

European Diversity and Autonomy Papers
EDAP 4/2005

Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina

Joseph Marko



Managing editors:

Emma Lantschner / Francesco Palermo / Gabriel N. Toggenburg

Editorial Board:

In alphabetical order:

Craufurd Smith Rachel (University of Edinburgh, UK)
Dani Marco (Università di Trento, I)
De Witte Bruno (European University Institute, I)
Gamper Anna (Universität Innsbruck, A)
Henrard Kristin (University of Groningen, NL)
Kujovich Gil (Vermont Law School, US)
Kymlicka Will (Queens University, CAN)
Marko Joseph (Universität Graz, A)
Nic Shuibhne Niamh (University of Edinburgh, UK)
Ortino Sergio (Università di Firenze, I)
Packer John (Tufts University, US)
Poggeschi Giovanni (Università di Lecce, I)
Sasse Gwendolyn (London School of Economics, UK)
Tarr William (Rutgers University, US)
Teachout Peter (Vermont Law School, US)
Toniatti Roberto (Università di Trento, I)
Woelk Jens (Università di Trento, I)

Assistant to the Managing editors:

Paulina M. Borowska

Europäische Akademie Bozen
Drususallee, 1
39100 Bozen - Italien
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

Accademia Europea Bolzano
Viale Druso, 1
39100 Bolzano - Italia
Tel. +39 0471 055200
Fax +39 0471 055299
edap@eurac.edu
www.eurac.edu/edap

Copyright Information:

Any sort of reproduction - including excerpts - is permitted only when indicating the exact EDAP source. Please quote EDAP as indicated in the following example: Gabriel N. Toggenburg, "The Debate on European Values and the Case of Cultural Diversity", 1 *European Diversity and Autonomy Papers - EDAP* (2004), 10, at www.eurac.edu/edap.

Abstract

The article analyses the effects of the implementation of the Dayton Peace Agreement, which had been based on a “political” compromise with various static and dynamic elements, with regard to the functioning of institutions, developments in the party system, rule of law, effective administration and the economy. In particular the role of the High Representative and the Constitutional Court’s jurisprudence are highlighted for post-conflict reconstruction through state- and nation-building. Finally, based also on a critique of the role of the International Community, the remaining problems are addressed such as the economic viability and attractiveness for foreign investment and the need to shift the balance more from ethnic power-sharing to state effectiveness. In this regard, lessons to be learned from the Bosnian case study are drawn and put into a prospective context for further integration into the European Union.

Author

Joseph Marko is Professor of Comparative Constitutional Law and Political Science at the Faculty of Law of the University of Graz. He is also the Director of the Law School’s Center for South Eastern Europe and Director of the Institute for Minority Rights at the European Academy Bolzano/Bozen. From 1997 till 2002 he served at the bench of the Constitutional Court of Bosnia and Herzegovina as one of its three international judges and from 1998 til 2002, under the Framework Convention for the Protection of National Minorities, as a member of the Advisory Committee of the Council of Europe’s Committee of Ministers. He was re-elected in 2004.

For further details and a list of publications see <http://www-ang.kfunigraz.ac.at/~marko/index.htm>.

The author can be reached at: josef.marko@uni-graz.at.

Key words

Dayton Peace Agreement - Ethnic Power-sharing - Constitutional Court Jurisprudence - Post-conflict Re-construction - State- and Nation-building - European Integration.

Table of contents

1. How to End a War? The Dayton Peace Agreement as a Political Compromise	5
2. Problems of the Implementation of the Dayton Agreement	7
3. The Roles of the High Representative and the Constitutional Court	9
4. BiH at the Cross-roads: from Semi-protectorate to European Integration:	14

Post-conflict Reconstruction through State- and Nation-building: The Case of Bosnia and Herzegovina

Joseph Marko

1. How to End a War? The Dayton Peace Agreement as a Political Compromise

The Republic of Bosnia and Herzegovina (BiH), having been one of the six republics of the former Socialist Federal Republic of Yugoslavia, was a Yugoslavia “en miniature” with three peoples, the Muslims, Serbs, and Croats - none of them in an absolute majority position - and 15 national minorities living intermingled on the entire territory until 1991. BiH was seen therefore by many both in the West and the East as a model of a multiethnic society with peaceful interethnic co-existence. However, with the proclamation of an independent Republika Srpska (RS) on the territory of BiH in the process of the dissolution of communist Yugoslavia in the beginning of 1992 and the war from 1992 to 1995, massive ethnic cleansing and the creation of contiguous, ethnically homogenous territories went hand in hand. In April 1994 also the Federation of BiH was created on the territory held by the army of the Republic of BiH to stop the war between Muslims and Croats which had broken out in 1993 to adjust the military situation on the ground with newly drawn borderlines on maps after the “cantonization” of BiH had been proposed by international mediators. Unlike Republika Srpska, which was established and still is a central state, the Federation became territorially subdivided into ten cantons: five with a majority Muslim population, three with a majority Croat population and two so-called “mixed” cantons. The Muslims were renamed Bosniacs and a Bosnian language was created in addition to Serbian and Croatian; thereby finishing the political separation of the former Serbo-Croatian or Croat-Serbian language. Both political entities - at war with each other - had a fully fledged institutional structure like sovereign states with constitutions and all legislative, executive and judicial organs including supreme and constitutional courts.¹

¹ On the constitutional and political developments from 1991 to 1995 see Joseph Marko, “The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina”, in Swiss Institute of Comparative Law/Venice Commission (eds.), *Local Self-Government, Territorial Integrity and Protection of Minorities* (Schulthess, Zürich, 1996), 121-143.

