

# Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes

Jens Woelk

## Introduction

The basis for federalism in Bosnia-Herzegovina<sup>1</sup> is rather peculiar due to the unique complexity of the situation: a multiethnic population consisting of three major groups (Bosniaks/Muslims, Croats and Serbs) and a number of smaller minority groups,<sup>2</sup> the experience of “ethnic federalism” in former Yugoslavia, the democratisation and transition to a free-market and liberal-democratic system, and the post-conflict situation characterized by massive intervention of the International Community.

After more than three years of war, military intervention by NATO finally ended the Bosnian War in 1995. It had been characterized by brutal atrocities against the civilian population for the purpose of “ethnic cleansing”,<sup>3</sup> and the International Community’s<sup>4</sup> most important short-term objective was creating security through stability. This was to be accomplished by physical reconstruction as well as by preserving Bosnia and Herzegovina as one country. For this purpose, a peculiar federal system was established that forced the former

---

<sup>1</sup> In the following also the abbreviated forms “Bosnia“ or “BiH” will be used for referring to the State of Bosnia and Herzegovina.

<sup>2</sup> Bosnia and Herzegovina was rightly described as a “Yugoslavia in miniature” on account of its demographic structure: in the last census, 1991, Muslims (according to the Yugoslav terminology, since the 1990’s fallen into disuse and substituted by “Bosniaks”) comprised 43.7%, Serbs 31.45% and Croats 17.3% of the population, while 5.5% considered themselves “Yugoslavs”. In addition to the three largest ethnic groups members of other nations and nationalities (according to the terminology of communist constitutional law) lived in the country and were entitled to equality under the Constitution. However, none of these groups was settled in a separate, territorially defined or closed area.

<sup>3</sup> Mainly through air-strikes in summer 1995. The war left more than 110,000 people killed or registered as missing, led to the displacement of an estimated 1.8 million persons and to extensive physical and economic destruction. The long siege of Sarajevo and the massacre of Muslim men in Srebrenica shook the world’s public opinion.

<sup>4</sup> Despite its generic character and reference to a wide variety of international organizations and NGOs, the term “International Community” is generally used as an umbrella term in South Eastern Europe. It creates a clear - psychological, *de jure* and *de facto* - distinction between “internationals” (members of the international organizations) as opposed to “locals” (citizens of States in the Balkans), which reminds of the distinction between “Masters” and “natives” in the colonial epoch. Due to its direct or indirect powers of intervention, especially after conflict (such as in Bosnia, Macedonia and Kosovo), the “International Community” is often perceived as quasi-legal person; the term also suggests a uniform approach by one subject (which too often, however, is not matched by reality).

warring parties together, made them recognize each other, and provided for some common institutions.<sup>5</sup> However, the International Community's medium-term objective went far beyond merely overcoming the direct consequences of war: it was to create a viable state in which all ethnic groups could live peacefully together and the rights of all citizens were effectively guaranteed. This objective was seen as the essential precondition for reaching the long-term goal of Bosnia's integration into the European Union (EU) as an equal member.<sup>6</sup> These objectives required a functioning state, and in the daunting task of state-building, federalism was seen as an essential tool.

Bosnia's path towards accession to the EU was complicated by its triple transition. Like the countries of Central and Eastern Europe after the fall of Communism, Bosnia was also undergoing profound changes in the processes of democratization and transformation into a free-market economy. Unlike the Central and Eastern European countries, however, its multiethnic society and the legacies of war and ethnic cleansing posed additional problems for physical and institutional reconstruction, and thus for state-building.<sup>7</sup>

This is why the basic focus of this volume - namely, constitutional change from below, with change and development brought about by constituent units or federated entities - has to be reframed for the Bosnian case, where, at least so far and in line with historical experience, change has been brought or even imposed by external forces. This peculiar situation can only be explained by a number of paradoxes, underlying and conditioning the process of state-building in Bosnia as well as the evolution of its federal system. The basic paradox is plainly visible in the tensions and dysfunctional features created by the two fundamental but

---

<sup>5</sup> While the goal of Bosnian Serbs had been independence of "their" self-proclaimed *Republika srpska* (Serb Republic) for, at a later stage, possibly joining Serbia proper, and the Bosnian Croats had also hoped to create an autonomous territorial unit of their own in Herzegovina in order to prepare for joining Croatia in future, only the third major group, the Muslim-Bosniaks, shared and supported the International Community's objective of preserving Bosnia-Herzegovina's statehood and territorial integrity.

<sup>6</sup> A Stabilisation and Association Agreement (SAA) has been concluded between BiH and the EU in Luxemburg, on 16 June 2008; it is a clear expression of interest in Bosnia's future membership.

<sup>7</sup> On the differences between post-communist transition in CEE and SEE, see Judy Batt, *Introduction: the stabilisation/integration dilemma*, in Judy Batt (ed.), *The Western Balkans moving on*, Chaillot Paper n. 70 (Paris: EU Institute for Security Studies, October 2004), pp. 7-20 [www.iss-eu.org].

contrasting objectives of the International Community: stability through territorialisation and institutional entrenchment of ethnicity, on the one hand, and reconstruction of a multinational state,<sup>8</sup> on the other.

The following chapter illustrates the main paradoxes of state-building in Bosnia-Herzegovina as well as the evolution from a post-war situation towards the objective of European integration, analyzing the constitutional change this brought about. The decisive questions are whether it shall be possible to build a viable and sustainable multinational federal state on these paradoxes, what are the incentives for doing so, and where might change come from? As of 2010, the agents of change have mostly been external. The challenge for Bosnia-Herzegovina in order to become a sustainable multinational state is therefore reaching consensus and rallying support for this state from within its borders.

### International Imposition Rather than Domestic Legitimacy of the Constitution

Some months after NATO's air strikes, in November 1995, a Peace Agreement was negotiated at a U.S. Air Force base in Dayton, Ohio, which guaranteed the unity of the State of Bosnia-Herzegovina in a federal arrangement.<sup>9</sup> The "State" of Bosnia-Herzegovina is identical in its territorial extension with the former Yugoslav Republic of Bosnia-Herzegovina and consists of two "Entities", the *Republika Srpska* (Serb Republic, RS) and the Federation

---

<sup>8</sup> While the sociological concept of a "multiethnic society" is related to a society characterized by the presence of different ethnic groups and their interaction, in legal terms, a "multiethnic State" is based on the legal recognition of an ethnically diverse population. However, it depends on the general orientation of the constitutional system whether by consequence of this recognition (ethnic) diversity is guaranteed and protected or even promoted: according to the classic liberal constitutional approach, only individual rights are recognized; in a "promotional" system, members of minority groups can also exercise specific rights, in particular regarding language use, religion or political participation. The peculiar feature of a "multinational" system, as a subspecies of a "multiethnic" system, is legal and institutional parity of its (constituent) groups independent from their social or demographic situation. See for these concepts in particular Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in Tiziano Bonazzi/Michael Dunne (eds.), *Citizenship and Rights in Multicultural Societies*, Keele 1995, pp. 206-210.

<sup>9</sup> The Dayton Peace Agreement (DPA) was signed in December 1995 in Paris; see for the "General Framework Agreement of Peace – GFAP" ([http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380)).

of Bosnia and Herzegovina (FBH). Both Entities had been founded during the war as “states” with proper constitutions and full-fledged, state-like institutional systems; thus, the Entities are actually older than the current state of which they are compound units. The RS had been proclaimed on April 7, 1992 as a separate State of Serbs in a clear act of secession.<sup>10</sup> The Constitution of the FBH had been adopted in June, 1994, on the basis of the Washington Agreement of March, 2004, which brought an end to the hostilities between Croats and Bosniaks and provided the foundation for a federal system.<sup>11</sup>

The construction of the State of Bosnia-Herzegovina reflects the logic of a cease-fire: in order “to end a war”,<sup>12</sup> it was necessary to avoid creating winners or losers, no side should gain anything. This approach led to a package deal with the warring parties, as well as to the partition of the territory according to the situation on the battlefield (after the international air strikes): 51% for FBH, 49% for RS. The cease-fire line became the “Inter-Entity Boundary Line – IEBL” which mirrored the position of the troops on the ground at the end of war but did not take into account other factors that were important for the reconstruction and development of the country, such as demographic, geographical, and economic considerations. International (i.e. American) pressure was decisive for the conclusion of the Dayton Peace Agreement (DPA), which was signed by the three Presidents of Bosnia-Herzegovina (A. Izetbegović), Croatia (F. Tudjman) and Yugoslavia (S. Milošević): thus, the three warring groups (Bosniaks, Croats and Serbs) were all represented, but there was no direct recognition of RS or FBH, which would have been in contrast with the IC’s main objective of continuity and unity of Bosnia as a State.

The objective of keeping Bosnia together also explains why the Presidents of the neighbour States, Croatia and Serbia, were involved in the agreement, even though they were

---

<sup>10</sup> Prior to BiH’s independence, in a referendum held on 1 January 1992, i.e. after and in response to the referendum on the independence of BiH as a whole, in which practically only Bosniaks and Croats took part.

<sup>11</sup> The Washington Agreement has been signed on 1 March 1994 (see text at: [http://www.usip.org/library/pa/bosnia/washagree\\_03011994\\_toc.html](http://www.usip.org/library/pa/bosnia/washagree_03011994_toc.html)); cf. N. Malcolm, *Bosnia. A Short History*, Basingstoke and Oxford, 2002, pp. 253 ff.

