

Is the Dayton Agreement a model for Long-Term peace? A Problematic case of  
Bosnia and Herzegovina

Submitted by

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# **Is the Dayton Agreement a model for Long-Term peace? The Problematic case of Bosnia and Herzegovina**

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## **Abstract**

The research focuses on Bosnia and Herzegovina in the post-conflict scenario. More than twenty-five years on, a weak, politicized, corrupt and inept system of government is characteristic of the post-conflict period and it is a result of deep-seated interests of nationalists, ethno-nationalists, sectarianism and different factions. Although nationalism played a major role in the outbreak of the Yugoslav wars and in particular in the war in Bosnia and Herzegovina, different authors point out at the international, economic and historical reasons as well. Manipulative ethnic and political leaders revive animosities among the peoples in Bosnia and Herzegovina and these, magnified by the press, are permanent threat to Bosnian peace and great obstacle to its prosperity as an independent country. It appears that the nationalism has penetrated every aspect of the Bosnian political life and there is little desire to focus on working towards common interest and eliminating discrimination among its citizens. Unsustainable approach of the international community towards the conflict and post war period, prolonged fighting that was a direct consequence of this approach and insistence that the Bosnian leaders agree on the necessary constitutional reforms within the constraints of the Dayton Peace Agreement has proved mission impossible and improbable. A major way of resolving this type of problem in the post conflict societies is to perfect the peace treaties ending the conflict. It is important to end violence and humanitarian disaster swiftly but it is also necessary to negotiate treaties that promote fairness, justice and efficiency in a country's legal and political system.

## **Outline of the thesis**

The war in Bosnia and Herzegovina started after its own government at the Republic level was split and the balance of power was disturbed, and the Referendum on independence was followed by recognition of Bosnia and Herzegovina as an independent country. The same lack of balance of power and power struggle has proved to be a great obstacle to Bosnia's post war recovery.

The main reasons amongst others for the country's stagnation and discrimination of its own citizens are the lack of the rule of law and legal certainty. The international community has played significant role from the moment it recognized Bosnia and Herzegovina as an independent country through years of unsuccessfully attempting to broker numerous ceasefires during the war, making the Dayton Peace agreement possible and it has important and significant role in the post war period through the involvement of different international bodies, agencies and organizations. Office of the High Representative is the most significant mechanism that the international community has introduced in order to make the implementation of the civilian part of the Dayton Peace Agreement possible.

The thesis examines the most significant reasons for the outbreak of the wars in the territory of the Former Yugoslavia and in particular in Bosnia and Herzegovina and how these reasons influenced the post war recovery in Bosnia and Herzegovina.

Also, the thesis explores substantial and active involvement and response of the international community in the period preceding the dissolution of Yugoslavia and its permanent presence in Bosnia and Herzegovina during the war and after signing of the Dayton Peace Agreement. It is submitted that the international community's approach has been inconsistent, uncoordinated and influenced by numerous geopolitical issues and dimensions.

The Dayton Peace Agreement that stopped the war in Bosnia and Herzegovina but has been subject to permanent interpretations and used for different political aims by the leading nationalist parties in Bosnia and Herzegovina. The Dayton Peace

Agreement has eleven annexes. The most contentious annex that this thesis focuses on is Annex 4, the Constitution of Bosnia and Herzegovina. This thesis examines the discriminatory nature of this Constitution. The discriminatory nature is in the fact that an abstract citizen of Bosnia and Herzegovina and his adequate participation in the Parliamentary Assembly of Bosnia and Herzegovina does not negate rights of the constitutive peoples, Serbs, Croats and Bosniaks, but on the other hand the rights of the constitutive peoples are not the source of sovereignty of Bosnia and Herzegovina. This anomaly in the Constitution of Bosnia and Herzegovina has created two-tiered citizenship. Uniqueness of the Bosnian Constitution is in its provision for its own change in order to be harmonized with the European Convention on Human Rights, but Bosnia and Herzegovina has not managed to amend the discriminatory provisions from its Constitution.

In the period after the war there have been several proposals and calls for revisiting the Constitution and elimination of discrimination of its citizens, but nationalist political leaders compete in reviving old animosities, thus creating permanent state of uncertainty and threat to the peace in the country. It could be argued that although the Dayton Peace Agreement stopped the war, it still reinforces ethnic tensions and therefore perpetuates the issues that caused the war in the first place.

It is apparent from the analysis that a major mistake in The Dayton Peace Agreement is that it included ethnic group rights because this has demonstrated that ethnic groups have no political will to create context in which democratic political culture could be introduced in Bosnia and Herzegovina. International involvement in Bosnia and Herzegovina has demonstrated that in the absence of a blueprint for dealing with the post conflict societies, they attempted to introduce Western liberal principles and values and impose democratization on the country as its main political ingredient. The Dayton Peace Agreement brought peace to Bosnia and Herzegovina but lack of engagement with unresolved past grievances and consistency in the approach by the international community significantly reduces chances of Bosnia and Herzegovina to have a successful post war recovery. The reason for this might be that the Dayton Peace Agreement was negotiated more as a ceasefire package and not in a way multilateral treaties would be negotiated through a series of stages before they would come into force. It could be argued that the Dayton Peace Agreement not only did not solve the

problems that divided the parties before the war, but integrated those problems within the peace agreement.

It is clear that Bosnia and Herzegovina will have to adopt a type of democracy that will be in accordance with its geographical, historical, cultural and political heritage in order to become a functional state without permanent international supervision.

The question that this thesis aims to address is how a particular historical and political context in 1992 when the war in Bosnia and Herzegovina broke out, influenced specific post war arrangement in the country that requires permanent outside tutelage in the form of educating, retraining, introducing democracy and at the same time dealing with the past that is even more than a quarter of a century after the war still used as an excuse for reinterpreting history and obstructing normal life of all the citizens of Bosnia and Herzegovina.

The lens through which this issue is addressed is the war in Bosnia and Herzegovina and The Dayton Peace Agreement that brought the war to an end. Using interdisciplinary methodology, combining history, law, politics and international relations proves to be the most salient vantage point to address the problematic case of Bosnia and Herzegovina after the war and in the period that followed the signing the Dayton Peace Agreement. The research addresses historical and geopolitical context and focus on the constitutional justice issues, having identified that it is The Dayton Peace Agreement's inherent limitations that have created intransigencies in the legal system of Bosnia and Herzegovina. These intransigencies have significantly impacted on its constitutional and judicial processes and reconciliation. A country where identities are distinguished by religion, culture, language and long historical memories of previous conflicts cannot be based on the rule of law. Injustice in Bosnia and Herzegovina is manifested by exclusion, violations of human rights, stagnant and inefficient legal and political institutions. The Dayton Peace Agreement is very comprehensive peace agreement that was negotiated and signed by the politicians who started the war. However, once this peace agreement had to be implemented many other actors at different national and international levels had their own interests and agendas and this created seemingly intransigent obstacles and differences that

have only deepened ethnic division, violated human rights and extremely impoverished the peoples of Bosnia and Herzegovina. It is obvious that the Constitution that is Annex 4 to The Dayton Peace Agreement will have to be revisited in some form in order to deal with the anomalies and gaps in it and create conditions for the full implementation of the judgement of the ECHR and re-establish symmetry of powers on the ground.

## **Acknowledgments**

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## Chapter One

### Outbreak of War in Yugoslavia

#### 1.1 Introduction

‘While Yugoslavia was disintegrating in the early 1990s, the Serbs, Croats and Muslims began a civil war in which each group played a dual role of aggressor and defender, ethnic cleanser and expelled refugee, torturer and tortured. When the dust of fighting settled, it became clear that no one ever tried to become a good guy and that all should feel guilty and ashamed (although regrettably but not unexpectedly, very few people actually did).’<sup>1</sup>

The destruction of Yugoslavia ought to be remembered against the backdrop of the dissolution of the Soviet Union and the First Gulf War. The projects of global changes would have far reaching legacies for newly created states in the territory of former Yugoslavia. Woodward’s analysis of the foreign influences on the Yugoslav crisis includes different actors, all of whom had taken sides in the Yugoslav conflict depending on their diverging historic or economic interests.

Woodward illustrates this view as follows:

Foreign influences—from neighbouring states, Western bankers, churches, émigrés, and even global powers – also served to escalate rather than moderate the pace of political disintegration in Yugoslavia... External factors began to take sides as they were defined by republican leaders, while they did nothing to change their policies toward the federal government or to reduce the growing uncertainty in the external environment caused by the end of the Cold War and the shifting border within Europe.<sup>2</sup>

It could be argued that insensitivity towards the issues in the former Yugoslavia by a different range of actors could not be viewed in isolation and could be compared to the conflict in Ukraine that is happening more than twenty-five years later. The element that links the two conflicts is ‘the persistent element of territorial and strategic insecurity in parts of the world that are not geopolitically

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<sup>1</sup> Aleksa Djilas, ‘Funeral Oration for Yugoslavia, An Imaginary Dialogue with Western friends’ in Dejan Djokic, ed., *Yugoslavism, Histories of a failed idea 1918 – 1992* (The University of Wisconsin Press 2003) p. 318.

<sup>2</sup> Susan L. Woodward, *Balkan Tragedy: Chaos and the Dissolution after the Cold War* (The Brookings Institution Washington D.C. 1995) p.145

free from conflicts over land, borders, supply routes, and vital physical resources such as water in the way that North America and Western Europe have been, more or less for some time'.<sup>3</sup> Woodward places responsibility on 'the outside powers and neighbours...that were acting historically in their repeat interests, alignments and means of influence toward the Yugoslav tragedy and that were insensitive toward its demands'<sup>4</sup> thus allowing 'political disintegration, territorial fragmentation and tolerance for intolerance'.<sup>5</sup> The relevance of this is to demonstrate that 'the outsiders cannot remain oblivious to their role in undermining the capacity to provide security and rights nor miss opportunities to help strengthen governing capacity, without which there can be neither stability, nor justice'.<sup>6</sup>

Jovic, who was the penultimate President of the Socialist Federative Republic of Yugoslavia, from May 1990 to May 1991, explicitly blames Germany for the destruction of Yugoslavia by hastened recognition of Croatia.<sup>7</sup>

After the war in the Balkans it has not only been important to find a way to deal with that most recent conflict but also to find a way to deal with the past.

Regardless of the successes and achievements of the peace process and reconciliation efforts and attempts to rebuild the countries and lives of their

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<sup>3</sup> Ibid. p. 399

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. p. 340

<sup>7</sup> Borisav Jovic, *Kako su Srbi izgubili vek, The way the Serbs lost the Century* [Author's translation] (Glasnik, Beograd 2016) pp.71-77

For examples of foreign influences and interests in Yugoslavia see also the document released by The Office of the Historian within the Foreign Relations clearly indicating that the United States had a special interest and a stake in maintaining Yugoslavia stable and prosperous. This was due to its geopolitical position and influence it had among the non-aligned countries, especially those in The Middle East, despite the fact that in multilateral forums Yugoslavia expressed views that were opposed to those held by the United States. Foreign Relations, 1996-1976, Volume E-15, Documents on Eastern Europe, 1973-1976, 61 and 62 Airgram A-385 From the Embassy in Yugoslavia to the Department of State, July 23, 1973. 'The United States in its policies and official statement should give proof of confidence we have maintained throughout the twenty years of overall Yugoslav progress since Tito's expulsion from Cominform that this country will meet crises successfully despite continuing problems of federalism nationalism and economic development. Yugoslav experiment is as great now as it was when we first committed ourselves to assist Tito's Yugoslavia to retain its independence.'

See also Henry Kissinger, Memorandum for the President, January 10, 1975, Declassified A/ISS/IPS, Department of State E.O.12958, as amended June 19, 2008 The White House

See also Helmut Sonnenfeldt, Memorandum for General Scowcroft, August 29, 1975, Declassified A/ISS/IPS, Department of State E.O.12958, as amended June 19, 2008 The White House

See also CIA Director for Central Intelligence, Yugoslavia Transformed, 18 October 1990, Approved for release May 2006 (US detailed analysis of the post-Tito's Yugoslavia and problems both in the country and externally)

citizens are the most important ingredients of the whole conflict and of the post-conflict period. People do not start wars out of nowhere, they have their histories and their memories and in order to understand the present and build the future in the post-conflict societies it is also necessary to understand the geography and history of the region and to try to find the possible reasons for the wars. Not in order to justify them, but to make it easier to deal with them in the post-conflict period. Understanding the background to the events in former Yugoslavia enables its peoples to have their own framework in which to make sense of events that are thus less susceptible to the subtleties of news frames.<sup>8</sup>

The reasons for the wars were many and they have not stopped to exist with ending of the hostilities. Some of them like ethnic hatred and division, economic poverty and global changes have become even more prominent.

## **1.2 The War and its origins**

The Socialist Federative Republic of Yugoslavia was destroyed in the war in the 1990s. In the language of Carla del Ponte and Chuck Sudetic, there is a clear blame to be attributed to this destruction:

The main culprits were hard line nationalists, Slobodan Milosevic of Serbia and Franjo Tudjman of Croatia, and their protégés: men and women who gained power and were striving to enhance and retain it by whipping up their people's fear into hysteria and turning them against one another. Croatia declared its independence in 1991, and the war in Bosnia started in the spring of 1992.<sup>9</sup>

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<sup>8</sup> Katie Smith, 'Framing The War in Croatia: Propaganda, Ideology and British Press', E-International relations publishing, December 22, 2007, p.26

<sup>9</sup> Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor* (Other Press New York 2009) p.37 See also Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics, Morals* (Oxford University Press 2nd edition, 1st ed. 2000) Comment on the background to the Tadic litigation before the International Criminal Tribunal for Former ~Yugoslavia p1156. See also See also Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics, Morals* (Oxford University Press 2nd edition, 1st ed. 2000) Laws of War and Customary International Law, pp59-67

Bosnia and Herzegovina was one of the six republics in the Socialist Federative Republic of Yugoslavia and it had the most ethnically mixed population. Thus any division on ethnic lines was always likely to have the most significant impact in this geographic/administrative region of the former Yugoslavia. In the words of Woehrel:

The rise of Slobodan Milosevic and Franjo Tudjman in the late 1980s and early 1990s posed a great threat to the unity of Bosnia and Herzegovina. Its own government at the Republic level was split between Bosniac, Serb and Croat nationalists. After the secession of Slovenia and Croatia the balance of power in Bosnia and Herzegovina was upset. The events that followed vote for independence in March 1992 and the recognition of Bosnia and Herzegovina by the European Community and the United States caused killing, ethnic cleansing, force deportation of people and strengthening of the organized crime groups with strong links to the government officials. This will prove a great obstacle to Bosnia's post war recovery.<sup>10</sup>

The cost of this war was significant as:

Neighbours turned against neighbours and the horrors of concentration camps and pictures of children and women herded aboard railroad cars and deported filled the media coverage around the world for many years.<sup>11</sup>

Despite several attempts to end the war, which will be the focus of Chapter Two,

The Dayton Peace Agreement signed in Paris on 14 December 1995 finally

brought the war to the end.<sup>12</sup>

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<sup>10</sup> Stephen Woehrel, *Bosnia and Herzegovina: Current issues and U.S. Policy*, Congressional Research Service, 24 January 2013, pp.1 - 2

<sup>11</sup> Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor* (Other Press New York 2009) p.37 See also Report of the Secretary General Pursuant to Security Council Resolution 1026, UN Doc. S/1995/1031 (1995) noting 1.2 million displaced persons within Bosnia and Herzegovina and 900 000 refugees that fled the country.

<sup>12</sup> These included the EC Conference on Peace in Yugoslavia ('Carrington'); the UN/EC co-sponsored International Conference on the Former Yugoslavia, August 26-27, and the Vance-Owen Plan (the principle stages of the Vance-Owen Plan are set out in UN Documents S/24795, Annex VII, 31 I.L.M. 1584 (1992)

Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, December 14, 1995

The Dayton/Paris peace Agreement was produced in UN Doc. A/50/790-S/1995/999 in the form initialed on November 21, 1995, Dayton and appears in 35 I.L.M. 89 (1996) in the form signed on December 14, 1995 in Paris. The Agreement was negotiated in the Air Force Base Wright Paterson n Ohio (USA) from November 1 to 21, 1995 and it was formally signed in Paris on December 14, 1995. In this research the Dayton version of the Agreement will be used although the Paris version is identical. According to the Report in Bliconline on February 13, 2008 the Government of Bosnia and Herzegovina reported that they had lost the original version of this Agreement but that

There have been a myriad of authors who have sought to study the causes and reasons of the destruction of Yugoslavia, mainly through an analysis of the events leading to the outbreak of hostilities in the 1990s. These studies narrated through the lenses of sociologists, economists, politicians, lawyers, academics, anthropologists, correspondents or historians have contributed to a particular understanding of the conflict as the inevitable conclusion pointed to ancient rivalries that were brought to the fore at the period of transition as indicated above. However what they all have in common is that they have failed to show due appreciation for and embark on an evaluation of the events within a particular historical context.

### **1.3 The theory of ‘ancient hatred’ and historical perspective**

In his account of the causes of the crisis in the 1990s, Scharf’s emphasizes the role of the Serbian nationalism as being the crucial to the tragic events that eventually led to the destruction of Yugoslavia. This version of history does not offer a more detailed explanation of the events that are mentioned. Instead, emphasis is placed in overtly dramatized language ‘on the boiling cauldron of ethnic tensions with deep historic roots’ which inevitably spilled into a hateful bout of ethnically induced violence.<sup>13</sup> But while there is an articulation of ‘deep historic roots’ the only ones that are highlighted focus on the Serbian nationalism as if it was the most powerful phenomenon, neglecting an emphasis on the nationalist euphoria that was raging in Croatia as well, and also Slovenia which was in fact the first of the Yugoslav republics to secede from Yugoslavia. As Damaska points out:

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did not prevent the three main political parties disputes about its relevance and possible changes. The Government was forced to ask for the remaining original version to be sent from Paris for which they had to pay. In October 2017 a copy of The Dayton Peace Agreement was found in the house of the driver of one of the previous presidents of the Peoples’ Assembly of the Republika Srpska, Dragan Kalinic but the court authentication established that it was not the lost original. This suggests the chaotic and disorganized situation in Bosnian politics and Government.

<sup>13</sup> Michael P. Scharf, *Balkan Justice, The Story behind the first international War Crimes Trial since Nuremberg* (Carolina Academic Press 1997) p.21

Consider the massive human rights violations attendant upon the disintegration of Yugoslavia. Individualisation of responsibility has, in this context, been justified by claiming that widespread atrocities were provoked by a small group of rabid nationalist leaders, whose rancorous propaganda unleashed ethnic furies. But it seems more likely that these leaders took advantage of the pre-existing pent up animosities. After all the leaders were freely elected, mostly by landslide victories, and were enthusiastically supported by broad swaths of population...Dispassionate historical research may someday reveal that even ethnic cleansing enjoyed widespread popular support for a while.<sup>14</sup>

It appears that Scharf's explanation of the origins of the Yugoslav crisis would benefit from a more balanced view of the conflict and the history of the region. This approach might be interpreted as if the evidence is to be presented mainly against one side.<sup>15</sup> Another example of this narrow and somewhat bias approach is the view that the Yugoslav National Army that was 'aided by the local Serbian insurgents, inflicted heavy casualties on the inexperienced and out gunned Croatian forces'<sup>16</sup> It is important to note that the Serbian population in the area of Croatian Krajina were people who lived there since the Ottoman Empire and the Habsburgs granted them the rights to erect their settlements on the borders towards the Ottoman Empire<sup>17</sup> and led to a great extents 'a historic separate existence'.<sup>18</sup>The Serbs in Croatian Krajina were the constitutive people of the Socialist Republic of Croatia<sup>19</sup> and have lived in the territory of Croatian Krajina since the time they were given the land and the titles by the Habsburg Empire to defend its eastern borders against the Ottoman Empire. The term insurgents might

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<sup>14</sup> Mirjan Damaska, 'What is the point of International Criminal Justice', Chicago – Kent Law Review [Vol 83:1] 333

See also critical analysis of the ethnic and religious side to the conflict between the Serbs and the Croats in Noel Malcolm, *Bosnia, A short history* (Pan Books 1996) (1<sup>st</sup>ed 1994), pp.165-166

<sup>15</sup> Michael P. Scharf, *Balkan Justice, The Story behind the first international War Crimes Trial since Nuremberg* (Carolina Academic Press 1997) p. 26

<sup>16</sup> Ibid.

<sup>17</sup> Nora Beloff, *Yugoslavia, an unavoidable war* (New European Publications Limited 1997) p.15  
See also Richard C. Hall, *War in the Balkans, An Encyclopaedic History from the Fall of the Ottoman Empire to the Break-up of Yugoslavia* (ABS-CLIO 2014) and Caroline Finkel, *Osman's Dream, The Story of the Ottoman Empire 1300-1923* (John Murray 2005)

<sup>18</sup> Ana S.Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press) p.190

<sup>19</sup> Ustav Socijalisticke Republike Hrvatske, Narodne Novine, Broj 8, 22 Veljace 1974, strana 110, Dio I Clan 1, The Constitution of the Socialist Republic of Croatia, The People's Gazette No.8 22 February 1974, Part I, Article 1, 22 february 1974 [Author's translation]

refer to the different paramilitary units that came from Serbia but this is not clear.<sup>20</sup>

Parallel to this Scharf fails to identify the reason why the Serbs from Croatian Krajina rebelled against the Government in Zagreb. The same might apply to the region of Slavonia in Eastern Croatia where the Serbian population lived alongside the Croats. The account of events in the smallest of the Yugoslav Republics, Slovenia would benefit from similar clarification. Similarly, Scharf's explanation that 'Milosevic started sending the Serb dominated Yugoslav National Army into Slovenia to crush that Republic's nascent militia'<sup>21</sup> suggests that the Yugoslav Army was not in Slovenia and came from outside to occupy it, although it was distributed and deployed throughout the territory of the former Yugoslavia which included Slovenia and comprised of peoples from all of its six republics and two autonomous provinces, hence the name.<sup>22</sup> There is no mention of the fact that the Slovenians were also included in the Yugoslav National Army.

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<sup>20</sup> John B. Allcock, *Explaining Yugoslavia* (Hurst and Company London 2000) p.390 – 394 Allcock offers a 'genealogy of the heroic models of violence...and hajduci and *uskoci*, who emerged in the early sixteenth century as communities of independent warriors along the northern coast of Dalmatia and were loosely attached to Venetian or Habsburg states as irregular troops providing garrisons along this part of the frontier against the Ottoman Empire) p.391 The author explains 'the importance of violent groups and individuals as positive role models in South Slav culture as being underlined by a long history of peasant rebellion'. P.302 See also Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) for the history of the *Krajina* region in Croatia which was established as a military frontier between the Habsburg and Ottoman Empires in 1520 in Vienna and predominantly inhabited by the Serbs who defended the Habsburgs against the Ottomans and who enjoyed a large degree of autonomy like schooling in their own language and an autonomous church. Statuta Valachorum, proclaimed on 5<sup>th</sup> October 1630 by Emperor Ferdinand II created an autonomous region and granted more extensive rights, thus putting the region of *Krajina* under the direct rule by Vienna and removing jurisdiction of Croatian Diet. In the eighteenth century the Croatian representatives in the Hungarian Parliament requested 'the enactment of laws and regulations which would make the life impossible for the Serbian people and for the Orthodox church' because they were exempt from various taxes and had privileged status, but that was rejected as the Serbs were extremely loyal to the Habsburgs and these in turn needed their manpower. (Trbovich, pp 85-86)

<sup>21</sup> Michael P. Scharf, *Balkan Justice, The Story behind the first international War Crimes Trial since Nuremberg* (Carolina Academic Press 1997) p.26

<sup>22</sup> Ustav Socijalisticke Federativne Republike Jugoslavije 1975, Clan 240, para 2, vidi takodjer Zakon o oruzanim snagama SFRJ, 1985, 1989 – Sluzbeni List SFRJ br.7/85, 20/89, 40/89 I 20/90, The Constitution of the Socialist Federative Republic of Yugoslavia 1975, Article 240, para 2, see also the Law on the Armed Forces of the Socialist Federative Republic of Yugoslavia 1985, 1989 – Official Gazette Nos 7/85, 20/89, 40/89 and 20/90 [Author's translation].



On the other side Alvarez argues that although ancient resentments and antipathies could be powerful weapons they are not the cause of the atrocities. He rather considers them as excuses and apparent motives revitalized in modern times by politicians who had reasons for doing so.<sup>23</sup>

Other authors, like a historian Despalatovic, views the ad infinitum repeated mistake of explaining the causes of war based on 'tribal hatred' in the former Yugoslavia as a misuse of history. This author argues that from a historical perspective the events that happened are still rather contemporary to be judged without appreciating numerous other aspects of the conflict because such superficial observations lead to false conclusions.<sup>24</sup>

To further illustrate this point Gagnon agrees with the critics of the dominant approaches to the conflict in former Yugoslavia that see ethnicity as the main cause of wars. He questions the effects and costs of constructing ethnically pure territories in formally plural countries and also the end result without taking into account the actual causes of violence. It is apparent from his analysis that it was nationalism that was used by the political leaders that caused the conflict and that kept them in power.<sup>25</sup>

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<sup>23</sup> Alex Alvarez, *Governments, Citizens and Genocide, A Comparative and Interdisciplinary Approach* (Indiana University Press 2001) p.70

<sup>24</sup> Elinor M. Despalatovic, 'The Roots of the War in Croatia' in Joel M. Halpern and David A. Kideckel (eds.), *Neighbors in War* (The Pennsylvania State University Press, 2000) p.83

<sup>25</sup> V.P.Gagnon, *The Myth of Ethnic War: Serbia and Croatia in 1990s* (Cornell University Press New edition 2006) (1<sup>st</sup> ed. 2004)

For the detailed account of history of the former Yugoslavia from the Ottoman Empire to the most recent events see also John R. Lampe, *Yugoslavia as a History: Twice there was a country* (Cambridge University Press, 2<sup>nd</sup> ed. 2000, 1<sup>st</sup> ed. 1996)

See also Misha Glenny, *The Balkans (1804-2012), Nationalism, War and Great Powers* (Granta Books, London, 2000) (1<sup>st</sup> ed. 1999)

See also Stevan K. Pavlowitch, *Yugoslavia* (Ernest Benn Limited London 1971) for a comprehensive historical perspective on the development that led to unification of the Yugoslav land before and after 1918 and the role played by the Serbs, Croats and Slovenes as well as invaluable maps and illustrations.

See also V.P.(Chip) Gagnon, Jr 'Political Science and the Yugoslav Dissolution in Florian Bieber, Armina Galijas and Rory Archer(eds) *Debating the Fall of Yugoslavia*(Ashgate 2014) Chapter 4, p63, Role of the elite.

See also Boris Tsilevich, 'New Democracies in the Old World: Remarks on Will Kymlicka's Approach to Nation Building in Post Communist Europe in Will Kymlicka and Magda Opalski

## 1.4 Nationalism as a cause of war in former Yugoslavia

‘A rise in nationalism as a bedrock of state ideology has been a powerful mechanism stimulated by the state. Throughout history it was imperative that the state create a sense of allegiance amongst the people it controlled in order to mobilize loyalty and commitment to central government, rather than to diverse and local people and institutions’.<sup>26</sup> In this way nationalism provided a new frame of reference that allowed collectives to define themselves.<sup>27</sup> Michael Ignatieff emphasises that nationalism operates at several different levels and in his words:

As a political doctrine nationalism is the belief that the world’s peoples are divided into nations, and that each of these nations has the right to self-determination, either as self-governing units within the existing nation state or nation states in their own right. As a cultural ideal, nationalism is the claim that while men and women have many identities, it is the nations that provides them with the primary form of belonging. As a moral ideal nationalism is an ethic of heroic sacrifice, justifying the use of violence in the defence of one’s nations against enemies external and internal.<sup>28</sup>

Gellner suggests that nationalism involves a manufactured system of belief and in particular ethnic nationalism assumes a collective identity based on inherited traits,<sup>29</sup> it is more a mode of thought not a category in nature.<sup>30</sup> In the former Yugoslavia much has been made of the differences between various ethnic nationalities, national rhetoric and ethnic nationalism exacerbated these perceived differences and among people, and transformed these divisions into all important

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(eds) *Can Liberal Political Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe*. (Oxford University Press 2<sup>nd</sup> ed 2003, 1<sup>st</sup> ed 2001) p 157.

The role of the political elite has proved to be significant both before the conflict in the former Yugoslavia, during the hostilities and in the transition to global democratic societies.

<sup>26</sup> Alex Alvarez, *Governments, Citizens and Genocide A Comparative and Interdisciplinary Approach* (Indiana University Press Bloomington and Indianapolis 2001) p62

<sup>27</sup> Ibid.

<sup>28</sup> Michael Ignatieff, *Blood and belonging Journeys into the new nationalism* (New York The Noon Day Press 1993) p5

<sup>29</sup> Ernest Gellner, *Thought and Change* (London Weidenfield and Nicholson 1964) p169

<sup>30</sup> H F Stein, ‘The International and Group Millieu of Ethnicity – Identifying Generic Group Dynamic Issues’ *The Canadian Review of Studies in Nationalism* 17 (1990) p 109

difficulties of identity.<sup>31</sup> Multi ethnic states as was the Former Yugoslavia can become unstable when members of specific nationalities are in a relatively weak position and vulnerable to scapegoating, or when members of national groups seek to breakaway and establish their own nation state. The situation in Bosnia and Herzegovina reflects many of these realities.<sup>32</sup>

There are four reasons why Bosnia and Herzegovina was most vulnerable to destabilization. Firstly, after Slovenia proclaimed its independence the conflict with the Yugoslav National Army did not last long before the Army withdrew from Slovenia; Croatia was more prepared to defend its independence militarily. Second, Bosnia and Herzegovina asked for recognition as an independent nation-state sometime after the events in Slovenia and Croatia unfolded so those who opposed the breakup of Yugoslavia had more experience and time to prepare for armed conflict. Third both Croatia and Serbia had aspirations to expand into Bosnian territory. And most of all Bosnia and Herzegovina was more ethnically mixed than the other former Yugoslav republics and its declaration of independence was more easily contested as it had large Serbian and Croat populations.<sup>33</sup> In the Former Yugoslavia and, in particular in Bosnia and Herzegovina, history has been used as ‘ideological club’ and as a potential mobilization vehicle for political objectives<sup>34</sup>. The challenge the international community had in situations like the one that developed in the former Yugoslavia was not to break up multi ethnic states, but to make them more civil.<sup>35</sup> Held suggests that it is the borders in the mind the borders of prejudice, supremacy and

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<sup>31</sup> Alex Alvarez, *Governments, Citizens and Genocide A Comparative and Interdisciplinary Approach* (Indiana University Press Bloomington and Indianapolis 2001) p63

<sup>32</sup> Ibid p64.

<sup>33</sup> Ibid p67.

