

High Representative in Bosnia and Herzegovina: Is the More Interventionist Way the Right Way to Go?

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Abstract: The Office of the High Representative was established by the Dayton Peace Agreement in 1995 to assist the implementation of the civilian aspects of the agreement. Since then, the High Representative (HR) has been authorised to intervene directly in domestic affairs if the HR considers it necessary. The use of the so-called Bonn powers and its impact on the peace and state-building process divides both policymakers and experts. This paper draws attention to the fact that the role of the HR cannot be assessed without considering the constantly changing domestic and international political context. The paper also shows that the extensive use of these executive powers has played a controversial role in achieving the original goals of the Agreement.

Keywords: Bosnia and Herzegovina, High Representative, peace-building and state-building

Introduction

Evaluating the role of international actors in peace and state-building processes often generates disputes among policymakers and experts, as the outcomes of the interventions often differ from what was originally intended. There may be several reasons behind this gap:

domestic dynamics might have been misunderstood or incorrectly assessed, inappropriate tools might have been chosen or used at an inopportune time, and even the international context might have an impact on the decisions made by the local and international actors. Bosnia and Herzegovina (BiH) is one successor state of former Yugoslavia that still carries the burden of the war and the deep wounds stemming from it, still under international supervision almost 30 years after the war.

The Dayton Peace Agreement (DPA)¹ put an end to the war in Bosnia and Herzegovina in 1995, having been reached under huge international pressure. The DPA stipulates that the High Representative (HR) facilitates and monitors the civilian aspects of the implementation of the Agreement. After the establishment of the position, the HR was given additional executive powers by the Peace Implementation Conference in Bonn in 1997 in that the HR was called on to directly intervene by imposing laws and removing local officials. The use of these powers has divided not only the local actors and civil society but the countries and organisations that appoint the HR as well. Those who² favour an interventionist approach believe that overcoming political deadlocks among the local actors and the implementation of reform will not happen without external pressure and intervention. Those who reject this idea claim that such interventions undermine local ownership, go against democratic principles, and lack accountability.³ Both groups can find supporting arguments in the history and activities of the OHR.

This longstanding debate came into focus again after former HR Valentin Inzko criminalised genocide denial in Bosnia and Herzegovina in July 2021, and German politician Christian Schmidt was appointed as HR in May 2021 under challenging circumstances and surrounded by high expectations. Both High Representatives intervened by using the so-called Bonn powers, which has led to controversial outcomes.

1 The full text of the Dayton Peace Agreement is available on the website of the Office of the High Representative in Bosnia and Herzegovina: <http://www.ohr.int/dayton-peace-agreement/>.

2 The Biden administration supports the use of the Bonn powers.

3 For example, David Chandler, professor at the Centre for the Study of Democracy at Westminster University in London.

After a short institutional introduction and a brief review of the debate on the Bonn powers, this policy brief uses HR Inzko's decision on the criminalisation of genocide denial and HR Schmidt's intervention after the elections in BiH on 2 October, 2022 to demonstrate the contradictory character of such interventions, while also considering the domestic and international context of HR Schmidt's decision and evaluating the outcomes of these steps.

The Office of the High Representative in Bosnia and Herzegovina: institutional and legal background

The Office of the High Representative (OHR) was established by the Dayton Peace Agreement. According to Article II of Annex 10 of the DPA, the mandate of the OHR is to facilitate and monitor the civilian aspects of the implementation of the Agreement and report to the United Nations, the European Union, the United States, the Russian Federation, and other interested governments, parties, and organisations. The OHR serves its mandate in consultation with the Peace Implementation Council (PIC), which was established by the Peace Implementation Conference in London in December 1995 to ensure international support for the Agreement.

PIC has 55 members from 40 member states and 15 international organisations and agencies. The London Peace Implementation Conference also established the Steering Board of the PIC to work under the chairmanship of the High Representative as the executive arm of the PIC. Steering Board members include Canada, France, Germany, Italy, Japan, Russia⁴, the United Kingdom, the United States, the Presidency of the European Union, the European Commission, and the Organisation of the Islamic Conference (OIC), which is represented by Turkey. The Steering Board provides the High Representative with political guidance.

