



FACULTY OF LAW
Lund University

Helena Paulsson

An Institution of Benevolent
Despotism?
An Examination of the Office of the
High Representative in Bosnia and
Herzegovina

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Bengt Lundell

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Summary

The war in Bosnia and Herzegovina ended 15 years ago. The General Framework Agreement for Peace in Bosnia and Herzegovina, commonly known as the Dayton Peace Agreement, stipulates the conditions for the peacebuilding process in the country. Annex 4 of the Dayton Peace Agreement comprises the constitution of Bosnia and Herzegovina. The constitution includes several aspects of power sharing among the three constituent people in Bosnia: Bosniacs, Serbs and Croats. Thus, Bosnia is a state governed according to consociational principles. The Dayton Peace Agreement also designates a High Representative, an international authority responsible for monitoring the implementation of the peace agreement. Since the work of establishing peace started in 1995, the High Representative has taken on a very far-reaching role, intervening in almost every aspect of Bosnia's political life. The High Representative has, inter alia, enforced decisions when Bosnia's elected politicians have failed to do so. This essay looks into two areas of peace and state building in Bosnia where the High Representative has had a crucial role. The first area concerns the changing of the entities constitutions, and the second refugee return. The main argument in this essay is that the High Representative and the international community are working against Bosnia as a consociational state, wanting in to change into a unitary state without power sharing mechanisms according to ethnicity. The conclusion is that, since the war ended, Bosnia's consociational features have both been weakened and strengthened at the same time. The work of the High Representative has entailed positive features for Bosnia, but ultimately, its extensive role has been harmful to the internal democratic process.

Sammanfattning

Kriget i Bosnien och Hercegovina tog slut för 15 år sedan. Daytonavtalet reglerar villkoren för fredsbyggandet i landet. Annex 4 i Daytonavtalet består av Bosniens konstitution. Konstitutionen innefattar flera aspekter av maktindelning mellan de tre konstituerande folken, bosniaker, kroater och serber. Bosnien är således en stat som styrs enligt en konsociationell modell. Daytonavtalet utser en hög representant för landet, en internationell instans ansvarig för att övervaka implementeringen av fredsavtalet. Sedan arbetet med att säkerställa freden inleddes 1995 har den höge representanten fått långtgående befogenheter, och intervenerar och medlar nu i nästan alla aspekter av bosnisk politik. Den höge representanten fattar egna politiska beslut och tvingar ofta igenom dessa när de lokala politikerna inte vill genomföra dem. Denna uppsats tittar närmare på två områden där den höge representanten har haft en central roll i freds- och statsbyggnadsprocessen i landet. Det första området behandlar ändringarna i entiteternas konstitutioner, det andra handlar om flyktingåtervändande. Huvudargumentet i uppsatsen är att den höge representanten och det internationella samfundet arbetar mot att Bosnien ska förbli en konsociationell stat och att de hellre vill se landet omvandlas till en enhetlig stat utan maktindelingsklausuler efter etnicitet. Slutsatsen är att Bosniens konsociationella kännetecken har både stärkts och försvagats sedan krigets slut. Den höge representantens arbete har haft en del positiva effekter för Bosnien, men sammantaget har dess extensiva roll varit skadlig för den interna demokratiska processen.

Preface

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Abbreviations

BiH	Bosnia and Herzegovina
DPA	Dayton Peace Agreement
CDPR	Commission for Displaced Persons and Refugees
COE	Council of Europe
DP	Displaced Persons
HR	High Representative
IC	International Community
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
PIC	Peace Implementation Council
RS	Republika Srpska
FBiH	Federation of Bosnia and Herzegovina
OHR	Office of High Representative
PLIP	Property Law Implementation Plan
RRTF	Reconstruction and Return Task Force
SRSg	Special representative of the Secretary General
IFOR	Implementation Force
UNHCR	Office of the United Nations High Commissioner for Refugees

1 Introduction

“If the sides do not agree about some decision, for example the passports, the licence plates, the flag, in the future, I will stop this process of infinite discussions. In the future, it would look like this: I will give them, for example, a term to bring a certain decision, that is, to agree about some decision. If they do not, I will tell them not to worry, that I will decide for them. And I will decide.”

The words above are Carols Westendorp's, the second High Representative (HR) in Bosnia and Herzegovina (Henceforth BiH or simply Bosnia).¹ He is giving an interview in Sarajevo just days before the Peace Implementation Council's (PIC) meeting in Bonn in 1997, where the HR was given extensive powers to mediate in Bosnia's domestic matters. Since then, the HR has imposed a wide range of what is referred to as “decisions” by the Office of the High Representative (OHR), ranging everywhere from deciding on the national hymn and design of the flag, to removing elected officials from office. The HR has pushed through legislation, both on a local level and all the way to the changing of the entities constitutions. Moreover, in cooperation with the international community (IC) the HR has changed property, media and election laws. All this is said to be done in the “Spirit of Dayton”.² What is particularly problematic is that all those who do not agree with the HR's interpretations of the Dayton agreement are regarded by the HR and the international community as working against or blocking Dayton.

This essay explains some of the developments in Bosnia since peace was brokered 15 years ago. By looking at the form of government in BiH, with an external, foreign actor – the Office of the High Representative – it will address the question if such an institution is

¹ OHR Homepage , Slobodna Bosna 1997-30-11, retrieved 2010-10-24

² Bieber 2006: 29

beneficial for a country trying to recover from a civil war. The reason for having such an institution as the OHR in Bosnia has its reasons; for almost four years, the three ethnic groups within the country fought a devastating civil war that changed the country from within. The formerly ethnically mixed country, at least demographically, had now turned into a country divided into two entities, separated by its citizen's ethnicity. The General Framework Agreement for Peace in Bosnia and Herzegovina, more known as the Dayton Peace Agreement (referred to from now as DPA or simply Dayton) ended the war, and in addition to many provisions on how to rebuild and demilitarize the country, it provided BiH with a new constitution. This essay will describe and analyze the functioning of the Bosnian state with this new constitution. It will illustrate the international community's often-contradictive policies in state and peace building.

1.1 Purpose and delimitation

This essays aims at exploring the contrasts and possibilities that lie in the creation of a consociational state within a divided society, both its limits and virtues. However, the example of BiH adds another factor to this particular case of state building; that of an external beneficiary. I will look deeper into decisions made by the OHR in two specific areas. The first area deals with the changing of the entities constitutions. The other with refugee return. Both areas are seen as crucial to the state building process in Bosnia. They are also enshrined in the DPA, and thus binding for Bosnian politicians. However, both these changes of the country's post-war set up are not made by the people's representatives, the parliamentarians and the government, but by other, external factors.

More specifically, I will study the functioning of a state founded on decision-making based on ethnic quota and under which

circumstances is it justified to have an external beneficiary as the High Representative substituting popularly elected politicians.

The main argument of this thesis concerning the role of the IC, which drafted the Bosnian constitution, has too a large extent been to constantly fight against the same state this constitution laid the foundation for, that is, an ethnically divided one, or in other terms, a consociational state.

1.2 Methodology and materials

To answer this question I will primarily do a literature study. The material used is specialized literature on Bosnia, articles from international journals, and legal texts such as cases from the BiH constitutional court, UN resolutions and of course the Dayton agreement. Literature on Bosnia often takes a clear, or sometimes, more concealed stance on the matter of things, and on what the authors perceive being the “best” solution for Bosnia. In this essay, I will try to present and put these dissenting opinions en clair. The answers to the above-stated research questions depend largely on which scholar or policy maker you ask, and above all, if you ask a Bosnian citizen or a member of the IC.

1.3 Theoretical background

1.3.1 Bosnia as a consociational state

Scholars depict Bosnia and Herzegovina as a “divided society”. Arend Lijphart describes divided societies, or plural societies, as “a society that is deeply divided along religious, ideological, linguistic, cultural, ethnic or racial lines into virtual sub-societies with their own political

parties, interest groups, and media of communication”.³ Another definition made by Lijphart of a divided society lies in the way political parties are formed under conditions of free association and competition, specifically whether or not the parties form according to group positions.⁴ In the first free elections in Bosnia in 1990, three ethno-nationalistic parties won the elections and formed a coalition.⁵ The majority of the voters voted according to ethnicity, making the elections almost an ethnic census.⁶ Thus, Bosnia should be regarded as a divided society.

In order to understand what significance a divided society has for state building, it is necessary to be aware that there are different theories and ideologies that guide state builders and constitution makers. Most experts on divided societies and ‘constitutional engineering’ agree that deep divisions within a society are a cause of great concern for democracy. It is generally more difficult to create and maintain democracy in divided than homogenous societies.⁷

One of the founding principles of the modern state is that of the *civic nation*, also described as the liberal nation. This notion entails a concept of a nation composed of equal citizens, enjoying equal rights and obligations regardless of ethnicity, race, sex, income, religion or any other characteristic. In a civic nation, anyone can obtain citizenship, regardless of the parameters stated above. Opposed to this model is that of the *ethnic nation*, where citizenship and nationality is bound to your blood, religion or whatever denominator the members of a certain group considers to be what brings them together and differentiates them from others.⁸

³ Lijphart 2008: 67

⁴ Bose 2002: 212

⁵ Kostic 2009: 16

⁶ Hayden 1999: 92

⁷ Lijphart 2004: 96

⁸ Kasapovic 2005: 12

Lijphart, regarded as the “father” of the consociational theory, argues that there are a number of constitutional rules that can accommodate the interests and demands of communal groups, and that they all involve power sharing. Lijphart emphasizes that his model does not imply a specific set of rules and institutions, but implies a general type of democracy, defined in four broad principles.⁹ This model is explained as below:

The consociational model has four key principles:

1. Government by ‘grand coalition’ at the centre, involving equitable and possibly equal distribution of the presidency and other high offices among the different [ethnic or national] groups
2. Minority veto on all policy matters and decisions that might affect the ‘vital interests’ of the minority communities
3. Proportionality as the principal standard of political representation, civil service appointments, and allocation of public funds
4. Group autonomy- a high degree of autonomy for each group to run its own internal affairs.¹⁰

Group autonomy can signify federalism.¹¹ Bose, for example, differentiates between national and multi-national federalism.¹²

National federalism has strong assimilationist and/or integrationist objectives. National federalists view the federation as a stepping-stone towards a more centralized unitary state. The multi-national federalist has no such objective. Instead, it seeks to institutionalize and protect different groups. It believes that dual or multiple national loyalties are possible and desirable. Examples of countries influenced by multi-

⁹ Lijphart 2008: 67

¹⁰ Lijphart 1977: 24, Bose 2002:216

¹¹ Lijphart 1997: 42

¹² Bose 2002:92

nationalism include Spain and Belgium, and a work in progress in becoming a multi-national federal state is the European Union.¹³ Bosnia's institutional and political framework (which will be explained later) is almost a blueprint of a consociational state. But to what definition of federalism does Bosnia adhere? Generalizing to some extent, Bosniacs favour the national federation, whereas Serbs and Croats want the multi-national model. The international community, even though often ambiguous and confused, must be said to promote the nationalist federation.¹⁴ This entails that even though Bosnia is a consociational democracy with power sharing enshrined on so many levels of decision-making; the different groups within Bosnia have a very different view of how the Bosnian state should be organized, and, eventually, what the finalized version of this state should look like.

