

The Illegality of the Bonn Powers

*“At the Bonn conference, we managed to introduce a method by which the High Representative can take these decisions, which is not exactly in legal terms with Dayton. . . It was not very legal, I have to admit.”*¹

*“You do not [have] power handed to you on a platter. You just seize it.”*²

—Carlos Westendorp, High Representative, 1997-1999

I. Introduction.

The so-called “Bonn powers,” which the international High Representative (HR) in Bosnia and Herzegovina (BiH) claims empower it to impose laws and punish individuals by simple edict, are manifestly unlawful. The 1995 Dayton Accords, which are the sole source of the HR’s lawful authority, cannot reasonably be interpreted to give the HR such dictatorial power. Neither the Peace Implementation Council—an ad hoc group of countries with no legal power—nor the UN Security Council have ever bestowed on the HR legal authority beyond its mandate under the Dayton Accords. Moreover, the Bonn powers’ use violates the human rights of Bosnia and Herzegovina (BiH) citizens under important binding treaties. Thus, the exercise of the Bonn powers violates international law. Such actions should not be permitted by the international community, and in any case cannot be considered legally binding.

The HR is an institution authorized by the parties to Annex 10 of the Dayton Accords, including Republika Srpska, to be a coordinator of international activities involved in the civilian aspects of the Dayton Accords and a facilitator of the parties’ efforts. Annex 10 defines a strictly limited mandate, authorizing the HR to engage in such activities as to “[m]onitor,” “[m]aintain close contact with the Parties,” “[f]acilitate,” “[p]articipate in meetings,” and “[r]eport.”

The HR’s mandate does not include any suggestion of the authority to make decisions binding on governments and citizens of Bosnia and Herzegovina (BiH). As international relations scholar and former Office of the High Representative (OHR) attorney Matthew Parish wrote, the HR’s “functions were limited to coordinating other international organisations’ work and monitoring and exhorting domestic officials to comply with their Dayton obligations.”³

Beginning in 1997, however, the HR claimed for itself, with no legal justification whatsoever, “Bonn powers” to rule and punish by decree, vastly exceeding any mandate under the Dayton Accords and casting aside the entire democratic system established by the BiH Constitution.

¹ Adis Merdzanovic, *Democracy by Decree, Prospects and Limits of Imposed Consociational Democracy in Bosnia and Herzegovina* (2015), 256.

² Quoted in, David Chandler, *State-Building in Bosnia: The Limits of ‘Informal Trusteeship,’* International Journal of Peace Studies, vol. 11, no. 1, 17, 27 (2006).

³ Matthew Parish, *A Free City in the Balkans* 86 (2010).

The term “Bonn powers” originates from a statement issued two years after the conclusion of the Dayton Accords by the Peace Implementation Council (PIC), an ad-hoc collection of countries and organizations, at a conference held in Bonn, Germany. The December 1997 statement “welcome[d] the High Representative’s intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions” on certain issues.

The HR in place at the time of the Bonn Conference, Carlos Westendorp, later admitted, “At the Bonn conference, we managed to introduce a method by which the High Representative can take these decisions, which is not exactly in legal terms with Dayton. . . . It was not very legal, I have to admit.”⁴ Westendorp was brazen in his usurpation of illegal authority, telling a reporter in 1998, “You do not [have] power handed to you on a platter. You just seize it.”⁵ Such disregard for the careful terms of the Dayton Accords and the BiH Constitution is antithetical to the goal of instilling a culture of respect for the rule of law in BiH.

Parish wrote that after the Bonn meeting, “[s]uddenly the High Representative found himself moving from being a ‘facilitator’ and a mediator to being able to issue ‘binding decisions’, known as the ‘Bonn powers’.”⁶ As Parish has recognized, the PIC’s Bonn statement “ran quite contrary to the spirit and text of Annex 10 to the [Dayton Accords], and was legally quite indefensible.”⁷

Using these so-called “Bonn powers,” the HR has imposed scores of BiH, Federation, and Republika Srpska laws by edict, *and even decreed 105 amendments to the constitutions of Republika Srpska and the Federation*. The HR has also imposed extrajudicial punishments on hundreds of BiH citizens, nullified a BiH Constitutional Court decision, and banned any proceeding that takes issue in any way with the HR’s decisions.

