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***A Unique European Governance Structure – Office of the High Representative
in Bosnia and Herzegovina
Basis of Its Legitimacy and Controversial Accountability***

In order to assess the successes and failures of Bosnia and Herzegovina's (BiH) challenging road towards a fully functional democratic state aiming at membership in the European Union (EU), this paper examines the state-building process in BiH, and the transition from the post-Dayton political development, the work of the interim, ad-hoc political institution of the Office of the High Representative (OHR) in BiH, as well as the justification – if any - of its future existence and operation. Guided by the coordination dilemma, the research question of this paper is a reflection on the challenges of self-enforcing democratic institutions and how the OHR substitutes for it. This paper claims that the original purpose of the Dayton Peace Agreement (DPA) was to create a powerful yet limited institution of the OHR, one that is to be given sufficient power to institute behaviour, but is prevented from abusing its power. However, this purpose deviated in the years that followed the signing of the DPA, creating an institution which doings resemble liberal imperialism. The hypothesis of the paper is that the OHR has been abusing its power and that it is time to close it because it is no more a substitute for the self-enforcing democratic institutions. This paper claims that the problem of political officials' lack of respect for the political and economic rights of citizens they administer, as investigated by Weingast, is one of the central features of the operation of the OHR in BiH. The novelty of the paper lies in the attempt to test if OHR could be a case that could serve as a very good field to test Weingast's model (1997).

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Introduction

In 1990s, with the start of the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY), Bosnia and Herzegovina (hereinafter referred to as: BiH), one of the six Yugoslav republics, embarked on a transition from socialism to democracy only to get embroiled into the most devastating of the wars (1992-1995) of the Yugoslav succession.

Following an internationally brokered peace settlement (the Dayton Peace Agreement) that put an end to the civil, inter-ethnic and inter-religious war, the country started its transition towards becoming a stable and viable state. The country was established as a confederal union (Sumatra, 2007), with majority of competences shared between its two sub-states (Tepšić, 2017) known as entities, the Republic of Srpska (RS), with majority of Serbs living there, and the Federation of Bosnia and Herzegovina (FBiH), with majority of Bosniaks (Bosnian Muslims) and Croats living there. The post-war political, cultural, economic society in BiH built itself on divisions that existed during the civil war 1992-1995, constituted 'around the fixed and unyielding social boundaries of ethnicity' (Sisk, 2008²⁵ as quoted in Tepšić et. Džuverović, 2018:28).

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²⁵ Sisk, T. D. (2008). Power sharing after civil wars: matching problems to solutions. In J. Darby & R. Mac Ginty (Eds), *Contemporary Peacemaking: Conflict, Peace Processes and Post-War Reconstruction* (pp. 195–209). Basingstoke, UK: Palgrave Macmillan.

Twenty-five years after the signing of the 1995 Dayton Peace Agreement (DPA), BiH is still under the extensive control of the Office of the High Representative (OHR), an international institution set up to support the country's peace implementation process (Lancaster, 2024).

Guided by the coordination dilemma, the research question of this paper is a reflection on the challenges of self-enforcing democratic institutions and how the OHR substitutes for it. This paper claims that the original purpose of the DPA was to create a powerful yet limited institution of the OHR, one that is to be given sufficient power to institute behaviour, but is prevented from abusing its power.

The hypothesis of the paper is that the OHR has been abusing its power and that it is time to close it because it is no more a substitute for the self-enforcing democratic institutions. Simultaneously, the OHR is undermining the establishment of democracy in BiH (Bochsler et al, 2020; Majstorović 2007²⁶ and Gilbert 2012²⁷ as quoted in Tepšić, 2024).

The OHR is an ad hoc international institution (Jovanović, 2013) responsible for overseeing the implementation of the civilian aspects of the Peace Agreement ending the war in Bosnia and Herzegovina. The function of the High Representative was established in accordance with the DPA (Annex 10 of the DPA)²⁸.

The subject of the not only mere existence but also of the very dominance of the OHR in the political landscape of Bosnia and Herzegovina almost thirty years after the civil war that the country experienced, put the light on dangers of too deep and too wide foreign factor meddling into internal affairs of a country that is considered a sovereign one. For example, the position given by the European Commission for Democracy Through Law, so-called "Venice Commission", in its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative (issued in Venice on 11 March 2005) (Galić et Woelk, 2023), also stipulated that the OHR is incompatible with the sovereignty of the state, which status is a precondition for the state to be eligible candidate for the EU membership (paragraph 90, p. 22).

The current processes of the High Representative's (HR) law imposition completely bypassing the democratic institutions of Bosnia and Herzegovina, putting on trial some of its legally and lawfully elected leaders (e.g. Milorad Dodik, President of the Republic of Srpska - RS), not only stirred controversies but created an open opposition of leaders and parties – but also the public - of two out of three Constituent peoples in BiH, Serbs and Croats. On the other side, Bosniak leaders give their full support to the HR's actions, possibly finding the OHR's decisions a useful tool in reaching those goals that could not be reached by means of fair play and democratic processes and procedures ("continuation of war by other means", as Paddy Ashdown described it; see Chandler 2006²⁹, as quoted in Tepšić, 2024:28).

BiH is a full member of the United Nations, Council of Europe, and as of 21 March 2024³⁰, an official candidate for accession to the European Union, a member of all the regional initiatives and plenty of organisations in the global fora. And yet, the most powerful politician, who actually it is not since the shortcoming of his election, is a former German agriculture minister, Christian Schmidt³¹. This fact creates yet another source of instability on the BiH political scene,

²⁶ Majstorović, D. (2007) "Construction of Europeanization in the High Representative's discourse in Bosnia and Herzegovina", *Discourse & Society*, 18(5): pp. 627–651.

²⁷ Gilbert, A. (2012) "Legitimacy Matters: Managing the Democratization Paradox of Foreign State-Building in Bosnia-Herzegovina", *Sudost-Europa: Zeitschrift für Politik und Gesellschaft*, 60 (4): pp. 483-496.

²⁸ Available at: <https://www.osce.org/files/f/documents/e/0/126173.pdf>

²⁹ Chandler, D. (2006) "State-Building in Bosnia: The Limits of 'Informal Trusteeship'", *International Journal of Peace Studies*, 11 (1): pp. 17-38.

