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THE HIGH REPRESENTATIVE AND THE CONSTITUTIONAL CRISIS IN BOSNIA AND HERZEGOVINA

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Abstract:

This scientific paper analyzes the constitutional crisis in Bosnia and Herzegovina, with a particular focus on the role of the High Representative in the criminalization of constitutional duties. The paper explores how the interventions of the High Representative, which often include the imposition or annulment of laws and decisions, impact the constitutional order and sovereignty of Bosnia and Herzegovina. Special attention is given to analyzing cases where the decisions of the High Representative have led to violations of constitutional rights and freedoms and how such interventions contribute to deepening political and ethnic tensions within the country. The paper also examines the international legal framework regulating the powers of the High Representative and his influence on the domestic legal system. Through the analysis of specific examples, the paper highlights the need for a revision of the role of the High Representative and seeks solutions that would enable greater domestic responsibility and respect for the constitutional order of Bosnia and Herzegovina. Additionally, the paper addresses how the criminalization of constitutional duties by the High Representative affects the legitimacy and efficiency of political institutions in Bosnia and Herzegovina. It analyzes how such interventions can undermine citizens' trust in the legal system and democratic processes. Possible mechanisms for strengthening transparency and accountability in the work of the High Representative are also considered, ensuring that his decisions contribute to stability and reconciliation, rather than further deepening the crisis. Alternatives to the current model of international oversight are proposed, which would allow for greater autonomy and democratic development of Bosnia and Herzegovina. In conclusion, the paper emphasizes the importance of establishing a clearer legal framework that would first limit the powers of the High Representative and ensure respect for the constitutional order and sovereignty of the country, and then abolish this undemocratic legacy.

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INTRODUCTION

The constitutional crisis in Bosnia and Herzegovina represents one of the key challenges to the stability and functionality of the state since the signing of the Dayton Peace Agreement. A central figure in this crisis is often the High Representative, an international actor whose role is defined by the Dayton Agreement with the aim of overseeing and implementing the civil aspects of the peace process. However, the activities of the High Representative in recent decades have led to significant controversies and tensions within the political system of Bosnia and Herzegovina. One of the most controversial aspects of the High Representative's work relates to his practice of criminalizing non-compliance with his own decisions. This approach, although motivated by the High Representative's "desire to preserve peace and stability," has raised serious questions about constitutionality, sovereignty, and democratic principles in Bosnia and Herzegovina. Through this paper, we will explore how the criminalization of constitutional duties by the High Representative has influenced the constitutional crisis, analyzing specific cases and decisions that have had a significant impact on the political landscape of the country.

One of the most controversial points in the recent history of the High Representative's role in Bosnia and Herzegovina concerns the appointment of Christian Schmidt to this position. Schmidt's appointment caused considerable controversy as it was not formally confirmed through the procedure of the Peace Implementation Council (PIC), an international body that brings together key international actors involved in the peace process in BiH. Although Germany, supported by the majority of PIC members, nominated Schmidt for this role, the lack of unanimous support and formal voting within the PIC led to questions about the legality and legitimacy of his appointment. This situation was further complicated by the fact that Russia, as an important member of the PIC, explicitly opposed Schmidt's appointment, arguing that the process was not in accordance with established procedures. The absence of a formal resolution by the United Nations Security Council, which would confirm the appointment, further contributed to the perception that Schmidt's assumption of the role of High Representative was not fully aligned with international law

and the procedures previously established for such appointments. This situation has deepened existing tensions within Bosnia and Herzegovina, especially among the political leaders of the Republika Srpska and the Serbian population as a whole, who openly challenge Schmidt's authority and legitimacy, significantly complicating the already complex political and constitutional situation in the country.

In the practice of establishing and confirming the role of the High Representative in Bosnia and Herzegovina, all previous holders of this position have been confirmed through resolutions of the United Nations Security Council. This process was established as part of the international oversight of the implementation of the Dayton Peace Agreement, with the Security Council playing a key role in approving and legitimizing the appointment of the High Representative. The Security Council resolutions provided a formal international legal framework for the actions of the High Representative, granting him the mandate and authority to take necessary steps to preserve peace and stability in Bosnia and Herzegovina. This confirmation process through Security Council resolutions also served as a mechanism to ensure broader international support and consensus around the role and powers of the High Representative, which was crucial for his effectiveness and acceptance within the political system of Bosnia and Herzegovina.

1. THE ILLEGITIMACY OF HIGH REPRESENTATIVE CHRISTIAN SCHMIDT

The assessment of the legitimacy of Christian Schmidt as the High Representative in Bosnia and Herzegovina can be considered through several key aspects:

1. *Formal Appointment*: One of the main challenges to Schmidt's legitimacy lies in the manner of his appointment. Unlike his predecessors, his appointment was not formally confirmed by a United Nations Security Council resolution, nor was it unanimously approved by all members of the Peace Implementation Council (PIC). The absence of these formal steps raises questions about the legal basis of his mandate. The lack of a formal appointment of the High Representative in Bosnia and Herzegovina represents a significant challenge to his efficiency, legitimacy, and authority. A formal appointment, which typically includes confirmation by the PIC and a United Nations Security Council resolution, provides the legal framework and international support necessary for the successful operation of the High Representative. When this process

is not fully conducted, as in the case of Christian Schmidt, it leads to legal and political ambiguities. The lack of formal confirmation can diminish the perception of the international community regarding the legitimacy of the High Representative, potentially limiting his ability to effectively implement his mandate and achieve cooperation within the country. This can also encourage internal political actors, particularly those who oppose his actions, to challenge his authority and ignore his decisions. Additionally, the absence of a formal appointment can affect the international reputation and credibility of the peace implementation process in Bosnia and Herzegovina, calling into question the commitment of the international community to maintaining peace and stability in the region. All these implications highlight the importance of a formal appointment as a crucial element for maintaining the authority, efficiency, and international legitimacy of the High Representative in Bosnia and Herzegovina.

