

# **Bases of Legitimacy and Problems of Accountability in International Administrations: An Examination of the Office of the High Representative (OHR) in Bosnia and Herzegovina**

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## **Abstract**

The international administration in Bosnia and Herzegovina is examined as a unique form of executive authority, sanctioned both by the parties to the war and by the international community to rule over a newly created but vulnerable state following a prolonged ethnic conflict. The High Representative effectively represents the international community rather than the people of that territory, and so lacks democratic legitimacy, but has international legitimacy based on consent of the warring parties and retroactive delegation by the UN Security Council, and also because it serves to maintain peace and security, protect human rights, and provide government in the absence of local capacity. However, it lacks accountability given that it holds a great deal of unchecked executive authority, a situation that would not be acceptable in an established democracy. The central paradox of international administrations is that they are tasked with facilitating democratic governance while they themselves lack accountability to the population they administer. When international oversight is also lacking in such administrations and when they are prolonged after the end of a conflict, serious problems of accountability can arise. The paper concludes with suggestions for accountability measures that could be put into place in future international administrations to make them more accountable, both upwardly to the international community that has appointed them, and downwardly to the people whose territory they administer.

## **Background to the OHR and Introduction**

Bosnia and Herzegovina has been led for more than ten years by the Office of the High Representative (OHR), a governing entity created by the 1995 Dayton Peace Agreement and tasked with implementing the civilian aspects of the agreement. The agreement ended the devastating 1992-1995 war in the territory and established Bosnia and Herzegovina as a consociational, independent state made up of two entities, the Republic of Serbia and the Federation of Bosnia and Herzegovina, each with characteristics of states within a complex state (Kaspovic 2005). This consociational model has been helpful for power-sharing between the different ethnic groups after the conflict (Bose 2005), but has been subject to gridlock when issues have been contested (Hayden 2005; International Crisis Group 2003).

In spite of independent statehood, and in order to assist the previously warring parties to secure their agreement, the High Representative was designated as the final authority to interpret the civilian aspects of the agreement. It was given no authority over the military aspects of the agreement, which were covered in the first ten years by the NATO-led military Stabilisation Force (SFOR). SFOR was replaced in December 2004 by a European Force (EUFOR Operation Althea), which remains independent of the OHR's authority.

The High Representative reports to the Peace Implementation Council (PIC), a group of representatives from 55 countries and international organizations that meet biennially to sponsor and direct the peace process, and more directly to the PIC Steering Council. As such, the international

administration in Bosnia and Herzegovina, unlike those in Kosovo and East Timor, is not a UN-sponsored entity, nor does it take direction or oversight from any UN body, although UN Security Council Resolution 1031 of December 1995 recognized the authority of the PIC retroactively. Legally, therefore, the OHR is present and operates in Bosnia and Herzegovina based on the request of the warring parties through their peace agreement rather than by external imposition, although outside powers, and the US government in particular, had a strong hand in drafting the agreement and securing the consent of the parties. The agreement involved considerable compromise on the part of the warring parties, and the Serbs in particular, who were ready to compromise only after NATO air strikes on the Serbian positions.<sup>1</sup>

In February 2002, the European Union's General Affairs Council (GAC) appointed the High Representative the EU's Special Representative (EUSR) in Bosnia and Herzegovina. Since that time, all OHRs have also jointly held the EUSR position. The OHR was due to be phased out in July 2007, with the more diplomatic EUSR position continuing in the country as it goes through the long process of internal reform and institutional preparation for EU membership. However, the OHR mandate has recently been extended through June 2008 by the PIC given that, upon the estimation of the current High Representative, Christian Schwarz-Schilling, local authorities have not assumed sufficient

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<sup>1</sup> One of the criticisms of the Dayton Agreement and the state-building process it has directed is that war criminals were among the principal negotiators and have been part of the new institutions that have been built, which is antithetical to justice and has given them the institutional structure to pursue their nationalist objectives (Festic and Rausche 2004).

responsibility for the continuing implementation of the Dayton Peace Agreement, nor have they met the requirements for signing a Stabilisation and Association Agreement (SAA) for eventual integration into the EU.

