditions to close the OHR, set by the PIC Steering Board

	5+2	DAYTON	2003 MIP	Implementation status	Additional explanation
Objective 1	<b>Resolution of State Property</b>	NOT MENTIONED	Strengthening the capacity of BiH's governing institutions, especially at the state-level	NOT IMPLEMENTED	The property concerned derives from the Succession Agreement signed between the successor states of former Yugoslavia. This agreement does not necessarily vest the state government with ownership rights. In the internal context of BiH, it is up to the different levels of jurisdiction to come to an agreement – on the basis of constitution and laws – on how this property is to be divided.
Objective 2	<b>Resolution of Defence Property</b>	NOT MENTIONED	Establishing state-level civilian command and control over armed forces, reform the security sector, and pave the way for integration into the Euro-Atlantic framework	NOT IMPLEMENTED	In the course of the defence reform in Bosnia, 69 objects have been defined as needed for the Bosnian Defence Forces. This part of the State Property since then began being referred to as the Military Property. NATO is also insisting that the State of BiH assumes the ownership of these 69 objects.
Objective 3	<b>Completion of the Brcko Final Award</b>		Integration of Brčko	PARTIALLY IMPLEMENTED	In 2009 the BiH parliament adopted the first ever amendment to the BiH constitution that redefined the legal status of Brčko District, which became a local governmental unit under the direct sovereignty of Bosnia and Herzegovina, and its territory is defined as a territory in the joint (condominium) ownership by the entities. The problem, however, remains that Brčko is not legally part of any electric networks in Bosnia, and it is not clear who gives them electricity - RS or FBiH. In September 2009 the HR imposed the law regulating this issue, but the RS refused to publish it the Official Gazette.
Objective 4	<b>Fiscal Sustainability of the State</b>		<b>Reforming the Economy</b>		
	Agreement on a Permanent ITA Co-efficient methodology	NOT MENTIONED	Tax reform, including the introduction of BiH-wide, EU-compatible VAT	IMPLEMENTED in June 2008	
	Establishment of a National Fiscal Council	NOT MENTIONED	NOT MENTIONED	IMPLEMENTED in May 2008	
Objective 5	<b>Entrenchment of the Rule of Law</b>		<b>Entrenching the rule of law</b>		
	Adoption of National War Crimes Strategy	NOT MENTIONED	Ensuring that extreme nationalists, war criminals, and their organised criminal networks cannot reverse peace implementation	IMPLEMENTED in December 2008	
	Passage of Law on Aliens and Asylum	NOT MENTIONED	NOT MENTIONED	IMPLEMENTED in May 2008	
	Adoption of National Justice Sector Reform Strategy	NOT MENTIONED	Restructuring of courts and prosecutors offices	IMPLEMENTED in June 2008	
Conditions 1	<b>Signing of the SAA</b>	NOT MENTIONED	To ensure that Bosnia and Herzegovina is a peaceful, viable state on course to European integration	IMPLEMENTED in June 2008	
Conditions 2	<b>Positive assessment of the situation in BiH by the PIC SB</b>	NOT MENTIONED	NOT MENTIONED	NOT IMPLEMENTED	After all other benchmarks are implemented, it will come down to a political decision by the PIC countries whether or not to close the OHR.

Source: Own compilation.

## Why the conditionality went wrong

In general, *conditionality* can be seen as the main mechanism through which international organisations such as the EU induce non-member states to comply with their rules. In order for conditionality to work and be effective, the international organisation grants or withholds rewards in reaction to the fulfilment or non-fulfilment of certain conditions.<sup>49</sup>

If applying this model to BiH, one would need to assume that in order for the 5+2 conditionality to appeal to Bosnian political leaders, they would need to consider the closure of the OHR as a reward. But do Bosnian leaders wish to get rid of the OHR at all?