1.3.2 Criticism of consociationalism

Several scholars are concerned about the democratic deficit that can be attributed to a consociational society. The idea of a society where politicians speak only for their own group and never address any wider concern is not a very satisfying solution for a country aspiring to be a true democracy. The core of the problem with consociationalism lies in the fact that it not only recognize collective identities at the exclusion of others, it also institutionally entrench these collective cleavages.¹⁵ The prevailing question is; what happens with the people who do not want to identify themselves with a particular group? Consociation depends heavily on the elite's will and capacity to make government work. When no such will is at hand, this proves a blueprint for political deadlock. It also enables a system where it is accepted to work for vested interests, where politicians can easily resort to enhancing politics of grievances, and devoting their

¹³ Ibid.

¹⁴ Bose 2002:93

¹⁵ See eg Brass, Phillips, Kymlicka and Norman in Bose 2002

energy to establish a perception of disadvantage, rather than working constructively together with their ‘adversaries’ to overcome such grievances.¹⁶ As this study intend to show, this is precisely what has been occurring in Bosnian politics since the end of the war.

Robert M. Hayden is very critical of what he refers to as ‘constitutional nationalism’. As Yugoslavia’s republics gained sovereignty, the nationalist parties created a constitutional and legal structure that privileged the members of one ethnic nation over others. This would confirm the identity of the republic as the nation-state of the dominant ethnic nation.¹⁷ Constitutional nationalism envisages a state in which sovereignty resides with a particular people, the members of which are the only one who can decide fundamental questions such as state form and identity.¹⁸ Hayden identifies constitutional nationalism as “based on the concept of the sovereignty of the (ethnic) nation rather than on the body of equal citizens of the state... As such, it may permit exploration of the manifestations of extreme hostility, to the point of genocide, against minority population within this region [Eastern Europe, author’s note].”¹⁹ It must be pointed out that what Hayden describes is not a consociational state, since such a state envisages equal treatment of minorities. However, he addresses the problem in Bosnia, where separation is viewed as essential to protect the supposedly threatened culture of each people, and the contradictions that lie within creating a consociational state in a divided society. Here, what is distinguished as “the other” is perceived both as an inferior and threatening element. The nation is seen as a unit that can only exist in ethnic isolation.²⁰

¹⁶ Bose 2002: 246

¹⁷ In former Yugoslavia, groups are not referred to as being ethnically distinct, but as to originate from different nations, “narod” or being belonging to different peoples, “narodi”. However, in this essay, I will I most cases use the term ethnicity, even if it is somewhat misleading.

¹⁸ Hayden 1999: 68

¹⁹ Ibid p. 69

²⁰ Hayden 1999: 143-144

2 Background to the Conflict

2.1 The disintegration of the Socialist Federal Republic of Yugoslavia

In 1974, the Socialist Federal Republic of Yugoslavia (from now on simply Yugoslavia) adopted its third constitution as a response to demands for increased self-government. The constitution created a loose federation, granting maximal autonomy to its six republics: Bosnia and Herzegovina (from now on Bosnia, or BiH), Croatia, Macedonia, Montenegro, Slovenia, Serbia and two semi-autonomous provinces linked to Serbia: Kosovo and Vojvodina.²¹ Yugoslavia comprised six constituent nationalities: Croatian, Serbian, Slovenian, Montenegrin, Macedonian and Muslim, the last one having become an official Yugoslav nationality for the first time in the constitution of 1974.²² Each republic's autonomy was protected by requiring unanimous consent for all major decisions within the federation of Yugoslavia. Practically all federal powers were now moved to the republics' level. Each republic had its own central bank, communist party, educational system, judiciary and police. The only institution that still operated exclusively at the federal level was the Yugoslav National Army (JNA). The commander-in-chief consisted of an eight-member, rotating federal presidency.²³ The basic structure of the Yugoslav constitution was that it was a multinational federation, composed by nations rather than citizens.²⁴ During the 80s, nationalist politicians increased their popularity with the support of religious institutions by playing on historical injustices, discontent and fear.²⁵

²¹ Hayden: 1999: 49

²² Cousens: 2001: 27

²³ Ibid: 17

²⁴ Hayden: 1999: 51

²⁵ Kostic: 2009: 16

At the same time, the Yugoslav economy went in to decline. In 1990, when the first democratic elections were held in all Yugoslav republics, nationalist politicians and parties became clear winners. On 25 June 1990, Slovenia declared its independence and a short war followed, when the JNA initially put up some resistance, which was more of a half-hearted police action, and independence was rapidly won. Simultaneously, Croatia declared itself independent, but met far more resistance from the JNA, Serb paramilitary forces and its own autonomy-seeking Serbs.

2.2 Bosnia falls apart

In the meantime in Bosnia, President Alija Izetbegovic (Bosniac²⁶) was advocating for Bosnia's independence, while the Bosnian Serbs opposed secession from Yugoslavia and started setting up 'autonomous areas' within Bosnia. While the other republics of Yugoslavia had one dominant ethnic majority (for example, Slovenia was almost 90 % Slovene and Croatia 78 % Croat), Bosnia's population composed of 44 % Muslim, 31 % Serb, 17 % Croat, 6 % Yugoslav and 2 % "Others" according to the census made in 1991.²⁷ When the first free elections were held in November 1990, the Bosnian electorate voted according to ethnic lines. The Muslim party, SDA, won 36 % of the votes, the Serb SDS 30 % and the Croat HDZ 18 %. The winning nationalist parties formed a coalition government and divided the power among them. A Muslim became president over a seven-member presidency, a Serb the president of the parliament and a Croat the president of the government, i.e. prime minister. These

²⁶ Most Bosnian Muslims, whether practicing or nominal, self-identify as Bosniacs. Bosnian is here used to identify citizens of Bosnia and Herzegovina regardless of faith or ethnicity. Bosnia's Croats and Serbs dislike the terms "Bosnian Croat" and "Bosnian Serb", which they feel imply a false ethnic distinction with their kin in neighbouring countries; unless otherwise indicated, in this essay the terms Croat and Serb refer to residents of BiH.

²⁷ Cousens: 2001: 19-21

positions were supposed to rotate after two years, but this rotation never took place.²⁸

In June 1991, when the dissolution of socialist Yugoslavia was a fact, Bosnia was divided over its own future status. The Croat HDZ claimed they would not remain within Yugoslavia without Croatia. The Serb SDS was willing to recognize a sovereign Bosnia within Yugoslavia, together with Serbia and Montenegro. The European Community (EC) called for a referendum on independence, which took place on 29 February and 1 March 1992. With a 64 % voter turnout 98, 9 % voted for independence. Most Serbs boycotted the referendum, as the SDS organized an alternative referendum, calling for secession from Bosnia. As Bosnia was recognized by the EC on 6 April 1992, the Serbs proclaimed the sovereign Serb republic, Republika Srpska (RS) in eastern Bosnia. War in Bosnia and Herzegovina had started.

2.3 War in Bosnia

The aim of this essay is not to discuss and explain what events took place during the three and a half years of war that tore Bosnia apart. However, some information about the major developments is needed in order to understand the constitutional set-up that followed.

The government initially fought a war on at least two fronts. In eastern Bosnia, Bosnian Serb forces brought a large part of territory under their control thorough mass murder, expulsion and destruction of Muslim and Croat property. They enjoyed support form Serbia, and their object was to sustain the independent Serb republic- Republika Srpska.²⁹ At this point, there existed an alliance between Croat and Muslims. It was however, a fragile one, as the Muslim SDA wanted to maintain the centralized republic whereas the Croat HDZ, with the support of the Croatian government supported a secession of

²⁸ Ibid. 92

²⁹ Cousen 2001: 21

predominantly Croat- inhabited Western Bosnia. In 1993, fighting erupted between Croat and Muslim forces in western and central Bosnia.³⁰ This war was brought to an end under US pressure in Washington in March 1994 and created the Bosnian-Croat Federation, and with it a joint strategy against the Bosnian Serb army.³¹ In 1995, the military balance changed when Croat (backed by the US) and Bosnian forces advanced and took back territories previously held by the Bosnian Serbs. In August 1995, the Croat army overthrew the self-proclaimed “Krajina Serb republic” in Eastern Croatia and made approximately 150 000 Croat Serbs and 50 000 soldiers flee to Serb-held parts of Bosnia and Serbia. As the map changed and with it the balance of power, it was possible to start peace negotiations.

2.4 The Constitution of Bosnia and Herzegovina prior to the war (1974-90)

In this section, I will give a very brief overview of the constitution that governed Bosnia prior to the Dayton Agreement. Bosnia was in fact already before the war a consociational state. The three nations were mentioned as the constituent peoples together with others, and power-sharing mechanisms were in place. This is important to be aware of in order to understand the constitution that was written in 1995.

