

TRANSITIONAL JUSTICE IN BOSNIA AND HERZEGOVINA:
EXAMINING THE EFFECTS OF POST-CONFLICT STATEBUILDING,
TRANSITIONAL JUSTICE AND RECONCILIATION

by

Narcis Bejtic

Graduate Program in Political Science

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The School of Graduate and Postdoctoral studies
The University of Western Ontario
London, Ontario, Canada

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Abstract

This paper examines statebuilding, transitional justice and post-conflict reconstruction and reconciliation in Bosnia and Herzegovina since 1995 by focusing on three key post-war mechanisms. Those being the Dayton Peace Accords, the Office of the High Representative and the International Criminal Tribunal for the former Yugoslavia. The paper examines the impacts and outcomes produced by these three internationally developed organs in the post-war country, offering the following conclusions based on the reviewed literature. The Dayton Agreement has instilled programs and rules that attempt to promote reconciliation and reconstruction, but are instead limited in their capabilities. The High Representative controls the statebuilding process from an outside standpoint, thus distancing locals from domestically led reconstruction efforts. Finally, the Tribunal allows for justice and reconciliation, but only through a narrow scope, thus limiting its capabilities and impact towards victims. It remains to be seen whether these external strategies of reconstruction and state building are able to achieve anything more than the absence of war where reconciliation is missing. Thus, while intervention and reconstruction efforts were necessary in Bosnia, they have not been sufficient to reconcile the ethnically divided country and this should be the focus moving forward.

Keywords: Bosnia and Herzegovina, Yugoslavia, transitional justice, post-conflict reconstruction, statebuilding, reconciliation, retributive justice, Dayton Peace Accords (DPA), Office of the High Representative (OHR), International Criminal Tribunal for the former Yugoslavia (ICTY).

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Chapter 1

1 Introduction

The death of Josip Broz Tito - Yugoslavia's long serving Prime Minister and President – in 1980 marked the end of communism and the beginning of Yugoslavia's gradual and violent dissolution. He had suppressed the violent tensions that arose after World War II, triumphing Yugoslavians to live peacefully amongst each other while adopting the creed of 'brotherhood and unity'. The states under Yugoslavia required internal political compromise and propitious external circumstances to survive, which according to Toal and Dahlman, Tito was able to provide until his death.¹ When war broke out, first in Croatia and then in Bosnia, Europe witnessed its worst atrocities and genocides since WWII. While the international community was reluctant to act with military force immediately, the eventual policies enacted by the Clinton Administration, including the lifting of the arms embargo and the signing of the Dayton Peace Accords, ended the fighting in Bosnia in November 1995. While the end of the war marked peace in the now ethnically divided country, it further illustrated a complex state facing issues towards statebuilding and reconciliation amongst its newly demarcated territories.

The former Yugoslavia had been split into six republics: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. While most of these countries gained independence without conflict, Bosnia and Herzegovina experienced grave human rights atrocities and genocide due to evolving partisan tensions since the fall of communism. Not only

¹ Gerard Toal and Carl T. Dahlman, *Bosnia Remade: Ethnic Cleansing and its Reversal*, Oxford University Press, New York, 2011: 2.

did their secession lead to a bloody war, it also transformed what used to be a highly intermixed country into near complete segregation of the three ethnicities.² The country was split into two federations: the Federation of Bosnia and Herzegovina and the Republic of Serbia. This was further isolated into three ethnic enclaves, where the Croatians (Croats) dominate the Southwestern portion of the country, the Serbians (Serbs) predominantly live in the North/Northwestern, Eastern, and Southeastern region, and Bosnian Muslims (Bosniaks) remain in the center. These federations remain highly segregated with approximately 90 percent of Bosniaks and Croatians populating the Federation of Bosnia and Herzegovina and approximately 81 percent of Serbians in the Republic of Serbia.³ Prior to the 1995 demarcation lines, these areas were more ethnically diverse, with no lines dividing specific ethnic groups. This ethnically divided state became a “highly visible testing ground for post-Cold War [intervention,] for the re-direction of European and transatlantic security organizations, and for the new agenda of development agencies in regard to post-conflict reconstruction”.⁴ It has further proved to be a complicated arena in which post-conflict reconstruction through the creation of the Dayton Peace Accords (DPA), the Office of the High Representative (OHR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) has faced numerous challenges.

This paper will examine which mechanisms were used to achieve transitional justice and post-conflict reconstruction in Bosnia and how they have been effective (and ineffective) in rebuilding the post-war state. Thus, briefly defining and understanding what transitional justice and post-conflict reconstruction entails is necessary. Transitional justice attempts to establish

² Florian Bieber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance*, Palgrave Macmillan, New York, 2006: 29.

³ *Ibid*, 32.

⁴ Sumantra Bose, *Bosnia After Dayton: Nationalist Partition and International Intervention*, Oxford University Press, New York, 2002: 4.

institutions and mechanisms to answer the questions that arise after mass human rights atrocities have been committed and/or a society is recovering from a post-conflict situation. Quinn states that transitional justice is approached through three main mechanisms: retributive, restorative and reparative. These mechanisms are used because they allow post-conflict countries to deal explicitly with the human rights violations that have occurred, they serve as a tool for ending the cycle of impunity, and are utilized through international or external organs such as the United Nations.⁵ As Quinn argues, retributive justice attempts to correct the perpetrator(s) by means of prosecution and punishment. Some examples would be trials and tribunals. Restorative justice looks to restore the dignity of the victim as well as restore the perpetrator back into society. Examples of this would be truth commissions and healing circles. Finally, there is reparative justice, which seeks to repair the injury suffered by victims through means such as restitution or apology.⁶ Post-conflict reconstruction and state building coincide with transitional justice as all three focus on rebuilding a nation divided and damaged by previous violent conflict. Reconstruction and state building center on different mechanisms, such as promoting democratic principles, fair elections and free-market economic reform to expand and strengthen the global community.⁷ These policies and mechanisms may stem from both national and international sources. It is these principles that outline the approach to reconstruction efforts pursued by both the international community and domestic organizations within post-Dayton Bosnia.

When examining the tools of transitional justice, post-conflict reconstruction and state building efforts in Bosnia, the Dayton Peace Accords, the Office of the High Representative,

⁵ Joanna R. Quinn, "Transitional Justice," in *Human Rights: Politics and Practice*, edited by Michael Goodhart, Oxford University Press, Second Edition, 2012: 329.

⁶ *Ibid*, 330.

⁷ Mark Peceny, *Democracy at the Point of Bayonets*, University Park, PA: The Pennsylvania State University Press, 1999, 149.

and the International Criminal Tribunal for the former Yugoslavia are key mechanisms of national and international involvement. The outcomes of the initiatives tested in Bosnia have been construed through the divided perspectives of the three differing ethnic narratives. These competing truths have led to difficulties in reconciliation, as division amongst ethnicities does not allow for much domestic agreement to occur. The DPA has instilled programs and rules that attempt to promote reconciliation and reconstruction, but are instead limited in their progress. The OHR controls the statebuilding process from an external standpoint, thus distancing locals from domestically led reconstruction efforts. Finally, the ICTY allows for justice and reconciliation to occur, but only through a narrow scope, thus limiting its progress and impact. It still remains to be seen whether these external strategies of reconstruction and state building have been able to achieve anything more than a situation in which war and reconciliation are absent. Despite their downfalls, the DPA, OHR, and ICTY did offer a limited framework for transitional justice and post-conflict reconstruction to occur. The literature argues that while necessary, intervention and reconstruction efforts in Bosnia were not effective enough to reconcile the ethnically divided country, and these mechanisms must address certain issues moving forward.

Chapter 2

2 History and Background to the War

For many wars or conflicts, like Bosnia, past causes and tensions exist. When examining and attempting to understand the issues that led to transitional justice, post-conflict reconstruction and state building in Bosnia, it is important to also understand how certain events were shaped and what led to the original conflict. That being said, the aim of this section is to assess the literature in order to frame how we understand the impact of history and context for transitional justice to take place in Bosnia.

2.1 Tensions Develop: The Ottoman Turks, World War I and World War II

Ethnicity may imply cultural traditions, customs, physical traits or language, however Morus argues that for ethnic groups in Bosnia and Herzegovina, ethnicity is defined rather differently and in a way that provides better differentiation amongst different groups. He contends that the definitive characteristic of ethnicity among these groups is religion, as Serbians are synonymous with Orthodox Christianity, Croats follow Catholicism, while Bosniaks are Muslim.⁸ The Ottoman Turks invasion of Bosnia and Herzegovina began in the fourteenth century and ended in the late nineteenth century, which also propelled the emergence of ethnic consciousness gaining force in Croatia and Serbia.⁹ People in Yugoslavia tended to align themselves towards a certain culture (specifically Serbs and Croats), depending

⁸ Christina M. Morus, "Violence Born of History/History Born of Violence: A Brief Context for Understanding the Bosnian War," in *The Development of Institutions of Human Rights: A Comparative Study*, edited by Lilian A. Barria and Steven D. Roper, Palgrave Macmillan, New York, 2010: 67.

⁹ Ibid, 68-69.

on their material interests, thus minor tensions were central throughout the existence of Yugoslavia.¹⁰ However, large-scale ethnic conflicts did not erupt until the 1990s.

Serbia began to gain greater recognition during World War I, as they fought with the Allies and led the new kingdom of Yugoslavia. In this state, Bosnians were not recognized ‘people’ and many were forced to declare themselves as either Serb or Croat.¹¹ During the early 1900s, Serbia united its territory with former Habsburg land, which in turn disappointed Croats as the new state gained control of their funds, replacing them with Serbian institutions.¹² Further, no parliamentary coalitions could be created that transcended the concerns of nationality groups, thus leading many Croats to push for independence.¹³ Spencer argues that this marked the beginning of Bosnian ethnic consciousness.

During World War II, Nazi’s invading Yugoslavia were welcomed by the Fascist Croatian nationalists, named the Ustase and led by Prince Paul, as he found it necessary to enter into agreements with Hitler.¹⁴ Ultimately, German troops entered Yugoslavia, as Hitler invaded in order to keep a route open for his army to wage their campaign in Greece.¹⁵ The Ustase “proved to be willing executioners, imprisoning and murdering Serbs, Jews, Gypsies, and anti-fascist Croats with a zeal that shocked even the Nazis”.¹⁶ The nationalist group in Serbia, the Chetniks, fought back, creating further atrocities and mayhem as both sides illustrated a desire and capacity for viciousness and violence.¹⁷ A third regional force, the communist Partisans,

¹⁰ Gavin Duffy and Nicole Lindstrom, “Conflicting Identities: Solidary Incentives in the Serbo-Croatian War,” *Journal of Peace Research*, Vol. 39, 2002: 72.

¹¹ Morus, “Context for Understanding the Bosnian War,” 69.

¹² Metta Spencer, “What Happened in Yugoslavia,” in *The Lessons of Yugoslavia*, edited by Metta Spencer, Elsevier Science, New York, 2000: 5.

¹³ Ibid.

¹⁴ Ibid, 6.

¹⁵ Ibid.

¹⁶ Morus, “Context for Understanding the Bosnian War,” 69.

¹⁷ Ibid, 70.

led by Josip Broz Tito fought both the Ustase and Chetniks. Winston Churchill sided with Tito over Draza Mihailovic, leader of the Serbian guerilla fighters. Mihailovic ultimately decided to fight against Tito, leading to the formers loss and giving birth to the Socialist Federation of Yugoslavia as well as ongoing tensions in the postwar era.¹⁸

2.2 Tito, Milosevic and Lead Up to the War

Serving as both Prime Minister (1944-63) and President (1953-80) of the Socialist Federal Republic of Yugoslavia, Josip Broz Tito built the Yugoslav National Army (JNA), making it the fourth largest military force in Europe at the time¹⁹. The JNA promoted a staunch brand of communism and executed Ustase criminals, Chetniks and suspected anti-Partisans between 1945 and 1946.²⁰ Under his rule, “people were expected to identify themselves as Yugoslavs,” encouraging and enforcing the maxim of brotherhood and unity. Spencer states that his brand of communism was able to restrain ethnic conflict through imposed ethnic group equality, rather than the liberal Western notion of individual equality.²¹ While Tito created a constitution that divided power amongst the six republics to ensure peace and equality, nationalists in the large Serbian Republic, which had been split into two autonomous provinces, viewed this as evidence of Serbian victimization (first by the Turks, then Ustase, and now Yugoslavia).²² Tito’s death in 1980 saw the dissolution of brotherhood and unity and the increase in nationalism as a strategy for acquiring power.

¹⁸ Spencer, “What Happened in Yugoslavia,” 6.

¹⁹ Riedlmayer, *A Brief History of Bosnia-Herzegovina*.

²⁰ Morus, “Context for Understanding the Bosnian War,” 70.

²¹ Ibid; Spencer, “What Happened in Yugoslavia,” 8.

²² Morus, “Context for Understanding the Bosnian War,” 70.

After Tito's demise, both the "Croatian and Serbian nationalists fed the other's paranoid fantasies, reinterpreting history for evidence of a present threat that the other posed".²³ This paranoia was especially evident in 1986, when the Serbian Academy of Arts and Sciences (SANU) leaked to the Serbian press a memorandum stating that Tito had subordinated Serbs, that Kosovar-Albanians were plotting genocide, and that Croats were planning an Ustase return.²⁴ Serbian President Ivan Stambolic condemned the SANU memorandum and these allegations. However, his comments only led to public mistrust, as the document criticized current Serbian leaders, setting the stage for a rising Slobodan Milosevic. Milosevic and Stambolic had been friends and colleagues since university, however the events of the SANU memorandum provided Milosevic the opportunity to step into Stambolic's position. After calling for a vote of no confidence on Stambolic's presidency, Milosevic intensified the politicization of injustices against Serbs, framing stories in the same theme as the SANU memorandum.²⁵ As tensions grew, the nationalist framework provided by Milosevic expanded to Slovenia, Macedonia and Croatia's independence in 1991.²⁶ Neither Slovenia nor Macedonia contained a significant Serbian population and was largely ignored. However, Croatia contained a significant Serbian minority, leading to the Croatian war in 1991, which eventually reached Bosnia and Herzegovina by 1992.²⁷

2.3 The Bosnian War and International Intervention (1992-1995)

In 1992, Bosnia and Herzegovina was recognized as an independent state by both the U.S. and EU, however Bosnian-Serbs resisted the split, abstaining from the vote. This vote was

²³ Ibid.

²⁴ Ibid, 71.

²⁵ Ibid.

²⁶ Ibid, 73.

²⁷ Duffy and Lindstrom, "Conflicting Identities," 75.

generated by the Bosnian community with the promise of international support from the US and EU.²⁸ As Bosnian-Serbs began to take control over Serb-dominated areas with the aim of joining the Republic of Serbia, Bosnia's recognition of independence was achieved with the hopes that international support would stabilize the political situation within the country.²⁹ Rather, this accelerated the violence and forcible removal and killing of Bosnian Muslims and Croats in an effort to create Serbian dominated enclaves. For instance, after the referendum results were announced, Serb paramilitary forces surrounded and attacked Sarajevo and by the end of March Serb forces had seized the town of Banja Luka.³⁰ This later came to be known as ethnic cleansing. The Serbian army (VRA), with support from the JNA, proceeded their takeover with haste. By the end of April 1992, 95 percent of Bosniaks had been cleansed from Kupres, Doboj, Tuzla, Zvornik, Visegrad, and Foca, giving Serbs control of about 60 to 70 percent of Bosnia.³¹ Serbian takeover and cleansing additionally gained the upper hand during the conflicts as the United Nations arms embargo left the Army of BiH (ARBIH) and the Bosnian-Croat Army (HVO) ill-prepared for war. The Serbian army gained support from JNA weapons and artillery, leaving them unaffected by the embargo.³²

As the war continued, the West came under pressure to develop methods for intervention, such as the Vance-Owen Peace Plan in 1993, which sought to divide Bosnia, but could not be negotiated upon.³³ President Bill Clinton and the U.S. only provided cargo planes to air drop food and medicine where Serbs barred UN relief convoys to stranded Bosniak men

²⁸ Morus, "Context for Understanding the Bosnian War, 74.