4 Russia decided to leave PIC SB in July 2021.

In the post-war period, the international community found it necessary to intervene more directly in the peace implementation process,⁵ and therefore, elaborating on Annex 10 of the DPA, the Peace Implementation Council requested the High Representative at its Conference in Bonn in December 1997 to remove from office public officials who violate the legal commitments and the Dayton Peace Agreement, and to impose laws as the HR sees fit if Bosnia and Herzegovina's legislative bodies fail to do so.

Nonetheless, the governing principle of the OHR's engagement in Bosnia and Herzegovina is the concept of domestic responsibility, also known as local ownership. This concept calls for the officials and citizens of Bosnia and Herzegovina to take responsibility for the peace process and the problems that their country faces.

The use of the Bonn Powers: legal and political debate about the need to intervene

After the Peace Implementation Conference in Bonn, the HR was authorised to impose legal decisions and suspend public officials in order to support the implementation of the DPA. It is clear that the removal of locally elected officials undermines the democratic principle, but in the post-war period some could argue that such interventions were necessary, otherwise the basic elements of the peace process could not be implemented. Without the intervention of the OHR, the introduction of the common currency, national symbols, and the establishment of common institutions could hardly have been imagined. There was also

5 Some examples that contributed to the decision of the PIC include the following. In the elections held in September 1996, the three major nationalist parties managed to get 86% of the seats in the bicameral parliament of BiH (Bideleux & Jeffries, 2007, p. 363). In the Republika Srpska, there was a power struggle to push the associates and supporters of Radovan Karadžić out of power, who was later brought to the Hague and convicted of war crimes (Ibid. pp. 365-370). Furthermore, nationalist representatives boycotted the return of internally displaced persons and refugees. During the night of 2-3 May, 1997, some 25 houses were set ablaze in the Croat-controlled municipality of Drvar, Federation of Bosnia and Herzegovina (Federation). The arson occurred after an international delegation headed by Federation mediator Dr Christian Schwarz-Schilling had met with local authorities and other international agencies earlier in the day to discuss the return of displaced Serbs to the area (ICG, 1997).

a need to counterbalance the major ethnonationalist parties that strongly resisted the implementation of the DPA. It should be noted that until the early 2000s, the major ethnonationalist Croat and Serb parties, the Croatian Democratic Union of Bosnia and Herzegovina (*Hrvatska demokratska zajednica* Bosnie i Hercegovine, HDZ BiH) and the Serb Democratic Party (*Srpska demokratska stranka*, SDS) did not declare openly that they had given up the idea of secession and accession to Croatia and Serbia (Bideleux & Jeffries, 2008).

Nonetheless, there were some “extreme” cases in the use of the Bonn powers. More than 130 officials had been removed from or banned from taking public positions by 2004 (Dijkstra & Raadschelders, 2022, p. 300). Furthermore, in some cases, especially during the mandate of Wolfgang Pertritsch and Paddy Ashdown, the removals happened *en masse*: HR Ashdown dismissed 58 public officials from their office on 30 June, 2004 (Banning, 2014, p. 268). According to the information on the website of the OHR, Wolfgang Pertritsch removed 23 persons from public office on 29 November, 1999. One frequent reason was related to the obstruction of the return of refugees or displaced persons, but HR Ashdown also dismissed several public officials based on the allegation that they were supporting and hiding Radovan Karadžić as well as sustaining criminal networks.

Although these steps might have been justifiable, it should also be highlighted that, as Bideleux and Jeffries (2008) point out, HR Ashdown’s activities in some cases made more moderate Serb politicians, such as the Prime Minister of the Republika Srpska, Dragan Mikerević, resign, and only time will tell whether it was a good decision to go so far. Since then, even those Serb politicians like the former President of RS, Dragan Čavić who once showed readiness to deal with the war and the Srebrenica genocide (Trifunovic, 2020), have joined Milorad Dodik, the current President of the RS, and his radical nationalist rhetoric (N1 Sarajevo, 2018).

