

# Restructuring Bosnia-Herzegovina: A Model with Pit-Falls

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## I. Introduction

The reconstruction of Bosnia-Herzegovina following the armed conflict between 1991 and 1995 can only be treated in the context of the break-down of the Yugoslav Federation. Therefore, a brief historical overview must report the developments which led to the secession first of Croatia and Slovenia from the Federal Socialist Republic of Yugoslavia and the international efforts accompanying the secession procedure in order to respect the legal prerequisites for a peaceful change. Only against this background will it be possible to understand the “case of Bosnia-Herzegovina” and to evaluate the post-conflict restructuring process.

## II. History

The roots of the conflict in Bosnia and Herzegovina may be traced to the aftermath of World War I when the “Kingdom of Serbs, Croats and Slovenes” was founded in 1918, which after 1929 was renamed into “Kingdom of Yugoslavia”.<sup>1</sup> In fact, it was the Serbs who were predominant in this multi-ethnic Kingdom. Nevertheless, the state perceived itself as a national state, which was expressed in the 1921 constitution based on national unitarianism and centralism. In violation of the com-

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<sup>1</sup> For the history see more in detail S. Oeter, “Yugoslavia, Dissolution”, in: R. Bernhardt (ed.), *EPIL* 4 (2000), 1563 et seq.; A. Herdina, “Bosnia and Herzegovina between Separation and Integration, The Historical Dimension of the Problem”, *Revue des Affaires Européennes* 7 (1997), 383 et seq.

promise agreed upon at the time of unification, this constitution was adopted by simple majority, i.e. the Serbian members of Parliament against the votes of the Croatians and Slovenians. Thus a crisis of legitimacy accompanied the state since its beginning.

After World War II and the end of the monarchy Yugoslavia was split up and its territory attributed to various states. However, in 1943 the Communists under Josip Broz "Tito" had already prepared guidelines for a future structure of Yugoslavia and in January 1946 a federal constitution was adopted following by and large the Stalinist Soviet constitution of 1936. Yugoslavia was constituted as a federation consisting of six constituent Republics: Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia as well as two autonomous territories inside Serbia, namely the Kosovo and the Vojvodina. Although the organization of the state was a federal one, in practice the state was highly centralized in that it was governed by a strong one-party communist dictatorship. Nevertheless, decentralising tendencies of the economic organization as well as of the Yugoslav Communist Party developed during the 1950s and 1960s.

In 1974 a new constitution was adopted which increased the competencies of the republics leaving only some powers, such as foreign policy, defence, currency, and customs to the federation. These central powers lay with the collective state Presidency which again was composed of representatives of the six republics and the two autonomous regions. The system thus resembled a confederation which was dominated, however, by the one-party-system existing in Yugoslavia since 1945.

When Marshall Tito died in 1980, the weakness of the institutional structure became evident and first signs of disintegration appeared. The economic situation was heavily worsening, with hyper-inflation and a decaying living-standard contributing thus to the delegitimation of the political system. At that time nationalist tendencies gained importance in the "constituent nations". Thus, in particular the new leader of the Socialist Party of Serbia, Slobodan Milosevic, abolished by forceful means the autonomy of the autonomous provinces Kosovo and Vojvodina, where 90 per cent of the population were Albanians. He also replaced the leadership of Montenegro by persons loyal to him so that the predominance of Serbian votes was guaranteed. Owing to these developments the leading role of the Communist Party could not be upheld and the Party broke apart in January 1990.

Also the other republics intensified their democratic reforms and opened the way for free elections. In the elections of 1990 the national-

ist centre-right parties obtained the majority in four of the six republics, which began to reform their constitutions according to the western parliamentary systems, however, strongly referring to the nationalism of the “constituent peoples”.

Nevertheless, the Serbian bloc tried to reconstruct Yugoslavia with a centralized constitution under Serbian dominance against the declared will of, in particular, Croatia and Slovenia which were prepared to accept only a rather loose confederation, but which, in practice, were more or less decided to gain independence. Bosnia-Herzegovina and Macedonia favoured a new federal constitution for Yugoslavia, but were decided to secede from Yugoslavia if Croatia and Slovenia did so.

### III. The Disintegration Process

The disintegration process which the Serbs tried to prevent by armed force was accompanied right from its beginning by diplomatic attempts, in particular by the EC, aimed at reaching a peaceful change.<sup>2</sup>

#### 1. The Declaration and Recognition of the Independence of the Constituent Republics

On 25 June 1991 Croatia and Slovenia declared their independence which was followed by an armed intervention of the federal army which, however, failed. The troops had to withdraw, also under the political pressure from outside, in particular the EC and the United States. The EC sponsored negotiations between the federal government and the Republics which led to a cease-fire and reserved the final status of Yugoslavia to further negotiations. However, the fighting continued and escalated into full-scale war. Again, cease-fires were agreed upon and observer missions of the EC installed for Slovenia and Croatia. Finally, because the cease-fires were unsuccessful, a Peace Conference on Yugoslavia was convened by the EC in September 1991 seeking a peaceful settlement in accordance with the commitments and principles of the Conference on Security and Cooperation in Europe (CSCE), in particular the one “never to recognize changes of any borders which

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<sup>2</sup> Cf. in this context C. Giersch, *Konfliktregulierung in Jugoslawien 1991-1995*, 1998, passim.

have not been brought about by peaceful means and by agreement". The Conference finally failed because Serbia refused any negotiated solution which would not consolidate its military conquests.<sup>3</sup>

## 2. The Badinter Commission

As to the question of recognizing Croatia and Slovenia as independent states the members of the EC were dissenting. When finally at the end of 1991 Germany and Austria declared that they would recognize Slovenia and Croatia unilaterally failing a common move of the EC, the other Member States of the EC finally agreed in mid-December on a specific procedure for recognizing the new states seceded from the former Yugoslavia and fixed the conditions which had to be fulfilled by the new states for recognition.<sup>4</sup> The decision in respect of the conditions was entrusted to an arbitration commission, the so-called "Badinter Commission".<sup>5</sup> The first opinion that the Badinter Commission had to deliver concerned the question of the legality of the secession, which was affirmed by the statement "that the Socialist Federal Republic of Yugoslavia is in a process of dissolution" and that "it is incumbent upon the Republics to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law".<sup>6</sup> Although the Badinter Commission had found that only Macedonia and Slovenia unconditionally qualified for immediate recognition, Croatia and Slovenia were recognized by Germany on 23 December 1991, the other EC members following soon.

With regard to Bosnia-Herzegovina, the Badinter Commission stated that "the will of the peoples of Bosnia and Herzegovina (BiH) to

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<sup>3</sup> Cf. P.W. Galbraith, "Washington, Erdut and Dayton: Negotiating and Implementing Peace in Croatia and Bosnia-Herzegovina", *Cornell Int'l L. J.* 30 (1997), 643 et seq.

<sup>4</sup> Decision of the EC-Council of 16 December 1991, *ILM* 31 (1992), 1485 et seq.

<sup>5</sup> The Arbitration Commission was originally established in the framework of the Peace Conference on Yugoslavia at the Brussels meeting on 7 August 1991, *ILM* 31 (1992), 1488. In 1993 the Commission agreed on terms of composition and reference as well as on its Rules of Procedure, *ILM* 32 (1993), 1573 et seq.; cf. also M.C.R. Craven, "The European Community Arbitration Commission on Yugoslavia", *BYIL* 66 (1996), 323 et seq.

<sup>6</sup> Text of the Opinion in *ILM* 31 (1992), 1494 et seq.

constitute the Socialist Republic of BiH as a sovereign and independent state cannot be held to have been fully established<sup>7</sup> and that a referendum was required. After a positive referendum, which was boycotted by the majority of the Serbs but received more than two-thirds of the Bosnian votes, the EC and its Member States recognized BiH on 7 April 1992 notwithstanding the beginning armed incidents. On 22 May 1992 BiH was admitted as a Member State to the UN.<sup>8</sup> As a response to the recognition of the Republic of BiH by the EC and the United States, the Assembly of Serbian People in BiH unilaterally declared the independence of the Serbian Republic of Bosnia and Herzegovina which was, however, declared unconstitutional by the constitutional court.

#### IV. The War in Bosnia-Herzegovina and the Accompanying Peace Process

##### 1. The Development of the Armed Conflict

Already in 1991 the Government of Serbia had threatened that declaring the independence of BiH would not be accepted and would lead to armed conflict. These warnings were ignored by the international community. However, when applying for recognition under the conditions set out by the EC, the President of BiH, Izetbegovic, had already asked for preventive deployment of UN forces in early 1992, which was rejected. The violence which the Serbs had already begun after the referendum in order to preclude recognition increased. The Government of BiH declared a state of emergency and mobilized its armed forces. But the Serb forces, supported by the JNA (the federal army of Yugoslavia) units still present in BiH, were better armed and trained and gained control over large parts of Bosnian territory. Serb authorities and militia began with the policy of “ethnic cleansing”, killing thousands of Muslims and Croats. When on 12 May 1992 Yugoslavia was declared reorganized as the new “Federal Republic of Yugoslavia” (FRY) with JNA forces stationed in BiH officially as the army of the Serbian Re-

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<sup>7</sup> Opinion No. 4 of 11 January 1992, text in *ILM* 31 (1992), 1501 et seq.

<sup>8</sup> See in this context the very critical remarks of M. Barutciski, “Politics Overrides Legal Principles: Tragic Consequences of the Diplomatic Intervention in Bosnia-Herzegovina (1991-1992)”, *Am. U. J. Int'l L. & Pol'y* 11 (1995/96), 767 et seq.

public of Bosnia and Herzegovina, the CSCE organs stated that aggression against BiH was continuing with gross violations of CSCE commitments and that action was warranted without the consent of the Yugoslav delegation. The CSCE also called for the establishment of full control over all its territory and the armed forces by the legitimate Government of BiH and that the JNA units be either subjected to the authority of the Government of BiH or withdrawn or disarmed. The UN Security Council did, however, not establish a peace-keeping operation, but only condemned the situation in several resolutions. Only Resolution 752 of 15 May 1992 referred to Chapter VII of the Charter, but did also not provide for concrete measures to terminate the conflict.

## 2. First Peace-Plans

The armed conflict in Bosnia was accompanied by several attempts to promote peace by giving a new constitutional structure to the state.<sup>9</sup> A first mediation effort led by the EC Conference on Peace in Yugoslavia reached a tentative “statement of Principles for New Constitutional Arrangements for Bosnia and Herzegovina” adopted by the representatives of all the main ethnic groups on 18 March 1992. According to this proposal BiH would be a state divided into three constituent ethnic units of Serbs, Croats and Muslims. The proposal was rejected 10 days later by the Serb leaders in BiH. The failure of this tentative plan was one of the reasons for replacing the EC Conference by the UN/EC co-sponsored International Conference on the Former Yugoslavia which continued the efforts of finding a settlement for BiH resulting in the adoption of a new peace plan, the “Vance-Owen-Plan”.<sup>10</sup> This plan provided that BiH would be a decentralized state recognizing the three constituent peoples and with most of the governmental functions carried out by its provinces. However, the provinces were not designed to form “contingent national territories”, but were scattered throughout Bosnian territory, only three provinces would bear a predominantly Muslim, Serb or Croat ethnic character. This plan again was rejected by the Bosnian Serbs provoking the break-down of the peace process which could not successfully be taken up again.

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<sup>9</sup> Cf. B. de Rossanet, *Peacemaking and Peacekeeping in Yugoslavia*, 1996.