²⁹ James B. Steinberg, "International Involvement in the Yugoslavia Conflict," in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, edited by Lori Fisler Damrosch, Council on Foreign Relations Press, 1993: 41-42.

³⁰ Noel Malcolm, *Bosnia: A Short History*, London, Macmillan, 1996: 235 as cited in Morus, "Context for Understanding the Bosnian War, 75.

³¹ Morus, "Context for Understanding the Bosnian War," 75.

³² Ibid, 76.

³³ Ibid, 78.

and women.³⁴ Besides this, Congress restrained U.S. action until Serbs heavily escalated their attacks in 1995.

The UN and European Community (EC) provided humanitarian aid and peacekeeping missions in an attempt to keep Bosnians safe. Although UN aid saved lives and reduced suffering in Bosnia, the bureaucratic organization of the humanitarian efforts unfortunately “did not prevent fighting and atrocities”.³⁵ For instance, while the Yugoslav army had completed its deployment of tanks and major communications points throughout the country by September 1991, the Vance-Owen plan had only been called to the table by mid-1992.³⁶ UN intervention further illustrated a lack of legitimacy through repeated violations of Security Council resolutions. Both the UN and EU “were reluctant to use force against Serb aggression even when the Serbs blocked aid convoys, refused to move heavy weapons away from Sarajevo’s airport, violated no-fly zones and ignored safe havens”.³⁷ This stemmed from a general reluctance by major Western powers to commit ground troops under the guise of humanitarianism.³⁸ So while ‘safe areas’ were created for civilians in Bosnia, UN troops failed to protect them by allowing enemy combatants to continue bombings, and the 1992 no-fly zone was ignored until 1994.³⁹ The number of violations of UN resolutions since 1992 (under

³⁴ Lester H. Brune, *The United States and The Balkan Crisis, 1990-2005: Conflict in Bosnia and Kosovo*, Regina Books, 2005: 32.

³⁵ Ibid, 27.

³⁶ The Vance-Owen Plan involved the division of Bosnia into 10 semi-autonomous regions, with the help of the UN and European Community; James Gow, “Nervous Bunnies – The International Community and the Yugoslav War of Dissolution,” in *Military Intervention in European Conflicts*, ed. Lawrence Freedman (Cambridge, MA: Blackwell Publishers, 1994): 22-23.

³⁷ Brune, *The United States and the Balkan Crisis*, 27.

³⁸ Anthony Lake, “From Containment to Enlargement: Address at the School of Advanced International Studies, John Hopkins University, Washington D.C., September 21, 1993,” *U.S. Department of State Dispatch* 4, No. 39 (1993): 663.

³⁹ Jane M. O. Sharp, “Appeasement, Intervention and the Future of Europe,” in *Military Intervention in European Conflicts*, ed. Lawrence Freedman (Cambridge, MA: Blackwell Publishers, 1994): 48.

resolution 781) had increased to 2,665 by the end of the conflict.⁴⁰ UN ‘safe areas’ proved to be weak as UN troops could not provide protection from Serb forces. In general, these safe areas encountered many problems: they “remained under siege, enduring regular mortar attack by the Bosnian Serbs and not receiving sufficient amounts of humanitarian assistance”.⁴¹ For instance, although Serb forces agreed to recognize the town of Srebrenica as a ‘safe area’ at UN Security Council meetings, they eventually initiated substantial ethnic cleansing against the town. While the violation of ‘safe areas’ did encourage eventual NATO military action, they could not keep Bosnian Serbs out and were vulnerable to retaliation and attacks.⁴²

Clinton needed to find a way to end the conflict in Bosnia. However, he faced “institutional restraints from both the American public and Congress that made the large-scale involvement of American troops unacceptable”.⁴³ The evolution and eventual ‘lift and strike’ policy enacted by the U.S. was driven by the White House’s gradual realization that the conflicts could be resolved and European security reestablished only if the U.S. exerted a major role in directing the peace effort”.⁴⁴ The U.S. increased its role and commitment to intervention, enacting policies, strikes, and the eventual cease-fire and peace plan in November 1995.

November 21, 1995 witnessed the creation of the Dayton Peace Accords and signified the end of the war. The conflicts left as many as 50 percent of Muslim-Croat Federation homes and 25 percent of Serbian Republic homes damaged while more than 2 million people were

⁴⁰ “Former Yugoslavia: Increased sanctions weighed,” *UN Chronicle* XXXI, no. 4 (December 1994): 27, as quoted in Rory P. O’Connor, “Impediments to United Nations Intervention in Violent Intra-state Conflict,” *The University of Western Ontario*, (1996): 67.

⁴¹ Carol McQueen, *Humanitarian Intervention and Safety Zones: Iraq, Bosnia, Rwanda*, Palgrave Macmillan, 2005: 76.

⁴² *Ibid*, 80.

⁴³ Peceny, *Democracy at the Point of Bayonets*, 170.

⁴⁴ Brune, *The United States and the Balkan Crisis*, 34.

displaced.⁴⁵ The Documentation Center in Sarajevo reports 93,837 dead, of which 63,687 were Bosniaks (30,514 civilians), 24,216 Serbs (1,978 civilians), 5,057 Croats (2,076 civilians), and 877 others.⁴⁶ While other figures, such as that of the ICTY, differ slightly, it is clear that the lives lost and damages done have left a once united country both traumatized and divided.

2.4 Conclusion

A brief understanding of the context and history of Yugoslavia's breakup came about through complex historical relations, which, along with other instigating factors, eventually ballooned into unbearable tensions. As Toal and Dahlman suggest, the violent breakup can be broadly grouped by institutional, economic, political, and cultural explanations.⁴⁷ These vulnerabilities have left behind a complex and fragile state divided by hatred amongst ethnicities. This is key and characteristic of state building and transitional justice. When rebuilding and reconciling groups and peoples within a nation, it is crucial to understand the past before addressing how to deal with the present and build towards a peaceful future. An examination of the state building mechanisms and transitional justice tools will be offered to understand the approaches that have been sought by both Bosnia and the international community to effectively achieve post-conflict reconstruction.

⁴⁵ Morus, "Context for Understanding the Bosnian War," 79.

⁴⁶ Marko A. Hoare, *The History of Bosnia: From the Middle Ages to the Present Day*, London, Saqi Books, 2007, as quoted in Morus, "Context for Understanding the Bosnian War," 79.

⁴⁷ Toal and Dahlman, *Bosnia Remade*, 21.

Chapter 3

3 The Dayton Peace Accords

Establishing security and the rule of law in a democratic society ultimately depends not on physical coercion but rather on legitimacy. Kaldor argues that obeying laws comes not out of coercion but rather because people “accept the legitimacy of the law and because the security forces are seen as symbols of legitimate power”.⁴⁸ Analogous to security, Ayoob argues that state building consists primarily of the “construction of credible and legitimate political apparatuses with the capacity to provide order – in many respects, the foremost social value – within the territories under their juridical control”.⁴⁹ Implementing these frameworks through international intervention while also attempting to restore domestic control and transition to a democracy, however remain a lengthy and arduous process in Bosnia and Herzegovina. In November 1995, the leaders of all the belligerents came to the Wright-Patterson Air Force Base in Dayton, Ohio accompanied by a team of negotiators, including Secretary of State Warren Christopher and Richard Holbrooke.⁵⁰ It was here that conditions for a settlement were set and a peace agreement was signed. The conditions were that Bosnia remains a single state, the settlement takes into account the history of multiethnic Sarajevo (capital of Bosnia), human rights are respected and criminals prosecuted accordingly, and the

⁴⁸ Mary Kaldor, “Security Structures in Bosnia and Herzegovina,” in *Governing Insecurity: Democratic Control of Military and Security Establishments in Transitional Democracies*, edited by Gavin Cawthra and Robin Luckham, Zed Books, New York, 2003: 205.

⁴⁹ Mohammed Ayoob, “Defining Security: A Subaltern Realist Perspective,” in *Critical Security Studies*, edited by Keith Krause and Michael C. Williams, University of Minnesota Press, Minneapolis, 1997: 131.

⁵⁰ Spencer, “What Happened in Yugoslavia,” 27.

status of Eastern Slavonia is resolved.⁵¹ The agreement reflected the situation on the ground at the time, as there were three nationalist groups, of which two (Serbs and Croats) had “more or less succeeded in carving out ethnically homogeneous territories [of which] some three-quarters of the pre-war Bosnian population had been displaced”.⁵² The difficulty was grounded in reintegrating Bosnia, a now divided country – both ethnically and territorially – by restoring multi-ethnicity and providing conditions whereby refugees and internally displaced persons could safely return home.⁵³ A month later, on December 1995, the Dayton Peace Accords were formally signed in Paris, consisting of both a constitution for Bosnia and a ceasefire agreement.

3.1 Overview of the Dayton Framework

The Dayton Peace Agreement, as Chandler argues, was unlike any other peace treaty of modern times, as it was imposed by powers external to the conflict that also reached well beyond military matters to cover aspects of government and state.⁵⁴ Further, it served as two major functions to Bosnia and Herzegovina: it sought to end hostilities and fighting through a ceasefire and undertake the reconstructing and democratizing of society. These features – specifically the latter – required a great deal of intervention, both in coordinating power and regulating policies for state building. It was also this feature that deemed Dayton to be “the most ambitious peace agreement in modern history,”⁵⁵ as regarded by the first international High Representative of the new state. This ‘ambition,’ to many such as Belloni, Bieber, Chandler, Clark, Donais, Knaus and Martin, Kostic, and McMahon, was also what led to its criticisms. However, before delving into its limitations and ineffectiveness, understanding the

⁵¹ Ibid.

⁵² Kaldor, “Security Structures in Bosnia,” 207.

⁵³ Ibid.

⁵⁴ David Chandler, *Bosnia: Faking Democracy After Dayton*, Pluto Press, London, 1999: 43.

⁵⁵ Carl Bildt, ‘Response to Henry Kissinger’s Article in the Washington Post of 8 Sept. entitled, “In the Eye of a Hurricane”, OHR Article by the High Representative’, 14 Sept. 1996, at www.ohr.int/articles/a960914a.htm.

basic framework of the DPA is necessary. This chapter will focus on an overview of the DPA itself, examine some of its advantages and achievements, then further analyze its criticisms and failures, concluding with its effectiveness in regards to state building and post-conflict reconstruction.

3.2 The Dayton Annexes

Under the DPA, there was to be a year of internationally supervised transition during which elections would be held and political institutions (elected and accountable by the people) as well as economic, judicial and human rights institutions (supervised by appointed international representatives) were established.⁵⁶ The agreement itself was only four pages long, while the eleven annexes distributed power over the Bosnian state to externally controlled institutions. The following will provide a brief overview of the Dayton annexes.⁵⁷

3.2.1 The Military Annexes⁵⁸

Annex 1-A, the Agreement on the Military Aspects of the Peace Settlement, transferred complete control of military activity within the state over to NATO. This annex undertook obligations to return to normal conditions through the assistance and implementation of territorial and military provisions.⁵⁹ Article III highlights some important agreements. All foreign forces were to be withdrawn while all local forces that remain “must act consistently with the territorial integrity, sovereignty, and political independence of Bosnia and

⁵⁶ Chandler, *Bosnia*, 44.

⁵⁷ It is important to note that while the DPA outlines a large amount of legislation overlooking numerous articles and paragraphs, this section will not review all of these, as that would be excessive for the purposes of this paper. Rather, this section will provide a brief and general outline of certain annexes as well as highlight important articles, paragraphs, and phrases throughout. Further, Annexes 5, 8, and 9 have been excluded from this analysis, as they do not provide content relevant to the arguments and analysis in this chapter.

⁵⁸ Chandler, *Bosnia*, 44-45.

⁵⁹ General Assembly Security Council, *General Framework Agreement for Peace in Bosnia and Herzegovina*, United Nations, 1995: Annex 1-A, Article I, paragraph 1.

Herzegovina”.⁶⁰ However, Chandler argues that this paragraph also excludes NATO, UNPROFOR, and the International Police Task Force (IFOR); meaning that while Bosnian forces had to respect territorial sovereignty under NATO, these internationally led forces did not.⁶¹

Article VI, Deployment of the Implementation Force, allowed IFOR troops to have the “unimpeded right to observe, monitor, and inspect any Forces, facility or activity in Bosnia,” as well as have the “unimpeded movement by ground, air, and water throughout Bosnia”.⁶² Annex B further states that NATO personnel are exempt from passport and visa regulations, and operations, training and movement would not be impeded by requests for identification.⁶³ Chandler argues that these annexes allowed international military forces to operate within Bosnia with almost full immunity towards the countries sovereignty.⁶⁴

Annex 1-B, Agreement on Regional Stabilization, focuses on measures taken to ensure regional stability and arms control in order to establish peace within the region. It provided a framework for restrictions such as military deployments, locations of heavy weapons, disbandment of armed civilian groups, and monitoring of weapons manufacturing capabilities.⁶⁵

Annex 2, Agreement on Inter-Entity Boundary Line and Related Issues, set and marked the boundary line dividing the Federation of Bosnia and Herzegovina and Republic of Serbia. McMahon argues that the military annexes were created to govern the cessation of hostilities,

⁶⁰ Ibid, Annex 1-A, Article III, paragraph 1.

⁶¹ Chandler, *Bosnia*, 44.

⁶² Security Council, *General Framework Agreement*, Annex 1-A, Article, VI, paragraph 6; Ibid, Annex 1-A, Article VI, paragraph 9.

⁶³ Ibid, Annex 1-A, Annex B, paragraph 4.

⁶⁴ Chandler, *Bosnia*, 44.

⁶⁵ Ibid, 45.

regional stability, and boundary demarcation by entrusting NATO with complete responsibility of a multinational force used to guarantee the peace.⁶⁶ Szasz further argues that while the military aspects of Dayton are wide-ranging, they are not given any function in implementing any of the human rights provisions, except the reporting of violations that happen to come to their attention.⁶⁷

3.2.2 The Civilian Annexes⁶⁸

The civilian annexes take up the rest of the DPA and comprise of a wide range of activities in which organizations, such as the OSCE, the UN and the EU were mandated to play key coordinating roles.⁶⁹ In order for these powers to have legality under international law, mechanisms were created and incorporated into the DPA.⁷⁰

Annex 3, Elections, outlined the conditions that must be agreed upon by both Federations to promote free, fair, and democratic elections and lay the foundation for a representative government. Chandler states that this annex gave the OSCE “far-reaching powers of regulation and control over the electoral process”.⁷¹ It allowed the OSCE to adopt and put in place an elections program and supervise it in a manner determined by them in cooperation with other international organizations.⁷² Szasz argues that this annex allowed Bosnian citizens to vote in the municipality in which they resided in 1991, thus refugees and

⁶⁶ Patrice C. McMahon, “Rebuilding Bosnia: A Model to Emulate or to Avoid?” *Political Science Quarterly*, Vol. 119, No. 4, 2004/2005: 572-573.

⁶⁷ Paul C. Szasz, “The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia,” *The American Journal of International Law*, Vol. 90 No. 2, 1996: 312.

⁶⁸ Chandler, *Bosnia*, 46-51.

⁶⁹ James Gow, “A Region of Eternal Conflict? The Balkans – Semantics and Security,” in *Rethinking Security in Post-Cold War Europe*, edited by W. Park and G. W. Rees, London, Longman, 169.

⁷⁰ Chandler, *Bosnia*, 46.

⁷¹ Ibid.