So, with the Dayton-Paris Agreement of December 1995 a political “compromise” was achieved to end the war. This compromise was legally institutionalised in the General Framework Agreement for Peace (GFAP)² and its annexes, in particular in Annex 4, the Constitution of BiH and Annex 10, creating the Office of the High Representative (OHR), which is responsible for coordinating the efforts of international and national actors in the civilian implementation of the GFAP. What are the elements of this compromise?

This compromise brought a “federalisation” of the former centralist Socialist Republic of BiH. As a price for the legal fiction of the legal continuation of the state, which had been internationally recognised in 1992 as the “Republic of Bosnia and Herzegovina”, the RS and the Federation of BiH were only constitutionally recognised as so-called “Entities” of BiH, the new name for the common state. Thereby the border that had been violently created between them was also codified. On the other hand, as a dynamic element, the Constitution and Annex 7 clearly entrenched the return of refugees and (internally) displaced persons as one of the main goals of the Peace Agreement in order to protect or even re-establish the multiethnic society which had existed before 1992.

Following the model of the Washington Agreement of April 1994 which created the bi-national Federation of Bosniacs and Croats, the Dayton-Constitution also brought a complex system of ethnic power-sharing for almost all the institutions of BiH. So BiH has a bi-cameral legislature where the three so-called “constituent peoples”, Bosniacs, Serbs and Croats, are represented in parity (5:5:5) in the second chamber, the House of Peoples. The same holds true for the collective State Presidency consisting of one Bosniac, one Serb, and one Croat member. Also the government with a chair and ministers and their deputies is composed according to an ethnic key. The Constitutional Court, which is the only court established at the state level, is the only state institution for which the Constitution did not proscribe an ethnic key. In actual practice, however, two Serbs, two Croats and two Bosniacs were elected by the Entity Parliaments in 1997 as “domestic” judges in addition to the three international judges appointed by the President of the European Court of Human Rights. In addition to this ethnic representation, mutual veto power was entrenched in the Constitution. Each member of the Presidency and the members of the caucuses of the constituent peoples in parliament could declare a decision or bill “destructive of the vital interest” of a constituent people. In contrast to these ethnic and collective rights, both the Constitution and Annex 6 of the GFAP on the protection of human rights do, of

² OHR, The General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, at http://www.ohr.int/dpa/default.asp?content_id=380.

course, also contain a catalogue of individual human rights based on the idea of the ethnically indifferent citizen, as can be seen from the non-discrimination provisions. However, institutional ethnic power-sharing seems to be predominant.

Following the pattern of the preservation of the fully fledged institutional structures of the “Entities”, they retained many of the responsibilities which they had before Dayton. Therefore, according to Article III of the BiH Constitution, the institutions at state level possess only few responsibilities such as foreign policy, customs policy, monetary policy, finances of the common institutions, immigration, refugee, and asylum policy, international and inter-Entity criminal law enforcement, common and international communication facilities, inter-Entity transportation, and air-traffic control. Hence, in the division of competencies, defence and therefore the two armies, the police, the judiciary, education and culture remained in the domain of the Entities. Moreover, Art VIII of the Constitution makes the institutions of BiH totally dependent of the Entities for financial support. They have, in a ratio of 2:1, to raise the revenues required by the budget of the state. In comparison, the state of BiH is one of the weakest federations, if it is considered a federation at all, since many Serb constitutional lawyers call it more a confederation, others a “complex state” or “union”.

2. Problems of the Implementation of the Dayton Agreement

What were the effects³ of these theoretical, constitutional and institutional compromises in the phase of re-construction of state and society after 1995?

On the state level, power-sharing in the ethnically representative institutions did not work. Instead of a positive elite consensus for co-operation making state reconstruction work, a negative consensus after the principle of divide et impera prevailed so that the Presidency and the Parliament were blocked along ethnic lines and were unable to adopt the necessary decisions and laws for the reconstruction of the state and the war-torn economy. The Constitutional Court was the only permanently functioning institution at state level, because there was no veto power foreseen and despite or due to the fact that it remained financially dependent on foreign donations and could not rely on the state budget.

³ The most comprehensive analyses are David Chandler, *Bosnia. Faking Democracy after Dayton* (Pluto Press, London, 1999); Sumantra Bose, *Bosnia after Dayton, Nationalist Partition and International Intervention* (Hurst and Co., London, 2002); Christophe Solioz and Tobias K. Vogel (eds.), *Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina* (Nomos, Baden-Baden, 2004).