³⁰ <https://europeanwesternbalkans.com/2024/03/22/eu-agrees-to-open-accession-talks-with-bosnia-and-herzegovina/>

³¹ His predecessors were: Valentin Inzko (2009-2021); Miroslav Lajčák (2007-2009), Christian Schwarz Schilling (2006-2007), Paddy Ashdown (2002-2006), Wolfgang Petrisch (1999-2002), Carlos Westendorp (1997-1999), Carl Bildt (1995-1997).

but also creates divisions among the Permanent Members of the UN Security Council, since two member states out of five, do not recognize Mr. Schmidt as the HR. This problem will be explained in more detail in the Conclusion of this paper.

Actuality of this subject have been presented to the academic public even before, in the works of Banning, Cox, Franić, Petrović, McCann, Zaum, Martin and others (as listed below), but still it seems to be not clear or present enough among the academicians, politicians or public opinion of Europe, let alone of the world. Therefore, the logic behind this paper is to put some light to it, and to also continue the string of authors who already critically wrote about the OHR, and to test if OHR could be a case that could serve as a very good field to test Weingast's model (1997).

In his paper titled „The Political Foundations of Democracy and the Rule of Law“ (1997), Barry R. Weingast investigated the problem of political officials' lack of respect for the political and economic rights of citizens. This paper claims that the problem investigated by Weingast is one of the central features of the operation of the OHR in BiH. Since the High Representative is not being elected by citizens of Bosnia and Herzegovina, for him/her, there is no incentive or motivation to serve them. Rather, motivation to serve is directed to those who elect and pay the person elected as the HR, and those are the PIC countries.

Furthermore, considering the fact that the last of alleged HR – Christian Schmidt – was not elected and approved by two out of five UN Security Council permanent members (Russia and China), and the PIC is ignoring the fact, this paper also claims that the OHR is a geopolitical tool in the hands of the West against the influence and presence of the East in Bosnia and Herzegovina. The dominance of the Western countries over the Eastern countries in BiH and the region of the Western Balkans in general – aimed at through all the decisions and measures taken by the OHR in accelerated pace, especially since July 2021³² - show the goal of the West to diminish importance and Dayton competences of the Republic of Srpska, in order to pull in the remaining part of the Western Balkans (BiH and the Republic of Serbia) into the NATO, pulling out Russian presence and cut out the region from the China's Silk Belt and Road Initiative, known as BRI³³.

Weingast was also guided by the coordination dilemma, searching for the Nash equilibrium where no party (in this case, the OHR) has interest to transgress the limits of its power and consequently, actors (citizens, and in case of BiH, domestic political officials) have no incentive to challenge the transgression.

In BiH, depending on the target and scope of transgression and challenging of the transgression by either side in BiH, the Nash equilibrium has not been acquired.

The Dayton Peace Agreement (DPA)

The civil, inter-ethnic war lasted from 1992-1995 bringing loss of around 100.000 human lives (Zwierzchowski and Tabeau, 2010³⁴ as quoted in Karić et Mihić, 2020; Tepšić et Džuverović, 2018), economy devastation, inter-ethnic loss of trust and – among the political elites - quite opposite vision of the future of the country.

The DPA, initialled in Dayton on 21 November, 1995 and signed in Paris on 14 December, 1995, created BiH as we now know it - a decentralised union of two entities with a high level of independence, both with their own governments and a large number of responsibilities that were omitted at the level of joint institutions (Gilbert, 2017).

³² On 23 July 2021, just two weeks before he ended his mandate, former HR Valentin Inzko imposed the Law on Ban on Genocide Denial, which set jail terms for anyone who „publicly condones, denies, grossly trivialises or tries to justify war crimes committed in BiH, including Srebrenica.

³³ Both BiH and Serbia signed the MoU to become an official BRI country.

³⁴https://www.icty.org/x/file/About/OTP/War_Demographics/en/bih_casualty_undercount_conf_paper_100201.pdf

One of these entities came to be the *Republic of Srpska* (RS), extending over 49% of the territory of BiH. The other entity, *Federation of Bosnia Herzegovina* (FBiH) is extending through 51% of the territory of BiH.

The DPA as an international treaty (Gilbert, 2017), primarily ended the war in BiH, and then determined its constitutional arrangements. The Constitution of BiH is given in Annex 4 of the adopted DPA. The signing of the DPA was performed simultaneously by leaders of the main constitutive ethnic groups in BiH (Serbs, Croats and Bosniaks), representatives of the international community, and leaders of the Republic of Serbia and the Republic of Croatia (two neighbouring countries), in the capacity of guarantors of the DPA.

According to Milorad Dodik, president of the RS, the DPA allocated 11% of competences to the level of joint institutions of Bosnia and Herzegovina, 83% belong to the entities respectively, and the rest, around 6%, belong to the Brčko District.

Annex 10 of the Dayton Peace Agreement stipulates that the then Republic of Bosnia and Herzegovina (nowadays Bosnia and Herzegovina – BiH), the Republic of Croatia, the then Federal Republic of Yugoslavia (which later separated into the Republic of Serbia, and Montenegro), as well as the BiH entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska, have the status of Parties.

The Parties agreed in Article I, paragraph 2, that “*Due to the complexity they face, the Parties request the appointment of a High Representative, who will be appointed in accordance with relevant United Nations Security Council resolutions, to facilitate the parties’ efforts and coordinate the activities of organisations and agencies engaged in the civilian aspect of the peace settlement by carrying out the tasks entrusted to it by the resolution of the United Nations Security Council, as set out below*”³⁵.

The quoted provision of Annex 10 prescribes the procedure for how and which body appoints the High Representative. Also, the aforementioned states clearly and unequivocally that the Security Council of the UN is the only body authorised to issue a relevant resolution on High Representative possible nomination provided that the Parties referred to in Article I, paragraph 2 of Annex 10 to the DPA in BiH have submitted an agreed request to it (Baros, 2010).

It is of the highest importance to follow and respect all the stipulated provisions and procedures, and by doing so to avoid any possible questioning regarding integrity and authority of a person nominated for that position.

The aforementioned is very important because a German diplomat – Christian Schmidt – currently acting as the High Representative for Bosnia and Herzegovina did not undergo the prescribed procedure since he did not get approval of two out of five permanent Security Council Member States – Russia and China (Galić et Woelk, 2023).

The observance of the DPA military provisions was then to be supervised by a multinational Implementation Force (IFOR). In 1996, IFOR was replaced by the NATO-led Stabilisation Force (SFOR) which in turn was replaced in 2004 by the EU-led multidimensional stabilisation force (EUFOR ALTHEA) (Chandler, 2006; Belloni, 2007; Gilbert, 2012; Kappler, 2013, as quoted in Tepšić et Džuverović, 2018:30).