⁷² Security Council, *General Framework Agreement*, Annex 3, Article II, paragraphs 1 & 2.

displaced persons were able to reverse ethnic cleansing politically, even if they were unable or unwilling to do so physically.⁷³

Annex 4, The Constitution, set out the “highest level of internationally recognized human rights and fundamental freedoms” for Bosnia and Herzegovina, applying the European Convention for the Protection of Human Rights and Fundamental Freedoms directly to the state and allowing it to “have priority over all other law”.⁷⁴ The Constitution further allowed the international community to enter and establish policies within Bosnia. Article II states “All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access [to] any international human rights monitoring mechanisms established for Bosnia and Herzegovina”⁷⁵. Chandler argues that the Constitution gave mandates of responsibility in Bosnia to international supervisory bodies, rather than the local government.⁷⁶

Article VI established a nine-member Constitutional Court to overlook questions and issues concerning domestic and international laws. Six members were from Bosnia and Herzegovina (four from the Federation and two from the Republic of Serbia) while three “judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state”.⁷⁷

Annex 6, Agreement on Human Rights, outlined general internationally recognized human rights and freedoms along with the establishment of a Commission on Human Rights consisting of two parts: the Office of the Ombudsman and the Human Rights Chamber.⁷⁸ The

⁷³ Szasz, “The Protection of Human Rights,” 312.

⁷⁴ Security Council, *General Framework Agreement*, Annex 4, Article II, paragraph 1; *Ibid*, Annex 4, Article II, paragraph 2.

⁷⁵ *Ibid*, Annex 4, Article II, paragraph 8.

⁷⁶ Chandler, *Bosnia*, 46-47.

⁷⁷ *Ibid*, 47.

⁷⁸ Security Council, *General Framework Agreement*, Annex 6, Article II, paragraph 1.

Ombudsman was to hold a five-year term, commissioned by the OSCE, and could not be a citizen of Bosnia and Herzegovina.⁷⁹ Further, the Ombudsman is to investigate any allegations in violation of human rights and issue findings and reports to the High Representative.

The Human Rights Chamber, consisting of members from the Federation of Bosnia and Herzegovina, Republic of Serbia and external members, was mandated to decide on cases of violations of human rights, develop an effective remedy and issue reports of its decisions to the High Representative, OSCE and the Council of Europe.⁸⁰

Chapter Three of the Annex outlines further provisions on human rights organizations operating within Bosnia. Chandler states that all parties were told to promote and encourage activities of human rights organizations (both international and non-governmental) by granting them full cooperation and unrestricted access.⁸¹ These organizations included and were not limited to the UN Commission on Human Rights, OSCE, UN High Commissioner for Human Rights, along with other intergovernmental or regional human rights missions or organizations.⁸²

Annex 7, Agreement on Refugees and Displaced Persons, guaranteed to all refugees and internally displaced persons (IDPs) the unqualified right to return to their prewar homes of origin.⁸³ What is important to take from this Annex is the establishment of the Commission for Displaced Persons and Refugees.⁸⁴ Chandler states that this Commission, consisting of members from the Federation, Republic of Serbia and external members delegated by the European Court of Human Rights, was mandated to decide claims on property, determine the

⁷⁹ Ibid, Annex 6, Article IV, paragraph 2.

⁸⁰ Ibid, Annex 6, Article VIII.

⁸¹ Chandler, *Bosnia*, 47.

⁸² Security Council, *General Framework Agreement*, Annex 6, Article XIII, paragraph 2.

⁸³ McMahon, "Rebuilding Bosnia," 575.

⁸⁴ Security Council, *General Framework Agreement*, Annex 7, Chapter Two.

lawful owner of a property, establish fixed rates to determine property values, and award compensation in lieu of return of the property.⁸⁵

Annex 10, Agreement on Civilian Implementation of the Peace Settlement, states that all parties will coordinate in implementing civilian aspects of the peace settlement, including humanitarian aid efforts, rehabilitation of infrastructure and economic reconstruction, establishment of political and constitutional institutions, promotion of respect for human rights, the return of displaced persons and refugees, and holding free and fair elections.⁸⁶ These activities were to be mobilized by and designated to the High Representative. The High Representative, being the “final authority in theater regarding interpretation of this Agreement,” was given a powerful and extensive mandate as outlined in Article II.⁸⁷

Annex 11, Agreement on International Police Task Force, states that in order to provide a safe and secure environment for all parties in their respective jurisdictions, the creation and assistance of a UN International Police Task Force (IPTF) will be agreed upon.⁸⁸ The IPTF was to be autonomous with regard to the execution of its functions while the High Representative coordinated their activities.⁸⁹ Article V further states that any obstruction, interference or failure to comply with IPTF requests and demands were to result in action by the High Representative. Chandler argues the role given to the IPTF “was to police the police,” as they monitored and inspected local law enforcement activities while enforcing internationally

⁸⁵ Chandler, *Bosnia*, 49.

⁸⁶ Security Council, *General Framework Agreement*, Annex 10, Article I, paragraph 1.

⁸⁷ Ibid, Annex 10, Article V; Chandler, *Bosnia*, 50.

⁸⁸ Security Council, *General Framework Agreement*, Annex 11, Article I.

⁸⁹ Ibid, Annex 11, Article II, paragraph 1.

recognized standards in accordance with international human rights, “and by taking such other measures as appropriate”.⁹⁰

According to Chandler, understanding the context of the DPA matters as it “sought to create a new political entity which was not a product of popular consensus or popular involvement” by the Bosnian people.⁹¹ Rather, Bosnians perceived this supervised transition as external imposition viewing it with little support. McMahon further argues that Dayton addressed goals by combing elements from each party’s objectives through the will of the international community, thus separating the state into two monoethnic units while also creating mechanisms to reunify the country.⁹² Understanding this contradiction illustrates the difficult context in which the DPA was operating.

3.3 The Importance of Dayton

As will be discussed in the next section, the DPA has been and still is criticized by its ineffectiveness as a state building mechanism in Bosnia. Before outlining any criticisms, this section will overview the positive outcomes created by the Dayton Agreement. It is important to remember that the West designed this document in the attempt to end genocide and violence within a divided country as well as design a democracy out of what was once communism and what was then a bloody war. Inside its development existed a difficult balance between two complex issues: ending violence and building a state. While on the surface, these goals appear to coincide (as ending violence in a country would further lead to reconstructing that state), they are riddled with issues and complexities that delve well beyond the state building mechanisms and legislation that they put into place.

⁹⁰ Chandler, *Bosnia*, 51; Security Council, *General Framework Agreement*, Annex 11, Article I, paragraph 2.

⁹¹ Chandler, *Bosnia*, 43.

⁹² McMahon, “Rebuilding Bosnia,” 574.

The slow genocide and violence that had continued to escalate in Bosnia during the war was viewable and seen by a worldwide audience. Thus, while the primary goal was to end the violence, it had a significant impact “not only for the civilians and combatants directly concerned with the hostilities, but also for a wider viewing public”.⁹³ Further, while ending armed conflict in itself was the goal, understanding the causal roots and creating structures to prevent recurrence had to be addressed. While achieving the latter was a much more complex task, as understanding long-lasting ethnic tensions from the outside is difficult, the DPA did put an end to the war. Although, following the end of the war, conflicts ensued in Kosovo and ethnic tensions still exist amongst the citizens of Bosnia, the Agreement put a stop to the war and created a non-violent peace between ethnicities. While eliminating ethnic tensions was not explicitly stated in the DPA, by establishing peace and democratization, it did reduce tensions.⁹⁴ Thus, the goal of ending violence in Bosnia was achieved.

The Dayton Agreement further created a blueprint for a new democracy in rare and undemocratic circumstances during the Bosnian war. Dayton was able to develop an agreement despite the unwillingness of the parties to engage and negotiate with each other.⁹⁵ This negotiation, involving the international community as a mediator, created the Muslim-Croat Federation and the Serb Republic, developed a new constitution, integrated human rights protection mechanisms, deployed international forces and created structures and legislation to promote the right of return for refugees and displaced persons.⁹⁶ It was clear that each party

⁹³ Fionnuala Ni Aolain, “The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis,” in *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, edited by Dzemal Sokolovic and Florian Bieber, Ashgate Publishing Limited, Burlington, 2001: 67.

⁹⁴ Chandler, *Bosnia*, 38.

⁹⁵ Marcus Cox, “Building Democracy from the Outside: The Dayton Agreement in Bosnia and Herzegovina,” in *Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-torn Societies* edited by Sunil Bastian and Robin Luckham, Zed Books, London, 2003: 258.

⁹⁶ Ibid.

within Bosnia wanted different objectives covering a wide range of targets to pertain to the Peace Accords.⁹⁷ In this sense, no ethnic group within Bosnia could achieve their own objectives as each ethnic narrative differed and contrasted. For instance, while Bosnian Serbs saw Dayton as “giving them partition of Bosnia that they had fought for,” Bosnian Muslims viewed the DPAs objectives “with suspicion, pessimism and in some cases with a deep sense of injustice”.⁹⁸ Therefore, for the Accords to have created structures in which a multiethnic country could exist despite ethnic differences should be viewed positively.

The Accords not only attempted to modify a previously communist nation, but also put in place the structures and state building mechanisms needed develop Bosnian sovereignty and establish a democratically accountable state.⁹⁹ As outlined in Annex 7 of the Agreement, a Commission for Displaced Persons and Refugees was formed to aid in the return of internally displaced persons (IDPs) and refugees. By 2004, 1,000,473 people out of a total of more than 2 million forcibly displaced during the war had returned to their home areas, of which 440,000 were refugees who had fled Bosnia and Herzegovina during the war and 560,000 were IDPs.¹⁰⁰ This number has witnessed slow progress throughout the years, as less IDPs and refugees return to their pre-war homes. However, the Commission continued to develop strategies for returnees, including the Implementation Strategy in 2010 and a housing project in 2014.¹⁰¹ Despite slow annual returns, currently approximately 84,500 registered IDPs remain in Bosnia

⁹⁷ Rory Keane, *Reconstituting Sovereignty: Post-Dayton Bosnia Uncovered*, Ashgate, Burlington, 2002: 70.

⁹⁸ Ibid.

⁹⁹ Chandler, *Bosnia*, 38.

¹⁰⁰ UNHCR: The UN Refugee Agency, “Returns to Bosnia and Herzegovina reach 1 million,” UNCHR, 21 September 2004, <http://www.unhcr.org/414ffeb44.html>.

¹⁰¹ Human Rights Watch, “World Report 2014: Bosnia and Herzegovina,” Human Rights Watch, 2014, <https://www.hrw.org/world-report-%5Bscheduler-publish-yyyy%5D/world-report-2014-bosnia-and-herzegovina>.

and Herzegovina, illustrating improvements in this area.¹⁰² While impediments to returnees remain, the influx of IDPs since 1995 has been a major step in the right direction for the DPA.

Further, Annex 4, the Constitution, and Annex 6, the Agreement on Human Rights, both outlined that Bosnia was to enforce and promote a high level of internationally recognized human rights and freedoms. Bosnia has ratified all major UN and international human rights conventions as well as promoted and enforced human rights through a number of activities including training courses for judges, prosecutors, prisons officers and police officers.¹⁰³ While certain rights, including women's rights and gender equality and LGBTI rights lag behind, overall, "the legal and institutional framework for the observance of human rights is in place and the main elements of international human rights laws have been incorporated into the legal system".¹⁰⁴ Although Bosnia and Herzegovina remains a divided country, separated between the Federation of Bosnia and the Republic of Serbia, the legal framework for the protection of minorities is largely in place.¹⁰⁵ Stronger implementation strategies are needed in the human rights area, as well as other improvements, however, the overall implementation of the DPA in Bosnia has shown progress toward a democratic society.¹⁰⁶ While faults remain, the implementation of the DPA remains somewhat effective in state building and post-conflict reconstruction.

3.4 Building Democracy in a Divided Society: Critique of the DPA

¹⁰² Human Rights Watch, "World Report 2015: Bosnia and Herzegovina," Human Rights Watch, 2015, <https://www.hrw.org/world-report/2015/country-chapters/bosnia-and-herzegovina>.

¹⁰³ European Commission, "Bosnia and Herzegovina 2013 Progress Report," European Commission, Brussels, 16 October 2013: 15.

¹⁰⁴ *Ibid.*, 19.

¹⁰⁵ *Ibid.*

¹⁰⁶ McMahan, "Rebuilding Bosnia," 591-592.

This section will borrow from different strands of analysis to illustrate how on various levels the DPA has been ineffective and unhelpful in state building and reconciliation in Bosnia and Herzegovina. It will assess its external regulation and structure, power-sharing methods, issues over ethnicity, territory and minority returns, and security and military structures. Issues over human rights and civilian implementation procedures will be discussed in Chapter 3.

3.4.1 External Development and Structure

In the midst of war and genocide, the inability of the parties to construct agreements amongst themselves led to the involvement of the international community in the creation and development of the DPA. It has facilitated the most extensive development of external democratization strategies and further illustrates a liberal internationalist world view towards nation building, suggesting an intention to create a multiethnic, secular, and capitalist state, regardless of the country's past, culture, or recent history.¹⁰⁷ This view, as McMahon argues, creates problems as the generic model distorts expectations of what the international community can realistically achieve and produces large-scale international involvement.¹⁰⁸ External imposition created an Agreement that was "rigid where it concerned the limits to Bosnian self-rule but extremely flexible in relation to the powers which the international community could exercise".¹⁰⁹ This is illustrated throughout the Annexes. For instance, the Military Annexes gave NATO, UNPROFOR and IFOR complete control of military activity within the state, offering them immunity to damages or any impediments to military action.¹¹⁰ Further, Annex 3 on elections gave far-reaching powers of regulation to the OSCE. Annex 6 on human rights established an Ombudsman as well as a Commission on Human Rights,

¹⁰⁷ Ibid, 587-588.

¹⁰⁸ Ibid, 588.

¹⁰⁹ Chandler, *Bosnia*, 52.

¹¹⁰ Ibid, 44.

consisting of eight (of a total fourteen) members being from outside Bosnia. Annex 7 on refugees and IDPs created a Commission in which the Chair and two other members were not Bosnian. While Annex 10 witnessed the development and deployment of the IPTF by the UN, in order to regulate local police.¹¹¹ The Office of the High Representative creates further division between local and external policy regulation and implementation, overlooking the civilian implementation process as well as other mandates, as will be discussed in Chapter three. The DPA had successfully deployed various international actors within Bosnia to take charge, establish peace and begin rebuilding. This quasi-protectorate structure over the Bosnian states has created dependence, forcing weak Bosnian institutions to lean on the use of international authority, enabling them to evade responsibility for difficult choices.¹¹² Due to its externally regulated structure, it is ill equipped for both post-conflict reconstruction and a democratic transition.

3.4.2 Power-sharing, Constitution and Electoral System

From the perspective of the external actors, the DPA signaled peace and the creation and rebuilding of a multiethnic country.¹¹³ However, this overlooks national and local perspectives. Bosnian Serbs viewed Dayton as “giving them the partition of Bosnia that they had fought for [while] Bosnian Muslims viewed [it] with suspicion, pessimism and in some cases with a deep sense of injustice”.¹¹⁴ This division is further illustrated through the power sharing system and consociational arrangement created by Dayton. This includes an ethnically based distribution of seats in parliament, a rotating presidency, legislative conditions for

¹¹¹ Ibid, 44-51.

¹¹² Cox, “Building Democracy from the Outside,” 272.

¹¹³ Richard Holbrooke, “In the Balkans be sure to carry on for the long haul,” *International Herald Tribune*, 1999: 6 as quoted in Keane, *Reconstituting Sovereignty*, 70.

¹¹⁴ Keane, *Reconstituting Sovereignty*, 70.

passing of bills, ethnically based legislative veto for matters of vital interest, and an electoral system based on proportional representation.¹¹⁵ In Bosnia, the reserved seats apply to the three recognized constituent peoples (Bosniaks, Serbs and Croats), while communities are represented through the House of Peoples (the upper chamber), which has equal representation of the three parties.¹¹⁶ The House of Representatives (the lower chamber) consists of forty-two members, which are elected in their respective entities. It set out the structure of government institutions, composition of electorates, the distribution of power and responsibilities between the state and its constituent entities and the constitutional-amending procedure.¹¹⁷ This system was further developed on a power-sharing procedure, which served as the structure that held it together.

