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Bosnia and Herzegovina: Statehood at the Crossroads

It was rather obvious in 1991 that Bosnia and Herzegovina, then one of the six Yugoslav republics, was not going to survive the collapse of Yugoslavia without plunging into violence. The question, which was discussed at several workshops in Sarajevo that year, still sounds pertinent: Could the 1992-5 war have been avoided and a relatively smooth transition to independence achieved with an internationally enforced and administered protectorate? ¹ The idea of a protectorate was based on the experience of the UN “trusteeship” system, which had been established over certain territories to help them to sort out tensions and conflicts that were threatening their internal stability and transition toward independence. ² This “Question X” of our time survived the war and was still debated in the first years of the Dayton Peace Agreement. ³ Hardly a meeting in Bosnia or an interview in the media went by without making a reference to that dilemma. ⁴ A group of NGOs from the region have had it on their agenda and were even granted a hearing before a committee of the European Parliament in 1994. ⁵

Legacy of Dayton

Eventually, neither protectorate nor trusteeship were formally tried in Bosnia. Instead, following the 1995 Dayton Agreement, the country was granted an overwhelming presence of outside powers and international community institutions tasked with monitoring peaceimplementation and helping the postwar reconstruction. At the same time, the Dayton Agreement implicitly put Bosnia and Herzegovina under the “protectorate” of the international community. This label may sound rather controversial, but it is still more acceptable than “trusteeship”. Leaving aside political sensitivities regarding the definition of the Dayton Agreement institutional structure in Bosnia and Herzegovina, the argument about protectorate can be illustrated clearly. First and foremost, the Office of the High Representative acts as the steering power on behalf of the international community and is based in Sarajevo. The High representative is instructed “to facilitate the Parties’ own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement”. ⁶ The Constitutional Court of Bosnia and Herzegovina is composed of nine members, three of whom are foreign nationals appointed by the President of the European Court of Human Rights. ⁷ A foreigner served as Governor of the Central Bank, for the first 5 years and was appointed by the International Monetary Fund. ⁸ The Human Rights Ombudsman used to be appointed by the Organization for Security and Cooperation in Europe (OSCE) and this position was also held by international officials for the first 8 years of the Dayton Agreement.

The Human Rights Chamber with a majority of foreign members (8 out of 14 were appointed by the Council of Europe) functioned until 2003.⁹ Finally, the international armed force deployed in Bosnia and Herzegovina is without precedent as far as manpower, heavy armoury and the mandate are concerned. Consequently, it can safely be asserted that the mission of the international community in Bosnia has been a de facto protectorate, or to put in a politically correct vocabulary – the country, by and large, has been governed by an international administration. The case of Bosnia’s “protectorate” falls into the category of a wider mandate undertaken by the international community in the mid-1990 to administer war-torn and strife-ridden territories. Primarily United Nations and the European Union have been entrusted with exceptional authority and have assumed responsibility for governance in Bosnia and Herzegovina, Eastern Slavonia, Kosovo and East Timor. These initiatives represent some of the boldest experiments in the management and settlement of intra-state conflict ever attempted by third parties.¹⁰

This was crowned by the unprecedented executive and legislative powers over a sovereign country given to the High Representative of the international community in Bosnia.¹¹ Such a heavy-handed mandate of any outside power is, per definitionem, incompatible with a sovereign status of a country which had been internationally recognized as well as confirmed as an independent state by the Dayton Accords, acquiring along the way full membership in almost all major international organizations, from the UN to the Council of Europe. In the context of contemporary international law B&H escapes any formal categorization. De iure, it has full sovereignty, accepted by the international organizations through the process of admission to full membership. Furthermore, its statehood is guaranteed by an international instrument, i.e. Dayton Agreement and explicitly defined in its Annex 4, which makes the Constitution of Bosnia and Herzegovina.¹² On the other hand, the very same agreement contains a number of crucial de facto limitations imposed by the international community over the authorities of B&H to **Exercise** their sovereign prerogatives in full capacity, which puts a big question mark over its statehood.¹³ Although there is no doubt that these limitations are based on the agenda of restoring human rights, rule of law and democracy, the Bosnian experiment nonetheless set a precedent for a temporary surrender of sovereignty to governance by international agencies. Bosnia and Herzegovina could be safely categorized a state sui generis, but this escapism only blurs the answer to the question about the responsibility for running the country and providing safety and security for its citizens.