Annex X of the Dayton Peace Agreement clearly and unequivocally states: “Given the complexities involved, the Parties require the establishment of a High Representative, who will be appointed in accordance with relevant United Nations Security Council resolutions, to facilitate the Parties’ own efforts, and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement, carrying out the tasks entrusted to him by the United Nations Security Council resolution as specified below.”² Given that Christian Schmidt was appointed by the Peace Implementation Council (PIC) and not appointed or confirmed in accordance with the relevant United Nations Security Council resolution, his mandate, legally speaking, is contrary to international law and the Dayton Agreement as an instrument of international law.³

2 Article 1, Paragraph 2 of Annex X of the Dayton Peace Agreement.

3 When it comes to the legal nature of the Dayton Agreement, the Dayton Peace Agreement, formally known as the General Framework Agreement for Peace in Bosnia and Herzegovina, represents a key document that ended the war in Bosnia and Herzegovina in 1995. This agreement has a complex legal nature that reflects its role in achieving peace, redefining state governance, and establishing the foundations for the future political and legal structure of the country. Legally, the Dayton Agreement is an international treaty signed by Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia (now Serbia) with the mediation of the international community, led by the United States. As such, the agreement is binding on the signatories and constitutes part of international law. One of the key characteristics of the Dayton Agreement is its dual nature. On the one hand, the agreement serves as an international peace treaty that regulates the cessation of hostilities and the establishment of peace. On the other hand, the agreement acts as the constitution for Bosnia and Herzegovina, as it establishes the constitutional framework and institutional structure of the country. This dual nature makes the Dayton Agreement unique in international law. The agreement consists of several annexes, each focused on different aspects of post-conflict arrangements. Annex 4, in particular, contains the Constitution of Bosnia and

The opposition of Russia and China to the appointment of Christian Schmidt as the High Representative in Bosnia and Herzegovina was expressed in the form of public statements and diplomatic communication. Russia, for example, expressed its disagreement with Schmidt's appointment through statements by its diplomatic representatives and official announcements.⁴ Similarly, China also expressed its views through diplomatic channels. In addition to Russia, China also opposed the appointment of Christian Schmidt as the High Representative in Bosnia and Herzegovina. China, like Russia, expressed concern about the appointment process and believed that the established practice of selecting the High Representative was not followed. These two countries were the only members of the United Nations Security Council that publicly expressed opposition to Schmidt's appointment. This opposition was not part of a formal vote in the United Nations Security Council but was expressed through bilateral and multilateral diplomatic interactions. Russia and China emphasized that Schmidt's appointment was not in accordance with the procedures previously established for such appointments, and therefore they contested his legitimacy as the High Representative. He emphasized that his country supports the long-term closure of the Office of the High Representative but respects the 5+2 agenda from 2008.⁵

Herzegovina, which defines the state structure as a complex state with two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, and the Brčko District as a special administrative unit. The Dayton Agreement also established mechanisms for its implementation and supervision, including the role of the High Representative as an international overseer responsible for monitoring the civilian aspects of the agreement's implementation. Although the Dayton Agreement successfully ended the war and established a framework for peace, its legal nature and implementation have been the subject of numerous criticisms and challenges. Critics argue that the complexity of the constitutional arrangement established by the agreement has contributed to political fragmentation and hindered effective governance of the state. Additionally, there is concern that certain provisions of the agreement are being used to maintain ethnic divisions rather than promote reconciliation and integration. Despite these challenges, the Dayton Agreement remains the foundational legal document for Bosnia and Herzegovina, whose legal nature reflects its crucial role in shaping the modern state and its legal system.

⁴ Russia expressed its opposition to the appointment of Christian Schmidt as the High Representative in Bosnia and Herzegovina during the United Nations Security Council session held on June 29, 2021. The Russian Permanent Representative, Vasily Nebenzya, stated during this session that all parties in Bosnia and Herzegovina and the UN Security Council should consent to Schmidt's appointment, which, according to him, did not happen.

⁵ The 5+2 Agenda represents a set of seven key goals that the international community, led by the Office of the High Representative (OHR) in Bosnia and Herzegovina, has established as conditions for the closure of the OHR and the end of international oversight of the implementation of the Dayton Peace Agreement. This agenda was adopted in 2008 and consists of five objectives and two conditions, as follows: 1. Acceptance and implementation of the national strategy for public administration reform, 2. Acceptance and implementation of the national strategy for combating corruption, 3. Acceptance and implementation of the national strategy for judicial reform, 4.

Ambassador Richard Mills, Deputy Permanent Representative of the United States to the United Nations, stated on July 22, 2021: “There is no decisive role for the Secretary-General or the UN Security Council in the appointment process, nor is there a requirement for the Council to take action to confirm Mr. Schmidt’s appointment. The Security Council and its support have never been necessary for the appointment of the High Representative.”⁶ This violation of international law by the United States could be related to the essence of an old Roman saying: “Quod licet Iovi, non licet bovi.”⁷

The appointment of the High Representative in Bosnia and Herzegovina represents „a process that involves international coordination and the approval of major global actors. This ensures that the chosen candidate has broad support and legitimacy.“ (Bose, 2002)

2. *International Support:* Although Schmidt enjoys the support of most European Union member states and other international actors, the lack of support from Russia and the absence of a formal UN resolution affect the perception of his broader international (il)legitimacy. The lack of broad international support for the High Representative in Bosnia and Herzegovina can have serious consequences for his ability to effectively perform his duties. The High Representative is designed as an international actor whose role is to oversee and facilitate the implementation of the Dayton Peace Agreement, and therefore his effectiveness largely depends on the support of key international actors. When support is lacking or divided, it can lead to a weakening of the High Representative’s authority and his ability to implement decisions and initiatives. The lack of consensus within the Peace Implementation Council (PIC) or the United Nations Security Council can signal to internal political actors in Bosnia and Herzegovina that there is room to challenge the High Representative’s decisions, which can further complicate political dialogue and compromise. Additionally, the lack of