The power sharing arrangement was proposed to be the essence of multi-ethnicity in Bosnia. O'Halloran argues that Dayton designed it to be a "weak federation in which mechanisms based on ethnic criteria would operate throughout all levels of government [while] Federal power ... was devolved ... to provide security to all three minorities".¹¹⁸ The Bosnian constitution illustrates a framework that protects individual rights, however also models its government through identity-group politics.¹¹⁹ This not only presents a conflict between its constitutional human rights and power-sharing system, but further creates less incentive for the three groups to develop a multi-ethnic party system that promotes inter-ethnic voting.¹²⁰ The

¹¹⁵ Patrick J. O'Halloran, "Post-Conflict Reconstruction: Constitutional and Transitional Power-sharing Arrangement in Bosnia and Kosovo," in *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, edited by Sid Noel, McGill-Queen's University Press, 2005: 105.

¹¹⁶ Florian Bieber, "Power Sharing after Yugoslavia: Functionality and Dysfunctionality of Power-sharing Institutions In Post-war Bosnia, Macedonia, and Kosovo," in *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, edited by Sid Noel, McGill-Queen's University Press, 2005: 91.

¹¹⁷ O'Halloran, "Post-Conflict Reconstruction," 106.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, 108.

¹²⁰ *Ibid.*

consociational model carries the risk of “freezing ... multiple and shifting identities,” creating the fragmentation of social and political life into enclaves and leaving little space for development of a wider solidarity within Bosnia.¹²¹ Thus, Bosnia has suffered from a lack of cooperation amongst the three ethnic groups, and as a result has experienced in less political autonomy than intended. The DPA was able to protect the ethnic groups but, as Cox argues, it has been “weak on creating the political and institutional ties that bind them together” as the states authority is limited giving the political elites no incentive to cooperate.¹²²

3.4.3 Ethnicity and Territory

During the conflicts, negotiations to partition the Bosnian territory took place on numerous occasions. This included the Own-Stoltenberg plan, which would have given Serbs 53 percent of Bosnian territory, Muslims 30 percent and Croats 17 percent.¹²³ Parties failed to agree on this plan, as the division of ethnicities would have concluded that Serb aggression was effective, due to the fact that Serbs would receive the majority of territory. The final agreement was not far off however. The Bosnian-Croat Federation and the Serb Republic was divided 51:49 respectively. Keane argues that partition into these sovereign nation states was wrong. He states that it explicitly validates the process of ethnic cleansing as a successful tactic and political maneuver; it forces minorities to either assimilate or move, destroying the former multi-ethnic character of Bosnia; and finally the demarcation of borders produces boundary lines that do not fall in line with ethnicity.¹²⁴

Since reconciliation is an integral part of the Dayton Accords, issues of territory and ethnic identity have remained central to the reconciliation process, including ethnic

¹²¹ Bose, *Bosnia After Dayton*, 247.

¹²² Cox, “Building Democracy from the Outside,” 263.

¹²³ Keane, *Reconstituting Sovereignty*, 67.

¹²⁴ *Ibid*, 67-68.

reintegration. The inter-entity boundary (IEBL) has been a major factor for preserving ethnicity within the two large territories. As previously mentioned, over 2 million people were either internally displaced or sought refuge. While under Annex 7 of the DPA, “refugees and displaced persons have the right freely to return to their homes of origin ... without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion,” many citizens feared returning, as they would be considered minorities in their pre-war homes.¹²⁵ While minority returns in Bosnia and Herzegovina have steadily continued, reaching a total of 413,097 minority returns by 2003, the politics and socio-economics of returns still face issues.¹²⁶ Further, these numbers alone do not illustrate the entire return process, as tensions may still occur despite refugee return.

Fagen argues that after a conflict has occurred, internationally led programs to return refugees and IDPs frequently produce measures that are inadequate because they assume that the need to create a future for the returnees is satisfied by simply restoring them to their prior lives.¹²⁷ There is also usually a lack of long-term engagement and strategies by the international authorities. After the conflicts, Bosnian refugees were under pressure to return to the new Bosnia. For instance the IPTF recruited minority police officers with the explicit aim of aiding in the minority return process and providing assurance of law and order.¹²⁸ However, this had a relatively minor impact on the returnee process, as security was not the only issue. Those who wished to return to their pre-war homes were thwarted by the amount of housing that had been destroyed, the forced refugee movements that had caused thousands of displaced

¹²⁵ Security Council, *General Framework Agreement*, Annex 7.

¹²⁶ Timothy Donais, *The Political Economy of Peacebuilding in Post-Dayton Bosnia*, Routledge, New York, 2005: 130.

¹²⁷ Patricia Weiss Fagen, “Refugees and IDPs after Conflict,” *United States Institute of Peace Special Report*, United States Institute of Peace, Washington, 2011: 1.

¹²⁸ Timothy Donais, “Power Politics and the Rule of Law in Post-Dayton Bosnia,” *Studies in Social Justice*, Volume 7, Issue 2, 2013: 199.

persons to occupy the homes of other displaced persons and finally, the local hostility to returns that undermined the ethnic uniformity developed during the conflict.¹²⁹

Recreating a genuine multi-ethnic society in Bosnia goes beyond the mere number of minority returns that the country achieves. Donais states that what is important here is not just the quantity, but also the quality of returns. Most minority returnees live in conditions of poverty, lack the means to sustain themselves, have to survive off of subsistence agriculture as well as the assistance provided by aid agencies or family members.¹³⁰ Many that do move back do so due to a strong emotional connection to their land or temporarily, then quickly moving on in search of jobs if none are to be found in their area.¹³¹ Despite the international community making minority returns a centerpiece in peace building efforts (as outlined in Annex 7) and devoting more resources to it than any other post-conflict country, progress in overcoming socio-economic obstacles to sustainable return was slow.¹³²

For post-conflict reconstruction and peace building efforts in Bosnia, this has meant that while Dayton recognized the three ethnic groups as constituent peoples, it further made political representation dependent on a person's ethnic belonging. This creates problems for those who have returned to their pre-war homes, but now constitute as a minority.¹³³ The DPA attempted to create conditions in which ethnicity could be softened after the war. Instead it has made ethnicity integral to the countries design, leading to a fragmented society in which reconciliation remains stagnant.

¹²⁹ Fagen, "Refugees and IDPs after Conflict," 4.

¹³⁰ Donais, *The Political Economy of Peacebuilding*, 130.

¹³¹ Ibid.

¹³² Ibid, 133.

¹³³ Roberto Belloni, "Bosnia: Dayton is Dead! Long Live Dayton!," *Nationalist and Ethnic Politics*, Routledge, Volume 15, 2009: 360.

3.4.4 Security Structures

Security structures in Bosnia consist of four main entities: IFOR/SFOR, the IPTF, Bosnian Armies and the local police forces. IFOR (which later became SFOR) was created under the DPA in order to prevent renewed hostility and support civilian agencies. Kaldor argues that these security structures have been established and remain under international rather than democratic control, leading to a lack of accountability.¹³⁴ The IPTF, as stated in Annex 11 of the DPA, served the function of monitoring and supervising local police and police reform.¹³⁵ Expenditure on these security structures in 1998 (including international contributors) exceeded the total Bosnian GDP.¹³⁶ Despite the overwhelming costs and effort exerted on security forces in Bosnia, grassroots nationalism also emerged, becoming more powerful than before the war. This was especially directed against minority returns or symbols of multi-ethnicity.¹³⁷ This led to violent demonstrations in the early 2000s in Trebinje, Banja Luka and Western Herzegovina. The fear, insecurity and mistrust that were left by the war created greater tensions in Bosnia. To be successful, Aolain argues that security structures must restore neutrality among partisan ethnic groups and fill the confidence-building role by demonstrating impartiality and satisfying the requirements of representatives in ethnically mixed and divided communities.¹³⁸ Further, according to Quinn, while transitional justice mechanisms focus on reforms to the justice sector, rehabilitating security structures is needed to confront the transition to democracy.¹³⁹ While the international community can be instrumental

¹³⁴ Kaldor, "Security Structures in Bosnia," 224.

¹³⁵ Security Council, *General Framework Agreement*, Annex 11.

¹³⁶ Kaldor, "Security Structures in Bosnia," 212.

¹³⁷ *Ibid.*, 210-211.

¹³⁸ Aolain, "The Fractured Soul of Dayton," 82.

¹³⁹ Quinn, "Transitional Justice," 329.

in advancing these goals and helping provide reconciliation to a post-conflict society, IFOR/SFOR and the IPTF has experienced limited effects towards this mandate.

First, the tension between military and civilian implementation has unfortunately hindered peace building in Bosnia. While military objectives focused on preventing the renewal of hostilities through the separation of forces, the cantonment of weapons and the establishment of demarcation lines, civilian implementation involves objectives oriented towards integration.¹⁴⁰ These differing objectives led to difficulties in reconciliation. Second, in the early stages of IPTF deployment, there was a notable lack of sensitivity to and knowledge of domestic legal culture and rules. This was illustrated when IPTF officers interfered and stopped local court proceedings, claiming that the trials were unfair, due to a lack of knowledge.¹⁴¹ For instance, Aolain states that in many cases the IPTF simply had no knowledge of how court procedure in a civil-law system operated.¹⁴² Third, there was an overwhelming dependence of all security services on international sources of finance. Consequently, these services were not directly accountable to the state, but rather to the international agencies operating them (UN, NATO and EU).¹⁴³ Fourth, the role of these forces was to defend the entities, not the overall state itself. This created further hostility between ethnic groups, as these forces did not produce a sense of uniformity but rather further divided.¹⁴⁴ Fifth, while NATO was charged with providing security in support of the free movement of civilian populations, refugees, and displaced persons, their authority and willingness to do so was lacking up until 1999.¹⁴⁵ It was only when SFOR assumed these responsibilities that minority returns steadily increased,

¹⁴⁰ Kaldor, "Security Structures in Bosnia," 209.

¹⁴¹ Aolain, "The Fractured Soul of Dayton," 83.

¹⁴² *Ibid.*

¹⁴³ Kaldor, "Security Structures in Bosnia," 224.

¹⁴⁴ *Ibid.*, 225.

¹⁴⁵ Patrice C. McMahon, "Rebuilding Bosnia," 578.

suggesting that without an international presence, many Bosnians are unlikely to return home on their own.¹⁴⁶ Providing security for returns early on could have sped up the process. Finally, Annex 1A of Dayton requires that local authorities must cooperate fully with the War Crimes Tribunal in the arrest, detention, surrender of or access to persons who are accused of violation under the jurisdiction of the Tribunal.¹⁴⁷ Unfortunately, Serbs and Croats have not always followed these guidelines and procedures. For the first two years, neither did international troops. SFOR only arrested twenty-six of the 112 individuals indicted.¹⁴⁸ Arresting war criminals is vital to refugee and IDP return as well as creating a secure environment based on a respect for law and order. Martin-Ortega argues that removing criminals from society has a positive effect on refugee return because people feel safer to return to their pre-war homes and territories.¹⁴⁹ Currently, no criminals remain at large and prosecutions are ongoing. However, a greater emphasis on cooperation and apprehension of criminals in the immediate aftermath of the war may have produced a safer environment and less nationalist rhetoric amongst ethnicities.

Many of these issues existed during the immediate years following the war. In recent years however, the international security forces are overall considered to be somewhat successful, as their overall mandate to bring peace and reestablish local police forces back into society have, for the most part, been completed. However, problems, such as corruption still persist. For instance, while a large number of bribes are paid to the health sector, more than half

¹⁴⁶ Ibid, 579.

¹⁴⁷ Security Council, *General Framework Agreement*, Annex 1-A, Article IX, paragraph 1(g).

¹⁴⁸ McMahon, "Rebuilding Bosnia," 579.

¹⁴⁹ Olga Martin-Ortega, "Building Peace and Delivering Justice in Bosnia and Herzegovina: The Limits of Externally Driven Processes," in *Transitional Justice and Peacebuilding on the Ground*, edited by Chandra Lekha Sriram, Jemima Garcia-Godos, Johanna Herman and Olga Martin-Ortega, Routledge, New York, 2013, 145.

(52 percent) of citizens who pay bribes pay them to police officers.¹⁵⁰ Further, Nations in Transit, the Global Corruption Barometer and the UN Office on Drugs have ranked that “police officers are perceived as one of the most corrupt professions in Bosnia and Herzegovina”.¹⁵¹ Further, trust between citizens and police is low, as 62 percent of households consider the police to be ‘corrupt’ or ‘extremely corrupt’.¹⁵² The security structures developed by Dayton ended the war and prevented further violence, however hostility remains amongst ethnic groups and the local police force suffers from corrupt practices.

3.5 Conclusion

The overall discussion in this chapter has been to analyze the DPA by observing its framework, achievements, critiques and general effect in Bosnia and Herzegovina since the end of the war. Through these observations, the final analysis should illustrate whether or not the implementation of the DPA has been effective towards state building and post-conflict reconstruction and reconciliation. What this chapter has attempted to do, through an examination of the DPA, is illustrate that assessing its effectiveness is a complex process. Despite these complexities, this chapter does conclude that while the DPA has been successful in putting an end to the war and been somewhat successful in establishing and implementing state building structures, it has been less effective at post-conflict reconstruction and reconciliation among the three main ethnicities.

The DPA has allowed for the extension of international mechanisms of regulation in order for the transition to democracy and self-rule to occur, which has meant that Bosnian state

¹⁵⁰ “Corruption in Bosnia and Herzegovina: Bribery as Experienced by the Population,” UNDOC Statistics and Surveys Section and Prism Research, 2011: 4.

¹⁵¹ “Bosnia and Herzegovina Country Profile,” Business Anti-Corruption Portal, <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/bosnia-and-herzegovina/corruption-levels/police.aspx>.

¹⁵² Ibid.

bodies have had little influence over policy development and implementation.¹⁵³ Underpinning the elements of state building in Bosnia is the liberal internationalist worldview, with the “assumption that future states will look like secular, democratic states in the West”.¹⁵⁴ However, the problem with this approach is it negates the countries past, culture, or particularities of history. This is also where the difficulties lie in Dayton.

The DPA stopped the war and developed structures and policies to aid in state building. The agreement developed democratic elections through the OSCE, produced a constitution with a high level of internationally recognized human rights and freedoms, introduced international military programs to ensure peace and the return of refugees and IDPs, brought in an International Police Task Force to oversee the role of local police, and implemented a High Representative to overlook the civilian implementation process.¹⁵⁵ While these policies were implemented, two major problems occurred within them: placing substantial responsibility for peace and state building on the shoulders of external actors who also harbor their own national interests and failing to achieve reconciliation among ethnic groups in Bosnia.¹⁵⁶

Research on nation building has illustrated that success depends on both the internal characteristics of the state as well as the sustained political and economic engagement by an outside power.¹⁵⁷ The international community produced its own structures within Bosnia but has not effectively coincided these policies with the indigenous population. Although examining the DPA from a quantitative perspective may illustrate positive outcomes (such as overall refugee returns or indicted war criminals), qualitatively, reconciliation amongst

¹⁵³ Chandler, *Bosnia*, 64.

¹⁵⁴ McMahon, “Rebuilding Bosnia,” 588.

¹⁵⁵ Security Council, *General Framework Agreement*.

¹⁵⁶ Donais, *The Political Economy of Peacebuilding*, 47.

