

ON THE EVE OF THE DAYTON PEACE AGREEMENT ANNIVERSARY: WAS IT SUSPENDED?*

Summary

This paper critically examines the legal and political implications of the legislative actions taken by the High Representative (HR) in Bosnia and Herzegovina (BiH) and the subsequent institutional responses of the Republic of Srpska. The analysis focuses on whether these actions constitute a suspension of Annex 10 of the Dayton Peace Agreement (DPA) and assesses the legal basis for the HR's authority. Through a detailed examination of relevant international legal frameworks, including the Vienna Convention on the Law of Treaties (VCLT), the paper explores the transfer and oversight of powers from the United Nations Security Council (UNSC) to the HR. It argues that the absence of UNSC endorsement of Mr. Hans Christian Friedrich Schmidt's appointment undermines the legitimacy of his actions under international law. Furthermore, the study examines the legal countermeasures taken by the Republic of Srpska, particularly the 2023 Law excluding HR's decisions from its official publications, as a de facto partial suspension of Annex 10. The paper also evaluates whether the HR's actions constitute a material breach of the DPA, thereby justifying the Republic of Srpska's response under VCLT provisions. It highlights the erosion of effective UNSC oversight over the HR and the evolving role of domestic institutions within BiH constitutional framework. This analysis contributes to ongoing debates regarding international intervention, the rule of law, and the limitations

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of external governance in post-conflict societies, offering valuable insights for scholars, policymakers, and legal practitioners concerned with the future of the Dayton Peace Agreement and international oversight mechanisms.

Keywords: Dayton Peace Agreement, Material Breach, Treaty Suspension, Post-Conflict States.

UOČI GODIŠNJICE DEJTONSKOG MIROVNOG SPORAZUMA: DA LI JE SPORAZUM BIO SUSPENDOVAN?***

Sažetak

U ovom radu kritički su ispitane pravne i političke implikacije zakonodavnih aktivnosti koje je preduzeo visoki predstavnik (VP) u Bosni i Hercegovini (BiH), kao i naknadni institucionalni odgovori Republike Srpske. Analiza se fokusira na to da li te aktivnosti predstavljaju suspenziju Aneksa 10 Dejtonskog mirovnog sporazuma (DMS) i procenjuje se pravni osnov za ovlašćenja VP-a. Na osnovu detaljne analize relevantnih međunarodnih pravnih okvira, uključujući Bečku konvenciju o pravu ugovora (VCLT), u radu se ispituje prenos ovlašćenja sa Saveta bezbednosti Ujedinjenih nacija (SBUN) na VP-a i kontrola istih. Tvrdi se da nepostojanje podrške od strane SBUN-a za imenovanje gospodina Hansa Kristijana Fridriha Šmita potkopava legitimitet njegovih postupaka i usklađenost istih sa međunarodnim pravom. Osim toga, u studiji se ispituju i pravne kontramere koje je preduzela Republika Srpska, posebno Zakon iz 2023. godine kojim se odluke Visokog predstavnika isključuju iz zvaničnih publikacija RS, koji de fakto predstavlja delimičnu suspenziju Aneksa 10. U radu se takođe procenjuje da li postupci visokog predstavnika predstavljaju materijalno kršenje Dejtonskog mirovnog sporazuma, čime se opravdava odgovor Republike Srpske prema odredbama Bečke konvencije o pravu ugovora (VCLT). Ističe se urušavanje efektivne kontrole od strane Saveta bezbednosti UN nad Visokim predstavnikom i sve veća uloga domaćih institucija u okviru ustavnog okvira BiH. Ova analiza doprinosi aktuelnim debatama o međunarodnoj intervenciji, vladavini prava i ograničenjima spoljne uprave u postkonfliktnim

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društvima i pruža korisne uvide za naučnike, formulatore politike i pravne stručnjake koji se bave budućnošću Dejtonskog mirovnog sporazuma i mehanizama međunarodnog nadzora.

Ključne reči: Dejtonski mirovni sporazum, materijalno kršenje, suspenzija sporazuma, postkonfliktne države.

1. Introduction

In 2021, during the final days of his tenure, the High Representative to Bosnia and Herzegovina (HR) invoked the so-called Bonn Powers and issued Decision No. 26/21, enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina. A particular amendment within this law, which criminalized the public denial of crimes established by a final adjudication of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court, or a court in Bosnia and Herzegovina, triggered a profound crisis in the country. The Republic of Srpska perceived this as infringement of freedom of speech and freedom of thought. In response, the Republic of Srpska enacted the Law on Non-Application of the Decision of the High Representative Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina¹, which stipulates that the HR's Decision and its amendments shall not apply within the territory of the Republic of Srpska. This was the first instance of an exceptional institutional response that suspended the authority of the High Representative. Since then, Bosnia and Herzegovina has remained in a continuous state of political and constitutional turmoil.

The crisis escalated when Mr. Hans Christian Friedrich Schmidt assumed his position at the Office of the High Representative (OHR). Although Mr. Schmidt was designated by the Peace Implementation Council (PIC) on May 27, 2021, his appointment did not receive approval from the United Nations Security Council (UNSC), as evidenced by Draft Resolution S/2021/667 and the 8823rd UNSC meeting held on July 22, 2021. This situation is unprecedented in the context of the High Representative's position and introduced a new dimension to the ongoing dispute.

