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When the Total is less than the Sum of the Parts: The Lessons of Bosnia and Herzegovina

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Overview

The territorial reorganization of Bosnia and Herzegovina (BiH) is one of the key outcomes of the Dayton Peace Agreement (DPA), the US-brokered agreement that brought the conflict in Bosnia and Herzegovina to an end. As they sought to silence the guns, the mediators behind the DPA struggled with the need not to reward the ethnic cleansing that harkened back to Europe's darkest hours while having to acknowledge that ethnic cleansing had, in fact, profoundly affected the demography of the country. The result was a complicated structure. Bosnia was reorganized as a consociational federation comprising two entities: Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH).

In many ways, the territorial restructuring agreed at Dayton could be perceived as 'ground zero' for many of the other cases in this volume. This chapter analyzes the impact of territorial restructuring in BiH and the context in which it took place. The restructuring of Bosnia was decided behind closed doors and under international pressure. The process was brief and backward (rather than forward) looking in the sense that it was primarily driven by the imperative to end the war. The Bosnian case study thus serves as a harbinger of the unintended and detrimental consequences that follow from poor process. It tells the tale of a territorial restructuring driven by strategic considerations that resulted in the hardening of contentious ethnic identities, the capture of the state by ethnic entrepreneurs, and the subsequent inefficiency, instability, yet unexpected resiliency of the BiH.

Background

Volumes have been written about the context that accompanied the breakup of the Socialist Federal Republic of Yugoslavia.¹ While this is not the place to recount this history in detail, suffice it to highlight that, in the decade preceding its disintegration, the country met multiple challenges. Faced with nationalist stirrings in the 1970s, Tito introduced a new Constitution in 1974 which gave greater autonomy to the Republics, recognized the autonomous status of the two provinces of Kosovo and Vojvodina, and promoted Macedonians and Montenegrins to nationalities. The 1974 Constitution ushered in a period of economic growth but it left the Serbs, one of the two founding constituent peoples of the SFRY, deeply dissatisfied. They perceived the granting of autonomy to Kosovo and Vojvodina, both of which are located in Serbia, and the recognition of Macedonians and Montenegrins as nationalities as attempts to weaken them relative to Croats, the group from which President Tito hailed.² Indeed, "ever since the founding of Yugoslavia, two distinct nationalist policies have struggled for primacy in the debate over the country's political future: Croatian separatism striving for an independent state and Serbian centralism striving to preserve the common Yugoslav state under its dominion".³ Following Tito's death in 1980, mounting debt and the end of the Cold War exerted further pressure on the SFRY. The country had benefited from its unique position during the Cold War to navigate the international system and extract concessions from East

¹ Laura Silber and Alan Little, *Yugoslavia: Death of a Nation* (Penguin Books 1997); Misha Glenny, *The Fall of Yugoslavia: The Third Balkan War* (3rd edn, Penguin Books 1996); Susan L Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (Brookings Institution Press 1995).

² Steven L Burg, 'Ethnic Conflict and the Federalization of Socialist Yugoslavia: The Serbo-Croat Conflict' (1977) 7 (4) *Publius* 119; Doris Gödl, 'Challenging the Past: Serbian and Croatian Aggressor-Victim Narratives' (2007) 37 (1) *International Journal of Sociology* 43; Michael Sorenson, 'Major Causes of the Hatred Between Serbs and Croats' (1993) 34 (1) *Balkan Studies* 119.

³ Vesna Pestic, 'Serbian Nationalism and the Origins of the Yugoslav Crisis' (Peaceworks No 8, United States Institute of Peace 1996) <www.usip.org/publications/1996/04/serbian-nationalism-and-origins-yugoslav-crisis>.

and West. When this ended, richer republics resented having to pay interest on the debt of poorer ones and the decision to exit the Federation gained increasing support among elites and in the population, particularly in Slovenia.⁴

With the departure of Slovenia, then Croatia, both of which declared independence in 1991, the disintegration of the SFRY exerted particularly intense pressure on Bosnia and Herzegovina (BiH). One of the most diverse SFRY republics, Bosnia had to contend with large Serb and Croat communities. According to the 1991 Yugoslav census, the republic had 4,377,053 inhabitants including 1,902,956 Muslims (43.47%), 1,366,104 Serbs (31.21%), and 760,872 Croats (17.38%). Approximately 5.54% of the population, or 242,682 persons, defined themselves as Yugoslavs while 104,439 persons (2.40%) belonged to other minority groups.⁵ Elections in 1990 yielded a Bosnian parliament divided between three nationalist parties, the Stranka Demokratske Akcije (SDA, Party of Democratic Action - Bosniac⁶), the Hrvatska Demokratska Zajednica (HDZ, Croatian Democratic Union) and the Srpska Demokratska Stranka (SDS, Serb Democratic Party). Initially governing as an inter-ethnic coalition, the three parties quickly differed over whether to stay within the rump SFRY (favored by the SDS) or become independent (favored mostly by the SDA). Amidst a deepening split, the war in neighbouring Croatia stoked up fears that the Yugoslav National Army (JNA, Jugoslavenska Narodna Armija) was implementing a plan to arm Serbs in the remaining Yugoslav republics in an attempt to thwart decisions to declare independence.⁷ In reaction, the BiH parliament declared sovereignty on 15 October 1991 and announced its plan to hold a referendum on independence on 29 February and 1 March 1992. On 24 October, Serb members of parliament walked out and formed the Assembly of the Serb People of Bosnia and Herzegovina which established the Serbian Republic of Bosnia and Herzegovina in January 1992.⁸ On 18 November 1991, it was the turn of the HDZ to proclaim the existence of the Croatian Community of Herzeg Bosna. The 1992 referendum was boycotted by a majority of Serbs but with a turnout of 63.4% of voters of whom 99.7% voted yes, BiH declared independence on 3 March 1992.

Academics have hotly debated whether the conflict that ensued was an ethnic war or not.⁹ While ethnicity was clearly instrumentalized by leaders vying for power, at the outset of the Bosnian war there were also genuine fears among Serbs regarding their status in an independent BiH. These fears were stoked by two interrelated external factors – newly independent Croatia's failure to provide

⁴ See notably Woodward (n 1).

⁵ Department of Statistics Bosnia and Herzegovina, 'Zavod za statistiku Bosne i Hercegovine Bilten no 234 (Department of Statistics Bosnia and Herzegovina Bulletin No 234)' (Government of the Socialist Republic of Bosnia and Herzegovina 1991). It is worth noting that the last Yugoslav census was conducted at a time of tension between the communities, something that may have biased the results particularly as regards the definition of nationality, language and religious conviction. See Snjezana Mrdjen, 'Le dernier recensement de la Yougoslavie' (1991) 263 *Populations et Sociétés* 3, 3-4.

⁶ The term Bošniak has come to be used to refer to Bosnian Muslims.

⁷ On the Yugoslav support to the Serbs of Bosnia see Veljko Vujčić, 'Elites, Narratives, and Nationalist Mobilization in the Former Yugoslavia' (2007) 40 (1) *Comparative Politics* 103; Branimir Anzulovic, *Heavenly Serbia: From Myth to Genocide* (New York University Press 1999); VP Gagnon, 'Serbia's Road to War' (1994) 5 (2) *Journal of Democracy* 117; Tim Judah, *The Serbs: History, Myth, and the Destruction of Yugoslavia* (Yale University Press 1997).

⁸ This would become the *Republika Srpska* in August 1992.

⁹ Steven Majstorovic, 'Ancient Hatreds or Elite Manipulation? Memory and Politics in the Former Yugoslavia' (1997) 159 *World Affairs* 170; Woodward (n 1); Bogdan Denis Denitch, *Ethnic Nationalism: The Tragic Death of Yugoslavia* (University of Minnesota Press 1996); Anthony Oberschall, 'The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia' (2000) 23 (6) *Ethnic and Racial Studies* 982; VP Gagnon, *The Myth of Ethnic War: Serbia and Croatia in the 1990s* (Cornell University Press 2004); Silber and Little (n 1).

adequate minority rights guarantees to its own Serb minority and the conclusions of the Arbitration Commission of the Conference on Yugoslavia. Croatian Serbs reacted very strongly to Zagreb's failure to provide them with acceptable minority rights guarantees. With the support of Belgrade, they proceeded to arm themselves prompting the new Croatian government to assert control over police stations in Serb-majority areas. The Milosevic government in Belgrade poured oil on the fire suggesting that this state of affairs would inevitably lead to a repetition of the pro-Nazi Croat Ustashe regime's genocide against the Serbs in World War II. Supported by the JNA, fearful Croatian Serbs escalated the conflict between them and the Croatian government.