The 1974 Constitution of the Socialist Republic of Bosnia and Herzegovina stated that Bosnia was a:

“...democratic community of the working class and citizens, the nations of Bosnia and Herzegovina – Muslims, Serbs and Croats, members of other nations and nationalities, that live within it, based on the authority and self-management of the working class and all working people and on the sovereignty and equality and of the nations of Bosnia and Herzegovina and the members of other nations and nationalities living within it.”³²

³⁰ Bieber: 2006: 26-27

³¹ Kostic: 2009: 20

³² Article 1, Hayden: 1999: 89

Article 3 of this constitution granted proportional representation to the three nations and other nations and nationalities in the assemblies of “social-political bodies”. Amendments to the constitution made in 1990 (which removed references to the working class and working people) required that “the nations and nationalities” should be represented in proportion to their respective numbers in the population in all governmental organs at all levels. It also required a special, two-thirds majority to pass legislative provisions alleged as violating the principles of national equality.³³

³³ Ibid. 91

3 The Dayton Peace Agreement

3.1 Arriving at the Agreement

In September 1995, peace talks in Geneva led to an agreement in which Bosnia would remain as a state with two highly autonomous entities, the Serb Republika Srpska making up 49 % of the territory and the Bosniak-Croat Federation 51 %.³⁴ The negotiations were an US initiative, which involved talking exclusively to the Croat President Franjo Tudjman, Serbian President Slobodan Milosevic and Bosniak President Alija Izetbegović. Bosnian Serbs and Croats were thus excluded from the talks.³⁵ The same setup applied when the leaders arrived at the US Air Force base in Dayton, Ohio, on November 1, 1995. However, there were delegations of Bosnian Serbs and Bosnian Croats present, but they had little leverage in the process. Tudjman negotiated on two fronts. Firstly with Milosevic concerning reintegrating Serb-controlled Western Slavonia into Croatia and secondly, making sure the Bosnian Croats, being the smallest minority in Bosnia, would feel sufficiently represented within the Federation and the central government.³⁶ Milosevic, on the other hand, did not include the opinions of the Bosnian Serbs while negotiating. According to Carl Bildt, the European Union's mediator, the Bosnian Serbs were almost completely excluded from the peace talks in Dayton.³⁷ There were also major differences in the European and American approaches. The Americans did not want the High Representative to be appointed by the UN Security Council, neither to let it have any influence over the military aspects of the peace agreement. After 3 weeks of negotiation, on 21 November 1995, the

³⁴ Cousens 2001: 24-25

³⁵ Kostić: 2009: 22

³⁶ Cousens: 2001: 25

³⁷ Bildt: 1997: 192

General Framework Agreement for Peace in Bosnia, more commonly known as the Dayton Peace Agreement, Dayton Peace Accords (DPA) or simply as “Dayton”, was signed. Milosević faxed the signature of the Bosnian Serbs ten days later.³⁸

At the end of the war, the formally geographically mixed population in Bosnia was now largely concentrated to three ethnically homogeneous territories. Out of Bosnia’s pre-war population of 4.3 million citizens, around 1.2 million were refugees outside the country, 1.1 million were displaced within Bosnia. The death toll amounted to between 100 000 and 300 000. However, the balance in population between the three nations stayed more or less the same.³⁹

3.2 The content and purpose of the agreement

The DPA consist of a short introductory text (the General Framework Agreement) and eleven annexes, containing the concrete agreement. The DPA is more comprehensive than a traditional peace treaty as it goes far beyond being just a cease-fire agreement. The goal of the DPA was twofold: to end the war and to rebuild a Bosnian state. The agreement includes a wide range of both military and civilian aspects of peace building. The military aspects include the deployment of a NATO- led Implementation Force (IFOR), arms-reduction and the demarcation of the Inter-Entity Boundary Line. The civilian aspects include inter alia agreements on elections, human rights, arbitration, a commission to preserve national monuments and the establishment of public corporations. Annex 7, the Agreement on Refugees and Displaced persons, states the right of all citizens to return to their pre-war homes.⁴⁰ To implement the peace agreement, the international community was given extensive power in almost all of the aspects of

³⁸ Kostić 2009: 31

³⁹ Bieber: 2006: 29 Also, see maps in Annex A

⁴⁰ Kostic: 2009: 32-33, Cousens: 2001: 33, For full text of DPA, see www.ohr.int

the agreement. Here follows a short list of examples: The OSCE were in charge of monitoring and conducting the elections. The return of refugees and internally displaced persons (IDPs) were under UNHCR responsibility. Three of the nine seats on Bosnia's Constitutional Court are reserved for non-Bosnians. Bosnia's Central Bank was to be governed the first six years by a non-Bosnian citizen, appointed by the IMF.⁴¹ In order to coordinate the whole spectrum of civilian, or be it political, bodies, Dayton created the Office of the High Representative (OHR). Annex 10 addresses the civilian implementation of the DPA. In this 2-page agreement, the mandate of the High Representative is found, which will be explained more in detail below. The constitution of Bosnia and Herzegovina is in annex 4. The functioning of the state of BiH will be explained more in detail in chapter 5.

⁴¹ Cousens: 2001: 39

4 The office of the HR

4.1 OHR Mandate According to Dayton

Article 1 of Annex 10 of the DPA outlines the reason for establishing a High Representative:

“In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution, the tasks set out below”.

Article II states the mandate of the HR, which is, inter alia, to “monitor the implementation of the peace settlement [...] [f]acilitate as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.”

Article V states: “The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement.”⁴²

The HR shall not be confused with a UN Special Representative of the Secretary-General (SRSG). However, the DPA stipulates that the HR should “be appointed with relevant United Nations Security Council resolutions“. Carl Bildt says the reasons for not making it a SRSG-post was mostly due to the Americans “...fear of the UN”;⁴³ whereas other says it was due to the UN: s poor peacekeeping performances during the war.⁴⁴ Instead, the HR would be under the auspices of the Peace Implementation Council (PIC), a group created in London 8

⁴² DPA, OHR homepage

⁴³ Bildt 1997: 199

⁴⁴ Cousens: 2001: 46

December 1995, consisting of about fifty ‘implementation-friendly’ governments. This group was created out of the remnants of the International Conference of the Former Yugoslavia (ICFY)⁴⁵ and its task was to support and give strategic advice to the peace implementation process, and the HR. A Steering Board (SB) was formed, consisting of the G8 countries⁴⁶, the OSCE-Chairman-in-Office, the EU presidency and the Organisation of the Islamic Conference (OIC), which is represented by Turkey.⁴⁷ The first two years after the signing of Dayton, PIC assembled every six months to hold strategic conferences. As for the Steering Board, the HR meets with the Ambassadors to Bosnia of the Steering Board member countries every week. The SB meets at the level of political directors every three months.⁴⁸

4.1.2. Expanding the HR:s powers

Carl Bildt was assigned as the first HR in Bosnia and held this position until June 1997. It soon became clear that the de facto real parties to the DPA - that is- the people of Bosnia, were reluctant to implement the peace agreement.⁴⁹ Bosnian authorities blocked efforts of unification, such as power sharing and return of refugees. At the end of 1996, no person indicted for war crimes had been brought to the International Criminal Tribunal for the former Yugoslavia (ICTY). The ethnic separation had further increased since the signing of the DPA.⁵⁰ As the players on the international scene shifted, and with it the composition of the PIC, with both the UK and the US having foreign minister with an interventionist agenda, it was time for a more

⁴⁵ ICFY was an international body that had been working to establish peace since 1991.

⁴⁶ Canada, France, Germany, Italy, Japan, Russia, United Kingdom, and the United States.

⁴⁷ Cousens: 2001: 43, Bildt: 1997: 239

⁴⁸OHR homepage

⁴⁹ More correctly put the warring parties that won the first elections after the war. The Bosnian people have never been asked what their opinion on the DPA is, as it has never been legitimated through a referendum.

⁵⁰ I.e; In January 1996, the majority of the Serbian population left Sarajevo. Bildt 1997: 275

assertive approach to Dayton implementation.⁵¹ At the PIC meeting in Sintra, Portugal, in June 1997 attention was drawn to the Bosnian authorities' non-compliance with Dayton. Strict deadlines for collaboration on a number of provisions were set up. As time passed without any increase in the willingness to comply, the international community grew frustrated. At the next PIC meeting in Bonn, Germany, in December 1997, the HR was vested with extensive authority and power.⁵² The PIC Bonn Conference issued a comprehensive 20-page document complying 10 areas that remained problematic in Bosnia. The document ranges from human rights and war crimes to economic and media reform policies. The end of the last paragraph reads as follows:

The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues:

- a. timing, location and chairmanship of meetings of the common institutions;
- b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
- c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.⁵³

⁵¹ Cousens : 2001: 130

⁵² Ibid.

⁵³ PIC Bonn Conclusions, OHR homepage

This mandate came at the request of the HR, Carlos Westendorp. At a speech before the PIC in Bonn, he said:

“Let there be no misunderstanding. I am not seeking from this Council a new or revised mandate. Not yet. But what I will need from you is your full support in the more vigorous exercise of my existing mandate in order to clear the boulders strewn across our path. I intend to exercise to the full the final authority in theatre, given to me under Annex 10 of the Peace Agreement, to break the log-jam in a number of key areas where other approaches have been exhausted”.⁵⁴

The powers vested in the OHR after the Bonn Meeting are hereinafter referred to as the *Bonn Powers*.