It rather seems as though they have become used to someone else solving their problems for them:

Although in favour of a certain law, often Bosnian politicians say that they cannot publicly express it as they would lose support of their respective ethnic group voters. Regularly such discussions end with them saying ‘if that law is so important for you, tell the High Representative to impose it’.<sup>50</sup>

The OHR relieved local politicians of the obligation to negotiate and compromise. By effectively fulfilling the BiH government’s responsibilities, the OHR created an atmosphere in which politicians were able to advocate inter-ethnically uncompromising political stances without fear of being blamed for negative actions by their electorates. Current stalemate over state and military property,<sup>51</sup> which at the moment is a crucial outstanding condition of the 5+2 package, can serve as an illustration of this.

The issue of the state/military property appeared on the agenda of the OHR quite belatedly in 2004. Due

to the entities beginning<sup>52</sup> to take control over assets, which was interpreted by the former High Representative as creating an imminent danger of misuse, the OHR imposed a decree in 2005 that declared the distribution and sale of the state/military property by any government level illegal and forbidden, until a state-level law defining how it should be distributed was in place.<sup>53</sup>

Very little has been achieved regarding the law, demonstrated by the fact that five years later, this prohibition is still in force. It remains the main barrier to the OHR closure, and it is the clash of two opposite political views on how this property should be dealt with that is at the root of the problem.<sup>54</sup> The OHR, not

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<sup>52</sup> It should be clarified that a large amount of state property is actually well regulated and does not fall within the category under prohibition. Until the issue of “state property” came onto the agenda, the entities were effectively using the assets of prewar Bosnia and Herzegovina as their own property for years. As if perpetuating the former Republic Bosnia and Herzegovina on their own territories, they assigned the property of the forests to public cantonal forestry companies in the Federation under the guidance of cantonal ministries. In the RS the same happened on the entity level. The water resources of Bosnia and Herzegovina were also divided between the two entities, while the Federation again divided them into two riverbasin-oriented agencies. The same division has taken place in the energy sector. The Bosnian energy sector is divided among the Elektroprivreda BiH and Elektroprivreda RS. Roads were divided between the RS and the Federation, and they are again divided among the federal, the cantonal and the municipal level. The railways are also divided into two companies.

<sup>53</sup> The OHR issued three decisions simultaneously, enacting Laws “on the Temporary Prohibition of Disposal of State Property” in the Republika Srpska, the Federation of BiH and of Bosnia.

<sup>54</sup> Bosniak SBiH party leader Haris Silajdzic, stated that all the immovable property should be owned by the state level government, while the entities and other lower levels should receive the right of usage on the property they need. The Serb SNSD party leader Milorad Dodik says it is the entities that should receive the ownership, and then they could give the right of usage to the state for the property the state institutions need. He claims that the Dayton Agreement vested the entities with the right of ownership over state property. In all of its provisions and annexes, the Dayton Agreement does not have a single article that regulates state property. However, that fact that the Dayton Agreement did not foresee any regulation on state property does not mean that the property titles of the former Socialist Republic of Bosnia and Herzegovina were automatically abolished and transferred to the entities. Annex 4, the Constitution, postulated that Bosnia and Herzegovina is the legal successor of Republic (GFAP, Annex IV (The Constitution), Article I.), thus creating a basis for Silajdzic’s argument on how all property owned by the former Republic of BiH should now be owned by the State of BiH. Silajdzic’s party lost the 2010 general elections, and it is to be seen whether the SDP and the SDA who got the majority of

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<sup>49</sup> Aneta Borislavova Spendzharova (2003), “Bringing Europe In? The Impact of EU Conditionality on Bulgarian and Romanian Politics”, *Southeast European Politics* Vol. 4, No. 2 (<http://www.seep.ceu.hu/archives/issue42/spendzharova.pdf>).

<sup>50</sup> EU Commission official, interviewed by the author, June 2010.