Meanwhile, the rights of constituent peoples were being examined by the Arbitration Commission of the Conference on Yugoslavia (commonly known as the Badinter Arbitration Committee) that had been set up by the European Economic Community to provide the International Peace Conference on Yugoslavia chaired by Lord Carrington with legal advice. Asked to consider whether the Serbian population in Croatia and Bosnia and Herzegovina, as one of the constituent peoples of Yugoslavia, had the right to self-determination, the commission concluded on 11 January 1992 that the Serbs of Croatia and BiH were entitled to "all the rights concerned to minorities and ethnic groups[...]" and "that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality."¹⁰ Scholars have suggested that the conclusions of the Badinter Arbitration Committee provided some of the justification for the ethnic cleansing that the Vojska Republike Srpske (Army of Republika Srpska) carried out from 1992 until 1995.¹¹ Serb leaders interpreted these conclusions as proof that their community would be demoted from a constituent people to a mere national minority in an independent BiH. For the community to be entitled to join the rump Federal Republic of Yugoslavia (FRY, composed of Serbia including Kosovo and Vojvodina, Macedonia and Montenegro), Serbs needed to establish majority control over territory and to hold a referendum on secession. Thus was born the decision to compel Bosnian Muslims to leave the territory of the Republika Srpska.¹² From there to physically eliminating those who would not comply, there were only too few steps.

The war in BiH began with the siege of Sarajevo in April 1992. It would last until August 1995 when BiH President and SDA party leader Alija Izetbegović, FRY President Slobodan Milošević, and Croatian President Franjo Tuđman agreed on the terms of the General Framework Agreement for Peace (GFAP also known as Dayton Peace Accords or DPA). The manner in which the DPA addressed the territorial dimension of the conflict would structure the politics of BiH for years to come.

The Period of Constitutional Engagement

Looking back on the manner in which the Dayton Peace Agreement dealt with the enactment of the BiH Constitution, two major issues deserve mention: the process (or lack thereof) of constitutional

¹⁰ Allain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 (1) *European Journal of International Law* 1178.

¹¹ Jennifer Jackson Pearce, 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms' (1998) 20 (4) *Human Rights Quarterly* 817; Robert M Hayden, 'Imagined Communities and Real Victims: Self-Determination and Ethnic Cleansing in Yugoslavia' (1996) 23 (4) *American Ethnologist* 783; Ralph K White, 'Why the Serbs Fought: Motives and Misperceptions' (1996) 2 (2) *Peace and Conflict: Journal of Peace Psychology* 109.

¹² See also Marie-Joëlle Zahar, 'Republika Srpska' in Tozun Bahcheli, Barry Bartmann, and Henry Srebrnik (eds), *De Facto States: The Quest for Sovereignty* (Routledge 2004).

change and the centrality of territory. Both would determine in great part the structure of present day Bosnian politics.

1. *Constitutional Process, What Process?*

In the words of its architect, US diplomat Richard Holbrooke, the word Dayton has “entered the language as a shorthand for a certain type of diplomacy—the Big Bang approach to negotiations: lock everyone up until they reach agreement.”¹³ In twenty days of November, 1995, a process of mostly proximity talks at Wright-Patterson air base in Dayton, Ohio, saw Bosnia emerge with a peace agreement, of which the country’s new Constitution was an annex. The talks were held between President Izetbegović and Prime Minister Haris Silajđić representing the Bosniacs, FRY President Slobodan Milošević representing the interests of Serbia and of the Bosnian Serbs, and President Franjo Tuđman of Croatia representing his country and speaking for the Bosnian Croats. The interests of the Yugoslav and Croat presidents did not always coincide with those of their ethnic kin in Bosnia.¹⁴ Milošević wanted sanctions on the FRY lifted and he was therefore interested in forcing the Bosnian Serbs to compromise. In fact, at a key point in the talks, he broke ranks with the Bosnian Serbs over the fate of Sarajevo. He agreed to hand the capital city to the Bosniacs in what Holbrooke and his team could only explain as a move to weaken the radical SDS leadership based in Pale and which, in Milošević’s opinion, had become an “impediment.”¹⁵ As for Tuđman, he was mostly interested in a settlement of the Eastern Slavonia conflict, the conflict that opposed his government to Croatian Serbs in the Krajina.

It is worth reiterating what many have since highlighted: two of the protagonists of the conflict, the Bosnian Serbs and the Bosnian Croats, were not directly involved in the talks. Truth be told, there were senior Bosnian Serb officials in Milošević’s delegation. Momcilo Krajišnik, then a member of the collective presidency of Republika Srpska, Nikola Koljević, who had been the Serb member of the collective presidency of Bosnia following the 1990 elections before becoming vice-president of the RS, and General Zdravko Tolimir, a deputy of VRS commander Ratko Mladić, were present at Dayton. But, as Holbrooke recalls, they were “relegated to the second floor of the two-story Serb quarters, and treated [by Milošević] with open contempt.”¹⁶ After an incident on day eight of the talks, during which Krajišnik was particularly uncompromising on the fate of Sarajevo, he and his Bosnian Serb colleagues “were truly nonpersons at Dayton.”¹⁷ For their part, Bosnian Croat officials were included in the Bosnian delegation but Holbrooke’s account of the talks makes it clear that their involvement was marginal. Nor was there any consideration of the opinion of ordinary citizens of BiH in the process.

2. *The centrality of territory*

While there was no constitutional process to speak of during the negotiations that led to the signing of the DPA, territory was central to the talks. To appreciate the role that territory played at Dayton requires us first to review the manner in which territorial divisions were dealt with in previous attempts at bringing Bosnia and Herzegovina’s war to an end. This review will set the stage for better appreciation of the territorial issues as they played out at the Dayton peace talks.

¹³ Richard Holbrooke, *To End a War* (Random House 1998) 212.

¹⁴ Nina Caspersen, 'Between Puppets and Independent Actors: Kin-State Involvement in the Conflicts in Bosnia, Croatia and Nagorno Karabakh' (2008) 7 (4) *Ethnopolitics* 357.

¹⁵ Holbrooke (n 13) 293.

¹⁶ *ibid* 243.

¹⁷ *ibid* 256.

The DPA has often been hailed as the agreement that managed to end the war while restoring a single, multiethnic Bosnia.¹⁸ While the United States did not oppose voluntary changes that would either modify the international boundaries of the country or divide it into more than one country,¹⁹ Washington was intent not to reward ethnic cleansing nor to go along with partition plans that Presidents Milošević and Tudjman were said to have hatched in 1991.²⁰ In so doing, Dayton and its architects were attempting to depart from a trend, begun even before the war erupted in Bosnia, to equate nation with ethnicity and to allocate separate territories to different nationalities in a stark illustration of the logic expounded by Chaim Kaufman when he argued that the only solution to the security dilemma triggered by ethnic civil war was the partition of countries along communal lines.²¹

Ever since the “Statement of Principles for New Constitutional Arrangements for Bosnia and Herzegovina”,²² the assumption had been that, even as Bosnia would become an independent state, it would be partitioned into ethnic cantons. Meeting in Lisbon under the chairmanship of the then-foreign minister of Portugal, José Cutileiro, the European Community Conference on the former Yugoslavia’s working group on Bosnia “established the cartographic and statistical criteria for the division of Bosnia.”²³ The map was based on the 1991 Yugoslav national census and on a crude evaluation of the national absolute or relative majority in each municipality. As David Campbell rightfully remarks, not only did such a territorial division fail to “achieve the perfect alignment between identity and territory necessary to satisfy the nationalists,” it also reflected an underlying tension between the professed support of outsiders for the independence and integrity of BiH and their efforts to redraw internal boundaries according to a “separatist logic hostile to any notion of overarching authority.”²⁴

With the Bosnian war in full swing and ethnic cleansing underway, the EC and the UN launched a new initiative, the International Conference on the Former Socialist Federal Republic of Yugoslavia (ICFY). Meeting at its first session in London, on 27 August 1992, the ICFY reasserted “the priority of individual rights and the importance of sovereignty, independence and territorial integrity.”²⁵ Among the principles that participants adopted as the basis for a future negotiated settlement was the “non-recognition of all advantages gained by force or fait accompli or of any legal consequences thereof.” However, the ICFY acknowledged that a Bosnian unitary state would be rejected by at least two communities; furthermore, it accepted the need to protect minorities and the right to self-determination. In attempting to reconcile all these principles, ICFY co-chairmen Cyrus Vance and Lord Owen proposed a decentralized state structure consisting of nine provinces and a capital district. Vance and Owen argued that only such a solution would “not acquiesce in already accomplished ethnic cleansing, and in further internationally unacceptable practices.”²⁶ According to

¹⁸ *ibid* 335.