¹⁵⁷ Minxim Pei and Sara Kasper, “Lessons from the Past: The American Record in Nation-Building,” Carnegie Endowment for International Peace Policy Brief, 11 April 2003 as quoted in McMahon, “Rebuilding Bosnia,” 588.

ethnicities remains divided. From a Dayton perspective, Bosnia is viewed as an ethnically mixed country, but within its borders locals view it as a division amongst ethnicities. That being said, while Dayton's efforts have not completely resolved domestic issues, neither have they failed. It has had achievements and shortcomings, but what are most important to remember are the complexities in nation building and reconciliation. Thus, when implementing internationally led policies through Dayton following the war, the agreement should have been more flexible and cooperative with local state building initiatives in order to balance domestic and international power. Ending a war and making peace within a diverse and divided country requires long-term solutions, investment and diverse strategies that go beyond a cookie-cutter approach.

Chapter 4

4 The Office of the High Representative

The previous chapter illustrated and examined the extent of external regulation implemented by the DPA. This chapter will continue this analysis, but through a specific focus on implementation strategies for state building and reconciliation. While the UN and OSCE played large and extensive roles in democratization and state building in Bosnia, the OHR, created under the auspices of the UN, implemented powerful control and regulation over the civilian implementation process. Although the structure of the DPA was produced in the attempt to bring ethnic balance and ethnic representation to Bosnia, the OHR played a significant role in promoting cooperation between political institutions through the civilian implementation process.¹⁵⁸ Its importance in the state building and reconciliation process should not be overlooked. The following sections will assess both the achievements and criticisms of the OHR. In the case of the OHR, many of its achievements have also been considered its downfalls as implementing certain policies has impeded on Bosnian sovereignty and not taken into account the local voice of the communities.¹⁵⁹ Further, while policies may be implemented successfully, they are not necessarily deemed a positive outcome for state building and reconciliation.

4.1 Background to the OHR

¹⁵⁸ Keane, *Reconstituting Sovereignty*, 105.

¹⁵⁹ *Ibid*, 106.

The OHR was developed by the UN, as created under the DPA on December 1995. It is an ad hoc international institution responsible for overseeing the implementation of civilian aspects, as stated in Annex 10 of the Peace Agreement. While its mandate is specified under the DPA, the ultimate goal of the High Representative is to work with the people and institutions of Bosnia as well as the international community to ensure that the country evolves into a peaceful and viable democracy on course for integration in Euro-Atlantic institutions.¹⁶⁰ Despite its efforts since the end of the war and the EUs increased commitment to the country, the OHR is still “working towards the point where Bosnia and Herzegovina is able to take full responsibility for its own affairs”.¹⁶¹ The OHR also works with the OHR Secretariat in Brussels and the Peace Implementation Council (PIC). The PIC consists of states, international organizations and agencies, such as the UN Security Council, the North Atlantic Council, OSCE, World Bank and International Monetary Fund, which hold conferences and decisions on policy implementation, which also coordinates with the Secretariat.¹⁶² Once a decision is reached at this level, the High Representative then implements it on the ground. Originally, the powers of the OHR were limited to facilitating, coordinating and reporting, which led to a lack of recognition and implementation by parties. Recognizing that the current powers did not suffice, in 1997 the High Representative was equipped with expansive executive and legislative powers to impose national policies in accordance with the limitations outlined in the DPA (civilian implementation and human rights), emerging as one of the most influential institutions in Bosnia.¹⁶³ These powers have been attributed to tangible successes, such as refugee return,

¹⁶⁰ “OHR Introduction,” Office of the High Representative, 2012, http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519.

¹⁶¹ Ibid.

¹⁶² Chandler, *Bosnia*, 57.

¹⁶³ Bieber, *Post-War Bosnia*, 84.

but also hurting the development of power-sharing structures through the implementation of the Bonn powers, and impeding on reconciliation.¹⁶⁴

4.2 Mandate of the OHR

The High Representative was given a powerful and extensive mandate as the “final authority in theater regarding interpretation ... on the civilian implementation of the peace settlement”.¹⁶⁵ Under Article II of the Agreement, the mandates are: monitoring implementation of the peace settlement; maintaining close contact with the Parties to promote cooperation; coordinating activities of civilian organizations; facilitating the resolution in civilian implementation; participating in meetings of donor organizations; reporting progress to the UN, EU, US, Russian Federation and other interested governments, parties and organizations; and finally providing guidance to, and receive reports from, the IPTF.¹⁶⁶ This illustrates how far-reaching the OHRs agenda is since the integration of the DPA. In 1997, the High Representatives powers were extended, allowing him to “decide the time, location and chairmanship of meetings of the central institutions, to enact interim measures where the Bosnian representatives could not agree to OHR policy, and to take action against non-compliant officials at both state and entity level”.¹⁶⁷ These new powers were named the ‘Bonn’ powers, after the city in Germany in which the conference took place.¹⁶⁸ Thus, the OHRs role in civilian implementation and reconstruction efforts in Bosnia has been significant.

4.3 Successes of the OHR

¹⁶⁴ Ibid, 85.

¹⁶⁵ Security Council, *General Framework Agreement*, Annex 10, Article V.

¹⁶⁶ Ibid, Annex 10, Article II, paragraph 1.

¹⁶⁷ Chandler, *Bosnia*, 54.

¹⁶⁸ “Key Events,” Office of the High Representative, http://www.ohr.int/ohr-info/key-events/default.asp?content_id=35971.

The international agenda in Bosnia comprised of concerted military action, the division of the country into two semiautonomous units, and the development and democratization of a new state through the intimate involvement by the international community.¹⁶⁹ The latter, also deemed the civil society solution, was important in the aftermath of violence, as it attempted to aid in both interethnic reconciliation and state building from above, specifically following the Bonn powers in 1997.¹⁷⁰ Aitchison states that the general disagreement among critics towards the OHR revolves around the concentration of external power in one body that does not answer to the people of Bosnia.¹⁷¹ However, certain achievements of the OHR are also attributed to its external regulation.

Local capacity building in war-torn societies is implemented through international administrations and agencies, such as the OHR, with the objective of establishing “effective public administrative bodies and practices and training individuals capable of sustaining them following the withdrawal of the international authorities”.¹⁷² According to Caplan, in the early stages of post-conflict reconstruction, local actors are either inexperienced or untrustworthy, due mainly to partisan, nationalist ideologies based on previous ethnic tensions. Thus international authorities become insufficiently receptive to local input, favoring instead their own agencies towards development and reconstruction efforts.¹⁷³ This was also the case in Bosnia and Herzegovina following the war. Difficulties arose between the OHR and local capacity building initiatives, as local authorities were “frequently more concerned with the

¹⁶⁹ McMahon, “Rebuilding Bosnia,” 572.

¹⁷⁰ Ibid, 575.

¹⁷¹ Andy Aitchison, *Making the Transition: International Intervention, State-Building and Criminal Justice Reform in Bosnia and Herzegovina*, Intersentia, Portland, 2011: 52.

¹⁷² Richard Caplan, “Partner or Patron? International Civil Administration and Local Capacity-building,” *International Peacekeeping*, Vol. 11, No. 2, 2004: 230.

¹⁷³ Ibid.

pursuit of personal and political partisan gains than with general welfare”.¹⁷⁴ In certain cases, these difficulties led to positive outcomes for Bosnians as non-partisan decisions were made by the OHR.

For instance, militant nationalists were determined to thwart integration in the early period of the Bosnian administration. They attempted to constrain freedom of movement across the IEHL by issuing distinctive number plates for automobiles in each entity.¹⁷⁵ However, in 1998, the High Representative issued a decision to enforce the Uniform License Plate system, allowing all vehicles – passenger or commercial – to cross international borders, in the effort to promote maximum freedom of movement.¹⁷⁶ This decision allowed freedom of movement across demarcation lines to be more accessible and without it, individuals might have been too fearful to move beyond the relative safety of their entities, even today.¹⁷⁷ That same year, when Bosnian politicians failed to agree, a flag and national anthem were also imposed.¹⁷⁸

Numerous other decisions have been enacted since the extension of powers in 1997, illustrating a noticeable increase up until 2004 (with 158 decisions), whereby the number of decisions made by the OHR has gradually declined.¹⁷⁹ However, nationalist ideologies stood in the way of establishing agreements amongst politicians and thus the OHR implemented a variety of decisions. The Office overlooked and decided on various security and judicial matters. For instance, in 1999 and early 2000, the High Representative imposed a law on stricter state border service as well as judicial framework laws to combat crime and corruption

¹⁷⁴ Ibid, 233.

¹⁷⁵ Ibid.

¹⁷⁶ Carlos Westendorp, “Decision on the deadlines for the implementation of the new uniform license plate system,” Office of the High Representative, 1998, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=347.

¹⁷⁷ Caplan, “Partner or Patron?” 233.

¹⁷⁸ Roberto Belloni, “Civil Society and Peacebuilding in Bosnia and Herzegovina,” *Journal of Peace Research*, Vol. 38, No. 2, 2001: 172.

¹⁷⁹ Aitchison, *Making the Transition*, 51.

in the Federation of Bosnia and Herzegovina.¹⁸⁰ Also in 1999, an introduction of specific property laws that evicted illegal occupants from houses and improved security resulted in a large increase of minority and IDP returns since 1999, as it allowed refugees to return safely.¹⁸¹ In addition to enforcing property laws, the High Representative has supported the UNHCRs ‘Open Cities Initiative,’ which rewarded municipalities that opened themselves up to minority returns, and has used its powers to remove local officials who do not abide by Dayton legislation and obstruct the return process.¹⁸² Some decisions also focused on political reform and removal of public officials. In November 1999, the OHR removed twenty-two local officials from their positions because of their “role in fostering the poison of division and obstructing Dayton implementation”.¹⁸³ This continued and in 2004, the peak year for OHR decisions, 74 out of the 158 decisions (47 percent) were related to the removal or suspension of individuals from office.¹⁸⁴ The OHR further used its powers to enact changes that alleviated criminal activities and nationalist rhetoric. Serious efforts were made to control sources for criminal income “by establishing effective border control to stop smuggling and illegal trafficking [and] closing the Arizona Market,” notorious for its illegal trading in the region.¹⁸⁵ Further, in April 2001, the OHR in cooperation with SFOR seized the Herzogovacka Bank in Mostar, as it was the main source for HDZ (Croatian Nationalist Party) finances.¹⁸⁶

These decisions cover only some of the major policies implemented by the High Representative. These initiatives have aided Bosnia’s progress on interethnic reconciliation

¹⁸⁰ Belloni, “Civil Society and Peacebuilding,” 172.

¹⁸¹ Kaldor, “Security Structures in Bosnia,” 210.

¹⁸² Donais, *The Political Economy of Peacebuilding*, 132.

¹⁸³ Belloni, “Civil Society and Peacebuilding,” 172.

¹⁸⁴ Aitchison, *Making the Transition*, 51.

¹⁸⁵ Kaldor, “Security Structures in Bosnia,” 210.

¹⁸⁶ *Ibid.*

through heightened security measures. Further, given that a “core goal of international efforts in Bosnia is to undermine the strength of the hardline nationalist parties on all sides,” the OHR has been partially successful on that front as well.¹⁸⁷ In addition, because the Bosnian power-sharing structure provides low incentive for politicians to appeal to cross-ethnic voters and affiliations, the OHR has been effective in suppressing nationalist rhetoric in order to open up a society in which ethnicity is less fragmented.¹⁸⁸

The intrusive nature of the OHR in Bosnia has led to initiatives and policy prescriptions that have progressed state building and post-conflict reconstruction. Moreover, while maintaining a critical stance of the organization, Donais boldly states that in order to further tackle the economic roots of Bosnia’s nationalist structures, the OHR was necessary as a form of intrusive international intervention. Not only did the post-war state need internationally led power structures, but it “would have required much greater ... powers in order to [further] remove demonstrably corrupt management boards and managers of publicly owned enterprises”.¹⁸⁹ In addition, Bose maintains that elite cooperation across segmental divides is difficult in post-conflict scenarios. This is because, if left to themselves, elites “may not be willing and able to cooperate, [so rather] a judicious mixture of international inducement and compellance [is needed] to elicit the grudging pragmatism necessary from them”.¹⁹⁰ Bose further states that although the initiatives and reform of rights and representation across Bosnia by the High Representative may at times be “derided as ... superficial window dressing,” it is no less still a step in the right direction, specifically when addressing minority returns and

¹⁸⁷ Donais, *The Political Economy of Peacebuilding*, 118.

¹⁸⁸ Belloni, “Partner or Patron?” 172.

¹⁸⁹ Donais, *The Political Economy of Peacebuilding*, 169.

¹⁹⁰ Sumantra Bose, ‘The Bosnian State a Decade after Dayton,’ *International Peacekeeping*, Vol. 12, No. 3, 2005: 327.

ethnic integration.¹⁹¹ The OHR, while intrusive in nature, served as a non-partisan decision maker toward policy initiatives in which nationalist rhetoric complicated efforts to rebuild and reconcile Bosnian society. Although the Office applied policies and decisions from a top-down approach, it also offered solutions to an ethnically divided state where the power-sharing structure deemed to be less efficient.

4.4 External State building and Policy Making: Critiques of the OHR

One of the general critiques of the OHR have centered on the concentration of power within an external governance body that does not answer to the domestic population. Chandler states that the OHR, among other external state building institutions, has “perpetuated the fragmentation of political power and reliance on personal and local networks,” which in turn has “reinforced general insecurity and atomization”.¹⁹² Knaus and Martin acknowledge that this external regulation, through the OHRs heavy-handed decision-making has led to a form of liberal imperialism, where control is imposed through a system of ‘indirect rule’.¹⁹³ After Dayton, control and regulation over civilian implementation efforts in Bosnia was handed over to this externally led organization. It is evident that the OHR lacks a local voice or grassroots approach to policy-making, as it is responsible only to the PIC. Thus, its implementation as a strategy for intervention in Bosnia has been criticized due to expansive executive powers that set the agenda, impose it, and punish with sanctions those who refuse to implement it.¹⁹⁴

4.4.1 External Regulation and the Bonn Powers

¹⁹¹ Ibid, 328.

¹⁹² Chandler, *Bosnia*, 195.

¹⁹³ Gerhard Knaus and Felix Martin, “Travails of the European Raj,” *Journal of Democracy*, Volume 14, No. 3, 2003: 62.

¹⁹⁴ Ibid, 61.

Knaus and Martin argue that after the signing of the Dayton Accords the international community concluded that Bosnia required governance by international experts rather than democratic domestic politics.¹⁹⁵ This is the overarching theme of the OHR. Although the DPA established the High Representative, it was not until the implementation of the Bonn powers in 1997 that the Office was able to “impose national policy and remove political elites who obstructed the long-term goals of the peace agreement”.¹⁹⁶ These powers present a contradiction. On the one hand, democracy in post-war Bosnia cannot flourish in the “institutional and historical vacuum ... wracked by war and torn by ethnic and social divisions”.¹⁹⁷ However, are these externally led and extraordinary powers justified to building a stable democracy and economy? Further, can it offer a form of effective reconciliation? Critics argue that while these powers have stable political outcomes, it also “implicitly teaches that technocratic rule at arm’s length from the people is perfectly good governance”.¹⁹⁸

The Bonn powers allowed the High Representative to impose on Bosnia’s sovereignty and development through its own means. It presented the OHR with powers to dismiss almost any major public official - including presidents, prime ministers, judges and mayors – without further review by an independent appeals body and was granted the ability to veto candidates from ministerial positions without presenting evidence to the public.¹⁹⁹ Thus, any local policies or goals carried out inconsistent to Dayton may be reversed, amended or halted by the OHR as they see fit. These actions further illustrated that the lack of accountability of the OHR did inherit limits on domestic representatives or organizations within Bosnia. It instead answers to

¹⁹⁵ Knaus and Martin, “European Raj,” 61.

¹⁹⁶ Patrice C. McMahon and Jon Western, “The Death of Dayton,” *Council on Foreign Relations*, 2009.

¹⁹⁷ Knaus and Martin, “European Raj,” 63.

¹⁹⁸ *Ibid*, 70.