In recent years, the HR’s exercise of the Bonn powers has declined because of increasing recognition of their illegality and illegitimacy and the damage they have done to BiH’s ability to govern itself. Consequently, the HR has not issued a decree using its pretended authority since 2011.⁸ At the May 8, 2019, meeting of the UN Security Council, however, the current HR, Valentin Inzko, pointedly asserted that the HR retains the authority to use the Bonn powers.

Many international observers have decried the corrosive effect that the HR and its asserted dictatorial powers have had on BiH’s politics. The International Crisis Group, for example, has written that “keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach.”⁹ The Council of Europe’s Venice Commission wrote in 2005 that an HR claiming dictatorial powers “is fundamentally incompatible with the democratic

⁴ Merdzanovic at 256.

⁵ Chandler at 27.

⁶ Matthew T. Parish, *The Demise of the Dayton Protectorate*, 1 J. Intervention and Statebuilding, Special Supp. 2007, 14.

⁷ *Id.*

⁸ In 2012 and 2014, HR Inzko lifted extrajudicial punishments against certain individuals.

⁹ International Crisis Group, *Bosnia’s Dual Crisis*, 12 Nov. 2009, p. 16.

character of the state and the sovereignty of BiH. The longer it stays in place the more questionable it becomes.”¹⁰ As Professor Bernhard Knoll has observed, “[T]he international community’s practice of ruling by command may lastingly debilitate democratic development because it entails an abrogation of the Courts’ monopoly over the correct interpretation of the constitution.”¹¹

This paper does not focus on the Bonn powers’ perverse effects on BiH politics, their hindrance of the development of BiH as a functioning state, or the damage they caused to BiH’s decentralized constitutional system. Rather, it focuses on the simple fact that the Bonn powers have no legitimate basis in law whatsoever, such that the exercise of such powers can have no binding legal force.

The question of the Bonn powers’ legality—as opposed to their desirability or political legitimacy—has been the subject of little scholarly attention; however, analyses of the legal basis for the exercise of the Bonn powers have concluded that the Bonn powers are unlawful.

Parish writes, “The PIC’s ‘interpretation’ of the High Representative’s powers at the Bonn Conference, and the High Representative’s subsequent use of his new powers, starts to look legally preposterous, the sort of nonsense and confusion one would not expect from a first-year law student.”¹² Parish further writes, “It is hard to escape the conclusion that the extent of the legal fiction involved in creating the Bonn powers was breathtaking. . . . There was no justification in international law for the way the Bosnia and Herzegovina was, almost overnight, transformed into a colony jointly administered by the international powers.”¹³

Similarly, Dr. Miroslav Baros of Sheffield Hallam University writes, “Legally speaking, the assumption of the powers by the High Representative is ultra vires; there is neither legal basis nor justification for any powers outside those envisaged in the [Dayton Accords], which is to monitor and help with the implementation of the civilian aspect of the treaty.”¹⁴

In a thorough legal analysis of the Bonn powers appearing in the *Goettingen Journal of International Law*, Tim Banning concludes, “[The Bonn powers] do not qualify as a legal power. Their existence is a powerful, but delusive legal fiction.”¹⁵

Even Paddy Ashdown, during his tenure as HR, recognized that the authority of his decrees as HR derived only from their acceptance by BiH citizenry, saying, “If I pass a decree that is refused, my

¹⁰ European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session (March 11-12, 2005) (2005 Venice Commission Opinion) at para. 90.

¹¹ Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organizations* (Cambridge Univ. Press 2012) at 317.

¹² *A Free City in the Balkans*, 90.

¹³ *Id.* at 91-91.

¹⁴ Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

¹⁵ Tim Banning, *The ‘Bonn Powers’ of the High Representative in Bosnia Herzegovina: Tracing a Legal Fingert*, *Goettingen Journal of International Law* 6 (2014) 2, 259-302, at 302.

authority is gone like the morning dew.”¹⁶

Further, the Bonn powers are not only unsupportable under international law, but in fact the exercise of such unconstrained powers by the HR constitutes a flagrant and grave violation of the applicable international law that is binding upon all parties to the Dayton Peace Accords, and therefore any such acts can have no binding legal effect upon any such parties.

II. The High Representative’s exercise of purported Bonn powers vastly exceeds any conceivable legal mandate under the Dayton Accords.

The HR was not imposed on BiH, but was created by an international agreement, Annex 10 of the Dayton Accords, which was entered into by Republika Srpska, the Federation of Bosnia and Herzegovina, and other signatories to the Dayton Accords. Annex 10 is the sole source of the HR’s legal authority.