¹⁹ *ibid* 363-64.

²⁰ Mladen Klemenčić, 'The Boundaries, Internal Order and Identities of Bosnia and Herzegovina' (2000-2001) 8 (4) *IBRU Boundary and Security Bulletin* 63.

²¹ Chaim Kaufmann, 'Possible and Impossible Solutions to Ethnic Civil Wars' (1996) 20 (4) *International Security* 136.

²² Developed by the European Community Conference on the Former Yugoslavia which was established in 1991 and chaired by Lord Carrington.

²³ David Campbell, 'Apartheid Cartography: The Political Anthropology and Spatial Effects of International Diplomacy in Bosnia' (1999) 18 (4) *Political Geography* 395, 406.

²⁴ *ibid* 408.

²⁵ *ibid*.

²⁶ 'UNITED NATIONS: SECRETARY-GENERAL REPORT ON THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA' (1992) 31(6) *International Legal Materials* 1549.

their proposal, each of the three communities would constitute the majority in three of the nine provinces. In January 1993, the Vance-Owen Peace Plan (VOPP) was presented to the parties. Bosnian Croats accepted it, in great part because the map it drew was particularly favorable to them. Bosnian Muslims reluctantly went along. However, the Bosnian Serb Assembly rejected the plan thus bringing this particular peace effort to an end.²⁷

With Cyrus Vance replaced by Thorvald Stoltenberg, the ICFY resumed its efforts to seek acceptable terms for the conclusion of a peace agreement. In the meantime, Serbs and Croats had hardened their positions. They now sought a confederal solution with three separate republics.²⁸ The map that Owen and Stoltenberg negotiated gave approximately 53% of the territory to the Bosnian Serbs, 30% to the Bosniacs and 17% to the Croats. It included complex arrangements for protected routes that would connect the Bosniac-majority towns of Žepa and Goražde to the Bosniac Republic through Serb territory. A new set of constitutional principles were also agreed whereby the loose confederation thus formed would be ruled by a nine-member council with three members representing each group. Key positions such as those of Prime Minister and Foreign Minister would rotate among the groups and the three republics would be allowed to enter into agreements with neighbouring states only if these agreements did not damage the interests of the other republics.²⁹ This plan would ultimately be rejected by the Bosniacs who wanted more territory than they could get at the negotiating table and who, strong of the support of the United States, believed that their military fortunes could still improve to create a context in which these demands would be met.³⁰

A number of developments laid the ground for the next effort, which, unlike its predecessors, focused primarily on ending the conflict between Bosniacs and Croats. First came a challenge to the official Croat ethnic narrative by Ivo Komšić, a Croat-member of the Bosnian collective presidency and leader of the Croat Peasant Party. Komšić proposed a new map which, although it reaffirmed the principle of cantonization, starkly differed from international proposals in that it was not based on the principle of ethnic majority.³¹ Then, following the February 1994 attack on the market in Sarajevo, the international community decided to take a firmer stance and the UN Protection Force (UNPROFOR) issued an ultimatum to the Serbs to withdraw from their positions around the city. This coincided with the US decision to assume leadership of the international community's efforts. To change the balance of forces on the ground, the US worked on healing the rift that had developed between Bosniacs and Croats since 1993.

As Bosniacs and Croats came under pressure to renew their alliance, Bosnian Prime Minister Haris Silajdžić and Croatian foreign minister Mate Granic held a series of meetings in Frankfurt and in Washington in February 1994. These resulted in the announcement, on 1 March 1994 in Washington, of an agreement establishing the Federation of Bosnia and Herzegovina (FBiH), a Muslim-Croat federation³² of BiH territories with Muslim and Croat majorities. The constitution of the newly established Federation was ratified by the Bosnian parliament on 29 and 30 March.³³ The

²⁷ Paul C Szasz, "The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia" (1995) 19 (2) Fordham International Law Journal 368.

²⁸ David Owen, *Balkan Odyssey* (Harcourt Brace and Co 1995).

²⁹ Mladen Klemenčić, *Territorial Proposals for the Settlement of the War in Bosnia and Herzegovina* (Martin Pratt and Schofield eds, Boundary and Territory Briefing vol 1 no 3, International Boundaries Research Unit 1994) 53.

³⁰ Owen (n 28).

³¹ Klemenčić, *Territorial Proposals for the Settlement of the War in Bosnia and Herzegovina* (n 29) 66-70.

³² The initial designation of Bošniaks was Muslim Bosnians.

³³ For this occasion, Muslim and Croat parliamentarians elected in 1990 were summoned.

structure of the federation was a clear prelude to the DPA. The agreement described the Federation as the outcome of Bosniacs and Croats exercising their rights as constituent peoples to transform the internal structure of the territories where they were a majority; it also underlined the decisions on the constitutional status of Serb-majority territories would be made “in the course of negotiations toward a peaceful settlement and at the International Conference on the Former Yugoslavia.”³⁴ The constitution of the new federation was part of the Framework Agreement signed by Bosniac and Croat representatives in Washington D.C. Pursuant to this constitution, the Federation of Bosnia and Herzegovina would be governed according to principles of proportional representation with a Bosniac and a Croat alternating at the helm as President and Vice-President, a government where all ministers would have deputies who would be from a different constituent people, a House of Representatives elected on a proportional basis and a House of Peoples with equal numbers of Bosniac and Croat representatives as well as a number of delegates representing ‘Others’.

3. *Territorial Issues and the Dayton Peace Agreement*

Territory was as central to the DPA as it had been to other attempts at finding a solution to the war in BiH. This is nowhere clearer than in Richard Holbrooke’s account of territorial negotiations that led to the signing of the DPA, from the status of BiH’s capital city, Sarajevo, to discussions around the Posavina “pocket”, the Posavina corridor and the towns of Brčko Goražde, Srebrenica, Žepa and Bosanski Novi. Rather than delve into the details of the answers to each of the above-mentioned territorial issues, the following discussion is intended to highlight the constitutional solutions that Dayton offered to the quandaries that stood in the way of earlier efforts at conflict resolution. The discussion will focus on a) the legal continuity of Bosnia and Herzegovina, b) the institutional structure of and division of powers in BiH or the relationship between the parts and the whole, and c) the issue of citizenship. It is important to underline that this discussion refers to the Constitution of Bosnia and Herzegovina as spelled out in Annex 4 of the DPA. Since then, a number of amendments have been introduced that will be touched upon in the next section of this chapter.

i. The legal continuity of BiH

When BiH gained independence as a result of the 1992 referendum, the new state was immediately recognized by and granted membership in the United Nations. But the three communities that comprised the majority of its citizens fundamentally disagreed on its legitimacy and on the form it ought to take. Of the three, Bosniacs were the strongest proponents of a sovereign unitary state. While open to Bosnian sovereignty, Croats preferred cantonization. For their part, Serbs preferred for BiH to remain within the FRY; their second-best option revolved around the right of Serb areas to seek secession and rejoin the FRY.³⁵ Not only did the three communities broadly disagree, Serbs considered the birth of independent BiH illegal because of the fact that the referendum on independence had gone ahead in spite of the boycott of one of the constituent people.

The question as to whether the state that would emerge from peace negotiations would be a legal continuation of BiH or a completely new state was thus tabled as early as the Owen-Stoltenberg plan. The DPA resolved this issue in favor of continuity of the state and of its international legal personality. The decision was made on multiple grounds: because the issue represented an emotional charge for Bosniacs; because US negotiators did not want to grant de facto legitimacy to Republika

³⁴ Framework Agreement for the Federation Peace Agreements (1 March 1994) (Washington Agreement) <www.usip.org/sites/default/files/file/resources/collections/peace_agreements/washagree_03011994.pdf>.

³⁵ Klemenčić, *Territorial Proposals for the Settlement of the War in Bosnia and Herzegovina* (n 29) 31-32.