<sup>34</sup> Peter Maas, *Love thy Neighbour; a Story of War* (New York Vintage books 1996) p79

<sup>35</sup> David Held, *Political Theory and the Modern State* (Stanford Stanford University Press 1984)

hate rather than the borders on the map that are most in need of changing.<sup>36</sup> In

Alvarez's words

The manipulators condoned and even provided local ethnic violence in order to engage animosities that could be magnified by the press, leading to further violence.<sup>37</sup>

'Political leaders manipulated the feelings reworked history and revived antagonisms and violence was the inevitable result in the former Yugoslavia.'<sup>38</sup>

Although many of the accounts of Yugoslavia emphasised that prior to the ethnic violence of the 1990s the country had been well along the path toward a tolerant multicultural society with cosmopolitan and relatively sophisticated population more intent on supporting their standards of living than victimizing their neighbours.<sup>39</sup>

Banac offers the most comprehensive analysis of the nationalism as a cause of the war in former Yugoslavia. In his words:

Yugoslavia's national question was the expression of the conflicting national ideologies that have evolved in each of its numerous national and confessional communities reflecting the communities' historical experiences.<sup>40</sup>

He blames the percept of unitaristic Yugoslavism, a position that denied national identity of each South Slavic nation for the establishment of centralism and a system that was least likely to foster national identity.<sup>41</sup> '[It] gathered the goal of Serbian supremacy, reflected in the dominant position of the Serbs in all spheres

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<sup>36</sup> Ibid.

<sup>37</sup> Alex Alvarez, *Governments, Citizens and Genocide A Comparative and Interdisciplinary Approach* (Indiana University Press Bloomington and Indianapolis 2001) p205

<sup>38</sup> Ibid p81

<sup>39</sup> See Brian Hall, *The Impossible Country: A Journey Through the Last Days of Yugoslavia* (New York Penguin Books 1999)

<sup>40</sup> Ivo Banac, *The National Question in Yugoslavia, Origins, History, Politics* (Cornell University Press 1984)

<sup>41</sup> Ibid. p. 407

of public affairs'.<sup>42</sup> He goes on to explain how the national question penetrated every aspect of Yugoslavia's public life after 1918.<sup>43</sup> The tragedy of the Vidovdan Constitution Banac sees in the subsequent elementary aspect of all Serb national programme.<sup>44</sup> Banac's argument is that ethnic cleansing and the construction of nationally homogenous state was not the consequence of the war but rather the aim of the war.<sup>45</sup> He explains it as follows:

The leaders of Serbs, Croat, Bosniaks, Kosovar Albanian and other national communities, with variations, evidently believed that national homogeneity, that is statehood without minorities, constituted political stability and offered the only genuine chance for peace.<sup>46</sup>

Zizek's position in relation to the national question in former Yugoslavia centres on the philosophical status of nationalism as a transcendental illusion, the illusion of direct access to a Thing and as such it epitomises the principle of fanaticism in politics.<sup>47</sup> The author places nationalism at the heart of the present crisis of post-socialist states. He defines it as 'a struggle for one's place'<sup>48</sup> and 'a first class taste of the twenty first century, the prototype of post-cold war armed conflicts'.<sup>49</sup> Zizek explains this as follows:

What is effectively at stake in the present crisis of post-socialist states is precisely the struggle for one's place, now that the illusion for the 'third way has evaporated: who will be admitted 'inside', integrated into the developed capitalist order, and who will remain excluded from it? Ex-Yugoslavia is perhaps the exemplary case: every actor in the bloody play of its disintegration endeavours to legitimise its place 'inside' by presenting itself as the last bastion of European civilization (the current ideological designation for the capitalist 'inside' in the face of oriental barbarism).<sup>50</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid. p. 415

<sup>44</sup> Ibid. p. 403, On St. Vitus Day 1921 Yugoslavia's Centralist Constitution was adopted.

<sup>45</sup> Ivo Banac, 'The politics of National Homogeneity' in Brad K. Blitz, *War and Change in the Balkans: Nationalism, Conflict and Cooperation* (Cambridge University Press 2006), p.30

<sup>46</sup> Ibid.

<sup>47</sup> Slavoj Zizek, *Tarring with the Negative, Kant, Hegel and Critique of Ideology* (Duke University Press Durham 1993), p. 222

<sup>48</sup> Ibid. pp. 222-223

<sup>49</sup> Ibid. p.223

<sup>50</sup> Slavoj Zizek, *Tarring with the Negative, Kant, Hegel and Critique of Ideology* (Duke University Press Durham 1993), p. 223

Nationalism has been identified as one of the major causes of the conflict in former Yugoslavia by other authors, some of who include Radan<sup>51</sup>, Starovcic<sup>52</sup>, Burg<sup>53</sup>, Ramet<sup>54</sup>, Woodward<sup>55</sup>, Glandic<sup>56</sup> and Spegelj<sup>57</sup>.

Although nationalism has been identified as one of the major sources of the former Yugoslavian conflict there is no consensus among scholars about the exact reasons why the former Yugoslavia disintegrated. Grgic's argument that since the Socialist Federative Republic of Yugoslavia was an asymptomatic ethno-federation with Serbia pointed towards the rest of the Republics and experiencing overwhelmingly illiberal nationalistic mobilization in the years of increased political pluralism<sup>58</sup>. As Grgic suggests:

In the former Yugoslavia, the 1974 Constitution made a distinction between the two categories of ethnic groups six nations where traditional territorial homelands laid within state boundaries and nationalities where traditional homelands were found outside these boundaries yet, after the Second World War, the State was set up in a way to limit Serbian

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<sup>51</sup> Peter Radan, *Nationalism and the beginning of End of Yugoslavia (1980- 91)* (2003) (2002), p.153

<sup>52</sup> Vojislav Starovcic, *The Concept of National Minority and Treatment of Individual and Collective Rights*, Yearbook 2008, Faculty of Political Science University of Belgrade, (UDK 333.15(100)

<sup>53</sup> Steven L. Burg and Paul S. Shoup, *The war in Bosnia-Herzegovina, Ethnic Conflict and International Intervention* (Routledge Taylor & Francis Group, London and New York 2015, 1<sup>st</sup> ed.1999) pp. 40 - 61

<sup>54</sup> Sabrina Petra Ramet, *Balkanbabel : The Disintegration of Yugoslavia from the Death of Tito to Ethnic War* (Westview Press 1996) pp. 26 - 31

<sup>55</sup> Susan Woodward, *Balkan Tragedy: Chaos & Dissolution after the Cold War* (Brookings Institution Washington D.C. 1995) pp. 333-73

The author argues that it was the rise of nationalism and territorial claims that were the main causes of the conflict and offers a detailed account of the dynamic of dissolution and war.

<sup>56</sup> Josip Glandic, ' Inside the Serbian War Machine', *The Milosevic's telephone intercepts 1991-1992*, *Eat European Politics and Societies*, Vol.23, No1 (2009): 86-104 available at Sage journals 2014, accessed 16 April 2016

The author offers evidence presented at the trial of the Serbian President Slobodan Milosevic at the International Criminal Tribunal for Former Yugoslavia in the Hague (IT-02-54) in relation to the important issues of nationalistic aspirations of Slobodan Milosevic and Franjo Tudjman, the President of Croatia, as well as in relation to the interpretation of the events before and after the Yugoslav conflict.

<sup>57</sup> Martin Spegelj, *Sjecanja vojnika*, *The Memoirs of a Soldier* [Author's translation], (Zagreb: Znanje 2001) pp.55-56

Martin Spegelj was the first Defence Minister in Franjo Tudjman's Government and he acknowledges the renewal of ultra-nationalist Ustasha movement encouraged and supported from outside the country and he criticizes the damage that that movement has inflicted on political and democratic life in Croatia, 'we have suffered consequences ever since and have witnessed the emergence of different source of neo-fascism'. (pp. 55-56)

<sup>58</sup> Grgic Gorana, *Ethnic Conflict in Asymmetric Federations Comparative Experience of the former Soviet and Yugoslav Regimes* (Routledge 2018) p 4

domination. In that respect Serbia did not enjoy the principal state Russia had within the Soviet Union.<sup>59</sup>

The fact that the former Yugoslavia was a de facto confederal state with less centralised economy and relatively politically open, that almost dual military structure of the territorial defence which existed at the level of the Republics and the national Army created an environment in which it was easier to achieve ethno national mobilization.<sup>60</sup>

Grgic argues that though the central goal of Bosniac nationalism was the creation of an Islamic State, Bosniac leadership was primarily advocating within the existing federal structure of the former Yugoslavia, rather than arguing for secession that had to do with the fact that Bosnia and Herzegovina stood to lose more with the collapse of the Socialist Federative Republic of Yugoslavia due to the system of federal funds allocation.<sup>61</sup>

In Bosnia and Herzegovina the nationalist options prevailed since nationalist parties represented all three entities in the republic agreed on the power-sharing agreement. The deal fell through after the Bosniacs and Croats decided to push for independence, while the Serbs advocated the preservation of the federal state.<sup>62</sup> Grgic concludes:

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<sup>59</sup> Ibid p52.

<sup>60</sup> Ibid p56,57

<sup>61</sup> Grgic Gorana, *Ethnic Conflict in Asymmetric Federations Comparative Experience of the former Soviet and Yugoslav Regimes* (Routledge 2018) p219. See also Grgic pp 199-207 for an explanation of the reasons why Bosnia and Herzegovina was 'a late mobilizer' in Yugoslavia and what was etiology and dynamics of Bosnian ethno-nationalist mobilization. Grgic compares the late mobilization in Bosnia and Herzegovina with the ones in Moldova and Chechnya with reference to factors that contributed to ethno-political action and consequently to the onset of conflict. 'While Moldova and Chechnya didn't have any pre-existing pan national structures along which nationalists could organize after an illegal annexation by the Soviets, Bosnia and Herzegovina had a marginalised movement of 'Young Muslims' which was particularly active from the 1970s to the early 1980s that provided the basis for what would later emerge as Izabegovic's Party of Democratic Action' p210. This nationalist movement truly took off after the creation of the SDA and particularly with the Islamic community. This was enabled only after the laws of pluralism were introduced and as the religious community grew ideological divided. (p219).

<sup>62</sup> Ibid

[There is] potentially pacifying effects of liberalization when it precedes ethno-nationalist mobilization, since it can lead to political pluralisation and emergence of more moderate nationalist factions. However, it seems that under the conditions of state weakness ethno-nationalist mobilization, even if it occurs when polity begins to liberalize sets off the spiral that induces rival mobilization and thus makes it harder for liberal alternatives to emerge.<sup>63</sup>

Different scholars focus on multiple sources and reasons for conflict in the former Yugoslavia.<sup>64</sup>

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<sup>63</sup> Ibid.

<sup>64</sup> For the primordial theories behind some of the reasons for the war in the territory of the former Yugoslavia see Van Evera, S., 'Hypotheses on Nationalism and War, *International Security* 18(4) 5, 39 and H J Morgenthau, *Politics Among Nations The Struggle for Power and Peace* (New York, McGraw Hill 1948) The interpretation of this is that despite the argument that violent conflicts occur when an ethnic group compares its nation's supremacy over another, it does not offer an explanation about long periods of peaceful co-existence between the nations as it was in Bosnia and Herzegovina and the prevalence of mixed marriages on the whole of the territory of the former Yugoslavia.

Similarly, there are theories of cultural differences as argued by Bruce Russett, *Grasping Democratic Peace. Principles for a Post-Cold War World* (Princeton NJ, Princeton University Press) and Samuel P Huntington *The Clash of Civilisations*, *Foreign Affairs* 72(3):22-49 as well as Russel Leng and Patrick Regan *Culture and Negotiation in Militarized Interstate Disputes*, *Conflict Management and Peace Science* 80(1) 111-132. The limitations of explaining the conflicts through exploration or the cultural effects on the outcome of disputes between the States in the war are related to the notion that the political leaders in the former Yugoslavia were not democratic leaders who would settle disputes through compromise but rather used the 'cultural differences' to promote their goals.

Ethnic hatred theory likens ethnicity and nationalism with central geopolitical factors. Scholars like Monica Duffy Toft *Geography of Ethnic Violence Identity, Interest and Indivisibility of Territory* (Princeton, NJ, Princeton University Press 2003) and Lars Eric Lederman and Luc Rardik, *Beyond Fractionalization: Mapping Ethnicity onto National Insurgencies* *The American Political Science Review* 101(01): 173-185 explore the question of the likelihood of violence occurring within the geopolitical area where one ethnic group seeks sovereignty

The limitation of these theories that link ethnicity and nationalism to likely causes of conflict is that several parameters such as the period of peaceful co-existence as in the case of Bosnia and Herzegovina even when one of the ethnic groups would have been a minority facing cultural issues and dominant did not create violence for a considerable amount of time. Furthermore, it is that other conditions ought to be met, such as the collapse of the state, that the violence might occur. Grgic argues that 'the ethnicity and nationalism only become important as a result of conflict, not because of it. Grgic Gorana, *Ethnic Conflict in Asymmetric Federations Comparative Experience of the former Soviet and Yugoslav Regimes* (Routledge 2018)

Some scholars like Ted Robert Gurr 'Why Minorities Rebel: A Global Analysis of Communal Mobilization and Conflict since 1945. *The International Political Science Review* 14(2) 161-201, Michael Edward Brown: *The International Dimension of Internal Conflicts in Eastern Europe* (Gutersloth, Bertlesmann Foundation Publishers 1996) argue that the elements including historical and economic oppression have a role to play in mobilizing ethnic groups into conflict.

Shale Asher Horowitz *From Ethnic Conflict to Still Born Reform The Former Soviet Union and Yugoslavia* (College State TX, Texas A&M University Press 2005) concludes there is a considerably higher risk of ethnic conflict in the situations and countries where there is an interconnection of clan and ethnic dimension within a State. On the other hand Ernest Gellner *Nations and Nationalism* (Ithaca, NY, Cornell University Press 2008) thinks the course of conflict is the desire of disadvantaged minorities to be economically prosperous. Authors like Dejan Jovic *Yugoslavia: A State that Withered Away* (West Lafayette, IN, Purdue University Press 2009) points



## 1.5 The need for ideology – ‘Memorandum’ SANU

Some scholars, like Bjelajac and Zunec argue that the reason for different interpretations of the conflict might be not only in different nature of the conflicts in Croatia and Bosnia, but also because opposing sides would get a more favourable status depending on which interpretation they adopt, the Croats want to be seen as victims of aggression and the Serbs in Croatia as victims of discrimination.<sup>65</sup>

Scholars, like Cigar suggest that ‘religion, history or culture - may have provided the backdrop for the resurgence of Serbian’s nationalism in the 1980s, but they would not have been enough to generate open warfare, much less the genocide that follow’.<sup>66</sup> In his opinion the ‘defining moment and a traceable catalyst’<sup>67</sup> is the issuing of the Serbian Memorandum, drafted in 1986 by the Serbian Academy of Arts and Sciences. This Memorandum crystalized the revival among Serbian intellectuals of earlier nationalist goals of a Greater Serbia.<sup>68</sup> In his words:

The Memorandum proclaimed in no uncertain terms that the earlier quest for Greater Serbia retained its validity and thereby defined the nation’s legitimate political agenda. The manifesto maintained that the ‘national question’ of the Serbian people had been thwarted by the Communists at the end of World War II, since ‘it [the Serbian people] did not get its own state like other peoples.’<sup>69</sup>

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out that before the armed conflict States on the territory of the former Yugoslavia the tensions that occurred between the central Yugoslav Government and the republics/autonomous provinces did not have a powerful ethnic character, but economic benefit.

See also Dusan Bilandzic *Jugoslavija postlije Tita 1980-1985*, Zagreb, Globus. It is submitted that despite the degree of presence of political oppression on Yugoslav economic, historical and political differences among the peoples of the former Yugoslavia became prominent only when in the situation of uncertainty, after the disintegration of the League of Communists and the death of president Tito, political and ethnic elite started utilizing the period of uncertainty and information to mobilize ethnic groups for those ethno-political goals

<sup>65</sup>Mile Bjelajac and Ozren Zunec, ‘The War in Croatia, 1991-1995’ in Charles Ingrao and Thomas A. Emmet (eds.), *Confronting the Yugoslav Controversies, A Scholarly Initiative* (United States Institute of Peace Press Washington D.C., Purdue University Press, West Lafayette Louisiana 2009), pp.231-270

<sup>66</sup> Norman Cigar, *Genocide in Bosnia, Policy of Ethnic Cleansing* (Texas A&M University Press, College Station 1995) p.22

<sup>67</sup> Ibid. p. 23

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

It was ‘a manifesto that established full national integrity of the Serbian people, regardless of which republic or province it inhabits as its historic and democratic right’.<sup>70</sup> It is apparent that ‘nationalism emerged from the elite as a political programme in Yugoslavia...and opened the floodgate of repressed national sentiments throughout Yugoslavia’.<sup>71</sup> This new wave of Serbian nationalism, according to Cigar, turned its attention against all those communities that were seen to stand in the way of the goal of creating a Greater Serbia.<sup>72</sup> The uncompromising hostility was particularly directed against the Muslim community, which, according to Cigar, because of its size and location, was central in determining whether or not Bosnia and Herzegovina would become part of a Greater Serbia.<sup>73</sup> Cigar observes a significant attempt by some Serbian scholars and the Church to present Islam and Muslims as being retrograde and a threat to modern civilization by blending – and bending – of scholarship and political and religious rhetoric and by frequent presence in the mass media.<sup>74</sup>

It is important to note that ‘most of the Communists then in power in Belgrade reacted with hostility to this agenda of a Greater Serbia, since they viewed it as a

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<sup>70</sup> Boze Covic (ed.) *Izvori velikosrpske agresije*, The sources of Serbian aggression [Author’s translation] (Zagreb: Skolska knjiga 1991) pp.218-219, also available at [www.helsinki.org.rs/memorandum%20sanu.pdf](http://www.helsinki.org.rs/memorandum%20sanu.pdf), accessed 17 October, 2016

<sup>71</sup> Kerstin Carlson, *Model(ing) Law: The ICTY, the International Criminal Justice Template, and Reconciliation in the former Yugoslavia*, UC Berkeley Electronic Theses and Dissertations, 01/01/2013, pp.63-64, available at <https://escholarship.org/uc/item/4xd0t6zz>, accessed 23 April 2017

See also J.R.Lampe, *Yugoslavia as a history: Twice there was a country* (Cambridge University Press 2000) (1<sup>st</sup> ed. 1996) p.348

<sup>72</sup> Norman Cigar, *Genocide in Bosnia, Policy of Ethnic Cleansing* (Texas A&M University Press, College Station 1995) p.23

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* pp. 27 and 32

See also Ana S.Trbovich, *A Legal Geography of Yugoslavia’s Disintegration* (Oxford University Press) p.191 about the role of the Catholic Church in the events in Croatia in the Second World War

See also Vjekoslav Perica, *Balkan Idols, Religion and Nationalism in Yugoslav States* (Oxford University Press 2005) pp.3-16

See also John Kelsay, ‘Bosnia and the Muslim Critique of Modernity’ in G. Scott Davis, *Religion and Justice in the War over Bosnia* (Routledge 1996) pp.115 – 141

See also John B. Allcock, *Explaining Yugoslavia* (Hurst & Company, London 2000) p. 366-376  
The author offers a sociological debate about the church-state relationship and the importance of the link between religion and ethnicity during the period of the break-up of Yugoslavia

point of no return towards communal violence'.<sup>75</sup> Cigar illustrates this by quoting Ivan Stambolic, Serbia's president and reformist Communist in his [Stambolic's] address at Belgrade University on 30 October 1986 explaining the significance of Memorandum:

[T]he so called 'Memorandum' is not new. It is the old chauvinist concern for the fate of the Serbian cause with the well-known formula that the Serbs win the war but lose the peace... In short, the so-called memorandum, more precisely and with easy conscience, could be entitled 'In Memoriam' for Yugoslavia, Serbia, Socialism, self-management, equality, brotherhood, and unity... Essentially, it is diametrically opposed to the interests of the Serbs throughout Yugoslavia.<sup>76</sup>

## 1.6 The role of ethnicity

Tony Judt argues that these contrasting interpretations of the origins and responsibility for the Yugoslav wars, one that is based on the 'age-old conflicts' fuelled by memories, injustice and vengeance and the other one which is based on the outside intervention, both diminish the role of the Yugoslavs themselves because the breakup of the country is the work of men, not fate.<sup>77</sup> He places the greatest responsibility on the Yugoslav politicians in Belgrade. In his view 'the ethnic lines in the Former Yugoslavia were never clearly defined, especially in Bosnia that was most ethnically variegated region of Yugoslavia. Likewise, to invoke religious differences is also misleading because they were more prominent in earlier centuries. Religious practices were fading and Muslim Bosniaks were thoroughly secularised and probably the only generalized discrimination was against the Albanian minority in the south'.<sup>78</sup> In addition Judt argues that while the Serbs felt threatened by the demographic changes in Kosovo that has a special

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<sup>75</sup> Ibid.

<sup>76</sup> Ivan Stambolic, *Rasprave o SR Srbiji, Debates on the Socialist Republic of Serbia* (Zagreb: Globus 1987) quoted in Norman Cigar, *Genocide in Bosnia, Policy of Ethnic Cleansing* (Texas A&M University Press, College Station 1995), p.24

<sup>77</sup> Tony Judt, *Post War, A History of Europe since 1945* (Vintage Books London 2010), (First published in GB by William Heinemann in 2005 and in the USA by Penguin Press in 2005) pp. 665 - 666

<sup>78</sup> Ibid. pp. 669 - 670

significance in their history, the others, in the northern part of the country, distasted the Albanians because of economics reasons. Northern parts of Yugoslavia were more prosperous and like rich north of Italy had to subsidise their impoverished south.<sup>79</sup> Judt's rationale is that the deep-rooted nationalism and the religious sentiments were not the only reasons why Slovenia and Croatia wanted to go their own way. In his opinion the economic reasons and unwillingness of the northern parts of the country to subsidize the southern regions were the cause of the crisis. Like Scharf, Judt emphasises the role of the Serbian nationalism because it was the only way Slobodan Milosevic of Serbia could keep himself in power and create the state led by the Serbs.<sup>80</sup> This created imbalance in the Federal Government and the richer republics, Slovenia and Croatia, could not support it.

Judt's comparison of the roads to democracy after the fall of Communism in Russia and other countries in Eastern Block and in Yugoslavia comes to the conclusion that the former countries' 'survival depended upon re-calibrating one's public allegiances with the conventional party alignment of the liberal political culture'.<sup>81</sup> He goes on to explain that the Baltic States, Ukraine and Slovakia built new states and new democracy at the same time in the process of gaining national independence. None of them had ethnic card available to substitute it for democracy.<sup>82</sup> It is interesting that Judt compares the situation in Yugoslavia with the intractability of the Point eleven of the Woodrow Wilson's 'Fourteen points' plan<sup>83</sup> relating to the friendly determination of lines between the countries in the Balkans along historically established lines of allegiance and nationality. The issue was intractable because, 'with the exception of Slovenia, in case of

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid. p. 672

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Woodrow Wilson: Fourteen Points (1918), American Congress Speech, 8 January 1918

separation into independent states, there would be a significant minority stranded in someone else's country'.<sup>84</sup> Judt concludes that the reasons for wars were both the internal domestic changes and problems of the former Yugoslavia but also hasty recognition of Slovenia and Croatia by the European Community.<sup>85</sup>

This author further argues that propaganda by local and international media significantly helped fuel the tensions created by the dismemberment of Yugoslavia and gave all sides the reasons to stir up memories of previous unresolved conflicts and justify fighting.<sup>86</sup>

Similarly, Solioz and Dizdarevic illustrate the pattern of blame and victimhood that the conflict created. This particular interpretation of the events will be exploited both by the warring factions and the international community in the aftermath of the conflict and will create obstacles to the implementation of the Peace Agreement.

A vrai dire, les cyniques pourraient faire remarquer qu'en Bosnie-Herzegovine différentes vérités sont en jeu, trois au moins, trois interprétations différentes des récents événements. Chacune des parties – Serbe, Croate et Bosnienne – a, lorsqu'elle l'évoque, sa propre interprétation de la guerre, chacune posant son propre peuple en victime. Chacun des groupes ethniques se considère comme la seule victime, les deux autres groupes nationaux étant qualifiés de "criminels" et auteurs de toutes les atrocités.<sup>87</sup>

Allcock gives a more comprehensive and in depth analysis of the origins of the violence in the former Yugoslavia. He accepts that some forms of violence could

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<sup>84</sup> Tony Judt, *Post War, A History of Europe since 1945* (Vintage Books London 2010) (First published in GB by William Heinemann in 2005 and in the USA by Penguin Press in 2005) p. 673

<sup>85</sup> Ibid. p. 674

<sup>86</sup> Ibid. pp 674 - 675

<sup>87</sup> Christophe Solioz et Svebor Andre Dizdarevic (sous la direction de), *La Bosnie-Herzegovine, Enjeux de la transition* (L'Harmattan 2003), p. 94, Christophe Solioz and Svebor Andre Dizdarevic (eds.), *Bosnia and Herzegovina, The stakes in the transition* (L'Harmattan 2003) Indeed, the cynics might point out that in Bosnia and Herzegovina different truths are involved, at least three different interpretations of recent events. Each party – Serbs, Croats and Bosnians – when evoke their own interpretation of the war, each is putting its people as victims. Each of the ethnic groups considers itself as the only victim, the other two national groups being qualified 'criminals' and creators of all atrocities. [Author's translation]

be a characteristic pattern in the Balkan history but he also he recognises that other important dimensions of the recent conflict, which do not fit these patterns, need to be taken into account.<sup>88</sup> Although he identifies six factors that could be applied across the region: 1) the impact of demographic factors; 2) the continuing importance of paternalistic state; 3) the rootedness of populist democracy in a fundamentally collectivist popular culture; 4) the long-term significance of patterns of ethnic diversity; 5) the uneasy balance between the tradition and modernity; and 6) the tensions between local and global.<sup>89</sup> He concludes that ethnicity was only one of the phenomena which influenced the historical change. In addition, Allcock does not deny the significance of the Serbian nationalism but fundamentally questions the prevailing views, both on the territory of the former Yugoslavia and in the West, of Slobodan Milosevic as ‘the voice of the Serbian nationalism and as a supremely cunning politician in pursuit of Greater Serbian vision’.<sup>90</sup> He argues that the ethnic principle has always been the underlying barrier to the creation of a more complex civil society in the former Yugoslavia. In his words:

Across the history of the entire Yugoslav region, the nature of political development has made for the subversion of any possibility of building the entire community upon generic sense of citizenship. The lines of political division shaping the definition of identities have always worked to undercut the creation of a more complex civil society and to reinforce ethnic principle.<sup>91</sup>

It appears that Allcock shares Damaska’s view<sup>92</sup> that there cannot be only one ethnic group singled out as espousing the ethnic principle. Rather than that ‘the

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<sup>88</sup> John B. Allcock, *Explaining Yugoslavia* (Hurts & Company 2000) p. 11

<sup>89</sup> *Ibid.* p. 431

<sup>90</sup> *Ibid.* p. 429

<sup>91</sup> *Ibid.* p. 428

<sup>92</sup> Mirjan Damaska, ‘What is the point of International Criminal Justice’, *Chicago – Kent Law Review* [Vol. 83:1] 672

contradiction between *ethnos*<sup>93</sup> and *demos*<sup>94</sup> as a basis for legitimacy of any new political order was built into the system as a whole'.<sup>95</sup>

Contrary to this Campbell rejects the views that the origin of the violence in the territory of former Yugoslavia was in the strategic plan to produce political domination and cultural homogeneity, but instead argues that it is a result of a mechanical operation of a historically inevitable ethnic antagonism.<sup>96</sup>

In the light of this it could be argued that the debates about the most significant causes of wars mostly support the narrative that the Serbs and the Yugoslav Peoples Army were the main villains in the conflict in the former Yugoslavia ignoring the other important elements like the fact that, as mentioned earlier, 'all the national leaders in the 1980s and 1990s were elected by a landslide victories by swaths of population that supported ethnic cleansing'.<sup>97</sup>

### **1.7 Conclusion.**

In conclusion, some authors find the origins and reasons of the Yugoslav wars in the old ethnic tensions that have been a predominant characteristic of the whole of the Balkan region throughout its history, the others, like Beloff, consider that what happened in the former Yugoslavia could only be understood within the broader international context because it soon became clear that the conflict would be significantly influenced by the international community.

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<sup>93</sup> F. Gk. *Ethnos* – nation, people, culture (in the text above in the meaning of ethnicity), *The New Shorter Oxford English Dictionary, On Historical Principles*, ed. Leslie Brown, Vol. 1 A – M (Clarendon Press Oxford) p. 857

<sup>94</sup> F. Gk. *Demos* – the people or commonality of an ancient Greek state, the common people; the people, the masses (in the text above in the meaning of citizenship), *Webster's New World Dictionary of the American Language, Second College Edition*, Prentice Hall Press 1984, p. 376

<sup>95</sup> John B. Allcock, *Explaining Yugoslavia* (Hurts & Company 2000) p. 428

<sup>96</sup> David Campbell, *National Deconstruction: Violence, Identity and Justice in Bosnia*, (University of Minnesota Press, Minneapolis, London, 1998) p. 99

The same approach to the causes of war is offered and expressed in Thomas Friedman, 'Not Happening', *New York Times*, January 23, 2001, p.21 and Robert Kaplan, *Balkan Ghosts: A Journey through History* (New York: Random House 1994)

<sup>97</sup> Mirjan Damaska, 'What is the point of International Criminal Justice', *Chicago – Kent Law Review* [Vol 83:1] 333

This Chapter focuses primarily on the background to the conflict in the former Yugoslavia and its distinct geography and history. The aim is to create a context for complex issues and events that unfolded in the former Yugoslavia, of which Bosnia and Herzegovina is arguably the most specific part. The Chapter offers overview of the specific geographic position of the former Yugoslavia which played significant role in the country's turbulent past. It is submitted that in the course of history foreign interests have crossed in the former Yugoslav territory and influenced peoples' lives and allegiances. It could be argued that the breakup of Yugoslavia did not happen suddenly but rather in phases and it was caused by complex domestic reasons and foreign influences. This Chapter discusses the most prevailing theories of the multiple reasons for wars in the territory of the former Yugoslavia and the actors who played role in the country's destruction.

The war in the former Yugoslavia happened as a consequence of wider political, economic and military structure change in Yugoslavia and the world. It also happened 'against the background of diverging interests and goals of the constituent peoples of the countries concerned with regard to the political future of their state.'<sup>98</sup>The relevance of this Chapter is that it provides historical and geographical context for the events that happened in the 1990s it illustrates what was at the core of the Dayton peace negotiations and subsequent Dayton Peace Agreement. The wars were wars over territory and the Dayton Peace Agreement is based on the maps of these territories and the future arrangement between them. It could be argued that the reasons for the wars in the 1990s have relevance more than twenty years later because ethnic tensions and territorial disputes have not ceased to exist with signing of the Dayton Peace Agreement. It is submitted that ethnic divisions became deeper as Bosnia and Herzegovina is in continuous

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<sup>98</sup> Marie-Janine Celic, 'Ethnic Cleansing and War Crimes' in Charles Ingrao and Thomas A. Emmet (eds.), *Confronting the Yugoslav Controversies: Scholars Initiative* (Purdue University Press 2009) p.121



violation of the European Convention on Human Rights because of discriminatory nature of its new Constitution which is Annex IV of the Dayton Peace Agreement and which will be analysed in the thesis. This creates intransigencies and political blockade within the Government of Bosnia and Herzegovina, thus creating a non-functional state. The national question in the former Yugoslavia was addressed by the establishment of centralism but with the beginning of Yugoslav disintegration every nation wanted to present itself as worthy of being recognized as independent either by calling upon the medieval kingdoms like Croatia, or by wanting to present itself, as Zizek best illustrates it 'last bastion of civilization', like Slovenia. In the light of this, nationalism continues to be a prevailing feature of Bosnia and Herzegovina reality more than twenty five years after secession of hostilities and after signing the Dayton Peace Agreement. The Dayton Peace Agreement legitimized homogenous ethnic territories and national parties that started the war are still in power and ethnic principle on which the country has been established by the Dayton Peace Agreement continues to be the underlying barrier to the creation of fairer society. At present Bosnia and Herzegovina is a non-functional state and in violation of the European Convention on Human Rights which is directly incorporated in its Constitution because of discriminatory nature of its articles and it is the debate about their transient nature and different interpretations of the Dayton Peace Agreement by the three national parties in Bosnia and Herzegovina that create the Bosnian stalemate.