¹⁹⁹ *Ibid*, 61.

the Peace Implementation Council, an external body consisting of 55 countries, international organizations and agencies.²⁰⁰ The entire process behind policy implementation through the OHR was inherently unaccountable to the Bosnian population. Thus, while the OHR attempts to promote cooperation between political institutions and inter-ethnic relations, it ironically also involves “implementing binding decisions when/if the domestic institutional structures fail to find common ground”.²⁰¹

The use of the Bonn powers affected the development process for communities both politically and institutionally. For instance, although agreement by state legislators during parliamentary sessions can be effective for coming to an agreement on a certain agenda, these sessions quickly become inefficient due to minority vetoes.²⁰² McMahon states that even those laws that were passed are usually ones that are forced through because of pressure from the international community.²⁰³ She further states that most of those that do are rarely implemented. This fails on two factions: it does not allow for a truly local implementation of domestic legislation and policies and fails to resolve any type of inter-ethnic division or disagreement as it does not allow for national or domestic input into externally imposed legislation. This illustrated the move toward the need to push reforms that Bosnian politicians were unwilling or unable to implement.²⁰⁴

The shift towards expediency is best illustrated through an example of judicial reform in 2002, when the OHR completely revamped the judicial process. In 2000, the OHR implemented measures to help root out corrupt or partial judges and prosecutors, however by

²⁰⁰ McMahon and Western, “Death of Dayton”.

²⁰¹ Keane, *Reconstituting Sovereignty*, 105.

²⁰² McMahon, “Rebuilding Bosnia,” 586.

²⁰³ Ibid.

²⁰⁴ Knaus and Martin, “European Raj,” 64.

2002 the reform was not experiencing effective outcomes.²⁰⁵ This reform failed based on the poor complaint system created by the OHR (which relied on complaints from citizens using the court system), as it yielded less than satisfactory results. Knaus and Martin state that while the Federation received hundreds of complaints that resulted in 70 investigations in the first year, the Republic of Serbia only received six complaints in 18 months.²⁰⁶ Rather than amending the investigation process, the High Representative decided to scrap the reform and decreed that all judges and prosecutors resign and reapply for their positions, despite strong opposition from the Council of Europe.²⁰⁷ Following this, the Bonn powers were also used to “suspend 10 judges, one deputy minister of justice, and one prosecutor”.²⁰⁸ This checked power illustrates the lack of coordination between external and internal agencies as the OHR “did not involve anyone from local ministries of justice in designing its strategy and never made its deliberations public”.²⁰⁹ The OHR could have coordinated better with judges in order to develop a more effective investigation process.

4.4.2 Two Schools Under One Roof: Education Under the OHR

In the aftermath of the war, tensions amongst the three major ethnic groups in Bosnia remained consistent as large numbers of refugees and IDPs began to return home, in which many returnees were minorities. In the attempt to remove themselves from the other ethnicities, many parents opposed the idea of their children attending classes with other ethnic groups, in turn setting up make-shift schools in private houses, coffee shops, or anywhere else they could

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid, 64-65.

²⁰⁸ Ibid, 65.

²⁰⁹ Ibid.

find.²¹⁰ In response to this growing divide, the OHR wanted to get children back into proper classrooms and thus developed the ‘two schools under one roof’ system. This formula meant that children with different ethnic backgrounds have their own classrooms in different parts of a school building, or they use the same classrooms, but in different shifts.²¹¹ For instance, the high school in Gornji Vakuf-Uskoplje (located in a Croat part of the town) has separate entrances for Croat and Bosniak children, classrooms on separate floors, and contains a Bosniak and Croat director and a Bosniak and Croat secretary.²¹²

The classroom can be an important tool for reconciliation toward unresolved tensions; however, Donais argues that education is being used as an ideological tool to reinforce ethnic bias, intolerance, segregation and discrimination.²¹³ This system, although developed merely as a short-term fix by the OHR, has been damaging towards long-term effects of inscribing separate identities, maintaining collective myths, and aiding in the construction of a pluralistic society.²¹⁴ Serb children have been taught that the war amounted to a Muslim campaign of genocide against the Serbs; Bosniaks are taught that the Serbs ‘attacked our country;’ and Croats learn about how their forces fought off Serb and Muslim ‘aggressors’.²¹⁵ In turn, this divided curriculum, specifically when focusing on history, language, literature and geography, has fostered accounts of Bosnian society, culture and history that are not only deeply offensive to minority communities, but have also impacted municipalities economically as their costs

²¹⁰ Janine Clark, “From Negative to Positive Peace: The Case of Bosnia and Hercegovina,” *Journal of Human Rights*, Volume 8, 2009: 366.

²¹¹ *Ibid*, 365.

²¹² *Ibid*.

²¹³ Donais, *The Political Economy of Peacebuilding*, 153.

²¹⁴ Harvey M. Weinstein, Sarah Warshauer Freedman, and Holly Hughson, “School Voices: Challenges Facing Education Systems After Identity-based Conflicts, *Educations, Citizenship and Social Justice*, Volume 2, 2007: 52.

²¹⁵ *Ibid*.

increase almost twofold (for busing, equipment, teachers, etc.).²¹⁶ Further, the creation of this divisive system “constitute[s] a fundamental obstacle to reconciliation”.²¹⁷ By dividing youth in classrooms, sustained contact in learning and social interaction is removed, hence abolishing any ‘bridges’ to the other ethnic group(s).²¹⁸

4.4.3 The State Court and Reconciliation

The effects of the OHR have remained problematic in Bosnia as it creates obstacles for the need to address human rights on the ground, in turn limiting the growth of liberal democratic traditions.²¹⁹ A key issue is the separation that has been created between the suppressed domestic voices and the externally led approach to state building and reconciliation. Any solutions or reforms implemented or sought out by the OHR, while they may result in a minor short-term success, tend to fail in long-term reconciliation. For instance, when the international community noticed the inability for the ICTY to process all war crimes, the OHR established the State Court of Bosnia and Herzegovina in 2000. This court is a hybrid tribunal that “employs both international and domestic judges [as well as] applies a mixture of international and domestic law in processing accusations of war crimes and human rights abuses”.²²⁰ While the court has, since 2011, passed 93 sentences for war crimes and human rights abuses, indicting 67 people, linked to 32 unresolved cases of war crimes, it has also been difficult to draw a definitive conclusion as to its impact on justice and reconciliation²²¹. While some Bosniaks agree that the court has been somewhat effective as a precondition for just

²¹⁶ Ibid, 154.

²¹⁷ Clark, “From Negative to Positive Peace,” 366.

²¹⁸ Weinstein, Freedman, Hughson, “School Voices,” 66.

²¹⁹ David A. Hoogenboom and Stephanie Vieille, “Rebuilding Social Fabric in Failed States: Examining Transitional Justice in Bosnia,” *Human Rights Review*, Vol. 11, (2010): 188.

²²⁰ Roland Kostic, “Transitional Justice and Reconciliation in Bosnia-Herzegovina: Whose Memories, Whose Justice?,” *The Hugo Valentin Centre*, (2012), 660.

²²¹ Ibid.

peace and normal relations (44.1%), very little Croats (27.5%) and Serbs (5.2%) agree with this statement.²²²

The solution imposed by the State Court was to provide more prosecutions at the domestic level in order to coordinate better with the local communities in reconciling the past. While their motives were well intentioned, their procedure was not. Rather than developing a mechanism for reconciliation and justice that goes beyond the Tribunal, they instead created another version of it. This stems from similar issues involved with the Tribunal, as will be further illustrated in chapter 4. It fails to deal with a large number of crimes; because the community remains divided, this court faces a substantial degree of pressure from all sides in the attempt to influence investigations and trials; and ultimately it is difficult to produce a “measured and fair punishment for individual war criminals without this being interpreted in terms of the responsibility and guilt of whole communities”.²²³ Thus, any attempts to reconcile the past, such as the implementation of the State Court have proven to be limited in reconciling individuals and ethnicities. Rather, the OHR has, through externally led forces, been able to control and regulate governance from a top-down approach, in turn developing limited, short-term solutions towards reconciliation and locally built democracy in Bosnia.

4.5 Conclusion

The OHR was created by the Dayton Accords to provide a durable solution to the post-conflict period through the “construction of a viable civic Bosnian state, while in the process defeating alternative state-building projects based on ethnicity”.²²⁴ This model of state building and reconciliation, one in which external actors pursue the leading role in reshaping the

²²² Ibid.

²²³ Ibid, 661.

²²⁴ Donais, *The Political Economy of Peacebuilding*, 53-54.

country, is forceful and externally-driven but has also somewhat overshadowed ethnic nationalism and tensions. The ultimate goal in Bosnia is to achieve consolidated statehood and a minimum level of consensus amongst the ethnic communities.²²⁵ While strategies by the OHR have been inconsistent and contradictory at times, international initiatives have generated successful policies and central institutions.²²⁶

With this in mind, however, the OHR still poses a difficult situation in Bosnia. In the post-Dayton period it has shifted power into external regulation, which has not only relieved domestic legislators of unpopular stands, but also has failed to be held accountable by anyone within Bosnia.²²⁷ Further, although the OHR has used its powers to remove uncooperative officials and impose legislative reforms, “removing officials does not fundamentally alter structures of power and imposing laws is very different from enforcing them”.²²⁸ Though the OHR focuses on civilian implementation under the DPA, its focus has also extended beyond this, specifically following the Bonn powers in 1997. However, because of its growing mandate throughout the years, other initiatives and state building procedures, such as social sector reform, has been low on its priority list.²²⁹ So while the OHR has expanded its authority, it has also lacked a coherent dialogue between itself and domestic actors in certain policy reform areas, as one agency, no matter how large or extensive its powers, cannot solely rebuild the institutions in a post-conflict state.²³⁰

As Knaus and Martin suggest, more accountability and transparency should have been established towards the OHR. For instance, every dismissed official and legislative imposition

²²⁵ Ibid, 54.

²²⁶ Ibid.

²²⁷ Ibid, 80.

²²⁸ Ibid, 83.

²²⁹ Ibid, 146.

²³⁰ Knaus and Martin, “European Raj,” 73.

should have been thoroughly reviewed and assessed by an independent commission, elected by Bosnian legislators.²³¹ Further, now that the OHR has left behind its trail of external imposition, regulation must be shifted over to domestic legislators, officials, and agencies. If a domestic remedy exists, then OHR intervention should either be barred or limited.²³² By establishing stronger control within domestic institutions, the continuing progress toward democratization and rule of law can be restored in Bosnia. As well, by finding an appropriate balance between international imposition and local regulation, Bosnian society can find a consensus on decisions while also suppressing nationalist rhetoric.²³³

²³¹ *Ibid*, 72.

²³² *Ibid*.

²³³ Bose, "Decade After Dayton," 333.

Chapter 5

5 The International Criminal Tribunal for the Former Yugoslavia

The previous two chapters have examined the international agencies and institutions used to rebuild a violently fragmented Bosnian state. These institutions sought to rebuild Bosnia by imposing externally regulated state building tools and procedures. These tools, while controversial in their methods, have produced both constructive and damaging outcomes to state building and reconciliation. However, prior to the implementation of the DPA and OHR, another transitional justice mechanism was developed during the war in response to the threat of international peace and security. The International Criminal Tribunal for the former Yugoslavia, or ICTY, is an integral tool in the transitional and reconciliatory process in Bosnia. This chapter will outline how the Tribunal is an important transitional justice mechanism for Bosnia and Herzegovina, but proved to have significant limitations for the transitional process. Thus, while playing an important role in post-conflict societies, retributive justice as a form of transitional justice should not be relied upon too heavily.²³⁴

5.1 Background to the ICTY

In the summer of 1992, the idea for establishing an international tribunal began to take shape, as there was a growing concern for something to be done in the midst of massive

²³⁴ Janine Natalya Clark, "Transitional Justice in Bosnia: The International Criminal Tribunal for the Former Yugoslavia," in *The Development of Institutions of Human Rights: A Comparative Study*, edited by Lilian A. Barria and Steven D. Roper, Palgrave Macmillan, 2010: 83.

violations of international humanitarian law.²³⁵ As the war escalated, so did the interest and desire for a tribunal. The ICTY was finally created as an ad hoc tribunal in May of 1993 under the Security Council Resolution 827, with the purpose being to prosecute persons for violations of international humanitarian law.²³⁶ The Tribunal is located in The Hague, Netherlands and consists of three main organs: the Office of the Prosecutor, who prepares indictments and investigates and prosecutes cases; the Chambers, which hears the evidence presented by the prosecution and defense, issues judgments and imposes sentences on those found guilty; and finally the Registry, responsible for public information, security, and management of the Tribunal.²³⁷ To date, the ICTY has indicted 161 individuals, of those 79 have been sentenced to prison terms.²³⁸ Those indicted include “heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts”.²³⁹ The Tribunal has been an important and crucial organ towards achieving justice in the post-war state.

5.2 The Tribunals Mandate

The ICTY was created out of and during the violent conflicts in the former Yugoslavia. Thus, its chief objective is to “try those individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property” and any other crimes listed under its Statute.²⁴⁰ By doing so, the Tribunals aim is to deter future crimes in the region and render justice to those affected by the war, thus “contributing to a lasting peace in the former

²³⁵ Ibid, 84.

²³⁶ Lilian A. Barria and Steven D. Roper, “How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR,” *The International Journal of Human Rights*, Vol. 9, No. 3 (2005): 354.

²³⁷ Clark, “Transitional Justice in Bosnia,” 85-86.

²³⁸ “ICTY Facts and Figures,” UN ICTY, <http://www.icty.org/sid/11186>.

²³⁹ “About the ICTY,” UN ICTY, <http://www.icty.org/sections/AbouttheICTY>.

²⁴⁰ Ibid.

Yugoslavia”.²⁴¹ Although its primary mandate is to prosecute and indict individuals responsible for war crimes, secondary objectives have also been laid out as antirequisites to the Tribunals effects. The ICTY states that by simply removing some of the senior and most notorious criminals from society and holding them accountable for their crimes, it has been able to “lift the taint of violence, contribute to ending impunity and help[ed] pave the way for reconciliation”.²⁴² This mandate has illustrated its successes through a wide array of progress, stating that it has not only achieved retributive justice in Bosnia, but also further progressed reconciliation amongst ethnic groups. However, beyond the surface this becomes less evident, as will be discussed in further sections. The Tribunal has had major significance historically through its proceedings and precedents, has in some sense facilitated the transition to democracy, and has been able to mobilize those affected by collective suffering to strive for better conditions and attitudes over time.²⁴³ However, analyses and literature of the ad hoc court has also resulted in pessimistic conclusions from scholars such as Barria and Roper, Clark, Fletcher and Weinstein, Martin-Ortega and Nettelfield, as there is still a “profound sense of injustice” felt by victims of the war because the Tribunal has not been able to extend its mandate effectively beyond retribution and deterrence.²⁴⁴ Thus, a clear impact on how the Tribunal has affected the transitional process is yet to be determined.

5.3 Analyzing the Impact of the ICTY

This chapter will proceed by analyzing both the achievements and disappointments of the Tribunal in Bosnia through measurements of effectiveness, as put foreword by Barria and

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Lara J. Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State*, Cambridge University Press, New York, 2010: 4-8.

²⁴⁴ Ibid, 6.

Roper. While the importance of the Tribunal is evident, there is much less agreement on how to measure its effectiveness due to the Tribunals multi-faceted mandate.²⁴⁵ Thus, to judge the relative success and failure of the ICTY, this chapter will examine three goals, as put forward by Barria and Roper: the maintenance of peace and security, providing justice and retribution, and achieving the process and goal of reconciliation.²⁴⁶ By addressing the successes and criticisms in each of these three categories, this paper will develop an unbiased analysis and conclusion on the effects of the ICTY in state building and transitional justice in Bosnia.