General Information about the OHR

Under Annex 10 of the DPA, the OHR has the status of a diplomatic mission to Bosnia and Herzegovina. It is made up of diplomats seconded by the governments of the PIC countries, international staff hired directly, and national staff from Bosnia and Herzegovina.

It is important to add that the PIC – *Peace implementation Council*, was established at the London Conference held on December 8 and 9, 1995, after the negotiations between the Parties

³⁵ Annex 10 to the DPA.

were finalised. The PIC comprises 55 countries³⁶ and agencies that are supposed to support the peace process in BiH³⁷.

However, Serb officials in BiH claim that the PIC is a “self-proclaimed body” which was not foreseen by the DPA (Chandler, 2007 as quoted in Baros, 2010:3) and whose decisions are therefore not binding anyone in BiH (statement of Milorad Dodik on 7 June 2022, while being a Serb Member of the BiH Presidency)³⁸. The statement of Željka Cvijanović dated 14 November 2019, while being a President of the Republic of Srpska, “pointed out that the conclusions of the PIC have been stereotyped for a number of years, and always directed against what the Republic of Srpska is doing”³⁹.

This paper also claims that the PIC, although retroactively approved by the UN Security Council Resolution 1031 of December 1995 (McCann, 2007), was the first of many deviations from the original DPA since this body took on the supreme role above the OHR, something the DPA did not stipulate (Zaum, 2006). Also, the use of the so-called “Bonn powers”, that would be explained in following chapters, challenged legitimacy of the OHR (Knaus et. Martin, 2003; Sumantra, 2005; Jovanović, 2013), while pointing to its lack of accountability (McCann, 2007; Zaum, 2006) as the main set-back of this body.

Mandate

Article II.9 of Annex 10 of the Dayton Peace Agreement directs the High Representative to *monitor* the implementation of the peace agreement giving *guidance* to domestic political actors while respecting their autonomy (my emphasis) (Baros, 2010).

The main tasks conferred to the OHR by the DPA included the monitoring of the implementation of civil codes, coordination and mobilisation of the international actors involved in the implementation process, liaising with the international military forces in BiH, as well as reporting to the PIC, the UN, and other involved actors (Petrović, 2019; Knaus et. Martin, 2003).

However, the mandate evolved from the aforementioned role stated in the Article II.9 of Annex 10 of the DPA to the following:

‘The Order further confirms that any proceeding instituted before any Court... which challenges [my] decisions sanctioning individuals ...enacted by me, will be inadmissible, unless... I expressly give my prior consent.

³⁶ **PIC Members and Participants:** Albania, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (resigned in May 2000), Croatia, Czech Republic, Denmark, Egypt, Federal Republic of Yugoslavia (now the republics of Serbia and Montenegro), Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Jordan, Luxembourg, Malaysia, Morocco, Netherlands, North Macedonia, Norway, Oman, Pakistan, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States of America; the High Representative, Brcko Arbitration Panel (dissolved in 1999 after the Final Award was issued), Council of Europe, European Bank for Reconstruction and Development (EBRD), European Commission, International Committee of the Red Cross (ICRC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Monetary Fund (IMF), North Atlantic Treaty Organisation (NATO), Organisation for Security and Co-operation in Europe (OSCE), United Nations (UN), UN High Commissioner for Human Rights (UNHCHR), UN High Commissioner for Refugees (UNHCR), UN Transitional Administration of Eastern Slavonia (UNTAES; disbanded in January 1998) and the World Bank.

³⁷The Russian Federation, in an official letter addressed to the High Representative on 28 July 2021, announced that it would no longer participate in the meetings of the PIC Steering Board under the chairmanship of the High Representative. In another official letter sent to the OHR on 17 February 2022, the Russian Federation announced that it had suspended its participation in the financing of the OHR. Available at: <https://www.ohr.int/international-community-in-bih/peace-implementation-council/>

³⁸ <https://lat.rtrs.tv/vijesti/vijest.php?id=476052>

³⁹ <https://lat.rtrs.tv/vijesti/vijest.php?id=358195>

The Decision of the Court does not affect [my] decisions...and individuals who have been banned from public life by such decisions.

Moreover, any step taken by any institution or authority... to establish any domestic mechanism to review... my decisions will be considered an attempt to undermine...me.

This Order comes into immediate effect'...

Order Concerning Implementation of Constitutional Court Decision AP-953/05 of 23/03/07 (Baros, 2010).

The “Bonn Powers” of the OHR – the most controversial feature of its functioning

Although the governing principle of the OHR’s engagement in Bosnia and Herzegovina is the concept of domestic responsibility which calls on the officials and citizens of Bosnia and Herzegovina to take responsibility for the peace process and the problems that their country encounters (Gilbert, 2017), this concept was hugely abused after the Conference in Bonn, held in December 1997, when the PIC requested the High Representative to remove from office public officials democratically elected, and to impose laws as the HR sees fit if Bosnia and Herzegovina’s legislative bodies fail to do so (Peace Implementation Council 1997)⁴⁰. Introduction of the “Bonn Powers” proved the OHR as the highest legislative and executive authority in the country (Knaus et. Martin, 2003; Galić et. Woelk, 2023).

However, the use of the Bonn Powers has not gone without criticism (Lancaster, 2024) coming from political scientists and academia and also from domestic politicians, mostly Serbs⁴¹ and recently Croats as well⁴². On the other side, on many occasions, Bosniak politicians gave full support to the HR⁴³ decisions (Szewczyk, 2010) and even requested the use of the Bonn powers (Knaus et Martin, 2005; Beglerović, 2022; Tepšić, 2024; Pehar, 2012), or even to set-up BiH as a full protectorate, as requested by several Bosniak intellectuals (Gilbert, 2017:1).

In July 2003, the European Stability Initiative published Open Letter raising its voice against the so-called „Bonn Powers“ claiming that they „were hurting the country’s European future“ (Baros, 2010:3), claiming also that „the „Bonn powers“ are incompatible with international efforts to build democracy and the rule of law“ (Baros, 2010:4; Galić et. Woelk, 2023).

One of the most controversial of all the High Representatives was Paddy Ashdown (his mandate lasted from 2002-2006), whose performance of duty was described as the one of “raj” and “vigorous despot” (Jovanović, 2013:18; Knaus et. Martin, 2003:69). Pehar (2012:5) considers High Representative in BiH as a “premodern sovereign with unlimited rights and no responsibility, who practices tyranny in a subtle and sophisticated form” (as translated and quoted in Tepšić, 2024:29), while the director of the European Stability Initiative described his office as ‘imperial’ (Szewczyk, 2010:31).