<sup>10</sup> Cf. Docs S/24795, Annex VII, S/25050, Annexes VI-VII, and S/25479, Annexes I-IV; *ILM* 31 (1992), 1584 et seq.

### 3. The Involvement of the UN

The involvement of the United Nations in the Bosnian conflict has been characterized as too reluctant and half-hearted.<sup>11</sup> The United Nations indeed took some measures to contain the conflict which were, however, too restrained. In the first place mention has to be made of the arms embargo<sup>12</sup> imposed upon all parties to the Yugoslav conflict despite the extremely uneven situation in particular of the various sides in BiH. This resolution was followed by an economic embargo against the FRY (Serbia and Montenegro)<sup>13</sup> as a reaction to the aggression against BiH. The sanctions were monitored by a UN Sanctions Committee. Finally, by Resolution 787 (1992) and 820 (1993) the Security Council authorized the use of force to ensure compliance with the embargo against the FRY. NATO and Western European Union naval forces implemented the military part of the embargo between November 1992 and October 1995. The Security Council remained, however, reluctant to use direct military power against the parties in the Bosnian conflict.

When, by resolution 743 of 21 February 1992 the Security Council established UNRPOFOR (United Nations Protection Force) it limited its mandate to a period of one year. Only some 100 military observers of the UNPROFOR were deployed in Croatia and BiH which later on became entrusted with the task of ensuring the security of the airport in Sarajevo in order to facilitate the delivery of humanitarian aid.

The UN Secretary-General rejected a project to place all heavy weapons under UNPROFOR supervision because UNPROFOR had not enough resources and because the conditions for a successful peace-keeping operation did not yet exist in the whole territory of BiH. With a view to protect the humanitarian convoys organized by the United Nations High Commissioner for Refugees (UNHCR) the Security Council authorized, however, the use of UNPROFOR.<sup>14</sup> Insufficient personnel and material resources were the reason that UNPROFOR could not effectively implement this mandate. With a view to the wors-

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<sup>11</sup> Cf. Oeter, see note 1, 1580; P.C. Szasz, "Peacekeeping in Operation: A Conflict Study of Bosnia", *Cornell Int'l L. J.* 28 (1995), 685 et seq.; B. Ashton, "Making Peace Agreements Work: United Nations Experience in the Former Yugoslavia", *Cornell Int'l L. J.* 30 (1997), 769 et seq.

<sup>12</sup> S/RES/713 (1991) of 25 September 1991.

<sup>13</sup> S/RES/757 (1992) of 30 May 1992.

<sup>14</sup> S/RES/776 (1992) of 14 September 1992 which was not explicitly based on Chapter VII; cf. in this context Szasz, see note 11.



ening humanitarian situation the Security Council adopted resolution 819 of 16 April 1993 declaring the town of Srebrenica and its surroundings a “safe area”, and in resolution 824 of 6 May 1993 Sarajevo and other areas were declared “safe areas”, which meant that they should be free from armed attacks and other hostile acts. However, UNPROFOR was not equipped for guaranteeing the safety of these areas and, as is common knowledge, the Bosnian Serbs did not respect the “safe areas”, even after UNPROFOR was authorized to “robust peace-keeping” by Security Council Resolution 836 (1993) of 4 June 1993. This resolution extended the mandate of UNPROFOR, against the resistance of the Secretary-General, and enabled it to deter attacks against safe areas by authorizing it to “take the necessary measures, including the use of force”. In the same resolution the Security Council empowered the Member States, “acting nationally or through regional organizations or arrangements” to take, under the authority of the Security Council, “all necessary measures, through the use of air power, in and around the safe areas” to support UNPROFOR. However, UNPROFOR again remained under-equipped and the events occurring in July 1995 in Srebrenica revealed the collapse of the UNPROFOR mission. In order to prevent a repetition of what occurred in Srebrenica to other safe areas the United Nations and NATO agreed on the authorization of NATO air operations for the protection of safe areas in BiH. The NATO air strike “Deliberate Force” on 30 August 1995 was a response to bombardments of Sarajevo.<sup>15</sup> The termination of the air campaign was linked to several conditions, such as withdrawal of Serb heavy weapons from the Sarajevo area, complete free movement for UN forces and personnel and NGOs. On 14 September 1995 a framework agreement was signed by the Bosnian Serb leaders and the air strikes were suspended. In the meantime, Croat and Bosnian forces had regained considerable parcels of territory lost to the Serbs and in early October 1995 they controlled again about 51 per cent of Bosnian territory – which corresponded exactly to the percentage allocated to them in the various peace plans of the time. These facts therefore constituted a sound basis for a peace settlement.

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<sup>15</sup> Cf. C. Krefß, “Friedenssicherung durch Vereinte Nationen und NATO”, *AVR* 35 (1997), 213 et seq.

## V. The Dayton Peace Agreement (DPA)

### 1. The Negotiating Process

The peace negotiations which had been carried out by international mediators, namely Stoltenberg and Lord Owen for the United Nations and then Bildt for the EU were entrusted in 1994 to a so-called “Contact Group” which was composed of representatives of the United States, Russia, the United Kingdom, France and Germany. The Contact Group maintained the basic principles of the peace plans developed by the International Conference on the Former Yugoslavia, namely the concept of partitioning the Bosnian territory between Serbs, 49 per cent, and Muslims/Croats, 51 per cent, as laid down in a map attributing the territories to the two sides. In a document of 8 September 1995 it was decided that BiH would continue its legal existence within the present borders and that two entities would be created within the Republic: the Bosnian Serb entity with 49 per cent of the territory and the Bosnian-Croat Federation with 51 per cent of the territory. Provisions concerning elections under international control, the adoption of human rights standards, the return of displaced persons and the creation of certain joint institutions were also part of that document.

The adoption of the peace treaty was reached at Dayton/Ohio by the governments of BiH, Croatia and Serbia-Montenegro on behalf of the parties concerned and witnessed by delegations from France, Germany, the United Kingdom, Russia and the United States on 21 November 1995 and signed in Paris on 14 December 1995. The Dayton Agreement created a detailed legal structure for the implementation of the “Agreed Basic Principles”. It relied on earlier peace plans, but made them binding and linked the peace-building mechanisms and constitutional arrangements with a detailed international monitoring and enforcement system. The Peace Agreement aimed at providing the population of Bosnia and Herzegovina with the opportunity to rebuild their lives together in peace and prosperity by creating a state that would bring the peoples of Bosnia and Herzegovina together within a social and political framework that would enable the country to take its rightful place in Europe.

Although the Dayton Peace Agreement took the shape of a treaty mention has to be made of the rather unusual treaty-making process which did not consist of face-to-face meetings among the parties. The delegations who held widely differing views, were held apart throughout the negotiations with the U.S. negotiators moving from party to

party with texts prepared by the American team. Also the other sponsoring powers were largely excluded from this process but were briefed by the U.S. delegation. There was thus no opportunity for the directly affected participants, the BiH parties, to explore to what extent they agreed upon the meaning of the texts. Furthermore, the delegation of the Republika Srpska (RS) was not represented by a Bosnian Serb, but by President Milosevic of Serbia, who also represented the FRY and who did not even consult with the Bosnian Serbs. Therefore, although the Peace Agreement took the shape of a treaty, the most characteristic element of a treaty, the consent between the parties, was lacking; the parties had to sign the texts that they had not had any significant role in developing. The DPA and its Annexes entered into force on signature, without ratification which certainly would not have been obtained from the RS, and possibly also not from the Federation BiH,<sup>16</sup> because none of the parties to the DPA achieved anything close to what they had been fighting for. Thus, the main success of the DPA was the effective termination of the military confrontation while the implementation of the post-conflict state building process remained unsatisfactory due to the lack of consent between the parties concerned.

## 2. Contents of the Dayton Peace Agreement

The Dayton Peace Agreement<sup>17</sup> consists of a “General Framework Agreement for Bosnia and Herzegovina” (GFA) concluded between the new state Bosnia and Herzegovina (BiH), the Republic Croatia and the Federal Republic of Yugoslavia. The GFA constitutes an international treaty which has, however, almost no substantive content and is mostly a structure from which a dozen Annexes are suspended. The twelve Annexes contain the details of the peace settlement and are for the most part in the form of agreements between the Government of Bosnia and Herzegovina and the two “entities” that are to constitute that state: the “Federation of Bosnia and Herzegovina” and the “Republika Srpska”. It contains furthermore a number of side-letters, a “Concluding statement by the Participants of the Bosnia Proximity Peace Talks” and an “Agreement on Initialling”.

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<sup>16</sup> For more details see P.C. Szasz, “The Dayton Accord: The Balkan Peace Agreement”, *Cornell Int’l L. J.* 30 (1997), 759 et seq. (763 et seq.).

<sup>17</sup> Text in *ILM* 35 (1996), 75 et seq.

The Annexes may be grouped into two categories. Five Annexes set out transitional arrangements by Bosnia and Herzegovina (BiH) and its two entities for largely giving formal approval to NATO and other forces and authorities to carry out particular functions in the country.<sup>18</sup> What is important is that the international forces and organs referred to in these Annexes were not established by the Agreement, but were left to the respective international organizations, in particular the United Nations and NATO. The Annexes thus only expressed the consent of the parties concerning further action of the respective organizations. The NATO Council accordingly established IFOR (Implementation Force-Operation Joint Endeavour) and the UN Security Council acted by several resolutions.<sup>19</sup>

The second category, the seven remaining Annexes, are basically constitutional.

Annex 2 contains an “Agreement on Inter-Entity Boundary Line and Related Issues” and sets out a map of the boundary between the Federation of Bosnia and Herzegovina and the RS, leaving aside, how-

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<sup>18</sup> These are the following Annexes: Annex 1-A, with regard to cessation of hostilities, withdrawal of armed forces, deployment of a NATO-organized Multinational Implementation Force (IFOR), withdrawal of UNPROFOR and the Establishment of a “Joint Military Commission”. The Annex is accompanied by a Status of Forces Agreement (SOFA) between BiH and NATO, a SOFA between Croatia and NATO, an agreement between the FRY and NATO; Annex 1-B concerns an “Agreement on Regional Stabilization” providing *inter alia* for “Confidence-and Security-Building Measures” calling in particular for a limitation of defined heavy weapons; Annex 5 concerns the Arbitration on the disputed region of Brcko; Annex 10 contains the centre piece of international involvement, namely the “Agreement on Civilian Implementation” providing for a “High Representative” to monitor the implementation of the peace settlement and to co-ordinate the many civilian organizations performing functions in this connection, and Annex 11 concerning an “Agreement on International Police Task-Force” requesting the establishment of the “IPTF” to assist the parties in “maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards”.

<sup>19</sup> S/RES/1021 (1995) and 1022 (1995) of 22 November 1995; S/RES/1026 (1995) of 30 November 1995, S/RES/1031 (1995) of 15 December 1995, 1034 and 1035 of 21 December 1995 and 1037 (1996) of 15 January 1996. Many of these actions were reported and coordinated at the London “Peace Implementation Conference” of 8-9 December 1995, the “Conclusions” of which are reported to the Security Council, Doc. S/1995/1029), text in *ILM* 35 (1996), 223.

ever, the area of Brcko where no agreement could be reached and where the drawing of the border was left to binding arbitration provided for in Annex 5.<sup>20</sup>

Annex 3 is an “Agreement on Elections” providing for the first free elections in Bosnia and Herzegovina as well as in the entities, the Federation of BiH and the RS, within 6-9 months under OSCE supervision. According to this Agreement, the citizens should vote in the place where they were counted in the 1991 census ignoring thus the effects of the ethnic cleansing.