On the Entity level, ethnic cleansing and homogenisation was continued at first, as can be seen from the fact that until 2000 there was no substantive “minority” returns of refugees and displaced persons, i.e. that Serbs would return to the Federation and Bosniacs and Croats into RS.⁴ Moreover, schools remained segregated on the basis of the right to “mother-tongue” instruction, despite of the fact that differences between Bosnian-Croatian-Serbian (B-C-S) are minor. This homogenisation is also shown by figures on the ethnic composition of the executive and judiciary in the Entities, published by the Constitutional Court in the landmark decision on “constituent peoples” (3rd Partial Decision in U 5/98 as of July 2000)⁵, which show that there were virtually no non-Serbs represented in the government, judiciary and police of RS and almost no Serbs in the respective institutions of the Federation. Secondly, through legislation in all of their fields of powers, the Entities enforced the already existing legal fragmentation, creating more and more barriers to the free movement of people, goods, services and capital in opposition to the guarantee of a common market as is foreseen in the Constitution of BiH. Moreover, the Entities were not ready to make use of the constitutional provision of a transfer of powers to the state level by negotiations.

Despite repeated elections on all levels and election-engineering by the OSCE, which was responsible for the organisation of elections according to Annex 3 of the GFAP, the three nationalist parties SDA, SDS and HDZ⁶, representing most of the Bosniac, Serb and Croat electorate and having dominated the political system before the war started, were - with the exception of the year 2000 - repeatedly re-elected and thereby democratically legitimised. So, all efforts of the OSCE and the International Community (IC) to establish a multi-ethnic party system failed.⁷

Moreover, there is not only a lack of elite co-operation due to nationalist exclusiveness. According to opinion polls in 2002 only 53% of the Bosniac electorate are for a common and strong state. Fully 53% of Serbs want independence and/or the annexation of RS to Serbia in contrast to just 13% who are for a common state for BiH. Again only 19% of Croats stand up for BiH as it is, whereas 31% opt for a third, separate Croat entity and 18% for an

⁴ UNHCR, “Returns Summary To Bosnia and Herzegovina from 01/01/96 to 31/01/05”, at <http://www.unhcr.ba>.

⁵ Constitutional Court, Case No. U-5/98-III, 1 July 2000, at <http://www.ccbh.ba>, (Službeni glasnik BiH [Official Journal], No. 23/00, 14 September 2000).

⁶ These are the Serb-Croat-Bosnian acronyms for the Party for Democratic Action, the Serb Democratic Party, and the Croatian Democratic Community.

⁷ See International Crisis Group (ICG), “Bosnia’s Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building”, 146 *ICG Balkan Report* (Sarajevo, Brussels, 22 July 2003).

independent Herceg-Bosna.⁸ These figures clearly show that the majorities of two of the three constituent peoples do not really want the common state BiH. Moreover, there is a desperate lack of a civic concept of BiH statehood and an “overarching” Bosnian identity.

Due to the failures of elite co-operation and the ethnic “pillarisation” of the society, the re-construction of the war-torn economy failed and, consequently, the transition from a socialist to a market economy was also very slow. This was camouflaged in the years after Dayton by massive foreign aid. It became visible only after 2000 that the economy of BiH is totally aid-dependent instead of investment driven, due to the lack of foreign investment again caused by the lack of an effective rule of law.

On the other hand, due to the territorial delimitation of powers to the Entities and cantons, there is a huge state apparatus with 13 Prime Ministers, dozens of ministers, around 750 elected representatives and 1200 judges and prosecutors⁹ for a population of 4 million which is, however, not able to secure effective legal security and basic public services (pensions, social security).

In conclusion, the institutionalisation of ethnic power-sharing on state level on the basis of territorial strongholds of nationalist forces in the Entities prevailed over the civic principle so that almost every aspect of state and society became seen through the ethnic lens. This, however, did not contribute to the establishment of mutual trust and interethnic co-operation nor did it foster reconciliation and the formation of a common state identity, but instead it prevented effective state reconstruction and nation-building. At the same time, the recognition of the Entities and their strong powers, which they did not want to give up, enforced the disintegrative factors and tendencies of the ethno-national divide.

3. The Roles of the High Representative and the Constitutional Court

However, there are two institutions which acted against the disintegration of state and society.

⁸ UNDP, “Early Warning System Bosnia and Herzegovina”, Quarterly Report, July-September 2003, Sarajevo 2003 and UNDP, “Early Warning System Bosnia and Herzegovina”, Annual Report 2002, Sarajevo 2003.

⁹ International Crisis Group (ICG), “Courting Disaster: The Misrule of Law in Bosnia & Herzegovina”, 127 *ICG Balkan Report* (Sarajevo, Brussels, 25 March 2002), and International Crisis Group (ICG), “Rule of Law in Public Administration: Confusion and Discrimination in a Post-Communist Bureaucracy”, 84 *ICG Balkan Report* (Sarajevo, Brussels, 15 December 1999).