<sup>51</sup> The Succession Agreement signed between the successor states of former Yugoslavia divided the property of former SFRJ among succession states. It defined the right of Bosnia and Herzegovina in regards to part of the former SFRJ property. However, the agreement “does not necessarily vest the State government with the ownership rights. In the internal context of BiH, it is up to the different levels of jurisdiction to come to an agreement – on the basis of constitution and laws – on how this property is to be divided.” Later on, in the course of the defence reform in Bosnia, 69 objects have been defined as needed for the Bosnian Defence Forces. This part of the State Property has since been referred to as “Military Property”.

having the political support to impose the solution for the state/military property issue, is calling for a compromise solution,<sup>55</sup> but the attitudes of Bosnian political leaders remained irreconcilable. Moreover, in September 2010, in the midst of the pre-election campaign, the Republika Srpska Assembly adopted a law regulating the status of the property under OHR's prohibition on the territory of that entity. Such law is in direct violation of the OHR-imposed ban on the state property. It is difficult to understand why the RS government, which is one of the "strongest advocates for the OHR closure"<sup>56</sup> just keeps heating up the political debate, making it impossible for the PIC to take a decision on OHR closure.

The OHR took no action regarding the adoption of the litigious law.<sup>57</sup> In the past, such a law would have been annulled by the High Representatives before the delegates even left the Assembly building, but now, without the PIC consensus, such a decision is impossible. There was just a brief announcement by the PIC SB saying that the adoption of this law by the Republika Srpska National Assembly:

is a unilateral act that undermines the long-term effort to allocate state property in a way that ensures the functionality of all levels of authority in Bosnia and Herzegovina...

Russia, however, refused to join the statement.

This course of action (or rather non-action) proves that the OHR is just a "dead horse", as Miroslav Lajcak described it when he resigned from the position of High Representative in order to become Slovakia's foreign minister in January 2009.<sup>58</sup> Lajcak said:

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Bosniak votes in 2010 general elections will take a softer stance on the state property issue.

<sup>55</sup> The compromise should be based on "self assessment": The State of BiH to define what objects it currently needs, and will need in the course of EU accession, while the other property will be distributed to other levels of government. So far, the Bosnian authorities have failed to produce this self assessment, and the OHR names former BiH Prime Minister Nikola Spiric, who is a member of Dodik's SNSD, as the main culprit.

<sup>56</sup> Antonio Prlenda, "Gregorian: Bad Rhetoric is Preventing OHR Closure", *SETimes*, 20 July 2009 (<http://www.setimes.com>).

<sup>57</sup> OHR will simply wait for someone in the FBiH to take the RS law to the Bosnian Constitutional Court, hoping that the court ruling will set a precedent to help draft a law that will define the status of all the state property, enabling the OHR to lift the imposed prohibition of disposal.

<sup>58</sup> What worried the international community in 2007, when Miroslav Lajčák took the position of the High Representative, was the inability of Bosnia's leaders to agree on the country's future and their propensity to articulate their disagreements in inflammatory terms. Lajčák was not able to do much about either problem, although he named the main culprit, RS Prime Minister Milorad Dodik, but also mentioned the Bosniak

If there is no decision to close down the OHR, then efforts should be made to strengthen the role and authority of the High Representative – and that would absolutely mean that European issues become secondary... Europe's philosophy is a philosophy of partnership, while strengthening the OHR is a continuation of the protectorate.<sup>59</sup>

Nevertheless, the protectorate continues to exist, but the OHR capacities are not strengthened. Since 2007, the use of the Bonn powers declined dramatically, due to a lack of political support for such actions by leading PIC countries, mainly Russia, but also by the majority of the EU countries of the PIC.

## Part of the problem?

For most EU member states, the goal of closing the OHR has become an *idée fixe*. Europe's plan was to prolong reinforcing the Sarajevo EUSR Office until the OHR closes.<sup>60</sup> As it became apparent that the implementation of the 5+2 was not progressing, most of the EU started seeing the OHR as part of the overall problem, rather than part of the solution. As the Italian representative within the EU Council explains, "the Conditions are important, but we must not let ourselves become hostages of the 5+2".