4.2 Mandate after the Bonn Meeting

The OHR was thus given authority both to develop and enact laws that the Bosnian politicians could not agree on, as well as enforcement powers with which to take action against anyone opposing the OHR decrees, be it an elected or appointed official, members of the media or others with some sort of influence in decision making.⁵⁵ In short, the OHR now has the power to enact decisions on areas such as housing, elections, citizenship, travel, refugee return, economic policies etc. The full width of powers within Dayton extended all the way to enforcing the sport organisations in the Entities to form teams together to represent BiH in the upcoming Winter Olympics in Nagano, Japan. Thus, one week after the Bonn meeting, HR Westendorp enacted the first OHR “decision”, imposing a disputed law on citizenship in BiH.⁵⁶ From 1998 until today, the HR has been imposing numerous decisions every year. In January 2011, the total account of decisions was 906.⁵⁷ At the OHR homepage, the decisions are divided into the following categories:

⁵⁴ Speech 1997-12-09 at the PIC Conference in Bonn: OHR homepage

⁵⁵ Cousens: 2001: 131

⁵⁶ Chandler: 2000: 157

⁵⁷ OHR Homepage

- Decisions relating to State Symbols and State-Level Matters and Constitutional Issues
- Decisions in the Economic Field
- Decisions in the Field of Judicial Reform
- Decisions relating to the Federation, Mostar and Herzegovina-Neretva Canton
- Removals and Suspensions from Office
- Media Restructuring Decisions by the HR
- Decisions in the field of Property Laws, Return of Displaced Persons and Refugees and Reconciliation
- Decisions relating to individuals indicted for war crimes in the former Yugoslavia⁵⁸

4.3 Legal mandate of the OHR

The authority of the HR was endorsed through various UN resolutions; the first one adopted 15 December 1995. UN Resolution 1174 adopted 15 June 1998. It reads:

“The Security Council [...] reaffirms that the High Representative is the final authority in theatre regarding the interpretation of Annex 10 on civilian implementation of the Peace Agreement and that in case of dispute he may give his interpretation and make recommendations, and make binding decisions as he judges necessary on issues as elaborated by the Peace Implementation Council in Bonn on 9 and 10 December 1997;”

The OHR and the Bonn Powers are hence fully recognized and approved of by the UN. The UN also expresses its support for the PIC’s conclusions and endorses the HRs. Valentin Inzko, the present HR, was welcomed in UN resolution 1869 from 25 March 2009.⁵⁹ The HR and the work of the PIC thus have a solid international legal and political mandate for its actions.

⁵⁸ In 2001, decisions started to be translated to Bosnian, Croat and Serb, the official languages of BiH. However, still, not all decisions are being translated from English.

⁵⁹ UN Resolution 1869 (2009)

5 OHR imposing changes in Bosnia and Herzegovina

In the following part, I will look into and analyze two areas of decisionmaking that are considered to have had a big impact on the peace and nation building of BiH. They deal with the right to return to your pre-war home, as enshrined in the DPA, and the questions relating to the entities constitutions being in accordance with the BiH constitution.

5.1 The Constituent People Decision

In this part, I will try to outline the main features of how Bosnia and its entities are governed and what changes that have taken place since the constitutional court's decisions in 2000. However, a complete summary of all the events and changes that took place is beyond the scope of this essay. I will leave out most of the political parties' actions and try my best to give a legal background to the most crucial parts of Bosnia's and its entities form of government. The focus is the broader impact the changes will have on how Bosnia is or could be governed, and whether the HR's intervention was or maybe will be beneficial for Bosnia.

5.1.1. The Confederal State of Bosnia

The constitution of Bosnia and Herzegovina created an extremely weak, decentralised state.⁶⁰ In its preamble, it is stated that "Bosniacs, Croat and Serbs, as constituent people (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia is as follows".⁶¹ It further states in article I that

⁶⁰ Some scholars argue that the constitution of BiH is so flawed that the country cannot be regarded as a state. See e.g. Hayden: 1999: 124-127

⁶¹ DPA Annex 4 Constitution of Bosnia and Herzegovina, Preamble para. 10

BiH shall consist of two Entities, the Federation of Bosnia and Herzegovina (FBiH or the Federation) and the Republika Srpska (RS). The institutions of BiH are expressly vested with 10 “matters”, covering, inter alia, monetary policies, foreign policy, immigration, international and inter-Entity criminal law enforcement, inter-Entity transportation and air traffic control. All governmental functions and powers not expressly assigned to the state of BiH shall be those of the Entities. The Entities are further given the right to establish “special parallel relationships” with neighbouring states⁶² as long as they are consistent with the sovereignty and territorial integrity of BiH. The functioning of the government and legislative is as follows: The Parliamentary Assembly consists of two chambers, the House of Peoples and the House of Representatives. The House of Peoples comprise of 15 delegates, two-thirds from the Federation, (including five Croats and five Bosniacs) and one third from the Repbulika Srpska (five Serbs).⁶³ The House of Representatives comprise of 42 members, two-thirds elected from the territory of the federation and one-third from the RS. The Presidency consists of three members, each representing one of the constituent peoples. There is also a Council of Ministers, whose Chair (equivalent to a Prime Minister) is appointed by the Presidency. The Chair is responsible for nominating the Ministers. No more than two-thirds of all Ministers may be appointed from the Federation. The Deputy Ministers are also nominated by the Chair and can not be of the same constituent people as their Ministers.⁶⁴ Power-sharing based on ethnicity is thus enshrined on virtually all levels of decision-making in the constitution.

⁶² This is referring to the right for Serbs to have relationships with Serbia (at the time the FRY) and equally for the Croats with Croatia, even though this is not explicitly spelled out. Authors note.

⁶³ Thus it is expressly stated what ethnicity the representatives elected from the entities must have. No one belonging to the category “other” can be elected.

⁶⁴ DPA Annex 4 , U 5/98 §62

5.1.2. The Constitution of the Federation of Bosnia and Herzegovina

The Croat-Bosnian entity, the Federation of Bosnia and Herzegovina, was created through the Washington Agreement signed in March 1994 by the Croatian president Franjo Tudjman and Bosniak president Alija Izetbegović. The Washington Agreement includes a constitution for the Federation. The first paragraph, 3rd passage, reads:

Bosniacs and Croats, as constituent peoples (along with others) and citizens of the Republic of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the territories with a majority of Bosniac and Croat population in the Republic of Bosnia and Herzegovina into a Federation, which is composed of federal units with equal rights and responsibilities.⁶⁵

Serbs were consequently not mentioned as a constituent people in the Federation's constitution. Otherwise, the governmental organisation of the Federation resembles Bosnia's as stipulated in the DPA, with a rotating presidency based on ethnicity, and a House of Peoples and a House of Representative.⁶⁶

5.1.3. The Constitution of Republika Srpska

The Constitution of RS was very different from that of the FBiH. Its preamble stated that:

Starting from the natural, inalienable and non-transferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development; Respecting the centuries-long struggle of the Serb people for freedom and State independence; [...]Taking the natural and democratic right, will and

⁶⁵ Washington Agreement, 1 March 1994

⁶⁶ Ibid.

determination of the Serb people from the Republika Srpska into account to link its State completely and tightly with other States of the Serb people;⁶⁷

The RS is thus described as a sovereign state for the Serb people. The RS constitution had no explicit demand for elected officials to be Serbs, as opposed to the FBiH where ethnicity was a condition for eligibility. However, the political framework of the RS entailed that virtually all elected officials were Serbs. The RS had a different structure from the Federation, with only one legislative body, the National Assembly.⁶⁸

5.2 The Case before the Court

In January 1996, peace was fragile and Carl Bildt, the first HR in Bosnia, was struggling to maintain Sarajevo as a multi-ethnic city.⁶⁹ His efforts to make the Serbs a constituent people in the Federation failed at that time.⁷⁰ The Serb Civic Council (SCC) is an association founded in March 1994, partly as a response to the creation of the FBiH. The failure to include the Serbs in the entity was a disappointment to this group, which was working for a united, democratic, multi-ethnic Bosnia.⁷¹ After intensive lobbying towards domestic and international actors, in 1998, the Bosniac president, Alija Izetbegović submitted the case to the constitutional court, arguing that fourteen provisions of the RS constitution and five provisions of the FBiH violated the BiH constitution. What he (and the SCC) was arguing was that the special statuses of the Serbs in the RS and of the Croats and Bosniacs in the Federation was discriminatory and was a “typical example of ethnic apartheid, which harms all three peoples in a state that ought to be common”.⁷²

⁶⁷ Constitution of RS

⁶⁸ Bieber 2006: 122

⁶⁹ As mentioned above, Sarajevo belonged to the Federation after the signing of the DPA, leading most of the Serbs to flee the city.

⁷⁰ Bildt 1997: 270

⁷¹ Belloni 2007: 58

⁷² Ibid p 59

5.2.3. The Constitutional Court's argument

After two years, the Constitutional Court of Bosnia issued its response in four partial decisions, delivered between January and August 2000. The court found that several provisions of both the FBiH and the RS constitutions were in violation of the BiH constitution.⁷³

The Court states clearly that it sees all three peoples as constituent peoples on all the territory of BiH.:

However vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples.⁷⁴

The Court further answers the question whether the DPA stipulates a division of the three constituent peoples through the territorial separation of the entities. The Court, basing its judgment on constitutional law, doctrine and referring to the Framework Convention on the Protection of National Minorities, establishes that

“...in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I.2 of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble.”⁷⁵

The Court, citing cases from Canada and Switzerland, establishes that even though some of the constituent peoples are in fact in a majority or minority position within the Entities, the constitution does not recognize any of them as a majority. Hence, they enjoy constitutional

⁷³ See above all U 5/98 partial decision III.

⁷⁴ U 5/98 Partial decision III §52

⁷⁵ Ibid §57

equality as groups.⁷⁶ Thus, the Constitutional Court basically overthrew the model of ethnic division that the entities were founded on, saying inter alia,

“...the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation.”⁷⁷

As such, the court reaffirms the collective identities in BiH, while at the same time establishing these collective’s intrinsic equality throughout Bosnia and Herzegovina.

5.2.4. The ethnic division within the Court

The constitutional court has, as noted above, a very special set-up. It is composed of two judges from each constituent people, and three international judges. It was the Bosniac judges, together with the international judges, who voted in favour of the judgement. Hence, the Croat and Serb judges did not regard the entities constitutions being in violation of the BiH constitution and offered dissenting opinions. The Croat judge claimed, inter alia, that changing the entities constitutions would “lead to a radical revision of the overall constitutional structure, not only of the Constitutions of the Entities but also of Bosnia and Herzegovina itself.”⁷⁸ The Serb judge asserted that

“If Bosniacs, Croats and Serbs were to be constituent peoples individually in both Entities, Bosnia and Herzegovina would not be a complex state union as stipulated by the Dayton Peace Agreement (and under the Constitution of BiH), i.e. the *raison d’être* for the entities would cease to exist.”⁷⁹

⁷⁶ Ibid §59

⁷⁷ U 5/98 Partial decision III §65

⁷⁸ Ibid, Zvonko Miljke dissenting opinion.