Srpska – something that would have happened if a new state of BiH was created out of the union of the RS and the Federation; and because there were matters of international legal practicality regarding the action filed by BiH against the FRY before the International Court of Justice for abetting genocide.

The BiH constitution thus stated that the country “shall remain a Member State of the United Nations.”³⁶ Continuity of Bosnia’s international legal personality contrasted with the rupture in constitutional continuity that was the product of the Dayton agreement. The DPA provided that the constitution “shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.”³⁷ However, Annex II to the constitution on “Transitional Arrangements” did ensure the continuation of laws, regulations, judicial rules, pending judicial and administrative proceedings, as well as governmental bodies in force or existence within the territory of Bosnia and Herzegovina. Nevertheless, the manner in which the Constitution was written conforms with what Saunders in her chapter characterizes as a “revolutionary” legal rupture, in that the new constitution was not made in conformity with the amending rules of its predecessor, but derives its legitimacy from an agreement of some kind, in this case the Dayton Peace Agreement, or from a diktat on high. In choosing this approach, however, little if any consideration was given to the democratic deficit inherent in the process: a Constitution negotiated as part of a peace agreement, under conditions where some of the key actors (particularly the Bosnian Serbs but also the Bosnian Croats to a certain extent) were not effectively at the table. Yet, as Paul Szasz astutely remarked, allowing the Constitution to enter into force in any other way, either by ratification by the respective legislatures or by referenda, would have implied a new start for the State.³⁸ For all the reasons expounded above, this was unacceptable.

ii. BiH, greater than the sum of its parts?

Under the DPA, Bosnia and Herzegovina was reorganized as a state comprised of two Entities, the Federation of Bosnia and Herzegovina (FBiH comprising 51% of BiH territory) and Republika Srpska (RS with 49% of BiH territory).³⁹ Much as the stated objective was to restore a single multi-ethnic Bosnia, the federal structures reflect the ethno-territorial nature of the arrangement reached at Dayton.

The entities share a central legislature, the Parliamentary Assembly of Bosnia and Herzegovina consisting of a House of Representatives and a House of Peoples as well as a three-member collective Presidency. This central government is two-thirds Muslim and Croat and one-third Serb. The federal House of Peoples is comprised of 15 delegates—two-thirds hailing from the Federation (5 Croats and 5 Bosniacs), one third (5 Serbs) from Republika Srpska (RS).⁴⁰ The BiH House of Representatives is composed of 42 members, two-thirds elected from the FBiH and one-third from the RS. Members of the Presidency (one representative from each constituent people) are directly

³⁶ Bosnia and Herzegovina Constitution, art I(1).

³⁷ *ibid* art XII(1).

³⁸ Szasz (n 27) 378.

³⁹ The description of the structure of BiH draws in great part on Marie-Joëlle Zahar, 'Bosnia and Herzegovina' in Ann L Griffiths (ed), *Handbook of Federal Countries* (2nd edn, McGill-Queens University Press and the Forum of Federations 2005) 73-89.

⁴⁰ Croat and Bosniac delegates are elected respectively by the Croat and Bosniac delegates to the House of Peoples of the Federation of Bosnia and Herzegovina. The National Assembly of Republika Srpska selects the Serb delegates to the federal House of Peoples.

elected from the FBiH (Bosniac and Croat members) and from the RS (Serb member). A proposed decision of the Parliamentary Assembly may be declared “destructive to a vital interest of the Bosniac, Croat, or Serb people.”⁴¹ This constitutional provision provides members of each constituent people with veto power over contested legislation. In such instances, a joint committee including three members of each community reviews the legislation; if they fail to reach agreement, the matter is forwarded to the Constitutional Court.⁴² A similar veto exists within the presidency.⁴³

Not only is the structure of BiH complicated and premised upon a delicate balancing act between Bosniacs, Croats, and Serbs but the powers of the central government are weak relative to the Entities. BiH institutions are responsible for foreign policy and trade; customs; monetary policy; finances of the institutions and international obligations of Bosnia and Herzegovina; immigration, refugee, and asylum policy and regulation; international and inter-entity criminal law enforcement; the establishment and operation of common and international communications facilities; regulation of inter-Entity transportation; and air traffic control. However, residual powers are the preserve of the Entities which also control the all-important power of taxation.⁴⁴ In some instances, the Entities even appear to “intrude into the jurisdiction of the central government.”⁴⁵ Thus, while foreign policy is a responsibility of the central government, the Entities can establish special parallel relationships with neighbouring states.⁴⁶ They can also enter agreements with foreign states and international organizations with the consent of the federal Parliamentary Assembly. Last but not least, national defense is conveniently and conspicuously missing from the list of exclusive powers of the central government. This reflected two realities: the profound mistrust of the parties and their unwillingness to disarm or join forces in a common national army and the fact that the FBiH constitution, negotiated before the DPA, had assigned to the Federation exclusive responsibility for “[o]rganizing and conducting the defense of the Federation and protecting its borders, including establishing a joint command of all military forces in the Federation.”⁴⁷

iii. The thorny issue of citizenship

BiH was born of an arranged marriage buttressed by a change in the balance of power on the ground in the summer of 1995. Indeed, the DPA was signed against the background of territorial gains by the FBiH forces and of NATO air strikes on Bosnian Serb military positions. But this was a marriage in which at least one of the parties was an unwilling partner. As discussed earlier in this chapter, Bosnian Serbs did not want to see an independent Bosnia and Herzegovina, preferring to remain within the Former Yugoslavia and resorting to ethnic cleansing, in part, to be able to justify the legality of a referendum that would allow them to secede from Bosnia. How the new constitution dealt with this fact and the extent to which it was able to create the framework for a BiH citizenship are therefore important issues for consideration.

⁴¹ Bosnia and Herzegovina Constitution, art V(2)(e).

⁴² *ibid* art IV(3)(f).

⁴³ *ibid* art V(2)(d).

⁴⁴ The federal Parliamentary Assembly has responsibility for ‘deciding upon the sources and amounts of revenues for the operations of the institutions ... and international obligations of Bosnia and Herzegovina’ (BiH Constitution IV(4)(b)). The FBiH provides two-thirds and the RS one-third of the revenues required by the federal budget, ‘except insofar as revenues are raised as specified by the Parliamentary Assembly’ (BiH Constitution VIII(3)). Under Article III(2)(b) the Entities are also expected to provide ‘all necessary assistance’ to the central government in order to enable it to honour its international obligations.

⁴⁵ Zahar, ‘Bosnia and Herzegovina’ (n 39).

⁴⁶ This was deemed consistent with the constitution including with provisions concerning the sovereignty and territorial integrity of BiH.

⁴⁷ Bosnia and Herzegovina Constitution, art III(1)(b).

Much as the constitution stipulated that BiH should “ensure the highest level of internationally recognized human rights and basic freedoms” to its citizens, “without discrimination on any basis, including gender, race, skin, color, language, religion, political or other opinions, national and social origin, belonging to a national minority, [and] financial status that is acquired by birth,”⁴⁸ the ethno-territorial foundations of the state prevented this aspiration from being translated into reality. In fact, citizenship of BiH is based on the notion of constituent peoples. Article 1.7 (a) stipulates that all citizens of the two Entities are citizens of Bosnia and Herzegovina. However, rather than transcending the ethnic divisions of the war, the constitution institutionalized them and gave privileged political status to Bosniacs, Croats and Serbs and, while mentioning them in the Preamble, it left ‘Others’ “out of the reach of the constitutional regulative.”⁴⁹ In so doing, the constitution jeopardized the notion of equal citizenship and the principle of non-discrimination as regards access to state functions. The fifteen or so other peoples identified as living in Bosnia by the 1991 census were thus excluded from seeking political office.

Furthermore, in spite of all the talk of reversing ethnic cleansing, the constitution disallowed Serbs living in the FBiH and Bosniacs and Croats living in RS “the possibility of using the passive election right for seats in the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH.”⁵⁰ Last, but not least, the constitution also allowed citizens of Bosnia to hold citizenship of another state.⁵¹ Thus, not only did the constitution institutionalize a situation whereby citizenship of BiH was mediated by citizenship of the Entities, it also provided arrangements for those Entities and communities that did not want to see an independent Bosnia to maintain citizenship ties with the FRY and with Croatia.