And Italy is not the only EU member state to hold such a position. The majority of the EU member states feel hostage to the PIC 5+2 conditionality, which isn't producing results. In order to break the stalemate, some EU countries, particularly Italy<sup>61</sup> and France,<sup>62</sup> pushed the idea of 'watering down' the 5+2 conditionality. On the other hand, the UK<sup>63</sup> and to a lesser extent the Netherlands<sup>64</sup> and Denmark,<sup>65</sup> did not want to agree on it. For the latter, the issue was a matter of credibility – not to loosen the conditionality, as that would send the wrong message of the EU

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leader Haris Silajdžić who took part of the blame. Dodik openly defied the OHR, saying he would be ready to "wrestle with NATO tanks" if the OHR used its powers against him. With no tanks in sight, the OHR refrained from using its powers although it accused Dodik and others of violating the Dayton Agreement.

<sup>59</sup> Tihomir Loza, "The Disenchanted Potentate", *European Voice*, 3 February 2009 ([www.europeanvoice.com](http://www.europeanvoice.com)).

<sup>60</sup> EU Council official, interviewed by the author, June 2009.

<sup>61</sup> Author's interview with an Italian diplomat in the EU Council, June 2010.

<sup>62</sup> Author's interview with a French diplomat in the EU Council, June 2010.

<sup>63</sup> Author's interview with an UK diplomat in the EU Council, July 2010, and with a Foreign and Commonwealth official in London.

<sup>64</sup> Author's interview with a Dutch diplomat in the EU Council, May 2010.

<sup>65</sup> Author's interview with a Danish diplomat in the EU Council, May 2010.

backing off when faced with enduring resistance to fulfilling its conditions. Since this position was shared by the US and Turkey, the conclusion was obvious: the 5+2 conditions must be fulfilled – full stop.

In addition, US officials are sceptical that the EUSR can do much in Bosnia with its “punitive recourses” compared to those of the OHR. Without executive powers, “the EU pull power is not strong enough to make the three ethnic groups in BiH cooperate.”<sup>66</sup> The EU has done little to convince them otherwise.

The Butmir Process in late 2009 was another attempt to help Bosnia move forward.<sup>67</sup> Clearly it was impossible to gain consensus of the EU27, let alone the consensus of the PIC on the OHR closure, without seeing Bosnia deliver on the 5+2. So the last commissioner for enlargement, Olli Rehn, and the Swedish Prime Minister Carl Bildt came up with the idea of linking Bosnia’s EU accession with the phasing-out of the OHR.<sup>68</sup> They hoped that it would present additional leverage for Bosnian politicians to broker a deal on the 5+2. This idea gained the approval of the member states, as seen in the 2009 December Council conclusions:

The Council will not be in a position to consider an application for membership by Bosnia and Herzegovina until the transition of the OHR to a reinforced EU presence has been decided.<sup>69</sup>

The exact meaning of having a “reinforced EU presence” in Bosnia has never been fully clarified. While preparing for the transition meant to happen on 30 June 2007, the idea for the revised EUSR mandate was to

continue to concentrate on political and security-related issues, ... as well as residual responsibilities of the Dayton Peace Agreement”, and to “offer political advice and facilitate political and legal processes, in particular with respect to constitutional reform.”<sup>70</sup>

Neither was it ever determined how the EUSR should accomplish these goals. During the Czech presidency

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<sup>66</sup> US official, interviewed by the author, May 2010.

<sup>67</sup> In November 2009 at Butmir (EUFOR military base in Butmir on the outskirts of Sarajevo) senior American and European officials presented a package of proposed constitutional changes to Bosnian political party leaders. The initiators of this political dialogue were Swedish Foreign Minister Carl Bildt and US Deputy Secretary of State, James Steinberg. The Butmir talks ended without agreement.

<sup>68</sup> EU Council official, interviewed by the author, June 2009.