The illegality of the dictatorial authority claimed by the HR is obvious to anyone who has read the HR’s strictly limited mandate under Annex 10, which does not include any words or phrases that would suggest the authority to make decisions binding on BiH, the Entities, or their citizens. In defining the HR’s legal authority, Annex 10 uses such verbs and phrases as “monitor,” “maintain close contact with the Parties,” “promote,” “coordinate,” “facilitate,” “participate in meetings,” “report,” and “provide guidance.” Annex 10 does not include words such as “enact,” “suspend,” “nullify,” “impose,” “decree,” “punish,” “ban,” or any other words that would suggest the authority to make decisions binding upon BiH, the Entities, or their citizens.

Annex 10 cannot conceivably be read to empower the HR to substitute itself for a legislature, elected official, or court of law. As summarized by Parish, the HR is to be “a manager of the international community’s post conflict peace building efforts, and a mediator between the domestic parties.”¹⁷

Former UK Ambassador to BiH Charles Crawford, who helped invent the Bonn powers, has written, “[A]s far as I could see the Bonn powers had *no real legal basis at all*. They amounted to an international political power-play bluff which successive High Representatives wrapped up in legal language to make the whole thing look imposing and inevitable.”¹⁸

In his analysis of the Bonn powers, Banning explains:

The amendment and violation of constitutional provisions, the imposition of substantial legislation, the removal of democratically elected officials, as well as the annulment of decisions of the Bosnian Constitutional Court are measures which even dramatically

¹⁶ Ed Vulliamy, *Farewell, Sarajevo*, The Guardian, 2 November 2005, p. 10, quoted in Knoll at 298.

¹⁷ *The Demise of the Dayton Protectorate* at 13.

¹⁸ Charles Crawford, *Bosnia: the Bonn Powers Crawl Away to Die*, available at charlescrawford.biz/2011/07/05/bosnia-the-bonn-powers-crawl-away-to-die/ (emphasis added).

exceed the outer limits of an effective interpretation. In fact, the interpretation adopted by the OHR must be termed a revision of Annex 10 of the GFA.¹⁹

There being nothing in Annex 10 to support the HR's self-asserted powers, the Bonn Declaration tried to justify them by referring to Annex 10's provision making the HR the "final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement [Annex 10]."

As Banning points out, however:

The authority to interpret cannot be understood as a *carte blanche* for the OHR to create its mandate. Under this reading of *Annex 10* the OHR would acquire a status *legibus solutus*. However, international organizations are, as "[a] rule of thumb", not allowed to generate their own powers or to determine their competences.²⁰

Moreover, the HR's authority to interpret Annex 10, which is an international treaty, is circumscribed by its very mandate in Annex 10, by general international law, and by other sources of applicable law. The HR's authority is limited, for example, by the obligation under the Vienna Convention on the Law of Treaties (VCLT)—as well as customary international law—to interpret a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²¹

The HR breached its obligation of good-faith interpretation by asserting and using powers of rule by decree, extrajudicial punishment, and other autocratic authorities. The terms of Annex 10 manifestly do not give the HR any legislative, executive, or judicial powers. Annex 10 cannot reasonably be read to empower the HR to decree laws or otherwise act as a final executive, prosecutorial, and judicial official. Examining the HR's authority under Annex 10 to "facilitate resolution of difficulties," which was used to justify the Bonn powers, Parish writes:

On the natural reading of these words, the thought being captured is surely the idea of mediation between the parties. It is a long stretch of the meaning of "facilitate" to see it as including dictatorship and coercion.²²

It is also inconceivable that Republika Srpska and other parties to Annex 10 would have agreed to divest themselves of the very democratic powers to govern that they established in the BiH

¹⁹ Banning at 302.

²⁰ Banning at 266 (quoting H. G. Schermers & N. M. Blokker, *International Institutional Law* 157, para. 209 (5th ed. 2011)). (citations omitted).

²¹ Vienna Convention on the Law of Treaties, Art. 31.

²² *A Free City in the Balkans* at 89.

Constitution (Annex 4 of the Dayton Accords). Parish writes:

The thought that the presidents of Croatia, Yugoslavia and the Republic of Bosnia and Herzegovina, in agreeing to Annex 10 to the DPA, intended to give such broad and sweeping dictatorial powers over the entire territory of Bosnia and Herzegovina to an unelected official over whose appointment and decisions they had no say, is quite far-fetched.²³

Under the Vienna Convention on the Law of Treaties, part of the context for the purpose of treaty interpretation is “[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”²⁴ Thus, a key part of the context of Annex 10’s terms is the rest of the Dayton Accords, including Annex 4, the BiH Constitution. Moreover, the Vienna Convention also requires that treaties be interpreted in a manner that is consistent with other binding legal obligations in effect between the parties,²⁵ and, as explained further below, the declaration and exercise of the Bonn powers violates key treaties incorporated into the Dayton Accords and made applicable among the parties.