The extensive use of the Bonn powers was followed by a sudden shutdown in the mid-2000s. HR Christian Schwarz-Schilling was appointed, and he was asked by the PIC to decrease the use of the Bonn powers, as there was increasing international demand for local ownership of the decisions and measures made in the country. On the other hand, it was becoming difficult to make this interventionist approach acceptable for the domestic public of the Western countries. Even a plan to close the OHR was announced, but then in 2008 the Steering Board of the PIC

decided to define a set of criteria as a prerequisite for the closure, known as the *Agenda 5+2*⁶. Due to those decisions, the OHR, whose capacities were significantly decreased, has lost a great part of its leverage and power to influence.

The criminalisation of genocide denial

HR Inzko was the High Representative in Bosnia and Herzegovina from 2009 to 2021. During his mandate, he regularly reported to the PIC and the UN Security Council about the worsening political environment in Bosnia and Herzegovina, including secessionist rhetoric and actions in Republika Srpska, worsening interparty relations in the country, as well as ongoing genocide denial and the glorification of convicted war criminals (OHR, 2021). He often directly criticized Bosnian Serb politicians for glorifying convicted war criminals and engaging in genocide denial, claiming that the Srebrenica genocide was just a myth. Despite his reports and calls for action, no major legal change has taken place.

As the BiH Parliament failed to adopt a law on banning genocide denial, HR Inzko decided to criminalise genocide denial and the glorification of war criminals, amending the Criminal Code of BiH by using his Bonn powers right before the end of his mandate in July 2021. This decision would have made sense if it had been done much earlier, and the HR had had time to properly explain, facilitate, and foster implementation. In addition, such a drastic intervention after long years of inaction was difficult to understand.

6 The objectives that need to be delivered by the BiH authorities prior to OHR closure are:

1. Acceptable and Sustainable Resolution of the Issue of Apportionment of Property between State and other levels of government;
2. Acceptable and Sustainable Resolution of Defence Property;
3. Completion of the Brčko Final Award;
4. Fiscal Sustainability (promoted through an Agreement on a Permanent ITA Co-efficient methodology and establishment of a National Fiscal Council); and
5. Entrenchment of the Rule of Law (demonstrated through Adoption of National War Crimes Strategy, passage of Law on Aliens and Asylum, and adoption of National Justice Sector Reform Strategy).

In addition to these objectives, the PIC SB agreed that two conditions need to be fulfilled prior to OHR closure:

1. Signing of the SAA; and
2. a positive assessment of the situation in BiH by the PIC SB based on full compliance with the Dayton Peace Agreement (Source: Website of the OHR, <https://www.ohr.int/agenda-52/>).

Beyond the timing, the measure itself was also controversial. Although Pistan (2021) acknowledges that such a law on genocide denial is necessary in Bosnia and Herzegovina, she also underlines that “[i]n the absence of an internal political will to address past wrongs, the imposed legislation risks to trigger an internal memory war and further exacerbate divisions”. After the decision, the domestic political context became even more tense. Milorad Dodik (the Serb member of the tripartite Presidency of BiH at the time) immediately announced that the law would not enter into force in RS, even stating that secession from BiH was the only way for Republika Srpska to go. Serbian politicians started to boycott the work of state institutions. The RS National Assembly also adopted a law banning any definition of the entity as based on genocide (Crawford, 2021). It is important to add, as László Márkus, former Senior Researcher of the Institute for Foreign Affairs and Trade and Hungarian diplomat also underlines, that some of the Bosniak parties in BiH wish to abolish RS based on the argument that it is the result of a genocide. This significantly contributes to RS resistance to accepting that what happened in Srebrenica was a genocide (Külügyi és Külgazdasági Intézet, 2021).