<sup>69</sup> Council of Europe, General Affairs Council, *Conclusions on Enlargement/Stabilisation and Association Process*, Brussels: Progress Report, 7-8 December 2009.

<sup>70</sup> EU Council Internal Document, “Report on a Reinforced EU-Engagement in Bosnia and Herzegovina in the Context of the Closure of the Office of the High Representative”.

of the EU, member states discussed the Bosnian “EUSR toolbox”, but no consensus was ever reached. Most of the European countries seemed reluctant to have a EUSR with any form of executive powers, as this would be in contrast to European values. Others wanted to have a ‘back-up option’ in case things went wrong after the OHR closed, being in favour of some form of “residual Bonn powers”.<sup>71</sup> And then, as BiH entered the election year, all debates halted, as no solution to the remaining 5+2 was in sight.

Meanwhile, the Lisbon Treaty came into force, and the roles of EUSRs all over the world are being reshaped. Regarding Bosnia, a ‘personal union/double-hatting arrangement’ of the EUSR and the Head of the Commission Delegation, is being considered,<sup>72</sup> but a precondition for such a development is the closure of the OHR. The Bosnian EUSR mandate has been extended until August 2011; it is not clear what will happen after that.

Frustrated with waiting for the double-hatted OHR/EUSR arrangement to end, the European Commission together with some member states, particularly France and Italy, started looking into a possible way out – to decouple the two roles. Two camps have resurfaced on this matter. Those in favour justify the idea, saying it would create clarity by defining EU envoys’ competences clearly in regards to those of the HR.<sup>73</sup> The ones opposing, namely the UK, the Netherlands and Germany, express their concerns on the impact of the decoupling on the future OHR, but also on the overall situation in Bosnia. Until now, not a single official discussion in the European Council has taken place on this matter.

Although the EU makes up more than half of the PIC Steering Board, there is no common EU voice in the PIC. Mostly due to the UK’s position (shared by some smaller MS such as Denmark and partly the Netherlands), there is no common stand of the EU27 that the time of OHR in Bosnia has expired, or that its further existence presents an impediment to Bosnia’s development as a sovereign democratic country striving to become an EU member state. Only when there is no more OHR as a supreme ruler of Bosnia,

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<sup>71</sup> Such powers should be used only in extremely urgent cases, such as potential moves towards secession by Republika Srpska (RS). Of course, the question would be whether the RS would care at all and whether the HR would have the support of the EU member states to enforce the decision, even if it meant for them to impose sanctions if Republika Srpska does not give in.

<sup>72</sup> European Commission, Communication from the Commission to the European Parliament and the Council, “Enlargement Strategy and Main Challenges 2009-2010” Brussels, 14 October 2009 (<http://www.delbih.ec.europa.eu/docs/StrategyPaper20092.pdf>).

<sup>73</sup> EU MS diplomat, interviewed by the author, June 2009.

will the local politicians get an opportunity to show that they are really capable of governing themselves.

## Remodelling conditions as the way forward

The decision to link the OHR closure with Bosnia's membership application has backfired.<sup>74</sup> The OHR has become an obstacle to Bosnia's slow but steady path to EU accession, because OHR practice, as the Venice Commission stated, "does not correspond to democratic principles."<sup>75</sup> However, the EU doesn't seem to be capable of providing guidance to Bosnia "by more subtle means" because it is left in the shadow of the OHR.

At the same time, the OHR is left with very little credibility, and is unable to take up any action that will contribute to finding solutions, as the recent developments with the state property issue suggest. In addition, OHR's transition to the EUSR has become one of the major frustrations for most member states.

Although tempting, the idea of decoupling the roles of the EUSR and the OHR should be abandoned. Even if the OHR is to be downsized<sup>76</sup> and displaced from Sarajevo, knowledge that there is a 'protector' with his super powers will remain a perfect excuse for BiH leaders not to take any responsibility.