Prior to this development, on March 11, 2021, the National Assembly of the Republic of Srpska enacted the Conclusions regarding the Evaluation of the Work of the High Representative, and the Implementation of Annex X of the General Framework Agreement for Peace in Bosnia and Herzegovina during the Period of Talks on the Appointment of a New High Representative. Among the key points in these conclusions, it was emphasized that the Republic of Srpska rejects the

¹ *Official Gazette of the Republic of Srpska*, No. 89/21.

imposition of any individual as High Representative, stressing that the appointment process requires consultations and the consent of the signatory parties to Annex 10 of the Dayton Agreement. Consequently, the National Assembly of the Republic of Srpska contends that prior nominations, elections, and confirmations of the High Representative contradict Annex 10, lack transparency, and fail to adhere to the necessary consultations and advice stipulated in Annex 10.

The National Assembly concluded that this provides sufficient justification to dismiss any appointment of a High Representative that does not adhere to the procedures outlined in Annex 10. Furthermore, the conclusions asserted that the National Assembly, as the highest authority of the Republic of Srpska that had approved Annex 10 – which pertains to the implementation of the civilian aspects of the Dayton Peace Agreement – would communicate its position to the signatory parties of that Annex. This communication would include a proposal to terminate the High Representative and reassess the decisions made by the High Representative that fall outside the scope established by Annex 10.

Not only were the parties to Annex 10 not consulted regarding Mr. Schmidt's appointment as a High Representative (HR), but the United Nations Security Council (UNSC) was also disregarded in the process. Despite these circumstances, Mr. Schmidt invoked the so-called Bonn Powers and proceeded to take substantial actions. Since October 2, 2022, a series of legislative actions were initiated by him, starting with the decisions dated June 22 and July 22, 2022, which were published in the "Official Gazette of BiH" No. 67/22. These decisions resulted in amendments to the Constitution of the Federation of Bosnia and Herzegovina and Articles 1 to 5 of the Election Law of Bosnia and Herzegovina. Additionally, Mr. Schmidt enacted changes to the Criminal Code of Bosnia and Herzegovina on July 1, 2023, and to the Criminal Code of the Republic of Srpska on April 27, 2023.

Following the amendments of the Constitution of the Federation of Bosnia and Herzegovina and the Election Law of Bosnia and Herzegovina, Messrs. Željko Komšić, Member of the Presidency of Bosnia and Herzegovina, and Šefik Džaferović, Chairman of the Presidency of Bosnia and Herzegovina, challenged the legitimacy of these amendments before the Constitutional Court of Bosnia in cases labeled U-27/22 and U-30/22. The Constitutional Court ruled that Mr. Schmidt's competences derive from Article II (1), items (a) and (d) of Annex 10 to the Dayton Peace Agreement (Case No. U-27/22, para. 63). Furthermore, in assessing Mr. Schmidt's law-enacting authority, the Court drew parallels with the powers vested in the High Representative. It reiterated its position that the High Representative's authority is derived from Annex 10 of the General Framework Agreement, relevant UN Security Council resolutions, and the Bonn Declaration. The Court emphasized that these powers, and their exercise, fall outside the scope of its judicial review.

However, when Mr. Schmidt intervened in Bosnia and Herzegovina's legal system, supplanting domestic authorities, he effectively assumed the role of a Bosnian and Herzegovinian authority (Case No. U-27/22, paras. 73, 74). Consequently, in accordance with its theory of functional duality (see Case No. U-9/00, para. 5), the Constitutional Court recognized Mr. Schmidt as a Bosnian and Herzegovinian body with law-enacting competences. Arguably, the absence of a power transfer from the UNSC to the HR was substituted by a transfer of power from the Constitutional Court to the HR.

The intention herein is not to evaluate this delegation of power to an unelected foreign diplomat, particularly not from a human rights standpoint. Instead, the focus will be on the legal remedies taken by the Republic of Srpska in response to the HR's legislative alterations to both the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Republic of Srpska. Specifically, we will examine whether the Republic of Srpska suspended Annex 10 to the Dayton Peace Agreement by enacting the Law on Amendments to the Law on the Publication of Laws and Other Regulations of the Republic of Srpska.² This new legislation excludes the HR's decisions from the list of acts published in the Official Gazette of the Republic of Srpska, effectively stripping them of any binding authority within its territory. Unlike the previous law from 2021, which specifically targeted Decision No. 26/21, the 2023 Law is broader in scope and applies to all future decisions made by the HR.

To achieve this, we will begin with a general argument arising from Annex 10, which outlines the criteria for legitimate international intervention through the Office of the High Representative (OHR). Next, we will analyze both the procedural and substantive challenges surrounding the appointment of Mr. Hans Christian Friedrich Schmidt as High Representative, with a particular focus on the absence of UNSC resolutions validating his actions and the implications this has for the legitimacy of his operations. By applying international legal principles, we will assess whether the actions of the current officeholder at the OHR can be considered representative of the international community – the High Representative – and whether they meet the requirements for legitimate intervention as specified in Annex 10.

2. Suspension of Annex 10 of the Dayton Agreement

Acting in the capacity as a Contracting Party to Annex 4 and Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Gaeta, 1996. p. 148), the National Assembly of the Republic of Srpska, on behalf of the Republic of Srpska, adopted the Request for arbitral settlement of the dispute (hereinafter: the

² *Official Gazette of the Republic of Srpska*, No. 60/23, Law 2023.