## **Chapter Two**

### **Initiatives To Stop The War**

#### **2.1. Background**

In order to assess the wars in the former Yugoslavia it is not only necessary to take into account complex reasons for why these wars occurred and the role of numerous regional actors but also to understand the influence and input of the international organisations involved in the complicated chain of events that unfolded immediately before and during the conflicts. This complexity of reasons, the presence of regional and international factors and the different interests of the parties who could be deemed stakeholders remained the most prominent feature of the conflict on the territory of the former Yugoslavia, and spread its influence to the efforts to resolve the conflict and in the post-conflict period. An analysis of the historical background to the conflicts sheds light on some key developments on the territory of the former Yugoslavia that need careful attention since they help explain the legacy of the political union of South Slavs within the borders of Yugoslavia.

The dissolution of communist Yugoslavia occurred at the time of the breakdown of the Soviet Union and the European Community was cautious with respect to the events as they were happening in both countries.<sup>99</sup> In the words of Schindler, '[I]nterestingly, and perhaps paradoxically, the area in which it had most influence, and in which it intervened the most, suffered the most.'<sup>100</sup>

Different American and European diplomats had presented opposing views on the events in the former Yugoslavia and as a result have identified different ways in

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<sup>99</sup> Sol Schindler, 'Europe and Recognition of New States in Yugoslavia', *Mediterranean Quarterly*, Vol.18, No. 3, Summer 2007, pp. 110 - 113

<sup>100</sup> *Ibid.*

which the crisis should be dealt with. It is clear that there were many contradicting interests among the members of the European Community and the United States. The result of these differences and mixed contradicting interests among the very actors who could have influenced the chain of events in the former Yugoslavia resulted in ill-thought out policies which were political compromises rather than genuine solutions and as a result derived unhelpful conclusions. It needs to be borne in mind, that this was also a period in which both the United States and Europe were increasingly concerned and involved in the Gulf War and as a result their policies towards Yugoslavia were less in focus and incoherent.

In America the war was perceived primarily as a result of Serbian aggression and with this diagnosis uppermost the deployment of limited NATO forces and air power against the Bosnian Serbs who would need to give up their military gains in order to secure political settlement was seen as the ideal answer. The Europeans by and large diagnosed the civil war as a rather complex affair that was attributed to various factors and raised many specific aspects that were identified as in need of fixing. However, European policy was premised on an assessment that the most important reason for war was the revival and rise of ethnic tensions that was an inevitable consequence of the fall of the previously strong centrist communist led regime. For Europeans the solution thus lay in seeking to engineer a political settlement after the fall of communism. In their view the solution would be a political settlement among the three parties involved over their territorial dispute that sought to dampen their ethnic tensions and forge a new understanding between them, accompanied by the promises guaranteeing democracy.<sup>101</sup>

It could be argued however that the prime responsibility for the wars in the Former Yugoslavia lies with the quarrelsome leaders of the Yugoslav Republics,

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<sup>101</sup> David Anderson, 'The Collapse of Yugoslavia: Background and Summary', Research Paper No. 14 1995 – 96, Parliamentary Research Service, Australian Department of Parliamentary Library 1995, p. 17

but equally with the international community that proved inept in responding to the problems as they unfolded.<sup>102</sup> Woodward points out that the chief failure was that the European Community did not diagnose the problems in the former Yugoslavia early enough or at least did not realise the seriousness of it until it was almost too late. She also points out that the European Community did not use its enormous leverage on insisting on a comprehensive settlement in the former Yugoslavia in order that the country could find the way of joining the European Community and seeking to engage in a successful transition to a market based economy at the end of cold war.<sup>103</sup> Instead, Yugoslavia started disintegrating with a great speed and ‘more than a dozen European Community negotiated cease-fire agreements collapsed in rapid succession largely because the sides in the war were more interested in winning the war than in any political solution or settlement.’<sup>104</sup> Micha Glenny goes further in his explanation of the reasons for the failure of the European and American diplomacies in trying to resolve the Yugoslav crisis. In his view:

... they [European and American diplomats] realised that the country was breaking apart but considered the squabbles of a rather unappealing group of Balkan politicians to be insignificant measured against the drama of the Gulf War and the rapid erosion of the Soviet Union (President Bush’s desire to prevent the latter was reflected in James Baker’s demand in Belgrade that Yugoslavia remains whole).<sup>105</sup>

## **2.2 Different approaches of the international community towards Yugoslav crisis**

Arikan suggests that the EU’s approach to the conflict and wars in the Balkans had been subject to criticism on the grounds of a slow response to the conflict, a

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<sup>102</sup> Ibid. p. 24

<sup>103</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) pp. 284 - 286

<sup>104</sup> David Anderson, ‘The Collapse of Yugoslavia: Background and Summary’, Research Paper No. 14 1995 – 96, Parliamentary Research Service, Australian Department of Parliamentary Library 1995, p. 11

<sup>105</sup> Micha Glenny, ‘Yugoslavia: The Great Fall’, *The New York Review of Books*, Vol.42, No. 5 March 1995, p.60

lack of common policy stance and a lack of military capacity to act as a powerful actor and influence the parties in the conflict.<sup>106</sup> The EU did not speak with one voice from the outset as Slovenia and Croatia were promptly recognised by Germany as independent states while the other EU states feared deepening of the conflict in the Balkans<sup>107</sup> since its own Foreign and Security policy had been incomplete at the time when the conflict and the hostilities in the former Yugoslavia started, the EU lacked a legal structure for any possible military involvement.<sup>108</sup> Arikan argues that the EU's response to the war in Bosnia and Herzegovina was declaratory as the EU's issued a number of declarations calling for ceasefires, then pointing out that it appears that the international community's efforts to manage the situation in the former Yugoslavia were on the wrong track from the very outset. As Freedman highlights in a critical article in 1994-1995:

[This] policy never recovered from the early reluctance to take simmering crisis seriously. Once it came to boil in June 1991, the possibilities for constructive action had already narrowed – the international community failed to comprehend its character and inner dynamic.<sup>109</sup>

Thus for Freedman the actions of western countries were motivated more by the sentiment in western countries' and realisation that once again 'their destiny was tied to the behaviour of the Balkan hot – heads'.<sup>110</sup> In other words:

Through the trauma the West became aware of its stake in Balkan instability, from refugee flows to the risks of a wider conflict involving

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<sup>106</sup> Harun Arikan, 'The European Union Policy Towards the Balkan States in the Post Cold War Era' SDU Faculty of Arts and Sciences Journal and Social Sciences, Special Issue on the Balkans, August 2014, p16.

<sup>107</sup> Ibid.

<sup>108</sup> See Treaty of the European Union, Title V Provision on Common Foreign and Security Policy, Official Journal of the European Union C191, 20 July 1992. See also Maastricht Treaty of the European Union, 1992 which provided a legal framework to take joint action on the matters of Common Foreign and Security policy of the EU.

<sup>109</sup> Lawrence Freedman, 'Why the West Failed', Foreign Policy No. 97 (Winter 1994 – 1995), pp. 53 - 69

<sup>110</sup> Ibid.

neighbouring states. It also became aware of how its failure to manage crisis was draining credibility from all those institutions - from NATO to the European Union (EU) – that were attempting to contribute to a solution, not to mention all the grand designs for a new European Security structure.<sup>111</sup>

It could be argued that on the whole the attitude of the European Community ranged from the support for the territorial integrity of the former Yugoslavia to bidding farewell to Yugoslavia as a country.<sup>112</sup> Nakarada and Racic explain this as European initial support for the democratic right of the peoples of former Yugoslavia to decide about the future of Yugoslavia and then adopting the approach that the individual republics should decide about the destiny of the country.<sup>113</sup> According to Nakarada and Racic this approach assumed abandoning the principle of inviolability of the state borders as the foundation of the European security and stability and recognizing secessions as legitimate.<sup>114</sup> The result of this approach was that almost overnight the significant groups of previously constitutive peoples became minorities within the same territory.<sup>115</sup> In other words, European answer to European crisis ranged from efforts to balance the principles of self-determination and territorial integrity to sacrificing the principle of territorial integrity in the case of the former Yugoslavia and to sacrificing the principle of self-determination in the cases of the Serbs in Croatia and Bosnia and Herzegovina.<sup>116</sup> In light of this Nakarada and Racic argue that it was expected that

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<sup>111</sup> Ibid.

<sup>112</sup> Radmila Nakarada and Obrad Racic, *Raspad Jugoslavije-Izazov evropskoj bezbednosti (Projekat Evropska kolektivna bezbednost nakon Mاستrihta)* (Mrljes 1998), Radmila Nakarada and Obrad Racic, *The Distruction of Yugoslavia – The Challenges for the European security ( Project: European Collective Security after Mاستricht)* ( Mrljes 1998) [Author’s translation] p.23

<sup>113</sup> Ibid. See also Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics, Morals* (Oxford University Press 2nd edition, 1st ed. 2000) Comment on the background to the Tadic litigation before the International Criminal Tribunal for Former ~Yugoslavia p1156.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

the Conference on the European Security and Cooperation<sup>117</sup> played a major role in defining the framework for the negotiations and finding the solution to the Yugoslav crisis, instead it replaced the principle of consensus with the principle consensus minus one and suspended membership of Yugoslavia in this body.<sup>118</sup>

Hadzikadunic points out at a lack of cooperation among the European countries and argues ‘that despite some joint efforts to offer peace initiatives there were not even two members of the European Community at the time of the Yugoslav crisis that would share common platform, not to mention to have common foreign policy.’<sup>119</sup> To illustrate this view Hadzikadunic offers examples of the British and the German approaches to the Yugoslav crisis. According to Hadzikadunic at the G7 Summit in Munich in 1992 these two countries had rather opposing views about the Yugoslav problem. On the one hand, Germany argued that the United Nations should send troops into Yugoslavia in order to intervene in the crisis and on the other hand, the United Kingdom, which was presiding over the European Community at the time, argued for more time for its peace initiative led by Lord Carrington. Also, in relation to arms embargo, Germany wanted to lift it while the United Kingdom was firmly against it.<sup>120</sup> According to Hadzikadunic British

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<sup>117</sup> Conference for Security and Cooperation in Europe was a multilateral forum for dialog and negotiation between West and the East and establishing the norms and obligations among the member states. Thirty five of them signed The Helsinki Act in 1975. In 1994 the Conference changed the name into The Organization for Security and Cooperation in Europe.

<sup>118</sup> Radmila Nakarada and Obrad Racic, *Raspad Jugoslavije-Izazov evropskoj bezbednosti (Projekat Evropska kolektivna bezbednost nakon Mاستrihta)* (Mrljes 1998), Radmila Nakarada and Obrad Racic, *The Distruction of Yugoslavia – The Challenges for the European security ( Project: European Collective Security after Mاستriicht)* ( Mrljes 1998) [Author’s translation] p.25 The authors argue that by adopting view that only one side is responsible for the aggressive nationalism in the former Yugoslavia, the Conference for Security and Cooperation in Europe greatly limited its authority in establishing peace and diplomatic influence.

<sup>119</sup> Emir Hadzikadunic, *Od Dejtona do Brisela ( ACIPS Sarajevo 2005)*, p.29, Emir Hadzikadunic, *From Dayton to Brussels ( ACIPS Sarajevo 2005)* p.29 [Author’s translation]

<sup>120</sup> Ibid.

efforts to include Russia into peace negotiations only aimed at curbing the German influence.<sup>121</sup>

To further illustrate the response that the European Community had to solving of the Yugoslav crisis it is important to draw attention to the context in which Yugoslav crisis happened. As mentioned earlier, the end of the Cold war, the dissolution of the Soviet Union<sup>122</sup> and the reunification of Germany are among the most challenging transformative processes that affected the security in Europe in the end of the 1990s. It could be argued that the Yugoslav crisis did not happen as a single event unrelated to restructuring on the global arena but it is one of its significant constituent parts.<sup>123</sup> In the light of this Nakarada and Racic argue that the response of the international actors to the Yugoslav disintegration is in accordance with the principles of the global world order, like inequality in the application of the international law, asymmetry relating to the consequences of globalization and hierarchical structure.<sup>124</sup> The authors also emphasize the prejudicial views of the Balkans when defining the attitude of the European Community to the Yugoslav crisis.<sup>125</sup> This prejudice reflects in the view of the Balkans as tribal, backward and primitive.<sup>126</sup> Nakarada and Racic explain that by treating the Balkan region as the region that is outside Europe, culturally different

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<sup>121</sup> Ibid. See also Johnathan Eyal, 'Peace, or myth wrapped in a folly: The Vance-Owen plan salves the West's conscience but won't save Bosnia', *The Independent* (London Monday 3 May 1993) accessed online 20 February 2016, 'As always, the Balkans mattered less than Western internal policy.'

<sup>122</sup> Reneo Lukic and Allen Lynch, *Europe from the Balkans to the Urals; The disintegration of Yugoslavia and Soviet Union* (New York: Spiri, Oxford University Press, 1996) pp.244 – 245 The authors draw parallel between the disintegration of Soviet Union and Yugoslavia.

<sup>123</sup> Radmila Nakarada and Obrad Racic, *Raspad Jugoslavije-Izazov evropskoj bezbednosti (Projekat Evropska kolektivna bezbednost nakon Mاستrihta)* (Mrljes 1998), Radmila Nakarada and Obrad Racic, *The Destruction of Yugoslavia – The Challenges for the European security (Project: European Collective Security after Mاستriht)* ( Mrljes 1998) [Author's translation] p.19

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid. See also Harun Arikian, 'The European Union Policy towards the Balkan States in the Post-Cold War Era' (2014) SDU Faculty of Arts and Science Journal of Social Sciences Special Issue on Balkans (15 – 22), p.15



and uncivilized, European nations create space for the application of non-European principles.<sup>127</sup> The authors illustrate this view of the Yugoslav crisis as follows:

...The borders in that part are not like borders in Europe proper, that is the place where it is difficult to differentiate between the people and the minority and where because of a latent fighting (mostly in Kosovo and again in Bosnia) it is necessary to have constant outside tutelage (re-training, bringing democracy and dealing with the ghosts from the past).<sup>128</sup>

In addition Nakarada and Racic argue that different interpretations of the reasons for the wars in the former Yugoslavia and different approaches of the international actors to the crisis are still not widely learnt and that create space for manipulations, half-truths and false conclusions.<sup>129</sup> The significance of this is creating a context for the preferable interpretation of the Yugoslav crisis and justifying the way it has been resolved by different international actors according to their respective interests.<sup>130</sup>

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid. See also Michel S. Lund, *Preventing Violent Conflicts: A Strategy for Preventative Diplomacy* (United States Institute for Peace Press Washington D.C. (First ed. 1996) (Second ed.2001) for the American perspective on how to prevent violent conflicts. Lund also argues that ‘...[A] major factor impeding the efforts of mediators to keep the dissolution of Yugoslavia from erupting into violence, for example, was the ongoing disintegration of organs of the state (such as the system of self-management, the collective presidency, and the Yugoslav army)- a process of fragmentation that had begun as early as 1974 with Marshal Tito’s devolution reforms and had been accelerated since late 1980s. Before and during the debate between the republics over Yugoslavia’s Constitution, a high degree of control was held by the presidents of the republics over political, administrative, economic, and -increasingly- military resources. A common tactic of aspiring nationalists was first to capture control of their parties, thus pushing moderates out, and then to use well- timed referendums to validate their parties’ control over the republics. As early as 1990, republics were not sending conscripts to the Yugoslav army and instead were creating their own armed units within the police.’ pp. 104 105

See also Matjaz Klemecic, ‘The International Community and the FRY/Belligerents, 1898-1997’ in Charles Ingrao and Thomas A. Emmert (eds.), *Confronting the Yugoslav Controversies: The Schoolars’ Initiative* (Purdue University Press 2009) p.137, for further debates about the role the international community played in destruction of Yugoslavia.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid. Nakarada and Racic quote examples of the initiatives and events that have not been widely known and that were possibly interpreted in particular way in order to influence the direction in which the crisis in Yugoslavia and in particular war in Bosnia should be viewed and dealt with. Examples of such initiatives and events include suggestions by the Government of the Netherlands at the beginning of Yugoslav crisis that the internal administrative borders of Yugoslavia are changed, then the admission of Yasushi Akashi, former Special Representative of the United Nations Secretary-General to Former Yugoslavia, about the United Nations report in relation to the

Similarly Arikan argues that the criticism of European Community in respect of slow response to the conflicts in the former Yugoslavia, lack of common policy stance and lack of military capacity to act as powerful actor is not groundless because the European Community was not unanimous when it came to the recognition of the individual states after they seceded from Yugoslavia.<sup>131</sup> It could be argued that another reason for the slow reaction of the European Community might be the view that the secession of Slovenia, which had homogenous ethnic territory within nation state, would not destabilize Yugoslavia too much.<sup>132</sup> In Glenny's words:

Slovenia could act as a catalyst but could never generate massive instability in the Balkans. In June 1991 only the Serbs and Croats were

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controversial incident in the Sarajevo Markale marketplace which was the excuse for the bombing of the Bosnian Serbs by NATO, The Times and The Guardian reports about the mass graves in Srebrenica and others, p.21.

In addition these authors note that at the beginning of the Yugoslav conflict, during the secession of Slovenia and Croatia, the United Nations did not play a prominent role but later on assumed intensive activity imposing the arms embargo, approving the peace missions and organizing humanitarian relief operations. An example is lack of United Nations protests over violation of the territorial integrity of sovereign Yugoslavia and then subsequent defense of the sovereignty of the newly created states in its territory. Nakarada and Racic are critical of the United Nations' change of tone and action that came after the change in the position of the United States in relation to the war in Bosnia. In the light of this the authors point out at the double standards by the United Nations in treating the violation of United Nations Resolution 757 of May 1992, then at unequal treatment of the warring factions after rejections of different peace plans, thus helping the assumption that only one side [the Serbs] is guilty for the war (p.27).

For detailed account on the alignment of the United States Government with the Muslim Government of Alija Izetbegovic in Bosnia and Herzegovina and the Croatian Government see also David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) pp.112-129

The author argues 'that the primary motivation of the United States policy in Bosnia were considerations of geostrategic policy. A second motive was economic interest in Europe...and intervention in Bosnia would serve to protect America's overseas markets and advance the United States interests.' p. 114

Gibbs criticizes bias in reporting by the Western media, especially CNN, about the atrocities carried out by the Muslim and Croat forces and draws attention at numerous points that received little or no attention in the Western interpretation of the events, particularly in Bosnia and Herzegovina. Some of these relate to the public relations campaigns resulting in distorted and false presentation of the events in the war like 'Machiavellian practices on the part of the Izetbegovic's Government to use civilian suffering strategically' (p.126) and numerous other reports by the United Nations Protection Force and even the European Community negotiator, David Owen, relating to firing and shelling of the Moslem forces at their own people or provoking the Serbs' attacks by choosing to shoot from questionable locations, pp.122-127.

<sup>131</sup> Harun Arikan, 'The European Union Policy towards the Balkan States in the Post-Cold War Era' (2014) SDU Faculty of Arts and Science Journal of Social Sciences Special Issue on Balkans (15 – 22) p.16

<sup>132</sup> Misha Glenny, *The Fall of Yugoslavia* (Penguin Books 1<sup>st</sup> ed.1992, 2<sup>nd</sup> ed. 1993, 3<sup>rd</sup> ed. 1996) p.97

capable of that, and following the Declaration of Independence by the Croatian Sabor [Parliament], it was exactly what they were about to do.<sup>133</sup>

For some authors like Gibbs economic difficulties in the former Yugoslavia in the 1990s were the root causes of the political problems and the Yugoslav prime minister at that time, Ante Markovic, achieved some initial success with his programme of radical economic restructuring, which sought a full break-up with socialist economy. The reforms were not very popular but ‘the population was not only encouraged by the prime minister’s sense of drive and purpose but also impressed by his positive relationship with the United States ambassador and other Western interests, since this introduced the possibility of external financial support and debt relief.’<sup>134</sup> It is often assumed that this was the last real chance to save Yugoslavia and prevent wars.<sup>135</sup> In Gibbs’s view it is clear that the United States and the IMF could have done more to postpone payment of part of Yugoslav debt and provide a significant aid because this would help preserve federal arrangement in the country.<sup>136</sup> For authors like Woodward the reasons for encouraging the emphasis on statehood find in liberalising and market objectives of the government economic reform and focusing on changes in governmental jurisdictions, revenues and budgets, property rights and the content of citizenship.<sup>137</sup> Woodward argues that ‘[b]y March 1991 Western powers began to intervene directly, but not as neutral mediators or with the procedures so patently

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<sup>133</sup> Ibid.

<sup>134</sup> David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) p.72

<sup>135</sup> Ibid.

<sup>136</sup> Ibid. ‘A majority of Yugoslavs still favored preserving the country in some form, 57 percent favored a federal or confederal system of government, while only 19 percent favored secession or nationalist dissolution.’ P.72 Gibbs considers the proposals that came from Slovenia and Croatia to restructure the former Yugoslavia into a confederation, modeled after the European Community, a well-designed fraud because, according to him, they would exist as independent states and be free to leave the confederation if they wanted. p.73

<sup>137</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.144

needed'.<sup>138</sup> To further illustrate this point it is necessary to mention that the significant offer of \$4.5 billion in aid as well as additional financial assistance from international financial institutions, such as International Monetary Fund was made by the European Community Mission on 30 and 31 June 1991 to try to resolve the Yugoslav crisis and keep the country within its existing borders.<sup>139</sup> Gligorov who was the President of Macedonia at the time of the Yugoslav crisis explains that in order to avert the war in the former Yugoslavia, European Community offered \$ 4.5 billion and an associate membership in the European Community by political decision for Yugoslavia which would be arranged as confederation and continue with the necessary reforms started by the Prime Minister Ante Markovic. According to Gligorov this offer was not accepted by the Presidents of Serbia and Croatia, Slobodan Milosevic and Franjo Tudjman. Gligorov argues that Milosevic refused it because he argued for a strong and modern federative arrangement for Yugoslavia with Belgrade as its central stronghold, while Croatian President, Franjo Tudjman 'felt he had a historic mission to renew Croatian kingdom and was not interested in anything else'.<sup>140</sup> It could be argued that the reason the Croatian President rejected an offer was because of German reassurances that 'the recognition of independence was only a matter of choosing the right moment and the right circumstances'.<sup>141</sup> Bosnian President, Alija Izetbegovic who was perhaps more conscious of a complex and precarious reality of multi-ethnic Bosnia and Herzegovina was willing to come to some arrangement and avoid the war as well as Gligorov who argued that the new arrangement could be made by building on the common achievements of the

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<sup>138</sup> Ibid. p. 145

<sup>139</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.241

<sup>140</sup> Interview with the former member of the Presidency of the Socialist federative Republic of Yugoslavia and the long term President of Former Yugoslav Republic of Macedonia, Kiro Gligorov, at the fifteenth anniversary of the dissolution of Yugoslavia, HRT1, 17 January 2007

<sup>141</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.253

Yugoslav peoples.<sup>142</sup> It could be argued that the offer of economic help came too late because by mid-1991 the nationalist tensions and secessionist movements were already irreversible and because different diplomats were visiting Yugoslavia with different pronouncements, some of which were ambiguous or could not be enforced.<sup>143</sup> Woodward argues that this intervention by the international community turned into irreversible escalation of nationalism and war and illustrates it as follows:

By abandoning Yugoslav federal government, which depended on international support for its economic and political reforms; prejudicing the army as nationalist and its actions to restore order in the republics as illegitimate intervention; and ignoring the many citizens' groups working to foster countrywide cooperation, the West deprived Yugoslav citizens of the last of protections for their individual rights and the last alternatives to nationalist or treasonous loyalties within their republics of residence.<sup>144</sup>

### **2.3 Recognition of Slovenia and Croatia**

It is often regarded that Germany's recognition of Slovenia and Croatia were premature and that it was a contributing factor in deepening the Yugoslav crisis and dissent into war. Some authors like Gibbs view German influence in South East Europe and support for separatism as part of their anticommunism motivation and re-establishing of German dominance in South East Europe, and argue that Germany was taking specific measures to effect Yugoslavia's dissolution.<sup>145</sup> '...[I]ntervention in the Yugoslavia conflict was a way of announcing to the world and to Europe that Germany had truly arrived as regional

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid. p. 241-242

<sup>144</sup> Ibid. p.198 See also Hearing by the House International Relations Committee, Chaired by Representative Benjamin A. Gilman, Witness: James Baker, Former Secretary of State, January 12, 1995, Federal News Service Transcript ( Lexis/Nexis) where James Baker expresses his regret for supporting the secession of Slovenia and Croatia in 1991.

<sup>145</sup> Ibid. p.79

power, one willing and able to act unilaterally in certain circumstances'.<sup>146</sup>

German intervention relates to providing intelligence support for Croatia while it was still part of Yugoslavia, to illegal supply of arms, but it also contained an element of miscalculation as it has underestimated the consequences that kind of intervention might have.<sup>147</sup> To further illustrate this point Trbovich notes Austria and Vatican openly lobbying for the independence of predominantly Roman Catholic republics<sup>148</sup> and Austrian vice-chancellor, Erhard Busek, saying that 'the collapse of communism in the USSR modifies the situation in Yugoslavia [in that] there is no more reason not to recognize the independence of Slovenia and Croatia'.<sup>149</sup> Woodward agrees with the views that German recognition of Slovenia and Croatia was a premature act<sup>150</sup> and explains it as follows:

The European position was, in fact, inconsistent. Alongside the insistence on Helsinki norms for the sake on Yugoslav stability in general, it seemed to prefer the democratic principle under the influence of German reasoning that the referendums in Slovenia and Croatia had been the legitimatising acts of self-determination – in the same manner as German reunification in 1989 – 1990...

By revoking their solution at Versailles, but without a consistent, principled rationale for the borders of the new states, the European powers

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<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.245

<sup>149</sup> Calendrier de la crise Yougoslave, p.15 E.C. document cited in Trbovich, *A Legal Geography*, p.245 and Woodward, *Balkan Tragedy*, p.178 See also Graham N. Green, 'No Fire in a Vacuum, Distraction, Disinterest, Distortion and Disunity in Formulating Western Policy towards the Former Yugoslavia' in Maya Shatzmiller (ed.), *Islam and Bosnia: Conflict Resolution and Foreign Policy in Multi-Ethnic States* (McGill-Queen's University Press Montreal & Kingston London Ithaca 2012) pp.161-176 for the account of the international intervention in the former Yugoslavia See also 'the statement by the German Foreign Minister responsible for the German policy towards former Yugoslavia from 1991 to 1995 which demonstrates bias of the German Government towards the Serb as they decided at the beginning of the war that the Serbs are the main culprit', cited in Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.247

<sup>150</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.214

For detailed account of recognition in international law see also Sir Hersch Lauterpacht, Recognition in *International Law* (Cambridge University Press 1<sup>st</sup> ed. 1947, 2<sup>nd</sup> ed.2013), Chapter II, The legal nature of recognition and the practice of state, pp.7-26

opened three specific problems at once: ‘ the Serbian question’, ‘the Albanian question’ and Bosnia Herzegovina.<sup>151</sup>

Woodward’s analysis centres on German aspirations to build a new role for themselves within Europe and regardless of the consequences recognition of Croatia would have for Yugoslavia, prove their new form of statecraft.<sup>152</sup>

Approaching the problem within a wider context of the transitioning taking place throughout Europe the author argues that not only Germany but the other West European countries lacked strategy for dealing with the consequences of their individual expansionary policy eastward.<sup>153</sup> Woodward’s explanation for this is the following:

They had no reason to see why their policies of operating out of national interest and adapting rules expediently to new circumstances as they arose would not continue to have the beneficial outcomes of increasing integration, decreasing aggression, and democratic liberation in the region. Able to defend their security through economic protection and border controls, there was no incentive to see this as contributing to the decline in security in the continent.<sup>154</sup>

It could be argued that the European Community not only did not speak with one voice as far as Yugoslav crisis is concerned, but also lacked the knowledge about the country and its geography and history and did not have necessary instruments to react to the crisis.<sup>155</sup> In Busek’s words:

Nobody was really aware that it (destruction) might happen or I think that the Americans were convinced that the Europeans would take care that the

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<sup>151</sup> Ibid.

<sup>152</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.186

<sup>153</sup> Ibid. p.187

<sup>154</sup> Ibid.