Outcome of the Process

In the twenty years since the DPA was negotiated, the outcome of the decisions summarized above has been abundantly discussed and commented upon. “[Dayton] created a complex institutional structure, composed of one state, two entities, three peoples, an estimated 3.9 million citizens, and five layers of governance led by 14 prime ministers and governments, making Bosnia the state with the highest number of presidents, prime ministers, and ministers per capita in the entire world.”⁵² It has contributed to creating political paralysis, institutionalizing ethnicity, and perpetuating corruption and inefficiency at both Entity and BiH level institutions.⁵³

⁴⁸ Srdjan Dizdarevic, 'The Need to Change the Constitution of Bosnia and Herzegovina' (2005) 1 (4-5) *Südosteuropa Mitteilungen* 90, 91.

⁴⁹ *ibid.*

⁵⁰ *ibid.* 92.

⁵¹ Provided that there is a bilateral agreement, approved by the Parliamentary Assembly between Bosnia and Herzegovina and that state governing this matter. See Bosnia and Herzegovina Constitution, art I(7)(d).

⁵² Roberto Belloni, 'Bosnia: Dayton Is Dead! Long Live Dayton!' (2009) 15 (3-4) *Nationalism and Ethnic Politics* 355, 359.

⁵³ For example, see David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press, 2000); Eldar Sarajlic, 'Bosnian Elections and Recurring Ethnonationalisms: The Ghost of the Nation State' [2010] (2) *Journal on Ethnopolitics and Minority Issues in Europe* 66; Robert M Hayden, 'Democracy' without a Demos? The Bosnian Constitutional Experiment and the Intentional Construction of Nonfunctioning States' (2005) 19 (2) *East European Politics & Societies* 226; Dejan Guzina, 'Dilemmas of Nation-Building and Citizenship in Dayton Bosnia' (2007) 9 (3) *National Identities* 217; Florian Bieber and Carsten Wieland, *Facing the Past, Facing the Future: Confronting Ethnicity and Conflict in Bosnia and Former Yugoslavia* (Longo 2005); Andrea Kathryn Talantino, 'Intervention as Nation-Building: Illusion or Possibility?' (2002) 33 (1) *Security Dialogue* 27; Charles G Boyd, 'Making Bosnia Work: A Report From the Field' (1998) 77 (1)

Rather than dwell upon these outcomes again, I focus on whether and how change has been brought about. In so doing, I look at the role played by international engagement in the implementation of the DPA, the activism of BiH's Constitutional Court, and the impact of the European Union. I also put the focus squarely on only one instance in which each of these mechanisms sought to break the deadlock of Bosnian politics as a way of assessing the opportunities and the limits therein.

1. *The International Arbitration of Brčko*

International engagement has been key in securing the implementation of the DPA. As early as 1997, the Peace Implementation Council representing all the international actors involved in the implementation of the DPA agreed, at a meeting in Bonn, to give its High Representative in Bosnia exceptional powers to ease implementation of the agreement and to remove from office any obstructionist Bosnian officials. These "Bonn Powers,"⁵⁴ as they came to be known, were instrumental at key moments such as when the High Representative unilaterally signed a law on citizenship in 1997 which allowed Serbs living in the FBiH and Bosniacs and Croats living in RS the right to vote for candidates and stand for election to the Presidency of BiH and the House of Peoples of the Parliamentary Assembly of BiH.

As regards territorial issues, however, international engagement is best illustrated by the international arbitration of Brčko, a Bosnian-majority strategic municipality, which is key to the territorial continuity of the RS as it divides the eastern and western parts of the Republic. The fate of Brčko, which according to the 1991 census was a microcosm of Bosnian ethnic heterogeneity, could serve as a harbinger of the future of Bosnia. Handed to the RS, it would seal the territorial dimension of ethnicity and the segregationist logic underlying it. Handed to the FBiH, it would signal the international community's intent to prevent RS from functioning as one. At Dayton and as neither party was willing to compromise, they ultimately agreed to have the territorial dispute settled by international arbitration. After placing the district under international supervision in 1997, the International Arbitral Tribunal for Brčko, led by Robert Owens a former legal advisor to the US State Department, issued a final award in 1999. It ruled that Brčko should become a democratic multiethnic unit of local government to be developed by the Office of High Representative (OHR) supervisory regime. The FBiH and RS would jointly hold the territory of the resulting Brčko District 'in condominium'.⁵⁵ This decision would yield a number of positive outcomes. Brčko saw a high rate of returns, its local institutions were multiethnic, its inhabitants could claim citizenship first in either

Foreign Affairs 42; Ulrich Schneckener, 'Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation' (2002) 39 (2) *Journal of Peace Research* 203; Roberto Belloni, 'Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina' (2004) 11(2) *International Peacekeeping* 334; Roberto Belloni, *State Building and International Intervention in Bosnia* (Routledge 2008); David Chandler, 'The Problems of 'nation-building': Imposing Bureaucratic 'rule from Above'' (2004) 17 (3) *Cambridge Review of International Affairs* 577; Nils B Weidmann, 'Violence and the Changing Ethnic Map: The Endogeneity of Territory and Conflict in Bosnia' (2009) Households in Conflict Network Working Paper 64, 2 <<https://ideas.repec.org/p/hic/wpaper/64.html>>; John W Hulsey, 'Why Did They Vote for Those Guys Again?' Challenges and Contradictions in the Promotion of Political Moderation in Post-War Bosnia and Herzegovina' (2010) 17 (6) *Democratization* 1132.

⁵⁴ For a comprehensive analysis of the Bonn Powers see, Tim Banning, 'The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Fingert' (2014) 6 (2) *Goettingen Journal of International Law* 259.

⁵⁵ Peter C Farrand, 'Lessons from Brcko: Necessary Components for Future Internationally Supervised Territories' (2001) 15 *Emory International Law Review* 229.

and then in both BiH Entities.⁵⁶ Yet, Brčko is by no means free from some of the ills that plague BiH. While under international supervision, the supervisory authorities intervened repeatedly to transcend differences. Brčko's local institutions of governance have suffered the same corruption as the rest of the country. As a result, promising signs of economic recovery soon became stunted and investments fled the District as they did the rest of BiH.⁵⁷

2. *The Constitutional Court and the Constituency of Peoples*

If international activism is credited for breaking the paralysis of the Bosnian political system and forcing the implementation of the DPA, BiH's Constitutional Court played an equally important role in attempting to reverse the strict ethno-territorial logic of Dayton. Most significant in this respect was the Court's 2000 decision on the constituency of peoples. This decision resulted from proceedings, instigated in 1998 by the then Chairman of the BiH Presidency, Alija Izetbegović who was seeking implementation of Art. XII.2 of the BiH Constitution according to which the Entities had to amend their respective constitutions to bring them in line with the BiH Constitution within three months of the latter's entry into force. Izetbegović argued that "the same provisions contained in the constitutions of entities, which violated the Constitution of BH and the overall Dayton Agreement, also discriminated against Bosnians and Croats in the Republic of Srpska (RS) and against Serbs in the Federation of Bosnia and Herzegovina (Federation of BH) by treating them as constituent peoples."⁵⁸

In its ruling on the matter, the court interpreted the Preamble of the BiH Constitution as affirming three normative principles⁵⁹: 1) the multi-ethnicity of the State and the fact that "territorial delimitation does not have to lead to institutional segregation and national homogenization within the State institutions,"⁶⁰ 2) the collective equality of the constituent people of BiH which was interpreted as "effective political participation in decision-making processes not only through individual equality in respect of the electoral right but also through the collective ethnic representation of the three constituent peoples,"⁶¹ and 3) the prohibition of discrimination de jure and de facto with retroactive effect.

This decision meant that Entities could not discriminate against any member of the three constituent peoples, particularly demographic minorities; nor could they grant special privileges to majorities. As a result, Serbs were included as constituent peoples in the FBiH while Bosniacs and Croats were recognized as constituent peoples in RS. The decision led to the reorganization of entity institutions and to the introduction of "mandatory quotas of representation in all parts of government for all three constituent ethnic groups in both entities [as well as] the introduction of the language and script of other constituent ethnic groups as official language" in all parts of BiH.⁶² Addressing the

⁵⁶ Alex Jeffrey, 'Building State Capacity in Post-Conflict Bosnia and Herzegovina: The Case of Brčko District' (2006) 25 (2) *Political Geography* 203.