Resolution of military property issues, 5. Resolution of state property issues (five objectives) and (two conditions): 1. Full compliance with the Dayton Peace Agreement and 2. A positive assessment of the situation in Bosnia and Herzegovina by the Steering Board of the Peace Implementation Council (PIC). The 5+2 Agenda provides a framework for Bosnia and Herzegovina’s progress toward greater stability, democratization, and European integration. However, progress in meeting these goals and conditions has been slow, and many of these issues remain unresolved, complicating the closure of the OHR and the transfer of full sovereignty to the institutions of Bosnia and Herzegovina.

6 Original text: “There is no determinative role for the Secretary-General or the UN Security Council in the appointment process, and no requirement that the Council take action to confirm Mr. Schmidt’s designation. Security Council and support from the Security Council has never been required to designate a High Representative.” Vidi: <https://usun.usmission.gov/explanation-of-vote-on-a-un-security-council-resolution-for-bosnia-and-herzegovina/>, 19.03.2024. 11:59 h.

7 In translation: “What is permitted to Jupiter is not permitted to an ox.”

unified international support can limit the resources and tools available to the High Representative, affecting his ability to effectively address challenges in the country. Finally, international division regarding support for the High Representative can lead to a weakening of the international reputation and credibility of the High Representative's institution itself, as well as the entire peace implementation process in Bosnia and Herzegovina. All this underscores the importance of strong and unified international support for the successful operation of the High Representative and the preservation of stability and peace in Bosnia and Herzegovina. Essentially, „the role of the High Representative is crucial for maintaining peace and stability in Bosnia and Herzegovina, and the selection process reflects the importance of international consensus.“ (Chandler, 2000)

3. *Acceptance within BiH*: The legitimacy of the High Representative also depends on the degree of acceptance of his mandate within Bosnia and Herzegovina itself. Schmidt faces significant resistance from political leaders of the Republika Srpska, who challenge his legality and refuse to cooperate with him. This internal opposition presents a significant challenge to his efficiency and authority. The acceptance of the High Representative by Muslim politicians in Bosnia and Herzegovina varies depending on the political context and specific issues at hand. Generally, Muslim politicians, that is, politicians from the Bosniak community, are often inclined to support the High Representative, especially when it comes to initiatives aimed at preserving central state power and strengthening state-level institutions. This can be explained by the fact that Bosniak political representatives usually advocate for a stronger centralized state, which aligns with some of the goals of the international community and the mandate of the High Representative. However, the acceptance of the High Representative is not unconditional, and there can be moments when Bosniak politicians criticize his decisions or approach, particularly if they believe they are not in line with their national or political interests. Additionally, the perception of the High Representative can vary within the Bosniak political scene itself, with different factions or parties having different views on his role and actions. In any case, the acceptance of the High Representative by Muslim politicians is crucial for his ability to act effectively and achieve results within the complex political landscape of Bosnia and Herzegovina.

4. *Consistency of Actions*: The legitimacy of the High Representative can also be assessed based on his ability to act consistently and fairly in accordance with his mandate. Schmidt's efforts to address challenges

and crises within BiH, as well as his ability to maintain neutrality and objectivity, are crucial for maintaining and strengthening his legitimacy. The consistency of the High Representative's actions in Bosnia and Herzegovina is an important aspect of his role in maintaining peace and stability in the country. Consistent and fair action by the High Representative is key to maintaining the trust of all parties in the peace implementation process. However, there are accusations that the High Representative sometimes acts in a manner that is not entirely fair or consistent, which can lead to perceptions of bias or animosity towards certain ethnic groups. Specifically, political representatives from the Republika Srpska accuse the High Representative of animosity towards Serbs and of making decisions that are unfavorable to the Serbian community in Bosnia and Herzegovina. Such accusations may arise from decisions by the High Representative that are perceived as limiting or discriminatory towards the interests of the Republika Srpska or the Serbian people in Bosnia and Herzegovina. It is important to emphasize that the role of the High Representative is to act in accordance with the Dayton Peace Agreement and to promote peace, stability, and respect for human rights for all citizens of Bosnia and Herzegovina, regardless of their ethnic affiliation. However, the perception of unfair actions or animosity can undermine the authority of the High Representative and complicate the peace implementation process. Therefore, it is crucial for the High Representative to strive to maintain transparency, fairness, and consistency in his decisions to build trust and support from all parties in Bosnia and Herzegovina.

Overall, the legitimacy of Christian Schmidt as the High Representative in Bosnia and Herzegovina is a complex issue, involving both the formal legal aspects of his appointment and the practical challenges related to his acceptance and actions within the country. This situation highlights the need for clear and transparent mechanisms for the appointment and confirmation of the High Representative's authority to ensure his effectiveness and acceptance in the peace and stability implementation process in Bosnia and Herzegovina.

5. Disagreement Among the Signatory Countries of the Dayton Peace Agreement on the Appointment of Christian Schmidt: The disagreement among the signatory countries of the Dayton Agreement can be a key factor affecting the illegitimacy of High Representative Christian Schmidt in Bosnia and Herzegovina. According to the Dayton Agreement, the High Representative plays an important role in overseeing the civilian implementation of the peace agreement and stabilizing the country.

