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CASE STUDY*

Bosnia-Herzegovina

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To what extent was the conflict in Bosnia-Herzegovina generated by lack of inclusion of a group or groups in the state's political and legal structures? Was there a lack of human rights protection for the excluded group?

Interpretations of the causes of conflict in Bosnia-Herzegovina are highly contested. One interpretation highlights the struggle for control of state institutions between ruling elites of the Socialist Federal Republic of Yugoslavia (SFRY), following the death of its president, Josip Broz Tito in 1980. Nationalist entrepreneurs such as Slobodan Milošević and Franjo Tuđman framed the struggle in terms of zero-sum ethnic competition, risks of becoming a minority group in a successor state dominated by other national interests, and historical experiences of inter-communal atrocities committed during the second world war (Benett 2016, 33–44; Gagnon 2006). To what extent the exclusion and precariousness of certain groups drove secession and conflict is debatable (see Bieber et al (eds) 2016; and Baker 2015). However, both domestic elites and international commentators manipulated or subscribed to narratives of fear and grievance between intractable national communities. Understanding the war in Bosnia-Herzegovina through this ethnic lens contributed to the priorities of the resulting peace process,

which advocated solutions institutionalising ethnic identities and titular majorities of territorial entities.

How did reform initiatives and various peace processes try to address this?

Between 1992 and 1995, internationally mediated peace plans drew from Yugoslavia's constitutions – which from 1946 established a federal system between titular constituent nations and rights for national minorities (Trbovich 2008, 153–70) – by proposing a power-sharing settlement between the Muslim/Bosniak,¹ Croat and Serb communities. These plans increasingly subscribed to the belief that multi-ethnic democracy in Bosnia-Herzegovina is impossible without institutionalised guarantees for the three main ethnic groups. The European Community Conference on Yugoslavia was succeeded by the International Conference on the Former Yugoslavia, which was tasked with negotiating a political settlement guaranteeing the rights of all national communities and minorities in an independent and recognised Bosnia-Herzegovina.

As the conflict in Bosnia-Herzegovina was a consequence of Yugoslavia's wider dissolution, and recognising that the Serbian and Croatian governments were supporting ethnic political parties and armed actors,

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Flags for sale at a market in Brčko / © BalkansCat/istock.com

the leaders of neighbouring countries were included in some of the negotiations, particularly the final talks at Dayton, US in 1995. Throughout the ensuing peace processes, the notion of a central state divided between three constituent peoples became the principle around which constitutional proposals were designed. Pushing for a power-sharing system from the outset, the main peace process also attempted to maintain the existence of a central Bosnian state that, as conflict escalated and ethnic cleansing dramatically changed, altered territorial demographics became less acceptable to the parties, either unwilling to rescind territorial gains and military victories, or to sign up to plans deemed as rewarding ethnic cleansing (Silber and Little 1995, 306–22).

How did inclusion and protection of rights feature in the agreements, or constitutional and institutional reform approaches?

The first proposal to divide Bosnia-Herzegovina into a two-tier state of central institutions and sub-state units along ethnic lines was the Carrington-Cutileiro Plan of

18 March 1992. It proposed “a state composed of three constituent units, based on national principles”, with “citizens of the Muslim, Serb and Croat nations and other nationalities” retaining sovereignty.²

This notion of a Bosnian state divided both politically and territorially between Bosniaks, Serbs and Croats became a common feature of the major international plans throughout the peace process, from that time on, with more details on the ethnic allocation of positions and constitutional units provided by each subsequent agreement. The 1993 Vance-Owen plan provided for power-sharing at the state and sub-state levels in an interim capacity, which included: a nine-member presidency divided equally between each group; a rotating President of the presidency; interim provincial governments formed proportionally on the basis of the 1991 census, and veto rights on matters of vital concern to constituent peoples. These arrangements were envisaged as transitional towards a new negotiated constitution, “under which the role of the Presidency and the Government chosen from a democratically elected Parliament is expected to be different and will reflect more

accurately the will of the people”³. However, the decentralisation of the Vance-Owen plan formed the backbone of future agreements, and as each peace plan was agreed and then rescinded by one or more party, these power-sharing provisions became more complex and multi-layered.