The OHR was originally given a one-year mandate and tasked to facilitate the efforts of Serbs, Croats and Muslims in the territory to work out their differences and establish a viable state, but the office has taken on increasingly more powers since the Dayton Peace Agreement, sanctioned by the PIC. Since 1997, when the PIC increased its powers significantly over those outlined in the Dayton Peace Agreement, the OHR has been criticized for taking a heavy-handed, top-down approach to administering the territory and for not sufficiently involving local actors in the governance process. Much of this criticism points to the fact that accountability measures were not built into the design of the office, leading to a lack of oversight of the powers exercised by the High Representative, either by a higher, international authority or by local people and institutions.

This paper considers the OHR as a unique form of executive authority, sanctioned both by the parties to a war and by the international community to rule for an unspecified period over a newly created but vulnerable state after a prolonged ethnic conflict. The holder of this office effectively represents the international community rather than the people of that territory, and holds a great deal of unchecked executive authority that would not be acceptable in an established democracy. The central paradox of international administrations is that they are tasked with facilitating democratic governance while they

themselves lack accountability to the population they administer. When international oversight is also lacking in such administrations and when they are prolonged, serious problems of accountability can arise. The paper first considers the bases of legitimacy for such administrations, then outlines the current challenges of accountability in Bosnia and Herzegovina, and finally concludes with suggested measures that could be put into place in future international administrations to make them more accountable, both upwardly to the international community that has appointed them, and downwardly to the people they administer.

The study is timely because interventions into the domestic affairs of states and territories in conflict, led by single nations or regional alliances such as NATO, have become more common since the end of the Cold War, followed by the establishment of international administrations over these territories. While these administrations are designed to be transitional, with the goal of handing over political authority to local governing bodies in a relatively short period of time, in practice they may be prolonged, as has been the case of the OHR in Bosnia-Herzegovina (since 1995) and the UN-led international administration in Kosovo (since 1999). Such administrations are effectively a new form of political administration that are worthy of scholarly attention given their increasing incidence and their unique challenges. While their autocratic style may be justified in the short run in order to return order and stability in an ethnically divided territory and to protect human rights, provisions for oversight of their

activities must be incorporated into their design to protect the people of territory in the transitional period.

### **Mandate of the OHR**

Article II of Annex 10 of the Dayton Peace Agreement lays out the mandate of the OHR. The High Representative is to: (1) Monitor the implementation of the agreement; (2) Maintain close contact with the parties to the conflict; (3) Promote their full compliance with the civilian aspects of the agreement; (4) Coordinate the activities of the civilian organizations and agencies in the country while respecting their autonomy and giving necessary general guidance about the impact of their activities on the implementation of the agreement; (5) Facilitate resolution of any difficulties arising in connection with civilian implementation; (6) Participate in meetings of donor organizations; and (7) Report periodically on progress to various international bodies. The OHR has always been held by a European national, and there have been five to date.<sup>2</sup>

This original mandate was expanded at the PIC conference in Bonn in 1997, when the High Representative was given the authority to impose laws if the legislative bodies failed to do so, and to remove from office public officials

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<sup>2</sup> The first, Carl Bildt, served from December 1995 to June 1997, a former Swedish Prime Minister. The second, Carlos Westendorp, served from June 1997 to July 1999 and was a Spanish diplomat with extensive involvement in EC developments in the 1980s and 1990s. The third, Wolfgang Petritsch, served from August 1999 to May 2002, and Austrian diplomat and former Ambassador to the Federal Republic of Yugoslavia and an EU envoy and negotiator in Kosovo. The fourth was Paddy Ashdown, perhaps the most controversial of all the OHR's, and he held the position from May 2002 through January 2006. He was a former British parliamentarian and leader of the Liberal Democrat party and had been a leading advocate for international intervention during the Bosnian war. The current OHR is Dr. Christian Scharz-Schilling, an Austrian politician and businessman who resigned from the government in 1992 and became involved in delivering humanitarian aid to victims of the fighting in Bosnia and mediating in the conflict.

who might obstruct the implementation of the Dayton Peace Agreement. These “Bonn powers” have been the subject of much controversy, with some High Representatives exercising these powers regularly, while others have been more restrained (Brown 2003; Knaus and Martin 2003; Ivanic 2005).