Request)³ between itself and Bosnia and Herzegovina during a session held on March 13, 2025.⁴ In this Request, the Republic of Srpska asserts that the Law on Amendments to the Law on the Publication of Laws and Other Regulations of the Republic of Srpska,⁵ which removes the decisions of the High Representative from the list of acts published in the Official Gazette of the Republic of Srpska, thereby depriving them of legal effect within its territory, constitutes a remedial measure adopted in accordance with the provisions of Article 60 of the Vienna Convention on the Law of Treaties (VCLT). In this context, the Republic of Srpska argues that a temporary partial suspension of Annex 10 of the Dayton Peace Agreement has occurred.

The material breach of Annex 10, as claimed in the Request, essentially arises from the material breach of Annex 4, which governs the agreed-upon distribution of legislative authority in post-war Bosnia and Herzegovina. Specifically, the Constitutional Court's conferral of legislative competences to Mr. Schmidt (Case No. U-27/22), despite the lack of UNSC authorization, is viewed as a material breach of both Annex 4 and Annex 10. Regarding the specific breach of Annex 10, the Republic of Srpska argues that the actions of the Constitutional Court violated the intervention conditions. By granting legislative powers to the High Representative without the necessary UN resolution or consultation with the contracting parties, the Constitutional Court overstepped its legal authority, undermining the legitimate governance structure. The introduction of an unauthorized legislative entity into Bosnia and Herzegovina's legal system is regarded as a breach of the duty to act in good faith by Bosnia and Herzegovina. This violation raises doubts about the legality of the Constitutional Court's decisions, suggesting they may not impose binding obligations on the Republic of Srpska.

The Request includes a section arguing the fulfilment of procedural conditions for suspension and the tacit acceptance of the measures taken. The Republic of Srpska asserts that the procedural requirements for the suspension of Annex 10 of the Dayton Peace Agreement, as prescribed by Articles 65 and 67 of the Vienna Convention on the Law of Treaties (VCLT), have been met. This is based on the fact that the remedial acts of the Republic of Srpska were adopted in the form of laws, published in its official gazette, and are of a public nature. Furthermore, due to the absence of any objections or protests by the other contracting parties in response to the aforementioned publicly promulgated laws, the Republic of Srpska asserts that the international legal acceptance of these acts by all parties has been implicitly recognized.

³ For the review of the distinct sort of arbitration in Bosnia and Herzegovina see Brodlija, 2025, pp. 783-801.

⁴ For legal remedies available to the Republic of Srpska see Dakić, 2024, pp. 376-377.

⁵ *Official Gazette of the Republic of Srpska*, No. 60/23.

3. Analysis of the Republic of Srpska's Arguments on the Material Breach of Annex 10

3.1. General Argument: Conditions for Legitimate Intervention

In the context of international law, certain circumstances can preclude the wrongdoing typically associated with interventions that might otherwise violate the principle of non-intervention. The article by Maziar Jamnejad and Michael Wood identifies three principal situations that can justify such actions without constituting unlawful intervention (Jamnejad & Wood, 2009; see also: *United Kingdom v. Albania*). First, Security Council authorization under Chapter VII of the UN Charter serves as a critical safeguard. When the Security Council determines that there is a threat to international peace, a breach of peace, or an act of aggression, it has the authority to take measures to restore peace and security. This authorization allows member states to act in ways that might otherwise be seen as interventions, as they are operating under the collective mandate of the international community. Second, the concept of consent plays a vital role. If a state consents to the intervention by another state or entity, this consent legitimizes the action. This situation often arises in humanitarian crises or when a government requests assistance to maintain order or address specific issues. The principle of sovereignty is respected when a state voluntarily invites external assistance, thereby precluding any claims of wrongdoing. Lastly, countermeasures can also serve as a justification for actions that might otherwise be deemed unlawful. In international law, countermeasures are actions taken by a state in response to an unlawful act by another state, aimed at inducing compliance with international obligations. These measures must be proportionate and directed at addressing the initial wrongdoing, thus providing a legal basis for intervention that is not considered wrongful.

The first and second demands for lawful intervention are conjointly integrated in Annex 10 to the Dayton Peace Agreement, titled: "Agreement on Civilian Implementation", which, in its Article 1, reads:

37. In view of the complexities facing them, the Parties request the designation of a High Representative (*second condition, emphasis added*), to be appointed consistent with relevant United Nations Security Council resolutions (*first condition, emphasis added*), 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 by carrying out, as entrusted by a UN Security Council resolution, the tasks set out below.

Consequently, the procedure for appointing a High Representative is crucial for being recognized as a legitimate intervener. This process, which involves the United Nations Security Council (UNSC), is inseparably tied to the transfer of authorization under Chapter VII of the UN Charter and effective oversight over their conduct. These provisions were further certified by the UNSC. Specifically, acting under Chapter VII of the Charter of the United Nations, the UNSC “[w]elcome[d] and support[ed] the Peace Agreement” in Bosnia and Herzegovina (para. 1) (Resolution 1031 (1995), UN Doc. S/RES/1031(1995)). Additionally, in the same Resolution 1031 (1995), the UNSC “[e]ndorse[d] the establishment of a High Representative” in Bosnia and Herzegovina (para. 26), in line with Annex 10 of the Dayton Peace Agreement.