Annex 4 contains the “Constitution of Bosnia and Herzegovina”. It provides, according to the principles in all earlier peace plans, for the continuation of the Republic of Bosnia and Herzegovina as a new state Bosnia and Herzegovina consisting of two entities, the Federation Bosnia and Herzegovina, consisting mainly of Bosnians and Croats, and the Republika Srpska. The construct of BiH is highly decentralized with only few powers left to the central institutions and the remainder left to the two entities. All principal governmental organs are designed to have an equal number of Bosnian, Serb and Croat members and to provide for means to prevent the adoption by any groups joining of decisions “destructive of a vital interest” of any of the groups.<sup>21</sup> The Constitution was adopted by the leaders of the BH Republic of Bosnia and Herzegovina, the BH Federation and the RS and entered into force upon signature of the General Framework Agreement superseding the old Constitution. It is worth mentioning that the Constitution was not adopted by the people by referendum and that its original version is English.

Annex 6 sets out an “Agreement on Human Rights” providing for a Commission on Human Rights consisting of the “Office of the Ombudsman” and the “Human Rights Chamber” performing a task comparable to that of the European Court of Human Rights and composed of international judges.<sup>22</sup>

Annex 7 establishes an “Agreement on Refugees and Displaced Persons” providing for reversal of the ethnic cleansing and establishing in this context a “Commission for Displaced Persons and Refugees”.

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<sup>20</sup> See under VI. 1.

<sup>21</sup> For more details see under VI. 2.c.

<sup>22</sup> See under VI. 3.b.

Annex 8 and 9 respectively contain an “Agreement on Commission to Preserve National Monuments” and an “Agreement for the Establishment of Bosnia and Herzegovina Public Corporations”.

### 3. Related Agreements

Surrounding both the GFA and its Annexes, but not formally part of them, are numerous arrangements that were negotiated before, during and immediately after Dayton between the sponsors of that conference: the United States and a number of other, mainly European countries. These arrangements relate to: the Implementation Force (IFOR – later replaced by SFOR) established by NATO (since 1 December 2004 replaced by EUFOR);<sup>23</sup> the International Police Task Force (IPTF) established by the United Nations;<sup>24</sup> the High Representative (HR);<sup>25</sup> an Election Commission established by the OSCE; economic assistance etc. Only a few of these arrangements are expressed as treaties; they are rather in the form of decisions of international organs.<sup>26</sup>

In order to “mobilise the international community behind a new start for the people of BiH” the Dayton negotiations were followed by a Peace Implementation Conference held in London from 8-9 December 1995.<sup>27</sup> This Conference established the Peace Implementing Council (PIC) to support the peace process in different ways such as financial assistance, provision of troops for SFOR or specific other operations. The PIC is an *ad hoc* body composed of 42 states and 13 international agencies and offers political guidance to the High Representative and, since May 2002, to other civilian agencies working in BiH. The PIC further established a Steering Board under the chairmanship of the HR, composed of representatives of Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom, the United States, the Presidency of the EU, the European Commission and the Organization of the Islamic Conference. The Peace Implementation Conference pointed out the goals of the peace agreement, as i.e. the creation of a “climate of stability and security”, “the establishment of new political

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<sup>23</sup> Report of the Secretary-General Pursuant to S/RES/1026 (1995) of 30 November 1995, Doc. S/1995/1031 (1995).

<sup>24</sup> S/RES/1035 (1995) of 21 December 1995.

<sup>25</sup> S/RES/1031 (1995) of 15 December 1995.

<sup>26</sup> Cf. also to Szasz, see note 16.

<sup>27</sup> Cf. *ILM* 35 (1996), 2232 et seq.

and constitutional arrangements in order to bring the country together within the framework of democracy and the rule of law”, as well as “the protection of human rights and the early return of displaced persons”. The international community “including a wide range of international and regional organizations and agencies” was expected to be “deeply involved in assisting in the implementation of the tasks flowing from the Peace Agreement” in an initial phase – a phase which now has lasted since nearly 10 years!

#### 4. Summary Assessment of the DPA

The short overview over the contents of the Dayton Agreement demonstrates the will of the international community on the one side to bring peace to BiH and on the other to reconstruct the new state according to international standards and to remain in control of the implementation of the rebuilding process. In the present context, primarily the state-building aspects of the DPA are of relevance as a possible model for post-conflict state reconstruction. In contrast to other reconstruction initiatives such as Kosovo<sup>28</sup> and East Timor<sup>29</sup>, the general legal basis was not a Security Council Resolution under Chapter VII, but an international treaty concluded between three of the five successor states to the Socialist Federal Republic of Yugoslavia: the Republic of Bosnia and Herzegovina, the FRY and the Republic of Croatia, and was witnessed by the five Member States of the Contact Group and by the representative of the EU. With a view to the actual treaty-making<sup>30</sup> it may, however, be questioned whether, in this case, there is a significant difference to an imposed peace-process.<sup>31</sup> Furthermore, it has to be stressed that the DPA provided for a comprehensive post-conflict ruling in that it did not only provide for a framework within which the new state had to be developed, but created the state as such including a

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<sup>28</sup> S/RES/1244 (1999) of 10 June 1999, see also J. Friedrich in this Volume on Kosovo.

<sup>29</sup> S/RES/1272 (1999) of 25 October 1999, see also M. Benzing in this Volume on East Timor.

<sup>30</sup> See under V. 1.; Szasz, see note 16, 759.

<sup>31</sup> Cf. as an example of a successful treaty-based solution L. Keller in this Volume on Cambodia, where the 1991 Paris Agreement constituted a sound treaty basis for the state building process.

constitution which is not conceived as a transitional constitution to be approved at some later time by the people.

## VI. The State-Building Aspects of the DPA

In the context of building a democratic state BiH the most important part of the DPA is Annex 4 containing the constitution of the new state and Annex 10 concerning the international administration, since, after an armed conflict, assistance by the international community is indispensable in order to implement the newly created institutions and to overcome the causes of the conflict, in BiH the ethnic antagonism. Accordingly, the following section will focus on 1.) the general aspects of the constitution, 2.) the management of ethnic aspects in the constitution, 3.) the human rights issues which are closely related to the ethnic problems, and 4.) the international administration of the territory.

### 1. The General Aspects of the Constitution

As already mentioned, the constitution of BiH is a contractual document concluded between, on the one hand, the Republic of Bosnia and Herzegovina, which was declared to continue in the new state “Bosnia and Herzegovina” formed under the constitution, and, on the other hand, its two constituent entities, the Federation Bosnia and Herzegovina and the Republika Srpska (RS). There was no constitutional assembly or other constitutional process involving the people of BiH as the *pouvoir constituant*, which is only referred to in the preambular paragraph: “Bosniacs, Croats, and Serbs, as the constituent peoples (along with others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows”.<sup>32</sup> It has rightly been remarked that this is “a Dayton constitu-

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<sup>32</sup> As to the meaning of this paragraph reference is made to the decisions of the Constitutional Court of 28/29 January 2000; 18/19 February 2000, 30 June/1 July 2000 and 18/19 August 2000; text in Official Journal BiH No. 11/2000, 17/2000, 23/2000 and 36/2000 respectively. See also the commentaries to these decisions by C. Stahn, “Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton? Zugleich eine Anmerkung zur dritten Teilentscheidung des bosnischen Verfassungs-



tion, and not a Bosnian constitution”,<sup>33</sup> because the constitution is not the outcome of consensus but a document not even voluntarily agreed upon between an internationally recognized and existing state with leaders of the insurrectional groups exercising *de facto* control over part of the territory of that state. The constitution is a compromise between the wish of the Bosniacs to have a strong central state over which they would have political control and the strong Serb and partly Croat preferences to have a very weak central government.<sup>34</sup> The constitution entered into force with the signature, not ratification, of Annex 4 by all its parties. It did not, however, establish full sovereignty for the newly created state.

What is of primary significance for the further developments is the fact that the DPA decided for the continuity of the Republic of Bosnia and Herzegovina notwithstanding the fact that separatist ambitions had caused the armed conflict and continued to exist.

Although BiH had never been a sovereign state it had constituted one of the Republics of the Yugoslav Federation since 1946 and had explicitly favoured a new federal constitution for Yugoslavia when democratic reforms began in the 1990s after the break-down of the Communist Party following the death of Marshall Tito.<sup>35</sup> When BiH declared its independence in 1992, the Bosnian and Croat parts of the territory were integrated in the new state by the federal constitution of 1994, which, by the way, served as model in elaborating the new constitution in Annex 4 of the DPA.<sup>36</sup> As already mentioned, on 9 January 1992, the Bosnian Serbs forming the other territorial entity of BiH reacted by proclaiming their independence and adopted on 14 September

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gerichts vom 1. Juli 2000 im *Itzetbegovic*-Fall, *ZaöRV* 60 (2000), 663 et seq.; I. Winkelmann, “Der Bundesstaat Bosnien-Herzegowina”, in: W. Graf Vitzthum/ I. Winkelmann, *Bosnien-Herzegowina im Horizont Europas*, 2003, 59 et seq., (64 et seq.).

<sup>33</sup> F. Ni Aolain, “The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis”, *Mich. J. Int’l L.* 19 (1997/98), 957 et seq. (971).

<sup>34</sup> G. Nystuen, “The Constitution of Bosnia and Herzegovina, state versus Entities”, *Revue des Affaires Européennes* 7 (1997), 394 et seq. (398).

<sup>35</sup> See under II.

<sup>36</sup> Cf. for further details on the former and actual constitutions E. Sarcevic, *Die Schlußphase in der Verfassungsgebung von Bosnien und Herzegovina*, 1996; Stahn, see note 32, 664 et seq.

1992 the constitution of the “Republik Srpska”.<sup>37</sup> The constitutional court of the then Republic of BiH declared the proclamation illegal which resulted in the continuance of the armed conflict until 1995.

With a view to these attempts to create a separate Serb state it is of particular interest not only that the DPA opted for the continuation of the “old” state of BiH, but that in forming the state it essentially took account of the results of the armed conflict reinforcing the partition.<sup>38</sup> The Constitution accordingly provides for a federal state structure with two territorial “entities”, namely the Federation of BiH consisting of Bosniacs and Croats, and the Republika Srpska, existing within the central state.

The central state has only rather restrained competencies, namely, according to Art. III of the constitution, foreign policy, foreign trade, customs and monetary policy, immigration and asylum policy, air traffic control as well as regulatory power concerning inter-entity criminal law enforcement and inter-entity transportation. The entities have a very strong position within the central state constituting *de facto* (mini-)states. They are competent in all those fields which are not explicitly attributed to the central state (Art. III, paragraph 3 a.) and dispose of their own legislative, executive and judicial organs. The central state organs are composed with a view to a fair representation not only of the two entities, but of the three constituent peoples Bosniacs, Croats and Serbs (see under VI. 2 c.). The disintegrating effect of the constitution is further determined by the fact that the inhabitants of the entities had even been accorded a special “entity-citizenship” besides their nationality as Bosnians. Both entities are competent with regard to the external relations to neighbouring states (Art. III, paragraph 2a.)). However, the entities are obliged to respect the central constitution and the decisions of the Bosnian Constitutional Court.

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<sup>37</sup> “Declaration on the Proclamation of the Republic of the Serb People of Bosnia and Herzegovina”, *Official Gazette of the Serb People of Bosnia and Herzegovina*, No. 2/92.