<sup>155</sup> Erhard Busek, ‘Keynote Speech’ in ‘ The Stability Pact for South East Europe – Dawn of Era of Regional Cooperation’, November 2002, Busek’s Speech was in 2002 when the name of the European Community has already been changed into European Union.

provinces would stick together... The European Union is learning from this because by each of the crisis the Union is fully aware that we are missing something for which we have no instrument. During the Bosnian war, the common Foreign and Security policy was created... because the European Union learned that they had to speak with one voice and there must be somebody in charge. This is very important and the process is not finished.<sup>156</sup>

Busek is critical about the approach that the European Community had towards the former Yugoslav crisis because of lack of knowledge about the region, because of disbelief that the crisis was possible and fragmented action and argues that what was positive in dealing with the crisis was that European Community developed tools necessary to address the future crises.<sup>157</sup>

The apparent problem with this approach by the western European countries, and particularly Germany in recognizing the independence of Slovenia and Croatia, is that the Peace Conference was based on the assumption that the issue at stake was the dissolution of Yugoslavia and that common framework would be created for them to come to mutual agreement.<sup>158</sup> Woodward's analysis of the precedent set by this German manoeuvre concludes that the principle of self-determination could legitimately break up multinational states, that European Community application of this principle was arbitrary, and that the surest way for politicians bent on independence to succeed was to instigate a defensive war and win international sympathy and then recognition.<sup>159</sup> Parallel to this Woodward argues that 'the German argument for recognizing Croatian sovereignty was to circumvent the problems in relation to deployment of peace-keeping troops

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<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid. 189



between armed parties in Croatia, and later in Bosnia and Herzegovina amidst the western powers disagreement in relation to financing and consent on the ground.<sup>160</sup>

Klemencic's analysis of the role of the international community towards the Yugoslav crisis consider different interpretation of the German Government recognition of Slovenia and Croatia. Klemencic's interpretation focuses on the German Government threat of recognition as a method of putting pressure on the Serbs in Croatian Krajina and the Yugoslav Peoples Army to end the military fighting.<sup>161</sup>

While the majority of authors argue that despite the fact that Germany initially supported the territorial integrity of Yugoslavia, the German recognition of Slovenia and Croatia was premature and erroneous and that it triggered an attempt at recursive secessions of the Serbs in Srpska Krajina in Croatia, of Bosnian Croats who established the Republic of Herceg- Bosna in Bosnia and of the Republika Srpska established by the Bosnian Serbs in Bosnia, Conversi rejects as 'myth' that Germany could be solely blamed for the dissolution of Yugoslavia and attributes it to the 'particular moments of international debacle to excuse the West from its incapacity to coordinate a common policy of the war.'<sup>162</sup> Conversi argues that 'a barrage of international criticism'<sup>163</sup> of German recognition of

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<sup>160</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.199

<sup>161</sup> Matjaz Klemencic, 'The International Community and the FRY/Belligerents, 1898-1997' in Charles Ingrao and Thomas A. Emmert (eds.), *Confronting the Yugoslav Controversies: The Scholars' Initiative* (Purdue University Press 2009) p.156  
The author quotes the German Foreign Minister's, Hans Dietrich Genscher's, demarche to the Yugoslav Ambassador in Bonn, Boris Frlec as follows: 'If the bloodshed continues and the policy of fait accompli by force supported by the Yugoslav Army is not halted immediately, the Federal Government [of Germany] must seriously examine the recognition of Slovenia and Croatia in their existing frontiers.' PP.156-157

See also Christopher Bennett, *Yugoslavia's Bloody Collapse, Causes, Course and Consequences* (Hurst and Company London 1995) p. 178

<sup>162</sup> Daniele Conversi, 'Germany and the Recognition of Slovenia and Croatia' in Brad K. Blitz (ed.), *War and Change in the Balkans: Nationalism, Conflict and Cooperation* (Cambridge University Press 2006) p.69

<sup>163</sup> Ibid. p. 57

Slovenia and Croatia had three reasons: re-emergence of anti-European trends, particularly in Britain, perverse effects of German unification and the lack of Western expertise in the Balkan security.<sup>164</sup> At the same time Conversi is critical of the German attempt to recognize Slovenia and Croatia in isolation assuming that the recognition would resolve the problems these two former Yugoslav republics had with Serbia and argues that this flaw in German foreign policy, to undermine the strategic Serbian aggression in Bosnia and Herzegovina, had tragic consequences.<sup>165</sup> Similarly, Trbovich demonstrates that the European Community's initial support for the territorial integrity of Yugoslavia despite intelligence information that a violent conflict was imminent, stems from their belief that Yugoslavia (at the time) was not part of the East Block and as it possessed the strongest ties with the West among the Eastern European countries it would be the leader in European integrative processes.<sup>166</sup> Many high-ranking European officials like Cyrus Vance, United Nations envoy to Yugoslavia, Lord Carrington, the Chairperson of the Peace Conference on Yugoslavia and the United States Deputy Secretary of State, Lawrence Eagleburger, voiced their concern that early recognition of Croatia might initiate the war in Bosnia and Herzegovina, but the German foreign minister, Hans Dietrich Genscher, justified the German intention to recognize the two republics by implying to the principle of territorial integrity.<sup>167</sup> Territorial integrity applies to non-violability of frontiers, but Genscher applied the principle with respect to internal in addition to external borders of Yugoslavia.<sup>168</sup> In his words:

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<sup>164</sup> Ibid. pp. 58-59

<sup>165</sup> Ibid. p. 69

<sup>166</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.240-241 'Yugoslavia was a member of the Organization of Nonaligned countries that gathered many Third World countries, which attempted to mitigate tensions between East and West. The late Yugoslav President Josip Broz Tito was one of the founding leaders of non-alignment movement.' p.240

<sup>167</sup> Ibid. pp. 253-254

<sup>168</sup> Ibid. p. 254

I would like to point out that according to the Treaty of Helsinki and the Paris Charter, the borders in Europe are inviolable and cannot be changed by force. Therefore the European Community has demanded that the internal and external borders of Yugoslavia be respected.<sup>169</sup>

Trbovich argues that ‘such novel legal interpretations were embodied in the opinion of the advisory body attached to the Conference on Yugoslavia which was called the Arbitration Commission, but became known as Badinter commission’.<sup>170</sup>

## 2.4 The Badinter Commission

There were European diplomats who believed that the Yugoslav crisis should be dealt with based on the principles of the international law, particularly following the doctrine of *uti possidetis juris* that is based on the respect of the existing borders. For instance Stephen Ratner suggests that ‘[T]he breakup of the former Yugoslavia, the Soviet Union and Czechoslovakia served as yet another opportunity to test the durability of *uti possidetis*’.<sup>171</sup> The Arbitration Commission, sent to bring parties to the table to negotiate came to be known as the Badinter Commission under the auspices of Joseph Badinter, President of the French Constitutional Council. It was established in August 1991 by the European Community with the mandate ‘... to draw up a constitution of the Federal Republic of Yugoslavia that would enable peaceful co-existence with the state of

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid.

Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) The commission was named by the President of the French Constitutional Council and other members of the Arbitration Commission were the president of the German Federal Constitutional Court (Roman Hercog), the president of the Italian Constitutional Court (Aldo Corsaniti), the president of the Spanish Constitutional Court (Francisco Tomas y Valiente) and the president of the Belgian Arbitration Court (Irene Petry). The Commission appointed five judges.

<sup>171</sup> Steven R. Ratner, ‘Drawing a better line: *uti possidetis* and the borders of new states’, *American Society of International Law*, Vol.90, No.4 October 1996, pp. 590 – 624  
For more on the doctrine of *uti possidetis* see Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Ashgate 2002)

the different threatening and threatened minorities.’<sup>172</sup> The Commission was thus created to generate:

... [L]egal advice on how to deal with the crisis in Yugoslavia, but as the events in Yugoslavia began to unfold these issues became difficult to separate and as a result, the Arbitration Commission found itself thrust into the role of international adjudication organ for which it had little experience.<sup>173</sup>

It is interesting to note that the composition of the Commission was itself unusual.

It consisted of famous European constitutional lawyers who were appointed because of the initial task of giving advice on constitutional matters in the former Yugoslavia, but ‘events overtook the Commission and instead the Commission found itself working on the intricacies ‘ concerning specific questions of the treatment of the territory of the former Yugoslavia problematic since these issues ‘...form an important part of the development of modern international law.’<sup>174</sup>

And have little to do with the constitutional law from which the experts drew their intellectual sustenance. Thus the Badinter Commission ended up articulating opinions on the questions of self-determination, on sovereignty of the individual Yugoslav republics, then on the issues of secession and dissolution and the significance and implication of both in the modern international law, on the status of boundaries, all of which was well beyond its original mandate.<sup>175</sup>

In seeking to describe the events that were taking place in Yugoslavia one of the most important opinions expressed by the Commission was that Yugoslavia was in dissolution and as a consequence of this that the republics had right to secede

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<sup>172</sup> Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis*, (Ashgate 2002) p. 159 See also Micheline R Ishay, *The History of Human Rights from Ancient Times to the Globalization Era* (University of California Press 2003) pp 310-311.

<sup>173</sup> *Ibid.* p. 60

<sup>174</sup> *Ibid.* p. 158

<sup>175</sup> *Ibid.* p. 163

from Yugoslavia within their existing borders and asked to be recognized.<sup>176</sup> In this Opinion the Commission stated that *uti possidetis* 'is today recognized as a general principle and that this principle applies all the more readily in former Yugoslavia.'<sup>177</sup> Both Ratner and Castellino agree that the Commission made a mistake in applying the doctrine of *uti possidetis* to dissolution of the country because 'the principles at stake with regard to the transfer of international status to international boundaries were applied strictly in the context of decolonization.'<sup>178</sup> In the following explanation Ratner highlights the misrepresentation of key judicial precedent on which the Commission relied and argues that the dissolution of Yugoslavia lacked both pillars of *uti possidetis*:

Whatever normative force *uti possidetis* has enjoyed depended on two core considerations: the universally agreed policy goal it was serving – orderly decolonization – and lack of competing norms of internal self-determination. With decolonization now historically complete (more or less) and the law now cognizant of notions of internal self-determination and political participation, the foundations of *uti possidetis* are weak, and the validity of the principle for non-colonial breakup suspects.<sup>179</sup>

By declaring Yugoslavia in dissolution the Badinter Commission gave opinion contrary to the Helsinki Treaty that enumerates inviolability of frontiers.<sup>180</sup> If the Commission had decided that it was an act of secession and separatism, under international law, the situation would have had to be handled differently although Radan argues that 'the right of self-determination of peoples is legal right in international law, and that on its proper interpretation makes secession legal in

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<sup>176</sup> Conference on Yugoslavia, Arbitration Commission Opinion No.3, Jan 11, 1992, 31 ILM 1500 (citing Frontier Dispute, 1986 ICJ Rep., at 565)

<sup>177</sup> Steven R. Ratner, 'Drawing a better line: *uti possidetis* and the borders of new states', American Society of International Law, Vol.90, No.4 October 1996, p. 613

<sup>178</sup> Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis*, (Ashgate 2002) p. 187,

See also Steven R. Ratner, 'Drawing a better line: *uti possidetis* and the borders of new states', American Society of International Law, Vol.90, No.4 October 1996, p. 613 - 614

<sup>179</sup> Steven R. Ratner, 'Drawing a better line: *uti possidetis* and the borders of new states', American Society of International Law, Vol.90, No.4 October 1996, p. 613 - 614

<sup>180</sup> Conference on Security and Cooperation in Europe, Final At, Helsinki 1 August 1995

international law in certain situations.’<sup>181</sup> Trbovich argues that Yugoslav Constitutional Court explicitly declared that Yugoslavia was challenged by secession but the Badinter Commission made no reference to this or any other opinion by the Yugoslav Constitutional Court.<sup>182</sup> In Trbovich’s words:

By expressly circumventing an analysis that would inevitably lead to the same conclusion as deduced by the Yugoslav Constitutional Court, the Badinter Commission provided the European Commission with a justification that would not appear to be sanctioning secession.<sup>183</sup>

Trbovich argues that although validity of Badinter Commission’s reasoning could be challenged it gave justification to the European Community’s political recognition of the former Yugoslav republics.<sup>184</sup> It is apparent from Trbovich’s analysis that the Badinter Commission was inconsistent in its opinions, in particular in Opinion No.11 when it postulate that the dissolution of Yugoslavia had begun on 29 November 1991 which is after the three republics have seceded and became new states.<sup>185</sup> It appears that the Badinter Commission used selectively the paragraphs of Yugoslav Constitution to justify its opinions and misapplied the principle of *uti possidetis* in the international recognition of the Yugoslav republics because it was not a question of the exact location of the borderlines, as in the cases of decolonization, but whether these lines should be future international boundaries.<sup>186</sup> In addition Badinter Commission transferred the right from a people to a territory by defining the people as ethnic rather than civic category and interpreted the provision in the Yugoslav Constitution in relation to

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<sup>181</sup> Peter Radan *The Breakup of Yugoslavia and International Law* (Routledge, London New York 2002) p. 6

<sup>182</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia’s Disintegration* (Oxford University Press 2008) p.258

<sup>183</sup> *Ibid.* p. 259

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.* p. 263

<sup>186</sup> *Ibid.*

self-determination to apply to the republics as opposed to the constituent peoples thus completely ignoring the preamble to the Constitution.<sup>187</sup>

Radan concurs with Trbovich that the basis for the recognition of the post-secession international borders involved some innovative applications of the international principles of self-determination of peoples and *uti possidetis*.<sup>188</sup>

It is important to point out that there are not many in depth analyses of the approach that the Soviet Union and Non-aligned Movement demonstrated in relation to the Yugoslav crisis and subsequent destruction of the country. As mentioned earlier the context within which the Yugoslav crisis developed was the period of the dissolution of the Soviet Union which experienced independence movements and declarations of independents by some of its Soviet Republics.<sup>189</sup> The position of the Soviet Union was that the territorial integrity of Yugoslavia should be preserved at all costs<sup>190</sup> and in 1991 the Soviet Foreign Minister, Alexander Bessmertnych stated that ‘the stability of Yugoslavia was a precondition for the stability in Europe’.<sup>191</sup>

In addition Klemencic argues that as far as the Nonaligned Movement is concerned a split appeared among the member states because on the one hand, a

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<sup>187</sup> Ibid.

For detailed discussion about the different schools of thought in relation to the Badinter Commission’s interpretation of the principle of *uti possidetis* and its application see pp. 251-291 See also Ane Peters, ‘The principle of *Uti Possidetis Juris*, How relevant is it for the issue of secession?’ in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds.), *Self-Determination and Secession in International Law* (Oxford University Press 2014) pp. 95-137 The author ‘sought to demonstrate that *uti possidetis* is, as a matter of positive law and practice, applicable to non-colonial secessions. This extended scope is reconcilable with other relevant international principles, and defensible as legal policy.’ p.136

<sup>188</sup> See Peter Radan, *The Breakup of Yugoslavia and International Law* (Routledge 2004) for a critical analysis of the break up of Yugoslavia from international law perspective and analysis of the development of the Yugoslav internal borders.

<sup>189</sup> Matjaz Klemencic, ‘The International Community and the FRY/Belligerents, 1898-1997’ in Charles Ingrao and Thomas A. Emmert (eds.), *Confronting the Yugoslav Controversies: The Scholars’ Initiative* (Purdue University Press 2009) p.157

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

number of them supported the unity of Yugoslavia, particularly as it was one of the Movement's founding members, and on the other hand, some Muslim countries were most concerned about supporting Yugoslavia's Muslim population.<sup>192</sup> It could be argued that this split would later be exploited by the United States Government in choosing to align with the Muslim Government of Alija Izetbegovic in Sarajevo in order to further the American interests in the Middle East.<sup>193</sup> It is apparent from Gibbs's analysis that the United States policy in Bosnia was motivated by considerations of geostrategic primacy and economic interests.<sup>194</sup> In Gibbs's words:

...[I]ntervention in Bosnia would serve to protect America's overseas markets and advance the United States interests; if the United States failed to intervene, however, these interests would be harmed.<sup>195</sup>

It is against this specific backdrop that attempts to gain a pacific settlement of the crisis needs to be viewed and the following section will seek to track the most significant attempts.

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<sup>192</sup> Ibid.

<sup>193</sup> David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) pp. 114-119

The author gives a detailed account of the American support for Bosnian independence and in effect start of the American management of the Bosnian crisis and also of the Bosnian Muslim leader, Alija Izetbegovic, 'associated with Islamic political tendencies, often with the extremist bent. There is little in his background to suggest a commitment to pacifism, multiculturalism, or democracy' p.106-119

<sup>194</sup> Ibid. p. 113

<sup>195</sup> Ibid. p. 114

The author quotes Senator Richard Lugar who noted that if the United States failed to intervene in Bosnia it could cause 'a loss of jobs and loss of income in his country'. p. 114

The author also argues that it was the United States that would 'play a decisive role in blocking measures that might have allowed Bosnia to achieve independence without the war.' p. 108

See also Michael Ignatieff, *Empire Light, Nation Building in Bosnia, Kosovo and Afghanistan* (Vintage 2003), p. 96 'Every American in Sarajevo knew that his government could have stopped the Bosnian war...so every smart local would exploit international guilt, while every smart international will blame the locals'.



## 2. 5 The Peace Conference for former Yugoslavia

On August 27, 1991 the European Community set up a Peace Conference for the former Yugoslavia<sup>196</sup> in order to arrive at a negotiated solution for ending the war even if it involved the dissolution of the country. This Conference was established as impartial forum for negotiations. It was resolved not to recognize the changes of any borders which have not been brought about by peaceful means and by agreement and at the beginning the Conference aimed ‘ at a constitutional reconstruction of the Yugoslav Federation into confederative alliance of states’.<sup>197</sup> As mentioned earlier the European Community offer to rearrange the constitutional arrangement of Yugoslavia could be viewed as the last attempt to stop the wars.

As a result of dissolution of Yugoslavia and Slovenian and Croatian independence Bosnia and Herzegovina was forced to confront the question of independence.<sup>198</sup> It is submitted that the first multi-party election results in Bosnia and Herzegovina in 1991 reflected the ethnic composition of the country with 43.7 percent Muslims, 31.2 percent Serbs, 17.3 percent Croats and 5.5 percent Yugoslavs. Calic argues that although the three leading parties, the Muslim dominated party of Democratic Action, the Croat dominated Croatian Democratic Union and the Serb dominated Serbian Democratic Party formed a coalition power sharing

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<sup>196</sup> European Community Declaration on Yugoslavia 27 August 1991

The International Conference on the former Yugoslavia was convened in London. It was chaired by the former British foreign secretary Lord Carrington. The Conference was later transferred to Geneva where it was acting as an umbrella for the international mediation on the Yugoslav conflict until 1994 when the lead was taken by the so-called Contact Group (representatives from France, Germany, Russia, the United Kingdom and the United States). See Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.294

<sup>197</sup> Aleksandar Pavkovic, *The Fragmentation of Yugoslavia, Nationalism and Wars in Balkans* (Palgrave Macmillan 1<sup>st</sup> ed.1997, 2<sup>nd</sup> edition 2000) p.148

<sup>198</sup> Marie Janine- Calic, ‘ Ethnic Cleansing and War Crimes’ in Charles Ingrao and Thomas A. Emmert (eds.), *Confronting the Yugoslav Controversies: The Scholars' Initiative* (Purdue University Press 2009) p. 122

government they became deadlocked over the future constitutional structure of Bosnia and Herzegovina and its political status.<sup>199</sup> It will become apparent from the analysis of the intransigencies and deficiencies of the Dayton Peace Agreement that the deadlock in relation to the constitutional and political arrangements will be the same after the war. The reason for this is that more than twenty five years after the war the three main nationalist parties still have in mind entirely different aims despite official pronouncements about support for the present constitutional arrangement. In Calic's words:

The Serb and Croat leadership, having in mind the unification of their nationals with their mother countries, supported plans for the 'cantonization' of the Republic of Bosnia and Herzegovina into three or more ethnically defined regions, each of which would be dominated by either the Bosniaks, Serbs or Croats. The Bosniaks leadership, on the other hand, sought to preserve Bosnia-Herzegovina as a unified, multi-ethnic, and unitary state. The Bosniaks population was scattered across nearly whole Bosnia, with a large proportions scattered in towns. The Serbs and Croats were more compactly settled in certain areas of Bosnia. It would have been difficult for the Bosniaks to have carved out an ethnically defined federal state, which was being proposed by the Serb and the Croat leadership.<sup>200</sup>

It is against this backdrop of 'irreconcilable views and complementary contingency plans among the political leaders about the future constitutional order of the country that the tensions increased in Bosnia and Herzegovina'<sup>201</sup> and the European Community requested that the referendum on the independence of Bosnia and Herzegovina be held.

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<sup>199</sup> Ibid.

<sup>200</sup> Ibid. See also pp.122-127 for a detailed analysis of the early phase of the war in Bosnia and Herzegovina

The Bosniaks population here is the term used for the Muslim population of Bosnia and Herzegovina and other peoples that supported the idea of a unitary Bosnia and Herzegovina or decided to stay in the territory controlled by the Government in Sarajevo for different reasons.

<sup>201</sup> Ibid. p. 124

The referendum was boycotted by the Bosnian Serbs and the sixty six percent of the rest of the population voted with ninety nine percent in favour of referendum. It could be argued that the recognition of Bosnia and Herzegovina by the European Community on the 6 April 1992 and the United States the next day only deepened the crisis and tensions in Bosnia and Herzegovina because the same day intensive fighting started in Sarajevo and throughout Bosnia and Herzegovina and the unspeakable cruelty and atrocities continued to be carried out by all three warring factions for more than three years. In the fighting that followed ethnic structure of Bosnia and Herzegovina was changed in only a few months, seventy percent of expulsions had occurred between April and August 1992,<sup>202</sup> war crimes, crimes against humanity, grave violations of international humanitarian law, the destruction of cultural heritage were systematic ‘policies aimed at the purification of the territories by physically removing unwanted population from a territory and at the same time eliminating all cultural and social traces of their existence. This was done by targeting groups based on their ethnicity, religion and nationality’<sup>203</sup>.

Gibbs argue that ‘the United States despite the alleged unwillingness to take action in the Balkans...played a crucial role in the diplomacy of Bosnia’s independence from the beginning of the conflict and ...helped spread and intensify the disorder that begun in 1991.’<sup>204</sup> It is clear from his analysis that the

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<sup>202</sup> Ibid. p. 126

<sup>203</sup> Ibid. p. 144

See also United Nations Security Council Resolution 771 (13 August 1992) about the forcible mass expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centers, deliberate attacks on noncombatants and wanton destruction of property, cited in Celic, ‘Ethnic Cleansing’, p.126

See also United Nation Secretary General Interim Report of the Commission of Experts (S/25274) 9 March 1993 about ‘al kind of atrocities, including killings, sexual assaults, and rapes committed in order to implement the policy of ethnic cleansing’, cited in Celic, ‘Ethnic Cleansing’p.126

<sup>204</sup> David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) p.107

reasons for this conclusions are the alignment of the United States Government with the Bosnian President Alija Izetbegovic's policy of having unitary Bosnia and Herzegovina, the motivation for this United States policy to employ the new strategy of predominance, of which Bosnia and Herzegovina would be the first major test case and the undermining of the peace negotiations conducted by the European Union.<sup>205</sup>

It is within this context that the European Community tried to avert the political crisis in Bosnia and Herzegovina from sliding into ugly partition war.

## **2.6 Carrington Cutileiro Plan**

The Chair of the Peace Conference, Lord Carrington, drafting a plan with the Portuguese ambassador Jorge Cutileiro in which they propose a weak central government for Bosnia and Herzegovina with most administrative powers devolved to a district level. According to this Carrington Plan<sup>206</sup> Bosnia and Herzegovina districts would be classified as Muslim, Croatian or Serbian, even where no ethnic group was majority.<sup>207</sup> This set of principles was seen as by secularists and human rights' groups as increasing ethnic polarisation in Bosnia's already fragile environment. It also presupposed that such delineation would mean that there could be no significant minorities left stranded in somebody else's territory thus increasing the risk of ethnic polarisation. Nationalists, on the other hand, thought that this plan did not go far enough in ethnic polarisation.<sup>208</sup> As a result all sides rejected the Carrington-Cutileiro Plan after it had been previously agreed and signed by all three party delegations. In his interview for Novosti

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<sup>205</sup> Ibid. pp. 106 - 114

<sup>206</sup> Carrington - Cutileiro Plan is also known as Cutileiro Plan or Lisbon Treaty, 'Statement of Principles of March 18,1992 for New Constitutional Arrangements in Bosnia and Herzegovina,' reproduced in Bertrand B. Ramcharan (ed.), The international Conference on the former Yugoslavia: Official Papers (Kluwer Law International 1997) pp.24-28

<sup>207</sup> Radha Kumar and David Pacheco, Bosnia's Failed Peace Plans, Partition Conflicts and Peace Processes (2007)

<sup>208</sup> Ibid.

Cutileiro argues that his plan for Bosnia and Herzegovina had been almost identical to the division agreed at Dayton Ohio and had the Bosnian Muslims representatives not withdrawn their signature from that Plan many lives would have been saved since the war intensified after that.<sup>209</sup> Stoltenberg also argues that the Peace deal he proposed and that was rejected the Bosnian Muslim's delegation was a better deal than the Dayton Peace Agreement because the Peace Agreement from 1993 suggested three units within Bosnia and Herzegovina instead of two and a half as a result of the Dayton Peace Agreement,<sup>210</sup> because the Owen-Stoltenberg agreement suggested three units as well as all the negotiators were aware that the alliance between the Muslims and the Croats would not work. At the same time when European Community's efforts were aimed at 'gaining the commitment of the three party leaderships to existing Bosnian borders, without making any commitment to Bosnian sovereignty at the time'<sup>211</sup> the United States 'found the disunity among the European countries disturbing'<sup>212</sup> and 'recognition of Bosnia became their cause'.<sup>213</sup> 'A week after signing the Lisbon Treaty Muslim Leader, Alija Izetbegovic, reversed his position after his foreign minister Haris Silajdzic had consultation with the American diplomats, and was joined by the Bosnia's Croatian representative, Mate Boban, who also reneged<sup>214</sup> and after the Americans put pressure on the European countries Bosnia and Herzegovina was recognized as a sovereign state on 6th April 1992.<sup>215</sup>

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<sup>209</sup> Jose Cutileiro, War could have been avoided, Interview, Darile/Novosti/RS

<sup>210</sup> Thorvald Stoltenberg Imali smo bolji sporazum od Detonskog [We had a better deal than Dayton [Author's translation] - available at <https://balkaninsight.com/2013/02/22/karadzic-calls-former-peace-mediator/>

<sup>211</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.196

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> See also Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.315 '...[this] peace plan resembles all the subsequent peace proposals in that it accepts the partition of Bosnia to be the only means to end the violence. The core of the negotiations constantly involved the maps. The constitutional framework was not unimportant, but it was certainly secondary.'

In Glenny's view 'no international mediators have come closer to resolving the Balkan riddle than Lord Carrington did with his document.'<sup>216</sup> Parallel to this Cohen agrees that the reason for reneging on the Carrington Cutileiro Plan was the influence of the United States Government on the Government of Alija Izetbegovic.<sup>217</sup> It is apparent that the Lisbon agreement was not perfect but it presumed a compromise among all three ethnic groups. These compromises would include reduction in the territory for the Serbs, Croat side would control far less territory than the other two sides, and the Muslims viewed confederative arrangement offered in Lisbon agreement negatively as they supported the idea of a unitary Bosnia and Herzegovina.<sup>218</sup> As a result of American intervention and the rivalry between the United States Government and the European Community this peace plan was never implemented and Bosnia and Herzegovina was set for a protracted war.

The significance of Carrington-Cutileiro plan is that it was the only plan that the three parties to the conflict drew up and even briefly accepted.<sup>219</sup> According to Trbovich relevance of the Lisbon Treaty is also in acceptance of the partition of Bosnia and Herzegovina and establishing a manner of negotiation that favoured the maps and the territory at the expense of the agreeing on the constitutional framework, all of which will be replicated in subsequent peace negotiations and plans.<sup>220</sup>

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<sup>216</sup> Micha Glenny, 'Yugoslavia: The Great Fall', *The New York Review of Books*, Vol.42, No. 5 March 1995, p.60

<sup>217</sup> Lenard J. Cohen, *Broken Bonds; Yugoslavia's Disintegration and Balkan Politics in Transition* (Westview Press 1995) p. 243 The author offers an account of the destruction of Yugoslavia and emphasizes the role of the outside intervention in that process

<sup>218</sup> David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) p.109

<sup>219</sup> Robert M. Hayden, *Blueprints for a House Divided; The Constitutional Logic of the Yugoslav Conflict* (Ann Arbor: The University of Michigan Press 2000) p.100

<sup>220</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.315

By the middle of 1992 the Serbs had consolidated their positions in the former Yugoslavia and the international community settled into policy of easing the plight of the Muslims in Bosnia while seeking to eliminate any option of going to war on their behalf.<sup>221</sup> At the same time Fetherstone pointed out at the growing tensions and lack of cooperation between the European Community's peace-making efforts under Lord Carrington and the UN led peacekeeping mission in Croatia at the time.<sup>222</sup> Woodward explains the reasons for 'the United States re-entry into the Yugoslav debacle'<sup>223</sup> as 'a part of the balance of power dynamic in Europe'<sup>224</sup>. It is important to note that with the recognition of Bosnia and reasserting its influence over the Yugoslav crisis the United States foreign policy objective was to prevent differences between itself and its European allies from causing rift, to adhere to its interpretation of the conflict in Bosnia as Serbian aggression and to take on Bosnia as its responsibility, thus conceding a primary sphere of influence over Croatia to Germany.<sup>225</sup>

## 2.7 Vance – Owen Plan

In 1992 the International Conference for former Yugoslavia was established in Geneva and the new negotiators, Cyrus Vance and Lord Owen, took over from

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<sup>221</sup> David Anderson, 'The Collapse of Yugoslavia: Background and Summary', Research Paper No. 14 1995 – 96, Parliamentary Research Service, Australian Department of Parliamentary Library 1995, p. 13, For Washington Agreement

See also Zijad, 'Pax Americana, Republika Bosna I Hercegovina, I medjurodna Diplomaija od Wasingtonskog do Dejtonskog Sporazuma' (18.3.1994-21.11.1995) DOI 10.5644/P12016.166.01.,p.35

<sup>222</sup> A.B. Fetherstone, *Towards a Theory of UN Peacekeeping* (Palgrave MacMillan 1994) pp. 80 - 81

<sup>223</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.197

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

See also Radmila Nakarada and Obrad Racic, *Raspad Jugoslavije-Izazov evropskoj bezbednosti (Projekat Evropska kolektivna bezbednost nakon Mاستrihta)* (Mrljes 1998), Radmila Nakarada and Obrad Racic, *The Destruction of Yugoslavia – The Challenges for the European security* ( Project: European Collective Security after Mاستriht) ( Mrljes 1998) [Author's translation] p.25

Lord Carrington. In 1993 they presented a new plan to end the war in Bosnia that became known as Vance -Owen Plan.<sup>226</sup> This was a ten-point plan and was intended to be an interim solution based on a reworked Carrington-Cutileiro plan, and like its predecessor, it sought to forestall partition by scattering the provinces so that Bosnia and Herzegovina could not be divided into three ethnic territories.<sup>227</sup> In comparison to any future peace initiatives this Plan was much more favourable to the Bosnian Muslims fighting for a unitary state as it avoided the division of the country into three ethnic parts and it forced the Serbs to hand back a large part of the territory they acquired militarily. In April 1993 the Bosnian Government accepted it, but the Serbs rejected it as it failed to secure the northern corridor crucial for linking of their dispersed territories.<sup>228</sup> Lord Owen argued that the Bosnian Serbs rejected the Peace Plan because the Serbian Leader, Slobodan Milosevic 'refused to flex his political muscle'.<sup>229</sup> Some authors, like Zumach argue that Vance-Owen Plan had little to do with the peace and all to do with carving up the territory of Bosnia and Herzegovina thus legitimising the results of ethnic cleansing by introducing the category of ethnic cultural categories as the criteria for drawing of borders and the distribution of political, administrative and military power.<sup>230</sup> Trbovich argues that the subsequent peace plans to stop the Bosnian war built on the Vance-Owen Plan in that they were

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<sup>226</sup> 'Proposed Constitutional Structure for Bosnia and Herzegovina (Vance-Owen Peace Plan), International Conference on the Former Yugoslavia, document STC/2/2, 27 October 1992

<sup>227</sup> Radha Kumar and David Pacheco, 'Bosnia's Failed Peace Plans, Partition Conflicts and Peace Processes' (2007),

For detailed explanation of Vance-Owen Plan see Lenard J. Choen, *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition*, (Westview Press 2<sup>nd</sup> revised ed. 20 June 1995)

<sup>228</sup> Micha Glenny, *The Fall of Yugoslavia*, (Penguin Books, 3<sup>rd</sup> ed. 1996) (1<sup>st</sup> ed. 1992) pp. 229 - 230

<sup>229</sup> Testimony of Lord Owen at the trial of Slobodan Milosevic at the International Criminal Tribunal for Former Yugoslavia, ICTY Milosevic, Slobodan Case No. IT-02-54

<sup>230</sup> Andreas Zumach, 'The Scandal Geneva', Bosnia Report (Bosnian Institute July – September 2000, No.4 February – March 1994) available at [www.bosnia.org.uk/bosrep/report\\_format.cfm?articleid=1781&reportid=103](http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=1781&reportid=103) , accessed on 25 September 2016

See also David Owen, *Balkan Odyssey (London: Indigo 1995)* for detailed explanation of the reasons why the Bosnian Muslims rejected the Peace plan and critical approach toward the United States lack of support for the peace negotiation. pp. 106 - 111



based on the division of the territory of Bosnia and Herzegovina but produced separate and contiguous ethnic areas thus changing the spirit of the Vance-Owen Plan.