In July 1993 the Constitutional Agreement of the Owen-Stoltenberg peace plan proposal drew on the Croat-Serb Constitutional Principles for Bosnia-Herzegovina, and moved from territorial power-sharing by province to a union of three constituent republics, with internationally governed interim districts for Sarajevo and Mostar. Positions in central institutions would be allocated proportionally and rotated between Muslims, Serbs and Croats. The number of proposed constituent republics dropped from three to two in March 1994, when the Washington Agreement (or Contact Group plan) established a joint Bosniak-Croat federation, following a series of ceasefire agreements between the Army of Bosnia-Herzegovina (ABiH) and the Croatian Defence Council (HVO) throughout 1993 and 1994. This federation included a Bosniak-Croat shared central government and legislature, cantonal governments, and municipal governments.

The question of Serb-majority territories remained unresolved until the Agreed Basic Principles at Geneva in September 1995, which established that Bosnia-Herzegovina would consist of proportionally divided central institutions, and two federal entities: the Bosniak-Croat constituent Federation of Bosnia-Herzegovina (FBiH) and the Serb constituent Republika Srpska (RS). This 51–49% principle forms the basis of the territorial power-sharing agreed on by parties to the General Framework Agreement for Peace in Bosnia-Herzegovina in 1995, also known as the Dayton Peace Agreement (DPA), a comprehensive agreement heralded for

ending the war, but criticised for consolidating division and rewarding ethnic cleansing.

Comprised of an initial agreement and 11 substantive annexes, including Bosnia-Herzegovina’s current constitution (Annex 4), the DPA provides extensively for the inclusion and protection of rights for three constituent peoples: Bosniaks, Serbs and Croats. Those citizens who do not identify as such are excluded from many of the power-sharing mechanisms, while simultaneously guaranteed rights of equality, political participation, and non-discrimination. Many of the complex power-sharing mechanisms in the DPA were adapted from constitutional proposals in earlier peace plans. Key features include: a three-member, rotating presidency; an executive coalition; veto rights on matters of national interest; proportionality throughout most public institutions, including legislatures at central and entity levels; international involvement and oversight; territory divided into majority entities, cantons (in the FBiH) and municipalities; and the self-governing multi-ethnic district of Brčko.

Annex 4 also contains the human rights and fundamental freedoms enjoyed by all citizens of Bosnia-Herzegovina (Article II.3), and international human rights treaties to



Men play chess in Sarajevo's Liberation Square / © ToolX/iStock.com

be applied (Annex I), including conventions on the rights of national minorities. These instruments were previously incorporated and withdrawn from earlier peace plans, depending on different rationales of parties and negotiators, including the importance for citizens to have rights explicitly listed, and the time constraints of writing and re-writing constitutional proposals during peace talks (Szasz 1996, 306–7). Article II.4 of the constitution affirms equal enjoyment of these rights without discrimination, a commitment that plaintiffs at the European Court of Human Rights have used in cases against the state, regarding the right to political participation of minorities and non-ethnic citizens. Crucially, Article II.2 stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms “shall have priority over all other law”.

Beyond the constitution, the Agreement on Human Rights (Annex 6) contains further mechanisms to protect rights, establishing a Human Rights Commission consisting of

an Office of the Ombudsman and a Human Rights Chamber. The Chamber is staffed using a combination of proportionality between the entities and international involvement, with the initial Ombudsman appointed by the Organization for Security and Co-operation in Europe (OSCE). The Agreement on Refugees and Displaced Persons (Annex 7) provides extensively for the right to return and to reclaim property.

How did the peace or reform process approach inclusivity: did it focus just on the dominant groups at the heart of the conflict? To what extent did it also attempt broader inclusion of other groups and interests?

The peace process for Bosnia-Herzegovina entirely focused on the demands of three dominant parties to the conflict. Each round of negotiations and peace plans addressed the interests of Bosniak, Croat and Serb armed



The Dayton Peace Accords in Paris, 14 December 1995 / © U.S. Air Force/Wikimedia Commons

actors or political parties, to the exclusion of “others” or non-aligned minorities. This reflects the fact that representatives of other interest groups – displaced persons, women, Roma, Jews, other non-aligned minorities – were mostly excluded from the peace talks, and that agreements were signed only by representatives of the Bosniaks, Croats, Serbs, heads of neighbouring republics, and international actors.