The text of Annex 10 is clear regarding the UNSC’s role in appointing a High Representative and has never been amended or modified in this regard. Annex 10, Article 1 of the Dayton Peace Agreement uses straightforward language, with no ambiguity or vagueness, and the meaning of the terms used is evident and cannot be interpreted in any other way. According to the Vienna Convention on the Law of Treaties 1969 (VCLT), specifically its Article 31, paragraph 1, the meaning of Article 1 of Annex 10 can be interpreted through three fundamental approaches in international law: a strict textual interpretation of the terms used, one that considers the parties’ intentions, and one that examines the agreement’s object and purpose (Edwards & Worboys, 2021, p. 127). Whether applied individually or in conjunction, all three methods of interpretation lead to a unified conclusion regarding the role of the UNSC in appointing a High Representative for Bosnia and Herzegovina under Article 1 of Annex 10 to the Dayton Peace Agreement: beyond any reasonable doubt, the involvement of the UNSC in the appointment process appears mandatory.

However, a procedural fragmentation of the appointment process was simultaneously conceived. The Peace Implementation Conference in London (1995) laid the groundwork for the establishment of the Peace Implementation Council (PIC), which was endorsed by UN Security Council Resolution 1031 (1995). Although neither the Conference nor the Resolution explicitly granted the PIC the authority to appoint a High Representative to Bosnia and Herzegovina, this practice has been consistently followed ever since. The PIC’s powers are derived from paragraph 18 of the Conference Conclusions (hereinafter: the Conclusions) and are supported by the aforementioned Resolution 1031. According to paragraph 18 of the Conclusions, the Conference, in consultation with the Government of Bosnia and Herzegovina, approved the designation of Mr. Carl Bildt as High Representative and invited the UN Security Council to endorse his appointment. Thus, the three essential elements of the appointment process were introduced: consultation with the Government of Bosnia and Herzegovina, the PIC designation, and the UNSC agreement.

While the first element was abandoned with the appointment of the second High Representative in 1997, the second and third elements have remained consistent throughout the implementation of the Dayton Peace Agreement.

The title and authority of the High Representative to exercise Chapter VII of the UN Charter on behalf of the UNSC is less contestable when the PIC designation and the UNSC endorsement align. However, the situation becomes ambiguous in the absence of UNSC endorsement, as is currently the case with Mr. Hans Christian Friedrich Schmidt. While the Steering Board of the PIC appointed him, the UNSC rejected this decision, as evidenced by Draft Resolution S/2021/667 and the 8823rd UNSC meeting on July 22, 2021. This appointment prompted strong protests from UNSC members, including the Russian Federation, which was also a PIC member, and the People's Republic of China. Furthermore, the Republic of Srpska – a party to Annex 10 – has persistently objected to the appointment on the grounds of the lack of consultation with the Government of Bosnia and Herzegovina, i.e., the parties to Annex 10, as reflected in the National Assembly's conclusions regarding the High Representative's report on the civilian implementation of the peace agreement in BiH from 2009 to 2020.

While Mr. Hans Schmidt's suitability for the position of High Representative may be called into question, it is essential to consider the multifaceted nature of this role. The title encompasses not only a trusted individual wielding UNSC powers but also the chairperson of the Office of the High Representative (OHR) (see Annex 10, Article III, Section 9, and paragraph 19 of the Conclusions) and the president of the PIC's Steering Board (as outlined in paragraph 21 (c) of the Conclusions). It is possible that the OHR and PIC may assert their autonomy in appointing their own bodies, including a High Representative (cf. Džakić, 2023, 59-63). However, it remains debatable whether the PIC has the authority to unilaterally confer powers derived from Chapter VII of the UN Charter.

3.2 Argument(s) for Suspension of Annex 10: Absence of Power Transfer

To determine whether Mr. Hans Christian Friedrich Schmidt acts as a legitimate representative of the international community it is crucial to examine the delegation of Chapter VII powers of the UN Charter and the extent of the UNSC's oversight. The Chapter VII powers in question correspond to the Bonn Powers (see Whittle, 2015, pp. 677-680). It remains unclear whether the Bonn Powers are attached to the individual officeholder or to the Office of the High Representative (OHR) as an international organization. One possible interpretation of UNSC Resolution 1144 is that it confers Chapter VII powers to the OHR for an indefinite period, thereby empowering each successive officeholder with the Bonn Powers.

This interpretation aligns with the approach of interpreting the Bonn Powers within the concept of implied powers (see: Banning, 2015). However, even in such an interpretation, Mr. Schmidt would still require explicit UNSC authorization to lawfully exercise the Bonn Powers. This is due to the nature of the UNSC resolutions and the three-decade-long practice of power transfer to a High Representative. Specifically, UNSC resolutions regarding the appointment of a High Representative for Bosnia and Herzegovina can have either direct substantive effects or causative effects (see: Öberg, 2006).

The three main components of substantive effects are binding effects, authorizing effects, and (dis)empowering effects. A key element of substantive effects is the binding effect, which involves the creation of legal obligations for states and other entities through UNSC resolutions. In *Nicaragua v. United States* (ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*), the International Court of Justice (ICJ) analyzed the binding nature of UNSC resolutions related to the use of force and determined that states must adhere to these resolutions. Furthermore, the authorizing effects of UNSC resolutions provide specific rights or powers to entities, enabling them to undertake certain actions. An illustration of this can be observed in the *East Timor* case (*East Timor (Portugal v. Australia)* [1995] ICJ Rep 90), where the ICJ discussed the authorizing effect of UNSC resolutions in the context of self-determination (refer to Öberg, 2006, p. 892). These authorizing effects empower entities to act in alignment with the directives outlined in UNSC resolutions. In addition, the (dis)empowering effects of UNSC resolutions can either strengthen or weaken the legal capacity of states or organizations. For instance, a resolution that disempowers a state from engaging in particular activities due to breaches of international law can have profound implications. While the ICJ has not extensively deliberated on this aspect, the potential influence of (dis)empowering effects on the legal rights and capabilities of entities is noteworthy.