## 2.8 Owen – Stoltenberg Plan

The international community's efforts to end the bloodshed in Yugoslavia continued in 1993 with the new proposal to divide Bosnia into loose union of three ethnic republics that the Bosnian Government was reluctant to accept.<sup>231</sup> According to Freedman the core problem was 'how to persuade the Serbs to relinquish sufficient territory for the Bosnian Government to concoct a viable state with honour saved.'<sup>232</sup> This was the proposal put forward by the President of Serbia, Slobodan Milosevic, and the President of Croatia, Franjo Tudjman, but it is known as Owen – Stoltenberg Plan.<sup>233</sup> The Plan is also known as the Invincible package, after the British battleship on which the revised version of Vance-Owen Plan was discussed (on September 20) that returned to the ethnic principle of Lisbon and divided Bosnia into confederation of three ethnic states.<sup>234</sup>

The starting point for the plan was the acceptance of the situation on the ground at the time (in 1993) and the same happened later when the Dayton Peace Agreement was negotiated. This Plan had two major deficiencies. Firstly, on the one hand the US rhetoric at the time was that the European Community should

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<sup>231</sup> David Anderson, 'The Collapse of Yugoslavia: Background and Summary', Research Paper No. 14 1995 – 96, Parliamentary Research Service, Australian Department of Parliamentary Library 1995, p. 15

<sup>232</sup> Lawrence Freedman, 'Why the West Failed', Foreign Policy, No. 97 (Winter 1994 – 1995) pp. 53 - 69

<sup>233</sup> Constitutional Agreement of the Union of Republics of Bosnia and Herzegovina; Appendix I to the Letter from the United Nations Secretary General addressed to the President of the Security Council, August 20, 1993, U.N. Document S/26337 and reproduced in Bertrand G. Ramcharan (ed.), *The International Conference on the Former Yugoslavia: Official Papers* (Kluwer Law International 1997) pp. 286-317

In September 1993 Thorvald Stoltenberg became the representative of the UN Secretary General and the Peace Plan that followed is known as Owen-Stoltenberg Plan

<sup>234</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p. 310

find the solution for the problem in Bosnia and help negotiate the peace and on the other hand they advised the representatives of the Bosnian Government not to accept it as they would get only 33,3 per cent of the territory. Today, the Bosnian Government controls between 26 and 28 percent of the territory. The second point is that the Owen – Stoltenberg Plan was based on three units existing within Bosnia and Herzegovina, Bosnian, Serbian and Croatian.<sup>235</sup> As with previous peace agreements Bosnian Serbs and Bosnian Croats accepted it but the Bosnian Muslims were opposed and their ‘Izetbegovic- Silajdzic leadership shifted from the diplomatic to military means in order to reclaim the territory lost to the Serbs and the Croats.<sup>236</sup> Lord Owen argues the American once again undermined the peace negotiations by ‘refusing to pressurize the Muslims, who were the victims.’<sup>237</sup> Bosnian Army and the Muslim militia supported by the foreign fighters from Al Mujahid brigade started a brutal campaign of expelling Croats from Central Bosnia and Croatian Army openly intervened to reverse those gains while the Serbian forces continued the fighting against the enclaves of Sarajevo and Tuzla in Northern Bosnia.<sup>238</sup> According to Stoltenberg who later commented on the advantages and disadvantages the Dayton Peace Agreement, this [the Dayton Peace agreement] created ‘two and a half units’ as it was well established that the Federation between the Bosnians and the Croats would not function properly.<sup>239</sup> In his view the Bosnians are responsible for the two years of war and for getting less by signing of the Dayton Peace Agreement rather than the Owen – Stoltenberg Plan.<sup>240</sup>

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid. pp. 310 - 311

<sup>237</sup> David Owen, *Balkan Odyssey* (London: Indigo 1995)

<sup>238</sup> Ibid.

<sup>239</sup> Torwald Stoltenberg, ‘Da su prihvatili Owen – Stoltenberg Plan Bosnjaci bi kontrolisali vise teritorija, a rat bi trajao dvije godine manje’, ‘If Bosnians accepted the Owen – Stoltenberg Plan they would be in control of a larger territory and the war would have been two years shorter’ [Author’s translation], HRSVIJET.net, 19 April 2012, accessed on 17 June 2012

<sup>240</sup> Ibid.

It is important to note that in 1993 the United States failed to get a support from their European allies for their proposal to employ air power against the Serb forces in Bosnia, but in 1994 the chain of events brought them back into negotiations. After a bomb that exploded in a busy Sarajevo market in February 1994 for which the Bosnian Serbs took the blame, NATO threatened air strikes and the Russian peacekeepers replaced the Serb forces around the besieged town of Sarajevo.<sup>241</sup> The United States, Russia, France, the United Kingdom and Germany formed a new Contact Group with the mandate to repair the stranded relationship between the Croats and the Muslims. As a result of renewed military alliances The Washington Agreement was signed in March 1994 by which the Croatian – Muslim Federation was established.<sup>242</sup> The Washington Agreement meant that Bosnia and Herzegovina would be divided into two parts, one of which would be dominated by the Serbs and the other would be divided into several cantons that would be dominated either by the Croats or the Muslims. This agreement was an indication that the Bosnian Government had finally considered carving up Bosnia<sup>243</sup> and it would be used as a basis for negotiation of the future Dayton Peace Agreement.

## **2.9 Conclusion**

In conclusion Western intervention in the Yugoslav crisis aimed at mediation and crisis management but it provided the irreversible turning point in its escalation into nationalist extremism and war.<sup>244</sup> The international community was engaged in the Gulf War and the dissolution of the Soviet Union and it ignored the

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<sup>241</sup> David Anderson, 'The Collapse of Yugoslavia: Background and Summary, Research Paper No. 14 1995 – 96', Parliamentary Research Service, Australian Department of Parliamentary Library 1995, p. 16

<sup>242</sup> Ibid. p. 17

<sup>243</sup> Ibid.

<sup>244</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.198

mounting crisis in the former Yugoslavia in the end of the 1990s when national party leaders in the former Yugoslavia gained legitimacy after the first multi-party elections and were speedily promoted by the European Community, Organization for Security and Cooperation and the United Nations to the status of statesmen leaders of nations struggling for independence.<sup>245</sup> This Chapter demonstrates that the breakup of the Yugoslav Federation was gradual and happened in distinct phases starting with the secession of Slovenia and Croatia and that established a momentum which triggered a complete unravelling of national unity.<sup>246</sup> Woodward argues that by accepting the principle of national self-determination for the independence of states without regard to the Yugoslav conditions of multi-nationality and the shared rights to national sovereignty western powers were making war over territory inevitable.<sup>247</sup> This Chapter offers a review of the international responses to the crisis and wars in the former Yugoslavia and in particular in Bosnia and Herzegovina.

This Chapter offers overview of a series of unsuccessful efforts by the international community to bring the war in Bosnia and Herzegovina to an end. The Lisbon Treaty was based on the presumption of ethnic partition, the Vance-Owen Plan drew a map on proposal for ten provinces. It could be argued that the negotiators had to negotiate with the same national leaders, commanders of the armies, that were fighting for national right and parallel to the negotiations they intended to get as much territory through fighting as possible. The Serbs and the Croats signed the plan, but not the Muslims and the Vance-Owen Plan failed.<sup>248</sup> Owen-Stoltenberg Plan returned to the principle of the Lisbon Treaty to divide

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<sup>245</sup> Ibid.

<sup>246</sup> David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt University Press Nashville 2009) p.106

<sup>247</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.198

<sup>248</sup> Susan Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.304

Bosnia as confederation of three ethnic states<sup>249</sup> and again the Serbs and the Croats, but not the Muslims supported it.

In addition this Chapter also demonstrates that the approach of the international community to Yugoslav disintegration and in particular to the war in Bosnia and Herzegovina was continuously inconsistent, ranging from commitment to sovereignty and territorial integrity of Bosnia and Herzegovina at the London meeting with the presidents of the former Yugoslav republics, than at the Geneva Conference the European Community negotiated with ethno nationalist leaders of the warring factions insisting that these leaders needed to find a political settlement. It could be argued that in that way John Major, the British Prime Minister at the time, shifted the problem back to the ones that created it.<sup>250</sup> This Chapter also explains the approach of the United States, the Soviet Union and the Non-Alignment Movement in relation to the crisis in the former Yugoslavia and later in Bosnia and Herzegovina as well as the consequences of the German recognition of Slovenia and Croatia that triggered the war in Bosnia. Some authors argue that the reason for a long delay in American involvement is due to geopolitical negotiations and agreements by the international community in relation to the Balkans and South Eastern Europe.<sup>251</sup> In essence it could be concluded that 'like the division of labour between Germany and the United States regarding Croatia and Bosnia and Herzegovina...the effect of American involvement in the Vance-Owen Plan was to favour national interests over multilateral initiatives and norm-based approach.'<sup>252</sup>

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<sup>249</sup> Ibid. p. 310

<sup>250</sup> Ibid. p. 303

<sup>251</sup> Dr Omer Ibrahimagic, *Dejton=Bosna u Evropi, Pravna sustina Dejtona, The Dayton = Bosnia in Europe, The Legal Character of the Dayton Peace Agreement* [Author's translation] (Vijeće Kngresa bosnjackih intelektualaca 2001) ( The Council of the Congress of the Bosnian Intellectuals 2001) p. 29

<sup>252</sup> Susan Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.306

In addition the reasons for displayed inconsistency and lack of coordinated effort by the international community were global changes in geopolitical situation in which Cold War, dissolution of the Soviet Union and the German unification were the most prominent issues. Also the United States Government thought that the European Union would deal with the Yugoslav crisis and later find a solution for ending the Bosnian war. Apparent problem with this line of thought is that conflicts such as the ones in the former Yugoslavia and later in Bosnia and Herzegovina required an understanding of threats to international security that is different from that which dominated thinking during the Cold War.<sup>253</sup>

Woodward's argument is that conflicts of national sovereignty only produce a complex Cyprusization, when major powers behind those negotiations are willing to define and agree on policy concerning the right to a state and perceive no vital interest to do anything more to them than to contain the conflict.<sup>254</sup> The significance of this view is that it demonstrates an unsustainable approach the international community had towards the conflict in Bosnia and Herzegovina and the prolonged fighting which was a consequence of such approach. Western leaders repeated frequently that it was up to the Bosnians to decide their fate – but that they also intended an outcome (as security) that was not neutral.<sup>255</sup> Similarly the European Union insists that it is up to the Bosnian nationalist leaders to agree on the necessary constitutional reforms but within the constraints of the Dayton Peace Agreement, which has proved mission impossible and improbable in the last 25 years.

This Chapter points out at the consequences of the opinions of Badinter Commission which favoured the sanctity of the former Yugoslav republics' borders over the minority-right concepts favoured by some warring parties.

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<sup>253</sup> Ibid. p. 317

<sup>254</sup> Ibid.

<sup>255</sup> Ibid. p. 326

Parallels could be drawn between the international community's efforts during the Vance-Owen peace negotiations to get agreement on constitutional principles, interim constitution and peace agreement to cease hostilities, when only one side (Serbian) agreed on constitutional principles, and long-term attempts to get agreement among the same political parties to agree on the amendments to the Bosnian Constitution which is part of the Dayton Peace Agreement. Parallel could also be drawn between the approach by some countries that supported the narrative of 'aggressors and victims' in the Yugoslav wars, as it has been the United States Government approach, and American sanctions or the threat of sanctions against the President of the Republika Srpska for non-compliance with the Bosnian Constitutional Court decisions in relation to the celebration of the Day of the Republika Srpska and at the same time not criticizing or sanctioning the intransigent and divisive policies of the Muslim and the Croatian leaders which negatively affect the running of the country.

It is important to point out at the relevance of the notion of interim constitution in the Vance-Owen Peace Plan. It is submitted that the Dayton Peace Agreement should have followed this notion and the Constitution from Annex IV should have been negotiated as a compromise and an interim Constitution for the transitional period after the end of the conflict because of different requirements during different periods in the aftermath of the military conflict and the post-conflict period should have reflected it. The Dayton Peace Agreement is not characterised by the theoretical classification, rather it is a unique Agreement that is a result of a certain historical context and involvement of several groups of interested parties, both locally and internationally.

In the light of the analysis from this Chapter it could be concluded that the inconsistent and biased approach by the international community towards the

Yugoslav crisis and in particular to the war in Bosnia and Herzegovina primarily protects European security and stability. By applying legal precedents that might be used in future conflicts, like recognition of the administrative internal borders as international borders, the international community generated new sources of political conflict in Bosnia and Herzegovina where entrenched national leaders cannot agree on the necessary constitutional change without undermining their own political existence.

This Chapter demonstrates that ‘the struggle to create new states out of Yugoslav Federation was a struggle to get international recognition; the fight for international opinion had been an important as fighting on the ground.’<sup>256</sup> Judt argues that on the whole the international community did not have many practical achievements during the former Yugoslav crisis apart from ‘installing a 14 000 strong United Nations Protection Force in Croatia to separate Croats and Krajina Serbs and sending a few hundred uniformed United Nations peacekeepers into the ‘Safe Areas’ and later establishing United Nations authorized ‘no-fly’ zones.’<sup>257</sup> This author argues that of greater long-term significance was setting up in The Hague, in May 1993, of an International Criminal Tribunal for Yugoslavia.<sup>258</sup> In Judt’s words:

The mere existence of such a court confirmed what was by now obvious—that war crime, and worse, was perpetrated just a few miles south of Vienna. But since most of the presumptive criminals, including Mladic and his fellow Bosnian Serb Radovan Karadzic (President of Republika Srpska) were actively pursuing their crimes with impunity, the Court remained a ghostly and irrelevant side-show.<sup>259</sup>

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<sup>256</sup> Ibid. p. 198

<sup>257</sup> Tony Judt, *Postwar, A History of Europe since 1945* (1<sup>st</sup> ed. The Penguin Press 2005, 2<sup>nd</sup> ed. Vintage 2010) p.676

<sup>258</sup> Ibid. See Also Theodor Meron, ‘The case for war crimes trials in Yugoslavia’ *Foreign Affairs* 122 (No3, 1993) at 123 cited in Henry J. Steiner and Philip Alston, *International Human Rights in Context, Law, Politics, Morals* (Oxford University Press 2nd edition, 1st ed. 2000) pp1144-1145.

<sup>259</sup> Ibid. p. 677



## Chapter Three

### The Dayton Peace Agreement

#### 3.1 Introduction

The Dayton Peace Agreement marks the end of the war in Bosnia and Herzegovina and by this Agreement the country was divided into two entities, Republika Srpska, the Federation of Bosnia and Herzegovina, consisting of ten cantons and the District of Brcko. Republika Srpska got control over 49 per cent of the territory and the Federation retained control of 51 per cent. A weak and decentralised government with ‘sometimes non-existent state-level institutions’<sup>260</sup> has been in control of both entities.<sup>261</sup> It could be argued that the Dayton Peace Agreement created ‘atypical and undemocratic nature of entities.’<sup>262</sup> The Agreement included provisions for administrative and constitutional running of the country and comprehensive international supervision embodied in the role of The High Representative.

#### 3.2 What is fair and just process?

The complex issues during peace negotiations and treaty agreements following a prolonged conflict that left a legacy of massive violence from virtually all sides in the conflict are often characterised with the challenges that the negotiators need to deal with is political groups or actors, who attempt to represent their group as innocent victims of someone else’s injustice. The violence, discrimination, human rights violations and anti-democratic repression also come from within the

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<sup>260</sup> Ana E. Juncos, ‘The European Union’s post-conflict Intervention in Bosnia and Herzegovina: (1) Integrating the Balkans and /or (re) Inventing the European Union?’, *Southeastern Politics*, (November 2005 ) Vol.VI, No.2, p.9

<sup>261</sup> Kate Hudson, *Breaking the South Slav Dream: The Rise and fall of Yugoslavia*, (London, Pluto Press 2003). pp. 120 – 121

See also Ronald C. Slye, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 *Yale J.Int’l L.*453 1996 about the constitutional framework of Bosnia and Herzegovina

<sup>262</sup> Ana E. Juncos, ‘The European Union’s post-conflict Intervention in Bosnia and Herzegovina: (1) Integrating the Balkans and /or (re) Inventing the European Union?’, *Southeastern Politics*, (November 2005) Vol.VI, No.2, p. 9

same ethnic community in the form of power struggles, or other forms of rivalry. Complicated and unresolved history could offer guidance to involve not only the main parties representatives but often parts of the communities involved in the war, such as women, representatives of minority groups, young people and the academic community.

Just and fair process of negotiating a peace treaty ought to consider the core issues of the conflict through extensive constitutional proposals and create a democratic space for the articulation of grievances and aspirations of different participants in the conflict. It could be argued that the non-inclusion of different political voices and the alienation and oppression of the political subjects that could have been involved in the peace negotiations has greatly contributed to numerous failed attempts to bring the war in Bosnia and Herzegovina to an end. Just and fair peace process ought 'to address the complex political and legal issues that underlie the armed conflict'<sup>263</sup> as the avoidance of dealing with the issues of justice and accountability extends beyond the complex issue of the constitution and administrative division of territory. Avoidance of dealing with the causes of the war or reluctance to initiate or insist on any public discussion only reaffirms and strengthens the patterns mutually reinforcing ethnic groups' hostility. It is submitted that lack of engagement with unresolved past grievances significantly reduces the chances of the successful implementation of the peace agreement. The reason why this approach is significant and should be dominant throughout the peace process is because it could create 'room for making human rights protection an integral part of the peace process'<sup>264</sup>

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<sup>263</sup> Alan Keenan, "Building a democratic middle ground" in Julie A. Mertus and Jeffrey W. Hesling, eds, *Human Rights and Conflict, Exploring the links between Rights, Law and Peacebuilding*. (United States Institute of Peace Press 2006) p.468

<sup>264</sup> Ibid p.269

The Dayton Peace Agreement was negotiated more as a ceasefire package and not in the way multilateral treaties that go through a series of stages before being adopted and coming into force.<sup>265</sup> It was important to stop the war but the internationally sponsored and imposed federal arrangement on a state based on the war gains and not in any way historical promises, without a broad consultation with the citizens and society but with the introduction of international bureaucracy to oversee the status quo without any explicit or time limited exit strategy but a set of five general conditions could not be a model answer to a conflict situation to stop the hostilities, but it certainly proved to be an unsuccessful experiment for normal foundation of a state after an ethnic conflict.

The United States brokered The Washington Agreement between the Muslims and the Croats in March 1994 creating the entity of the Federation of Bosnia and Herzegovina.<sup>266</sup> The remaining territory was the Republika Srpska. It could be argued that the Washington Agreement was a reversal of the political approach of the International Conference for former Yugoslavia which was characterized by a step by step, or a ‘piecemeal’ approach<sup>267</sup> to negotiations.<sup>268</sup> Woodward argues that this kind of negotiation aimed at ‘the absence of hostilities would provide the first step in a three-step process that would move to economic negotiations, building on mutual interests to restore communications and trade (and) on that basis difficult political negotiations necessary to a final settlement could be

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<sup>265</sup> Ilias Bantekas Lutz Oette *International Human Rights Law and Practice* (Cambridge University Press 2<sup>nd</sup> ed 2016) see also Dinah Shelton, *The Oxford Handbook of International Human Rights Law*(Oxford University Press 2015, 1<sup>st</sup> ed 2013) p.53

<sup>266</sup> The Washington Agreement, March 1,1994, Washington DC, see Venice Commission Opinion, March 2005, Part II, p.3

See also Aleksandar Pavkovic, *The Fragmentation of Yugoslavia, Nationalism and War in the Balkans*, (2<sup>nd</sup> ed. Palgrave MacMillan 2000) (1st ed.1997) p. 174 for the constituent parts of the newly created Federation of Bosnia and Herzegovina and the importance of the adopted model of offering incentives in return for concessions that followed in the next international proposal of the Contact Group Plan.

<sup>267</sup> This was the name of the approach to negotiation by Yasushi Akashi, Special Rapporteur of the United Nations Secretary-General, describing a step-by-step approach to ceasefires and negotiations to create conditions for lasting ceasefire and move on to the next phase of negotiation

<sup>268</sup> Susan L.Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold War* (The Brookings Institution Washington 1995) p.314

confronted.<sup>269</sup> The Washington Agreement, on the other hand, ‘aimed at adjusting the military balance in favour of Bosnian government against the Bosnian Serbs – by ending the war between the Croats and Muslims so that forces could be redeployed against the Serbs’.<sup>270</sup> Americans believed that this was not just some glorified ceasefire and believed that this Agreement was ‘the only chance that the Bosnian Muslims develop the resources to balance Serb power.’<sup>271</sup>

It is widely accepted that the precursor for the North Atlantic Treaty Organisation’s (Thenceforth NATO) military intervention against the Bosnian Serbs was provided by the third televised Sarajevo massacre, this time at Markale market, on the 28th of August 1995, where a mortar shell killed 28 people.<sup>272</sup> The other events that are considered direct precursors for the NATO’s intervention in Bosnia were shelling of the Markale market on the 14th of February 1994, the hostage taking of the United Nations peacekeepers by the Bosnian Serbs forces in May 1995 and the Srebrenica massacre in July 1995. Betts argues that the significance of these events, which were broadcasted throughout the world, was that they shifted the perception of the international community and it sided with

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<sup>269</sup> Ibid.

<sup>270</sup> Ibid. p. 315

<sup>271</sup> Derek Collet, *The Road to the Dayton Accords, A study of American Statecraft* (Palgrave Macmillan 2005) p.6

<sup>272</sup> Aleksandar Pavkovic, *The Fragmentation of Yugoslavia, Nationalism and War in the Balkans* (1st ed 1997, Palgrave MacMillan 2000) p. 175

The Serbian side rejected the responsibility for the massacre as well as for the previous massacres, but the difference is that this one was contested. Pavkovic criticizes the hasty United Nations official inquiry in which they blamed the Serbs forces for the attack.

See also General Michael Rose, *Fighting for Peace* (Harvill Press, London 1998). Rose argues that ‘the bomb that fell on the Markale market had been fired from the Bosnian side of the battle lines...it was difficult to be precise because the Bosnian Army had removed some of the important forensic evidence before the United Nations arrived.’ p. 48

See also the testimony of one of the bodyguards of the Bosnian President, Alija Izetbegovic, during the trial of Radovan Karadzic, the Bosnian Serb leader tried at the ICTY (Case No.IT-95-5/18-I, witness KW-568, 17th February 2014, transcript page 47188), for similar view about the strategy used by the Bosnian side in the conflict ‘to provoke incidents before or during official visits to Bosnia in order to cause mass suffering that would then engage Serbian shelling which in turn would be used against the Serbs before the international community. Wherever shelling was provoked in the places where civilians would be hurt, the TV crews and journalists would be close by.’

See also Justin Raimondo, *Into the Bosnian Quagmire: the case against US intervention in the Balkans* (Americas First Books 1996) pp. 18 – 19

the Bosnian Muslims as victims in this war.<sup>273</sup> As a result, the United Nations Resolution authorized The Rapid Reaction Force that consisted of the British and French soldiers with the mandate to protect the United Nations peacekeepers in Bosnia.<sup>274</sup>

### 3.3 Dayton Peace Accords

The international community's response to the Bosnian conflict changed as the conflict developed and depending on which particular configuration of international players were involved. Holbrooke argues that Europe and the United States were equally misguided about the resolution of the Bosnian war.<sup>275</sup>

The Europeans were never content with the new American lead in the negotiations and their support role in the Dayton Peace talks. The reason for this was lack of joint approach and different national interests of the European countries, members of the Contact Group, and American unwillingness to cooperate with them in major decisions. Holbrooke argues that 'it was a sad admission, on the one hand, that the European Community did not exist as a single negotiating entity. On the other hand, it was not surprising that nations that still aspired to greatness and global influence wanted to retain an independent voice on foreign policy.'<sup>276</sup>

As a consequence, among these players a meta-conflict raged over the parameters of any solution.<sup>277</sup> Bell's argument is that this all impacted different use of

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<sup>273</sup> Richard K. Betts, 'The Delusions of Impartial Intervention' (November/December 1994) Vol.73, No. 6 Foreign Affairs, pp. 20 - 33

<sup>274</sup> United Nations Security Council Resolution S/RES/998 16 June 1995  
See also Neil Fenton, *Understanding the United Nations Security Council: coercion or consent?* (Ashgate Publishing Ltd. 2004) p.3 for detailed explanation of the changing role of the United Nations Security Council in dealing with the international crises and hot spots after the collapse of the Cold War when it became more willing to intervene for humanitarian reasons.

<sup>275</sup> Richard Holbrooke, *To End a War* (The Modern Library 1999) p. 29

<sup>276</sup> Ibid. p. 242

See Also Richard Holbrooke, *To End a War* (The Modern Library 1999) p. 84

<sup>277</sup> Christine Bell, *Peace Agreements and Human Rights* (OUP 2000) Ibid. p. 97

international law to contain the conflict, which often made legal responses incoherent.<sup>278</sup>

Richard Holbrooke's shuttle diplomacy in the peace negotiations involved negotiations to obtain different agreements; firstly, on a set of principles concerning primarily the institutional arrangement of Bosnia and Herzegovina, commitment to human rights, lifting of the siege of Sarajevo and withdrawal of heavy weapons around the city; and secondly, about the second set of principles defining the governmental superstructure, commitment to free democratic elections and international community monitoring of the compliance to the agreement.<sup>279</sup> It could be argued that the most contentious issue to be negotiated was ceasefire and that was surprisingly left for the end of negotiations because the goal of the negotiation was to secure a lasting peace in Bosnia.<sup>280</sup>

In addition, this specific and unique approach to negotiating peace has revealed firstly, that the fundamental reasons for wars, analysed earlier, and the reasons for the divisions in Bosnia and Herzegovina were not settled by these negotiations; secondly, it revealed the weakness in the American and European reliance on the Serbian and Croatian presidents to secure the future of the Dayton Peace Agreement, because it limited their willingness to criticize the two guarantors of the Agreement, and thirdly, it gave little option to Americans to hand over the responsibility for the enforcement of the Agreement to the others.<sup>281</sup> In Daalder's words:

...Rather than resolving this issue [that divided the parties before Dayton], Dayton incorporated it, as is evident from Bosnia's complex constitutional arrangements. Although it was designed to preserve Bosnia as a multi-ethnic state, the Dayton Constitution prescribed an extreme degree of centralization ...secondly, because the parties could not be relied upon to

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<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Ibid. p. 181

ensure the compliance with the provisions of the Dayton Accords, the alternative was to look towards Zagreb and Belgrade to make sure that the implementation proceeds apace...Milosevic was not only the arsonist of the Balkans, but also its indispensable fireman...and thirdly, pulling out or handling the enforcement to the others was not an option.<sup>282</sup>

During the Dayton peace negotiations the Americans faced two important questions, one in relation to the overarching objective of the American engagement in Bosnia and Herzegovina and the other one in relation to the implementation.<sup>283</sup>

It is submitted that the American engagement to stop the war steadily changed into the need to build a lasting and viable peace in Bosnia and Herzegovina and this change was influenced by the desire of the negotiators to ensure that the hostilities would not resume and to build as much as possible into the peace agreement so that Bosnia and Herzegovina becomes self-sustaining.<sup>284</sup>

### **3.3.1 Legal Principles of the Dayton Peace Agreement**

The Dayton General Framework Agreement for Peace in Bosnia and Herzegovina was brokered on 22 November 1995 at the Wright-Patterson Airbase in Dayton, Ohio. Naval Base Newport (Long Island) and the Langley Airbase (Norfolk, Newport) were also considered as possible places to conduct negotiations. The Peace Agreement was signed in Paris on 14 December 1995 and the war in Bosnia and Herzegovina ended. The parties to the Agreement were the United States, European Community, Russia, NATO the Serbian President Slobodan Milosevic, the Croatian President Franjo Tudjman and the Bosnian President, Alija Izetbegovic. It could be argued that The Dayton Peace Agreement had two aims, to stop the war and to consolidate Bosnia and Herzegovina within its sovereign,

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<sup>282</sup> Ibid. p. 180 - 181

<sup>283</sup> Ibid. p. 159

<sup>284</sup> Ibid.

internationally recognized borders. Paralell to this Bosnia and Herzegovina recognized the Federal Republic of Yugoslavia and previously Bosnia and Herzegovina and Croatia mutually recognized each other after they proclaimed their respective independence. The parties to the Agreement agreed to act in accordance with the principles of the United Nations Charter, Helsinki Act and OSCE documents and agreed to respect their sovereignty and resolve mutual disagreements peacefully. The parties to the Dayton Peace Agreement also accepted their obligation in relation to Annex 1-A and Annex 1-B in relation to the military and civilian implementation of the agreement and other annexes concerning the elections, the Constitution, Arbitral Tribunal, Human Rights, Police force and the Office of the High representative.

The constituent parts of the Dayton Peace Agreement are the General Framework Agreement which has eleven articles and 11 Annexes,<sup>285</sup> the most contentious being Annex IV, the Constitution of Bosnia and Herzegovina and Annex VII in relation to return of refugees and displaced persons. In the aftermath of the Dayton Peace Agreement Annex IV has been widely debated and challenged among the two entities and the international community because it is the source of the discrimination in Bosnia and Herzegovina and core reason for long-term political stalemate. It could be argued that the complexity of the Dayton Peace Agreement is reflected in the fact that it has been signed by three states, Bosnia

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<sup>285</sup> Annexes to the Dayton General Framework Agreement for Peace in Bosnia and Herzegovina are as follows:

- Annex 1-A: Agreement on Military Aspects of the Peace Settlement
- Annex 1-B: Agreement on Regional Stabilization
- Annex 2: Agreement on Inter-Entity Boundary Line and Related Issues
- Annex 3: Agreement on Elections
- Annex 4: Constitution
- Annex 5: Agreement on Arbitration
- Annex 6: Agreement on Human Rights
- Annex 7: Agreement on Refugees and Displaced Persons
- Annex 8: Agreement on the Commission to Preserve National Monuments
- Annex 9: Agreement on Bosnia and Herzegovina Public Corporations
- Annex 10: Agreement on Civilian Implementation
- Annex 11: Agreement on International Police Task Force



and Herzegovina, Croatia and Federal Republic of Yugoslavia. Furthermore, Annexes to the Peace Agreement were signed by different signatories depending on the relevance of the Annexes for the involvement of each state.<sup>286</sup>

### **3.3.2 Shortcomings of the Dayton Peace Agreement**

As mentioned earlier the representatives of the Bosnian Serbs were not present during the negotiations and neither they, nor the Bosnian Croats initialled the final Dayton Peace Accords. On their behalf Holbrooke negotiated with the Serbian and Croatian presidents who would be guarantors of the implementation of the Peace Agreement by the Serbian and Croatian side respectively because of their close ties with the Bosnian Serbs and Croats. In addition Serbian President Slobodan Milosevic was motivated to have severe United Nations sanctions lifted from his country. Daalder argues that ‘...being included in negotiations and being guarantors of the outcome is quite different from the surrogate role the Serb and the Croat presidents performed all through the Dayton talks.’<sup>287</sup> The reason for this approach adopted by the negotiators was to ease the effort to reach the agreement<sup>288</sup> but it appeared that Serbian President throughout the negotiations did not inform the Bosnian Serbs what territorial compromises he made on their behalf and even offered that the Foreign Secretary of the Republic of Serbia initial the final Agreement.<sup>289</sup> This demonstrates that the Serbian President was willing to do whatever was possible to have the sanctions toward the Federal Republic of

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<sup>286</sup>The following is an illustration of the complex system of involvement of different states and entities signatories to the Dayton Peace Agreement: Annex 1-A, Annex 1-B and Annex 10 were signed by the three states signatories (Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia) and the representatives of both Bosnian entities, the Federation of Bosnia and Herzegovina and the *Republika Srpska*, Annexes 3,4,6,8 and 11 were signed by Bosnia and Herzegovina and representatives of both entities, Annexes 5 and 9 were signed only by the Bosnian entities.