<sup>12</sup> R. Holbrooke, *To end a war*, Random House, New York, 1999, p. 292 ff.

not directly and formally representing combatants in the conflict.<sup>13</sup> Their inclusion was meant to dissuade them from further intervention into Bosnian affairs as well as to secure *de facto* approval within the Entities (being Croats and Serbs in Bosnia represented by the Heads of their respective kin-States).

While the involvement of neighbours and the pressure of the International Community (IC) were crucial for the International Peace Treaty, which consisted of a long list of 11 annexes on various military and civilian issues, among them the Constitution of the State (annex 4 of the DPA), there was no involvement of Bosnian citizens at all. Although it is the basis for reconstruction and normalization, the “Dayton Constitution” has never been directly approved by the population of BiH; even now, an official version of the English document in local language(s) does not even exist.<sup>14</sup> It is no wonder that under such conditions there is not much acceptance of this Constitution, either by the population or by local politicians.

### Bosnian Federal Geometry: Three Peoples, Two Strong Entities, One Weak Centre

---

<sup>13</sup> The International Court of Justice (ICJ), which deals with controversies between States (while the International Criminal Tribunal for the former Yugoslavia, ICTY, holds specific individuals criminally responsible), was faced with Bosnia’s claim that Serbia was responsible for the Srebreniça massacre. Although the ICJ ruled that genocide had taken place, it decided that Serbia was not responsible under international law; ICJ, judgment of 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). However, the Court also found that Serbia had violated its obligation under the Genocide Convention to prevent genocide in Srebreniça and that it has also violated its obligations under the Convention by having failed fully to co-operate with ICTY. In late March 2010, Serbian Parliament passed a resolution condemning the massacre and apologizing for Serbia not doing more to prevent the tragedy.

<sup>14</sup> This has given rise to controversies regarding some parts of the version published on the website of the High Representative of the IC ([www.ohr.int](http://www.ohr.int)) regarding their conformity with the original text adopted in Dayton and Paris. However, so far there has been no publication of an authorized translation of the Constitution in the Official Gazette of the country. – Although linguistically very close to each other and even known as “Serbo-Croatian” in former Yugoslavia, the official languages of BiH are nowadays three, known as “B-C-S”: Bosniak, Croatian and Serbian. Despite some smaller differences, people usually understand each other perfectly; however, reversing the famous saying by the linguist Weinrich (“a language is a dialect with an army and a navy”), currently, a politically steered process of linguistic differentiation takes place. By highlighting the existing and by deliberately introducing new differences, three distinct languages shall be created in order to strengthen the distinct “national” character of the three constituent groups in Bosnia.

The Constitution recognizes the pre-existing constituent units, RS and FBH, as “Entities” (not Member-“States”)<sup>15</sup>. Their institutional design is strongly asymmetrical: while the RS is organized as a centralized and unitary system, the FBH is itself a federal system,<sup>16</sup> consisting of ten Cantons (homogenous in ethnic terms, only two are “mixed”) with a wide range of powers and their own constitutions.

Bosnia’s federal system is based upon the constituent role of these Entities which are vested with the residual powers and exercise all powers and functions that are not expressly assigned to other authorities (art. III.3.a Const.). Their dominant position within the system is best demonstrated in the field of foreign affairs, where the Entities are able to establish and maintain independent relations with neighbouring States, including agreements with these States and with international organizations.<sup>17</sup> This obviously preserves and facilitates the “special relations” between RS and Serbia as well as between FBH (in particular Herzegovina) and Croatia.<sup>18</sup> But it is above all the close-to-complete fiscal and financial autonomy of the Entities that permits their independent action. Regarding the necessary support of the central government, the BiH Constitution only contains basic principles providing that 1/3 of its resources have to be borne by the RS and 2/3 by the FBH.<sup>19</sup>

Both Entities have created complete state-like institutional structures with a President, a government, legislative institutions, and a judicial system. While initially the RS had only one Parliamentary chamber, the National Assembly, whose members were elected by a proportional electoral system, the federal structure of FBH has always been reflected by its

---

<sup>15</sup> In fact, the abstract term “Entities” shall avoid any reference to a “State”-like character of these territorial units.

<sup>16</sup> In fact, the term “federal” in Bosnia is reserved for the FBH, while the federal level is referred to as “State” and its institutions are the “Common Institutions” compared to those of the Entities. In the same way, “sub-national” is inappropriate for referring to the Entity-level, as Bosnia is a “multi-national” State, i.e. composed of three “constituent peoples” and the Entities are not supposed to be ethnically homogenous; in addition, already the name of the State – “Bosnia and Herzegovina” – is composite.

<sup>17</sup> These relations or agreement are subject to the approval by the State Parliament (art. III.2.d) and are counterbalanced by the obligation of the Entities to provide the necessary support to the central government necessary for the respect and the implementation of international obligations (art. III.2.b).

<sup>18</sup> In fact, such agreements have been concluded between FBH and Croatia in 1998 and between RS and the then Federal Republic of Yugoslavia in 2001.

<sup>19</sup> Articles III.2.b and VIII BiH Constitution.

bicameral system consisting of a House of Representatives and of a House of Peoples, the latter representing the interests of the ten Cantons.<sup>20</sup> The equal constitutional status of Bosniaks and Croats in the FBH is symbolically expressed by the rotation between President and Vice-President of the two Houses as well as in the office of Prime Minister of that Entity. However, despite their strong position vis-à-vis the State of Bosnia-Herzegovina, neither RS nor FBH has been able to control effectively all of the respective territory. The highly decentralised cantonal structure of FBH facilitated the creation of parallel institutional structures, the preservation of Croat military units as well as direct political, institutional, and financial relations with Croatia.<sup>21</sup> In the RS, political centralisation has not been matched with geographical integration, as the latter Entity consists of two separate areas that are connected only through the city of Brčko in Northern Bosnia. Due to its strategic importance, in 1999 the Brčko-District was declared a territory under direct international administration in an international arbitration award.<sup>22</sup>

According to the original design of the Dayton Peace Accord, the powers of the State of Bosnia-Herzegovina are rather modest, extending only to foreign policy, foreign trade relations, customs, currency, refugee policy, some elements of financial policy, prosecution of crimes, air-traffic control, and communications (art. III.1.). Further functions and powers can be transferred by agreement between the Entities, which are also responsible for the budget of the “Common Institutions”. Thus, these institutions were from the outset “underdeveloped” compared to those of the Entities. The Head of the State is a tripartite Presidency (art. V.2) whose members, one for each constituent people, are directly elected and rotate in the office of the acting President. Each of them is vested with civilian command authority over the

---

<sup>20</sup> The 74 members of the House of Peoples are elected by the Cantonal assemblies; quotas guarantee the equal representation of Bosniaks and Croats (30 members each, plus 14 “Others”).

<sup>21</sup> F. Bieber, *Governing Post-War Bosnia and Herzegovina*, in K. Gál (ed.), *Minority Governance in Europe*, (2002), p. 328 ff.

<sup>22</sup> Brčko Arbitration Tribunal for Dispute over Inter-Entity Boundary in Brčko Area, *Final Award* (5 March 1999), para. 1 e 11, attributed Brčko a status similar to the District of Columbia in the USA, but with an international supervisor.

armed forces.<sup>23</sup> The Presidency nominates the Council of Ministers after approval by the House of Representatives (art. V.4). The weak position of the government is already apparent in the lack of a separate constitutional article dealing with it: it is, in fact, part of the article on the Presidency. The Constitution expressly mentions only two Ministries (foreign affairs and foreign trade relations); only after 2000 were further Ministries added, so that by 2010 there were nine.

From the perspective of the structural elements characteristic of a federal system,<sup>24</sup> in Bosnia-Herzegovina there are certainly two orders of government each acting directly on their citizens (the Constitution even recognizes distinct citizenships of the State and the Entities (art. I.7), but there also remain questions about the voluntary adherence of the constituent units because the State of Bosnia-Herzegovina has been established and is mainly held together due to pressure from beyond its borders. Regarding the distribution of legislative and executive authority, the asymmetry between the constituent units (the one federal, the other unitary) is striking, and the weakness of the underdeveloped State institutions seems to be the expression of a bare minimum of a State. This is particularly true given the initial lack of State powers regarding defense, as well as the total dependence of the State on financial transfers from the Entities; both, defense and resources, were mainly guaranteed by the International Community itself. The dominant position of the Entities as holders of the residual powers vis-à-vis the limited list of State powers and correspondingly weak “Common Institutions” has required a gradual increase of State functions in order to create efficient and functional institutions. Important examples include the creation of a single army at the State level as well as the creation of self-generated financial resources for the State with the introduction of a value-added tax (VAT) in 2006. The participation of the constituent units in the decision-making process of the State is guaranteed through a second chamber for the representation of

---

<sup>23</sup> The candidates for office have to declare their group-affiliation and are elected in “their” territories: the Serb member is elected by voters in RS, the voters of FBH elect the Bosniak and Croat member.