Qualifying the effect of UNSC resolutions in transferring its powers to a High Representative for Bosnia and Herzegovina as substantive reveals the crucial interplay among various key aspects of such effects. When considering the binding effects of a UNSC resolution, it becomes evident that states and entities would be under a legal obligation to adhere to the decision of transferring power to a High Representative. The absence of such a resolution, however, could introduce uncertainties and potential obstacles in enforcing the power transfer, as the lack of a well-defined mandate may leave room for ambiguity regarding the parties' obligations. Conversely, the authorizing effects of a UNSC resolution would confer the necessary rights and authorities to facilitate the smooth transition of power to a High Representative. Without such authorization, the process could encounter setbacks due to the absence of a clear mandate, which is essential for implementing

such a substantial governance change. The legitimacy and competence of the High Representative could also be called into question without the authorizing effect of a UNSC resolution, potentially undermining the transition's effectiveness. Addressing the (dis)empowering effects, the presence or absence of these effects in a resolution could significantly influence the roles and responsibilities of key actors, including former High Representatives. In the absence of such effects, there may be a lack of clarity regarding the distribution of powers and authorities, which could introduce challenges in governance and decision-making processes during the power transfer.

The adoption of resolutions by the UNSC can also have a crucial impact on the initiation of legal consequences driven by determinations of law or fact – causative effects. A key aspect of these effects is their ability to produce legal outcomes through determinations of law or fact. An example of this can be seen in the *Certain Expenses of the United Nations* case (*Certain Expenses of the United Nations* [1962] ICJ Rep 151), where the ICJ indirectly recognized the impact of UNSC resolutions in establishing the legality of UN actions (see Öberg, 2006, p. 905). Additionally, these causative effects can influence the development of customary international law, especially when supported by authoritative bodies. In situations where a UNSC resolution establishes specific facts that are later endorsed by states, the legal ramifications arise from this endorsement, rather than from the initial determination (Öberg, 2006, p. 904). The ICJ's jurisprudence further emphasizes the intrinsic nature of causative effects, underscoring their foundation in the unique treaty powers of the UNSC. By generating legal consequences based on determinations within UNSC resolutions, these effects are vital for ensuring the enforcement and application of international law.

In the absence of a UNSC resolution addressing the transfer of power to a High Representative, despite its potential consequential impacts, several significant implications arise. Without a UNSC resolution containing factual determinations pertaining to the power transfer, there may be a lack of clarity regarding the factual grounds for the transition. This uncertainty could lead to difficulties in ascertaining the legitimacy and rationale for the transfer of power to a High Representative, potentially undermining the overall efficacy and acceptance of the decision. Causative effects arising from legal determinations involve the interpretation and application of legal principles to guide substantive legal outcomes. In the absence of a UNSC resolution incorporating explicit legal determinations regarding the power transfer, the legal foundation for the transition could be uncertain. The absence of clear legal determinations could raise doubts regarding the legality and authorization of the transfer, thereby introducing complexities in executing and upholding the decision within the international legal framework. The

non-existence of a UNSC resolution with causative effects could have far-reaching implications on substantive legal consequences. Without the activation of factual and legal determinations through a resolution, the process of transferring power to a High Representative may lack a solid legal footing. This could lead to obstacles in executing the transfer, as well as potential disagreements on the legitimacy and adherence to international legal standards.

Therefore, if the effect of the UNSC resolutions in transferring its powers to a High Representative for Bosnia and Herzegovina is qualified as substantive, it implies that, without an explicit UNSC resolution, Mr. Hans Christian Friedrich Schmidt has neither the authorization nor the entitlement to exercise any powers. If the effect of the UNSC resolutions in transferring powers is qualified as causative, it implies that the High Representative, as a body itself, is substantively conferred with the powers from Chapter VII of the UN Charter, thereby continuously bearing the UNSC's authorization for activities that would otherwise be unlawful. Even in that case, a UNSC resolution is needed to trigger such authorization. The conclusion remains the same if the UNSC resolutions in transferring its powers to a High Representative are presumed to have modal effects (see Öberg, 2006, p. 892).

3.2.1 Overview of Practice in Implementing Annex 10

Further insights into the connection between the actions of a High Representative and the international community can be gained by examining the process of transferring power to a High Representative, as established through practice. Mr. Carl Bildt was the first High Representative. Following the Conclusions of the London Peace Implementation Conference, and acting under Chapter VII of the UN Charter, the UNSC adopted Resolution 1031 (1995), agreeing to the designation of Mr. Carl Bildt as High Representative. An overview of this particular resolution reveals that the UNSC reiterated the authorizations previously conferred to member states in peace-implementing tasks, which suggests temporal constraints to these authorizations and an intent to maintaining effective oversight. Mr. Carlos Westendorp was the second High Representative. In Resolution 1112 (1997), the UNSC “welcome[d] the conclusions of the Ministerial Meeting of the Steering Board of the Peace Implementation Council held in Sintra, Portugal on 30 May 1997 (S/1997/434, Annex) and “agree[d] to the designation of Mr. Carlos Westendorp as High Representative in succession to Mr. Carl Bildt.” This power-transfer process marks a significant departure from the previous procedures, as it no longer included consultations with the Government of Bosnia and Herzegovina as a constitutive step. While this change deviated from established precedent, it faced no significant protests. The designation of Mr. Wolfgang Petritsch as High Representative by the