⁴⁰ Available at <https://www.ohr.int/pic-bonn-conclusions/> under the title ‘Bosnia and Herzegovina 1998: Self-sustaining Structures, Conclusions’.

⁴¹ <https://banjaluka.net/stevandic-kriza-u-bih-pocela-zbog-nepostovanja-rezolucija-savjeta-bezbjednosti/>
<https://www.nezavisne.com/novosti/bih/Cvijanovic-BiH-na-ivici-propasti-OHR-instrument-za-generisanje-kriza/784388>

https://www.glassrpske.com/cir/novosti/vijesti_dana/smit-sprovodi-drzavni-udar/485643

https://www.glassrpske.com/cir/novosti/vijesti_dana/nesic-kristijan-smit-je-najveca-nesreca-koja-je-zadesila-bih/486354

⁴² <https://raport.ba/kristo-pred-varhelyijem-optuzila-ohr-nicim-izazvani-su-ugrozili-parlamentarnu-vecinu-na-nivou-bih/>

⁴³ <https://www.nezavisne.com/novosti/bih/Konakovic-o-odluci-Smita-Vezi-konja-gdje-ti-aga-aze/827111> , statement of the current minister of Foreign Affairs of BiH on the HR decision on the Law on Election.

Criticism referring to the OHR operations

According to Cox (2001), the mandate of the High Representative needs to be limited, since it was not to be a direct authority over either civilian or military actors, and no authority within the domestic constitutional sphere. Another deficiency lies in the fact that the “Bonn Powers” are being understood as unlimited authority to impose laws at any constitutional level, and to dismiss elected representatives, political party officers and public officials (Cox, 2001; Knaus et. Martin, 2003; Sumantra, 2005).

As McCann (2007) points out, the OHR was established in BiH on the basis of the formal request and consent of all the Parties to the DPA (Baros, 2010). However, the same consent was not given to the use of the “Bonn powers” (Zaum, 2006).

Furthermore, McCann (2007) observes that international political administration bodies are more common after the Cold War (Heathershaw, 2012; Paris and Sisk, 2007; Toal and Dahlman, 2011; Zaum, 2012, as all quoted in Gilbert, 2017:417; Tepšić et. Džuverović, 2018).

Hypothetically, those bodies may be understood as geopolitical tools of the unipolarity and supremacy of the West over the territories that used to be considered as the former USSR sphere of interest (the Western Balkans, Cambodia, East Timor, Afghanistan).

McCann (2007), as well as Pehar (2012), underlines the lack of accountability (both upward – e. g. toward some international agency, or downward – toward the citizens it administers) as the main deficiency of the OHR. It is also the main paradox since the purpose of its existence and operation is to implement democratic principles and procedures while the OHR itself is lacking the same (Gilbert, 2017).

Knaus and Martin (2003), as well as Majstorović (2007) question the lack of limits on the authority for the OHR, and also express their concern over the fact that the OHR is actually interpreting and determining its own mandate without being accountable to any of the official institutions of higher level. This is especially obvious in the context of the OHR’s decisions regarding dismissal of politicians and imposition of legislation and new institutions, and none of which is scrutinised or questioned by external authority. As in Galić et Woelk (2023) “former High Representative Carlos Westendorp explicitly stated: “I have the authority to interpret my own authority” (Galić et Woelk, 2023:452).

Apart from the policy of imposition of decisions based on the “Bonn Powers”, politicians from the RS entity often see the OHR as a supporter of Bosniak’s elite “continuation of war by other means”, as Paddy Ashdown described it. This statement of Paddy Ashdown actually reflects the controversy of the BiH political scene, and according to domestic Serb politicians, it is actually the main logic behind attempts of the Bosniak political leaders⁴⁴ and academia (Merđžanović, 2016 as quoted in Beglerović, 2022) to change the DPA and establish new governance system, BiH without entities. Those Bosniak attempts were underpinned by some of international agencies, such as ICG⁴⁵ with its ‘radical and subversive critique of the fundamentals of the Dayton’ (Sumatra, 2005:325). No sanctions of the OHR have ever been imposed towards them⁴⁶.

⁴⁴ Haris Silajdžić, Party for BiH (SBiH) campaigned in Bosnian elections on the slogan ‘Bosnia Without Entities’. Also, one of leading Bosniak parties, the SDA (Party for Democratic Action), in its Program Declaration adopted on 14 October 2023 and available at https://sda.ba/assets/docs/Programska_deklaracija_8_Kongres.pdf also foresees BiH without entities.

⁴⁵ ICG – International Crises Group - a policy advocacy group based in Brussels

⁴⁶ “While the segregationist Serb Radical Party (SRS) was banned in BiH at this time for its ‘anti-Dayton stance’ no sanctions were imposed on the SBiH. Just before the November 2000 elections Richard Holbrooke appeared in Bosnia and called for the proscription of the Serb Democratic Party (SDS), the largest party in the RS” (as given in Sumatra 2005:334).

Decisions of the High Representative based on the “Bonn powers”

Previous HR, Valentin Inzko speaking before the UN Security Council in May 2019, informed that during the period of 1997 - 2019, High Representatives (HRs) had used the Bonn Powers 958 times to impose decisions upon BiH (Vrbetić, 2024).

By means of those OHR's impositions published mostly as press-releases on the OHR website (Majstorović, 2007), the DPA itself was changed by creation of a total of nine ministries in the Council of Ministers of BiH, whereas the original DPA had envisaged only three ministries (Vrbetić, 2024). There also were attempts of the BiH Constitution changes, as described and explained in the paper authored by Milorad Dodik, leading political figure in the Republic of Srpska⁴⁷.

Besides imposing hundreds of laws and constitutional amendments, the HRs fired hundreds of democratically elected officials without due process. Obviously, a serious attempt has been made to change the legality of the main pillars of the statehood of Bosnia and Herzegovina but also an “attack” to competences of the entities and “correction” of the electoral body democratic will and election results. The true nature of the category of imposition of decisions has been best described by one of the HRs, Carlos Westendorp's (whose HR mandate lasted from (1997-1999), statement to *Wall Street Journal*: ‘Yes, this disregards the principles of sovereignty, but so what? This is not the moment for post-colonial sensitivity [. . .]. The problems of the region will only be solved when we have introduced a general respect for democracy and the rule of law’ (Westendorp, May 1999, quoted in Chandler, 2000:201 and re-quoted in Majstorović, 2007:629).