<sup>24</sup> According to the generally common structural characteristic elements of a federal system as identified by Ronald L. Watts, *Comparing Federal Systems*, 2<sup>nd</sup> ed., Montréal et al. 2001, p. 7.

territorial interests which also participates in amendments of the State Constitution; however, already its denomination as “House of Peoples” is an indicator for the predominant importance of the ethnic interests of the three peoples in this institution. Although a supremacy clause does guarantee the legal integration of BiH by establishing the supremacy of the State Constitution over all other sources of law including the Entity Constitutions (art. III.3.b.), the obligation of bringing the latter in line with the State Constitution (art. XII.2.) has been substantially disregarded. The Constitutional Court of the State rules on disputes between the State and the Entities (art. VI.3.). Horizontal coordination and intergovernmental collaboration of the Entities shall be guaranteed through their members within the Presidency (art. III.4.), but the respective formulation is quite weak (“might facilitate coordination”) and the coordination is subject to a veto by the Entities. As seen, also the transfer of powers from Entity to State level is possible (art. III.5), but totally dependent on the – improbable – political will of the Entities.

This brief examination of the characteristic elements of federal systems reveals that the Dayton Peace Accord created an extremely weak framework of common institutions that totally depend on the two Entities. Territorial representation of the Entities in the State institutions is primarily ethnic representation of the three constituent peoples. This “ethnic federalism” is above all a guarantee of the autonomy of the constituent units and, implicitly, of the groups that comprise them rather than an integration of those units and groups into the State with an emphasis on efficient governance. Thus, the Bosnian case fits into the category of “keeping-together federalism” or, rather, “forced-together federalism”.<sup>25</sup>

#### Power Sharing Based on Ethnic Sovereignty Leads to “Ethnic Democracy”

---

<sup>25</sup> As its federal system has been imposed by the International Community as an instrument of “crisis federalism”. Cfr., for the concept of “forced-together federalism”, Nancy G. Bermeo, *The Import of Institutions*, *Journal of Democracy*, Volume 13, Number 2, April 2002, p. 96-110.

The effect of the creation of “ethnic homelands” through federal arrangements is additionally strengthened by a system of power sharing between the various groups. The institutional recognition of the groups is seen as a necessary “correction” of liberal democracy in a context where ethnicity is an important factor. Put differently, “consociationalism” is established on all levels of government in Bosnia and Herzegovina. Power sharing aims at facilitating elite cooperation in a segmented society through the representation and participation of all groups in public life, their autonomy regarding decisions that particularly or only affect them, and veto rights for the protection of important interests.<sup>26</sup>

On the State level, the parity of the three major groups, the “constituent peoples”, and the equal participation of their representatives in government are guaranteed through the tripartite Presidency and the rotation of its chair, the requirement that Ministers and Deputy Ministers must not be of the same group, and the prescription that no more than two-thirds of the members of the Government can be from FBH.<sup>27</sup> The bicameral Parliamentary Assembly of the State comprises, as in the Federation, a House of Representatives and a House of Peoples. The 42 representatives are elected in separate caucuses: one third by the population of the *Republika Srpska*, two thirds in the Federation. This scheme is repeated for the House of Peoples, with five members delegated by the National Assembly of RS and ten members by FBH. The representation of all three constituent peoples is extended to the chair of the two parliamentary chambers with a rotating system of one chair and two vice-chairs.

Thus, the Bosnian system of power sharing is based on the principle of parity in the representation of the “constituent peoples”. By contrast with the theoretical model of Power Sharing, according to which proportionality should be the basic standard of political

---

<sup>26</sup> According to Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977). Arend Lijphart, The Power Sharing Approach, in Joseph V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies* (New York: Lexington Books 1991), p. 492-494. See also Florian Bieber, Recent Trends in Complex Power-Sharing in Bosnia and Herzegovina, in Eurac/ECMI (eds.), *European Yearbook of Minority Issues*, vol. 1, 2001/2 (The Hague: Kluwer Law International 2003) pp. 269-282.

<sup>27</sup> For a comparative analysis, see Florian Bieber, Institutionalizing Ethnicity in Former Yugoslavia: Domestic vs. Internationally Driven Processes of Institutional (Re-)Design, *The Global Review of Ethnopolitics*, 2 (January 2003): pp. 3-16.

representation, public service, appointments, and allocation of public funds, the Bosnian system excludes minority representation and participation: neither the Constitution nor the Dayton Peace Accord define roles for citizens not belonging to one of the three peoples or of mixed ethnic heritage. Thus, members of other ethnic groups and individuals refusing to declare their affiliation with one of the three peoples cannot stand as candidates for the post of delegate or member of the Presidency, a clear violation of minority-protection standards (this was judged to be discriminatory by the European Court of Human Rights on 22 December 2009, see below).

A high degree of autonomy for the groups, especially on issues that are not of common concern, is guaranteed by the federal system, which assigns most of the responsibilities traditionally related to “statehood” (such as the military, police etc.) to the Entities. However, the lack of political will to do anything that could strengthen the common institutions of the State contradicts the basic assumption on which consociational systems are founded, namely, the cooperation of the elites.

A minority veto is the ultimate weapon for the protection of essential group interests in case normal consultation procedures fail. Indicative of the “institutionalized mistrust” in Bosnia, there are three different kinds of veto mechanisms. All legislative decisions need to be approved by both chambers of Parliament. Decisions are generally taken by a simple majority vote, but a quorum is required for action: in the House of Representatives a majority has to be present, and in the House of Peoples at least nine members, three from each of the constituent peoples. However, a kind of suspensory veto can be invoked by the representatives of each Entity: if a cross-community approval by at least one third of deputies from each Entity cannot be achieved, the chairs of each House are obliged to present a re-elaborated draft within three days. If this new draft fails to win approval, a simple majority is sufficient for the adoption of the decision. The suspensory veto can turn into an absolute one, if in the second

voting procedure two thirds of the members representing one Entity vote against the decision (art. IV.3d).

In addition, each of the constituent peoples can block any decision in the House of Peoples with a declaration that an issue touches upon a “vital interest”.<sup>28</sup> If a majority of another group challenges the vital-interest statement, a Joint Commission (with one member selected by the Delegates of each ethnic group) is established to work out a compromise. If no compromise can be achieved within five days, the Constitutional Court determines whether a vital interest has been affected (art. IV.3f). Of course, this leaves a high number of unresolved political controversies to the Constitutional Court.

This complex institutional design for legislation, budgetary issues, ratification of international treaties, and coordination with the Entities is complicated by extensive *de facto* veto powers in the Presidency. Decisions in the Presidency have to be taken unanimously (article V.2c), but this is often impossible as the organ is composed of three representatives elected independently with no obligation to function as a coalition. In the event of disagreement, decisions might be taken by majority vote, but at the risk of an appeal to the Parliament of the respective Entity by the outvoted member of the Presidency. Support of a two-thirds majority of either the National Assembly of the RS or the FBH’s House of Peoples can block the majority decision by the Presidency, thus in effect creating a veto right for each member of the Presidency.

In sum, the Bosnian model of power sharing involves the institutionalization of ethnicity in all its main elements: direct and separate election of the members of the Presidency, the division of the electorate into groups corresponding to the populations of the Entities, numerous and invasive veto rights, broad autonomy for the Entities, and their decisive influence in the common institutions of the State. Thus, it is appropriate to

---

<sup>28</sup> A majority within the three groups of present members is required (art. IV.3e). This means that for a veto on legislation, an ethnic group of Delegates constituting only 20% of the House of Peoples is sufficient.

characterize the Bosnian federal systems as based on “ethnic sovereignty” instead of popular sovereignty.<sup>29</sup>

### Static versus Dynamic Elements in (Re-)construction of the State

While probably necessary for ending hostilities, the institutionalization of ethnicity and the continued ethnic identification of territory have further entrenched ethnic divisions and prevented progress in establishing peaceful relations and the reconstruction of the country.<sup>30</sup> The combination of federalism and power sharing established by the Dayton Peace Accord have contributed to a negative elite consensus (“*divide et impera*”) directed toward obstruction rather than construction. The extensive veto rights established in Dayton have been (ab)used by those groups that have no interest in strengthening the common State, especially Croat and Serb nationalists, to block each step towards integration. Often the primary loyalty of political representatives in State-level institutions lies with the Entities, where the “real power” is exercised, with the national groups they represent, and—most importantly—with the nationalist political party they represent. Thus, numerous efforts to block State action further weakened an already structurally weak central government, contributing to the continuous disintegration of the State, while both Entities operated nearly independently from each other.

The complexity of the institutional system further encouraged obstructionist and divisive behaviour: the establishment of 13 governments and Constitutions, Parliaments, Constitutional Courts etc., at the levels of State, Entity and Canton, plus the special district of Brčko, in a country of roughly 4 million inhabitants, risks creation of an “institutional overkill” in the face of scarce financial resources and of limited capacities and staff at each

---

<sup>29</sup> S. Yee, The New Constitution of Bosnia and Herzegovina, in *European Journal of International Law – EJIL*, 1996, vol. 7, p. 179 ff. (187).

<sup>30</sup> In fact, also the school system and the media are divided along ethnic lines.

level of government.<sup>31</sup> The dysfunctional and disproportionate institutional arrangement has proved extremely costly: according to estimates, government expenditure is around 50% of the GDP and in large part needed to maintain the huge institutional apparatus and bureaucracy at all levels.<sup>32</sup> Instead of creating beneficial checks and balances for controlling and containing power by distributing it among various institutional players, this system has allowed players to defend the status quo by regularly using power to block initiatives advanced by other players.