<sup>38</sup> W. Graf Vitzthum/ M. Mack, “Multiethnischer Föderalismus in Bosnien-Herzegowina”, in: W. Graf Vitzthum (Hrsg.), *Europäischer Föderalismus*, 2000, 81 et seq.; S. Yee, “The New Constitution of Bosnia and Herzegovina”, *EJIL* 7 (1996), 176 et seq.; cf. also Aolain, see note 33, 968.

## 2. The Management of the Ethnic Aspects in the Constitution

### a. The Entities

Although one of the aims of the constitution was the integration of the different ethnic groups the result is rather the territorial separation or segregation of the ethnic groups. This is reflected in the geographical distribution of the territory and the decentralized structure of the constitution. The two entities correspond to a high degree to the ethnic distribution of the population as resulting from the war<sup>39</sup> which certainly is an advantage with regard to reaching within a brief period a peaceful coexistence of the ethnic groups. However, with a view to creating a multi-ethnic state this may prove, and in fact did so, to be counterproductive because the ethnic grouping is not “clean” so that minorities within these entities may be in danger of being ostracized or assimilated. This is reflected on the entity level in the fact that within the entities a certain percentage of government offices are reserved not only for representatives of the different ethnic groups, but also for individuals who themselves are of a certain ethnicity. The consequences flowing from such provisions are that certain citizens of the two entities are ineligible for some representative offices based solely on their ethnicity and that thereby an incentive is created for ethnic groups to become citizens of the respective entity.

On the central state level the same problem results from the requirement that the composition of the most important central state organs relies not only on the ethnic citizenship flowing from being a citizen of one of the entities but also on the membership in a particular ethnic group. Thus, e.g., an ethnic Serb can only be elected as a delegate to the House of Peoples if he or she is also a citizen of the RS. This leads to a clear under-representation of minorities within the ethnic groups and thus to furthering the segregation effect. As the Sub-Commission on the Promotion and Protection of Human Rights dealing with effective participation by minorities stressed at its fifth session, citizenship, not membership in a particular ethnic group, constitutes an important condition for full and effective participation; it further rec-

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<sup>39</sup> In the RS, i.e. the majority of the Serbs is clearly a consequence of the ethnic cleansing, since before the outbreak of the conflict in 1991 only 54.3 per cent Serbs lived in this territory, while at the time of the conclusion of the Dayton Peace Agreement the percentage was 96.8 per cent (cf. Decision no. 5/98 of 1 July 2000, <http://www.ustavnisud.ba>).

ommended that public institutions should not be based on ethnic or religious criteria.<sup>40</sup> As already demonstrated, on the central state level the ethnic territorialism is predetermined to lead to paralyzing decision-making because the “nationalist factor” may and did obstruct decision-taking at the central level.<sup>41</sup>

The - artificial - ethnically based partition of the state was reflected also in Art. I of the constitutions of both entities. Art. I of the constitution of the RS even proclaimed the right of self-determination of the Serb people which is named as the sole constituent people; while Art. I of the constitution of the Federation BiH refers only to the Bosniacs and Croats as constituent people. Accordingly, the organs of the SR were composed by more than 90 per cent of Serbs; those of the Federation of BiH predominantly by Bosnians and Croats.<sup>42</sup> With a view to the constitution of the central state, the Bosnian Constitutional Court declared unconstitutional this practice or, more precisely, Art. I of the constitution of the RS and Art. I of the constitution of the Federation BiH, for the reason that the central constitution to which the constitutions of the entities have to conform, does not allow for a “mononational” entity.<sup>43</sup> This decision is of utmost importance because it blocked the privileges accorded to the respective ethnic groups in both entities which could only lead to more separatism instead of co-existence. The reasoning of the constitutional court relying primarily on human rights arguments indicates the only viable means to overcome ethnic conflicts because enhancing the human rights aspect rightly

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<sup>40</sup> Cf. A. Eide, “The Role of the Sub-Commission on Promotion and Protection of Human Rights and its Working Groups in the Prevention of Conflicts”, *International Journal on Minority and Group Rights* 8 (2001), 25 et seq., (28).

<sup>41</sup> Cf. see under VI. 2 a. and see for more details in this context R.C. Slye, “The Dayton Peace Agreement: Constitutionalism and Ethnicity”, *Yale J. Int'l L.* 21 (1996), 459 et seq.

<sup>42</sup> Before the conflict, the percentage of Serbs was about 17.6 per cent it was reduced to 2 per cent during the conflict.

<sup>43</sup> Cf. the decisions of the Constitutional Court of 28/29 January 2000; 18/19 February 2000, 30 June/1 July 2000 and 18/19 August 2000; text in Official Journal BiH No. 11/2000, 17/2000, 23/2000 and 36/2000 respectively. See also the commentaries to these decisions by Stahn, see note 32, Winkelmann, see note 32, 64 et seq.

puts the accent upon the human being instead upon his membership in an ethnic group.<sup>44</sup>

### b. The Right to Self-Determination

This decision of the constitutional court terminated also any discussion as to the right of self-determination of the Serb entity because it explicitly declared unconstitutional the relevant provision in Art. I of the constitution of the RS. This decision was the logical consequence from the view already expressed by the Badinter Commission in its second opinion.<sup>45</sup> In November 1991, when secession of the republics forming the Federal Socialist Republic of Yugoslavia was imminent, the Republic of Serbia requested an opinion on the question whether “the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination”. The Commission found, on the basis of international law, that the territorial integrity and political unity of a sovereign state should be maintained if it represents the whole of the people or peoples resident within its territory on a basis of equality and without discrimination.<sup>46</sup> As to the Serb request it stated:

“that the Serbian population in Bosnia and Herzegovina and Croatia is entitled to all the rights accorded to minorities and ethnic groups under international law and under the provisions of the draft Convention of the Conference on Yugoslavia of 4 November 1991, to which the Republics of Bosnia and Herzegovina and Croatia have undertaken to give effect; and that the Republics must afford the members of those minorities and ethnic groups all the human rights

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<sup>44</sup> It has been rightly stated that beginning with this decision the Constitutional Court became the “engine” of the – however slow – integration process; W. Graf Vitzthum, “Staatsaufbau in Südosteuropa, Bosnien-Herzegowina als Paradigma außengestützter Staatsbildung”, in: J.A. Frowein/ K. Scharioth/ I. Winkelmann/ R. Wolfrum, *Verhandeln für den Frieden, Negotiating for Peace, Liber Amicorum Tono Eitel*, 2003, 823 et seq. (834).

<sup>45</sup> *ILM* 31 (1992), 1497.

<sup>46</sup> Cf. to the international law on self-determination M.P. Scharf, “Earned Sovereignty: Juridical Underpinnings”, *Den. J. Int’l. L. & Pol’y* 31 (2003), 373 et seq.; cf. also for new approaches concerning self-determination G.J. Simpson, “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age”, *Stanford J. Int’l L.* 32 (1996), 255 et seq.

and fundamental freedoms recognized in international law, including where appropriate, the right to choose their nationality”.

As the constitution adopted within the framework of the DPA maintained the standard provided for in the project of a constitution of November 1991, the decision of the Constitutional Court is fully in accordance with international law: since human rights, in particular those enshrined in the Convention on the Elimination of all Forms of Racial Discrimination, the 1992 European Charter for Regional and Minority Languages and the 1994 Framework Convention for the Protection of National Minorities besides those in the more far reaching UN Covenants of 1966 and the Geneva Conventions of 1949, are applicable and enforceable in BiH, the question of internal or also so-called remedial self-determination, the only possible alternative of self-determination in this case, is not at stake. Although the issue of effective partition of the state Bosnia and Herzegovina was raised again during the thorny way of the state-building process, there was large agreement that the state should be maintained.<sup>47</sup>

### c. The Central State

The composition of the central state organs, the Parliamentary Assembly, the Presidency and the Council of Ministers, also reflects the ethnic partition. The Parliament consists of two chambers, the House of Peoples, comprising 15 delegates, two-thirds of which are from the Federation BiH (including five Croats and five Bosniacs) and one-third from the RS (five Serbs) (Art. IV. 1). The House of Representatives comprises 42 members, two-thirds elected from the territory of the Federation BiH, one-third from the territory of the RS (Art. IV. 2). What is important is the fact that in both chambers decisions require a majority of at least one-third of the votes of the delegates or members from the territory of each entity, so that each of the entities can bloc decisions of the other entity by two-thirds of its members (Art. IV. 3 d.) of the constitution.

The Executive consists of the Presidency and the Council of Ministers. These organs also reflect the ethnic composition in that the Presidency consists of three members: one Bosniac and one Croat, directly elected from the territory of the Federation, and one Serb, directly elected from the territory of the RS (Art. V.). The presidency takes its

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<sup>47</sup> C. Bildt, “Europe and Bosnia, Lessons of the Past and Paths for the Future”, *Revue des Affaires Européennes* 7 (1997), 450 et seq. (454).

decisions in principle by consent, only in exceptional cases by majority (Art. V. 2 c.)). In case of majority decisions the dissenting member of the Presidency has a right of veto if vital interests of the entity from the territory of which he was elected, are at stake; if the veto is confirmed within ten days by a two-thirds vote of the representatives of said ethnic group, not the entity representatives, the decision does not take effect. The Presidency nominates the Chair of the Council of Ministers who then nominates a Foreign Minister, a Minister for Foreign Trade and other Ministers with the approval of the House of Representatives. Not more than two-thirds of the ministers may be from the Federation BiH. The Chair also nominates Deputy Ministers, who shall not be of the same constituent people as the Minister (Art. V. 4 b.)).<sup>48</sup> This complicated structure and in particular the requirement of taking decisions by consent implying the possibility of both entities to bloc the decision-making was the reason for the failure of implementing the DPA.

#### d. The Constitutional Court

Special mention has to be made of the Constitutional Court which is the sole court at central level; the judiciary being run on the entity level, which means that there are two different court systems and different legislation from entity to entity in many areas. The Constitutional Court has far-reaching powers laid down in Art. VI of the constitution, namely to decide disputes between the entities, central institutions and entities or between institutions at the central level, as well as questions of constitutionality or compatibility with laws of the central state, the European Convention on Human Rights or general principles of international law or any law in BiH. Furthermore it may function as a court of appeal over issues “under this Constitution arising out of a judgment of any other court”. Questions concerning the protection of human rights were at first only a subsidiary part of the competencies of the

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<sup>48</sup> The difficulties in nominating ministers is demonstrated in an exemplary manner with regard to the minister of Defence of the central state: only in March 2004 was it possible to nominate a Minister of Defence for the central state, which could be realized only with the active involvement of the HR Ashdown. Since the defence of a state is an original power of the central state, the fact, that nearly ten years after the creation of the state BiH only the entities disposed over an army and a minister for Defence is a revealing sign for the separatist move of the entities. Cf. M. Martens, “Normalität im Dreivölkerstaat”, *Frankfurter Allgemeine Zeitung* of 7 August 2004, 8.

Constitutional Court and were entrusted to a special body instituted by Annex 6 of the DPA: the Human Rights Chamber.<sup>49</sup> Under the aspect of international involvement it has to be mentioned that out of the nine members of the Constitutional Court three have to be appointed by the President of the European Court of Human Rights “after consultation with the Presidency” and they “shall not be citizens of Bosnia and Herzegovina or of any neighbouring state”. From the six national judges four are selected by the House of Representatives of the Federation and two by the Assembly of the RS. No quorum is required for taking a decision so that the simple majority of five votes is sufficient. Thereby it is guaranteed that the international judges cannot alone decide a case, but that, with the consent of judges of one of the entities, they have the majority with regard to the judges of the other entity, this is not without criticism. Although for the first time in the reconstruction process, this provision may prove necessary, the fact that it is part of the definite constitution is rather unusual. Only by an amendment of the constitution can the involvement of international judges in the Constitutional Court be abolished, since the provision in Art. VI. 1 d.) of the constitution merely provides that a different *method of selection* of the three judges selected by the President of the European Court of Justice may be introduced by ordinary law of Parliament.