At the time Dayton Agreement was reached it looked like a perfect international instrument by which to stop the war and turn the tide of events in Bosnia. Written in a diplomatic language widely open to interpretation, the agreement was evasive enough to make all concerned parties, including the international community, satisfied. At the same time, the text of the agreement was precise enough in its function to safeguard peace and prevent a new outbreak of violence under the watchful eye of the international community.

Dayton Constitution Versus State-Building

As the years went by, it became obvious that the Dayton Agreement could not open the way to a consistent process of state-building and the consolidation of institutional

prerogatives at the State level. Most commentators and analysts blame the Dayton Constitution (Annex 4 of the Dayton Agreement) for instituting a stalemate in the country and allowing for the fragmentation of Bosnia along ethnic lines. The blame should not focus on the Constitution itself, but rather on the fact that the Dayton Agreement failed to rescind the Constitutions of Bosnia's two entities, the predominantly Bosniak (Bosnian Muslim) and Croat Federation and the Serb-dominated Republika Srpska (RS). The Croat Community (later Republic) of Herzeg-Bosnia, although it had never been as prominent as the other two, has also left its mark on the consistency of the Dayton Agreement.

The agenda for the constitutional controversy was first set by depriving the country of the "republic" attribute in its name, namely, Republic of Bosnia and Herzegovina. In spite of the "continuation" paragraph of the Constitution, the drafters of the Dayton Agreement were explicit in stipulating that the Republic of B&H was no more the official name of that country, but merely "Bosnia and Herzegovina".¹⁴ This wording implicitly put the entities' status above B&H, which as a state was supposed to accommodate within its territory one "republic" and one "federation". Thus, the way the country had been structured escapes any practical logic as well as any principles of constitutional theory. Furthermore, in the process of dissolution of the former Yugoslavia, all the former socialist republics, i.e. member states of the federation (SFRY), retained the "republic" in their respective names - except Bosnia and Herzegovina.¹⁵ It can be argued that this, often ignored, fact left Bosnia in an inferior political position in relation to the other successor states that have emerged from the former Yugoslavia and allowed for questioning its statehood by the Serbian and Croatian political establishments in the early years of the Dayton Agreement.

More importantly, the Annex 4 of the Dayton Agreement failed to deal with the entities' competing constitutions and left them intact, regardless of the fact that when negotiations in Dayton started in November 1995, both constitutions already belonged to a different era having been created under the circumstances which the international community wanted to put behind the post-war Bosnia and Herzegovina. The Dayton Constitution failed as well to provide for a provision that would secure bringing entities' constitutions in compliance with the State one in due course. Instead, it limited such a possibility to a case-to-case approach that eventually had to be resolved by the Constitutional Court of B&H.¹⁶

The Serb Republic (RS) was proclaimed as early as in 1992 (9 January) and its Constitution was adopted on 28 February of the same year. The Constitution leaves no doubt that the RS was meant to be an independent state of the Serb people, having made no reference to Bosnia and Herzegovina or to the Muslim and Croat peoples whatsoever.¹⁷ The Federation of Bosnia and Herzegovina (FB&H) was conceived by the Washington Agreement in March 1994, as a "Federation in the areas of the Republic of B&H with a majority of Bosniak and Croat population" ... The Constitution of the FB&H was proclaimed on 30 March 1994 with no reference to the Serb people, except in a conditional way.¹⁸

It contained no explicit provisions that would characterize the Federation as an independent state, but its institutional structure reflected sovereign aspirations. The Washington undertaking reflected the Clinton administration's desire to simplify the

Bosnian conflict by reducing the three-way war (“all against all”) to a two-way one. In effect, two separate countries were created on the territory of Bosnia and Herzegovina: the already existing self-proclaimed RS and the FB&H.¹⁹

It is obvious that in the spring of 1994 the international community did not consider the RS as an element to be built into the reconstruction of Bosnia and Herzegovina. Furthermore, the Washington Agreement foresaw establishing a confederation between the Republic of Croatia and the proposed Federation of Bosnia and Herzegovina.²⁰ Although this idea had never materialized, it undoubtedly showed the intentions of the state-making character of the “fathers” of the Federation in the aftermath of the Washington Agreement.