The action-frustrating effect of these ethnically based institutional structures stand in sharp contrast with the declared objectives of the international community, which were to restore the multi-ethnic society and structures of 1991 as a means of promoting “justice” and long-term stabilisation. It was expected that this transformation into a multi-national State would be progressively achieved by encouraging and actively promoting the return of refugees and displaced persons to their pre-war residence (“minority returns”). Even before their effective return, therefore, these persons were allowed to vote in their pre-war residence in order to make political representation more diverse than the actual population distribution. The aim was to add a virtual community of former inhabitants to the current, often ethnically more homogenous one and thereby to change, at least virtually, the ethnic composition of local communities.

#### Continuous International Intervention as a Substitute for Domestic Legitimacy?

---

<sup>31</sup> The term “institutional overkill” is used by Joseph Marko, *Bosnia and Herzegovina – Multi-Ethnic or Multinational?*, in European Commission for Democracy through Law (ed.), *Societies in Conflict, Science and technique of democracy*, Nr. 29, Strasbourg, 2000, 92 – 118.

<sup>32</sup> International Monetary Fund, *Bosnia and Herzegovina: 2008 Article IV Consultation-Staff Report*. IMF Country Report 08/327, Washington DC, October 2008, p. 13. See also Jan Werner, Laurent Guihéry, Ognjen Djukić, *Fiscal Federalism in Bosnia and Herzegovina: Ten Years after the Dayton Treatment and Still not in a Steady Condition*, ILPF – Institute for Local Public Finance, Working Paper 01-2006 (January 2006), at: <http://www.ilpf.de/en/download/wp-01-2006.pdf>.

Five years after the war ended, it seemed possible that the nationalist ethnic parties, democratically elected in frequent elections, would reach in the Entities the objectives they had been striving for during the war, employing strategies of discrimination rather than military violence. With this prospect in view, no meaningful cooperation took place at State level, and whatever progress occurred was the result of international intervention.

During the first years after the war, the International Community directly guaranteed security – through NATO’s military contingent SFOR (Stabilisation Force) – and stability through special international bodies, such as the Electoral Commission and the International Police Task Force.<sup>33</sup> Interestingly, for key institutions in the reconstruction a softer, and more durable way was chosen with a “mixed” composition of international and domestic members: in the Human Rights Chamber, the Constitutional Court, and the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), two thirds of domestic members decide together with one third of international ones; according to the pattern of parity, two thirds of the domestic members are nominated by the FBH and one third by the RS.<sup>34</sup> But the direct or indirect involvement of the IC inevitably increased institutional complexity. Human rights protection may serve as an instructive example. Human rights, as contained by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, have priority over all other law; special emphasis is placed on the rights of refugees and displaced persons to return to their places of origin and on the related right of restoration of property lost because of the war (art. II.2. and art. II.5.). Human rights protection is thus directly linked to international standards and principles and constitutes an important source of legitimacy for international intervention and interference. However, numerous bodies dealt

---

<sup>33</sup> On the basis of the DPA and its annexes, these international bodies worked for a transitional period, after which their functions have been transferred to local institutions: the OSCE has handed over the Electoral Commission to the State of BiH; the IPTF has been substituted by the EU Police Mission which, however, does not have any operational, but only consultative and monitoring functions.

<sup>34</sup> The international constitutional judges and members of the HRC have been nominated by the President of the European Court for Human Rights in Strasbourg. Also, the President of the National Bank, responsible for the stability of the currency, has to be foreigner. The work of the HRC has been directly based on annex 6 DPA (see: <http://www.hrc.ba/>), the work of the CRPC on annex 7 DPA ([http://www.law.kuleuven.be/ipr/eng/CRPC\\_Bosnia/CRPC/new/en/main.htm](http://www.law.kuleuven.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm)).

with the protection of human rights in general or in specific cases, such as property rights, on the “State” level, and the same is true at the level of the Entities. There were ten different organs expressly charged in the three Constitutions for dealing with human rights violations.<sup>35</sup> Instead of ensuring effective protection of the rights of individuals, this institutional proliferation created confusion as to which remedy to use and dragged out getting a final and binding decision, not to mention the difficulties of enforcing such decisions in an often hostile environment. It also raised the question of which institution had the “final say”.<sup>36</sup>

From the Dayton negotiations onwards, the International Community tried to maintain equal distance from all parties in order that it might be recognized by all as a neutral intermediary.<sup>37</sup> In particular, the question of responsibility for war and ethnic violence was never been addressed other than in terms of individual responsibility, with the prosecution for war crimes through extradition to the International Criminal Tribunal for Yugoslavia or through processes of vetting and lustration for members of the security forces and the judiciary.<sup>38</sup> Yet over time it became clear, that in order to preserve the unity of the State and promote efficiency in institutions and services, the creation of two “*de facto* States” had to be halted, and the process of nation-building within the Entities had to be contained, while at the same time State structures were strengthened. The main dilemma was how to make the institutions function and how to guarantee the rights of minorities and the multinational character of the country. The IC responded by assisting and supervising institution-building at

---

<sup>35</sup> At State level, the Constitutional Court, the Ombudsperson, the Chamber of Human Rights (annex VI) and the CRPC (annex VII), in the Federation the Constitutional Court, the Supreme Court, the Human Rights Court, the Federation Ombudsmen and the Federation Implementation Council, and in the Republika Srpska the Constitutional Court and the Supreme Court.

<sup>36</sup> It is by no means clear from text of the Constitution, whether this authority is vested with the Human Rights Chamber or the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court declared appeals against decisions of the Human Rights Chamber inadmissible in cases U 7/98 through U 11/98 in Official Gazette of Bosnia and Herzegovina, Nr. 9/1999.

<sup>37</sup> The function of monitor and mediator is expressly foreseen in annex 10 of the DPA establishing the Office of the High Representative (OHR) as coordinating and final authority for the interpretation of the civilian aspects of implementation of the DPA.

<sup>38</sup> These processes have been carried out by the IC itself: between 2002 and 2004, the IPTF and a special High Judicial and Prosecutorial Council, composed by international members screened members of the security forces and judges as well as prosecutors, for eventual Human Rights violations during the War.

all levels trying to promote and foster democracy, human rights, and the rule of law,<sup>39</sup> while at the same time emphasizing efficiency, i.e., technical governance instead of political government.<sup>40</sup>

The key institution of the International Community in Bosnia is the High Representative, who is responsible for the coordination of all activities related to the civilian implementation of the DPA and is also the highest authority regarding the interpretation of the Agreement.<sup>41</sup> These functions have been the basis for an extension of the mandate by the Peace Implementation Council (PIC)<sup>42</sup> in order to overcome the obstructionist behaviour of local politicians regarding the full implementation of the DPA. The “Bonn Powers” enable the High Representative to unilaterally impose legislation and administrative provisions as well as to dismiss public officials and politicians who impeded progress in the implementation process.<sup>43</sup> With these extraordinary powers of substitution and direct interference, the High Representative’s role changed from that of a supervisor of the peace implementation process to its main actor. Making use of these far-reaching powers, the High Representative could do – and actually did – what Bosnian politicians were not willing to do or even tried to block by the use of their veto powers. Between 1998 and 2005, in the period of frequent use of the extraordinary powers, altogether 757 decisions have been adopted by the High Representative: of these, 119 regarded the removal of non-cooperative persons and 286 the imposition of laws or the amendment of laws; in fact, all major laws have been adopted as unilateral decrees by the High Representative, such as the reform of the judicial system, the

---

<sup>39</sup> Since the Council Meeting in 1993, the well-known Copenhagen criteria are the political condition for membership in the EU; economic reforms and transformation into a market economy as well as the building up of sufficient administrative capacity are further criteria to be respected and fulfilled by (potential) candidates for membership.

<sup>40</sup> This is the main thesis of D. Chandler, Introduction, in D. Chandler (ed.), *Peace Without Politics? Ten Years of International State-Building in Bosnia*, Routledge, London and New York, 2006, p. 13.

<sup>41</sup> The legal base for the mandate of the High Representative is annex 10 of the DPA and therefore agreement by the Parties; however it is also “entrusted by a U.N. Security Council resolution” (annex 10, art. I) which can be seen as an act of approval by the UN (S/RES/1031, 15.12.1995).

<sup>42</sup> The Peace Implementation Council (PIC) is an international forum of 55 States supporting the peace process in Bosnia with different means. It monitors the activities of the High Representative and, through a Steering Board of a smaller group of countries, provides strategic guidelines for the IC’s action in Bosnia; see [http://www.ohr.int/pic/default.asp?content\\_id=38563](http://www.ohr.int/pic/default.asp?content_id=38563).

<sup>43</sup> The Bonn Powers have been conferred by the PIC at its meeting in Bonn, in December 1997.

laws on citizenship, the laws establishing the symbols and flag of the State, the laws on passports and ID cards, the laws on the licence plates, etc.<sup>44</sup>

Despite its success in passing necessary legislation and dismissing obstructive officials, this “international protectorate” has not significantly reduced the role of nationalist parties. Rather, it has further weakened the institutional structures based on power sharing, as the probability of imposition of decisions has relieved the institutional representatives from negotiation and compromise. As a result, the Office of the High Representative (OHR) became a superimposed layer of government without being accountable within the institutional system, subject only to the merely political control of the Peace Implementation Council.<sup>45</sup> However, given the political situation and the continued strength of nationalist political parties, less international intervention would probably have left legitimate national and minority rights unprotected in the face of unacceptable nationalist demands.