### **Criticism of the International Administration**

The 10-year anniversary of the Dayton Peace Agreement in 2005 was occasion for a good deal of reflection on the successes and failures of international intervention into Bosnia and Herzegovina, and on lessons learned (Bonsor 2004; Bose 2005; Chandler 2005b; Pugh 2005; Hemmer et al. 2006). Bonsor (2004) argues that the intervention in Bosnia has been successful in terms of saving lives and restoring peace, as compared to the Kosovo intervention which he claimed increased the suffering and violence due to a misunderstanding of the conflict (Bonsor 2004). Bose (2005) also concludes that the operation in Bosnia has been generally successful, in terms of sharing power in the territory, enforcing the Dayton Peace Agreement, and allowing for state-building in the last decade.

Chandler (2005b) is critical of the international administration ten years after its establishment, arguing that it has been able to achieve peace through the external pressure of military intervention and political and economic sanctions, but that it lacks a secure basis in Bosnian society and has little legitimacy. He argues that the administration of the territory ended the war but has not created a state because it has not fostered democratic participatory

politics among the local population. Conces (2005) gives a critique similar to Chandler's (2005b), based not on the lack of political participation but rather of success in creating a unified and pluralistic Bosnian identity; she argues that top-down institutional reform has not addressed problems at the personal and inter-personal levels to forge a common identity, but have rather served to fix the ethnic and religious divisions in society. Hemmer et al. (2006) note that after ten years of international administration, there is no national peace movement or coalition, nor any national campaign to protect the peace from a resurgence of nationalism and violence, making the situation highly dependent on the presence of international troops and a powerful administration overseeing the Dayton Peace Agreement. They recommend a stronger emphasis on local level politics and large-scale negotiation between social groups, rather than on dyadic relationships between the representatives of the major ethnic groups.

### **Bases of Legitimacy for International Administrations**

Zaum (2006) has analyzed the legitimacy of international administrations in Bosnia and Herzegovina, Kosovo and East Timor, and found that while all lack democratic legitimacy because they do not represent the people of the territories, they are based on one or more of five possible sources of authority: consent, delegation, the maintenance of peace and security, the promotion of human rights and democracy, and the provision of government in the absence of functioning political and administrative institutions after conflicts. Consent and delegation are procedural bases of authority, while the remaining three are

related to the social and normative purposes that have been taken on by international society.

Zaum (2006) argues that consent is the most powerful source of political authority for international administrations; of the three administrations to date, he asserts that the one in Bosnia and Herzegovina is most strongly based in consent, given that it was created by the Dayton Peace Agreement that was signed by all of the parties involved in the conflict. For East Timor, consent for the international administration was given by Indonesia, which ruled over the territory since 1975, as well as Portugal, the former colonial ruler. While the Bosnian administration is the most consent-based, this consent is not based on the will of the state itself, nor of the people of Bosnia and Herzegovina, and so it remains problematic (Zaum 2006). Moreover, there is considerable controversy over the legitimacy of the “Bonn powers” granted by the PIC to the High Representative in 1997, which sharply expanded the powers of the OHR from those outlined in the Dayton Peace Agreement. These powers are not as clearly based on consent as was the Dayton Peace Agreement.

Delegation is the second procedural basis for legitimacy in international administrations, and takes place when an institution with authority over a particular jurisdiction grants another institution the right to exercise part of this authority (Zaum 2006). The UN Security Council can assert authority over a territory under Chapter VII of the UN Charter, and did so with Resolution 1244, delegating authority over Kosovo to the international administration. The Kosovo administration could also be seen as being based on the consent of the Federal

Republic of Yugoslavia, which holds the title to the territory, although this consent was given under the duress of NATO aerial campaigns.

Whereas consent and delegation refer to the processes of authorization for international administrations, these administrations have also been justified on normative grounds, based on the ends they have been created to serve (Zaum 2006). Provision of peace and security is one of the principal purposes of international society, usually represented by the UN, and so the right to take measures to restore international peace and security are codified in Chapter VII of the UN Charter. All three international administrations to date, in Bosnia and Herzegovina, Kosovo, and East Timor, have been justified on the grounds of maintaining international peace and security. The second normative justification for international administrations has been promotion of human rights and democracy (Zaum 2006). All three administrations have been deemed by the international community as necessary to rectify human rights violations during the conflicts that preceded them, and all have promoted democracy as the most appropriate form of governance to be established after the conflicts.