The HR’s imposition of laws and extrajudicial punishments without the barest due process or opportunity to appeal is, of course, antithetical to the BiH Constitution, which establishes a democratic system for approving laws, recognizes civil liberties, and directly incorporates the European Convention on Human Rights. The Constitution does not even mention the HR except for a single reference in its annex on transitional arrangements. (The annex merely designated the HR to chair meetings of the Joint Interim Commission, a temporary body that was empowered to do nothing more than “discuss practical questions” and “make recommendations and proposals.”).²⁶

Another part of the context for purposes of interpreting Annex 10 is the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP). Article 1 of the GFAP provides that “the Parties shall fully respect the sovereign equality of one another . . . and shall refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State.” The GFAP further provides that the “Parties shall fully respect and promote fulfillment of the commitments made” in Annex 4, the BiH Constitution. Thus, when interpreted in context, it is even clearer that a good-faith interpretation of Annex 10 could not include a grant of unbounded dictatorial authority over BiH.

A legally valid interpretation of the HR’s mandate in Annex 10 must also be guided by the cannon of treaty interpretation stating that an agreement not be construed to give what is not explicitly given. In cases where a treaty delegates to an international official responsibilities touching upon

²³ *Id.* at 90-91.

²⁴ Vienna Convention on the Law of Treaties, Art. 31(2)(b).

²⁵ See *Id.* at Art. 31(2)(c).

²⁶ BiH Constitution, Annex II (1).

domestic governance of a state, a very restrictive interpretation of the relevant treaty provision is required.²⁷ Such a restrictive interpretation is not necessary, however, to easily conclude that Annex 10 does not give the HR the autocratic powers it claims. Any good-faith reading of Annex 10 compels such a conclusion.

It must also be pointed out that the HR's interpretive authority under Article V of Annex 10 is not nearly as broad as it claims. The HR's interpretive authority begins and ends with Annex 10. The Dayton Accords unambiguously limit the HR's interpretive authority to the interpretation "in theater" of Annex 10, entitled, "Agreement on the Civilian Implementation of the Peace Settlement." Annex 10 provides, "The High Representative is the final authority in theater regarding interpretation of *this Agreement on the civilian implementation of the peace settlement*."²⁸ Thus, as Dr. Baros observes, Article V of Annex 10 "clearly limits the power of interpretation designated to the High Representative to the interpretation of this particular Annex, not to the whole [Dayton Accords]."²⁹

In spite of the clarity of the Dayton Accords on this point, the HR, through dogged repetition, has persuaded some that the HR is the "final authority" regarding the Dayton Accords as a whole. In his May 8, 2019, appearance before the UN Security Council, current HR Valentin Inzko once again claimed that the Dayton Accords make the HR "the final authority on interpretation of the Dayton Accords."

That statement is simply false. It is contradicted by the plain language of Annex 10, and by the other provisions of the Dayton Accords. The Dayton Accords designate other specific mechanisms for interpretation of many of its other provisions. For example, Annex 1A, the Agreement on the Military Aspects of the Peace Settlement, provides that "the IFOR Commander is the final authority in theatre regarding interpretation of this agreement on the military aspects of the peace settlement." Numerous other examples can be found in Annexes 1B, 2, 3, 4, 5, 6, 7, and 8.

Thus, in addition to Annex 10, the plain terms of the rest of the Dayton Accords are clear: The HR has no interpretive authority over the Dayton Accords outside of Annex 10.

III. The PIC had no authority to bestow additional powers on the HR, and never purported to do so.

The HR has often attempted to justify its assertion of dictatorial authority by referring to the Conclusions of the Peace Implementation Conference held in Bonn in 1997. This attempt fails because the PIC had no power to supplement the HR's Annex 10 authority in the Bonn Conclusions, and it has never even purported to do so.

²⁷ W. Michael Reisman, *Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations*, 10 Mich. J. Int'l L. 231, 234 (1989).

²⁸ Emphasis added.