The Dayton Agreement assumed quite the opposite position bringing all three “constituent peoples”, including the Serbs, under one roof of the State of Bosnia and Herzegovina, which was explicitly confirmed by the Annex IV. This was the least controversial outcome in the new circumstances: revive and reconstruct Bosnia and Herzegovina in her pre-war borders and move on! Historically it could be justified and politically it followed the pattern of the dissolution of the former Yugoslavia when all constituent republics maintained their previous borders. But this logic was going to be undermined until the present time by the presence of both entities’ constitutions and their respective government structures that have obstructed the implementation of the Dayton Agreement with variable but continuous dynamics. The entity constitutions were inconsistent with the ideas expressed in the Preamble of Annex 4. As much as the Preamble reads as an agenda for the future and re-integrated B&H, it created an illusion that helped both entities to pretend that their constitutions were in line with the new thinking of the international community on Bosnia and Herzegovina.²¹

Repealing the entity constitutions at Dayton would have been the only way to give the Annex IV some breathing space to assume a life of its own. But this was nobody’s priority at the time. Instead, the Annex IV became a hostage of the entity constitutions. There is a provision, though, which stipulates that “the entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the Constitutions and law of the Entities”...²² But the decision making procedures at the State level were obstructed or fully blocked by the overall constitutional settlement, which had left this provision by and large ineffective.

Leaving the entities’ constitutions in full force made it very difficult for the drafters of the Annex 4 to reconcile it with the requirements to provide for a viable state in the new Constitution. Consequently, the general provisions of the Dayton Constitution are rather hesitant on how to define the country and accept a clumsy compromise between the requirement to guarantee “a pluralistic society” and to protect the existing concept of de facto ethnic statelets within Bosnia and Herzegovina. The Constitution’s operative paragraphs, however, clearly follow the reasoning of the entity constitutions and thus fail to open the way towards state building that would be supported by an appropriate and effective governing structure at the State level. This anomaly gradually brought Bosnia to the point of constitutional crisis and statehood paralysis. For the future of the country -this

was the best possible outcome. It proved right the old wisdom that things have to get worse before starting to get better, which, in Bosnia, may mean the new beginning of the state building process.

The present situation took too long to emerge, but it could have been predicted. While the basic constitutional framework stayed intact for almost a decade, the life went on. Economic growth, however insufficient, has been rather steady and kept opening new opportunities; foreign investors started testing the waters and made quite a few ventures in various parts of the country; foreign trade and import in particular are on a constant rising curve, etc.²³ All ethnic communities have undergone dramatic social changes: massive return of refugees; repossession of the property once usurped or confiscated; presence of the new generation born 15-25 years ago, etc. Political process brought the new issues, both internally and externally: the war-lords have been replaced by the post-war generation of politicians; reckoning with the past, including with the war atrocities, have become a normal experience for many; joining the European Union and NATO is firmly on the agenda of all major political parties as well as on the minds of people in general, etc. The list of new and positive issues in the Bosnian reality is long and still open, but it has been in a desperate need of a different and more flexible legal and administrative framework in order to get properly articulated. The above trends find themselves trapped by the old, inadequate, and outlived constitutional agreement and composition of the country in which they tend to develop and open new possibilities.

De Facto Revision of the Constitution

Voices have been raised advocating amendments to the Constitution through a formal procedure, but that course of action did not seem realistic until just a year ago. On one hand, the international community was too impressed by the firm opposition, coming mainly from the RS, to any change of the Dayton Agreement, and terrified by the prospect of destabilizing the “Dayton peace” if the amendment ball started rolling.²⁴ On the other, the procedure for amending the Constitution was a non-starter because it required a large majority in the Parliamentary Assembly, which was quite unlikely to be won.²⁵

In the meantime, the international community, led by the Office of High Representative (OHR), tried an alternative way of improving and securing the efficiency of the State structure in order to enable Bosnia and Herzegovina to become a credible member of the international community and to participate fully in the European integration process. Rather than changing the Constitution through a formal procedure, the OHR opted for de facto changes of the Annex 4. This option was born out of the realization that Annex 4 was not going to be amended any time soon and might prevent successful outcome of the Bosnia bid for the European Union.