A series of missed opportunities, half-baked plans and lack of exit strategies are starting to have negative consequences on BiH. All of these attempts lead one logic and one logic only: 2011 must be a year of

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<sup>74</sup> The 2010 Commission's progress report does not directly mention the link between the OHR closure and Bosnia's membership application; it just merely asserts that "making progress towards meeting the conditions which have been set for the closure of the OHR by the PIC Steering Board remains essential". Using such watered-down language suggests that the Commission has started to consider accepting BiH's application while the OHR is still in place. However, since the membership application is not a 'letterbox exercise' anymore and requires a political consensus among the EU27, it remains unclear what the members states positions on such a development will be.

<sup>75</sup> European Commission for Democracy Through Law (Venice Commission), "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative", Venice, 11 March 2005.

<sup>76</sup> A decision will be made to proceed with the decoupling. the idea of OHR being be downsized and maybe even displaced from BiH was discussed, so the EU delegation can then be merged with the EUSR, and resume its mandate in accordance with the new EU foreign affairs policies. However, such a development would imply that Bosnia's EU path is obstructed as it cannot even submit the membership application while there is still the OHR, unless the EU Council changes the December 2009 conclusions and allows Bosnia, regardless of the OHR, to apply for membership and keep pace with its neighbours.

decision: the OHR needs to be succeeded by the reinforced EU delegation that will be merged with the EUSR into a single body.

This should not imply that the 5+2 conditionality should be abandoned, by any means. The condition of finding a solution for the state property issue has the potential for a remodelling, so it does not interfere with Bosnia's accession process. The condition of the military property has already been taken over by NATO, in order for Bosnia to continue moving towards membership in the Alliance. In a similar matter, the issue of state property can also be easily remodelled so it becomes a condition for Bosnia in the course of the accession process.

Lifting the emphasis from the state/military property issues will put the spotlight on the real EU conditions for Bosnia, such as implementing the ECHR ruling, adopting the State Census Law, proceeding with the Stabilisation and Association Agreement (SAA) implementation, etc.

The decision to close the OHR is not to be made by the EU – this must be decided by the PIC Steering Board (SB) – unanimously. Even if the state/military property issue is resolved, the 5+2 benchmarks require a "positive assessment of the situation in BiH by the PIC SB." This will be a political decision of the PIC countries.

The consensus of EU27 is a precondition for the EU to start seriously using available mechanisms to create a joint vision within all the PIC members – particularly the US and Turkey – that the OHR is a broken instrument beyond hope of repair and must be closed as soon as possible. Only when such a common position is reached can the EU can start reassuring its international partners that it is capable of sorting out problems in its own backyard, especially after having invested years and billions of euro in doing so.

Re-shaping the conditions, such as that of state property, in a way that makes the EU responsible for their implementation will show that the EU is flexible enough to recognise when a certain strategy isn't working. However, the EU will have to find a carrot that is tempting enough to help reach consensus in Bosnia on such issues.

The EU anticipated the results of the October 2010 general elections in Bosnia hoping they would change the political landscape of the country in such a way that the pending conditions would be fulfilled. The elections did bring certain changes, but only among the Bosniak voters.<sup>77</sup> The shift away from Silajdzic

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<sup>77</sup> The Social Democratic Party (SDP) received the majority of their votes. Also, the election of Bakir Izetbegovic (Party of Democratic Action – SDA) to the post of Bosniak representative in the tripartite country's presidency came as

and his maximalist stance can be seen as positive. However, in Republika Srpska and parts of the Federation with a Croatian majority, the voters generally elected the same parties that were in power under the 2006-2010 mandate.<sup>78</sup> It is yet to be seen whether their nationalistic rhetoric was just part of a pre-election campaign. The best case scenario, of course, would be the ability of the new government to deliver on the remaining 5+2. However, if political deadlock in Bosnia continues, remodelling the conditionality would enable Bosnia to move forward.