²⁹ Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

A. The PIC had no power to bestow additional authority on the HR.

The PIC never had the authority to supplement the Annex 10 mandate of the HR, let alone give him the powers of a dictator. For one organ to delegate authority to another, the delegating organ must have a principal-subordinate relationship with the receiving organ.³⁰ In addition, the “powers delegated may not exceed the extent of powers which the delegating organ itself possesses.”³¹

One reason the PIC could not have bestowed authorities on the HR is that it did not have a principal-subordinate relationship with the PIC.

Annex 10, which is the only source of the HR’s authority, does not so much as mention the PIC. More important, as Banning notes, is the fact that the General Framework Agreement for Peace in Bosnia and Herzegovina also makes no mention whatsoever of the PIC. He explains:

If it would have been intended to vest the PIC with any meaningful legal role, it would have made its way into the agreement. Hence the required institutional link of a principal-subordinate relation between the PIC and the OHR does not exist.³²

Indeed, it is clear that the “the PIC is a body created to support the OHR.”³³

The PIC also could not have bestowed additional powers on the HR—let alone sweeping dictatorial powers—because an organ cannot delegate authority it does not itself have, and the PIC has never had any legal authority at all.

David Chandler, an expert on the Dayton Accords at the University of Westminster, writes:

The PIC was a legal figment, designed to cohere the international management of the Dayton process, but *without* the restrictive ties of international law. Dame Pauline Neville Jones, former Political Director of the UK Foreign and Commonwealth Office and leader of the British delegation to the Dayton peace conference, was instrumental in the establishment of the PIC. As she later described it, “Everybody knew that this was a phoney.”³⁴

Parish observes:

[T]he PIC does not have legal authority to interpret anything nor, indeed, *to do anything whatsoever of legal consequence*. It is just a

³⁰ Banning at 293-94.

³¹ *Id.* at 294 (footnotes omitted).

³² *Id.* at 296.

³³ *Id.* at 295.

³⁴ David Chandler, *From Dayton to Europe*, 12 *International Peacekeeping* 3, 226, 338 (2007).

meeting of people who are interested in what the High Representative (and Supervisor) are doing, the establishing act for which is a meeting of itself.³⁵

Banning agrees, explaining that “a look at the 1995 London Conclusions, the founding document of the PIC, reveals that no express powers have been bestowed upon the PIC.”³⁶

It would be preposterous to assert that the PIC could claim authority to rewrite a legally binding treaty witnessed by six PIC members, and indeed it could be expected that numerous member countries of the PIC would themselves object to such an unsupportable assertion of authority.

B. The PIC did not purport to supplement the HR’s Annex 10 authority.

In its Bonn Conclusions, the PIC did not even claim to supplement the HR’s powers under Annex 10. Instead, the PIC said it “welcomes the High Representative’s intention to use his final authority in theatre regarding interpretation [of Annex 10] to make binding decisions” on certain issues. This is an utterly indefensible interpretation of Annex 10, as explained above, but nonetheless it does not purport to *supplement* the HR’s authority under Annex 10. As Parish explains, the Bonn Conclusions merely interpret Annex 10, though “the interpretation they give is quite absurd.”³⁷

The Bonn Conclusion are, at most, a policy statement, not a grant of authority. As Banning explains, the language of the Bonn Conclusions “does not at all indicate the PIC’s intent to actively grant additional powers to the HR. If it would have been intended to suggest the legally binding character of this provision, a wording such as ‘the Council decides’ could have easily been chosen instead of this passive formulation.”³⁸

The European Stability Initiative agrees, observing that “the PIC was careful to avoid the impression that it was conferring additional functions on the High Representative.”³⁹ Similarly, Dr. Baros writes that even if the PIC had been legally entitled “to provide the High Representative with new, significantly extended powers, it did not actually do that.”⁴⁰

Thus, the Bonn Conclusions were nothing more than a policy statement by a body with no legal authority to grant the HR additional powers, and a policy statement that has been vastly expanded and misapplied by the HR.

³⁵ *A Free City in the Balkans* at 91 (emphasis added).

³⁶ Banning at 294.

³⁷ *A Free City in the Balkans* at 90.

³⁸ Banning at 296.

³⁹ *Reshaping international priorities in Bosnia and Herzegovina, Part Two: International Power in Bosnia*, European Stability Initiative, 30 March 2000, at 26.

⁴⁰ Miroslav Baros, *The High Representative for Bosnia and Herzegovina: A Requiem for Legality*, EJIL: Talk (Blog of the European Journal of International Law), 14 Dec. 2010.