### Reforming Dayton (f)or Overcoming Dayton?

The frequent interventions by the High Representative clearly demonstrated that some “corrections” of the system established by the Dayton Peace Accords were necessary in order to unblock it and to make it work. The two most critical fields were the multinational character of the country, which was contradicted by the realities created on the ground, and its dysfunctional institutions. In 2000, both issues were addressed by the Constitutional Court in

---

<sup>44</sup> Until January 2010, altogether nearly 900 decisions have been adopted over thirteen years by the High Representative; see for an analysis Bart M.J. Szewczyk, The EU in Bosnia and Herzegovina: powers, decisions and legitimacy, *EUISS Occasional Paper*, no. 83, March 2010 [www.iss.europa.eu]. From 2000-2005, the international presence has at times been highly interventionist: the total number of annual decisions under High Representative Lord Paddy Ashdown between 2003-5 exceed those of any of his predecessors and successors. See Matthew T. Parish, The demise of the Dayton protectorate. *J Interv State Build* 2007/1(Special Suppl), pp. 11–23, and, for a list of all decisions adopted: [www.ohr.int/decisions/archive.asp](http://www.ohr.int/decisions/archive.asp). The removals from office even included Presidents and Prime Ministers.

<sup>45</sup> See in particular Gerald Knaus and Felix Martin, Travails of the European Raj, Lessons from Bosnia and Herzegovina, in *Journal of Democracy*, vol. 14, Number 3 (July 2003): pp. 60-74 (<http://www.journalofdemocracy.org/KnausandMartin.pdf>), and the following debate, provoked by the authors' main thesis that “you can't create a stable democracy by these authoritarian methods”, see <http://www.esiweb.org/europeanraj/reactions.php> and D. Chandler (ed.), *Peace Without Politics? Ten Years of International State-Building in Bosnia*, Routledge, London and New York, 2006.

a landmark judgment, known as the “constituent peoples” case.<sup>46</sup> The case had been brought before the Court in 1998 by Alija Izetbegovic, then the Bosniak chair of the Presidency, arguing that fourteen provisions of the RS Constitution and five provisions of the FBH Constitution violated the Constitution of Bosnia and Herzegovina.<sup>47</sup>

The essential question the Court had to resolve was whether the list of Bosnia’s constituent peoples in the preamble of the State constitution - “Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina ...” - gave these three peoples equal status throughout Bosnia and Herzegovina, or whether they were equal only at the State level. At that time, no Serb had been elected to the institutions of the FBH or as a representative of the FBH in the institutions of the State, and the same was true for Bosniaks and Croats in the RS. Thus, the political question raised was whether a multinational system could legitimately be grounded on an absolute partition of power along territorial lines, i.e. de facto on three mono-ethnic sub-systems. In effect, the Court had to decide on nearly all basic questions of a multinational democracy, such as the normative meaning of the Constitution, the concepts of “constituent people” and of “minority group”, the right to self-determination, the federal structure of the State, and, last but not least, the political representation of groups.

With regard to the last issue, the Court first clearly distinguished between constituent peoples and minorities, thus indicating the constitutional mandate to treat differently what ought to be different. For the Court “the adopters of the Dayton Constitution would not have designated Bosniaks, Croats and Serbs as constituent peoples, in marked contrast to the constitutional category of a national minority, if they wanted to leave them in such a minority

---

<sup>46</sup> Constitutional Court Bosnia and Herzegovina, Judgment, Case No. U 5/98-III (1 July 2000), in *Službeni glasnik* (official gazette) no. 23/2000, 14th September 2000 [<http://www.ustavnisud.ba/english/default.htm>].

<sup>47</sup> The Court decides on all controversies between the State and the Entities; as well as on issues referred to it by each member of the Presidency, the President of the Council of Ministers, the Chair or Deputy Chair of each chamber of Parliament, or a quarter of all members of each chamber, at either the State or Entity level (art. VI 3a). Decisions of the Court are to be final and binding, but the Constitution did not specify how decisions are to be taken or whether they are subject to an ethnic or other veto. The Court, however, when determining its rules of procedure by majority vote, decided that decisions are taken by a simple majority without any further requirement: see Constitutional Court, Rules of Procedure, article 35.

position in the respective Entities as they had, in fact, obviously been placed in at the time of the conclusion of the Dayton Agreement”.<sup>48</sup> The Entities thus have a constitutional obligation not to discriminate against those constituent peoples of the State who are as a matter of fact a numerical minority within their territory (i.e. Serbs in the Federation, Bosniaks and Croats in the Republika Srpska). The principle of non-discrimination thus applies not only to individuals,<sup>49</sup> but also to groups as such, prohibiting special adverse treatment. For the Court, a principle of “collective equality” of the constituent peoples exists that “prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation”.<sup>50</sup>

The judgment focused on the violation of human rights, as a common practice in the Entities, and in particular on the right of refugees and displaced persons to “voluntary return and harmonious reintegration, without preference for any particular group” as provided for in Annex 7 of the General Framework Agreement for Peace (article II.1, the so-called minority-returns). The Court cited the domination of institutions in the Entities (especially courts and police)<sup>51</sup> by privileged peoples to illustrate the discriminatory effect of the contested provisions in the Entities’ constitutions. It pointed to population figures in order to demonstrate that these constitutions established discriminatory frameworks aimed at discouraging return.<sup>52</sup> As a result, the provisions of the Entities’ constitutions that declared only one or two peoples as constituent in the respective Entity and ensured a more favorable treatment of those peoples in the governmental structure of the Entities violated the constitutional principle of collective equality as well as article 5 of the UN Covenant against

---

<sup>48</sup> Constitutional Court Bosnia and Herzegovina, Judgment, Case No. U 5/98-III (at 63).

<sup>49</sup> As established in art. II.3 and 4 of the Bosnia and Herzegovina constitution.

<sup>50</sup> Constitutional Court Bosnia and Herzegovina, Judgment, Case No. U 5/98-III (at 59 and 60). The Court ruled that “despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination, national homogenization or a right to uphold the effects of ethnic cleansing” (at 61).

<sup>51</sup> For instance, the government of RS was composed only by Serbs (21 members out of 21), and the same was true for police forces (93,7%) and judges (97,6%); analogous figures were in place in FBH.

<sup>52</sup> See at 92 (RS) and at 137 (FBH).

racial discrimination of 1966 (right to equal access to governmental posts) and were thus unconstitutional.

A second important and often overlooked aspect of the judgment was the judicial recognition of State framework legislation in some subject matters which, according to the text of the Constitution, would be exclusive competencies of the Entities. According to the Constitutional Court, the particular importance of some matters for the (economic) integration of the whole system as well as the necessity of strengthening the powers of the State institutions for avoiding separation and guaranteeing the minimum base for the functioning as a State require a joint and shared responsibility of all levels of government.<sup>53</sup> Going beyond the limited catalogue of State powers (art. III) and based on systematic arguments, the Court interpreted the constitutional competence lists as “open”, in particular for guaranteeing equal levels of human rights protection throughout the country (e.g. by determining minimum standards)<sup>54</sup> and a functioning economic integration in order to effectively realize and guarantee the fundamental economic freedoms in the Constitution of the State.<sup>55</sup>

The Court also gave indications on the implementation of the decision: in addition to the necessary amendments, further measures would be required to guarantee the protection of equal rights and to promote minority returns. Fair representation would need to be assured in the constitutional institutions and, in particular, in the judiciary and the police. Special attention would have to be paid at the sub-entity level to avoid ethnic homogenization of cantons or municipalities.

The composition of the Constitutional Court follows the parity pattern found in other institutions, with two judges appointed by RS and four by the FBH. However, the Court also

---

<sup>53</sup> Constitutional Court Bosnia and Herzegovina, Judgment, Case No. U 5/98-IV (fourth partial decision); the decision is based on the precedent of the “Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina” (official gazette BiH, no. 14/98) imposed by the High Representative.

<sup>54</sup> In the case decided, the Court confirmed an (implicit) power of the State to determine minimum standards regarding the regulation of the official use of languages which was part of the exclusive competencies of the Entities, but had been used in a discriminatory way, Const. Court, case U 5/98-IV, sub 24 and 34.

<sup>55</sup> Art. I.4. of the BiH Constitution guarantees the free movement of persons, goods, services and capital. A Framework legislation of the State might be necessary to guarantee the fulfillment of the Entities’ obligations and to remove obstacles to the common market; Const. Court, case U 5/98-IV, sub 31 and 34.

includes three international judges nominated by the President of the European Court of Human Rights (art. VI.1a). This addition reflects international concerns about the fragility of the Dayton scheme and its implementation. The ruling would not have been possible, if a minority-veto existed within the Court. In fact, the decision was taken with a narrow majority: the three international and the two Bosniak judges voted for it, four judges (Croat and Serb) against.