Steering Board of the Peace Implementation Council on 12 July 1999, in succession to Mr. Carlos Westendorp, was welcomed and agreed upon by the UNSC in Resolution 1256 (1999). In the preambular part of this particular resolution, the UNSC specifically recalled its previous resolutions – 1031 (1995) of 15 December 1995, 1088 (1996) of 12 December 1996, and 1112 (1997) of 12 June 1997 – acknowledging them as general framework resolutions in the context of a particular situation. The UNSC, by repeatedly referencing these resolutions, brought them closer to the status of precedents, granting them combined and potentially cumulative effects.

In contrast, the UNSC, in the preambular part of its Resolution 1256 (1999), made a direct reference to the conclusions of the Peace Implementation Conferences held in Bonn on 9 and 10 December 1997 (hereinafter: the Bonn Conclusions), which were annexed to the Resolution. This meant that the UNSC effectively suppressed its previous Resolution 1144 (1997), temporarily constraining its effects, disconnecting it from the scope of precedent resolutions, and preventing it from being implicitly relevant to future appointments. Resolution 1144 (1997) was adopted while Mr. Carlos Westendorp was already in office. Although it appeared to be a general resolution, it was effectively revoked, and its effects ceased with the new Resolution on the subject matter. Each subsequent resolution, starting with Resolution 1144 (1997), included references to the Bonn Conclusions. Subsequently, in Resolution 1256 (1999), the UNSC substantively conferred the so-called Bonn Powers upon Mr. Wolfgang Petritsch, agreeing to his designation. This was a clear indication that Resolution 1144 (1997) had empowered only the named officeholder – Mr. Wolfgang Petritsch’s predecessor. Through this approach, the UNSC likely sought to maintain effective oversight over the powers deriving from Chapter VII of the UN Charter.

In the executive part of its Resolution 1396 (2002), the UNSC “welcome[d] and agree[d] to the designation by the Steering Board of the Peace Implementation Council (PIC) on 28 February 2002 of Lord Ashdown as High Representative in succession to Mr. Wolfgang Petritsch.” In the same Resolution, in its preambular part, the UNSC reiterated its direct reference to the Bonn Conclusions annexed to the Resolution, but notably did not refer to Resolution 1144 (1997), which initially welcomed the Bonn Conclusions and transferred the so-called Bonn Powers to Mr. Carlos Westendorp, nor to Resolution 1256 (1999), which entrusted the so-called Bonn Powers to Mr. Wolfgang Petritsch. Lord Ashdown was substantively assigned with the so-called Bonn Powers by UNSC Resolution 1396 (2002), which welcomed his appointment and explicitly recalled the Bonn Conclusions. Mr. Christian Schwarz-Schilling (a German national) lacks such a UNSC resolution. There is only a letter dated 30 January 2006 from the President of the Security Council addressed to the Secretary-General, stating that the decision of the Steering Board of the

Peace Implementation Council (PIC) to select Mr. Christian Schwarz-Schilling (Germany) as the successor to Paddy Ashdown as High Representative for Bosnia and Herzegovina, effective 31 January 2006, had been brought to the attention of the UNSC members, who welcomed the decision of the Peace Implementation Council. Two key precedential elements still coincide: 1) the selection made by the PIC, and 2) the UNSC's approval.

Mr. Miroslav Lajčák, as the successor to Mr. Christian Schwarz-Schilling, was welcomed, and his designation by the Steering Board of the PIC on 19 June 2007 was agreed upon by the UNSC in Resolution 1764 (2007). Again, in line with its established practice, the UNSC directly recalled the Bonn Conclusions and annexed them to the Resolution. Mr. Miroslav Lajčák was therefore assigned the so-called Bonn Powers by the UNSC Resolution, and not merely through his designation by the PIC. The successor to Mr. Miroslav Lajčák was Mr. Valentin Inzko. His designation by the Steering Board of the PIC on 13 March 2009 was also agreed upon by the UNSC in Resolution 1869 (2009), which, once again, directly recalled the Bonn Conclusions. The latter resolution effectively terminated the former.

The authorization of Mr. Valentin Inzko, who requested dismissal from office, to exercise the so-called Bonn Powers lasted until May 27, 2021, when the PIC designated Mr. Hans Christian Friedrich Schmidt as High Representative. The situation in which Mr. Hans Christian Friedrich Schmidt now finds himself is unprecedented. His legislative actions extend beyond the scope of his authorization and the competencies he would eventually hold as an officeholder at the OHR or as the chairperson of the PIC's Steering Board. The authorization by the UNSC is a mandatory element for these actions to be considered legitimate interventions by the international community.