The Constitutional Court is thus in a position to play a very important role in building the new state Bosnia and Herzegovina because it can interpret the often vague or even obscure provisions of the Constitution and develop them through practice. On the other hand, it is the point of reference for the two court systems of the entities and can support the harmonization of the two legal systems.<sup>50</sup> Meanwhile it can be stated that it has in fact played a very important role in the state-building process.<sup>51</sup>

Likewise significant was the role of the Constitutional Court with regard to its competence to review acts of the “international organs”, in particular the High Representative and the Human Rights Chamber. Since the Constitutional Court as well as the High Representative and the Human Rights Chamber were established by the same international agreement, the DPA, without determining their relationship within the constitutional framework, it was for the Constitutional Court to take position with regard to several questions in this context. As it is not

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<sup>49</sup> See under VI. 3.

<sup>50</sup> Nystuen, see note 34, 406.

<sup>51</sup> See under VI. 2. b.



possible to treat these decisions in detail,<sup>52</sup> it may, however, be stated that, in general, the relevant Constitutional Court's jurisprudence struck the right balance between the international mandate of such organs and the constitutional implications of their acts.<sup>53</sup> Nevertheless, a more precise regulation in the DPA would have been helpful in particular with regard to the accountability of the international actors.

#### e. Consequences Flowing from the Ethnic Partition

As already mentioned, not surprisingly this system of ethnic partition led to obstructionism in the national organs resulting consequently in a more extensive involvement and dependency of the international actors, in particular the HR.<sup>54</sup> The Constitution as derived from the DPA must thus be regarded as one of, or even the main reason for, the difficulties met in building the state BiH. In contrast to the history of BiH which always had to cope with its ethnic diversities, the Dayton Constitution for the first time created a link between an ethnic group and a specific territory, establishing thus what has been called "ethno-territorialism"<sup>55</sup> and what seems to be a rather insurmountable obstacle for the *nation-building* process. Furthermore, this linkage corresponds to the results of the ethnic cleansing carried out during the armed conflict and is thus artificial and legally questionable in comparison with the former state structure. Therefore, BiH as established by the DPA has been said to be a "fake" state, not a decentralized state,<sup>56</sup> because this partition proved to cement ethnic antagonism rather than to enhance unity.<sup>57</sup> Moreover, this political construct led to a convoluted institutional structure: in May 2002, BiH had 1200 judges and prosecutors, 760 legislators, 180 ministers, four governments and three armies which clearly could only be contra-productive for the unification process.<sup>58</sup> With regard to these

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<sup>52</sup> Cf. under VI. 4. d.

<sup>53</sup> Cf. for details C. Steiner/ N. Ademovic, "Kompetenzstreitigkeiten im Gefüge von Dayton", in: Vitzthum/ Winkelmann, see note 32, 109 et seq.

<sup>54</sup> Cf. Winkelmann, see note 32, 59 et seq.

<sup>55</sup> Cf. M. Ducasse-Rogier, "Recovering from Dayton: From 'peace-building' to 'state-building' in Bosnia and Herzegovina", *Helsinki Monitor* 15 (2004), 76 et seq. (78).

<sup>56</sup> Ibid.

<sup>57</sup> A. Borden/ R. Caplan, "The former Yugoslavia: the war and the peace process", *SIPRI Yearbook* 1996, 203 et seq. (229).

<sup>58</sup> Cf. inaugural speech of HR Ashdown, 27 March 2002, text on <www.ohr.int>, section "Speeches by OHR principals".

deficiencies inherent in the Dayton Constitution for BiH it is evident that the state-building process necessarily had to be shifted to the international actors, thus strengthening the international dependency in the state-building process.<sup>59</sup>

### 3. Human Rights Issues

#### a. General Remarks

As already mentioned, human rights take a particular place in the DPA because it was clear that human rights were not only part, but even a precondition for a durable peace after a conflict in which human rights had been grossly violated.<sup>60</sup> It is therefore only consequent that the constitution comprises an extensive catalogue of human rights providing even that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in BiH, and shall have priority over all other law, including the Constitution. Furthermore, Annex I to the Constitution lists 15 international human rights instruments which are to be applied directly in BiH. The human rights listed in Art. II of the Constitution are moreover “untouchable” (Ewigkeitsgarantie) in that amendments of the Constitution may not “eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph”. The implementation and protection of human rights is guaranteed through the Constitutional Court (Art. VI. paragraph 3 c.) and the Constitutional Courts of the two entities.

In addition to the organs established by the Constitution of the central state and the entities, the DPA institutes several other organs concerned with the protection and monitoring of human rights, as e.g. the Commission for Displaced Persons and Refugees<sup>61</sup> which is empowered to take binding decisions on restoring property to refugees and displaced persons; the UN Commission on Human Rights, the OSCE, the UN High Commissioner for Human Rights, and other intergovernmental or regional human rights missions or organizations;<sup>62</sup> in a wider sense, also the International Criminal Tribunal for the Former

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<sup>59</sup> Under VI. 4.

<sup>60</sup> See in this context also A. Seibert-Fohr, in this Volume.

<sup>61</sup> Annex 7 to the DPA.

<sup>62</sup> Annex 6 on Human Rights, Art. XIII.

Yugoslavia although instituted by the Security Council, not the DPA, may be mentioned in this context.

The most important human rights organ is, or more precisely was - because it is meanwhile *functus officio* -, the Commission on Human Rights (see below) which is unprecedented in former post-conflict state building processes and may be understood as confirming the fact that external standards and in particular external actors were required in order to guarantee the protection of human rights in post-war Bosnia as long as faith in the domestic courts was lacking.

### **b. The Commission on Human Rights**

The Commission on Human Rights is established by the Republic of BiH and the Federation of BiH and the RS according to Annex 6 to the DPA. It consists of an Ombudsman and the Human Rights Chamber. The Ombudsman may not be a citizen of BiH or any neighbouring state; he/she may receive allegations of violations of human rights by any party to the agreement, any individual, group or non-governmental organization but may investigate also on his/her own initiative. He/she, however, cannot take binding decisions, but may bring a case to the Human Rights Chamber.

The Human Rights Chamber is composed of 14 members, eight appointed by the Committee of Ministers of the Council of Europe, four by the Federation of BiH and two by the RS. It takes binding decisions on violations of human rights by the organs of the central state BiH, the Federation BiH or the RS.<sup>63</sup> Its term of office was originally fixed to

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<sup>63</sup> For the practice of these organs cf. Human Rights Chamber for Bosnia and Herzegovina/ Digest, Decisions on Admissibility and Merits: 1996-2002, 2004; M. Nowak, "Die Menschenrechtsbestimmungen des Abkommens von Dayton in der Praxis", in: W. Benedek/ O. König/ C. Promitzer (eds), *Menschenrechte in Bosnien und Herzegowina: Wissenschaft und Praxis*, 1999, 29 et seq.; H. Alefsen, "Menschenrechtsschutz in Bosnien und Herzegowina: Aus der Sicht der internationalen Gemeinschaft", *ibid.*, 51 et seq.; P.C. Szasz, "The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia", *AJIL* 90 (1996), 301 et seq.; R. Aybay, "A New Institution in the Field: The Human Rights Chamber of Bosnia and Herzegovina", *NQHR* 15 (1997), 529 et seq.; K. Oellers-Frahm, "Die Rolle internationaler Gerichte im Friedensprozeß in Bosnien und Herzegowina nach dem Abkommen von Dayton", in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1998, 263 et seq.

five years after which period its tasks were to be transferred to the institutions of BiH, unless the parties otherwise agree. The main goal was, however, to prepare BiH for access to the ECHR and the Council of Europe which was finally achieved on 24 April 2002 when BiH became a Member State of the Council of Europe. At this time, however, the Human Rights Chamber was not fully abolished, but followed by a Human Rights Commission within the Constitutional Court of BiH according to an Agreement between the parties of 22 and 25 September 2003. This Commission was established only for deciding cases brought before 31 December 2003 and its term of office ended on 31 December 2004. New applications have to be brought before the Constitutional Court and only in case of a negative decision the European Court on Human Rights may be seized according to the provisions governing its functioning. The abolishment of the Human Rights Chamber may thus be interpreted as a success in that the human rights protection in BiH no longer needs special means but may be left to the national courts.

#### **4. The International Administration**

##### **a. The Office of the High Representative**

The most important aspect in the practical reconstruction process under the DPA are the provisions concerning the administration of the territory by organs of the international community. With regard to former systems of international administration known from the League of Nations as mandates system and as trusteeships under the United Nations after World War II,<sup>64</sup> the administration of BiH constitutes a new category of international administration. With the consent of the leaders of the parties concerned, namely the Republic of BiH, the Republic of Croatia, the Federal Republic of Yugoslavia, the Federation of BiH and the RS, a High Representative was to be appointed in order to implement “the civilian aspects of the peace settlement”.<sup>65</sup> His functions were only roughly circumscribed in Annex 10 including the very far-reaching provision that he would be “the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement”.<sup>66</sup> The designation of the High Representative was ef-

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<sup>64</sup> Cf. N. Matz, in this Volume.

<sup>65</sup> Annex 10 to the Dayton Peace Agreement.

<sup>66</sup> Annex 10, Art. V.

ected in the framework of the Peace Implementation Conference; he was appointed according to Annex 10 of the Dayton Peace Agreement by Security Council Resolution 1031 of 15 December 1995. However, he is not a UN organ. In this Resolution, the Security Council merely endorsed the mandate of the HR as laid down in Annex 10, namely that he “will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved,” without circumscribing in more detail the extent of his competencies. The Resolution furthermore simply confirms that the HR is the final authority in theatre regarding the interpretation of Annex 10 (Art. V of Annex 10). The Security Council thus did not add nor specify the tasks or competencies of the HR although the wording of Annex 10 would have allowed it to do so. Annex 10, Art. I paragraph 2, not only provides that the HR be “appointed consistent with relevant United Nations Security Council resolutions”, but moreover that he will carry out the tasks set out in Annex 10 “as entrusted by a U.N. Security Council resolution”. The Security Council thus missed the opportunity to clearly define the mandate and the competencies of the HR which seems rather problematic with a view to the rule of law. Whenever powers of administration or legislation are transferred upon an international body this should be done in clear terms in a resolution of the Security Council, as was the case, e.g. for East Timor and Kosovo.<sup>67</sup> It has, however, to be borne in mind that in the latter cases the reconstruction of the states was completely in the hands of the United Nations while the reconstruction in BiH was based on the Dayton Peace Agreement. Nevertheless, as the appointment of the HR was entrusted to the Security Council it should have taken care to base his tasks on clearly defined competencies in order to give legitimacy to the action of the HR.