The Court's decision was condemned by most Serb parties, but welcomed by the Bosniak and Croat parties as well as by the International Community. It offered "a probably unrepeatable chance to push the Dayton Peace Agreement to their limits and to permit Bosnia and Herzegovina to become a functional multinational state" by reforming the existing Entities within the Dayton architecture.<sup>56</sup> The Court did not simply confirm the static elements of the territorial and ethnic compromise found in Dayton, but strengthened the dynamic elements contained in the DPA: the return of refugees and Internally Displaced Persons (IDPs) as a means for rebuilding a truly multiethnic society. With this interpretation, the Court went well beyond the text of the Constitution by integrating it with sources of international law.<sup>57</sup>

Furthermore, by addressing not only the constitutionality of the institutionalization of ethnic dominance but also its impact on the *quality* of democracy, the ruling raised fundamental questions at the State level. Apart from the over-institutionalization of ethnic identities, a whole segment of the population, the "Others" (i.e. minorities, persons from ethnically mixed marriages, or persons simply unwilling to affiliate with one of the three peoples) remain generally excluded from the power-sharing structures.<sup>58</sup>

---

<sup>56</sup> International Crisis Group (ICG), *Implementing Equality: The 'Constituent Peoples' Decision in Bosnia & Herzegovina*, ICG Balkans Report No. 128 (2002) [www.crisisweb.org].

<sup>57</sup> Referring to the other annexes of the DPA and to the international sources mentioned in the Constitution, in particular those related to Human Rights protection which consequently, due to their supremacy, can be considered as supreme constitutional principles.

<sup>58</sup> F. Bieber, *Governing Post-War Bosnia and Herzegovina*, in K. Gál (ed.), *Minority Governance in Europe* (2002), p. 328 ff. (p. 332).

## Imposing Change Instead of Creating “Local Ownership”

In the aftermath of the Constitutional Court’s ruling, constitutional commissions for each Entity were created in January 2001 and charged with drafting amendments complying with the Court’s ruling. But there was virtually no progress, and a series of deadlines set by the High Representative were missed by both Entities. After negotiations called for by the High Representative, an agreement on the principles of the Court decision that the parties would comply with was finally reached in March 2002, although it was not signed by all parties. In the end, the High Representative imposed three decisions in order to bring the two Constitutions fully in line with the Court ruling.<sup>59</sup>

In essence, the agreement and the imposed constitutional amendments recognized Bosniaks, Croats and Serbs as constituent peoples in both Entities. The institutional diversity within the Entities was reduced, as an upper house was created in the *Republika Srpska*, as well as two vice presidential posts in each Entity, for the representation of all three constituent peoples, with a requirement that those occupying the three offices to come from different constituent peoples. The agreement defined “vital interests” - examples include education, religion, language, culture, promotion of tradition, and equal representation in government institutions - and the procedures to protect such interests. This detailed elaboration of the vital-interest clauses was intended to limit their abuse for the sole purpose of obstruction. Finally, the “constitutional principle” of proportional representation for all ethnic groups in the “public institutions”, i.e. in ministries at the Entity, cantonal and municipal levels, as well as in the courts within both Entities, was introduced.

---

<sup>59</sup> On 19 April 2002, Wolfgang Petritsch, in his last days in office, imposed all the amendments of the FBH Constitution with the first decision, while the second corrected shortcomings of the RS Constitution; the third decision amended the election law according to the previous constitutional amendments (in view of the October 2002 elections). See, for a critical analysis, Valery Perry, *Constitutional Reform and the ‘Spirit’ of Bosnia and Herzegovina*, ECMI Brief 7, February 2002 ([http://www.ecmi.de/doc/download/brief\\_7.pdf](http://www.ecmi.de/doc/download/brief_7.pdf)), and European Stability Initiative (ESI), *Imposing constitutional reform? The case for ownership* (2002) [[www.esiweb.org](http://www.esiweb.org)]

The main principle of the imposed amendments can be described as “symmetry in substance”: most important is the identical level of protection throughout the country, which is not necessarily to be achieved by identical mechanisms, a reasonable approach in the face of a political elite in both Entities in profound disagreement over the issue of mechanisms.<sup>60</sup> In order to further strengthen the government of the State, in December 2002 the High Representative also adopted a decree that reformed the Council of Ministers, ending the rotation of its chairmanship, introducing a four years term corresponding with the legislature, and establishing two new Ministries (Justice and Security).

The Constitutional Court confirmed its orientation regarding the multinational organization of the country at all levels of government in further important decisions on place names, symbols of the Entities, etc.<sup>61</sup> While these decisions apply the principle of institutional and collective equality of the constituent peoples in order to avoid any discrimination or creation of ethnic homelands, they do not sufficiently consider the individual rights of those who are not affiliated with one of the three major groups and thus find themselves excluded from a number of offices that are reserved to members of one of the three groups. As this exclusion is in conflict with the guarantees of the European Convention of Human Rights and Fundamental Freedoms, which is the highest source of law in Bosnia (art. II.1.), it raises important questions as to whether Bosnia is actually a State of all of its citizens, independent of their affiliation to particular ethnic groups, and whether this precedence of collective guarantees over individual rights can be justified. Although some attempt to recognize the

---

<sup>60</sup> See [www.ohr.int](http://www.ohr.int) for further information as well as for the content of the Sarajevo-agreement (27/03/2002); for a detailed and critical analysis see ICG, Balkans Report N° 128, esp. p. 12-14 (<http://www.crisisweb.org>).

<sup>61</sup> For example, the judgment on place names which prohibited and annulled the “ethnic prefixes“ (“Srpsko Sarajevo“ and others) which had been introduced during the war in order to indicate the ethnic character of a town (often after operations of ethnic cleansing) by contrast with older, historical place names; Constitutional Court Bosnia and Herzegovina, Judgment, Case No. U 44/01 (27.2.2004), in *Službeni glasnik* (official gazette) no. 23/2000, 14.9.2000. See for a profound analysis of the Constitutional Court’s case law Christian Steiner and Nedim Ademović, *Kompetenzstreitigkeiten im Gefüge von Dayton*, in Graf Vitzthum, Wolfgang, Winkelmann, Ingo (eds.), *Bosnien-Herzegowina im Horizont Europas*, Duncker & Humblot, Berlin, 2003, pp. 109-147; Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, in European Diversity and Autonomy Papers, Bozen 7/2004 [[www.eurac.edu/edap](http://www.eurac.edu/edap)]; and Christian Steiner, Nedim Ademović (eds.), *Constitution of Bosnia and Herzegovina. Commentary*, Konrad Adenauer Stiftung e.V. – Rule of Law Program South East Europe, Sarajevo, 2010 [[http://www.kas.de/wf/doc/kas\\_19629-1522-1-30.pdf?100531103302](http://www.kas.de/wf/doc/kas_19629-1522-1-30.pdf?100531103302)].

rights of “Others” has occurred - at Entity level, the constitutional amendments of 2002 reserved some seats in the House of Peoples for “Others” - a complaint to the European Court of Human Rights (ECtHR) has been filed challenging the continuing reservation of many other offices and positions to members of the three constituent peoples.<sup>62</sup> On 22 December 2009 the Grand Chamber of the European Court of Human Rights applied the far-reaching general prohibition of discrimination in Protocol No. 12 to the European Convention of Human Rights to electoral discrimination based on ethnicity in Bosnia’s post-conflict society. The implementation of the Court’s judgment requires an amendment to the Bosnian Constitution.<sup>63</sup>

The frequent and wide use made of the Bonn Powers by the High Representative also included reforms of the judiciary (with the establishment of a State Court and of a High Judicial and Prosecutorial Council), of the defence (imposing a merger of forces into one army and creating a Ministry of Defence at State level), of the Council of Ministers, etc., all aimed at strengthening State institutions. A Mission Implementation Plan adopted by the Peace Implementation Council in 2003 provided the basis and the priorities for these “corrections” which were, however, established without consultation with or participation by Bosnian politicians. In addition to creating resistance by local elites and frustration among the citizens, these measures triggered an intense debate on the legitimacy of the international semi-protectorate, raising the question of the accountability of the International Community.<sup>64</sup>

---

<sup>62</sup> See the comment by the European Commission for Democracy through Law (Venice Commission), Opinion no. 483/2008, Strasbourg 22 October 2008, *Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina* (Applications no. 27996/06 and 34836/06), which criticizes the continuous discrimination of “Others” due to their exclusion from the State Presidency and the House of Peoples.

<sup>63</sup> ECtHR, *Sejdić and Finci v. Bosnia and Herzegovina* (27996/06 and 34836/06). The Court has found that applicants’ ineligibility to stand for election to the House of Peoples violates Article 14 of ECHR (ban of discrimination in the field of Convention rights) taken in conjunction with Article 3 of Protocol No. 1 (free elections), and that their ineligibility to stand for election to the Presidency violates Article 1 of Protocol No. 12 (general ban of discrimination).