There were two alternatives on that road, one based on a restrictive and the other one on an extensive interpretation of the Dayton Agreement. The former would give more power to the entities and solidify the power of nationalistic elites, maintaining the status quo. This approach is restricted to applying the

Constitution word for word and strictly following the phrasing of each and every provision. The latter would be inspired by the preamble of the Constitution, which does allow for a different vision of the country with more substantive prerogatives for the State level legislative and executive branches of government, what in turn would make Bosnian institutions more compatible with those in developed democracies, including the European institutions. In reality, the choice has not been as clear-cut and lots of gray areas still exist between these two options. Whoever advocated one or the other alternative, in the international community or in the country itself, should have kept in mind the bottom line: the mandate of the High Representative and of the Peace Implementation Council is to implement the Dayton agreement and not to change it.²⁶ It means that all decisions by the OHR had to thread carefully on a thin line between maintaining the peace and stability, helping the country to consolidate its institutions and international position, but at the same time to work within the strict remit of the Dayton Agreement without shooting itself in the foot.

So far the international community has followed an extensive approach in interpreting the Constitution and has given priority to the institution building process at the State level. This approach has been possible because of a favorable international and European environment in the first place. The process of European integration, including the EU enlargement, provided a necessary carrot for Bosnian politicians and stimulated the debate on the “European future” for the country. It required a more functional government structure, as well as the State level institutions with wider powers. Internally, the inevitable inter-entity cooperation gradually relaxed the attitudes towards State institutions even in the areas, which were considered the last resorts of entity prerogatives – defense and police force. Over the past four years, the extensive interpretation of Annex 4 has resulted in a substantial [Exercise](#) of amending of the Constitution in a de facto manner. While not a single word of the Annex IV has been touched, this process established a trend of shifting the governing responsibilities from the entity to the state level in almost all areas.

The steps initiated by the High Representative and later accepted by domestic authorities include some striking examples. The Council of Ministers of Bosnia and Herzegovina started initially as a modest State-level executive body with a dysfunctional rotating chairmanship and only three ministries.²⁷ This is the best that was possible to squeeze out of the Constitution in first years after Dayton. The Council of Ministers is now under a permanent chairmanship (since 2000) and the number of state ministries gradually reached eight.²⁸ The Court of Bosnia and Herzegovina was established in 2003 as the first State level court of law in the country. Simultaneously, the new state level criminal and civil legislation has been enacted, while the existing entity laws had been gradually harmonized with the State codes. Finally, in late 2005, leading political parties agreed to carry out police reform and to relax the entity grip on its institutional structure. This is to name just a few breakthroughs that were achieved and based solely on the “functional” interpretation of the Constitution, without attempting to open up the sensitive issue of formally amending its text.

It must be said, though, that some of these changes have not yet resulted in full

and real governance and functionality of the new or transformed institutions. Their inauguration was not always followed by appropriate legislation and book of rules, the work of some of them is still obstructed by entities, sufficient office space is sometimes critical for a proper internal organization, etc. Most of the ministries can be described as “empty shells” without genuine powers and responsibilities of their own. They still lack proper administrative procedures, as well as an army of competent civil servants to man them and to secure continuity and smooth running of day-to-day businesses. This is a good example of a turning point when the ball got into the court of the domestic team to take over. It shows that there are limits to what the international community can do in the state building process, in spite of such a wide and forceful mandate.

Crossing the Crossroads

Bosnia and Herzegovina reached a crossroad of that process. The country has completed the post-Dayton period and just opened the door of its pre-European phase. The first one is generally known as post-conflict reconstruction and applies to countries emerging from violent conflict, where state authority has collapsed completely or had been hijacked by warlords and militia rule. Cases of Afghanistan, Bosnia, East Timor, Iraq, Kosovo and Somalia, although very different in nature, share many similarities. The main purpose of this phase is to rebuild devastated institutions and to restore stability and public safety through deployment of peacekeeping military force and police (in Bosnia, SFOR and IPTF). As a rule this phase is considered to be under the responsibility of outside powers and international agencies. In Bosnia and Herzegovina it included more mundane but non-less important tasks like humanitarian relief and technical assistance in clearing mine fields, restoring public transport, electricity and water supply, supporting local currency, banking and payment system, rebuilding hospitals, schools, etc.