5.4 The Maintenance of Peace and Security

Barria and Roper state that typically, judicial institutions, such as that of the ICTY, are not seen as organs of peace and security. Rather, law enforcement agencies oversee the directive of providing law and order.²⁴⁷ However, in the international context, that being external intervention and state building efforts, judicial institutions, including the ICTY have been used to promote peace and security.²⁴⁸ In fact, UN Security Council Resolution 827 determines the ICTY as an ad hoc tribunal for the prosecution of persons responsible for serious violations of international humanitarian law, which “would contribute to the restoration and maintenance of peace”.²⁴⁹

Achieving peace through the creation of the ICTY is an understandable goal, as it was developed in the midst of war in the growing calls for ‘something to be done’.²⁵⁰ Since the situation in Yugoslavia at the time constituted a threat to peace and security, the ICTY served

²⁴⁵ Barria and Roper, “How Effective are International Criminal Tribunals?” 357.

²⁴⁶ Ibid.

²⁴⁷ Ibid, 358.

²⁴⁸ Ibid

²⁴⁹ United Nations Security Council, “Resolution 827 (1993),” 25 May 1993, 1.

²⁵⁰ Clark, “Transitional Justice in Bosnia,” 84.

as an element of the international community's peace building initiatives. However, Barria and Roper conclude that, although the Tribunal does constitute as a mechanism towards achieving peace, it did not achieve this goal upon its creation.²⁵¹ The Tribunal began operating in November of 1993 but the Bosnian conflict continued until 1995, after the signing of the DPA. Thus, the Tribunal, at least initially, did not achieve peace in Bosnia for over two years. While one may argue that peace was eventually achieved, the ending of hostilities in 1995 is mainly attributed to the signing of the Peace Agreement and not the Tribunal's effects on ending violence since 1992.²⁵²

Although Barria and Roper conclude that the goal of peace initially was not achieved, maintaining peace and security since the end of the conflicts has remained an objective for the ICTY. The DPA focused on its own implementation process for achieving peace and stability within the newly formed country, mentioning little of wartime atrocities and the court. Where the Peace Agreement had mentioned this, an emphasis on cooperation with the Tribunal was not matched with robust enforcement mechanisms.²⁵³ Instead, the agreement states that all parties to the agreement were "expected to comply on their own accord with not only the arrest and transfer of those indicted, but also in allowing the transfer of documentation vital to the Office of the Prosecutor".²⁵⁴ The DPA thus made cooperation difficult, as politicians withheld self-incriminating information fearing that they would appear on trial at the Tribunal.²⁵⁵ Further, capturing war criminals proved to be a difficult feat as peacekeepers on the ground had an ambiguous relationship with the ICTY. IFOR forces, for instance were not technically

²⁵¹ Barria and Roper, "How Effective are International Criminal Tribunals," 358.

²⁵² Ibid.

²⁵³ Nettelfield, *Courting Democracy in Bosnia*, 84.

²⁵⁴ Ibid.

²⁵⁵ Ibid, 85.

obligated to apprehend or arrest war criminals if they came across them in the course of their peacekeeping duties.²⁵⁶ Nettelfield states that commanders and Pentagon officials were against expanding the mandate of ground troops to include specific obligations regarding war criminals due to “fears about expecting casualties and a resulting loss of support for the peace operation among taxpayers at home”.²⁵⁷ Increased cooperation developed with the implementation of the EU and SFOR.

Despite these difficulties and setbacks inhibited by the implementation of the Dayton Accords, the ICTY has been able to contribute to enhanced peace and security since the end of the war in 1995. While Barria and Roper are correct in stating that the ICTY's goal of maintaining peace was not initially achieved in 1993, the Tribunal has, along with international military forces, aided in peace and security initiatives in Bosnia and Herzegovina since the end of the war. The Tribunal has captured and indicted 161 war criminals and has zero fugitives at large as of July 2011.²⁵⁸ Its judicial processes facilitated peace and stability in the region by individualizing guilt, addressing the needs of victims and establishing the facts concerning the conflict.²⁵⁹ By helping remove the most notorious political leaders from positions of institutional power and marginalizing radical nationalist groups, the ICTY has consolidated peace and stability, positively affecting refugee return, as people feel safer to return to their pre-war municipalities.²⁶⁰ It has further contributed to the gradual elimination of “informal security forces as a consequence of the capture of war criminals,” thus establishing a firmer

²⁵⁶ Ibid, 87; Under Annex 1A, IFOR forces are permitted to use necessary force to ensure compliance with this Annex, but there is no explicit mention of the apprehension, arrest, or transfer of indictees.

²⁵⁷ Ibid.

²⁵⁸ “ICTY Facts and Figures,” UN ICTY, <http://www.icty.org/sid/11186>.

²⁵⁹ Martin-Ortega, “Building Peace and Delivering Justice in Bosnia and Herzegovina,” 144.

²⁶⁰ Ibid, 145.

security structure within Bosnia.²⁶¹ Although peace was not established immediately, enforcing peace and strengthening security has been somewhat positive for the ICTY.

5.5 Achieving Justice and Retribution

Achieving justice is the core goal of the ICTY, as it is with every Criminal Tribunal. Judging the effectiveness of the Tribunal's key mandate will allow some insight into considering how well justice has been applied to the scenario in Bosnia. This section will briefly highlight the progress and positive outcomes achieved by the Tribunal since its implementation as well as outline some of the issues involved with achieving justice and retribution through the ICTY.

In the absence of the Tribunal, war criminals in Bosnia may have never been brought to justice, or at least not to the same extent. Through its indictments and trials, the ICTY has been able to document and acknowledge the suffering of thousands of victims, given many of them the opportunity to tell their stories, and has comprehensively established a historical record of the crimes and atrocities committed during the war.²⁶² Retributive justice further reduces the risk of revenge, prevents a return to power by the perpetrators of war crimes and crimes against humanity, and leads to the individualization of accountability, thus removing the stigma of collective guilt from communities.²⁶³ Further, criminal trials can uncover information and knowledge about the past, helping to heal wounds and restore self-confidence to victims.

In terms of comprehending how effective providing justice was, Barria and Roper use apprehension as a form of measurement. The Tribunal was prolific in issuing indictments, especially in its initial stages. Between 1994 and 1996, it issued 44 public indictments, between

²⁶¹ Kaldor, "Security Structures in Bosnia," 224.

²⁶² Clark, "Transitional Justice in Bosnia," 88.

²⁶³ Kostic, "Transitional Justice in Bosnia-Herzegovina," 657.

1998 and 1999, this decreased to 17, with a similar number between 2000 and 2002.²⁶⁴

Apprehension of criminals has occurred through both voluntary surrender (about 44 percent) as well as SFOR capture (about 34 percent).²⁶⁵ Although the Republic of Serbia has shown a lack of cooperation towards criminal apprehension and prosecution by the ICTY, countries such as Austria, Bosnia, Croatia, Serbia and Germany has helped arrest those indicted.²⁶⁶ Apprehension by the ICTY has led to the indictment of all 161 high-level war criminals responsible for the atrocities and war crimes in Bosnia and Herzegovina. Of these criminals, the arrest of Slobodan Milosevic, who was the first head of state to face a trial in an international court and faced charges of grave breaches of the Geneva Conventions and Genocide in Bosnia and Croatia, represents a landmark case for the Tribunal.²⁶⁷ According to Barria and Roper, this level of apprehension for those publicly indicted is boasted as a success by the ICTY, as it placed restrictions of travel and deprivation of freedom of movement as well as removed war criminals from public office.²⁶⁸

5.5.1 Achieving Victims Justice

While indictments and apprehension by the ICTY has been successful, justice must also be measured by the victims' perceptions. As Fletcher and Weinstein state, international "tribunals must be seen as legitimate by those on whose behalf they operate in order for their

²⁶⁴ Barria and Roper, "How Effective are International Criminal Tribunals," 359.

²⁶⁵ Ibid.

²⁶⁶ Payam Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', Human Rights Quarterly, Vol.20 (1998) as cited in Barria and Roper, "How Effective are International Criminal Tribunals," 359.

²⁶⁷ Barria and Roper, "How Effective are International Criminal Tribunals." 360.

²⁶⁸ Ibid, 359.

work to be accepted within affected societies”.²⁶⁹ Thus, justice cannot fully exist or be completely achieved while dissatisfaction exists among victims and citizens within post-conflict communities.

Unfortunately for the ICTY, citizens and victims in Bosnia and Herzegovina have been left disappointed and dissatisfied by the Tribunals work.²⁷⁰ Victims not only feel that the 161 indictments barely scratch the surface of culpability as there were wide scale atrocities committed, but further regard the Tribunals prison sentences as “unacceptably lenient”.²⁷¹ Clark notes an example, illustrating Bosnian Muslim interviewees whom had been interned in one or more of the three concentration camps in northwestern Bosnia (Keraterm, Omarska, and Trnopolje). They state that they cannot feel satisfied that justice has been done when defendants such as Dragan Kolundzija, Damir Dosen, and Predrag Banovic, whom all held positions in the Keraterm camp, had only received prison sentences of three, five, and eight years respectively.²⁷²

Indeed, it will always be difficult to satisfy victims, however the ICTY has not effectively achieved justice, as perceptions towards it remain dissatisfied. In 2010, 18.1 percent of citizens somewhat disagreed and 29 percent totally disagreed that the Tribunal is a precondition for just peace and normal relations, while a further 20 percent somewhat disagreed and 41.7 percent totally disagreed that the trials at the Tribunal are fair.²⁷³ What impact the

²⁶⁹ Laurel E. Fletcher and Harvey M. Weinstein, “A world unto itself? The application of international justice in the Former Yugoslavia,” *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, edited by Eric Stover and Harvey M. Weinstein, Cambridge: Cambridge University Press, 2004, 30.

²⁷⁰ Clark, “Transitional Justice in Bosnia,” 90.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ Kostic, “Transitional Justice in Bosnia-Herzegovina,” 659.

Tribunal has in Bosnia will partly depend on how these negative perceptions affect the courts ability to fulfill justice amongst Bosnians.²⁷⁴

Clark further argues that although the Tribunal claims to deliver justice to victims through retributive means, it has not necessarily given them what they want. While the ICTY has produced retributive justice through its creation and indictments in Bosnia, it has not provided justice to individual victims.²⁷⁵ So while the perception of justice may exist, victims are not necessarily satisfied with the results of retribution. For instance, Clark notes that because the ICTY mainly focuses on high-profile cases (dealing with those individuals in high positions of authority and power, such as Milosevic), it fails to focus on or prosecute low-ranking perpetrators.²⁷⁶ This, according to Clark remains a dissatisfying issue amongst Bosnians, as many prefer to know which individuals were directly responsible for acts of violence or genocide. Victims interviewed were overall more interested in low-ranking perpetrators who were directly responsible for killing their loved ones, as one female interviewee in Kozarac stated that the arrest of Radovan Karadzic (former President of the Republic of Serbia and accused of the Srebrenica genocide) did not mean much to her, but rather she wanted to know who killed her brother in Trnopolje.²⁷⁷

It is important to note here that while the ICTY mainly focuses on those top echelons of political and military leadership, many low- to mid-level perpetrators are dealt with in the domestic courts of the region.²⁷⁸ However, Bosnia faced severe problems in domestic war crimes processing. The courts and prosecutors' offices were "underresourced and

²⁷⁴ Fletcher and Weinstein, "A world unto itself," 40.

²⁷⁵ Clark, "From Negative to Positive Peace," 375.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Stephanie A. Barbour, "Making Justice Visible: Bosnia and Herzegovina's Domestic War Crimes Trials Outreach," in *Transitional Justice, Culture, and Society: Beyond Outreach*, edited by Clara Ramirez-Barat, Social Science Research Council, New York, 2014: 98.

nonspecialized in war crimes matters and struggled to deal with the caseload of present-day crimes in addition to past war crimes”.²⁷⁹ The legal and institutional framework in domestic war crimes processing remains a complex issue, however for the purposes of this paper, delving further into its complexities is unnecessary.

As a second example of victims not getting what they want, Clark notes that because the ICTY focuses on individual responsibility rather than political responsibility of states, victims are unsatisfied.²⁸⁰ For instance, many Bosniak interviewees stated that they were not satisfied with trying perpetrators for individual responsibility and rather want Serbia to be held responsible.²⁸¹ Clark illustrates that while international tribunals, such as the ICTY, are centered on achieving retributive justice through prosecutions and indictments, responding to the needs of victims and their perceptions of justice become marginalized.

5.6 Providing National Reconciliation

National reconciliation is not expressly mentioned in the mandate of the ICTY but is a precondition to a permanent peace.²⁸² Achieving reconciliation in the former Yugoslavia has not only been difficult to achieve but also to effectively measure. Its objective is to have “individuals involved in the conflict return to a normal life, living side by side with those they once fought [while] maintaining the peace”.²⁸³ The ICTY, along with policies enacted by the DPA and intervention of UN military forces, has helped somewhat achieve this goal through refugee returns. Martin-Ortega argues that prosecutions in The Hague have removed the most notorious political leaders from powerful positions and ostracized nationalist radicals, which in

²⁷⁹ Ibid.

²⁸⁰ Clark, “From Negative to Positive Peace,” 376.

²⁸¹ Ibid.

²⁸² Barria and Roper, “How Effective are International Criminal Tribunals,” 362.

²⁸³ Ibid.

turn has had a positive effect on refugee return with people feeling safer to return to their pre-war municipalities.²⁸⁴ In turn, this allows reconciliation to occur amongst the three main ethnicities in Bosnia. However, as Barria and Roper state, many continue to remain displaced and have not returned for fear of going back to areas controlled by opposing ethnic factions.²⁸⁵ Thus, while Martin-Ortega concludes that the impact of the ICTY on peacebuilding and transitional justice has been positive, there are issues in the way of realizing reconciliation in Bosnia.

5.6.1 Retribution is Insufficient

As stated in the introduction, transitional justice may occur through various institutions, policies and agencies, however takes its form through three main mechanisms, those being retributive, restorative and reparative justice. The ICTY attempts to produce transitional justice and reconciliation through retributive justice. According to Minow, the goal of retribution regarding reconciliation is to motivate punishment out of fairness to those who have been wronged and reflect the belief that wrongdoers deserve blame and punishment in direct proportion to the harm inflicted.²⁸⁶ Retribution offers the post-conflict community to correct the wrongdoer's false message that the victim was less worthy or valuable and reasserts the truth of the victim's value.²⁸⁷ Overall, its ideal is the equal dignity of all persons within the affected community. However, Minow states that committing to retributive mechanisms also carries limitations on reconciliation. By seeking to lower the perpetrator in response to the victim's infliction or injury, the victim may become a tool of hatred or revenge and satisfaction may

²⁸⁴ Martin-Ortega, "Building Peace and Delivering Justice in Bosnia," 145.

²⁸⁵ Barria and Roper, "How Effective are International Criminal Tribunals," 362.

²⁸⁶ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, Boston, 1998: 12.

²⁸⁷ *Ibid.*

never come.²⁸⁸ Barria and Roper further state that while retributive justice is effective towards reconciliation, fundamentally, national reconciliation can only occur in an environment in which all sides feel that justice has been achieved. “As long as individuals perceive that international [and] domestic judicial institutions are systematically biased towards one group, reconciliation will never occur”.²⁸⁹ This systematic bias amongst ethnic groups in Bosnia has led to a lack of trust towards the Tribunal. Surveys show that, among international organizations, the ICTY was the least trusted, with 51 percent of Bosnians in the Federation and only 4 percent in the Republic of Serbia indicating they had trust in the court.²⁹⁰ The ICTY promotes a retributive mechanism where victims’ justice yields limits on reconciliation as victims on opposing sides cannot agree nor concede each other’s pasts or presents. This domestic apathy amongst each other and the Tribunal reflects back to Minow’s argument and thus places limitations on reconciliation in Bosnia.