While waiting for the new Bosnian government to be consolidated, which is not expected before February 2011, The EU Council, together with Catherine Ashton, the new High Representative of the Union for CFSP,<sup>79</sup> should re-open the debate on the 'EUSR toolbox', focusing on defining the "reinforced EU presence" that will succeed the OHR. This time it needs to be clarified that "reinforced EU presence" will not be an OHR under a different name. Instead, the soft politics of conditionality – proven to work by the successful visa liberalisation roadmap implementation in BiH should be the cornerstone of any future EU engagement in this country.

The decision to close down the OHR will enable Bosnia to submit its membership application and start the screening process. Such development is "far more likely turn Bosnia's unwieldy constitutional structures into a working federal system than any attempt to renegotiate the constitution in isolation from the EU accession process."<sup>80</sup> More importantly, OHR closure will coerce BiH politicians to assume ownership.

Only then, for the first time since the Dayton, will the future of the country truly be in the hands of its

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the greatest surprise. In the past couple of years, the SDA has been trying to reposition itself as a more moderate party, wanting to base its politics on compromise.

<sup>78</sup> Croat Democratic Union (HDZ) took the lead in Cantons with the Croatian majority. This party is particularly unhappy. Under current electoral law in Bosnia, the presidency members are elected in a way that the Serb member is elected from Republika Srpska, while the Bosniak and Croat members are elected from the Federation. Because of this, there is no guarantee that Bosniaks will not vote for the Croat candidate and vice versa. As in 2006, they declared that SDP Zeljko Komsic had no legitimacy to represent the interests of Bosnian Croats, as most of his votes came from Bosniaks.

<sup>79</sup> The post was introduced by the Treaty of Amsterdam as the High Representative for Common Foreign and Security Policy; until it was expanded by the Lisbon Treaty to sit in the European Commission and chair the council of EU foreign ministers. The post will be backed up by the European External Action Service, a diplomatic corps, once it is fully operational.

<sup>80</sup> Heather Grabbe, Gerald Knaus and Daniel Korski, "Beyond wait-and-see: The way forward for EU Balkan policy", ECFR, May 2010.

democratically elected political leaders. Maybe then the government can keep up the EU accession pace with the other Western Balkan countries.

## Afterword: The myth about OHR preserving the peace in Bosnia

A commonly expressed concern is that the security situation in Bosnia will deteriorate when there is no more OHR. This fear has little to do with reality, as it is not the OHR that preserves peace in BiH. After the 1995 GFAP, there was a NATO-mandated peacekeeping force of over 60,000 soldiers in Bosnia. But as the security situation improved, peacekeeping duties were given to the EU in December 2004.<sup>81</sup> Even in the event of a security threat, the Bonn powers are not the tool to prohibit violence, as the High Representative cannot order EUFOR to act.<sup>82</sup> EUFOR engagement needs to be decided by the EU Council's Political and Security Committee. The Council's readiness to maintain an executive military role beyond 2010,<sup>83</sup> while almost no one in Europe believes there is a threat of conflict in BiH, sends a "strong political message"<sup>84</sup> to BiH – mainly to Bosniaks – that any attempt at Republika Srpska secession is out of the question. This safeguard should remain once the OHR is gone.

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<sup>81</sup> An EU peacekeeping force, called EUFOR, is charged with keeping the peace in Bosnia and overseeing the Bosnian armed forces. Currently there are roughly 2,000 troops on the ground, reinforced by over-the-horizon reserves of up to four battalions from Austria, France, Germany, Italy and the UK.

<sup>82</sup> "The High Representative shall have no authority over the IFOR and shall not in any way interfere in the conduct of military operations or the IFOR chain of command." – GFAP, Annex X, Article II, 9.

<sup>83</sup> Council of the European Union, *EU Military Operation in Bosnia and Herzegovina (Operation EUFOR ALTHEA.)*, Brussels: Factsheet, January 2010.

<sup>84</sup> EU Commission official, July 2010.