If the collapsed state is “lucky enough to achieve a modicum of stability with international help (as in the case of Bosnia),” it will be ready to move on to the next phase.²⁹ The next step in Bosnia has coincided with its pre-European process. Here the chief objective is to create self-sustaining State institutions that can achieve public confidence among its population and credibility in international affairs and finally survive the withdrawal of the international community.

The continuity and success of the international community in pursuing de facto amendment approach notwithstanding, the potentials of changing the Constitution in that way have now been exhausted. Any further changes would have to follow the amendment procedure stipulated by the Constitution itself. They may include re-drawing of the internal design of the country, as well as changing borders between the entities or the cantons (within the Federation). They may involve restructuring of Bosnia’s tripartite rotating Presidency, transforming the Parliament and competences of its houses, guaranteeing general and equal electoral rights for all, as well as addressing dual citizenship issues, etc.

When it comes to the future of the constitutional settlement, the crossroad for Bosnia is even more complex. In other words, the present situation has deep roots

in the events and political bargaining that date back long time before Dayton Agreement. That legacy cannot be overcome by a single stroke of the international community's brush or by a package of constitutional amendments assembled in haste.

Broadly speaking, three distinct options have emerged over the past few years of discussions, press releases and interviews on how to overcome the present impasse.³⁰ The first one advocates the unstitching of the Dayton structure altogether, whereby the entities and the District of Brčko would be abolished and the concept of territories controlled by ethnic majorities rejected. Territorially, B&H would be reorganized into several "logical" economic areas and decentralised on different principles than today. The second approach would rather see an entirely centralized State of Bosnia and Herzegovina, whose institutions would be transformed accordingly. And finally, yet another vision advocates a country made up of three rather than the existing two entities, consequently applying the principle of "symmetry" between ethnicity and territoriality.

It will be up to the people of Bosnia and Herzegovina to choose a system they want to live by and to forge a consensus in the process of changing the Constitution. As part of Bosnia's EU bid, the European Union and the Council of Europe should monitor this process closely. Since the start of talks between Bosnia and the EU on a Stabilization and Association Agreement in late 2005, the country has found itself on what is now commonly understood to be irreversible journey toward membership of the European Union.

Controversies and Concerns

This may be an appropriate moment to voice scepticism toward the current American initiative for the change of the Bosnian Constitution at the beginning of 2006. While the United States, including American lawyers and NGOs, might have some valuable advice to offer, they should refrain from taking a leading role in the process of drafting amendment proposals. That job should be left to their European colleagues. It is really about time that Bosnia takes a serious and honest turn toward Europe on all fronts. Pushing for the European agenda cannot be responsibility of a few State ministries only, while many other areas of public services continue to pay the lip service to European standards. Europe is where this country should look for principles and criteria of good governance, democracy, rule of law and human rights.³¹ In Bosnia today "the road to Europe" is the most powerful incentive for all groups and communities, be it ethnic, political, social, professional or age ones. Listening to and accepting "all American" in the state-building process may now be counterproductive and even alienate Bosnia from its European partners, as well as put the country on a path inconsistent with European constitutional standards.

At the same time, the work of the Council of Europe in Bosnia and Herzegovina should also be reconsidered. Its presence in the country has been rather inert and passive, to say the least. This organization, which Bosnia joined with great expectations in 2002, should be at the forefront of debates on a new constitutional

framework and rule of law principles. The Council of Europe is in the best position to offer its experience in implementing the democratic principles defined in its Statute, not to mention legal and technical assistance that this organization could provide as a lead agency in the “europeanization” of the region.

Finally, it is an illusion to believe that the crisis of the Bosnian statehood can be salvaged by changing the Constitution only. The Bosnian society is dramatically lacking a sense of belonging to its own country. Bosnian citizens are often unsure of their own identity, apart from ethnicity or religion. Process of forging an identity often goes hand in hand with success stories that one’s country is able to provide. These cohesion-promoting narratives may stem from building general trust in state institutions or from an attractive image of the country internationally, but they all potentially build self-esteem among citizens. In other words, a sense of identity and belonging is a key foundation for state-building and consolidation of a “homeland” feeling. To get to this point happens to be far more delicate and slow moving than to reach any consensus on constitutional amendments. Bosnia’s transition will nevertheless have to move on both of these tracks simultaneously.

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