3.2.2 International Jurisprudence

Another cumulative requirement recognized in the relevant jurisprudence of the European Court for Human Rights (hereinafter: the Court) is effective oversight. As previously noted, for actions to be qualified as carried out on behalf of the international community, in addition to the power transfer, the UNSC's effective oversight is essential. The UNSC enforces this oversight through a set of crucial elements that ensure the accountable exercise of its authority, which is vital for upholding its legitimacy and credibility as a global peacekeeping and security entity. These components include authorization, compliance mechanisms, and monitoring procedures. Notably, the absence of authorization through substantive or causative resolutions has been observed in some instances. Regarding compliance mechanisms, these include the obligation of UN member states to adhere to UNSC resolutions,

even when they may conflict with other international commitments. Applied to the current context, this implies that the parties to Annex 10 must comply with Mr. Schmidt's directives under valid power transfer conditions, regardless of any conflicting obligations arising from the Convention, as seen in *Libyan Arab Jamahiriya v. United States of America* and *Libyan Arab Jamahiriya v. United Kingdom* (ICJ Reports, 1992, p. 16, § 42 and p. 113, § 39). Monitoring processes involve regular reporting to the UNSC to facilitate the assessment of decision outcomes. To date, in accordance with Resolution 1031 (UN Doc. S/RES/1031(1995)), Mr. Hans Christian Friedrich Schmidt has submitted six reports to the UN Secretary-General regarding the Peace Agreement in Bosnia and Herzegovina, covering the period from April 16, 2021, to April 15, 2024. While reporting to the UN Secretary-General, as the figure representing the interests of the international community, may suggest effective oversight over the reporting party, it does not provide conclusive evidence of such oversight.

When assessing effective oversight in the context of accountability for the actions of the High Representative in the *Berić* case, the Court relied upon the general legal framework for conferring the Bonn Powers to the High Representative. The Court took into account UNSC Resolution 1031, which confirmed the High Representative as the final authority in the field regarding the interpretation of Annex 10 on the civilian implementation of the Peace Agreement. Furthermore, the Court referred to the Conclusions of the Bonn Peace Implementation Conference (UN Document No. S/1997/979) and UNSC Resolution 1144 (1997), which explicitly endorsed those Conclusions and authorized the High Representative to undertake the actions that were the subject of the complaint. Additionally, the Court recognized the subsequent UNSC endorsement of the contested actions of the High Representative through Resolution 1722 of 21 November 2006, as well as the regular reporting mechanism, as evidence of an ongoing oversight mechanism.

The Court's analysis of the general legal framework, in conjunction with the oversight mechanism, led to the conclusion that the UNSC continued to maintain effective oversight over the High Representative. This decision was deemed justified given the specific circumstances of the case, as the actions in question were carried out by Lord Ashdown, whose status as High Representative and the delegation of powers by the UNSC were undisputed. By focusing on the general framework of power distribution outlined in Chapter VII of the UN Charter to the High Representative, and overlooking UNSC Resolution 1396 (2002), which approved Lord Ashdown's appointment and granted him the Bonn Powers, the Court may have been distinguishing between the substantive and causative effects of UNSC resolutions. While the Court considered UNSC Resolution 1031 and UNSC Resolution 1144 as substantive resolutions, UNSC Resolution 1396 (2002) was viewed as causative. Therefore, there was no

need to refer to the latter resolution, as a clear distinction existed between substantive resolutions (1031 and 1144) and the triggering resolution (1396).

The *Berić* case provides valuable insights into the judicially verified oversight mechanism under the regime of valid power transfer. A functioning oversight mechanism consists of two key components: regular reporting in line with Resolution 1031, and the subsequent endorsement by the UNSC of the High Representative's actions. While the first component is effectively in place, the second is conspicuously absent. Since Mr. Hans Christian Friedrich Schmidt assumed office, the UNSC has consistently addressed the situation in Bosnia and Herzegovina through a series of resolutions, including Resolutions 2604 (2021), 2658 (2022), and 2706 (2023), all of which focused primarily on extending the mandate for the EUFOR ALTHEA multinational stabilization force. Notably, these resolutions did not provide any endorsement of or support for Mr. Schmidt's actions. In fact, discussions among permanent member state representatives suggest the opposite (see Johnstone, 2003. p. 453)

During the adoption of Resolution 2604 (2021) on November 3, 2021 (S/PV.8896), and the presentation of Mr. Schmidt's first report, the Chinese representative emphasized the Security Council's crucial role in appointing a High Representative, as stipulated in the Dayton Peace Agreement. Similarly, the Russian representative echoed this concern, criticizing the attempt to appoint Mr. Schmidt as the new High Representative for Bosnia and Herzegovina without the requisite Security Council consensus, which they viewed as a violation of international law and established practices. The Russian representative further emphasized that, as of that date, the Office of the High Representative remained vacant, with no legitimate candidate or incumbent in place.

Similarly, when adopting the Resolution 2658 (2022) on November 2, 2022, the Russian Federation's representative to the UNSC condemned the imposition of Special Envoys and the internationally appointed High Representative for Bosnia and Herzegovina, denouncing the latter an "illegitimate protégé" that undermines the authority of democratically elected officials. The representative further called for the dissolution of the Office of the High Representative, labeling it a "body of colonial governance", and asserting that its continued existence deprived the population of relief. In response, Bosnia and Herzegovina's delegate echoed this sentiment, arguing that the Office's electoral measures violated the Dayton Agreement and failed to ensure fairer elections. Earlier, during the UNSC meeting on May 11, 2022 (SC/14886), several delegates expressed reservations about hearing a briefing from Mr. Schmidt in his capacity as High Representative, citing the Council's lack of authorization for his appointment. This objection was reiterated by the Russian

Federation's representative when Mr. Schmidt addressed the UNSC on May 10, 2023 (SC/15279).