⁵⁷ International Crisis Group, 'Brčko Unsupervised' (Europe & Central Asia Briefing No 66, International Crisis Group 8 December 2011) <www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/brcko-unsupervised> accessed 16 November 2015.

⁵⁸ Zlatan Begić and Zlatan Delić, 'Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing Fair Solutions' (2013) 11 (2) *International Journal of Constitutional Law* 447, 450.

⁵⁹ For a detailed discussion of the interpretation of these principles see Saša Gavrić and Damir Banović, 'Constitutional Reform in Bosnia and Herzegovina – Procedures, Challenges, Recommendations' (2010) 1 *Südosteuropa Mitteilungen* 60.

⁶⁰ *ibid* 66.

⁶¹ *ibid*.

⁶² *ibid* 60.

tension between individual and collective rights, the Court also ruled that the total exclusion of persons from the representative system gave rise to a violation of their individual political rights. This established the right of ‘Others’ to be represented in parliaments and administrative bodies. It is however worth noting that it took two years and the intervention of the OHR to enforce the amendments to the entities’ constitutions and create the space for institutional reorganization.

3. *The European Court of Human Rights: Sejdić & Finci v. Bosnia and Herzegovina*

Notwithstanding the 2000 Constitutional Court decision on the Constituency of Peoples, it would take another legal challenge to address the status of ‘Others’ in BiH. Indeed, in spite of the fact that, “as of 2002, seven seats out of 58 are reserved for ‘others’ in the Federation’s House of Peoples, while in the case of RS, national minorities are guaranteed four seats out of 28 in the Council of Peoples,”⁶³ national minorities continued to be denied one of the basic citizenship rights at the federal level of the state: the right to compete for office. The definition of Bosnia as a country of constituent peoples bars members of national minorities to run for office at the state presidency level, or to seek election to the BiH House of Peoples.

In summer 2006, two BiH citizens, Dervo Sejdić and Jakob Finci instituted proceedings before the European Court of Human Rights (ECtHR). They claimed that the Constitution and the Election law of BiH prevented them from running for Presidency and for the BiH House of Peoples solely on the ground of their Roma and Jewish origins. They relied on Articles 3 (prohibition of inhuman and degrading treatment), 13 (right to an effective remedy), and 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), on Article 3 of Protocol No. 1 (right to free elections), and on Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention.⁶⁴

As it sided with the plaintiffs, the Court stated that “The nature of the conflict was such that the approval of the “constituent peoples” (namely, the Bosniacs, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants’ preoccupation with effective equality between the “constituent peoples” in the post-conflict society.”⁶⁵ The Court highlighted that Bosnia and Herzegovina had undertaken to review and revise its electoral legislation according to EU standards when it became a member of the Council of Europe in 2002 and when it ratified the Stabilisation and Association Agreement with the European Union in 2008. Acknowledging that Sejdić and Finci had been victims of discrimination, the Court urged Bosnia to amend constitutional provisions regarding the election of the members of the House of Peoples and the Presidency. As I write, the 20th anniversary of the DPA has just been celebrated. But the implementation of the peace agreement is still overseen by a High Representative and the country has not yet made sufficient progress to be admitted into the EU.

Lessons learned

Negotiated at Dayton, the territorial restructuring of Bosnia was driven by strategic considerations.

⁶³ Guzina (n 53) 227.

⁶⁴ Samo Bardutzky, ‘The Strasbourg Court on the Dayton Constitution: Judgment in the Case of *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009’ (2010) 6 (2) *European Constitutional Law Review* 309, 317.

⁶⁵ Marko Milanovic, ‘Sejdić & Finci v. Bosnia and Herzegovina (Eur. Ct. H.R.)’, Introductory Note by Marko Milanović’ (2010) 49 (2) *International Legal Materials* 281.

Its primary purpose was to square the circle between the reality of ethnic segregation on the ground and the desire to rebuild a multi-ethnic Bosnia to prevent those responsible for ethnic cleansing from reaping the political rewards of their violent actions. As the political agreement was institutionalized into a new Constitution, including a set of rules and norms regulating the relationships between the two Entities and the central government, the negotiators decided to make the Constitution into an annex of the peace agreement. The provisions of the Constitution were thus as much if not more backward than forward looking. They established an ethno-territorial system of governance that resulted in the hardening of contentious ethnic identities, the capture of the state by ethnic entrepreneurs, and the subsequent inefficiency, instability, yet unexpected resiliency of the BiH. In conclusion, I consider the lessons of Bosnia for the way in which territorial cleavages ought to be handled in constitutional processes. I focus on two lessons: state capture and citizen loyalties.

1. *State Capture*

Commenting on the 2010 elections, long-term Bosnia observer Peter Lippman described the paradox of Bosnian politics as follows: “that while there is no reasonable alternative to peaceful change through electoral politics, the structural arrangements created by the Dayton constitution have created long-term paralysis. The primacy given by Dayton to ethnic categories, to the detriment of voters as citizens, lies at the root of this paralysis.”⁶⁶ The DPA has, indeed, facilitated the capture of the Bosnian state by ethnic entrepreneurs. Nowhere is this clearer than in an overview of party politics and electoral outcomes since 1995.

The international community viewed continuous, free, and fair elections as the road to BiH’s stability and recovery.⁶⁷ It spared no effort to ensure that elections in BiH, which involve a total of 15 simultaneous races,⁶⁸ would live up to international standards. International custodians of the DPA have also sought to de-nationalize politics by supporting multi-ethnic and moderate mono-ethnic parties. These efforts involved a mix of carrots and sticks: successive High Representatives have used the Bonn powers to place funding and political constraints on ethnonationalist parties while providing incentives, including technical assistance and public support, to parties seen to be more moderate.

In spite of it all, twenty years later, “multiethnic parties have met with very limited electoral success and moderate mono-ethnic parties have found electoral success primarily by radicalizing their political discourse to match that of nationalist parties.”⁶⁹ This pattern has endured in spite of attempts to tweak electoral rules.⁷⁰ To account for this, now “classic case of party politics gone wrong,” one must look at the impact of constitutional and electoral arrangements on party and voter

⁶⁶Peter Lippman, ‘Bosnia’s Politics of Paralysis,’ (*Open Democracy*, 19 October 2010)

<www.opendemocracy.net/bosnia%E2%80%99s-politics-of-paralysis/peter-lippman>.

⁶⁷ Commission on Security and Cooperation in Europe (United States Helsinki Commission), ‘Elections in Bosnia-Herzegovina, September 12–13, 1998’ (105th Congress 2nd Session, CSCE 1998)

<www.csce.gov/sites/helsinkicommission.house.gov/files/Bosnia1998elections.pdf>.

⁶⁸ The fifteen races are: the collective BiH presidency; the BiH House of Representatives; the presidency of the RS, the RS National Assembly; the Federation House of Representatives, and ten Federation cantonal races. In addition, there are municipal elections in which polls are organized in 145 municipalities.

⁶⁹ Hulsey, “Why did they vote for those guys again?” (n 53).

⁷⁰ See Carrie Manning, ‘Elections and Political Change in Post-War Bosnia and Herzegovina’ (2004) 11 (2)

Democratization 60; John Hulsey, ‘Electoral Accountability in Bosnia and Herzegovina under the Dayton Framework Agreement’ (2015) 22 (5) *International Peacekeeping* 511.

behaviour.⁷¹

By organizing politics around ethnicity, the Dayton Peace Agreement and the BiH Constitution created the conditions for the persistence of ethnonationalist parties. Bosnia observers acknowledge that while the country's party system is well-consolidated and competitive, it is still largely based on ethnicity and competition takes place "between parties of one ethnicity, frequently within electoral constituencies that are ethnically homogeneous."⁷² Although they vote in 15 simultaneous races, many of these races do not pit parties or candidates belonging to the three constituent peoples against each other. This is what Hulseley describes as monoethnic non-competitive electoral competition, i.e. . "positions where a constituency either de facto or de jure represents only one ethnic group and in which elected representatives are not in direct competition for resources with elected representatives of other ethnic groups."⁷³ If nationalism is the result of either intense competition or a security dilemma pitting the three Bosnian constituent peoples against one another, monoethnic non-competitive constituencies should be best placed to produce non-nationalist parties as there are no ethnic 'others' against whom to campaign.⁷⁴ In contrast, monoethnic competitive contexts are contexts where the constituency is monoethnic but where the elected representative "is in direct competition with representatives of other ethnic groups. For example, the members of the presidency are allocated to each ethnic group but sit on a presidential council and vote with the other two members of the presidency."⁷⁵ These contexts usually encourage outbidding as various parties try to win votes by positioning themselves as the true defenders of the community, the so-called 'ethnic tribune' effect.⁷⁶ In other words, within each Entity, parties will run on the basis of political programs that address needs and wants; they position themselves against other parties representing the same constituent people. However, as they move onto the larger Bosnian political sphere, parties present themselves as champions of their own community's political project and become more ethnonationalist.