⁷⁹ Ibid, Snežana Savić dissenting opinion

In sum, the dissenting judges challenged the decision primarily on the basis that they did not consider the preamble of the BiH constitution being a legal text that could serve as a legal ground for declaring the entities' constitutions inconsistent with it.⁸⁰ However, it is clear that they see an ethnically separated Bosnia as a precondition for its existence, and that this is in accordance with the DPA.

The court is one of the few institutions in Bosnia that have no group-based veto rights or special voting procedures, hence, a simple majority sufficed.⁸¹ What is interesting is that where as some scholars see this as a proof of the ethnic division that is still prevailing at all institutional levels in the country⁸², other claim this proved that the court is as transparent and effective domestic institution and not an undemocratic instrument used by the IC to achieve their own aims for Bosnia.⁸³ Belloni claims that the ruling demonstrates that decision by consensus, the standard decision-making process in consociational democracies is not an indispensable process. He claims that simple majority voting is a legitimate procedure when consequences of a decision applies equally to all ethnic groups, even when this regard such monumental decisions as constitutional reforms.⁸⁴

5.3 The OHR imposes constitutional amendments

5.3.1. The OHR creates constitutional commissions

After the court's decision, which would entail not only amending the entities constitutions, but also modifying legislative and institutional structures in order to include all ethnicities, none of the affected

⁸⁰ Ibid, Bieber 2006: 123

⁸¹ Bieber 2006:123

⁸² Ibid

⁸³ Belloni 2007:62

⁸⁴ Ibid

parties responded or took action towards a change.⁸⁵ After six months, the HR at the time, Wolfgang Petrisch established two constitutional commissions, one from each entity. Each commission had 16 members, four from each constituent nation and four representing other groups. The members were proposed by the entities' parliaments and nominated by the OHR. All political parties participated except the Croat HDZ, which boycotted all institutions since 2001.⁸⁶ In January and February 2002, the parties sat down to negotiate a compromise on the amendments. The key issues at stake were whether there should be complete symmetry between the entities form of government, something that would entail the biggest changes on the part of the RS. Another issue was the question of equitable representation. The Serbs wanted it to be based on the present demography in RS, whereas the Bosniacs and Croats wanted it to be based on the 1991 census.⁸⁷ The parties finally reached an agreement, called the Mrakovica- Sarajevo agreement signed by the major, but not all, parties on March 27. When the agreement was to be approved by the entities own political assemblies, both failed because of the above-mentioned reasons; the RS politicians thought the changes went to far, and their counterparts in the Federation considered the changes not enough far-reaching.⁸⁸

5.3.2. OHR patience ends

In April 2002, the HR decided to break the stalemate by imposing the amendments, saying that this time, the major work was done by the parties themselves, and therefore, this time this imposition was different: "This is an imposition, but it does not look like the previous impositions", Petrisch stated in an interview. The OHR wanted a symmetric institutional setup for both entities, whereas the RS

⁸⁵ Morawiec Mansfield 2003: 2074

⁸⁶ This was done as a protest against the internationally sponsored changes to the electoral laws in 2000, Bieber 2006: 128, Bellini 20007: 63

⁸⁷ Since 1991, no one has really dared to touch upon the issue of doing a new census. However, in 2002, the Serbs were in majority in RS. Author's note.

⁸⁸ Bieber 2006:129, Belloni: 2007: 64

National Assembly had adopted constitutional amendments granting the three peoples a minimum of 15 % representation as opposed to a strictly numerical representation quota. Since the explicit demands of the OHR was not met, the HR imposed constitutions with numeric quotas in both entities. It should be said that such strict and regulations were not something explicitly required by the Constitutional Court's decision.⁸⁹ Accordingly, both entities now have a strict power sharing institutional set-up. In order to achieve this, particularly the RS constitution had to undergo a fundamental change, or as the Council of Europe's Venice Commission calls it, "a complete overhaul".⁹⁰

The OHR also "resolved" two of the most contentious aspects; the decision explicitly spells out that the 1991 census "shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented". It also defines what should be regarded as a "vital national interest of constituent people".⁹¹

All key international actors welcomed the OHR decision. As for the parties opposing the decision, they took on the approach of slowing down implementation, a tactic used many times before in response to OHR impositions.⁹²

5.3.3. Imposition by the HR- a necessary evil?

There are many dissenting opinions on the fact that the OHR imposed the changing of the constitutions on Bosnian politicians.⁹³ The OHR stressed the decision in order to have arrangements finalized for the elections coming up in October 2002. In April 2002, the talks between the affected parties had only been going on for about a year, with a

⁸⁹ Bieber 2006:129

⁹⁰ Venice Commission 2002, Opinion on the implementation of decision U 5/98

⁹¹ OHR decision 19 April 2002. What is quite ironic is that "constitutional amendments" are listed as one of these interests.

⁹² Biber 2006: 130

⁹³ Belloni 2007: 66-70

serious debate starting only in January 2002.⁹⁴ Furthermore, the DPA stipulates that the entities constitutions should be amended to be in conformity with the constitution within three months after the signing.⁹⁵ This deadline passed in March 1996. The “urgency” that the HR argued was at hand was hence of a very artificial character. Both chairpersons of the constitutional commissions deemed the imposition of the HR unnecessary.⁹⁶ The policy institute European Stability Initiative (ESI) points out that in its judgement, the court used old numbers when claiming that the low figures in minority return was due to the discriminatory elements in the entities constitutions. ESI shows with numbers from UNHCR that minority returns have increased up to ten times in both entities between 1998 and 2002.⁹⁷ ESI points out that in practice, change is underway in Bosnia with or without constitutional reform.

The HR, Petritsch himself, stated, “I simply cannot accept the continuing obstruction on the side of these nationalistic dinosaurs. I cannot allow the prospect...that these parties could hold the citizens of this country hostage”.⁹⁸ The International Crisis Group (ICG), an influential international NGO saw no problem with an HR intervention and claimed that “...any imposition will need to be accompanied by mobilisation of the full arsenal of international weapons and inducements. Otherwise, constitutional amendments imposed on upon dissenting parties will not stick, and Bosnia will remain a dysfunctional and resentful Western dependency.” They are

⁹⁴ ESI Imposing Constitutional Reform? The case for Ownership, 20 March 2002

⁹⁵ DPA Article XII (2)

⁹⁶ Jakob Finci, Chair of the Federation’s commission suggested that the (unstated) desire of Petrisch to “leave an important legacy behind at the end of his mandate as HR also played an important role”. Belloni 2007: 187

⁹⁷ It should be made clear that the Courts decision came in 2000, so the ESI is maybe a bit too eager in their criticism. However, these numbers still show that minority return is not linked to constitutional changes.

⁹⁸ Chandler 2004: 316

emphasizing that the HR is accountable to the PIC, and should not “be deterred by Croat and Serb extremists”.⁹⁹

However, the main criticism towards the imposition is that it is an imposition. Such a politically important decision as changing the entities’, and thus Bosnia’s, governing structures should not be left to the hands of a foreign implementer, not accountable to the population.¹⁰⁰ ESI points out that as the negotiating parties always knew there was a possibility for HR intervention, so why bother trying to find a compromise? If Bosnians themselves do not have the capacity to transform their political life, an HR imposition will not help in developing it, quite the contrary.¹⁰¹ Belloni’s reasoning on the dissenting judges, as accounted for above, opens for questions. Even though a majority voting system would be preferable on all levels in Bosnia, this has proved to be impossible so far. A court, which is composed of judges who are not democratically elected, and further- as the case is in BiH- with international judges as members of the court, means it lacks in democratic legitimacy. This deficit is however repaired when, in conventional democracies, the parliament votes for new laws or amendment to old ones. This process did not take place in Bosnia. It is also hard to understand the ICG’s reasoning that constitutional amendments will “stick” on obstructing parties only through coercion. Finally, it should be obvious that the imposition of the constitutional amendments of the HR is a very flawed method for enhancing democracy in Bosnia.

5.3.4. Making Bosnia work?

There are many aspects of the changing of the entities organization that can be analyzed. Besides the democratic, constitutional and legitimacy aspects, another important aspect is that of effectiveness. In order for a society to function, there needs to be an element of

⁹⁹ ICG Balkans Report no. 128 16 April 2002

¹⁰⁰ Belloni 2007: 65, Chandler 2004: 315,

¹⁰¹ Venice Commission 2002

efficiency in the state apparatus. The administrative organization of BiH has been criticized by many for being too complex with too many different and complex levels of government. Furthermore it is a state with an extremely weak central government. At the same time as the OHR imposition brought more symmetry to the institutional set-up, it also complicated decision-making processes even more. With a new veto-right now enshrined on all levels of governance, possibilities for blocking decision-making seem almost endless. In addition, the list of what consists of a vital national interest is far too broad and extensive. As the CoE's Venice Commission states: "The desire to protect the constituent peoples seems to lead to a system of reciprocal paralysis the long-term effects of which may be destructive."¹⁰² OHR officials indicated at the time that introducing a greater degree of complexity would weaken the entities power, thus empowering the state level. This was particularly aimed at the RS, who up until now had been able to conduct its affair independently and without such obstructions that had been taken place in the Federation and on the state level due to the power-sharing mechanisms in these institutions.¹⁰³ Today, almost eight years since the imposed constitutional changes, it is still uncertain if these changes has had a real impact. The RS is still obstructing the HR's interventions. Within the Federation there has been political deadlock since 2009. The now even more complicated structure of the entity resulted in an even more dense bureaucracy.¹⁰⁴ It seems like no matter what measures the OHR takes, as long as the elected officials do not share the purposes of OHR impositions, they will have small effects.

¹⁰² Venice Commission 2002

¹⁰³ Bieber 2006:130

¹⁰⁴ ICG 2010:1 and 2009:3

5.4 Refugee return

Closely linked to the changing of the entities constitutions is the international community's role in trying to reverse the demographic effects of the war. In this part, I will try to give the background to the events taking place in order to implement Annex 7 of the DPA. I will describe how some scholars view the actions of the IC and its impact on reconstructing Bosnia.