The International Police Task Force (IPTF) envisaged in Annex 11 was conceived to assist the parties in carrying out their responsibilities for “maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards”. It is worth mentioning that the four High Representatives nominated until now were all Europeans: Carl Bildt, Carlos Westendorp, Wolfgang Petritsch and now Paddy Ashdown as hopefully the last one in this office. This choice

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<sup>67</sup> Cf. J. Friedrich on Kosovo, and M. Benzing on East Timor, in this Volume. See also J.A. Frowein, “Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen”, in: H.W. Arndt/ F.L. Kniemeyer/ D. Kugelmann/ W. Meng/ M.Schweitzer *Völkerrecht und deutsches Recht*, 2001, 43 et seq.

clearly underlines the EU-perspective of the state-building process finally ending in participation in the EU, a strong if not decisive incentive for implementing the necessary reforms.<sup>68</sup>

#### b. The Powers of the HR

As originally conceived, the main function of the HR was merely the supervision of co-operation and co-ordination in the implementation of the state-building process by the national organs. However, when the paralysis of the national institutions led to an impasse in the peace-building process, the HR interfered by extensive legislative and executive action, and thus became the most important actor for the functioning of the state. As the legal basis for his far-reaching action, only Art. V of Annex 10 can be mentioned which institutes the HR as the “Final Authority” in interpreting his own functions.<sup>69</sup> The interpretation that he gave to the powers flowing from his mandate was in fact very comprehensive and included legislation, - bypassing thus the elected Parliament -, going so far as to declare unconstitutional a law adopted by the Parliamentary Assembly,<sup>70</sup> as well as administrative decisions, including even removal of public officials.<sup>71</sup> This interpretation was later endorsed by the Peace Implementation Council (PIC) Conference in Bonn in 1997.<sup>72</sup> The Council explicitly approved such actions underlin-

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<sup>68</sup> Cf. in this sense B. Hombach, “Zukunftsstrategie Stabilitätspakt”, *Internationale Politik* 11 (2000), 36 et seq.; Bildt, see note 47.

<sup>69</sup> Ibid.

<sup>70</sup> Decision of 7 August 2000 Amending the Law on Filling a Vacant Position of the Member of the Presidency of BiH, <<http://www.ohr.int>>.

<sup>71</sup> See for details <<http://www.ohr.int>>; cf. also *Frankfurter Allgemeine Zeitung* of 7 August 2004, see note 48, reporting that in spring 2004 the HR Ashdown removed 59 members of the political leadership of the RS because of their lacking co-operation with the ICTY. In March 2005, HR Ashdown even dismissed the Bosnian member of the Presidency of the central state, Dragan Čović, *Frankfurter Allgemeine Zeitung* of 30 March 2004, 3, reviving the discussion and critics on the competencies of the HR.

<sup>72</sup> Cf. Doc. S/1997/979 of 16 December 1997. On the basis of the Bonn decisions, respectively “Bonn powers”, the newly appointed HR Westendorp in 1998 set into force temporarily a whole series of draft laws, such as the law on citizenship, the customs tariffs schedule, the law on foreign investment, the laws on the flag and on the coat of arms of BiH, the laws on privatization of banks and enterprises and on telecommunications, the common currency, the uniform licence plates system and later also the common

ing once more that the HR was the final authority to interpret Annex 10. The Security Council supported this attitude in Resolution 1144 of 19 December 1997 and again in Resolution 1256 of 3 August 1999 going thus much further than in an earlier resolution where it had stated that the HR could, in case of dispute, “give his interpretation and make his recommendations, including to the authorities of BiH or its entities, and make them known publicly”.<sup>73</sup> This terminology seems rather at odds with the action of the HR concerning legislation or removal of public officials. However, on the basis of the PIC Conference in Bonn, which “legalized” such powers of the HR, the HR adopted quite a series of laws and other acts which could not pass Parliament or be adopted by the national organs because of their ethnical composition respectively obstructionism.<sup>74</sup> As a consequence of such local obstructionism the international actors had to replace more and more the national authorities increasing thereby the dependency of the state-building process upon international involvement instead of transferring action from the international actors to national authorities in order to establish full sovereignty of the state.

### c. Change of Strategy

Thus, the process of state-building lay predominantly with the HR and his office so that in fact it was up to him to find ways out of this dilemma which was a result of the lack of sound and democratic state structures provided for in the DPA. Although the DPA was not amended nor put into question, the main obstacles deriving from the ethnically based partition of the state were overcome by a change of approach from 1999 onwards. The new strategy aimed at building first a functioning state, i.e. reinforcing integration and shifting control from the international actors to the state level. This strategy progressed only slowly but marked the right way in particular by recruiting Bosnian nationals within the international organizations and by making more transparent for the people the goals on the agenda of the HR.<sup>75</sup> In 2002

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driving licence. The removal of officials trying to obstruct the peace process took place in particular in the context of creating conditions for return of displaced persons.

<sup>73</sup> S/RES/1088 (1996) of 12 December 1996.

<sup>74</sup> For more details see Stahn, see note 32, 663 et seq. (669, 670).

<sup>75</sup> In 2002 two documents were issued in this context: one document on ‘Jobs and Justice’ (available at <[www.ohr.int](http://www.ohr.int)>) and one on the ‘OHR Mission Implementation Plan’ (available at <[www.ohr.int/print/?content\\_id=29145](http://www.ohr.int/print/?content_id=29145)>).

the PIC furthermore established a 'Board of Principals' reinforcing the HR's role in co-ordinating the often overlapping efforts and responsibilities of the international actors in place, namely the Office of the High Representative (OHR), SFOR, OSCE, European Police Mission, UNHCR and the EU.<sup>76</sup> This new move in overcoming the deficiencies of the DPA was furthermore enhanced by a strong incentive to accelerate the reformation of the state in order to join the NATO Partnership for Peace and prepare for membership in the EU.<sup>77</sup>

#### d. Accountability of the HR

Having stated that the HR became the central player in implementing the reconstruction of BiH and that he was constrained to interpret his functions extensively in order to replace the non-functioning national authorities, the question which finally has to be addressed is whether there are limits to his powers and where they lie and whether and to whom he would be accountable. As already mentioned the source of the authority of the HR is essentially contractual since it derives from the Dayton Agreement and is confirmed by the PIC, respectively its Steering Board and only finally agreed to by the Security Council. The HR is not an organ of the United Nations<sup>78</sup> and provisions concerning control of his acts or responsibility are lacking in the DPA. He seems, at most, to be responsible to the Steering Board of the PIC which lacks any provisions going into more detail.<sup>79</sup> As has been demonstrated, the PIC, and also the Security Council, confined itself to endorsing the interpretation given to the mandate by the HR himself as the "final authority in theatre". Thus, the lack of provisions on accountability of the HR reflects to a certain degree the lack of a precise basis for his powers,

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<sup>76</sup> Cf. Vitzthum, see note 44, 839.

<sup>77</sup> Ibid., 835.

<sup>78</sup> According to the conclusions of the Peace Implementation Conference (PIC) held on 8 and 9 December 1995, the HR is the chairman of the Steering Board of the PIC and is funded by the budget of the PIC., cf. text of the conclusions in *ILM* 35 (1996), 225 et seq., (229).

<sup>79</sup> Cf. in this context R. Wilde, "Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor", *ILSA Journal of International and Comparative Law* 7 (2001), 455 et seq., who monitors the lack of accountability of international actors in the process of after-conflict state-building; also R. Wilde, "The Complex Role of the Legal Adviser when International Organizations Administer Territory", *Proceedings of the ASIL, 95th Meeting*, 2001, 251 et seq. (254).



i.e. the legitimacy of his action. As post-conflict state-building is conceived as corresponding to the rule of law and aimed at creating democratic state structures also the organ or organs themselves accordingly empowered have to be submitted to the rule of law in order to be credible. In this context there should be provisions on control over their acts and on consequences of *ultra vires* action as confidence-building measures for the people of the state concerned. If, as in the case of BiH, the international administration powers are “open ended” the necessary acceptance is difficult to achieve which may obstruct the reconstruction process.<sup>80</sup> Clearly defined competencies and consequences or sanctions for exceeding these competencies are therefore indispensable requirements for the involvement of international actors in state reconstruction.

Not only the international instruments, but also the Constitution of BiH did not provide for review of HR decisions which is, in principle, not surprising because the control of the international administrator who has a particular status and derives his powers from the DPA would in any case not belong to the original powers of a Constitutional Court. However, in a decision of 3 November 2000,<sup>81</sup> the Constitutional Court took a more differentiated position and distinguished between the acts that he took as an international authority and those taken as or in the place of a national organ of BiH. It rightly found that it had no power to review acts of the HR with regard to the DPA, Annex 10; it stated, however, that it was competent to examine whether the acts of the HR were in conformity with the constitution of BiH. As in the case under review, the HR had acted essentially as a substitute to national institutions of BiH, in particular the legislator, and as, consequently the act concerned had the nature of a national law of BiH, the Constitutional Court found itself competent. The Court considered that the relevant factor was the *content* of the law, not its *author*, and that the law related to a field “falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution” and was thus susceptible to review by the Court. Although such reasoning is not above criticism, it demonstrates at least, that the Constitutional Court,

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<sup>80</sup> Cf. On this issue more in detail R. Utz in this Volume who refers to the concept of *ressentiment* as a strong impediment to the nation building process.

<sup>81</sup> Constitutional Court of Bosnia and Herzegovina, Decision 9/00 of 3 November 2000, homepage of the constitutional court <<http://www.ustavnisud.ba>>; and *ZaöRV* 61 (2001), 173 et seq.

guardian of the Constitution of BiH, wanted to put some limits to the uncontrolled extension of powers by the HR. As the mandate of the HR is defined as assisting the national organs in implementing the peace process and, lacking other means of control over the powers of the HR, the decision of the Constitutional Court clearly constitutes a welcome reminder of the limits of the role of the HR.<sup>82</sup>

## VII. Accountability for Acts Committed During the Armed Conflict: The ICTY

The DPA was only concerned with peace-making and the reconstruction of the state of BiH, not with questions of accountability for crimes committed during the conflict which was already addressed and resolved in 1993 and only referred to in the DPA. In contrast to numerous former armed conflicts and wars there had been a feeling that the perpetrators of such crimes should not pass unpunished. Criminal accountability would on the one hand serve as deterrence for future conflicts in that punishment would no longer be a rather hypothetical perspective, but would give at least some sort of satisfaction to those having suffered from such crimes.<sup>83</sup> The question of whether to establish in such situation a truth commission or a criminal tribunal resulted, for the conflict in the former Yugoslavia, in the creation of an *ad hoc* international criminal tribunal which, after the military tribunals of Nuremberg and the Far East was the first international criminal tribunal to punish crimes committed during an armed conflict. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a Security Council Resolution taken under Chapter VII of the Charter,<sup>84</sup> not by a treaty as was the case for the Nuremberg Military Tribu-

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<sup>82</sup> Cf. also C. Stahn, "International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges ahead", *ZaöRV* 61 (2001), 107 et seq., (166 et seq.); critical with regard to the responsibility also Vitzthum, see note 44, 828 and 842.

<sup>83</sup> P.A. Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *AJIL* 95 (2001), 7 et seq.