IV. The UN Security Council did not bestow additional powers on the High Representative.

On occasion, the HR has falsely claimed that it has two separate sources of authority: Annex 10, and UN Security Council resolutions. In reality, the Security Council, like the PIC, has never bestowed powers on the HR beyond its mandate under Annex 10. The Security Council has never taken any action contrary to its stated position that “the primary responsibility for the further successful implementation of the Peace Agreement lies with the authorities in Bosnia Herzegovina themselves.”⁴¹

The HR has been inconsistent and opportunistic in describing its legal status before courts and tribunals. To prevent the European Court of Human Rights (ECtHR) from ruling on a complaint that the HR’s extrajudicial punishments violated the claimants’ human rights, the HR argued, in *Beric v. Bosnia*, that its actions could not engage the responsibility of any state because it derives its powers from various international instruments, including decisions of the UN Security Council. The ECtHR did not consider the merits of the claimants’ case. Relying on the HR’s arguments, the ECtHR, in a 2007 decision, found that it lacked jurisdiction over the claim, writing that “the High Representative was exercising lawfully delegated UNSC Chapter VII powers, so that the impugned action was, in principle, ‘attributable’ to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations.”⁴²

After the *Beric* decision, however, the HR jettisoned the arguments it made before the ECtHR in favor of an entirely contrary claim. As a defendant before a U.S. federal court, the HR stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁴³ This representation directly conflicted with the HR’s representation to the ECtHR that it is an international organization whose actions cannot engage the responsibility of any state.

In any event, the *Beric* decision does not withstand scrutiny because its reasoning rests on false premises. The *Beric* court determined that the key question was whether the Security Council exercised “effective overall control” over the HR. Its affirmative answer to the question rested on three legs, each of which collapses under examination.

The court found first that the Security Council explicitly delegated authority to the HR in Resolution 1031 in 1995. In reality, there was no explicit or implicit delegation in the resolution, and nothing in the resolution suggested a supplementation of the HR’s powers under Annex 10. Rather, the resolution merely

[e]ndorse[d] the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the

⁴¹ See, e.g., UNSC Res. 1247 (1999) at para. 2.

⁴² *Beric v. Bosnia and Herzegovina, Decision on Admissibility*, European Court of Human Rights (2007) at para. 28.

⁴³ Specially Appearing Defendants’ Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak, Office of the High Representative*, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved.

To “endorse” is not to delegate, and the powers the Security Council endorsed are only those limited powers found in Annex 10.

Second, the *Beric* court wrote that “UNSC Resolutions subsequent to the initial UNSC Resolution endorsed the Conclusions of the Peace Implementation Conferences, which further elaborated on the mandate of the High Representative (see, for example, UNSC Resolution 1144, endorsing the Conclusions of the Bonn Peace Implementation Conference).” In none of these decisions, however, did the Security Council decide to delegate dictatorial authorities to the HR. The Security Council’s statements in these resolutions were mere expressions of political support for the conclusions of the PIC, an ad hoc group with no legal power. Again, to endorse is not to delegate.

Third, the *Beric* court emphasized that “the High Representative was required by [Resolution 1031] to report to the UNSC, so as to allow the UNSC to exercise its overall control.” In this conclusion the court was simply mistaken; Resolution 1031 did not require—or even request—the HR to report to the Security Council.

In addition to the reasons explained above, the notion that the Security Council delegated dictatorial authorities to the HR is legally groundless because the Security Council could not grant such powers, as explained below.

A. The Security Council could not have delegated or attributed powers to the HR.

In order for the Security Council to delegate or attribute powers to the HR, as Banning points out, the HR would have to have been “established as a subsidiary organ of the UN SC according to Article 29 *UN Charter*.”⁴⁴ An example of what this would look like is the UN Interim Administration Mission in Kosovo (UNMIK), which “was clearly placed under UN auspices, and . . . vested with the responsibility of ‘[p]erforming basic civilian administrative functions where and as long as required.’”⁴⁵ Similarly, the UN Interim Administration in East Timor (UNTAET) was “vested with the overall responsibility to exercise all administrative and legislative powers, as well as with executive powers, including the administration of justice, right from the beginning.”⁴⁶

In contrast, the HR and its functions were created only by the parties to Annex 10 with no involvement of the Security Council, and its authority is defined in Annex 10, not Security Council resolutions. At the time of the Dayton Accords, the Security Council merely expressed support for the establishment of the HR.⁴⁷ Banning concludes:

⁴⁴ Banning at 298.