<sup>64</sup> See Knaus and Martin as well as Chandler (footnote 40). Besides the accountability issue (including the lack of legal remedies against overriding measures of international institutions), the disproportion between intensity and duration of the extraordinary powers have been criticized as well as their often paternalistic use. Particularly instructive is the vetting process regarding police officers carried out by the IPTF without any possibility of appeal by the de-certified police officers who had lost their jobs according to a decision of the international institutions; see for details European Stability Initiative (ESI), *On Mount Olympus. How the UN violated Human*

The Constitutional Court denied that it had authority to control the exercise of the extraordinary Bonn powers, but it underlined that acts in substitution of domestic actors had to be adopted in conformity with the Constitution. For these reasons, the International Community has rightly been referred to as the “fourth constituent” element in Bosnia and Herzegovina.<sup>65</sup>

### The Paradox of European Integration: Creating an Efficient State Raises Questions about the Dayton System

In recent years European integration has clearly become the central goal of the transition process in the Western Balkans. In the framework of the Stabilization and Association Process, all States have to respect and fulfil concrete conditions set up by the European Union.<sup>66</sup> These conditions translate principles such as the Copenhagen criteria into specific and detailed parameters that have to be met and implemented,<sup>67</sup> while the process of implementation is assisted and monitored by EU institutions. The risk of this “conditionality” is a limited and formal adherence through the mere adoption of legislation without any guarantee of effective implementation in practice and penetration of the legal and administrative system. By contrast with the previous phase of transition, when the reception

---

*Rights in Bosnia and Herzegovina, and why nothing has been done to correct it* (February 2007)  
[www.esiweb.org]

<sup>65</sup> Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention*, Oxford University Press, Oxford, 2002.

<sup>66</sup> For an overview of the Stabilisation and Association Process in the Western Balkans, see Christian Pippan, *The rocky road to Europe: the EU's stabilisation and association process for the Western Balkans and the principle of conditionality*, in *European Foreign Affairs Review*, vol. 9, n. 2, 2004, 219-245, and Sofia Sebastián, *The Stabilisation and Association Process: are EU inducements failing in the Western Balkans?* FRIDE - Fundación para las Relaciones Internacionales y el Dialogo Exterior, Working Paper 53, February 2008.

<sup>67</sup> Any country seeking membership of the European Union (EU) must conform to the conditions set out by Article 49 and the principles laid down in Article 6 (1) of the Treaty on European Union. Criteria for membership in the EU have been defined in 1993, at the Copenhagen European Council (often referred to as the ‘Copenhagen criteria’). These require that the candidate country must have achieved: a) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; b) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; c) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. See “Accession criteria” (<http://ec.europa.eu/enlargement/>).

of the principles and the related reforms had been determined and imposed by external actors, the Stabilization and Association Process requires authentic and convinced domestic initiative and adherence that is summarized in the concept of “local ownership”.

Local ownership would signify the transition from imposed reforms linked to the Dayton Peace Accord to a reform process driven by domestic actors and directed toward the objective of EU accession. The latter might also require changes not covered by the Dayton system, which would therefore also exceed the High Representative’s power of substitution. As a result, since 2002 the High Representative has also acted as an EU Special Representative with a complementary mandate based on persuasion through conditionality in fields related to EU integration. Thus, the change from an externally imposed to a generally accepted constitutional system can be considered as the true defining moment for Bosnia-Herzegovina in the process of transition. This moment should be formally marked by a constituent act, such as the adoption of a new Constitution or amendments of the Dayton Constitution, legitimated by the people.

Ten years after Dayton, the time seemed to have come for constitutional reform. In March 2005, the Venice Commission expressed its opinion on the constitutional reforms necessary to make the system compatible with European standards. As neither the Dayton Constitution nor the Entity Constitutions “provide a sound basis for the future, it is desirable for the citizens at some state to have an entirely new Constitution based on their own wishes...”.<sup>68</sup> The Commission identified five areas in which constitutional changes were needed: (1) transfer of competencies from Entities to the State, (2) reform of inefficient legislative and executive structures at State level, (3) elimination of “prerogatives for ethnic or

---

<sup>68</sup> Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, March 11-12, 2005 [[http://www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.pdf](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.pdf)]. – The European Commission for Democracy of Law (“Venice Commission”) is the Council of Europe’s advisory body on constitutional matters and is composed of currently 54 “independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science” (article 2 of the revised Statute); see [<http://www.venice.coe.int>].

group rights”, (4) strengthening citizens’ rights and (5) clarification of the Entities’ future relationship to the State.

Among the initial attempts in this direction was the creation of a constitutional working group agreed upon by the leaders of seven major political parties through negotiations brokered by the United States embassy. In March 2006, a political agreement on constitutional amendments in four areas was reached.<sup>69</sup> The constitutional changes imposed by the High Representative regarding the distribution of competencies were to be confirmed, including a category of shared powers between State and Entities.<sup>70</sup> A second amendment was related to changes in the Parliamentary Assembly’s composition, powers, and procedures, including, in particular, abolishing the perfect symmetry between the two Houses and changes in the definition of the “vital interests veto”. A third amendment transformed the collective Presidency into a single President with two Vice-Presidents, and a fourth amendment focused on the reform of the Council of Ministers. These constitutional amendments required approval by the Parliamentary Assembly, including a two-thirds majority in the House of Representatives (art. X), but despite the political agreement, the so-called April Package 2006 failed to win approval by two votes in the House of Representatives.<sup>71</sup> After this failure and with the prospect of general elections in October 2006, nationalistic rhetoric again rose. Two subsequent attempts by the International Community to re-initiate constitutional reform failed

---

<sup>69</sup> See [[www.daytonproject.org/publications/printer.php?id=140](http://www.daytonproject.org/publications/printer.php?id=140)] and the analysis and comments by Joseph Marko, *Constitutional Reforms in Bosnia and Herzegovina 2005-06*, in *European Yearbook on Minority Issues*, vol.5 (2005/6), Martinus Nijhoff, Leiden/Boston, 2007, pp. 207-218, Matthias Hartwig, *Gutachten zu dem Entwurf der Verfassungsänderung der Verfassung von Bosnien-Herzegowina*, Heidelberg, Mai 2007 [[www.kas.de/db\\_files/dokumente/7\\_dokument\\_dok\\_pdf\\_10998\\_1.pdf](http://www.kas.de/db_files/dokumente/7_dokument_dok_pdf_10998_1.pdf)].

<sup>70</sup> Responding to EU and CoE requirements, these shared powers would have included the taxation, the electoral system, the judiciary, agriculture, science and technology, environment and local self-governance.

<sup>71</sup> On 24 April 2006, due to the opposition of the second largest Bosniak party (SBiH) and a fraction of the Croat party HDZ, which had split from the party in April 2006 in protest against the April Package forming a new party, “HDZ 1990”.

in 2007 and 2009, revealing a lack of coordination and the absence of a uniform position within the IC.<sup>72</sup>

With the constitutional reform process stalled, efforts of the International Community concentrated on police reform, which, as part of the conditions for signing a Stabilisation and Association Agreement (SAA) between the European Union and Bosnia-Herzegovina, was viewed as a functional reform. However, the long dispute over this reform, which was aimed at unifying and coordinating the Entities' police forces in order to make them more efficient and ready for the EU, clearly showed that even "technical" reforms might touch upon constitutional issues. Strong resistance came from RS, which would not agree to the transfer of police powers to State or inter-entity institutions.<sup>73</sup> In December 2007, a compromise was finally reached, which permitted to "initial" the Stabilisation and Association Agreement.<sup>74</sup> However, it also showed the flaw in the objective of EU integration: whereas integration requires efficient State institutions both for the negotiations and for the implementation of EC law, the creation of such institutions may conflict with the status quo of the Entities' powers and ethnic fiefdoms.

Even though European integration is a shared goal, it cannot be considered neutral to the positions of the Entities: strengthening the State threatens the full autonomy of RS and favours the positions of Bosniaks (and, to a lesser extent, Croats). There is still no common vision for the country, and the polarization produced by war has been preserved and prevails in the political positions of the various groups. Bosnian Serb politicians insist on the integrity of RS and regularly seek to undermine State institutions, even questioning the State itself;<sup>75</sup>

---

<sup>72</sup> In May 2007, the US substantially re-proposed the April Package; in June 2007, High Representative Schwarz-Schilling tried to establish an open dialogue on reforms without predetermining their content, without success. His term was already close to the end and his efforts were not supported by all States.

<sup>73</sup> International Crisis Group (ICG), *Bosnia's Stalled Police Reform: No Progress, No EU*, Europe Report No. 164, Sarajevo/Bruxelles, 6 September 2005 [www.crisisweb.org].

<sup>74</sup> In a ceremony in Sarajevo, as a first step in order to positively respond to the political agreement on police reform; the true signing of the SAA, decisive in legal terms, actually occurred months later, in June 2008, after police reform had been definitely adopted by the Parliament of Bosnia-Herzegovina in April 2008.

<sup>75</sup> The unilateral declaration of independence of Kosovo in 2008 and the renewal of Russia's activism in the Balkans have encouraged the Serbs to press their case in Bosnia including threats to call a local referendum on

whereas for many Bosniaks, the very existence of RS, the “Serb entity,” remains a provocation which should be overcome by transforming Bosnia into a “civic” and unitary State, i.e., one not based on ethnicity and without the current Entities.<sup>76</sup> As the smallest group, Croats seek above all to consolidate their status as one of the constituent peoples and insist on their equal standing. While in the past a “Croat Entity” had been demanded, nowadays Croats link any reform of FBH to an overall constitutional and institutional reform of the country and ask for at least four constituent units, one of which would have a Croat majority.<sup>77</sup>

The institutional and territorial entrenchment of ethnicity combined with the limited number of institutional players regularly creates antagonism rather than fostering creative solutions.<sup>78</sup> The fact that the changes required by EU conditionality, which go beyond the Dayton Peace Accord, cannot be imposed by the High Representative might create a power vacuum, especially when there is a lack of coordination within the International Community.<sup>79</sup> For this reason, in February 2008, the Peace Implementation Council set five objectives to be reached before closing Office of High Representative: acceptable and sustainable resolution on (1) State property and on (2) defence property, (3) completion of the Brčko Final Arbitration Award, (4) fiscal sustainability and (5) entrenchment of the Rule of Law. In addition, two conditions were set: signing of the Stabilisation and Association Agreement (which happened in June 2008) and a “positive assessment” of the situation in Bosnia-Herzegovina by the Steering Board of the Peace Implementation Council (PIC). Failure to

---

the status of the Dayton Peace Agreement and RS secession from Bosnia; see RS Government’s Position of 14 December 2009 and the RS National Assembly Conclusions of 28 December 2009.