While the Director of the Srebrenica Memorial Center, Emir Suljagić, stated that Inzko’s move was a “relief” in a climate of increasing genocide denial by some Bosnian Serbs and in Serbia (Crawford, 2021), the outcome of imposing the law is not fully positive for the victims. Namely, the amendment to the criminal code also put a break on several trials that were launched on the basis of the existing legislation on hate speech, and the HR’s intervention left many important ongoing cases without a final verdict.

To conclude, although Inzko tried to overcome a legal gap in the absence of consensus among the representatives of the constituent peoples, it is doubtful whether his decision really contributes to the reconciliation process and helps victims, even if it was to serve the morally right goal. Furthermore, it seems that HR Inzko thus left behind a BiH with even more tensions for his successor to deal with.

The appointment of Christian Schmidt and increasing domestic and international polarisation

Partly as a consequence of Inzko’s last decision, the next High Representative, German politician Christian Schmidt was appointed under worsening domestic political conditions, which were accompanied

by deteriorating international circumstances. The increasing tension between the West and Russia affected the decision-making on the OHR and the appointment of the new HR.

Moscow (and Beijing) did not support the extension of the mandate of the OHR and the appointment of the German politician. Although it is legally not necessary, this time the appointment of the HR was not confirmed by the UN Security Council, and therefore both China and Russia refused to accept Schmidt as High Representative. The two UNSC members even initiated in the UN the closure of the OHR by July 2022. Milorad Dodik, who is a close partner of Russian President Vladimir Putin, also announced that he would not cooperate with the new, in his view illegal and illegitimate HR (AFP, 2021).

Despite Dodik's and Putin's resistance, the West decided to maintain support for the OHR, and the PIC appointed Schmidt. The Russian Federation, in an official letter addressed to the High Representative on 28 July, 2021, announced that it would no longer participate in the meetings of the PIC Steering Board under the chairmanship of the High Representative. In another letter sent on 17 February, 2022, the Russian Federation announced its suspension of financing the OHR (OHR, 2022). The Bosniak political leaders welcomed the decision to sustain the OHR in light of the strengthening secessionism in the RS.

Changing the rules of the game after it is over – Schmidt's measures after the 2022 elections

Despite the secessionist actions in RS, Schmidt's first "memorable" decision was not related to this issue but to the elections held in October 2022. The election of Croat representatives⁷ at the state level

⁷ In the Federation, both the Bosniak and the Croat members of the tripartite Presidency are directly elected, and it has happened on several occasions that Željko Komšić, a Croat social democrat politician was elected mainly by Bosniak voters, whose ratio in the population is significantly higher than that of Croats. The HDZ BiH considers itself the legitimate representative of Croats in BiH, and it wished to change the election law in a way that only Croats could vote for the Croat Presidency member. Furthermore, there were additional attempts by mainly Bosniak-favoured parties to exclude HDZ BiH from the government coalition. HDZ BiH expressed its objection to this practice by blocking decision-making processes at the entity level.

and in the Federation of Bosnia and Herzegovina has for many years been an obstacle to forming governments and the proper functioning of the entity. During the summer, news was leaked that Schmidt would intervene if the parties could not agree on the amendments to the election law. The leaked “plans” were considered to favour HDZ BiH, which led to protests among the Bosniaks. The timing was already a problem, as the elections were too close. Schmidt later only made some technical changes (e.g. on institutional funding and the election budget⁸), but he then decided to use his Bonn powers more extensively to amend the Election Law of BiH and the constitution of the Federation on election eve, after the closure of polls on 2 October. This timing of his actions raised even more concerns, as it happened after the votes had been cast. Although the High Representative emphasised that his amendments did not influence the directly elected officials, and the intention was to make coalition formation and the elections of officials in the Federation more efficient, the move was definitely not in line with democratic principles.