⁴⁵ *Id.* at 299.

⁴⁶ *Id.*

⁴⁷ *Id.*

As the OHR was neither established as a subsidiary organ of the UN SC nor established under the auspices of the UN as for example the United Nations Mission in Bosnia and Herzegovina, the UN SC could consequently neither have delegated nor attributed powers to the OHR.⁴⁸

B. The Security Council did not de facto bestow powers on the HR.

Moreover, the Security Council did not, even de facto, transfer powers to the HR.

Although the Security Council, in certain resolutions, has occasionally expressed a measure of political support for the Bonn powers, it has never purported to bestow such powers on the HR. In these resolutions, Banning explains:

[T]he UNSC does not *decide* that the OHR has the power to make binding decisions, it only reaffirms what the PIC concluded. This must be understood as a mere expression of political support. Therefore it does not amount to an actual act of *de facto* granting of powers to the OHR.

To infer a *de facto* grant of powers from a mere expression of UN SC support for an act which was in itself not a grant of power, but only the political advice of a diplomatic body, would truly be legal fiction. It would further imply that the UN SC intended to act outside of its powers because the OHR does not even form a subsidiary organ of the UN SC to which a power could be lawfully granted. In conclusion, it cannot be argued that the so-called ‘Bonn Powers’ were conferred upon the OHR by the UN SC.⁴⁹

The extraordinary and dictatorial authorities claimed by the HR cannot be legally justified by the Security Council’s mere expression of political support for the Bonn Conclusions, which themselves were a just a policy statement by an ad-hoc group with no legal authority. As Parish points out, “an act by the PIC without legal basis cannot be given subsequent legal legitimacy merely because the Security Council acknowledges what it has done.”⁵⁰

Moreover, like the PIC, the Security Council has never purported to supplement the HR’s authority under Annex 10. Its expressions of support for the HR and its authority have always been based on Annex 10 and its misinterpretation by the PIC.

Thus, the Security Council has not, even de facto, supplemented the HR’s power under Annex 10.

V. The exercise of the Bonn powers by the HR is an illegal violation of the rights of BiH

⁴⁸ *Id.* at 299-300.

⁴⁹ *Id.* at 301.

⁵⁰ *A Free City in the Balkans* at 92.

citizens.

Apart from their lack of a legal basis, the dictatorial authorities claimed by the HR are obviously incompatible with the human rights of BiH citizens, and the exercise of such rights would constitute violations of important treaties protecting such rights. Under Annex 4 of the Dayton Accords, the BiH Constitution, the European Convention on Human Rights and its protocols “apply directly in Bosnia and Herzegovina” and “have priority over all other law.”⁵¹ The European Convention provides, “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁵² The HR’s extrajudicial punishments, such as its summary removal and banning of individuals from public office, manifestly violate this provision.

Moreover, the HR’s rule by decree and its removal of elected officials violate the right to free elections guaranteed under Protocol No. 1 of the European Convention⁵³ and the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ which also applies directly under the BiH Constitution.⁵⁵ In addition, the HR’s decrees violate the very first article of the ICCPR, which provides: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

The HR’s practice of imposing extrajudicial punishments against BiH citizens without any form of due process or right of appeal has earned sharp international condemnation. In a 2004 resolution, the Parliamentary Assembly of the Council of Europe held, “[T]he Assembly considers it irreconcilable with democratic principles that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being a legal recourse.”⁵⁶

In a March 2005 opinion, the Council of Europe’s Venice Commission concluded as follows regarding the HR’s extrajudicial punishments:

The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and Herzegovina]. He pursues a political agenda As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a*

⁵¹ BiH Constitution, art. II (2).

⁵² European Convention on Human Rights, art. 6.

⁵³ Protocol no. 1, European Convention on Human Rights, art. 3.

⁵⁴ International Covenant on Civil and Political Rights, art. 25.

⁵⁵ BiH Constitution, art. II (4) and (7), Annex I.

⁵⁶ Parliamentary Assembly of the Council of Europe, Res. 1384 (2004), June 23, 2004.

fair hearing or at least the minimum of due process and scrutiny by an independent court.