Even Paddy Ashdown, the fourth HR, who himself removed 60 Bosnian Serb politicians from office in 2003 only (Jovanović, 2013), described unlimited powers invested in the OHR as ‘near imperialism’ (Glover, 2002 as quoted in Tepšić et. Džuverović, 2019:36) and on 22 August 2012, that HR has “powers that ought to make any liberal blush.”⁴⁸

Weingast's problem of coordination in (the BiH) political context

As early as 1997, just two years after the end of the war and establishment of the Office of the High Representative to BiH, Barry Weingast, American political scientist and economist, political scientist, marks the main concerns of some societies, in which BiH fits as well, and that is how political officials should limit their behaviour for the sake of citizens and stability of democracy. In his paper “The Political Foundations of Democracy and the Rule of Law”, published in 1997, Weingast claims that the road to stable democracy is limitations put on government, where a citizen does feel that their leader/sovereign does not transgress the rights that citizens consider as their basic rights.

So, in a democracy, a sovereign will be careful on limiting his actions within the boundaries where they can be sure of the support of the citizenry, because being aware that any transgression can leave them without the necessary support. Absence of support can be displayed at the very next elections, and any sovereign will take care to govern their actions. But the question this paper deals with is what if the sovereign is not the one being elected by the citizenry of a state, they govern but by an external elite determined to fulfil its interests and values and not those of the citizenry? As put in Knaus et Martin (2003:61) „in BiH, outsiders actually *set* that agenda, *impose* it, and *punish with sanctions* those who refuse to implement it“ (italics given in the Knaus et Martin's original).

⁴⁷ European Stability Initiative: https://www.esiweb.org/pdf/esi_worstinclass_reactions_id_3.pdf

⁴⁸ <https://www.libdemvoice.org/paddy-ashdown-whats-wrong-with-the-world-and-what-we-need-to-do-about-it-29907.html>

And this is the very problem with Bosnia and Herzegovina. Because, obviously, not democratically elected domestic leaders but external elites govern political, social and economic processes in Bosnia and Herzegovina (Galić et Woelk, 2023).

As put in Hudson (2003), “while the west talks of its commitment to democracy, in fact actual power in Bosnia lies in the hands of non-elected, non-citizens acting in the interests of western creditors and investors” (Hudson, 2003:105). Following the Hudson's logic, western creditors and investors belong to the elite in BiH, and putting it into the Weingast model, this paper claims that this elite is seeking its values and interests satisfied, and ethnic division of the BiH society helps them keep resolution of the coordination dilemma about the appropriate role of the state unreachable in BiH.

Those who oppose this hypothesis would ask how it is then possible to have the same model of the society – consociationalism – successful in another society where ethnic divisions have also been present for a long time of history, but where their coordination problems have been resolved. Lijphart (1968)⁴⁹, as quoted in Weingast (1997) is studying the case of Dutch consociationalism that fits the model.

But the response of this paper is that the Dutch did not have a bloody civil war in their recent history, and that their model did not have a sovereign outside their political landscape, no foreign official acting as a sovereign giving advantage to the interests of foreign elites before the domestic ones.

Weingast sees mutual dependence between the concepts of democratic stability and the rule of law. He claims that democracy is a form of limited government, where political officials observe limits on their behavior. These limits are abiding by election results and respect for political rights of citizens.

As this paper understands, limited government is what is also known as check and balances (distribution of power), stipulated with the DPA which foresaw three main types of power: judicial, legislative and executive, as distributed at the level of joint BiH institutions, entity level and municipal, i.e. cantonal level. However, presence and operation of the OHR, since disrespectful towards the DPA by monopolizing the power in BiH, creates instability of democracy in BiH.

Bosnia and Herzegovina as fitting the Model 2 of Weingast's

As Weingast puts it: “Model 2 adds two political elements to the problem of transgressions. First, the sovereign need not transgress against all citizens simultaneously. Second, transgressions have distributional implications: When the sovereign transgresses against one group, he shares some of the benefits with the other group in exchange for their support. For example, violating one group's right of representation may allow the other a greater share of legislative benefits” (Weingast, 1997:248).

The previous statement of Weingast's is a good example of the BiH political scene functioning, and it will be explained in more detail in the next chapter. When HR transgresses against the rights of Serbs in BiH, Bosniaks usually applaud to those HR's imposed decisions, as could be seen from the examples given earlier in this paper. In that way, Bosniak elite gets the benefit through critics and measures addressed towards Serbs and offers their support to the operation of the OHR. The OHR also gets the benefit of silencing voices that are opposing the OHR's methods and operation. Since the OHR does not transgress what Bosniak elite believes to be their fundamental rights, they give the OHR sufficient support that help it remain in power.

This paper will allocate roles of the aforementioned Model 2 by Weingast as follows: the Sovereign (S) will be High Representative. Instead of citizenry divided into two ethnic/economic/social groups, as explained in the Weingast, in the case of Bosnia and

⁴⁹ Lijphart, A. (1968). *The Politics of Accommodation*. Published by Berkeley: University of California Press.

Herzegovina we will study transgressions against 1) two entities that make the state union of BiH – the Republic of Srpska (with majority of Serbs living there) and the Federation of Bosnia and Herzegovina (with majority of Bosniaks (Bosnian Muslims) and Croats living there). Also, the Weingast model will be applied to explain relation 2) between the HR and Bosniaks and Croats in the entity of the Federation of Bosnia and Herzegovina.

1) *Weingast Model 2 applied to transgression of the HR towards the Republic of Srpska*

The main focus of this part of the paper will be on the decision of the OHR made in accordance with the so-called “Bonn powers”, especially in the category referring to removals and suspensions from office. This category is of interest because it shows full disrespect for one of elementary democratic processes and manifestation of democracy – free and fair elections. If we rely on the work of Robert Dahl, as researched and explained in Elklit et. Svensson (1997), “freedom includes elements relating to voters’ opportunity to participate in the election without coercion or restrictions of any kind” (Elklit et. Svensson, 1997:35), and “fairness is equal treatment of all” ((Elklit et. Svensson, 1997:35).

Therefore, the OHR is depriving citizens of the Republic of Srpska of their freedom to choose one politician over another by the very motion of removing elected officials coming from the RS from their functions and even suspending them from taking any future offices. Following the logic of Elklit et. Svensson’s (1997), by the coercion on display in this example of the OHR mode of operation, the absence of choice that citizens of the RS are subjected to, “will have negative consequences for their own and their families’ safety, welfare and dignity” (Elklit et. Svensson, 1997:35).