However, this representative must have the support of all signatory parties to the agreement, including key international actors such as the Contact Group countries (USA, Russia, United Kingdom, France, and Germany) and other relevant international organizations. If one or more signatory states challenge the legitimacy of the High Representative's appointment, it can seriously undermine his ability to effectively perform his duties. In the case of Christian Schmidt, the lack of agreement from all signatories, especially if a key country like Russia or another important member of the international community opposes his appointment, can be considered a reason for the illegitimacy of his position. Moreover, domestic actors in Bosnia and Herzegovina, including entities and political parties, may use disagreements among international actors as an argument to challenge the authority of the High Representative. This can lead to additional political tensions and complications in the process of implementing the Dayton Agreement and the functioning of the state.

Therefore, the disagreement among the signatory states of the Dayton Agreement presents a significant problem that can call into question the legitimacy and effectiveness of the work of High Representative Christian Schmidt in Bosnia and Herzegovina.

2. FORMAL SOURCES OF AUTHORITY OF THE HIGH REPRESENTATIVE FOR BOSNIA AND HERZEGOVINA

The powers of the High Representative in Bosnia and Herzegovina are based on several documents and decisions by the international community:

1. *Dayton Peace Agreement*: The basic framework for peace in Bosnia and Herzegovina, which established the general political and constitutional order of the country. Although the Dayton Agreement does not explicitly grant powers to the High Representative, it lays the foundation for his role in overseeing and implementing the civilian aspects of the agreement. According to Annex 10 of the Dayton Agreement, the High Representative is appointed by the Steering Board of the Peace Implementation Council (PIC), which consists of representatives of key international actors, including the European Union, the United States, Russia, Japan, Canada, the United Kingdom, France, Germany, Italy, Turkey, and the Organization of Islamic Cooperation. There is no doubt that „according to the Peace Implementation Council (PIC), the appointment of the High Representative is made by the PIC Steering

Board and subsequently confirmed by the United Nations Security Council.“ (Office of the High Representative, 2020)

2. *Decisions of the Peace Implementation Council (PIC)*: The PIC, which consists of representatives of the main international actors involved in the peace process in Bosnia and Herzegovina, makes decisions that define and expand the powers of the High Representative. The most significant of these decisions are the so-called Bonn Powers, adopted at the PIC conference in Bonn in 1997. These powers give the High Representative the authority to impose laws and dismiss officials to ensure the implementation of the peace agreement. The Bonn Powers, derived from the conclusions of the PIC in Bonn in 1997, enable the High Representative in Bosnia and Herzegovina to enact laws and remove officials to ensure the implementation of the Dayton Agreement. Although these powers were conceived as a means to preserve the stability and functionality of the state, their legality and legitimacy are often contested.

Critics of the Bonn Powers argue that they are not explicitly provided for by the Dayton Agreement, which is the foundation of the constitutional order of Bosnia and Herzegovina. The Dayton Agreement does not specify the authority of the High Representative to enact laws or dismiss elected officials but envisages his role as a coordinator and mediator. Therefore, it is interpreted that the Bonn Powers exceed the authorities provided by Dayton and undermine the sovereignty of Bosnia and Herzegovina. As rightly noted: „The Bonn Powers are considered inconsistent with the principles of sovereignty and self-governance established by the Dayton Agreement. According to the European Union Institute for Security Studies, the application of these powers often undermines the legitimacy of domestic political processes and institutions, creating a dependency on international intervention rather than fostering genuine local governance and accountability.“ (Szewczyk, 2010)

3. *United Nations Security Council Resolutions*: Although Security Council resolutions do not directly grant powers to the High Representative, they support his role and mandate, confirming international backing for his activities in Bosnia and Herzegovina.

The combination of these documents and decisions forms the legal and political framework that enables the High Representative to act as a key actor in the implementation of the Dayton Peace Agreement and the maintenance of peace and stability in Bosnia and Herzegovina.

3. BONN POWERS

The Bonn Powers represent a specific mechanism of international governance in Bosnia and Herzegovina, established after the signing of the Dayton Peace Agreement in 1995. These powers grant the High Representative of the international community broad authority to implement the peace agreement and maintain stability in the country. The Bonn Powers emerged from the Peace Implementation Conference on Bosnia and Herzegovina held in Bonn in 1997. At this conference, the Steering Board of the Peace Implementation Council (PIC) granted the High Representative additional powers, including the ability to impose laws and dismiss local officials who obstruct the implementation of the Dayton Agreement. The application of the Bonn Powers has often been a subject of controversy. On one hand, these powers are seen as having helped preserve peace and stability in Bosnia and Herzegovina, allowing the High Representative to respond swiftly to political blockages and challenges. On the other hand, critics argue that the excessive use of these powers has undermined democratic processes and the sovereignty of Bosnia and Herzegovina, creating a dependency on international intervention. The future of the Bonn Powers and the role of the High Representative in Bosnia and Herzegovina remains open. While some advocate for the gradual phasing out of these powers and the transfer of responsibilities to domestic institutions, others believe they are still necessary to maintain peace and stability in the country. It is crucial to find a balance between international support and the strengthening of domestic capacities for self-governance. The Bonn Powers represent a unique instrument of international governance in Bosnia and Herzegovina, aimed at ensuring the implementation of the Dayton Peace Agreement and maintaining stability in the post-conflict period. Although they have contributed to the preservation of peace, their use has sparked debates about the sovereignty and democratization of the country.⁸ The future of the Bonn Powers will depend on Bosnia and Herzegovina's ability to take full responsibility for its political and social development. The High Representative has „claimed that his office was created based on various international instruments, including legally binding UN Security Council resolutions, and that his powers derive from these instruments,

⁸ On March 23, 2007, High Representative Schwarz-Schilling annulled a decision of the Constitutional Court of Bosnia and Herzegovina in which the judges determined that the practice of dismissing public officials was contrary to the ECHR. Here, the OHR explicitly prohibited any attempt to establish a domestic mechanism for reviewing its decisions. The decision made it clear that the OHR would not allow any Bosnian institution to challenge its claim to authority.

meaning that his actions cannot result in accountability for any state.“ (Banning, 2014)

The Bonn Powers, which originated from the conclusions of the Peace Implementation Council meeting held in Bonn in 1997, grant the High Representative in Bosnia and Herzegovina extraordinary authority to intervene in the country's political and legislative processes. These powers include the ability to impose laws and dismiss elected officials without the need for approval from domestic institutions. While initially conceived as a mechanism to ensure peace and stability, there is significant debate regarding their legality and legitimacy.