<sup>287</sup> Ibid.p.180

<sup>288</sup> Ibid.

<sup>289</sup> Richard Holbrooke, *To End a War* (The Modern Library 1999) p.310

Yugoslavia lifted and also that he was confident he would secure the Bosnian Serbs' approval of the solution he agreed in Dayton.

Furthermore, it could be argued that the exclusion of women from the Dayton Peace negotiations has significantly diminished the prospects for sustainable peace.<sup>290</sup> Mlinarevic, Porobic and Rees argue that 'during the peace process that preceded the signing of the Dayton Peace Agreement not a single woman participated, whether as lead mediator, witness, member of the negotiating team or signatory.'<sup>291</sup> It could be argued that this has had significant consequences both for the society as a whole and also for women as distinct group in the society and their future recognition in the society in the processes of peace building and reconciliation.<sup>292</sup> The authors point out at widespread lack of women participation in the peace talks or post-conflict rebuilding of the countries and argue that the absence of women is not only unique to Bosnia and Herzegovina. It could be argued 'that the only peace treaties that have brought sustainable peace are those which have been drafted with the participation of women and with clear inclusion of a gender analysis in drawing up framework for the conclusion of the conflict, for transition and for the future path of the nation.'<sup>293</sup>

It could be argued that acknowledging the lessons from Bosnian peace negotiations could contribute to developing innovative and meaningful strategies for improving peace processes and securing their success. It is submitted that a number of problems that arose after the war in Bosnia and Herzegovina like domestic violence, trafficking, health care, education, employment could have been addressed more adequately had there been a transition period defined in the

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<sup>290</sup> Gorana Mlinarevic, Nela Porobic and Madeleine Rees, 'If women are left out of peace talks', in *Forced Migration Review* [September 2015] Issue 50, pp. 34-37 available at [www.fmreview.org](http://www.fmreview.org), accessed 27 October 2017

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid. p. 35

Dayton Peace Agreement in which the divided ethno-nationalist elites would have to abandon discriminatory or gendered aspect of issues that have been used for political purposes.<sup>294</sup>

### 3.3.3 Complexities and Omissions of the Dayton Peace Agreement

As mentioned earlier the Dayton Peace negotiations were primarily concerned with the maps of Bosnia and Herzegovina and the division of the territory. Bosnia and Herzegovina was divided into two entities, (Muslim-Croat) Federation of Bosnia and Herzegovina and the Republika Srpska and the District of Brcko which was a strategic town in northeast Bosnia and which was rendered by the international arbitration ‘neutral district’ under the supervision of the Bosnian Federal authorities and the international supervisor.<sup>295</sup> Trbovich argues that the legal arrangement for the Brcko District represented another legal innovation.<sup>296</sup> This innovation included multiple layers of administrative control. The District ‘was under the control of a new multi-ethnic district government under intensified international supervision and beyond the control of either entity.’<sup>297</sup> Establishment of a separate district only contributed to complexity of the political arrangement in Bosnia and Herzegovina as this district was held in condominium by both entities which would not exercise any authority over it.<sup>298</sup> Trbovich argues that awarding

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<sup>294</sup> Ibid.

<sup>295</sup> *Brcko* Arbitration Arbitral Tribunal for dispute over Inter-Entity Boundary in *Brcko* Area, Final Award, 5 March 1999

<sup>296</sup> Ana S. Trbovic, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.320

<sup>297</sup> Statement by Robert B. Owen who was Presiding Arbitrator for the *Brcko* Arbitral Tribunal Sarajevo, Bosnia and Herzegovina, 5 March 1999, cited in Ana S. Trbovic, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.320

<sup>298</sup> Ana S. Trbovic, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p.389

See also *Brcko* Arbitral Tribunal for Dispute over Inter-Entity Boundary in *Brcko* Area, Final Award, March 5, 1999, paragraph 11

See also European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, based on comments by Mr J. Helgesen (Member, Norway), Mr. J. Jowel (Member, United Kingdom), Mr. G. Malinverni (Member, Switzerland), Mr. J. - C. Scholsem (Member, Belgium), Mr. K. Tuori (Member, Finland), adopted by the Venice Commission at its 62<sup>nd</sup> plenary session, Venice, March 11-12, 2005, paragraph 10, for the difficulties created by the introduction

the town of Brcko the status of ‘a district’ infringed on the negotiating principles for the Dayton Peace Agreement that defined the entities as continuous and specified territorial percentage division as 49 percent for the Republika Srpska.<sup>299</sup>

It was apparent that a number of critical activities in the civilian implementation would need to be coordinated in order to secure success of the Dayton Peace Agreement and with many already in Bosnia dealing with issues such as International Committee of Red Cross, International Criminal Tribunal for former Yugoslavia, High Commissioner for refugees, Organization for Security and Cooperation in Europe, International Bank for Reconstruction and Development it was necessary to have overall coordination and direction when needed<sup>300</sup> and the role of the High representative was derived. His work would be overseen by Peace Implementation Council and Steering Committee consisting of the major powers, seven countries plus Russia. It could be argued that the role of the High Representative and his mandate was not precisely defined in Article X of the Dayton Peace Agreement and his decisions were not legally binding in the initial phase. The Bonn Implementation Conference on 10 December 1997 welcomed the decision that the High Representative’s decisions should be binding and consequently the powers that the High representative assumed are called ‘Bonn Powers’.<sup>301</sup> The authority of the High Representative has been criticized as not

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of a complicated decision-making procedure at different levels of Bosnia and Herzegovina Government and a constitutional amendment introduced by the High Representative to have strong national interest veto even in cases when the ethnic governments represent relatively limited number of people.

<sup>299</sup> Ana S. Trbovic, *A Legal Geography of Yugoslavia’s Disintegration* (Oxford University Press 2008) p.389

<sup>300</sup> Ibid. p. 156

<sup>301</sup> European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, based on comments by Mr J. Helgesen (Member, Norway), Mr. J. Jowel (Member, United Kingdom), Mr. G. Malinverni (Member, Switzerland), Mr. J.-C. Scholsem (Member, Belgium), Mr. K. Tuori (Member, Finland), adopted by the Venice Commission at its 62<sup>nd</sup> plenary session, Venice, March 11-12, 2005, paragraph 8

See also Charles Crawford, ‘For Bosnia Devotees Only: The Bonn Powers, Speeches from Leaders leave audiences wanting more, 12 Nov 2009 available at <https://charlescrawford.biz/2009/11/12/for-bosnia-devotees-only/> Crawford explains that ‘The Bonn Powers had no real legal basis at all. They amounted to an international political power play

being fully accountable to anyone and uncontested.<sup>302</sup> Chandler argues that the lack of international legal accountability explains the ad hoc and flexible nature of the powers of the High representative.<sup>303</sup>

As a result of inconsistent approach and without a coherent implementation plan which would be carried out during different periods after the secession of the hostilities the role of the High Representative has been limited more to coordination rather than guidance in relation to the civilian effort.<sup>304</sup> Trbovic argues that the position of the High Representative has evolved beyond the authority intended in the agreement and that ‘the High Representative has used ambiguous provisions of the Dayton Peace Agreement to change the letter or at least the spirit of Bosnia and Herzegovina’s and its two entities constitution by granting unlimited authority to otherwise restricted central government agreed at Dayton.’<sup>305</sup> The most disputed issues include the constitutional amendments, electoral laws, return of refugees, central institutions, municipal institutions and the status of Mostar and the District of Brcko.

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bluff which successive High Representatives wrapped up in legal language to make whole thing look imposing and inevitable.’ The problem with this type of quasi-colonial authority (Crawford) is that they run out of steam and the OHR has been reluctant to use the Bonn Powers as they might prove to be a legal challenge. According to Crawford the OHR should be revisited and other instruments used in order to resolve the problems with the Bosnian government.

See also dr Miroslav Baros in the High Representative for Bosnia and Herzegovina: A requiem for legality 14 Dec 2010 available at <https://www.ejiltalk.org/the-high-representative-for-bosnia-and-herzegovina-a-requiem-for-legality/> for the overview about the OHR and its powers and questioning the presence of that body after the conflict finished.

‘The Venice Commission in 2005 acknowledged that ‘the use of the Bonn Powers by the High Representative was beneficial for Bosnia and Herzegovina and its citizens and a necessary following the ‘bloody war’, but it also called for progressive phasing out of those powers and for the establishment of an advisory panel of independent lawyers for decisions directly affecting the rights of the individuals pending the end of the practice. The European Commission for Democracy Through Law (the Venice Commission) CDL-AD(2005) 004

<sup>302</sup> Ivo H. Daalder, *Getting to Dayton, Making of America’s Bosnia Policy* (Brookings Institution Press Washington D.C.2000) p. 156

<sup>303</sup> David Chandler, ‘From Dayton to Europe’, in David Chandler (ed.) *Peace without Politics? Ten Years of International State-Building in Bosnia* (Routledge 2006) p. 32

<sup>304</sup> Ibid. p. 159

<sup>305</sup> Ana S. Trbovic, *A Legal Geography of Yugoslavia’s Disintegration* (Oxford University Press 2008) p.321

Trbovic identifies Article III 5 of the Constitution of Bosnia and Herzegovina used by the High representative, which could be interpreted as granting unlimited authority to otherwise restricted central government.

Alvarez argues that ‘mistrust, intolerance and lack of community level integration have resulted in the failure of reconciliation efforts at both the community and national level.’<sup>306</sup>

It could be argued that if the legal and policy framework created by the Dayton Peace Agreement and the necessary political, economic and social measures by the United Nations High Commissioner for Refugees were defined as priority with clear time frame coordinated among the countries where most of the displaced people from Bosnia and Herzegovina lived, and if the International Stabilization Force deployed in Bosnia made more effort in providing security, more refugees would have returned to their homes. Alvarez argues that enforcement and protection is especially important in case of minorities who would feel vulnerable in ethnically homogenous areas.<sup>307</sup>

The apparent problem with the implementation of these integral parts of the Dayton Peace Agreement is lack of programme of implementation that would include both priorities and timetable and clearly defined role of international actors in enforcing of the critical provisions from the Agreement. This approach would have verifiable success and prevent the situation in which the three governing parties rarely cooperate and de facto continue the original conflict by different means and more than twenty years after signing the Peace Agreement still do not have consensus about the political arrangement of their country, whether it should be partitioned or united country.

The cumbersome constitutional system in Bosnia and Herzegovina thus involves five different Bosnian presidents, all of who could be overruled by a sixth, international president of Bosnia and Herzegovina – the High Representative.<sup>308</sup>

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<sup>306</sup> Ibid. p. 6

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

Annex X of the Dayton Peace Agreement establishes the High Representative as ‘final authority in theatre regarding the interpretation of this Agreement on the civilian implementation of the peace settlement.’<sup>309</sup>

Thus Bosnia and Herzegovina became nominally independent state but de facto international protectorate and its Constitution was never officially published in any of the languages of the peoples of Bosnia and Herzegovina and it has never been prepared with the participation of all political forces and civil society and adopted by the Parliament of Bosnia and Herzegovina. Instead it was imposed on the peoples of Bosnia and Herzegovina in the Dayton Peace Agreement, written by the foreign drafters and published in foreign language English. It is against the backdrop of peace negotiations and with the participation of ethnic war leaders and their sponsors that the context for the drafting the Bosnian Constitution should be perceived. It is submitted that Bosnian Constitution and the Constitution of the Federation of Bosnia and Herzegovina were political compromises aimed at stopping the hostilities, and the Constitution of the Republika Srpska was drafted in the state of war, thus both cannot reflect the wish of the population to integrate into Europe and be in line with the European standards.<sup>310</sup>

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<sup>309</sup> Annex X, General Framework for Peace in Bosnia and Herzegovina 1995,U.N.Doc A50/750, reprinted in (1996) 35 ILM 75

<sup>310</sup> European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, based on comments by Mr J. Helgesen (Member, Norway), Mr. J. Jowel (Member, United Kingdom), Mr. G. Malinverni (Member, Switzerland), Mr. J.-C. Scholsem (Member, Belgium), Mr. K. Tuori (Member, Finland), adopted by the Venice Commission at its 62<sup>nd</sup> plenary session, Venice, March 11-12, 2005, paragraphs 63,64 and 65

The Commission issued opinion on the powers of the High Representative within the framework of the constitutional situation in Bosnia and Herzegovina, the deficiency and rationality of the constitutional arrangements in the country and compatibility of the Constitution with the European Convention of Human Rights and finally the compatibility with European standards of the exercise by the High Representative of his powers. (paragraph 3)

### 3.3.4 Dayton Peace Agreement – legacy and debates

As mentioned earlier the main reason the international community got involved in the conflict in Bosnia was because of its international dimension.<sup>311</sup> Since signing of the Dayton Peace Agreement there has been a varied discussion among scholars and lawyers about an involvement of the international actors in negotiation of the Dayton Peace Agreement, its interpretation, implementation and implications for the post-war situation in Bosnia and Herzegovina. According to Bell ‘the parties’ claims to separate statehood meant that the conflict much more clearly straddled international law’s internal-international boundary.<sup>312</sup>

The problem with interpretation of the Dayton Peace Agreement mostly within a political discourse is that the legal, constitutional impasse, which is the main characteristic of Bosnia and Herzegovina’s reality, cannot be resolved. This has created a situation that can at best be described as continuous effort of the political parties in government to endlessly compromise instead of creating conditions for changing of the existing Constitution that does not satisfy the need of a modern democratic state. Great economic problems in Bosnia and Herzegovina and unsettled political status continue to be obstacles to Bosnian integration in the European Union and other international structures.<sup>313</sup>

Today, almost all of the parties criticize it, although the official government of the Republika Srpska disagrees with the idea that the agreement should be modified or changed.

Most authors agree that the invaluable contribution of the Dayton Peace Agreement is that it ‘brought peace to Bosnia and Herzegovina and ensured broad rights for its three principal ethnic groups albeit within the international

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<sup>311</sup> Christine Bell, *Peace Agreements and Human Rights* (OUP 2000) p. 69

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.



protectorate.<sup>314</sup> Although The Dayton Peace Agreement was aimed at conflict resolution and preservation of an independent state of Bosnia and Herzegovina and it was by its nature interventionist peace agreement, it could be argued that it also represented new standards for other post-war societies.<sup>315</sup> To further illustrate this point Bjorkdahl argues that this agreement was clearly designed to firstly, create new multi-ethnic and democratic institutions of a war-torn society and to ensure respect for fundamental human rights and freedom and the rule of law; secondly, to provide for post-conflict reconstruction towards sustainable peace for Bosnia and Herzegovina, and thirdly to prevent the recurrence of the conflict or its potential spill over in the region.<sup>316</sup>

It appears that the implications of territorial, political and legal organisation of Bosnia and Herzegovina defined by the Dayton Peace Agreement have had a profound effect on the sustainability and future of the country as a unit. It could also be argued that the Dayton Peace Agreement is linked to the development of the international law that promote the concept of negotiated settlement and link ceasefire to new constitutional order aimed at developing and sustaining ceasefire.<sup>317</sup> Bell argues that peace agreements like the Dayton Peace Agreement set out distinctive form of hybrid self-determination with a peace agreement operating as an internationalized transitional constitution. In Bell's words:

...The new practice of peace-making can be viewed as old wine in new bottles: the latest phase in an on-going negotiation as to the respective remits of domestic and international legal spheres.<sup>318</sup>

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<sup>314</sup> Ibid. p. 323

<sup>315</sup> Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld and Nicholson 1998), p. 392

<sup>316</sup> Annika Bjorkdahl, 'A Gender-Just Peace, Exploring the post-Dayton Peace process in Bosnia', (2012) Vol 37, No.2 *Peace and Change*, p. 294

<sup>317</sup> Christine Bell, *Peace Agreements and Human Rights* (OUP 2000) p.286

<sup>318</sup> Ibid.

It could be argued that the implementation of the Dayton Peace Agreement involved interpretation of the text that was deliberately ambiguous as to the meaning.<sup>319</sup> Douzinas agrees that the problems in law making are confounded by difficulties in both the interpretation and implementation.<sup>320</sup> In relation to the implementation of the military part of the Dayton Peace Agreement, Douzinas argues that ‘weak implementation mechanisms ensure that the shield of national sovereignty is not seriously pierced, unless the interests of great powers dictate otherwise.’<sup>321</sup>

### **3.4 Positive Aspects of the Dayton Peace Agreement.**

It is apparent from the analysis so far that the most positive aspect of the Dayton Peace Agreement is that it stopped the war and created conditions for lasting ceasefire and rebuilding of the country. Another positive conclusion from Bosnian experience is the management of humanitarian effort during the war and in the immediate aftermath and the reception and care for more than two million displaced persons that needed protection.<sup>322</sup>

Chandler notes that it would be more appropriate to call the Dayton Peace Agreement a framework for reconstruction of the country because the civilian annexes comprise five-sixths of the Dayton Accords and involve a wide range of international actors mandated with playing key roles in Bosnia and Herzegovina post-war scenario which go far beyond military matters.<sup>323</sup> It is apparent that majority of annexes to the Dayton Peace Agreement do not relate to ending the hostilities as expected from the traditional peace agreements, but rather to post-

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<sup>319</sup> Ibid. p. 263

<sup>320</sup> Costas Douzinas, *The End of Human Rights* (Oxford 2000) p.119

<sup>321</sup> Ibid. p. 120

<sup>322</sup> Brad K. Blitz, ‘Bosnia revisited’ *Forced Migration Review* [September 2015] Issue 50, p.51 available at [www.fmreview.org](http://www.fmreview.org), accessed 27 October 2017

<sup>323</sup> David Chandler, ‘From Dayton to Europe’, in David Chandler (ed.) *Peace without Politics? Ten Years of International State-Building in Bosnia* (Routledge 2006) p.33

war rebuilding of the country and reconstructing of the society.<sup>324</sup> Bildt explains the reasons for the unique and interventionist character of the Dayton Peace Agreement and the Constitution of Bosnia and Herzegovina which were not a result of consensus among the peoples of Bosnia and Herzegovina, but were externally imposed as it follows:

No one thought it was wise to submit the constitution to any sort of parliamentary or other similar proceeding. It was to be a constitution by international decree.<sup>325</sup>

As mentioned earlier, signing the Dayton Peace Agreement and imposing the new Constitution on the peoples of Bosnia and Herzegovina have not eradicated the fundamental disagreements among the three major ethnic groups. Instead, it could be argued that these disagreements have been incorporated into the Peace Agreement, thus enabling further conflicts, only this time by some other means, like the previously mentioned abuse of the vital interest veto in the cases where only a limited number of people are involved.<sup>326</sup>

In light of this it could be argued that there is a need for a comprehensive assessment of the effects of the implementation of the Dayton Peace Agreement on the whole of Bosnia and Herzegovina and especially on human rights of all peoples of Bosnia and specifically on vulnerable people as they seem to be most affected by the inherent discriminatory nature of Bosnian Constitution. It is against this backdrop that the Montesquieu's view of the laws of the land from the beginning of this Chapter should be observed and the questions poised: what is the degree of liberty and protection that the Bosnian Dayton Constitution offers taking into account the intent of the external legislator not to include the peoples

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<sup>324</sup> Ibid.

See also C. Bildt, *Peace Journey, The Struggle for Peace in Bosnia* (London Weidenfield & Nicholson 1998) p. 139.

<sup>325</sup> Ibid.

<sup>326</sup> See Venice Commission Opinion on the Constitutional situation in Bosnia and Herzegovina and Powers of High representative, 2005, paragraph 10, note 76 above

to whom it matters most and who should abide by it as it is intended to be the highest law in the country. It would appear that the laws made for the Bosnian peoples in Dayton as a part of the peace negotiations do not adequately protect the human rights and aspirations of all the peoples in Bosnia and Herzegovina, but only of some of them depending on their ethnicity.

Some authors like Trbovich the solution to the intransigency of the Bosnian Constitution and dependency on the international involvement see in strengthening Bosnia and Herzegovina's European orientation even with the ethnically divided government. This approach would require greater accountability of the ethnic representatives and insistence on high human rights standards, which might in turn lead to greater democratization of the country.<sup>327</sup> It could be argued that another consequence of closer ties to European economic and human rights standards would be permissible stronger ties to the two regional sponsors of the Dayton Peace Agreement, Croatia and Serbia, which in turn might reduce the allure for secessionism which was one of the strongest motivation for acquiring the territory during the armed conflict.<sup>328</sup>

### **3.5 Deficiency of the Dayton Peace Agreement**

The core deficiency of the Dayton Peace Agreement is that it has not addressed the central democratic ideal and that is the notion that the powers given to political representatives and office holders are 1) given only on trust and 2) never given completely. Instead they must be supplemented by peoples active involvement in their own governance, through mentoring, challenging, advising, and ultimately when necessary replacing those who temporarily make use of peoples' power. Therefore, a democratized conception of human rights would

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<sup>327</sup> Ana S. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press 2008) p. 391

<sup>328</sup> Ibid.

include first, rights of individuals to organize themselves and to act politically, independent of, or even in opposition to the government or give government powers, second the right to hold those in power and institutions of the state accountable, both making sure that the wishes and interests of the majority and of common good are respected and preventing abuses of rights and excesses of power, and third establishment and preservation of independent spaces for citizen power are definite ingredients of democratic politics.<sup>329</sup> Keenan argues that the adoption of such an explicitly democratic conception of human rights would reduce if not fully overcome, the tension between the traditional liberal set of civil and political rights and the idea of a collective right to national self-determination.<sup>330</sup>

### **3.6 Conclusion**

From the very beginning the Dayton Peace Agreement was the United State's foreign policy initiative and an ambition of the civilian administration to maintain it's supremacy on the world stage. The goal of this effort was to stop the war and create a unitary multi-ethnic state. It stopped the war but the unitary state has not be realized. Overly optimistic initial assessments have been excessive. The nation building operation based on two semi-autonomous countries and dominated by the parties that started the war was never a guarantee of a successful return of refugees and displaced persons, encouraging international aid for reconstruction was handled by the corrupt elite, the country is deeply fractured, the prospect for ethnic integration is not promising because of a perpetual cycle of voting along ethnic lines in order to counterbalance perceived political power of the other two

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<sup>329</sup> Keenan A, "Building a Democratic Middle-Ground: Professional Civil Society and the Politics of Human Rights in Sri Lanka's Peace Process", in Jeff Helsing and Julie Mertus (eds.), *Human Rights and Conflict: New Actors, Strategies and Ethical Dilemmas* (Washington, DC, 2006) p480

<sup>330</sup> Ibid.p481

sides. In this way the Dayton Peace Agreement and the Constitution as its Annex are impediments to the economic and political reform. Instead of a Constitution that would uphold the rights of the citizen of Bosnia and Herzegovina, the Dayton Constitution was created with the provisions to preserve an environment of perpetual ethnic confrontation and political insecurity<sup>331</sup>.

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<sup>331</sup> For functions of the Dayton Peace Agreement see Gary Dempsey 'Rethinking the Dayton Peace Agreement, Bosnia Three Years Later' Policy Analysis No 327, Dec 14, 1998.

## **Chapter Four**

### **The Constitution of Bosnia and Herzegovina**

‘Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.’

Constitution of Bosnia and Herzegovina, Article 2.1

#### **4.1. Introduction**

This Chapter offers analysis of the constitutional arrangement of Bosnia and Herzegovina and the problems in relations to its two entities that during the Dayton Peace negotiations assumed the role of international legal personalities and continued with diminishing the role of the State of Bosnia and Herzegovina in the post-war period.

It then moves on to the analysis of the Bosnian Constitution and critique of the anomalies and intransigencies which are the result of discriminatory nature of the Constitution despite the fact that Bosnia and Herzegovina is signatory to numerous international treaties, conventions and other instruments, some of which are directly incorporated into the Bosnian Constitution like the European Convention on Human Rights. The core of the Chapter is about the landmark case judgment of the Grand Chamber of the European Court of Human Rights, *Sejdic and Finci v Bosnia and Herzegovina* which has still not been implemented in Bosnia and Herzegovina and its Constitution continues to be in violation of the European Convention on Human Rights.

It is apparent from the analysis so far that the Dayton Peace Agreement was initiated by the United States Foreign Policy Department, and although it expressed the wishes of the negotiating parties, the Agreement itself was written by anonymous legal officers in the United States State Department ‘with some

help from their European counterparts'.<sup>332</sup> Norfolk argues that the Dayton Peace Agreement was legally ambiguous, minimally acceptable to the signing parties and rested on several deeply flawed assumptions and the chief negotiator, Richard Holbrooke recognized its limitations and tried to draw a line under them.<sup>333</sup>

#### **4.2 Bosnia's Constitution – giving effect to Dayton?**

As mentioned earlier the Constitution of Bosnia and Herzegovina is Annex 4 to the Dayton Peace Agreement and Article I (1) of the Constitution of Bosnia and Herzegovina identifies Bosnia and Herzegovina as a federal state consisting of two entities (Republika Srpska and the Federation) with relatively high degree of autonomy.<sup>334</sup> The entities in Bosnia and Herzegovina are not legal subjects in international law, and it could be argued that, by signing Annex 4 to the Dayton Peace Agreement, the representatives of the Republika Srpska and the Federation of Bosnia and Herzegovina, as well as the international community that approved the assumed legal personalities of the entities, violated international regulations containing imperative norm of the international law. However, 'the entities de facto exercise control over a specific territory and at Dayton negotiating parties took for granted that the Federation of Bosnia and Herzegovina and the Republika Srpska had legal personality, albeit an extremely limited one, and they were entitled to conclude all the agreements annexed in the Dayton Peace Agreement and in addition undertake international obligations by means of unilateral

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<sup>332</sup> Lawrence Norfolk, *The Future Came Late: The Text Known as the Dayton Accords*, available at <http://www.lawrencenorfolk.com/archive/sarajevo-and-after/the-future-came-late-the-text-known-as-the-dayton-peace-accords/>

<sup>333</sup> Ibid.

<sup>334</sup> The Constitution of Bosnia and Herzegovina, Article I (1) Continuation, The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations.



declarations.<sup>335</sup> Gaeta argues that the assumption that both entities had de facto control over the portion of the territory could be disputed because the Federation of Bosnia and Herzegovina did not meet all of the requirements for the de facto government since it was a fictitious entity created by the Washington Agreement for political purposes, and it was recognized as a subject in international law as long as it participated in negotiations.<sup>336</sup> Gaeta compares the fictitious and political international personality of the Federation, that was meant to satisfy the Bosnian Croats' requirement not to be represented by the Izetbegovic's Government, and at the same time strengthen the position of the Croat-Muslim alliance in respect of the Bosnian Serbs. The legitimacy of the Republika Srpska and the Federation to exercise the function of international legal personalities would be differently interpreted by their respective nationalist leaders, although it is clear that both entities lost their international personality as soon as the Peace Agreement entered into force and they accepted the Bosnian Constitution. On the other hand, the overall legitimacy of the Dayton Peace Agreement could be challenged because of giving the entities the status of international legal personality for political purposes.<sup>337</sup> Gaeta emphasizes the 'insurrectional' nature of the Government of Republika Srpska that 'was obliged to accept the United States' offer for a peaceful settlement of war before losing any negotiating power and international status.<sup>338</sup>

Another vague Dayton formulation in relation to the entities in Bosnia and Herzegovina is contained in Article III (2) which 'permits entities to establish

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<sup>335</sup> Paola Gaeta, 'The Dayton Agreements in International Law', Symposium: The Dayton Agreements: A Breakthrough for Peace and Justice?, 7 EJIL (1996) 147-163, 158

<sup>336</sup> Ibid.

<sup>337</sup> In the same way legitimacy of another signatory to the Dayton Peace Agreement could be challenged. Slobodan Milosevic signed the Agreement on behalf of the Federal Republic of Yugoslavia which was recognized only in April 1996. These arguments and also the fact that the negotiating parties were kept in isolation and de facto forced to negotiate could be used to challenge the legitimacy of the Bosnian Constitution.

<sup>338</sup> Paola Gaeta, 'The Dayton Agreements in International Law', Symposium: The Dayton Agreements: A Breakthrough for Peace and Justice?, 7 EJIL (1996) 147-163, 160

‘special parallel relationships with neighbouring states,’<sup>339</sup> again contrary to international law, because only states can enter into such relationships. This permissible parallel relationship with neighbouring countries, Serbia and Croatia could only be realized if they do not endanger sovereignty and territorial integrity of Bosnia and Herzegovina as defined in Article III (2) of the Constitution. Furthermore, the Constitutional Court can overturn the agreements between any of the entity and the neighbouring countries if it is in violation of Article III (2). There have been attempts to misuse this provision in the Constitution of Bosnia and Herzegovina in order to diminish the international status of the country and at the same time to promote the presumption of the statehood of entities as they already have significant autonomy.<sup>340</sup> It could be argued that further justification for promotion of presumed statehood of the entities is in their territorial separation, the existence of the Constitutions of the entities and the administrative structure with comprehensive authorities and loose ties to the central government. It is submitted that all these attributes encourage the nationalist leaders of Bosnia and Herzegovina entities to undermine the state institutions and promote secessionist ideas. However, it is clear from Article I of the Constitution of Bosnia and Herzegovina that the statehood and the continuity of Bosnia and Herzegovina as independent and internationally recognized state, are pronounced in its Constitution and that the entities are administrative units created within the state borders and separated by a demarcation and not a state line. The main problem with the Constitution arises from the relationship between the authority of the

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<sup>339</sup> Ana S. Trbovich, *Yugoslavia's Disintegration* (Oxford University Press 2008) p.322  
See also Kori Shake, 'The Dayton Peace Accord: Success or Failure?' in Kurt R. Spillmann and Joachim Krause (eds. with the assistance of Derek Muller and Claude Nicolet), *International Security Challenges in a Changing World*, Vol.3 (Peter Lang, Bern 1999) p.288  
See also Ilias Bantekas Lutz Oette *International Human Rights Law and Practice* (Cambridge University Press 2<sup>nd</sup> ed 2016) see also Dinah Shelton, *The Oxford Handbook of International Human Rights Law*(Oxford University Press 2015, 1<sup>st</sup> ed 2013) 00 52-71.

<sup>340</sup> See also Dr Rajko Kuzmanovic, *Ustavno pravo, Constitutional Law* [Author's translation](Pravni fakultet 2002) pp. 438- 439 for different perspective on the statehood of the entities v. the statehood of Bosnia and Herzegovina.

entities and rights of the constitutive peoples because it is this relationship that violates the rights of abstract citizens and their adequate participation in the Parliamentary Assembly of Bosnia and Herzegovina. In essence, the rights of an abstract citizen in Bosnia and Herzegovina does not negate the rights of the constitutive peoples in Bosnia and Herzegovina, but on the other hand, the rights of the constitutive peoples are not the source of the Bosnian sovereignty.