First of all, it is the responsibility of the High Representative (HR) to work for the civilian implementation of the GFAP and thereby for the reconstruction of the state. In the very beginning after 1995, however, the HR was a “toothless” tiger against the obstruction of the ethno-nationalist parties and politicians in the institutions of BiH due to the competencies given to him under Annex 10 of the GFAP. Thus, in 1997, the mandate of the HR was extended by the Peace Implementation Council (PIC) Meeting in Bonn so that he could intervene in the legislative process and dismiss obstructionist public officials.¹⁰ Based on these new, so-called “Bonn Powers”, the HR immediately started an integrationist legislation for state and society by decreeing laws on citizenship, the flag, the national anthem, the currency, ethnically neutral licence plates and passports: all laws the nationalist parties could not agree on in the Parliamentary Assembly. Secondly, HR Petritsch started to dismiss more and more public officials, from mayors up to members of the collective State Presidency for obstruction against the implementation of the GFAP.¹¹

The second institution which effectively counterbalanced the nationalist and disintegrative tendencies was the Constitutional Court of BiH.¹² Already in 1999 the Constitutional Court declared the Law on Government of BiH unconstitutional because it had foreseen a system of ethnically divided Co-chairs of the government who would effectively appoint the ministers (U1/99)¹³. The landmark decision, however, became the case U 5/98 which was decided and published in 2000 in four partial decisions.¹⁴ In particular the third Partial Decision is known as the so-called “constituent peoples” decision. Then-President Alija Izetbegovic had brought the case before the Constitutional Court since the Entities’ constitutions, despite an express provision in the Dayton constitution with a time limit of six months, had not been brought into conformity with the Dayton constitution by 1998. So the claim alleged that more than 20 provisions in the Entity constitutions, most importantly the official languages, the status of the Orthodox Church, the command authority of the Entities presidents over armed forces, the

¹⁰ For a critical analysis of these powers and the relation between the HR and the Constitutional Court of BiH see Joseph Marko, “Challenging the Authority of the UN High Representative before the Constitutional Court of Bosnia and Herzegovina”, in Erika de Wet and André Nollkaemper (eds.), *Review of the Security Council by Member States* (Intersentia, Antwerp, Oxford, New York, 2003), 113-117.

¹¹ Christian J. Ebner, “The Bonn Powers - Still necessary?”, in Predrag Jurekovic (ed.), *From Peace Making to Self Sustaining Peace- International Presence in South East Europe at a Crossroads?* (Landesverteidigungsakademie, Vienna, 2004), 118-150.

¹² See Joseph Marko, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: a First Balance“, in *7 European Autonomy and Diversity Papers - EDAP* (2004), at <http://www.eurac.edu/edap>.

¹³ Constitutional Court, Case U-1/99, 14 August 1999, at <http://www.ccbh.ba>.

¹⁴ Constitutional Court, Case U-5/98, 30 January 2000, Službeni glasnik BiH, No. 11/00, 17 April 2000; 19 February 2000, Službeni glasnik BiH, No. 17/00, 30 June 2000; 1 July 2000, Službeni glasnik BiH, No. 23/00, 14 September 2000; 19 August 2000, Službeni glasnik BiH, No. 36/00, 31 December 2000.

institution of socially-owned property as a communist legacy and the position of constituent peoples were contrary to the Dayton constitution. In particular the claim that constituent peoples have to be constituent “on the entire territory of BiH” aimed at the break up of the nationalist exclusiveness, discrimination and segregation at Entity level.

The alternatives for the Constitutional Court were either to uphold the “historic” compromise at Dayton in 1995, with the recognition of a national state of the Serb people, as the name Republika Srpska clearly enough indicated, and the bi-national Federation as the price for a negative peace with the consequence of legitimising ethnic cleansing and national homogenisation through territorial separation, or to rely on the other constitutionally entrenched, dynamic goal of the GFAP, namely the return of refugees and displaced persons in order to re-establish a multiethnic society. With a narrow 5:4 vote, and the Serb and Croat judges dissenting, the Constitutional Court decided that all of the three constituent peoples have to be also constituent peoples on Entity level in order to break up the national homogenisation of the Entities without, however, giving clear directions for the necessary constitutional amendments and thereby institutional changes except for a warning to introduce “vital interest clauses”, i.e. veto powers of constituent peoples, on all levels of government.¹⁵

The second most important integrative step in this decision was the ruling to allow for “framework legislation” of the state in those fields which were deemed the exclusive competence of the Entities. In an important interpretation of Article III in the context of the entire constitutional text, the majority of the Court argued that the Constitution does not foresee a system of mutually exclusive competences of the institutions of BiH and the Entities, but that there are concurring competences in fields which - through an isolated reading of Article III - seem to be an exclusive responsibility of either the institutions of BiH or the Entities.

In conclusion, the Constitutional Court did provide the ground for a strengthening of the state responsibilities in order to counterbalance the disintegrative forces following from the division of powers and did shift the balance from collective rights and ethnic power-sharing of constituent peoples to the protection of minorities and the rights of individual citizens with a strong emphasis on the non-discrimination principle again to break the ground for the re-establishment of a multiethnic society.

¹⁵ See Carsten Stahn, „Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken - Neue Hoffnung für das Friedensmodell von Dayton?“, 60 (3-4) *ZaöRV* (2000), 663-701.