5.4.1. Background

The war left Bosnia as a demographically changed country. The war's main objective, to create ethnically pure zones, or 'mini-states', was achieved through mass killings and forcing people to leave their homes. Approximately half the population left their homes during the war. About 1.3 million people left the country to seek refuge outside BiH, whereas 1.1 million people remained within the country as internally displaced persons (IDPs or DPs).¹⁰⁵ The war left the country more or less completely divided in two different ethnic zones.

Annex 7 of the DPA, "Agreement on Refugees and Displaced Persons", states:

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. (...) The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries¹⁰⁶.

Hence, the signatories of the DPA, those who engaged in the project of "ethnic cleansing" of Bosnia, now signed an agreement that required them to reverse these policies. Not only should they allow

¹⁰⁵ Heimerl 2005: 377

¹⁰⁶ DPA, Article 1, para. 1, Annex 7

people to return to their homes of origin,¹⁰⁷ the parties “shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons.”¹⁰⁸ These steps included various measures such as repealing discriminatory legislation in terms of housing, preventing media from dissemination warnings towards returnees, etc.¹⁰⁹ Annex 7 thus provides for the reversal of the effects of the war, and, ultimately, for the weakening of those in power. A remixing of the population would inevitable mean a loss in voter support for the ethnic nationalist parties in power in the entities. Hence, the IC was deeply divided on how to work towards re-establishing multi-ethnicity and what priority this goal should have in the various DPA –implementing efforts taking place.¹¹⁰

5.4.2. The road to implementation of Annex 7

The road to implementation of Annex 7 proved to be long and complicated, with a number of different actors involved. I will here try and give a brief overview of the major actor’s work and actions. Office of the United Nations High Commissioner for Refugees (UNHCR) was given the role of “coordinating among all agencies assisting with the repatriation and relief of refugees and displaced persons”.¹¹¹ However, the main body supposed to handle repatriation was created under chapter II of Annex 7; the Commission for Displaced Persons and Refugees (CDPR). DPA stipulates that the CDPR shall be composed of an equal number from all ethnic groups, and its mandate is primarily to determine who the lawful owner of a property is to which a claim is made, and be restituted for it. However,

¹⁰⁷ The term “home of origin” set an extremely high benchmark for the rights of DP, stretching far beyond the existing standards or practices for the rights of the displaced. The right to return conventionally meant repatriation to one’s home country. Cousens 2001: 72, Heimerl 2005: 378

¹⁰⁸ DPA Annex 7, Article 1, para 3

¹⁰⁹ Ibid.

¹¹⁰ Cousens 2001: 71

¹¹¹ DPA Annex 7 Article III para 1

the CDPR did not manage to perform its work, or at least performing it to slowly for the ICs taste. The local authorities, the ones to carry out the task of restitution, proved to be the ones preventing the same restitution, either by not acting at all, or by encouraging the ones occupying property to remain in place.¹¹² The Commission received 240 333 claims for 319 220 properties, but did not have enough capacity to solve the cases, nor the power to enforce their decisions. In 1997, the ICs policy is started to change, by focusing more decisively on implementing Annex 7. The OHR had established the Reconstruction and Return Task Force (RRTF) earlier the same year, and as the HR obtained its Bonn Powers in December 1997, the RRTF was given additional resources and a deputy HR was appointed head. The RRTF was consequently a department under the OHR, separated from UNHCR. They mainly focused on majority-returns, i.e. DPs returning to areas where they would be part of the ethnic majority. Minority returns were considered too risky as IFOR insisted that they did not have the mandate to assist returnees or to guarantee their safety. There were thus several reported incidents of violence against people trying to return to their homes.¹¹³ In addition, the assumption made by the IC that the majority of refugees and IDPs *wanted* to return to their homes of origin proved wrong. As the war had changed the country, returning to your “home” was linked to an array of different social and economic factors. Employment, schooling for your children, friends and family support, wartime leaders in powers, new social hierarchies; these were some of the factors to take in to account. Another key factor was the problem concerning what to do with the people now occupying the property that had been vacated by their proper owners during the war. A further major obstacle towards minority return were the laws created in both Entities that legalized vacated property that had been taken over either by other IDPs or

¹¹² Philpott 2005: 5

¹¹³ Cousens 2005:77, Heimerl 2005:379; Belloni 2007: 133

residents who had remained in the same city or village throughout the war.¹¹⁴

5.5 OHR Intervention

During 1998-2001, the OHR issued 94 decisions in the field of “Property Laws, Return of Displaced Persons and Refugees and Reconciliation”.¹¹⁵ In addition to this, the HR suspended over 30 mayors and other municipal officials held to have obstructed the implementation of property laws and the exercise of the right to return.¹¹⁶ One example of HR intervention is the case of the RS law making it possible for IDPs to resituate property only if they could prove that it had been taken from them in an unlawful manner and that they had tried, but could not find housing elsewhere in Bosnia. This law was repealed by the OHR.¹¹⁷ The OHR eventually repealed all entity property laws, and imposed a uniform Property Law Implementation Plan, called the PLIP in 2000. After years of un-coordinated ad-hoc managing of the issue, a new agenda took form. The main change with this new plan was that it focused on creating a “due process”, forcing the authorities to handle the cases in a chronological order. Earlier, the IC had used a “mix of bribes, threats and other leverages available” to ensure DP return.¹¹⁸ However, in 2000, minority returns started to increase. The OHR passed a number of amendments to property laws in December 2001, making this due process a legal obligation for the local housing authorities. The main change was the decree saying that the pre-war owner had the right to re-occupy its building no matter if the present occupier did not have an alternative accommodation.

¹¹⁴ Heimerl 2005: 80

¹¹⁵ See OHR webpage.

¹¹⁶ Chandler 2004:319

¹¹⁷ Philipott: 2005:9

¹¹⁸ Heimerl 2005: 379

5.5.1. Outcome of OHR's work

In 2004, the UNHCR announced that over one million people had returned to their pre-war properties. This represents about half of the population that was forced to flee their homes. 75% of the returnees went back to the Federation and 25% to RS. It has to be taken into account that many of the 500,000 refugees who fled BiH, who now have gained citizenship or permanent residency in their new countries will not return to live in Bosnia.¹¹⁹ Another important aspect is that many returnees only came back to sell their property or to rent it to the new occupier. There are no sure figures on how many restituted properties that were sold directly, some figures point to 75% being sold immediately, some to the opposed number.¹²⁰ Thus, what the “real” or “sustainable“ return rate consist of, is still a bit too early to say.

5.5.2. Interventionists vs autonomists

One of the firmest critics of the IC and the OHRs role in Bosnia is Professor David Chandler. He argues that the HR numbers of return are not trustworthy since they do not distinguish between permanent return and return to sell or let your property. He claims that the imposition of property laws created and contributed to economic and social tensions.¹²¹

Daniela Heimerl concludes that the IC saw minority return not as a process evolving at the end of the peace process, but as a tool through which achieve multi-ethnicity and erase the consequences of ethnic cleansing. This raises the question of the morality in taking on such a project, where the IC has seen the Bosnians' choices based on the reality of Bosnia today as less legitimate than the Dayton stipulations

¹¹⁹ Heimerl 2005:384

¹²⁰ Ibid 386

¹²¹ Chandler 2004:315

of return.¹²² Chandler quotes the OHR in 1997: “Relocation is clearly unacceptable when it takes place as a result of official manipulation. Even where it takes place as a result of individual, informed decision-making it remains problematic”¹²³ (Relocation within Bosnia, not the same as return to your home origin. Authors note.)

If we can agree that both sides are partly right in their claims, there is still the legal aspect of restitution and Dayton implementation to observe. The complicated and strenuous task of granting the rights of refugees and displaced persons could have been, as so many other aspects of the IC and OHRs implementation, handled in a more coordinated and decisive way. It is surely true that many people are still waiting to have their property restituted; however, one cannot ignore the fact that a very large amount of applicants has been granted compensation for some of their losses during the war. Despite all the surrounding issues of economic and social aspects of returning to your place of origin in a post-war country, many people have benefited from the intervention of the OHR and the IC. They have had their property restituted and been given the choice to reside in their property, or to sell it. Thus, Annex 7 of the DPA, by many thought to be an impossible task, finally was given priority and result was seen.

¹²² Heimerl 2005: 388

¹²³ Chandler 2000: 107

6 Discussion and analyzis

6.1 Constituent People and Refugee Return

The constituent people decision, issued at the same time as the PLIP – process was ongoing, shows that change was taking place in Bosnia. However, one cannot be indulgent towards the fact that yet again, this was done against the will of local authorities and that in the 2002 elections, the nationalist parties again won a clear victory.¹²⁴ These two aspects - the OHR imposing constitutional changes and implementing refugee return - of international intervention in Bosnia can be discussed and analyzed from a number of different angles. At the same time, they both weaken *and* strengthen the consociational structure of Bosnia. Number four in Lijphart’s model calls for ethnic separation- another term for this is autonomy. The minority return of refugees contradicts this principle. As pointed out by the ICG, both Croat (HDZ) and Serb (SDS) political parties are opposed to their constituencies casting their vote in their pre-war home regions, since this hindering their consolidation of power in the post-war homogeneous cantons.¹²⁵ As the amendments to the entities constitutions came into effect, so did the ethnic quota of representatives on all levels of government. Hence, consociationalism is thus deepening in Bosnia, now implemented on virtually all levels of society.

The commentators that were applauding the change of the entities constitutions as a “revolution for Bosnia” now, eight years later, talk

¹²⁴ ICG underlines that the nationalist parties did loose some grounds compared to previous elections, and that turnout was low, only 55 %. ICG 2002: 2

¹²⁵ ICG 2002: 6

about the “crisis” in the country.¹²⁶ It seems like little has changed on the ground since the HR decisions were implemented.

As for refugee return, the result of HR intervention has had effects that are more positive. Roberto Belloni claims that the relative success of the IC’s work came only when the RRTF’s activities started to follow the flow of DPs, instead of requiring the DPs to follow the activities of the RRTF. Even so, Belloni admits the PLIP and the HR’s harmonizing of the entities’ property laws as crucial factors to minority returns.¹²⁷

The process of refugee return is linked to the changing of the entities constitutions. Why return to your pre-war home if you are no longer considered being a citizen there? Chandler, who is critical of the IC’s actions argue that now that all nations have to be politically represented in both entities, this means that some representatives live miles away from their constituents.¹²⁸ To some extent this is a problem for a democracy, but it could also be seen as a temporary solution, acceptable as Bosnia moves towards being a multi-ethnic state.