These “others” are mentioned infrequently in several peace agreements prior to the DPA, sometimes receiving guaranteed representation in institutions, such as one of the four ombudspersons proposed by the Owen-Stoltenberg agreement, or the 16 reserved seats of the Mostar City Council in the DPA on Implementing the FBiH. However, these allocations eventually only existed at the federation level legislature, and other institutional arrangements, such as the rotating presidency or the tripartite body of ombudspersons, require candidates to identify as one of the three constituent peoples. Therefore, “others” do not enjoy the same rights to political participation as those who identify as Bosniak, Croat, or Serb. This exclusion has proved problematic in the two decades since the agreement was signed, and has led to several legal challenges regarding the agreement’s additional commitments to equality and non-discrimination.

Women were almost invisible in both the peace process and the agreement texts. Of the 113 peace agreements signed regarding Bosnia-Herzegovina,⁴ none were signed by anyone explicitly acting on behalf of women’s groups or interests. A female representative of a party to the conflict signed only one agreement,⁵ and four other agreements list women as observers, chairpersons, or representatives of humanitarian organisations and neighbouring states.⁶ Regarding content, approximately 10% of the agreements refer to women, girls



Anti-government protesters in Sarajevo, 19 February 2014 / © Adrien Barbier

and gender issues. These are predominantly references to humanitarian protection, or inclusion of international conventions such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in appendices of human rights instruments to be incorporated into a future constitution.

Local or de facto minorities – those who became members of minority groups in entities, cantons or municipalities – were mainly provided for in Annex 7 of the DPA. This annex aimed to reverse the territorial results of ethnic cleansing through guaranteeing the right to return, reclaim property, and receive protection, all of which was hoped would encourage the “re-mixing of peoples” (Brubaker 2013). If successful, however, the mechanisms for return would result in some sub-state entities becoming more heterogeneous, directly challenging the reliance on ethno-territorial federalism and complex systems of majority representatives of entities. Under the current constitution, a Bosniak or Croat returnee to the RS cannot run to be the entity’s member of the state presidency – likewise for Serb returnees to the FBiH – as citizens must

identify as the titular nationality of the entity they reside in to stand for office as a member of the presidency.⁷

What were the critical moments when attempts at inclusion could have succeeded (and did not) or failed (and did not)? What factors – in country leadership, civil society mobilisation and international intervention – determined whether they succeeded or failed?

The initial Carrington-Cutileiro plan, as the first agreement to produce a vision of the new constitutional arrangements, was a chance to propose a plan for Bosnia-Herzegovina that was not over-reliant on the use of nationality to define territorial units and institutional composition. However, the “negotiators accepted the political realities on the ground” that the three main ethnic parties in Bosnia-Herzegovina were bargaining to control territory, and relying on the dominance of the ethnic conflict narrative (Greenberg and McGuinness 2000, 45). The plan also proposed a directly elected chamber of citizens, and mechanisms to protect human rights and rights of minorities; however, it was the concept of constituent peoples and majorities that became entrenched in the peace process. While initially accepted by all three parties, it was later rejected by the Bosnian presidency.

Another critical moment of opportunity for securing a more inclusive settlement was the failed Vance-Owen peace plan in 1993. Although it institutionalised ethnicity in a weak, decentralised state, the plan explicitly stated the transitional nature of the ethnic state structures, before democratic elections would lead to a more majoritarian system of governance. Belligerents agreed to different parts of the plan over several months of

international mediation; however, the Bosnian Serb signature was conditional on the approval of the Assembly of the Republika Srpska, who ultimately rejected it.

How transformative has the process been on the inclusion front? If not transformative now, were there transformative moments, or is there further transformative potential?

Inclusion and protection of different identity groups in Bosnia-Herzegovina – be they constituent peoples, “others”, non-ethnic citizens, or de facto minorities – is still a contentious and unresolved issue. Due to the fragmented nature of the state and inherent contradictions of the DPA, there has been limited transformation of the exclusiveness of the current state structures, despite numerous attempts to challenge or reverse this institutionalised ethnicity.

Multiple attempts to reconfigure exclusive structures at different levels of state governance have proved either difficult to implement once reformed (Bieber 2006, 108–43), or have subsequently violated the constitution. The most prominent of these has been the case of *Sejdić and Finci v Bosnia-Herzegovina* at the European Court of Human Rights (ECtHR), which in 2009 ruled that their ineligibility to stand for election to the House of Peoples and the presidency – as members of the Roma and Jewish communities respectively – violates their right to freedom from discrimination (ECtHR 2009).