Similarly, Joseph Raz⁵⁰ suggests that „a system where individuals are denied to exercise any choices because they are constrained by absolute authority cannot be legitimate“ (as quoted in Zaum, 2006:6)

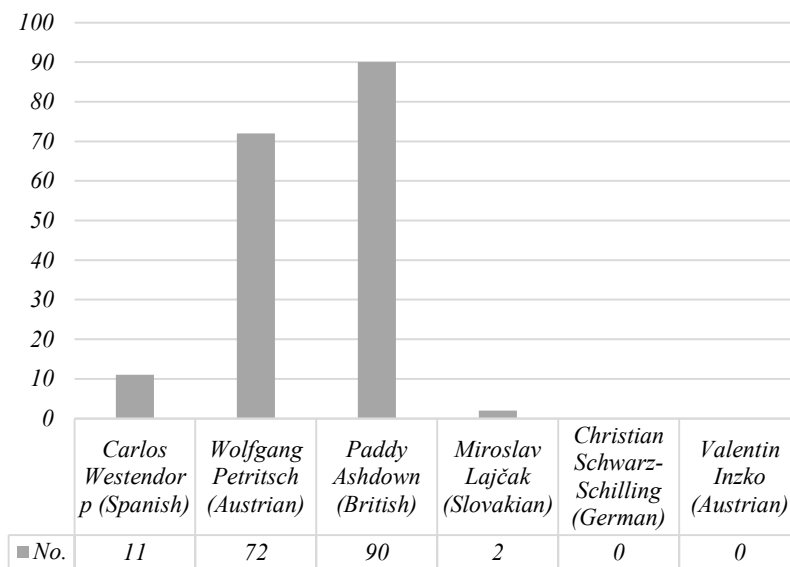


Figure 1. Number of suspended individuals by respective HR

Source: author’s own work

⁵⁰ Joseph Raz, 'Introduction', in Joseph Raz (ed.), *Authority* (New York: New York University Press, 1990), pp.12-14.

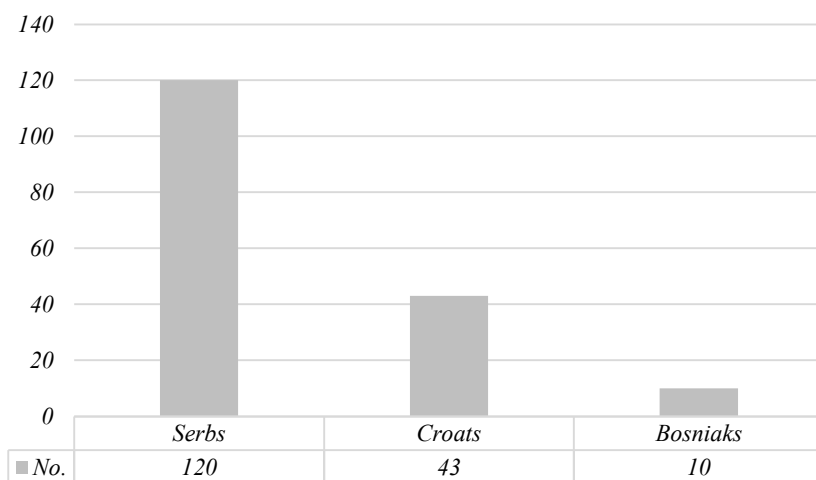


Figure 2. Suspended persons
 Source: author's own work

As shown in the diagrams, the entity of the Republic of Srpska was the target of substantive changes of its leaders although those were democratically elected by citizens of the Republic of Srpska. Not only at the level of the Republic of Srpska but also those representing interests of the Republic of Srpska in the joint BiH institutions. Although it cannot be said that ethnic affiliation only of the suspended individuals was the logic behind the decisions made in this context, it is obvious that those numerous removals and suspensions from office caused that majority of experienced politicians and other experts were completely removed from the political and professional scene in the Republic of Srpska (Majstorović, 2007). Those individuals never received any kind of compensation neither from the OHR, nor the state union of BiH. They never got any kind of “trial”, they were simply removed as the HR felt it fit and satisfying the purpose and interests of external and foreign elites. If we take into account the claim of Besley (2005) that “who is picked for public office is instrumental to adopting a credible policy stance” (Besley, 2005:45), it helps to further understand the gravity of the imposed measures to political officials from the RS and the RS and BiH political landscape. Their suspension and removal were enforced simply by publishing the decisions on the website of the OHR, and since those decisions were imposed and not adopted through democratic BiH institutions, there was no legal remedy against them (Galić et Woelk, 2023).

So, transgression with the political element added against both entities, gave rise to acquiescing. However, high scope of attack against the Republic of Srpska, produced high support to the HR's actions and measures expressed from the other entity (the Federation of BiH). This support was obvious in political statements and speeches of the Federation of BiH leaders, but also the citizens who in all the polls broadcasted in BiH applauded the use of the Bonn-powers of the HR against the Republic of Srpska politicians and leaders. For years, the Government as well as the National Assembly of the Republic of Srpska acquiesced all those invasive measures that significantly changed its political landscape and the space to politically manoeuvre, representing an asymmetric equilibrium.

The moment the Republic of Srpska started to challenge the HR's decisions⁵¹ (especially in the light of lack of stipulated procedures of nomination, as in the case of Christian Schmidt), those decisions again targeting the DPA (as the product and agreement of the political elites) and the

⁵¹ According to Weingast, an equilibrium is a set of strategies such that no player has an incentive to deviate. In this case, asymmetric means that S attacks both entities, but only one challenges the Sovereign decisions, while the other acquiesces.

Constitution of BiH, as in the case of the “state/entity property”, retaliation of the OHR and the foreign external elites (the PIC) show the new level of attack to the political future of the president of the Republic of Srpska, Milorad Dodik, as the main opponent to decisions of the OHR.

This relation of deep disagreement and non-recognition of each other's status between the OHR and the Republic of Srpska was widely declared during the Session of the Security Council of the UN held on 30 April 2024 starting at 4 pm New York local time (i.e. 10 pm CET)⁵².

By securing the support emanated from the Federation of BiH, its political leaders and the public, the OHR succeeds in transgressing towards the Republic of Srpska, its political leaders and the public, and surviving, as foreseen by the Weingast model.

Following the logic of Weingast, the equilibrium in the relation between the OHR and BiH's entities should have the following “scenario”:

OHR: If either Republic of Srpska or Federation of BiH has ever accepted any transgression, the OHR should transgress against both entities or not transgress at all (the same and equal treatment at all times).