The third normative justification has been provision of government, given that in all cases there were significant problems of government after the conflicts, given political divisions and reduced or non-existent local capacity for self-government immediately after the conflicts. Caplan (2004) argued that, while a strong executive authority is needed in post-conflict situations given a vacuum in administration, this strong authority can inhibit autonomous capacity building and local parties may choose to “wait out” the international administration rather than

prescribing to the peace implementation. Chandler (2004b) argues that external enforcement of law has not led to legitimacy for the international administration in Bosnia, and that externally imposed legal and administrative solutions cannot be used in place of addressing local political problems. He argues that the local populations must have a stake in the peace-building or nation-building process.

In addition to the above-mentioned sources of legitimacy, international administrators, like other executives, may have additional sources of power, including legitimate power that is enjoyed when others accept the authority of an office, coercive power when forceful action can be taken to back up decisions, reward power when it is possible to confer or withhold rewards, referent power when others see the holder of the office as someone to be emulated, and expert power when the holder of an office has control of knowledge, information, and skills (Rainey 2003). While international administrations may have legitimate power on bases discussed, because their authority is accepted by those who are being administered, and because they have coercive powers granted to them by the international community, they are still in need of referent and expert power in order to lead effectively. Zaum (2006) argues that international administrations such as that in Bosnia and Herzegovina have reduced their legitimacy by their limited effectiveness in government, which indicates that they have been weak in referent and expert power to back up their coercive and legitimate power. He suggests that they should increase their effectiveness, better collect and manage information about the societies they govern, and capture lessons from other state-building experiences, in order to focus better on the problems of the

territories rather than on their own organizational problems. He suggests that the new UN Peacebuilding Commission could help address these issues, given that it is designed as an inter-governmental body to direct and coordinate the actions of a multitude of stakeholders in post-conflict countries.

### **Accountability of International Administrations**

While the legitimacy or bases of authority for international administrations have been established on a number of grounds other than democratic legitimacy, the accountability of these administrations has been strongly questioned. A number of scholars express concerns about the accountability of the international administration in Bosnia and Herzegovina (Caplan 2005; Chandler 2005a; Zaum 2006), the strong power vested in the Office of the High Representative (Bose 2002; Chandler 2004b; Caplan 2005; Chandler 2005a, 2005b; Zaum 2006), and insufficient participation of Bosnian citizens in the political process (Bose 2002; Chandler 2004b, 2005c).

The accountability of public officials in a democratic society has been a subject of long-standing interest in public administration discourse, going back to Woodrow Wilson's founding essay that established the field (Wilson 1887) and even to discussions in the Federalist Papers at the time of the founding of the US political system (Hamilton, Madison, and Jay 1961, Bertelli and Lynn 2003). Accountability involves having to answer for one's actions or inaction, and being responsible for the consequences of one's actions (Roberts 2002). It can be considered both in an upward direction, when an official is accountable to higher

authority, and in a downward direction, when an official is accountable to citizens or constituents.

Both formal and informal mechanisms have been used to keep public officials accountable. Formal mechanisms of accountability include judicial, legislative, and executive or hierarchical controls, whereas informal mechanisms have more to do with norms, culture, and ethics (Roberts 2002). Types of accountability include bureaucratic accountability deriving from hierarchical arrangements, supervision, and organization, legal accountability based on contractual arrangements, professional accountability based on deference to peers or a work group, and political accountability established by responsiveness to elected officials, clients, or other stakeholders (Romzek and Dubnick 1987; Romzek 1998, 2000; Roberts 2002; Rainey 2003).

There has been little agreement on which accountability mechanisms should be used in which situations, and recent world-wide governmental reforms in line with New Public Management precepts have complicated the field further by attempting to devolve more responsibility to executives and managers to set strategic direction and establish goals for the operations they lead, while simultaneously trying to hold them more accountable through laws, rules and edicts. This situation has led to a number of paradoxes arising from the tension between the simultaneous needs for freedom in the form of managerial discretion and control in the form of managerial accountability (Borins 2000; Roberts 2002; Christiansen and Laegreid 2002; Bertelli and Lynn 2003; Kane and Patapan 2006). New Public Management principles have also been questioned on the

grounds that they reduce representative democracy and popular sovereignty (Christensen and Laegreid 2002).