That this pattern exemplifies the logic of the system, which drives parties to adopt an ethnonationalist attitude to maintain themselves in power, is best illustrated by the trajectories of the Stranka Nezavisnih Socijal Demokrata (Alliance of Independent Social Democrats, SNSD) and the Stranka za Bosnu i Hercegovinu (Party for Bosnia and Herzegovina, SBiH). SNSD and SBiH were respectively the junior partners of the Serbian SDS and the Bosniac SDA; they fought the dominant ethnonationalist parties for community votes but also entered into coalitions with them. By the 2000 election, both parties had garnered sufficient electoral support and presented themselves as moderate nationalist alternatives to the SDS and SDA; they gained substantial international support and joined the 'Alliance for Change'. After a period during which their electoral fortunes fluctuated, both resurged in the 2006 elections, a resurgence which coincided with a nationalist turn in both parties.⁷⁷

⁷¹ Hulseley, 'Electoral Accountability in Bosnia and Herzegovina under the Dayton Framework Agreement' (n70).

⁷² Hulseley, "Why did they vote for those guys again?" (n 53) 1138.

⁷³ Three electoral contexts coexist in Bosnia: monoethnic, non-competitive; monoethnic competitive; and multiethnic. '*Multi-ethnic constituencies* are those where the representation of any particular group is not fixed and is an open competition involving voters of more than one ethnic group' (Italics added). See *ibid* 1141.

⁷⁴ John Garry, 'Consoationalism and its Critics: Evidence from the Historic Northern Ireland Assembly Election 2007' (2009) 28 *Electoral Studies* 458, cited in Hulseley, 'Why did they vote for those guys again?' (n 53) 1141.

⁷⁵ Hulseley, 'Why did they vote for those guys again?' (n 53)1141.

⁷⁶ Paul Mitchell, Geoffrey Evans, and Brendan O'Leary, 'Extremist Outbidding in Ethnic Party Systems is Not Inevitable: Tribune Parties in Northern Ireland' (2009) 57 (2) *Political Studies* 397.

⁷⁷ Hulseley, 'Why did they vote for those guys again?' (n 53) 1136.

The Dayton Peace Agreement did not only produce an electoral system that favors ethnonationalist politics, it also provided parties that gain political power with access to the resources of the State and with a wide patronage network. Article 9(3) of the Constitution of Bosnia and Herzegovina mandates that government appointments be generally representative of the population of Bosnia and Herzegovina. This opens the doors for politicians to use the quota system to appoint their supporters to government positions. According to a 2014 International Crisis Group report, “party leaders are said to exercise power through subordinates in posts at all levels of government, who in turn have an array of tools for directing money and jobs to chosen targets. Regulatory authority can be used to open business opportunities, block competitors and increase or decrease real estate value.”⁷⁸ Control over essential economic resources is another important tool of state capture. Bosnia’s wartime ethnonationalist parties seized control of the “most lucrative assets in their respective territories, including utilities, transportation networks, and industrial enterprises.”⁷⁹ And in spite of a transition to a market economy, “Government has retained large shares in a vast number of privatised firms, can name their executives and directors and influence hiring. This is especially true in the big-money areas: energy, telecommunications, infrastructure construction, banking and forestry.”⁸⁰

Says Peter Lippman, “the ethno-nationalist dimension is more a tool than an immutable reality. Many of Bosnia’s voters and political observers alike understand that politics in Bosnia-Herzegovina is about power and profit rather than ethnic animosity. Indeed, few of Bosnia’s post-war leaders have escaped being tarnished by some corruption scandal or abuse of authority.”⁸¹ In a country where unemployment reaches 40%, “politics is a cash cow and politicians are among the highest paid in Europe in comparison to the salaries of the rest of the population.”⁸² Politics does not only profit politicians financially; observers contend that, while Bosnia is consistently ranked near the bottom of international rankings on ease of doing business, “government officials circumvent regulations to operate the economy in a complex, informal system of patronage and corruption.”⁸³

Beyond electoral politics and control of the economy, the most telling sign of state capture may be the emergence of an extremely powerful informal institution, the Šestorka (sextet). This self-selecting informal coalition includes the leaders of the two major political parties of each community.⁸⁴ As these all-powerful men need not be office holders, their power is not matched with equivalent accountability. The Šestorka has become the major interlocutor of the international community and, according to some, the real government of Bosnia. Says the ICG, “When

⁷⁸ *ibid.*

⁷⁹ International Crisis Group, ‘Bosnia’s Future’ (Europe Report No 232, International Crisis Group 10 July 2014) 13, <www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/bosnia-s-future>.

⁸⁰ International Crisis Group, ‘Federation of Bosnia and Herzegovina – A Parallel Crisis’ (Europe Report No 209, International Crisis Group 28 September 2010) 2-3, <www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/federation-bosnia-and-herzegovina-parallel-crisis>.

⁸¹ Lippman (n 66).

⁸² Heather McRobie, ‘Breaking the Old Narratives of Bosnia’ (*Prekarious Europe*, 20 September 2014) <www.precariousEurope.com/power/breaking-narratives-bosnia>.

⁸³ ‘In 2013, Bosnia was 131st in the World Bank’s Doing Business ranking, third worst in Europe. In such areas as “Starting a Business” and “Dealing with Construction Permits”, it is among the world’s worst, 174th and 175th respectively, and sinking (2014 rankings).’ International Crisis Group, ‘Bosnia’s Future’ (n 79) 13.

⁸⁴ According to the ICG, the six leaders are Sulejman Tihić (SDA), Zlatko Lagumdžija (SDP), Milorad Dodik (SNSD), Mladen Bosić (SDS), Dragan Čović (HDZ) and Martin Raguž (HDZ 1990). At times, a third Bosnian patriot is a seventh Group member (making it a sedmorka). In 2006, Čović was convicted in for wrongly exempting a company of import duty while FBiH finance minister. He was ultimately retried and acquitted of all charges. *ibid.* 11.

international officials want to negotiate an important issue with Bosnia's leadership, these are the men they call."⁸⁵ No decisions are taken without the Šestorka's approval. It has a say on the distribution of senior government posts and on the formation of governing coalitions; it controls election lists. However "the Group's most important task may be dividing spheres of influence: control over public utilities, privatisation, concessions, state-owned banks, government tenders and other sources of revenue and patronage."⁸⁶

2. *Citizens' Loyalties*

"He who sows hunger reaps anger." Such was the graffiti one could find on the walls of Sarajevo in February 2014 as Bosnia witnessed a country-wide wave of popular protests against the corruption and stagnation. Originating in the northern industrial city of Tuzla and quickly spreading to major cities and towns, the protests were met by police brutality. While the political elites sought to dismiss the movement as hooliganism, protesters who took part in this 'Bosnian Spring' accused the elites of "pursuing their own interests and stirring ethno-nationalist tensions for political gain at the expense of providing essential services for all their citizens."⁸⁷

The mobilization gave rise to a new phenomenon, 'plenums' or public assemblies in which citizens exercised direct democracy and articulated their demands. However, no sooner had the plenums begun to organize that the country was hit by severe flooding; this national emergency brought the protest movement to a halt. Both the short-lived timespan of the mobilization and the natural disaster that followed complicate the assessment of the movement and of its transformational potential. Citizens did score some successes as the prime ministers of cantonal governments in Sarajevo, Tuzla and Zenica resigned. The protests and the plenums resurrected hopes for citizen-led reforms but they did not result in major changes. In fact, Lena Pasic makes the important point that, in spite of claims that the protests amounted to a sort of a 'Bosnian spring,' "Social unrest in February was mainly in the Federation, and although citizens and students in Republika Srpska also decided to voice their grievances, they were not connected with the citizens' groups in the other entity."⁸⁸

On 12 October 2014, Bosnians voted in the country's sixth general election amidst heightened expectations regarding political participation. After all, not only had the year witnessed the first widescale citizen mobilization movement, this was also the first election in which the post-war generation would have the right to vote. Nevertheless, "the statistics on voter turnout showed that civil mistrust of democratic institutions and the country's political representatives remain[ed] high – election turnout was only 54.14%, lower than during the 2010 elections."⁸⁹ True to the pattern established since the DPA, the October 2014 elections brought nationalist parties back into power, the only exception being the victory of Mladen Ivanic, from the opposition party in Republika Srpska, who won the Serbian seat in the Presidency.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ McRobie (n 82); see also Chiara Milan, 'Sow Hunger, Reap Anger' (*Roar Magazine*, 9 February 2014) <<https://roarmag.org/essays/bosnia-protests-tuzla-workers/>>.