However, the implementation of this decision of the Constitutional Court through constitutional amendments on the Entity level did again require pressure from the High Representative. He installed constitutional commissions¹⁶ and brokered the “Mrkovica-Sarajevo-Agreement”¹⁷ of the parties for the draft constitutional amendments. When the Serb parties did not fully stick to the text of the Agreement, he again imposed the constitutional amendments.¹⁸

Contrary to the decision of the Constitutional Court, however, which had sought to de-ethnicise the institutional structures with its warning on veto powers, the amendments of the Entities’ constitutions reinforced the ethnic principle by providing for the ethnic representation of the constituent peoples and so-called “Others” on all institutional levels in the legislature, the executive and the judiciary. Moreover, vital interest clauses and thereby the possibility to block the entire decision-making process which had led to obstruction on the state level were also introduced in the legislative process of the Entities.¹⁹

The first case in order to decide whether a vital interest had correctly been invoked in the parliamentary legislative process was brought before the Constitutional Court of BiH in 2004 in case U 8/04.²⁰ The Court took a decision on the merits in order to de-block the work of the Parliamentary Assembly. In an interesting twist to define the term “vital interest”, the Constitutional Court declared first that effective participation of constituent peoples without domination of one group was the “vital interest” and went on to argue that efficient participation of constituent peoples must be balanced with the efficient operation of the state: “Vital interests must not endanger the implementation of the theory of state functionality which is closely connected to the neutral and essential understanding of the term citizenship as the criterion of national affiliation. In other words, the protection of vital

¹⁶ OHR, Decision Establishing Interim Procedures to Protect Vital Interests of Constituent Peoples and Others, including Freedom from Discrimination, 11 January 2001, at http://www.ohr.int/print/?content_id=365, (Službeni glasnik BiH, No. 2/01) and OHR Press Office, “High Representative names Members of the Constitutional Commissions of the Entity Parliaments”, 7 February 2001, at http://www.ohr.int/print/?content_id=4216.

¹⁷ OHR, Agreement on the Implementation of the Constituent Peoples’ Decision of the Constitutional Court of Bosnia and Herzegovina, 22 March 2002, at http://www.ohr.int/print/?content_id=7273.

¹⁸ OHR, Decision on Constitutional Amendments in Republika Srpska, 19 April 2002, at http://www.ohr.int/print/?content_id=7474, (Službeni glasnik RS, No. 21/02, 25 April 2002) and OHR, Decision on Constitutional Amendments in the Federation, 19 April 2002, at http://www.ohr.int/print/?content_id=7475, (Službene novine FBiH [Official Journal], No. 16/02, 28 April 2002).

¹⁹ See International Crisis Group (ICG), “Implementing Equality: The ‘Constituent Peoples’ Decision in Bosnia and Herzegovina”, 128 *ICG Balkans Report* (Sarajevo, Brussels, 16 April 2002).

²⁰ Constitutional Court of Bosnia and Herzegovina, Case No. U-8/04, 25 June 2004, at <http://www.ccbh.ba>.

interests must not lead to unnecessary disintegration of civil society as the necessary category of the modern sovereignty.” In conclusion, the contested proposal of a Framework Law on Higher Education in BiH was declared destructive of the vital interest, but contrary to the intention of the requesters, not because it did not guarantee them a university with instruction in the Croatian language only, but due to the fact that it did not provide for equality of all the three languages and thereby access to higher education for members of all the constituent peoples and others in order to counterbalance segregation in this field.

In a similar case, U 2/04²¹ from the same date, the draft law on Amendments to the Law on Refugees and Displaced Persons of BiH was declared destructive of vital interests of the Bosniac people. Again the Court argued that the vital interest is to neutralize the consequences of mass exodus of constituent peoples and the return of refugees is necessary “to re-establish the multi-ethnic society which existed before the war without any territorial divisions on ethnic grounds”.

Already in case U 44/01²², adopted in February 2004, the Constitutional Court had declared the renaming of Bosnian cities and municipalities by RS authorities during the war by use of the suffix Serb to be unconstitutional because this process was inherently discriminatory. Since Serb majorities had been the consequence of war and ethnic cleansing and the designation of these municipalities as “Serbian” would prevent the return of refugees, this process violated an explicit obligation under Article II/5 of the Constitution and Annex 7 of the GFAP. In an unprecedented motion, the Constitutional Court then renamed all of these cities and municipalities as a preliminary measure under its Rules of Procedure in September 2004 “in order to prevent legal chaos as long as the Parliament of Republika Srpska does not implement the Constitutional Court decision”.

In conclusion, the Constitutional Court went on to counterbalance the effects of ethnic cleansing and the domination of the ethnic principle by referring to the necessity of state functionality and the citizenship principle.

Also the High Representative did put further pressure on the parties after 2001 in order to strengthen the state level for integrative purposes. Hence the number of ministries on the state level was increased and a State Court²³ was

²¹ Constitutional Court of Bosnia and Herzegovina, Case No. U-2/04, 25 June 2004, see <http://www.ccbh.ba>

²² Constitutional Court of Bosnia and Herzegovina, Case No. U 44/01, 22 September 2004, Službeni glasnik BiH, No.18/04.