Apparent problem with bringing into question the legitimacy of Bosnia and Herzegovina is undermining of the central government and creation of the climate of political instability. This anomaly in the Constitution of Bosnia and Herzegovina relating to the authority of the entities and rights of the constitutive peoples in Bosnia and Herzegovina is one of the main deficiencies of the Dayton peace Agreement.

#### **4.3 Constitution of Bosnia and Herzegovina – two- tiered citizenship**

As mentioned earlier the anomalies in the Constitution of Bosnia and Herzegovina relating to the authority of the entities and rights of the constitutive peoples in Bosnia and Herzegovina are the main deficiencies of the Dayton peace Agreement. Another deficiency is in relation to the discrimination of minorities and ‘others’.

Annex 4 to the Dayton Peace Agreement provided Bosnia and Herzegovina with a Constitution that at first might seem like a shiny beacon of hope for reconciliation in an integrated country because it comprises all major international treaties. However, it is obvious that the principle of ethnicity is in conflict with basic prerequisite of a modern state and it raises the question whether the legislator intended human rights to be dependent of group rights or that was a temporary solution to establish a lasting ceasefire. It is clear that modern state human rights cannot depend on group rights and with this premise it could be argued that

Bosnian Constitution could not have been created as a permanent law for Bosnia and Herzegovina. It is submitted that the importance of gradual and timely changes of the Constitutional provisions cannot be underestimated because of the priority to maintain the stability and peace in the country.

There are two significant features of the Constitution of Bosnia and Herzegovina, its international origin, because it was negotiated and signed in Dayton, Ohio, in the United States, and its far-reaching openness to international demands.<sup>341</sup> Gaeta questions the legal nature of the three similar unilateral declarations by which the three Bosnian parties negotiating in Dayton, the Republic of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina accepted the Constitution; whether these declarations of acceptance of the Bosnian Constitution should be regarded as elements of international agreement or they represent separate unilateral acts.<sup>342</sup>

Gaeta further maintains that the constitutional law-making process regarding the Bosnian Constitution is anomalous.<sup>343</sup> Firstly, the Constitution of Bosnia and Herzegovina is Annex 4 to the Dayton Peace Agreement but it does not appear to be an international agreement.<sup>344</sup> Gaeta illustrates it as follows:

[The] ‘constitutional Charter of an existing State was drafted and agreed upon in an international forum, and subsequently entered into force by virtue of international transaction...and it was negotiated at international level by the Republic of Bosnia and Herzegovina, with on the one side two insurrectional groups wielding de facto control over part of the territory of that State, and on the other, a group of foreign States.’<sup>345</sup> Approaching the problem in this way it could be argued that the Constitution of Bosnia and Herzegovina has not been a result of either internal constitution making process in Bosnia and Herzegovina, or by a completely ‘external

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<sup>341</sup> Paola Gaeta, ‘The Dayton Agreements in International Law’, Symposium: The Dayton Agreements: A Breakthrough for Peace and Justice?, 7 EJIL (1996) 147-163, 160

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid. As mentioned earlier the Constitution of Bosnia and Herzegovina was drafted in English

process'.<sup>346</sup>The Preamble of the Constitution states that the Constituent peoples are Croats, Serbs and Bosniaks...(along with Others), and the citizens of Bosnia and Herzegovina.

The second feature of the Bosnian Constitution relates to its openness and friendliness towards the international legal system and its rules and adoption of the highest standards of international law and human rights.<sup>347</sup> This is reflected in the Preamble which refer to' the purposes and principles of the United Nations and pledge 'to ensure full respect for international humanitarian law' and to uphold international instruments on human rights, such as the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic and Cultural Rights, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, and other human rights instruments.<sup>348</sup> Almost the entire Article 2 of the Bosnian Constitution refers to the highest protection of internationally recognized human rights, but the most notable is Article 2, paragraph 2 whereby the 'rights and freedoms set forth in the European Convention for protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina and they shall have priority over all other law; and also Article 10, paragraph 2, whereby all the constitutional provisions on human rights are non-amendable by constitutional process which means that no amendments to the Constitution may eliminate or diminish any of the rights and freedoms referred to in Article 2 of the Constitution.<sup>349</sup>

While most countries incorporated the European Convention on Human Rights into their legislation by ratifying it in their national parliaments, Bosnia and Herzegovina adopted the Convention by virtue of signing the Dayton Peace

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<sup>346</sup> Ibid. p. 161

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

Agreement and this Constitution became one of the annexes to that Peace Agreement. The legal reason for this exception is contained in the Recommendation of the Council of Ministers in the Parliamentary Assembly of the Council of Europe in relation to establishing mechanisms for the protection of human rights in European countries that are not members of Council of Europe.<sup>350</sup> Sadikovic argues that the reason for direct incorporation of the European Convention on Human Rights into the Bosnian Constitution was to eliminate the basic flaw from the Dayton Constitution relating to the dominant role of the ‘three constitutive peoples’ as opposed to an individual citizen with his/her rights and obligations.<sup>351</sup> As mentioned earlier Article 2 (2) of the Constitution of Bosnia and Herzegovina endorses the supra-national character of the European Convention on Human Rights, thus promoting an individual citizen as beneficiary of all human rights and basic freedoms and a democratic State as the main guarantor of these rights and freedoms.<sup>352</sup> On the other hand, it diminishes the primacy of the ‘constitutive peoples’, their ‘vital national interests’ and discrimination against the other seventeen peoples as recognized in 1991 Census. In addition, Sadikovic argues that the reason for direct incorporation of the European Convention on Human Rights into the Bosnian Constitution was attempt to alleviate the results of the destruction and disintegration of the Bosnian society after the war and bring the country in line with the development of the neighbouring countries that have already started the process of transition towards democratic societies.<sup>353</sup>

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<sup>350</sup> Gret Haller, ‘Incorporation of human rights treaties into domestic law prior to their ratification’ in *The status of international treaties on human rights* (Council of Europe Publishing 2006) p.105

<sup>351</sup> Lada Sadikovic, ‘The Supra-Constitutional Character of the European Convention on Human Rights’ (2012) Vol. LIII No.1 Pregled, Periodical for Social Issues pp. 31- 57, 60

See also Fionnula Ni Aolain, ‘The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis’ (1998) Vol.19 Michigan Journal of International Law, Issue 4, 956-1004, 974-984

<sup>352</sup> Ibid.

<sup>353</sup> Ibid.

Uniqueness of the Bosnian Constitution is that it contains provision for its own change in order to be harmonized with the European Convention on Human Rights. This way of incorporation of the European Convention on Human Rights meant that it was intended to protect human rights in Bosnia and Herzegovina and at the same time to strengthen the State institutions in order that human rights are protected through the representative system of government and power sharing.<sup>354</sup> Kadribasic refers to the dualistic nature of the provisions of the Constitution that combines the direct application of the European Convention on Human Rights and enumeration of a list of human rights.<sup>355</sup> However, it is clear that Bosnia and Herzegovina has not managed to amend the discriminatory provisions from its Constitution which give primacy to the three constitutive peoples and it is in direct violation of the European Convention on Human Rights which is based on the promotion and protection of individual rights and the obligation of a State to protect those rights.<sup>356</sup>

Sadikovic questions whether Bosnian Constitution, by protecting only the interests of the three constitutive peoples and not the interests of all individuals, also excludes and discriminates against the individual citizens of these

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See also Zlatan Begic and Zlatan Delic '*Constituency of peoples in the Constitutional System of Bosnia and Herzegovina: chasing fair solutions*. I-CON(2013) Vol 11 No2 447-465 available at <https://academic.oup.com/icon/article/11/2/447/753622> accessed 17 July 2020. In order to achieve the rights of constituency, there is a constitutional mechanism for protecting vital national interests of constituent peoples which provides 'A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosnian, Croat or Serb people by a majority of, as appropriate, The Bosnian, Croat or Serb delegates.' In this way, the delegates from any constituent peoples can stop the majority decision pertaining to any matter that is the subject of the decision making.

The problem with this mechanism is that the Bosnian Constitution does not specify the range of issues that may not be considered to be vital national interest and this mechanism often blocks important decisions in the Parliamentary Assembly and creates stalemate in decision making.

<sup>354</sup> Ibid.

<sup>355</sup> Adnan Kadribasic, 'Developing Equality Legislation in divided Societies: The Case of Bosnia and Herzegovina' (2013) Vol.10 *The Equal Rights Review* pp.59-79, 60

<sup>356</sup> Ibid.

constitutive peoples as well as against the others.<sup>357</sup> Comparing the laws of other multi-ethnic states like Belgium, Switzerland and Spain the laws of these countries always protect interests of all their citizens and not the interest of any particular ethnic groups, and the anachronism in Bosnian Constitution, not only violates the European Convention on Human Rights, but blocks the work of the Parliamentary Assembly and the Presidency of Bosnia and Herzegovina.<sup>358</sup> It could be argued that frequent and unnecessary calls by the representatives of the three constitutive peoples in the Parliamentary Assembly and the Bosnian Presidency for protection of their ‘vital national interests’, creates paralysis in these government bodies, and the subsequent inefficiency of the State institutions negatively impacts on the economic, democratic and all other aspects of the three ethnic communities whose vital interests are supposed to be protected.<sup>359</sup>

Similarly, Kurtcehajic argues that all the peoples who do not belong to one of the constitutive peoples are in fact second-class citizens and also the constitutive peoples in two entities could be second-class citizens if they are minority in each of the entities.<sup>360</sup> Kurtcehajic concurs with Sadikovic that the anachronism in the Bosnian Constitution is on the one hand, in the provision for the direct application of the European Convention on Human Rights in Bosnia and Herzegovina, and on the other hand, existence of the provisions that simultaneously violate the rights conveyed by the Convention.<sup>361</sup>

Some authors like Kurtcehajic call for exploring the possibility of amendments or changes in relation to Article 3 (5) of the Bosnian Constitution which refers to the

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<sup>357</sup> Ibid. p. 64 See also Christian Tomuschat, ‘Democracy and the Rule of Law’ in Dinah Shelton (ed) *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) pp 469-496

<sup>358</sup> Ibid. p. 65

<sup>359</sup> Ibid. p. 66

<sup>360</sup> Suad Kurtcehajic, ‘The Possibility of reviving the Constitution of the Republic of Bosnia and Herzegovina’ (2012) Vol. LIII No.1 *Pregled, Periodical for Social Issues* pp.57-73, 88

<sup>361</sup> Ibid. (An example of this anachronism is that only the members of the three constitutive peoples can run for the Presidency of Bosnia and Herzegovina and the same discrimination applies to the members of the three constitutive peoples if they are minority in each of the entities, p.88)



additional authority of the State and which seems to offers options for greater transfer of powers to the State in relation to the issues acceptable to both entities, and those conferred in Annexes 5 -8 or when the sovereignty and territorial integrity of the State is endangered.<sup>362</sup> In this way the Constitution allows for the establishment of the additional institutions that might be beneficial for better functioning of Bosnia and Herzegovina and consequently improved political climate.<sup>363</sup> Perhaps the most radical proposals relate to the calls for revisiting the Constitution of the Republic of Bosnia and Herzegovina form 1995 and also to the possibility of proclaiming the Peace Agreement void, because it has recognized as legitimate the entity of the Republika Srpska and its territory gained through ethnic cleansing, and because it has not been completely implemented.<sup>364</sup> It could be argued that this is unlikely scenario, as it would involve obtaining agreement from the all the parties involved in the negotiation of the Dayton Peace Agreement and it would disturb the fragile power sharing agreement among the three ethnic parties. It is important to note that it is the Dayton Peace Agreement that has introduced mechanism aimed at insuring parity between the parties to the armed conflict along ethnic lines.<sup>365</sup>

As mentioned earlier the central provision of the Constitution of Bosnia and Herzegovina in Article 2 (4) relates to non-discrimination and states it as follows:

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination

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<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

See also 'Problems Regarding Constitutional Framework in Bosnia and Herzegovina and its (Non) Implementaion' in Human Rights in Bosnia and Herzegovina 2011, Legal Provisions, Practice and International Human Rights Standards with Public Opinion Survey, Human Rights Centre, University of Sarajevo 2012, p.60 for the grounds on which the Bosnian Constitution allows for greater expansion of the responsibilities of State institutions.

<sup>364</sup> Suad Kurtcehajic, 'The Possibility of reviving the Constitution of the Republic of Bosnia and Herzegovina' (2012) Vol. LIII No.1 Pregled, Periodical for Social Issues pp.57-73, 85

<sup>365</sup> Adnan Kadribasic, 'Developing Equality Legislation in divided Societies: The Case of Bosnia and Herzegovina' (2013) Vol.10 The Equal Rights Review pp.59-79, 72

on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with the national minority, property, birth or other status.

The Dayton Peace Agreement aimed primarily to stop the armed conflict among the three warring factions and since it was necessary to obtain consensus on the terms of the cease fire and ensuring the future stability of Bosnia and Herzegovina it was necessary to provide mechanisms so that the three main ethnic groups accept some kind of power sharing and have the necessary mechanisms to influence decisions. This was ensured by reserving seat in the upper House of the Parliamentary Assembly- the House of Peoples and for the three-member Presidency of Bosnia and Herzegovina for people from certain ethnic background.<sup>366</sup>

This provision is in direct contravention with the ECHR and it was challenged before the European Court of Human Rights and the Grand Chamber of the ECHR agreed that the provision is discriminatory and needs to be removed from the Constitution.

#### **4.4 European Court of Human Rights - Sejdic and Finci v. Bosnia and Herzegovina**

The most important decision of the Grand Chamber of the European Court of Human Rights against Bosnia and Herzegovina with regard to anti-discrimination rights is the judgment delivered in the case *Sejdic and Finci v Bosnia and Herzegovina* in December 2009.<sup>367</sup> *Sejdic* is a Bosnian Roma who was prevented to put himself forward as a candidate for the Presidency and *Finci* is a Bosnian Jew who could not become a candidate for the House of Peoples in the Parliament. They alleged that the Constitutional provisions violated their rights

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<sup>366</sup> Ibid. p. 61

<sup>367</sup> *Sejdic and Finci v. Bosnia and Herzegovina* ECHR Applications Nos. 27996/06 and 34836/06, Judgment 22 December 2009.

under Articles 3,13 and 14 of the ECHR, Article 3 of the Protocol No.1 to the ECHR and Article 1 of Protocol No.12 to the ECHR.

This case is the best example of the notion that democracy and human rights do not always come together and are not interchangeable. Bosnia and Herzegovina is based on democratic principles of free elections, it has Constitution which is a result of the Dayton Peace Agreement and the Country has signed numerous international treaties like Protocol 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that entered into force in Bosnia and Herzegovina in 2005. And yet, the European Court of Human Rights found that Bosnia and Herzegovina had violated Article 1 of this Protocol relating to the enjoyment to the rights and freedoms, Article 21 of the Universal Declaration of Human Rights which guarantees the right to take part in Government and public service and Article 14 of the European Convention of Human Rights which contains prohibition from discrimination. The true nature of the Bosnian Constitution is best illustrated as follows:

This case centres on the provisions in the current Bosnian Constitution that exclude the others from candidacy for the House of Peoples in the Bosnian Parliament. Bosnian Constitution established a tri-partite Government based on ethnic divisions. This was a political compromise in order to establish peace. It was hammered out in protracted and persistent negotiations that aimed at creating institutional bodies based almost exclusively on the systems of checks and balances between the three belligerent ethnicities. It was ultimately the most precarious equilibrium that was reached, resulting in a fragile tri-partite symmetry born from mistrust and nourished on suspicion.<sup>368</sup>

The constitutive peoples of Bosnia and Herzegovina are only Serbs, Croats and Bosniaks. The national minorities are therefore denied rights in government and other public services because of this discriminatory constitutional provision. The

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<sup>368</sup> Ibid.

European Court of Human rights ruled that there was no reasonable and justified excuse to still have the discriminatory provisions enshrined in the Bosnian Constitution and that the country was in violation of Articles 14 and 3 of Protocol No.1 and also Article No.1 of Protocol No.12. In light of this judgement it appears that peace in Bosnia came at a price. Bosnia and Herzegovina had an obligation to review the electoral legislation in the light of Council of Europe standards and to revise it where necessary but failed to do so.<sup>369</sup> Both Judges Mijovic and Bonello recognize the fragile truce established in Dayton and the reasons why power sharing in Bosnia and Herzegovina had to be based on ethnic equilibrium. Judge Mijovic, partly dissenting and partly concurring explains his reasoning in this case as follows:

Hypothetically speaking, were it not occurring in a state built on atrocities, massacres and bloodshed, I would be of the opinion that, even taken alone the obligation, of an individual to declare his or hers affiliation with an ethnic group in order to stand as a candidate for public position is unacceptable and sufficient to find violation of the prohibition of discrimination based on ethnic affiliation.<sup>370</sup>

Judge Bonello concurs with Judge Mijatovic that imperfect peace is far better than war. In his words:

It seems that the filigree construction of the Dayton Peace Agreement was capable of extinguishing the inferno of Bosnia and Herzegovina and although an imperfect architecture, it managed to induce dialogue instead of dynamite. Power sharing was based on the recipe of exact ethnic proportions.<sup>371</sup>

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<sup>369</sup> Ibid. Part D, Para 21.

<sup>370</sup> Ibid. Part D.

<sup>371</sup> Ibid. Judgment, Dissenting Opinion of Judge Bonello.

See also Edin Hodzic and Nenad Stojanovic (2011) *New/Old Constitutional Engineering? Challenges and Implications of the European Court of Human Rights decision in the case of Sejdic and Finci v. Bosnia and Herzegovina*, Sarajevo: Centre for Social Research Analitika, p. 27 for discussion on how entering into force of the Protocol No.12 in Bosnia and Herzegovina on 1 April 2005, as the new equality provision that prohibits discrimination on any grounds by a public authority, encouraged Sejdic and Finci

More than ten years after the judgement of the European Court of Human Rights Bosnia and Herzegovina has not implemented the Court's ruling despite the renewed calls of the ministers of the Council of Europe and it is still the country in which the Constitution openly discriminates against minorities. It could be argued that the reason for this is that by implementing this ruling the existing equilibrium of power sharing might be, and probably would be disturbed. In addition, the other constitutional provisions that are discriminatory based on ethnicity would need to be changed as well. The question is whether Bosnian Government is ready to renegotiate the Constitution and implement human rights as per the Court's ruling. Judge Bonello, dissenting, reminds of a possibility of recurrence of a conflict if the enforcement of human rights calls causes the fragile architecture of Bosnian justice to crumble.

Judge Bonello also questioned the Court's finding that the situation in Bosnia and Herzegovina had changed and that the state should not be put under any ethical or legal obligation to sabotage the very system that saves its democratic existence. It is an interesting observation that the Court has in its history approved restrictions of electoral rights based on the widest spectrum of justifications and yet, in this case, the danger of civil war, the safeguard of territorial cohesion did not present sufficient value to limit the rights of the two applicants.<sup>372</sup>

The Venice Commission got involved in discussions about the methods of election to the Presidency and the House of Peoples and echoed the criticism expressed previously by the Advisory Committee of the Framework Convention

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to take their case to the Court in Strasburg since before that 'neither applicant believed he had legal basis for an application'.

<sup>372</sup> Ibid.

for the Protection of National Minorities that assessed the compatibility of consociational arrangements with human rights.<sup>373</sup>

It could be argued that The Commission has realized that constitutional changes in Bosnia and Herzegovina could only be done incrementally and within a context in which it would be possible to ‘overturn multinational federal and consociational agreement for the three peoples negotiated at Dayton in 1995, and its replacement with an integrated state of equal citizens’.<sup>374</sup> This demonstrates that the Constitution imposed on the warring factions is a temporary law necessary to maintain stability in the war-torn country and that the inherent discriminatory norms were tolerated because of wider considerations relating to post-conflict scenario.

From the analysis so far it is clear that the implementation of the judgement in Sejdic and Finci case will not necessarily improve the situation for the minorities in Bosnia and Herzegovina, whose marginalization is more due to the political culture than to the impugned constitutional provisions, but a hastily brought changes in the Constitution could create imbalance in power sharing and ethnic tensions and even a spark further conflict as Judge Bonello warns in his dissenting opinion.<sup>375</sup> It is submitted that the Opinion of the Venice Commission offers balanced approach and takes into account the complexities of Bosnia and Herzegovina’s two entities and three different ethnic communities still under the veil of unresolved issues that caused the war, the main one being the different approach to political arrangement of the joint country.

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<sup>373</sup> Christopher McCrudden and Brendan O’Leary, *Courts and Consociation, Human Rights versus Power Sharing* (Oxford University Press 2013) pp. 73-74

See also Venice Commission, Opinion on the Electoral Law of Bosnia and Herzegovina, CDL-INF 92001) 21, 24 October 2001, [31]

See also Venice Commission *Amicus Curiae Brief in the cases of Sejdic and Finci v. Bosnia and Herzegovina (Application no. 27996/06 and 34836/06) Pending before the European Court of Human Rights*, CDL-AD (2008)027, 17-18 October 2008 for Commission’s intervention and influence as a third party in Sejdic and Finci case

<sup>374</sup> Christopher McCrudden and Brendan O’Leary, *Courts and Consociation, Human Rights versus Power Sharing* (Oxford University Press 2013) pp. 73-74, 75

<sup>375</sup> ‘Bosnia’s Gordian Knot: Constitutional Reform’, International Crisis Group, Europe briefing No.63, 12 July 2012, available from <https://www.crisisgroup.org/en/regions/europe/balkans/bosnia-herzegovina/b068-bosnia-gordian-knot-constitutional-reform.aspx>, accessed on 17 March 2016

## 4.5 Constitutional reform

It seems that more than twenty five years since the Dayton Peace Agreement there is still great distrust by both the international community and the peoples of Bosnia and Herzegovina in the capabilities of Bosnian politicians to shape the future of the country. The new Constitution is expected to reorganise otherwise dysfunctional entity of the Federation of Bosnia and Herzegovina. Although both the United States Government and the European Union are interested in the reforms of the Constitution of the Federation and although they engaged the expert groups in order to find a solution it seems that the reason for a lack of progress is diminished confidence in the democratic processes in Bosnia and Herzegovina that they helped to create despite the fact that it should represent the will of the peoples of Bosnia and Herzegovina and that there is a fully functioning Constitutional Court. A consensus on the future of the state should be achieved by the people to ensure respect for universal principles such as respect for human rights and democratic government.<sup>376</sup> It would appear that in the post conflict period both Bosnia and Herzegovina and the international community accepted that it was necessary and even desirable to adhere to the guiding principles for developing legislation and help in drafting that legislation because it was the time when a country's many factions were struggling to implement a fragile truce. By allowing entity of the Federation the time to make their own constitutional changes through detailed negotiations and people participation, where key groups could rise above give and take of everyday majority politics, and focus on the future of the state, might have a twofold advantage. It might contribute both to peace building and strengthening of the state institutions, thus strengthening the respect for the universal principles of human rights enshrined in the Constitution.<sup>377</sup> However fast-track drafting of the proposals for the constitutional reforms without wider consultation cannot limit the political power of the majority and protect the rights of the individual and minority groups and cannot play a role in the process of reconciliation.<sup>378</sup>

It could be argued that the deep-seated disagreements and power struggle have created obstacles to strengthening the state institutions and it is now clear to all

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<sup>376</sup> Jamal Benomar, *Constitution Making and Peace Building: Lesson Learned from the Constitution Making Processes of Post-Conflict Countries*, UN Development Programme, August 2003, p. 2.

<sup>377</sup> *Ibid.* p. 2.

<sup>378</sup> *Ibid.* p. 2.

parties in Bosnia and Herzegovina that political change is necessary. Similarly, the Dayton Peace Agreement that included the adoption of the new Constitution as Annex 4 to the agreement has not left space for future political changes. It might be argued that in light of this it has served the purpose of a peace agreement and an interim arrangement and that the future Constitution has to include guarantees not only for the three main actors who were in the position to decide between war and peace but other groups as well. Continuing delays in drafting the necessary constitutional changes, including changes to the electoral provisions, and on-going political crises impede necessary human rights reforms, including the constitutional changes needed to end discriminatory restrictions on Jews, Roma and others to holding political office. Roma in particular remain extremely vulnerable and subject to widespread discrimination.<sup>379</sup>

It is apparent that Bosnia and Herzegovina has adopted the most important international treaties, conventions and international instruments, some of them directly incorporating into the Constitution, like the European Convention for protection of Human Rights and Fundamental Freedoms and its Protocols, but that does not guarantee stable peace in the country. All of these 'legal weaponry' is at the disposal only if the parties that accepted them are willing to translate these large potentialities into reality.<sup>380</sup>

It could be argued that the process of Constitutional reform in Bosnia is a clear indication of the failure of democracy in Bosnia.<sup>381</sup> The reason for this failure is in the fact that 'the international community sided with the idea that popular sovereignty throughout Bosnia and Herzegovina is a desired outcome, but left it to national politicians to agree on the precise mechanism of achieving it.'<sup>382</sup>

Bojkov challenges the notion that Bosnia and Herzegovina is a protectorate because of the existing fabric of national politics and the framework of available

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<sup>379</sup> Human Rights Watch, World Report 2012: Bosnia and Herzegovina

<sup>380</sup> Ibid. p. 163

<sup>381</sup> Victor D. Bojkov, 'Democracy in Bosnia and Herzegovina', (2003) Vol.4, Southeast Politics, No.1, pp. 41-67, 60

<sup>382</sup> Ibid.



options it has been given to democratically reconstruct polity, therefore the more appropriate definition would be a controlled democracy.<sup>383</sup> The fact that Bosnia and Herzegovina fails to utilize the available options offered in the Dayton Peace Agreement and subsequent need for more external intervention does not obviate the fact that these options exist; rather, the failures to utilize the available potential is due to a lack of reconciliatory politics among the governing parties.<sup>384</sup> Bojkov argues that the biggest hindrance to consolidating democracy in Bosnia and Herzegovina is ‘the lack of a uniting political project within the political space of the country.’<sup>385</sup>

It is submitted that the Bosnian Government has a difficult task of proving to the international community that it is capable of implementing the European Court’s ruling by bringing the necessary changes to the Constitution. At the same time it is an opportunity to show if the Bosnian democracy is ready for human rights guaranteed by the international treaties without the need that the international community imposes the legislation. It is clear that the changes to the Constitution or failure to do that would have far reaching consequences. So far Bosnian political leaders are not willing to deal with the issue of constitutional ethnic discrimination as they are aware that it would trigger a number of other issues, like calling for a referendum which would decide on the position of the Republika Srpska within Bosnia and Herzegovina. Furthermore the European Union and the United States are aware that they bear responsibility for the provisions of the Bosnian Constitution by facilitating and negotiating the Dayton Agreement and they would now want to see the discriminatory provisions removed. However, it could be argued that once again the focus of the international community has shifted to other challenging areas of the world, and consequently Bosnia and Herzegovina remains unstable.

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<sup>383</sup> Ibid. p. 61

<sup>384</sup> Ibid.

<sup>385</sup> Ibid.

#### **4.6 Attempts at Addressing Discriminatory Nature of the Bosnian Constitution**

Judgements of the Constitutional Court of Bosnia and Herzegovina indicate a lack of respect for the rule of law. By the end of 2019, there were sixteen judgments of the Constitutional Court of Bosnia and Herzegovina that have not been carried out. Eight of these judgments concern the constitutionality of the decisions of the lower courts and eight were appeal cases. The Parliament, cantonal governments and lower courts have not been respecting the decisions of the Constitutional Court of Bosnia and Herzegovina. Some of the cases on which the Constitutional Court of Bosnia and Herzegovina had to deliberate included the right to a fair trial, unconstitutionality of the Statute of the town of Mostar, electoral laws, police, sale of real estate, change of names of the towns in the Republika Srpska, official holiday in Republika Srpska, the status of displaced persons, the status of the constitutive peoples and others. Although non-compliance with the decisions of the Constitutional Court of Bosnia and Herzegovina is a criminal act carrying a custodial sentence from six months to five years it is clear that there is a considerable degree of impunity as the very institutions that are at the forefront of the legal system in Bosnia and Herzegovina do not comply with the decisions of the Constitutional Court or at best only carry out some of the decisions while the situation on the ground remains unchanged. The Prosecutor's Office, although informed about the decisions of the Constitutional Court, has yet to raise charges for non-compliance. It seems that the highest institutions of Bosnia and Herzegovina do not have respect for the rule of law and this creates an atmosphere of impunity.<sup>386</sup>

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<sup>386</sup> Case U-2/18. 18 March 2019, Official Gazette of Bosnia and Herzegovina No 30/19 Constitutional Court of Bosnia and Herzegovina judgment in relation to constitutionality of 9 January as a Day of the Republika Srpska that places Serbs in the Republika Srpska in a privileged position at the exclusion of others and it was decided that it contravened Art 1/2 of the

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Constitution of Bosnia and Herzegovina in conjunction with Articles 1.1 and 2a) and c) of the International Convention on Prohibition of all forms of Race Discrimination and Article 1 of Protocol No 12 of the European Convention for the Protection of Human Rights and Basic Freedoms and Article VI/5 of the Constitution of Bosnia and Herzegovina, The President of the Constitutional Court Zlatko H. Knezevic and Judge Miodrag Simovic dissented.

See also Case AP 3317/17 Official Gazette No 20/19 on the constitutionality of decisions in land registry cases from the town of Mostar and two from the place of Siroki Brijeg and it was decided that arbitrary application of the material law was in contravention to Art 1/3 right to fair trial in the Constitution of Bosnia and Herzegovina.

See also Case 4/4401, Official Gazette of Bosnia and Herzegovina No 2/04, judgment on the change of names of the towns in the Republika Srpska. It was found that the names with the prefix Srpski violated Art II/4 and Art II/5 of the Constitution of Bosnia and Herzegovina and that the decision to add the prefix was discriminatory to non Serbs who lived in these locations.

See also Case of Zornic v Bosnia and Herzegovina ECHR 217(2014) 15.07.2020 3681/06. This case concerned the ineligibility of Ms Zornic to stand for election in the House of Peoples and the Presidency of Bosnia and Herzegovina because she refused to declare affiliation to any particular ethnic group but declared herself a citizen of Bosnia and Herzegovina and in accordance with the Constitution of Bosnia and Herzegovina only those that declared an affiliation to the so called 'constituent peoples' (Bosniacs, Croats and Serbs were entitled to stand for election. The ECHR decided there was a violation of Article 14 (prohibition of discrimination in conjunction with Article 3 of Protocol 1 (right to free elections) and said that Bosnia's constitutional provisions were never designed to be permanent. The Court said that the 'impugned constitutional provisions were put in place when a very fragile ceasefire was in effect on the ground and that the provisions were designed to end brutal conflict marked by genocide and ethnic cleansing...however more than eighteen years later after the end of the tragic conflict, there could no longer be reason for the maintenance of the contested constitutional provisions'.

See also Case of Pilav v Bosnia and Herzegovina ECHR 198 (2016) 09.06.2016. The case concerned the complaint by the politician residing in the Republika Srpska who declares herself as Bosniac, and it was legally impossible for her to stand for election to the presidency of the country. ECHR found violation of Article I Protocol No 1 (general prohibition against discrimination).