The illegality of the Bonn Powers can be considered through the lens of international law and the constitutional order of Bosnia and Herzegovina. The Bonn Powers enable an international actor, the High Representative, to intervene in the internal affairs of a sovereign state. This can be seen as a violation of the principle of state sovereignty, which is a cornerstone of international law. The Bonn Powers are not formally embedded in the Constitution of Bosnia and Herzegovina nor do they derive from an international treaty that has been ratified in accordance with internal legal procedures. Therefore, the question arises on what legal basis these powers rest. The illegitimacy of the Bonn Powers can be analyzed from the perspective of democratic principles and the right to self-determination of the people. The imposition of laws and the dismissal of elected officials without the approval of domestic institutions represents a democratic deficit. This practice undermines democratic processes and restricts the right of citizens to decide on their representatives and laws themselves. Relying on the Bonn Powers as a mechanism to resolve political issues can lead to long-term dependence on international intervention. This undermines the ability of domestic actors to develop their own mechanisms for conflict resolution and stability-building.

The Dayton Agreement did not explicitly foresee such a form of interventionism. The Bonn Powers represent a significant expansion of the High Representative's role that was not agreed upon by all parties involved in signing the Dayton Agreement. The High Representative is neither elected by the citizens of BiH nor accountable to representative bodies in the country. This raises questions about the democratic legitimacy of his decisions. The imposition of laws and the dismissal of officials without consultation with domestic institutions is perceived as a violation of BiH's sovereignty, calling into question the legitimacy of the Bonn Powers from an international legal perspective. The Bonn Powers

are not formally established in international treaties or conventions, which casts doubt on their legal validity at the international level. In some cases, the decisions of the High Representative may conflict with the provisions of the BiH Constitution, raising questions about their legality within the BiH legal system. The principle of the rule of law requires that all subjects, including international actors, are subject to the law. Imposing decisions without a legal basis or judicial oversight can be seen as a violation of this principle. Even Western writers emphasize that „the extensive powers of the High Representative are often criticized as undemocratic, as they override the authority of locally elected officials and institutions,“ (Knaus, Martin, 2003) while „the Office of the High Representative in Bosnia and Herzegovina is described as a neocolonial institution that undermines the sovereignty and self-governance of the country.“ (Chandler, 2006)

However, even if the Bonn Powers were legal, the High Representative would still „have to adhere to international law in interpreting his mandate“ (Banning, 2014) and in the practical application of these so-called powers concerning the international legal order.

4. LEGAL STATUS OF CHRISTIAN SCHMIDT

Christian Schmidt, a German politician and diplomat, assumed the role of High Representative in Bosnia and Herzegovina (BiH) on August 1, 2021. However, his legal status and legitimacy in this position are subjects of controversy, particularly due to the fact that he was not formally appointed by the United Nations (UN) Security Council, which is the usual practice for this role.

Typically, the High Representative is appointed with the support of the UN Security Council through an appropriate resolution. However, Christian Schmidt took office without a formal Security Council resolution, which calls his international legitimacy into question. Schmidt's appointment faces resistance within BiH, particularly from the Republika Srpska, which challenges his legitimacy and refuses to recognize him as the High Representative. This internal resistance further complicates his legal status in the country. While Christian Schmidt enjoys the support of the United States and some EU member states, the lack of unanimous support within the international community, especially through formal UN appointment, leads to the perception that he is more of a German diplomat than an impartial international mediator. Schmidt's perceived illegitimacy hampers his ability to effectively carry out the

mandate of the High Representative, particularly in terms of imposing laws and reforms necessary for BiH's progress towards EU integration. This perception of illegitimacy can reduce the authority of the High Representative in the eyes of both domestic and international actors, leading to a diminished ability to influence political processes in BiH. Controversies surrounding Schmidt's legal status may further polarize the political situation in BiH, making it more difficult to achieve consensus and compromise among the various ethnic and political groups.

U.S. Ambassador Robert A. Wood expressed support for Christian Schmidt and his office, emphasizing the importance of the High Representative's reports in keeping the international community informed about efforts for lasting stability and prosperity in the region. French Ambassador Clarisse Paolini also expressed support for the High Representative's mandate and voiced concern over declarations and initiatives in the Republika Srpska aimed at „undermining the institutional order,“ the unity of the country, and reform efforts as part of the European integration process. On the other hand, Russian Federation Ambassador Vasily Alekseyevich Nebenzya⁹ expressed concern about the worsening internal political crisis in Bosnia and Herzegovina, stating that the country has become „a colonial entity openly manipulated by Washington, London, and Brussels.“ Nebenzya „expressed disagreement with Christian Schmidt's presence at the meeting in the capacity of High Representative. The Security Council did not endorse Mr. Schmidt to assume this position, he noted, adding that the Bosnian issue is on the agenda under Chapter 7, and the practice is to support the High Representative. In light of this, he emphasized that Mr. Schmidt has no right to speak on behalf of the international community or transmit any documents to the Council, and the position of High Representative remains vacant.“¹⁰

The first key aspect is the fact that Christian Schmidt does not have the status of a United Nations diplomat. Traditionally, the High Representative in Bosnia and Herzegovina should have the support of all parties to the Dayton Agreement and be appointed by the Steering Board