<sup>84</sup> S/RES/827 (1993) of 25 May 1993. From the abundant bibliography on the ICTY see in particular V. Morris/ M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1993, and A. Cassese, "Yugoslavia: International Criminal Tribunal for the Former

nal. The ICTY sanctions individuals having committed grave breaches of humanitarian international law and breaches of customs and laws of war as well as genocide and crimes against humanity. In contrast to the newly created International Criminal Court the ICTY has priority with regard to national criminal jurisdiction which must be welcomed as an important guarantee for fair and equal proceedings. Although, thus, the domestic jurisdiction to account for war crimes is in a relationship of subordination to the ICTY, it was never envisaged in creating the ICTY that it would prosecute all persons responsible for committing war crimes in the former Yugoslavia. Thus, there is a two-tier system of war crimes prosecution where the primary responsibility remains with the national courts. On the other hand it has to be regretted that the indispensable co-operation with the ICTY is still lacking, or at least is unsatisfactory, so that several of the most important criminals are not transferred to the Tribunal which cannot hold proceedings *in absentia*. The lack of co-operation of the states seceded from the former Yugoslavia is a strong obstacle which can only partly be overcome by international pressure although some success may be reported such as e.g. the transfer of Slobodan Milosevic in spring 2001. This is not the place to go into details of the activity of the ICTY; in this context it is, however, important to stress that the creation of an international criminal tribunal has to be considered as a most significant condition for the peace-making and reconstruction process after an armed conflict.<sup>85</sup> The antagonism between different ethnic groups may better be decreased if crimes committed on both sides do not go unpunished and if the criminal prosecution is guaranteed by an independent international organ, for as long as new institutions composed of unsuspected members are not in place. Under these auspices the special criminal tribunal for Iraq which only provides for voluntary involvement of international actors seems rather problematic.<sup>86</sup>

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Yugoslavia", in: R. Bernhardt (ed.), *EPIL* 4 (2000), 1608 et seq. with further bibliographical indications.

<sup>85</sup> Cf. R. Wolfrum in this Volume.

<sup>86</sup> For the text of the Statute see <[http://www.cpa-iraq.org/human\\_rights/Statute.htm](http://www.cpa-iraq.org/human_rights/Statute.htm)>.

## VIII. Excursus: Two Special, but Characteristic Issues: Brcko and Mostar

As already mentioned several times, the main reasons for the difficulties in reconstructing BiH is the persistence, through the DPA enhanced, of ethnic separation. Two examples which have raised particular international attention may be cited because they demonstrate in an exemplary manner the consequences of the strong ethnic separation: the first one is the case of Brcko which – already in the phase of elaborating the DPA – demonstrated unambiguously that the ethno-territorial approach would rather create than solve ethnic problems. The second is the case of Mostar which exemplifies within a rather small city the strong and not reconcilable ethnic separation as practised throughout the state.

### 1. The Case of Brcko

As already mentioned<sup>87</sup> the inter-entity boundary which was determined in Annex 2 to the DPA remained disputed in the area of Brcko. This area is at the intersection between both the parts of RS and the main part of the Federation BiH and additional Federation territory. If attributed to the RS, the area of Brcko would constitute the link between the northern and the southern part of the RS, but would then leave the Federation BiH without direct connection to its eastern neighbours; if attributed to the Federation BiH it would separate the territory of the RS into two parts unconnected between each other. The main problem was that the boundary, wherever it would be drawn, would have the effect of an inter-state, rather than an inter-entity boundary separating two parts of one and the same state. This demonstrates that the parties had no faith whatsoever in the Constitution they had agreed to sign, for the Constitution laid down freedom of movement across the inter-entity-boundary line for persons, goods, services and capital. If the parties had thought that this would become reality, the Brcko issue would not have been so important because anyone would have had the right to enter the region. As no consent could be found for this problem in the DPA, which was even threatened to fail completely for this reason,<sup>88</sup> the drawing of the boundary line in the

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<sup>87</sup> Under V. 2.

<sup>88</sup> Nystuen, see note 34.

area of Brcko was left to binding arbitration.<sup>89</sup> The arbitration process reflects in an impressive manner the lack of any basis for peaceful co-existence between the two entities which conceived their entity rather as a separate state than as part of the central state BiH. Without going into details<sup>90</sup> it may be stated that the arbitral tribunal which had the task to draw a borderline between the entities in the area of Brcko was not able to fulfil this mandate. Instead it – more exactly its President alone, since the members of the tribunal appointed for the Federation of BiH and for the RS abstained from voting – decided that the area would be placed under international administration until a final solution could be found. In 2000 a new Statute for District Government was enacted<sup>91</sup> scheduling new elections and creating an interim regime. This “transitional” solution, which, by the way, was in fact a wise political settlement of the dispute, although not at all what is known as an arbitral decision, exists until today and it is not foreseeable when it could be terminated. This example demonstrates clearly the enormous difficulties in rebuilding a state on an ethno-territorial basis which strengthens the nationalist instead of the common perspective. Only under these circumstances can free circulation beyond inter-entity boundaries pose more severe problems than free circulation beyond inter-state boundaries. Conceiving a territorial entity not as part of a state, but as a separate state, made the case of Brcko so problematic and the attribution of that part of the territory a vital question for each of the entities.

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<sup>89</sup> DPA, Annex 2, Article V and Annex 5.

<sup>90</sup> For the arbitral awards see Doc. S/1997/126 in *ILM* 36 (1997), 396, and Final Award of 5 March 1999, at <<http://www.ohr.int/docu/d991315c.htm>>; cf. Oellers-Frahm, see note 63; M. Baros, “The Arbitral Tribunal’s Award for the Dispute over the Inter-entity Boundary in the Brcko Area”, *Journal of Armed Conflict Law* 3 (1998), 233 et seq.; P.C. Farrand, “Lessons from Brcko”, *Emory International Law Review* 15 (2001), 529 et seq.; M.G. Karnavas, “Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina, a model for the region and other postconflict countries”, *AJIL* 97 (2003), 111 et seq.; C. Schreuer, “The Brcko Final Award of 5 March 1999”, *LJIL* 12 (1999), 575 et seq.

<sup>91</sup> Statute of the Brcko District of Bosnia and Herzegovina of 7 December 1999, in: *ILM* 39 (2000), 879; cf. R. Wilde, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration”, *AJIL* 95 (2001), 583 et seq. (595).

## 2. The Case of Mostar

A second example demonstrating the deep separation between and obstruction of the ethnic groups in implementing the DPA is the one of Mostar. When in July 2004 the reconstruction of the historic bridge of Mostar was inaugurated, the political situation of the city was once more recalled to the public. The Dayton Agreement on Implementing the Federation of BiH contained an attachment on agreed principles for the interim statute for the city of Mostar concluded between the Mayors of East and of West Mostar representing respectively the Muslim and the Croat parties and the EU Administrator of Mostar who had been appointed pursuant to a “Memorandum of Understanding on the European Union Administration of Mostar” concluded between the Federation BiH and the EU on 6 July 1994 for a two-year period.<sup>92</sup> However, the EU administrators completely failed to merge the Muslim and Croat parts of the divided city into an operational municipal administration. Instead, there existed parallel institutions of the Croat and the Muslim part which even practised a separate payments and pensions system within the same city. Also the return of displaced Serbs did not function, as was the case in other parts of the country. If displaced persons regained possession of their former houses they preferred to sell them instead of returning and stayed in territories in which their own ethnic people constituted the majority. All efforts to prepare a plan for reunification of the city to be adopted by all parts concerned failed: the two commissions established by the HR Ashdown could not reach agreement between the parties. In line with former action of the HR, Ashdown then acted by decree: in January 2004 he abolished the six municipalities, three Croat, three Bosniac, and adopted a new statute for the city.<sup>93</sup> According to this statute, Mostar had to reach a uniform administration and to establish one Municipal Council until October 2004. The interests of the minority ethnic group, the Bosniacs, are protected in that most of the decisions in the Municipal Council have to be taken by a two-thirds majority, such as e.g. the budget. However, it is completely open whether that “decreed” unification will work, for unification is much more difficult to (re-)construct than the ancient bridge

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<sup>92</sup> Cf. *ILM* 35 (1996), 76/77 et seq. and 170 et seq. for the Agreement and Interim Statute for the City of Mostar, cf. also Wilde, see note 91, 583 et seq. (590); F. Pagani, “L’administraton de Mostar par l’Union Européenne”, *AFDI* 42 (1996), 234 et seq.

<sup>93</sup> Text of the Statute <[www.ohr.int/decisions/mo-hncantdec/default.asp?content\\_id=31707](http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=31707)>.

which stands for unification as external symbol and waiting for completion of the internal peaceful co-existence between the ethnic groups.<sup>94</sup>

### IX. Model Character of the DPA for Other Cases, in particular Iraq?

Nearly ten years after the DPA the new state BiH still strongly depends on international actors in order to maintain peace and prevent ethnic conflicts. The country remains split up ethnically and only a small number of refugees and displaced persons returned to their former living places. The economy is stagnating, co-operation with i.e. the *ad hoc* criminal tribunal is unsatisfactory and the judiciary and executive, in particular the police forces, are not functioning as they should. Are these shortcomings imputable to the DPA or are they characteristic for post-conflict state-building?<sup>95</sup> The answer to this question is certainly not a simple yes or no. The DPA has advantages but also disadvantages for rebuilding a state.

It may be considered as an advantage of the DPA that it constitutes a sort of a peace treaty. In contrast to other conflicts the post-conflict process was not imposed unilaterally by the international community acting through the Security Council, as e.g. in the cases of Kosovo and East-Timor,<sup>96</sup> but was agreed upon by representatives of the international community and the leaders of the parties to the conflict albeit in a problematic way.<sup>97</sup> Although peace by agreement between the conflicting parties may be more promising than peace imposed,<sup>98</sup> concern may be expressed as to the persons involved in the elaboration of the Agreement, some of whom were war criminals and were later prosecuted by the ICTY. Even if this did not influence the contents of the DPA, it raises concern as to its legitimacy so that in such situations a peace settlement imposed by the international community may be preferable as long as adequate national partners are lacking. This is not to say that conflict leaders should not be involved in reaching a peace

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<sup>94</sup> M. Martens, "Versöhnung durch Dekret", *Frankfurter Allgemeine Zeitung* of 23 July 2004, 10.

<sup>95</sup> F.O. Hampson, "Can Peacebuilding Work?", *Cornell Int'l L. J.* 30 (1997), 701 et seq.

<sup>96</sup> Cf. Frowein, see note 67, 43 et seq.

<sup>97</sup> Cf. under V.1 on the "consensus" in the treaty-making process.

<sup>98</sup> Cf. to the example of Cambodia, in this Volume.

agreement, a fact that is of course unavoidable; however, these persons have to be representatives of the respective conflict parties.<sup>99</sup> Furthermore, the involvement of the conflict parties in reaching a peace settlement and bases for the reconstruction of the state should in any case be followed later by a consultation of the people, first through elections and later in the elaboration of the constitution as was the case in Iraq.

A positive aspect of the DPA is undoubtedly the strong emphasis laid on human rights protection which constitutes an indispensable part of any post-conflict regulation and is a significant aspect of all cases of state reconstruction, be it on the basis of a treaty or of a Security Council resolution. The same is true in particular for entrusting human rights protection to an international body, at least for the time until the national judicial system is functioning. The example of BiH demonstrates, however, also that human rights protection, even through international organs, is dependent on a functioning executive, i.e. organs implementing the decisions. In this respect, there were severe deficiencies persisting for a rather long period.<sup>100</sup>

On the other side, some provisions which were designed to reconstruct a new state within a short period have proven less positive, namely the ambition to change the political leadership through elections within a very short term in order to transfer full sovereignty upon the newly constituted organs. This approach ignored the fact that elections, even free elections under international supervision, could not promote reform and democracy as long as true democratic structures and in particular the necessary internal, i.e. national cohesion was missing. In fact, the elections held in 1996 served to legitimize the powers of the nationalist leaders, authors of the armed conflict, and also the efforts to overcome such results by new elections – in fact, seven election rounds were organized between 1996 and 2002 – could not remedy that situation.<sup>101</sup> The confirmation of nationalist leaders through the elections is certainly one of the reasons for the slowness of the state-building process in BiH because decision-making continued to follow

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<sup>99</sup> Cf. A. von Bogdandy et al., in this Volume, who use the term “elite consensus” which in a first time after a conflict is certainly needed but which should not constitute the ultimate basis for the reconstruction of the state.