See also Case Baralija 30100/18 29/10/2019, judgment concerning a legal void that made it impossible for the applicant, a local politician from Mostar, to vote or stand in elections. This case was also decided on appeal in the ECHR in Strasbourg and it was decided that there was a case concerning discrimination (Articles 14 and 1 of Protocol No12). In this case the ECHR ordered the President of Bosnia and Herzegovina to change the electoral law. The Court went even further and authorised the Constitutional Court of Bosnia and Herzegovina to bring temporary laws that would enable elections in Mostar in case the Parliament of Bosnia and Herzegovina failed to comply with the ECHR decision. This was significant because the Constitutional Court, in this case, was given a legislative role. This decision of the ECHR is significant because the Constitutional Court's of Bosnia and Herzegovina legislative role will enable elections in Mostar which have been suspended since 2010 after the Constitutional Court's decision that the regulations of the Statute of the town of Mostar were violating the Constitution of Bosnia and Herzegovina.

See also Andre Nollkaemper and August Reinisch with Ralph Janik and Florentine Simlinger, eds., *International Law in Domestic Courts, A case book* (Oxford University Press 2018) p370.

See also Case 4-5/98, 1 July 2002 on constitutive peoples of Bosnia and Herzegovina. The Court decided that the two entities should change their respective constitutions in order to guarantee full equality of all three constitutive peoples. The significance of this decision is in its emphasis on the overriding principle of rights of the three constituent peoples in Bosnia and Herzegovina and that is represented by the right to be represented and equal. Also this was an opportunity for Bosnia and Herzegovina to become a fully functioning and stable international state and still remain within the framework of the Dayton Peace Agreement.

It is important to note that the Constitution of Bosnia and Herzegovina, as Annex 4 to the Dayton Peace Agreement, was written whilst the country was still at war and divided along ethnic lines. Therefore, it was difficult to achieve the goal of stopping the war and negotiating with war lords a better and more workable solution that would serve the peoples in Bosnia and Herzegovina after the cessation of the conflict in which all relevant groups, and not only three constituent peoples would be equally served and had an interest in upholding the constitution.

Since the decision of the Constitutional Court of Bosnia and Herzegovina on constitutive peoples in 2002 there have been several initiatives to change the unworkable Constitution and make it at least a bit less discriminatory. Also, several decisions of the ECHR have made little impression on the Bosnian ruling elite as they still ignore the orders to change the Constitution. The first significant initiative was the so called 'April Package' in 2006 offering a package of constitutional changes, but it was later rejected in the Parliamentary Assembly. It is significant to note that the representatives of the parties at that time achieved impressive results during the election held after this meeting. Two further attempts to agree on the changes of the constitution, Butmir I and Butmir II have also been unsuccessful apart from dealing with suggestions to strip the House of Peoples of its legislative role and the composition of the Presidency of Bosnia and Herzegovina. It is interesting to note that Butmir II reinstated the legislative role of the House of Peoples.

All of these unsuccessful initiatives and a further meeting in Brussels were initiated by the USA, supported by the EU with the aim to achieve consensus amongst the ruling parties. It was also a test as to whether to close the OHR and

bring to an end their mandate to maintain peace and stability in Bosnia and Herzegovina.

There has also been Prud meeting organized by the domestic actors themselves but no major agreement was reached. The only significant success was agreement on the amendments concerning the District of Brcko and exploration of options to further divide the Federation of Bosnia and Herzegovina.

It is obvious that Bosnia's internal politics has reached a point where despite the decisions of the Constitutional Court of Bosnia and Herzegovina about the violations of the Constitution and a stream of cases and judgments from the ECHR the ruling political elite consistently ignore the discriminatory nature of the constitution and its implications for the lives of all peoples in Bosnia and Herzegovina. This is particularly discriminatory against minority groups that have suffered abuse even before the war in Bosnia and Herzegovina.

'It seems that Bosnian and Herzegovinian elite understands that how states treat their minorities is now seen as a matter of legitimate international concern, monitoring and intervention. They are also aware that this international framework is deployed to export Western models to newly democratizing countries in Bosnia and Herzegovina and other countries in Eastern Europe.'<sup>387</sup>

'It seems that the ethnic leaders in Bosnia and Herzegovina and other East European countries understand that the Western democracies cannot agree on a set of minimum standards or best practices in their own countries and are not very effective within their own context'<sup>388</sup> Therefore, they, by carrying out the minimum of what is required and ordered by the Courts and international representatives maintain themselves in power and juggle between obligations

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<sup>387</sup> Will Kymlicka 'Multiculturalism and Minority Rights West and East' in Joshua Castellino, *Global Minority Rights* (Routledge 2011) p219.

<sup>388</sup> Ibid.

towards the international community and maintaining enough ethnic tensions to keep themselves in power. It is submitted that this inconsistency and even inefficiency of the international community to deal with the ethno-cultural diversity and shifting of focus on diverse domestic and international issues has greatly contributed to the lack of respect for the rule of law in Bosnia and Herzegovina and continued violations of international and domestic judgments. The implementation of the ruling in the landmark case of *Sejdic-Finci*<sup>389</sup> ‘would assist in breaking down ethnic and religious divisions in Bosnia and Herzegovina by encouraging political participation and representation and promoting social cohesion’.<sup>390</sup>

Kymlicka criticises ‘European experiment in national minority rights and he proposes a new framework that would recognise not only legitimate claims of indigenous people but also other homeland minorities.’<sup>391</sup> The case of Bosnia and Herzegovina has shown that the international community has become increasingly influential in shaping domestic choices concerning the rights of minorities, however, there are deep and unresolved questions about how this influence should be resolved.<sup>392</sup> The *Sejdic-Finci* case offers important protection for the inhabitants who lack electoral rights in other states by providing a legally binding judgment that can be relied upon against their own government. The significance of this case at the international level is that it is the first time that the ECHR has considered how Protocol 12 of the ECHR should be applied to potentially discriminatory situations.<sup>393</sup> In the absence of the previous decisions regarding the Protocol the test the Court applied was the same as that previously applied under Article 14 of the ECHR which provides freedom from discrimination in

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<sup>389</sup> *Sejdic-Finci v Bosnia and Herzegovina*, ECHR 985, 22.12.2009 nos 27996/06 and 34836/06

<sup>390</sup> Lucy Claridge, ‘Discrimination and Political participation in Bosnia and Herzegovina, *Sejdic-Finci v. Bosnia and Herzegovina*’, Minority Rights Group International Briefing

<sup>391</sup> *Ibid* p 65

<sup>392</sup> *Ibid* p 66

<sup>393</sup> *Ibid* p66

conjunction with another ECHR right.<sup>394</sup> In Bosnia and Herzegovina it is not only minorities that are disenfranchised as a result of a discriminatory constitution, constitutive peoples, Serbs, Croats and Bosniacs are also discriminated against if they live in the territory where they are a minority.

The Strasbourg Court was aware that the Bosnian Constitution was a result of a bargain among warring factions in 1995, but it took a dim view and rejected any reasons for non-implementation of the contested constitution and provisions.<sup>395</sup>

The following paragraph from the judgment illustrates the need for change to the Constitution:

The Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities of citizens.<sup>396</sup>

In *Sejdic-Finci* the Court pointed out the limitations of the Dayton Peace Agreement and contradictory nature of the Constitution of Bosnia and Herzegovina because it equalizes the collective ethnic identity with the individual identity and limits individual rights to collective political rights of ethnic groups.<sup>397</sup> The Bosnian Constitution on the one hand prohibits any form of discrimination and on the other hand precludes Bosnian citizens who do not

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<sup>394</sup> Lucy Claridge, 'Discrimination and Political participation in Bosnia and Herzegovina, *Sejdic-Finci v. Bosnia and Herzegovina*, Minority Rights Group International Briefing

<sup>395</sup> Ibid

<sup>396</sup> Ibid

<sup>397</sup> Zlatan Begic and Zlatan Delic 'Constituency of peoples in the Constitutional System of Bosnia and Herzegovina: chasing fair solutions, I-CON(2013) Vol 11 No 2 447-465 available at <https://academic.oup.com/icon/article/11/2/447/753622> accessed 17 July 2020

belong to any of the constituent peoples from running for particular government office.<sup>398</sup>

It is submitted that the international community had intervened in the situation in Bosnia and Herzegovina even before the hostilities on its territory started and they have an obligation to help it become an organized and stable state with respect for the rule of law. The interventions by the USA and European countries have not been consistent as it could be seen during the attempts to bring about the changes to the present Constitution, the change of direction by the USA and EU has happened already several times since 1995 and it seems that a quarter of a century later there is a limited repertoire of approaches and tools that the international community could utilize.

The Strasbourg Court has discharged its obligations in a series of cases before it and it is now left to international actors to try to move to the battlefield of European integration of the gridlocked state where ethnicity should not be a constitutional category. According to Mujanovic, from the perspective of the post Yugoslav elite reform is necessary and undeniable because they already dominate the electoral process through a combination of fear and patrimonialism (and if anything substantive changes to the legal order of the state would almost certainly result in their fall from power.<sup>399</sup> Mujanovic argues that given 'the cross criminality that defines the existing political regimes in the whole of the region, in particular in Bosnia and Herzegovina, the fall from power would not be a gentle one.<sup>400</sup>

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<sup>398</sup> Ibid

<sup>399</sup> Jasmin Mujanović, *Hunger and Fury: The Crisis of Democracy in the Balkans* (Oxford University Press, 2018) p99

<sup>400</sup> Ibid p99



#### 4.7 Dilemmas about the Bosnian type of democracy

The most significant problems with the Dayton Peace Agreement are: firstly, the Agreement encourages continued ethnic identification among the citizens of Bosnia and Herzegovina, secondly, it is more ambitious than the civil and political circumstances in Bosnia can support, and thirdly, the international community is unable to convince Bosnians to resolve their own problems.<sup>401</sup> According to Shake the central dichotomy of the Dayton Peace Agreement is that it reinforces ethnic group identification and at the same time it seeks to diminish its influence in Bosnia and Herzegovina, thus perpetuating the problems that caused the war in the first place.<sup>402</sup> In Skake's words:

The ethnic recognition and ties to neighbouring countries that reinforce them may have been necessary conditions for getting any agreement. However they gravely undercut the ability to build a multi-ethnic state in Bosnia and Herzegovina. Bosnia would have been better served by a strict recognition of individual rather than group rights.<sup>403</sup>

It could be argued that the steps necessary to secure the end of the hostilities in Bosnia and Herzegovina and establish peace, such as the tolerance of ethnic division which is in the crux of the political arrangement of the country, and permissible ties with neighbouring states, were justified at the time of the Dayton negotiations, but more than twenty years later these provisions hinder the lives of the Bosnians and they are the source of permanent political and economic instability. It is submitted that had a transitional period for monitoring the progress towards implementation of different provisions of the Dayton Peace Agreement been included into the Agreement, the greater the probability of creating the context of tolerance and civil society in line with the intentions of the international society would have been. This brings into focus the critique of the

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<sup>401</sup> Kori Shake, 'The Dayton Peace Accord: Success or Failure?' in Kurt R. Spillmann and Joachim Krause (eds. with the assistance of Derek Muller and Claude Nicolet), *International Security Challenges in a Changing World*, Vol.3 (Peter Lang, Bern 1999) p.288

<sup>402</sup> Ibid.

<sup>403</sup> Ibid. p. 289

Dayton Peace Agreement that it 'was not satisfied with a largely peaceful but segregated Bosnia, instead the international community has set the bar so high.'<sup>404</sup> Shake argues that the international community has expected too much within so short time from a country just recovering from war and reconstituting a sense of community and this was the reason for the failures in the implementation of the Dayton Peace accords.<sup>405</sup> It could be concluded that less ambitious agenda with clearly set priorities and with long-term defined time frame for its implementation might have resulted in more successful implementation of The Dayton Peace Agreement provisions.

Approaching the problems in relation to the deficiencies and intransigencies built into the Dayton Peace Agreement and the Constitution of Bosnia and Herzegovina it could be argued that the Dayton Peace Agreement might 'be seen as a bridge boldly built out into the void of an international society'<sup>406</sup>, the bridge that could be revisited when necessary but that would be lasting and reliable reminder how far forward Bosnia and Herzegovina has moved.

#### **4.8 Challenges in the implementation of the Dayton Peace Agreement**

It is apparent from the above analysis that the implementation of the provisions of the Dayton Peace Agreement would benefit from a comprehensive overhaul and setting of incremental goals within a new time frame. There have clearly been numerous changes in the last twenty five years and progress in many areas of

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<sup>404</sup> Ibid.

<sup>405</sup> Ibid. p. 289

Shake describes a very ambitious agenda and conditions 'that many successful leaders of stable democracies could not meet' such as at the same time 'maintaining the climate of peace, stability, law and order, tolerance and ethnic reintegration, making significant progress towards refugee return, and full implementations of laws on property, continuing the process of market-led reform, continuing police and judicial reform, working with the international representatives on laws being introduced, respecting and strengthening the new government institutions of Bosnia and Herzegovina and fostering the creation of a civil society in line with the goals of the Council of Europe.'

<sup>406</sup> Peter Reuter, *Introduction to the law on treaties* (London Kegan Paul International 2<sup>nd</sup> ed.1995) p.2, cited in Christine Bell, note 77

social and political life in Bosnia and Herzegovina, as well as in other countries of the former Yugoslavia, which could be the standards for setting more manageable goals in order to demonstrate recognizable contribution towards the implementation of the civilian part of the Dayton Peace Agreement.

Parallel to this argument it is important to note the most difficult problem to resolve in Bosnia and Herzegovina in relation to the implementation of the civilian part of the Dayton Peace Agreement is the expectation of the Bosnian ethnic leaders that the international community will always resolve their intransigencies and inflexibility and they have been unwilling to contribute to resolutions of multiple problems that the country faces.<sup>407</sup> ‘Many in Bosnia would like to have the international community impose resolutions along a broader range of civil and political activity.’<sup>408</sup> To further illustrate this point Shake argues that ‘unless solutions grow indigenously out of the political culture of Bosnia, they are unlikely to be respected by the population once the international community leaves.’<sup>409</sup> In Shake’s words:

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<sup>407</sup> Kori Shake, ‘The Dayton Peace Accord: Success or Failure?’ in Kurt R. Spillmann and Joachim Krause (eds. with the assistance of Derek Muller and Claude Nicolet), *International Security Challenges in a Changing World*, Vol.3 (Peter Lang, Bern 1999) p. 291

<sup>408</sup> Smith R. Jeffrey, Washington Post Correspondent in the Balkans quoted in Kori Shake, ‘The Dayton Peace Accord: Success or Failure?’ in Kurt R. Spillmann and Joachim Krause (eds. with the assistance of Derek Muller and Claude Nicolet), *International Security Challenges in a Changing World*, Vol.3 (Peter Lang, Bern 1999) p. 291; it is important to note that the interview Shake had with Jeffrey was in 1998. More than twenty years after signing the Dayton Peace agreement the attitude of the Bosnian ethnic leaders is the same; see ‘Izetbegovic: OHR neće nametnuti izborni zakon’, ‘Izetbegovic: Office of the High representative will not impose the electoral laws’ [Author’s translation] available at naslovi.net, 13 March 2018, accessed 17 March 2018.

See also Dejan Guzina (2007) Vol. 9 ‘Dilemmas of Nation-building and Citizenship in Dayton Bosnia’, *National Identities*, pp.217-234, 225

Official citation for online journal: Dejan Guzina (2007) Dilemmas of Nation-building and Citizenship in Dayton Bosnia, *National Identities*, 9:3, 217-234, DOI: 1080/14608940701406195 available at <https://dx.doi.org/10.1080/14608940701406195> accessed on 28 October 2016

The author emphasizes the difficulty in the day-to-day international community’s involvement in Bosnia and culture of dependency of ethnic entrepreneurship of the Bosnian leaders who follow the same visions of Bosnia as they had during the war, and whose political objectives may not reflect the interests of either the international community or their own citizens.

<sup>409</sup> Kori Shake, ‘The Dayton Peace Accord: Success or Failure?’ in Kurt R. Spillmann and Joachim Krause (eds. with the assistance of Derek Muller and Claude Nicolet), *International Security Challenges in a Changing World*, Vol.3 (Peter Lang, Bern 1999) p. 291;

People who have not contributed to the solution can abdicate responsibility for its failure. The Dayton Accords have failed in the essential task of creating the political community that takes responsibility for resolving its problems, which is perhaps the most damning evidence that a peace, with a life and logic of its own, has not been created in Bosnia.<sup>410</sup>

The result of the present arrangement is weak and dysfunctional local power and continuing need for the presence of the Office of High representative, as well as space for the interference and influence of diverging interests not only of the neighbouring countries but other countries outside the region. But, perhaps, as Shake suggests, the biggest mistake was to include ethnic groups rights into the Dayton Peace Agreement because ethnic parties to the Agreement do not have the ability and political will to implement the provisions they signed and consequently they cannot create conditions and context within which the political culture of taking responsibility for the future of the country could flourish.<sup>411</sup>

It is apparent from this analysis that the international community, which took over responsibility for the implementation of the Dayton Peace Agreement, did not have a blueprint for dealing with the post-conflict societies in which peace was a result of multi-party negotiations and multiple competing interests. Instead the Western principles of liberalism served as a template that guided the actions of the international community in Bosnia.<sup>412</sup> In the political realm this meant the international imposition of democratization that he defines as promotion of regular elections, imposition of constitutional limits on governmental powers and respect for basic civil and political rights, and in economic realm it meant

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<sup>410</sup> Ibid.

<sup>411</sup> Ibid. p. 295

<sup>412</sup> Dejan Guzina (2007) Vol. 9 'Dilemmas of Nation-building and Citizenship in Dayton Bosnia', *National Identities*, pp.217-234, 222  
Official citation for online journal: Dejan Guzina (2007) Dilemmas of Nation-building and Citizenship in Dayton Bosnia, *National Identities*, 9:3, 217-234, DOI: 1080/14608940701406195 available at <https://dx.doi.org/10.1080/14608940701406195> accessed on 28 October 2016

stabilization and economic restructuring according to free market principles.<sup>413</sup> It is important to note that the agreement reached in Dayton emphasized that the four conventional pillars of democratic governance, market economy, regular free and fair elections, the rule of law and respect for human rights should be organized around two goals in Bosnia and Herzegovina: developing a politically and economically stable liberal-democratic state and at the same time integrating ethnicity as unavoidable political ingredient of post-conflict scenario in Bosnia and Herzegovina.<sup>414</sup>

Guzina maintains that the international community's idea for the constitutional and institutional structure of Dayton Bosnia was based on political democratization, economic liberalization and the formal recognition of the multinational character of the Bosnian state.<sup>415</sup> Parallel to this the Constitution of Bosnia and Herzegovina was the result of the international community's views about the reasons for Bosnian civil war: failures of economic and political reforms in the post-communist period, ethnic cleansing, conflict between different nationalist parties, external interferences by Serbia and Croatia and the gross violations of human rights that followed.<sup>416</sup> It could be argued that in the post-Dayton period the reasons that motivated the international community negotiators to impose the present Constitution as a part of the Peace Agreement have not been eradicated: economic and political reforms have not been carried out, ethnic divisions are still deep in Bosnia and Herzegovina and the external influences not only by the neighbouring countries but wider region are even more prominent than in the period immediately before the war.

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<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid.

It could be argued that the Dayton Peace Agreement has laid foundations for a concept of democracy that the country should pursue, however the way in which it will be realized might considerably differ from the well-known types of democracy, liberal and representative democracy. Bojkov's argument that the underlying principles and foundations of democracy are incontestable, but that the implementation of these principles have evolved, might mean that Bosnia and Herzegovina will have to find a type of democracy that will be in accordance with its geographical region 'that exhibits certain cultural patterns based on common historical, political, linguistic and religious experiences, and designed differently from what the Western countries as the main sponsors of the Dayton peace Agreement expect.'<sup>417</sup>

In addition, it could be argued that in Bosnia and Herzegovina the willingness to make constitutional changes and comply with the ruling of the European Court of Justice might be possible only if the country, firstly, addresses the issues of security, corruption and insecurity that the Dayton Peace agreement may not hold, presumably endangered by the domestic political discourse, all of which is the consequence of weak state, and secondly, cease to unquestionably accept external interventions.<sup>418</sup> It appears that the ruling political elite that is expected to offer a solution for the Constitutional changes is not greatly motivated to carry out the necessary reforms even in order to be on the way to join European Union and the reality on the ground demonstrates 'a lack of other critical mass to drive

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<sup>417</sup> Ibid. Bojkov notes different types of democracy such as consociational democracy, deliberative democracy, associational democracy, multiethnic democracy and multicultural democracy and democracies according to the regions as some theories claim that geographical regions exhibit certain common features that craft democracy. For the best metaphor he refers to Nodia's analogy between crafting democracy and the art of shoe making. 'Shoes, Nodia observed, maybe produced in different fashions, from different materials, with different tools, for different markets, and by different shoemakers, who can vary widely in skill, motivation and work habits. In fact, he continued, the quality of the shoes maybe so poor that they barely deserve the glorious name of shoes.' (See also Ghia Nodia, (1996) 'How Different are post-Communist Transitions?' *Journal of Democracy*, Issue 7, pp.15-29, 16)

<sup>418</sup> Ivan Krastev, 'The Balkans: Democracy Without Choices' (2002) 13 *Journal of Democracy*, pp. 39-53, cited in Victor D. Bojkov, 'Democracy in Bosnia and Herzegovina', (2003) Vol.4, *Southeast Politics*, No.1, pp. 41-67, 45

change'.<sup>419</sup> Krastev discusses the situation in the Balkans in general and Bosnia and Herzegovina appears to be the point of vulnerability for Europe that is 'naive to believe that it can regain influence... simply by repeating its commitment to integration, or by sinking more money into the region'.<sup>420</sup>

Bosnia and Herzegovina and the wider Balkans region lack a 'unifying force' and 'a critical mass' that would drive changes, and the international community is unwilling to impose it externally.<sup>421</sup> It is against this backdrop that the lack of progress in implementing the ruling of the European Court should be perceived.

#### **4.9 Conclusion**

This Chapter deals with the Constitution of Bosnia and Herzegovina and discusses its unique origin and characteristics. The core of the Chapter is about the anomalies in the Constitution which are major source of discrimination in the country's political life and which create intransigencies and paralysis in the work of the government institutions. The major judgement of the Grand Chamber of the European Court of Human Rights in the case of *Sejdic and Finci v Bosnia and Herzegovina* in relation to the discrimination against minorities has not yet been implemented in Bosnia and Herzegovina but the Venice Commission's Opinion offers recommendations about the incremental changes in the Constitution of Bosnia and Herzegovina taking into account the complexities of ethnically divided country and unwillingness of the nationalist leader of all three ethnic parties to cooperate.

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<sup>419</sup> Ivan Krastev, 'EU goes back to the future in the Balkans', Opinion Balkans, 15 March 2017, available at <https://www.ft.com/content/620509da-0968-11e7-ac5a-903b21361b43>, accessed on 24 November 2017

<sup>420</sup> Ibid.

<sup>421</sup> See note 43 above

## CONCLUSION

More than two decades after the Dayton Peace Agreement Bosnia and Herzegovina is not at war, however, the absence of war is not peace, the political discourse still dominates the lives of Bosniaks, Serbs and Muslims and many of the same politicians that started the war are still active and continue with the rhetoric of hatred and division.<sup>422</sup> Bosnia and Herzegovina is a country with institutionalized discrimination at a local level throughout the country and it is in a state of political, economic and social deadlock.<sup>423</sup>

This research attempts to focus on the Dayton Peace Agreement in Bosnia and Herzegovina within the context of wars in the former Yugoslavia after the end of violent conflict.

Bosnia today is paralyzed in ethno-political rivalries and the international community that has created the framework which does not offer protection for all Bosnia's citizens will have to recognize the need to help the country move beyond the limiting and unworkable political and constitutional arrangement. One way of doing this would be to work on perfecting the provisions of the existing Peace Treaty because peace treaties do not get cancelled or proclaim void, but they can be considered as interim measures aimed at establishing peace and the immediate functioning of the country. It is submitted that in Bosnia and Herzegovina the stalemate has lasted too long and caused great damage to its economy, peoples' lives and it has severely limited the future prospects.

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<sup>422</sup> Christopher Bennet, *Bosnia's Paralyzed Peace* (Hurst & Company London 2016),

p .266

<sup>423</sup> Ibid.



Chapter One discusses and analyses the reasons for the war in the former Yugoslavia and particularly in Bosnia and Herzegovina since that was the most ethnically mixed Former Yugoslav Republic and therefore had most to lose. The breakup of Yugoslavia was a gradual process and it occurred in distinct phases starting with the secession of Slovenia and Croatia and war spreading to Bosnia and Herzegovina where the most heinous crimes and ethnic cleansing happened over more than three and half years.

Also, Chapter 1 argues that the war in the former Yugoslavia happened as a consequence of wider political, economic and military structure change in Yugoslavia and the world. It also happened ‘against the background of diverging interests and goals of the constituent peoples of the countries concerned with regard to the political future of their state.’<sup>424</sup>

This Chapter provides historical and geographical context for the events that happened in the 1990s it illustrates what was at the core of the Dayton peace negotiations and subsequent Dayton Peace Agreement; maps and the division of the country. Chapter One demonstrated that the reasons for the wars in the 1990s have relevance more than twenty years later because of deepening ethnic division and continuation over territorial disputes which have not ceased to exist with signing of the Dayton Peace Agreement. Nationalism continues to be prevailing feature of Bosnia and Herzegovina’s reality more than twenty years after secession of hostilities and after signing the Dayton Peace Agreement.

Chapter Two addresses the Western intervention in the Yugoslav crisis aimed at mediation and crisis management but it provided the irreversible turning point in

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<sup>424</sup> Marie-Janine Celic, ‘Ethnic Cleansing and War Crimes’ in Charles Ingrao and Thomas A. Emmet (eds.), *Confronting the Yugoslav Controversies: Scholars Initiative* (Purdue University Press 2009) p.121

its escalation into nationalist extremism and war.<sup>425</sup> This Chapter offers a review of the international responses to the crisis and wars in the former Yugoslavia and in particular in Bosnia and Herzegovina.

Further on this Chapter analyses a series of unsuccessful efforts by the international community to bring the war in Bosnia and Herzegovina to an end. Chapter Two also demonstrates that the approach of the international community to Yugoslav disintegration, and in particular to the war in Bosnia and Herzegovina, was continuously inconsistent, ranging from commitment to sovereignty and territorial integrity of Bosnia and Herzegovina at the London meeting, than at the Geneva Conference the European Community negotiated with ethno-nationalist leaders of the warring factions insisting that these leaders needed to find a political settlement. This Chapter offers an overview of the approach of the United States, the Soviet Union and the Non-Alignment Movement in relation to the crisis in the former Yugoslavia and later in Bosnia and Herzegovina. It demonstrates that the German recognition of Slovenia and Croatia had profound consequences and triggered the war in Bosnia.

In addition this Chapter also focuses on the global changes in geopolitical situation in which Cold War, dissolution of the Soviet Union and the German unification as the most prominent issues and argues that they were partly the reasons for inconsistent and untimely reaction of the international community to Yugoslav crisis.

Chapter Two points out at the consequences of the opinions of Badinter Commission which favoured the sanctity of the former Yugoslav republics' borders over the minority-right concepts favoured by some warring parties. In addition, it is established that the international community's approach to

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<sup>425</sup> Susan L. Woodward, *Balkan Tragedy, Chaos and Dissolution after the Cold war* (Brookings Institution Press Washington 1995) p.198

implementation of the military and civilian parts of the Dayton Peace Agreement demonstrated different and inconsistent approaches.

In the light of the analysis from Chapter Two it could be concluded that the inconsistent and biased approach by the international community towards the Yugoslav crisis and in particular to the war in Bosnia and Herzegovina primarily protects European security and stability. By applying legal precedents that might be used in future conflicts, like recognition of the administrative internal borders as international borders, the international community generated new sources of political conflict in Bosnia and Herzegovina where entrenched national leaders cannot agree on the necessary constitutional change without undermining their own political existence.

Chapter Three analyses the core deficiency of the Dayton Peace Agreement the Constitution of Bosnia and Herzegovina and its dysfunctional and discriminatory nature.

The Constitution of Bosnia and Herzegovina is Annex 4 to the Dayton Peace Agreement that stopped the war and divided the country into two entities. This chapter analyses the discriminatory nature of the Constitution and the judgments of the ECHR. There is no political will in Bosnia and Herzegovina to implement the judgements of the ECHR as that would mean that the country would abandon the ethnic principle which underpins its division.

Chapter Four discusses the attempts at addressing the discriminatory nature of the Constitution of Bosnia and Herzegovina, its unique origin and characteristics. The core of Chapter Four is about the anomalies in the Constitution which are major source of discrimination in the country's political life and which create

intransigencies and paralysis in the work of the government institutions. The major judgment of the Grand Chamber of the European Court of Human Rights in the case of *Sejdic and Finci v Bosnia and Herzegovina* in relation to the discrimination against minorities has not yet been implemented, but the Venice Commission's Opinion offers recommendations about the urgent need to implement the judgments of the ECHR and uphold the rule of law by implementing the changes in the Constitution of Bosnia and Herzegovina, taking into account the complexities of ethnically divided country and unwillingness of the nationalist leader of all three ethnic parties to cooperate. .

The peace agreement that changed Bosnia and Herzegovina from the state of war to the state of peace was rather symbolic, the Constitution that is Annex 4 to that peace agreement was written in a foreign country, in a foreign language using words that represented a fragile moment in history and signed by the warlords that started the war and that wilfully accepted, or were made to accept, its ambiguities. The Dayton Peace Agreement and its provisions were the price the ethnic sides were willing to take to end the war and it represented the possibility for agreement.

Core anomaly of the Bosnian Constitution, as judged by the ECHR, that human rights can depend on group rights suggest that Bosnian Constitution was not created as permanent law.

It is submitted that the Dayton Peace Agreement was limited from the onset, as only warring factions were involved in its negotiation and they never had any intention to negotiate a peace deal or accept the Constitution that might in any way endanger their war gains.

The war in Bosnia and Herzegovina, the Dayton Peace Agreement, all post Dayton initiatives and the present efforts by the countries that supposed to be the guarantors of the Dayton Peace Agreement revolve around retaining the status quo in this impossible country where there is no respect for the rule of law from the very people who ought to uphold it. At present, in this the model for peace that is Bosnian experiment, established on 'imposed consociation' outside influences by guarantors of that arrangement and their interventions have negative impact on sustainability of that consociational arrangement. It seems that the international community, although aware of failures of Bosnian experiment, is still reluctant to radically and meaningfully interfere with the corrupt ethno nationalist political elites in Bosnia and Herzegovina. It seems also that twenty-five years ago the war has shifted from the battlefield to the political arena in the peace time. State building is impossible in the context in which political elites in the peacetime pursue the same goal as they did in the war.

It is perplexing, that more than ten years of the ECHR judgment in Sejdic-Finci and many more case after that, the international community is complacent in Bosnia and Herzegovina flaunting the Convention on Human Rights that is integral part of its Constitution, that there are no sanctions imposed on that country, that the Office of the High Representative is unwilling to use its powers because of persistent violation of international law and yet, in the other EU countries such violations would be considered unacceptable.

The reason for the Bosnian deadlock is that the Dayton Peace Agreement stopped the war but has not addressed the underlying root causes of the conflict and therefore has not achieved he desired outcome in the long term. In the case of Bosnia and Herzegovina post-agreement phase has shown that, as it stand, the model of ending violent conflicts that has been established for the case of Bosnia

and Herzegovina could not and should not be transplanted to other similar conflict situations unless it contained a realistic and comprehensive long-term state building programme.

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