As Sahadžić (2022) summarizes, “[t]he election-eve decisions of the HR did not tackle the quota issue, but they did tackle the number and proportional representation of the constituent peoples, based on the 2013 census. The HR’s decision increased the number of seats in the Federation House of Peoples from 17 to 23 seats per constituent people. Because the Schmidt decisions appear to give Croats a more prominent place, it is understood that the decisions are an appeasement to HDZ BiH.” This assessment seemed to be confirmed by the statements of Andrej Plenković, the Prime Minister of Croatia, who presented the decision of the HR as a victory for Croatia. While the decision is likely to bring more seats for HDZ BiH, it could be justified with the “perceived underrepresentation of Croats in institutions at the state level in BiH” (Sahadžić, 2022). On the other hand, the decision also for the first time facilitates “Others” to be elected in each canton, which was not the case previously.

As HR Schmidt also argued during his hearing in the UK Parliament’s Foreign Affairs Committee on 30 January, 2023, his intervention was necessary to overcome political deadlock in the Federation, to

8 The HR’s decisions are available on the website of the OHR: <https://www.ohr.int/decisions-of-the-high-representative/>

bring all parties on board again, to make the Federation functional again. After the elections, it seemed that in contrast with previous political stalemates, there would be a chance to form a government coalition more smoothly at the federation and the state level. As an ESI analysis (2023) highlights, the process went smoothly at the state level: the tripartite Presidency was inaugurated on 16 November, 2022 and nominated a new Chairwoman (Borjana Kristo, HDZ BiH). The appointment was approved by the majority of the House of People in December 2022. In January 2023, the upper house also approved the new Council of Ministers.

In contrast, in the Federation of Bosnia and Herzegovina the political stalemate continued at the federation level (although not at the cantonal level), as HDZ BiH and the Social Democratic Party (*Socijaldemokratska partija Bosne i Hercegovine*, SDP BiH) agreed to form a government coalition with eight smaller parties (*Osrnorska*), thus excluding the leading Bosniak Party, the Party for Democratic Action (*Stranka demokratske akcije*, SDA). However, they lacked the necessary support to implement this agreement. Consequently, the crisis of building coalitions continued (ESI 2023).⁹

While the use of the Bonn powers on the eve of elections has not managed to resolve the obstacles, it has also increased the gap among the Western allies. While the US Embassy explicitly supported the direct intervention of the HR (US Embassy, 2022), the European Union only took note of the decision (EEAS, 2022) and did not express any direct support for it.

Based on these examples of the decisions made by HR Inzko and Schmidt, it can be concluded that direct intervention via the Bonn powers is a risky practice. On the one hand, it can strengthen domestic fragmentation and undermine the relations of the OHR with the political actors in BiH. On the other hand, it can cause conflicts among the international partners as well, and the unintended consequences can easily undermine the leverage of the West in the country.

⁹ The deadlock was finally resolved by another intervention of HR Schmidt in April through which he took away the opportunity from the Bosniak Vice-President of the Federation (coming from the SDA) to endlessly block the formation of the coalition government without the SDA (Kurtic, 2023). This intervention, however, can be easily interpreted as a direct intervention to domestic (party) politics of BiH.

Conclusion

As domestic political conditions deteriorated in Bosnia and Herzegovina, Western (especially US) demand increased for more direct intervention by the High Representative in Bosnia and Herzegovina. This paper did not have the space to introduce all the details of how the international and domestic conditions have changed over the almost three decades of the existence of the OHR, but the above examples of the use of the Bonn powers by the High Representative allow us to understand the complexity of their impact and the challenges to predicting the final outcomes of such interventions.

While it must be added that the deteriorating situation makes the OHR's work in early warning necessary, sometimes these actions even sped up the negative spillover effects on entity-state and/or interparty relations. Reconciliation cannot be put in place by external actors, and sustainable solutions necessitate local compromises.

The war in Ukraine and the rising tension between Moscow and Washington has increased Western (US and EU) demand for resolving conflicts more quickly in the Western Balkans so that the region is more resilient towards Russia. This puts great pressure on the High Representative as well. The question is, however, whether in light of previous experiences this is really the right way to go.

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