Other cases have followed: *Zornić v Bosnia-Herzegovina* (2014) on the right to political participation as a non-ethnically affiliated citizen; and *Pilav v Bosnia-Herzegovina* (2016) on the right to stand for election to the presidency as a representative of an entity where one is de facto minority.

These judgments remain unenforced, as constituent politicians are reluctant to pass de-ethnic reforms which would reduce their consolidation of power and benefit from the status quo (Gordy 2015, 611–22). Following the decision of the Bosnia-Herzegovina's Constitutional Court regarding the “Constituent Peoples” case in 2000, the Court has repeatedly made rulings in line with the ECtHR judgments, to little effect.

Furthermore, pushes for non-discrimination and minority inclusion raise the spectre of opportunistic ethnic entrepreneurs' calls for further fragmentation of the state, such as using the recent Constitutional Court ruling on equality and electoral reform to push for a third, Croat-majority entity (Rose 2016). Anticipated reform resulting from Bosnia-Herzegovina's beleaguered accession process to the European Union has also failed to materialise, as the process has slowly remained on track despite failure to implement the Sejdić-Finci and other ECtHR judgments. Calls for greater inclusion of women have mainly come from civil society activists, with limited gains, although Bosnia-Herzegovina's National Action Plan to implement United Nations Security Council Resolution (UNSCR) 1325 was launched in 2013 (Action Plan).

The human rights provisions in the DPA which are listed in what can be described as an “international friendly” constitution, could be critiqued for simply tacking on

international human rights standards to one particular context. However, the inclusion of the European Convention on Human Rights in the constitution can also be viewed as a “tool that gives a concrete language to human rights in the domestic sphere” (Ni Aolain 2001, 63–4). During the negotiation processes, there were concerns that reiterating established rights such as the right to life would be interpreted as too similar to previous Yugoslav constitutional rights, and thus be mistrusted due to failure to protect such basic rights; simultaneously, as SFRY had been a party to almost all UN human rights treaties, there was already a precedence for inclusion of international human rights standards (Szasz 1996, 306–7).

Therefore, the difficulty in implementing human rights protections is not due to an inability to translate international norms into a domestic context, but is more a result of the fundamental contradiction between a power-sharing constitution which enshrines institutional discrimination based on proscribed ethno-national identity, and human rights mechanisms which guarantee rights to non-discrimination and equality. While the supposed enforcement mechanisms or safeguards in the power-sharing constitutional framework to promote non-ethnic reform (such as international involvement or the superiority of the European Convention on Human Rights over all other law) continue to fail, international human rights standards remain ineffective.

Endnotes

- 1 In 1993 the Second Bosniak Congress agreed to move from the use of the term “Muslim” to “Bosniak”; therefore throughout this section “Bosniak” will be used, unless a peace agreement has used the term “Muslim”.
- 2 Statement of Principles for New Constitutional Arrangements for Bosnia-Herzegovina, 18 March 1992, see A. Independence, 1 and 3.
- 3 See Annex 1.A. Interim Presidency and Interim Central Government, 1. Agreement on Interim Arrangements, Vance-Owen Plan, 2 May 1993.
- 4 Number recorded as of 12 January 2017. PA-X, Peace Agreements Database, www.peaceagreements.org
- 5 Biljana Plavšić signed the Agreement on a ceasefire in Bosnia-Herzegovina on 8 May 1992 ‘for the Serbian side’. At the time Plavšić was part of the three-member presidency of the self-declared Serb Republic of Bosnia-Herzegovina.
- 6 Ms. Olga Lazić-Đerđ, for the Federal Republic of Yugoslavia, 1 October 1992; Mrs. A. M. Demmer, Director, Regional Office for Europe and America, United Nations High Commission for Refugees, 1 October 1992, 6 June 1992; Iris Wittwer, Head of Delegation, ICRC Zenica, 30 January 1993; and Mrs. Ogata, United Nations High Commissioner for Refugees, 18 November 1993 (titled as signed).
- 7 Article V Presidency, Annex 4: Constitution, General Framework Agreement for Peace in Bosnia-Herzegovina, 21 November 1995.

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