⁹ Vasily Alekseyevich Nebenzya (rus. Василий Алексеевич Небензя) is the Permanent Representative of the Russian Federation to the United Nations. He has been active in discussions at the UN Security Council, particularly concerning the issues of Bosnia and Herzegovina and the role of the High Representative in the country. Nebenzya has expressed concern about the political situation in Bosnia and Herzegovina and believes that Bosnia and Herzegovina has become „a colonial entity openly manipulated by Washington, London, and Brussels.“

¹⁰ Statement at meeting number 9319. (SC/15279) from 10 May 2023. According to: <https://press.un.org/en/2023/sc15279.doc.htm>, accessed on 20 March 2024 at 10:51h.

of the Peace Implementation Council (PIC), followed by confirmation from the UN Security Council. However, Schmidt's appointment did not go through this standard procedure, which calls his legitimacy into question. Schmidt is, in fact, a German diplomat, as evidenced by the fact that he entered Bosnia and Herzegovina with a German diplomatic passport rather than a travel document issued by the UN.¹¹

The use of a German diplomatic passport instead of a UN travel document further complicates his legal status. UN diplomatic documents represent formal recognition by the international community and confer specific privileges and immunities on the holder. The absence of such a document for Schmidt indicates that he does not have formal UN support as the High Representative, undermining his ability to perform the role with the necessary authority and legitimacy.

Another important aspect is the manner in which Christian Schmidt addresses the United Nations. Instead of speaking as the High Representative, he often addresses as the individual Christian Schmidt. This difference is not merely symbolic; it has substantial implications for his perception and legitimacy on the international stage. Speaking in a personal capacity, Schmidt does not carry the same weight and authority as he would if speaking in the official capacity of High Representative, further undermining his role and effectiveness in Bosnia and Herzegovina.

5. IMPLEMENTATION OF CRIMINALIZATION BY THE HIGH REPRESENTATIVE

One of the main arguments against the implementation of criminalization by the High Representative is that such measures undermine the democratic process and local self-governance. Critics argue that imposing laws without consulting local authorities and the population can lead to additional tensions and destabilization. Additionally, there is an argument that such decisions can be counterproductive, as they may provoke resistance and deepen existing divisions instead of overcoming them. Furthermore, Schmidt's implementation of criminalization is

¹¹ Previous High Representatives in Bosnia and Herzegovina possessed *laissez-passer*, travel documents issued by the United Nations. These documents are internationally recognized and provide holders with specific privileges and immunities associated with their official status as representatives of the international community. The *laissez-passer* allows High Representatives to move and act effectively in accordance with their mandate, ensuring appropriate protection and recognition by host states and other international entities. The lack of such a document for Christian Schmidt further supports arguments about his incomplete legal status and lack of full international legitimacy, which contrasts with the established practice of his predecessors.

often perceived as selective and politically motivated. Critics point out that certain crimes and events are treated differently depending on the political context and international community pressures, which can lead to perceptions of unfairness and bias.

Disregarding the decisions of the High Representative in Bosnia and Herzegovina constitutes a serious offense that can lead to significant legal sanctions for responsible officials. Article 203a¹² specifies that officials in institutions at all levels of government, including entities, districts, cantons, cities, and municipalities, who do not implement or intentionally obstruct the implementation of the High Representative's decisions can be punished with imprisonment ranging from six months to five years. Additionally, individuals who act on orders that compel them to violate the High Representative's decisions, but who report such orders to their superiors, may receive a lighter sentence. If such individuals inform the competent prosecutor about illegal orders, they will be exempt from punishment. This rule aims to protect those who find themselves under pressure to break the law to keep their job or avoid abuse. For those who nevertheless violate the High Representative's decisions, strict penalties are provided, including not only imprisonment but also security measures such as bans on holding office. The legal consequences of such convictions include the termination of official duties and employment, the revocation of honors, and the prohibition of holding and acquiring official duties in any publicly funded body. These measures aim to ensure that officials take their obligations to the High Representative's decisions seriously and to prevent the recurrence of such violations. These rules emphasize the importance of respecting the decisions of the High Representative to maintain legal order and stability in Bosnia and Herzegovina. Disregarding these decisions not only undermines the authority of the High Representative but also destabilizes the political and legal system of the country. Therefore, strict sanctions are provided to ensure that all levels of government adhere to their obligations under international agreements and laws.

12 "An official in an institution of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska, the Brčko District of Bosnia and Herzegovina, or in a canton, city, municipality, or local community, or any body of local administration and self-governance, or a responsible person who does not apply, implement, execute, or otherwise respect the decision of the High Representative for Bosnia and Herzegovina, or who prevents or otherwise obstructs the application, implementation, or execution of such a decision, shall be punished by imprisonment from six months to five years." (Article 203a, Paragraph 1 of the Criminal Code of Bosnia and Herzegovina) Behavior criminalized as a criminal offense by the decision of the illegitimate High Representative as of July 1, 2023.

Expansion of the Scope of “Disrespect for the Law”. Amendments to Article 156 of the Criminal Code of Bosnia and Herzegovina bring significant changes in how criminal offenses involving the use of force or threats of force, as well as other illegal actions, are defined and sanctioned. These amendments were introduced to encompass all forms of illegal behavior, thereby expanding the legal framework for punishing these acts. The previous version of Article 156 was limited to physical force or the threat of physical force. However, the new formulation “use of force or threat of use of force, or in any other unlawful manner” allows for the inclusion of other forms of force, including psychological, economic pressure, and other forms of illegal behavior. This expanded definition ensures that the legislation can effectively respond to various situations and forms of abuse. New paragraphs have also been introduced to specify additional punitive measures for perpetrators. Paragraph (2) stipulates that for any criminal offense under Article 156, a security measure of a ban on performing duties is imposed. This measure is crucial for preventing further abuse of position and ensuring that offenders cannot continue illegal activities from their official positions. Paragraph (3) outlines the detailed legal consequences for convicted persons. According to this paragraph, a conviction for criminal offenses includes the termination of official duties and employment, the revocation of honors, and the prohibition of holding and acquiring official duties in all public bodies. These measures aim to prevent the recurrence of offenses in the long term and ensure the integrity of public services.