6.2 Democracy and ethnicity

Many scholars and practitioners express their scepticism of the power-sharing model in Bosnia. It is true that many of the pitfalls accounted for in the theory-chapter in this essay have occurred in Bosnia. Politicians have been refusing to cooperate across ethnic lines and some argue that even though this is not primarily due to the ethnic quotas, these mechanisms nevertheless are enforcing the ethnic identities and consequently the cleavages.¹²⁹

¹²⁶ ICG 2010:1

¹²⁷ Belloni 2005: 442

¹²⁸ Chandler 2004:317

¹²⁹ Belloni 2007:51

Few scholars, however, can show a good alternative to a consociational model for Bosnia. This also accounts, it must be said, for the Bosnian politicians. In its fact-finding mission in 2005, the Venice Commission finds that a majority of Bosnian politicians wants to see reform and change within the country.¹³⁰ However, the Commission observes, quite laconic, that the same politicians claiming they want change within Bosnia have been blocking reforms for years. The main obstacle is the uncompromising stance of the elected leaders. Within the Federation, the preferred solution would be to abolish the entities and create economically integrated regions. However, the RS refuses any such proposal and the Federation refuses to reform if the RS does not do the same.¹³¹ Belloni points to the fact that those in favour of a consociational model cannot fully prove the causal relation between cooperation and consociationalism. Lijphart argues that it takes time and patience for a spirit of cooperation to emerge.¹³² The problem within Bosnia is that not only do the politicians not want to cooperate; their vision of a unitary state is very divergent. Hayden points to the fact that the current constitutional model in Bosnia is the same as when the war started. He claims that the failure of this model is “built in”, since there is no social consensus of the character or even the existence of a common state.¹³³ He criticizes the consociational system for not acknowledging the paradox of a model that demand for elite consensus in a divided society, thus ignoring the entire foundation of the consociational society; i.e. the (perceived) need among groups to be protected from the other groups. Hayden is very critical of the HRs interventions concerning both refugee return and constitutional changes. As for the Courts decision, he argues that the majoritarian model of the Court was used to “impose the desires of one national group over the expressed wishes of the other two“. According to Hayden, the

¹³⁰ CoE Venice Commission Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, 2005

¹³¹ Ibid

¹³² Belloni 2007:49

¹³³ Hayden 2005: 230

constitution stipulated in the DPA together with the rule of the IC, makes Bosnia “a dictatorship of virtue”.¹³⁴

6.3 OHR intervention a good substitute for Bosnian decision makers?

Generally speaking, the politicians in the Federation consider the HR’s use of his Bonn Powers to have been indispensable for the country being able to move forward. Within the RS, the opinion is the absolute opposite.¹³⁵ The ensuing question is, has the country moved forward under HR rule? The answer depends on whom you ask. Bart Szewczyk claims that the OHR is a legitimate institution, while at the same time giving an account for the low figures of popularity the OHR holds from the Bosnian population.¹³⁶

It has to be acknowledged, with the respect to the above-mentioned cases that the HR has managed to achieve change within Bosnia. The question is: at what price? The Venice Commission is convinced that positive reforms in Bosnia have come to pass thanks to the HR’s work. At the same time, the Commission is very critical of the HR’s extensive use of its powers, warning for the “perverse effects” the HR’s decisions have on domestic politics. Why would local politicians accept painful but necessary compromises if they know that in the end the HR will impose such legislation?¹³⁷ One example shows to what extent this has already happened: When the “Alliance for Change”, a coalition of “non-nationalist” parties supported by the IC won the general elections in 2000, the politicians told the HR they would only form a government if the HR would agree to decide in sensitive issues.¹³⁸

¹³⁴ Ibid 250

¹³⁵ Venice Commission, 2005

¹³⁶ Szewczyk 2010: 40

¹³⁷ Venice Commission, 2005

¹³⁸ Knaus and Martin 2003: 68

Roland Kostić conducted a survey in BiH in 2005 among all three constituent people on, i.a., their views on the OHR. There is a clear discrepancy between the three peoples, with the Bosniacs being moderately in favour of OHR interventions (ranging from 30%-50% depending on the issue) to the Serbs strongly opposing the OHR, and the Croats somewhere in between the two. As it seems, the HR is perceived as an institution working for the benefit of the Bosniacs. A quite logical conclusion, since it is the IC and the Bosniacs who want BiH to be a unitary state, whereas the Croats and Serbs are fighting for more self-autonomy.

Julie Mostov writes about the self-perception of the people of ex-Yugoslavia:

“This is one of the few things upon which the opposing forces in the ex-Yugoslavia could agree. No one wanted to be a 'minority' in the other's national state. [...]. As majorities in their own states, they have proved arrogant in their blindness to the concerns of other ethnic or national groups; as minorities in the states of others, they have been militant in their indignation about violations or potential violations of their citizenship rights, political and cultural autonomy.”¹³⁹

Herein lays the core problem in Bosnia. This premise has still not changed despite the fact that all Bosnians do share the same problems: unemployment, dire economic situation, corruption, the lack of good schooling for their children, etc. This fact, however, has had almost no impact on the segmentation of society.¹⁴⁰ The deeper meaning of this quote is that in order for Bosnian society to change, Bosnians have to change their perception of themselves and of the Others.

Thanks to the OHR, nationalist politicians can enjoy the personal benefits of a status quo. They do not need to take responsibility, or to engage in policymaking or other reforms. Until the IC and the HR relieves themselves of this task, it is hard to envisage the Bosnian society changing.

¹³⁹ Mostov 1994:21

¹⁴⁰ Bose 2002:212

6.4 The HR as an European Raj

With the above analysis as a backdrop, a few words can be said about the different HRs' look upon themselves. I believe it is necessary to point to some of the criticism against the HR in terms of it acting as a colonial administrator.¹⁴¹

“As High Representative, I have to take decisions now and in the future with your best interests in mind, should your leaders fail to take them. But the day will come when we are no longer here and you will have to demand from your representatives that they take those decisions.”

The words are Carlos Westendorp's, who is giving a New Year's Eve speech on the last day of 1997.¹⁴² It is not very hard to notice that this speech, directed towards the Bosnian public, has quite a pejorative tone. Carlos Westendorp is expressing himself as if he is addressing a class of naughty schoolchildren. He may be the first, but not the last High Representative doing this. His successor, Wolfgang Petritsch, seems not even to understand the question when a Bosnian journalist asks him about the lack of accountability his office holds. He responds by explaining that he is accountable to the entire PIC, not to mention the American ambassador!¹⁴³ The fact that he seems to forget to mention the Bosnian people speaks for itself. Every HR has pursued their own little agendas, be it being business friendly or focusing on law and order, choosing like a benevolent despot from a smorgasbord of options what is best for his people. Few of the HRs fail to mention in various speeches or interviews the bright future that lies ahead as a member of the European Union, as oppose to, in Paddy Ashdown's words “be left behind as the stagnant pool of the Balkans”. Ashdown states in the same interview that ““It was a mistake to bring democracy here before the rule of law...” and adds that economic and legal reform can only be achieved if he forces new laws through, with

¹⁴¹ The British Raj was the name for the British colonial rule in India

¹⁴² OHR homepage, New Year message 31 December 1997

¹⁴³ OHR homepage, Interview with Petritsch 26 July 2001

or without the elected officials' approval.¹⁴⁴ In what way such a conduct could be consistent with rule of law he does not explain. Another scholar describes Bosnia's politicians as "...a political class compromised by avarice, greed, cruelty and laziness merely serve to prolong both hatred and the UN presence". The continuation of the opinion leaves the reader quite confused: "The politicians may well be democratically elected but, as we are reminded, this doesn't mean that they are any better - more honest, less racist - than anybody else."¹⁴⁵ There is no doubt that some of Bosnia's politicians are incompetent and corrupt (such politicians exists in every country) but who did ever say they had to be better than ordinary people to deserve to stand for office? The Balkans Programme Director for the International Crisis Group puts it in the open: "Europe and the international community cannot afford to leave Bosnia to its own devices. That strategy was tried in the early 1990s with disastrous results."¹⁴⁶

It is quite clear that according to the IC, Bosnians can't be trusted neither to elect to their own politicians, nor to govern their own country. One can not avoid the question if one of the reasons for the HR being so reluctant to leave its office has something to do with good old fashioned racism and sense of superiority towards the people living in the "stagnant pool of the Balkans".

¹⁴⁴ Interview The Guardian 11 October 2002

¹⁴⁵ Adam Walker, Letter to the Guardian, 11 July 2002

¹⁴⁶ Nicholas Whyte, *ibid*

7 Concluding remarks

The main objective of this essay was to study the functioning of a consociational state with an external part frequently substituting for domestic politicians. The main argument was that the international community is working against Bosnia being a consociational state. This is both true and false. It is a fact that EU and the US would like Bosnia to have a constitution without ethnic references. However, most implementers realize that this is not- at least not yet- a viable solution for Bosnia. Thus, the international community has been working to restore Bosnia to its pre-war setting with a demographically ethnically mixed population, hoping this would lead to better relations between the country's ethnic groups. If this strategy has been accurate to achieve this aim is still too early to say. What can be concluded is that it is certain that victims of war have had their property restituted in a legally correct manner.

The OHR also engaged in changing the entities constitutions, hoping that this would improve the conditions for making Bosnia a multi-ethnic state again. A domestic political process was commenced, but instead of letting this process be finalized by the concerned parties, the HR interrupted and imposed far-reaching changes of the country's structure without domestic consent. These changes led to Bosnia's consociational structure being deepened and weakened at the same time. Today, no ethnic group has complete self-government in any entity, at least not on paper. However, Bosnia is still plagued by political deadlock, and few think the Bosnian society is ready to have the HR removed.