In subsequent UNSC meetings, Mr. Schmidt faced further contestation. At the UNSC meeting on May 15, 2024 (SC/15696), China's representative expressed concern over the High Representative's amendments to Bosnia and Herzegovina's election laws, stressing that the country's affairs should be decided and managed by its own people. The Russian Federation's representative went further, accusing the High Representative of establishing a parallel, extra-constitutional system that makes decisions on behalf of the entire country, effectively bypassing democratic processes. This sharp criticism was reiterated during the UNSC meeting on April 30, 2024 (SC/15688), where the Russian Federation's representative refused to acknowledge Mr. Schmidt's title, referring to him as "a citizen of Germany styling himself as High Representative."

In light of these circumstances, the argument that the UNSC's oversight structure satisfies the *Berić* case loose criteria for effective oversight becomes increasingly untenable. The assumption that the High Representative receives support and endorsement through the adoption of UNSC resolutions concerning EUFOR ALTHEA's mission temporal extensions lacks a solid foundation in both substantive and formal terms. The mandate and responsibilities of multinational stabilization forces were regulated by the Agreement on the Military Aspects of the Peace Settlement – signed between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Srpska – known as Annex 1-A to the Dayton Peace Agreement, and subsequently confirmed in UNSC resolutions. In contrast, the mandate and responsibilities of the High Representative are defined by a separate international agreement between the same parties – Annex 10 to the Dayton Peace Agreement, alongside relevant UNSC resolutions. Article II, Section 34 of the Annex 10 to the Dayton Peace Agreement expressly underlines that the High Representative shall have no authority over the multinational military force and shall not, under any circumstances, interfere in the conduct of military operations or the chain of command.

Considering the lack of valid power transfer and the absence of effective oversight, one might reasonably conclude that the actions taken by the current officeholder at the OHR cannot be ascribed to the international community and, therefore, do not meet the criteria for legitimate intervention as outlined in Annex 10 to the Dayton Peace Agreement.

4. Conclusion

This paper has critically examined the legal and political ramifications of the High Representative's (HR) contested authority in Bosnia and Herzegovina (BiH) and the Republic of Srpska's institutional responses, situating these developments within the broader framework of the Dayton Peace Agreement (DPA). The analysis demonstrates that the appointment of Mr. Hans Christian Friedrich Schmidt as HR without United Nations Security Council (UNSC) endorsement, coupled with his unilateral legislative actions, has significantly destabilized the constitutional equilibrium established under Annex 10 of the DPA (see Bieber, 2013). The Republic of Srpska's 2023 Law on Amendments to the Law on the Publication of Laws and Other Regulations – which excludes HR's decisions from its legal framework – emerges as a *de facto* partial suspension of Annex 10, justified under international law as a proportionate countermeasure to a material breach of the treaty.

Central to this conclusion is the procedural irregularity in Mr. Schmidt's appointment. Annex 10 explicitly requires UNSC validation for the HR's legitimacy, a condition unmet due to the rejection of Draft Resolution S/2021/667. The absence of UNSC authorization undermines the legal basis for his invocation of the Bonn Powers, rendering his interventions devoid of the international community's collective mandate. This procedural deficit, compounded by the Constitutional Court of BiH's controversial delegation of legislative authority to the HR, constitutes a material breach of Annexes 4 and 10. By transferring powers to an unelected entity without UNSC oversight, the Court eroded the DPA's foundational principle of consensual governance, thereby violating the principle of good faith under the Vienna Convention on the Law of Treaties (VCLT).

The Republic of Srpska's remedial measures, while unprecedented, align with Article 60 of the VCLT, which permits partial treaty suspension in response to a material breach. By enacting laws that reject HR's decisions, the Republic of Srpska has highlighted the breakdown of effective UNSC oversight over the HR – a critical criterion for legitimate international intervention. The UNSC's repeated refusal to endorse Mr. Schmidt's actions, evidenced by resolutions focused solely on EUFOR ALTHEA and vocal objections from permanent members, further invalidates claims of effective oversight. This disconnect underscores a broader erosion of the DPA's institutional safeguards, shifting authority from internationally mandated structures to contested domestic interpretations.

These developments carry profound implications for post-conflict governance and international law. The case of BiH illustrates the fragility of externally imposed constitutional frameworks when key stakeholders perceive procedural inequities. The HR's unchecked exercise of power, divorced from UNSC legitimacy, risks entrenching

parallel governance systems that undermine local sovereignty and democratic accountability. Conversely, unilateral countermeasures by sub-state entities such as the Republic of Srpska challenge the coherence of international treaty regimes, potentially incentivizing fragmentation. Moving forward, this paper underscores the urgency of reaffirming the DPA's original procedural safeguards. The HR's authority must be recalibrated to ensure UNSC endorsement and meaningful consultation with all signatory parties, as Annex 10 mandates. Additionally, the international community must address the growing dissonance between the PIC's operational autonomy and the UNSC's oversight role to prevent further institutional decay.

Scholars and policymakers ought to prioritize bridging the gap between sovereignty and external intervention within post-conflict environments, ensuring that treaty mechanisms remain adaptable to changing political dynamics without compromising their legal legitimacy. In conclusion, the contested and partial suspension of Annex 10 symbolizes a deeper systemic failure in the execution of the DPA. Restoring its effectiveness requires a recommitment to multilateral engagement, strict adherence to procedural standards, and a balanced approach that harmonizes international oversight with local autonomy. Only through these steps can BiH and comparable post-conflict states successfully manage the delicate balance between peacebuilding efforts and self-determination.

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