In discussing accountability of international administrations, Caplan (2005) defines accountability as “the various norms, practices and institutions whose purpose is to hold public officials (and other bodies) responsible for their actions and for the outcomes of those actions. It is concerned, in particular, to prevent and redress abuses of power” (Caplan 2005:464). He identifies the paradox an international administration faces in trying to enshrine democratic accountability without being accountable themselves to the local population (i.e. downward accountability). He notes that the powers of the High Representative have grown since the Dayton Peace Agreement, whereas the original role of the agreement involved facilitating the parties’ own efforts to implement the agreement.

Caplan (2005) recognizes that some limited, informal mechanisms of accountability are already in place in Bosnia and Herzegovina, such as oversight by the media and non-governmental organizations, who watch closely and critically report on the activities of the OHR. However, there is no ombudsperson’s office overseeing the work of the OHR, no checks on the use of international power, no elections or popular referenda on the performance of the international administration, and a general lack of transparency in its work. He argues that the accountability situation in Kosovo is somewhat better given the presence of an ombudsperson office.

Knaus and Martin (2003) question the lack of limits on the authority for the OHR, which they claim constitutes an extraordinary political reality in Europe,

whereby an international mission is able to overrule all the democratic institutions of a sovereign member state of the UN. They express grave concern that the OHR is allowed to interpret its own mandate, has essentially unlimited powers, and is not accountable to any elected institution. They point out that the OHR's decisions regarding dismissal of politicians and imposition of legislation and new institutions are not reviewed by any independent appeals process, and that the OHR himself chairs the biennial gathering of the PIC and drafts its reports, seriously undercutting the capacity of the PIC to act as an oversight body to the OHR's activities. Ivanic (2005) confirms this view, noting that PIC meetings are infrequent, are no longer attended by senior officials, and have become a formality given that all the OHR's decisions are supported by the PIC with minimal opposition or questioning. Knaus and Martin (2003) argue that the Bonn powers should be limited by precise rules, as well as by a review process through an independent commission. Ivanic (2005) argues that the Bonn powers have inhibited local institutions from governing independently, and so need to be revised, to give the OHR only an advisory role.

Perry (2003) qualifies these criticisms, arguing that the PIC has both formal and informal authority over the OHR and can remove him from office at any time. Formal authority is vested in the PIC itself and through its Steering Committee, while informal authority is exercised in the form of influence from ambassadors of several prominent PIC countries. She also argues that local leaders do have an important role in ongoing debates in the country, and that the OHR's strong role must be considered in the context of considerable corruption

among local leaders, the lack of strong, progressive local leaders who can appeal to Bosnians across ethnic lines, and the lack of local opposition to or discontent with international rule among the local population. This lack of opposition has been noted by other commentators (Alic 2003).

Caplan (2005) suggests a number of improvements to the accountability of the international administration, including enlargement of the institution of the ombudsperson to include oversight of the international administration from its current, exclusive focus on human rights violations, expanding the jurisdiction of the Bosnian high courts to review the exercise of powers by the international authorities, reviewing the experiences of past UN and League of Nations trusteeships, creating an independent oversight body, increasing local ownership and participation in governance, and establishing clear limits on international executive authority.

The OHR's Mission Implementation Plan (MIP), started by High Representative Paddy Ashdown in 2003, is a start at setting such limits, given that it has identified the core tasks that the OHR proposes to focus on in order to mark transition to local rule. It has been updated annually since then, with tasks coming off the plan as they are completed. However, the MIP leaves it to the OHR to identify the tasks and transition points and to self-determine and self-report whether the points have been reached, while it lacks any mechanism for allowing Bosnian citizens to assess the progress of transition to self-rule. Because it is internally generated and evaluated, the MIP serves to structure the work of the OHR, but it does not constitute a strong accountability mechanism.

Zaum (2006) also suggests new mechanisms for greater accountability of international administration to the local population, for example by extending the jurisdiction of local supreme courts over acts of the international administrations, strengthening ombudsman institutions, and establishing appeals boards which the local people can access. He also suggests making international administrations more democratically accountable by giving local political institutions more decision-making power. The various suggestions for improving accountability both upward to the international community and downward to the Bosnian local community are summarized in Table 1.