⁸⁸ Lana Pasic, 'Protests, Floods, Elections, Anniversaries, and Arrests: Reflecting on Bosnia's Main Events of 2014' (*Balkan Analysis*, 14 January 2015) <www.balkananalysis.com/bosnia/2015/01/14/protests-floods-elections-anniversaries-and-arrests-reflecting-on-bosnias-main-events-of-2014/>.

⁸⁹ *ibid.*

It would thus seem that, not only does the system incentivize parties to adopt a nationalist rhetoric if they want to gain and maintain power, it also incentivizes voters to give preference to ethnonationalist parties over more moderate, nationalist or mixed, alternatives. To understand why voters keep going back, to paraphrase the title of John Hulsey's article, one must understand that voters usually cast votes in simultaneous monoethnic non-competitive, monoethnic competitive and sometimes multi-ethnic races. "For example, a Bosniak voter from a canton with a majority Bosniak population in the Federation votes for the Bosniak member of the state-level presidency (a monoethnic, competitive context), the state-level parliament (multi-ethnic), the Federation parliament (multi-ethnic) and the Cantonal Assembly (monoethnic, non-competitive) all during the same visit to the ballot box."⁹⁰ In other words, the campaign that leaders wage in one specific race impacts voter decisions across races. And while voters do not necessarily like Bosnia's political parties, with only 17% expressing willingness to join one in a 2013 PRISM survey,⁹¹ they understand that, in monoethnic competitive and multiethnic contexts, a vote for a non-ethnic or multiethnic party is construed as weakening one's ethnic community.

Yet, as discussed in the preceding section, it is precisely ethnonationalist parties that control access to employment. Furthermore, it is membership in a constituent people which, according to the terms of the DPA, entitles people to specific benefits and rights. Putting two and two together, "people continue to vote for nationalist parties, not necessarily because they wish to return to the politics of genocide and ethnic polarization, but because these parties can deliver the means of sustenance. As long as what happens at the ballot box does not shake the nationalist parties' influence in this area, they will remain strong."⁹²

3. *Dayton, a model or a cautionary tale?*

It has been twenty-two years since the DPA was negotiated. The agreement dealt with territorial cleavages in a way that yielded a set of complicated institutional arrangements that allowed Bosnia's main political actors to pursue their political projects. Officially Serbs, Croats and Bosniacs are citizens of the same country; the reality is more complicated. The DPA may have ended the war; it did not solve the fundamental disagreement over the nature of the state. The RS leadership still intermittently threatens partition; Croat leaders have on occasion demanded their own entity; and some, though not all, Bosniac politicians have called for the total abolition of the entities while others have adopted a clerical nationalism strongly supported by the Reis Mustafa *efendija* Cerić (head imam of Bosnia's Muslim community).⁹³ As Dayton forbids secession and as any change to the entity system requires consensus among all three constituent peoples lest one of them use their veto right, none of these proposals is likely to see the light any time soon. The ongoing fundamental disagreement about the nature of the state is at the heart of Bosnia's paralysis. "For the past decade, the country has drifted. Bosnia currently has one of the highest youth unemployment rates in the world, according to World Bank statistics."

⁹⁰ Hulsey, 'Why did they vote for those guys again?' (n 53) 1141.

⁹¹ 'More than 87 per cent expressed little or no confidence in parties, with scant difference among regions or groups (though slightly greater Croat confidence). 86 per cent blamed politicians for BiH problems. Croats, at 23.6 per cent, were most willing to join a party.' PRISM Research survey, May 2013, cited in International Crisis Group, 'Bosnia's Future' (n 79) 12.

⁹² Julian Borger, 'Bosnia's bitter, flawed peace deal, 20 years on' *The Guardian* (Bosnia-Herzegovina, 10 November 2015) <www.theguardian.com/global/2015/nov/10/bosnia-bitter-flawed-peace-deal-dayton-agreement-20-years-on>.

⁹³ Lippman (n 66).

Yet, not only do nationalists consistently win at the polls, when asked in a recent survey, most Bosnians said they would vote for Dayton had there been a referendum for the DPA today. In fact, “across all ethnic groups a minority — only 28 percent — say they would have definitely or probably voted against Dayton in 2013. Bosnian Serbs [who were initially opposed to the agreement] are seven times more likely to say they would vote for the agreement than would oppose it.”⁹⁴ It is however important not to interpret this support as an unreserved endorsement. In fact, two-thirds of the Serb respondents also said they would support Republika Srpska’s full independence while the Bosnian Muslims are polarized “about whether or not Dayton’s broader compromise was and is a good thing.”

Academics are sharply divided on whether Bosnia is a model or a cautionary tale. Julian Borger quotes Marko Attila Hoare, a British historian of Bosnia, as saying “Thanks to Dayton, Karadžić’s Serbs snatched a victory from the jaws of defeat, the Republika Srpska was consolidated and Bosnia was condemned to permanent dysfunction.”⁹⁵ Borger himself argues that Dayton “spawned a political system that is a cash cow for politicians,” a system that is both self-serving and self-perpetuating.⁹⁶ Edward Morgan-Jones and his co-authors acknowledge that, although the agreement did not just aim to secure the end of violence but also to protect human rights and cooperation, ethnic divisions and fragmentation prevented these goals. Yet, they conclude that “despite the caveats, . . ., Bosnia’s citizens appear to have accepted Dayton as the best compromise available. And despite the common narrative of “ancient ethnic hatreds,” perhaps Bosnia stands for the possibility that post-conflict societies needn’t always be hostages to their past.”⁹⁷

However, Bosnia’s most enduring lesson regards the potential for change once a system so complex and intricate is established. Twenty years of international efforts to manipulate carrots and sticks and weaken the hold of nationalist parties on power have failed to achieve their objective. The reason is the twin impact of Bosnia’s constitutional and political context. The DPA sought to address Bosnia’s de facto partition while at the same time ensuring the country’s territorial integrity. The result was a complicated arrangement which profited nationalist parties. These parties have, in turn, perpetuated and exploited ethnically defined security dilemmas. By threatening partition or centralization, perpetuating uncertainty about the country’s political and economic future, they have managed to “trump the incentives for change created by institutional and electoral reform.”⁹⁸ As a consequence, Bosnia is as resilient and stable as it is dysfunctional. Thus lies the paradox of Bosnian politics as aptly stated by Lippman: “that while there is no reasonable alternative to peaceful change through electoral politics, the structural arrangements created by the Dayton constitution have created long-term paralysis. The primacy given by Dayton to ethnic categories, to the detriment of voters as citizens, lies at the root of this paralysis.”⁹⁹

⁹⁴ According to survey results, 42% of Bosnia’s Serbs would definitely vote for Dayton, only 9 percent would vote against it. Croats are the least enthusiastic group with 37% not sure if they support the DPA and 22% who would either probably or definitely vote against it. Edward Morgan-Jones, Neophytos Loizides and Djordje Stefanovic, ‘20 years later, this is what Bosnians think about the Dayton peace accords’ *The Washington Post* (Monkey Cage, 14 December 2015) <www.washingtonpost.com/news/monkey-cage/wp/2015/12/14/20-years-later-this-is-what-bosnians-think-about-the-dayton-peace-accords/?utm_term=.71d3f7dce4d2>.

⁹⁵ Borger (n 92).

⁹⁶ *ibid.*

⁹⁷ Morgan-Jones, Loizides and Stefanovic (n 94).

⁹⁸ Carrie Manning and Miljenko Antic, ‘The Limits of Electoral Engineering’ (2003) 14 (3) *Journal of Democracy* 56.

⁹⁹ Lippman (n 66).

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CONTRIBUTING ORGANIZATIONS

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