Republic of Srpska: If the Federation of BiH has challenged every previous transgression by the OHR, then the Republic of Srpska should also challenge if the OHR uses the Bonn powers and accept otherwise. If the Federation of BiH has accepted a previous transgression by the OHR, then the Republic of Srpska should accept every time.

Federation of BiH: If the Republic of Srpska has challenged every previous transgression by the OHR, then the Federation should challenge too if the OHR transgresses and accept otherwise. If the Republic of Srpska has accepted a previous transgression by the OHR, its institutions, leaders and public opinion, then the Federation of BiH should accept the OHR transgression every time.

However, in BiH we have the asymmetric equilibrium caused by one entity challenging an OHR transgression while the other is accepting it. The reason for this is cooperation of one the BiH entities (Federation of BiH) supporting the decisions of the OHR against the other BiH entity (the Republic of Srpska), in order to gain political payoffs which would not be gained by the strict implementation of the Dayton Peace Agreement.

2) *Weingast Model 2 applied to transgression of the HR towards Croats in the Federation of BiH*

According to both the DPA and the Constitution of BiH, Bosnia and Herzegovina has a three-member collective Presidency, composed of three representatives of each of the ethnic constitutional peoples in BiH.

For Croats in BiH, the election of the Croat Member of the Presidency is especially sensitive issue, since their position has been that a person representing Croats is the person who is a Croat by his ethnicity (the current Croat member, Željko Komšić), but that his politics and statements align to those of Bosniaks.

The Croatian position on this issue is that Željko Komšić is being elected to this high function for numerous consecutive terms because Bosniaks vote for him against another Croat who actually has support of Croats in BiH, and would follow politics that is not aligned to the Bosniaks' one.

All the proposals of the Election Law that came from the Croat side were rejected by the Bosniak elite. In the end, the HR imposed the amendments in Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina, published on the website on 26 March 2024 (three days after the decision of the EU Council that BiH should start accession

⁵² <https://press.un.org/en/2024/sc15688.doc.htm>

negotiation), as well as its Corrigenda, published on 2 April 2024⁵³. This imposition bypassed both the Council of Ministers and Parliament Assembly of Bosnia and Herzegovina.

Those two decisions contain total of 114 amendments of the Election Law of Bosnia and Herzegovina, which constitutes 70% of changes of the Law⁵⁴, while the Legal Office within the Council of Ministers issued the Opinion that amendments to any law may be accepted only if they constitute up to 50% of the content of the Law.

In this concrete example, the conclusion can be reached that political parties, as well as two major ethnic peoples residing in the entity of the Federation of BiH, are facing the massive coordination problem. This problem was caused by the fact that the positions and interests of citizens and ethnic political parties differ, meaning that violations of the rights of Croats may benefit Bosniaks. The Croats' reaction (challenging) to the transgression of the OHR should be self-enforcing, meaning of such a scale and quality that the OHR would restrain itself from transgressing.

Also, each of the challenges mentioned above have one major precondition, be it the social consensus. The construction of a consensus about limits to be put on the actions and transgressions of the OHR, means that citizens targeted by the OHR transgressions should agree not only on “a set of actions that trigger their reaction” (Weingast, 1997:251), but also on the very transgressions that undermine their civil/human/economic/political rights. The current political narrative in BiH adopted the new terminology stating that any problem recognized as such a transgression actually represents the “red lines” in political theatre in BiH as a whole, as well as its two entities.

Conclusion

Immediately after the 1992-1995 civil war, the Office of the High Representative, seemed to be a necessary tool of the international community in state-building of BiH.

However, this paper claims that it has metamorphosed into the institution instigating the coordination dilemma within the BiH society which cannot agree on the limits of the OHR.

Existing ethnic divisions in BiH impede resolution of the coordination dilemma about the appropriate role of the OHR. Opposite interests and values of three constituent BiH ethnic groups create asymmetric equilibria where one group of citizens (Bosniaks) form a sort of coalition with the OHR against remaining citizens (Serbs and Croats). This coalition undermines the social trust and questions the democratic stability.

Furthermore, additional problem arising around the operation of the OHR is the issue of authority. According to Zaum (2006:4-5), the conclusion is derived that there is a clash between the current HR, Mr. Schmidt, who is in authority but is not authority himself. Zaum (2006:4) claims that in order to exercise their political authority, an individual/body needs to be legitimate, and since Mr. Schmidt was not elected in accordance with the DPA (Annex 10 of the DPA), there are opposite views within international community, but in BiH as well regarding legality of his occupying the position as well as regarding his decisions. Also, according to Zaum, “authority entails the right to be obeyed within the scope of its rules. This right to obedience emphasises voluntary submission to the commands of an authority, and distinguishes authority clearly from other forms of power, such as coercion or persuasion“ (Zaum, 2006:5). This condition obviously is not in force in BiH any more. Those claiming that Mr. Schmidt is not legally and lawfully elected HR (Serbs in BiH) claim that he has not authority and that disobedience towards his decisions is in place. Consequently, HR Schmidt relies on coercion and persuasion, as tools unimaginable in a sovereign state.

⁵³ <https://www.ohr.int/cat/hrs-decisions/decisions-relating-to-state-symbols-state-level-matters-and-const-issues/>

⁵⁴ <https://www.srna.rs/sr/novost/1198451/nesic:-bih-nema-izborni-zakon>

Therefore, the conclusion derived is that the OHR metamorphosed into an international supra-authority governing BiH while simultaneously undermining the sovereignty of the country that is supposed to start its process of negotiation for the full EU membership.

Bosnia and Herzegovina also proves one other hypothesis of Weingast which is that deep ethnic divisions and attempts of BiH political elites to gain some benefits while other two constituent peoples in BiH are facing losses and setbacks caused by the OHR transgression of their rights.