<sup>100</sup> Cf. K. Oellers-Frahm, see note 63, 277 referring to a decision of the Human Rights Chamber in which the lack of co-operation in enforcing decisions of the Chamber is qualified as a violation of article 8 ECHR.

<sup>101</sup> Cf. Vitzthum, see note 44, 832.



ethnic, not subject-oriented considerations.<sup>102</sup> The lesson to be learned from this experience should be that state-building, even better nation-building, is a precondition for peace, not the natural consequence of absence of war,<sup>103</sup> and that in ethnically torn countries consensus democracy is required. That means that a number of *a priori* schematic commitments must be fulfilled before state-building can be successful.<sup>104</sup> In the case of Iraq elections were scheduled for roughly a year and a half after the conflict and even that seemed to be insufficient, because the religious antagonism had not at all been overcome.

A further weakness of the DPA was the multitude of international actors involved and the lack of cohesion<sup>105</sup> between them, in particular between the military and the civilian actors with regard, e.g. to the tasks of SFOR. Differences appeared also between the civilian agencies because their tasks were not clearly delineated and because they all had their own logistics requirements, financing mechanism, staffing and chain of command. The most important international agencies involved were: the OSCE responsible for electoral support, human rights monitoring, and arms control implementation; the United Nations Mission in Bosnia and Herzegovina (UNMIBH) controlling the operation and restructuring of civil police; the European Commission and the World Bank implementing economic reconstruction programs; the UNHCR responsible for humanitarian relief, refugees and displaced persons; and the International Committee of the Red Cross (ICRC) concerned with prisoners of war. Mention has also to be made of the International Police Training Force (IPTF) and the European Community Monitoring Mission (ECMM). Furthermore, the civilian international actors had no power to compel local actors to implement their obligations flowing from the DPA. Nevertheless, despite some tensions and lack of coordination, these different agencies have, to a certain extent, done a helpful job, in particular by enhancing the working relations for the day-to-day operations, such as handling civilian traffic across inter-ethnic boundaries or bringing together international agencies with local mayors and public officials in order to resolve numerous difficulties.<sup>106</sup>

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<sup>102</sup> Ibid., 839; cf. also Borden/ Caplan, see note 57, 231.

<sup>103</sup> Cf. also Ducasse-Rogier, see note 55, 80.

<sup>104</sup> Cf. Aolain, see note 33, 969, 970.

<sup>105</sup> Vitzthum, see note 44, 839.

<sup>106</sup> J.A. Schear, "Bosnia's Post-Dayton Trauma", *Foreign Pol'y* 104 (1996), 87 et seq. (94).

On the other hand they were also manipulated by the Bosnian parties who used or better misused them to further their own political ends.<sup>107</sup>

What proved, however, to be the main problem of the DPA was the effective consolidation of division. Within the guise of unity the *de facto* partition of the country among ethnic communities was perceived to form a homogenous state. The incompatibility of this duality with basic democratic principles illustrates the weakness of the DPA.<sup>108</sup> On this basis the construction of the central state BiH which would help to overcome the problems resulting from the ethnic-based partition, was rather illusory. As already indicated, the ethnically based structure of the central state prevented the creation of sound institutions,<sup>109</sup> ensuring respect for the rule of law and the integration of Bosnia. When this became evident to the international actors it was up to them to accordingly change their strategy, since an amendment of the DPA was not in question and also a definite division of Bosnia was not regarded as providing a basis for greater stability in the region.<sup>110</sup> In this context the flexibility of the DPA proved to be extremely helpful, in particular the undefined, but large powers accorded to the HR. On the other hand, the maintenance of the DPA despite of its deficiencies for promoting the state-building process made it clear that it was dependent on the HR, respectively the PIC and its Steering Board, to initiate the necessary change of strategy. Thus it was finally the personality and quality of the HR to which the change of strategy was due which certainly is not a sound legal basis for state-building processes. Nevertheless, in the case of BiH, it was the HR who took the initiative to overcome the obstructionism by giving a very wide interpretation to his own powers which was backed by the PIC by the so-called "Bonn-powers"<sup>111</sup> thus initiating some progress in the state-building process. What was still lacking at that time was, however, a modification of the overall civilian strategy, i.e. the co-ordination between the main actors: OHR, OCSE, IPTF and UNHCR.<sup>112</sup> It was the third HR, Wolfgang Petritsch, who initiated a change in the conception and management of the state-building process in that priority was given to build first sound and de-

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<sup>107</sup> Aolain, see note 33, 993.

<sup>108</sup> Aolain, see note 33, 968.

<sup>109</sup> Vitzthum, see note 44, 840.

<sup>110</sup> Bildt, see note 47, 455.

<sup>111</sup> See under VI. 4. b., cf. Doc. S/1997/979 of 16 December 1997, Conclusions of the Peace Implementation Conference.

<sup>112</sup> Cf. Vitzthum, see note 44, 839.

mocratic state structures and institutions before holding elections. During 1999 and 2000 such factual change of the DPA was slowly realized leading to significant results in the field of refugee returns, macro-economic performance and electoral, constitutional and judicial reforms<sup>113</sup> which had an important impact on the partition of the territory.

A second innovation introduced by HR Petritsch may retrospectively be considered as the real turning point in reconstructing BiH, namely the “concept of ownership”.<sup>114</sup> This concept seems to express a banality, namely that the goal of the international involvement in the peace-process was to allow Bosnians to regain full control over their country as soon as possible. Although this concept did not materialize under Petritsch it set the right impetus for the action of the fourth HR, Paddy Ashdown, still in office at the time of writing. The strategy then initiated took account of the fact that due to the obstructionism in the central state organs the international administration had been forced to fulfil increasingly state functions instead of decreasing its involvement. Thus, state administration happened “far away” from the people and the democratic structures of the new state. The change initialled by the “concept of ownership” consisted on the one hand in involving national officials in the action of the international agencies and on the other in explaining to the people the necessity of the reforms for their personal lives. By these means an increased partnership between the international and local actors was reached which sooner or later will diminish the need for international involvement.<sup>115</sup> On the other hand the “dialogue” with the people, the effort to make them understand the necessity of reforms which all have the aim to enhance their living conditions<sup>116</sup> should finally lead to decrease the influence of the nationalist leaders, a precondition for establishing an efficient administration, a reliable judiciary and functioning political institutions as well as the respect for the rule of law.

With regard to the case of Iraq as well as Kosovo and East Timor it seems that a lesson has in fact been learned from the case BiH, namely that the post-conflict regulations should be based on a sound basis. In all these cases a Security Council resolution instead of a “fake” treaty.

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<sup>113</sup> Ducasse-Rogier, see note 55, 84.

<sup>114</sup> Speech of Wolfgang Petritsch to the UN Security Council, New York, 8 November 1999.

<sup>115</sup> Cf. under X.

<sup>116</sup> Aolain, see note 33, 963.

Furthermore, it is certainly not by chance that BiH is the only example where a constitution entered into force the very day the peace agreement was signed without any provision for involving the people in the constitution-making or constitution-affirming process. The elaboration of a constitution after free elections seems in fact to constitute a significant step not only in the state-building, but also in the nation-building process. Finally, there should be only one or two leading states implementing the reconstruction-process and co-ordinating the international organizations involved. A lesson which finally seems to be learned from BiH and which also applies for Iraq concerns the fact that international involvement will be necessary for a rather long time and that the date of elections cannot be the date of discharge of the international actors.

## X. Concluding Remarks

A final analysis of the model of rebuilding BiH as provided for in the DPA has to come to the conclusion that this model has failed, in particular because of its underlying paradigm: “early elections – quick exit”. What finally marked a turning point and is a, if not the, promising means to build a democratic and functioning state BiH, was the new strategy based on the “concept of ownership”. This concept relies on the fact that conflicts involving questions of sovereignty and ethnic antagonism cannot efficiently be resolved by simply creating a new although federal structured state and transferring full sovereignty to that state at the end of the armed conflict, but that the transfer of sovereignty has to be effected step by step involving the national actors. The main idea behind this strategy is the conviction that sound democratic institutions require cohesion at the basis, that they cannot work if imposed from outside without acceptance by the people(s) and that therefore the most important task of international actors is an “educational” one, namely to convince the people(s) of the advantage of building a state ensuring the rule of law.

What has been labelled in BiH as “concept of ownership” is discussed and proposed as efficient peace-building concept after sovereignty-based/ethnic conflicts in international doctrine as the model of “earned sovereignty”.<sup>117</sup> According to this model the newly created or

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<sup>117</sup> Cf. J.R. Hooper/ P.R. Williams, “Earned Sovereignty: The Political Dimension”, *Den. J. Int'l L. & Pol'y* 31 (2003), 355 et seq.; P.R. Williams/ F. Jan-

reconstructed state will gain full sovereignty according to the progress of the functioning of its national institutions. Sovereignty is thus no longer indivisible, but can take different forms so that there are conceivable entities that are something less than a sovereign state, but more than a sub-state entity. In this process three core elements are distinguished:<sup>118</sup>

1. During a first phase earned sovereignty is characterized by shared sovereignty, that means that international institutions, such as e.g. the OHR in BiH, exercise sovereign authority and functions in addition or, more realistically in a first phase, in lieu of the state.

2. During the shared sovereignty phase institutions are constructed with the assistance of the international community, but not by *octroi* of the international actors. This phase may take much time and seems to be the most important and difficult one in that it requires the international actors to persuade the national partners of the necessary changes and to make them acquainted with democratic standards and the rule of law.

3. The determination of the final status could be reached by referendum which would be best with regard to the legitimacy of the status, but also by a negotiated settlement. What is necessary in this context is on the one hand the acceptance of the new status by the people(s) concerned as well as the consent of the international community in the form of international recognition.

During these different phases a measured devolution of sovereign functions and authority from the international community to the new state organs has to be enacted which could be made dependent on the fulfilment of certain benchmarks, such as protection of human rights and minorities, developing democratic institutions, institution of the rule of law or regional stability.

The concept of “earned sovereignty” which may follow from a peace treaty as well as from a peace-process imposed by the international community, i.e. Security Council Resolution under Chapter VII, seems the most promising solution in ethnically based conflicts where the prerequisites for self-determination are not met. Reconstructing a state composed of several ethnical entities needs international involve-

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notti Pecci, “Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination”, *Stanford J. Int’l L.* 40 (2004), 347 et seq.

<sup>118</sup> Hooper/ Williams, see above, 360 et seq.; Williams/ Jannotti Pecci, see above, 355 et seq.

ment *before* full sovereignty is transferred. As recent experience has shown, it is, however, not a more or less long-lasting international administration superposed on the national organs which guarantees peaceful state-building, but the joint action of international and national actors. Only where the reconstruction of a state is accompanied, not dominated, by the international community, is it possible to create the necessary confidence-building climate, to reduce *ressentiment*, and to enhance national efforts. What is, therefore, necessary in post-conflict reconstructing states is to prevent complete international dependency under the umbrella of which nationalist ambitions may continue to prosper. In the case of BiH the basic error was the ethno-territorial principle governing the new state together with the too early timed elections. This could only lead to strengthening the position of the nationalist leaders and to shift responsibility for the state-building to the international actors. The indispensable international involvement has to be clearly defined, also with regard to the accountability, and has to be organized in such a way that co-operation with national organs is guaranteed from the beginning, coupled with permanent information efforts in order to convince the basis of the importance of the necessary reforms and decrease the influence of ethnic oriented politics.