²³ OHR, Decision establishing the BiH State Court, 12 November 2000, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=362.

established in addition to the Constitutional Court of BiH. With the Law on Defence a BiH Ministry of Defence and a common command for both armies were created.²⁴ Also a State Border Service²⁵ took over control of the external borders from the Entities and a VAT²⁶ collected by the state was introduced. After having integrated also the armies by 2005, with the approval of the police reform²⁷ the last important obstacle to start negotiations on a Stabilisation and Association Agreement with the EU was removed. The new local police regions will be based on technical, and not ethnic criteria.

4. BiH at the Cross-roads: from Semi-protectorate to European Integration:

Despite the integrative role the HR and the Constitutional Court play to make BiH a functioning multiethnic federation, serious problems remain:

Due to the territorial subdivision into Entities and cantons in the Federation and finally municipalities for the local level in both Entities, a complex, overburdened institutional structure of the state bureaucracy remains in place which cannot be financed and does not provide the necessary public services in a professional and neutral way. Hence, the European Stability Initiative (ESI), a Berlin based think-tank, made an interesting proposal to “make federalism work” in January 2004.²⁸ According to this proposal, the Entity level should be abolished and RS and the ten cantons, without re-drawing boundaries, should become the new territorial subunits of BiH. Thereby the powers of the Entities should be either further devolved to the local level closer to the citizens or transferred upwards to the state level to strengthen the state. This proposal was met with “mixed feelings” in BiH itself. On the

²⁴ OHR, Decision Amending the Constitution of Republika Srpska, 02 April 2003, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=29617, (Službeni glasnik RS, No. 31/03, 3 May 2003), Decision Amending the Constitution of the Federation of Bosnia and Herzegovina, 02 April 2003, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=29622, (Službene novine FBiH, No. 18/03, 9 May 2003) and Zakon o odbrani Bosne i Hercegovine (BiH Defence Law), http://www.mod.gov.ba/bos/bos_zakonoodbr.html, (Službeni glasnik BiH, No. 43/03, 29 December 2003).

²⁵ Zakon o Državnoj granicnoj službi Bosne i Hercegovine (Law on the State Border Service of BiH), Službeni glasnik BiH, No.19/01 and 50/04.

²⁶ Zakon o porezu na dodatu vrijednost (Law on the Value Added Tax), Službeni glasnik, No. 09/05 and Zakon o izmjenama i dopunama zakona o porezu na dodatu vrijednost (Amendments to the Law on the Value Added Tax), Službeni glasnik BiH, No. 35/05, 6 June 2005.

²⁷ Narodna skupština Republike Srpske, “Odluka o prihvatanju Sporazuma o restrukturiranju policijskih struktura u Bosni i Hercegovini” (Parliament of BiH, “Decision on the Adoption of the Agreement on the Reform of Police Structures in BiH”), Službeni glasnik RS, No. 89/05 and “Sporazum o restrukturiranju policijskih struktura u Bosni i Hercegovini” (“Agreement on the Reform of Police Structures in BiH”), at http://www.narodnaskupstinars.net/lat/odluke/odluke.php?id_odluke=42.

²⁸ European Stability Initiative (ESI), “Making Federalism Work - A Radical Proposal for Practical Reform”, ESI Reports, Berlin, 8 January 2004, http://www.esiweb.org/docs/showdocument.php?document_ID=48.

one hand, the existing Serbian political power elite, despite the development of a formal multi-party system, will never give up RS and immediately raised serious objections to the “downgrading” of RS into one canton out of eleven. This despite the fact that RS would not further be subdivided and no new borders drawn, which seems a dangerous undertaking on the Balkans anyway. Moreover, the overburdening bureaucracy would only slightly be reduced if the Entity governmental structures of the Federation are abolished. The real problem, in my opinion, is not the size of the sub-national territorial units and their institutional structures, but the economic viability of the country as a whole as well as of its regions. The big challenge will be to make any territorial subunits attractive for foreign investment in tourism and industry.²⁹

This problem goes hand in hand with the alternative of a functioning state and the “ethnic compromise”. As can be seen from the process of implementation of the GFAP, there is no abstract, theoretical formula to be applied. One of the lessons to be learned from the example of BiH is, that the overemphasis on democratisation is wrong. If elections come too early without the necessary preconditions, i.e. free media throughout the country and a re-established civil society instead of ethnic pillarisation of the population, the nationalist elites are reinforced and democratically legitimised. Moreover, rule of law was not a topic immediately after Dayton. The necessity of a functioning system of rule of law was recognised by the IC only in 2000. With the Civil Service Law and the creation of High Judicial and Prosecutorial Councils³⁰ and the entire re-appointment process in the judiciary in 2002/03 serious efforts were made to fight political party patronage and crony appointments in the public sector based on national affiliations, even if these processes did not meet the self-proclaimed standards of rule of law as indicated below. However, the constitutional amendments of the Entities’ constitutions in 2002 brought, at the same time, a strict ethnic representation for all groups in all executive and judicial institutions, in particular in the