<sup>76</sup> This is the position of Haris Silajdžić and his party (SBiH). The decision on the genocide in Srebreniça by the ICJ in February 2007 (see endnote 13) has further widened the divide and sparked nationalist rhetoric between Bosnian Serbs and Bosniaks.

<sup>77</sup> Often a special status for Sarajevo is proposed: as a fourth unit or a federal district.

<sup>78</sup> Already in 2004, in order to overcome the deadlock resulting from this antagonism by increasing the number of institutional actors representing territorial interests, in a provocative proposal the abolition of the Federation and a territorial design of Bosnia based on 12 constituent units (10 Cantons, RS and Brčko-District) had been proposed by the European Stability Initiative (ESI), *Making federalism work: A radical proposal for practical reform* (January 2004) [www.esiweb.org].

<sup>79</sup> For instance, between the West and Russia, but also between the US and the EU; Constantine Arvanitopoulos and Nikolaos Tzifakis, *Implementing reforms in Bosnia and Herzegovina: the challenge of the constitutional process*, Centre for European Studies, 2008, Eur View (2008) 7:15-22 [http://www.springerlink.com/content/1mg60j00gr23rt21/fulltext.pdf].

meet these conditions would mean the continuation of the Office of the High Representative (OHR); in fact, in its subsequent meetings, the PIC has extended OHR's mandate.

### Internal Change Depends on Coordinated External Support

“States require cohesive ideas and identities to legitimate themselves”;<sup>80</sup> what had been referred to - the lack of such ideas and identities facilitating the breakup of - Yugoslavia in the 1990's could also be applied to Bosnia-Herzegovina today. Throughout history, while Bosnia has mostly been a distinct entity, it has also usually been ruled from the outside and been subject to interference by its neighbours. Compared to only a decade ago, the regional context has changed much: regional cooperation is improving and Croatia and Serbia are on their way to EU membership. Yet although EU accession is a shared goal, it still seems secondary to the aim of preserving the relative power of one's own group. It is too weak, too abstract, and too far in the future to trigger a concrete common vision of the State. Thus, the IC and the EU will have to be involved in the process leading to constitutional reform by guaranteeing the procedures and facilitating the process without imposing the outcome. The strongly needed incentive for reform might be provided by clarifying that there will be neither closure of the Office of the High Representative nor transfer of full sovereignty to Bosnian authorities nor implementation of the Stabilisation and Association Agreement without a sustainable and open reform process. In the view of local ownership, such a process will have to occur in Parliament as a public and transparent process, including civil society and the (technical) assistance of international and EU experts.<sup>81</sup>

---

<sup>80</sup> George Schoepflin, *The rise and fall of Yugoslavia*, in John McGarry, Brendan O'Leary, *The Politics of Ethnic Conflict Regulation. Case Studies of Protracted Ethnic Conflicts*, London and New York, 1993 (reprint 1995), pp. 192 ss., who continues: “The principal national communities never sought genuinely to understand the other's perspectives, interests or aspirations. The consequences were predictable.”

<sup>81</sup> These conclusions are rightly identified as lessons to be learned from the failure of the April Package, see E.P. Joseph/R.B. Hitchner, *Making Bosnia Work. Why EU Accession is Not Enough*, USIPeace Briefing, June 2008, p. 7.

Currently, Bosnia remains an “assisted State” with dysfunctional institutions and an “ethnic democracy” that does not guarantee equal rights and benefits to all citizens. In order to integrate into the European Union, it has to become a “normal”, i.e. democratic and unified, State. However, “normality” in and for Bosnia is and will remain different from normality in other candidate States, as ethnicity still matters and will continue to matter. But the current degree of institutionalization of ethnicity bears the risk that territorial claims might endanger the very existence of the State and that guarantees will be used in an obstructionist fashion for the protection of specific groups.

The aim of peacefully living together in a multiethnic society and the integration into a multinational constitutional order require corrections of the democratic principle (in its narrow sense). These corrections in favour of groups and respect for ethnic diversity must not, however, limit individual rights disproportionately, nor question or challenge the very foundations on which the multinational system is built upon, i.e., the equality of its citizens, the equal standing of the groups, and loyalty towards the common institutions. In making its choices and shifting these balances, Bosnia will continue to need support from the International Community as well as from the European Union.<sup>82</sup> A promising way of starting the process of establishing a viable multinational State would be the implementation of the ECtHR-judgment in the Sejdić-Finci case by a constitutional amendment aimed at ending the discrimination against “Others”. This would emphasize the importance of “civic” elements and individual rights as counterweights vis-à-vis ethnicity.

---

<sup>82</sup> According to recent declarations, the EU is willing to adapt its strategy and instruments for preparation of membership to the specific situation of a multinational State as well as to actively promote and facilitate the process of constitutional reform. See the communications “2009 the year of the Western Balkans” by EC COMMISSION, *Communication from the Commission to the European Parliament and the Council. Enlargement Strategy and Main Challenges 2008-2009*, Brussels, 05.11.2008, COM(2008)674 final, p. 14, and Summary note on the joint report by Javier Solana, EU High Representative for the CFSP, and Olli Rehn, EU Commissioner for Enlargement, on “*EU’s policy in Bosnia and Herzegovina: the way ahead*”, Brussels, 10 November 2008, S 367/08. For interesting reflections on the lessons (to be) learned see Matthew Parrish, *A Free City in the Balkans. Reconstructing a Divided Society in Bosnia*, I.B. Tauris, London – New York, 2010 (in part. chapters 1 and 9).

At the beginning of 2009, after only one and a half year in office, the High Representative Miroslav Lajcak unexpectedly resigned from office, after being nominated to be Foreign Minister of Slovakia. Also unexpectedly, the leaders of the three major parties - Bosniak SDA, Serb SNSD and Croat HDZ - agreed upon constitutional amendments that recognized that Bosnia-Herzegovina was a decentralized country with four territorial units as opposed to the current three territorial units (known as Prud Process); however, controversy immediately surrounded the creation and the shape of these territorial units, the territorial continuity and integrity of RS, and the division of FBH.<sup>83</sup> With the international “interregnum” the moment for such an initiative and demonstrating local ownership was certainly well chosen, but the proposals did not become concrete and have not been introduced in the constitutional amendment procedure.<sup>84</sup> Other recent attempts to overcome the current stalemate regarding constitutional reforms have also proved insufficient. On 9 and 20 October 2009, the EU and US initiated talks at the EUFOR military headquarters in Butmir, but no agreement was reached.

The parallel crisis looming in the FBH has recently become more acute and mirrors all problems present at the level of the State. The need for reform of FBH is evident: its fragmented and dysfunctional administrative system and continuous disputes among and between Bosniak and Croat leaders has brought the Entity close to bankruptcy and caused social unrest. While constitutional reform at State level seems unfeasible, a reform of FBH might be achievable and provide an impetus to state-level reform: “a well-functioning Entity would be more attractive to Bosnian Croats and Serbs and would be more convincing in negotiations with RS at the State level”.<sup>85</sup>

---

<sup>83</sup> The Prud Agreement (January 2009) is based on a first and broader Joint Statement of the same political leaders (Odžak Declaration, 8 November 2008), which also dealt with the controversial issues of State property, the constitutional status of the Brčko-District, the creation of a Fiscal Council and reforms of the Council of Ministers.

<sup>84</sup> The three political parties alone fall short of having a sufficient (2/3) majority in the House of Representatives.

<sup>85</sup> International Crisis Group, *Federation of Bosnia and Herzegovina – A Parallel Crisis*, Europe Report N° 209, 28 September 2010 [www.crisisgroup.org/]. So far, any reform of the FBH has been impossible due to the

So far, the Entities as constituent units have predominantly tried to block any change as they understood themselves as “ethnic homelands”. Only by international imposition have their (pre-existing) Constitutions been amended in order to reach conformity with the State Constitution and the multinational system of Bosnia-Herzegovina. For building up a viable multinational federal State, the exclusive identification of territory with one of the three constituent peoples has to be ended (the necessary introduction of civic elements in favour of “Others” could be useful in this regard). Accordingly, the representation of ethnic and territorial interests need to be distinguished - specific and group related the former, general and related to the whole population the latter - , and guaranteed in different ways and procedures.

Bosnia remains a construction site, but the paradoxes in the plans for building a viable multinational federal State have been clearly identified. Although they will have to be resolved by domestic forces, international assistance on the way to compromise and agreement will be crucial due to the distance of positions, the dimension of needed change and the lack of experience in change from bottom-up.

Woelk, Jens, *Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes (Chapter 4)*, in Michael Burgess, Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives*, McGill-Queen’s University Press, 2011 (in print)

---

contrasting concepts of Croats (rather insisting on a fourth Entity) and Bosniaks (fearing any weakening of their positions).