Criminalization of Genocide Denial as a Criminal Offense. The Criminal Code of Bosnia and Herzegovina has undergone significant amendments in Article 145a, which expand and tighten punitive measures for various forms of hate speech, crime denial, and glorification of war criminals. These amendments were introduced to ensure the protection of society from harmful behaviors that undermine peace and stability. According to the new provisions, public incitement to violence or hatred directed against a particular group of people based on race, color, religion, origin, or national or ethnic affiliation is now punishable by imprisonment from three months to three years. This measure was introduced in response to rising tensions and increasing instances of public incitement to hatred. Additionally, publicly approving, denying, grossly minimizing, or attempting to justify genocide, crimes against humanity, or war crimes confirmed by final judgments is punishable by imprisonment from six months to five years. This provision aims to prevent revisionism and the denial of serious crimes that have already been judicially confirmed,

which can further incite hatred and violence. A criminal offense involving the distribution or public availability of materials such as leaflets, images, or other propaganda materials is punishable by a minimum of one year in prison. This seeks to curb the spread of harmful content that can further destabilize society. If the criminal offense is committed in a manner that can seriously disrupt public order and peace or is threatening, abusive, or offensive, the perpetrator will face a minimum prison sentence of three years. This harsher penalty aims to discourage particularly dangerous behaviors that can cause widespread social harm. Another important amendment concerns the glorification of individuals convicted of genocide, crimes against humanity, or war crimes. Individuals who award honors, rewards, commemorative plaques, or in any way glorify these convicts, or name public objects after them, will face a minimum prison sentence of three years. This measure is crucial to prevent the glorification of war criminals and support a culture of memory based on justice and reconciliation.

Finally, the new provision stipulates that officials or responsible persons in government institutions who commit these criminal acts will be punished with a minimum prison sentence of three years. This severe penalty emphasizes the special responsibility of public officials to respect the law and serve as an example to others.¹³

6. CONSTITUTIONAL CRISIS

Amendments to the Criminal Code of Bosnia and Herzegovina, which introduce harsher penalties for hate speech, denial of crimes, and glorification of war criminals, have led to significant political tensions that threaten the constitutional order of the country. These measures have caused dissatisfaction among political representatives of the Republika Srpska, who see them as an attempt to disenfranchise the Serbian people and endanger their political rights. One of the key points of contention is the perception that the laws are selectively targeted against Serbs, thereby undermining the principle of equality before the law. Political leaders from the Republika Srpska argue that these amendments were imposed without their consent and represent a violation of the Dayton Agreement, which is the foundation of the constitutional order of Bosnia and Herzegovina. This dissatisfaction is further exacerbated by the fact that many Serbs view these laws as an attempt to revise history and impose a one-sided

¹³ Decision of the High Representative 26/21 published in the Official Gazette of Bosnia and Herzegovina, No. 46/21.

truth about the past war. Such a situation contributes to deeper political divisions within the country and strengthens secessionist tendencies in the Republika Srpska. Political leaders from Banja Luka increasingly threaten to withdraw from joint institutions and organize a referendum on independence, which could lead to the de facto dissolution of the state. Such a development would have catastrophic consequences for regional stability and the European integration of Bosnia and Herzegovina.

The implementation of laws that Serbian political leaders consider unjust and discriminatory creates a sense of political isolation and marginalization among the Serbian people. This dissatisfaction manifests through mass protests, boycotts of joint institutions, and open threats of withdrawal from the state. This dynamic further complicates the work of institutions and paralyzes political processes, thereby worsening the constitutional crisis. The international community, which plays a significant role in Bosnia and Herzegovina, is also divided on this issue. While some support the strict measures as necessary for maintaining peace and stability, others warn of the dangers of excessive imposition of decisions that do not have the support of all ethnic groups in the country. This lack of a unified stance within the international community further complicates the situation and makes it difficult to find a solution that would satisfy all parties. In such an atmosphere, political dialogue becomes increasingly difficult, and compromises less likely. Without constructive dialogue and a willingness to compromise, Bosnia and Herzegovina faces the danger of existing political tensions turning into a serious constitutional crisis that could lead to the disintegration of the country. This situation requires urgent attention and engagement from all relevant actors to find a sustainable solution that will ensure peace and stability for all peoples in Bosnia and Herzegovina.

Republika Srpska (RS) has enacted a law that suspends the application of the decisions of the High Representative in Bosnia and Herzegovina on its territory.¹⁴ This move is a response to recent amendments to the Criminal Code of BiH, which many political leaders in RS consider unjust and discriminatory against the Serbian people. The law is part of

14 The Law on the Non-Application of the Decision of the High Representative Introducing the Law on Amendments to the Criminal Code of Bosnia and Herzegovina published in the Official Gazette of Republika Srpska No. 89/21. Article 2 of this law reads:

(1) The competent authorities of Republika Srpska will not cooperate with the competent authorities of Bosnia and Herzegovina regarding the application of the Decision of the High Representative as mentioned in Article 1 of this law.

(2) Upon the entry into force of this law, the Government of Republika Srpska will ensure the implementation of paragraph 1 of this article to protect the citizens of Republika Srpska.

a broader strategy of political resistance to the imposed decisions of the international community, which are believed to threaten the autonomy and rights of RS.