²⁹ At the very moment (November 2005), however, there is little prospect for reform. Although all parties speak of the necessity to create „Dayton II” by adopting a new constitution, the question of territorial division seems to block any other argument. All the Serb parties of RS, including Milorad Dodik’s Social Democrats, refuse to give up RS as an Entity of BiH. The Croat HDZ is willing to create viable regions as proposed by the Bosniac SDS, but only if RS is abolished. If this is not the case, they insist on the creation of their own “Croat” Entity. This would further entrench the logic of ethno-nationalist domination of territory, accepted in Dayton, but fought against by the Constitutional Court and the HR so far. For the respective Serb and Croat political party positions see the recently published volumes: Bozo Zepic, *Pat pozicija u Bosni i Hercegovini* (Patt position in BiH), (Mostar, 2005) and Akademija Nauka i Umjetnosti Republike Srpske, *Republika Srpska - Deset godina dajtonskog mirovnog sporazuma* (Academy of Sciences of RS, *Ten years of the Dayton Peace Agreement*), (Banja Luka, 2005).

³⁰ OHR, Decision Amending the Constitution of the Republika Srpska, 23 May 2002, at http://www.ohr.int/print/?content_id=8455 (Službeni glasnik RS, No. 31/02, 10 June 2002) and OHR, Decision Amending the Constitution of the Federation of Bosnia and Herzegovina, 23 May 2002, at http://www.ohr.int/print/?content_id=8452 (Službene novine FBiH, No. 22/02, 5 June 2002).

Entities. For the time being, i.e. for the immediate aftermath of conflict settlement, this measure can be seen justified by the need to break up ethnic homogenisation and to develop interethnic trust. Strict proportional representation in the public service is seen as one of the pillars of the Autonomy Statute of South Tyrol which enabled the resolution of the ethnic conflict there. However, because of this ethnic key, all efforts to strengthen the independence, accountability, professional performance through education and training, and efficiency of the administration and judiciary become all the more important. Only these measures will enable the creation of a “corps d’ esprit”, which can counterbalance ethnic affiliations. Efforts made by the EU Commission under CARDS Regional in this direction have to be strengthened.

The alternative of “ethnic” versus “civic” is not only a problem of institutional structures and elites, but also of the population at large. There is almost no overarching “Bosnian” identity and loyalty to the state of BiH, not only because of the ethnic cleavages. Paradoxically enough, almost only the foreigners in the institutions of BiH (The Central Bank, the Constitutional Court, the Human Rights Chamber) developed a “Bosnian” identity. Due to the difficulties for housing, getting jobs and proper education for the children, refugee returns were and continue to be very difficult. There is a serious danger of a second “exodus” and brain-drain as 75% of people between 28 and 36 are ready to leave the country!³¹ Therefore, not only the strengthening of civic education and NGOs for a vivid civil society is necessary, but also a dramatic improvement of the economic conditions in order to ease the ethnic tensions as again the example of South Tyrol clearly shows.

Despite a full or semi-protectorate of the OHR, a self-sustainable economy and functioning state independent of external help do not yet exist. Even if HR Petritsch had announced a policy of “ownership” and HR Ashdown changed the role from a harsh arbitrator and ruler to a “soft mediator”³², the record of IC intervention in BiH is a mixed one at best. Too often, the IC and even the EU does not speak with one voice but is divided along national lines and spheres of interest. Moreover, the IC preaches democracy, rule of law and protection of human rights. But the “Bonn powers” of the HR are exercised too often in an “imperial” way and the dismissals of public functionaries and the re-appointment process in the judiciary in 2002 did not meet the lowest

³¹ UNDP, *supra* note 8.

³² See Ebner, “The Bonn Powers...”, 118-150.

standards of rule of law. Thus all the emphasis on European values and standards is in strong danger of losing credibility.³³

However, European integration with the prospect of EU membership is the only perspective the country has, politically, economically as well as culturally. “United in diversity”, the motto of the EU, must be brought to life in BiH as well. In this way, BiH was not only a Yugoslavia “en miniature”, but is such again in European terms. This time, however, not under communist, but democratic auspices. Sovereignty and independence of smaller and smaller ethnically divided territorial entities cannot cope with the challenges of globalisation, but only autonomy and integration, i.e. only a flexible federal system from the local to the supra-national level can adapt to the new interdependencies. In this way, territorial borders will lose their ethno-national significance, the multi-national co-operation of organised crime can only be fought through inter- and supranational criminal law enforcement. And last, but not least, through several territorial units, there are no clear cut majorities any longer: everybody will be in a minority position on a specific level. Again this experience will counteract all attempts at domination and provide the basis for the creation of multiple identities to overcome ethno-national exclusiveness.

³³ For a comprehensive overview on problems of rule of law in the Western Balkans countries see Joseph Marko, Francesco Palermo and Jens Woelk, “Re-enforcement of the Rule of Law. Division of Competencies and Inter-relations between Courts, Prosecutors, the Police, the Executive and Legislative Powers in the Western Balkans Countries”, Strategic Studies in CARDS 2003, July 2004, at <http://www.uni-graz.at/suedosteuroopa>.