List of Abbreviations:

BiH – Bosnia and Herzegovina

FBiH – Federation of Bosnia and Herzegovina (entity in BiH)

DPA – Dayton Peace Agreement

HR – High Representative

ICG - International Crisis Group (ICG)

OHR – Office of High Representative

PIC – Peace Implementation Council

RS – Republic of Srpska (entity in BiH)

References

- Banning, T. (2014). The ‘Bonn Powers’ of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment. *Goettingen Journal of International Law*, (6), 259-302.
- Baros, M. (2010). The High Representative for Bosnia and Herzegovina: A Requiem for Legality. Published in *European Journal of International Law*, Oxford.
- Barretto, M. A. G. (2013). Asymmetric Equilibrium in Weak Institutions. Available at: <https://www.researchgate.net/publication/258993314>
- Beglerović, N. (2022). The Role, Expectations and Challenges of High Representative in Bosnia and Herzegovina. *Politics in Central Europe* (ISSN 1801-3422). Vol. 18, No. 3, DOI: 10.2478/pce-2022-0018
- Berkowitz, D., Pistor, K., & Richard, J. F. (2003). Economic development, legality, and the transplant effect. *European Economic Review*, vol. 47(1), 165-195.
- Besley, T. (2005). Political Selection. Published in *Journal of Economic Perspectives*—Volume 19, Number 3—Summer 2005—Pages 43–60.
- Bochsler, D. Merdzanovic, A. & Petrić, D. (2020) Turning International Intervention into Domestic Cooperation in Post-War Societies, *International Peacekeeping*, 27:1, 124-151, DOI: 10.1080/13533312.2019.1680291. To link to this article: <https://doi.org/10.1080/13533312.2019.1680291>
- Chandler, D. (2007). From Dayton to Europe. *International Peacekeeping*, 12:3, 336 - 349 To link to this article: DOI: 10.1080/13533310500074077 URL: <http://dx.doi.org/10.1080/13533310500074077>
- Cowen, T., Coyne, C.J. Postwar Reconstruction: Some Insights from Public Choice and Institutional Economics. *Constit Polit Econ* 16, 31–48, (2005). <https://doi.org/10.1007/s10602-005-5851-1>
- Cox, M. (2001). State Building and Post-Conflict Reconstruction: Lessons from Bosnia.
- Elklit, J. and Svensson, P. (1997). The Rise of Election Monitoring. What makes elections free and fair? Published in *Journal of democracy*, Volume 8, Number 3, July 1997.
- Franić, D. (2013). Bónski sustav u Bosni i Hercegovini.
- Gilbert, A. (2017). The Limits of Foreign Authority: Publicity and the Political Logic of Ambivalence in Postwar Bosnia and Herzegovina. Published in *Comparative Studies in Society and History* 2017;59(2):415–445. 0010-4175/17 # Society for the Comparative Study of Society and History 2017, doi:10.1017/S0010417517000093
- Greif, A. (2006). Chapter 8: Building a State: Genoa's Rise and Fall. In *Institutions and the Path to the Modern Economy* (pp. 217-269). Cambridge University Press.
- Hudson, K. (2003). Breaking the South Slav dream: the rise and fall of Yugoslavia.

- Karić, T. and Mihić, V. (2020). Construing Reconciliation – Lay People Definitions in Bosnia and Herzegovina: A Qualitative Approach. Published in PRIMENJENA PSIHOLOGIJA, 2020, Vol. 13(2), STR. 211-242. <https://doi.org/10.19090/pp.2020.2.211-242>
- Knaus, G. and F. Martin (2003). Travails of the European Raj. *Journal of Democracy* 14(3): 60-74.
- Lancaster, M. (2024). Western Balkans: Renewed Security Challenges on NATO's Doorstep.
- Jovanović, J. (2013). Does Bosnia and Herzegovina still need the OHR?
- Merdžanović, A. (2016). 'Imposed consociationalism': external intervention and power sharing in Bosnia and Herzegovina. Published in *Peacebuilding* 5(1):1-14
DOI: [10.1080/21647259.2016.1264918](https://doi.org/10.1080/21647259.2016.1264918)
- Pehar, D. (2012). Bosna i Hercegovina kao Veleposlanstvo Visokog predstavnika – republikanska kritika.
- Office of the High Representative (02/27/2008 Brussels). Press conference by the High Representative Miroslav Lajčák following the Peace Implementation Council Steering Board session in Brussels on 26-27 February 2008. <http://www.ohr.int/press-conference-by-the-high-representative-miroslav-lajcak-following-the-peace-implementation-council-steering-board-session-in-brussels-on-26-27-february-2008/>
- Martin, E. C. (2007). Nation Building in Bosnia and Herzegovina: Cooperation, Coordination and Collaboration. Published in *South East European Journal of Economics and Business*. DOI: 10.2478/v10033-007-0001-5
- McCann, L. (2007). Bases of Legitimacy and Problems of Accountability in International Administrations: An Examination of the Office of the High Representative (OHR) in Bosnia and Herzegovina.
- Parish, M. (2007). The Demise of the Dayton Protectorate. *Journal of Intervention and State Building, Vol. 1* (Special Supplement).
- Petrović, Z. (2019). Dayton Peace Agreement – The Basic Constitutional Order of BiH.
- Rohan, M., Maxwell M., and Andreas, J. (2013). Introduction: 'Mission BiH', *Whitehall Papers, 80:1, 6-12*, DOI: [10.1080/02681307.2013.803793](https://doi.org/10.1080/02681307.2013.803793).
- Tepšić, G. (2024). Building Nations Instead of Peace(s): the Bosnian Metaconflict. *Serbian Political Thought*. Vol. 16, pp. 23-38. 2024, UDC 323.1:327.57(497.6), <https://doi.org/10.22182/spt.1622017.2>
- Tepšić, G. and Džuverović, N. (2018). Bosnia and Herzegovina. *Collection: Social and Political Science 2018*. DOI: <https://doi.org/10.4337/9781783479054.00010>. Available at: <https://www.elgaronline.com/edcollchap/edcoll/9781783479047/9781783479047.00010.xml>
- Szewczyk, B. M. J. (2010), The EU in Bosnia and Herzegovina: powers, decisions and legitimacy. *Occasional Papers No. 83. European Union Institute for Security Studies*. ISBN 978-92-9198-164-9 ISSN 1608-5000
- United Nations, <http://webtv.un.org/meetings/events/watch/arria-formula-meeting-in-commemoration-of-the-25-year-anniversary-of-the-general-framework-agreement-for-peace-in-bosnia-and-herzegovina/6212120452001>
- Vrbetić, M. (2024). Protecting Dayton's Shared Governance by Countering Faux Narratives of Russia's Influence in Bosnia and Herzegovina. Published in *National Security and the Future 1 (25) 2024*. DOI: <https://doi.org/10.37458/nstf.25.1.10>
- Wagner, R. (1989). Constitutional Order in a Federal Republic. *Public Choice*, 61(2), 187-192. Retrieved April 20, 2021, from <http://www.jstor.org/stable/30025035>.
- Weingast, B. (1997). The Political Foundations of Democracy and the Rule of Law. *The American Political Science Review*, 91(2), 245-263.
- Zaum, D. (2006). The Authority of International Administrations in International Society. Published in *Review of International Studies*.