**Table 1: Suggested Accountability Mechanisms for International Administrations**

<b>Formality of the Accountability Structure:</b>	<b>Mechanism for Accountability to:</b>	
	<b>Local Community</b>	<b>International Community</b>
<b>Formal</b>	<ol style="list-style-type: none"> <li>1. Ombudsman, appeals board to address grievances of local population</li> <li>2. Expand jurisdiction of local courts over some actions of the international administration</li> <li>3. Local ownership, participation, and decision-making power in some areas</li> <li>4. Elections or referenda on actions by the international administration</li> </ol>	<ol style="list-style-type: none"> <li>1. Rules delimiting powers of the international administrator</li> <li>2. Review of certain decisions of the international administrator by an independent international oversight committee</li> </ol>
<b>Informal</b>	<ol style="list-style-type: none"> <li>1. Transparency in the actions of the international administration, outreach to the local population and provision of information using the local language</li> <li>2. Oversight by local media</li> <li>3. Oversight by local NGOs</li> </ol>	<ol style="list-style-type: none"> <li>1. Transparency in the actions of the international administration</li> <li>2. Oversight by international media</li> <li>3. Oversight by international NGOs</li> </ol>

## **Conclusions and Recommendations**

This paper has examined some of the critical challenges of international administrations, the central one being how to foster democratic governance in a post-conflict situation when the administrations lack democratic legitimacy and formal mechanisms for ensuring their accountability, both upwardly to the international community and downwardly to the local community. These administrations have been set up on the bases of non-democratic sources of legitimacy, including consent or delegation by a previous authority over the territory or by the UN Security Council representing the international community, and toward the ends of maintaining international peace and security, promoting human rights and democracy, and providing government in the absence of functioning political and administrative institutions after conflicts. While these administrations hold international legitimacy, this legitimacy has been undermined by a lack of accountability, given that formal mechanisms of accountability have not been included in their design.

The international administration in Bosnia and Herzegovina was established on the basis of consent by the warring parties, as well as by a retroactive delegation by the UN Security Council, recognizing the OHR as an authority over the civilian aspects of the Dayton Peace Agreement. However, the addition of the “Bonn powers” by the PIC in 1997, which re-interpreted the OHR’s role and expanded its powers after Dayton without providing corresponding oversight mechanisms, has been strongly questioned. Although the PIC was set up to oversee the activities of the OHR, it was not provided with institutional

mechanisms to do so, other than having the power to remove an incumbent OHR from the office. Given that the OHR is not a UN body, the UN does not offer any oversight to its activities. Nor is there any provision for oversight of the OHR's activities by the Bosnian people or Bosnian institutions. Only informal accountability mechanisms are operating, in the form of oversight by the media and NGOs.

While the autocratic nature of the OHR may have been justified in the early years after the conflict, serious questions about the continued validity of these powers started to proliferate with the 10-year anniversary of the Dayton Peace Agreement, particularly given that Bosnia and Herzegovina is an independent state and could be self-governing, unlike neighboring Kosovo which continues to be a part of the Federal Republic of Yugoslavia. The OHR has been strongly criticized and a number of suggestions have been made to create both local and international oversight mechanisms and to expand local participation in governance and decision-making power.

Given that international administrations are relatively new, but serve an important function in maintaining international peace and security, and that serious shortcomings have been identified in the accountability structure of the OHR in Bosnia and Herzegovina, the crafters of future international administrations can learn from the experience of the OHR and build in accountability structures when setting up these administrations. To provide upward accountability to the international community, clear rules should be in place to delimit the powers of the international administrator, and there must be

an independent international oversight body or committee to review the actions of the administration rather than taking direction from it or being led by it. To provide downward accountability to the local population, whom the administration does not directly represent, several measures can be included in the design of the international administration, including establishment of an ombudsperson and local appeals boards to address grievances from the local population, expanding the jurisdiction of local courts to oversee some of the activities of the international administration, building in local ownership, participation, and decision-making power in the institutions of the international administration, and allowing for elections and referenda on important decisions made by the international administration. On the informal side, international administrations can be more transparent and provide more information and outreach to local populations using the local language.

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