* * *

The continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable.⁵⁷

A report by the Council of Europe Parliamentary Assembly condemned the HR's assertion of authority to remove and ban public officials from office without any right of appeal:

39. Your Rapporteur believes that such powers run counter to the basic principles of democracy and are reminiscent of a totalitarian regime. Their use, no matter how seemingly justifiable on public interest grounds, has an extremely harmful effect on the democratisation process in Bosnia and Herzegovina, since it causes feelings of injustice and undermines the credibility of democratic institutions and mechanisms.

40. In this respect, it should be recalled that the rights of the people of Bosnia and Herzegovina are protected by the European Convention on Human Rights.⁵⁸

As the European Stability Initiative's Gerald Knaus and Felix Martin observed about the HR, "Banning individuals for life from public employment or political office without even giving them a chance to confront the charges against them plainly violates even the most basic notions of due process and is simply unacceptable in a democratic country."⁵⁹

Austrian professor Joseph Marko, who served as a foreign member of the BiH Constitutional Court, wrote that the HR's removal of public officials from office "did not meet the lowest standards of rule of law."⁶⁰

Commenting on the HR's asserted authority to enact laws by decree, the Venice Commission observed, "Art. 3 of the (first) Protocol to the [European Convention on Human Rights] requires the election of the legislature by the people, and this right is deprived of its content if legislation

⁵⁷ 2005 Venice Commission Opinion at paras. 94, 96, and 98 (emphasis added).

⁵⁸ *Strengthening of democratic institutions in Bosnia and Herzegovina*, Council of Europe Parliamentary Assembly, Political Affairs Committee, Doc. 10196, 4 Jun. 2004.

⁵⁹ Gerhard Knaus and Felix Martin, *Travails of the European Raj*, 3 J. Democracy 60, 72 (2003).

⁶⁰ Joseph Marko, *Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina*, European Diversity and Autonomy Papers EDAP 4/2005, at 16-17.

is adopted by another body.”⁶¹

In 2006, the BiH Constitutional Court held that individuals must have an opportunity to appeal extrajudicial punishments decreed by the HR. In response, the HR, in an astonishing assertion of absolute authority unbounded by any law, declared that its actions are not subject to any review by any BiH authority, issuing a decree nullifying the court’s verdict. Even the Bonn powers, as Dr. Knoll points out, “do not foresee, or imply, a competence to revoke a decision of Bosnia’s highest constitutional organ.”⁶² The HR’s decree, which remains in place today, banned any proceeding before the Constitutional Court or any other court that “*takes issue in any way whatsoever with one or more decisions of the High Representative.*”⁶³ By issuing this order, Dr. Knoll observes, the HR “set the international community on a war path with Bosnia’s constitutional organs.”⁶⁴ Thus, the HR, using its illegal powers, declared itself above that law and shut down any forum for BiH citizens to challenge its violations of human rights.

VI. Conclusion.

As this paper demonstrates, the so-called Bonn powers claimed by the HR are wholly unlawful. Annex 10 to the Dayton Accords, which is the sole legal basis for the HR’s authority, establishes a strictly limited mandate for the HR that cannot reasonably be interpreted to include any binding powers, let alone the dictatorial authorities the HR asserts. Moreover, contrary to the HR’s claims, the PIC did not bestow additional authorities on the HR, nor did it have the power to do so. There is also no basis for the claim that the UN Security Council supplemented the HR’s powers under Annex 10. The exercise of the Bonn powers constitutes a flagrant violation of the human rights of BiH citizens as expressed in important binding international treaties.

International organizations “are bound to act within the limits and in accordance with the terms of the grant made to them,” and acts taken outside the limits of the terms of grant made to them, an “assertion of competence by an incompetent organ,” is an illegal act.⁶⁵ Moreover, “there runs through . . . evidence of the practice of states and organisations and of the views of judges and writers of authority a single common thread: the recognition that as a matter of principle illegal acts ought not to give rise to valid and permanently effective consequences in law.”⁶⁶

Because the Bonn powers have no legal basis and violate the human rights of BiH citizens, as well as fundamental principles of international law, as recognized in applicable treaties and in customary international law, the exercise of these purported powers can have no binding legal effect and no binding force upon anyone. The effect of any such issuance by the HR can only be considered hortatory in nature unless and until the parties to whom such issuances are addressed

⁶¹ 2005 Venice Commission Opinion at para. 88.

⁶² Knoll at 315.

⁶³ Office of the High Representative (OHR), Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05, March 23, 2007 (emphasis added).

⁶⁴ Knoll at 313.

⁶⁵ Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations* (1980) 89.

⁶⁶ Lauterpacht at 115.

consent to their application as a matter of law.