Bibliography

Akademija Nauka i Umjetnosti Republike Srpske, *Republika Srpska - Deset godina dajtonskog mirovnog sporazuma* (Academy of Sciences of RS, *Ten years of the Dayton Peace Agreement*), (Banja Luka, 2005).

Bose Sumantra, *Bosnia after Dayton, Nationalist Partition and International Intervention* (Hurst and Co., London, 2002).

Chandler David, *Bosnia. Faking Democracy after Dayton* (Pluto Press, London, 1999).

Ebner Christian J., "The Bonn Powers - Still necessary?", in Jurekovic Predrag (ed.), *From Peace Making to Self Sustaining Peace- International Presence in South East Europe at a Crossroads?* (Landesverteidigungsakademie, Vienna, 2004), 118-150.

European Stability Initiative (ESI), "Making Federalism Work - a Radical Proposal for Practical Reform", ESI Reports, Berlin, 8 January 2004, http://www.esiweb.org/docs/showdocument.php?document_ID=48

International Crisis Group (ICG), "Rule of Law in Public Administration: Confusion and Discrimination in a Post-Communist Bureaucracy", 84 *ICG Balkan Report* (Sarajevo, Brussels, 15 December 1999).

International Crisis Group (ICG), "Courting Disaster: The Misrule of Law in Bosnia & Herzegovina", 127 *ICG Balkan Report* (Sarajevo, Brussels, 25 March 2002).

International Crisis Group (ICG), "Implementing Equality: The 'Constituent Peoples' Decision in Bosnia and Herzegovina", 128 *ICG Balkans Report* (Sarajevo, Brussels, 16 April 2002).

International Crisis Group (ICG), "Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building", 146 *ICG Balkan Report* (Sarajevo, Brussels, 22 July 2003).

Marko Joseph, "The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina", in Swiss Institute of Comparative Law/Venice Commission (eds.), *Local Self-Government, Territorial Integrity and Protection of Minorities* (Schulthess, Zürich, 1996), 121-143.

Marko Joseph, "Challenging the Authority of the UN High Representative before the Constitutional Court of Bosnia and Herzegovina", in de Wet Erika

and Nollkaemper André (eds.), *Review of the Security Council by Member States* (Intersentia, Antwerp, Oxford, New York, 2003), 113-117.

Marko, Joseph, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: a First Balance“, in 7 *European Autonomy and Diversity Papers - EDAP* (2004), at <http://www.eurac.edu/edap>.

Marko Joseph, Palermo Francesco and Woelk Jens, “Re-enforcement of the Rule of Law. Division of Competencies and Inter-relations between Courts, Prosecutors, the Police, the Executive and Legislative Powers in the Western Balkans Countries“, *Strategic Studies in CARDS 2003*, July 2004, at <http://www.uni-graz.at/suedosteuroopa>.

Soloz Christophe and Vogel Tobias K. (eds.), *Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina* (Nomos, Baden-Baden, 2004).

Stahn Carsten, „Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken - Neue Hoffnung für das Friedensmodell von Dayton?“, 60 (3-4) *ZaöRV* (2000), 663-701.

UNDP, “Early Warning System Bosnia and Herzegovina“, Annual Report 2002, Sarajevo 2003.

UNDP, “Early Warning System Bosnia and Herzegovina“, Quarterly Report, July-September 2003, Sarajevo 2003.

Zepic Bozo, *Pat pozicija u Bosni i Hercegovini (Patt position in BiH)*, (Mostar, 2005).

Published in the EDAP series:

3/2005

Ferri Delia, "EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks", 3 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

2/2005

De Schutter Olivier and Verstichel Annelies, "The Role of the Union in Integrating the Roma: Present and Possible Future", 2 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

1/2005

Toggenburg Gabriel N., "*Die Sprache und der Binnenmarkt im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten*", 1 *European Diversity and Autonomy Papers - EDAP* (2005), at www.eurac.edu/edap.

7/2004

Marko Joseph, "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance", 7 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

6/2004

Petričušić Antonija, "Wind of Change: The Croatian Government's Turn towards a Policy of Ethnic Reconciliation", 6 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

5/2004

Henrard Kristin, "The European Convention of Human Rights and the Protection of the Roma as a Controversial Case of Cultural Diversity", 5 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

4/2004

Neuwirth Rostam J., "The 'Cultural Industries': A Clash of Basic Values? A Comparative Study of the EU and the NAFTA in Light of the WTO", 4 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

3/2004

Herold Anna, “EU Film Policy: between Art and Commerce”, 3 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

2/2004

Bia Maria Teresa, “Towards an EU Immigration Policy: Between Emerging Supranational Principles and National Concerns”, 2 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.

1/2004

Toggenburg Gabriel N., “The Debate on European Values and the case of cultural diversity”, 1 *European Diversity and Autonomy Papers - EDAP* (2004), at www.eurac.edu/edap.