It was adopted as a reaction to what is claimed to be the excessive use of the High Representative's powers, who, according to RS authorities, often acts without the consent of local political actors. The suspension law serves as a legal mechanism to protect the interests of RS and its autonomy within the complex political system of BiH. By doing so, RS aims to affirm its legal and political sovereignty and resist what it claims are illegitimate impositions from Sarajevo and the international community.

This law further deepens the already existing political tensions between the entities and the central authorities in BiH, creating the risk of escalating conflicts. Critics of the law warn that such moves could destabilize the entire country and jeopardize the peace process established by the Dayton Agreement. Additionally, the law poses a challenge for the international community, particularly the EU and the USA, which support the work of the High Representative. Aside from political tensions, the law could provoke legal disputes and conflicts within the BiH legal system. The legal validity of such a law can be contested on the grounds that it violates the provisions of the Dayton Agreement and the constitutional order of BiH. If the international community and the High Representative decide to respond, sanctions or other measures against RS could follow. The enacted law suspending the decisions of the High Representative represents a significant step in RS's political resistance towards the centers of power in BiH and the international community. It highlights deep divisions and different visions for the future of the country that exist among its peoples. The key to resolving these tensions lies in dialogue and compromise, which are currently difficult but necessary to maintain peace and stability in Bosnia and Herzegovina.

CONCLUSION

Based on the analysis of the legal status of Christian Schmidt as the High Representative in Bosnia and Herzegovina, it is clear that his appointment and work have serious legal deficiencies. Schmidt's appointment did not go through the usual confirmation procedures by the United Nations Security Council, which calls into question his legitimacy. His arrival in Bosnia and Herzegovina with a German diplomatic passport,

rather than a UN laissez-passer, further undermines his legal status and authority.

The criminalization of certain actions imposed by Christian Schmidt, such as the denial of genocide or hate speech, although having “noble” goals, was carried out without consultation with all relevant domestic actors, which has caused political tensions. These measures are often perceived as selective and directed against the Serbian people, further polarizing society and deepening ethnic divisions.

Schmidt’s behavior and the manner in which he implements his decisions contribute to a serious constitutional crisis in Bosnia and Herzegovina. The imposition of laws without the consent of domestic institutions and political leaders violates the principles of sovereignty and self-governance, which is contrary to the spirit of the Dayton Agreement. Such actions create a sense of political marginalization among the Serbian people and encourage secessionist tendencies in the Republika Srpska. Political leaders from the Republika Srpska are intensifying their resistance to central authorities and international impositions, leading to further destabilization of the political system. These tensions seriously jeopardize the functionality of joint institutions and threaten to paralyze political processes in the country. The international community is divided on the issue of supporting Schmidt, which further complicates the situation. Without constructive dialogue and compromise, Bosnia and Herzegovina faces the risk of escalating political conflicts and further worsening the constitutional crisis. Resolving these problems requires urgent and coordinated action by all relevant actors, including domestic political leaders and the international community. It is necessary to ensure that all laws and decisions are made with broad consensus and respect for legal procedures.

In conclusion, the legitimacy of Christian Schmidt, the manner in which he implements his decisions, and the consequences these decisions have on the constitutional order of Bosnia and Herzegovina represent a serious challenge to the stability and future of the country. Only through respect for international and domestic legal norms, and through inclusive dialogue, can the current crisis be overcome and sustainable peace and prosperity ensured for all citizens of Bosnia and Herzegovina.

VISOKI PREDSTAVNIK I USTAVNA KRIZA U BOSNI I HERCEGOVINI

Slaven Knežević

Apstrakt:

Ovaj naučni rad bavi se analizom ustavne krize u Bosni i Hercegovini, sa posebnim osvrtom na ulogu Visokog predstavnika u kriminalizaciji ustavnih dužnosti. U radu se istražuje kako intervencije Visokog predstavnika, koje često uključuju nametanje ili ukidanje zakona i odluka, utiču na ustavni poredak i suverenitet Bosne i Hercegovine. Posebna pažnja posvećena je analizi slučajeva u kojima su odluke Visokog predstavnika dovele do kršenja ustavnih prava i sloboda, te kako takve intervencije doprinose produbljivanju političkih i etničkih tenzija unutar zemlje. Rad takođe razmatra međunarodno-pravni okvir koji reguliše ovlaštenja Visokog predstavnika i njegov uticaj na domaći pravni sistem. Kroz analizu konkretnih primjera, rad ukazuje na potrebu za revizijom uloge Visokog predstavnika te njenog skorog ukidanja i traži rješenja koja bi omogućila veću domaću odgovornost i poštovanje ustavnog poretka Bosne i Hercegovine. Osim toga, rad se bavi pitanjem kako kriminalizacija ustavnih dužnosti od strane Visokog predstavnika utiče na legitimnost i efikasnost političkih institucija u Bosni i Hercegovini. Analizira se kako takve intervencije mogu podriti povjerenje građana u pravni sistem i demokratske procese. Takođe se razmatraju mogući mehanizmi za jačanje transparentnosti i odgovornosti u radu Visokog predstavnika, kako bi se osiguralo da njegove odluke doprinose stabilnosti i pomirenju, umjesto daljem produbljivanju krize. Predlažu se alternative za trenutni model međunarodnog nadzora, koje bi omogućile veću samostalnost i demokratski razvoj Bosne i Hercegovine. Na kraju, rad naglašava važnost uspostavljanja jasnijeg pravnog okvira koji bi se prvo ograničila ovlaštenja Visokog predstavnika i osigurao poštovanje ustavnog poretka i suvereniteta zemlje, a potom i ukinula ova nedemokratska tekovina.

***Ključne riječi:** ustavna kriza, visoki predstavnik, PIC, Rusija, kriminalizacija, međunarodno pravo, Savjet bezbjednosti UN, genocid, Bosna i Hercegovina.*

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