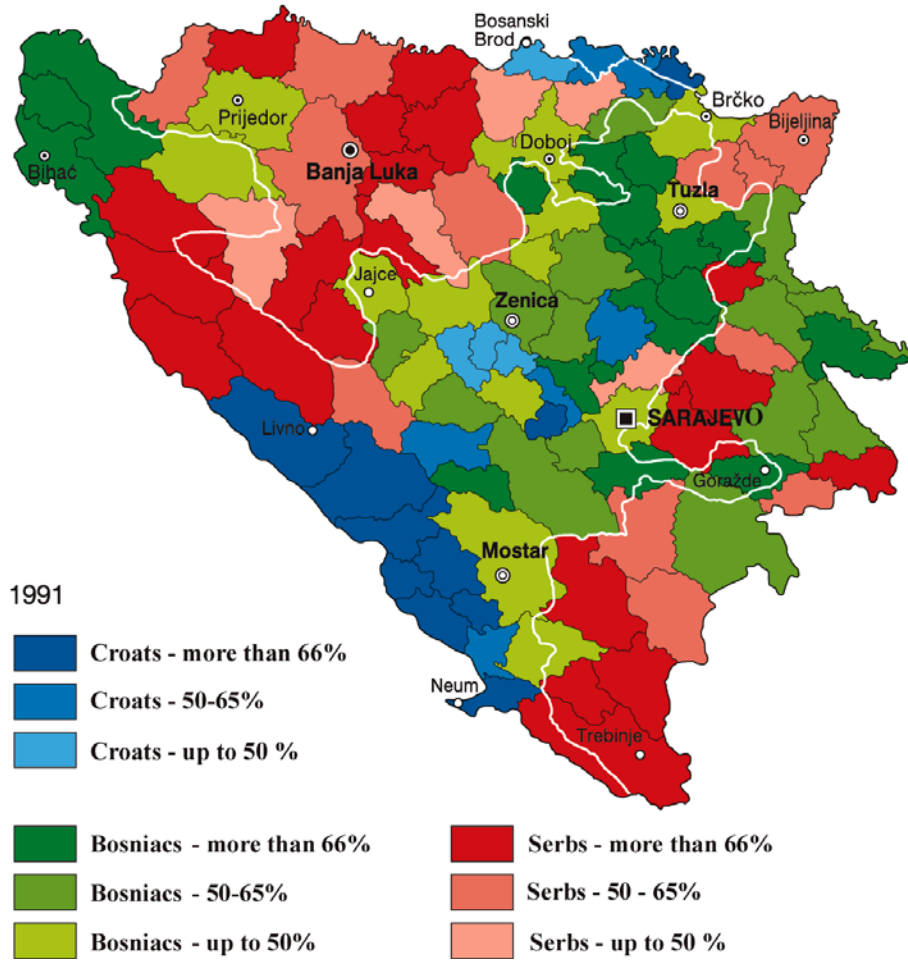
My conclusion is that the HR had a very important role to play in the years following the civil war. However, with time, the HR has on its own extended this role with full support from the international

community, and in addition been given too far-reaching powers to implement its policies. The use of the HR's Bonn Powers has had a directly harmful effect on Bosnia's democratic development. It has stopped the political parties own efforts to make compromises, how small these efforts may have been. The HR has also acted with great assertiveness despite lacking accountability to the Bosnian people. Trying to impose democracy through non-democratic means has not proved to be an effective procedure.

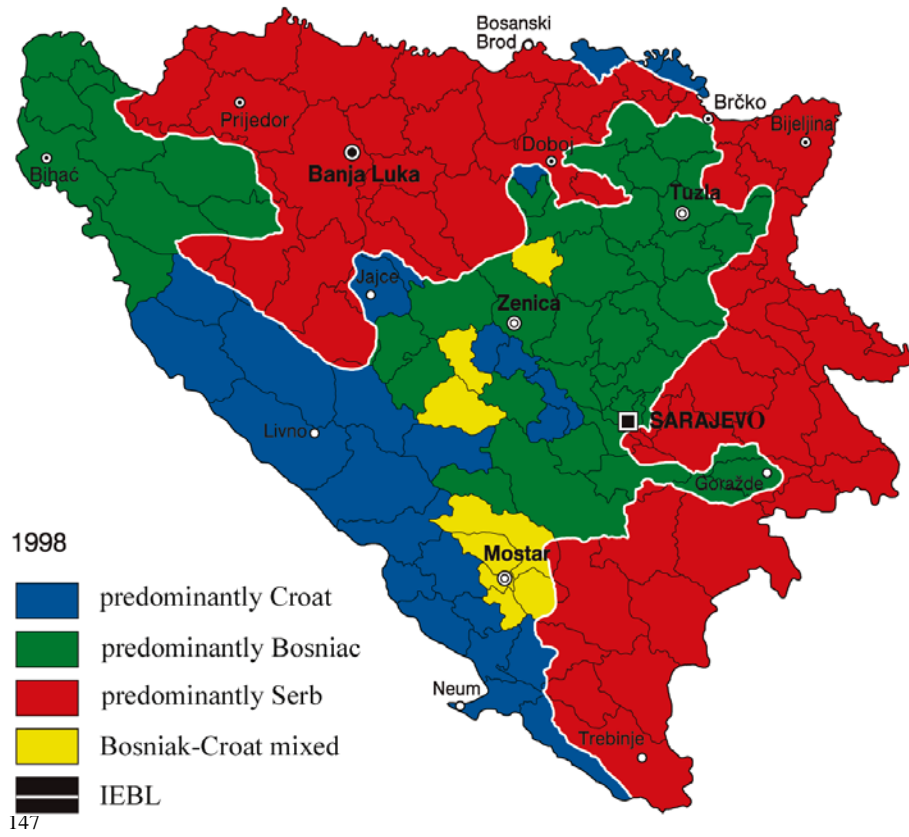
On a final, personal note, I believe that the Bosnian future should be in the hands of the Bosnians. If that entails a division of the state, meaning the RS declaring themselves independent like the Kosovars did, maybe the international community should let that happen. I, however, hope that 15 years of international peacebuilding will have had some result, and that Bosnia will eventually be a full-fledged member of the European Union as a unitary state.

Supplement A

Ethnic composition before the war in BiH (1991)

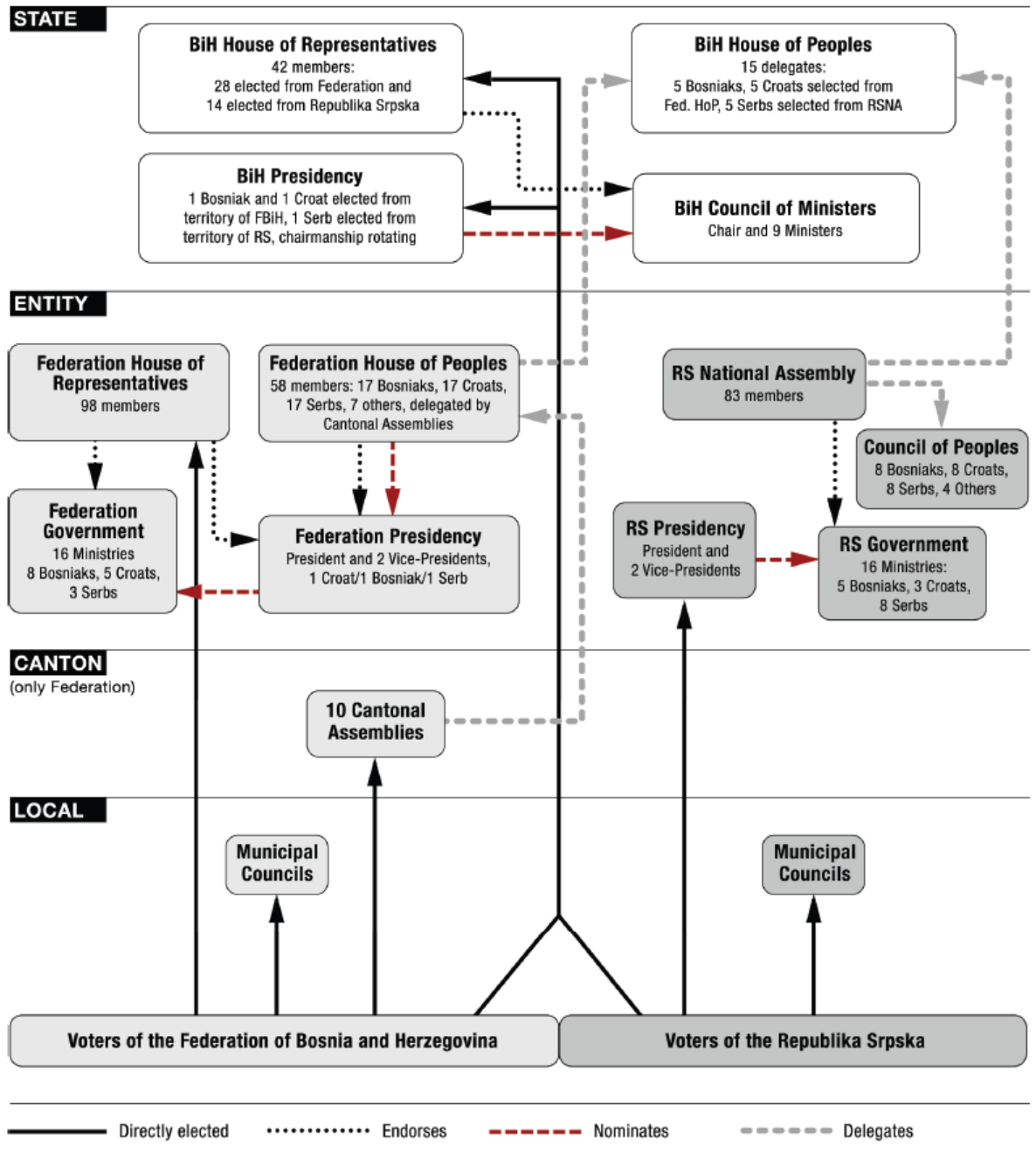


Ethnic composition in 1998



¹⁴⁷ Both maps from the OHR homepage

Supplement B



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¹⁴⁸ Chart from OHR homepage/ICG Europe Report no 209, 2010

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