5.6.2 Competing Truths and Denial

As mentioned earlier, views towards the ICTYs work tend to harshly vary amongst the three main ethnic groups in Bosnia. For instance, while 56.7 percent of Bosniaks somewhat or totally agree that the trials at the ICTY are fair, 56.6 percent of Croat and 89.6 percent of Serbs in Bosnia somewhat or totally disagree with this view.²⁹¹ This, according to Kostic, is not surprising, given that three group narratives have come to exist and evolve since the war. His research reveals a greater presence towards competing truths amongst ethnic groups. For instance, while 96.6 percent of Bosniak and 69.6 percent of Croats agree that the Bosnian war

²⁸⁸ Ibid, 13.

²⁸⁹ Barria and Roper, “How Effective are International Criminal Tribunals,” 363.

²⁹⁰ Jill A. Irvine and Patrice C. McMahon, “From International Courts to Grassroots Organizing: Obstacles to Transitional Justice in the Balkans,” in *Transitional Justice and Civil Society in the Balkans*, edited by Olivera Simic and Zala Volcic, Springer, New York, 2013: 221.

²⁹¹ Kostic, “Transitional Justice in Bosnia-Herzegovina,” 658.

is best defined as an act of ‘aggression,’ 87.3 percent of Serbs define the war as a ‘civil war’.²⁹² Further, although the ICTY has indicted predominantly Serbian perpetrators on acts of genocide and while they are primarily illustrated as the aggressors, an overwhelming majority of Bosniaks, 97.6 percent, Croats, 94.5 percent, and Serbs, 88.2 percent, somewhat or totally agree with the statement ‘my people have fought only defensive wars.’²⁹³

Kostic’s research illustrates an obvious presence of three competing truths in Bosnia. However, these contested narratives also present a contrast towards the Tribunals goals of reconciliation. According to Clark, an important way in which the ICTY can aid reconciliation is by establishing the truth, because in reality there is not only one truth but many truths about what occurred in the past.²⁹⁴ However, revealing the truth through indictments and trials at the ICTY does not necessarily mean that competing truths will be reconciled. Clark argues that the notion that ‘revealing is healing’ is premised on the flawed “assumption that the truths it is documenting will be accepted and internalized by those who need to be reconciled”.²⁹⁵ The ICTY website states that “determining the facts of the crimes committed in the former Yugoslavia is crucial in order to combat denial and prevent attempts at revisionism ... mak[ing] it impossible for anyone to dispute the reality of the horrors that took place [in Bosnia]”.²⁹⁶ Clark argues that while trials and judgments at The Hague are thorough, this argument is naïve and oversimplistic. “The reality is that there are many people in [Bosnia] who are unwilling or unable to accept them, particularly among the Bosnian Serbs and Bosnian Croats”.²⁹⁷ Clark found that Bosnian Serbs in Srebrenica and Northwestern Bosnia continue to deny that

²⁹² Ibid, 656.

²⁹³ Ibid. 655.

²⁹⁴ Clark, “Transitional Justice in Bosnia,” 88.

²⁹⁵ Ibid, 89.

²⁹⁶ “Achievements,” UN ICTY, www.icty.org/sid/324.

²⁹⁷ Clark, “Transitional Justice in Bosnia,” 89.

genocide occurred in Srebrenica. Despite the ICTY's work and strong focus on Srebrenica, including the indictment and prosecution of Radislav Krstic, found guilty of aiding and abetting the crime of genocide, Bosnian Serbs maintain that it was "not genocide because only men were targeted and not women and children, because only soldiers died, not civilians or because there were far fewer victims than the Muslims allege".²⁹⁸ Cohen terms this as 'interpretive denial,' stating that it is not the raw facts that are being denied, but rather are given different meanings from what seems obvious to others.²⁹⁹ While Bosniaks suffered the most during the events of the war, the reality is that there were victims and crimes committed on all three sides, however, "all sides portray themselves as the principal, if not exclusive victims".³⁰⁰

5.6.3 Denial, Knowledge and Outreach

The presence of competing truths and denial offered by Clark support Stover and Weinstein's argument that international criminal tribunals that are located far away from where the massacres took place, can forge a common version of the history of the conflict that would be accepted by all sides is an illusory idea.³⁰¹ The problem of denial is further exacerbated by the separation of the Tribunal from the domestic peace process. It is evident that the Tribunal has both prosecuted individuals guilty of war crimes and in doing so, made public the atrocities that have occurred, punished those responsible for atrocities, and ensured that fair and just consequences are put forward in the name of the law. This, it can be argued, has "contributed to interethnic reconciliation by telling the truth about the underlying causes" of the Yugoslav

²⁹⁸ Ibid.

²⁹⁹ Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering*, Cambridge, Polity Press, 2001: 7.

³⁰⁰ Clark, "From Negative to Positive Peace," 369.

³⁰¹ Eric Stover and Harvey M. Weinstein, "Conclusion: A common objective, a universe of alternatives," in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, edited by Eric Stover and Harvey M. Weinstein, Cambridge, Cambridge University Press, 2004: 332-333.

tragedies.³⁰² As stated previously however, truth is a contested concept in Bosnia. For instance, when interviewed, many Serbians stated that the notorious concentration camps (located in Keraterm, Omarska, and Trnopolje) were created to protect Bosnian Muslims from Serbs seeking revenge, and many Bosnians felt safer in these camps.³⁰³ Recognizing that its work faced risks of being undermined by misinformation, the ICTY developed public information and outreach apparatuses starting in 1997.³⁰⁴ However, despite outreach by the Tribunal, a lack of knowledge still exists regarding its work and mandate. Clark notes in her fieldwork that Bosnians frequently confused the ICTY with the International Court of Justice (ICJ) and did not understand that the ICTY has no powers of arrest.³⁰⁵ This left them dissatisfied and disappointed with the Tribunal's work. These misconceptions create negative opinions and narratives that threaten reconciliation and undermine the sense that justice is being done.³⁰⁶ Thus, despite outreach apparatuses, the goal of reconciliation and building a sense of local ownership over war crimes processing and trust in the international judicial system is struggling.

5.7 Conclusion

After examining the effects and impact of the ICTY in Bosnia, yielding a definitive conclusion as to whether it has been successful or effective remains an arduous task. By analyzing the Tribunal's implementation of peace, justice and reconciliation, it can be argued however, that the relationship between a tribunal and the local populace is a critical dimension

³⁰² Clark, "From Negative to Positive Peace," 370.

³⁰³ Ibid, 371.

³⁰⁴ Barbour, "Making Justice Visible," 101.

³⁰⁵ Clark, "From Negative to Positive Peace," 374.

³⁰⁶ Barbour, "Making Justice Visible," 125.

of its success.³⁰⁷ In Bosnia, this relationship is characterized by prejudice, confusion, misunderstanding, apathy, and indifference.³⁰⁸ Although peace has been maintained since the end of the war and high-ranking war criminals have been indicted, the “continued prevalence of denial and competing truths, the dissatisfaction of victims, and popular attitudes toward the tribunal all suggest that it has had only a limited impact in the country”.³⁰⁹ This presents the conclusion that although the ICTY has minimally achieved a mandate towards retribution, its presence as an overarching solution to justice and reconciliation in Bosnia uncovers its limits and illustrates the importance of embracing other forms of transitional justice in Bosnia.

³⁰⁷ Fletcher and Weinstein, “A World Unto Itself,” 44.

³⁰⁸ Clark, “Transitional Justice in Bosnia,” 93.

³⁰⁹ *Ibid.*

Chapter 6

6 Conclusion

Bosnia and Herzegovina experienced one of the bloodiest wars since 1945, having an immense impact on the individuals involved, specifically affecting heightening ethnic tensions inter-group relations. State building and transitional justice mechanisms in post-war situations such as Bosnia are important to consider because they examine what can be achieved by transitional justice initiatives. By examining the three key mechanisms of national and international involvement and development in Bosnia and Herzegovina, that being the DPA, the OHR and the ICTY, this paper has illustrated the ways in which these three tools have affected transitional justice, post-conflict reconstruction and state building efforts in Bosnia. Each of these mechanisms has contributed towards the development and reconciliation amongst ethnic groups in Bosnia. The literature reviewed poses both optimistic outcomes and analysis towards the mechanisms and their impact in Bosnia and on the Bosnian population. However, the literature has also been the source of criticism, claiming that state building and reconciliation in Bosnia has been limited in its implementation and results.³¹⁰ By assessing the reviewed literature, this paper has concluded that while the external strategies have been effective toward promoting state building and reconciliation, they have also been limited in their overall impact. While the adopted strategies have resulted in preventing violence and war, it has not reconciled the ethnically divided country.

The Dayton Accords allowed for the extension of international mechanisms of regulation in order for a transition to democracy and self-rule, in turn stopping the war and

³¹⁰ Kostic, "Transitional Justice and Reconciliation in Bosnia," 664.

developing structures and policies to aid in state building.³¹¹ The Agreement developed democratic elections through the OSCE, a constitution with internationally recognized human rights and freedoms, internationally led military programs to ensure peace and refugee and IDP returns, the IPTF, and the High Representative to overlook civilian implementation. Despite these initiatives and their relative successes, Donais argues that these policies placed considerable responsibility for peace and state building on external actors and were limited in achieving reconciliation among ethnic groups in Bosnia.³¹² The ethnic composition since the war has led to a division along ethnic borders rather than helped to resolve ethnic tensions. Thus, the international community developed structures within Bosnia that were well suited to the ethnic makeup of the nation.

The Office of the High Representative was developed through the DPA to provide a durable solution to the post-conflict period through the construction of a viable civic Bosnian state while aiming to eliminate state building initiatives based on ethnic divisions.³¹³ OHR strategies have involved extensive powers and policies, which in turn have been somewhat successful, but cannot solely rebuild the institutions in a post-conflict state. Knaus and Martin argue that more accountability and transparency should have been established within the OHR, and currently, regulation must shift over to domestic legislators and agencies.³¹⁴ Thus, progress towards democratization and rule of law must continue through domestic institutions, while also suppressing nationalist rhetoric to produce reconciliation.

The ICTY has been one of the most important mechanisms towards justice and reconciliation in Bosnia and Herzegovina. While peace has been maintained since the end of

³¹¹ Chandler, *Bosnia*, 64.

³¹² Donais, *The Political Economy of Peacebuilding*, 47.

³¹³ *Ibid*, 53-54.

³¹⁴ Knaus and Martin, "European Raj," 72.

the war and high-ranking officials involved in war crimes and genocide have been indicted, Clark argues that denial, competing truths, and dissatisfaction among victims illustrate that the Tribunal has had a limited impact in Bosnia.³¹⁵ The Tribunal has offered justice and reconciliation through retribution, but as suggested by the literature, retributive justice alone cannot produce an inclusive solution to achieving justice and reconciliation amongst the Bosnian population.

6.1 Recommendations

The major disappointment in Bosnia, specifically when examining the effects of the ICTY, has been a lack of development and the limited process of reconciliation. Thus, this final section will examine literature and minor suggestions towards further promoting reconciliation in Bosnia and Herzegovina. Clark argues that there has been a “gap between the aspirations of transitional justice to bring about reconciliation and the experiences of local communities where these reconciliation processes are meant to take place”.³¹⁶ Further, the interest in achieving truth is generally growing in Bosnia, with 87.6 percent of respondents in a 2010 public opinion poll stating that the authorities in Bosnia and Herzegovina should devise a concrete plan for facing the past and addressing truth-seeking issues.³¹⁷ Clark also states that the ICTY has provided only a limited platform for victims to state their stories, thus she argues for the need for a Truth and Reconciliation Commission (TRC).

Clark’s research illustrated that interviewees from all three main ethnic groups – Bosniak, Serb and Croat – desired an opportunity to tell their stories and receive official

³¹⁵ Clark, “Transitional Justice in Bosnia,” 93.

³¹⁶ Janine Natalya Clark, “Does Bosnia Need a Truth and Reconciliation Commission? Some Reflections on its Possible Design,” *Ethnopolitics*, Vol.12, No. 3, 225.

³¹⁷ UNDP, “Facing the Past and Access to Justice from a Public Perspective: Special Report,” UNDP, 2010 as cited in Clark, “Does Bosnia Need a Commission,” 226.

acknowledgement that they had suffered.³¹⁸ She argues a TRC can function in a more victim-friendly way, when compared with a criminal tribunal. For instance, while the storytelling process may be just as painful in both a tribunal and a TRC, the more informal nature of the truth commission creates a less intimidating environment, thereby helping to put the victim at ease as much as possible.³¹⁹ Hayner argues that a truth commission is not concerned with ascertaining guilt, rather, a TRC functions to “investigate a period of human rights abuses and documenting the truth thereof,” which allows prominence to victims over the criminal justice system.³²⁰ Thus, the prerequisite for a successful Bosnian TRC is that its process and development should reflect and give expression to the victims’ needs, concerns and requirements, which would further lead to two important advantages. First, these public consultations, debates and hearings would render the truth commission process visible and accessible, which previous Bosnian commissions (Sarajevo Commission and the Truth and Reconciliation Commission for the Municipal Assembly of Bijeljina) have lacked.³²¹ Second, by including victims from the outset, Le Touze, Silove and Zwi argue that it would allow more realistic expectations and a better understanding of the process.³²²

Clark further argues that there is a stronger need for establishing the truth for victims. For instance, the ICTY has established legal truth, that being the truth that is necessary to determine whether a defendant is guilty. However, many micro-truths remain unknown to

³¹⁸ Clark, “Does Bosnia Need a Commission,” 230.

³¹⁹ Ibid.

³²⁰ P.B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, New York, Routledge, 2010: 20 as cited in Clark, “Does Bosnia Need a Commission,” 230.

³²¹ Clark, “Does Bosnia Need a Commission,” 231-232.

³²² Derrick Silove, Anthony Zwi, and Dominique le Touze, “Can there be healing without justice? Lessons from the Commission for Reception, Truth and Reconciliation in East Timor,” *Intervention*, Volume 3, Issue 3, 2005: 200.

victims and Bosnian society.³²³ While a TRC may not necessarily provide these micro-truths, a commission does allow victims to be involved more so than the judicial process would, placing them in a strong position to receive the answers they are searching for.³²⁴ Fletcher and Weinstein argue that the ICTY has also faced challenges of denial, as the truth becomes contested after war and ethnic cleansing, even when the facts are revealed to the court.³²⁵ Clark states that while it would be unrealistic to expect that a Bosnian TRC could “entirely extinguish denial,” it could initiate a process of national conversation about the war as a first step in addressing the competing versions of truth that exist.³²⁶

This author agrees with Clark’s proposition and recommends that the creation of a Truth and Reconciliation Commission in Bosnia and Herzegovina would be beneficial towards the overall reconciliation process. While the Tribunal has achieved important work since 1993, victims have had only a limited opportunity to voice their stories, many are still seeking the truth and denial remains widespread. For these reasons and based on the suggestions and literature of Janine Clark, this paper argues that the creation of a TRC should consult extensively with victims and victims’ groups to involve them in the process from the outset in order to address a significant restorative justice gap within the country.³²⁷ While no single transitional process may be able to tackle the complexities of post-conflict societies attempting to achieve reconciliation, a TRC would initiate a deeper approach to transitional justice in Bosnia.

³²³ Clark, “Does Bosnia Need a Commission,” 232.

³²⁴ *Ibid*, 233.

³²⁵ Laurel E. Fletcher and Harvey M. Weinstein, “Empathy and rehumanization after mass violence,” *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, edited by Eric Stover and Harvey M. Weinstein, Cambridge, Cambridge University Press, 2004, 317.

³²⁶ Clark, “Does Bosnia Need a Commission,” 239.

³²⁷ *Ibid*, 240-241.

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Curriculum Vitae

Name: Narcis Bejtic

Post-secondary Education and Degrees: King's University College at The University of Western Ontario
London, Ontario, Canada
2009-2013 B.A.

The University of Western Ontario
London, Ontario, Canada
2014-2015 M.A.

Related Work Experience Teaching Assistant
The University of Western Ontario
2014-2015